

Lead Case No. 20-cv-8008

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

IN RE AVIANCA HOLDINGS S.A., ET AL.,
DEBTORS.

USAV SECURED LENDER GROUP,
USAVFLOW LIMITED,
APPELLANTS,

v.

AVIANCA HOLDINGS S.A., ET AL.,
APPELLEES.

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
BANKR. CASE No. 20-11133 (MG)

**DECLARATION OF JOSHUA D. WEEDMAN IN
SUPPORT OF APPELLANT'S EMERGENCY MOTION
FOR STAY PENDING APPEAL, OR IN THE
ALTERNATIVE TO EXPEDITE APPEALS, AND
REQUEST TO CONSOLIDATE APPEALS**

October 14, 2020

WHITE & CASE LLP

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I, Joshua D. Weedman, hereby declare as follows:

1. I am an attorney with the law firm of White & Case LLP, counsel to the USAV Secured Lender Group, in the above-captioned matter. I submit this declaration pursuant to rule 8013(d) of the Federal Rules of Bankruptcy Procedure in support of the USAV Secured Lender Group's *Emergency Motion For Stay Pending Appeal, or in The Alternative To Expedite Appeals, and Request to Consolidate Appeals* (the "Motion"),¹ filed contemporaneously herewith. Unless otherwise stated, the following is based on my personal knowledge.

NATURE OF THE EMERGENCY

2. Today the bankruptcy court held an omnibus hearing in Avianca's chapter 11 cases. At that hearing, counsel to Avianca confirmed that Avianca is in discussions with alternative credit card processors to replace the credit card processing agreements it sold to USAV in 2017. This is consistent with representations made by counsel to Avianca at a hearing held on October 5, 2020. At that hearing, counsel stated that Avianca is working "behind the scenes" to replace the credit card processing agreements.² The proceeds of those credit card processing agreements are owned by USAV, and now comprise the entirety of the

¹ Capitalized terms used but not defined herein have the meaning ascribed to them in the Motion.

² See 10/5/20 Hr'g Tr. at 58:21-59:16, attached hereto as Exhibit M.

USAV Secured Lender Group’s collateral.³ Absent a stay pending appeal, there is a substantial risk, if not a certainty, that Avianca will improperly terminate the credit card processing agreements, permanently impairing the Appellants’ rights. White & Case LLP has used its best endeavors to resolve the matters raised in the Motion with Milbank LLP (“Milbank”), counsel for Avianca, but as set forth below those efforts have not been successful.

3. On the morning of October 9, 2020, White & Case LLP contacted Milbank, and Morrison & Foerster LLP (“MoFo”), counsel for the committee of unsecured creditors in Avianca’s chapter 11 cases, to notify them of the Appellants’ intention to file a motion in the bankruptcy court, seeking a stay pending appeal (the “Bankruptcy Court Stay Motion”). We sought to agree with Milbank and MoFo on an expedited schedule for the hearing of that motion. Specifically, we proposed that the stay motion be heard by the bankruptcy court at the next omnibus hearing in the debtors’ chapter 11 cases, scheduled for October 14, 2020 at 2:00pm (the “October 14 Omnibus Hearing”). Milbank and MoFo refused to consent to that request. In accordance with the bankruptcy court’s case management procedures, White & Case wrote to the court in the afternoon of October 9, 2020 to request a hearing date for the Bankruptcy Court Stay Motion, prior to filing it. We advised the bankruptcy

³ See Order, at 35–36, attached hereto as Exhibit A.

court of the USAV Secured Lender Group's disposition to move this Court for similar relief after filing the Bankruptcy Court Stay Motion.

4. In accordance with Fed. R. Bankr. P. 8013(d)(3), on the evening of October 9, 2020, we wrote to Milbank notifying them of the Appellants' intention to file the Motion on October 13, 2020. Specifically, we informed Milbank that, pursuant to the Motion, the Appellants intended to seek from this Court an expedited briefing schedule for the appeal (on the timetable set forth in the Motion), or a stay of the Order pending appeal. We also indicated that Appellants would seek to consolidate this appeal with the appeal filed by USAV.

5. We also requested that the parties meet and confer regarding filing a Joint Appendix on an expedited basis, and noted that if such an agreement on the Joint Appendix could not be reached, the Appellants would seek a schedule from this Court which requires that the transmission of the record on appeal be completed on or before Friday, October 16, 2020 and that the Joint Appendix also be filed on or before the same day. We also informed Milbank that we would file the form of appendix together with the Motion.

6. On the morning of October 10, 2020, Milbank requested further information as to the basis for expedition of the appeals. White & Case responded:

Avianca is proceeding with its scheme to divert to itself the contract rights and future proceeds it sold in 2017 by terminating the credit card processing agreements that produce the proceeds and replacing them with agreements that will not be sold to USAV as required. Expediting

the appeal will allow for review of the Order allowing Avianca to do so before the card processing agreements are terminated and replaced.

7. Later that same day, October 10, 2020, Milbank confirmed that Avianca opposes the Appellants' request for a stay pending appeal, and to expedite the appeals. However, Milbank confirmed that Avianca does not oppose consolidation of the appeals. In respect of the Joint Appendix, counsel for Avianca stated as follows:

The Debtors are willing to confer on a joint appendix. We note that our counter-designation of the record on appeal is due to be filed with the Bankruptcy Court on Friday, October 16, and we are still considering what additional record designations may be appropriate. Once we have made that determination—which, per our deadline to counter-designate, will be on or before October 16—we are happy to confer with you with the goal of submitting a joint appendix, as the District Court requested.

8. We responded promptly, and requested an update as to whether Avianca is working to terminate the existing card processing agreements and replace them with new ones. Milbank did not respond to our request for information concerning the status of the credit card processing agreements.

9. On the morning of October 13, 2020, the bankruptcy court's deputy responded to our email of October 9 and advised us that the hearing had been scheduled for October 23, 2020 at 10am (prevailing Eastern Time). That afternoon, we filed the Bankruptcy Court Stay Motion, noticing the hearing for that date. On the evening of October 13, Milbank wrote to the bankruptcy court requesting that

the bankruptcy court postpone the hearing on the stay motion to October 27, 2020. The hearing was rescheduled for October 29, 2020.

10. In further support of the Motion, I attach the following additional documents referred to therein.

- a. Attached hereto as Exhibit A is a true and correct copy of the Order.
- b. Attached hereto as Exhibit B is a true and correct copy of the Option Agreement in Respect of the Issued Shares in USAVflow Limited.
- c. Attached hereto as Exhibit C is a true and correct copy of the Pledge Over Contract Rights and Future Revenues between Aerovías del Continente Americano S.A. Avianca and USAVflow Limited.
- d. Attached hereto as Exhibit D is a true and correct copy of the Costa Rican Back-Up Security Agreement.
- e. Attached hereto as Exhibit E is a true and correct copy of an extract of the Registro de Garantías Mobiliarias in Colombia.
- f. Attached hereto as Exhibit F is a true and correct copy of the UCC Financing Statement filed in respect of the transaction.
- g. Attached hereto as Exhibit G is a true and correct copy of an extract from the Registro Bienes Mubles Sistema de Garantías Mobiliarias in Costa Rica.

- h. Attached hereto as Exhibit H is a true and correct copy of the New York Security Agreement by and among USAVflow Limited as Grantor, Citibank, N.A. in its capacity as agent for the Secured Parties, together with each of the other Parties thereto.
- i. Attached hereto as Exhibit I is a true and correct copy of the Account Control Agreement by and among USAVFlow Limited, as Pledgor, Citibank N.A., as Secured Party and Citibank, N.A., as Bank.
- j. Attached hereto as Exhibit J is a true and correct copy of the Security Agreement between USAVflow Limited as Chargor, Citibank, N.A., London Branch, as Collateral Trustee and Citibank, N.A. as Account Bank.
- k. Attached hereto as Exhibit K is a true and correct copy of the Security Trust Deed between Citibank N.A., London Branch as Collateral Trustee, USAVflow Limited as Company and others.
- l. Attached hereto as Exhibit L are true and correct copies of each of the following unpublished decisions and orders cited in the Motion.
 - i. *Barcia v. Sitkin*, 79 Civ. 5831 (RLC), 2004 U.S. Dist. LEXIS 5362 (S.D.N.Y. Mar. 29, 2004)
 - ii. *Curtis v. Curtis*, 1992 U.S. Dist. LEXIS 12695 (S.D.N.Y. Aug. 24, 1992)
 - iii. *Eur. Movieco Partners Ltd. v. United Pan-Europe Communs. N.V. (In re United Pan–Europe Communs. N.V.)*, 02-16020 (BL),

- M-47 (RWS), 2003 U.S. Dist. LEXIS 1297 (S.D.N.Y. Jan. 30, 2003)
- iv. *In re BGI, Inc.*, No. 11-10614, 2012 Bankr. LEXIS 5244 (Bankr. S.D.N.Y. Nov. 2, 2012)
 - v. *In re Brown*, No. 18-10617 (JLG), 2020 Bankr. LEXIS 1537 (Bankr. S.D.N.Y. June 10, 2020)
 - vi. *Clark v. Perez*, 05 Civ. 698, 2006 U.S. Dist. LEXIS 85289 (S.D.N.Y. Nov. 13, 2006)
 - vii. *In re Daebo Int'l Shipping Co.*, No. 15-10616 (MEW), 2016 Bankr. LEXIS 356 (Bankr. S.D.N.Y. Feb. 4, 2016)
 - viii. *In re Neff*, No. 1:11-bk-22424-GM, 2020 Bankr. LEXIS 2079 (Bankr. C.D. Cal. August 4, 2020)
 - ix. *Lussier v. Sullivan (In re Sullivan)*, Nos. 08-18652-JNF, 09-1211, 2011 Bankr. LEXIS 871 (Bankr. D. Mass. Mar. 7, 2011)
 - x. *Schmidt v. FCI Enters. LLC*, No. 18-cv-01472 (RDA/JFA), 2020 U.S. Dist. LEXIS 95323 (Feb. 3, 2020)
 - xi. *Westpoint Stevens Inc. v. Aretex, LLC (In re Westpoint Stevens Inc.)*, 2007 U.S. Dist. LEXIS 33725 (S.D.N.Y. May 9, 2007)
- m. Attached hereto as Exhibit M is a true and correct copy of the transcript of the October 5, 2020 hearing held by the bankruptcy court.

Dated: October 14, 2020
New York, New York

/s/ Joshua D. Weedman
Joshua D. Weedman, Esq

EXHIBIT A

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

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In re:

FOR PUBLICATION

Chapter 11

AVIANCA HOLDINGS S.A., *et al.*,¹

Case No. 20-11133 (MG)

Debtors.

(Jointly Administered)

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**MEMORANDUM OPINION GRANTING IN PART AND DENYING IN PART
DEBTORS' MOTION TO REJECT THE USAV AGREEMENTS**

A P P E A R A N C E S:

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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 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.

By: Andrew M. Leblanc, Esq.
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MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

I. INTRODUCTION²

Pending before the Court is the motion of Avianca Holdings S.A. and its affiliated debtors (the “Debtors” or “Avianca”) seeking entry of an order pursuant to section 365 of the Bankruptcy Code authorizing the rejection of the eight (8) contracts collectively referred to as the USAV Agreements *nunc pro tunc* to June 23, 2020, the motion filing date. (“Motion,” ECF Doc. # 306.) The USAV Agreements were entered into on or about December 12, 2017 to

² Capitalized terms in the Introduction are defined below.

effectuate a transaction among the Debtors, USAVflow Limited (“USAV”), an offshore special purpose vehicle, certain credit card processors, and other counterparties (collectively, the “2017 Transaction”) in connection with USAV’s purchase of certain existing contract rights—including the proceeds generated from certain credit card receivables—and accrued receivables from the Debtors for \$150 million plus the potential for additional amounts. (Lender Objection ¶ 1.) The USAV Lender Group financed the \$150 million purchase price in exchange for primary and guarantee claims against USAV and certain Debtors. (*Id.*)

The central question before the Court is whether some or all of the USAV Agreements are executory and can be rejected under section 365 of the Bankruptcy Code. The Debtors argue that the Debtors and USAV have material unperformed obligations under two of the eight agreements, the RSPA and Undertaking Agreement, and ask the Court to deem the remaining agreements inseparable from the RSPA and Undertaking Agreement for purposes of rejection. (Motion ¶ 29; Reply ¶ 36.) USAV and the USAV Lender Group (together, the “USAV Parties”) argue that the RSPA and Undertaking Agreement are not executory contracts because USAV has no material unperformed obligations under either agreement. According to the USAV Parties, the Debtors, by rejecting the RSPA, are seeking to unwind the 2017 Transaction to get back the contract rights they sold in violation of the Supreme Court’s holding *Mission Prod. Holdings v. Tempnology, LLC*, 139 S. Ct. 1652 (2019) [hereinafter “*Tempnology*”]. (Lender Sur-Reply ¶ 16 (citing *Tempnology*, 139 S. Ct. at 1662, 1663); USAV Objection ¶¶ 31–32).)

For the reasons discussed below, the Debtors’ Motion is **GRANTED IN PART** and **DENIED IN PART**: The Court concludes that the RSPA and Undertaking Agreement are executory contracts that the Debtors may reject pursuant to section 365 of the Bankruptcy Code.

The remaining USAV Agreements are not executory contracts that can be rejected by the Debtors.

II. BACKGROUND

Established in 1919, Avianca is a leading provider of air travel and cargo services in Latin America and around the globe. (Motion ¶ 7.) Avianca is the second-largest airline group in Latin America and the most important carrier in the Republic of Colombia and the Republic of El Salvador. (*Id.*) Avianca is a code-share partner of United Airlines and a member of the Star Alliance—the world’s largest global airline alliance. (*Id.*) Before the COVID-19 pandemic, the Debtors offered passenger services on more than 5,350 weekly flights to more than 76 destinations in 27 countries. (*Id.* ¶ 8.) With approximately 18,900 employees and approximately \$3.9 billion in annual revenues, the Debtors play a key role in the Latin American airline market. (*Id.*) On March 20, 2020, the Republic of Colombia closed its airspace to address the spread of COVID-19. (*Id.* ¶ 9.) Due to the restrictions imposed by the Colombian government, on March 24, 2020, the Debtors announced that they were suspending all scheduled passenger flights from March 25, 2020. (*Id.*) On May 10, 2020 (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. (*Id.* ¶ 10.) Each Debtor is continuing to operate its business and manage its properties as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. (*Id.*)

A. The Rejection Motion

On June 23, 2020, the Debtors filed the Motion to reject the USAV Agreements.³ In support of the Motion, the Debtors submit the declaration of their CFO, Adrian Neuhauser

³ On June 23, 2020, the Debtors also filed an adversary proceeding against USAV seeking to recharacterize the 2017 Transaction as a disguised secured financing and seeking a declaration that USAV has no security interest in certain postpetition credit card receivables and related collateral pursuant to section 552 of the Bankruptcy Code. (*See* “Complaint,” Adv. Proc. No. 20-1189, ECF Doc. # 1 ¶¶ 2–3.) The Debtors state that it will not be necessary

(“Neuhauser Declaration,” ECF Doc. # 306-1), and the declaration Aaron L. Reneger, which attaches copies of the USAV Agreements. (“Reneger Decl.,” ECF Doc. # 306-2.) On July 22, 2020, objections were filed by USAV (the “USAV Objection,” ECF Doc. # 616) and the USAV Lender Group (the “Lender Objection,” ECF Doc. # 617). Foreign law opinions and declarations were submitted in support of the USAV Objection (ECF Doc. # 616-1) and the Lender Objection (ECF Doc. # 618). The Lender Group also submits the declaration of Joshua D. Weedman in support of their Objection. (“Weedman Decl.,” ECF Doc. # 619.)

On July 27, 2020, the Court held a status conference with counsel to the Debtors, USAV, the Lender Group, and the Official Committee of Unsecured Creditors (the “Committee”) to discuss the schedule of reply briefs and the necessity of an evidentiary hearing. (*See* ECF Doc. # 628.) The Court also raised several inquiries for the parties to address in supplemental briefs.

On August 7, 2020, the Debtors filed their reply brief (“Reply,” ECF Doc. # 683) and the Committee filed a reply in support of Debtors’ Motion (“UCC Reply,” ECF Doc. # 681). In support of the Reply, the Debtors submit the second declaration of Adrian Neuhauser (“Second Neuhauser Decl.,” ECF Doc. # 683-1) and the second declaration of Aaron L. Renenger (“Second Renenger Decl.,” ECF Doc. # 683-2). The Debtors also submit the declaration of Jamie Alberto Arrubla-Paucar analyzing, under Colombian law, the effects of a failure to comply with the RSPA by Avianca and the contractual remedies available to USAV. (“Arrubla Decl.,” ECF Doc. # 684.)

On August 18, 2020, the Debtors and the Committee each filed a supplemental response to the Court’s questions posed at the July 27, 2020 status conference. (“Debtors’ Supplemental Response,” ECF Doc. # 715; “UCC Supplemental Response,” ECF Doc. # 714.) On that same

for the Court to reach the issues raised in the Complaint to the extent that the Court grants the relief requested in the Motion. (*See* Motion ¶ 1 n.2.)

day, the Lender Group filed their response to the Court’s questions posed at the July 27, 2020 status conference (“Supplemental Lender Response,” ECF Doc. # 716) and a sur-reply to the Lender Objection (“Lender Sur-Reply,” ECF Doc. # 718). In support of the Supplemental Lender Response and Lender Sur-Reply, the Lenders submit the declaration of Vicente Lines (“Lines Decl.,” ECF Doc. # 719); the second declaration of Jorge Suescun Melo (“Second Melo Decl.,” ECF Doc. # 720); and the second declaration of Joshua D. Weedman (“Second Weedman Decl.,” ECF Doc. # 721). USAV filed a combined response to the Debtors’ Reply and questions posed at the July 27, 2020 status conference. (“Supplemental USAV Response,” ECF Doc. # 717.)

The parties also agreed that all of the declarations and exhibits offered in support of and in opposition to the Motions were admissible in evidence (ECF Doc. ## 749, 750), and the parties waived the right to cross-examine any of the declarants (ECF Doc. # 740). The Court entered an Order admitting the declarations and exhibits in evidence. (ECF Doc. # 751.)

On August 25, 2020, the Court entered an order with questions that counsel for the parties were asked to address during the hearing on the Motion. (ECF Doc. # 757.) On August 26, 2020, the Court held a hearing using Zoom for Government and heard arguments from the Debtors, the Committee, the USAV Lender Group, and USAV.

B. Overview of the 2017 Transaction

In 2017, Avianca retained an investment banker to assist in securing new debt financing—the 2017 Transaction was the result of these efforts. (*See* Complaint ¶ 12.) On December 12, 2017, the Debtors and USAV entered into the Contract Rights and Receivables Sale, Purchase and Servicing Agreement (the “RSPA”).⁴ (*Id.* ¶ 13.) The RSPA is governed by

⁴ The RSPA is annexed as Exhibit 1 to the Reneger Decl.

the laws of Colombia. (*Id.* (citing RSPA § 9.09).) The RSPA memorializes the purported sale of the Debtors’ accrued credit card receivables (the “Receivables”) and the Debtors’ rights to future credit card receivables under card processing agreements (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. (*Id.* ¶ 14 (citing RSPA § 2.01; Recitals).)

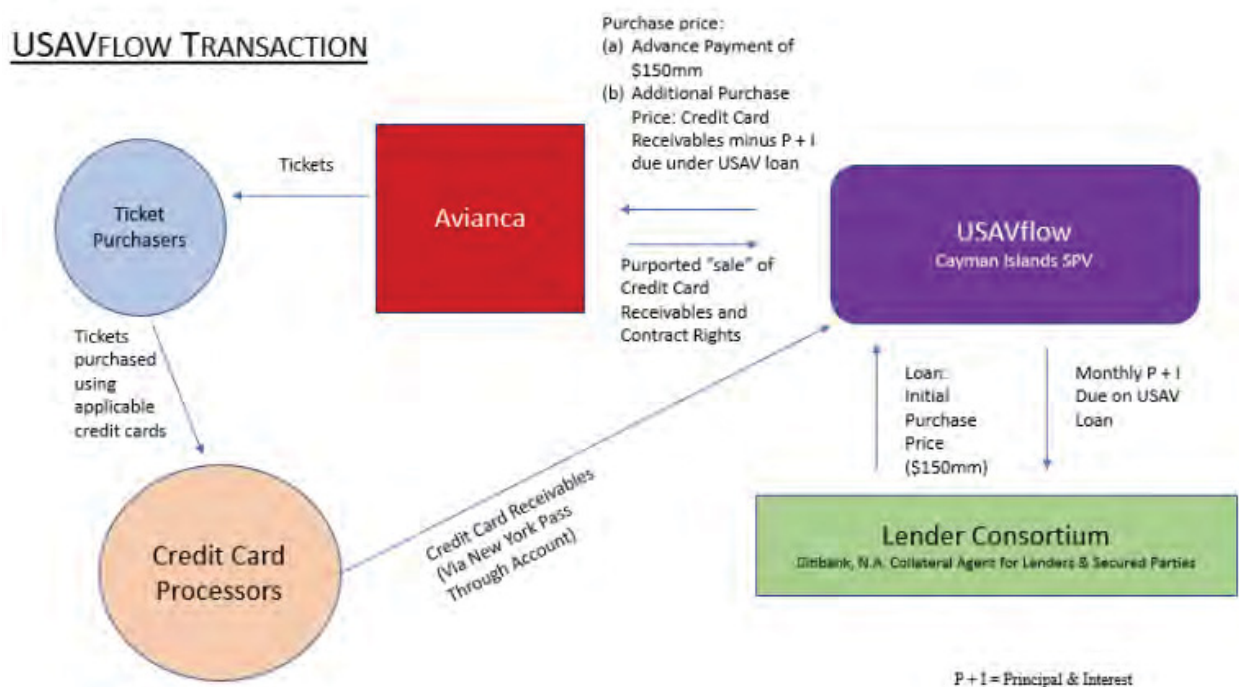
In exchange for the purported “sale” of the Contract Rights and Receivables, Avianca received \$150 million plus the potential for additional amounts equal to future credit card receivables generated in any payment period less a reserve amount generally equal to the amount required for USAV’s monthly amortization payments (the “Additional Purchase Price”) under the USAV Loan Agreement (defined below). (*Id.* (citing RSPA § 3.01(a)).)

Contemporaneously with the execution of the RSPA, USAV entered into a loan agreement (the “USAV Loan Agreement”)⁵ with the USAV Lender Group, certain Debtors as guarantors, and Citibank, N.A. as administrative agent and collateral agent (in such capacities, “Citibank”). (*Id.* ¶ 15.) The USAV Loan Agreement is governed by New York law. (*Id.* ¶ 15 n.4 (citing USAV Loan Agreement § 8.9.1).) Under the USAV Loan Agreement, the USAV Lender Group advanced to USAV \$150 million—the same amount USAV used to pay Avianca under the RSPA. (*Id.* ¶ 16 (citing Cash Management Agreement § 2.1.1).) To repay the loan, USAV retains a portion of the collections on credit card receivables—funneled through a New

⁵ The USAV Loan Agreement is annexed as Exhibit 9 to the Reneger Decl.

York-based bank account (the “New York Pass-Through Account”)—sufficient to make the required amortization payments under the USAV Loan Agreement. (*Id.*) 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. (*Id.* (citing RSPA § 2.01 and Cash Management Agreement § 2.02).)

The figure below provides an overview of the “future flow” transaction structure contemplated by the 2017 Transaction.



(“Figure 1,” Complaint ¶ 17.)

C. Events Prior to the Petition Date

From January 2020 through March 2020, the Debtors generated between \$25.2 million and \$48.8 million in credit card receivables each month, with 92% to 95% flowing back to the Debtors as Additional Purchase Price payments. (Reply ¶ 9 (citing Second Neuhauser Decl. ¶ 3).) On March 31, 2020, Citibank, as Administrative Agent, sent a notice to the Debtors by

email, with the subject line, “USAVFlow—Notice of Reservation of Rights” (the “March Notice”). (*Id.* ¶ 10.) The March Notice declared that a Trigger Event had occurred as a result of the Debtors’ inability to fly and that as a result the Debtors were in “breach” of the RSPA (the “Flight Impairment Trigger Event”). (*Id.*) The March Notice did not invoke any remedies, but simply reserved Citibank’s rights to pursue available remedies under the RSPA. (*Id.* (citing Weedman Decl., Ex. A–B.) Thereafter, between April 1, 2020 and April 9, 2020, the Debtors received Additional Purchase Price payments in the aggregate amount of \$255,951.22. (*Id.* ¶ 11 (citing Second Neuhauser Decl. ¶ 5).)

D. Retention Event Notice

On May 11, 2020, the day after the Petition Date, Citibank delivered to the Debtors a notice that a “Retention Event” under the RSPA had occurred as a result of the drop in the Collections Coverage Ratio (the “Retention Event Notice”). (*Id.* ¶ 13 (citing Motion ¶ 22).) On May 15, 2020, Debtors’ counsel delivered a letter to Citibank’s counsel via email stating that the Retention Event Notice implicated the Debtors’ property and was likely in violation of the automatic stay (the “Automatic Stay Notice”). (*Id.* ¶ 14 (citing Second Renenger Decl., Ex. 1).) On May 18, 2020, Citibank, at the instruction of the Lender Group, transferred approximately \$13.5 million from the New York Pass-Through Account, the Debt Service Reserve Account, and the Collection Account⁶ to the accounts of the Lender Group. (*Id.* ¶ 15 (citing Second Neuhauser Decl. ¶ 7; Second Renenger Decl., Ex. 2).) The Debtors state that, on information and belief, from May 18, 2020 to the present, Citibank has been sweeping all funds received from AMEX and Credomatic (the “Credit Card Processors”)—over \$5 million—to the accounts of the Lender Group. (*Id.* ¶ 16 (citing Second Neuhauser Decl. ¶ 8).)

⁶ The New York Pass-Through Account, Debt Service Reserve Account, and the Collection Account are under the control of Citibank, N.A., London Branch. (*See* RSPA at 4, 6, 10.)

E. Overview of the USAV Agreements

The eight USAV Agreements that are the subject of the Motion, include the following:

- i. The **RSPA**, entered into on December 12, 2017 between Aerovías del Continente Americano S.A. Avianca, as Seller and Servicer, and USAV, as purchaser. (Renenger Decl. ¶ 2; *id.*, Ex. 1.) The governing law under the RSPA is Colombian law. (*See* RSPA § 9.09.) The RSPA is more fully discussed below.
- ii. The **Undertaking Agreement**, entered into on December 12, 2017 between Aerovías del Continente Americano S.A. Avianca, as Seller and Servicer, and USAV, as purchaser. (Renenger Decl. ¶ 3; *id.*, Ex. 2.) The governing law under the Undertaking Agreement is Colombian law. (*See* Undertaking Agreement § 4.09.) The Undertaking Agreement is more fully discussed below.
- iii. The RSPA Assignment of Rights Agreement (the “**Assignment Agreement**”), entered into on December 12, 2017 between Aerovías del Continente Americano S.A. Avianca and USAV. (Renenger Decl. ¶ 4; *id.*, Ex. 3.) The governing law under the Assignment Agreement is Costa Rican law. (Assignment Agreement § 5.) The form of Assignment Agreement is annexed to the RSPA as Exhibit E.
- iv. The **Cash Management Agreement**, entered into on December 12, 2017 among Aerovías del Continente Americano S.A. Avianca, as Seller and Servicer, USAV as purchaser, and Citibank, as Administrative Agent and Collateral Agent. (Renenger Decl. ¶ 5; *id.*, Ex. 4.) The governing law under the Cash Management Agreement is New York law. (Cash Management Agreement § 3.08(a).)
- v. The Credomatic Notice of Transfer (the “**Credomatic Notice**”), dated December 12, 2017 executed by Aerovías del Continente Americano S.A. Avianca, Avianca, Inc., Taca International Airlines, S.A. and USAV and accepted and agreed by Citibank as Collateral Agent. (Renenger Decl. ¶ 6; *id.*, Ex. 5.) The governing law under the Credomatic Notice is New York law. (Credomatic Notice § 7(a).)
- vi. The **Credomatic Consent and Agreement**, dated December 12, 2017 executed by Credomatic. (Renenger Decl. ¶ 7; *id.*, Ex. 6.) The contract does not have a governing law provision. The form Credomatic Consent and Agreement is annexed to the RSPA as Exhibit B.
- vii. The **AMEX Notice and Consent**, dated December 12, 2017 and executed by Aerovías del Continente Americano S.A. Avianca and other of the Debtors, USAV, American Express Travel Related Services Company, Inc., American Express Payment Services Limited, and Citibank as Collateral Agent. (Renenger Decl. ¶ 8; *id.*, Ex. 7.) The governing law under the AMEX Notice and Consent is New York law. (AMEX Notice and Consent § 6.) The form of AMEX Notice and Consent is annexed to the RSPA as Exhibit A.

- viii. The **Expenses Agreement**, entered into on December 12, 2017 between USAV and Aerovías del Continente Americano S.A. Avianca. (Reneger Decl. ¶ 9; *id.*, Ex. 8.) The governing law under the Expenses Agreement is the law of the Cayman Islands. (Expenses Agreement § 6.)

Collectively, USAV Agreements effectuate the 2017 Transaction and establish the mechanics of the “future flow” transaction structure set forth in Figure 1 above.

1. The RSPA

The RSPA functions as the master agreement pursuant to which the other USAV Agreements were entered to effectuate the 2017 Transaction. As previously stated, the RSPA was entered into between Aerovías del Continente Americano S.A. Avianca, as Seller and Servicer, and USAV, as Purchaser.

a. Purchase, Sale and Transfer (Article II)

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 Agreements⁷ “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.) “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 prior

⁷ The RSPA defines Card Processing Agreements to mean the Credomatic Contract, the AMEX Contract, and each Additional Card Purchasing Agreement. (Reneger Decl. at 12.)

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.)

The RSPA provides a general definition of the term “Specified Sales” and refers to the AMEX Notice and Consent and the Credomatic Notice and Consent to determine what “Specified Sales” means with respect to each Card Processing Agreement. (*See Reneger Decl.* at 22.)

The AMEX Notice and Consent defines Specified Sales to mean “the sales, including future sales, made by travel agencies in the United States and cleared through ARC of airline tickets or related services provided by the Receivables Seller where payment in the case of any such sale is made by an American Express® Card, however branded, or any one or more of such Cards, including all such sales identified by those certain merchant codes set forth on Exhibit A hereto, with such changes, if any, as shall have been made from time to time after delivery and acceptance of a Merchant ID Supplement.” (*Id.* at 321.) Exhibit A to the AMEX Notice and Consent includes just one (1) merchant number: “7992700286.” (*Id.* at 322.)

The Credomatic Notice and Consent defines Specified Sales to mean “the sales, including future sales, made by travel agencies in the United States and cleared through ARC of airline tickets or related services provided by Avianca S.A. where payment in the case of any such sale is made by a Master Card® Card or Visa® Card, however branded, or any one or more of said Cards, including all such sales identified by those certain merchant codes set forth on Exhibit A hereto, with such changes, if any, as shall have been made from time to time after delivery and acceptance of a Merchant ID Supplement.” (*Id.* at 280–281.) Exhibit A to the Credomatic Notice and Consent includes just one (1) merchant code: “Credomatic FL (VI/MC): 5610-014001084970”. (*Id.* at 283.)

The RSPA also provides that upon termination of either of their Credit Card Processing Agreements, Debtors are required to enter into replacement credit card processing agreements on substantially similar terms within 10 calendar days. (*See* RSPA § 2.03(b).) Upon entry into the replacement processing agreements, the Debtors are obligated to sell to USAV for no additional consideration the Debtors' payment rights under the new agreements. (*See id.* § 2.01(a)(ii).) The Debtors are also required to enter into ancillary agreements with the credit card processors intended to perfect USAV's interest in the new agreements and resulting proceeds. (*See id.* §§ 2.01(b)(ii), (c)(ii); 2.03(b)(i)–(vii).)

b. Consideration (Article III)

The purchase price under the RSPA was \$150 million plus the Additional Purchase Price, which is defined as amounts payable to the Seller under the RSPA subject to the satisfaction of various conditions, including that no Trigger Event be continuing. (*See id.* §§ 1.01, 3.01(a).) If a Trigger Event occurs, USAV is entitled to withhold the Additional Purchase Price from Avianca during the continuance of the Trigger Event. (*See id.* § 3.01(a)(ii).)

c. Trigger Events and Remedies

The RSPA lists eighteen (18) events that constitute "Trigger Events." (*See id.* § 6.01(a)–(r).) As discussed above, the RSPA provides that "no Additional Purchase Price shall be paid during the continuation of . . . a Trigger Event." (*See id.* § 3.01(a)(ii).) A Trigger Event occurs, for example, when "the capacity or ability of the Seller to operate domestic and/or international flights is materially impaired for any reason" (*see id.* § 6.01(i)(i)), or upon the occurrence of any Insolvency Event, which the RSPA defines to include the filing of a voluntary petition in bankruptcy (*see id.* § 6.01(h).) A Trigger Event also occurs if the Debtors fail to perform or observe "any term or obligation under the Undertaking Agreement (except Sections 2.01(c), (d),

(e), and (s)(i) and Section 2.02(c) thereof), any RSPA Security Document or any Notice and Consent. (*See id.* § 6.01(c)(i).) Avianca must also continue to generate Receivables sufficient to (i) pay to USAV the Monthly Settlement Amount (as defined in the Cash Management Agreement) and (ii) maintain a Collection Coverage Ratio of at least 1.75:1:00 at any date of determination. (*See id.* §§ 6.01(a), (b).)

If a Trigger Event occurs, USAV is entitled to terminate the RSPA and demand Liquidated Damages, which the RSPA defines as an amount equal to unpaid principal on USAV's loan plus surcharged interest and administrative costs related to unwinding the transaction. (*See id.* § 6.02.) If a Trigger Event occurs due to an Insolvency Event, the Liquidated Damages shall become automatically due and payable. (*See id.* § 6.03.)

2. The Undertaking Agreement

Pursuant to the Undertaking Agreement, certain of the Debtors agreed to carry out certain duties as responsibilities as a Servicer in respect to the Contract Rights and Receivables. (Undertaking Agreement §§ 3.02 and 3.03.) As Servicer, the Debtors agreed to undertake certain administrative duties that include (i) responding to inquiries of the Card Processors, correcting errors, and settling claims and disputes relating to receivables (*id.* § 3.02(b)); (ii) managing, servicing, and administering the Contract Rights and the Collections (*id.* § 3.02(e)); (iii) using its best efforts to collect all payments called for under the terms and provisions of the Card Processing Agreements as and when the same become due (*id.* § 3.02(h)); and (iv) providing monthly statements regarding Collections to USAV and Citibank (*id.* § 3.02(k)). Pursuant to the Undertaking Agreement, USAV is required to provide documents, including powers of attorney, necessary for the Debtors to carry out their obligations under the Undertaking Agreement. (*See id.* § 3.05.)

3. The Relationship Among the USAV Agreements

The USAV Agreements each have a separate and distinct purpose. (USAV Objection ¶ 12.) As discussed above, the RSPA is a sale agreement pursuant to which Avianca sold its rights to future credit card receivables and associated contract rights under the Card Processing Agreements—*i.e.*, the Contract Rights and Receivables. Pursuant to the Card Processing Agreements, Credomatic and AMEX agreed, among other things, to pay Avianca for sales, including future sales, made by travel agencies in the United States of Avianca’s airline tickets and related services purchased in the United States with Visa or MasterCard cards and American Express cards, respectively. (*Id.*)

Under the Assignment Agreement, Avianca assigned to USAV its interests in its Card Processing Agreement with Credomatic in exchange for the purchase price under the RSPA. Similarly, Avianca transferred to USAV the Contract Rights and Receivables under the AMEX Card Processing Agreement through the AMEX Notice and Consent. (*Id.* ¶ 13.)

The Cash Management Agreement governs the disbursement of funds to the parties, including in the case of a “Trigger Event,” as defined in section 6.01 of the RSPA. Upon notice of the parties of major events (including a Retention Event or a Trigger Event) or any unpaid fees, expenses or indemnities incurred by or claimed through or disburseable to USAV or the Administrative Agent, Citibank is required to adjust the schedule of payments to conform with the priority of payments set forth in Article II of the Cash Management Agreement. (*See* Cash Management Agreement §§ 2.06, 2.07(a), 2.09(c).)

Pursuant to the Expenses Agreement, Avianca agreed to indemnify and settle on USAV’s behalf certain costs, including but not limited to, “any and all fees and expenses USAV incurred in connection with its entry into and the performance of its obligations,” and “all costs, fees and

expenses incurred by [USAV, Citibank], and any other person contracted to provide services in relation to the Receivables or the Loan Agreement or the transactions contemplated thereby.”

(See Expenses Agreement ¶¶ 3.1, 3.4.)

The Debtors concede that the following six (6) agreements are not executory by their own terms: Cash Management Agreement, Expense Agreement, Assignment Agreement, Credomatic Notice, Credomatic Consent and Agreement, and AMEX Notice and Consent. (Motion ¶ 29.)

The Debtors state that these agreements exist solely to effectuate the RSPA, which, according to the Debtors, should deem them inseparable from the RSPA and Undertaking Agreement for purposes of rejection. (*Id.*)

III. LEGAL STANDARD

A. Determining Whether a Contract is Executory

Section 365 of the Bankruptcy Code provides that “the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). Notably, the Bankruptcy Code does not define the term “executory contract.” The Supreme Court has noted that an executory contract is a contract that neither party has finished performing. *Tempnology*, 139 S. Ct. at 1657 (citing 11 U.S.C. § 365(a)). Most courts have adopted Professor Countryman’s definition of an executory contract as “a contract under which the obligation of both the [debtor] and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.” Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973). Under Countryman’s “material breach” test, a prepetition contract is executory when both sides are still obligated to render substantial performance. *Enter. Energy Corp. v. United States (In re Columbia Gas Sys.)*, 50 F.3d 233, 239

(3d Cir. 1995); *Mitchell v. Streets (In re Streets & Beard Farm P'ship)*, 882 F.2d 233, 235 (7th Cir. 1989); *In re 375 Park Ave. Assocs.*, 182 B.R. 690, 697 (Bankr. S.D.N.Y. 1995). Where such performance remains due on only one side, the contract is non-executory, and hence, neither assumable nor rejectable. *See In re Chateaugay Corp.*, 102 B.R. 335, 345 (Bankr. S.D.N.Y. 1989). The materiality of the breach is a question of state law. *In re Columbia Gas Sys., Inc.*, 50 F.3d at 239 n.10.

To determine whether a contract was executory, the court in *Gen. DataComm Indus., Inc. v. Arcara (In re Gen. DataComm Indus., Inc.)*, 407 F.3d 616, 624 (3d Cir. 2005), considered whether there were material obligations that remained unperformed by the counterparty at the time the bankruptcy petition was filed. The court found that when the parties define a breach of one party's obligation as a terminable breach in the contract, such obligations are material obligations. *See id.* As such, the benefit plan at issue was executory because it specified that the failure to perform certain duties entitled the counterparty to terminate the contract, and "by contractual definition, therefore, such obligations were material." *Id.* at 625; *see also Jay Dee/Mole Joint Venture v. Mayor & City Council of Balt.*, 725 F. Supp. 2d 513, 526 (D. Md. 2010) ("Where the contract itself is clear in making a certain event a material breach of that contract, a court must ordinarily respect that contractual provision.") (internal quotation marks and citations omitted).

B. *Tempnology* and the Effect of Rejection

Tempnology involved a debtor's attempt in a Chapter 11 case to terminate a trademark license it had previously granted to a licensee by rejecting the underlying licensing agreement. *Tempnology*, 139 S. Ct. at 1658–59. The debtor argued that, as a result of rejection, the debtor not only was free to stop performing under the parties' agreement, but also that rejection

terminated the licensee's right to use the licensed trademark going forward. *Id.* The bankruptcy court agreed, reasoning that the debtor's rejection of a trademark licensing agreement must extinguish the rights that the agreement had conferred in the trademark licensee. *Id.* at 1659.

The Bankruptcy Appellate Panel reversed, relying on the Seventh Circuit's decision in *Sunbeam Prods. v. Chicago Am. Mfg., LLC*, 686 F.3d 372 (7th Cir. 2012). The court determined that while rejection converts a debtor's unfulfilled obligations to a pre-petition damages claim, it does not "terminate the contract" or "vaporize[]" the counterparty's rights, so the licensee could continue to use the trademark as previously granted to it by the debtor. *Tempnology*, 139 S. Ct. at 1659. The First Circuit rejected the Panel's view, reinstating the bankruptcy court's opinion terminating the license. *Id.* The Supreme Court granted certiorari to resolve the circuit split. *Id.* at 1660.

In an 8-1 decision, Justice Kagan, writing for the Court, reversed the decision of the First Circuit, holding that rejection of an executory contract gives rise to a claim for breach of contract against the debtor, but it does not operate as a termination or rescission of the rejected contract, so a debtor cannot evade its pre-rejection grant of rights. *Id.* at 1657–58. The Court deemed this distinction a "rejection-as-breach" approach, as opposed to the "rejection-as-rescission" approach advocated by the debtor and adopted by the First Circuit. *Id.* at 1663.

The Supreme Court explained that rejection is a breach, and the consequences of such breach are determined by "non-bankruptcy contract law." *Id.* at 1662. Thus, "a debtor's rejection of an executory contract in bankruptcy has the same effect as a breach outside of bankruptcy." *Id.* at 1666. That is, it "does not eliminate rights to the contract already conferred on the non-breaching party." *Id.* at 1659. "It gives the counterparty a claim for damages, while

leaving intact the rights the counterparty has received under the contract.” *Id.* at 1661.

Thus, a debtor does not have a right to repudiate prior performance, but rather can only “repudiat[e] any further performance of its duties.” *Id.* at 1658, 1662 (stating that a debtor “cannot unilaterally revoke” what it contracted to provide the counterparty based on the debtor’s own breach); *In re Lyondell Chem. Co.*, 416 B.R. 108, 115 (Bankr. S.D.N.Y. 2009); *In re Exec. Tech. Data Sys.*, 79 B.R. 276, 282 (Bankr. E.D. Mich. 1987). “A rejection breaches a contract but does not rescind it. And that means all the rights that would originally survive a contract breach, remain in place.” *Tempnology*, 139 S. Ct. at 1657–58, 1666 (“[Rejection] cannot rescind rights that the contract previously granted.”); *Rudaw/Empirical Software Prods., Ltd. v. Elgar Electronics Corp. (In re Rudaw/Empirical Software Prods., Ltd.)*, 83 B.R. 241, 245 (Bankr. S.D.N.Y. 1988) (stating that “debtor cannot undo an executed sale of property where title has passed. Such property does not revert as a result of the debtor’s rejection of the executory contract.”). “When it occurs, the debtor and counterparty do not go back to their pre-contract positions. Instead, the counterparty retains the rights it has received under the agreement. As after a breach, so too after a rejection, those rights survive.” *Tempnology*, 139 S. Ct. at 1662.

Tempnology applies to all contracts, not just trademark licenses: “we reject an argument for the rescission approach turning on the distinctive features of trademark licenses. Rejection of a contract—any contract—in bankruptcy operates not as a rescission but as a breach.” *Id.* at 1661. As the Court explained, Section 365 provides debtors with a “powerful tool: Through rejection, the debtor can escape all of its future contract obligations, without having to pay much of anything in return,” given that debtors typically pay claims at “only cents on the dollar.” *Id.* at 1658, 1665.

C. Business Judgment Standard

Courts are inclined to “approve motions to assume, assume and assign, or reject executory contracts or unexpired leases upon a showing that the debtor’s decision to take such action will benefit the debtor’s estate and is an exercise of sound business judgment.” *In re MF Glob. Holdings Ltd.*, 466 B.R. 239, 242 (Bankr. S.D.N.Y. 2012); *see also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (stating that section 365 is traditionally subject to the “business judgment” standard); *In re Gucci*, 193 B.R. 411, 415 (Bankr. S.D.N.Y. 1996) (“A bankruptcy court reviewing a trustee’s decision to assume or reject an executory contract should apply its ‘business judgment’ to determine if it would be beneficial or burdensome to the estate to assume it.”).

In most cases, a court “will not second-guess a debtor’s business judgment concerning whether the assumption or rejection of an executory contract or unexpired lease would benefit the debtor’s estate.” *MF Glob. Holdings*, 466 B.R. at 242; *see also In re Balco Equities Ltd., Inc.*, 323 B.R. 85, 98 (Bankr. S.D.N.Y. 2005) (“A court ‘should defer to a debtor’s decision that rejection of a contract would be advantageous.’”) (quoting *In re Sundial Asphalt Co.*, 147 B.R. 72, 84 (Bankr. E.D.N.Y. 1992)). “The ‘business judgment’ test merely requires a showing that either assumption or rejection of the executory contract or unexpired lease will benefit the Debtor’s estate.” *MF Glob. Holdings*, 466 B.R. at 242; *see also Bregman v. Meehan (In re Meehan)*, 59 B.R. 380, 385 (E.D.N.Y. 1986) (“The primary issue under the business judgment test is whether rejection of the contract would benefit general unsecured creditors.”); *In re Helm*, 335 B.R. 528, 538 (Bankr. S.D.N.Y. 2006) (“To meet the business judgment test, the debtor in possession must ‘establish that rejection will benefit the estate.’”) (quoting *In re Cent. Jersey Airport Servs., LLC*, 282 B.R. 176, 183 (Bankr. D.N.J. 2002)).

IV. DISCUSSION

The central question before the Court is whether the USAV Agreements are executory and can be rejected under section 365 of the Bankruptcy Code. The parties agree on the legal standard for determining whether the USAV Agreements are executory: “if *both* parties have substantial unperformed obligations, the contract is executory even though the uncompleted obligation of one of the parties only involves the payment of money.” *In re Teligent, Inc.*, 268 B.R. 723, 732 (Bankr. S.D.N.Y. 2001) (emphasis in original). (See Motion ¶ 27; USAV Objection ¶ 22 n.7; Lender Objection ¶ 47.)

The Debtors argue that the Debtors and USAV have material unperformed obligations under the RSPA and Undertaking Agreement. (Motion ¶¶ 24–28; Reply ¶¶ 18–29.) The USAV Parties argue that the RSPA and Undertaking Agreement are not executory contracts because USAV has no material unperformed obligations under either agreement. (Lender Objection ¶¶ 44–60; USAV Objection ¶¶ 17–26.) The Debtors concede that the remaining six (6) agreements are not executory by their own terms (Motion ¶ 29), but argue that, under Colombian law, the USAV Agreements should be construed as one transaction for purposes of rejection. (Reply ¶ 37.) The USAV Parties agree that the Court should apply Colombian law to this part of the analysis (Supplemental Lender Response ¶¶ 21–24), but argue that Colombian law does not permit multiple agreements to be treated as one integrated contract. (*Id.* ¶¶ 18–20.)

According to the Lenders, the Debtors, by rejecting the RSPA, are seeking to unwind the 2017 Transaction to get back the contract rights they sold in violation of Supreme Court’s holding in *Tempnology*. (Lender Sur-Reply ¶ 16 (citing *Tempnology*, 139 S. Ct. at 1662, 1663).) The Debtors argue that they are not seeking to unwind the 2017 Transaction. Rather, the Debtors seek to reject—*i.e.*, breach—the RSPA to be relieved of their unperformed obligations

thereunder, namely under RSPA § 2.01 to sell to USAV, for no additional consideration, the contract rights arising under new card processing agreements. (*See* Reply ¶¶ 7, 57.)

A. The RSPA Is Executory

The USAV Parties argue that neither the Debtors nor USAV have material obligations remaining under the RSPA. (*See* Lender Objection ¶¶ 44–60; USAV Objection ¶¶ 18–29.) The Debtors and Committee disagree. As discussed below, the RSPA is an executory contract subject to rejection under section 365 of the Bankruptcy Code because both the Debtors and USAV have material unperformed obligations thereunder.

1. The Debtors’ Ongoing Obligations Under the RSPA

The Debtors have several material unperformed obligations under the RSPA, including the obligation to sell their rights to payment under replacement credit card processing agreements to USAV for no additional consideration. (*See* RSPA § 2.01(a)(ii).) Other material unperformed obligations of the Debtors include to (a) ensure the Collection Coverage Ratio does not drop below 1.75:1:00 (RSPA § 6.01(b)); (b) observe all obligations under the Undertaking Agreement (*id.* § 6.01(c)(i)); (c) keep all Card Processing Agreements in effect by adhering to all obligations under those agreements (*id.* § 6.01(e)–(f)); and (d) maintain the capacity or ability to operate domestic and/or international flights (*id.* § 6.01(i)(i)) (collectively, the “Trigger Event Obligations”).

The failure to perform any of the Trigger Event Obligations results in a Trigger Event under the RSPA, whereby USAV is entitled to prematurely terminate the RSPA and demand, as damages, payment in full of its loan to the Lender Group, plus surcharged interest and administrative costs—*i.e.*, the Liquidated Damages. (*See* RSPA § 6.02.) The Lender Group argues that the Trigger Event Obligations are not ongoing obligations of the Debtors, but rather

conditions—the non-occurrence of which trigger certain consequences—namely, acceleration of the loan amount in the form of the Liquidated Damages. (Lender Sur-Reply ¶ 46, 47.) The Lender Group interprets the Trigger Event Obligations as being the opposite of a breach, they represent the Debtors’ obligation to comply with contractual terms, not a failure to comply with a contractual term. (*Id.* ¶ 47 (citing *In re Peanut Corp Ins. Litig.*, 524 F.3d 458, 474 (4th Cir. 2008) (noting that “[a] condition precedent is either an act of a party that must be performed or a certain event that must happen before a contractual right accrues or contractual duty arises”) (citations and quotations omitted)).) According to the Lender Group, “all” Trigger Events are merely conditions and that failing to perform is “simply not a breach.” (Lender Objection ¶ 57 (citing *In re Hawker Beechcraft, Inc.*, 486 B.R. 264, 276 (Bankr. S.D.N.Y. 2013) (stating that the “[n]on-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.”) (citations and quotations omitted)).

Regardless of how the Trigger Events are characterized, the RSPA clearly gives USAV the right to “prematurely terminate” the RSPA upon the occurrence of a Trigger Event—whether USAV decides to exercise that right is up to it. (*See* RSPA § 6.02.) While the RSPA does not require Avianca to “use best efforts” to ensure that a Trigger Event does not occur, USAV, at the direction of the Lender Group, has the right to unilaterally terminate the RSPA if a Trigger Event occurs. (*Id.* (providing that, “[u]pon the occurrence of a Trigger Event, the Purchaser may or the Administrative Agent (at the direction of the Required Lenders pursuant to the Purchaser Credit Agreement) shall prematurely terminate (*resolver*) this Agreement . . .”).)

When parties to a contract define a breach of one party’s obligations as a terminable breach, such obligations are material obligations. *See In re Gen. DataComm Indus., Inc.*, 407 F.3d at 625 (holding that a contract was executory because it specified that the failure to perform

certain duties entitled the counterparty to terminate the contract, and “by contractual definition, therefore, such obligations were material”). *See also In re Hawker Beechcraft, Inc.*, 486 B.R. at 278 (stating that where the parties “contractually agree that some or all of the terms are sufficiently important to discharge any further obligations imposed on the party aggrieved by a breach, their intent will govern”); *Gencor Indus., Inc. v. CMI Terex Corp. (In re Gencor Indus., Inc.)*, 298 B.R. 902, 911 (Bankr. M.D. Fla. 2003) (holding that an “affirmative duty to [e]nsure that the condition occurs” will be a material obligation); *In re Level Propane Gases, Inc.*, 297 B.R. 503, 508–09 (Bankr. N.D. Ohio 2003) (holding that the requirement to execute releases was material, and not conditional, where it was “specifically what the Debtors bargained for,” without the satisfaction of which, “there would be no sound reason” for the parties to have entered the agreement). Accordingly, the Court concludes that the Debtors have material unperformed obligations under the RSPA.

2. USAV’s Ongoing Obligations Under the RSPA

USAV also has material ongoing obligations under the RSPA, most significantly to distribute funds and make payments to the Debtors of the Additional Purchase Price. (Motion ¶ 27 (citing RSPA § 3.01(a)(ii)).) However, the USAV Parties argue this obligation is no longer ongoing because the prepetition Flight Impairment Trigger Event automatically “cut off” the Debtors’ right to an Additional Purchase Price. (Lender Objection ¶¶ 14–15, 48 (citing RSPA § 3.01(a)(ii)).) The Debtors counter that the occurrence of a Trigger Event does not permanently relieve USAV from payment of the Additional Purchase Price. (Reply ¶ 28 (citing RSPA § 3.01(a)(ii) providing “that no Additional Purchase Price shall be paid during the continuance of a . . . Trigger Event”).) Thus, the declaration of a Trigger Event only temporarily relieves USAV’s obligation to pay the Advance Purchase Price. (Reply ¶ 28.) The Debtors also point to section

2.02 of the Cash Management Agreement, which calls for the resumption of payment of the Additional Purchase Price once the Collateral Agent revokes any Trigger Event Notice. (*Id.* (citing Cash Management Agreement § 2.02).)

USAV's conduct confirms its obligation is only temporarily "cut off" upon the occurrence of a Trigger Event: Citibank continued to send Additional Purchase Price payments to the Debtors in April 2020 after sending the March Notice declaring a Trigger Event. (*See* Second Neuhauser Decl. ¶ 5.) The Lender Group does not dispute that the Additional Purchase Price payments are a contingent obligation of USAV. (*See* Lender Sur-Reply ¶ 33.) Rather, the Lenders argue that, because the Flight Impairment Trigger Event remains ongoing and neither USAV nor the Agents has revoked the Trigger Event, USAV has no unperformed obligation to make Additional Purchase Price payments. (*Id.* ¶ 35.)

The fact that an obligation is contingent is irrelevant for the purposes of determining whether the underlying contract is executory. (*See* UCC Reply ¶ 13 (citing *In re RoomStore, Inc.*, 473 B.R. 107, 112–13 (Bankr. E.D. Va. 2012) ("In contrast, debtor's position, which finds ample support in the case law, is that a contingent obligation, even though not yet triggered on a debtor's petition date, is nevertheless executory until expiration of the contingency because until the time has expired during which an event triggering a contingent duty may occur, the contingent obligation represents a continuing duty to stand ready to perform if the contingency occurs.")) (citations and internal quotations omitted) (collecting authorities). The fact that USAV's obligation to pay the Additional Purchase Price was contingent on the Petition Date (*i.e.*, such payments would become due following the cessation of the Trigger Event in the future) does not change the legal reality that the obligation is material and unperformed for the purposes of determining the executory nature of the RSPA. (*See* RSPA §§ 3.01(a), 6.01(i)(i).)

Accordingly, the Court finds that USAV has material ongoing and unperformed obligations under the RSPA, namely the contingent obligation to make Additional Purchase Price payments. Therefore, the Court concludes that the RSPA is an executory contract that the Debtors may reject pursuant to section 365 of the Bankruptcy Code.

B. The Undertaking Agreement Is Executory

The parties do not seriously dispute that the Debtors have material unperformed obligations under the Undertaking Agreement. However, the extent of USAV's unperformed obligations is contested by the USAV Parties. For the reasons set forth below, the Court finds that the Undertaking Agreement is executory because both the Debtors and USAV have material unperformed obligations thereunder.

1. Debtors' Ongoing Obligations Under the Undertaking Agreement

The Debtors have several ongoing obligations under the Undertaking Agreement. These include carrying out duties and responsibilities as servicer of the Contract Rights and Receivables. As Servicer, the Debtors agreed to undertake certain administrative duties that include (i) responding to inquiries of the Card Processors, correcting errors, and settling claims and disputes relating to receivables (Undertaking Agreement § 3.02(b)); (ii) managing, servicing, and administering the Contract Rights and the Collections (*id.* § 3.02(e)); (iii) using its best efforts to collect all payments called for under the terms and provisions of the Card Processing Agreements (*id.* § 3.02(h)); and (iv) providing monthly statements regarding Collections to USAV and Citibank (*id.* § 3.02(k)). (Motion ¶ 24). The Undertaking Agreement also requires the Debtors to ensure that each of the Card Processing Agreements remains the legal, valid, and binding obligation of each of the parties thereto, to perform and observe all of its material covenants and obligations contained in each of them, and to “renew each Card Processing

Agreement in accordance with the terms thereof and not consent to any termination by any Card Processor to any termination thereof.” (Motion ¶ 25 (citing Undertaking Agreement § 2.01(v)).)

The USAV Parties do not contest that the Undertaking Agreement imposes ongoing obligations on the Debtors. (*See, e.g.*, USAV Objection ¶ 15 (stating that Avianca has ongoing obligations to USAV under the Undertaking Agreement “concerning late and delinquent receivables, including to collect USAV-owned receivables so that they can be delivered to USAV”).) While the Lender Group appears to argue that the March Notice terminated the Debtors’ obligations under the Undertaking Agreement, they immediately concede in a footnote that it failed to comply with the technical requirements to name a new servicer as would have been required under the Undertaking Agreement. (*See* Lender Objection ¶ 56; Undertaking Agreement § 3.12.)

Accordingly, the Court concludes that the Debtors have material unperformed obligations under the Undertaking Agreement.

2. USAV’s Ongoing Obligations Under the Undertaking Agreement

Pursuant to section 3.05 of the Undertaking Agreement, USAV is required, upon the Debtors’ request, to furnish to the Debtors any documents necessary to enable the Debtors to carry out their duties under the Undertaking Agreement, including furnishing any powers of attorney and other documents. (Lender Objection ¶ 49 (citing Undertaking Agreement § 3.05).) The Lenders argue that such obligation is *de minimis* and contingent, thus, not a material obligation for purposes of determining whether the Undertaking Agreement is executory. (*Id.*)

The Court rejects the Lenders’ argument and finds that the obligation to furnish to the Debtors any documents, including powers of attorney, necessary to enable the Debtors to carry out their duties under the Undertaking Agreement is a material unperformed obligation. *Burley*

v. Am. Gas & Oil Investors (In re Heafitz), 85 B.R. 274 (Bankr. S.D.N.Y. 1988) is instructive in this regard. There, the court found that an oil and gas limited partnership agreement was executory because, *inter alia*, the general partner had an ongoing “obligation to make distributions, to furnish additional financial statements, to prepare quarterly progress reports and to maintain the books and records of the partnership.” *Id.* at 282–84. Similarly, in *In re Teligent, Inc.*, 268 B.R. 723 (Bankr. S.D.N.Y. 2001), Judge Bernstein, while ruling that a merger agreement was executory on narrower facts than those raised by the parties, flagged, *inter alia*, the following as an unperformed obligation under the merger agreement: “the parties must execute any and all further documents and instruments necessary and/or appropriate to carry out the terms and provisions of the Merger Agreement.” *Id.* at 729 n.7; *see also RDP Holdings v. Tech Pharmacy Servs. (In re Provider Meds, L.L.C.)*, 907 F.3d 845, 855 (5th Cir. 2018) (finding that a licensing agreement was executory where, *inter alia*, the agreement “straightforwardly obligated the debtors to take certain ongoing actions, such as filing quarterly reports and not discussing the settled lawsuit”). These cases support the conclusion that USAV’s ongoing obligation to furnish all necessary account records to the Debtors is a material obligation, especially where—as here—Debtors require those documents to perform their obligations under the Undertaking Agreement.

Accordingly, the Court finds that USAV has material unperformed obligations under the Undertaking Agreement. Therefore, the Court concludes that the Undertaking Agreement is an executory contract that the Debtors may reject pursuant to section 365 of the Bankruptcy Code.

C. Under Colombian Law, The USAV Agreements Cannot be Construed as One Agreement for Purposes of Rejection

Having concluded that the RSPA and Undertaking Agreement are executory contracts that may be rejected, the Court will now address the Debtors’ request to reject the remaining

USAV Agreements. As previously stated, the Debtors concede that the following six (6) agreements are not executory by their own terms: (1) Cash Management Agreement, (2) Expense Agreement, (3) Assignment Agreement, (4) Credomatic Notice, (5) Credomatic Consent and Agreement, and (6) AMEX Notice and Consent. (Motion ¶ 29.) The Debtors state that these agreements exist solely to effectuate the RSPA and ask the Court to deem these agreements to be inseparable from the RSPA and Undertaking Agreement for purposes of rejection. (Motion ¶ 29; Reply ¶ 36.) The USAV Parties argue that the USAV Agreements are not a single contract for purposes of rejection. (Lender Objection ¶ 34–43; USAV Objection ¶ 27–29.)

The parties agree that Courts look to applicable non-bankruptcy law on this issue and agree that Colombian law—governing law of the RSPA and Undertaking Agreement—should apply to the Court’s analysis regarding the relatedness of the USAV Agreements. (See Supplemental Lender Response ¶ 16; Reply ¶ 36.) The Debtors and the Lender Group submitted Colombian law declarations addressing, *inter alia*, the extent to which several related agreements can be treated as a single contract under Colombian law. (See Arrubla Decl., ECF Doc. # 684-1; Second Melo Decl., ECF Doc. # 720.) The Court has reviewed the Colombian law declarations and both declarants were available at the August 26, 2020 hearing to answer questions of the Court. For the reasons discussed below, the Court concludes that, under Colombian law, the USAV Agreements should not be treated as a single contract for purposes of rejection under section 365 of the Bankruptcy Code.

The Debtors argue that, under Colombian law, the USAV Agreements should be evaluated together for purposes of rejection under section 365. (Reply ¶ 37.) In support of their position, the Debtors submit the Arrubla Declaration, which states that, under Colombian law, agreements that are “related between themselves in regard to their overall economic purpose, so

that each of them has repercussion on the others, and may be based on a single cause or shared economic objective . . . must not be understood in an isolated manner, but instead, they should be interpreted according to the ‘supra-contractual’ economic function of the entire operation as a whole.” (Arrubla Decl. ¶ 14 (citing Supreme Court of Justice, Civil Division, Judgment of December 19, 2018).) Further, “[i]n order to establish a link, the emphasis of the interpretation should not be on the contract, but rather the overall deal as an economic reality and this can be present even when in different contracts the parties only coincide partially or when they are regulated by different rules, whenever they seek the same overall economic goal.” (*Id.* (citing Supreme Court of Justice, Civil Division, Judgement of November 15, 2017).)

The Lender Group submits that, under Colombian law, the USAV Agreements cannot be evaluated together. (*See* Lender Group Supplement Response ¶ 19.) In support, the Lender Group submits the second declaration of Jorge Suescun Melo, which states that, under Colombian law, the doctrine of “colligated contracts” (*contratos coligados*) does not permit multiple agreements to be treated as one integrated contract. (Lender Sur-Reply ¶ 19 (citing Second Melo Decl. ¶¶ 9–19).) Further, “the purpose of the *contratos coligados* doctrine is not to treat separate contracts as a single contract, but simply as an aid to courts when considering how to interpret one contract within a suite of linked contracts, or as a framework for understanding links among a series of contracts towards a common business objective.” (Second Melo Decl. ¶ 19.) The Second Melo Declaration also provides that:

The *contratos coligados* doctrine has nothing to do with whether, and to my knowledge has never been used (and in my view cannot be used) in a manner that would result in, the colligated contracts being treated as a single contract. I am aware of no Colombian case law or arbitral awards applying Colombian law holding that *contratos coligados* are “inseparable” or inextricably linked such that they would be treated by a Colombian court or arbitral panel as a single contract. In fact, the case law says that the opposite is true: if parties wished for a suite of contracts to be treated as one contract,

they must combine all terms and conditions of the proposed transaction into a single writing and separate writings will never be considered a single contract for purposes of Colombian law.

(*Id.* ¶ 11 (citing Colombian Supreme Court of Justice, Decision, November 15, 2017).)

Having considered the Parties respective Colombian law declarations, the Court concludes that, under Colombian law, the USAV Agreements cannot be treated as a single contract for purposes of rejection.⁸ The Court finds that the Arrubla Declaration merely sets forth a general canon of contract interpretation with respect to related agreements but does not discuss or cite to any Colombian case law or arbitral awards holding that related agreements should be treated as a single contract. (*See* Arrubla Decl. ¶¶ 14, 15.) In contrast, the Second Melo Declaration specifically states that “the case law says that . . . separate writings will never be considered a single contract for purposes of Colombian law.” (Second Melo Decl. ¶ 11 (citing Colombian Supreme Court of Justice, Decision, November 15, 2017).) The Second Melo Declaration further provides that “I am aware of no Colombian case law or arbitral awards applying Colombian law holding that *contratos coligados* are ‘inseparable’ or inextricably linked such that they would be treated by a Colombian court or arbitral panel as a single contract.” (*Id.* ¶ 11.)

Therefore, the Court rejects the Debtors’ argument that the USAV Agreements should be considered a single contract for purposes of rejection and concludes that the following agreements are not executory contracts that the Debtors may reject pursuant to section 365 of the Bankruptcy Code: (1) Cash Management Agreement, (2) Expense Agreement, (3) Assignment Agreement, (4) Credomatic Notice, (5) Credomatic Consent and Agreement, and (6) AMEX

⁸ Federal Rule of Civil Procedure 44.1 provides, in relevant part, as follows: “In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court’s determination must be treated as a ruling on a question of law.” FED. R. CIV. P. 44.1.

Notice and Consent. But as the Debtors' counsel acknowledged during argument, while the Debtors may not reject these contracts, the counterparties can assert damages claims under applicable non-bankruptcy law for any breach.

D. Rejection of the RSPA Does Not Rescind or Unwind the 2017 Transaction

Having concluded that the RSPA and Undertaking Agreements are executory contracts subject to rejection under Bankruptcy Code section 365, the Court must still address the USAV Parties' argument that rejection of the RSPA would violate the Supreme Court's holding in *Tempnology* that rejection does not permit a debtor to "get back" rights that they sold or "unwind" or "rescind" a transaction. (Lender Sur-Reply ¶ 16 (citing *Tempnology*, 139. S. Ct. at 1662–63); *see also* Lender Group Objection ¶¶ 26, 33 (stating that rejection "would not allow the Debtors to take back from USAV Proceeds of the Contract Rights they sold in 2017 because of the contract mechanics.")) The USAV Parties argue that even if the RSPA may be rejected, they are entitled to receive all of the proceeds from *future* (post-rejection) credit card receivables without paying any additional consideration because future receivables were among the Contract Rights sold in 2017. The Debtors and Committee disagree with the assertions made by the Lenders and USAV. Debtors submit that they seek to breach the RSPA so that they are no longer obligated to perform under the RSPA, namely, under RSPA § 2.01(a)(ii), to sell to USAV, for no additional consideration, the contract rights arising under new card processing agreements that the Debtors may seek to enter. (*See* Reply ¶¶ 7, 57.) Indeed, whether the USAV Parties are entitled to receive all of the proceeds from future (post-rejection) credit card receivables without paying any additional consideration is the crux of the dispute.

1. Tempnology Holds that Rejection Does Not Terminate a Contract

In *Tempnology*, the Bankruptcy Court granted the debtors' motion to reject a non-exclusive executory license agreement it entered into with Mission Products for, *inter alia*, the use of certain trademarks of the debtors both in the United States and around the world. *See Tempnology*, 139 S. Ct. at 1658. The consequence of debtors' breach meant two things on which the parties agreed. First, the debtors could stop performing under the contract. *Id.* at 1659. Second, Mission could assert (for whatever it might be worth) a pre-petition claim in the bankruptcy proceeding for damages resulting from the debtors' nonperformance. *Id.* However, the debtors thought that a further consequence of rejection was termination of the rights it had granted Mission to use the trademarks. *Id.* The debtors returned to the Bankruptcy Court and moved for a determination of what rights Mission retained following rejection of the license agreement. *Id.*

In an 8-1 decision, Justice Kagan, writing for the Court, held that rejection of an executory contract gives rise to a claim for breach of contract against the debtor, but it does not operate as a termination or recession of the rejected contract. *Id.* at 1657–58. The Court deemed this distinction a “rejection-as-breach” approach, as opposed to the “rejection-as-rescission” approach advocated by the debtor and adopted by the First Circuit. *Id.* at 1663.

Section 365 of the Bankruptcy Code provides that subject to Bankruptcy Court approval, a debtor may “reject any executory contract”—meaning a contract that neither party has finished performing.” *Id.* at 1657 (quoting 11 U.S.C. § 365(a)). The Supreme Court explained that rejection is a breach, and the consequences of breach are determined by “non-bankruptcy contract law.” *Id.* at 1662. The majority held, and the concurrence emphasized, that in specific cases, specialized terms in a contract may limit what rights the non-breaching counterparty may

have. *See id.* at 1666 (“[T]he baseline inquiry remains whether the licensee’s rights would survive a breach under applicable nonbankruptcy law. Special terms in a licensing contract or state law could bear on that question in individual cases.”) (Sotomayor, J., concurring). Thus, “a debtor’s rejection of an executory contract in bankruptcy has the same effect as a breach outside of bankruptcy. *Id.* That is, it “does not eliminate rights to the contract . . . already conferred on the non-breaching party.” *Id.* at 1659. Rather, “[i]t gives the counterparty a claim for damages, while leaving intact the rights the counterparty has received under the contract.” *Id.* at 1661. “When [rejection] occurs, the debtor and counterparty do not go back to their pre-contract positions. Instead, the counterparty retains the rights it has received under the agreement. As after a breach, so too after rejection, those rights survive.” *Id.* at 1662.

2. The Debtors Sold Contract Rights to Specified Sales Processed by AMEX and Credomatic

Here, the determination of any rejection damages claim is not currently an issue before the Court. But the parties have forcefully contested what rights USAV, as Purchaser, received under the RSPA that necessarily survive the Debtors’ rejection of the RSPA.

Pursuant to the RSPA, Avianca agreed to (i) sell and transfer to the Purchaser, and to be replaced by the Purchaser in the contractual positions under the Card Processing Agreements with respect to, all rights of the Seller in, to and under the Contract Rights; and (ii) sell and transfer to the Purchaser the Receivables.⁹ (Reneger Decl. at 10.) The RSPA defines Contract Rights to mean “the contract rights of the Seller under the Card Processing Agreements to (i) receive any kind of payments, indemnities or economic compensations derived therefrom on

⁹ The RSPA defines Receivables to mean “any and all Collections accrued under the Card Processing Agreements that are due on account of Specified Sales from (a) AMEX or Credomatic to the Seller immediately 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).” (ECF Doc. # 306-2 at 20–21.)

account of Specified Sales, including the right, among other things, to receive all future Collections derived therefrom; and (ii) enforce the rights referred to in (i) against the respective Card Processors thereunder.” (*Id.* at 13.) The RSPA provides a general definition of the term “Specified Sales”¹⁰ and refers to the AMEX Notice and Consent and the Credomatic Notice and Consent to determine what “Specified Sales” means with respect to each Card Processing Agreement. (*Id.* at 22.)

The AMEX Notice and Consent defines Specified Sales to mean “the sales, including future sales, made by travel agencies in the United States and cleared through ARC of airline tickets or related services provided by the Receivables Seller where payment in the case of any such sale is made by an American Express® Card, however branded, or any one or more of such Cards, including all such sales identified by those certain merchant codes set forth on Exhibit A hereto, with such changes, if any, as shall have been made from time to time after delivery and acceptance of a Merchant ID Supplement.” (*Id.* at 321.) Exhibit A to the AMEX Notice and Consent includes just one (1) merchant number: 7992700286 (the “AMEX Merchant Number”). (*Id.* at 322.) Accordingly, the Court finds that the Debtors sold to USAV the Debtors’ right to receive payment of any sales identified by the AMEX Merchant Number and/or any replacement or additional merchant number assigned by AMEX that identify the Specified Sales with respect

¹⁰ The RSPA defines Specified Sales to mean “the sales, including future sales, made by travel agencies in the United States and cleared through ARC of airline tickets or related services provided by the Seller where payment in the case of any such sale is made by a MasterCard® Card, Visa® Card, or American Express® Card, however branded, or any one or more of such Cards, including all such sales identified by those certain merchant codes set forth in any Notice and Consent or any notice given by a Card Processor to the Purchaser and the Collateral Agent from time to time as provided in the Notice and Consent by and among, inter alia, the Purchaser, the Seller, the Collateral Agent, and such Card Processor; provided that with respect to each Card Processing Agreement, ‘Specified Sales’ shall include only ‘Specified Sales’ as defined in the Notice and Consent relating to such Card Processing Agreement.” (*Id.* at 22.)

to AMEX. Rejection of the RSPA and Undertaking Agreement does not terminate USAV's right to receive payment of any sales processed by AMEX under the AMEX Notice and Consent.

The Credomatic Notice and Consent defines Specified Sales to mean "the sales, including future sales, made by travel agencies in the United States and cleared through ARC of airline tickets or related services provided by Avianca S.A. where payment in the case of any such sale is made by a Master Card® Card or Visa® Card, however branded, or any one or more of said Cards, including all such sales identified by those certain merchant codes set forth on Exhibit A hereto, with such changes, if any, as shall have been made from time to time after delivery and acceptance of a Merchant ID Supplement." (*Id.* at 280–281.) Exhibit A to the Credomatic Notice and Consent includes just one (1) merchant code: "Credomatic FL (VI/MC): 5610-014001084970" (the "Credomatic Merchant Code"). (*Id.* at 283.) Accordingly, the Court finds that the Debtors also sold to USAV the Debtors' right to receive payment of any sales identified by the Credomatic Merchant Code and/or any replacement or additional merchant code assigned by Credomatic that identify the Specific Sales with respect to Credomatic. Rejection of the RSPA and Undertaking Agreement does not terminate USAV's right to receive payment of any sales processed by Credomatic under the Credomatic Notice and Credomatic Consent and Agreement.

The result of rejection here is not a recession of the RSPA or Undertaking Agreement and rejection does not allow the Debtors to take back the Contract Rights to Specified Sales processed by AMEX and Credomatic that the Debtors sold in 2017. Rather, the 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 card processing agreements that the Debtors may seek to enter with new

credit card processors. The only link between the profits generated by operating flights and selling airline tickets and the payment rights purportedly acquired by USAV is the fact that the Debtors have not yet terminated their prepetition credit card agreements with AMEX and Credomatic. (Committee Reply ¶ 22.) Accordingly, the Court rejects the USAV parties' argument that rejection of the RSPA and Undertaking Agreement is a rescission of those agreements in violation of the Supreme Court's holding in *Tempnology*.

E. Rejection Damages

The Debtors' rejection of the RSPA and Undertaking Agreement gives the USAV Parties a claim for damages. *See* 11 U.S.C. § 365(g)(1); *see also Tempnology*, 139 S. Ct. at 1661. The USAV Parties argue that any rejection damages claim in the amount of the Liquidated Damages under the RSPA would be wholly secured pursuant to the terms of the RSPA and its attendant security agreements. The Debtors and Committee submit that USAV's claim for rejection damages would be an unsecured prepetition claim in the amount of the Liquidated Damages under the RSPA. The issue of rejection damages must be resolved through the claims resolution process and is not relevant to the question before the Court of whether the Debtors should be permitted to reject the USAV Agreements. Without resolving the rejection damages issues, the Court will summarize the Parties' competing positions in the footnote below.¹¹ The parties

¹¹ The Lenders argue that providing USAV with an impaired claim under a plan of reorganization would not provide "payment in full" of the Liquidated Damages amount. (Lender Sur-Reply ¶¶ 6, 20.) The Lenders submit that all obligations of the Debtors under the RSPA and the Undertaking Agreement, including the obligation to "transfer Collection to [USAV] should they be received by [the Debtors] after the date of execution of the RSPA," are "Secured Obligations" under (i) a Pledge over Contract Rights and Future Revenues (the "Colombian Purchaser Security Agreement") between Aerovias, as grantor, and USAV as secured party; and (ii) a Costa Rican Back-Up Security Agreement (the "Costa Rican Purchaser Security Agreement") between Aerovias, as grantor, and USAV as secured party. (Supplemental Lender Response ¶ 10 (citing RSPA §§ 6.02 and 6.03).) Thus, the Lenders argue that USAV would be entitled to priority rights against the Contract Rights and Proceeds under the Colombian and Costa Rican Purchaser Security Agreements. (*Id.* ¶ 12.)

The Lender Group further argues that USAV granted security interests in all of its assets to the Lender Group to secure the obligations under the Loan Agreement, including the Contract Rights, and all of USAV's bank accounts into which the Proceeds are deposited, pursuant to (i) a New York Security Agreement governed by New York law; (ii) an Account Control Agreement governed by New York law; (iii) a Security Agreement governed by

should endeavor to resolve these disputes through plan negotiations and, if necessary, through mediation.

F. Rejecting the RSPA and Undertaking Agreement is a Sound Exercise of the Debtors' Business Judgement

In most cases, a court “will not second-guess a debtor’s business judgment concerning whether the assumption or rejection of an executory contract or unexpired lease would benefit the debtor’s estate.” *MF Glob. Holdings*, 466 B.R. at 242; *see also In re Balco Equities Ltd., Inc.*, 323 B.R. at 98 (“A court ‘should defer to a debtor’s decision that rejection of a contract would be advantageous.’”) (quoting *In re Sundial Asphalt Co.*, 147 B.R. at 84). “The ‘business judgment’ test merely requires a showing that either assumption or rejection of the executory contract or unexpired lease will benefit the Debtor’s estate.” *MF Glob. Holdings*, 466 B.R. at 242.

Here, the Debtors state that rejection of the RSPA and Undertaking Agreement is crucial for their estates because when the Debtors begin flying again, the cash flow generated by the

English law; and (iv) a Security Trust Deed governed by English law. (*Id.* ¶ 13.) Thus, the Lender Group concludes that, in the event that the Court grants the rejection Motion, the Lender Group would have a first-priority lien on the Contract Rights and Proceeds “back-to-back” to the valid and enforceable security interests held by USAV under the Colombian and Costa Rican Purchaser Security Agreements. (*Id.*)

The Debtors contend that the result of breach as a result of rejection will be USAV’s claim for rejection damages against the Debtors—specifically, an unsecured pre-petition claim in the amount of the Liquidated Damages provision contained within the RSPA. (Reply ¶ 42.) This Liquidated Damages amount is equal to the unpaid principal remaining on USAV’s loan, plus surcharged interest on that principal until paid in full, and other miscellaneous costs related to the unwinding of the transaction. (*Id.*) That breach of the RSPA, the Debtors submit, would lead to this result is apparent from the RSPA itself—for under Colombian law, as under U.S. law, the remedy for breach of contract is determined in the first instance by reference to the contract itself. (*See Arrubla Decl.* ¶ 18.) The Debtors submit that, at most, they granted a contingent security interest in the Contract Rights and Receivables to USAV in the Colombian and Costa Rican Purchaser Security Agreements. (Debtors’ Supplemental Response ¶ 15.) The Debtors argue, however, that the contingent security interests granted in both of these security agreements were not in effect as of the Petition Date, and to date have not yet sprung into effect. (*Id.*) Although the RSPA permitted USAV to file, and USAV did file, a UCC-1 filing statement, the UCC-1 statement did not perfect a security interest in the Contract Rights but rather perfected the sale thereof. (*Id.* ¶ 18.) The Debtors submit that, even if the Court were to determine that USAV would have a secured rejection damages claim, section 552 of the Bankruptcy Code would cut off any such security interest with respect to post-petition receivables. (*Id.* ¶ 19.) According to the Debtors, because post-petition receivables are generated by the Debtors’ post-petition operations and labor, those receivables would no longer be subject to any security interest that the USAV Parties claim to hold. (*Id.*)

credit card receivables collected under the Card Processing Agreements and the proceeds thereof will be a vital component of the Debtors' liquidity. (Reply ¶ 8.) And Debtors believe that rejection is in their best interests whether the rejection damages claim is secured or unsecured. Absent that cash flow, the Debtors will not be able to bear the cost related to producing the services that give rise to such receivables. (*Id.*) The Court finds that being relieved of unperformed obligations under the RSPA and Undertaking Agreement will benefit the Debtors' estates by restoring critical cash flow to the Debtors. Accordingly, the Court concludes that the decision to reject the RSPA and Undertaking Agreement is a sound exercise of the Debtors' business judgment.

G. Rejection of the RSPA and Undertaking Agreement Is Effective *Nunc Pro Tunc* to June 23, 2020

The Debtors argue that rejection should be effective as of June 23, 2020, the date that the rejection motion was filed. The USAV Parties appear to dispute that argument. The Court agrees that rejection should be *nunc pro tunc* to the date the Motion was filed. *See BP Energy Co. v. Bethlehem Steel Corp.*, No. 02 CIV. 6419 (NRB), 2002 WL 31548723, at *3–4 (S.D.N.Y. Nov. 15, 2002) (stating that, in a case involving gas purchase contracts, “nothing in the language of § 365(a) indicates that a bankruptcy court should be prohibited from assigning a retroactive rejection date” and holding “that a bankruptcy court is not precluded as a matter of law from authorizing a rejection date which precedes the filing of objection when the equities demand such remediation”); *see also In re Jamesway Corp.*, 179 B.R. 33, 38 (S.D.N.Y.1995) (“[A] court can, where appropriate, approve rejection retroactively.”); *In re CCI Wireless LLC*, 279 B.R. 590, 595 (Bankr. D. Colo. 2002) (“[T]his Court may—and in this instance should—approve the

rejection of a non-residential lease retroactive to the filing date of the motion to reject the lease.”)¹²

V. CONCLUSION

For the reasons discussed above, the Debtors’ Motion is **GRANTED IN PART** and **DENIED IN PART**: The Court concludes that the RSPA and Undertaking Agreement are executory contracts that the Debtors may reject pursuant to section 365 of the Bankruptcy Code. The remaining USAV Agreements are not executory contracts that can be rejected by the Debtors.

IT IS SO ORDERED.

Dated: September 4, 2020
New York, New York

Martin Glenn

MARTIN GLENN
United States Bankruptcy Judge

¹² While the Court acknowledges that courts in this Circuit have approved retroactive rejection dates most commonly in the context of unexpired leases of nonresidential real property under section 365(d)(3), the Court rejects the Lenders’ argument that such precedent is inapposite to the present Motion. *See BP Energy Co. v. Bethlehem Steel Corp.*, 2002 WL 31548723, at *3 n.7 (stating that while the majority of cases “deal with the rejection of an unexpired lease rather than the rejection of an executory utility contract, we find these cases analogous for the purposes of determining whether a bankruptcy court is authorized to assign a retroactive rejection date”)

EXHIBIT B

OPTION AGREEMENT
IN RESPECT OF THE ISSUED
SHARES IN
USAVflow LIMITED

December 12, 2017

**OPTION AGREEMENT IN RESPECT OF THE ISSUED
SHARES IN USAVFLOW LIMITED**

THIS OPTION AGREEMENT IN RESPECT OF THE ISSUED SHARES IN USAVFLOW LIMITED (this “**Agreement**”) is made on December 12, 2017, between **MAPLESFS LIMITED**, a company incorporated in the Cayman Islands the registered office of which is at PO Box 1093, Queensgate House, South Church Street, George Town, Grand Cayman, KY1-1102, Cayman Islands, solely in its capacity as trustee of the Trust (as defined below) (the “**Share Trustee**”), and **AVIANCA HOLDINGS S.A.**, a Panamanian company (“**Holdings**”), **TACA INTERNATIONAL AIRLINES S.A.**, a Salvadorian company (“**TACA**”), **AVIANCA COSTA RICA S.A.** (formerly known as Lineas Aéreas Costarricenses S.A.), a Coast Rican company (“**ACR**”), and **TRANS AMERICAN AIRLINES, S.A.**, a Peruvian company (“**TAA**” and, together with Holdings, TACA, and LAC, the “**Option Holders**”).

RECITALS:

The Share Trustee is duly licensed to carry on business as a trust company under the laws of the Cayman Islands and is the registered holder of 250 shares (the “**Shares**”) of US\$1.00 par value in USAVflow Limited (the “**Company**”). The Share Trustee holds the Shares subject to the terms of a trust (the “**Trust**”) formed pursuant to a declaration of trust dated December 12, 2017 (the “**Declaration of Trust**”).

The Company, as borrower, and the Option Holders, as guarantors, have entered into that certain Loan Agreement (the “**Loan Agreement**”), dated the date hereof, with the Lenders, Citibank, N.A., as the administrative agent for the Lenders (in such capacity, together with its successors in such capacity, the “**Administrative Agent**”), and Citibank, N.A., as the Collateral Agent for the Lenders (in such capacity, together with its successors in such capacity, the “**Collateral Agent**”).

Pursuant to the Loan Agreement, the Lenders have required that, as a condition to their making a US\$150,000,000 loan to the Company, the Option Holders shall have executed and delivered the Loan Agreement, including the unconditional guaranty of payment and performance contained as Section 8.19 thereof, to and in favor of the Secured Parties (the “**Guaranty**”), providing for the Option Holders to guaranty the Company’s full and prompt payment at maturity (whether by acceleration or otherwise) of all obligations of the Company arising under the Loan Agreement and the other Credit Documents.

To induce the Option Holders to execute and deliver the Guaranty, and as required under the Declaration of Trust, the Share Trustee is granting the Option contained herein to each of the Option Holders, jointly and severally.

NOW, THEREFORE, in consideration of the foregoing Recitals, **IT IS HEREBY AGREED** as follows:

I. DEFINITIONS

Terms defined in the Loan Agreement shall have the same meanings when used herein (including in the foregoing Recitals), unless a contrary intention shall be stated herein.

As used herein, the term “**Prepayment Amount**” shall mean the prepayment price at which the Borrower is entitled, as provided in Section 2.6 of the Loan Agreement, to prepay all, but not part, of the outstanding Loan on any Payment Date occurring at least 18 months after the Closing Date.

2. OPTION

- 2.1 The Share Trustee grants to each of the Option Holders, jointly and severally, an irrevocable option to purchase the Shares (the “**Option**”), subject to the terms and conditions hereof, for a price of: (i) in the case of the Loan Termination Option Exercise (as defined below) US\$750, payable to the Share Trustee, and (ii) in the case of the Prepayment Option Exercise (as defined below) US\$750, payable to the Share Trustee, plus the amount of the Prepayment Amount, calculated as if the Prepayment Date were the Exercise Date (as defined below) and payable, on behalf of the Share Trustee, for the account of the Company, directly to the Collateral Agent, for the benefit of the Secured Parties.
- 2.2 The Option shall be exercisable by any one or more of the Option Holders (i) at any time after payment in full of all amounts owing under the Credit Documents to the Secured Parties (the date of such payment being referred to herein as the “**Loan Termination Date**” and the exercise of the Option on or after the Loan Termination Date being referred to herein as the “**Loan Termination Option Exercise**” as applicable) or (ii) on any Payment Date occurring at least 18 months after the Closing Date and prior to the Loan Termination Date, but after payment in full of the Prepayment Amount directly by the Option Holders, on behalf of the Share Trustee, for the account of the Company, to the Collateral Agent, for the benefit of the Secured Parties (the exercise of the Option before the Loan Termination Date being referred to herein as the “**Prepayment Option Exercise**”).
- 2.3 The Option Holders (or any of them) shall exercise the Option by giving to the Share Trustee (and, in the case of a Prepayment Option Exercise, to the Administrative Agent) at least 30 days’ prior written notice. The written notice shall specify (i) the date on which the Option shall be exercised (the “**Exercise Date**”), (ii) the persons to whom the Shares are to be transferred (the “**Transferees**”), and (iii) if the Shares are to be transferred to different persons, the number of shares (not exceeding 250 in the aggregate) which each Transferee is to receive.
- 2.4 In the case of a Loan Termination Option Exercise, subject to receipt by the Share Trustee of US\$750 on or before the Exercise Date, the Share Trustee on the Exercise Date shall deliver the certificate(s) in respect of the Shares to the Option Holder exercising the Option (or, if more than one Option Holder, then as they jointly direct the Share Trustee in writing), together with duly completed and executed share transfer(s) in favour of the Transferees in the form attached as a schedule to this Agreement. All costs and expenses in connection with such transfer shall be borne by the exercising Option Holder(s).
- 2.5 In the case of the Prepayment Option Exercise, subject to receipt by the Share Trustee of (i) US\$750 on or before the Exercise Date and (ii) confirmation from the Collateral Agent that the Prepayment Amount has been received by the Collateral Agent, for the benefit of the Secured Parties, the Share Trustee on the Exercise Date shall deliver the

certificate(s) in respect of the Shares to the Option Holder exercising the Option (or, if more than one Option Holder, then as they jointly direct the Share Trustee in writing), together with duly completed and executed share transfer(s) in favour of the Transferees in the form attached as a schedule to this Agreement. All costs and expenses in connection with such transfer shall be borne by the exercising Option Holder(s).

3. UNDERTAKINGS

The Share Trustee undertakes and confirms that:

- 3.1 it will not sell, charge, mortgage, pledge, or in any other fashion dispose of or encumber its interest in the Shares, other than in accordance with the terms of the Declaration of Trust and this Agreement; and
- 3.2 it will require, as a condition to the appointment of any replacement trustee pursuant to Clause 16.1 of the Declaration of Trust that the replacement trustee enter into an option agreement on identical terms to this Agreement.

4. NOTICES

All notices under this Agreement shall be given in writing:

In the case of the **Share Trustee** to:

Address: PO Box 1093, Boundary Hall, Cricket Square,
Grand Cayman, KY1-1102, Cayman Islands

Fax Number: (345) 945 7100

Attention: Peter Lundin

In the case of the Option Holders to:

Avianca Holdings S.A.

Address: Avenida Calle 26 # 59 – 15 P5, Bogota, Colombia

Fax Number:

Attention: The Directors

TACA International Airlines S.A.

Address: Avenida Calle 26 # 59 – 15 P5, Bogota, Colombia

Fax Number:

Attention: The Directors

Avianca Costa Rica S.A.
(formerly known as Lineas Aéreas
Costarricenses S.A.)

Address: Avenida Calle 26 # 59 – 15 P5, Bogota, Colombia

Fax Number:

Attention: The Directors

Trans American Airlines, S.A.

Address: Avenida Calle 26 # 59 – 15 P5, Bogota, Colombia

Fax Number:

Attention: The Directors

5. TRUSTEE LIMITED RECOURSE

For the avoidance of doubt the Share Trustee has executed this Agreement solely in its capacity as trustee and with the intention of binding the Trust, and not in its personal capacity. Notwithstanding any other provisions of this Agreement: (i) the aggregate of all liabilities of the Share Trustee under this Agreement shall at all times and for all purposes be limited to the assets of the Trust; (ii) in no circumstances shall any liability attach to or be enforced or enforceable against any assets of the Share Trustee other than the assets which comprise the Trust (including without limitation any assets held in its personal capacity, in its capacity as trustee of any other trust, or in any other capacity whatsoever); (iii) all representations, warranties, undertakings, obligations and covenants in this Agreement are made, given, owed, or agreed by or in relation to the Trust and in the Share Trustee's capacity as trustee of the Trust, and for the avoidance of doubt shall not be construed to be made, given, owed, or agreed by or in relation to the Share Trustee in its capacity as trustee of any other trust or in its personal capacity or in any other capacity whatsoever; and (iv) the Share Trustee's obligations under this Agreement will be solely the corporate obligations of the Share Trustee, and there shall be no recourse against the shareholders, directors, officers, or employees of the Share Trustee for any claims, losses, damages, liabilities or other obligations whatsoever in connection with any of the transactions contemplated by the provisions of this Agreement.

6. COUNTERPARTS

This Agreement may be executed in several counterparts, each of which shall be deemed an original and all such counterparts shall together constitute one and the same agreement.

7. GOVERNING LAW

This Agreement is governed by and shall be construed in accordance with Cayman Islands law.

IN WITNESS WHEREOF the parties hereto have executed this Agreement as a deed the day and year first above written.

EXECUTED AS A DEED

for and on behalf of

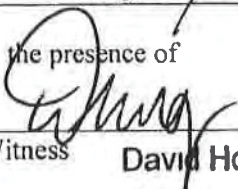
MAPLESFS LIMITED, solely in its capacity as trustee of the Trust

by:



Phillip Hinds
Authorised Signatory

In the presence of



Witness **David Hogan**

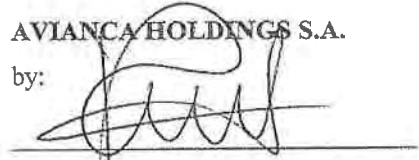
(Signature Page to Option Agreement in Respect of the Issued Shares in USAVflow Limited)

EXECUTED AS A DEED

for and on behalf of

AVIANCA HOLDINGS S.A.

by:



In the presence of


Witness

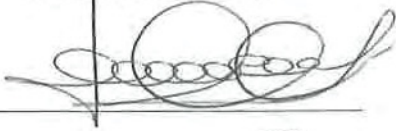
(Signature Page to Option Agreement in Respect of the Issued Shares in USAVflow Limited)

EXECUTED AS A DEED

for and on behalf of

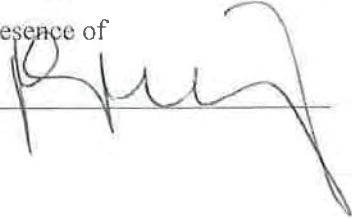
TACA INTERNATIONAL AIRLINES S.A.

by:

A handwritten signature in dark ink, consisting of several loops and a long horizontal stroke, positioned above a horizontal line.

In the presence of

Witness

A handwritten signature in dark ink, appearing as a series of connected loops and a long vertical stroke, positioned above a horizontal line.

EXECUTED AS A DEED

for and on behalf of

AVIANCA COSTA RICA S.A.

(formerly known as Lineas Aéreas Costarricenses S.A.)

by:

Viviana Morúa

In the presence of

Carlos Serrano

Witness

[Signature]

(Signature Page to Option Agreement in Respect of the Issued Shares in USAVflow Limited)

EXECUTED AS A DEED

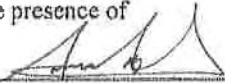
for and on behalf of

TRANS AMERICAN AIRLINES S.A.

by:



In the presence of



Witness

(Signature Page to Option Agreement in Respect of the Issued Shares in USAVflow Limited)

SCHEDULE

SHARE TRANSFER

We, [] (the “Transferor”), in consideration of the payment of [US\$] do hereby transfer to [] (the “Transferee”), the 250 Shares standing in our name in the undertaking called:

USAVflow Limited

to hold the same unto the Transferee.

Signed by the Transferor:

[Transferor]

In the presence of:

Witness

DATED this _____, 20____.

EXHIBIT C

EXECUTION VERSION

PLEDGE OVER CONTRACT RIGHTS AND FUTURE REVENUES

by and between

AEROVÍAS DEL CONTINENTE AMERICANO S.A. AVIANCA,

as the Grantor

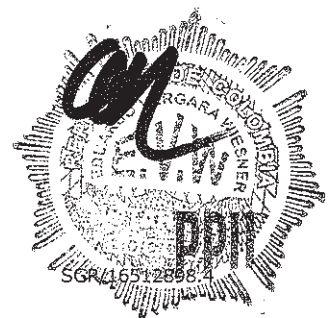
and

USAVFLOW LIMITED,

as the Secured Party

December 12, 2017

GPZ-286869-v1A



SGR/16512886-1

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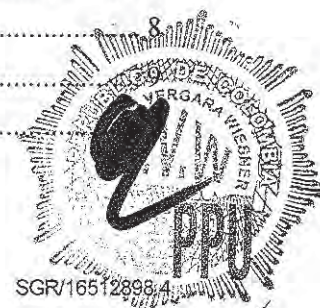


ESCUELA EL MANCO
BOGOTÁ 19
DEL CÍRCULO DE BOGOTÁ, D.C.

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CLUB DEL CIRCOLO
DE BOGOTÁ, D.C.
DEL CIRCOLO DE BOGOTÁ, D.C.



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Equipo de Trabajo
16
CIRCULO DE BOGOTÁ, D.C.



PLEDGE OVER CONTRACT RIGHTS AND FUTURE REVENUES

This **PLEDGE OVER CONTRACT RIGHTS AND FUTURE REVENUES** dated as of December 12, 2017 (this "**Pledge Agreement**"), is entered among **AEROVÍAS DEL CONTINENTE AMERICANO S.A. AVIANCA**, a Colombian *sociedad anónima*, as the grantor (the "**Grantor**"), and **USAVFLOW LIMITED**, an exempted company incorporated in the Cayman Islands with limited liability, as the secured party (the "**Secured Party**" and, together with the Grantor, the "**Parties**" and each, individually, the "**Party**").

RECITALS:

The Grantor and the Secured Party are a party to that certain Contract Rights and Receivables Sale, Purchase and Servicing Agreement, dated as of December 12, 2017 (the "**RSPA**"), pursuant to which the Grantor sold and assigned to the Secured Party, as absolute owner, all of the Grantor's rights under the Contract Rights and the Receivables, subject to the terms and conditions of the RSPA.

The Grantor and the Secured Party are a party to that certain Receivables Maintenance Agreement, dated as of December 12, 2017 (the "**Undertakings Agreement**" and, together with the RSPA, the "**Secured Contracts**"), pursuant to which the Grantor agreed to make the warranties, covenants, and other agreements set forth therein with regard to the maintenance, preservation, and performance of the Grantor's obligations under the RSPA in respect of the Contract Rights and the Receivables transferred and sold to the Secured Party.

Pursuant to the terms of the Secured Contracts, the Grantor agreed, among others, to (i) to replace the Credomatic Contract and the AMEX Contract with Additional Card Processing Agreements, under certain circumstances; (ii) comply with Section 2.03(b) of the RSPA; (iii) transfer the Collections to the Secured Party should they be received by the Grantor after the date of execution of the RSPA and (iv) all other obligations set forth in the Secured Contracts (the "**Secured Obligations**").

In order to induce the Secured Party to enter into the RSPA and the Undertakings Agreement, the Grantor has entered into this Pledge Agreement, pursuant to which the Grantor grants the Secured Party a pledge over the Contract Rights and the Receivables to secure the Secured Obligations.

NOW, THEREFORE, in consideration of the Recitals, the Grantor hereby agrees with the Secured Party, as follows:

ARTICLE I **DEFINED TERMS**

SECTION 1.01. Definitions and Interpretation. Capitalized terms used herein but not otherwise defined herein have the meanings ascribed to such terms in the Secured Contracts.

SECTION 1.02. Other Defined Terms. The following terms have the following meanings:

"**Appraiser**" means the expert appraiser from the list created by the Superintendence of Corporations (*Superintendencia de Sociedades*) in charge of the Pledged Rights and Assets valuation during the Direct Payment Procedure.



Febrero 1960
LA CIUDAD DE BOGOTÁ, D.C.



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“**Authorized Person**” means a person that has been authorized to execute, sign or undertake general proceedings in relation to this Pledge Agreement or any document, certificate, or notice to be executed or signed under or in connection with any Secured Contract.

“**Cancellation Notice**” has the meaning set forth in **Section 6.02**.

“**Direct Payment Procedure**” means the procedure related to the enforcement of said Pledge, and defined in article 2.2.2.4.2.3 of Decree 1074 of 2015.

“**Disagreement Communication**” has the meaning set forth in **Section 5.01(g)**.

“**Enforcement Form**” means the form to be filled in and registered upon the Registration System before commencing the enforcement procedure as it is defined in article 2.2.2.4.2.3 of Decree 1074 of 2015.

“**Form of Notice of Enforcement**” has the meaning set forth in **Section 5.01**.

“**Future Revenues**” means the Collections accrued under the Card Processing Agreements on account of Specified Sales from (i) the early termination date of the RSPA, if any, (ii) the date of execution of the RSPA, if the RSPA is rescinded, nullified, abrogated or declared void (*rescisión, inexistencia, nulidad, resolución* and *ineficacia*, as such terms are understood under Colombian law), until the date on which the Secured Party files the Form of Notice of Enforcement in the Registration System, as set forth in Section 5.01 of this Pledge Agreement or (iii) under the Additional Card Processing Agreements, should any such Collections not be transferred to the Secured Party pursuant to the provisions of the RSPA.

“**Indemnified Amount**” has the meaning set forth in **Section 7.4(a)**.

“**Indemnified Party**” has the meaning set forth in **Section 7.4(a)**.

“**Interested Party**” has the meaning set forth in **Section 5.01(g)**.

“**Law 1676**” means Law 1676 of 2013 that regulates the legal figure of the guarantee over movable assets in Colombia, jointly with the administrative decrees that regulate the matter.

“**List**” has the meaning set forth in **Section 5.01(g)**.

“**Other Party**” has the meaning set forth in **Section 5.01(g)**.

“**Pledge**” has the meaning set forth in **Section 2.01**.

“**Pledge Agreement**” means this Pledge Agreement, as the same may be amended, supplemented, or otherwise modified from time to time.

“**Pledged Rights and Assets**” has the meaning set forth in **Section 2.01**.

“**Registration**” has the meaning set forth in **Section 2.02**.

“**Registration System**” means the *Registro de Garantías Mobiliarias*, as defined in article 2.2.2.4.1.1 of Decree 1074 of 2015.



“Replacement and Additional Contract Rights” means the Grantor’s contract rights originated from the replacement of AMEX or Credomatic from the original Card Processing Contracts, if applicable.

“RSPA” has the meaning set forth in the recitals hereto.

“Secured Obligations” has the meaning set forth in the recitals hereto.

“Transfer Request” has the meaning set forth in **Section 5.01 (b)**.

“Undertakings Agreement” has the meaning set forth in the recitals hereto.

“Valuation Standards” has the meaning set forth in **Section 5.01 (d)**.

SECTION 1.03. Other Interpretive Provisions.

(a) The meanings of defined terms are equally applicable to the singular and plural forms of the defined terms.

(b) The words “hereof,” “herein,” “hereunder” and similar words refer to this Pledge Agreement as a whole and not to any particular provision of this Pledge Agreement, and any subsection, Section, Article, Schedule, and Exhibit references are to this Pledge Agreement unless otherwise specified.

(c) The term “documents” includes any and all documents, instruments, written agreements, certificates, indentures, notices, and other writings, however evidenced (including electronically).

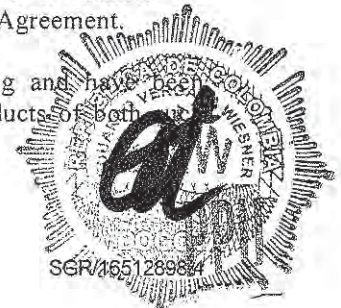
(d) The term “including” is not limiting and (except to the extent specifically provided otherwise) shall mean “including without limitation.”

(e) Unless otherwise specified, in the computation of periods of time from a specified date to a later specified date, the word “from” shall mean “from and including,” the words “to” and “until” each shall mean “to but excluding,” and the word “through” shall mean “to and including.”

(f) The terms “may” and “might” and similar terms used with respect to the taking of an action by any Person shall reflect that such action is optional and not required to be taken by such Person.

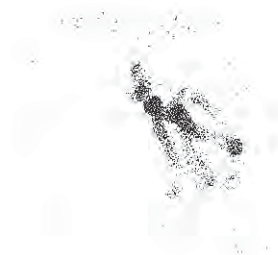
(g) Unless otherwise expressly provided herein: (i) references to agreements (including this Pledge Agreement) and other documents shall be deemed to include all subsequent amendments and other modifications thereto, but only to the extent that such amendments and other modifications are not prohibited by any Secured Contract, (ii) references to any Applicable Law are to be construed as including all statutory and regulatory provisions or rules consolidating, amending, replacing, supplementing, interpreting, or implementing such Applicable Law, and (iii) references to Articles, Sections, or other subdivisions or Exhibits are references to Articles, Sections or other subdivisions or Exhibits to this Pledge Agreement.

(h) This Pledge Agreement is the result of negotiations among and have been reviewed by counsel to the Grantor and the Secured Party and are the products of both






DEL CIRCULO DE BOGOTA, D.C.



Parties. Accordingly, they shall not be construed against either Party merely because of any such Party's involvement in their preparation.

(i) The reference to any act undertaken by the Secured Party in relation to the Registration proceedings, shall be understood as an act developed directly by it or by any Authorized Person.

ARTICLE II GRANT OF PLEDGE



SECTION 2.01. Grant of Pledge. To secure the full, complete and indefeasible performance of the Secured Obligations and pursuant to the terms of articles 1207 of the Colombian Code of Commerce and Law 1676, the Grantor hereby grants to the Secured Party a movable guarantee (*garantía mobiliaria*) in the form of a first priority pledge (the "**Pledge**") on the following future assets and rights, should they belong to the Grantor in the following circumstances (the "**Pledged Rights and Assets**"):

(a) The Collections should they be wired to, or received by, the Grantor;

(b) The Contract Rights under any Additional Card Processing Agreement, and the Future Revenues and Collections derived therefrom, should any such Contract Rights, Future Revenues and Collections not be transferred to the Secured Party pursuant to the provisions of the RSPA (the "**Replacement and Additional Contract Rights**");

(c) The Contract Rights under any Card Processing Agreements, and the Future Revenues and Collections derived therefrom, should the RSPA be declared illegal or invalid or, for any reason whatsoever, if the RSPA ceases to exist or the sale and purchase under the RSPA is held to be or becomes ineffective or for any other reason the Secured Party fails to have title to the Contract Rights under any Card Processing Agreements, or the Future Revenues or the Collections derived therefrom; and

(d) To the extent not otherwise included, all substitutions, replacements, accessions, products, and Proceeds of any or all of the foregoing (*bienes derivados y atribuibles*).

SECTION 2.02. Obligations and Registration. The Secured Party will file this Pledge Agreement for registry with the Registration System. The Secured Party will also file for registry any modifications, amendments or early termination of this Pledge Agreement.

The Secured Party will have the right to request the Grantor to deliver or execute, upon such request, the documents and information related to the Registration of the Pledge, as may be necessary or desirable in the reasonable judgement of the Secured Party.

For the exclusive purposes of article 14 of Law 1676 the following information is provided:





DEL CÍRCULO DE BOGOTÁ, D.C.
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DEL CÍRCULO DE BOGOTÁ, D.C.



Secured maximum amount:	USD\$170,000,000.
Pledged assets:	The Pledged Rights and Assets.
Term:	7 years renewable in accordance with Law 1676 as set forth in Section 6.02.
Secured Obligations:	The Secured Obligations.
Grantor:	AEROVIAS DEL CONTINENTE AMERICANO S.A. AVIANCA
Beneficiary:	USAVFLOW LIMITED

SECTION 2.03. Grantor to Remain Liable. The Pledge is granted as security only and shall not subject the Secured Party to, or in any way alter or modify, any obligation or liability of the Grantor with respect to or arising out of the Secured Contracts. It is expressly agreed the Grantor shall remain liable under the Secured Contracts to perform all the obligations assumed by it thereunder, all in accordance with and pursuant to the terms and provisions thereof, nor shall the Secured Party be required or obligated in any manner to perform or fulfill any obligation of the Grantor under or pursuant to the Secured Contracts or to make any payment, to make any inquiry as to the nature or sufficiency of any payment received by it, to present or file any claim or to take any action to collect or enforce the payment of any amounts which may have been assigned to it or to which it may be entitled at any time or times.

ARTICLE III REPRESENTATIONS AND WARRANTIES

As of the date hereof, the Grantor represents and warrants to the Secured Party, and with respect to Section 3.06, on each other date on which any Pledged Rights and Assets is acquired by the Grantor, the Grantor shall be deemed to have represented and warranted to the Secured Party with respect to any Pledged Rights and Assets as of such date (after giving effect to all acquisitions of Pledged Rights and Assets to be made on such date), as follows (and each such actual or deemed representation and warranty shall survive the execution and delivery of this Pledge Agreement).

SECTION 3.01. Existence; Qualification to Do Business. The Grantor is duly organized and validly exists as a *sociedad anónima* in good standing under the laws of Colombia, has the corporate power and authority to conduct the business in which it is currently engaged and has its principal office at Avenida Calle 26, No. 59-15 Piso 10, Bogotá, D.C., Colombia.

SECTION 3.02. Licenses and Approvals. The Grantor is duly qualified to transact business and has obtained all necessary licenses and approvals in each jurisdiction in which the conduct of its business requires such qualification, licenses, and approvals.

SECTION 3.03. Power and Authority. The Grantor has the power and authority and legal right to execute and deliver the Pledge Agreement and to perform and observe the terms thereof. The execution, delivery, and performance of the Pledge Agreement by the Grantor have been duly authorized by the Grantor by all necessary action, and the Grantor has duly executed and delivered the Pledge Agreement.



ESTUDIO EL BLANCO
CALLE 16
CALLE 16 DE BOGOTÁ, D.C.



SECTION 3.04. Binding Obligation. The Pledge Agreement constitutes a legal, valid, and binding obligation of the Grantor, enforceable in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium, or other similar laws now or hereafter in effect relating to creditors' rights. Subject to the preceding sentence and except for the registration of the Pledge Agreement in the Registration System to be made by the Secured Party, all formalities required in Colombia for the validity and enforceability (including any necessary registration, recording or filing with any court or other Governmental Authority) of this Pledge have been accomplished, and no Taxes are required to be paid for the validity and enforceability thereof.

SECTION 3.05. No Violation. The execution, delivery, and performance of the Pledge Agreement and the fulfillment of the terms hereof by the Grantor do not conflict with, result in any breach of any of the terms and provisions of, or constitute (with or without notice or lapse of time), a default under, or require the consent of any third party that has not been obtained under (i) the Grantor's constitutive documents or (ii) any indenture, credit agreement or other agreement or instrument to which the Grantor is a party or by which it or any of its property is bound.

SECTION 3.06. No Consents. Except as otherwise set forth herein, no authorization, consent, license, order, or approval of, or registration or declaration with, any Governmental Authority or other Person is required to be obtained, effected or made by the Grantor in connection with the execution and delivery by the Grantor of the Pledge Agreement or the performance of its obligations hereof or the transaction contemplated hereby, or for the exercise by the Secured Party of its rights hereunder or thereunder, except for filings required hereunder and those that have been obtained, effected, or made.

SECTION 3.07. Title; No Other Liens. By virtue of the Notices and Consents, the Grantor has received all consents and approvals required to grant the Pledge. Other than Pledge created pursuant to this Pledge Agreement and, the Grantor has not created any other Lien over the Pledged Rights and Assets, except in favor of Secured Party.

SECTION 3.08. Material Adverse Effect. As of the date of this Pledge Agreement, there have been no events, circumstances, developments or other changes in facts that, individually or in the aggregate, would have or could reasonably be expected to result in a Material Adverse Effect.

SECTION 3.09. Solvent. Both before and after giving effect to this Pledge Agreement and the other Secured Documents and the entering into of the transactions contemplated hereby and thereby, the Grantor was and is Solvent.

ARTICLE IV COVENANTS

The Grantor hereby covenants and agrees with the Secured Party that, from and after the date of this Pledge Agreement and until the Secured Obligations (other than obligations arising under **Section 7.04** that have not yet been asserted) are fully, completely, and indefeasibly paid and performed:

SECTION 4.01. Funds Remittance. If any funds are received by the Grantor from time to time in respect of Collections, the Grantor shall: (a) promptly (and, in any event, within two Business Days) after its receipt thereof, remit such funds to the Collections Account (and until so remitted, hold such funds in trust for the benefit of the Collateral Agent) and (b) promptly (and, in any event, by no later than the Business Day after any such remittance): (i) notify the Secured Party (and authorize the Secured party to notify the Collateral Agent) of its receipt of any such funds and of each such remittance by it (or on its behalf) into the Collections Account (specifying the amount and date of the remittance) and the Card Processing Agreement, if any, with respect to which it received such funds) and (ii) deliver



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to the Secured Party (and authorize the Secured Party to deliver to the Collateral Agent) evidence that it has sent a notice to the applicable Card Processor that all future payments on Collections are to be deposited into the Collections Account.

SECTION 4.02. Performance of Obligations. The Grantor shall, in all material respects, timely and fully (a) perform and comply with all provisions, covenants, and other promises required to be observed by it under the Secured Contracts to which it is a party, (b) take, or request each party to a Secured Contract other than the Secured Party to take, all such action to enforce its rights and remedies under each Secured Contract as may be from time to time reasonably requested by the Secured Party, and (c) make or request each party to a Secured Contract other than the Secured Party to make to each other party to each such Secured Contract such demands and requests for action as the Grantor is entitled to make thereunder which may be from time to time reasonably requested by the Secured Party.

SECTION 4.03. Negative Covenants. The Grantor shall not, without the prior written consent of the Secured Party:

(a) sell, transfer, exchange or otherwise dispose of, or create, incur, assume or suffer to exist any Lien on any part of the Pledged Rights and Assets, except as expressly permitted by the Secured Contracts or this Pledge Agreement;

(b) terminate, or take or permit any action that would reasonably be likely to cause the termination of, any Secured Contract other than in accordance with the terms thereof or as permitted by the terms of the Secured Contracts; or

(c) permit that this Pledge Agreement be impaired, or permit the Pledge created by this Pledge Agreement to be amended, terminated, or discharged; (ii) permit any Lien to be created on or extend to or otherwise arise upon or burden the Pledged Rights and Assets or any part thereof, any interest therein, or the proceeds thereof, except as may be expressly permitted by the Secured Contracts or this Pledge Agreement, or (iii) take any action that would permit the Pledge created by this Pledge Agreement not to constitute a first priority Pledge in the Pledged Rights and Assets.

SECTION 4.04. Notices. The Grantor shall give written notice to the Secured Party promptly, but in any event within ten (10) Business Days, upon the Grantor's acquiring actual knowledge of:

(a) the occurrence of any Trigger Event or Retention Event;

(b) the submission of any claim or the initiation or threat of any legal process or proceeding, or rule making or disciplinary proceeding by or against the Grantor, or the promulgation of any proceeding or any proposed or final rule which would reasonably be expected to have, a Material Adverse Effect; and/or

(c) any Lien (other than the Pledge) on any of the Pledged Rights and Assets.

SECTION 4.05. Maintenance of Perfected Pledge; Further Documentation. The Grantor shall maintain the Pledge created by this Pledge Agreement as a perfected Pledge and shall defend such Pledge against the claims and demands of all Persons whomsoever.

SECTION 4.06. [RESERVED].



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SECTION 4.07. Further Assurances. Upon the reasonable request of the Secured Party, the Grantor shall duly execute and deliver, or cause to be duly executed and delivered, at the cost and expense of the Grantor, such further instruments as may be necessary or desirable in the reasonable judgment of the Secured Party to carry out the provisions and purposes of this Pledge Agreement and the other Secured Contracts. In addition, the Grantor shall pay upon request of the Secured Party and directly to it, all the expenses associated with the Direct Payment Procedure.

ARTICLE V TRIGGER EVENTS; ENFORCEMENT

SECTION 5.01. Enforcement. Upon breach of the Secured Obligations the Secured Party shall have the right to enforce the Pledge Agreement by following the Direct Payment Procedure, according to article 60 of Law 1676 and article 2.2.2.4.2.3 of Decree 1074 of 2015, taking into consideration the following:

(a) When the Secured Party files the Enforcement Form in the Registration System, the notice of said filing to the Grantor will be done using the notification addresses set forth in this Pledge Agreement, substantially in the form of the Schedule 5.01(a) (Form of Notice of Enforcement);

(b) Once the Enforcement Form is filed, the Secured Party may request in writing to the Grantor to (i) wire any Collections received and not previously wired or transferred at that moment to the Collections Account; and (ii) assign the Contract Rights not previously assigned to the Secured Party (the "Transfer Request"). The Transfer Request will include a specific reasonable date in which the Collections and the Contract Rights must be transferred or assigned, as the case may be. For such purposes the parties will follow the transfer procedures set forth in the RSPA.

(c) If the Grantor does not comply with the terms of the Transfer Request, the Secured Party shall request the Superintendence of Corporations (Superintendencia de Sociedades) the appointment of an Appraiser.

(d) Once the Appraiser has been appointed, any of the Parties may inform the Appraiser that they have chosen the following valuation standards for purposes of the appraisal (the "Valuation Standards"): discounted cash flows projected based on the amount of Collections received under the Card Processing Agreements during the last 3 years.

(e) The Parties hereto irrevocably acknowledge and agree to waive any right they may have under article 2.2.2.4.2.3 of Decree 1074 of 2015 to make comments to the appraisal unless there is a manifest error in the valuation.

(f) Once the Appraiser has delivered the appraisal of the Pledged Rights and Assets to both parties, such Pledged Rights and Assets shall be transferred to the Secured Party. For such purposes, the Grantor hereby agrees to deliver, within 10 Business Days of the date hereof, to the Secured Party a power of attorney to sign on its behalf the document included as Schedule 5.01(f) (Form of Power of Attorney) hereto, for purposes of the transfer of such Pledged Rights and Assets to the Secured Party.

(g) If either one or both of the Parties does not agree with the appraisal, the disagreement will be subject to the following mechanism according to article 78 of Law 1676 and articles 59, 60 and 61 of Law 1563 of 2012:

(i) The party that disagrees with the appraisal (the "**Interested Party**") send a written communication to the other party (the "**Other Party**") notifying such disagreement



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appointing an *amigable componedor* from the list set forth in Schedule 5.01(g)(i) (the "List").

(ii) Within the 3 Business Days following the appointment of the *amigable componedor*, the Interested Party shall send a written communication to the *amigable componedor*, with a copy to the Other Party, describing the reasons behind the disagreement, together with all relevant documentation to evidence such disagreement (the "Disagreement Communication").

(iii) Within 5 Business Days following the date in which the Disagreement Communication is received by the Other Party, the Other Party shall send, by a written communication to the *amigable componedor* and the Interested Party, any comments to the Disagreement Communication.

(iv) Within 10 Business Days following the receipt of the comments by the Other Party or the expiration of the 5 Business Days set forth above, the appointed *amigable componedor* shall make a decision and communicate such decision to the Parties by a written communication.

(v) Pursuant to Article 2.2.2.4.2.3. of Decree 1074 of 2015 and paragraph of Article 66 of Law 1676, the decision of the *amigable componedor* does not affect the Direct Payment Procedure.

SECTION 5.02. Delay or Omission Not Waiver. No delay or omission of the Secured Party to exercise any right or remedy shall impair any such right or remedy or constitute a waiver thereof or an acquiescence therein. Every right and remedy given by any Secured Contract or by law to the Secured Party may be exercised from time to time, and as often as may be deemed expedient, by the Secured Party.

SECTION 5.03. Action on the Obligations. The Secured Party's right to seek and recover judgment on the Secured Contracts or under this Pledge Agreement shall not be affected by the seeking or obtaining of or application for any other relief under or with respect to this Pledge Agreement. Neither the Pledge created by this Pledge Agreement nor any rights or remedies of the Secured Party shall be impaired by the recovery of any judgment by the Secured Party.

SECTION 5.04. Amendments, Etc., with Respect to the Obligations; Waiver of Rights. The Grantor shall remain obligated hereunder notwithstanding that, without any reservation of rights against the Grantor and without notice to or further assent by the Grantor, (a) any demand for payment of any of the Secured Obligations made by the Secured Party may be rescinded by such party and any of the Secured Obligations continued, (b) the Secured Obligations, or the liability of any other Person upon or for any part thereof, or any collateral security or guarantee therefor or right of offset with respect thereto, may, from time to time, in whole or in part, be renewed, extended, amended, modified, accelerated, compromised, waived, surrendered or released by the Secured Party, (c) the Secured Contracts and any other documents executed and delivered in connection therewith may be amended, modified, supplemented, or terminated, in whole or in part, as the applicable Secured Party may deem advisable from time to time, and (d) any collateral security, guarantee, or right of offset at any time held by the Secured Party for the payment of the Secured Obligations may be sold, exchanged, waived, surrendered or released. The Secured Party shall not have any obligation to protect, secure, perfect, or insure any Lien at any time held by it as security for the Secured Obligations or under this Pledge Agreement or any property subject thereto. When making any demand hereunder against the Grantor, the Secured Party may, but shall be under no obligation to, make a similar demand on any other Person, and any failure by the Secured Party to make any such demand or to collect any payments from any other Person or any release of any other Person shall not relieve the Grantor in respect of which a demand or collection was made or the Grantor not so released of its several obligations or liabilities hereunder, and shall not



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or affect the rights and remedies, express or implied, or as a matter of law, of the Secured Party against the Grantor. For the purposes hereof "demand" shall include the commencement and continuance of any legal proceedings.

ARTICLE VI PLEDGE AGREEMENT TERM; PLEDGE

SECTION 6.01. Absolute Pledge. All rights of the Secured Party hereunder, the Pledge, and all obligations of the Grantor hereunder shall be absolute and unconditional.

SECTION 6.02. Pledge Agreement Term; Cancellation proceedings. In accordance with article 42 of Law 1676, the period for which the Registration will remain in full force corresponds to 7 years following the initial registration date. Notwithstanding, said term can be renewed in the terms of article 42 of Law 1676 (the "**Pledge Agreement Term**").

When the full, complete and indefeasible performance of the Obligations is accomplished, having complied with the terms considered herein, the Grantor shall have the right to deliver a cancellation notice to the Secured Party, for the latter to proceed with the Registration cancellation related procedures (the "**Cancellation Notice**"). This right shall not be exercised by the Grantor in the event of the partial accomplishment of the Obligations.

SECTION 6.03. Continuing Pledge; Successors and Assigns. This Pledge Agreement shall remain in full force and effect and be binding in accordance with and to the extent of its terms upon the Grantor and the successors and assigns thereof (except that the Grantor may not assign, transfer, or delegate any of its rights or obligations under this Pledge Agreement without the prior written consent of the Secured Party) and shall inure to the benefit of the Secured Party, its successors, endorsees, transferees, and assigns until all Obligations (other than obligations arising under **Section 7.04** that have not yet been asserted) shall have been fully, completely and indefeasibly paid and performed.

ARTICLE VII MISCELLANEOUS

SECTION 7.01. Amendments in Writing. None of the terms or provisions of this Pledge Agreement may be waived, amended, supplemented or otherwise modified except by a written instrument executed by the Grantor and the Secured Party and with the consent of the Administrative Agent (at the direction of the Required Lenders).

SECTION 7.02. bis Subordination. The Secured Party acknowledges its intent to, at a later date, enter into a separate security agreement with Citibank N.A. (the "**Collateral Agent**") pursuant to which the Secured Party will grant the Collateral Agent a security interest over the Pledged Rights and Assets and this Pledge Agreement. The Secured Party hereby agrees to subordinate all of its rights over the Pledged Rights and Assets in favor of the Collateral Agent.

SECTION 7.03. Notices. For the purposes contemplated in this Pledge Agreement the Parties establish as their notification addresses, the following:

Secured Party

USAVflow Limited
c/o P.O. Box 1093
Boundary Hall





LA FOTOFIA BLANCO
FOTOFIA 16
DEL CIRCULO DE BOGOTA, D.C.



Cricket Square
Grand Cayman
KY1-1102
Cayman Islands
Facsimile No.: (345) 945-7100;
Telephone No.: (345) 945-7099;
email: info@maplesfs.com

Grantor

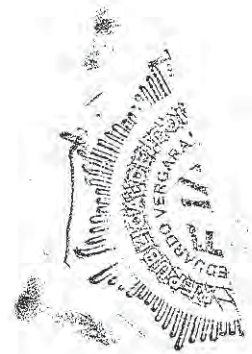
Aerovías del Continente Americano S.A. Avianca,
Centro Administrativo,
Avenida Calle 26 No. 59-15 Piso 10,
Bogotá, D.C.,
Colombia;
Attention: Vicepresidente Financiero;
Facsimile No.: (571) 413-9809;
Telephone No.: (571) 295-6765;
email: Lucia.avila@Avianca.com;

SECTION 7.04. No Waiver by Course of Conduct; Cumulative Remedies. The Secured Party shall not by any act (except by a written instrument pursuant to **Section 7.01**), delay, omit, or otherwise be deemed to have waived any right or remedy hereunder or to have acquiesced in any breach of any of the terms and conditions hereof. No failure to exercise, nor any delay in exercising, on the part of the Secured Party, any right, power, or privilege hereunder shall operate as a waiver thereof. No single or partial exercise of any right, power, or privilege hereunder shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. A waiver by the Secured Party of any right or remedy hereunder on any one occasion shall not be construed as a bar to any right or remedy that the Secured Party would otherwise have on any future occasion. The rights, remedies, powers and privileges herein provided are cumulative, may be exercised singly or concurrently and are not exclusive of any other rights or remedies provided by law.

SECTION 7.05 Indemnities by Grantor.

(a) Subject to **Section 7.04(b)**, without limiting any other rights which any of the Secured Party, its successors and assigns, and their respective directors, officers, employees, and agents (each, an "**Indemnified Party**") may have hereunder or under Applicable Law, the Grantor hereby agrees to indemnify each Indemnified Party from and against any and all damages, losses, liabilities and reasonable and documented out-of-pocket expenses (including reasonable fees and disbursements of outside counsel) (all of the foregoing being collectively referred to as "**Indemnified Amounts**") arising out of, or relating to, or in connection with the execution, negotiation, delivery or administration of, the transactions contemplated by, or enforcement of any rights or obligations set forth in or created by, this Pledge Agreement. Without limiting the foregoing, such indemnity shall apply to any Indemnified Amounts arising out of (a) any representation or warranty made by the Grantor under this Pledge Agreement which shall have been incorrect in any material respect when made or (b) a failure of the Grantor to perform or observe its respective covenants or other material obligations under this Pledge Agreement. Without limiting or being limited by the foregoing, the Grantor agrees to pay, on demand, to each Indemnified Party any and all amounts necessary to indemnify such Indemnified Party from and against any and all Indemnified Amounts relating to or resulting from any legal proceeding related to or of the matters referred to above in this **Section 7.04** or any investigation, litigation or proceeding with

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respect to any action, or failure to act, by the Grantor under any of the Secured Contracts to which it is a party or any of the transactions contemplated thereby.

(b) Notwithstanding anything in this **Section 7.04** to the contrary, the Grantor shall have no obligation to indemnify any Indemnified Party under this **Section 7.04** in respect of Indemnified Amounts to the extent resulting from (a) the gross negligence or willful misconduct on the part of such Indemnified Party or its directors, officers, employees or agents as determined by the final judgment of a court of competent jurisdiction no longer subject to appeal or (b) litigation between Indemnified Parties not involving an actual or alleged act or omission of the Grantor or any of the Grantor's Affiliates. Promptly after receipt by an Indemnified Party of notice of the commencement of any action or proceeding involving a claim referred to in subsection (a) above, such Indemnified Party shall, if a claim in respect thereof is to be made against the Grantor under such subsection (a), promptly give notice to the Grantor of the commencement of such action or proceeding; provided, however, that the failure of such Indemnified Party to give any such notice shall not (i) relieve the Grantor of its obligations under such subsection (a), except to the extent that such failure results in the forfeiture of rights or defenses and the Grantor incurs an increased obligation to such Indemnified Party under such subsection on account of such failure, or otherwise prejudices the Grantor, and (ii) in any event relieve the Grantor from any liability with respect to such Indemnified Party which the Grantor may have otherwise on account of this Pledge Agreement or any other Secured Contract.

SECTION 7.06 [Reserved].

SECTION 7.07 Benefits of Pledge Agreement. Nothing in this Pledge Agreement or in the other Secured Contracts, expressed or implied, shall give to any Person, other than the Parties and their successors hereunder and the Administrative Agent, any benefit or any legal or equitable right, remedy, or claim under this Pledge Agreement

SECTION 7.08 Counterparts. This Pledge Agreement may be executed by one or more of the Parties on any number of separate counterparts (including by facsimile or other electronic transmission), and all of said counterparts taken together shall be deemed to constitute one and the same instrument.

SECTION 7.09 Severability. Any provision of this Pledge Agreement that is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction. The parties hereto shall endeavor in good-faith negotiations to replace the invalid, illegal or unenforceable provisions with valid provisions the economic effect of which comes as close as possible to that of the invalid, illegal or unenforceable provisions.

SECTION 7.10 Section Headings. Article and Section headings and the Table of Contents used herein are for convenience of reference only, are not part of this Pledge Agreement, and are not to affect the construction of, or to be taken into consideration in interpreting, this Pledge Agreement.

SECTION 7.11 Integration. This Pledge Agreement represents the entire agreement of the Parties with respect to the subject matter hereof, and there are no promises, undertakings, representations, or warranties by the Secured Party relative to the subject matter hereof not expressly set forth or referred to herein.

SECTION 7.12 Governing Law. THIS PLEDGE AGREEMENT AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES UNDER THIS PLEDGE AGREEMENT SHALL BE GOVERNED BY THE



EXPEDIENTE BLANCO
FOLIO 16
DEL CIRCULO DE BOGOTÁ, D.C.



BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAWS OF THE REPUBLIC OF COLOMBIA.

SECTION 7.13 Limited Recourse. Notwithstanding any other provision of this Pledge Agreement, each party hereto hereby agrees that the Secured Party's obligations under this Pledge Agreement shall be limited recourse obligations of the Secured Party, with recourse being limited to the assets (other than the ordinary share capital and any transaction fee charged by the Secured Party pursuant to the Administration Agreement) of the Secured Party at such time available for application by or on behalf of the Secured Party in making payments in accordance with this Pledge Agreement. The parties hereby acknowledge and agree that the Secured Party's obligations under this Pledge Agreement are solely the corporate obligations of the Secured Party, and that none of the officers, directors, shareholders or agents of the Secured Party, any of its Affiliates or any other Person shall be personally liable to make any payments of principal, interest or any other sum now or hereafter owing by the Secured Party hereunder. After the Secured Party's assets are realized and exhausted, all sums due but still unpaid in respect of the Secured Party's obligations hereunder shall be extinguished and shall not thereafter revive with respect to the Secured Party and its liability hereunder, and the parties hereto shall not have the right to proceed against the Secured Party or any of its Affiliates or any of its officers, directors, shareholders or agents for the satisfaction of any monetary claim or for any deficiency judgment remaining after foreclosure of any of its assets.

No party hereto shall take any steps for the purpose of procuring the appointment of any examiner, administrator, receiver, liquidator, provisional liquidator, bankruptcy trustee or administrative receiver or the making of any administrative order or court order or application or for instituting any bankruptcy, examinership, reorganization, arrangement, insolvency, winding up, liquidation, composition or any like proceedings under Applicable Law in respect of the Secured Party or its Affiliates or in respect of any of their liabilities, including, without limitation, as a result of any claim or interest of such parties.

The provisions of this Section 7.13 shall survive termination of this Pledge Agreement.

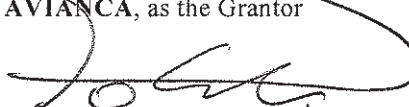
[SIGNATURE PAGES FOLLOW]



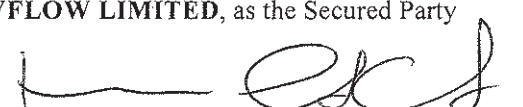
RECEIVED
OCT 13 2020
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA, D.C.

IN WITNESS WHEREOF, each of the Parties has caused this Pledge Agreement to be duly executed and delivered as of the date first above written.

AEROVÍAS DEL CONTINENTE AMERICANO
S.A. AVIANCA, as the Grantor

By: 
Name: Roberto Held.
Title: CEO

USAVFLOW LIMITED, as the Secured Party

By: 
Name: Maria Camila Quintero.
Title: POA.

16 NOTARÍA DIECISEIS DEL CÍRCULO DE BOGOTÁ D.C.
Notaría
DILIGENCIA DE AUTENTICACIÓN DE FIRMA

Ante mí, EDUARDO VERGARA WIESNER, NOTARIO 16 DE BOGOTÁ D.C., Compareció:

QUINTERO LEGUIZAMO MARIA CAMILA

Quien se identificó con: C.C. 1019009264
y manifestó que reconoce como suya la firma que aparece en el presente documento, la que es de su puño y letra. De conformidad con el Art. 73 del Decreto Ley 960 de 1970.


Verifique los datos en:
www.notariaenlinea.com
91GM05F0255UEQNHZ

5t57tt7nmy58sant5j
Bogotá D.C. 12/12/2017 a las 10:02:54 a.m.

CDS



EDUARDO VERGARA WIESNER
NOTARIO 16 DE BOGOTÁ D.C.



Se autoriza de conformidad con el artículo 12 del decreto 2148 de 1983 y procedo en respecto a la filomena como lo establece el artículo 3° de la resolución 0007 del 12 de junio de 2016 que autoriza la firma de las personas que autoricen la firma de despacho sin que medie intervención de la base de datos de la Registraduría Nacional del Estado Civil.





16 NOTARÍA DIECISEIS DEL CÍRCULO DE BOGOTÁ D.C.
Notaría
DILIGENCIA DE AUTENTICACIÓN DE FIRMA

Del Circuito de Bogotá
Ante mí, **EDUARDO VERGARA WIESNER**, NOTARIO 16 DE BOGOTÁ D.C., Compareció:

HELD OTERO ROBERTO
Quien se identificó con: C.C. 79783632
y manifestó que reconoce como suya la firma que aparece en el presente documento, la que es de su puño y letra. De conformidad con el Art. 73 del Decreto Ley 960 de 1970.

Verifique los datos en:
www.notariaenlinea.com
9GLMPIEW9ONA2J84

h6hygngb4b4bbr4h

Bogotá, D.C. 12/12/2017 a las 08:38:50 a.m.

EDUARDO VERGARA WIESNER
NOTARIO 16 DE BOGOTÁ D.C.










Se autoriza de conformidad con el artículo 12 del decreto 2148 de 1980 y con respecto a la denuncia suscrita el artículo 3° de la Resolución de junio de 2018 que autoriza a otras firmas fehacientemente reconocidas para el presente sin que medie intervención de la mesa de partes del Tribunal de Nación del Circuito C.I.



Schedule 5.01(a)
Form of Notice of Enforcement

[Date]

AEROVÍAS DEL CONTINENTE AMERICANO S.A. AVIANCA

Avenida Calle 26 No. 59-15 Piso 10,
Bogotá, D.C., Colombia;

At.: []

Vicepresidente Financiero

Ref: Notice of Enforcement

Dear Sirs,

Pursuant to Section 5.01 of the Pledge Over Contract Rights and Future Revenues (the "Pledge Agreement") entered into by and between Aerovías del Continente Americano S.A. Avianca (the "Grantor") and USAVflow Limited (the "Secured Party") on [], and considering that on [] the Grantor failed to comply with its Secured Obligations, the Secured Party hereby notifies the Grantor of the following:

- i. the Secured Party intends to exercise its right to enforce the Pledge Agreement by following the Direct Payment Procedure, according to article 60 of Law 1676 and article 2.2.2.4.2.3 of Decree 1835 of 2015 and execute the Pledge Agreement; and
- ii. therefore, on [] the Secured Party filed the Enforcement Form in the Registration System.

Capitalized terms used herein but not otherwise defined have the meanings ascribed to such terms in the Pledge Agreement.

Best regards,

[]



PPH

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COPIES TO: ANCO
DEL CIRCUITO DE BOGOTÁ, D.C.



Schedule 5.01(f)
Form of Power of Attorney

In the City of Bogota, at December [], 2017 the undersigned [], in my capacity as Legal Representative of **AEROVÍAS DEL CONTINENTE AMERICANO S.A. AVIANCA** (the "Company"), a stock company incorporated and existing under the laws of the Republic of Colombia, identified with Tax Identification No. [], as said legal capacity is certified by the Certificate of Existence and Legal Representation issued by the Chamber of Commerce of Barranquilla attached herein, I do hereby confer special power of attorney to **USAVFLOW LIMITED**, an exempted company incorporated in the Cayman Islands registered and filed as No. 324668 (the "Attorney-in-Fact") and together with the Company, the "Parties"), to act in the name and on behalf of the Company, to transfer the Pledged Rights and Assets on his own behalf, as provided under the Section 5.01(f) of the Pledge Over Contract Rights and Future Revenues entered into by and between the Parties on [] (the "Pledge Agreement"), and do all necessary acts, execute all documents and file all petitions required or necessary to execute, perfect and perform the abovementioned transfer of Pledged Rights and Assets.

This power of attorney will be valid as long as the Pledge Agreement is in force, unless earlier revoked throughout a written agreement executed by the Parties.

This power of attorney contains a Spanish and an English version. In case of doubt, the Spanish version shall prevail.

This power of attorney and any non-contractual obligations arising out of or in connection with it are governed by the laws of the Colombia and will be construed in accordance with Colombian law.

The courts of Colombia have exclusive jurisdiction to settle any dispute arising out of or in connection with this power of attorney (including a dispute regarding the existence, validity or termination of this power of attorney or any non-contractual obligation arising out of or in connection with this power of attorney).

Capitalized terms used herein shall have the meaning granted on the Pledge Agreement.

[Name]

AEROVÍAS DEL CONTINENTE AMERICANO S.A. AVIANCA



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ESTADO DE EL SALVADOR
BOGOTÁ, D.C. 16
OCT 2020

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Schedule 5.01(g)(i)

List

- 
1. Inverlink S.A. y Bancapital S.A.S.
 2. Bonus Banca de Inversión S.A.S.
 3. BBVA Valores Colombia S.A.
 4. Nexus Banca de Inversión S.A.
 5. Structure S.A.



ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 03-11-2009 BY 60322
UCBAW/BJA

EXHIBIT D

COSTA RICAN BACK-UP SECURITY AGREEMENT

This SECURITY AGREEMENT dated as of December 12, 2017, as amended, supplemented or modified from time to time (this “**Agreement**”), is made by and between Aerovías del Continente Americano, S.A. AVIANCA, a company incorporated according to the laws of Colombia, represented by Roberto Held, (the “**Grantor**”) and USAVFlow Limited, an exempted company incorporated and registered under the laws of the Cayman Islands, represented in this act by Peter Lundin, (the “**Secured Party**”), together the “**Parties**” and each individually, a “**Party**”.

RECITALS

WHEREAS, reference is made to the AVIANCA-BAC CREDOMATIC Regional Agreement for the Processing of Credit Card Transactions in Affiliated Commercial Establishments, dated as of June 10, 2015, between the Grantor, Taca International Airlines, S.A. (“**TACA**”) and BAC International Bank, Inc. (“**Credomatic**”) (the “**Credomatic Master Agreement**”) pursuant to which Credomatic serves as Taca’s and Avianca’s card processing agent for sales generated through the cards and in the locations and/or channels specified in the Credomatic Master Agreement.

WHEREAS, reference is made to the Merchant Application & Agreement dated March 17, 2016 among Avianca, Inc., a corporation organized under the laws of the State of New York (“**Avianca Inc.**”) and Credomatic of Florida, Inc. (the “**Credomatic Supplement**”), a “Local Contract” as defined under the Credomatic Master Agreement (together with the Credomatic Master Agreement, the “**Secured Contracts**”).

WHEREAS, reference is made to the Assignment of Rights Agreement, dated as of the date hereof, 2017 among Avianca, Taca International Airlines S.A. (“**Taca**”), and Credomatic (the “**Taca Assignment**”) pursuant to which Avianca’s and Taca’s rights under the Secured Contracts were divided into “Avianca Contract Rights” and “Taca Contract Rights” and where Taca assigned all Avianca Contract Rights to Avianca and Avianca assigned all Taca Contract Rights to Taca.

WHEREAS, reference is made to the Contract Rights Receivables Sale, Purchase and Servicing Agreement, dated as of the date hereof between Grantor and the Secured Party (the “**RSPA**”) pursuant to which Grantor will sell and the Secured Party will purchase all of Avianca’s Contract Rights and the Receivables under the Secured Contracts.

WHEREAS, reference is made to that certain Receivables Maintenance Agreement, dated as of the date hereof (the “**Undertakings Agreement**”), pursuant to which the Grantor will agree to make the warranties, covenants, and other agreements set forth therein with regard to the maintenance, preservation, and performance of the Grantor’s obligations under the RSPA in respect of the Contract Rights and the Receivables sold to the Secured Party.

Pursuant to the terms of the RSPA and the Undertakings Agreement, the Grantor will agree, among others, to (i) replace the Credomatic Contract and the AMEX Contract with Additional Card Processing Agreements, under certain circumstances; (ii) comply with Section 2.03(b) of the RSPA; (iii) transfer the Collections to the Secured Party should they be received by the Grantor after the date of execution of the RSPA and (iv) perform all other obligations set forth in the RSPA and the Undertaking Agreement (the “**Secured Obligations**”).

WHEREAS, to induce the Secured Party to enter into the RSPA and the Undertaking Agreement, the Grantor has entered into this Agreement, pursuant to which the Grantor grants the Secured Party a pledge over the Contract Rights and Receivables (the “**Collateral**”).

NOW, THEREFORE in consideration of the Recitals, the Grantor hereby agrees with the Secured Party, as follows:

1. Definitions and Interpretation

Capitalized terms used herein but not otherwise defined herein have the meanings ascribed to such terms in the RSPA. The interpretative provisions set forth in Section 1.02 of the RSPA apply to this Agreement.

With respect to the enforcement of the Collateral, the Parties agree to supplement any applicable procedure with the Law on Security over Movable Assets and any applicable law including the Costa Rican Code of Civil Procedure. In any event, unless legally mandated or otherwise established in this Agreement, the maximum term that may be granted by the Enforcement Agent for any notice or proceeding is of five (5) business days.

Additionally, the following terms have the following meanings:

“**Costa Rican Security**” means the security granted over the secured assets (bien dado en garantía) as understood under the Law on Security over Moveable Assets and incorporating all the rights and obligations that the Law on Security over Moveable Assets grants in relation to such secured assets.

“**Law on Security over Movable Assets**” means Ley de Garantías Mobiliarias, law number 9246 and its bylaws.

“**Judicial Enforcement**” means the enforcement procedure established under article 59 of the Law on Security over Movable Assets, or, in any event, the current legally mandated judicial proceeding for the enforcement of executive titles in the applicable jurisdiction for the Republic of Costa Rica.

“**Moveable Asset Security System**” means el Sistema de Garantías Mobiliarias as understood under the Law on Security over Moveable Assets.

“**Notary Public**” Means a Costa Rican Notary Public, in good standing, and with no legal impediments to act as the enforcer of the pledged Collateral in accordance with the Law on Security over Movable Assets and this Agreement.

“Out of Court Enforcement” means the enforcement procedure agreed to in this Agreement established in accordance to Articles 57 and 58 of the Law on Security over Movable Assets.

“Security Enforcement Form” means the form or forms required under the Law on Security over Movable Assets or any other law, regulation, bylaw or otherwise required by the Mobile Guaranty System, the National Registry or any other public or private entity, including any courts or other authority appointed to review the terms of this Agreement, to enforce the security interest. This term includes the “formulario de ejecución” as utilized in Article 57 of the Law on Security over Movable Assets.

“Security Registration Forms” means the form or forms required by under the Law on Security over Movable Assets or any other law, regulation, bylaw or otherwise required by the Mobile Guaranty System, the National Registry or any other public or private entity to register and perfect the security interest in the Collateral in favor of the Secured Party. This term includes the “formulario de inscripción inicial al Sistema de Garantías Mobiliarias y demás formularios de inscripción posteriores” and the “formulario de registro en el Sistema de Garantía Mobiliaria” as utilized in articles 11, 43 and 44 of the Law on Security over Moveable Assets.

“Trustee” means any legally appointed trustee (“fiduciario”) in good standing according to the laws of Costa Rica and able to perform the duties required of a trustee as enforcer of security interests under the Law on Security over Moveable Assets.

2. Grant of Security Interest

Notwithstanding the mutual intent of the parties to treat the sale of the Contract Rights and the Receivables under the RSPA as a true sale to Secured Party, and without limitation of such sale, Grantor hereby (i) based on Law on Security over Movable Assets and (ii) constituting a Costa Rican Security grants, effective as of the date hereof, to the Secured Party a security interest in the Collateral to secure full, complete and indefeasible performance of the Secured Obligations. With respect to such grant of a security interest, the Secured Party may at its option exercise from time to time any and all rights and remedies under this Agreement, the Law on Security over Moveable Assets or otherwise.

3. Guaranteed Amount.

The guaranteed amount under this Agreement corresponds to USD \$170,000,000 (One Hundred Seventy Million Dollars).

4. Term

The security interest set forth herein shall remain in force and effect until all of Grantor’s obligations under the Secured Obligations have been paid or otherwise performed in full (the **“Termination Date”**).

5. Enforcement

5.1. Forced Assignment of Collections and Contract Rights

If a Trigger Event has occurred and is continuing, the Secured Party, subject to the terms of the RSPA and the Undertaking Agreement, may provide notice to the Grantor and at the same time, or immediately thereafter, submit the Security Enforcement Form before the relevant Costa Rican authorities under the Law on Security over Moveable Assets.

Once the Security Enforcement Form is filed, the Secured Party may request in writing to the Grantor to (i) wire any Collections received and not previously wired or transferred at that moment to the Collections Account and (ii) to assign the Contract Rights not previously assigned to the Secured Party (the “**Transfer Request**”). The Transfer Request will include a specific date in which the Collections and the Contract Rights must be transferred or assigned.

The Secured Party may also notify Grantor’s counterparties in the Secured Contracts of the assignment of the Collateral and instruct them to (i) wire any Collections to be sent to Grantor to the Collections Account and (ii) to take note of and implement the assignment of Contract Rights in favor of the Secured Party.

5.2. Out of Court Enforcement

The Parties fully and irrevocably agree that after a Trigger Event has occurred and is continuing, the Secured Party may, in its sole discretion, and in addition to the assignment of Collections and Contract Rights outlined in Clause 5.1 above, and in addition to any other rights and remedies provided for herein or otherwise available to it, exercise all of the rights and remedies of a secured party upon default under the Law on Security over Moveable Assets, including the forced sale of the Collateral either through (i) Judicial Enforcement or (ii) Out of Court Enforcement.

5.2.1 Appointment of Enforcement Agent

With the registration of the Security Enforcement Form, the Secured Party may immediately appoint a Notary Public or a Trustee to serve as the person designated to enforce its security interest in the Collateral through the Out of Court Enforcement (the “**Enforcement Agent**”).

5.2.2 Notice

Within two (2) business day of being appointed as such, the Enforcement Agent will provide notice to the Grantor so that it can, within a term of five (5) business days after receiving such notice, provide documentation evidencing payment of all Secured Obligations and any additional amounts due under the RSPA and the Undertaking Agreement (“**Full Performance**”).

If Full Performance is not properly evidenced at the end of such term, the Enforcement Agent shall proceed with the forced sale of the Collateral.

Grantor expressly recognizes the Secured Party’s right to act in accordance with what is established herein and, therefore, upon the provision of such notice as contemplated above, undertakes to stop exercising any of its rights, as applicable, over the Collateral.

5.2.3 Forced Sale or Auction of Collateral

If the Enforcement Agent is instructed by the Secured Party to proceed with the forced sale or auction of the Collateral, it shall publish a notice of sale in a newspaper of national circulation with at least 8 days' notice prior to the date of the sale or auction. Such notice must indicate the time, place and date of the sale as well as a brief description of the assets to be sold, a base price and parameters for additional base prices were they to be adjusted for the auction.

Written notice of the sale must also be provided to all interested parties which have a legal right over the Collateral in accordance with article 57 of the Law on Security over Moveable Assets.

From the sale or auction, the Enforcement Agent will prepare an affidavit to be signed by the Enforcement Agent and the purchaser of the Collateral. Upon payment of the price in the sale or auction, the Enforcement Agent shall grant evidence of title to the purchaser. If the price paid is not enough to cover the Secured Obligations, the Collateral Agent may proceed to collect the remaining amounts through Judicial Enforcement.

The transfer of title over the Collateral in the event of a forced sale or auction will be free of any liens established pursuant to this Agreement.

6. Authorizations

The Grantor hereby authorizes the Secured Party to file the Security Registration Forms before the relevant entities. The Secured Party may appoint anyone it deems appropriate to act on its behalf to file the Security Registration Forms.

7. Notices

All notices and other communications made in relation to this Agreement shall be sent in writing to the following addresses. Notwithstanding, if a Party is properly served a notice under the RSPA and/or the Undertakings Agreement, it will be valid for purposes of this Agreement.

Grantor:

Aerovías del Continente Amerciano S.A., Avianca
Centro Administrativo, Avenida Calle 26 No. 59-15 Piso 10
Bogotá D.C. Colombia
Attention: Vicepresidente Financiero
Facsimile No.: 571-413-9809
Telephone No.: 571-295-6765
E-mail: Lucia.avila@avianca.com

Secured Party:

USAVflow Limited
c/o PO Box 1093
Boundary Hall

Cricket Square
Grand Cayman
KY1-1102
Cayman Islands
Facsimile No.: (345) 945-7100
Telephone No.: (345) 945-7099
E-mail: info@maplesfs.com

with a copy to

Citibank, N.A.
388 Greenwich Street
New York, NY 10013
Attn: Miriam Y. Molina
Tel.: (212) 816-5576
email: miriam.molina@citi.com

and with a copy to

Citibank, N.A.
388 Greenwich Street
New York, NY 10013
Attn: Karen Abarca
Tel.: (212) 816-7759
email: karen.abarca@citi.com / cts.spag@citi.com

8. Representations and Warranties

The Grantor certifies that the representations and warranties, as applicable to Grantor, set forth in the RSPA are true and correct in all material respects as of the date hereof.

The Grantor certifies it has not granted a prior security interest in the Collateral to any other person.

The Grantor certifies that its counterparties in the Secured Contracts will be able to honor their obligations therein and agrees to indemnify and hold the Secured Party harmless against any loss due to the noncompliance of any counterparty in such Secured Contracts.

The Grantor shall indemnify and hold the Secured Party harmless against any loss, as well as against any costs or expenses (including legal fees and expenses), which the Secured Party sustains or incurs due to any Trigger Event or any other amount payable hereunder, or under the Secured Contracts.

9. Modifications

Subject to the terms of the RSPA and the Undertakings Agreement, and except as otherwise provided therein or herein, any modification of any part of this Agreement shall require the

consent in writing of all the parties to the RSPA and the Administrative Agent (at the direction of the Required Lenders).

10. **Successors and Assigns**

This agreement shall be binding upon and shall inure to the benefit of the Parties hereto and their respective successors and permitted assigns.

None of the Grantor's rights or obligations hereunder nor any interests herein may be assigned by the Grantor unless it is established in the RSPA or related documents or with the consent of all the parties to the RSPA and the Administrative Agent (at the direction of the Required Lenders).

11. **No Waiver**

No failure or delay by the Secured Party in exercising any right, remedy, power or privilege under this Agreement shall operate as a waiver thereof.

12. **[RESERVED]**

13. **Assignment**

The Secured Party may assign, indorse, or transfer any instrument evidencing all or any part of this Agreement as provided in, and in accordance with the RSPA and the holder of such instrument shall be entitled to the benefits of this Agreement.

14. **Severability**

In the event any one or more of the provisions contained in this Agreement should be held invalid, illegal or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby. The Parties shall endeavor in good-faith negotiations to replace the invalid, illegal or unenforceable provisions with valid provisions the economic effect of which comes as close as possible to that of the invalid, illegal or unenforceable provisions.

15. **Discharge**

Upon the Termination Date, (i) subject to Section 17, this Agreement and the security interests and licenses created hereby shall terminate and all rights to the Collateral shall revert to Grantor, (ii) the Secured Party agrees to request the cancelation of the registration of the security interest before the Moveable Asset Security System. If the Secured Party does not proceed with such cancelation within a period of fifteen (15) days of written notice to the Secured Party, the Grantor may either (i) go before a Notary Public, who must request the Secured Party's signature in a public affidavit to proceed with the cancellation before the National Registry or (ii) go before a civil judge in the applicable jurisdiction so that the judge may order the cancellation through a summary process.

16. **Applicable Law**

This Agreement shall be governed and enforced in accordance with the laws of the Republic of Costa Rica and may be translated into Spanish by an official translator in accordance to Article 395 of the Costa Rican Civil Code.

17. Reinstatement

This Agreement shall remain in full force and effect and continue to be effective should any petition be filed by or against the Grantor for liquidation or reorganization, should the Grantor become insolvent or make an assignment for the benefit of any creditor or creditors or should a receiver or trustee be appointed for all or any significant part of the Grantor's assets, and shall continue to be effective or be reinstated, as the case may be, if at any time payment or performance of the Secured Obligations, or any part thereof, is, pursuant to applicable law, rescinded or reduced in amount, or must otherwise be restored or returned by any obligee of the Secured Obligations, whether as a "voidable preference," "fraudulent conveyance," or otherwise, all as though such payment or performance had not been made. In the event that any payment, or any part thereof, is rescinded, reduced, restored or returned, the Secured Obligations shall be reinstated and deemed reduced only by such amount paid and not so rescinded, reduced, restored or returned.

18. Amendments in Writing

None of the terms or provisions of this Agreement may be waived, amended, supplemented or otherwise modified except by a written instrument executed by the Grantor and the Secured Party and with the consent of the Administrative Agent (at the direction of the Required Lenders).

19. No Waiver by Course of Conduct; Cumulative Remedies.

The Secured Party shall not by any act (except by a written instrument pursuant to Section 1), delay, omit, or otherwise be deemed to have waived any right or remedy hereunder or to have acquiesced in any breach of any of the terms and conditions hereof. No failure to exercise, nor any delay in exercising, on the part of the Secured Party, any right, power, or privilege hereunder shall operate as a waiver thereof. No single or partial exercise of any right, power, or privilege hereunder shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. A waiver by the Secured Party of any right or remedy hereunder on any one occasion shall not be construed as a bar to any right or remedy that the Secured Party would otherwise have on any future occasion. The rights, remedies, powers and privileges herein provided are cumulative, may be exercised singly or concurrently and are not exclusive of any other rights or remedies provided by law.

20. Limited Recourse.

Notwithstanding any other provision of this Agreement, each party hereto hereby agrees that the Secured Party's obligations under this Agreement shall be limited recourse obligations of the Secured Party, with recourse being limited to the assets (other than the ordinary share capital and any transaction fee charged by the Secured Party pursuant to the Administration Agreement) of the Secured Party at such time available for application by or on behalf of the Secured Party in

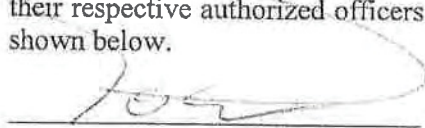
making payments in accordance with this Agreement. The parties hereby acknowledge and agree that the Secured Party's obligations under this Agreement are solely the corporate obligations of the Secured Party, and that none of the officers, directors, shareholders or agents of the Secured Party, any of its Affiliates or any other Person shall be personally liable to make any payments of principal, interest or any other sum now or hereafter owing by the Secured Party hereunder. After the Secured Party's assets (other than the ordinary share capital and any transaction fee charged by the Secured Party pursuant to the Administration Agreement) are realized and exhausted, all sums due but still unpaid in respect of the Secured Party's obligations hereunder shall be extinguished and shall not thereafter revive with respect to the Secured Party and its liability hereunder, and the parties hereto shall not have the right to proceed against the Secured Party or any of its Affiliates or any of its officers, directors, shareholders or agents for the satisfaction of any monetary claim or for any deficiency judgment remaining after foreclosure of any of its assets.

No party hereto shall take any steps for the purpose of procuring the appointment of any examiner, administrator, receiver, liquidator, provisional liquidator, bankruptcy trustee or administrative receiver or the making of any administrative order or court order or application or for instituting any bankruptcy, examinership, reorganization, arrangement, insolvency, winding up, liquidation, composition or any like proceedings under Applicable Law in respect of the Secured Party or its Affiliates or in respect of any of their liabilities, including, without limitation, as a result of any claim or interest of such parties.

The provisions of this Section 20 shall survive termination of this Agreement.

[Signature pages follow]

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed by their respective authorized officers as of the day and year first above written and in the location shown below.


Aerovias del Continente Americano S.A. Avianca
Grantor

Name: Roberto Held
Title: _____
Location: _____



Secured Party
USAVflow Limited

Name: Peter Lundin

Title: Director

Location: Grand Cayman, Cayman Islands

EXHIBIT E



REGISTRO DE GARANTÍAS MOBILIARIAS

FORMULARIO DE INSCRIPCIÓN INICIAL

Fecha y hora inscripción: 12/12/2017 09:40:14	Número de Inscripción (Folio Electrónico) 20171212000011400
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A.1 INFORMACIÓN SOBRE EL DEUDOR

Persona Jurídica: Persona jurídica nacional o extranjera registrada		
Número de Identificación 890100577		Digito de Verificación 6
Razón Social: Aerovías del Continente Americano S.A. Avianca		Tamaño de la empresa GRANDE
		La empresa es propiedad de mujer cabeza de familia NO
País Colombia	Departamento ATLANTICO	Municipio BARRANQUILLA
Dirección KR 51 B 80-58 LC '104' OF '1207' []		
Teléfono(s) fijo(s) 2956765	Teléfono(s) Celular 2956765	Dirección Electrónica (Email) lucia.avila@avianca.com
Tipo de cliente		Recurrente
Proceso de insolvencia NO	Tipo de administrador de insolvencia	Nombre de administrador de insolvencia
SECTOR: H Transporte y almacenamiento		

B.1 INFORMACIÓN SOBRE EL ACREEDOR GARANTIZADO

Persona Jurídica: Persona jurídica extranjera no registrada		
Numero de identificación 324668		Digito de verificación
Razón Social: USAVflow Limited		
País Islas Caimán	Departamento Grand Cayman	Municipio George Town
Dirección OF 'MaplesFS Limited' [KY1-1102, Cayman Islands]		
Teléfono(s) fijo(s) 5713268600, 5713261494	Teléfono(s) Celular 3053496895	Dirección Electrónica (Email) marilia.salim@ppulegal.com, stefania.olmos@ppulegal.com
Porcentaje de participación:		0,00%



C. INFORMACIÓN SOBRE LOS BIENES EN GARANTÍA

Descripción de los bienes De acuerdo con el contrato de prenda sobre derechos contractuales e ingresos futuros celebrado por y entre Aerovías del Continente Americano S.A. Avianca en calidad de Garante Prendario y USAVFLOW LIMITED como Acreedor Prendario, de fecha 12 de diciembre de 2017, ("Prenda de Derechos Contractuales") que tiene por objeto garantizar el cumplimiento de las Obligaciones Garantizadas los bienes dados en garantía corresponden a los Bienes y Derechos Prendados que, de acuerdo con el Contrato de Prenda de Derechos Contractuales, son: a) Los Recaudos transferidos al, o recibidos por, el Garante Prendario; b) Los Derechos Contractuales, Ingresos Futuros y Recaudos bajo cualquier Acuerdo de Procesamiento de Tarjetas Adicional, si dichos Derechos Contractuales, Ingresos Futuros y Recaudos no fueren transferidos al Acreedor Prendario de acuerdo con lo dispuesto en el Contrato de Compraventa (los "Derechos Contractuales Adicionales y de Reemplazo"); y c) Los Derechos Contractuales, Ingresos Futuros y Recaudos bajo cualquier Acuerdo de Procesamiento de Tarjetas, si el Contrato de Compraventa fuere declarado ilegal o inválido, o si por alguna razón, el Contrato de Compraventa deja de existir, o si por alguna razón, el Acreedor Prendario no se hace propietario de los Derechos Contractuales, Ingresos Futuros y Recaudos derivados de cualquier Acuerdo de Procesamiento de Tarjetas. Para efectos de claridad los términos que inicien con letra mayúscula en esta descripción tendrán el significado que a ellos se les otorga en la Prenda de Derechos Contractuales.	
Es garantía prioritaria de adquisición	NO
Tipos de bienes:	Cuentas por cobrar
Bienes para uso:	COMERCIAL

D. DATOS GENERALES

Monto máximo de la obligación Garantizada (Dólar estadounidense)	\$170.000.000,00
Tiene vigencia definida SI	Vigencia de la garantía (dd/mm/aaaa) 12/12/2024 23:59:59
Tipo de garantía	Garantía Mobiliaria
Nombre del anexo de la orden judicial o administrativa o protocolización	
Datos de referencia	

E. DATOS DE QUIEN DILIGENCIA EL FORMULARIO

Parte que diligencia: ACREEDOR GARANTIZADO			
Primer Apellido Salim	Segundo Apellido Kotait	Primer Nombre Marilia	Segundo Nombre
País Colombia	Departamento BOGOTA	Municipio BOGOTA	
Dirección KR 9 74-8 []			
Dirección Electrónica (Email) marilia.salim@ppulegal.com			
Numero de identificación 691543			

Certificado expedido el día 12/12/2017 9:40 a. m..



Confecámaras - Calle 26 57-41 Piso 15 torre 7, Colombia - Conmutador: 3814100

EXHIBIT F

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS

A. NAME & PHONE OF CONTACT AT FILER (optional)
B. E-MAIL CONTACT AT FILER (optional)
C. SEND ACKNOWLEDGMENT TO: (Name and Address)
<div style="border: 1px solid black; padding: 10px; width: 80%; margin: 0 auto;"> United Corporate Services, Inc. 100 State Street, Suite 800 Albany, NY 12207 </div>

Print**Reset****THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY**

1. **DEBTOR'S NAME:** Provide only one Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 1b, leave all of item 1 blank, check here ☐ and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

1a. ORGANIZATION'S NAME Aerovías del Continente Americano S.A. Avianca				
OR	1b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX
1c. MAILING ADDRESS Centro Administrativo, Calle 26 No. 59-15, Piso 10		CITY Bogotá, D.C.	STATE	POSTAL CODE
				COUNTRY COL

2. **DEBTOR'S NAME:** Provide only one Debtor name (2a or 2b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 2b, leave all of item 2 blank, check here ☐ and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

2a. ORGANIZATION'S NAME				
OR	2b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX
2c. MAILING ADDRESS		CITY	STATE	POSTAL CODE
				COUNTRY

3. **SECURED PARTY'S NAME** (or NAME of ASSIGNEE of ASSIGNOR SECURED PARTY): Provide only one Secured Party name (3a or 3b)

3a. ORGANIZATION'S NAME Citibank, N.A.				
OR	3b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX
3c. MAILING ADDRESS 388 Greenwich Street		CITY New York	STATE NY	POSTAL CODE 10013
				COUNTRY USA

4. **COLLATERAL:** This financing statement covers the following collateral:

See Addendum A attached hereto.

Citibank, N.A. as Secured Party is acting as Collateral Agent for the benefit of the secured parties under the Loan Agreement, dated on or about the date hereof, between USAVflow Limited, the Guarantors party thereto, the Lenders party thereto from time to time, Citibank, N.A. as Administrative Agent and the Secured Party, as amended, amended and restated, supplemented or otherwise modified from time to time.

5. Check <u>only</u> if applicable and check <u>only</u> one box: Collateral is <input type="checkbox"/> held in a Trust (see UCC1Ad, item 17 and Instructions) <input type="checkbox"/> being administered by a Decedent's Personal Representative	
6a. Check <u>only</u> if applicable and check <u>only</u> one box: <input type="checkbox"/> Public-Finance Transaction <input type="checkbox"/> Manufactured-Home Transaction <input type="checkbox"/> A Debtor is a Transmitting Utility	6b. Check <u>only</u> if applicable and check <u>only</u> one box: <input type="checkbox"/> Agricultural Lien <input type="checkbox"/> Non-UCC Filing
7. ALTERNATIVE DESIGNATION (if applicable): <input type="checkbox"/> Lessee/Lessor <input type="checkbox"/> Consignee/Consignor <input checked="" type="checkbox"/> Seller/Buyer <input type="checkbox"/> Bailee/Bailor <input type="checkbox"/> Licensee/Licensor	

8. **OPTIONAL FILER REFERENCE DATA:**

To be filed with the Washington DC Recorder of Deeds

International Association of Commercial Administrators (IACA)

UCC FINANCING STATEMENT ADDENDUM

FOLLOW INSTRUCTIONS

9. NAME OF FIRST DEBTOR: Same as line 1a or 1b on Financing Statement; if line 1b was left blank because Individual Debtor name did not fit, check here ☐

9a. ORGANIZATION'S NAME

Aerovías del Continente Americano S.A. Avianca

OR 9b. INDIVIDUAL'S SURNAME

FIRST PERSONAL NAME

ADDITIONAL NAME(S)/INITIAL(S)

SUFFIX

Print**Reset****THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY**

10. DEBTOR'S NAME: Provide (10a or 10b) only one additional Debtor name or Debtor name that did not fit in line 1b or 2b of the Financing Statement (Form UCC1) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name) and enter the mailing address in line 10c

10a. ORGANIZATION'S NAME

OR 10b. INDIVIDUAL'S SURNAME

INDIVIDUAL'S FIRST PERSONAL NAME

INDIVIDUAL'S ADDITIONAL NAME(S)/INITIAL(S)

SUFFIX

10c. MAILING ADDRESS

CITY

STATE

POSTAL CODE

COUNTRY

11. ☐ ADDITIONAL SECURED PARTY'S NAME or ☒ ASSIGNOR SECURED PARTY'S NAME: Provide only one name (11a or 11b)

11a. ORGANIZATION'S NAME

USAVflow Limited

OR 11b. INDIVIDUAL'S SURNAME

FIRST PERSONAL NAME

ADDITIONAL NAME(S)/INITIAL(S)

SUFFIX

11c. MAILING ADDRESS

P.O. Box 1093GT

CITY

Georgetown, Grand Cayman

STATE

POSTAL CODE

COUNTRY

CI

12. ADDITIONAL SPACE FOR ITEM 4 (Collateral):

13. ☐ This FINANCING STATEMENT is to be filed [for record] (or recorded) in the REAL ESTATE RECORDS (if applicable)

14. This FINANCING STATEMENT:

☐ covers timber to be cut ☐ covers as-extracted collateral ☐ is filed as a fixture filing

15. Name and address of a RECORD OWNER of real estate described in item 16 (if Debtor does not have a record interest):

16. Description of real estate:

17. MISCELLANEOUS:

ADDENDUM A TO UCC-1

Debtor/Seller: Aerovías del Continente Americano S.A. Avianca

Secured Party/Buyer: USAVflow Limited

Secured Party Assignee: Citibank, N.A., as Collateral Agent

Description of Collateral:

All of the Debtor's/Seller's Contract Rights and Receivables accrued under the AMEX Contract, the Credomatic Contract and each Additional Card Processing Agreement, whether now existing or hereafter arising, created, or acquired, and all proceeds of the foregoing.

As used herein, the following terms have the following meanings:

"Additional Card Processing Agreement" means a Card Processing Agreement that is the subject of any Contract Rights and Receivables Addition.

"Additional Card Processor" means each person who enters into a Notice and Consent with the Seller in connection with a Contract Rights and Receivables Addition.

"AMEX" means, collectively, American Express Travel Related Services Company, Inc. and American Express Payment Services Limited and their respective affiliates (together with their respective successors or assigns).

"AMEX Contract" means the Airline Card Service Agreement, dated as of October 8, 2013, among AMEX, the Debtor/Seller, Taca International Airlines S.A., Avianca Costa Rica, S.A. (f/k/a Líneas Aéreas Costarricenses S.A.), Trans American Airlines S.A. d/b/a Taca Peru, Aviateca S.A., America Central Corporation, and Lifemiles Corp., and all extensions, amendments, supplements, or replacements of such agreement, pursuant to which AMEX agrees, among other things, to pay for goods and services of the Debtor/Seller purchased in the United States with the American Express® Card.

"Card Processing Agreements" means the AMEX Contract, the Credomatic Contract, and each Additional Card Processing Agreement.

"Card Processors" means Credomatic, AMEX, and each Additional Card Processor.

"Collections" means all cash collections and other cash proceeds derived from the Contract Rights or the Receivables, whether received by the Debtor/Seller, the Secured Party/Buyer, or any other person.

"Contract Rights" means the rights under the Card Processing Agreements to (i) receive any kind of payments, indemnities, or economic compensations 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.

"Contract Rights and Receivables Addition" has the meaning set forth in the RSPA.

“Credomatic” means BAC International Bank, Inc. and its subsidiaries (together with their respective successors or assigns).

“Credomatic Contract” means (a) the CONVENIO REGIONAL DE AVIANCA-GRUPO BAC CREDOMATIC PARA EL PROCESAMIENTO DE TRANSACCIONES DE TARJETAS EN COMERCIOS AFILIADOS, dated as of June 10, 2015, among the Debtor/Seller, Taca International Airlines, S.A. and Credomatic, (b) the MERCHANT APPLICATION & AGREEMENT, dated March 17, 2016, between Avianca, Inc., as agent on behalf of the Debtor/Seller, and Credomatic, (c) the Amendment to the Convenio Regional de Avianca-Grupo BAC Credomatic para el Procesamiento de Transacciones de Tarjetas en Comercios Afiliados, dated as of November 29, 2017, among the Debtor/Seller, Taca International Airlines, S.A., and Credomatic, and (d) the Assignment of Rights Agreement, dated on or about December 12, 2017, and all extensions, amendments, supplements, or replacements of such agreements, pursuant to which Credomatic agrees, among other things, to pay the Debtor/Seller for goods and services of the Debtor/Seller purchased in the United States with Visa® or MasterCard® Cards.

“Notice and Consent” has the meaning set forth in the RSPA.

“Receivables” means any and all Collections accrued under the Card Processing Agreements that are now or hereafter due on account of Specified Sales from AMEX, Credomatic, or any other person who is now or hereafter obligated to make payments under any Card Processing Agreement.

“RSPA” means the Contract Rights and Receivables Sale, Purchase and Servicing Agreement, dated on or about the date hereof, between the Debtor/Seller and the Secured Party/Buyer, as amended, restated, replaced or otherwise modified from time to time.

“Specified Sales” means the sales, including future sales, made by travel agencies in the United States and cleared through Airlines Reporting Corporation (or any successor or replacement thereof) of airline tickets or related services provided by the Debtor/Seller where payment in the case of any such sale is made by a MasterCard® Card, Visa® Card, or American Express® Card, however branded, or any one or more of such Cards.

Doc #: 2017136428
Filed & Recorded
12/12/2017 01:22 PM
IDA WILLIAMS
RECORDER OF DEEDS
WASH DC RECORDER OF DEEDS
RECORDING FEES \$25.00
SURCHARGE \$6.50
TOTAL: \$31.50

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS

A. NAME & PHONE OF CONTACT AT FILER (optional)
B. E-MAIL CONTACT AT FILER (optional)
C. SEND ACKNOWLEDGMENT TO: (Name and Address)
<div style="border: 1px solid black; padding: 10px; margin: 0 auto; width: 80%;"> United Corporate Services, Inc. 100 State Street, Suite 800 Albany, NY 12207 </div>

Print**Reset****THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY**

1. **DEBTOR'S NAME:** Provide only one Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 1b, leave all of item 1 blank, check here ☐ and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

1a. ORGANIZATION'S NAME USAVflow Limited					
OR 1b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX		
1c. MAILING ADDRESS c/o P.O. Box 1093GT, Queensgate House, South Church Street, Georgetown		CITY Grand Cayman	STATE	POSTAL CODE KY1-1102	COUNTRY CYM

2. **DEBTOR'S NAME:** Provide only one Debtor name (2a or 2b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 2b, leave all of item 2 blank, check here ☐ and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

2a. ORGANIZATION'S NAME					
OR 2b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX		
2c. MAILING ADDRESS		CITY	STATE	POSTAL CODE	COUNTRY

3. **SECURED PARTY'S NAME** (or NAME of ASSIGNEE of ASSIGNOR SECURED PARTY): Provide only one Secured Party name (3a or 3b)

3a. ORGANIZATION'S NAME Citibank, N.A.					
OR 3b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX		
3c. MAILING ADDRESS 388 Greenwich Street		CITY New York	STATE NY	POSTAL CODE 10013	COUNTRY USA

4. **COLLATERAL:** This financing statement covers the following collateral:

All assets of Debtor, whether now owned or hereafter acquired or arising.

Citibank, N.A. as Secured Party is acting as Collateral Agent for the benefit of the secured parties under the Security Agreement, dated on or about the date hereof, between Debtor and Secured Party, as amended, amended and restated, supplemented or otherwise modified from time to time.

5. Check <u>only</u> if applicable and check <u>only</u> one box: Collateral is <input type="checkbox"/> held in a Trust (see UCC1Ad, item 17 and Instructions) <input type="checkbox"/> being administered by a Decedent's Personal Representative					
6a. Check <u>only</u> if applicable and check <u>only</u> one box: <input type="checkbox"/> Public-Finance Transaction <input type="checkbox"/> Manufactured-Home Transaction <input type="checkbox"/> A Debtor is a Transmitting Utility			6b. Check <u>only</u> if applicable and check <u>only</u> one box: <input type="checkbox"/> Agricultural Lien <input type="checkbox"/> Non-UCC Filing		
7. ALTERNATIVE DESIGNATION (if applicable): <input type="checkbox"/> Lessee/Lessor <input type="checkbox"/> Consignee/Consignor <input type="checkbox"/> Seller/Buyer <input type="checkbox"/> Bailee/Bailor <input type="checkbox"/> Licensee/Licenser					

8. **OPTIONAL FILER REFERENCE DATA:**

D.C. - ROD 1140677-0003

Doc #: 2017136429
Filed & Recorded
12/12/2017 01:22 PM
IDA WILLIAMS
RECORDER OF DEEDS
WASH DC RECORDER OF DEEDS
RECORDING FEES \$25.00
SURCHARGE \$6.50
TOTAL: \$31.50

EXHIBIT G

Registro Nacional
Registro Bienes Muebles
Sistema de Garantías Mobiliarias

Publicidad Inicial Garantía Mobiliaria

* Fecha de Movimiento: 12/12/2017 9:46:33 AM

* N° Garantía: GM-10224-2017

* Fecha Publicidad Inicial: 12/12/2017 9:46:33 AM

* Información del Acreedor de la Garantía Mobiliaria:

Nombre Social: Usavflow Limited

Tipo de Identificación: Cédula Jurídica

Cédula Jurídica: 3-012-749743

País Residencia: Islas Caimán

Teléfono: 4036-2843

Correo Electrónico Notificaciones: diego.gallegos@ariaslaw.com

Dirección Residencia: Islas Caiman

* Información del Autorizado que ingresó la garantía:

Nombre Completo: Diego Gallegos Chacon

Tipo de Identificación: Cédula de Identidad

N° Identificación: 01-1300-0599

País Residencia: Costa Rica

Teléfono: 6170-1887

Género: Masculino

Correo Electrónico Notificaciones: diego.gallegos@ariaslaw.com

Dirección Residencia: Barrio Jimenez Guadalupe, de Rosti Pollos 50 metros sur 25 oeste

* Información de la garantía mobiliaria:

Fecha Formalización: 12/12/2017

Fecha Vencimiento: 12/12/2022

País de la Moneda: Estados Unidos

Tipo Moneda: Dolar Estadounidense

Monto Crédito: 170,000,000.00 Dolar Estadounidense

Interés Corriente: 0.00%

Interés Moratorio: 0.00%

Monto Máximo: 170,000,000.00 Dolar Estadounidense

Forma Ejecución (Judicial o Extrajudicial): Extrajudicial, según lo establecido en el contrato adjunto.

Observaciones: El plazo y el vencimiento del mismo se encuentra sujeto a la satisfacción por parte del deudor de todas las Obligaciones Garantizadas, tal y como se describen en el contrato adjunto.

Forma de pago: Lo que se garantiza es el derecho del Acreedor Garantizado de asumir los derechos contractuales y las cuentas por cobrar garantizadas. Si se fuese a ejecutar la garantía, los pagos se llevarán acabo tal y como lo establece el contrato adjunto.

Número de Operación del Crédito: N/A

* Contrato adjunto:

Nombre del archivo: DB Avianca - Costa Rican Back-Up Security Agreement - Executed Version.pdf

* Tipos de garantías:

Tipo: Cesión de derechos económicos

Descripción: Los derechos de Aerovías del Continente Americano S.A. Avianca que surjan del Contrato Credomatic.

* Bienes en garantía:

Bien:

Clasificación: Cuentas por Cobrar

Descripción: Los Derechos Contractuales y las Cuentas por Cobrar (tal y como se definen en el contrato de Receivables Sale and Purchase Agreement) pertenecientes a Aerovías del Continente Americano S.A. Avianca bajo el contrato Credomatic firmado entre Taca International Airlines S.A., Aerovías del Continente Americano, S.A. AVIANCA y BAC International Bank Inc., con fecha de 10 de junio de 2015, incluyendo todas sus enmiendas.

* Partes asociadas a la garantía:

Parte:

Tipo de Identificación: Cédula Jurídica

Cédula Jurídica: 3-012-271637

Nombre Social: Aerovías del Continente Americano S.A. Avianca

País Domicilio: Colombia

Teléfono: 4036-2800

Correo Electrónico Notificaciones: lucia.avila@avianca.com

Dirección Residencia: Centro Administrativo, Avenida Calle 26 No. 59-15 Piso 10, Bogota, D.C., Colombia

Otra Información: Para contacto telefónico el número indicado es en Colombia: 571-413-9809

Domicilio Contractual: Centro Administrativo, Avenida Calle 26 No. 59-15

Piso 10, Bogota, D.C., Colombia

Empresa: No Aplica

Tipo de Parte: Deudor

* Actividades Económicas de la Parte:

Transporte

EXHIBIT H

NEW YORK SECURITY AGREEMENT

SECURITY AGREEMENT, dated as of December 12, 2017 (as amended, supplemented or modified from time to time (this “**Agreement**”), is made by and between USAVflow Limited, an exempted company incorporated and registered under the laws of the Cayman Islands (the “**Grantor**”), represented in this act by Peter Lundin, and Citibank, N.A., in its capacity as collateral agent for the Secured Parties (in such capacity, together with its successors and assigns in such capacity, if any, the “**Collateral Agent**”, together with each other party hereto, the “**Parties**” and each individually a “**Party**”) represented in this act by Karen Abarca and Miriam Molina.

RECITALS:

WHEREAS, the Grantor, as borrower, each Person listed as a guarantor on the signature pages thereto, each lender that is a signatory thereto, and each other Person that becomes a “Lender” thereunder (collectively, the “**Lenders**”), the Collateral Agent and Citibank, N.A. as administrative agent (the “**Administrative Agent**”) are parties to the Loan Agreement, dated as of the date hereof (such agreement, as amended, restated, supplemented, modified or otherwise changed from time to time, including any replacement agreement therefor, being hereinafter referred to as the “**Loan Agreement**”);

WHEREAS, pursuant to the Loan Agreement, the Lenders have agreed to make certain term loans (collectively, the “**Loans**”) to the Grantor; and

WHEREAS, it is a condition precedent to the Lenders making any Loan to the Grantor pursuant to the Loan Agreement that the Grantor shall have executed and delivered this Agreement to the Administrative Agent for the benefit of the Secured Parties;

NOW, THEREFORE, in consideration of the premises and the agreements herein and in order to induce the Lenders to make and maintain the Loans to the Grantor pursuant to the Loan Agreement, the Grantor hereby agrees with the Collateral Agent, for the benefit of the Secured Parties, as follows:

SECTION 1. Definitions

(a) Reference is hereby made to the Loan Agreement for a statement of the terms thereof. All capitalized terms used in this Agreement that are defined in the Loan Agreement or in Article 8 or 9 of the Code and which are not otherwise defined herein shall have the same meanings herein as set forth therein; provided that terms used herein which are defined in the Code on the date hereof shall continue to have the same meaning notwithstanding any replacement or amendment of such statute except as the Collateral Agent may otherwise determine.

(b) For the avoidance of doubt, the following terms shall have the respective meanings provided for in the Code: “Accounts”, “Account Debtor”, “Cash Proceeds”, “Chattel Paper”, “Deposit Account”, “Documents”, “Electronic Chattel Paper”, “General Intangibles”, “Instruments”, “Investment Property”, “Letter-of-Credit Rights”, “Noncash

Proceeds”, “Payment Intangibles”, “Proceeds”, “Promissory Notes”, “Record”, “Securities Account” and “Supporting Obligations”.

(c) As used in this Agreement, the following terms shall have the respective meanings indicated below, such meanings to be applicable equally to both the singular and plural forms of such terms:

“**Administrative Agent**” has the meaning assigned to such term in the preamble hereto.

“**Assigned Agreements**” has the meaning assigned to such term in Section 2 hereof.

“**Code**” means the Uniform Commercial Code as in effect from time to time in the State of New York.

“**Collateral**” has the meaning assigned to such term in Section 2 hereof.

“**Costa Rican Collateral**” means all rights to the Collateral derived from the Credomatic Contract as well as any rights of the Grantor as a secured party under the Costa Rican Back-Up Security Agreement.

“**Costa Rican Notary Public**” means a Costa Rican notary public, in good standing and with no legal impediments to act as the enforcer of the Costa Rican Collateral in accordance with the Law on Security over Moveable Assets and this Agreement.

“**Costa Rican Security**” means the security granted over the Costa Rican Collateral (“*bien dado en garantía*”) as understood under the Law on Security over Moveable Assets and incorporating all the rights and obligations that the Law on Security over Moveable Assets grants in relation to such secured collateral.

“**Costa Rican Trustee**” means any legally appointed trustee (“*fiduciario*”) in good standing according to the laws of Costa Rica and able to perform the duties required of a trustee under the Law on Security over Moveable Assets.

“**Filing**” means (a) any UCC financing statement (including continuation statements and amendment statements, as applicable) or (b) any analogous filing, registration or record under applicable law, in each case covering any Collateral, that is filed, registered or recorded with any governmental, municipal or other office.

“**Grantor**” has the meaning assigned to such term in the preamble hereto.

“**Law on Security over Moveable Assets**” means under Costa Rican law, the *Ley de Garantías Mobiliarias*, law number 9246 and its bylaws.

“**Lender**” has the meaning assigned to such term in the Recitals hereto.

“**Loan**” has the meaning assigned to such term in the Recitals hereto.

“**Loan Agreement**” has the meaning assigned to such term in the Recitals hereto.

“**Moveable Asset Security System**” means the *Sistema de Garantías Mobiliarias* as understood under the Law on Security over Moveable Assets.

“**Notice of Registration of Costa Rican Collateral**” means the notice of registration of Costa Rican Collateral delivered by the Grantor to the Collateral Agent in form and substance set out in Exhibit A hereto, evidencing the specific language to be included by the Collateral Agent in the Security Registration Forms. The Notice of Registration of Costa Rican Collateral shall be delivered accompanied by a Spanish translation of such notice.

“**Out of Court Enforcement**” means the enforcement procedure agreed to under this Agreement for the enforcement of the Costa Rican Collateral established in accordance to Articles 57 and 58 of the Law on Security over Moveable Assets (“*ejecución en sede extrajudicial*”).

“**Secured Obligations**” has the meaning assigned to such term in Section 3 hereof.

“**Security Enforcement Form**” means the form or forms required under the Law on Security over Moveable Assets or any other law, regulation, bylaw or otherwise required by the Moveable Asset Security System, the Costa Rican National Registry or any other public or private entity, including any courts or other authority appointed to enforce the Costa Rican Collateral. This term includes the term “*formulario de ejecución*” as utilized in Article 57 of the Law on Security over Moveable Assets.

“**Security Registration Forms**” means the form or forms required under the Law on Security over Moveable Assets or any other law, regulation, bylaw or other regulation, required by the Moveable Asset Security System, the Costa Rican National Registry or any other public or private entity to register and perfect the security interest in the Costa Rican Collateral in favor of the Collateral Agent. This term includes the “*formulario de publicidad inicial*”, “*formulario de modificación*”, “*formulario de cancelación*”, “*formulario de ejecución*” and any other forms” as established in articles 11, 43 and 44 of the Law on Security over Moveable Assets.

“**Termination Date**” means the date on which the Grantor’s obligations under the Credit Documents have been paid or otherwise performed in full and all of the Commitments have been terminated. For the purposes of registration of the Costa Rican Collateral, the termination date shall be the one set out in the Notice of Registration of Costa Rican Collateral and may be adapted from time to time to adjust to the Termination Date of the Credit Documents.

SECTION 2. Grant of Security Interest; Power of Attorney.

(a) As collateral security for the payment, performance and observance of all of the Secured Obligations, the Grantor hereby pledges and assigns to the Collateral Agent (and its agents and designees), and grants to the Collateral Agent (and its agents

and designees), for the benefit of the Secured Parties, a continuing security interest in, all of the following property, wherever located and whether now or hereafter existing and whether now owned or hereafter acquired, all of the Grantor's right, title and interest in (all being collectively referred to herein as the "**Collateral**"):

- (i) the Contract Rights;
- (ii) the Receivables;
- (iii) the Collections;
- (iv) the New York Pass-Through Account;
- (v) the RSPA, the Undertaking Agreement, the Cash Management Agreement, the Costa Rican Assignment Agreement, the Costa Rican Back-Up Security Agreement, the Colombian Back-Up Security Agreement, the Notices and Consents and all other agreements to which the Grantor is a party (each as amended, restated, supplemented, modified or otherwise changed from time to time, collectively the "**Assigned Agreements**"), including (i) all claims of the Grantor for damages arising out of or for breach of or default under the Assigned Agreements and (ii) all rights of the Grantor to terminate, amend, supplement, modify or waive performance under the Assigned Agreements, to perform thereunder and to compel performance and otherwise to exercise all remedies thereunder;
- (vi) all Accounts, Chattel Paper (whether tangible or electronic), Documents, General Intangibles (including Payment Intangibles), Instruments (including Promissory Notes), Investment Property, Letter-of-Credit Rights and Supporting Obligations, in each case, to the extent relating to the Contract Rights, the Receivables, the Collections or the Assigned Agreements;
- (vii) any security interests or liens that the Grantor has in any of the foregoing;
- (viii) all Proceeds, including all Cash Proceeds and Noncash Proceeds, and products of any and all of the foregoing Collateral; and
- (ix) all other proceeds, products, offspring, accessions, rents, profits, income, benefits, substitutions and replacements of and to any and all of the foregoing Collateral (including, without limitation, any proceeds of insurance thereon and all causes of action, claims and warranties now or hereafter held by the Grantor in respect of any of the items listed above), and all books, correspondence, files and other Records, including, without limitation, all tapes, disks, cards, software, data and computer programs in the possession or under the control of the Grantor or any other Person from time to time acting for the Grantor that at any time evidence or contain information relating to any of the foregoing Collateral hereof or are otherwise necessary or helpful in the collection or realization thereof;

in each case, howsoever the Grantor's interest therein may arise or appear (whether by ownership, security interest, claim or otherwise).

(b) Additionally, the Grantor hereby, (i) based on the Law on Security over Moveable Assets and (ii) constituting a Costa Rican Security, grants to the Collateral Agent (and its agents and designees) for the benefit of the Secured Parties, a continuing security interest in the Costa Rican Collateral to secure full, complete and indefeasible performance of the Secured Obligations. With respect to such Costa Rican Collateral, the Collateral Agent may (but shall not be obligated to) at its option exercise from time to time all rights and remedies under this Agreement, the Law on Security over Moveable Assets or any other available legal instrument.

(c) The Grantor hereby authorizes the Collateral Agent to file the Security Registration Forms before the relevant entities. The Collateral Agent may appoint anyone it deems appropriate to act on its behalf to file the Security Registration Forms;

(d) Anything contained herein to the contrary notwithstanding:

(i) the Grantor will remain liable under the Assigned Agreements, to the extent set forth therein, to perform all of its duties and obligations thereunder to the same extent as if this Agreement had not been executed;

(ii) the exercise by the Collateral Agent of any of its rights hereunder will not release the Grantor from any of its duties or obligations under the Assigned Agreements; and

(iii) neither the Collateral Agent nor any other Secured Party will have any obligation or liability under any Assigned Agreement by reason of or arising out of this Agreement or any other document related thereto, nor will the Collateral Agent or any other Secured Party be required or obligated in any manner to perform or fulfill any of the obligations or duties of the Grantor thereunder or to make any payment, or to make any inquiry as to the nature or sufficiency of any payment received by it, or to present or file any claim, or take any action to collect or enforce any claim for payment included in the Collateral.

(e) None of the Collateral Agent, any other Secured Party or any purchaser at a foreclosure sale under this Agreement will be obligated to assume any obligation or liability under any Assigned Agreement unless the Collateral Agent, such other Secured Party or such purchaser otherwise expressly agrees in writing to assume any or all of said obligations or liabilities.

(f) Grantor hereby constitutes and appoints the Collateral Agent its true and lawful attorney, irrevocably, with full power (i) to exercise any right of the Grantor under the Assigned Agreements, and (ii) after the occurrence of and during the continuance of an Event of Default (in the name of Grantor or otherwise) to act, require, demand, receive, compound and give acquittance for any and all moneys and claims for moneys due or to become due to Grantor under or arising out of the Collateral, to endorse any checks or other instruments or orders in connection therewith and to file any claims or take any action or institute any proceedings necessary or advisable (as determined by the Required Lenders) to protect the interests of the Secured Parties, which appointment as attorney is coupled with an interest.

SECTION 3. Security for Secured Obligations. The security interest created hereby in the Collateral constitutes continuing collateral security for all of the following obligations, whether now existing or hereafter incurred (the “**Secured Obligations**”):

(a) the prompt payment by the Grantor, as and when due and payable (whether by scheduled maturity, required prepayment, acceleration, demand or otherwise), of all amounts from time to time owing by the Grantor in respect of the Loan Agreement and/or the other Credit Documents, including, without limitation, all interest, fees, commissions, charges, expense reimbursements, indemnifications and all other amounts due or to become due under any Credit Document (including, without limitation, all interest, fees, commissions, charges, expense reimbursements, indemnifications and other amounts that accrue after the commencement of any proceeding under any Bankruptcy Law of any Obligor, whether or not the payment of such interest, fees, commissions, charges, expense reimbursements, indemnifications and other amounts are unenforceable or are not allowable, in whole or in part, due to the existence of such proceeding); and

(b) the prompt payment and due performance and observance by the Grantor of all of its other obligations from time to time existing in respect of this Agreement and any other Credit Document.

SECTION 4. Guaranteed Amount

For purposes of the Costa Rican Security only, the guaranteed amount will be considered to be of USD \$150,000,000 plus any additional amounts arising out of the Secured Obligations.

SECTION 5. Representations and Warranties. The Grantor represents and warrants as follows:

(a) Schedule I hereto sets forth a complete and accurate list as of the date hereof of (i) the exact legal name of the Grantor, (ii) the jurisdiction of incorporation of the Grantor, (iii) the type of company of the Grantor, (iv) the address of the Grantor's principal place of business, namely its registered office address in the Cayman Islands and (v) the address or addresses where the Grantor keeps its Records concerning Accounts and all originals of all Chattel Paper, in each case, that relate to the Collateral.

(b) The Grantor is and will be at all times the sole and exclusive owner of, or otherwise have and will have adequate rights in, the Collateral free and clear of any Liens (other than the Lien, if any, created by the Receivables Seller in favor of the Grantor, which the Grantor has pledged and assigned to the Collateral Agent hereunder). No effective financing statement or other instrument similar in effect covering all or any part of the Collateral is on file in any recording or filing office, other than financing statements or other instruments in favor of the Collateral Agent or in favor of the Grantor and assigned of record to the Collateral Agent.

(c) This Agreement creates a legal, valid and enforceable first priority security interest in favor of the Collateral Agent, for the benefit of the Secured Parties, in the Collateral, as security for the Secured Obligations.

(d) The Grantor has delivered to the Initial Lenders, for filing in the applicable governmental, municipal or other office specified in Schedule II, true, complete and correct copies of all appropriate Filings containing an accurate description of the Collateral. Such Filings are all of the Filings that are necessary to perfect the security interest in favor of the Collateral Agent (for the benefit of the Secured Parties) in respect of all Collateral in which the Security Interest may be perfected by filing, recording or registration in the United States. No further or subsequent Filing is necessary in the United States, except as provided under applicable law with respect to (i) the filing of continuation statements and (ii) any changes to the Grantor's organizational structure or to the Grantor's organizational documents permitted by the Loan Agreement, as required pursuant thereto in order for the Collateral Agent to continue to have at all times following each such change a legal, valid and perfected security interest in all the Collateral.

(e) The Grantor does not maintain, nor at any time after the date of this Agreement shall establish or maintain, any demand, time, savings, passbook or similar account, except for the New York Pass-Through Account, the Collections Account and the Debt Service Reserve Account.

SECTION 6. Covenants as to the Collateral.

(a) Further Assurances. The Grantor will take such action and execute, acknowledge and deliver, at its sole cost and expense, such agreements, instruments or other documents as may be necessary or required by applicable law or as the Collateral Agent may require from time to time in order (i) to perfect and protect, or maintain the perfection of, the security interest and Lien purported to be created hereby; (ii) to enable the Collateral Agent to exercise and enforce its rights and remedies hereunder in respect of the Collateral; or (iii) otherwise to effect the purposes of this Agreement, including, without limitation: (A) at the request of the Collateral Agent, marking conspicuously all of its Records pertaining to the Collateral with a legend, in form and substance satisfactory to the Collateral Agent, indicating that such Records are subject to the security interest created hereby, (B) if any Account relating to the Collateral shall be evidenced by a Promissory Note or other Instrument or Chattel Paper, delivering and pledging to the Collateral Agent such Promissory Note, other Instrument or Chattel Paper, duly endorsed and accompanied by executed instruments of transfer or assignment, all in form and substance satisfactory to the Collateral Agent, (C) executing or authenticating (to the extent, if any, that the Grantor's signature is required thereon or its authentication is required with respect thereto) and filing of such financing or continuation statements or amendments thereto, (D) furnishing to the Collateral Agent from time to time statements and schedules further identifying and describing the Collateral and such other reports in connection with the Collateral as the Collateral Agent may reasonably request, all in reasonable detail, and (E) taking all actions required by law in any relevant Uniform Commercial Code jurisdiction, or by other law as applicable in any foreign jurisdiction. The Grantor shall not take or fail to take any action which could in any manner impair the validity or enforceability of the Collateral Agent's security interest in and Lien on any Collateral.

(b) Accounts Relating to the Collateral. The Grantor (or the Servicer on its behalf) will, except as otherwise provided in this subsection (b), continue to collect, at its own expense, all amounts due or to become due under the Accounts relating to the Collateral. In

connection with such collections, the Grantor (or the Servicer on its behalf) may (and, at the Collateral Agent's direction, will) take such action as the Grantor (or, if applicable, the Collateral Agent) may deem necessary or advisable to enforce collection or performance of such Accounts; provided, however, that the Collateral Agent shall have the right at any time, to notify the Card Processors or obligors under any such Accounts of the assignment of such Accounts to the Collateral Agent and to direct such Card Processors or obligors to make payment of all amounts due or to become due to the Grantor thereunder in respect of the Collection Rights directly to the Collateral Agent or its designated agent and, upon the occurrence and during the continuance of an Event of Default, to enforce collection of any such Accounts and to adjust, settle or compromise the amount or payment thereof, in the same manner and to the same extent as the Grantor might have done. All amounts and proceeds (including Instruments) received by the Grantor in respect of such Accounts relating to the Collateral shall be received in trust for the benefit of the Collateral Agent hereunder, shall be segregated from other funds of the Grantor and shall be forthwith paid over to the Collateral Agent or its designated agent in the same form as so received (with any necessary endorsement) and applied as specified in the Loan Agreement and the Grantor will not adjust, settle or compromise the amount or payment of any such Account relating to the Collateral or release wholly or partly any Card Processor or obligor thereof or allow any credit or discount thereon. Any such securities, cash, investments and other items so received by the Collateral Agent or its designated agent in respect of the Collateral shall (in the sole and absolute discretion of the Collateral Agent) be held as additional Collateral for the Secured Obligations or distributed in accordance with Section 8 hereof.

(c) Control. The Grantor hereby agrees to take any or all action that may be necessary or desirable or that the Collateral Agent may request in order for the Collateral Agent to obtain control in accordance with Sections 9-104, 9-105, 9-106, and 9-107 of the Code with respect to the following to the extent they relate to the Collateral: (i) Electronic Chattel Paper, (ii) Investment Property and (iii) Letter-of-Credit Rights. The Grantor hereby acknowledges and agrees that any agent or designee of the Collateral Agent shall be deemed to be a “secured party” with respect to the Collateral under the control of such agent or designee for all purposes.

(d) Records; Inspection and Reporting.

(i) The Grantor shall keep adequate records concerning the Collateral.

(ii) The Grantor shall not, without the prior written consent of the Collateral Agent, amend, modify or otherwise change (A) its name, (B) its jurisdiction of incorporation as set forth in Schedule I hereto or (C) its registered office address in the Cayman Islands as set forth in Schedule I hereto. The Grantor shall immediately notify the Collateral Agent in writing upon obtaining an organizational identification number, if on the date hereof, the Grantor did not have such identification number.

(e) New York Pass-Through Account. For the New York Pass-Through Account, the Grantor shall cause the U.S. Account Bank to execute and deliver to the Collateral Agent, on or prior to the date hereof, the Account Control Agreement.

SECTION 7. Additional Provisions Concerning the Collateral.

(a) To the maximum extent permitted by applicable law, and for the purpose of taking any action that the Collateral Agent may deem necessary or advisable to accomplish the purposes of this Agreement, the Grantor hereby (i) authorizes the Collateral Agent to execute any such agreements, instruments or other documents in the Grantor's name and to file such agreements, instruments or other documents in the Grantor's name and in any appropriate filing office, (ii) authorizes the Collateral Agent at any time and from time to time to file, one or more financing or continuation statements and amendments thereto, relating to the Collateral and (iii) ratifies such authorization to the extent that the Collateral Agent has filed any such financing statements, continuation statements, or amendments thereto, prior to the date hereof; *provided, however*, that, without limiting the foregoing, the Collateral Agent shall not be responsible for preparing, executing or filing any financing or continuation statements or any amendments thereto, for authenticating any signature of the Grantor, or otherwise for perfecting or maintaining the perfection of any security interest in the Collateral (including the Costa Rican Collateral). A photocopy or other reproduction of this Agreement or any financing statement covering the Collateral or any part thereof shall be sufficient as a financing statement where permitted by law.

(b) The Grantor hereby irrevocably appoints the Collateral Agent as its attorney-in-fact and proxy, with full authority in the place and stead of the Grantor and in the name of the Grantor or otherwise, from time to time in the Collateral Agent's discretion, to take any action and to execute any instrument that the Collateral Agent may deem necessary or advisable to accomplish the purposes of this Agreement, including, without limitation, (i) to ask, demand, collect, sue for, recover, compound, receive and give acquittance and receipts for moneys due and to become due under or in respect of any Collateral, (ii) to receive, endorse, and collect any drafts or other Instruments, Documents and Chattel Paper in connection with preceding clause (i), (iii) to receive, endorse and collect all Instruments made payable to the Grantor representing any dividend, interest payment or other distribution in respect of any Collateral and to give full discharge for the same, (iv) to file any claims or take any action or institute any proceedings which the Collateral Agent may deem necessary or desirable for the collection of any Collateral or otherwise to enforce the rights of each Secured Party with respect to any Collateral, (v) to execute assignments, licenses and other documents to enforce the rights of each Secured Party with respect to any Collateral, (vi) to pay or discharge taxes or Liens levied or placed upon or threatened against the Collateral, the legality or validity thereof and the amounts necessary to discharge the same to be determined by the Collateral Agent (in its sole discretion), and such payments made by the Collateral Agent shall constitute additional Secured Obligations of the Grantor to the Collateral Agent, be due and payable immediately without demand, and shall bear interest from the date payment of said amounts is demanded at the rate set forth in Section 2.5.6 of the Loan Agreement, and (vii) to sign and endorse any invoices, freight or express bills, bills of lading, storage or warehouse receipts, assignments, verifications and notices in connection with Accounts, Chattel Paper and other documents relating to the Collateral. This power is coupled with an interest and is irrevocable until the Termination Date.

(c) If the Grantor fails to perform any agreement or obligation contained herein, the Collateral Agent may itself perform, or cause performance of, such

agreement or obligation, in the name of the Grantor or the Collateral Agent, and the fees and expenses of the Collateral Agent incurred in connection therewith shall be payable by the Grantor pursuant to Section 13(g) hereof constitute additional Secured Obligations of the Grantor to the Collateral Agent, be due and payable immediately without demand and bear interest from the date payment of said amounts is demanded at the rate set forth in Section 2.5.6 of the Loan Agreement.

(d) The powers conferred on the Collateral Agent hereunder are solely to protect the interests of the Secured Parties in the Collateral and shall not impose any duty upon it to exercise any such powers. Other than the exercise of reasonable care to assure the safe custody of any Collateral in its possession and the accounting for moneys actually received by it hereunder, the Collateral Agent shall have no duty as to any Collateral or as to the taking of any necessary steps to preserve rights against other parties or any other rights pertaining to any Collateral and shall be relieved of all responsibility for any Collateral in its possession upon surrendering it or tendering surrender of it to the Grantor (or whomsoever shall be lawfully entitled to receive the same or as a court of competent jurisdiction shall direct). The Collateral Agent shall be deemed to have exercised reasonable care in the custody and preservation of any Collateral in its possession if such Collateral is accorded treatment substantially equal to that which the Collateral Agent accords its own property; it being understood that the Collateral Agent shall not have responsibility for ascertaining or taking action with respect to calls, conversions, exchanges, maturities, tenders or other matters relating to any Collateral, whether or not the Collateral Agent has or is deemed to have knowledge of such matters. The Collateral Agent shall not be liable or responsible for any loss or damage to any of the Collateral, or for any diminution in the value thereof, by reason of the act or omission of any warehouseman, carrier, forwarding agency, consignee or other agent or bailee selected by the Collateral Agent in good faith.

(e) The Grantor hereby authorizes the Secured Parties to file any such financing statements without the signature of such Assignor where permitted by law (and such authorization includes describing the Collateral as "all assets of Debtor, whether now owned or hereafter acquired or arising." of such Grantor).

SECTION 8. Remedies Upon Default. If any Event of Default shall have occurred and be continuing:

(a) The Collateral Agent may exercise in respect of the Collateral, in addition to any other rights and remedies provided for herein or otherwise available to it, all of the rights and remedies of a secured party upon default under the Code (whether or not the Code applies to the affected Collateral), and also may (i) take absolute control of the Collateral, including, without limitation, transfer into the Collateral Agent's name or into the name of its nominee or nominees (to the extent the Collateral Agent has not theretofore done so) and thereafter receive, for the benefit of each Secured Party, all payments made thereon, give all consents, waivers and ratifications in respect thereof and otherwise act with respect thereto as though it were the outright owner thereof, (ii) require the Grantor to, and the Grantor hereby agrees that it will, at its expense and upon request of the Collateral Agent forthwith, assemble all or part of the Collateral as directed by the Collateral Agent and make it available to the Collateral Agent at a place or places to be designated by the Collateral Agent that is reasonably

convenient to both parties, and (iii) without notice except as specified below and without any obligation to prepare or process the Collateral for sale, sell the Collateral or any part thereof at public or private sale, at any of the Collateral Agent's offices, at any exchange or broker's board or elsewhere, for cash, on credit or for future delivery, and at such price or prices and upon such other terms as the Collateral Agent may deem commercially reasonable. The Grantor agrees that, to the extent notice of sale or any other disposition of the Collateral shall be required by law, at least 10 days' prior notice to the applicable Grantor of the time and place of any public sale or the time after which any private sale or other disposition of the Collateral is to be made shall constitute reasonable notification. If the Collateral Agent sells any of the Collateral upon credit, the Grantor will be credited only with payments actually received by the Collateral Agent from the purchaser thereof, and if such purchaser fails to pay for the Collateral, the Collateral may resell the Collateral and the Grantor shall be credited with proceeds of the sale. The Collateral Agent shall not be obligated to make any sale or other disposition of Collateral regardless of notice of sale having been given. The Collateral Agent may adjourn any public or private sale from time to time by announcement at the time and place fixed therefor, and such sale may, without further notice, be made at the time and place to which it was so adjourned. The Grantor hereby waives any claims against each Secured Party arising by reason of the fact that the price at which the Collateral may have been sold at a private sale was less than the price which might have been obtained at a public sale or was less than the aggregate amount of the Secured Obligations, even if the Collateral Agent accepts the first offer received and does not offer the Collateral to more than one offeree, and waives all rights that the Grantor may have to require that all or any part of the Collateral be marshaled upon any sale (public or private) thereof. The Grantor hereby acknowledges that (A) any such sale of the Collateral by the Collateral Agent shall be made without warranty, (B) the Collateral Agent may specifically disclaim any warranties of title, possession, quiet enjoyment or the like, (C) the Collateral Agent may bid (which bid may be, in whole or in part, in the form of cancellation of indebtedness), if permitted by law, for the purchase, lease, license or other disposition of the Collateral or any portion thereof for the account of the Collateral Agent (on behalf of itself and each Secured Party) and (D) such actions set forth in clauses (A), (B) and (C) above shall not adversely affect the commercial reasonableness of any such sale of the Collateral.

(b) Any cash held by the Collateral Agent (or its agent or designee) relating to the Collateral and all Cash Proceeds received by the Collateral Agent (or its agent or designee) in respect of any sale of or collection from, or other realization upon, all or any part of the Collateral, may, in the discretion of the Collateral Agent, be held by the Collateral Agent (or its agent or designee) as Collateral for, and/or then or at any time thereafter applied (after payment of any amounts payable to the Collateral Agent pursuant to Section 13(g) hereof) in whole or in part by the Collateral Agent against, all or any part of the Secured Obligations in such order as the Collateral Agent shall elect, consistent with the provisions of the Loan Agreement. Any surplus of such cash or Cash Proceeds held by the Collateral Agent (or its agent or designee) and remaining after the Termination Date shall be paid over to whomsoever shall be lawfully entitled to receive the same or as a court of competent jurisdiction shall direct.

(c) [Reserved.]

(d) The Grantor hereby acknowledges that if the Collateral Agent

complies with any applicable requirements of law in connection with a disposition of the Collateral, such compliance will not adversely affect the commercial reasonableness of any sale or other disposition of the Collateral.

(e) The Collateral Agent shall not be required to marshal any present or future collateral security (including, but not limited to, this Agreement and the Collateral) for, or other assurances of payment of, the Secured Obligations or any of them or to resort to such collateral security or other assurances of payment in any particular order, and all of the Collateral Agent's rights hereunder and in respect of such collateral security and other assurances of payment shall be cumulative and in addition to all other rights, however existing or arising. To the extent that the Grantor lawfully may, the Grantor hereby agrees that it will not invoke any law relating to the marshalling of collateral which might cause delay in or impede the enforcement of the Collateral Agent's rights under this Agreement or under any other instrument creating or evidencing any of the Secured Obligations or under which any of the Secured Obligations is outstanding or by which any of the Secured Obligations is secured or payment thereof is otherwise assured, and, to the extent that it lawfully may, the Grantor hereby irrevocably waives the benefits of all such laws.

(f) Notwithstanding the foregoing and any provision to the contrary herein, amounts credited to the New York Pass-Through Account shall be transferred to the Collections Account in accordance with the Loan Agreement, to be applied as described in the Cash Management Agreement.

SECTION 9. Remedies Upon Default for the Costa Rican Collateral. Notwithstanding any remedies available to the Collateral Agent under this Agreement, the following shall be applicable with respect to the enforcement of Costa Rican Collateral in the Republic of Costa Rica:

(a) Forced Assignment of Collections and Contract Rights.

(i) If an Event of Default has occurred and is continuing, the Collateral Agent may provide notice of such event to the Grantor and submit the Security Enforcement Form before the relevant Costa Rican authorities under the Law on Security over Moveable Assets.

(ii) To the extent that a Security Enforcement Form is filed, the Collateral Agent may request in writing to the Grantor to (i) wire any Collections received and not previously wired or transferred at that moment to the Collections Account and (ii) to assign the Contract Rights not previously assigned to the Collateral Agent.

(iii) The Collateral Agent may also notify Grantor's applicable counterparties of the assignment of the Costa Rican Collateral and instruct them to (i) wire any Collections to be sent to Grantor to the Collections Account, or any other such account that the Collateral Agent instructs and (ii) to take note of and implement the assignment of Contract Rights in favor of the Collateral Agent.

(b) Out of Court Enforcement

(i) The Parties fully and irrevocably agree that after an Event of Default has occurred and is continuing, the Collateral Agent may, in addition to the Forced Assignment of Collections and Contract Rights outlined above and to any other rights and remedies provided for herein or otherwise available to it, exercise all of the rights and remedies of a secured party upon default under the Law on Security over Moveable Assets, including the forced sale of the Costa Rican Collateral through Out of Court Enforcement.

(ii) Appointment of Enforcement Agent. Upon registration of the Security Enforcement Form, the Collateral Agent may appoint a Costa Rican Notary Public or Costa Rican Trustee to serve as the person designated to enforce its security interest in the Costa Rican Collateral through the Out of Court Enforcement (the “**Enforcement Agent**”); it being understood and agreed that the Collateral Agent shall have no responsibility for or incur any liability in respect of any actions taken or not taken by any such Enforcement Agent.

(iii) Within two (2) business days of being appointed as such, the Enforcement Agent shall be required to provide notice to the Grantor so that it can, within a term of five (5) business days after receiving such notice, provide documentation evidencing payment of all Secured Obligations (“**Full Performance**”).

(iv) If Full Performance is not properly evidenced at the end of such term, the Enforcement Agent may proceed with the forced sale or auction of the Collateral.

(v) If the Enforcement Agent is instructed to proceed with the forced sale or auction of the Collateral, it shall publish a notice of sale in a Costa Rican newspaper of national circulation with at least 8 days’ notice prior to the date of the sale or auction. Such notice must indicate the time, place and date of the sale as well as a brief description of the assets to be sold, a base price and parameters for additional base prices were they to be adjusted for auction. Written notice of the sale must also be provided to all interested parties which have a legal right over the Costa Rican Collateral in accordance to article 57 of the Law on Security over Moveable Assets.

(vi) If the first auction is unsuccessful, the Enforcement Agent, at the direction of the Collateral Agent, may hold a second and up to a third auction. Such auctions may be held immediately after the first auction or at later dates that shall not be set at more than ten (10) business days after the immediately preceding auction. In each succeeding auction the Enforcement Agent will set lower base prices in accordance with the parameters established in the notice published before the first auction. If the third auction is unsuccessful, the Costa Rican Collateral will be awarded to the Collateral Agent as payment for the base price of the third auction.

(vii) From the sale or auction, the Enforcement Agent will prepare an affidavit to be signed by the Enforcement Agent and the purchaser of the Costa Rican Collateral. Upon payment of the price in the sale or auction, the Enforcement Agent shall grant evidence of title to the purchaser. The transfer of title over the Collateral in the event of a forced sale or auction will be free of any liens established pursuant to this Agreement.

SECTION 10. Notices, Etc. All notices and other communications provided for

hereunder shall be given in accordance with Section 8.3 of the Loan Agreement. For purposes of the registration of the Costa Rican Collateral, the notice addresses shall be as set out in the Notice of Registration of Costa Rican Collateral and may be adapted from time to time in accordance with Section 8.3 of the Loan Agreement.

SECTION 11. Security Interest Absolute.

(a) All rights of the Secured Parties, all Liens and all obligations of each of the Grantor hereunder shall be absolute and unconditional irrespective of (i) any lack of validity or enforceability of the Loan Agreement or any other Credit Document, (ii) any change in the time, manner or place of payment of, or in any other term in respect of, all or any of the Secured Obligations, or any other amendment or waiver of or consent to any departure from the Loan Agreement or any other Credit Document, (iii) any exchange or release of, or non-perfection of any Lien on any Collateral, or any release or amendment or waiver of or consent to departure from any guaranty, for all or any of the Secured Obligations, (iv) any release of or consent to the departure of any Guarantor from the Loan Agreement or any other Credit Document or (v) any other circumstance that might otherwise constitute a defense available to, or a discharge of, the Grantor in respect of the Secured Obligations. All authorizations and agencies contained herein with respect to any of the Collateral are irrevocable and powers coupled with an interest.

(b) The Grantor hereby waives (i) promptness and diligence, (ii) notice of acceptance and notice of the inurrence of any Secured Obligation, (iii) notice of any actions taken by the Collateral Agent, any Lender, or any other Person under any Credit Document or any other agreement, document or instrument relating thereto, (iv) all other notices, demands and protests, and all other formalities of every kind in connection with the enforcement of the Secured Obligations, the omission of or delay in which, but for the provisions of this subsection (b), might constitute grounds for relieving the Grantor of any of the Grantor's obligations hereunder and (v) any requirement that any Agent or any Lender protect, secure, perfect or insure any security interest or other lien on any property subject thereto or exhaust any right or take any action against the Grantor or any other Person or any collateral.

SECTION 12. Limited Recourse.

(a) Notwithstanding any other provision of this Agreement, each party hereto hereby agrees that the Grantor's obligations under this Agreement shall be limited recourse obligations of the Grantor, with recourse against the Grantor being limited to the Collateral and the actual amount derived from the Collateral (including the proceeds of any contingent claims that are included in the Collateral, other than the ordinary share capital and any transaction fee charged by the Grantor pursuant to the Administration Agreement) of the Grantor at such time available for application by or on behalf of the Grantor in making payments in accordance with this Agreement. The parties hereby acknowledge and agree that the Grantor's obligations under this Agreement are solely the corporate obligations of the Grantor, and that none of the officers, directors, shareholders or agents of the Grantor, any of its Affiliates or any other Person, other than the Guarantors, shall be personally liable to make any payments of principal, interest or any other sum now or hereafter owing by the Grantor hereunder. Without limitation of the obligations of the Guarantors under the Credit Documents, after the Grantor's

Collateral (including the proceeds of any contingent claims that are included in the Collateral, other than the ordinary share capital and any transaction fee charged by the Grantor pursuant to the Administration Agreement) is realized and exhausted, all sums due but still unpaid in respect of the Grantor's obligations hereunder shall be extinguished and shall not thereafter revive with respect to the Grantor and its liability hereunder, and the parties hereto shall not have the right to proceed against the Grantor or any of its Affiliates or any of its officers, directors, shareholders or agents for the satisfaction of any monetary claim or for any deficiency judgment remaining after foreclosure of any of its assets, it being agreed that the Guarantors shall remain liable for all of such obligations.

(b) No party hereto shall take any steps for the purpose of procuring the appointment of any examiner, administrator, liquidator, provisional liquidator or bankruptcy trustee or the making of any administrative order or court order or application or for instituting any bankruptcy, examinership, reorganization, arrangement, insolvency, winding up, liquidation, composition or any like proceedings under applicable Law in respect of the Grantor or its Affiliates or in respect of any of their liabilities, including, without limitation, as a result of any claim or interest of such parties; provided that nothing in this Section 12(b) shall prohibit or restrict the appointment of a Receiver and/or Delegate under and/or in accordance with and/or as contemplated by any provisions of the U.K. Account Charge.

(c) The provisions of this Section 12 shall survive termination of this Agreement.

SECTION 13. Miscellaneous.

(a) No amendment of any provision of this Agreement (including any Schedule attached hereto) shall be effective unless it is in writing and signed by the parties hereto, and no waiver of any provision of this Agreement, and no consent to any departure by the Grantor therefrom, shall be effective unless it is in writing and signed by the Collateral Agent, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

(b) No failure on the part of the Collateral Agent (on behalf of the Secured Parties) or the Secured Parties to exercise, and no delay in exercising, any right hereunder or under any other Credit Document shall operate as a waiver thereof; nor shall any single or partial exercise of any such right preclude any other or further exercise thereof or the exercise of any other right. The rights and remedies of the Secured Parties provided herein and in the other Credit Documents are cumulative and are in addition to, and not exclusive of, any rights or remedies provided by law. The rights of the Secured Parties under any Credit Document against any party thereto are not conditional or contingent on any attempt by such Person to exercise any of its rights under any other Credit Document against such party or against any other Person, including but not limited to, the Grantor.

(c) This Agreement shall create a continuing security interest in the Collateral and shall (i) remain in full force and effect, subject to paragraph (e) below, until the Termination Date and (ii) be binding on the Grantor all other Persons who become bound as debtor to this Agreement in accordance with Section 9-203(d) of the Code, and shall inure,

together with all rights and remedies of the Secured Parties hereunder, to the benefit of the Secured Parties and their respective successors, transferees and assigns. Without limiting the generality of clause (ii) of the immediately preceding sentence, each Secured Party may assign or otherwise transfer its respective rights and obligations under this Agreement and any other Credit Document to any other Person pursuant to the terms of the Loan Agreement, and such other Person shall thereupon become vested with all of the benefits in respect thereof granted to the Secured Parties herein or otherwise. Upon any such assignment or transfer, all references in this Agreement to any Secured Party shall mean the assignee of any such Secured Party. None of the rights or obligations of the Grantor hereunder may be assigned or otherwise transferred without the prior written consent of the Collateral Agent, and any such assignment or transfer shall be null and void.

(d) After the occurrence of the Termination Date, (i) subject to paragraph (e) below, this Agreement and the security interests and licenses created hereby shall terminate and all rights to the Collateral shall revert to the Grantor, and (ii) the Collateral Agent will, upon the Grantor's request and at the Grantor's cost and expense, (A) request the cancelation of the registration of the security interest over the Costa Rican Collateral before the Moveable Asset Security System (B) promptly return to the Grantor (or whomsoever shall be lawfully entitled to receive the same or as a court of competent jurisdiction shall direct) such of the Collateral as shall not have been sold or otherwise disposed of or applied pursuant to the terms hereof, and (C) promptly execute and deliver to the Grantor such documents as the Grantor shall reasonably request to evidence such termination, without representation, warranty or recourse of any kind. In addition, upon any sale or disposition of any item of Collateral in a transaction expressly permitted under the Loan Agreement, the Collateral Agent agrees to execute a release of its security interest in such item of Collateral, and the Collateral Agent shall, upon the reasonable written request of the Grantor and at the Grantor's cost and expense, execute and deliver to the Grantor such documents as the Grantor shall reasonably request to evidence such release, without representation, warranty or recourse of any kind.

(e) This Agreement shall remain in full force and effect and continue to be effective should any petition be filed by or against the Grantor for liquidation or reorganization, should the Grantor become insolvent or make an assignment for the benefit of any creditor or creditors or should a receiver or trustee be appointed for all or any significant part of the Grantor's assets, and shall continue to be effective or be reinstated, as the case may be, if at any time payment or performance of the Secured Obligations, or any part thereof, is, pursuant to applicable law, rescinded or reduced in amount, or must otherwise be restored or returned by any obligee of the Secured Obligations, whether as a "voidable preference," "fraudulent conveyance," or otherwise, all as though such payment or performance had not been made. In the event that any payment, or any part thereof, is rescinded, reduced, restored or returned, the Secured Obligations shall be reinstated and deemed reduced only by such amount paid and not so rescinded, reduced, restored or returned.

(f) THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK (NOT INCLUDING SUCH STATE'S CONFLICT OF LAWS PROVISIONS OTHER THAN SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW).

(g) In addition to and without limitation of any of the foregoing, this Agreement shall be deemed to be a Credit Document and shall otherwise be subject to all of terms and conditions contained in Sections 8.5, 8.6, 8.7 and 8.9 of the Loan Agreement, *mutatis mutandi*.

(h) Each party to this Agreement irrevocably consents to service of process in the manner provided for in Section 8.10 of the Loan Agreement. Nothing in this Agreement will affect the right of any party to this Agreement to serve process in any other manner permitted by law.

(i) The Grantor irrevocably and unconditionally waives any right it may have to claim or recover in any legal action, suit or proceeding with respect to this Agreement any special, exemplary, punitive or consequential damages.

(j) Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining portions hereof or affecting the validity or enforceability of such provision in any other jurisdiction.

(k) Section headings herein are included for convenience of reference only and shall not constitute a part of this Agreement for any other purpose.

(l) This Agreement may be executed in any number of counterparts and by the different parties hereto on separate counterparts, each of which shall be deemed an original, but all of such counterparts taken together shall constitute one and the same agreement. Delivery of an executed counterpart of this Agreement by facsimile or electronic mail shall be equally effective as delivery of an original executed counterpart.

(m) Any reference to the Collateral Agent in this Agreement shall be construed as a reference to the Collateral Agent acting as agent for and on behalf of the Secured Parties and in accordance with the terms of the Loan Agreement, and in each case acting on instructions of Lenders given under the Loan Agreement. The Collateral Agent shall be entitled to all of the rights, benefits, privileges, protections and indemnities provided to it in the Loan Agreement as if specifically set forth herein.

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IN WITNESS WHEREOF, the Grantor and the Collateral Agent have caused this Agreement to be executed and delivered by their respective officers thereunto duly authorized, as of the date first above written.

USAVFLOW LIMITED, as Grantor


By: 

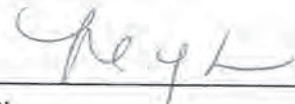
Name: Peter Lundin

Title: Director

Location: Grand Cayman, Cayman Islands

CITIBANK, N.A., as Collateral Agent

By: 
Name: Karen Abarca
Title: Vice President
Location: New York, NY

By: 
Name:
Title: Miriam Molina
Location: Vice President
New York, NY

SCHEDULE I

LEGAL NAME; JURISDICTION OF ORGANIZATION;
TYPE OF ORGANIZATION; LOCATIONS

Legal Name	Jurisdiction of Incorporation	Type of Company	Location of Principal Place of Business	Address where the Grantor keeps its Records concerning Accounts and all originals of all Chattel Paper, in each case, that relate to the Collateral.
USAVflow Limited	Cayman Islands	Exempted Company with Limited Liability	Offices of MaplesFS Limited Queensgate House Grand Cayman, KY1-1102 Cayman Islands	Offices of the Servicer Centro Administrativo Avenida Calle 26 No. 59-15 Piso 10 Bogotá, D.C., Colombia Attn: Vicepresidente Financiero

Exhibit A

Form of Notice of Registration of Costa Rican Collateral

Information to be included by the Collateral Agent in the Security Registration Forms

Lender Information

Name: Citibank, N.A.

Identification Type: Corporate identification number.

Identification Number: 3-012-114186.

Country of Residence: Costa Rica.

Address of Residence: San José, Costa Rica.

General Information

Initial Date: December 12, 2017

Termination Date: December 12, 2022

Country of Currency: United States of America.

Currency: United States Dollars.

Amount: 150,000,000.00.

Standard Interest: 4.75%

Default Interest: 6.75%

Maximum Guaranteed Amount: 150,000,000.00.

Execution (Judicial or Extrajudicial): Extrajudicial.

Observations: The standard and default interest rates are in addition to LIBOR, as defined in the Loan Agreement. Definition of interest to be paid is made in accordance to Section 2.5 of the Loan Agreement and that clause will govern all matters related to the interest rate to be paid.

Form of payment, payment schedule: Payment will be made according to Section 2.4 of the Loan Agreement.

Operation number: N/A.

Collateral

***Type of Inclusion:** Assignment of Economic Rights.

Observations: All of USAV Flow's rights over the (i) Contract Rights, (ii) the Receivables and (iii) the Collections arising out of the Credomatic Contract as well as all rights USAV flow may have as a secured party under the Costa Rican Back-Up Security Agreement.

***Classification of Collateral:** Accounts Receivable.

Description of Collateral: Credomatic Contract by and among Taca International Airlines S.A., Aerovias del Continente Americano, S.A. AVIANCA, and Bac International Bank Inc. dated as of June 10, 2015, as amended to this date.

Costa Rican Back Up Security Agreement by and among Aerovias del Continente Americano, S.A. AVIANCA and USAVFLOW Limited, dated as of December 12, 2017, with registration number in the Moveable Asset Security System _____.

Parties Associated to the Collateral

***Borrower/Assignor:**

Identification Type: Corporate identification number.

Identification Number: 3-012-749743

Name: USAVFLOW LIMITED

Country of Residence: Cayman Islands

Phone Number: 40362800

Email: info@maplesfinance.com

Address of Residence: P.O. Box 1093GT, Queensgate House, South Church Street, Georgetown, Grand Cayman, Cayman Islands.

Other Information: to contact via phone number, contact at the Cayman Islands phone number (345) 945-7099.

Contractual Address: Cayman Islands, P.O. Box 1093GT, Queensgate House, South Church Street, Georgetown, Grand Cayman

Exact Address: P.O. Box 1093GT, Queensgate House, South Church Street, Georgetown, Grand Cayman, Cayman Islands

Type of entity: Assignor

Economic Activity: Commercial

EXHIBIT I



ACCOUNT CONTROL AGREEMENT

among

USAVFLOW LIMITED, as PLEDGOR

CITIBANK, N.A., as SECURED PARTY

and

CITIBANK, N.A., as BANK

THIS ACCOUNT CONTROL AGREEMENT (this “**Agreement**”), dated as of December 12, 2017, by and among USAVflow Limited, an exempted company incorporated and registered under the laws of the Cayman Islands (the “**Pledgor**”), and Citibank, N.A., a national banking association organized and existing under the laws of the United States of America (“**Citibank**”) and acting through its Agency & Trust Division solely in its capacities as Collateral Agent for the Lenders and other Secured Parties (as such terms are defined in the Security Agreement (as defined below)) (the “**Secured Party**”) and bank under this Agreement, and any successors appointed pursuant to the terms hereof (Citibank in such capacity, the “**Bank**”).

WHEREAS, the Pledgor and the Secured Party have entered into a Security Agreement (“**Security Agreement**”), dated as of December 12, 2017, pursuant to which the Pledgor has granted the Secured Party a security interest in account #11925000, an account established and maintained by the Bank for the Pledgor (the “**Account**”).

WHEREAS, the parties wish that the Bank enter into this Agreement in order to provide for the “control” (as defined in Section 9-104(a) of the Uniform Commercial Code in effect in the State of New York (“**UCC**”), in the case of a deposit account or Section 8-106 of the UCC, in the case of a security account) of the account as a means to perfect the security interest of the Secured Party.

WHEREAS, capitalized terms used herein without definition and that are defined in Article 8 or Article 9 of the UCC shall have the respective meanings set forth therein.

NOW, THEREFORE, for good and valuable consideration, the receipt and adequacy of which is hereby irrevocably acknowledged, the parties hereto agree as follows:

1. The Account. The Pledgor and the Bank represent and warrant to, and agree with the Secured Party that:

(a) The Bank maintains the Account for the Pledgor, and all property (including, without limitation, all funds) held by the Bank for the account of the Pledgor are, and will continue to be, credited to the Account in accordance with instructions given by the Pledgor (unless otherwise provided herein).

(b) The Account is a deposit account. The Bank is the bank with which the Account is maintained. The Pledgor is the Bank’s customer with respect to the Account.

(c) Notwithstanding any other agreement to the contrary, the Bank’s jurisdiction with respect to the Account for purposes of the UCC is, and will continue to be for so long as the Secured Party’s security interest shall be in effect, the State of New York.

(d) The Pledgor and the Bank do not know of any claim to or interest in the Account or any property (including, without limitation, funds) credited to the Account,

except for claims and interests of the parties referred to in this Agreement.

2. Control over Account.

The Bank shall comply with all instructions and notifications that the Bank receives directing the disposition of funds in the Account including, without limitation, directions to distribute proceeds of any such transfer or redemption of interest in the Account (“**Account Direction**”), in each case originated by the Secured Party. The Account shall be under the sole dominion and control of the Secured Party. None of the Pledgor, nor any other person or entity, acting through or under the Pledgor, shall have any control over the use of, or any right to withdraw any amount from, the Account.

3. Priority of Secured Party’s Security Interest. The Bank subordinates in favor of the Secured Party any interest, lien or right of setoff it may have, now or in the future, against the Account or assets in the Account; *provided; however*, that, subject to the foregoing, the Bank may set off all amounts due to it in respect of its fees and expenses (including without limitation the payment of any legal fees or expenses) or any amounts payable pursuant to Section 4 hereof.

4. Transfer of Funds; Tax Reporting.

(a) Initially, until otherwise directed by the Secured Party, the Bank shall transfer all funds received in the Account promptly, and in any event on the Business Day on which they are received if received on or before 11:00 a.m. New York City time, by wire transfer to the Collections Account pursuant to the instructions set forth on Schedule B. Any funds received after 11:00 a.m. New York City time shall be transferred on the immediately succeeding Business Day. Funds held in the Account shall remain uninvested. For purposes of this Agreement “**Business Day**” shall mean any day that the Bank is open for business.

(b) The Pledgor and the Secured Party agree that any earnings or proceeds received on or distributions of earnings or proceeds from the assets in the Account during a calendar year period shall be treated as the income of the Pledgor and shall be reported on an annual basis by the Bank on the appropriate United States Internal Revenue Service (“**IRS**”) Form 1099 (or IRS Form 1042-S), as required pursuant to the Internal Revenue Code of 1986, as amended (the “**Code**”) and the regulations thereunder.

(c) The Pledgor and the Secured Party shall upon the execution of this Agreement provide the Bank with a duly completed and properly executed IRS Form W-9 or applicable IRS Form W-8, in the case of a non-U.S. person, for each payee, together with any other documentation and information requested by the Bank in connection with the Bank’s tax reporting obligations under the Code and the regulations thereunder. With respect to the Bank’s tax reporting obligations under the Code, the Foreign Account Tax Compliance Act and the Foreign Investment in Real Property Tax Act and any other applicable law or regulation, the Pledgor and the Secured Party understand, that, in the event valid U.S. tax forms or other required supporting documentation are not provided

to the Bank, the Bank may be required to withhold tax from the assets in the Account and report account information on any earnings, proceeds or distributions from the assets in the Account.

(d) Should the Bank become liable for the payment of taxes, including withholding taxes relating to any funds, including interest and penalties thereon, held by it pursuant to this Agreement or any payment made hereunder, the Bank shall satisfy such liability to the extent possible from the assets in the Account. The Pledgor agrees to indemnify and hold the Bank harmless pursuant to Section 6 hereof from any liability or obligation on account of taxes, assessments, interest, penalties, expenses and other governmental charges that may be assessed or asserted against the Bank.

(e) The Bank's rights under this Section shall survive the termination of this Agreement or the resignation or removal of the Bank.

5. Concerning the Bank.

(a) Bank Duties. Each of the Pledgor and the Secured Party acknowledges and agrees that (i) the duties, responsibilities and obligations of the Bank shall be limited to those expressly set forth in this Agreement, each of which is administrative or ministerial (and shall not be construed to be fiduciary in nature), and no duties, responsibilities or obligations shall be inferred or implied, (ii) the Bank shall not be responsible for any of the agreements referred to or described herein (including without limitation the Security Agreement), or for determining or compelling compliance therewith, and shall not otherwise be bound thereby, and (iii) the Bank shall not be required to expend or risk any of its own funds to satisfy payments from the Account hereunder.

(b) Liability of Bank. The Bank shall not be liable for any damage, loss or injury resulting from any action taken or omitted in the absence of gross negligence or willful misconduct (as finally adjudicated by a court of competent jurisdiction). In no event shall the Bank be liable for indirect, incidental, consequential, punitive or special losses or damages (including but not limited to lost profits), regardless of the form of action and whether or not any such losses or damages were foreseeable or contemplated. The Bank shall be entitled to rely upon any instruction, notice, request or other instrument delivered to it without being required to determine the authenticity or validity thereof, or the truth or accuracy of any information stated therein. The Bank may act in reliance upon any signature believed by it to be genuine and may assume that any person purporting to make any statement, execute any document, or send any instruction in connection with the provisions hereof has been duly authorized to do so. The Bank may consult with counsel satisfactory to it, and the opinion or advice of such counsel shall be full and complete authorization and protection in respect of any action taken, suffered or omitted by it in good faith and in accordance with the opinion and advice of such counsel. The Bank may perform any and all of its duties through its agents, representatives, attorneys, custodians and/or nominees. The Bank shall not incur any liability for not performing any act or fulfilling any obligation hereunder by reason of any

occurrence beyond its control (including, without limitation, any provision of any present or future law or regulation or any act of any governmental authority, any act of God or war or terrorism, or the unavailability of the Federal Reserve Bank wire services or any electronic communication facility).

(c) Reliance on Orders. The Bank is authorized to comply with final orders issued or process entered by any court with respect to the assets in the Account, without determination by the Bank of such court's jurisdiction in the matter. If any portion of the assets in the Account are at any time attached, garnished or levied upon under any court order, or in case the payment, assignment, transfer, conveyance or delivery of any such property shall be stayed or enjoined by any court order, or in case any order, judgment or decree shall be made or entered by any court affecting such property or any part thereof, then and in any such event, the Bank is authorized to rely upon and comply with any such order, writ, judgment or decree which it is advised is binding upon it without the need for appeal or other action; and if the Bank complies with any such order, writ, judgment or decree, it shall not be liable to the Pledgor or the Secured Party or to any other person or entity by reason of such compliance even though such order, writ, judgment or decree may be subsequently reversed, modified, annulled, set aside or vacated.

6. Compensation, Expense Reimbursement and Indemnification. The Pledgor covenants and agrees to pay the Bank's compensation specified in the Agent Fee Letter (as defined in the Loan Agreement (as defined in the Security Agreement)). The Pledgor covenants and agrees to pay to the Bank all out-of-pocket expenses incurred by the Bank in the performance of its role under this Agreement (including, but not limited to, any attorney's fees incurred in connection with the preparation and negotiation of this Agreement, which shall be due and payable upon the execution of this Agreement). The Pledgor covenants and agrees to indemnify the Bank and its employees, officers, directors, affiliates, and agents (each, an "**Indemnified Party**") for, hold each Indemnified Party harmless from, and defend each Indemnified Party against, any and all claims, losses, actions, liabilities, costs, damages and expenses of any nature incurred by any Indemnified Party, arising out of or in connection with this Agreement or with the administration of its duties hereunder, including but not limited to attorney's fees, costs and expenses, except to the extent such loss, liability, damage, cost or expense shall have been finally adjudicated by a court of competent jurisdiction to have resulted solely from the Indemnified Party's own gross negligence or willful misconduct. The foregoing indemnification and agreement to hold harmless shall survive the termination of this Agreement and the resignation or removal of the Bank.

7. Statements, Confirmations and Notices of Adverse Claims. The Bank will send copies of all statements and confirmations for the Account simultaneously to the Pledgor and the Secured Party. The Bank will use reasonable efforts promptly to notify the Secured Party and the Pledgor if any other person claims that it has a property interest in the Account.

8. Exclusive Benefit. This Agreement constitutes the entire agreement between the parties and sets forth in its entirety the obligations and duties of the Bank

with respect to the assets in the Account. This Agreement is for the exclusive benefit of the parties to this Agreement and their respective permitted successors, and shall not be deemed to give, either expressly or implicitly, any legal or equitable right, remedy, or claim to any other entity or person whatsoever. No party may assign any of its rights or obligations under this Agreement without the prior written consent of the other parties.

9. Resignation and Removal.

(a) The Pledgor and the Secured Party may remove the Bank at any time by giving to the Bank thirty (30) calendar days' prior written notice of removal signed by an Authorized Person of each of the Pledgor and the Secured Party. The Bank may resign at any time by giving to each of the Pledgor and the Secured Party thirty (30) calendar days' prior written notice of resignation.

(b) Within thirty (30) calendar days after giving the foregoing notice of removal to the Bank or within thirty (30) calendar days after receiving the foregoing notice of resignation from the Bank, the Pledgor and the Secured Party shall appoint a successor bank and give notice of such successor bank to the Bank. If a successor bank has not accepted such appointment by the end of such 30-day period, the Bank may either (A) safe keep the assets in the Account until a successor bank is appointed, without any obligation to invest the same or continue to perform under this Agreement, or (B) apply to a court of competent jurisdiction for the appointment of a successor bank or for other appropriate relief.

(c) Upon receipt of notice of the identity of the successor bank, the Bank shall either deliver the assets in the Account then held hereunder to the successor bank, less the Bank's fees, costs and expenses, or hold such assets in the Account (or any portion thereof) pending distribution, until all such fees, costs and expenses are paid to it. Upon delivery of the assets in the Account to the successor bank, the Bank shall have no further duties, responsibilities or obligations hereunder.

10. Governing Law; Jurisdiction; Waivers. This Agreement is governed by and shall be construed and interpreted in accordance with the laws of the State of New York, without giving effect to the conflict of laws principles thereof. The parties irrevocably and unconditionally submit to the exclusive jurisdiction of the federal and state courts located in the Borough of Manhattan, City, County and State of New York, for any proceedings commenced regarding this Agreement. The parties irrevocably submit to the jurisdiction of such courts for the determination of all issues in such proceedings and irrevocably waive any objection to venue or inconvenient forum for any proceeding brought in any such court. The parties irrevocably and unconditionally waive any right to trial by jury with respect to any proceeding relating to this Agreement.

11. Representations and Warranties. Each of Pledgor and the Secured Party represents and warrants that it has full power and authority to execute and deliver this Agreement and to perform its obligations hereunder; and this Agreement has been duly approved by all necessary action and constitutes its valid and binding agreement

enforceable in accordance with its terms, except as may be limited by applicable bankruptcy, insolvency, moratorium, reorganization or other similar laws affecting the enforcement of creditors' rights and subject to general equity principles.

12. Amendments. Any amendment of this Agreement shall be binding only if evidenced by a writing signed by each of the parties to this Agreement. No waiver of any provision hereof shall be effective unless expressed in writing and signed by the party to be charged.

13. Severability. The invalidity, illegality or unenforceability of any provision of this Agreement shall in no way affect the validity, legality or enforceability of any other provision. If any provision of this Agreement is held to be unenforceable as a matter of law, the other provisions shall not be affected thereby and shall remain in full force and effect.

14. Mergers and Conversions. Any corporation or entity into which the Bank may be merged or converted or with which it may be consolidated, or any corporation or entity resulting from any merger, conversion or consolidation to which the Bank will be a party, or any corporation or entity succeeding to the business of the Bank will be the successor of the Bank hereunder without the execution or filing of any paper with any party hereto or any further act on the part of any of the parties hereto except where an instrument of transfer or assignment is required by law to effect such succession, anything herein to the contrary notwithstanding.

15. Notices; Wiring Instructions.

(a) Any notice or instruction permitted or required hereunder shall be in writing in English, and may be sent by (i) secure file transfer or (ii) electronic mail with a scanned attachment thereto of an executed notice or instruction, and shall be effective upon actual receipt by the Bank in accordance with the terms hereof. Any notice or instruction must be executed by an authorized person of the Pledgor or the Secured Party, as applicable (the person(s) so designated from time to time, the "**Authorized Persons**"). Each of the applicable persons designated on Schedule A attached hereto have been duly appointed to act as Authorized Persons hereunder and individually have full power and authority to execute any notices or instructions, to amend, modify or waive any provisions of this Agreement, and to take any and all other actions permitted under this Agreement, all without further consent or direction from, or notice to, it or any other party. Any notice or instruction must be originated from a corporate domain. Any change in designation of Authorized Persons shall be provided by written notice, signed by an Authorized Person, and actually received and acknowledged by the Bank. Any communication from the Bank that the Bank deems to contain confidential, proprietary, and/or sensitive information shall be encrypted in accordance with the Bank's internal procedures. The Pledgor and the Secured Party agree that the above security procedures are commercially reasonable.

If to the Pledgor:

USAVFLOW LIMITED
c/o P.O. Box 1093GT,
Queensgate House,
South Church Street, Georgetown,
Grand Cayman, Cayman Islands;
Attention: The Directors;
Facsimile No.: (345) 945-7100;
Telephone No.: (345) 945-7099;
email: info@maplesfinance.com

with a copy to

Aerovías del Continente Americano S.A. Avianca,
Centro Administrativo,
Avenida Calle 26 No. 59-15 Piso 10,
Bogotá, D.C.,
Colombia;
Attention: Vicepresidente Financiero;
Facsimile No.: (571) 413-9809;
Telephone No.: (571) 295-6765;
email: Lucia.avila@Avianca.com;

If to the Secured Party:

Citibank, N.A.
Agency & Trust
388 Greenwich Street
New York, NY 10013
Attn.: Karen Abarca
Telephone: (212) 816-7759
E-mail: karen.abarca@citi.com / cts.spag@citi.com

If to the Bank:

Citibank, N.A.
Agency & Trust
388 Greenwich Street
New York, NY 10013
Attn.: Karen Abarca
Telephone: (212) 816-7759
E-mail: karen.abarca@citi.com / cts.spag@citi.com

(b) Any funds to be paid by the Bank hereunder shall be sent by wire transfer pursuant to the instructions set forth on Schedule B, or as otherwise may be instructed by the Secured Party.

(c) Payments to the Bank shall be sent by wire transfer pursuant to the following instructions: **CITIBANK, N.A.**, ABA: 0210-0008-9; A/C#: 36114317; Ref: 11925000.

16. Counterparts. This Agreement may be executed simultaneously in two or more counterparts, any one of which need not contain the signatures of more than one party, but all such counterparts taken together shall constitute one and the same agreement. Scanned signatures on counterparts of this Agreement shall be deemed original signatures with all rights accruing thereto except in respect to any non-US entity, whereby originals are required.

17. Termination. This Agreement shall terminate upon receipt by the Bank of notice from the Secured Party that its security interest in the Account and all assets therein have terminated. Upon receipt of such notice, the Secured Party shall have no further right to originate instructions with respect to the assets in the Account, and the Bank shall not transfer any funds in the Account pursuant to Section 4(a) or Section 15(b). The Bank shall, upon payment of all outstanding fees and expenses hereunder, promptly forward any amounts held by the Bank in the Account to the Pledgor as the Pledgor may instruct from time to time, and upon release of all funds in the Account, the Bank shall be relieved and discharged of any further responsibilities with respect to its duties hereunder.

18. Limited Recourse. Notwithstanding any other provision of this Agreement, each party hereto hereby agrees that the Pledgor's obligations under this Agreement shall be limited recourse obligations of the Pledgor, with recourse being limited to the assets (other than the ordinary share capital and any transaction fee charged by the Pledgor pursuant to the administration agreement dated the date hereof entered into between the Pledgor and MaplesFS Limited) of the Pledgor at such time available for application by or on behalf of the Pledgor in making payments in accordance with this Agreement. The parties hereby acknowledge and agree that the Pledgor's obligations under this Agreement are solely the corporate obligations of the Pledgor, and that none of the officers, directors, shareholders or agents of the Pledgor, any of its Affiliates or any other Person shall be personally liable to make any payments of principal, interest or any other sum now or hereafter owing by the Pledgor hereunder. After the Pledgor's assets (other than the ordinary share capital and any transaction fee charged by the Pledgor pursuant to the administration agreement dated the date hereof entered into between the Pledgor and MaplesFS Limited) are realized and exhausted, all sums due but still unpaid in respect of the Pledgor's obligations hereunder shall be extinguished and shall not thereafter revive with respect to the Pledgor and its liability hereunder, and the Seller shall not have the right to proceed against the Pledgor or any of its Affiliates or any of its officers, directors, shareholders or agents for the satisfaction of any monetary claim or for any deficiency judgment remaining after foreclosure of any of its assets.

No party hereto shall take any steps for the purpose of procuring the appointment of any examiner, administrator, receiver, liquidator, provisional liquidator,

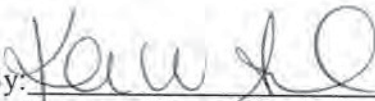
bankruptcy trustee or administrative receiver or the making of any administrative order or court order or application or for instituting any bankruptcy, examinership, reorganization, arrangement, insolvency, winding up, liquidation, composition or any like proceedings under applicable law in respect of the Pledgor or its affiliates or in respect of any of their liabilities, including, without limitation, as a result of any claim or interest of such parties.

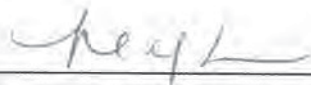
The provisions of this Section 18 shall survive termination of this Agreement.

[Remainder of Page Left Intentionally Blank]


IN WITNESS WHEREOF, each of the parties has caused this Agreement to be executed by a duly authorized representative as of the day and year first written above.

CITIBANK, N.A.,
as Bank


By: 
Name: Karen Abarca
Title: Vice President
Date: 12/12/2017

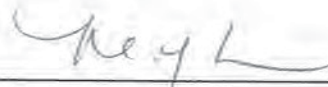
By: 
Name: Miriam Molina
Title: Vice President
Date: 12/12/17

USAVFLOW LIMITED,
As Pledgor

By:  _____
Name: Wendy Ebanks
Title: Director
Date:

CITIBANK, N.A.,
as Secured Party

By: 
Name: Karen Abarca
Title: Vice President
Date: 12/12/2017

By: 
Name: Miriam Molina
Title: Vice President
Date: 12/12/17

SCHEDULE A

AUTHORIZED LIST OF SIGNERS

Each of the following person(s) is authorized to execute documents and to direct the Bank as to all matters, including funds transfers, on the Pledgor's behalf.


USAVFLOW LIMITED

Name Peter Lundin
 Title Director
 Phone +1 345 814 5757
 E-mail Address* peter.lundin@maplesfs.com

Specimen Signature

Please check⁽¹⁾:

Upload Maker Checker

☐ ☐ ☐


Name Wendy Ebanks
 Title Director
 Phone +1 345 814 5820
 E-mail Address* wendy.ebanks@maplesfs.com

☐ ☐ ☐


Name _____
 Title _____
 Phone _____
 E-mail Address* _____

☐ ☐ ☐


The Bank may confirm the instructions received by return call to one of the telephone numbers listed below.

<i>Telephone Number (including Country code)</i>	<i>Name</i>
+1 345 814 5757	Peter Lundin
+1 345 814 5820	Wendy Ebanks

*must be a corporate domain

⁽¹⁾Secure File Transfer Designation Descriptions:

UPLOAD ONLY: The individual is authorized to upload such notices or instructions to the SFTP site. (NO CHECKER REQUIRED)

MAKER: The individual is authorized to create and upload such notices or instructions to the SFTP site.

CHECKER: The individual is authorized to authenticate and approve such notices or instructions to the SFTP site

SCHEDULE B

WIRE INSTRUCTIONS

Wire to: Citibank London
SWIFT BIC: CITIGB2L
Credit to IBAN: GB91CITI18500818821135
Beneficiary Name: CBNA FBO USAVflow Ltd Collections Account – USD

EXHIBIT J

WHITE & CASE

Dated 12 December 2017

Security Agreement

between

USAVflow Limited
as Chargor

Citibank, N.A., London Branch
as Collateral Trustee

Citibank, N.A.
as Account Bank

White & Case LLP
5 Old Broad Street
London EC2N 1DW

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This Deed is dated 12 December, 2017

Between:

- (1) **USAVflow Limited**, an exempted company incorporated and registered under the laws of the Cayman Islands having its registered office at the offices at MaplesFS Limited, PO Box 1093, Queensgate House, Grand Cayman, KY1-1102 with registered number 324668 (the “**Chargor**”);
- (2) **Citibank, N.A., London Branch** as trustee for the Secured Parties (as defined in the Loan Agreement referred to below) (the “**Collateral Trustee**”); and
- (3) **Citibank, N.A.** as the bank with which the Chargor maintains the Blocked Accounts (the “**Account Bank**”) (for the purposes of acknowledging the security created hereby and for the purposes of paragraph (d) of Clause 7.1 (*Withdrawals*), Clause 7.3 (*Notices of Charge*) and Clause 18.7 (*Account Bank Provisions*) only.

Background:

- (A) The Chargor enters into this Deed in connection with the Loan Agreement (as defined below).
- (B) It is intended that this document takes effect as a deed notwithstanding the fact that a party (other than the Chargor) may only execute this document under hand.

It is agreed as follows:

1. Interpretation

1.1 Definitions

In this Deed:

“**Act**” means the Law of Property Act 1925.

“**Administrative Agent**” means the Administrative Agent under (and as defined in) the Cash Management Agreement and the Administrative Agent under and as defined in the Loan Agreement.

“**Blocked Account**” means each account specified in Schedule 1 (*Blocked Accounts*) and all balances now or in the future standing to the credit of or accrued or accruing on such accounts and the debts represented thereby.

“**Business Day**” means a day (other than a Saturday or Sunday) on which banks are open for general business in London.

“**CA 2006**” means the Companies Act 2006.

“**Cash Management Agreement**” means the New York law governed cash management agreement dated on or about the date hereof and entered into by Aerovías del Continente Americano S.A. Avianca as seller and servicer, USAVflow Limited as purchaser, Citibank, N.A. as Administrative Agent and Citibank, N.A. as Collateral Agent.

“**Collateral Agent**” means the Collateral Agent under (and as defined in) the Cash Management Agreement and the Collateral Agent under and as defined in the Loan Agreement.

“**Credit Documents**” has the meaning given to the term “Credit Documents” in the Loan Agreement.

“Declared Default” means an Event of Default which is continuing in respect of which any notice has been served by the Administrative Agent in accordance with Section 6.1(y) (*Events of Default*) of the Loan Agreement.

“Delegate” has the meaning given to that term in the Security Trust Deed.

“Enforcement Event” means:

- (a)
 - (i) a Declared Default; and
 - (ii) the occurrence of a Trigger Event (as defined in the Cash Management Agreement) under the Cash Management Agreement; or
- (b)
 - (i) the occurrence of an automatic acceleration of the Loan and other amounts pursuant to Section 6.1(x) (*Events of Default*) of the Loan Agreement; and
 - (ii) the occurrence of a Trigger Event (as defined in the Cash Management Agreement) under the Cash Management Agreement.

“Loan Agreement” means the loan agreement dated on or about the date hereof between, amongst others, the Chargor as borrower, Avianca Holdings S.A., Taca International Airlines S.A., Avianca Costa Rica S.A. and Trans American Airlines S.A. as guarantors and Citibank, N.A. as administrative agent and collateral agent.

“Obligor” means each Obligor as defined in the Loan Agreement.

“Party” means a party to this Deed.

“Receiver” means a receiver and manager or any other receiver of all or any of the Security Assets, and shall, where permitted by law, include an administrative receiver in each case, appointed under this Deed.

“Secured Obligations” means all present and future liabilities and obligations of each Obligor to any Secured Party under any Credit Document (both actual and contingent and whether incurred solely or jointly or in any other capacity) except for any obligation or liability which, if it were so included, would result in this Deed contravening any applicable law.

“Secured Parties” means the “Secured Parties” as defined in the Loan Agreement.

“Security Assets” means all the assets, rights, title, interests and benefits of the Chargor the subject of, or expressed to be subject to this Deed.

“Security Period” means the period beginning on the date of this Deed and ending on the date on which all the Secured Obligations have been unconditionally and irrevocably paid and discharged in full and no further Secured Obligations are capable of being outstanding.

“Security Trust Deed” means the security trust deed dated on or about the date hereof relating to this Deed.

1.2 Construction

- (a) Capitalised terms defined in the Loan Agreement or in the Security Trust Deed have, unless expressly defined in this Deed, the same meaning in this Deed.

- (b) The provisions of Section 1.2 (*Other Interpretative Provisions*) of the Loan Agreement apply to this Deed as though they were set out in full in this Deed, except that references to the Loan Agreement will be construed as references to this Deed.
- (c) All security made with “full title guarantee” is made with full title guarantee in accordance with the Law of Property (Miscellaneous Provisions) Act 1994.
- (d) Unless the context otherwise requires, a reference to a Security Asset includes any part of that Security Asset, any proceeds of that Security Asset and any present and future asset of that type.
- (e) Unless a contrary indirection appears, a reference in this Deed to the “Collateral Agent”, “Administrative Agent” or the “Account Bank” shall be construed as a reference to it in its capacity as such and not in any other capacity.

1.3 **Trust**

- (a) All security and dispositions made or created, and all obligations and undertakings contained, in this Deed, in favour of or for the benefit of the Collateral Trustee are given in favour of the Collateral Trustee as trustee for the Secured Parties from time to time on the terms set out in the Security Trust Deed.
- (b) The Collateral Trustee holds the benefit of this Deed on trust for the Secured Parties.

1.4 **Third Party Rights**

- (a) Unless expressly provided to the contrary in this Deed, a person who is not a Party has no right under the Contracts (Rights of Third Parties) Act 1999 (the “**Third Parties Act**”) to enforce or enjoy the benefit of any term of this Deed.
- (b) Notwithstanding any term of any Credit Document, the consent of any person who is not a party is not required to vary, rescind or terminate this Deed at any time.
- (c) Any Receiver may, subject to this Clause 1.4 and the Third Parties Act, rely on any Clause of this Deed which expressly confers rights on it.

2. **Covenant to Pay**

2.1 **Covenant to Pay**

The Chargor shall, as primary obligor and not only as a surety, on demand, pay to the Collateral Trustee and discharge the Secured Obligations when they become due.

2.2 **Interest**

Any amount which is not paid under this Deed when due shall bear interest at the rate specified in Section 2.5.6 of the Loan Agreement (both before and after judgment and payable on demand) from the due date until the date on which such amount is unconditionally and irrevocably paid and discharged in full, such interest to accrue on a daily basis.

3. **Fixed Charge**

The Chargor with full title guarantee, and as continuing security for the payment and discharge of all Secured Obligations, charges in favour of the Collateral Trustee by way of first fixed charge, all its present and future right, title and interest in all Blocked Accounts.

4. Representations and Warranties - General

4.1 Nature of Security

The Chargor represents and warrants to the Collateral Trustee and to each Secured Party that:

- (a) the Security Assets are, or when acquired will be, beneficially owned by it free from any security other than as created by this Deed and other security instruments which secure Secured Obligations and which authorise or require the Chargor to enter into this Deed (together with this Deed, the “**Authorised Security Instruments**”); and
- (b) the Chargor is the sole legal and beneficial owner of all of the Security Assets.

4.2 Times for Making Representations and Warranties

- (a) The representations and warranties set out in this Deed are made by the Chargor on the date of this Deed.
- (b) Each representation and warranty under this Deed is deemed to be repeated by the Chargor on each date during the Security Period.
- (c) When a representation and warranty is deemed to be repeated, it is deemed to be made by reference to the circumstances existing at the time of repetition.

5. Further Assurances

5.1 General

The Chargor shall at its own expense promptly do all such acts or execute all such documents (including assignments, transfers, mortgages, charges, notices and instructions) as the Collateral Trustee or a Receiver may specify (and in such form as the Collateral Trustee or Receiver (as the case may be) may require in favour of the Collateral Trustee or its nominee(s)) to create, perfect, protect or preserve the security created or intended to be created under this Deed (including without limitation, the re-execution of this Deed, the execution of any mortgage, charge, assignment or other security over all or any of the assets which are, or are intended to be, the subject of the security created or intended to be created by this Deed) and the giving of any notice, order or direction and the making of any filing or registration, or for the exercise of any rights, powers and remedies of the Collateral Trustee or any Receiver or any other Secured Party provided by or pursuant to the Credit Documents or by law as well as to facilitate the realisation of the Security Assets.

5.2 Necessary Action

The Chargor shall take all such action as is available to it (including making all filings and registrations) as may be necessary for the purpose of the creation, perfection, protection or maintenance of any security conferred or intended to be conferred on the Collateral Trustee or the other Secured Parties by or pursuant to this Deed.

6. Restrictions on Dealings

The Chargor may not:

- (a) create or purport to create or permit to exist any security over any of the Blocked Accounts (other than the security created by this Deed or the other Authorised Security Instruments); or

- (b) either in a single transaction or in a series of transactions and whether related or not and whether voluntarily or involuntarily, dispose of or purport to dispose of all or any part of its title or interest in any of the Blocked Accounts.

7. Blocked Accounts

7.1 Withdrawals

- (a) Except with the prior consent of the Collateral Trustee, the Chargor may not receive, withdraw or otherwise transfer any moneys (including interest) standing to the credit of any Blocked Account.
- (b) The Collateral Trustee (or a Receiver or Delegate) on or after the occurrence of an Enforcement Event may withdraw amounts standing to the credit of any Blocked Account.
- (c) Subject to Clause 7.2 below, the Collateral Agent has sole signing rights on each Blocked Account. The Chargor has no access to any amount standing to the credit of any Blocked Account.
- (d) Until the end of the Security Period, the Account Bank shall not repay to the Chargor and the Chargor shall have no right to withdraw the balance from time to time standing to the credit of the Blocked Account or any part of it.

7.2 Application of Monies

The Collateral Trustee shall, following the occurrence of an Enforcement Event, at any time when there are Secured Obligations outstanding, be entitled without notice to apply, transfer or set-off any or all of the credit balance from time to time on any Blocked Accounts in or towards the payment or other satisfaction of all or part of the Secured Obligations in accordance with the Security Trust Deed.

7.3 Notices of Charge

- (a) The Chargor confirms to the Account Bank that if there is any conflict between the terms of this Deed and the terms of any other Authorised Security Instruments, the Cash Management Agreement and account opening mandates relating to the Blocked Accounts, the terms of this Deed shall prevail and:
 - (i) unless the Collateral Trustee so authorises the Account Bank in writing, the Account Bank shall not permit withdrawals from the Blocked Accounts other than by the Collateral Agent in accordance with the Cash Management Agreement;
 - (ii) the Account Bank may disclose to the Collateral Trustee any information relating to any Blocked Account requested by the Collateral Trustee from time to time;
 - (iii) the Account Bank shall comply with the terms of any written notice or instruction relating to the Blocked Accounts (or any of them) received by the Account Bank from the Collateral Trustee or the Collateral Agent;
 - (iv) the Account Bank shall hold all sums standing to the credit of the Blocked Accounts to the order of the Collateral Trustee (but shall permit the Collateral Agent to withdraw amounts therefrom in accordance with the terms of the Cash Management Agreement); and

- (v) the Account Bank shall pay or release any sum standing to the credit of any Blocked Account in accordance with the written instructions of the Collateral Trustee on or after the occurrence of an Enforcement Event.
- (b) The Account Bank confirms to the Collateral Trustee that:
 - (i) it has not received notice of the interest of any third party in the Blocked Accounts;
 - (ii) it has neither claimed nor exercised, nor will claim or exercise, any security interest, set off, counterclaim or other right in respect of the Blocked Accounts; and
 - (iii) it will not permit any amount to be withdrawn from the Blocked Account without the prior written consent of the Collateral Trustee (other than, prior to the occurrence of an Enforcement Event, by the Collateral Agent in accordance with the terms of the Cash Management Agreement).

8. When Security becomes Enforceable

8.1 When Enforceable

The security created by this Deed shall become immediately enforceable if an Enforcement Event occurs.

8.2 Enforcement

After the occurrence of an Enforcement Event, the Collateral Trustee may in its absolute discretion enforce all or any part of the security created by this Deed in such manner as it sees fit or as the Administrative Agent instructs, acting on the instructions of the Required Lenders.

9. Enforcement of Security

9.1 General

- (a) The power of sale and any other power conferred on a mortgagee by law (including under section 101 of the Act) as varied or amended by this Deed shall be immediately exercisable upon and at any time after the occurrence of an Enforcement Event.
- (b) For the purposes of all powers implied by law, the Secured Obligations are deemed to have become due and payable on the date of this Deed.
- (c) Any restriction imposed by law on the power of sale (including under section 103 of the Act) or the right of a mortgagee to consolidate mortgages (including under section 93 of the Act) does not apply to the security created by this Deed.
- (d) Any powers of leasing conferred on the Collateral Trustee by law are extended so as to authorise the Collateral Trustee to lease, make agreements for leases, accept surrenders of leases and grant options as the Collateral Trustee may think fit and without the need to comply with any restrictions conferred by law (including under section 99 or 100 of the Act).

9.2 Appointment of Receiver

- (a) Except as provided below, the Collateral Trustee may appoint any one or more persons to be a Receiver of all or any part of the Security Assets if:
 - (i) the security created by this Deed has become enforceable in accordance with Clause 9.1 (*General*); or
 - (ii) requested to do so by the Chargor.
- (b) Any appointment under paragraph (a) above may be by deed, under seal or in writing under its hand.
- (c) Except as provided below, any restriction imposed by law on the right of a mortgagee to appoint a Receiver (including an appointment under section 109(1) of the Act) does not apply to this Deed. If the Collateral Trustee appoints more than one person as Receiver, the Collateral Trustee may give those persons power to act either jointly or severally.
- (d) The Collateral Trustee shall not be entitled to appoint a Receiver solely as a result of the obtaining of a moratorium (or anything done with a view to obtaining a moratorium) under section 1A to the Insolvency Act 1986.
- (e) The Collateral Trustee may not appoint an administrative receiver (as defined in section 29(2) of the Insolvency Act 1986) over the Security Assets if the Collateral Trustee is prohibited from so doing by section 72A of the Insolvency Act 1986.

9.3 Agent of the Chargor

- (a) A Receiver shall for all purposes be deemed to be the agent of the Chargor. The Chargor is solely responsible for the contracts, engagements, acts, omissions, defaults and losses and for all liabilities incurred by a Receiver.
- (b) Neither the Collateral Trustee nor any other Secured Party will incur any liability (either to the Chargor or to any other person) by reason of the appointment of a Receiver or for any other reason.

9.4 Removal and Replacement

The Collateral Trustee may by writing under its hand remove any Receiver appointed by it and may, whenever it thinks fit, appoint a new Receiver in the place of any Receiver whose appointment has terminated.

9.5 Remuneration

The Collateral Trustee may fix the remuneration of any Receiver appointed by it without the limitations imposed by section 109(6) of the Act.

9.6 Relationship with Collateral Trustee

To the fullest extent allowed by law, any right, power or discretion conferred by this Deed (either expressly or impliedly) or by law on a Receiver may, after the security created by this Deed becomes enforceable, be exercised by the Collateral Trustee in relation to any Security Asset without first appointing a Receiver or notwithstanding the appointment of a Receiver.

9.7 No Liability as Mortgagee in Possession

Neither the Collateral Trustee nor any Receiver shall, by reason of entering into possession of all or any part of a Security Asset or taking any action permitted by this Deed, be liable:

- (a) to account as mortgagee in possession or for any loss on realisation; or
- (b) for any default or omission for which a mortgagee in possession might be liable.

9.8 Redemption of Prior Mortgages

- (a) At any time on or after the occurrence of an Enforcement Event, the Collateral Trustee may:
 - (i) redeem any prior security against any Security Asset;
 - (ii) procure the transfer of that security to itself; and/or
 - (iii) settle and pass the accounts of the prior mortgagee, chargee or encumbrancer; any accounts so settled and passed will be, in the absence of manifest error, conclusive and binding on the Chargor.
- (b) The Chargor shall pay to the Collateral Trustee, immediately on demand, the fees, costs and expenses incurred by the Collateral Trustee in connection with any such redemption and/or transfer, including the payment of any principal or interest.

9.9 Privileges

Each Receiver and the Collateral Trustee is entitled to all the rights, powers, privileges and immunities conferred by law (including by the Act) on mortgagees and receivers duly appointed under any law (including the Act) save that section 103 of the Act shall not apply.

9.10 Contingencies

If the security created by this Deed is enforced at a time when no amount is due under the Credit Documents but at a time when amounts may or will become due, the Collateral Trustee (or the Receiver) may pay the proceeds of any recoveries effected by it into such number of suspense accounts as it considers appropriate.

9.11 Protection of Third Parties

No person (including a purchaser) dealing with the Collateral Trustee or a Receiver or its delegate will be concerned to enquire:

- (a) whether the Secured Obligations have become payable;
- (b) whether any power which the Collateral Trustee or a Receiver is purporting to exercise has become exercisable or is being properly exercised;
- (c) whether any money remains due under the Credit Documents; or
- (d) how any money paid to the Collateral Trustee or that Receiver is to be applied.

9.12 Financial Collateral Arrangements

To the extent that the Security Assets constitute “financial collateral” and this Deed constitutes a “security financial collateral” (as defined in the Financial Collateral Arrangements (No. 2) Regulation 2003) the Collateral Trustee shall have the right at any time after the security created by this Deed becomes enforceable to appropriate all or any part of the Security Assets in or towards satisfaction of the Secured Obligations, the value of the

property so appropriated being the amount standing to the credit of the relevant Blocked Account.

10. Receiver

10.1 Powers of Receiver

A Receiver shall have all the rights, powers, privileges and immunities conferred from time to time on receivers by law (including the Act and the Insolvency Act 1986) and the provisions set out in Schedule 1 to the Insolvency Act 1986 shall extend to every Receiver.

10.2 Additional Powers

A Receiver shall have all the additional powers set out in Schedule 2 (*Additional Rights of Receivers*).

10.3 Several Powers

If there is more than one Receiver holding office at the same time, each Receiver may (unless the document appointing him states otherwise) exercise all the powers conferred on a Receiver under this Deed individually and to the exclusion of any other Receiver.

11. Application of Proceeds

Any monies held or received by the Collateral Trustee or a Receiver or Delegate after the occurrence of an Enforcement Event shall be applied by the Collateral Trustee or Receiver or Delegate (as the case may be) in accordance with Clause 3.1 (*Order of Application*) of the Security Trust Deed.

12. Delegation

The Collateral Trustee or any Receiver may delegate by power of attorney or in any other manner to any person any right, power or discretion exercisable by it under this Deed in which case such person shall be entitled to all the rights and protection of a Collateral Trustee or Receiver as if it were a party to this Deed. The Collateral Trustee shall have no obligation to monitor or supervise the actions of such person to whom it has delegated such right, power or discretion. Neither the Collateral Trustee nor any Receiver will be in any way liable or responsible to the Chargor for any loss or liability arising from any act, default, omission or misconduct on the part of any such delegate or sub-delegate. Any such delegation may be made upon any terms (including power to sub-delegate) which the Collateral Trustee or any Receiver may think fit.

13. Power of Attorney

13.1 Appointment

The Chargor, by way of security, irrevocably and severally, appoints the Collateral Trustee, each Receiver and each of their respective delegates and sub-delegates to be its attorney (with full power of substitution) to take any action which the Chargor is obliged to take under this Deed (including under Clause 5 (*Further Assurances*)).

13.2 Ratification

The Chargor ratifies and confirms whatever any attorney does or purports to do under its appointment under this Clause 13.

14. Preservation of Security

14.1 Continuing Security

The security created by this Deed is continuing security and will extend to the ultimate balance of the Secured Obligations, regardless of any intermediate payment or discharge in whole or in part.

14.2 Additional Security

- (a) This Deed is in addition to and is not in any way prejudiced by any other security or guarantees now or subsequently held by any Secured Party.
- (b) No other security held by any Secured Party (in its capacity as such or otherwise) or right of set-off over any Security Asset shall merge into or otherwise prejudice the security created by this Deed or right of set-off contained herein.

14.3 Security held by Chargor

The Chargor may not, without the prior consent of the Collateral Trustee, hold any security from any other Obligor in respect of that Chargor's liability under this Deed. The Chargor shall hold any security held by it in breach of this provision on trust for the Collateral Trustee.

14.4 Appropriation

Until all the Secured Obligations have been unconditionally and irrevocably discharged in full the Collateral Trustee may:

- (a) refrain from applying or enforcing any monies, rights or security held or received by it in respect of the Secured Obligations (whether through the exercise of its rights and powers under this Deed or otherwise) or apply and enforce the same in such manner and order as it sees fit; and
- (b) retain in a suspense account any monies so held or received.

15. Release of Security

15.1 Final Redemption

Subject to Clause 15.2 (*Avoidance of Payments*), if the Collateral Trustee has been informed by the Administrative Agent that all the Secured Obligations have been irrevocably paid in full and that the Secured Parties have no actual or contingent obligation under the Loan Agreement, the Collateral Trustee shall at the request and cost of the Chargor release, reassign or discharge (as appropriate) the Security Assets from the security created by this Deed.

15.2 Avoidance of Payments

If the Collateral Trustee considers that any amounts paid or credited to any Secured Party is capable of being avoided, reduced or otherwise set aside as a result of insolvency or any similar event, the liability of the Chargor under this Deed and the security constituted by this Deed shall continue and such amount will not be considered to have been irrevocably paid.

15.3 Retention of Security

If the Collateral Trustee reasonably considers that any amounts paid or credited to any Secured Party under any Credit Document is capable of being avoided, reduced or otherwise set aside, that amount shall not be considered to have been paid for the purposes of determining whether all the Secured Obligations have been irrevocably paid.

16. Enforcement Expenses

16.1 Expenses and Indemnity

The Chargor must:

- (a) immediately on demand pay all costs and expenses (including legal fees) incurred in connection with this Deed by the Collateral Trustee, any other Secured Party, attorney, manager, agent or other person appointed by the Collateral Trustee under this Deed, including any costs and expenses arising from any actual or alleged breach by any person of any law or regulation, whether relating to the environment or otherwise; and
- (b) keep each of those persons indemnified against any failure or delay in paying those costs and expenses.

16.2 Taxes

Section 2.7 (*Taxes*) of the Loan Agreement shall apply *mutatis mutandis* to any amount payable under a Credit Document to the Collateral Trustee, any other Secured Party or attorney, manager, agent or other person appointed by the Collateral Trustee under this Deed but as if references therein to Agents were references to the Collateral Trustee and any Receiver and Delegate.

16.3 Indemnity

The Chargor shall indemnify and hold harmless the Collateral Trustee and any and every Receiver, attorney, manager, agent or other person appointed by the Collateral Trustee under this Deed (each, an “**Indemnified Person**”) on demand from and against any and all costs, claims, losses, expenses (including legal fees) and liabilities, and any VAT thereon, which the Collateral Trustee, each Receiver or such Indemnified Person may incur:

- (a) as a result of:
 - (i) the occurrence of any Default;
 - (ii) the enforcement of the security constituted by this Deed;
 - (iii) the exercise or enforcement by the Collateral Trustee or a Receiver or any Indemnified Person of any of the rights conferred on it or them by this Deed or by law; or
- (b) otherwise in connection with this Deed, including, without limitation to the foregoing as a result of, any actual or alleged breach by any person of any law or regulation whether relating to the environment or otherwise.

Each Receiver and Indemnified Person may rely on and enforce this indemnity.

17. Assignments and Transfers

17.1 The Chargor's Rights

None of the rights and benefits of the Chargor under this Deed shall be capable of being assigned or transferred and the Chargor undertakes not to seek to assign or transfer all or any of such rights and benefits.

17.2 The Collateral Trustee's Rights

The Collateral Trustee may assign or transfer all or any of its rights and benefits under this Deed without the consent of the Chargor.

18. Miscellaneous

18.1 Tacking

Each Secured Party shall comply with its obligations under the Credit Documents (including the obligation to make further advances).

18.2 New Accounts

- (a) If any subsequent charge or other interest affects any Security Asset, any Secured Party may open a new account with any Obligor.
- (b) If a Secured Party does not open a new account, it will nevertheless be treated as if it had done so at the time when it received or was deemed to have received notice of that charge or other interest.
- (c) As from that time all payments made to that Secured Party will be credited or be treated as having been credited to the new account and will not operate to reduce any Secured Obligations.

18.3 Time Deposits

Without prejudice to any right of set-off any Secured Party may have under any secured Credit Document or otherwise, if any time deposit matures on any account a Chargor has with any Secured Party within the Security Period:

- (a) after the occurrence of an Enforcement Event; and
- (b) when none of the Secured Obligations is due and payable,

that time deposit will automatically be renewed for any further maturity which that Secured Party in its absolute discretion considers appropriate unless that Secured Party otherwise agrees in writing.

18.4 Covenants

Any covenant of the Chargor under this Deed remains in force during the Security Period and is given for the benefit of each Secured Party.

18.5 Security Assets

The fact that no or incomplete details of any Security Asset are inserted in Schedule 1 (*Blocked Accounts*) does not affect the validity or enforceability of the security created by this Deed.

18.6 Determination

Any certificate or determination by any Secured Party under any Credit Document is, in the absence of manifest error, conclusive evidence of the matters to which it relates.

18.7 Account Bank Provisions

- (a) The Account Bank shall be entitled to conclusively rely on any written instructions provided to it by the Collateral Trustee or the Collateral Agent pursuant to this Deed.

- (b) The Chargor acknowledges and agrees that the Account Bank in acting in accordance with this Deed shall not incur, and shall not be liable for, any costs, losses or other liability, and shall be held harmless by the Chargor against any of the foregoing.

18.8 Collateral Trustee Provisions

- (a) The Collateral Trustee executes this Deed in the exercise of the powers and authority conferred and vested in it under the Security Trust Deed for and on behalf of the Secured Parties for which it acts. It will exercise its powers and authority under this Deed in the manner provided for, or referenced in, the Security Trust Deed and, in so acting, the Collateral Trustee shall have the protections, immunities, rights, indemnities and benefits conferred on it under, or referenced in, the Security Trust Deed.
- (b) The Collateral Trustee shall not owe any fiduciary duties to the Chargor.
- (c) Notwithstanding any other provision of this Deed, in acting under and in accordance with this Deed the Collateral Trustee is entitled to seek instructions from the Required Lenders in accordance with the provisions of, or referenced in, the Security Trust Deed at any time and, where it so acts on the instructions of the Required Lenders, the Collateral Trustee shall not incur any liability to any person for so acting.
- (d) The powers conferred on the Collateral Trustee under this Deed are solely to protect the interests of the Secured Parties of the English Security and shall not impose any duty upon the Collateral Trustee or any other Secured Party to exercise any such powers.

19. Partial Invalidity

If, at any time, any provision of this Deed is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions nor the legality, validity or enforceability of such provision under the law of any other jurisdiction will in any way be affected or impaired.

20. Counterparts

This Deed may be executed in any number of counterparts and all of those counterparts taken together shall be deemed to constitute one and the same instrument.

21. Governing Law

This Deed and any non-contractual obligations arising out of or in connection with it are governed by English law.

22. Enforcement

22.1 Jurisdiction of English Courts

- (a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Deed (including a dispute regarding the existence, validity or termination of this Deed or any non-contractual obligations arising out of or in connection with this Deed) (a “**Dispute**”) (whether arising in contract, tort or otherwise).

- (b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.
- (c) This Clause 22.1 is for the benefit of the Secured Parties only. As a result, no Secured Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Secured Parties may take concurrent proceedings in any number of jurisdictions.

22.2 Service of Process

- (a) Without prejudice to any other mode of service allowed under any relevant law, the Chargor:
 - (i) irrevocably appoints Law Debenture Corporate Services Limited of Fifth Floor, 100 Wood Street, London, EC2V 7EX as its agent for service of process in relation to any proceedings before the English courts in connection with any Credit Document; and
 - (ii) agrees that failure by an agent for service of process to notify the Chargor of the process will not invalidate the proceedings concerned.
- (b) If any person appointed as an agent for service of process is unable for any reason to act as agent for service of process, the Chargor must immediately (and in any event within 5 days of such event taking place) appoint another agent on terms acceptable to the Collateral Trustee. Failing this, the Collateral Trustee may appoint another agent for this purpose.
- (c) The Chargor expressly agrees and consents to the provisions of this Clause 22 and Clause 21 (*Governing Law*).

23. Limited Recourse

- (a) Notwithstanding any other provision of this Deed or the Security Trust Deed, each Party hereby agrees that the Chargor's obligations under this Deed and the Security Trust Deed shall be limited recourse obligations of the Chargor, with recourse being limited to the Security Assets and the actual amount derived from the Security Assets (including the proceeds of any contingent claims that are included in the Security Assets). The parties hereby acknowledge and agree that the Chargor's obligations under this Deed and the Security Trust Deed are solely the corporate obligations of the Chargor, and that none of the officers, directors, shareholders or agents of the Chargor, any of its affiliates or any other person shall be personally liable to make any payments of principal, interest or any other sum now or hereafter owing by the Chargor hereunder. After the Chargor's Security Assets (including the proceeds of any contingent claims that are included in the Security Assets) is realized and exhausted, all sums due but still unpaid in respect of the Chargor's obligations hereunder shall be extinguished and shall not thereafter revive with respect to the Chargor and its liability hereunder, and the Parties shall not have the right to proceed against the Chargor or any of its affiliates or any of its officers, directors, shareholders or agents for the satisfaction of any monetary claim or for any deficiency judgment remaining after foreclosure of any of its assets.
- (b) No Party shall take any steps for the purpose of procuring the appointment of any examiner, administrator, liquidator, provisional liquidator, or bankruptcy trustee or the making of any administrative order or court order or application or for instituting any bankruptcy, examinership, reorganization, arrangement, insolvency, winding up, liquidation, composition or any like proceedings under applicable law in respect of the Chargor or its affiliates or in respect of any of their liabilities, including, without

limitation, as a result of any claim or interest of such parties provided that nothing in this paragraph (b) shall prohibit or restrict the appointment of a Receiver and/or Delegate under and/or in accordance with and/or as contemplated by any other provisions of this Deed.

- (c) The provisions of this Clause 23 shall survive termination of this Deed.

This Deed has been entered into on the date stated at the beginning of this Deed and executed as a deed by the Chargor and is intended to be and is delivered by them as a deed on the date specified above.

Schedule 1**Blocked Accounts**

Account Bank	Account Number	Account Name
Citibank, N.A.	18821143	USAVflow Ltd DSR Account - USD
Citibank, N.A.	18821135	USAVflow Ltd Collections Account - USD

Schedule 2

Additional Rights of Receivers

Any Receiver appointed pursuant to Clause 9.2 (*Appointment of Receiver*) shall have the right, either in his own name or in the name of the Chargor or otherwise and in such manner and upon such terms and conditions as the Receiver thinks fit, and either alone or jointly with any other person:

1. **Enter into Possession**

to take possession of, get in and collect the Security Assets, and to require payment to him or to any Secured Party of any book debts or credit balance on any Blocked Account;

2. **Carry on Business**

to manage and carry on any business of the Chargor in any manner as he thinks fit;

3. **Deal with Security Assets**

to sell, transfer, assign, exchange, hire out, lend or otherwise dispose of or realise the Security Assets to any person (including a new company formed pursuant to paragraph 4 (*Hive-Down*)) either by public offer or auction, tender or private contract and for a consideration of any kind (which may be payable or delivered in one amount or by instalments spread over a period or deferred);

4. **Hive-Down**

to form a new company and to subscribe for or acquire (for cash or otherwise) any investment in or of the new company and to sell, transfer, assign, exchange and otherwise dispose of or realise any such investments or part thereof or any rights attaching thereto;

5. **Borrow and Lend Money**

to borrow or raise money either unsecured or on the security of the Security Assets (either in priority to the security created by this Deed or otherwise) and to lend money or advance credit to any customer of the Chargor;

6. **Covenants and Guarantees**

to enter into bonds, covenants, guarantees, indemnities and other commitments and to make all payments needed to effect, maintain or satisfy them and give valid receipts for any moneys and execute any assurance or thing which may be proper or desirable for realising any Security Asset;

7. **Rights of Ownership**

to manage and use the Security Assets and to exercise and do (or permit the Chargor or any nominee of it to exercise and do) all such rights and things as the Receiver would be capable of exercising or doing if he were the absolute beneficial owner of the Security Assets;

8. **Claims**

to settle, adjust, refer to arbitration, compromise and arrange any claims, accounts, disputes, questions and demands with or by any person who is or claims to be a creditor of the Chargor or relating to the Security Assets;

9. **Legal Actions**

to bring, prosecute, enforce, defend and abandon actions, suits and proceedings in relation to the Security Assets or any business of the Chargor;

10. **Redemption of Security**

to redeem any security (whether or not having priority to the security created by this Deed) over the Security Assets and to settle the accounts of any person with an interest in the Security Assets;

11. **Employees, Etc.**

to appoint, hire and employ officers, employees, contractors, agents, advisors and others and to discharge any such persons and any such persons appointed, hired or employed by the Chargor, in each case on any terms as he thinks fit (subject to applicable law);

12. **Insolvency Act 1986**

to exercise all powers set out in Schedule 1, Schedule B1 or (in the case of a Scottish Receiver) Schedule 2 to the Insolvency Act 1986 as now in force (whether or not in force at the date of exercise and whether or not the Receiver is an administrative receiver) and any powers added to Schedule 1 or Schedule 2, as the case may be, after the date of this Deed;

13. **Other Powers**

to do anything else he may think fit for the realisation of the Security Assets or incidental to the exercise of any of the rights conferred on the Receiver under or by virtue of any Credit Document to which the Chargor is party, the Act or the Insolvency Act 1986; and

14. **Delegation**

to delegate his powers in accordance with this Deed.

Signatories

Chargor

EXECUTED as a deed by **USAVflow Limited** acting
by Peter Lundin who, in accordance with the
laws of the Cayman Islands, is duly authorised by
USAVflow Limited to sign on its behalf, in the
presence of:


.....
Director

Witness's Signature


.....

Name:

.....
Glorine Carter

Address:

.....
Boundary Hall, Cricket Square

.....
GT Grand Cayman, Cayman Islands

Occupation:

.....
Corporate Assistant

Account Bank

CITIBANK, N.A.

By:.....



Miriam Molina
Vice President

Collateral Trustee

CITIBANK, N.A., LONDON BRANCH

By:.....

Peter Larsen
Vice President

EXHIBIT K

EXECUTION VERSION

WHITE & CASE

Dated: 12 December 2017

Security Trust Deed

between

Citibank, N.A., London Branch
as Collateral Trustee

USAVflow Limited
as Company

and others

White & Case LLP
5 Old Broad Street
London EC2N 1DW
:

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This Deed is made on 12 December 2017

Between:

- (1) **USAVflow Limited**, an exempted company incorporated and registered under the laws of the Cayman Islands having its registered offices at MaplesFS Limited, PO Box 1093, Queensgate House, Grand Cayman, KY1-1102 (registered number 324668) (the “**Company**”);
- (2) **THE FINANCIAL INSTITUTIONS** listed in Part II of Schedule 1 (*The Original Parties*) as secured parties (together with the Collateral Trustee, the “**Original Secured Parties**”); and
- (3) **Citibank, N.A., London Branch** as trustee for the other Secured Parties (the “**Collateral Trustee**”, which expression includes any additional or successor collateral trustee appointed pursuant to and in accordance with the terms of this Deed).

It is agreed as follows:

1. Definitions and Interpretation

1.1 Definitions

In this Deed the following terms have the meanings given to them in this Clause 1.1.

“**Administrative Agent**” has the meaning given to that term in the U.K. Account Charge.

“**Business Day**” means each day other than Saturday, Sunday or any other day on which commercial banks in the city of London, United Kingdom are authorised or required by law to remain closed.

“**Cash Management Agreement**” has the meaning given to that term in the U.K. Account Charge.

“**Collateral Agent**” has the meaning given to that term in the U.K. Account Charge.

“**Delegate**” means any delegate, agent, attorney or co-trustee appointed by the Collateral Trustee.

“**English Security**” means the security created or expressed to be created in favour of the Collateral Trustee as trustee for the Secured Parties pursuant to the U.K. Account Charge.

“**Loan Agreement**” has the meaning given to that term in the U.K. Account Charge.

“**Party**” means a party to this Deed.

“**Receiver**” has the meaning given to that term in the U.K. Account Charge.

“**Secured Obligations**” has the meaning given to that term in the U.K. Account Charge.

“**Secured Parties**” has the meaning given to that term in the U.K. Account Charge.

“**Secured Party Accession Undertaking**” mean:

- (a) an undertaking substantially in the form set out in Schedule 2 (*Form of Secured Party Accession Undertaking*); or
- (b) an Assignment and Assumption Agreement (as defined in the Loan Agreement) (provided that it contains an accession to this Deed which is substantially in the form set out in Schedule 2 (*Form of Secured Party Accession Undertaking*)).

“Trust Property” means:

- (a) all rights, interests, benefits and other property comprised in the U.K. Account Charge and the proceeds thereof;
- (b) any rights, interests, entitlements, choses in action or other property (actual or contingent) and the proceeds thereof which the Collateral Trustee is required by the terms of the U.K. Account Charge to hold as trustee on trust for the Secured Parties;
- (c) any representation, obligation, covenant, warranty or other contractual provision in favour of the Collateral Trustee (other than any made or granted solely for its own benefit) made or granted in or pursuant to the U.K. Account Charge or this Deed;
- (d) other obligations in the U.K. Account Charge or this Deed expressed to be undertaken by an Obligor to pay amounts in respect of the Secured Obligations to the Collateral Trustee as trustee for the Secured Parties and secured by the U.K. Account Charge.

“Trustee Acts” means the Trustee Act 1925 and the Trustee Act 2000.

“U.K. Account Charge” means the security agreement dated on or about the date hereof between USAVflow Limited as chargor, the Collateral Trustee as trustee for the Secured Parties and Citibank, N.A. as account bank.

1.2 Construction

- (a) Unless a contrary indication appears, a reference in this Deed to:
 - (i) any **“Company”**, **“Administrative Agent”**, **“Collateral Agent”**, **“Lender”**, **“Party”**, **“Obligor”**, **“Secured Party”** or **“Collateral Trustee”** shall be construed to be a reference to it in its capacity as such and not in any other capacity;
 - (ii) any **“Company”**, **“Administrative Agent”**, **“Collateral Agent”**, **“Lender”**, **“Party”**, **“Obligor”**, **“Secured Party”** or **“Collateral Trustee”** or any other person shall be construed so as to include its successors in title, permitted assigns and permitted transferees to, or of, its rights and/or obligations under the Credit Documents and, in the case of the Collateral Trustee, any person for the time being appointed as Collateral Trustee in accordance with this Deed;
 - (iii) a **“Credit Document”** or any other agreement or instrument is a reference to that Credit Document, or other agreement or instrument, as amended, varied, novated, supplemented, extended or restated;
 - (iv) a **“person”** includes any individual, firm, company, corporation, government, state or agency of a state or any association, trust, joint venture, consortium, partnership or other entity (whether or not having separate legal personality);
 - (v) a **“regulation”** includes any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental or supranational body, agency, department or of any regulatory, self-regulatory or other authority or organisation; and
 - (vi) a provision of law is a reference to that provision as amended or re-enacted.
- (b) Section, Clause and Schedule headings are for ease of reference only.

- (c) Unless this Deed provides otherwise, a term which is defined (or expressed to be subject to a particular construction) in the Loan Agreement shall have the same meaning (or be subject to the same construction) in this Deed.

1.3 Certificates

A certificate of any Secured Party as to the amount of any Secured Obligation owed to it shall be *prima facie* evidence of the existence and amount of such Secured Obligation.

1.4 Third Party Rights

- (a) Unless expressly provided to the contrary in this Deed, a person who is not a Party has no right under the Contracts (Rights of Third Parties) Act 1999 (the “**Third Parties Act**”) to enforce or to enjoy the benefit of any term of this Deed.
- (b) Notwithstanding any term of this Deed, the consent of any person who is not a Party is not required to rescind or vary this Deed at any time.
- (c) The Administrative Agent, the Collateral Agent, any Receiver or any Delegate may, subject to this Clause 1.4 and the Third Parties Act, rely on any Clause of this Deed which expressly confers rights on it.

2. Collateral Trustee for the Secured Parties

2.1 Declaration of Trust

The Collateral Trustee declares that it holds the Trust Property on trust for the Secured Parties on the terms contained in this Agreement.

3. Application of Proceeds

3.1 Order of Application

All moneys from time to time received or recovered by the Collateral Trustee pursuant to the terms of this Deed or the U.K. Account Charge or in connection with the realisation or enforcement of all or any part of the English Security shall be held by the Collateral Trustee on trust to apply them towards discharge of the Secured Obligations:

- (a) **firstly**, in discharging any sums owing to the Agents (as defined in the Cash Management Agreement), the Collateral Trustee, any Receiver and any Delegate on a pro rata basis between them;
- (b) **secondly**, disbursing to the Administrative Agent’s Account (as defined in the Cash Management Agreement) for the benefit of the Lenders and directly to the Purchaser Finance Parties (as defined in the Cash Management Agreement) entitled thereto an amount of cash necessary to pay the Unwind Amount (as defined in the Cash Management Agreement) in full (as such amount is notified to the Collateral Trustee by the Administrative Agent and to the accounts as notified by the Administrative Agent);
- (c) **thirdly**, disbursing to any Purchaser Finance Party (as defined in the Cash Management Agreement) entitled thereto, as applicable, the cash required to pay, pro rata and pari passu, to such Purchaser Finance Party all unpaid fees, expenses and indemnities incurred by, or claimed through, such Purchaser Finance Party and subject to reimbursement to, or required to be paid to, such Purchaser Finance Party under, or in connection with, any Transaction Document (as defined in the Cash Management Agreement) as such amount is notified to the Collateral Trustee by the

Administrative Agent and to the accounts as notified by the Administrative Agent;
and

- (d) **fourthly**, the balance, if any, in payment or distribution to the Company.

3.2 **Deposit of Proceeds**

Prior to the application of the proceeds of the Trust Property in accordance with Clause 3.1 (*Order of Application*), the Collateral Trustee may (but is not required to) hold all or part of those proceeds in one or more suspense or other impersonal accounts in the name of the Collateral Trustee with such financial institutions (including itself) and for as long as the Collateral Trustee shall think fit, pending the application from time to time of those moneys in the Collateral Trustee's discretion in accordance with Clause 3.1 (*Order of Application*).

3.3 **Currency Conversion**

- (a) In order to apply any sum held or received by the Collateral Trustee or a Receiver in or towards payment of the Secured Obligations in accordance with Clause 3.1 (*Order of Application*), the Collateral Trustee or such Receiver may purchase an amount in another currency and the rate of exchange to be used shall be that at which, at such time as it considers appropriate, the Collateral Trustee or such Receiver is able to effect such purchase.
- (b) The obligations of any Obligor to pay in the due currency shall only be satisfied to the extent of the amount of the due currency purchased after deducting the costs of conversion.

3.4 **Permitted Deductions**

The Collateral Trustee shall be entitled, in its discretion (but without obligation to do so), (a) to set aside by way of reserve amounts required to meet and (b) to make and pay, any deductions and withholdings (on account of taxes or otherwise) which it is or may be required by any law or regulation to make from any distribution or payment made by it under this Deed, and to pay all taxes which may be assessed against it in respect of any of the Trust Property, or as a consequence of performing its duties or exercising its rights, powers, authorities and discretions, or by virtue of its acting in its capacity as Collateral Trustee under any of the Credit Documents or otherwise (other than in connection with its remuneration for performing its duties under this Deed).

3.5 **Discharge of Secured Obligations**

- (a) Any payment to be made in respect of the Secured Obligations by the Collateral Trustee pursuant to Clause 3.1 (*Order of Application*) shall to the extent of such payment be a good discharge by the Collateral Trustee.
- (b) The Collateral Trustee is under no obligation to make the payments under paragraph (a) above in the same currency as that in which the liabilities owing to the relevant Lender are denominated pursuant to the relevant Credit Document.
- (c) The Company hereby agrees that any sums due in respect of the Secured Obligations to any Secured Party shall only be discharged to the extent that such Secured Party has received such sums in the currency in which such sums are due under the Credit Documents.

3.6 **Clawback**

- (a) If any Secured Party that is a party to this Deed has received an amount as a result of the enforcement of the English Security and the Collateral Trustee is subsequently required to pay an amount equal to that amount (a "**Clawback Amount**") to a

liquidator (or any other party) whether pursuant to a court order or otherwise such Secured Party will promptly on the request of the Collateral Trustee pay an amount equal to such Clawback Amount to the Collateral Trustee for payment to the liquidator (or such other party).

- (b) Each Secured Party that is a party to this Deed that has received a Clawback Amount shall indemnify the Collateral Trustee against any and all costs, claims, losses, expenses (including legal fees) and liabilities together with any VAT thereon which the Collateral Trustee may incur with respect to that Clawback Amount otherwise than by reason of the Collateral Trustee's own gross negligence or wilful misconduct.

4. Secured Parties' Undertakings

Each Secured Party (other than the Collateral Trustee) that is a party to this Deed gives the undertakings set out in this Clause 4 to each of the other Secured Parties and acknowledges that the Collateral Trustee has entered into this Deed in reliance on those undertakings.

4.1 Secured Parties' Information

The Secured Parties shall supply to the Collateral Trustee (in the case of the Lenders, through the Administrative Agent), such information as the Collateral Trustee may reasonably specify (through the Administrative Agent) as being necessary or desirable to enable the Collateral Trustee to perform its functions as trustee. Each Lender shall deal with the Collateral Trustee exclusively through the Administrative Agent and shall not deal directly with the Collateral Trustee.

4.2 No Independent Power

The Secured Parties shall not have any independent power to enforce, or have recourse to, any of the Trust Property or to exercise any right, power, authority or discretion arising under the U.K. Account Charge except through the Collateral Trustee.

4.3 Indemnity to Collateral Trustee

Without prejudice to any of the provisions of any other Credit Document and to the extent that the Company does not do so on demand or is not obliged to do so, each Lender hereby severally agrees to indemnify (in the proportion that the Secured Obligations due to it bear to the aggregate of the Secured Obligations due to all Lenders for the time being (or, if the Secured Obligations due to the Lenders are zero, immediately prior to their being reduced to zero)), the Collateral Trustee (and every Receiver and Delegate) on demand from and against any action, charge, claim, cost, damage, demand, expense (including legal fees), liability or loss which may be brought, made or preferred against or suffered, sustained or incurred by the Collateral Trustee in complying with any instructions from any of the other Secured Parties or otherwise sustained or incurred by any of them in acting as Collateral Trustee, Receiver or Delegate under, or exercising any authority conferred under the U.K. Account Charge or this Deed except to the extent that the liability or loss arises directly from the Collateral Trustee's (or, as the case may be, the Receiver's or the Delegate's) gross negligence or wilful misconduct.

4.4 Assignments and Transfers

Each Secured Party agrees with the Collateral Trustee that it shall not assign or transfer any of its rights and benefits under the Loan Agreement or its rights, benefits and/or obligations under this Deed unless the person to whom such assignment or transfer is made shall have acceded to this Deed by the delivery to the Collateral Trustee of a duly completed Secured Party Accession Undertaking so as to ensure that such person shall be bound by the terms and conditions of this Deed as a Secured Party.

4.5 Secured Parties

- (a) The Parties acknowledge that the Administrative Agent and the Collateral Agent are not parties to this Deed and any obligations expressed to be assumed by the “Secured Parties” under this Deed are not enforceable against the Administrative Agent and the Collateral Agent pursuant to the terms of this Deed.
- (b) Notwithstanding the foregoing, each of the Company and each Secured Party that is a party hereto expressly confirms that it shall continue to be bound by the obligations expressed to be assumed by it under this Deed notwithstanding that the Administrative Agent and the Collateral Agent are not parties hereto.

5. Company’s Undertakings

5.1 Company’s Indemnity to Collateral Trustee

- (a) The Company shall promptly indemnify and hold harmless the Collateral Trustee and every Receiver and Delegate (“**indemnified parties**”) against any costs, claims, losses, expenses (including legal fees) and liabilities (together with any applicable VAT), incurred by any of them in relation to or arising out of:
 - (i) any failure by the Company to comply with its obligations under Clause 8 (*Fees and Expenses*);
 - (ii) acting or relying on any notice, request or instruction which it reasonably believes to be genuine, correct and appropriately authorised;
 - (iii) the taking, the holding, the preservation, the exercise or the enforcement of the English Security;
 - (iv) the exercise of any of the rights, powers, discretions and remedies vested in any of the indemnified parties by the Credit Documents or by law;
 - (v) any default by any Obligor in the performance of any of the obligations expressed to be assumed by it in the Credit Documents;
 - (vi) instructing lawyers, accountants, financial advisers, tax advisers, surveyors or any other professional advisers or experts as permitted under this Deed; or
 - (vii) acting as Collateral Trustee, Receiver or Delegate (as applicable) under the English Security Documents and, otherwise in relation to any of the English Security or the performance of the terms of this Deed.
- (b) The Collateral Trustee and every Receiver and Delegate may, in priority to any payment to any of the other Secured Parties and on its own behalf or on behalf of the other indemnified parties, indemnify itself or such other indemnified parties out of the Trust Property and the proceeds of the enforcement of the English Security and shall have a lien on the Trust Property for all moneys payable under this Clause 5.1.

5.2 Counter Indemnity

To the extent that a Secured Party that is a party to this Deed is required to indemnify the Collateral Trustee (or any Receiver or Delegate) pursuant to Clause 4.3 (*Indemnity to Collateral Trustee*) as a result of any action which any Obligor is required to take but does not, the Company agrees to indemnify each such Secured Party on demand against any amount it has paid to the Collateral Trustee pursuant to Clause 4.3 (*Indemnity to Collateral Trustee*).

5.3 Waiver of Rights

The Company hereby unconditionally waives, to the extent permitted under applicable law all rights it may have to require that the English Security be enforced in any particular order or manner or at any particular time or that any sum received or recovered from any person, or by virtue of the enforcement of any of the English Security or any other security, which is capable of being applied in or towards discharge of any of the Secured Obligations is so applied.

5.4 Sums Received by the Company

If the Company receives any sum which, pursuant to this Deed or the U.K. Account Charge, should have been paid to the Collateral Trustee, that sum shall be held on trust by the Company for the Collateral Trustee and shall promptly be paid to the Collateral Trustee for application in accordance with Clause 3.1 (*Order of Application*).

5.5 Savings Provision

If, for any reason, the trust expressed to be created by Clause 5.4 (*Sums Received by Company*) should fail or be unenforceable, the Company will promptly pay or distribute an amount equal to that receipt or recovery to the Collateral Trustee to be held on trust by the Collateral Trustee for application in accordance with the terms of this Deed.

5.6 Provisions Survive Termination

The indemnities provided to the Collateral Trustee pursuant to Clauses 4.3, 5.1 and incorporated by reference pursuant to Clause 6.2(a) (*Collateral Trustee's Acts and Protection*) of this Deed shall survive any termination or discharge of this Deed, the Loan Agreement (if applicable) or the resignation or removal of the Collateral Trustee.

6. Collateral Trustee's Rights and Duties**6.1 Powers and duties**

- (a) The Collateral Trustee shall have such rights, powers, authorities and discretions as are (i) conferred on trustees by the Trustee Acts, (ii) by way of supplement to the Trustee Acts as provided for in this Deed and/or the U.K. Account Charge and (iii) any which may be vested in the Collateral Trustee by law or regulation or otherwise.
- (b) Section 1 of the Trustee Act 2000 shall not apply to the duties of the Collateral Trustee in relation to the trusts constituted by this Deed and/or the U.K. Account Charge. Where there are any inconsistencies between the Trustee Acts and the provisions of this Deed and/or the U.K. Account Charge, the provisions of this Deed and/or the U.K. Account Charge shall, to the extent permitted by law, prevail and, in the case of any such inconsistency with the Trustee Act 2000, the provisions of this Deed shall constitute a restriction or exclusion for the purposes of that Act.

6.2 Collateral Trustee's Acts and Protections

- (a) Sections 7 (*Agents*) (other than Sections 7.1.1, 7.1.14 and 7.1.15), 8.6 (*Fees and Expenses*) and 8.7 (*Indemnities*) of the Loan Agreement shall be incorporated herein mutatis mutandis, but as if references therein to the Agents and/or the Collateral Agent were references to the Collateral Trustee (other than with respect to Sections 7.1.6(e)(*Agents*), 8.6 (*Fees and Expenses*) and 8.7 (*Indemnities*) of the Loan Agreement). Any Receiver or Delegate may rely on this Clause as if referred to herein as the Collateral Trustee.

- (b) The Collateral Trustee may appoint and pay any person to act as a custodian or nominee on any terms in relation to any asset of the trust as the Collateral Trustee may determine, including for the purpose of depositing with a custodian this Deed or any document relating to the trust created under this Deed and the Collateral Trustee shall not be responsible for any loss, liability, expense, demand, cost, claim or proceedings incurred by reason of the misconduct, act, omission or default on the part of any person appointed by it, or to which it has delegated any right, power, authority or discretion pursuant to paragraph (c) below under this Deed or be bound to supervise the proceedings or acts of any person.
- (c) Each of the Collateral Trustee and any Receiver or Delegate may, at any time (and upon such terms and conditions as the Collateral Trustee or Receiver or Delegate (as the case may be) thinks fit), delegate by power of attorney or otherwise to any person for any period, all or any right, power, duty, authority or discretion vested in it in its capacity as such.
- (d) Nothing in any Credit Document constitutes the Collateral Trustee as an agent, trustee or fiduciary of any Obligor and the Collateral Trustee shall not be bound to account to any other Secured Party for any sum or the profit element of any sum received by it for its own account.
- (e) Each Secured Party that is a party to this Deed, other than any Receiver or Delegate, confirms to the Collateral Trustee that it has been, and will continue to be, solely responsible for making its own independent appraisal and investigation of all risks arising under or in connection with any Credit Document including but not limited to the right or title of any person in or to, or the value or existence of any part of the Trust Property, the priority of the English Security or the existence of any security affecting the Trust Property.
- (f) The Collateral Trustee shall not be liable for any failure to:
 - (i) require the deposit with it of any deed or document certifying, representing or constituting the title of any Obligor to any of the Trust Property;
 - (ii) obtain any licence, consent or other authority for the execution, delivery, legality, validity, enforceability or admissibility in evidence of any Credit Document or the English Security;
 - (iii) register, file or record or otherwise protect any of the English Security (or the priority of any of the English Security) under any law or regulation or to give notice to any person of the execution of any Credit Document or of the English Security;
 - (iv) take, or to require any Obligor to take, any step to perfect its title to any of the Trust Property or to render the English Security effective or to secure the creation of any ancillary security under any law or U.K. Account Charge;
 - (v) require any further assurance in relation to the English Security Documents.
- (g) The Collateral Trustee is not required to be the registered holder of title to any assets prior to any Event of Default.
- (h) The Company by way of security for its obligations under this Deed irrevocably appoints the Collateral Trustee to be its attorney to do (until the expiration of the Security Period (as defined in the U.K. Account Charge) anything which that Company has authorised the Collateral Trustee or any other Party to do under, or as referenced in, this Deed, or is itself required to do under, or as referenced in, this Deed or but has failed to do within 10 Business Days of receiving notice requiring it

to do so (and the Collateral Trustee may delegate that power on such terms as it sees fit). The Company ratifies and confirms and agrees to ratify and confirm whatever any such attorney shall do in the exercise or purported exercise of the power of attorney granted in this Clause 6.2(h).

- (i) The Collateral Trustee may accept deposits from, lend money to and generally engage in any kind of banking or other business with the Obligors, each of their affiliates and subsidiaries and shall not be obliged to account for any profit therefrom.
- (j) The rights, privileges, protections and benefits given to the Collateral Trustee are extended to, and shall be enforceable by the Collateral Trustee hereunder and under any Credit Document to which it is a party. The Collateral Trustee shall not be responsible or liable for any direction provided to the Collateral Trustee or any action taken or omitted by the Administrative Agent or the Collateral Agent under the Credit Documents.

6.3 Retirement or Removal of Collateral Trustee

- (a) Subject to paragraph (b) below, the Collateral Trustee may resign or be replaced in accordance with Section 7 of the Loan Agreement as it is incorporated herein pursuant to paragraph (a) of Clause 6.2 (*Collateral Trustee's Acts and Protections*).
- (b) The retirement or removal of the Collateral Trustee in respect of the Trust Property shall not take effect until (i) the appointment of a successor Collateral Trustee and (ii) the transfer of the Trust Property to such successor.

7. Change of Parties

7.1 Assignment

No party to this Deed may assign all or any of its rights or transfer any of its rights and obligations under this Deed except as expressly contemplated by this Deed or as may be required by law.

7.2 Change of Secured Party

Any person which is (subject only to its accession to this Deed) a permitted assignee or a transferee of a Lender, in each case for the purposes of and in accordance with the terms of the Loan Agreement, shall be entitled to execute and deliver to the Collateral Trustee a Secured Party Accession Undertaking and, with effect from the date of acceptance by the Collateral Trustee or if later, the date specified in that Secured Party Accession Undertaking:

- (a) the Secured Party ceasing to be a Lender shall be discharged from further obligations towards the Collateral Trustee and other Secured Parties under this Deed and their respective rights against one another shall be cancelled (except in each case for those rights which arose prior to such date); and
- (b) as from that date, the new Lender shall assume the same obligations, and become entitled to the same rights as it would have had if it had been an original party to this Deed in that capacity.

7.3 Additional Parties

Each of the Parties appoints the Collateral Trustee to receive on its behalf each Secured Party Accession Undertaking delivered to the Collateral Trustee and to accept and sign it as soon as reasonably practicable after receipt by it if it appears on its face to be completed, duly executed and, where applicable, delivered in the form contemplated by this Deed. No Secured

Party Accession Undertaking shall be effective unless and until accepted and signed by the Collateral Trustee.

8. Fees and Expenses

8.1 Transaction and Enforcement Expenses

The Company shall, from time to time promptly on demand of the Collateral Trustee, reimburse the Collateral Trustee:

- (a) for all fees, costs and expenses (including legal fees) properly incurred by the Collateral Trustee, a Receiver or any Delegate in connection with the negotiation, preparation, printing and execution of this Deed and the U.K. Account Charge and the completion of the transactions and perfection of the security contemplated herein and therein; and
- (b) on a full indemnity basis, for all fees, costs and expenses (including legal fees) incurred by the Collateral Trustee, a Receiver or any Delegate in connection with the exercise, preservation and/or enforcement of the English Security, any of the rights, powers and remedies of the Collateral Trustee and any proceedings instituted by or against the Collateral Trustee as a consequence of taking or holding the English Security or of enforcing those rights, powers and remedies,

in each case, together with any applicable VAT thereon.

8.2 Collateral Trustee's management time and additional remuneration

- (a) Any amount payable to the Collateral Trustee under Clause 4.3 (*Indemnity to the Collateral Trustee*), Clause 5.1 (*Company's Indemnity to Collateral Trustee*) or, Clause 8 (*Fees and Expenses*) or pursuant to Section 8.7 (*Indemnities*) of the Loan Agreement as incorporated by reference pursuant to Clause 6.2(a) (*Collateral Trustee's Acts and Protection*) shall include the cost of utilising the Collateral Trustee's management time or other resources and will be calculated on the basis of such reasonable daily or hourly rates as the Collateral Trustee may notify to the Company and the Administrative Agent, and is in addition to any other fee paid or payable to the Collateral Trustee.
- (b) Without prejudice to paragraph (a) above, in the event of:
 - (i) a Default;
 - (ii) the Collateral Trustee being requested by the Company or the Required Lenders to undertake duties which the Collateral Trustee and the Company agree to be of an exceptional nature or outside the scope of the normal duties of the Collateral Trustee under the applicable Credit Documents; or
 - (iii) the Collateral Trustee and the Company agreeing that it is otherwise appropriate in the circumstances,

the Company shall pay to the Collateral Trustee any additional remuneration (together with any applicable VAT) that may be agreed between them or determined pursuant to paragraph (c) below.

- (c) If the Collateral Trustee and the Company fail to agree upon the nature of the duties or upon the additional remuneration referred to in paragraph (b) above or whether additional remuneration is appropriate in the circumstances, any dispute shall be determined by an investment bank (acting as an expert and not as an arbitrator) selected by the Collateral Trustee and approved by the Company or, failing approval,

nominated (on the application of the Collateral Trustee) by the President for the time being of the Law Society of England and Wales (the costs of the nomination and of the investment bank being payable by the Company) and the determination of any investment bank shall be final and binding upon the Parties.

8.3 Interest on demand

If any Lender or the Company fails to pay any amount payable by it under this Deed on its due date, such amount shall bear interest at the rate specified in Section 2.5.6 of the Loan Agreement (both before and after judgment and payable on demand) from the due date until the date on which such amount is unconditionally and irrevocably paid and discharged in full, such interest to accrue on a daily basis.

9. Amendments

9.1 Amendments

- (a) Subject to paragraph (b) below, unless the provisions of any Credit Document expressly provide otherwise, the Company and the Collateral Trustee, if instructed in writing by the Administrative Agent, acting on the instructions of the Required Lenders, may amend the terms of, waive any of the requirements of, or grant consents under, this Deed or the U.K. Account Charge, any such amendment, waiver or consent being binding on all the Parties to this Deed and the Collateral Trustee shall be under no liability whatsoever in respect thereof.
- (b) Any amendment, waiver or consent which relates to the rights, protections, privileges, indemnities, immunities or obligations of the Collateral Trustee (including, without limitation, any ability of the Collateral Trustee to act in its discretion under this Deed) may not be effected without the consent of the Collateral Trustee.

9.2 Effectiveness

Any amendment, waiver or consent given in accordance with this Clause 9 will be binding on all Parties and the Collateral Trustee may effect, on behalf of any Secured Party, any amendment, waiver or consent permitted by this Clause 9.

10. Termination of the Trusts

If the Collateral Trustee, with the written approval of the Administrative Agent, acting on the instructions of the Required Lenders, determines that:

- (a) all of the Secured Obligations and all other obligations secured by the U.K. Account Charge have been fully and finally discharged; and
- (b) no Secured Party is under any commitment, obligation or liability (actual or contingent) to make advances or provide other financial accommodation to any Obligor pursuant to the Credit Documents,

then the trusts set out in this Deed shall be wound up and the Collateral Trustee shall release, without recourse or warranty, all of the English Security and the rights of the Collateral Trustee under the U.K. Account Charge.

11. Remedies and Waivers

No failure by the Collateral Trustee to exercise, nor any delay by the Collateral Trustee in exercising, any right or remedy under this Deed shall operate as a waiver thereof nor shall any

single or partial exercise of any such right or remedy prevent any further or other exercise thereof or the exercise of any other such right or remedy.

12. Additional Provisions

12.1 Partial Invalidity

If, at any time, any provision of this Deed is or becomes illegal, invalid or unenforceable in any respect or any of the English Security is or becomes ineffective in any respect under any law of any jurisdiction, such illegality, invalidity, unenforceability or ineffectiveness shall not affect:

- (a) the legality, validity or enforceability of the remaining provisions of this Deed or the effectiveness in any other respect of the English Security under such law; or
- (b) the legality, validity or enforceability of such provision or the effectiveness of the English Security under any law of any other jurisdiction.

12.2 No Impairment

If, at any time after its date, any provision of the U.K. Account Charge or this Deed is not binding on or enforceable in accordance with its terms against a person expressed to be a party to that document, neither the binding nature nor the enforceability of that provision or any other provision of the U.K. Account Charge or this Deed will be impaired as against the other party(ies) to that document.

12.3 Potentially Avoided Payments

If the Collateral Trustee determines that an amount paid to the Secured Parties under any Credit Document is capable of being avoided or otherwise set aside on the liquidation or administration of the person by whom such amount was paid, then for the purposes of this Deed, such amount shall be regarded as not having been paid.

12.4 Rights Cumulative

The rights and remedies provided by this Deed are cumulative and not exclusive of any rights or remedies provided by law.

12.5 Waiver of Defences

The provisions of this Deed or any English Security will not be affected by an act, omission, matter or thing which, but for this Clause 12.5, would reduce, release or prejudice the subordination and priorities expressed to be created by this Deed including (without limitation and whether or not known to any Party):

- (a) any time, waiver or consent granted to, or composition with, any Obligor or other person;
- (b) the release of any Obligor or any other person under the terms of any composition or arrangement with any creditor of any Obligor or other person;
- (c) the taking, variation, compromise, exchange, renewal or release of, or refusal or neglect to perfect, take up or enforce, any rights against, or security over assets of, any Obligor or other person or any non-presentation or non-observance of any formality or other requirement in respect of any instrument or any failure to realise the full value of any security;
- (d) any incapacity or lack of power, authority or legal personality of or dissolution or change in the members or status of any Obligor or other person;

- (e) any amendment, novation, supplement, extension (whether of maturity or otherwise) or restatement (in each case, however fundamental and of whatsoever nature, and whether or not more onerous) or replacement of a Credit Document or any other document or security;
- (f) any unenforceability, illegality or invalidity of any obligation of any person under any Credit Document or any other document or security;
- (g) any intermediate payment of any of the Liabilities owing to the Secured Parties in whole or in part; or
- (h) any insolvency or similar proceedings.

12.6 Consents

Any consent given by the Collateral Trustee for the purposes of this Deed may be given on such terms and subject to such conditions (if any) as the Collateral Trustee may require.

13. Notices

13.1 Communications in Writing

Each communication to be made under or in connection with this Deed shall be made in writing and, unless otherwise stated, may be made by e-mail, fax or letter.

13.2 Delivery of Notices

- (a) Any communication or document to be made or delivered by one person to another pursuant to this Deed shall be made in accordance with Section 8.3 (*Addresses for Notices*) of the Loan Agreement and the address for notices for the Collateral Trustee shall be:

Citibank, N.A., London Branch
6th floor, CGC-1
Citigroup Centre
Canada Square
Canary Wharf
London E14 5LB
United Kingdom

E-mail: issuerepfla@Citi.com
Fax: +44 207 500 5877

- (b) Section 8.4 (*Effectiveness*) of the Loan Agreement shall apply hereto mutatis mutandis.
- (c) The Lenders under the Loan Agreement shall deal with the Collateral Trustee exclusively through the Administrative Agent.

14. Governing Law and Jurisdiction

14.1 Governing Law

This Deed and any non-contractual obligations arising out of or in connection with it are governed by, and shall be construed in accordance with, English law.

14.2 Jurisdiction

- (a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Deed (including a dispute relating to the existence, validity or termination of this Deed or any non-contractual obligation arising out of or in connection with this Deed) (a “**Dispute**”).
- (b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.
- (c) This Clause 14.2 is for the benefit of the Secured Parties only. As a result, no Secured Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Secured Parties may take concurrent proceedings in any number of jurisdictions.

14.3 Service of Process

- (a) Without prejudice to any other mode of service allowed under any relevant law, the Company:
 - (i) irrevocably appoints Law Debenture Corporate Services Limited of Fifth Floor, 100 Wood Street, London, EC2V 7EX as its agent for service of process in relation to any proceedings before the English courts in connection with this Deed; and
 - (ii) agrees that failure by an agent for service of process to notify the Company of the process will not invalidate the proceedings concerned.
- (b) If any person appointed as an agent for service of process is unable for any reason to act as agent for service of process, the Company must immediately (and in any event within 5 days of such event taking place) appoint another agent on terms acceptable to the Collateral Trustee, as instructed by the Administrative Agent (acting on the instructions of the Required Lenders). Failing this, the Collateral Trustee may appoint another agent for this purpose.
- (c) The Company expressly agrees and consents to the provisions of this Clause 14 (*Governing Law and Jurisdiction*).

15. Counterparts and Effectiveness

15.1 Counterparts

This Deed may be executed in any number of counterparts and such counterparts taken together shall constitute one and the same instrument.

15.2 Effectiveness

This Deed shall take effect and be delivered as a deed on the date on which it is stated to be made notwithstanding that the Collateral Trustee or any other Party may have executed it under hand only.

In Witness Whereof this Deed has been executed as a deed by the Company and has been signed on behalf of the Collateral Trustee and other Parties.

Schedule 1

The Original Secured Parties

1. Deutsche Bank AG, London Branch
2. Prival Bank S.A.
3. BankUnited N.A.
4. Metrobank S.A.
5. First Citizens Bank Limited
6. Banco de Credito del Peru, Miami Agency
7. Moneda Deuda Latinoamericana Fondo de Inversion
8. Moneda Latinoamerica Deuda Local Fondo de Inversion

Schedule 2

Form of Secured Party Accession Undertaking

To: *[Insert full name of current Collateral Trustee]*, for itself and each of the other Secured Parties to the Security Trust Deed referred to below.

This Undertaking is made on *[date]* by *[new Lender/Receiver/Delegate]* (the “**Acceding Secured Party**”) in relation to the Security Trust Deed (the “**Security Trust Deed**”) dated *[●]* between *[●]* as collateral trustee, the Secured Parties named therein and the Company. Terms defined in the Security Trust Deed shall bear the same meanings when used in this Undertaking.

In consideration of the Acceding Secured Party being accepted as a Secured Party for the purposes of the Security Trust Deed, the Acceding Secured Party hereby confirms that, as from *[date]*, it intends to be party to the Security Trust Deed as a Secured Party, undertakes to perform all the obligations expressed in the Security Trust Deed to be assumed by a Secured Party and agrees that it shall be bound by all the provisions of the Security Trust Deed, as if it had been an original party to the Security Trust Deed.

This Undertaking shall be governed by and construed in accordance with English law.

This Undertaking has been entered into on the date stated above.

Acceding Secured Party

By:

Address for Notices:

Fax:

For attention of

Accepted by the Collateral Trustee:

for and on behalf of
[Insert name of Collateral Trustee]

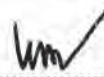
Date:

Execution

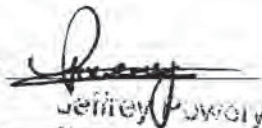
Company

Executed as a **Deed** by **USAVflow Limited** acting by **Wendy Ebanks** who, in accordance with the laws of the Cayman Islands, is duly authorised by **USAVflow Limited** to sign on its behalf in the presence of:

}



Witness's signature:



Name:

Jeffrey Powery
Company Secretary

Address:

Boundary Hall
Cricket Square
Grand Cayman KY1-1102
Cayman Islands

Occupation:


Original Secured Parties

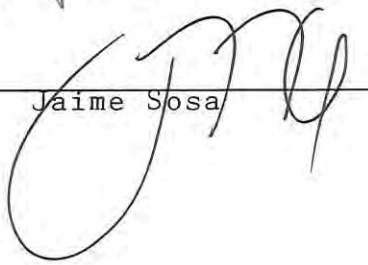
Deutsche Bank AG, London Branch

By:  _____
Gonzalo Barbon
Managing Director

By:  _____
Nicolas Ferrario
Managing Director

Prival Bank S.A.

By: 
Juan Carlos Fabrega

By: 
Jaime Sosa

VERIFICADO
 6/12/2017
Depto. Legal Prival Bank

BankUnited N.A.

By: _____

By: _____

Metrobank S.A.

By: 

Ernesto A. Boyd, Jr.
Power of Attorney

By: _____

First Citizens Bank Limited

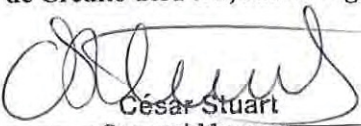
LINDI J. BALLANTULL

By: _____

By: _____

STERLING FROST

Banco de Credito del Peru, Miami Agency

By: 
Cesar Stuart
General Manager
BCP Miami Agency

By: 

Luis Awapara
VP of Corporate and
Relationship Banking

moneda SA administrador General de fondos
acting on behalf of
Moneda Deuda Latinoamericana Fondo de Inversion

By:  _____

By: _____

Moneda SA Administradora General de Fidei-
comiso, on behalf of:

Moneda Latinoamerica Deuda Local Fondo de Inversion

By: 

By: 

Collateral Trustee

Citibank, N.A., London Branch

By: _____



Peter Larsen
Vice President

EXHIBIT L-1



Positive

As of: September 25, 2020 5:36 PM Z

Barcia v. Sitkin

United States District Court for the Southern District of New York

March 29, 2004, Decided ; March 31, 2004, Filed

79 Civ. 5831 (RLC), 79 Civ. 5899 (RLC)

Reporter

2004 U.S. Dist. LEXIS 5362 *; 2004 WL 691390

NIDIA BARCIA, et al., Plaintiffs, -against- LOUIS SITKIN, et al., Defendants. MUNICIPAL LABOR COMMITTEE, et al., Plaintiffs, -against- LOUIS SITKIN, et al., Defendants.

Prior History: [*Barcia v. Sitkin*, 2003 U.S. Dist. LEXIS 9640 \(S.D.N.Y., June 9, 2003\)](#)

Disposition: Defendants' motion for stay pending appeal granted in part and denied in part.

LexisNexis® Headnotes

Civil Procedure > ... > Entry of
Judgments > Stays of Judgments > General
Overview

[HN1](#) [⬇] Entry of Judgments, Stays of Judgments

A district court will consider the following factors when determining whether to grant a stay of an injunction pending appeal: (1) whether the movant will suffer irreparable injury absent a stay; (2)

whether a party will suffer substantial injury if the stay is granted; (3) whether the movant has established a substantial possibility, which need not be a likelihood, of success on appeal; and (4) the public interest. The burden of establishing a favorable balance of these factors is a heavy one and more commonly stay requests will be denied for not meeting the standard.

Civil Procedure > ... > Entry of
Judgments > Stays of Judgments > General
Overview

[HN2](#) [⬇] Entry of Judgments, Stays of Judgments

When determining whether to grant a stay of an injunction pending appeal, controlling law is clear that "irreparable injury" to the moving party absent a stay is the more appropriate standard. Irreparable injury means the kind of injury for which money cannot compensate and is demonstrated by an injury that is actual and imminent, not remote or speculative. "Substantial injury" to the movant is appropriately considered under the second factor of the test for granting a stay.

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of
Protection

[HN3](#) [⬇] Procedural Due Process, Scope of Protection

2004 U.S. Dist. LEXIS 5362, *5362

Additional burden and expense do not normally justify a denial of fundamental due process rights.

ROBERT L. BECKER, Of Counsel, RAFF & BECKER, LLP, New York, New York.

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > General Overview

For Defendants: ELIOT SPTIZER, JUNE DUFFY, STEVEN KOTON, LINDA D. JOSEPH, Of Counsel, Attorney General of the State of New York, New York, New York.

[HN4](#) [↓] **Entry of Judgments, Stays of Judgments**

Tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.

Judges: ROBERT L. CARTER, U.S.D.J.

Opinion by: ROBERT L. CARTER

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Governments > Courts > Judicial Comity

[HN5](#) [↓] **Entry of Judgments, Consent Decrees**

Principles of federalism and comity are not part of the analysis of whether to modify a consent decree; rather, they come into play only after a court has determined that a modification is warranted.

ROBERT L. CARTER, District Judge

Defendants seek a stay of the court's order of June 10, 2003 (*Barcia v. Sitkin*, 2003 U.S. Dist. LEXIS 9640, 2003 WL 21345555 (S.D.N.Y. 2003)) (Carter, J.), pursuant to *Rules 62(c)* and *(d)*, F.R.Civ.P., pending their appeal to the United States Court of Appeals for the Second Circuit.

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > General Overview

[HN6](#) [↓] **Entry of Judgments, Stays of Judgments**

When determining whether to grant a stay of an injunction pending appeal, the necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors.

BACKGROUND

This case dates back to 1979 and concerns a 20-year-old consent decree, familiarity with which is assumed. The plaintiff class of unemployment insurance claimants originally brought suit challenging the procedures of defendants, the New York State Unemployment Insurance Appeal Board ("The Board"). The Consent Decree entered into by the parties provided for a list of procedural safeguards to be implemented by the Board.

The court in *Barcia v. Sitkin*, 2003 U.S. Dist. LEXIS 9640, 2003 WL 21345555 (S.D.N.Y. June 10, 2003) (Carter, J.) ordered the following relief: 1) the [*2] Board was enjoined from sending any reopening

Counsel: [*1] For Plaintiffs: DAVID RAFF,

notices that failed to provide specific reasons for reopening;¹ [*3] 2) the Board was ordered to turn over to plaintiffs any "draft" checklists or information about changes made to final checklists;² and 3) the Board was ordered to produce a random sample for the 450 cases that were previously (but insufficiently) reviewed.³ [*4] The court also made a finding that the Board was not in

substantial compliance with the Consent Decree.⁴ By way of remedy, the court did not order defendants to adopt plaintiffs' proposed amelioration plan because this was a drastic step and defendants had shown recent good faith efforts towards compliance. Instead, the court allowed defendants to come up with their own remedial plan as follows: "Defendants are ordered to produce a report and plan within 90 days, which at the very least should include (1) an analysis of compliance with all provisions of its own former plans; (2) a new plan; (3) a comprehensive system for tracking compliance with the provisions of the new plan; and (4) a system of tracking the level of compliance with the Decree." *Barcia, 2003 U.S. Dist. LEXIS 9640, 2003 WL 21345555 at *7.*

¹ The court found the Board's notices to claimants whose cases were to be reopened did not give specific reasons for reopening. As a result claimants had the virtually impossible task of trying to respond to every procedural issue the Board might consider under the checklist scheme set forth in the Decree. Furthermore, in order to cure the inadequate notices of reopening previously sent during the 1990 through 1997 reopening period, the court ordered the Board to send proper notices to those past claimants even though that meant reopening thousands of previously reopened cases at substantial cost to the government. The court found such measures necessary because claimants had a federal constitutional right to more specific notice than that provided by the Board. *Barcia, 2003 U.S. Dist. LEXIS 9640, 2003 WL 21345555 at *8.*

² Pursuant to the Decree, there was a prior history of such "checklists" being provided to the plaintiffs. The checklists are the plaintiffs' way of monitoring the Board's compliance with (continued on next page ...) the Decree. Before checklists were computerized in 1998, the Board used handwritten checklists and any changes to those checklists (such as addition or removal of a violation) were provided to plaintiffs. After computerization, defendants stopped providing plaintiffs with "draft" checklists reflecting such changes. Plaintiffs argued they were entitled to see any changes made to the checklists filled out by appeal Administrative Law Judges ("ALJs"), and that the switch to computerization should not affect that right. For 15 years prior to computerization, the checklists turned over to plaintiffs consisted of the original lists prepared by reviewing ALJs plus later changes. *Barcia, 2003 U.S. Dist. LEXIS 9640, 2003 WL 21345555 at *9.*

³ This issue involved defendants' performance of the terms of a 1997 Re-review Stipulation pursuant to which the Board was required to provide plaintiffs with up to 450 re-review cases for their inspection for each monitoring year. "Re-review" cases were those under review a second time due to problems with the Board's first review. Plaintiffs objected to the sample provided by the Board on the ground that it was not randomly selected. Although the 1997 Re-review Stipulation itself did not specify that the sample be "random," the court found that the Consent Decree itself was explicit that "review" cases be random, and that defendants have always been required to provide a random sampling of case files for review purposes. *Barcia, 2003 U.S. Dist. LEXIS 9640, 2003 WL 21345555 at *10.*

DISCUSSION

HNI [↑] A district court will consider the following factors when determining whether to grant a stay of an injunction pending appeal: (1) whether the movant will suffer irreparable injury absent a stay;⁵ (2) whether a party will suffer

⁴ The court concluded that the Board's violation rates today remain about the same as they were in 1992, and that the 1992 level was not acceptable in terms of providing "fair and impartial proceedings that conform to due process of law." The data submitted to the court by the parties revealed that procedural violations still occur in roughly one out of three cases, serious violations occur in roughly one out of four cases, and a remedy is necessary to cure violations in roughly one out of eight cases taken on appeal. *Barcia, 2003 U.S. Dist. LEXIS 9640, 2003 WL 21345555 at *7.*

⁵ In their briefs both parties stated that "substantial injury" to the movant should be considered for this factor. However, *HNI* [↑] controlling law is clear that "irreparable injury" to the moving party is the more appropriate standard. See *Hilton v. Braunskill*, 481 U.S. 770, 107 S. Ct. 2113, 2119, 95 L. Ed. 2d 724 (1987); *Rodriguez v. Debuono*, 175 F.3d 227 (2d Cir. 1999); *Cooper v. Town of East Hampton*, 83 F.3d 31 (2d Cir. 1996); *United States v. Private Sanitation Industry Association of Nassau/Suffolk, Inc.*, 44 F.3d 1082 (2d Cir. 1994). Irreparable injury means "the kind of injury for which money cannot compensate," *Sperry Int'l Trade, Inc. v. Government of Israel*, 670 F.2d 8, 12 (2d Cir. 1982), and is demonstrated by an injury that is actual and imminent, not remote or speculative. *Rodriguez*, 175 F.3d at 235. "Substantial injury" to the movant is appropriately considered under the second factor of this

substantial injury if the stay is granted; (3) whether the movant has established a substantial possibility, which need not be a likelihood, of success on appeal; and (4) the public interest. United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 44 F.3d 1082, 1084 (2d Cir. 1995). [*5] The burden of establishing a favorable balance of these factors is a heavy one and more commonly stay requests will be denied for not meeting the standard. 11 Charles A. Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. 2d § 2904.

[*6] I. IRREPARABLE INJURY TO MOVANT

Defendants contest the scope of the court's June 10, 2003 Order ("Order"). They argue that requiring the Board to expend resources when relief may be modified or limited on appeal will cause unnecessary and substantial injury to the Board and the public it serves. The Board will need to spend resources on a new computerized or manual system that will identify which cases require reopening, and on preparing notices for each case identified. This, it is argued, will divert "progressively dwindling" resources at a time when its caseload is substantially expanding due to recent increased unemployment in the last few years. ⁶ [*7] (Defs.' Mem. at 12.) Defendants argue that requiring maintenance of "draft" checklists will require additional programming resources and will increase the time in which current cases are processed. All of this will require substantial assistance from the Labor Department and the Board's computer technology staff, who are currently engaged in a "major modernization project" that might be jeopardized by any diversion of resources. ⁷ (Defs.' Mem. at 14.)

test. However, as the discussion *infra* Part I makes clear, defendants have done little to establish even "substantial injury" to the Board.

⁶ The Board claims that staff resources are dwindling due to a new United States Department of Labor funding formula, that no increases in staff are expected, and that it does not receive supplemental funding for a substantial portion of the re-review work. (Defs.' Mem. at 13.)

⁷ Defendants also claim that the following requirements, which are

Defendants, however, do not offer any evidence of the financial, administrative, or personnel burden they claim. ⁸ Even if they had offered such evidence, their brief only purports to show "substantial injury" rather than "irreparable injury." Plaintiffs point out and defendants do not counter that the relief ordered will not divert the attention of hearing and appeal ALJs from processing current cases, because the work required will be [*8] performed by Board management and support staff from the New York Department of Labor. Developing adequate notices of reopening will not be burdensome, particularly if the Board utilizes sample notices provided by plaintiffs. Nor should providing plaintiffs with "draft" checklists for purposes of tracking any alterations to the checklists be unduly burdensome or hamper the current claims process. ⁹ Defendants kept and provided plaintiffs with such "drafts" for 15 years before computerization, and assured plaintiffs and the court that providing the drafts would continue. (Pls.' Mem. at 9.) Undoubtedly there will be some additional burden and expense imposed by the court-ordered relief. But such HN3 [↑] additional burden and expense do not normally justify a denial of fundamental due process rights. Fuentes v. Shevin, 407 U.S. 67, 92 n. 22, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972); Goldberg v. Kelly, 397 U.S. 254, 265-266, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970); Rufo v. Inmates of Suffolk County Jail, 502

either directly mandated or implied by the court's Order, are onerous and entail significant cost and administrative burden: production of a random sample of 450 re-review cases; reopening with notice some 4,300 cases from 1990 to 1997; subjecting to re-review between 10,000 and 12,000 cases from 1990 to 1993, as well as several thousand class member cases since 1998. (Defs.' Mem. at 11-15.) However, these arguments are moot for purposes of this stay motion because plaintiffs do not object to a stay of reopening *past* cases or producing draft checklists with respect to these past cases.

⁸ The only evidence proffered is a Declaration by Robert Lorenzo, Chief Administrative Law Judge of the Board, which merely asserts that burdens will be imposed without further documentation to suggest that a serious impact analysis was conducted.

⁹ Plaintiffs describe a simple method for saving and identifying "draft" checklists on the computer system. (Pls. Mem. at 9.)

U.S. 367, 392, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992) (regarding modification of consent decree). Furthermore, in this case any burden imposed by the court's Order has not been shown [*9] to be "irreparable."

II. SUBSTANTIAL INJURY TO A PARTY

Defendants contend a stay of injunctive relief will not substantially injure the plaintiffs because the Board will continue to comply with all other provisions of the Consent Decree that are not on appeal; and that granting a stay will save resources for both parties.

However, a stay will substantially injure members of the plaintiff class. After 20 years of litigation the Board is still not in substantial compliance with the Consent Judgment, a fact that belies any claim that there is no ongoing injury to the plaintiff class. *See supra* note 4. Defendants' own [*10] data reveals that the existing plan does not work: for example, from 1991 through 2001 the violation rate remained around 29%; the remedy rate was far short of the Board's goal; the 2001 violation and remedy rates were significantly higher than in 1998; and there is no evidence that these rates were appreciably reduced in 2003 or will be absent a new plan. (Pls. Mem. at 10-11.) The Board's recent caseload increases, used by defendants to support their argument with respect to dwindling resources, makes a stronger case for the view that now even more claimants will be denied due process under the current system.

III. SUBSTANTIAL POSSIBILITY OF SUCCESS ON APPEAL

HN4^[↑] "Tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Goldstein v. Miller*, 488 F. Supp. 156, 172 (D.C.Md. 1980). *See also Carvel Corp. v. Eisenberg*, 1988 U.S. Dist. LEXIS 12043, 1988 WL

120135 at *2 (S.D.N.Y. Oct. 31, 1988).

Defendants contend that "admittedly difficult legal question[s]" present in this case and ripe for Appellate review are whether N.Y. State NOW v. Pataki, 261 F.3d 156 (2d Cir. 2001) [*11] ("NOW") requires an end to court-ordered monitoring of a state agency by plaintiffs' private law firm; and whether the principles of federalism and comity, newly-strengthened by recent decisions of the U.S. Supreme Court,¹⁰ require modification of the Consent Decree.¹¹

[*12] However, as the court found in Barcia v. Sitkin, 2003 U.S. Dist. LEXIS 9640, 2003 WL 21345555 at *3 (S.D.N.Y. June 10, 2003), these decisions, which may mark an attitudinal shift in the Supreme Court, do not go so far as to change the law applicable to this case. Furthermore, the NOW decision is distinct from this case and may not be persuasive on appeal. The NOW court concluded that because alternative procedures - in that case Article 78 proceedings -- were available to plaintiffs, it could not be said that all remedies had

¹⁰ Citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992); Agostini v. Felton, 521 U.S. 203, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997).

¹¹ Defendants also argue that the Supreme Court's grant of certiorari in Frazar v. Gilbert, 300 F.3d 530 (5th Cir. 2002), cert. granted by Frew v. Hawkins, 538 U.S. 905, 123 S. Ct. 1481, 155 L. Ed. 2d 223 (2003) will impact this case. Defendants argue that Frazar indirectly raises the issue of whether a federal court's (continued on next page ...) 42 U.S.C.A. § 1983 jurisdiction may continue over a state official as a result of a consent decree "when there has been no fault adjudicated against the state official, he has admitted no wrongdoing, and the alleged violations of the decree do not necessarily implicate federal rights;" and whether a Court can enforce a consent decree where the plaintiff cannot demonstrate an ongoing violation of a federal right but only a violation of a provision of the consent decree. (Defs.' Mem. at 8.) Frazar, however, is inapposite. Frazar held that the Eleventh Amendment bars enforcement of a consent decree against a state unless the decree seeks to enforce a federal right granted in the Constitution or a federal statute. In this case, the Consent Decree does enforce basic due process rights under the 14th Amendment and the fair hearing provisions of the Social Security Act, 42 U.S.C. § 503(a)(3), which grants a private cause of action to enforce those rights. *See, e.g., Shaw v. Valdez*, 819 F.2d 965, 966 n.2 (10th Cir. 1987).

been exhausted, and thus no violation of due process could be found. In this case, "neither Article 78 nor any other proceeding will avail unemployment insurance claimants." (Pls.' Mem. at 6.) Furthermore, whereas NOW was primarily concerned with reducing the huge backlog of cases before the New York State Division of Human Rights, here the fundamental due process rights of present and future claimants before the Board is primarily at issue.¹² This is a standard enforcement case that does not involve unique, untested, or complex legal issues. The Board agreed by Consent Decree to provide basic due process during its hearings and the plaintiff class has a right [*13] to see it enforced.¹³ Defendants fail to show a substantial possibility of success on appeal.

IV. PUBLIC INTEREST

Defendants assert that a stay is in the public interest because it will conform to the principles of federalism [*14] and comity, and because it will halt injunctive relief that will significantly burden a state agency. HNS[↑] Principles of federalism and comity, however, are not part of the analysis of *whether* to modify a consent decree; rather, they come into play only after a court has determined that a modification is warranted. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 392, n. 14, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992). Furthermore, as discussed above, defendants did not submit evidence to support their view that the injunctive

relief will significantly burden the Board or impact the work of its ALJs. The court, therefore, finds the public interest will be better served by a denial of the stay.

CONCLUSION

The motion for a stay is denied, except in so far as the retroactive relief to which plaintiffs have not objected for purposes of this stay is concerned. Defendants have not met their heavy burden of establishing that the balance of the equities tilts in their favor. There is no evidence that the injunctive relief ordered will significantly burden the Board. This is particularly so considering that plaintiffs have dropped an objection they could have made to a stay of retroactive [*15] relief, thus substantially reducing the overall burden imposed upon the Board. Even if a significant burden had been shown, there is no proof or even allegation that defendants will suffer "irreparable injury" if a stay is not granted. In contrast, a substantial burden upon the plaintiff class is evident from violation rate statistics and the court's previous findings of significant due process violations. At stake here are the due process rights of unemployment insurance claimants. Given the protracted 20-year history of this case and the longstanding failure to substantially comply with the Consent Decree,¹⁴ [*16] enforcement of the court's Order is the

¹² Although retroactive relief is part of the court-ordered injunction, plaintiffs do not object to staying retroactive relief pending appeal. (Raff Dec. at 2-3).

¹³ The parties also dispute how the 86% of claimants who never file appeals are to be considered by the court. Relying on NOW, defendants argue that such claimants were not (continued on next page ...) denied due process because they did not exhaust all remedies. The court need not address that argument to dispense with this motion, however, because the violation rates, upon which the court relied to determine that the Board had not achieved substantial compliance, were all based upon cases that had been appealed. See *Barcia v. Sitkin*, 2003 U.S. Dist. LEXIS 9640, 2003 WL 21345555 at *6 (S.D.N.Y. June 10, 2003).

¹⁴ In 1994 plaintiffs moved for enforcement and contempt of court for violations of the Consent Decree. The court granted the motions stating: "... defendants have consistently ignored their obligations under the Consent Decree, and, in so doing, have sought to nullify the Decree unilaterally" *Barcia v. Sitkin*, 865 F. Supp. 1015, 1034 (S.D.N.Y. 1994) (Carter, J.) In 1996 plaintiffs again moved for sanctions, contempt, enforcement, modification, and a wide range of other relief; and defendants failed to file papers in opposition to those motions. The court stopped short of entering default judgment for plaintiffs because "while defendants' failure to respond to the present motion perhaps constitutes an instance of the dilatoriness of which plaintiffs complain, the court will not exact a drastic price for their lapse, since the dereliction could well be the result of apparently wholesale staff turnover in the Attorney General's office." *Barcia v. Sitkin*, 945 F. Supp. 539, 542 (S.D.N.Y. 1996) (Carter, J.) The court noted that the Board had a "disturbing" rate of Consent Decree violations, but the court declined to enlarge or modify the

best way to serve the public interest. A substantial possibility of success on appeal has not been shown, and to the extent any possibility of success exists, the other three factors weigh in favor of denying the stay.¹⁵

Defendants have 90 days from the date of this opinion to implement the relief ordered by the court's June 10, 2003 opinion, notwithstanding the above-mentioned retroactive relief which shall be stayed pending appeal.

IT IS SO ORDERED

Dated: March 29, 2004

ROBERT L. CARTER

U.S.D.J.

End of Document

monitoring process at that time. Instead, the court held a conference and instructed the parties to work out a mutually acceptable response to plaintiffs concerns. *Id. at 546*. The Board devised a plan, subsequently revised in 1999, to ameliorate the problems. The parties also negotiated a series of detailed Stipulations and Orders entered between February, 1997 and July, 2001. In 2003 the parties were again at an impasse over some of the same issues from 1996, although the court noted that "after years of skirting its obligations, the Board appears to be making a sincere attempt to come to terms with its responsibilities." *Barcia v. Sitkin, 2003 U.S. Dist. LEXIS 9640, 2003 WL 21345555 at *1 (S.D.N.Y. June 10, 2003)* (Carter, J.)


¹⁵ [HN6](#) "The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors." *Goldstein v. Miller, 488 F. Supp. 156, 172 (D.C.Md. 1980)*.

EXHIBIT L-2



Neutral

As of: August 19, 2020 10:16 PM Z

Curtis v. Curtis

United States District Court for the Southern District of New York

August 24, 1992, Decided ; August 25, 1992, Filed

91 Civ. 8293 (JSM)

Reporter

1992 U.S. Dist. LEXIS 12695 *; 1992 WL 212411

RONALD CURTIS, Plaintiff, -against- STEVEN CURTIS, individually and as guardian for STARR and BRIELLE CURTIS; CURTIS BROTHERS DEVELOPMENT CORPORATION, a Florida Corporation; RITE WAY KITCHENS, INC., a Florida corporation; and POGGENPOHL, U.S., INC., a Florida corporation, Defendants.

HNI **Discovery, Methods of Discovery**

Fed. R. Civ. P. 56(c) provides that summary judgment shall be granted forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Evidence > Weight & Sufficiency

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

[HN2\[↓\]](#) Summary Judgment, Opposing Materials

The party moving for summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and of demonstrating the absence of a genuine issue of material fact. The moving party is not, however, required to refute the opponent's claim. Instead, the burden on the moving party will be discharged by showing that there is an absence of evidence to support the non-moving party's case. Once such a showing is made, the burden shifts to the non-moving party which must set forth specific facts showing that there is a genuine issue for trial. In order to prevail, the party opposing the motion must produce sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. Summary judgment is warranted where, after adequate time for discovery the nonmovant party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Business & Corporate
Compliance > ... > Contracts Law > Types of
Contracts > Settlement Agreements

Civil Procedure > Settlements > Settlement
Agreements > General Overview

[HN3\[↓\]](#) Types of Contracts, Settlement Agreements

A settlement is a contract, and once entered into is binding and conclusive.

Civil Procedure > Judgments > Relief From
Judgments > General Overview

Contracts Law > ... > Affirmative
Defenses > Coercion & Duress > General
Overview

Civil Procedure > Settlements > Settlement
Agreements > General Overview

[HN4\[↓\]](#) Judgments, Relief From Judgments

A contract may be voidable on the grounds of duress by a party who is compelled to agree to its terms by a wrongful threat that prevented him from exercising his own free choice. However, the wrongful conduct must directly relate to the procurement of the settlement, and must be distinct from the wrongs forming the basis for the underlying suit.

Business & Corporate
Compliance > ... > Contracts Law > Types of
Contracts > Settlement Agreements

Civil Procedure > Judgments > Relief From
Judgments > Fraud, Misconduct &
Misrepresentation

Civil Procedure > Settlements > Settlement
Agreements > General Overview

Civil Procedure > Settlements > Rescission

Contracts Law > ... > Affirmative
Defenses > Fraud &
Misrepresentation > General Overview

[HN5\[↓\]](#) Types of Contracts, Settlement Agreements

A claim that a litigant was fraudulently induced to enter into a settlement agreement may, if proven, be a ground for rescinding the settlement agreement.

Civil Procedure > Judgments > Relief From
Judgments > Fraud, Misconduct &
Misrepresentation

Contracts Law > ... > Affirmative
Defenses > Fraud &
Misrepresentation > Material

Misrepresentations

Contracts Law > ... > Affirmative

Defenses > Fraud &

Misrepresentation > General Overview

[HN6](#) [↓] **Relief From Judgments, Fraud, Misconduct & Misrepresentation**

To rescind a contract based on fraud one must show that the plaintiff detrimentally relied on a false material representation. Generally, statements regarding future events which may or may not occur are not the misrepresentations of material existing facts required to rescind a contract based on fraud. Statements expressing expectations of future results, however, are material misrepresentations if they are made with the knowledge or intent that the outcome predicted will not occur.

Civil Procedure > Judgments > Relief From Judgments > Fraud, Misconduct & Misrepresentation

Civil Procedure > Parties > Pro Se Litigants > Pleading Standards

Civil Procedure > Settlements > Settlement Agreements > General Overview

Civil Procedure > Settlements > Rescission

Contracts Law > ... > Affirmative

Defenses > Fraud &

Misrepresentation > General Overview

[HN7](#) [↓] **Relief From Judgments, Fraud, Misconduct & Misrepresentation**

In order to rescind a settlement agreement, a litigant must return the funds received pursuant to the agreement. This money, however, may be tendered at trial providing that the litigant offered to return it in the complaint.

Civil Procedure > Settlements > Settlement Agreements > General Overview

[HN8](#) [↓] **Settlements, Settlement Agreements**

Under both New York and Florida law, unreasonable delay in contesting a settlement may ratify it.

Judges: [*1] MARTIN, JR.

Opinion by: JOHN S. MARTIN, JR.

Opinion

MEMORANDUM OPINION AND ORDER

JOHN S. MARTIN, JR., District Judge:

Ronald Curtis commenced this action to rescind the settlement agreement he and the firms he controlled (collectively "Ronald Curtis parties") entered into with his brother Steven Curtis and entities controlled by Steven Curtis (collectively "Steven Curtis parties") and the settlement agreement the Ronald Curtis parties entered into with Poggenpohl U.S., Inc. ("Poggenpohl") and to recover lost profits. Plaintiff alleges that the defendants through threats, economic duress, and fraud induced him to enter into these agreements. Poggenpohl and the Steven Curtis parties have moved for summary judgment dismissing the complaint. Ronald Curtis has cross-moved for summary judgment.

Facts

Prior to the execution of the settlement agreements at issue, two separate lawsuits and an arbitration action had been filed involving, among other things, disputes between the brothers Ronald and

Steven Curtis regarding their rights with respect to distribution agreements with Poggenpohl. In short, the brothers contested whether the exclusive distribution rights for Poggenpohl cabinetry were held [*2] by entities controlled by Steven or to an entity controlled by Ronald. Poggenpohl, in turn, disputed the validity of the exclusive distribution agreement.

On, or about April 24, 1991, the Ronald Curtis parties entered into a settlement agreement with Poggenpohl concluding the litigation between them. In consideration for signing this agreement Ronald Curtis received \$ 150,000. The Agreement further provided that Ronald Curtis was to collect money due on certain "Northern Projects." To date he has acquired a total of \$ 82,570.02 from these properties.

On or about April 25, 1991, the Ronald Curtis parties and the Steven Curtis parties entered into a settlement agreement, concluding the litigation between them. This Agreement referenced the provision in the Poggenpohl/Ronald Curtis Agreement which stated that Ronald Curtis would receive proceeds from particular projects.

In addition, the parties to both settlements executed general releases discharging the opposite parties from any claims resulting from or arising out of the business transactions at issue and from any claims which were raised or could have been raised in the litigation which was settled. As required by the settlement [*3] agreements the parties also executed and filed stipulations dismissing the pending suits and arbitration with prejudice. All the parties entering into the settlement agreements were represented by counsel.

The instant action was commenced on December 9, 1991, and this Court subsequently dismissed the complaint for failure to allege diversity of citizenship. On March 30, 1992, the Court granted Ronald Curtis's motion to amend and reinstate his Complaint.

Discussion

[HN1](#)^[↑] [Rule 56\(c\)](#) provides that summary judgment "shall be granted forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

[HN2](#)^[↑] The moving party "always bears the initial responsibility of informing the district court of the basis for its motion" and of demonstrating the absence of a genuine issue of material fact. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 323, 106 S. Ct. 2548, 2552 (1986). The moving party is not, however, required to refute the opponent's claim. Instead, the burden on the moving party [*4] will be "discharged by 'showing' -- that is, pointing out to the District Court -- that there is an absence of evidence to support the non-moving party's case." [Celotex Corp.](#), 477 U.S. at 325, 106 S. Ct. at 2554.

Once "such a showing is made," the burden shifts to the non-moving party which "must set forth specific facts showing that there is a genuine issue for trial." [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986) (quoting [Fed. R. Civ. P. 56\(e\)](#)). In order to prevail, the party opposing the motion must produce "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party" [Anderson](#), 477 U.S. at 249, 106 S. Ct. at 2510 (citations omitted). "Summary judgment is warranted where, after adequate time for discovery the nonmovant party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." [Resource Developers, Inc. v. Statue of Liberty-Ellis Island Foundation, Inc.](#), 926 F.2d 134, 139 (2d Cir. 1991) [*5] (citations omitted). With the above standard in mind, the Court will now address the summary judgment motions.

[HN3](#)^[↑] "A settlement is a contract, and once entered into is binding and conclusive." [Janneh v. Gaf Corp.](#), 887 F.2d 432, 436 (2d Cir. 1989).

Plaintiff, therefore, cannot seek to recontest issues decided by the settlement agreements.

Ronald Curtis, however, contends that is not seeking to relitigate claims already settled, but rather is requesting the Court to rescind the settlements because he was coerced into signing the agreements. He alleges that the defendants applied economic pressure and threats to force him to enter into these contracts and that they fraudulently induced him to conclude the agreements.

[HN4](#)^[↑] A contract may be voidable on the grounds of duress by a party who is compelled to agree to its terms by a "wrongful threat" that prevented him from exercising his own free choice. *City of Miami v. Kory*, 394 So. 2d 494, 496-97 (Fla. Dist. Ct. App. 1981), petition denied, 407 So. 2d 1104 (Fla. 1981); *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 324 N.Y.S.2d 22, 25, 272 N.E.2d 533 (1971). [*6]¹ However, the wrongful conduct must directly relate to the procurement of the settlement, and must be distinct from the wrongs forming the basis for the underlying suit. See *Martina Theatre Corp. v. Schine Chain Theatres, Inc.*, 278 F.2d 798, 802 (2d Cir. 1960). For example, if party A is suing party B for failure to pay one million dollars, and the parties settle for two hundred thousand dollars, party A cannot later claim that the economic hardship of not receiving the one million dollars coerced him into settling. If this were the case, then most settlements would be voidable.

[*7] Ronald Curtis contends that Poggenpohl and Steven Curt is economically starved plaintiff by refusing to pay him money due him from his business dealings, and then deliberately prolonging

the litigation to drain Ronald's resources. Whether or not the defendants owed Ronald money was a subject of the underlying lawsuits, and thus withholding these funds cannot form the basis of a claim of duress. On the other hand, if, as plaintiff alleged, the defendants intentionally obstructed the progress of the litigation through delay tactics, this behavior might be a ground for attacking the settlement. See *Martina Theatre Corp.*, 278 F.2d at 802 (dicta). Plaintiff, however, has proffered no evidence that defendants delayed the litigation, never mind evidence that any such delay was intentional. Therefore, economic duress cannot constitute a basis for invalidating the settlements.

Plaintiff further argues that Poggenpohl forced him to settle by telling Ronald that he knew of deals between Curtis companies and organized crime. Ronald claims he viewed these comments as implicit threats that Poggenpohl would reveal the dealings. The complaints in the underlying lawsuits, however, [*8] make similar allegations of bribery and kickbacks. See, e.g., Schneider Affidavit, Ex. E, PP 53-58, 66-69. In fact, Ronald himself first raised the issue of possible illegal payments to former Poggenpohl employees in his opposition to Steven's petition to stay the New York arbitration first brought up the issue of possible illegal payments to former Poggenpohl employees by various Curtis entities. See Schneider Affidavit, Ex. C, P 28. Raising allegations of the same nature as contained in the underlying suits cannot be considered an independent wrong which could justify rescinding the agreement.

Ronald lastly contends that he was fraudulently induced to enter into the settlement agreements. [HN5](#)^[↑] This claim may, if proven, be a ground for rescinding the settlement agreements. See *Royal v. Parado*, 462 So. 2d 849, 854-55 (Fla. Dist. Ct. App. 1985) (fraudulent inducement ground for rescission); *Fitzgerald v. Title Guarantee & Trust Co.*, 290 N.Y. 376, 377, 49 N.E. 2d 489, 491 (1943); *Callanan v. Powers*, 199 N.Y. 268, 284, 92 N.E. 747, 752 (1910) (fraud in the making of the contract is a ground for rescission).

¹ The settlement agreements provide that they shall be governed by Florida law. Defendant Poggenpohl, however, rather than addressing the choice of law issue, argues that Florida and New York law are the same with respect to these issues and primarily cites New York law. The Court concurs that Florida and New York law are essentially in agreement with respect to the conditions required to rescind a contract, and therefore it does not need to reach the issue of which law applies to the validity of the agreements. Whenever possible citations to both jurisdictions are given.

[*9] Plaintiff asserts that his brother and Poggenpohl engaged in an elaborate scheme to execute a settlement which made it appear that Ronald would be paid a decent amount, but which was not nearly as remunerative as it seemed. Plaintiff points to provision 2.3 of the settlement with Poggenpohl which provided:

Poggenpohl has the right and obligation to direct the first \$ 150,000 of monies otherwise due to Ronald Curtis and/or Steven Curtis from certain "Northern Projects", as specified in Schedule B hereto, directly to Ronald Curtis (and not Steven Curtis) *when and as* said monies are received by Poggenpohl. Poggenpohl agrees to pay such monies, *as and when* received by it, to Ronald Curtis and to, thereafter, pay all such further monies otherwise due Ronald Curtis or Steven Curtis from such Northern Projects in equal amounts, 50% to Ronald Curtis and 50% to Steven Curtis.

Gora Affidavit, Ex. A, P 2.3 (emphasis added), and to Ronald's agreement with Steven which incorporated this provision by reference. Complaint, Ex. 43, P 2(b)(ii). Ronald contends that by the inclusion of these provisions, as well as through oral representations, defendants assured him that he would receive [*10] at least \$ 150,000 from these properties.² To date he has only received \$ 82,570.02 and was credited \$ 11,788.27 toward a preexisting debt, for a total of \$ 94,358.29. All of this money came from Carlyle Towers, only one of the fifteen projects listed on schedule B.

Poggenpohl counters that the company expressly refused to make any binding representations about the collectability of these receivables, and therefore Ronald Curtis has failed to state a claim. Indeed, a letter dated April 25, 1991 from the firm's attorney written in response to a question from Ronald's attorney specifically stated, "Poggenpohl makes no representation or warranty, nor takes any position,

with respect to the collectability, in likelihood or amounts, of that total or any portion thereof." The letter, however, is dated after the Poggenpohl agreement (and the same day as the agreement with Steven Curtis) and is [*11] not referenced by or incorporated in the agreement. It also estimated the outstanding requisitions to be \$ 1,700,000.

HN6^[↑] To rescind a contract based on fraud one must show that the plaintiff detrimentally relied on a false material representation." Hauben v. Harmon, 605 F.2d 920, 923 (5th Cir. 1979); Albany Motor Inn and Restaurant, Inc. v. Watkins, 445 N.Y.S.2d 616, 617 (App. Div. 1981). Generally, statements regarding future events which may or may not occur are not the misrepresentations of "material existing facts" required to rescind a contract based on fraud. See Chase Manhattan Bank, M.A. v. Perla, 411 N.Y.S.2d 66, 68 (App. Div. 1978) (emphasis added); Nicholson v. Kellin, 481 So. 2d 931, 935 (Fla. Dist. Ct. App. 1985); see also Palmer v. Santa Fe Healthcare Systems Inc, 582 So. 2d 1234, 1235 (Fla. Dist. Ct. App. 1991). Statements expressing expectations of future results, however, are material misrepresentations if they are made with the knowledge or intent that the outcome predicted will not occur. See Chase Manhattan Bank, 411 N.Y.S.2d at 68; Nicholson, 481 So. 2d at 935. [*12]

Plaintiff asserts that Poggenpohl and his brother knew at the time they signed the agreements that the Curtis's interest in the receivables outstanding would not total \$ 150,000. He argues that all that was due at the time of the signing of the settlement agreements was \$ 94,358.29.


Although plaintiff has not proffered any direct evidence of defendants' intent to defraud, the circumstances indicate that the defendants may have known that the proceeds would not total \$ 150,000. Therefore, it would be inappropriate at this stage of the litigation to grant defendants' summary judgment motions on the fraudulent inducement claim. Because there should be discovery, both with respect to whether the contract


² Plaintiff has offered no evidence of these oral representations, but perhaps after further discovery would be able to do so.

included an implicit representation that \$ 150,00 of proceeds would be received, and regarding the defendants' intent, all parties' motions for summary judgment on these questions are denied.³

[*13] The Court, therefore, grants the parties the right to engage in limited discovery regarding the fraudulent inducement claim. After completion of this discovery, the parties are free to move again for summary judgment.

As an alternative basis for summary judgment dismissing the complaint, defendants assert that by keeping the money he received pursuant to the settlement agreement, and delaying in bringing this suit, the plaintiff ratified the contract.

[HN7](#) In order to rescind the contract Ronald Curtis must return the funds received pursuant to the contract. This money, however, may be tendered at trial providing he offered to return it in the complaint. See Willis v. Fowler, 136 So. 358, 368 (Fla. 1931); Gilbert v. Rothschild, 280 N.Y. 66, 72, 19 N.E.2d 785, 878 (1939). Although the complaint does not make this offer, Ronald Curtis filed it pro se, and therefore we will give him more leeway. See Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 595-96 (1972). The court, thus, grants Ronald Curtis leave to amend his complaint to make this offer. Should he fail to amend within thirty days, defendants' [*14] motions for summary judgment will be granted.

[HN8](#) Under both New York and Florida law unreasonable delay in contesting a settlement may ratify it. See Komer v. Shipley, 154 F.2d 861, 865 (5th Cir. 1946); In re Frenz Enterprises Inc., 89 Bankr. 220, 222 (Bankr. M.D. Fla. 1988); Leader v. Dinkler Management Corp., 272 N.Y.S.2d 397, 398

(App. Div. 1966), *aff'd*, 283 N.Y.S.2d 281, 230 N.E.2d 120 (1967). Here, also, the parties should engage in discovery to more fully develop the record on the question of whether it was reasonable for Ronald Curtis not to contest the settlement soon after receiving a letter stating that Poggenpohl was making no representations regarding the collectability of the receivables, and whether his acceptance of \$ 82,570.02 on May 15, 1991 constituted a ratification of the contract.

Conclusion

Because we conclude that there should be discovery regarding both whether Ronald Curtis was fraudulently induced to enter into the settlement agreements, and whether his delay in bringing this action was unreasonable, defendants' motions for summary judgment are denied, without prejudice [*15] to the right of defendants to renew the motion after discovery is completed. Plaintiff's cross motion for summary judgment also is denied. Several material issues of fact clearly preclude granting his motion.

Discovery should proceed forthwith and be concluded by November 30, 1992.

SO ORDERED.

Dated: New York, New York

August 24, 1992

JOHN S. MARTIN, JR., U.S.D.J.

End of Document

³ If plaintiff is also seeking damages for the allegedly fraudulent representations, the same material issues of fact must be decided, see Hauben v. Harmon, 605 F.2d 920, 923 (5th Cir. 1979) (setting forth the elements of a fraud cause of action under Florida); Pappas v. Harrow Stores, Inc., 528 N.Y.S.2d 404, 407 (App. Div. 1988) (same for New York law), and summary judgment, therefore, is precluded on this claim as well.

EXHIBIT L-3



Positive

As of: September 30, 2020 11:52 PM Z

Eur. Movieco Partners Ltd. v. United Pan-Europe Communs. N.V. (In re United Pan-Europe Communs. N.V.)

United States District Court for the Southern District of New York

January 30, 2003, Decided ; January 31, 2003, Filed

CHAPTER 11, 02-16020 (BRL), M-47 (RWS)

Reporter

2003 U.S. Dist. LEXIS 1297 *

In re UNITED PAN-EUROPE
COMMUNICATIONS N.V., Debtor. EUROPE
MOVIECO PARTNERS LIMITED, Appellant, -
against - UNITED PAN-EUROPE
COMMUNICATIONS N.V., Debtor-Appellee.

Disposition:

Appellant's motion for expedited treatment denied.

LexisNexis® Headnotes

Bankruptcy Law > Procedural
Matters > Judicial Review > Bankruptcy
Appeals Procedures

Bankruptcy Law > Procedural
Matters > Judicial Review > General Overview

HN1 [Download] **Judicial Review, Bankruptcy Appeals Procedures**

Fed. R. Bankr. P. 8019 permits a district court to suspend or modify the normal rules and procedures governing appeals from a bankruptcy court decision and expedite the determination of an appeal.

Bankruptcy Law > Procedural
Matters > Judicial Review > Bankruptcy
Appeals Procedures

Bankruptcy Law > Procedural
Matters > Judicial Review > General Overview

HN2 [Download] **Judicial Review, Bankruptcy Appeals Procedures**See *Fed. R. Bankr. P. 8019*.

Bankruptcy Law > Procedural
Matters > Judicial Review > Bankruptcy
Appeals Procedures

Bankruptcy Law > Procedural
Matters > Judicial Review > General Overview

HN3 [Download] **Judicial Review, Bankruptcy Appeals Procedures**

Courts invoke the power given them by *Fed. R. Bankr. P. 8019* if there are unusual time considerations or if unfairness to the litigants would otherwise result.

Bankruptcy Law > Procedural
Matters > Judicial Review > Bankruptcy
Appeals Procedures

Bankruptcy Law > Procedural
Matters > Judicial Review > General Overview

HN4 [Download] **Judicial Review, Bankruptcy Appeals Procedures**

Fed. R. Bankr. P. 8011 provides that whenever a movant requests expedited action on a motion on the ground that, to avoid irreparable harm, relief is needed in less time than would normally be

Eur. Movieco Partners Ltd. v. United Pan-Europe Communs. N.V. (In re United Pan-Europe Communs. N.V.)

required for the district court or bankruptcy appellate panel to receive and consider a response, the word Emergency shall precede the title of the motion. By the plain language of the provision, [Rule 8011](#) appears to apply only to a court's determination of whether an Emergency motion court should be heard on an expedited basis.

Bankruptcy Law > Procedural
Matters > Judicial Review > Bankruptcy
Appeals Procedures

Bankruptcy Law > Procedural
Matters > Judicial Review > General Overview

[HN5](#) [📄] **Judicial Review, Bankruptcy Appeals Procedures**

[Fed. R. Bankr. P. 8019](#)'s requirement of showing good cause means a showing of irreparable harm, as explicitly required in [Fed. R. Bankr. P. 8011](#).

Bankruptcy Law > Procedural
Matters > Judicial Review > General Overview

[HN6](#) [📄] **Procedural Matters, Judicial Review**

In the context of a [Fed. Bankr. R. 8019](#) motion, monetary loss alone will generally not amount to irreparable harm. Such harm is injury for which a monetary award cannot be adequate compensation.

Bankruptcy Law > Procedural
Matters > Judicial Review > General Overview

[HN7](#) [📄] **Procedural Matters, Judicial Review**

Conclusory statements of irreparable harm, without more, do not suffice to grant relief under [Fed. R. Bankr. P. 8019](#).

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WHITE & CASE, Attorneys for Debtor-Appellee, New York, NY, By: J. CHRISTOPHER SHORE, ESQ., HOWARD S. BELTZER, ESQ., Of Counsel.

Judges: ROBERT W. SWEET, U.S.D.J.

Opinion by: ROBERT W. SWEET

Opinion

Sweet, D.J.,

Appellant Europe Movieco Partners Limited ("Movieco") has moved on an emergency basis pursuant to [Rules 8011](#) and [8019 of the Federal Rules of Bankruptcy Procedure](#) for an expedited determination of Movieco's appeal from an Order of the United State Bankruptcy Court for the Southern District of New York entered on January 8, 2003 (the "Rejection Order"), permitting the debtor, United Pan-Europe Communications, N.V. ("UPC"), to reject an agreement between Movieco and UPC.

For the following reasons, that motion is denied.

Parties

UPC is a holding company organized under the laws of The Netherlands, with its statutory seat and principal place of business in Amsterdam, Holland. UPC has no business operations or employees in the United States. UPC's principal assets consist of its direct and indirect interests in approximately 200 operating subsidiaries, [*2] which own and operate broadband communication networks that provide telephone, cable and internet services to residential and commercial businesses in eleven countries in Europe.

Movieco is a limited liability company organized under the laws of England, with its principal place of business in London, England. Movieco possesses a broadcast license issued by the Independent Television Commission of the United Kingdom pursuant to Part 1 of the Broadcasting Act of 1990,

Eur. Movieco Partners Ltd. v. United Pan-Europe Communs. N.V. (In re United Pan-Europe Communs. N.V.)

as amended by the Broadcasting Act of 1996. Movieco operates and broadcasts two movie channels, Cinenova and Cinenova 2, from England via satellite uplink for reception by subscribers in Benelux countries. Movieco is regulated by British television authorities.

The Agreement

UPC and Movieco entered into a Cable Affiliation Agreement (the "Agreement") on December 21, 1999. Under the Agreement, Movieco licensed to UPC, for a period of seven years, the right and the obligation to receive and distribute the Cinenova movie channel to UPC's subscribers on its cable systems in The Netherlands and Flemish-speaking Belgium. In consideration for this license, UPC is required to pay a certain monthly fee to Movieco.

[*3]

UPC has been in breach of its payment obligations under the Agreement since February 2002.

The Dual Insolvency Proceedings

On December 3, 2002, UPC filed a petition with the District Court of Amsterdam (Rechtbank) (the "Dutch Bankruptcy Court"), requesting that it grant UPC a suspension of payments or moratorium under Dutch bankruptcy law. With its petition, UPC filed a proposed plan of compulsory composition under the Dutch Faillissementswet ("Dutch Bankruptcy Code").

Also on December 3, 2002, UPC filed a voluntary bankruptcy petition under Chapter 11 of the United States Bankruptcy Code. With its petition, UPC filed a proposed plan of reorganization and an accompanying disclosure statement. On or about December 23, 2002, UPC filed an amended plan of reorganization (the "Amended Plan") and a related amended disclosure statement. The Amended Plan provides that holders of "rejection claims" will be provided the treatment accorded holders of pre-petition general unsecured claims and, thus, will be satisfied through the distribution of a *pro rata* share of equity in New UPC. Confirmation of the Amended Plan is scheduled to be heard on February 20, 2003.

[*4]

Rejection Order

Also on December 3, 2002, UPC filed a motion to reject the Agreement under [section 365 of the U.S. Bankruptcy Code](#) (the "Rejection Motion"). Movieco objected to the motion on the grounds that extending [section 365 of the Bankruptcy Code](#) to permit rejection of a contract between a Dutch company and an English company that is performed entirely overseas is contrary to the laws of the debtor's homeland and ran afoul of well-founded principles of international comity and the presumption against extra-territoriality. Movieco requested that the Bankruptcy Court abstain from hearing the Rejection Motion in deference to Dutch law and the proceedings pending before the Dutch Bankruptcy Court.

The Bankruptcy Court heard oral arguments on January 7, 2003. Concluding that no conflict existed between Dutch insolvency law and the U.S. Bankruptcy Code and that, in any event, the appropriate foreign tribunal would determine the preemptive effect, if any, of the Amended Plan, the Bankruptcy Court granted the Rejection Motion, authorizing rejection of the Agreement as of March 1, 2003.

The Rejection Order was entered on the Bankruptcy Court's docket on January 8, 2003. On January 16, 2003, Movieco [*5] filed a timely Notice of Appeal.

In pleadings served on UPC on January 24, 2003, Movieco has applied for an injunction requiring UPC to perform the agreement on various grounds, including the alleged unavailability of voluntary termination under Dutch law and the purported violation of Dutch competition laws.

On January 24, 2003, Movieco made the instant motion. Movieco included in its motion a proposed schedule for briefing and argument of its appeal that would result in the first brief filed on February 3, 2003 and argument held on February 23, 2003. Oral argument was held on the instant motion on January 29, 2003, at which time the motion was considered fully submitted.

DISCUSSION

Eur. Movieco Partners Ltd. v. United Pan-Europe Communs. N.V. (In re United Pan-Europe Communs. N.V.)

Bankruptcy Rule 8019 HN1^[↑] permits a district court to suspend or modify the normal rules and procedures governing appeals from a bankruptcy court decision and expedite the determination of an appeal. Fed. R. Bankr. P. 8019 HN2^[↑] ("In the interest of expediting decision or for other cause, the district court or the bankruptcy appellate panel may suspend the requirements or provisions of the rules in Part VIII, except Rules 8001, 8002 and 8013 and may order proceedings in accordance with the direction. [*6]

"); In re Island Helicopters, Inc., 211 B.R. 453, No. 97 Civ. 4584, 1997 WL 466973, at *4 (E.D.N.Y. Aug. 13, 1997) (permitting expedited appeal); In re Mego Int'l Inc., 30 B.R. 479, 479-80 (S.D.N.Y. 1983) (opinion issued on expedited appeal); 10 Collier on Bankruptcy P 8019.01 (15th ed. 2002) ("The primary purpose of Federal Rule of Bankruptcy Procedure 8019 is to give the district courts . . . the power to expedite the consideration of cases that are 'of primary concern to the public or to the litigants.'") (citing Original Advisory Committee Note to Rule 2 of the Federal Rules of Appellate Procedure, from which Rule 8019 is drawn).

HN3^[↑] "Courts will invoke the power given them by Rule 8019 if there are unusual time considerations or if unfairness to the litigants would otherwise result." 10 Collier on Bankruptcy P 8019.01; see also Groendyke Transp. Inc. v. Davis, 406 F.2d 1158, 1162 (5th Cir. 1969) (permitting expedited disposition because important public policy issues were involved and appellant's position was clearly correct as a matter of law); In re Finley, 135 B.R. 456, 458 (S.D.N.Y. 1992) (relying on specific detailed allegations [*7]

that the debtor's plan could not be implemented until all appeals were resolved, the court agreed to prompt resolution of appeal). For the purposes of determining this motion and in the absence of any discussion by the parties of the legislative history of Rule 8019 to the contrary, the "good cause" required by Rule 8019 will be equated to the requirement of "irreparable harm" required of emergency motions by Rule 8011.¹

UPC has cited to a number of cases explicitly brought pursuant only to Fed. R. Bankr. P. 8011(d) for the proposition that the law of this Circuit requires that Movieco show "irreparable harm" to expedite its appeal. E.g., In re Dairy Mart Convenience Stores, Inc., 272 B.R. 66,

70 (S.D.N.Y. 2002) ("The appellant must show by affidavit that, to avoid irreparable harm, relief is needed in less time than would normally be required."); In re Delco Dev. Mid-Island Ltd., 1990 U.S. Dist. LEXIS 18291, No. 90 Civ. 3914, 1990 WL 263495, at *1 (E.D.N.Y. Nov. 29, 1990) (movant must "demonstrate[]" that expedited consideration is necessary to avoid irreparable harm").

Rule 8011 HN4^[↑] provides that "whenever a movant requests expedited action on a motion on the ground that, to avoid irreparable harm, relief is needed in less time than would normally be required for the district court or bankruptcy appellate panel to receive and consider a response, the word 'Emergency' shall precede the title of the motion." By the plain language of the provision, Rule 8011 appears to apply only to a court's determination of whether an "Emergency motion" -- such as the one before this court should be heard on an expedited basis. Thus, Movieco would have had to submit, and label as an "Emergency," its appeal, in order for the requirement of "irreparable harm" to apply. Of course, it does not make any sense that a party could file an "Emergency motion" seeking permission for an expedited appeal, instead of directly filing their appeal, and thus avoid the higher showing of irreparable harm. Thus, the Court will read HN5^[↑] Rule 8019's requirement of showing "good cause" to mean a showing of irreparable harm, as explicitly required in Rule 8011.

[*8]

Based on the papers and on the arguments presented at a hearing on January 29, 2003, the Court holds that Movieco has failed to present sufficient considerations to justify an expedited schedule.

Movieco points to the fast approaching March 1, 2003 date set by the Bankruptcy Court, at which time UPC can reject the Agreement to show that time is of the essence. Movieco claims that in the absence of an expedited appeal to address whether Section 365 applies to the Agreement (and thus whether any rejection by UPC of the Agreement would be excused under U.S. Bankruptcy law), it would suffer economic and reputational harm if UPC rejected the Agreement and ceased broadcast of Movieco's movie channel. Further, Movieco argues that it stands to lose a substantial source of revenue if the Agreement is rejected, as more than 50 percent of Movieco's revenues are derived from payments UPC is obligated to make under the Agreement.

As an initial matter, according to Movieco's Head of Legal Affairs, UPC has been in breach of its payment obligations to Movieco since February 2002. In light of the ongoing nature of UPC's nonpayment, it is difficult to discern a compelling

Eur. Movieco Partners Ltd. v. United Pan-Europe Communs. N.V. (In re United Pan-Europe Communs. N.V.)

need to prevent UPC from [*9]

rejecting the Agreement. In any case, the harm complained of appears to be almost entirely economic in nature, and one for which a legal remedy would exist should Movieco be successful in arguing that [Section 365](#) does not apply in this situation and should Movieco further be successful in its arguments in an extra-territorial court that UPC should not be allowed to reject the Agreement. E.g., [In re Dairy Mart](#), 272 B.R. at 71 n.3 [HN6](#)^[↑] ("Monetary loss alone will generally not amount to irreparable harm") (citing [Borey v. Nat'l Union Fire Ins. Co. of Pittsburgh](#), 934 F.2d 30, 34 (2d Cir. 1991)); [Everest Capital Inv. Ltd. v. Editek, Inc.](#), 1996 U.S. Dist. LEXIS 17793, 1996 WL 695794, at *3 (S.D.N.Y. Dec. 4, 1996) ("Irreparable harm is injury for which a monetary award cannot be adequate compensation") (citing [Int'l Dairy Foods Ass'n v. Amestoy](#), 92 F.3d 67, 71 (2d Cir. 1996)(internal citations omitted)).

The only potential "irreparable harm" cited is the conclusory allegation that "reputational harm" will ensue if the Agreement is rejected. There are no specific allegations as to what Movieco's current reputation is in the Benelux countries and [*10]

how that reputation would be affected by the rejection of the Agreement. Nor has Movieco alleged that it could not in any case obtain a contract with another corporation that would provide similar services as UPC had done -- and perhaps lead to a better payment history. In light of these conclusory allegations, Movieco has failed to show irreparable harm. E.g., [In re Texaco, Inc.](#), 81 B.R. 820, 829 (Bankr. S.D.N.Y. 1988) (holding that [HN7](#)^[↑] conclusory statements of irreparable harm, without more, do not suffice to grant relief); [In re Penn-Dixie Indus., Inc.](#), 6 B.R. 832, 837 (Bankr. S.D.N.Y. 1980) (denying emergency relief because "there had been no demonstration by plaintiffs of any real injury whatsoever that would result from a denial of the relief sought"). In any case, because Movieco fails to establish what sort of reputational harm would occur, it is impossible to judge whether that too would be compensable with an eventual monetary award.

Movieco also points out that its appeal will raise important public policy issues regarding

international comity and the extra-territorial reach of [section 365 of the U.S. Bankruptcy Code](#). Movieco has failed [*11]

to explain, however, why these public policy considerations merit an expedited appeal. Indeed, given the weighty nature of the issues involved, due time and consideration should be given to their briefing and argument by the parties and the measuring thereof by this Court.

Because Movieco has failed to establish the existence of irreparable harm, the motion for expedited treatment must be denied.

Conclusion

For the foregoing reasons, Movieco's motion is denied.

It is so ordered.

New York, NY

January 30, 2003

ROBERT W. SWEET

U.S.D.J.

End of Document

EXHIBIT L-4



Caution

As of: September 25, 2020 5:30 PM Z

In re BGI, Inc.

United States Bankruptcy Court for the Southern District of New York

November 2, 2012, Decided

Case No. 11-10614 (MG), Substantively Consolidated

Reporter

2012 Bankr. LEXIS 5244 *; 57 Bankr. Ct. Dec. 48

Administration > Notice

In re: BGI, INC., f/k/a Borders Group Inc., Debtor.

HN2[↓] **Plans, Disclosure Statements**

Subsequent History: Appeal dismissed by, As moot *Beeman v. BGI Creditors' Liquidating Trust (In re BGI, Inc.)*, 2013 U.S. Dist. LEXIS 77740 (S.D.N.Y., May 22, 2013)

"Known" creditors must be afforded actual written notice of a bankruptcy filing and the bar date; unknown creditors need only receive constructive notice, such as notice by publication. A creditor is considered "known" where its identity is actually known to a debtor or is reasonably ascertainable by a debtor.

LexisNexis® Headnotes

Bankruptcy

Law > ... > Plans > Postconfirmation

Effects > Revocation of Confirmation

HN1[↓] **Postconfirmation Effects, Revocation of Confirmation**

Relief from a confirmation order may only be obtained within 180 days of the entry of the order and only where the order was procured by fraud. 11 U.S.C.S. § 1144.

Bankruptcy

Law > ... > Reorganizations > Plans > Disclosure Statements

Bankruptcy Law > ... > Bankruptcy > Case

Bankruptcy Law > Claims > Proof of Claim > Effects & Procedures

Civil Procedure > ... > Relief From Judgments > Excusable Mistakes & Neglect > Excusable Neglect

HN3[↓] **Proof of Claim, Effects & Procedures**

In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship.*, the United States Supreme Court established four factors to assist bankruptcy courts in evaluating excusable neglect: (1) the danger of prejudice to the debtor; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. The United States Court of Appeals for the Second Circuit strictly observes bar dates and has adopted what has been characterized as a "hard line" in applying the Pioneer test, meaning that a bankruptcy court should focus its analysis primarily on the reason for

the delay, and specifically whether the delay was in the reasonable control of the movant.

Bankruptcy

Law > ... > Plans > Postconfirmation

Effects > Effects of Confirmation

Bankruptcy

Law > ... > Reorganizations > Plans > Plan

Modification

Bankruptcy

Law > ... > Plans > Postconfirmation

Effects > Revocation of Confirmation

[HN4](#) [📄] **Postconfirmation Effects, Effects of Confirmation**

The Bankruptcy Code and the Federal Rules of Bankruptcy Procedure govern when and to what extent a court may grant a post-confirmation motion that would have the effect of modifying or revoking a confirmed Chapter 11 bankruptcy plan. [11 U.S.C.S. § 1141\(a\)](#) provides that a confirmed plan is binding on, among others, a debtor and any creditor, whether or not such creditor accepted the plan. An order of confirmation concededly binds a debtor and its creditors whether or not they have accepted the confirmed plan. Thus, it has preclusive effect.

Bankruptcy

Law > ... > Reorganizations > Plans > Plan

Modification

Evidence > Burdens of Proof > Allocation

[HN5](#) [📄] **Plans, Plan Modification**

A confirmed Chapter 11 bankruptcy plan may only be modified by a proponent of the plan or a reorganized debtor, and only before the plan has been substantially consummated. [11 U.S.C.S. § 1127\(b\)](#). Courts have found a plan to be substantially consummated when distributions

under the plan were commenced, and the proponent of a modification bears the burden of establishing that the plan has not been substantially consummated.

Bankruptcy

Law > ... > Reorganizations > Plans > Plan

Modification

[HN6](#) [📄] **Plans, Plan Modification**

The United States Court of Appeals for the Second Circuit has characterized as a "modification" of a bankruptcy plan a restructuring that effectively altered a payment right.

Bankruptcy

Law > ... > Plans > Postconfirmation

Effects > Revocation of Confirmation

[HN7](#) [📄] **Postconfirmation Effects, Revocation of Confirmation**

[11 U.S.C.S. § 1144](#) provides the sole basis for a court to overturn a confirmed Chapter 11 bankruptcy plan. It provides that a confirmation order may only be revoked where an adversary proceeding is brought within 180 days after entry of the order confirming the plan, and only where the order was procured by fraud. The 180-day deadline is absolute and may not be extended by the court pursuant to its equitable powers or [Fed. R. Bankr. P. 9024](#). In fact, in cases with more complicated plans of reorganization that impact greater numbers of interested parties, the time frame within which a request for revocation should be made necessarily shortens because the level of difficulty required to comply with the statute and protect innocent third parties in a revocation order increases exponentially.

Bankruptcy

Law > ... > Plans > Postconfirmation

Effects > Revocation of Confirmation

proceeding to revoke the order.

HN8 Postconfirmation Effects, Revocation of Confirmation

See [11 U.S.C.S. § 1144](#).

Bankruptcy Law > Procedural
Matters > General Overview

Civil Procedure > Judgments > Relief From
Judgments > Extraordinary Circumstances

Bankruptcy
Law > ... > Plans > Postconfirmation
Effects > Revocation of Confirmation

Civil Procedure > Judgments > Relief From
Judgments > General Overview

HN9 Bankruptcy Law, Procedural Matters

[Fed. R. Bankr. P. 9024](#) provides that [Fed. R. Civ. P. 60](#) applies in a Chapter 11 bankruptcy case. [Rule 60](#), in turn, allows a court to relieve a party from a final judgment, order, or proceeding for a variety of reasons if it is filed within a "reasonable" time after a final order or judgment is issued. [Fed. R. Civ. P. 60\(b\)\(6\)](#). However, [Rule 9024](#) provides that an action to revoke confirmation of a Chapter 11 plan is subject to the 180-day limit from [11 U.S.C.S. § 1144](#).

Bankruptcy
Law > ... > Plans > Postconfirmation
Effects > Revocation of Confirmation

HN10 Postconfirmation Effects, Revocation of Confirmation

Courts analyzing [11 U.S.C.S. § 1144](#) have consistently held that parties are barred from attacking a Chapter 11 confirmation order by characterizing their action as an independent motion or cause of action, rather than an adversary

Bankruptcy

Law > ... > Plans > Postconfirmation

Effects > Revocation of Confirmation

HN11 Postconfirmation Effects, Revocation of Confirmation

A court must look carefully at the facts and the requested relief to determine whether a party is attempting to revoke a confirmation order, focusing particularly on whether the relief sought would upset a confirmed plan, negatively affect innocent parties and creditors, and attempt to "redivide the pie." If a claim does not involve an attempt to "redivide the pie" by a disgruntled participant in a plan, and instead merely involves a dispute about an additional asset that did not figure into a reorganization plan, an adjudication of the dispute would not upset the confirmed plan, and the 180-day time limitation of [11 U.S.C.S. § 1144](#) is not a bar. On the other hand, where the requested relief would reverse what would otherwise be the consequences of a confirmed Chapter 11 plan, that action is a collateral attack on the plan and is subject to [§ 1144](#)'s strict limitations.

Bankruptcy Law > Procedural
Matters > Judicial Review > Bankruptcy
Appeals Procedures

Civil Procedure > ... > Stays of
Judgments > Appellate Stays > General
Overview

Evidence > Burdens of Proof > Allocation

HN12 Judicial Review, Bankruptcy Appeals Procedures

When a movant requests a general stay pending appeal from an order of a bankruptcy court pursuant to [Fed. R. Bankr. P. 8005](#), courts consider

2012 Bankr. LEXIS 5244, *5244

four factors: (1) whether the movant has demonstrated a substantial likelihood of success on the merits; (2) whether the movant will suffer irreparable injury absent a stay; (3) whether another party will suffer substantial injury if a stay is issued; and (4) the public interests at stake. A movant must show satisfactory evidence on all four factors.

Named parties seeking to assert claims on behalf of members of a putative class must allege and show that they personally have been injured, not that the injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.

Bankruptcy Law > ... > Judicial
Review > Standards of Review > Abuse of
Discretion

Civil Procedure > Special Proceedings > Class
Actions > Certification of Classes

Bankruptcy
Law > ... > Bankruptcy > Claims > Allowance
of Claims

Bankruptcy Law > ... > Judicial
Review > Standards of Review > Clear Error
Review

Bankruptcy Law > ... > Judicial
Review > Standards of Review > De Novo
Standard of Review

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[HN13](#) [📄] **Standards of Review, Abuse of Discretion**

In reviewing bankruptcy court decisions, a district court accepts factual findings unless clearly erroneous and reviews conclusions of law de novo. Bankruptcy court decisions to deny a request to file late claims or to certify a class are reviewed for abuse of discretion.

Judges: MARTIN GLENN, United States
Bankruptcy Judge.

Opinion by: MARTIN GLENN

Civil Procedure > ... > Class
Actions > Prerequisites for Class
Action > General Overview

Opinion

[HN14](#) [📄] **Class Actions, Prerequisites for Class Action**

MEMORANDUM OPINION AND ORDER

DENYING MOTION OF GIFT-CARD CLAIMANTS FOR A STAY OF INTERIM DISTRIBUTIONS PENDING APPEAL OF DENIAL OF LEAVE TO FILE LATE CLAIMS

Pending before the Court is a motion (the "Motion") by certain holders of the Borders Books' consumer gift-cards (the "Gift-Card Claimants") for a stay, pursuant to [Rule 8005 of the Federal Rules of Bankruptcy Procedure](#), of interim distributions by Curtis R. Smith (the "Liquidating Trustee") and the BGI Creditors' Liquidating Trust (the "Trust"), as successor to [*2] Borders Group Inc. and seven affiliates (the "Debtors") under the confirmed Plan of Liquidation, pending determination of the Gift-Card Claimants' appeal of a decision by this Court denying the Gift-Card Claimants' motion to file late claims and for certification of a class of gift-card holders (ECF Doc. # 2896). The Gift-Card Claimants also filed an objection (the "Interim Distribution Objection") (ECF Doc. # 2894) to the motion by the Liquidating Trustee and the Trust for an order authorizing interim distributions to general unsecured creditors pursuant to the terms of the confirmed Plan of Liquidation (the "Interim Distribution Motion") (ECF Doc. # 2875).

On October 16, 2012, the Liquidating Trustee and the Trust filed a reply to the Interim Distribution Objection (the "Reply") (ECF Doc. # 2905), and on October 24, 2012, they filed an objection to the Motion for a Stay of Interim Distributions (the "Objection") (ECF Doc. # 2923).

In a separate order entered today, the Court grants the motion of the Liquidating Trustee and the Trust to authorize the interim distributions to creditors. For the reasons explained below, the Court denies the motion of the Gift-Card Claimants for a stay [*3] of the interim distributions.

I. BACKGROUND

On August 14, 2012, the Court in a reported decision denied the motions of certain holders of the Borders' consumer gift-cards to (1) file

untimely proofs of claim based on the amounts remaining on their gift-cards and (2) enter an order certifying a class of all holders of Borders' gift-cards. See [In re BGI, Inc., 476 B.R. 812 \(Bankr. S.D.N.Y. 2012\)](#); *Memorandum Opinion Denying Gift-Card Claimants' Motion to File Late Claims and Class Certification* (the "Gift-Card Opinion") (ECF Doc. # 2806). On August 28, 2012, the Gift-Card Claimants filed notices of appeal from this decision.

The Gift-Card Claimants now argue that the Court should stay the interim distributions to creditors pending appeal of the denial of their late claims and class certification, arguing that putative class members would be prejudiced if distributions are made to creditors because insufficient funds would remain to satisfy putative claims of an uncertified class of gift-card holders. The Gift-Card Claimants argue that the [Rule 8005](#) balancing test that bankruptcy courts consider when deciding a motion to stay pending appeal weighs in their favor. However, the Gift-Card Claimants' [*4] Motion would prevent the Liquidating Trustee from being able to administer the confirmed Plan, which requires that distributions be made before year-end. As explained below, to achieve this result, the Gift-Card Claimants needed to make a timely motion to modify or revoke the confirmed Plan and Confirmation Order under [section 1144 of the Bankruptcy Code](#), something they have never done and could not do in any event. [HNI](#) [↑] Relief from a confirmation order may only be obtained within 180 days of the entry of the order and only where the order was procured by fraud. [11 U.S.C. § 1144](#). Because the Gift-Card Claimants filed the motion more than 180 days after entry of the Confirmation Order (nearly four months past the deadline in fact), it must be denied as untimely. In any event, even if the Court interpreted the motion as requesting a stay pending appeal of the denial of their late-claim motion, the Claimants have failed to show that the [Rule 8005](#) factors weigh in their favor. Therefore, the Court **DENIES** the motion for

a stay of interim distributions pending appeal.¹

Although a full history of this case has been set forth in the Court's previous opinions, the following background is relevant for the motion at issue. On February 16, 2011 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Court established June 1, 2011 as the deadline for each person or entity to file a proof of claim based on claims that arose on or prior to the Petition Date (the "General Bar Date"). The Court approved the notice of the General Bar Date and deemed the notice adequate and sufficient if served by first class mail on, among others, "all known creditors and other known holders of claims" (the "Bar Date Order") (ECF Doc. # 580). The Bar Date Order also directed the Debtors to publish notice of the General Bar Date once, in the national edition of *The New York Times*, at least twenty-eight days before [*6] the General Bar Date. See Bar Date Order at 7.

On December 21, 2011, the Court entered an order (the "Confirmation Order") (ECF Doc. #2384) confirming the *First Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code Proposed by the Debtors and the Official Committee of Unsecured Creditors*, dated as of November 10, 2011 (the "Plan") (ECF Doc. #2110, Ex. A). The Plan became effective on January 12, 2012.

On January 4, 2012, two individuals holding Borders Gift-Cards (the "Gift-Card Claimants" or "Claimants") filed motions for leave to file untimely proofs of claim against the Debtors (the "Late Claim Motion") (ECF Doc. # 2415). On January 9, 2012, those two individuals and one

additional gift-card holder who did not file a motion for leave to file a late claim filed a motion to certify a class on behalf of all gift-card holders (the "Class Action Motion") (ECF Doc. # 2450). In the Late Claim Motion, the Claimants alleged they were not provided adequate notice of the Bar Date from publication in *The New York Times*. The Claimants argued that they were "known" creditors that should have received actual notice of the General Bar Date. [HN2](#)^[↑] "Known" creditors must be afforded [*7] actual written notice of the bankruptcy filing and the bar date; unknown creditors need only receive constructive notice, such as notice by publication. See *In re Drexel Burnham Lambert Grp., Inc.*, 151 B.R. 674, 680 (Bankr. S.D.N.Y. 1993). A creditor is considered "known" where its identity "is actually known to the debtor or . . . is 'reasonably ascertainable' by the debtor." *In re XO Commc'ns, Inc.*, 301 B.R. 782, 793 (Bankr. S.D.N.Y. 2003) (quoting *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995)).

The issue whether the Gift-Card Claimants were "known" creditors raised a contested matter under [Rule 9014 of the Federal Rules of Bankruptcy Procedure](#). Therefore, the Court permitted expedited discovery and set the matter for an evidentiary hearing. On August 16, 2012, the Court denied the Gift-Card Claimants' Motions (the "Late Claim Orders") (ECF Doc. ## 2814, 2815), finding the following facts: (1) the Claimants were not "known" creditors because their status as possible creditors was not known or reasonably ascertainable to the Debtors, (2) publication in *The New York Times* constituted adequate constructive notice to put unknown creditors on notice of the Bar Date, and (3) [*8] the Gift-Card Claimants' failure to file proofs of claim before the Bar Date despite having adequate notice was not the result of excusable neglect based on an evaluation of the four factors set forth by the Supreme Court in [Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship.](#), 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L.

¹ The Gift-Card Claimants filed a motion seeking entry of an order shortening notice for a hearing with respect to their motion [*5] for a stay of interim distributions (ECF Doc. # 2898). The Court denied the motion but ordered the Trustee to file any opposition to the stay motion. On October 24, 2012, an objection to the Motion for a Stay of Interim Distributions was filed (ECF Doc. # 2923). No oral argument of the stay motion was permitted.

*Ed. 2d 74 (1993).*² See *In re BGI, Inc.*, 476 B.R. at 820-26. Because the Court concluded that the Gift-Card Claimants were not permitted to file untimely proofs of claim, the Court denied the class certification motion as moot. *Id.* at 826-27. Additionally, the Gift-Card Claimants cannot represent the putative class because they are not members of the class they seek to represent. *Id.*

II. DISCUSSION

A. The Gift-Card Claimants are Barred from Asserting a Collateral Attack on the Confirmation Order and Plan

[HN4](#)^[↑] The Bankruptcy Code and the Federal Rules of Bankruptcy Procedure govern when and to what extent a Court may grant a post-confirmation motion that would have the effect of modifying or revoking a confirmed chapter 11 plan. [Section 1141\(a\)](#) of the Code provides that a confirmed plan is binding on, among others, the debtor and any creditor, whether or not such creditor accepted the plan. *11 U.S.C. § 1141(a)*. "An order of confirmation concededly binds the debtor and its creditors whether or not they have accepted the confirmed plan. Thus, it has preclusive effect." *Maxwell Commc'n Corp. v. Societe Generale (In re Maxwell Commc'n Corp.)*, 93 F.3d. 1036, 1044 (2d Cir. 1996).

² [HN3](#)^[↑] The *Pioneer* Court established four factors to assist bankruptcy courts in evaluating excusable neglect: (1) the danger of prejudice to the debtor; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. *Pioneer*, 507 U.S. at 395. "The Second Circuit strictly observes bar dates and has adopted what has been characterized as a 'hard line' in applying the [*9] *Pioneer* test,' meaning that this Court should focus its analysis 'primarily on the reason for the delay, and specifically whether the delay was in the reasonable control of the movant.'" *In re BGI, Inc.*, 476 B.R. at 824 (quoting *In re Lehman Bros. Holdings Inc.*, 433 B.R. 113, 119-20 (Bankr. S.D.N.Y. 2010).

1. Modifying a Plan

[HN5](#)^[↑] A confirmed chapter 11 plan may only be modified by the proponent or reorganized [*10] debtor, and only before the plan has been "substantially consummated." *11 U.S.C. § 1127(b)*. Courts have found a plan to be substantially consummated when distributions under the plan were commenced and the proponent of a modification bears the burden of establishing that the plan has not been substantially consummated. See *Indu Craft, Inc. v. Bank of Baroda (In re Indu Craft, Inc.)*, 2012 U.S. Dist. LEXIS 105219, 2012 WL 3070387, at *9, 13, 16 (S.D.N.Y. July 27, 2012).

The Gift-Card Claimants are essentially seeking to modify the confirmed Plan by asking this court to enjoin the Liquidating Trustee from making distributions to creditors as mandated by the Plan and the Liquidating Trust Agreement. See 7 COLLIER ON BANKRUPTCY ¶1127.03 (16th rev. ed. 2012) ([HN6](#)^[↑] "The Court of Appeals for the Second Circuit has characterized as a 'modification' a restructuring that effectively altered a payment right."). These Claimants are seeking to do so without standing as a proponent of the Plan and long after the Plan has been substantially consummated. See *In re BGI, Inc.*, 476 B.R. at 825 (finding that the Plan had been substantially consummated). As such, this Court denies the Gift-Card Claimants' Motion to the extent it seeks to [*11] modify the Plan.

2. Revoking a Plan

[HN7](#)^[↑] [Section 1144](#) of the Code provides the sole basis for a court to overturn a confirmed chapter 11 plan. COLLIER ON BANKRUPTCY ¶ 1144.02. It provides that a confirmation order may only be revoked where an adversary proceeding is brought within 180 days after entry of the order,

and only where the order was procured by fraud.³ 11 U.S.C. § 1144. The 180-day deadline is absolute and may not be extended by the court pursuant to its equitable powers or Bankruptcy Rule 9024.⁴ In fact, "in cases with more complicated plans of reorganization that impact greater numbers of interested parties, the time frame within which a request for revocation should be made necessarily shortens because the level of difficulty required to comply with the statute and protect innocent third parties in a revocation order increases exponentially." Varde Inv. Partners, L.P. v. Comair, Inc. (In re Delta Air Lines, Inc.), 386 B.R. 518, 533 (Bankr. S.D.N.Y. 2008).

HN10^[↑] Courts analyzing section 1144 have consistently held that parties are barred from attacking a chapter 11 confirmation order by characterizing their action as an independent motion or cause of action, rather than an adversary proceeding to revoke the order. [*13] See Lauren Assocs. v. Reed (In re California Litfunding), 360 B.R. 310 (Bankr. C.D. Cal. 2007) (finding an adversary proceeding in state court alleging fraud in the inducement against the directors of the Debtor for misrepresentations in its disclosure statement constituted a collateral attack against the confirmation, effectively attempting to revoke the

confirmed plan); In re Winom Tool & Die, Inc., 173 B.R. 613, 616 (Bankr. E.D. Mich. 1994) (holding that conversion to a chapter 7 case cannot invalidate the effects of a confirmed chapter 11 plan, because doing so would constitute a *de facto* revocation of a confirmed plan in violation of section 1144); F & M Marquette Nat'l Bank v. Emmer Brothers Co. (In re Emmer Brothers Co.), 52 B.R. 385 (D. Minn. 1985).

HN11^[↑] A court must look carefully at the facts and the requested relief to determine whether a party is attempting to revoke a confirmation order, focusing particularly on whether the relief sought would upset the confirmed plan, negatively affect innocent parties and creditors, and attempt to "redivide the pie." If "a claim does not involve an attempt to 'redivide the pie' by a disgruntled participant in the Plan" and instead merely "involves [*14] a dispute about an additional asset that did not figure into the reorganization Plan, an adjudication of the dispute would not upset the confirmed Plan, and the 180 day time limitation of Section 1144 is not a bar." Farley v. Coffee Cupboard, Inc. (In re Coffee Cupboard, Inc.), 119 B.R. 14, 19 (E.D.N.Y. 1990). On the other hand, where the requested relief would reverse what would otherwise be the consequences of a confirmed chapter 11 plan, that action is a collateral attack on the plan and is subject to section 1144's strict limitations.

Although the Gift-Card Claimants have not filed a motion specifically requesting this Court revoke the Confirmation Order, granting the Motion to Stay the Interim Distributions provided for in the Plan would do just that.⁵ Granting the requested relief would necessarily interfere with the Liquidating Trustee's ability to carry out the provisions of the Plan requiring it to make scheduled interim distributions, and the Claimants' ultimate goal—allowing a class of gift-card holders to file untimely

³ Section 1144 provides: **HN8**^[↑] "On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if [*12] such order was procured by fraud." 11 U.S.C. § 1144.

⁴ **HN9**^[↑] Bankruptcy Rule 9024 provides that Rule 60 of the Federal Rules of Civil Procedure applies in a chapter 11 case. Rule 60, in turn, allows a court to relieve a party from a final judgment, order or proceeding for a variety of reasons if it is filed within a "reasonable" time after the final order or judgment is issued. Fed. R. Civ. P. 60(b)(6). However, Rule 9024 provides that an action to revoke confirmation of a chapter 11 plan is subject to the 180-day limit from section 1144. See COLLIER ON BANKRUPTCY ¶ 1144.07[1] ("Bankruptcy Rule 9024 specifically excepts an action to revoke confirmation of a chapter 11 plan from the scope of Rule 60. This does not mean that Rule 60 is inapplicable with respect to orders of confirmation. . . . If, for instance, clerical mistakes or other technical matters need to be corrected in an order confirming a plan, the court may do so under Rule 60.").

⁵ Article VI of the Plan provides for interim distributions to certain Holders of Liquidating Trust Interests in accordance with the Liquidating Trust Agreement and from the Disputed Claims Reserve in accordance with the Plan.

proofs of claims—would result in a substantial redistribution of estate assets long after confirmation of the Plan. The Court therefore considers the Gift-Card [*15] Claimants' Motion to be an action to revoke the confirmed chapter 11 Plan.

The Confirmation Order was entered on December 11, 2011, and the time period to commence an action seeking revocation of the Confirmation Order expired on June 9, 2012. The Gift-Card Claimants filed their Motion on October 11, 2012, approximately four months past the deadline. The Court therefore DENIES the Gift-Card Claimants' Motion as untimely under [section 1144](#) of the Code.

B. The Gift-Card Claimants Cannot Meet the Standard for a Stay Pending Appeal

Even if this Court were to interpret the Gift-Card Claimants' Motion as a motion for a traditional injunction as opposed to an action to modify or revoke the Confirmation Order, it would deny the Motion for failing to meet the standard for a stay pending appeal. [HN12](#)^[↑] When a movant requests a general stay pending appeal from an order of the Bankruptcy Court pursuant to [Bankruptcy Rule 8005](#), courts consider four factors:

- (1) whether the movant has [*16] demonstrated a substantial likelihood of success on the merits;
- (2) whether the movant will suffer irreparable injury absent a stay;
- (3) whether another party will suffer substantial injury if a stay is issued; and
- (4) the public interests at stake.

[ACC Bondholder Grp. v. Adelphia Commc'ns Corp. \(In re Adelphia Commc'ns Corp.\)](#), 361 B.R. 337, 346 (S.D.N.Y. 2007). The movant must show satisfactory evidence on all four factors. See [Rally Auto Group, Inc. v. Gen. Motors LLC \(In re Motors](#)

[Liquidation Co.\)](#), 2010 U.S. Dist. LEXIS 118166, 2010 WL 4449425, at *3 (S.D.N.Y. Oct. 29, 2010) ("The lack of any one factor is not dispositive to the success of the motion, rather the appropriate inquiry represents a balancing of the four factors. The moving party, however, must show satisfactory evidence on all four criteria.") (citations omitted).

The Claimants argue that the test weighs in their favor because (1) there is a substantial likelihood of success on the merits because, among others, "[t]he issues on appeal are purely legal, involving the application of due process and interpretation of notice obligations," and a court's rulings on law are subject to *de novo* review; (2) the Gift-Card Claimants will suffer irreparable injury [*17] absent a stay because interim distributions would diminish the assets available to pay the Claimants and essentially moot their appeal; (3) other parties would not be substantially injured by such order because the Trustee has not yet completed his administration of the Estate and he plans to administer the distributions over a five-year period; and (4) granting the stay is in the public interest because it would protect the Claimants' ability to prosecute a significant number of claims valued at over \$100 million. See Motion for a Stay of Interim Distributions.

This Court strongly disagrees with each of the Gift-Card Claimants' arguments. First, they have failed to demonstrate a substantial likelihood of success on the merits. Notwithstanding the Claimants' assertions to the contrary, the main issues on appeal revolve around whether this Court properly (i) determined that the Claimants were unknown creditors for whom notification by publication was adequate to inform them of the General Bar Date, (ii) denied certification of a class of Gift-Card Holders, and (iii) entered the order granting the Interim Distribution Motion. [HN13](#)^[↑] In reviewing bankruptcy court decisions, a district court accepts [*18] factual findings unless clearly erroneous and reviews conclusions of law *de novo*. See [Midland Cogeneration Venture Ltd. P'ship v. Enron Corp. \(In re Enron Corp.\)](#), 419 F.3d 115,

124 (2d Cir. 2005). Bankruptcy court decisions to deny a request to file late claims or to certify a class are reviewed for abuse of discretion. *See id. at 124* (late-filed claims decisions are reviewed for abuse of discretion); *Carrera v. Bally Total Fitness of Greater N.Y. (In re Bally Total Fitness of Greater N.Y., Inc.)*, 411 B.R. 142, 145 (S.D.N.Y. 2009) (class certification decisions are reviewed for abuse of discretion). Following an evidentiary hearing, the Court made factual findings concluding that the Gift-Card Claimants were not "known" creditors. Gift-Card Claimants' appeals therefore mainly involve factual findings subject to a deferential, not *de novo*, review.

Second, the Gift-Card Claimants have failed to demonstrate irreparable injury. Most courts have held that the risk that an appeal will be moot absent a stay, without more, does not constitute irreparable harm. *See, e.g., In re Best Prods. Co., Inc.*, 177 B.R. 791, 808 (S.D.N.Y. 1995), *aff'd on other grounds*, 68 F.3d 26 (2d Cir. 1995); *Adelphia Commc'ns Corp.*, 361 B.R. at 347. [*19] In any event, the Claimants only hold Gift-Cards valued at \$225 in the aggregate. Reserves held by the Liquidating Trust are more than adequate to satisfy these potential claims.⁶ Moreover, the Claimants lack standing to assert claims on behalf of a purported class of gift-card holders and this Court therefore will not consider any alleged harm to the purported class.⁷

Third, holders of allowed general unsecured claims

would [*20] face significant harm from a stay of Interim Distributions, including the loss of valuable working capital for an indefinite period of time, lost opportunities to invest the funds, and the risk of losing principal based on the FDIC's insurance coverage. *See Reply at ¶¶ 37-40*.

Last, staying the interim distributions would not be in the public's interest. Congress and the courts have stressed the need for parties to be able to rely on the finality of chapter 11 plans and related orders in conducting business and in dealing with the reorganized debtor. "If plans could be overturned or rescinded except in the most extreme of circumstances, the reliability of the plan process would be undermined." COLLIER ON BANKRUPTCY ¶1144.02[1].

III. CONCLUSION

For the reasons discussed above, this Court **DENIES** the Gift-Card Claimants' motion for a stay of interim distributions pending appeal.

DATED: November 2, 2012

New York, New York

/s/ Martin Glenn

MARTIN GLENN

United States Bankruptcy Judge

⁶In fact, Ms. Freij's \$25 Gift-Card may not be entitled to reimbursement because the Plan provides that distributions for amounts less than \$50.00 revert to the Trust. *See Plan at Art. VI.G*. And, Mr. Traktman may not be entitled to reimbursement for his \$100 Gift-Card because he never joined the Late Claims Motion or sought leave to file a late claim.


⁷*HN14* Named parties seeking to assert claims on behalf of members of a putative class "must allege and show that they personally have been injured, not that the injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 106 n.5 (2d Cir. 2008) (quoting *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)).

EXHIBIT L-5



Neutral

As of: October 13, 2020 7:27 PM Z

In re Brown

United States Bankruptcy Court for the Southern District of New York

June 10, 2020, Decided

Chapter 7, Case No. 18-10617 (JLG)

Reporter

2020 Bankr. LEXIS 1537 *

Stay motion denied.

In re: Michael Rodger Brown, Debtor.

Notice: NOT FOR PUBLICATION**LexisNexis® Headnotes****Core Terms**

Sheet, Equitable, Divorce, Matrimonial, marital, settlement, Expunge, irreparable, concealed, contingent, fraudulent, merged, judicata, liquidated, marriage, speculative, procured, decree, embody, Reply

Bankruptcy

Law > ... > Bankruptcy > Claims > Allowance of Claims

Bankruptcy

Law > ... > Bankruptcy > Claims > Objections to Claims

Case Summary**Overview**

HOLDINGS: [1]-Stay of court order expunging debtor's ex-wife's claim pending appeal pursuant to [Fed. R. Bankr. P. 8007](#) was not warranted because the ex-wife submitted no evidence to substantiate her contention that there was a risk that the trustee would fully administer debtor's case and make distributions to creditors before the district court could resolve the appeal; [2]-She also failed to establish that there was a substantial likelihood that she would prevail in her appeal of the order.

[HN1](#) [Download] Claims, Allowance of Claims

Under [11 U.S.C.S. § 502\(b\)](#), if a party in interest objects to a claim, the court: After notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured. [11 U.S.C.S. § 502\(b\)\(1\)](#).

Family Law > ... > Dissolution & Divorce > No Fault Grounds > Irretrievable Breakdown

[HN2](#) [Download] No Fault Grounds, Irretrievable Breakdown

[N.Y. Dom. Rel. Law § 170\(7\)](#) states that an action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving

Outcome

the marriage on the grounds that: The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath.

Bankruptcy

Law > ... > Bankruptcy > Claims > Allowance of Claims

[HN3](#) **Claims, Allowance of Claims**

[11 U.S.C.S. § 502\(b\)\(1\)](#) is most naturally understood to provide that, with limited exceptions, any defense to a claim that is available outside of the bankruptcy context is available in bankruptcy. If a claimant would be estopped under non-bankruptcy law from having a valid claim against the debtor, a party may seek disallowance of the claim under [§ 502\(b\)\(1\)](#). There is nothing in [§ 502](#) that requires a court to ignore that the claim is no longer valid under state law.

Bankruptcy Law > Procedural Matters > Judicial Review > Bankruptcy Appeals Procedures

[HN4](#) **Judicial Review, Bankruptcy Appeals Procedures**

[Fed. R. Bankr. P. 8007](#) governs an application for a stay pending appeal from a decision of a bankruptcy court. It states, in substance, that ordinarily, a party seeking a stay of a judgment, order, or decree of the bankruptcy court pending appeal must first move for such relief in the bankruptcy court. [Rule 8007\(a\)\(1\)\(A\)](#). The decision as to whether or not to grant a stay of an order pending appeal lies within the sound discretion of the court. In exercising this discretion, the court will consider the following four factors: (1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal, and (4) the public interest that may be affected. The burden on the movant seeking the extraordinary relief of a stay is a heavy one. Indeed, stays pending appeal are the exception, not the rule, and are granted only in limited circumstances.

Bankruptcy Law > Procedural Matters > Judicial Review > Bankruptcy Appeals Procedures

[HN5](#) **Judicial Review, Bankruptcy Appeals Procedures**

A showing of probable irreparable injury is the principal prerequisite for the issuance of a stay pursuant to [Fed. R. Bankr. P. 8007](#), and such harm must be neither remote nor speculative, but actual and imminent. The moving party must demonstrate that such injury is likely before the other requirements will be considered. To establish irreparable harm, plaintiffs must demonstrate an injury that is neither remote nor speculative, but actual and imminent.

Bankruptcy Law > ... > Examiners, Officers & Trustees > Duties & Functions > Liquidations

[HN6](#) **Duties & Functions, Liquidations**

Under [11 U.S.C.S. § 704\(a\)\(1\)](#) a trustee must collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest. [11 U.S.C.S. § 704\(a\)\(1\)](#).

Bankruptcy Law > ... > Examiners, Officers & Trustees > Duties & Functions > Liquidations

[HN7](#) **Duties & Functions, Liquidations**

The duty to close the estate as quickly and expeditiously as is compatible with the best interests of the parties in interest has been called the trustee's main duty. As a general rule, chapter 7 trustees make no distributions to creditors until they have liquidated the estate assets and filed a final account. [11 U.S.C.S. § 350\(a\)](#) authorizes the closing of bankruptcy cases only after an estate has been fully administered and the court has discharged the trustee. [11 U.S.C.S. § 350\(a\)](#). At a minimum, the full administration of a chapter 7 proceeding requires a final report by the trustee indicating the distribution of proceeds from liquidated assets. Chapter 7 cases come to an end in a final report indicating the distribution of proceeds from liquidated assets. A final report should be just that: a report evidencing facts from which the court can make a determination of finality based upon a finding that there are no administrative tasks remaining to be completed.

Bankruptcy Law > Procedural Matters > Judicial

2020 Bankr. LEXIS 1537, *1537

Review > Bankruptcy Appeals Procedures

HN8  **Judicial Review, Bankruptcy Appeals Procedures**

In the context of a stay pursuant to [Fed. R. Bankr. P. 8007](#), the substantial possibility of success test is considered an intermediate level between possible and probable and is intended to eliminate frivolous appeals.

For Jennifer Brown: Arthur L. Porter, Jr., Esq., Aaron E. Albert, Esq., FISCHER PORTER & THOMAS, P.C., Englewood Cliffs, NJ.

For John S. Pereira, as Chapter 7 Trustee for the Estate of Michael Rodger Brown: John P. Campo, Esq., AKERMAN LLP, New York, NY.

Contracts Law > Remedies > Ratification

HN9  **Remedies, Ratification**

A ratification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it.

Judges: Hon. James L. Garrity, Jr., United States Bankruptcy Judge.

Opinion by: James L. Garrity, Jr.

Bankruptcy Law > Procedural Matters > Judicial Review > Bankruptcy Appeals Procedures

HN10  **Judicial Review, Bankruptcy Appeals Procedures**

In the context of a stay pursuant to [Fed. R. Bankr. P. 8007](#), the case law is clear that the probability of success that must be demonstrated in applying this factor is inversely proportional to the amount of irreparable injury that the plaintiff will suffer absent the stay; in other words, more of one excuses less of the other.

Opinion**MEMORANDUM DECISION AND ORDER DENYING MOTION FOR STAY OF ORDER EXPUNGING CLAIM PENDING APPEAL PURSUANT TO [FED. R. BANK. P. 8007](#)**

HONORABLE JAMES L. GARRITY, JR.

UNITED STATES BANKRUPTCY JUDGE:

Bankruptcy Law > Procedural Matters > Judicial Review > Bankruptcy Appeals Procedures

HN11  **Judicial Review, Bankruptcy Appeals Procedures**

In the context of a stay pursuant to [Fed. R. Bankr. P. 8007](#), the public interest favors compliance with court orders and timely resolution of litigation.

Introduction

Michael Brown (the "Debtor") commenced his voluntary chapter 7 case in this Court in 2018. At that time, he was being sued for divorce (the "Matrimonial Action") in the Supreme Court of the State of New York, County of New York, Matrimonial Term (the "State Court") by Jennifer Brown ("Jennifer"), now his ex-wife. In that action, Jennifer contended that the Debtor fraudulently concealed in excess of \$12,000,000 in marital assets (the "Unaccounted for Marital Assets"). She timely filed a contingent, unsecured claim in this case in the sum of \$6,375,000, representing **[*2]** her claim to equitable distribution of the marital assets, including to her share of the Unaccounted For Marital Assets (the "Equitable Distribution Claim").¹ This Court granted Jennifer relief

Counsel: **[*1]** For Michael Rodger Brown, Chapter 7 Debtor: Kenneth L. Baum, Esq., LAW OFFICES OF KENNETH L. BAUM LLC, Hackensack, New Jersey.

¹ On the Debtor's claims docket, the Equitable Distribution Claim is designated as "Claim No. 6."

from the automatic stay to permit her to prosecute the Matrimonial Action (including the liquidation of the Equitable Distribution Claim) in the State Court. With the assistance of the State Court-appointed Special Referee, and the consent of the chapter 7 trustee appointed herein (the "Trustee"), the parties executed a "So Ordered Term Sheet" (the "Term Sheet") that was incorporated, but not merged, into the Judgement of Divorce entered by the State Court. Briefly, in the Term Sheet, the Debtor agreed to pay Jennifer \$2,500,000, out of his post-petition funds and over the course of four years, for her share of the marital assets (the "Equitable Distribution Payment"). In exchange, the Debtor and his bankruptcy estate retained ownership of the marital assets, and Jennifer agreed to turn over marital assets in her possession to the Trustee. To date, she has been paid \$500,000, in accordance with the Term Sheet.

On or about November 26, 2019, the Debtor, with the Trustee's support, filed a Motion [*3] to Approve Title to and Distribution of Marital Property Pursuant to Term Sheet in Matrimonial Action and Expunge Claim No. 6 of Jennifer Brown Pursuant to [11 U.S.C. § 502\(a\)](#) and [Fed. R. Bankr. P. 3007](#) [ECF 85] (the "Motion to Expunge Claim") in this chapter 7 case. After hearing argument on that motion, the Court issued its Memorandum Decision on Debtor's Motion to Approve Title to and Distribution of Marital Property Pursuant to Term Sheet in Matrimonial Action and Expunge Claim No. 6 of Jennifer Brown Pursuant to [11 U.S.C. § 502\(a\)](#) and [Fed. R. Bankr. P. 3007](#). See *In re Brown*, No. 18-10617, 2020 WL 1237935 (Bankr. S.D.N.Y. March 13, 2020) (the "Opinion"). As relevant, and in substance, in the Opinion, the Court held that in the Matrimonial Action, Jennifer liquidated and fixed the Equitable Distribution Claim at \$2,500,000, agreed to accept the Equitable Distribution Payment from the Debtor in satisfaction of that claim, and was barred from obtaining additional recoveries on account of the Equitable Distribution Claim in this case. Thereafter, the Court entered an order expunging the claim (the "Claim Order").² The matter before the Court is Jennifer's motion for a stay of the Claim Order pending her appeal of that order (the "Stay Motion").³ The Debtor objects to the Stay Motion.⁴

Jennifer filed a reply to the objection and in support [*4] of the Stay Motion (the "Reply").⁵ For the reasons set forth herein, the Court denies the Stay Motion.

Background

On March 26, 2013, Jennifer commenced the Matrimonial Action in the State Court against the Debtor. Opinion at *2. The State Court appointed the firm of Bollam Sheedy Torani & Co., LLP CPA ("BST") to serve as an independent expert in the case. In part, BST's mandate was to trace the source, use and application of marital funds acquired and spent by the Debtor. *Id.* The BST Report identified the Unaccounted for Marital Assets. *Id.* After BST produced its report, Jennifer retained Financial Research Associates ("FRA"), to serve as her own expert and to review the findings set forth in the BST Report. FRA produced a report (the "FRA Report") that essentially confirmed BST's findings. *Id.* The Debtor commenced this case on March 5, 2018 (the "Petition Date"). The Matrimonial Action was automatically stayed upon the commencement of this case. Among the open issues in the Matrimonial Action as of the Petition Date, was the extent of Jennifer's share of the marital assets. Jennifer timely filed her Equitable Distribution Claim, which she based on the information contained in the BST and FRA [*5] Reports. *Id.* at *4.

On March 12, 2018, Jennifer filed a motion seeking, alternatively, to dismiss the case or to obtain stay relief to permit her to proceed with the Matrimonial Action. *Id.* at *2. On April 4, 2018, the Court entered an order denying Jennifer's request to dismiss the case, but granting stay relief to permit the Matrimonial Action to proceed in all respects. *Id.* at *4. The Court held that litigation in the Matrimonial Action could proceed in all respects including a determination of (i) the nature and extent of the Debtor's and Jennifer's marital property, (ii) the nature and extent of Jennifer's interest in such property, and (iii) the equitable distribution of such property. However, the Court directed that any determination regarding the distribution of property of

Appeal Pursuant to [Fed. R. Bankr. P. 8007](#) [ECF No. 135].

² See Order Regarding Debtor's Motion to Approve Title to and Distribute Marital Property Pursuant to Term Sheet in Matrimonial Action and Expunge Claim No. 6 of Jennifer Brown Pursuant to [11 U.S.C. § 502\(a\)](#) and [Fed. R. Bankr. P. 3007](#) [ECF No. 120].

³ See Motion For Stay of Order Expunging Claim Pending

⁴ See Debtor's Objection to Jennifer Brown's Motion for Stay of Order Expunging Claim Pending Appeal Pursuant to [Fed. R. Bankr. P. 8007](#) [ECF No. 137].

⁵ See Jennifer Brown's Reply in Motion for Stay of Order Expunging Claim No. 6 Pending Appeal Pursuant to [Fed. R. Bankr. P. 8007](#) [ECF No. 138].

the bankruptcy estate and any determination of title to assets of the bankruptcy estate, whether for collection of support, equitable distribution or otherwise, would be subject to the Court's review and approval. Opinion at *4.

In February of 2019, the State Court directed that a Special Referee be appointed in the Matrimonial Action to conduct a hearing or trial in order to hear and report on all of the open financial issues in this matrimonial [*6] action. The open financial issues included the liquidation of the Equitable Distribution Claim. *Id.* The Special Referee conducted pre-trial conferences on April 15, 2019 and June 26, 2019 and scheduled twenty-two days of trial commencing on July 18, 2019. *Id.* The Special Referee commenced the trial on July 18, 2019. *Id.* After four days of trial and upon conclusion of the trial testimony on July 29, 2019, the Debtor and Jennifer, through their respective counsel, reached a settlement of the Matrimonial Action, including all open financial issues between the parties. *Id.* at *5. That agreement was embodied in the Term Sheet. *Id.* at *1. At a hearing on July 30, 2019, the Special Referee marked the Term Sheet as an exhibit to the record of the hearing and thereafter separately questioned Jennifer and the Debtor to determine whether each of them wished for the Term Sheet to be the agreement that resolves the financial issues in the divorce action. *Id.* at *6. At the conclusion of Jennifer and the Debtor's allocutions, the Special Referee accepted the Term Sheet as the basis for the parties' judgment of divorce. *Id.*

The Debtor and Jennifer each submitted Proposed Judgments of Divorce. In part, and in substance, the Debtor's [*7] proposed judgment provided that in accordance with the Term Sheet, the Debtor shall pay to Jennifer a total amount of \$2,500,000 as her share of equitable distribution. *Id.* Jennifer objected to the entry of the Debtor's Proposed Judgment of Divorce. Among other things, she contended that (i) in negotiating the Term Sheet she did not agree to withdraw the Equitable Distribution Claim, and (ii) she agreed to accept \$2,500,000 in payments from the Debtor as possibly a credit against the Equitable Distribution Claim, but not in satisfaction of that claim. *Id.* In another filing, she advised the State Court that:

[W]hen the Trustee establishes that the Defendant has hidden \$12,000,000.00, the Term Sheet will be vacated on the basis of Defendant's fraud. At such time, my rights to equitable distribution, as recognized by Judge Garrity, will be recognized and subject to enforcement. Clearly, the Defendant

mistakenly believed that he had escaped the microscope that the U.S. Trustee will now put him under to explain where the missing funds are, as reported by BST.

Opinion at *7.

On November 8, 2019, the State Court entered the Judgment of Divorce. *Id.* at *8. In so ruling, the State Court did not adopt Jennifer's distinction [*8] between her right to an equitable distribution of the marital assets and her contingent claim to those assets embodied in the Equitable Distribution Claim, and it did not modify, in any way, the Debtor's Proposed Judgment of Divorce. *Id.*

In part, the Judgment of Divorce orders that pursuant to the "Term Sheet, [the Debtor] shall pay to [Jennifer] or on behalf of [Jennifer] a total amount of \$2,500,000 as her share of equitable distribution." Judgment of Divorce at 6. It also provides that the Term Sheet "shall be incorporated herein by reference, [and] shall survive and shall not be merged into [Judgment of Divorce.]" *Id.* at 9.

Id. Thereafter, the Debtor filed the Motion to Expunge Claim. As relevant, in that motion, the Debtor sought to expunge the Equitable Distribution Claim pursuant to [§ 502\(a\) of the Bankruptcy Code](#) and [Bankruptcy Rule 3007\(a\)](#) on the grounds that (i) the Judgment of Divorce directs that the Debtor pay Jennifer \$2,500,000 as her share of equitable distribution, (ii) nothing in that judgment affords Jennifer any further right to equitable distribution, and (iii) the Debtor, not his estate, is obligated to pay Jennifer her share of equitable distribution. The Trustee supported the Motion to Expunge Claim. *Id.* at *8. Jennifer opposed it.

HN1 [↑] Under [§ 502\(b\)](#), if a party in [*9] interest objects to a claim, the court:

[A]fter notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured[.]

[11 U.S.C. § 502\(b\)\(1\)](#). The Court sustained the objection to the Equitable Distribution Claim. Briefly, in doing so, the Court first reviewed New York State law governing the Matrimonial Action. The Court considered

that Jennifer sought a divorce pursuant to [§ 170\(7\) of the New York Domestic Relations Law](#) (the "DRL"). [HN2](#)⁴] That section states that an action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on the grounds that:

The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment [*10] or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce.

DRL [§ 170\(7\)](#). The Court found that under the plain language of the statute, a court cannot grant a judgment of divorce under [§ 170\(7\)](#) unless it determines that the relationship between husband and wife has broken down irretrievably for a period of at least six months, and the economic issue of the equitable distribution of marital property, among others, is determined by the court and incorporated into the judgment of divorce. Opinion at *10. The Court found that the Judgment of Divorce met those standards, and specifically that the State Court determined

(i) that there were grounds for dissolving the marriage between Jennifer and the Debtor because their relationship has broken down irretrievably for a period of at least six months; and

(ii) the Parties settled the financial and custody issues by the So-Ordered Term Sheet dated July 30, 2019, and that in accordance with Paragraph 2 on pages 1 through 2 of the Term Sheet, [*11] the Debtor shall pay to Jennifer or on behalf of Jennifer a total amount of \$2,500,000 as her share of equitable distribution.

See *id.* The Court then considered application of the doctrine of res judicata to the Judgment of Divorce, and specifically whether it barred Jennifer from litigating the Equitable Distribution Claim in this Court. In part, the Court held:

The nature and extent of Jennifer's share in the marital assets was an issue before the State Court in the Matrimonial Action. In the Term Sheet,

Jennifer accepted the Equitable Distribution Payment as her share of equitable distribution. The Term Sheet is incorporated into the Judgment of Divorce, and the State Court had jurisdiction to issue the judgment. The Judgment of Divorce is a final judgment on the merits that resolves all matters that were or could have been raised in the Matrimonial Action, including all those related to equitable distribution of the marital assets. Jennifer relied on the BST Report and FRA Report in pursuing her equitable distribution claim in the Matrimonial Action. All matters relating to the equitable distribution of the marital property, including Jennifer's right to a share of the Unaccounted [*12] For Marital Property, necessarily were resolved in the Judgment of Divorce. See [Boronow v. Boronow, 71 N.Y.2d 284, 290, 519 N.E.2d 1375, 525 N.Y.S.2d 179, 183 \(1983\)](#) ("In a matrimonial action, where the essential objective is to dissolve the marriage relationship, questions pertaining to important ancillary issues like title to marital property are certainly intertwined and constitute issues which generally can be fairly and efficiently resolved with the core issue. The courts and the parties should ordinarily be able to plan for the resolution of all issues relating to the marriage relationship in the single action."). See also [Harrison v. Harrison, 134 A.D.2d 567, 568, 521 N.Y.S.2d 466, 468 \(2d Dep't 1987\)](#) ("Inasmuch as the matrimonial action was the appropriate forum within which to properly adjudicate the marital property and financial issues that are raised herein, the parties had the right to expect that any matters of that sort not considered in the matrimonial action would not be litigated elsewhere.") Jennifer incorporated the BST Report and FRA Report in her Equitable Distribution Claim. In substance, in that claim she is asserting the same claim against the Debtor that she settled in the Matrimonial Action. She is barred from doing so by application of the principle of res judicata.

Id. at *12. Based on those findings, the Court held that the [*13] Debtor rebutted the presumption of the prima facie validity of the Equitable Distribution Claim and demonstrated that Jennifer is entitled to no more than the Equitable Distribution Payment in full satisfaction of her Equitable Distribution Claim. Accordingly, the Court found that the Debtor demonstrated grounds for expunging the claim. *Id.*⁶ In reaching this conclusion,

⁶ [HN3](#)⁵] The Court held, as follows:

the Court considered and rejected all of Jennifer's arguments to the contrary. See Opinion at *12-16.

Analysis

Jennifer identifies the following issues to be presented on appeal:

1. Whether the Bankruptcy Court erred in finding that a settlement term sheet that was incorporated [*14] into, but not merged with, a judgment of divorce bars reopening of the settlement and judgment on discovering that the settlement and judgment were procured through the Debtor's fraudulent concealment of pre-petition assets;
2. Whether the Bankruptcy Court erred in finding that a settlement term sheet that was incorporated into, but not merged with, a judgment of divorce bars reopening of the settlement and judgment based on the doctrine of res judicata when the question of whether the settlement was procured by fraud was not litigated and no findings of fact were made by any court in connection with the settlement;
3. Whether the Bankruptcy Court erred in expunging a contingent claim of the Debtor's spouse that would have value only if the Debtor were found to have fraudulently concealed pre-petition assets that constituted marital property to which the claimant had a meritorious claim, despite the fact that a settlement incorporated into, but not merged with, a judgment of divorce provided that

Accordingly, the Debtor has demonstrated grounds for expunging the claim. *Travelers Cas. & Sur. Co. v. America v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 127 S. Ct. 1199, 1204, 167 L. Ed. 2d 178 (2007) (11 U.S.C. § 502(b)(1) "is most naturally understood to provide that, with limited exceptions, any defense to a claim that is available outside of the bankruptcy context is available in bankruptcy."); see also *In re LightSquared Inc.*, 504 B.R. 321, 336 (Bankr. S.D.N.Y. 2013) (the "language could not be plainer — if a claimant would be estopped under non-bankruptcy law from having a valid claim against the debtor, a party may seek disallowance of the claim under section 502(b)(1)."); *In re Ernst*, 382 B.R. 194, 197 (S.D.N.Y. 2008) ("[T]here is nothing in [section 502] that requires a court to ignore that the claim is no longer valid under state law.").

Opinion at *12.

the claimant gave up the right to retain only certain specifically enumerated marital property, and the settlement contained no language sufficient under New York law to waive or release [*15] claims to any other marital property including fraudulently concealed assets[.]

See Statement of the Issues to Be Presented on Appeal [ECF No. 131].

[HN4](#)^(↑) [Bankruptcy Rule 8007](#) governs an application for a stay pending appeal from a decision of a bankruptcy court. As relevant, it states, in substance, that ordinarily, a party seeking a stay of a judgment, order, or decree of the bankruptcy court pending appeal must first move for such relief in the bankruptcy court. See [Bankruptcy Rule 8007\(a\)\(1\)\(A\)](#). The decision as to whether or not to grant a stay of an order pending appeal lies within the sound discretion of the court. See, e.g., *In re Gen. Motors Corp.*, 409 B.R. 24, 30 (Bankr. S.D.N.Y. 2009); *New York Skyline, Inc. v. Empire State Building Co. L.L.C. (In re New York Skyline, Inc.)*, 520 B.R. 1, 5 (S.D.N.Y. 2014). In exercising this discretion, the Court will consider the following four factors: (1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal, and (4) the public interest that may be affected. See [ACC Bondholder Grp. v. Adelphia Commc'ns Corp. \(In re Adelphia Commc'ns Corp.\)](#), 361 B.R. 337, 346 (S.D.N.Y. 2007) ("*Adelphia*") (footnote omitted) (citations and internal quotation omitted). See also *In re Sabine Oil & Gas Corp.*, 548 B.R. 674, 681 (Bankr. S.D.N.Y. 2016).

The burden on the movant seeking the extraordinary relief of a stay is a "heavy" one. See *In re Gen. Motors Corp.*, 409 B.R. at 30. Indeed, "[s]tays pending appeal are [*16] the exception, not the rule, and are granted only in limited circumstances." *In re Taub, No. 08-44210*, 2010 Bankr. LEXIS 3458, 2010 WL 3911360, at *2 (Bankr. E.D.N.Y. Oct. 1, 2010) (first citing *In re Paolo Gucci*, 105 F.3d 837, 840 (2d Cir. 1997); then citing *In re Aston Baker, No. CV05-3487(CPS)*, 2005 U.S. Dist. LEXIS 36969, 2005 WL 2105802, at *3 (E.D.N.Y. Aug. 31, 2005)). While some courts have held that, to prevail, the moving party must show "'satisfactory' evidence on all four criteria," (see, e.g., *Turner v. Citizens Nat'l Bank (In re Turner)*, 207 B.R. 373, 375 (B.A.P. 2d Cir. 1997) (quoting *Bijan-Sara Corp. v. Fed. Deposit Ins. Corp. (In re Bijan-Sara Corp.)*, 203 B.R.

358, 360 (B.A.P. 2d Cir. 1996))), other courts have held that the inquiry involves a balancing of the four factors and the lack of any one factor is not dispositive to the success of the motion. See *In re Gen. Motors Corp.*, 409 B.R. at 30; *Adelphia*, 361 B.R. at 347. The Court declines to determine whether Jennifer is required to satisfy all four factors of the four-part test in order to succeed on her Stay Motion. Instead, the Court will employ the balancing approach utilized in *General Motors* and in other cases. The Court finds that it would reach the same conclusion—that Debtor's Stay Motion must be denied—under both tests. The Court discusses each of the factors in turn below.

Irreparable Injury

HN5 [↑] A showing of probable irreparable injury is the "principal prerequisite" for the issuance of a stay pursuant to *Bankruptcy Rule 8007*, and such harm "must be 'neither remote nor speculative, but actual and imminent.'" *In re Sabine Oil & Gas Corp.*, 548 B.R. at 681 (citations omitted). "[T]he moving party must demonstrate that such injury is likely before the other requirements [*17] will be considered." *Fox v. Mandiri (In re Perry H. Koplik & Sons, Inc.)*, No. 02—B-40648, 2007 Bankr. LEXIS 925, 2007 WL 781905, at *1 (Bankr. S.D.N.Y. Mar. 13, 2007) (citation omitted). See also *Adelphia*, 361 B.R. at 347 ("A showing of probable irreparable harm is the principal prerequisite for the issuance of a [Rule 8007] stay." (citation omitted)); *Stern v. Bambu Sales, Inc.*, 201 B.R. 44, 46 (E.D.N.Y. 1996) (denying stay pending appeal where movant failed to show irreparable harm). To establish irreparable harm, plaintiffs must demonstrate "an injury that is neither remote nor speculative, but actual and imminent." *Consolidated Brands, Inc. v. Mondy*, 638 F. Supp. 152, 155 (E.D.N.Y. 1986); accord *Kaplan v. Board of Educ. of the City School Dist.*, 759 F.2d 256, 259 (2d Cir. 1985); *Salant Acquisition Corp. v. Manhattan Indus.*, 682 F. Supp. 199, 202 (S.D.N.Y. 1988).

Jennifer contends that she will be irreparably harmed if the Court does not stay the Claim Order because she has a contingent claim to share in the Unaccounted for Marital Assets, should the Trustee discover such assets (see Reply ¶ 1; see also *id.* ¶ 4 (asserting that in staying the Claim Order, "the only thing being stayed is the expungement of a contingent claim to assets that have not yet been identified and located")), and there is a chance that while her appeal is pending, the Trustee will conclude the administration of the Debtor's case and make a final distribution to creditors. See Stay Motion ¶

15 ("If a stay is not granted and [Jennifer's] contingent claim is expunged, [Jennifer] faces the likelihood that any wrongfully [*18] concealed assets discovered by the Trustee will be distributed to other creditors and she will lose her only chance to assert her right to a proportionate share."). **HN6** [↑] Under § 704(a)(1) of the *Bankruptcy Code*, a trustee must "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest." 11 U.S.C. § 704(a)(1). See also *In re Riverside—Linden Inv. Co.*, 85 B.R. 107, 111 (S.D. Cal. 1988) ("It is well recognized that the trustee's duties under § 704 are not co-equal. **HN7** [↑] The duty to close the estate as quickly and expeditiously as is compatible with the best interests of the parties in interest has been called the trustee's 'main duty.'"), *aff'd* 99 B.R. 439 (B.A.P. 9th Cir. 1989). As a general rule, chapter 7 trustees make no distributions to creditors until they have liquidated the estate assets and filed a final account. See *In re Quid Me Broad., Inc.*, 181 B.R. 715, 717-20 (Bankr. W.D.N.Y. 1995) (agreeing that since the chapter 7 trustee is constrained under § 726(a) to make a pro-rata distribution to creditors holding similar claims "he must be afforded the luxury of waiting until case closing and final distribution to make certain that there are sufficient funds to cover all expenses of administration" and finding that the chapter 7 trustee was under no duty, absent a court order, [*19] to remit IRS administrative expense taxes before such final administration of the estate); see also *In re GPLA, Inc.*, No. 2:16-bk-13416-RK, 2016 Bankr. LEXIS 3085, 2016 WL 4440376, at *1 (Bankr. C.D. Cal. Aug. 22, 2016) (observing that "distributions to creditors in a Chapter 7 bankruptcy case generally coincides with filing of trustee's final account, but the court has power to authorize interim distributions upon assurance of sufficient remaining funds to pay all administrative expense claims" (citations omitted)). Section 350(a) of the *Bankruptcy Code* authorizes the closing of bankruptcy cases only "[a]fter an estate has been fully administered and the court has discharged the trustee[.]" 11 U.S.C. § 350(a). At a minimum, the "full administration" of a chapter 7 proceeding requires a final report by the trustee indicating the distribution of proceeds from liquidated assets. See *Matter of Wade*, 991 F.2d 402, 407 (7th Cir. 1993) ("Chapter 7 cases come to an end in a final report indicating the distribution of proceeds from liquidated assets."); see also *LBR 5009-1(b)* ("Unless the Court orders otherwise, in a chapter 7 asset case, the trustee must file and serve upon the United States Trustee, together with an affidavit of final distribution, a closing report . . ."). "A final report should be just that: a report

evidencing facts from which the court can make a determination [*20] of finality based upon a finding that there are no administrative tasks remaining to be completed." In re Kliegl Bros. Universal Elec. Stage Lighting Co., Inc., 238 B.R. 531, 542 (Bankr. E.D.N.Y. 1999).

Jennifer has submitted no evidence to substantiate her contention that there is a risk that the Trustee will fully administer the Debtor's case and make distributions to creditors before the district court can resolve the appeal. Moreover, in arguing that the issuance of a stay of the Claim Order will not harm other parties, she takes the opposite position and contends that "the Trustee has only just begun to search for concealed assets and has initiated an adversary proceeding against the Debtor and related parties to recover such assets that is still in its infancy." Stay Motion ¶ 15. She has not met her burden of demonstrating that she will be irreparably harmed if this Court does not stay the Claim Order pending her appeal of that order. See In re Taub, No. 08-44210, 2010 Bankr. LEXIS 3458, 2010 WL 3911360, at *4 (Bankr. E.D.N.Y. Oct. 1, 2010) (finding that the debtor had not established that the chapter 11 estate would suffer irreparable harm if retention orders of estate professionals are not stayed because the "substantial fees" by the trustee's retained professionals are speculative, subject to approval by the bankruptcy court, and the Debtor would have an opportunity to object [*21] at the time the professionals make their fee applications); In re Milford Conn. Assocs., L.P., No. 04-30511(ASD), 2008 Bankr. LEXIS 1434, 2008 WL 2003118, at *1 (Bankr. D. Conn. May 7, 2008) (finding no irreparable harm to justify staying all bankruptcy proceedings, including United States Trustee's motion to convert or appoint a chapter 11 trustee during pendency of appeal of bankruptcy court's order denying confirmation because "any alleged injury after the hearing of [the United States Trustee's] Motion is purely speculative since no one knows, or could know, at this time what, if any, relief this Court may enter in connection with the Conversion/Trustee Motion."), appeal denied, Case No. 08-107, 2008 U.S. Dist. LEXIS 39728, 2008 WL 2079126 (D. Conn. May 16, 2008); Koper v. Koper (In re Koper), 560 B.R. 68, 75 (Bankr. E.D.N.Y. 2016) (finding that the possibility that the implementation and enforcement of sanctions order and judgment on consent will impact attorney-defendant's license to practice is too speculative to show irreparable harm).

Potential Harm to Other Parties

To establish this factor, Jennifer must demonstrate that "the balance of harms tips in favor of granting the stay." Adelphia, 361 B.R. at 349 (citations omitted). She contends that the balance of equities tips decidedly in her favor because if the stay is not issued, she may lose her contingent claim to the assets described in the BST and FRA Reports that she asserts were fraudulently concealed by the Debtor from the [*22] State Court and this Court, while other creditors stand to gain an undeserved windfall if she is prevented from having the merits of her contingent claim to a share of those assets determined by the appropriate court if and when such assets are located by the Trustee. Reply ¶ 7. However, as noted above, Jennifer has not demonstrated that there is any risk of harm to her if the Court does not stay the Claim Order. She has failed to establish that this factor weighs in favor of granting the extraordinary relief she is seeking herein.

Substantial Possibility of Success on Appeal

HN8 [↑] "The 'substantial possibility of success' test is considered an intermediate level between 'possible' and 'probable' and is 'intended to eliminate frivolous appeals.'" In re Sabine Oil & Gas Corp., 548 B.R. at 683-84 (citing In re 473 West End Realty Corp., 507 B.R. 496, 501 (Bankr. S.D.N.Y. 2014)). In support of her contention that she is likely to succeed on the merits of the appeal, Jennifer asserts that in seeking to expunge her contingent Equitable Distribution Claim, the Debtor argued that Jennifer had waived and released any right to marital assets, wrongly concealed or otherwise, by entering into the Term Sheet. See Stay Motion at ¶ 5. Jennifer says that she rejected that contention and argued that the Term Sheet contained [*23] no such waiver or release, and that if the Debtor were found to have misrepresented and concealed his assets in the Matrimonial Action or in this proceeding, she would have the right to reopen the Term Sheet and seek to modify or vacate the Judgment of Divorce based on the Debtor's fraud. *Id.* She asserts that in the Opinion, the Court adopted the Debtor's rationale, finding among other things that the Term Sheet and the Judgment of Divorce barred any such application by the doctrine of res judicata.

Jennifer makes two arguments in support of the Stay Motion. First, she says that the Court's decision is contrary to applicable law, and as support cites to Van Wie v. Van Wie, 124 A.D. 2d 353, 355, 507 N.Y.S.2d 486, 488 (N.Y. App. Div. 1986) ("Van Wie") and Arizona v. California, 530 U.S. 392, 414, 120 S. Ct. 2304, 147 L.

Ed. 2d 374 (2000). Stay Motion ¶ 7. Second, she says that it would be inequitable for her to be deprived of the right to a share of any assets wrongfully concealed by the Debtor that may be discovered by the Trustee because she relied on the Debtor's fraudulent disclosures in agreeing to settle the financial issues in the Matrimonial Action. *Id.* The Court finds no merit to either contention. There is no basis for the contention that she relied on the Debtor's fraudulent disclosures in agreeing to settle the financial issues in the Matrimonial [*24] Action. In support of the Stay Motion, Jennifer contends:

[T]he question on appeal is not of any factual findings by the Court, but rather a question of law involving the construction of a settlement agreement and judgment of divorce, and Ms. Brown's Motion sets forth what she believes is a compelling legal argument for a construction that differs from that in the Order and Decision on appeal.

See Reply at ¶ 6. In the Opinion, the Court specifically rejected Jennifer's contention that she relied on the Debtor's alleged fraudulent disclosures in agreeing to settle the financial issues in the Matrimonial Action:

There is no merit to Jennifer's contention that she relied on false information in agreeing to the Term Sheet. She was fully aware of the contents of the BST Report and retained her own expert that produced the FRA Report. In agreeing to the Term Sheet, she advised the Special Referee that (i) she had sufficient information about the Debtor's finances to be able to enter into the Term Sheet and (ii) she understood each part of the Term Sheet and believed the Term Sheet to embody a fair and reasonable settlement of the economic issues in the Matrimonial Action. July 30 H'rg Tr. 4:20-22; [*25] 5:6-9; 8:10-13. Jennifer could have tried the open economic issues to conclusion before the Special Referee. Upon advice of counsel, she elected to settle those matters on the terms set forth in the Term Sheet. Any doubt that Jennifer was uncertain of the path she was taking in agreeing to the Term Sheet is dispelled by her allocution to the Special Referee, also with the guidance of her counsel.

Opinion at *15. To that end, the Court found that with the assistance of her counsel, Jennifer allocuted to the facts that (i) she read the entire Term Sheet, (ii) initialed each page, (iii) reviewed the Term Sheet with her attorney before executing it, (iv) believed that she had

sufficient information about the Debtor's finances to be able to enter into the Term Sheet, and (v) understood each part of the Term Sheet and believed the Term Sheet to embody a fair and reasonable settlement of the economic issues in the Matrimonial Action. *Id.* at * 6. Jennifer does not challenge any of the Court's factual findings in the Opinion and, as such, it is not plausible that on appeal she can demonstrate that she relied on the Debtor's fraudulent disclosures in agreeing to settle the financial issues in the Matrimonial Action. [*26] Moreover, in the Opinion, the Court found that although Jennifer contested the form of the Judgment of Divorce submitted by the Debtor to the State Court, and specifically argued in her Affidavit In Support of Counter Judgment of Divorce that "[s]imply put, on July 30, 2019, I resolved financial issues against Mr. Brown in the matrimonial matter, except I did not and never intended to resolve my claims against the bankruptcy estate nor my rights to assert and enforce my equitable distribution rights in bankruptcy court or subsequently in this court" (*id.* at *7), and submitted her own form of Judgment:

Jennifer did not appeal or otherwise challenge the entry of the Judgment of Divorce. To the contrary, Jennifer has embraced the Judgement as there is no dispute that she has accepted payments under the Judgement from the Debtor totaling \$500,000. [HN9](#) In that way, Jennifer has ratified the agreement in the Term Sheet that is incorporated in the Judgment of Divorce. See *Philips S. Beach, LLC v. ZC Specialty Ins. Co.*, 55 A.D.3d 493, 867 N.Y.S.2d 386, 387 (N.Y. Sup. Ct. 2008) (A ratification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it.); see also *Panaggio v. Panaggio*, 256 A.D.2d 1115, 684 N.Y.S. 2d 732, 733 (N.Y. App. Div. 1998) (Wife could not obtain rescission of separation agreement on grounds of fraud and duress because wife was represented [*27] by counsel during protracted settlement negotiations and agreed to stipulation in open court, and wife ratified agreement by continuing to accept benefits under the agreement for years).

Opinion at * 13. Jennifer does not challenge that determination on appeal.

Jennifer cites *Van Wie*, 124 A.D.2d 353, 507 N.Y.S.2d 486 as support for the proposition that the Term Sheet, which is incorporated, but not merged, into the Judgment of Divorce survives the judgment and the judgment does not bar a subsequent challenge to the validity of the Term Sheet based on fraud. See Stay Motion ¶¶ 6, 19. In that case, the plaintiff (wife) and

defendant (husband) were married in 1966. In June 1984, they entered into a separation agreement which provided, among other things, that plaintiff had no claim to the marital residence — which apparently was the primary asset of the marriage — and that she waived any right to maintenance. [507 N.Y.S. 2d at 487](#). Plaintiff was granted a judgment of divorce against defendant in September 1984, and the June 1984 separation agreement was incorporated, but not merged, into the divorce decree. *Id.* In March 1985, plaintiff sued to have certain provisions of the separation agreement declared void and to impose a constructive trust on the marital residence. [*28] Plaintiff contended that the terms of the separation agreement were procured by defendant's fraud, duress and misrepresentation. [Id. at 487-88](#). Defendant moved to dismiss the action on the grounds of documentary evidence, res judicata and failure to state a cause of action. [Id. at 488](#). Special Term credited the res judicata defense and dismissed the complaint. On appeal, the Appellate Term reversed. *Id.* It found that a separation agreement which is incorporated, but not merged, into a divorce decree survives the decree and the decree does not bar a subsequent challenge to the validity of the separation agreement based on fraud. *Id.* It reasoned that the doctrine of res judicata did not bar the lawsuit because the merits of plaintiff's contention that the separation agreement was procured through fraud had not been previously litigated. *Id.* This case is different from *Van Wie*. Here, before the State Court approved the Term Sheet and issued the Judgment of Divorce, Jennifer, with the advice of counsel, allocuted to the provisions of the Term Sheet and confirmed to the Special Referee, among other things, that (i) she had sufficient information about the Debtor's finances to be able to enter into the Term Sheet [*29] and (ii) she understood each part of the Term Sheet and believed the Term Sheet to embody a fair and reasonable settlement of the economic issues in the Matrimonial Action. Opinion at *15. The Debtor's alleged fraud in concealing marital assets was among the economic issues to be resolved in the Matrimonial Action. Jennifer agreed to accept the Equitable Distribution Payment in satisfaction of the Equitable Distribution Claim at a time that she was plainly aware of the Debtor's alleged fraud as set forth in the BST Report, her own FRA Report and her Equitable Distribution Claim. Moreover in entering the Judgment of Divorce, the State Court rejected Jennifer's assertion that while she "resolved financial issues against [the Debtor] in the matrimonial matter," she "did not and never intended to resolve [her] claims against the bankruptcy estate nor [her] rights to assert and enforce [her] equitable distribution rights in bankruptcy court or

subsequently in [State Court]." Opinion at *7. *Van Wie* is distinguishable and inapplicable in this case. In citing [Arizona v. California, 530 U.S. 392, 120 S. Ct. 2304, 147 L. Ed. 2d 374 \(2000\)](#) in support of her Stay Motion, Jennifer is rehashing an argument she made in opposition to the Motion to Expunge Claim. The Court found no merit to Jennifer's reliance on [Arizona](#) [*30] and distinguished that case, and others that she cited, on the facts of those cases. See Opinion at *15.

[HN10](#) [↑] The case law is clear that the probability of success that must be demonstrated in applying this factor is inversely proportional to the amount of irreparable injury that the plaintiff will suffer absent the stay; in other words, "more of one excuses less of the other." [In re Sabine Oil & Gas Corp., 548 B.R. at 684](#) (quoting [473 West End Realty Corp., 507 B.R. at 502](#)). Jennifer failed to demonstrate that there is any likelihood that she will be irreparably injured if the Court does not stay the Claim Order. She has also failed to establish, in that light, that there is a substantial likelihood that she will prevail in her appeal of the Claim Order.

Public Interest

[HN11](#) [↑] The public interest favors compliance with court orders and timely resolution of litigation. See, e.g., [In re Swartout, 554 B.R. 474, 480 \(Bankr. E.D. Cal. 2016\)](#) ("In short, the public interest favors compliance - not disobedience - with court orders." (citing *U.S. v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1371 (9th Cir. 1980))); [Borowski v. BNC Mortg., Inc., No. C12-5867, 2013 U.S. Dist. LEXIS 153161, 2013 WL 5770378, at *4 \(W.D. Wash. Oct. 24, 2013\)](#) ("Finally, there is a strong public interest in favor of timely compliance with orders of the court. There is also a public interest in resolution of litigation."); [Chevron Corp. v. Donziger, Case No. 12-mc-80237, 2013 U.S. Dist. LEXIS 151094, 2013 WL 5718532, at *2 \(N.D. Cal. Oct. 21, 2013\)](#) ("Further, there is a strong public interest in favor of timely compliance with orders of the court."). Jennifer [*31] says that the public interest will be served by the Court's issuance of a stay pending appeal because the public interest in "expedient administration of bankruptcy proceedings" is outweighed by the right of parties to appellate review. Stay Motion ¶ 20. She contends that the public interest is served ensuring that debtors make "truthful" statements about their financial condition. *Id.* ¶ 21. All that may be true, but Jennifer has not demonstrated that the public interest will be undermined if the Court does not stay the Claim Order.

2020 Bankr. LEXIS 1537, *31

She has failed to demonstrate that there is any likelihood that her appeal will be mooted if the stay is not granted.

Conclusion

Based on the foregoing, the Court finds that Jennifer has not met her heavy burden of establishing grounds for the Court to stay the Claim Order pending her appeal of that order. Accordingly, the Court denies the Stay Motion.

IT IS SO ORDERED.

Date: June 10, 2020

New York, New York

/s/ **James L. Garrity, Jr.**

Hon. James L. Garrity, Jr.

United States Bankruptcy Judge

EXHIBIT L-6



Neutral

As of: September 25, 2020 5:36 PM Z

Clark v. Perez

United States District Court for the Southern District of New York

November 13, 2006, Decided ; November 15, 2006, Filed

05 Civ. 698 (SAS)

Reporter

2006 U.S. Dist. LEXIS 85289 *; 2006 WL 3377606

JUDITH CLARK, Petitioner, -against- ADA
PEREZ, Superintendent Bedford Hills and ELIOT
SPITZER, Attorney General, State of New York,
Respondents.

Prior History: *Clark v. Perez*, 450 F. Supp. 2d 396, 2006 U.S. Dist. LEXIS 67908 (S.D.N.Y., Sept. 21, 2006)

Counsel: [*1] For Petitioner: Leon Friedman, Esq., Sharon Grobman, Esq., New York, New York; Lawrence Lederman, Esq., Michael L. Hirschfeld, Esq., Milbank, Tweed, Hadley & McCloy LLP, New York, New York.

For Respondents: Eliot Spitzer, Attorney General for the State of New York, New York, New York; Michael E. Bongiorno, District Attorney of Rockland County, New City, New York.

Judges: Shira A. Scheindlin, U.S.D.J.

Opinion by: Shira A. Scheindlin

Opinion

OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

By a judgment entered September 22, 2006, this Court granted Judith Clark's petition for a writ of habeas corpus, thereby vacating her conviction pursuant to section 2254 of title 28 of the United States Code.¹ Ada Perez and Elliot Spitzer (hereinafter "the State") now move to stay enforcement of the writ pending the State's appeal. Alternately, the State moves to amend the provision of the judgment providing for Clark's conditional release from custody by striking language ordering the State to "conduct a new trial" within ninety days of the Opinion and Order, and substituting it with language ordering the State to "retry" Clark within [*2] ninety days of the Opinion and Order.²

¹, *Clark v. Perez*, No. 05 Civ. 698, 450 F. Supp. 2d 396, 2006 U.S. Dist. LEXIS 67908, 2006 WL 2708412 (S.D.N.Y., Sept. 21, 2006) (hereinafter "Opinion and Order").

² Respondents' Memorandum of Law in Support of Motion to Stay the Judgment and Alternately to Amend the Judgment ("Resp. Mem.") at 13-14.

This seemingly minor alteration would allow the State to keep Clark imprisoned as long as her case remains on the trial calendar. For the reasons set forth below, the State's request for a stay is granted -- on the condition that all parties agree to an expedited appeal -- and the State's motion to amend the judgment is denied.

II. APPLICABLE LAW

Where a prisoner has successfully petitioned for a writ of habeas corpus and appellate review of her petition is pending, there is a strong presumption in favor of releasing her from confinement.³ This presumption "may be overcome" if a request to stay the decision is made and "'stay factors' tip the balance against it."⁴ The Supreme Court laid [*3] out these factors in *Hilton v. Braunskill*; they include the "traditional" stay factors that apply to all civil cases, as well as factors that are unique to the habeas context.⁵

The traditional criteria regulating whether a stay of a district court decision should be granted pending appeal are: (1) likelihood of appellant's success on the merits; (2) irreparable [*4] injury to the party requesting a stay if one is not issued; (3) substantial injury to the party opposing the stay if one is issued; and (4) the public interests that may be affected.⁶

The *Hilton* Court acknowledged the chameleon-like

quality of these factors, noting that they will necessarily vary from case to case: "Since the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a rigid set of rules."⁷ For example, where a request is made to stay the granting of habeas relief, the following considerations should be taken into account:

the possibility of flight should be taken into consideration. . . . [I]f the State establishes that there is a risk that the prisoner will pose a danger to the public if released, the court may [also] take that factor into consideration in determining whether or not to enlarge h[er].

[*5] The State's interest in continuing custody and rehabilitation pending a final determination of the case on appeal is also a factor to be considered; it will be strongest where the remaining portion of the sentence to be served is long, and weakest where there is little of the sentence remaining to be served.⁸

Finally, the Second Circuit has endorsed a sliding scale approach to weighing the first traditional factor.⁹ [*6] In considering whether a party requesting a stay is likely to succeed on the merits, "[t]he necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other [stay] factors."¹⁰ In other words, if enough factors weigh in favor of a stay, one may be appropriate even where the party requesting it has failed to demonstrate a likelihood of success on the merits. "Simply stated, more of

³ See *Fed. R. App. P. 23(c)* ("Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his own recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order."); *Hilton v. Braunskill*, 481 U.S. 770, 774, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987) ("*Rule 23(c)* undoubtedly creates a presumption of release from custody in [habeas] cases.").

⁴ *Hilton*, 481 U.S. at 777.

⁵ *Id.* at 776-77.

⁶ See *Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002) (citing *Hilton*, 481 U.S. at 776).

⁷ 481 U.S. at 777.

⁸ *Hilton*, 481 U.S. at 777.

⁹ See *Mohammed*, 309 F.3d at 101.

¹⁰ *Id.* (finding "considerable merit" in how this method has been used by the District of Columbia Circuit) (citation and quotation marks omitted). Accord *Washington Metro. Area Transit Comm'n v. Holiday Tours Inc.*, 182 U.S. App. D.C. 220, 559 F.2d 841, 843 (D.C. Cir. 1977).

one excuses less of the other." ¹¹

III. DISCUSSION

A. Likelihood of Success on the Merits

The State's submissions present the same arguments on the merits that I rejected in my previous Opinion and Order. ¹² They are no more convincing now than they were then. Notwithstanding the State's "less than a likelihood" of success on the merits, a stay is warranted here because other factors weigh so heavily in its favor. ¹³

[*7] The peculiar circumstances of Clark's trial raise an important Sixth Amendment issue that goes to the merits of her habeas petition: whether a pro se defendant's right to counsel is violated where the defendant is not present at the proceedings, either by choice or at the court's direction based on her inappropriate conduct, and there is *no one* else present in the courtroom to represent her interests (e.g. standby counsel or court appointed counsel) throughout the prosecution's entire case. The gravity of this constitutional question, together with the fact that it has never been directly addressed by the Second Circuit, tip the scales in favor of staying the judgment. ¹⁴ Justice Ruth Bader Ginsburg

underscored the significance of these considerations in *Doe v. Gonzales*, where she declined to vacate a stay of a district court judgment that was pending review by the Second Circuit. ¹⁵ In *Doe*, the district court found a provision of the Patriot Act unconstitutional as applied to the facts of the case. ¹⁶ Under those circumstances, "the character of the constitutional issue presented and the expedited [appeals] schedule" favored keeping the stay in effect. ¹⁷ Moreover, [*8] a stay was appropriate because "[r]espect for the assessment of the Court of Appeals is especially warranted [where an appeal is] proceeding . . . with due expedition." ¹⁸ [*9] Justice Ginsburg's analysis is certainly applicable here, in light of both the constitutional question Clark raises and the State's declared "inten[tion] to file [its] appeal as expeditiously as possible." ¹⁹

B. Interest in Continued Custody

Another factor weighing in favor of a stay is the State's interest in Clark's continued confinement. The strength of this interest lies not in any danger of additional violence or likelihood of flight, but in the length of her remaining sentence. ²⁰ Clark was

¹¹ *Mohammed*, 309 F.3d at 101 (citation and quotation marks omitted).

¹² See Resp. Mem. at 3-6.

¹³ *Mohammed*, 309 F.3d at 101 (quoting *Dubose v. Pierce*, 761 F.2d 913, 920 (2d Cir. 1985)). See also *id.* (noting that stays can issue "where the likelihood of success is not high but the balance of hardships favors the applicant," or where "[t]he probability of success is inversely proportional to the amount of irreparable injury plaintiff[] will suffer absent the stay") (citations omitted).

¹⁴ See, i.e., *Lucidore v. New York State Div. of Parole*, 209 F.3d 107, 111-12 (2d Cir. 2002) (holding that certificates of appealability may issue in a habeas case where "the questions themselves are adequate to deserve encouragement to proceed further," even if a petitioner has not shown a likelihood of prevailing on the merits).

¹⁵ See *Doe v. Gonzales*, 126 S. Ct. 1, 4, 163 L. Ed. 2d 22 (2005).

¹⁶ See *id.* at 1.

¹⁷ *Id.* Other factors tilting in favor of a stay in *Doe* included irreparable harm and injury to the public interest. *Id.* at 3.

¹⁸ *Id.* at 4. In *Doe*, the district court had "stayed its ruling [granting injunctive relief] to give the Government the opportunity to file an expedited appeal," which the Court of Appeals granted. *Id.* (citation omitted).

¹⁹ Respondents' Reply Memorandum of Law in Support of Motion for a Stay of Proceedings to Enforce the Judgment and, Alternately, to Amend the Judgment ("Resp. Reply Mem.") at 1.

²⁰ The State asserts, without any apparent basis, that Clark's release could cause irreparable injury because she may still belong to "notoriously political" groups that advocate violence, such as the Black Liberation Army or the Weathermen. Resp. Mem. at 11-12. The only evidence in the record suggests the opposite. See Petitioner's Memorandum of Law in Opposition to Motion to Stay the Judgment and Alternatively to Amend the Judgment ("Pet.

sentenced to three consecutive indeterminate terms of twenty-five years to life. Assuming she serves the minimum, Clark still has fifty years left in custody. In itself, the sheer length of her remaining sentence militates against releasing her pending appeal. Nor is there any indication that granting a stay will cause Clark substantial harm. She has already served twenty-five years in custody and has yet to request bail pending appeal. Clark maintains that she will only request bail "if there is an unnecessary delay in bringing her to trial in State court" and that her "chief interest is in expeditious consideration of the [*10] appeal" to ensure a prompt return of this matter to state court for retrial.

²¹

IV. CONCLUSION

For the reasons set forth above, the State's motion to stay this Court's judgment is granted on the condition that the parties agree to an expedited appeal, and the State's motion to amend the judgment is denied. The State must conduct a new trial within ninety days of the final judgment on Clark's petition [*11] or release her from confinement. The Clerk of the Court is directed to close this motion [Docket No. 17].

SO ORDERED:

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

November 13, 2006

End of Document

Mem.") at 12-15 (discussing in detail Clark's repudiation of violence and casting doubt on the present-day existence of these groups).

²¹ Pet. Mem. at 1-2.

EXHIBIT L-7



Neutral

As of: September 25, 2020 5:30 PM Z

In re Daebo Int'l Shipping Co.

United States Bankruptcy Court for the Southern District of New York

February 4, 2016, Decided; February 4, 2016, Entered

Chapter 15, Case No. 15-10616 (MEW)

Reporter

2016 Bankr. LEXIS 356 *; 2016 AMC 620

In re: DAEBO INTERNATIONAL SHIPPING CO., LTD., Debtor in a Foreign Proceeding

Prior History: *In re Daebo Int'l Shipping Co., Ltd.*, 543 B.R. 47, 2015 Bankr. LEXIS 4167 (Bankr. S.D.N.Y., 2015)**LexisNexis® Headnotes**

Bankruptcy Law > Procedural
Matters > Judicial Review > Bankruptcy
Appeals ProceduresCivil Procedure > ... > Entry of
Judgments > Stays of Judgments > Appellate
Stays**[HNI](#) Judicial Review, Bankruptcy Appeals Procedures**

Fed. R. Bankr. P. 8007 provides that a party seeking a stay pending appeal must apply in the first instance to the bankruptcy court. *Fed. R. Bankr. P. 8007(a)(1)(A)*. The decision to grant or deny a stay is within the discretion of the bankruptcy court. In ruling on such a motion, a court must consider (1) whether the movant will

suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has shown a substantial possibility, although less than a likelihood, of success on appeal, and (4) how public interests may be affected. With respect to the probability of success on appeal, the United States Court of Appeals for the Second Circuit has found considerable merit in the approach the United States Court of Appeals for the District of Columbia Circuit expressed in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, to the effect that the necessary level or degree of possibility of success will vary according to the court's assessment of other stay factors. Thus, the extent of the probability of success that must be shown is "inversely proportional" to the injury an appellant may suffer in the absence of a stay.

Bankruptcy Law > Ancillary & Other Cross
Border Cases

Governments > Courts > Judicial Comity

[HN2](#) Bankruptcy Law, Ancillary & Other Cross Border Cases

Under Chapter 15 of the Bankruptcy Code, it is proper as a matter of comity to enforce a custodian's rights.

Bankruptcy Law > Procedural
Matters > Judicial Review > Bankruptcy

Appeals Procedures

Civil Procedure > ... > Entry of
Judgments > Stays of Judgments > Appellate
Stays

[HN3](#) [⬇] **Judicial Review, Bankruptcy Appeals Procedures**

Courts have reached different conclusions as to whether a risk that an appeal could be rendered moot if a court does not grant a stay pending appeal amounts to irreparable injury, but the United States Bankruptcy Court for the Southern District of New York agrees that the loss of appellate rights is a quintessential form of prejudice warranting a finding of irreparable harm.

Counsel: [*1] For Daebo International Shipping Co., Ltd., Chang-Jung Kim, the custodian and foreign representative of Daebo International Shipping Co., Ltd., Foreign Representatives: Michael B. Schaedle, Blank Rome LLP, Philadelphia, PA.

Judges: Michael E. Wiles, UNITED STATES BANKRUPTCY JUDGE.

Opinion by: Michael E. Wiles

Opinion

DECISION GRANTING MOTION FOR STAY PENDING APPEAL

On December 15, 2015, this Court issued a

Memorandum Decision and a separate Order granting the motion of the foreign representative of Daebo International Shipping Co., Ltd to vacate maritime attachments made against the M/V DAEBO TRADER in Louisiana by SPV1, LLC and by other parties that collectively were referred to as the "Rule B Plaintiffs." SPV filed an appeal on January 6, 2016 and also filed a motion for a stay pending appeal, which the foreign representative opposes. Another Rule B Plaintiff also filed a motion for a stay pending appeal [ECF No. 86], but that party has not filed an appeal and its motion is moot.

Standard for Stay Pending Appeal

[HNI](#) [⬆] Bankruptcy Rule 8007 provides that a party seeking a stay pending appeal" must apply in the first instance to the bankruptcy court. Fed. R. Bankr. P. 8007(a)(1)(A). The decision to grant or deny a stay is within the discretion of the bankruptcy court. In re Overmyer, 53 B.R. 952, 955 (Bankr. S.D.N.Y. 1985). In [*2] ruling on such a motion the court must consider: (1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has shown "a substantial possibility, although less than a likelihood, of success" on appeal, and (4) how public interests may be affected. Hirschfeld v. Board of Elections, 984 F.2d 35, 39 (2d Cir. 1992).

With respect to the probability of success on appeal, the Court of Appeals for the Second Circuit has found "considerable merit in the approach expressed by the District of Columbia Circuit [to the effect that] [t]he necessary level or degree of possibility of success will vary according to the court's assessment of the other stay factors." Mohammed v. Reno, 309 F.3d 95, 101 (2d Cir.2002), citing Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843, 182 U.S. App. D.C. 220 (D.C.Cir.1977) (internal quotations omitted). Thus, the extent of the probability of success that must be

shown is "inversely proportional" to the injury the appellant may suffer in the absence of a stay. *Id.*

Discussion

The Court finds that SPV has not shown a reasonable prospect of success on appeal. It is undisputed that the Rule B attachments were issued after the commencement of a rehabilitation proceeding in Korea with respect to Daebo, and after the effectiveness of a stay order issued by the Korean court. [*3] The Rule B Plaintiffs admitted at trial that the Korean court's order barred them from proceeding against Daebo's property, and that as a result they were also barred from pursuing claims that a 2007 sale/leaseback transaction between Daebo and Shinhan Capital Co. with respect to the TRADER was a "sham," or that the transaction was really a disguised secured loan, or that for any other reason the TRADER is really Daebo's property. Moreover, the Rule B Plaintiffs agreed that this Court has the power, under chapter 15 and the relevant Korean law, to prevent the Rule B Plaintiffs from pursuing such claims in Louisiana.

The Rule B Plaintiffs nevertheless argued at trial that they were entitled to pursue separate "alter ego" and "fraudulent transfer" claims against Shinhan in Louisiana. The Court rejected these arguments for two reasons. First, the Court held that the purportedly separate fraudulent transfer and alter ego claims were not separate claims at all, but were just efforts to apply different labels to the contention that the sale/leaseback transaction between Daebo and Shinhan was really a secured financing and that the TRADER really is Daebo's property. Second, the Court held [*4] that even if the Rule B Plaintiffs were right in characterizing their claims, the pursuit of the claims in Louisiana nevertheless would interfere with the exclusive right of the custodian in the Korean rehabilitation proceedings to seek to recharacterize the lease with Shinhan and to treat the TRADER as property of Daebo in the Korean rehabilitation proceedings,

and with the exclusive power of the Korean court to determine the nature and the priority of the claims that Daebo's creditors may make against the TRADER.

As to the first ruling: The Court gave the Rule B Plaintiffs every opportunity at trial to explain how their "alter ego" and "fraudulent transfer" claims were somehow different from their contentions that the lease was a sham or that it was really a secured loan, and they failed to do so. Instead, the Rule B Plaintiffs acknowledged at trial that the sole basis for the claims they wished to pursue in Louisiana was their contention that the sale/leaseback transaction should be disregarded and should not be allowed to put the TRADER out of reach of Daebo's creditors. The Rule B Plaintiffs did not even purport to allege the elements of fraudulent transfer and alter ego claims, [*5] and in the case of the alter ego claims they acknowledged that they could not satisfy the basic elements of such a claim. Nor did the Rule B Plaintiffs identify any other facts that might support a finding that Shinhan had incurred some direct liability to the Rule B Plaintiffs. In short, the "alter ego" and "fraudulent transfer" claims were just efforts to apply different names to the "sham lease" claims that the Rule B Plaintiffs admitted they could not pursue directly. The protections afforded by chapter 15, and the Court's ability to prevent the Rule B Plaintiffs from pursuing claims that the TRADER is really Daebo's property, would be hollow if the Rule B Plaintiffs could evade the problem just by applying different labels to their claims.

As to the second ruling: the Court held that even if the Rule B Plaintiffs were correct as to the labeling of the claims that they wished to assert, and even if those claims were somehow different from the lease characterization claims, the Rule B attachments still would interfere with the exclusive powers of the custodian and the Korean court in the Korean rehabilitation proceeding. SPV has offered no reason to question this part of the Court's [*6] ruling.

The custodian in the Korean rehabilitation proceedings has the exclusive right to contend that the lease with Shinhan was really a secured financing, and that the TRADER should be treated as an asset of DAEBO and made available to the satisfaction of creditor claims in the Korean rehabilitation case. The papers filed in the Korean case, and the testimony at trial, were to the effect that the transaction between Shinhan and Daebo is being treated as a secured loan in the Korean rehabilitation proceedings, and that if there are any proceeds from disposition of the TRADER (after paying allowed secured claims) they will be made available to the payment of unsecured creditors generally. The Rule B attachment, and the Rule B proceedings, would interfere with these aspects of the Korean rehabilitation proceedings. SPV is a creditor of Daebo, and it has filed a claim in the Korean proceedings. The claim that SPV wishes to pursue in Louisiana arises entirely out of transactions between SPV and Daebo that did not involve the TRADER or Shinhan. The Rule B attachment, if it were not vacated, would allow one unsecured creditor of Daebo (SPV) to assert claims directly against the TRADER¹ in [*7] Louisiana in an effort to divert some of the value of the TRADER to the full payment of SPV's own claim in the United States, rather than having the full value of the TRADER made available for administration in Korea for the benefit of creditors generally.

In addition, the Rule B proceedings (if allowed to continue) would allow SPV to seek a ruling from the Louisiana district court, not the Korean court, as to whether SPV's unsecured claim should be allowed and whether that claim should be given priority over Shinhan's rights against the TRADER. It is the Korean court that has the exclusive right to decide, under Korean law, the nature and priority of any claims that Shinhan and other Daebo creditors

may assert with respect to the TRADER or with respect to any other asset that is subject to the Korean rehabilitation proceeding. [HN2](#)^[↑] Under Chapter 15 it is proper as a matter of comity to enforce the custodian's rights, and the Korean court's exclusive [*8] jurisdiction, by vacating the attachments and directing that the Rule B proceedings be dismissed.

The Court therefore finds that SPV has not shown reasonable prospects of success on appeal. However, Daebo has not alleged that either it or Shinhan will be prejudiced by continuing a stay pending the appeal. SPV has alleged that the appeal could be rendered moot in the absence of a stay; [HN3](#)^[↑] courts have reached different conclusions as to whether such a risk amounts to irreparable injury, but this Court agrees that the "loss of appellate rights is a 'quintessential form of prejudice' warranting a finding of irreparable harm." See [ACC Bondholder Group v. Adelphia Commc'n Corp. \(In re Adelphia Commc'n Corp.\)](#), [361 B.R. 337, 347-8 \(S.D.N.Y. 2007\)](#) (citing cases on both sides). Therefore, in balancing the equitable considerations, the Court has determined that, to avoid the risk that SPV's appeal would become moot, and notwithstanding the lack of merit to the Rule B Plaintiffs' arguments, it will grant the motion for a stay, as to SPV, during the pendency of its appeal. A separate Order will be issued.

Dated: New York, New York

February 4, 2016

/s/ **Michael E. Wiles**

UNITED STATES BANKRUPTCY COURT

ORDER REGARDING MOTIONS FOR STAY PENDING APPEAL

This Court issued an Order on December 15, 2015 (the "Vacatur Order") [ECF [*9] No. 76] that vacated certain maritime attachments. Before the Court are motions for a stay pending appeal filed

¹ Technically a bond was substituted for the TRADER, but with the agreement of the parties that for all purposes the continued validity of the attachment would be considered as though it were an attachment of the TRADER itself. [ECF No. 38 at ¶¶ 4-6.]

by SPV 1 LLC ("SPV") [ECF Nos. 83-84] and American Marine Services, Inc. ("AMS") [ECF No. 86]. Based on the record of the proceedings in this Court, and for the reasons stated in the separate Decision entered this same day, it is hereby

ORDERED, that the motion filed by AMS is denied as moot, as AMS has not filed an appeal from the Vacatur Order; and it is further

ORDERED, that the motion filed by SPV is granted, and the Vacatur Order shall be stayed as to SPV pending SPV's appeal; and it is further

ORDERED, that the foregoing stay shall apply only in favor of SPV, and that the Vacatur Order will remain in effect and may be enforced as to the parties who did not appeal.

Dated: New York, New York

February 4, 2016

/s/ **Michael E. Wiles**

UNITED STATES BANKRUPTCY COURT

EXHIBIT L-8



Neutral

As of: October 13, 2020 7:17 PM Z

In re Neff

United States Bankruptcy Court for the Central District of California, San Fernando Valley Division

August 4, 2020, Decided; August 4, 2020, Filed and Entered

Case No.: 1:11-bk-22424-GM, CHAPTER 7

Reporter

2020 Bankr. LEXIS 2079 *

In re: Ronald Alvin Neff, Debtor(s).

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > Appellate Stays

[HN1](#) Stays of Judgments, Appellate Stays

Core Terms

irreparable, prevail, homestead

The standard for a stay is that the court should consider the following: Under the traditional standard, a court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Case Summary

Overview

HOLDINGS: [1]-Creditor's motion for stay pending appeal was granted with respect to an order approving a disputed part of debtor's homestead exemption because, while the creditor had not made a strong showing that he was likely to prevail on appeal, it was not impossible and the possible harm to the creditor and the estate was much greater than the harm to the debtor.

Bankruptcy Law > Procedural Matters > Judicial Review

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > Appellate Stays

[HN2](#) Procedural Matters, Judicial Review

A stay pending appeal is initially presented to and determined by the bankruptcy court. [Fed. R. Bankr. P. 8005](#). The Ninth Circuit has described the requirements for a stay pending appeal as follows: There are four factors we consider when presented with a motion for a stay pending appeal: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies. To satisfy steps (1) and (2), the court will accept proof either that the applicant has shown a strong likelihood of success on the merits and a possibility of irreparable injury to the applicant, or that serious legal questions are raised and that the balance of hardships tips sharply

Outcome

Motion for stay pending appeal granted.

LexisNexis® Headnotes

2020 Bankr. LEXIS 2079, *2079

in its favor. These alternative formulations are described as two interrelated legal tests that represent the outer reaches of a single continuum.

Counsel: [*1] For Ronald Alvin Neff, c/o Law Offices of Michael D. Kwasigroch, Debtor: Michael D Kwasigroch, Simi Valley, CA.

For David Keith Gottlieb (TR), Trustee: M Douglas Flahaut, Arent Fox, LLP, Los Angeles, CA.

Judges: Geraldine Mund, United States Bankruptcy Judge.

Opinion by: Geraldine Mund

Opinion

TENTATIVE RULING ADOPTED AS THE MEMORANDUM OF OPINION GRANTING STAY PENDING APPEAL

THE FOLLOWING TENTATIVE RULING HAS BEEN ADOPTED AS THE MEMORANDUM OF OPINION GRANTING A STAY PENDING APPEAL:

DeNoce opposes the distribution and seeks a stay pending appeal of the January judgment and an order that the Trustee continue to hold the homestead funds until the appeal has been resolved. Neff opposes this motion for a stay and supports the motion by the Trustee to distribute the remaining homestead amount.

DeNoce Motion for a Stay of Execution

DeNoce asserts that he has a high likelihood of success on the appeal, that he will suffer irreparable harm if the disputed homestead funds are released to the Debtor, and that the stay will cause little harm to the Debtor. The crux of the argument is that the BAP will "remand and

allow Creditor to get the SSA records and to have expert Meyers review them." If the funds are disbursed, there is no [*2] chance that DeNoce or the Estate will ever get any money since Neff will surely use it. This is particularly true because of Neff's history of drug abuse, criminal conviction for fraud, a fraudulent transfer while in bankruptcy, and other conduct designed to cheat creditors.

DeNoce has contacted the BAP, which will allow him to file a motion to expedite an appeal and then it should be concluded in less than 45 days. If this stay is granted, DeNoce will immediately file such a motion with the BAP. All BAP briefing will be complete by the time that this motion is heard.

HN1 [↑] The standard for a stay is that the court should consider the following:

Under [the traditional] standard, a court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." [*Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 \(1987\)](#)

[*Nken v. Holder*, 556 U.S. 418, 425-6, 129 S. Ct. 1749, 173 L. Ed. 2d 550 \(2009\)](#)

DeNoce then provides some 50+ pages of facts, assertions, and argument that the stay should be imposed and attaches his appellate brief as an exhibit. Some of these [*3] arguments are largely set forth in his motion for new trial (dkt. 577)

The basic issue is that the Court did not allow admission of testimony of Mr. Meyers and that DeNoce was not allowed to obtain the SSA file through actions of the Court and of Neff. Further, it is asserted that the Court did not find that Neff lacked credibility and did not find that Neff should not qualify for SSI benefits because he is a drug addict and therefore he must have lied on his SSA application.

DeNoce goes on to assert that there will be irreparable harm to him should he prevail on appeal (or presumably a retrial) because the source of recovery will be gone by that time. Because Neff recently received the \$75,000 undisputed portion of his homestead exemption, he should be able to wait for the rest of the money.

Neff Opposition to Stay

Neff notes that granting of a stay is discretionary and that the party requesting the stay has the burden of showing that the circumstances justify it. Nken v. Holder, id. at 433-434

DeNoce has been given eight years and two trials to prove his case. His appeal and motion are based on speculation of if the SSA record had been obtained, there might be proof to rebut the presumption of disability. There is [*4] no reasonable chance of success on appeal. Any hardship that DeNoce claims is overwhelmed by the delays and attorney fees incurred by the Debtor.

Alternatively, Neff requests a \$200,000 bond be posted.

Reply to Opposition to Stay

The opposition does not deal with the issues raised in the motion for a stay. This is a violation of LBR 9013-1(f)(2), which required a complete written statement of all of the reasons in the opposition. It is insufficient just to say that there will be forthcoming extensive oral argument presented. This would be an ambush and should not be allowed.

No evidence of irreparable harm is given, not even the Debtor's declaration.

The SSA record is key and the opposition downplays that. And it does not address the Meyers issues, which alone should warrant a reversal or remand.

If the stay is not granted, DeNoce requests a 10 day period to have this motion for stay reviewed by the BAP.

On July 31, DeNoce filed a notice of Debtor's Default on Appeal, arguing that Neff appears to have no intent to participate in the appeal and has no standing to request that a bond be posted. In short, the responsive brief was due on July 30 and was not filed and Neff has not filed any papers [*5] in the appeal. He goes on to argue that he cannot afford to pay for a bond and because he is likely to succeed on the appeal, a bond is not justified. Further, Neff has not followed the proper procedures to request a bond.

ANALYSIS AND TENTATIVE RULING

HN2 [↑] A stay pending appeal is initially presented to and determined by the bankruptcy court. F.R.B.P. 8005. The Ninth Circuit has described the requirements for a stay pending appeal as follows:

There are four factors we consider when presented with a motion for a stay pending appeal:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.

Golden Gate Restaurant v. City and County of San Francisco, 512 F.3d 1112, 1115 (9th Cir. 2008) (quoting Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987)). We have recently explained that to satisfy steps (1) and (2), we will accept proof either that the applicant has shown "a *strong* likelihood of success on the merits [and] . . . a *possibility* of irreparable injury to the [applicant]," or "that *serious* legal questions are raised and that the balance of hardships tips *sharply* in its favor." Id. at 1115-16 (emphasis added; [*6] citations omitted). We have described these alternative formulations as "'two interrelated legal tests' that 'represent the outer reaches of a single continuum.'" Id. at 1115 (quoting Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983)).

Stormans Inc. v. Selecky, 526 F.3d 406, 408 (9th Cir. 2008) (emphasis in the original)

Although this preceded the 2009 case of *Nken*, that case did not change the law or process for a stay pending appeal.

Did DeNoce make a strong showing that he is likely to succeed on the merits or has he raise serious legal questions?

This case has had many twists and turns - moving from judgment for DeNoce (under Judge Kaufman) to judgment for Neff (under me). While I am convinced that my decision was absolutely correct, there is a small possibility that an appellate court will disagree with that determination. So while DeNoce has not made a strong showing that he is likely to prevail through reversal or remand, it is not impossible that this will occur. As to the issue of "serious legal questions," a large part of DeNoce's appeal revolves around his inability to obtain

and review the SSA file. Ultimately he could have or actually may have had access, but his own behavior prevented him from proceeding. As to the attempted testimony of Mr. Meyers, this is a question of basic evidentiary [*7] law and is doubtful as a serious legal question, but in the context of this case it might turn out to be one. However, this factor alone is not sufficient to grant the requested stay. But if the balance of hardships tips sharply in DeNoce's favor, it is enough to meet the minimum requirements for a stay.

Will DeNoce be irreparably injured absent a stay?

There is a high likelihood that once the money is distributed to Neff, it will be used or otherwise made unavailable to the Estate. Neff has no substantial assets, is unable to work, and has various health issues. He has not shown any ability to refund the exemption if he loses and the Court is not aware of any ability to do so. Of course this money would go back to the Estate, but DeNoce is a major creditor and is also entitled to a set distribution if he is the prevailing party on the enhanced exemption issue.

Would the issuance of the stay substantially injure Neff?

While the Court can assume that a further delay in obtaining this \$100,000 would be at least an inconvenience to Neff, he has not put forth any argument or evidence of substantial injury. The house in question is located on Lake Harbor Lane, Westlake Village. The sale of [*8] this property closed in October 2012, but Debtor's motion to release the undisputed portion of the homestead exemption was not filed until April 2019 (dkt. 511), about 6 ½ years after the property was sold. The judgment in the trial was entered in January 2020 and the appeal was filed in February 2020. Yet the Trustee did not file his motion to disburse the remaining money until July. Whether Neff pushed for earlier action is unknown.

I have reviewed the BAP docket and spoken to a staff person at the BAP as to the expected timing of this appeal. DeNoce's brief has been filed and Neff had until the end of July to file his (these dates are approximate). Then DeNoce will have a few weeks to respond. Assuming that there are no delays, it is expected that oral argument will take place in mid-October or mid-November 2020. In general the BAP is very prompt on issuing its opinions and that should occur no later than early 2021. Thus we are talking about a stay of

approximately six months or even less.

While it might be inconvenient to Neff if there is a further delay in distribution, it does not appear that he will suffer a substantial injury. Further, professionals (including and especially [*9] the Trustee's attorneys) have been paid a substantial amount in interim fees and any further diminution of the proceeds through time and fees will be easily recoverable from them.

Where does the public interest lie?

This is not an issue of public interest.

Should Neff prevail on appeal, DeNoce will certainly appeal to the Ninth Circuit. Should DeNoce prevail through reversal or remand, there will be no need for a stay. Because of the fairly short time-frame until oral argument and determination by the BAP, it is my intent to grant a stay. While I find that DeNoce has a very slim chance to prevail given the evidence before me in this motion, in its opposition, and in the history of this case, it is clear that the harm to DeNoce and the Estate is much greater than the harm to Neff. Reviewing the guidelines for a stay pending appeal, this motion barely meets the minimum requirements. But the balancing of harm is strongly in favor of DeNoce and that tips the scales in favor of granting the stay.

While it is disturbing that Neff has not filed a timely response in the appeal - which was due on July 30 - that does not indicate that he will not be part of the appeal. Response times are not jurisdictional [*10] and the BAP has flexibility to deal with this.

As to a bond, I see no need for one. The fact that the Trustee is holding the money means that it is safe. The fact that Neff does not seem to need the money at this time or in the next few months also weighs against requiring DeNoce to post a bond.

However, I do not intend this stay to be indefinite nor do I wish to force the BAP judges to review the voluminous papers before them on some sort of shortened timeframe. Thus, I will grant a stay pending appeal. It will terminate ten days after the entry of the BAP opinion.

Date: August 4, 2020

/s/ Geraldine Mund

Geraldine Mund

2020 Bankr. LEXIS 2079, *10

United States Bankruptcy Judge

End of Document

EXHIBIT L-9



Neutral

As of: October 13, 2020 7:19 PM Z

Lussier v. Sullivan (In re Sullivan)

United States Bankruptcy Court for the District of Massachusetts

March 7, 2011, Decided; March 7, 2011, Filed, Entered

Chapter 7, Case No. 08-18652-JNF, Adv. P. No. 09-1211

Reporter

2011 Bankr. LEXIS 871 *; 2011 WL 839531

In re BRIAN SULLIVAN, Debtor; STEPHANIE R. LUSSIER, Plaintiff v. BRIAN SULLIVAN, Defendant

Prior History: [*Lussier v. Sullivan \(In re Sullivan\)*, 444 B.R. 1, 2011 Bankr. LEXIS 483 \(Bankr. D. Mass., Feb. 14, 2011\)](#)**Core Terms**

consumer, paralegal

Counsel: [*1] For Brian Sullivan, Debtor: Christopher J. Fein, Fein Law Office, Braintree, MA.

For Joseph Braunstein, Trustee: Joseph Braunstein, Kristin M. McDonough, Riemer & Braunstein, LLP, Boston, MA.

Judges: Joan N. Feeney, United States Bankruptcy Judge.**Opinion by:** Joan N. Feeney**Opinion****MEMORANDUM**

Two matters are before the Court: 1) Plaintiff's Request for Fees and Costs, pursuant to which Stephanie Lussier (the "Plaintiff") seeks fees and costs in the total sum of \$8,302.50;¹ and 2) the Defendant's Motion to

¹ The Plaintiff seeks the following:[Go to table 1](#)

Court fees

\$250.00

Legal Research (115 hours x \$40)

\$4,600.00

Para Legal [sic] Services (25 hours x \$25.00)

\$625.00

Pacer services

\$150.00

Document typing services

\$750.00

341 transcript

\$168.00

Auto appraisal service

\$250.00

Cost for subpoena documents

\$150.00

Postage and mailing materials

\$300.00

Loss of income

\$750.00

Misc. supplies (folders files)

\$174.29

Stay Pending Appeal, pursuant to which the Brian Sullivan, (the "Debtor" or the "Defendant") seeks a stay of further proceedings pending appeal,² or, in the alternative, a denial of the Plaintiff's "request for sanctions," such as the cost of file folders and paralegal services. Neither party proffered legal support for their respective positions, and the Plaintiff did not substantiate her Request for Fees and Costs with receipts or other evidence of payment.

In Bridgewater Credit Union v. McCarthy (*In re McCarthy*), 243 B.R. 203 (B.A.P. 1st Cir. 2000), the United States Bankruptcy Appellate Panel for the First Circuit observed:

The general rule in federal litigation is the "American Rule," under which the prevailing litigant is not entitled to collect his reasonable attorney's fees from his opponent unless authorized by statute or provided for by contract. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975); *In re Sheridan*, 105 F.3d 1164, 1166 (7th Cir.1997) (rehearing en banc denied). The courts do not have "roving authority" to award counsel fees whenever they might consider it warranted. Roosevelt Campobello Int'l. Park Comm'n v. EPA, 711 F.2d 431, 435 (1st Cir. 1983) (quoting Alyeska Pipeline Serv. Co., 421 U.S. at 260, 95 S.Ct. 1612).

The American Rule reigns in the [*3] bankruptcy forum. See *In re Sheridan*, 105 F.3d at 1166; see also *In re DN Assocs.*, 165 B.R. 344, 348-49 (Bankr. D. Me.1994) (applying American Rule in bankruptcy setting). In the context of dischargeability disputes concerning consumer debts, however, § 523(d) intervenes, providing that:

If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a

reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

§ 523(d).

In re McCarthy, 243 B.R. at 207. Although the Panel in *McCarthy* referred only to attorney's fees, in decisions such as *In re Sheridan* courts have considered requests for attorneys' fees and costs associated with suit. The Plaintiff's assertion of entitlement to compensation for paralegal services and legal research is sufficiently analogous to attorney's fees for this Court to apply the American Rule.

The Plaintiff succeeded in obtaining [*4] a judgment denying the Debtor his discharge under 11 U.S.C. § 727(a)(4)(A). She is not, however, the holder of a consumer debt and, thus, does not qualify for an award of fees and costs under 11 U.S.C. § 523(d). Moreover, the Plaintiff did not assert that she is entitled to an award of fees and costs either contractually or pursuant to any statute. Accordingly, in accordance with the American Rule, the Court denies her Request for Fees and Costs; sustains the Debtor's objection to her Request contained in his Motion to Stay; and grants the Debtor's Motion to Stay Pending Appeal to the extent that the Motion to Stay is, in effect, and objection to the Plaintiff's Request.

Dated: March 7, 2011

By the Court,

/s/ Joan N. Feeney

Joan N. Feeney

United States Bankruptcy Judge

Travel

\$134.76

² The [*2] Debtor referenced obtaining a supersedeas bond pursuant to Fed. R. Civ. P. 62(d), but correctly observed the difficulty with the applicability of the rule in the absence of a money judgment. He requested the Court to treat the Motion for Stay Pending Appeal as an objection to the Plaintiff's Request for Fees and Costs.

2011 Bankr. LEXIS 871, *4

Table1 ([Return to related document text](#))

Table1 ([Return to related document text](#))

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EXHIBIT L-10



Neutral

As of: October 13, 2020 7:18 PM Z

Schmidt v. Fci Enters. Llc

United States District Court for the Eastern District of Virginia, Alexandria Division

February 3, 2020, Decided; February 3, 2020, Filed

Case No. 1:18-cv-01472 (RDA/JFA)

Reporter

2020 U.S. Dist. LEXIS 95323 *

ROBERT MARK SCHMIDT, et al., Plaintiffs, v. FCI ENTERPRISES LLC, et al., Defendants.

Opinion by: Rossie D. Alston, Jr.

Prior History: [Schmidt v. FCI Enters. LLC, 2019 U.S. Dist. LEXIS 192579 \(E.D. Va., Nov. 5, 2019\)](#)

Opinion

Core Terms

supersedeas, shutdown, notice, plant

Counsel: [*1] For Robert Mark Schmidt, John McDade, David Are, Stacy De La Hoz, Andrea Hallock, Timothy Rademacher, Bruce Morris, Gerald Lebel, Tommy Rembert, Isaac Gusman, Sr., Craig Chuba, Darrin Eaton, Laura Knight, Michael Novitsky, Mia Frankel, LaDeana Smith, Tucker Newberry, Antero Lacot, Thuy Nguyen, Kelly Hood, Jenifer Moorhead, Robert Boerjan, Plaintiffs: Travis Francis Salisbury, Brad Darin Weiss, Charapp & Weiss LLP, McLean, VA.

For FCI Enterprises LLC, Michael Gulino, Daniel Muse, John Bronson, Robert Knibb, B. Hagen Saville, Defendants: Anand Vijay Ramana, LEAD ATTORNEY, Margaret Grace Megumi Inomata, Vedder Price PC, Washington, DC.

Judges: Rossie D. Alston, Jr., United States District Judge.

ORDER

This matter comes before the Court on Plaintiffs' Motion for Bond, Dkt. 158, Defendants' Opposition to Bond, Dkt. 161, Defendants' Motion for Stay Pending Appeal, Dkt. 166, Plaintiffs' Response in Opposition, Dkt. 171, and Defendants' Reply, Dkt. 172. Considering the filings, the Court GRANTS Plaintiffs' Motion for Bond and DENIES Defendants' Motion for Stay Pending Appeal for the reasons stated below.

I. Background

The factual background of this case is fully set forth in the Court's [*2] Memorandum Opinion and Order. Dkt. 125. Accordingly, only facts germane to the resolution of the pending motions currently before the Court will be recounted here.

After a six-day jury trial, the Court adopted the advisory jury's verdict, finding that FCI Enterprises, LLC ("FCI") was an "employer" pursuant to [29 U.S.C. § 2101\(a\)\(1\)\(A\)](#), and that what occurred was a "plant shutdown," as defined by [29 U.S.C. § 2101\(a\)\(2\)](#). Dkt. 125. This finding required the Court to determine whether there was one or whether there were multiple "single sites of employment," [20 C.F.R. § 639.3\(i\)](#). Dkt. 125. In addition, the Court denied Defendants' affirmative defenses. One of the affirmative defenses maintained that the law permitted an employer to order a shutdown

of a single site of employment before the

conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

29 U.S.C. § 2102(b)(1).

In denying that affirmative defense, the Court found that Defendants were well [*3] aware of the depressed fiscal state that FCI was in and knew that the loan agreement and the accompanying line of credit with Branch Banking and Trust ("BB&T") was set to mature on a date certain. Only two months prior to the maturation date of the loan agreement and line of credit did the Chief Financial Officer, Defendant Dan Muse, attempt to secure additional capital. Each of the three institutions contacted refused to do business with FCI based on FCI's poor fiscal health. The Court denied the affirmative defenses and found FCI liable for violating the Worker Adjustment and Retraining Notification ("WARN") Act. The Court then awarded damages totaling approximately \$300,000.00 to all Plaintiffs except Mia Frankel.

The parties then filed post-trial motions, including Defendants' Motion for Judgment as a Matter of Law, Dkt. 127, and Plaintiffs Motion for Attorneys' Fees and Costs, Dkt. Nos. 130 and 134. Defendants then filed a Notice of Appeal, Dkt. 147, appealing the Court's Order denying Defendants' Rule 12(b)(6) Motion, Dkt. 16, the Court's Order denying Defendants' Rule 56 Motion for Summary Judgment, Dkt. 89, the Court's Order from the bench on October 18, 2019, denying Defendants' Rule 50(a) Motion for Judgment [*4] as a Matter of Law on Count 1, and the Court's Memorandum Opinion and Order, Did. 125.

The parties argued their post-trial motions, which included Defendants' Motion for Judgment as a Matter of Law, Dkt. 127, and Plaintiffs' Motion for Attorneys' Fees and Costs, Dkt. 130, on December 6, 2019.

On December 20, 2019, Plaintiffs filed a Motion for Bond, Dkt. 158, which Defendants opposed, Dkt. 161. On January 3, 2020, the Court issued its Order resolving the parties' post-trial motions, Dkt. 163. The Clerk, as directed in the previous Order, entered judgment pursuant to Federal Rule of Civil Procedure

58, Dkt. 164. Consequently, Defendants filed a Supplemental Notice of Appeal, including those two Orders. Dkt. 165. Defendants then filed a Motion for Stay Pending Appeal, Dkt. 166, which Plaintiffs opposed. Dkt. 171. Defendants filed a Reply. Dkt. 172.

In Plaintiffs' Motion for Bond, Plaintiffs requested an appeal bond pursuant to *Federal Rule of Appellate Procedure* 7. Dkt. 158. Because the WARN Act permits a district court to "allow the prevailing party a reasonable attorney's fee as part of the costs," 29 U.S.C. § 2104(a)(6), Plaintiffs requested that the amount of the appeal bond include the total amount of the judgment and costs on appeal. Dkt. 159. Plaintiffs explained their [*5] concern that "Plaintiffs have no security or protection that they will be able to recover costs if FCI's appeal is denied, as FCI has indicated they do not have the ability to pay." Dkt. 159, 3.

Next, anticipating that Defendants would file a motion staying execution of the judgment, Plaintiffs requested that if the Court were inclined to award a stay, that the Court require Defendants to post a supersedeas bond totaling the amount of the judgment. Dkt. 159. Plaintiffs reiterated its concern about FCI's insolvency and argued that a supersedeas bond is necessary for that reason and to protect Plaintiffs from "the possibility of loss resulting from the delay in execution." Dkt. 159, 4. Additionally, Plaintiffs maintained, that if Defendants are granted a stay stay of execution and required to post a supersedeas bond less than the amount of the judgment, Plaintiffs further noted that they would be harmed without adequate security. Plaintiffs argued that the status quo will not be maintained because Plaintiffs will be "spending more costs and fees on appeal with zero to no certainty that [FCI] will be able to satisfy the judgment if FCI loses the appeal." Dkt. 159-5.

Defendants opposed Plaintiffs' [*6] Motion for Bond. Dkt. 161. With respect to the appeal bond, Defendants cite to a case from the United States District Court for the Western District of Virginia as setting forth the "standard" for issuing an appeal bond. Dkt. 161, 2 (citing *Sky Cable, LLC v. Coley*, No. 5:11-cv-00048, 2016 WL 8138819, at *6 (W.D. Va. Dec. 5, 2016)). Defendants argue that FCI is unable to post the bond, that the appeal is not frivolous, and that Defendants have not engaged in vexatious or bad faith conduct.

Defendants also request that the Court stay execution of the judgment and not require Defendants to post a supersedeas bond in the amount of the judgment because posting a full bond would impose an undue

financial burden on FCI. Dkt. 161. Defendants suggest a supersedeas bond amount of \$272.30.

Defendants then filed a Motion to Stay Pending Appeal, Dkt. 166, incorporating by reference the arguments made in Defendants' Opposition to Plaintiff's Motion for Bond, Dkt. 161.

In Plaintiffs Response in Opposition, Dkt. 171, Plaintiffs point to evidence that FCI is not insolvent.

II. Analysis

1. Appeal Bond

Rule 7 of the Federal Rules of Appellate Procedure provides that "[i]n a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary [*7] to ensure payment of costs on appeal." "Such a bond 'may be given at or after the time of filing the notice of appeal . . .'" [*Brinn v. Tidewater Transp. Dist. Com'*](#)¹¹, 113 F. Supp. 2d 935, 939 (E.D. Va. 2000) (quoting *Fed. R. App. P.* 7). "In addition to a bond to cover costs, the court also has the discretion to order that the bond posted in connection with an appeal be sufficient to cover the judgment and post-judgment interests and costs." *Id.* (citing [*North River Ins. Co. v. Greater New York Mut. Ins. Co.*](#), 895 F. Supp. 83, 84 (E.D. Pa. 1995)). "The underlying purpose of posting a bond 'is to preserve the status quo while protecting the non-appealing party's rights pending appeal.'" *Id.* (quoting [*Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc.*](#), 600 F.2d 1189, 1190-91 (1979)). Ultimately, the amount of an appeal bond is within the sound discretion of the district court. [*Page v. A. H. Robins Co., Inc.*](#), 85 F.R.D. 139, 140 (E.D. Va. 1980).

The Court finds that an appeal bond is warranted that covers costs on appeal as well as the full amount of the judgment. Defendants contend that they essentially proved FCI's insolvency at trial, citing to Exhibits 112, 113, and 126, and attached additional exhibits reflecting FCI's account balances to date, Dkt. 161, 3. Defendants note that FCI has a total of "\$191.13 in its line of credit account at its only banking institution, BB&T," that "FCI has a total of \$81.17 in its operating account (over which BB&T exercises control)," that "FCI [*8] still owes BB&T almost \$1.5 million," that FCI's other accounts have \$0.00 balances, and that FCI "is not generating any revenue." Dkt. 161, 3. Plaintiffs contend that FCI's financial state is due to its own design. Dkt. 171, 2. As recounted in the background section, prior to the "plant

shutdown," the financial state of FCI was known well before any attempt to secure capital occurred. Dkt. 125. Further, in Plaintiffs' Response in Opposition to Defendants' Motion for Stay, Plaintiffs note the correspondence between BB&T and Defendants Robert Knibb, B. Hagen Saville, and Daniel Muse wherein they admit to "incorrectly calculate[ing] tax distributions resulting in overdistributions to shareholders" in June 2017, September 2017, and January 2018, totaling \$650,000.00. Dkt. 171, 2. Those overdistributions were never repaid. Dkt. 171, 2. Plaintiffs also note that Defendant Saville made an investment in FCI of \$370,000.00 which he had returned after FCI was shutdown; thus, it was not counted as an asset of FCI's. Dkt. 171, 2. In addition, Plaintiffs referred to BB&T employee Carolyn Pelton's testimony that the plant shutdown was contemplated by FCI's investors and that those investors could [*9] "take the loss of FCI against [] capital gains . . . be out some and move on." Dkt. 171, 2 (citing Dkt. 171-1).

Considering the above, the Court is concerned with respect to the significant dispute as to whether FCI is truly insolvent, and that the Plaintiffs will not have adequate security that their costs will be paid if Defendants' appeal is denied. Accordingly, the Court, acting within its sound discretion, determines that an appeal bond is warranted in an amount that covers the costs of appeal as well as the amount of the judgment.

2. Motion to Stay and Supersedeas Bond

[*Federal Rule of Civil Procedure 62\(d\)*](#) allows the party against whom a judgment was rendered, in this case FCI, to stay enforcement of the judgment by filing an appeal and obtaining a supersedeas bond. Defendants have appealed several of this Court's Orders and Defendants requested that the Court grant the Motion to Stay Pending Appeal without a supersedeas bond.

Generally, "[a] party can obtain a stay as a matter of right under [*Rule 62\(d\)*](#) by posting a supersedeas bond in the full amount of the judgment, but district courts have the discretion to grant a stay without a bond or with a reduced bond." [*E.I. DuPont de Nemours and Co. v. Kolon Industries, Inc.*](#), No. 3:09-cv-58, [*10] 2012 U.S. Dist. LEXIS 50514, 2012 WL 1202485, at *2 (E.D. Va. April 10, 2012) (citing [*Alexander v. Chesapeake, Potomac & Tidewater Books, Inc.*](#), 190 F.R.D. 190, 192 (E.D. Va. 1999)).

"A stay is considered 'extraordinary relief for which the moving party bears a 'heavy burden.'" [*Northrop Grumman Technical Services, Inc. v. DynCorp*](#)

International, LLC, No. 1:16-cv-534, 2016 U.S. Dist. LEXIS 78864, 2016 WL 3346349, *2 (E.D. Va. 2016) (quoting Larios v. Cox, 305 F. Supp. 2d 1335, 1336 (N.D. Ga. 2004)). "In determining whether to issue a stay pending appeal on the basis of less than a full bond, a district court should act to 'preserve the status quo while protecting the non-appealing party's rights pending appeal.'" Alexander, 190 F.R.D. at 193 (quoting Poplar Grove Planting and Refining Co., Inc., 600 F.2d at 1190-91). In considering a motion to stay pending appeal, the Court is guided by the following factors:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
- (2) whether the applicant will be irreparably injured absent a stay;
- (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
- (4) where the public interest lies.

Northrop, 2016 U.S. Dist. LEXIS 78864, 2016 WL 3346349 at *2 (quoting Men v. Holder, 556 U.S. 418, 434, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)).

"However, [s]ince the traditional stay factors contemplated individualized judgments in each case, the formula cannot be reduced to a set of rigid rules." *Id.* (quoting Hilton v. Braunskill, 481 U.S. 770, 777, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987)).

As an initial matter, Defendants are not entitled to a stay because Defendants have not posted a supersedeas bond in the full amount of the judgment.

With respect to whether [*11] the Court will nevertheless grant a stay, the Plaintiffs' claims presented matters of first impression as the United States Court of Appeals for the Fourth Circuit has not yet interpreted the statutory definitions of "plant closing," "single site of employment," and "employer" under the WARN Act. Accordingly, "" [t]his [first] factor weighs in favor of granting a stay because clear precedent from the Court of Appeals does not dictate the outcome of the substantive issue[s]."" 2016 U.S. Dist. LEXIS 78864 at *3 (quoting United States v. Fourteen Various Firearms, 897 F. Supp. 271, 273 (E.D. Va. 1995)).

Regarding harm to Defendants if a stay is not issued, Defendants maintain that FCI is insolvent; however, that contention is suspect based on the Court's previous iteration of the facts surrounding the "plant shutdown" in addition to Plaintiff's references to overdistributions

taken by several of the Defendants, Defendant Saville's \$370,000.00 investment not counted as an asset of FCI, and the testimony of Carolyn Pelton discrediting the bona-fides of FCI's asset administration. The Court also notes that at trial, Defendant Muse testified that FCI contracts were being sold off as FCI could no longer complete work under those contracts. Dkt. 126, 196. All of these factors weigh against issuing a [*12] stay.

Plaintiffs have argued that they will be substantially injured if the stay is issued and less than a full supersedeas bond is required to be posted. The Court recognizes that

Plaintiff[s], however, [are] entitled to the benefit of the judgment or to adequate surety that the judgment will be preserved throughout the appeals process, typically by Defendants' posting of a supersedeas bond. Defendants have not posted a supersedeas bond or provided alternative security, and therefore Plaintiff[s] would be harmed by a stay of execution because Plaintiff[s]' ability to execute on the judgment would be unsecured throughout the appeals process.

Newport News Holdings Corp. v. Virtual City Vision, Inc., No. 4:08-cv-19, 2009 WL 10689735, *4 (E.D. Va. 2009 Oct. 1, 2009). Thus, this factor weighs against awarding of a stay.

Moreover, it is in the public interest to deny the stay. Defendants urge that posting a bond "would impose an undue financial burden." Alexander, 190 F.R.D. at 193. The Court notes that the Fourth Circuit has held that "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Id.* (citing Long v. Robinson, 432 F.2d 977, 986(1970)). Thus, this factor weighs against awarding of a stay. Accordingly, [*13] the factors militate against awarding a stay. Thus, the Court DENIES Defendants' Motion for Stay Pending Appeal, Dkt. 166.

III. Conclusion

For the reasons previously set forth, the Court GRANTS Plaintiffs' Motion for Bond, Dkt. 158, awarding an appeal bond pursuant to *Rule 7 of the Federal Rules of Appellate Procedure* that covers the costs of appeal as well as the amount of the judgment.

The Court further orders that Defendants' Motion for Stay Pending Appeal, Dkt. 166, is DENIED.

It is SO ORDERED.

2020 U.S. Dist. LEXIS 95323, *13

/s/ Rossie D. Alston, Jr.

Rossie D. Alston, Jr.

United States District Judge

Alexandria, Virginia

February 3, 2020

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EXHIBIT L-11



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As of: October 13, 2020 7:22 PM Z

Westpoint Stevens Inc. v. Aretex, LLC (In re Westpoint Stevens Inc.)

United States District Court for the Southern District of New York

May 9, 2007, Decided ; May 9, 2007, Filed

Lead Docket No. 06 Civ. 4128 (LTS) (JCF) ¹

¹ On June 19, 2006, the Court consolidated, for pre-trial purposes, certain appeals and cross-appeals and a motion with the following docket numbers, all of which have been accepted by the undersigned as related matters: 06 CV 4128 (LTS); 06 CV 4129 (LTS); 06 CV 4130 (LTS); 06 CV 4164 (LTS); and M-47 (LTS). This Memorandum Order, filed under Lead Docket No. 06 CV 4128, relates to all aforementioned actions.

2007 U.S. Dist. LEXIS 33725, *33725

Reporter

2007 U.S. Dist. LEXIS 33725 *, 2007 WL 1346616

In re WESTPOINT STEVENS, INC., et al., Debtors. CONTRARIAN FUNDS LLC, et al., Appellants and Cross-Appellees, -v- ARETEX, LLC, et al., Appellees and Cross-Appellants.

Subsequent History: Later proceeding at [*Westpoint Stevens, Inc. v. Aretex, Inc.*, 2007 U.S. Dist. LEXIS 74864 \(S.D.N.Y., Oct. 9, 2007\)](#)

Prior History: [*Contrarian Funds, LLC v. Westpoint Stevens, Inc. \(In re Westpoint Stevens, Inc.\)*, 333 B.R. 30, 2005 U.S. Dist. LEXIS 28153 \(S.D.N.Y., 2005\)](#)

Core Terms

collateral, Lenders, affiliates, termination, entities, modify, irreparable, supersedeas, stock, prevailing, discretionary, modification, unsatisfied, pendency, foreclosure, shareholder, escrowed

Counsel: [*1] For Contrarian Funds, LLC, Satellite Senior Income Fund, LLC, CP Capital Investments, LLC, Wayland Distressed Opportunities Fund I-B, LLC, Wayland Distressed Opportunities Fund I-C, LLC, Appellants: Joshua Michael Mester, LEAD ATTORNEY, Hennigan Bennett & Dorman, LLP(CA), Los Angeles, CA; Michael Howard Swartz, LEAD ATTORNEY, Hennigan, Bennett & Dorman L.L.P., Los Angeles, CA.

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For Westpoint International, Inc., Westpoint Home, Inc., Appellees: Brian P. Flaherty, LEAD ATTORNEY, Wolf, Block, Schorr and Solis-Cohen, L.L.P., Philadelphia, PA; Jo Christine Reed, LEAD ATTORNEY, Sonnenschein Nath & Rosenthal LLP (NY), New York, NY; Jennifer Fletcher Beltrami, Kenneth Gary Roberts, Wolf Block Schorr and Solis-Cohen, LLP(NYC), New York, NY.

For Perry Principals LLC, GSC Partners, Pequot Capital Management, [*2] Inc., Appellees: Mark Thompson, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP (NY), New York, NY.

Judges: LAURA TAYLOR SWAIN, United States District Judge.

Opinion by: LAURA TAYLOR SWAIN

Opinion

MEMORANDUM ORDER MODIFYING STAY PENDING APPEAL

Appellants and Cross-Appellees Contrarian Funds LLC, Satellite Senior Secured Income Fund, LLC, CP Capital Investments, LLC, Wayland Distressed Opportunities Fund I-B, LLC, and Wayland Distressed Opportunities Fund I-C, LLC (collectively, the "Steering Committee") move to terminate or modify the Order Granting Stay of the Order Implementing the District Court's Order Entered November 16, 2005, as Amended December 7, 2005, which was issued by the United States Bankruptcy Court for the Southern District of New York on April 13, 2006 ("Stay Order"). Appellees and Cross-Appellants Aretex LLC ("Aretex"), WestPoint International, Inc. ("International"), and WestPoint Home, Inc. ("Home") (collectively, the "Icahn Group"), and GSC Partners, as investment manager/adviser for

certain investment funds and accounts, Pequot Capital Management, Inc., as investment manager/adviser for certain investment funds and accounts, and Perry Principals LLC (collectively, [*3] the "Funds"), oppose the Steering Committee's motion. The Court has carefully considered all of the parties' submissions and arguments in connection with this matter. The parties' familiarity with the history of this matter is assumed. Capitalized terms not otherwise defined herein have the meanings used in this Court's November 16, 2005 Opinion.

Following the issuance of this Court's November 16, 2005, Order and Opinion,² the Bankruptcy Court entertained briefing on the issues remanded to it, held hearings on January 11, 2006, and March 22, 2006, and, at the March 2006 hearing, announced its decisions with respect to the issues remanded to it by this Court. Based upon the representations of the Icahn Group and the Funds that they intended to appeal the Bankruptcy Court's order on remand and any subsequent order of this Court, the Bankruptcy Court also announced at the March 22, 2006, hearing that it would stay the implementation of its decisions on remand pending appeal. The Bankruptcy Court overruled the Steering Committee's objections to the stay and denied the Steering Committee's request that the stay be conditioned upon the posting of a bond. The Bankruptcy Court issued its [*4] written Order on Remand on April 13, 2006, together with its Stay Order.

In its Stay Order, the Bankruptcy Court directed that "the Remand Order is stayed for the pendency of all appeals of the Remand Order," and made the following Findings and Conclusions:

1. The Icahn Group [(defined in the Stay Order as Aretex, International, and Home)] and the Funds [(defined as GSC Partners, Pequot Capital Management, Inc., and Perry Principals, LLC)], and possibly others, will appeal the Remand Order (and/or the District Court Order) and have requested a stay of the Remand Order pending the anticipated appeals.

2. This Court has the discretion to stay the Remand Order under [Fed. R. Bankr. P. 8005](#) [*5] .

3. The Icahn Group and the Funds have a sufficient likelihood of success in their appeals to merit a stay, in the light of the risk of harm to the respective parties.

4. There is a serious risk of irreparable harm (i) to the Icahn Group and its affiliates that are parties in interest, including Aretex and its affiliates, who have invested approximately \$ 200 million in International and Home since the closing of the sale of substantially all of the Debtors' assets to them, if the Icahn Group were to be divested of the results of that sale prior to a final resolution of the issues that will be presented on appeal, and (ii) to the Icahn Group and the Funds if securities, presently held in escrow, in which they claim an interest under the Sale Order are sold prior to the resolution of the issues that will be presented on appeal.

5. The process of registering the Subscription Rights under the Asset Purchase Agreement and related documents and applicable law is continuing, and the Steering Committee's interests in the Subscription Rights are protected, pending registration, by the express terms of the Remand Order.

6. Counsel for the Objecting First Lien Lenders was [*6] unable to state whether the First Lien Lenders sold or have attempted to dispose of the Parent Shares that they received at the sale's closing, which suggests that the First Lien Lenders are unlikely to sustain harm from the continuation of the status quo and a stay of a foreclosure sale under applicable state law. That is, the Steering Committee is not as interested in a prompt cash recovery in respect of the securities as it is in obtaining a controlling interest in the business.

7. The public interest in the finality of an arms-length bankruptcy auction will be served by maintenance of the status quo under the foregoing present circumstances.

8. No admissible evidence has been adduced to support a bond requirement.

9. Based on the foregoing, it is appropriate to grant a stay of the Remand Order pursuant to [Bankruptcy Rule 8005](#).

(Stay Order, annexed as Ex. 1 to 4/19/06, Decl. of Sidney Levinson ("Levinson Decl.")). At the March 22, 2006, hearing at which the substance of its Remand Order and Stay Order decisions was announced, the Bankruptcy Court rejected the Steering Committee's request that a bond requirement be imposed on Appellees, stating "In any event, I [*7] have some question whether a bond is appropriate anyway but that

²The opinion is reported at [In re WestPoint Stevens, Inc. \(Contrarian Funds LLC v. WestPoint Stevens, Inc.\)](#), 333 B.R. 30 (S.D.N.Y. 2005). The Order and the December 7, 2005, order amending it are items A145 and A155 of the Joint Appendix ("JA"), respectively.

is a matter that the parties can argue about on appeal of the stay because I'll grant a stay pending appeal without [the] requirement for the posting of a bond." (Tr. of March 22, 2006, Bankruptcy Court Hearing, annexed as Ex. 5 to Levinson Decl.)

Application to Terminate or Modify Stay Order

In the instant Motion to Terminate or Modify Bankruptcy Court Order Granting Stay Pending Appeal ("Stay Termination Motion"), the Steering Committee moves for termination of the Stay Order, in the alternative, for modification of the Stay Order to:

(a) require any party seeking a stay pending appeal to i) post a bond in an amount no less than 130% of the outstanding principal, interest and fees currently owed to the members of the Steering Committee (and, if requested by the First Lien Collateral Trustee, any Objecting First Lien Lenders), to secure full payment in cash of those claims, and ii) with respect to the Purchasers, condition any stay upon their stipulation to refrain from any of the Prohibited Actions [(a term defined in the Steering Committee's moving papers to include changes in the capital structure [*8] and governing documents of the Purchasers and their subsidiaries, and entering into certain types of transactions)] pending appeal and to provide to Objecting First Lien Lenders, on a monthly basis, . . . information concerning the financial and operation performance of the Purchasers; and b) expressly authorize the Steering Committee and the First Lien Collateral Trustee to commence a civil action against Aretex, the Purchasers, and other parties based upon their misconduct, including their breach of the Asset Purchase Agreement and breaches of fiduciary duties, that have occurred subsequent to the entry of the Sale Order.

(Steering Committee's Mem. of Law. In Supp. of Mot., 1; see also id. at 28-29 (defining "Prohibited Transactions")). At a December 15, 2006, hearing on the Steering Committee's application to enjoin certain corporate transactions proposed by the Purchasers and their affiliates, this Court entered an order providing in pertinent part that:

To the extent that the Stay Order issued by the Bankruptcy Court on April 13, 2006, precludes or restricts the parties from litigating, in a forum of competent jurisdiction, the enforcement of and other issues concerning [*9] rights, if any, that they may have as holders of securities, secured parties holding liens on and other rights with respect to common stock and other

rights issued by WestPoint International, Inc. ("WPI"), or under documents related to equity or debt securities of the debtors-in-possession or entities holding assets purchased from any of the debtors-in-possession, including issues relating to contractual rights and corporate governance, the pending motion to modify or terminate the Stay Order is granted insofar as such restriction shall no longer be in effect. In addition, the Steering Committee, the Objecting First Lien Lenders and Beal Bank are not stayed or restrained from exercising rights, if any, that they may have to register with WPI any common stock included in their collateral and vote such common stock at any meeting of shareholders. Provided, however, that the Stay Order remains in effect, pending further Order of this Court, in all other respects, including but not limited to its restriction on the exercise of other remedies with respect to the collateral, including foreclosure.

(Order, dated Dec. 15, 2006 (docket entry no. 55 in 06 civ. 4128(LTS)).) Accordingly, [*10] the Court focuses at this juncture on the Steering Committee's requests for termination of the Stay Order altogether or, in the alternative, for the imposition of a bond requirement, corporate governance restrictions and information reporting requirements. Supplemental briefing on these issues was completed on January 31, 2007.

DISCUSSION

Rule 8005 of the Federal Rules of Bankruptcy Procedure provides in pertinent part that:

A motion for a stay of the judgment, order or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. . . . [S]ubject to the power of the district court . . . reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. A motion for such relief, or for modification or termination of relief granted by a bankruptcy judge, may be made to the district court . . . , but the motion shall show why the [*11] relief, modification, or termination was not obtained from the bankruptcy judge. The district court . . . may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court.

Fed. R. Bankr. P. 8005. While the Rules specifically provide that, in determining an appeal from a bankruptcy court order, the district judge is not to set aside the bankruptcy court's factual findings "unless [they are] clearly erroneous" (Fed. R. Bankr. P. 8013), no provision of the Federal Rules of Bankruptcy Procedure specifies the standard of review to be applied on consideration of a motion, directed to a district court, to terminate or modify a stay entered by a bankruptcy court.

Appellees cite Akai Holdings Ltd. v. Singer Co., N.V. (In re Singer Co. N.V.), No. M-47(VM), 2000 U.S. Dist. LEXIS 2565, 2000 WL 257138 (S.D.N.Y. March 7, 2000), a matter in which an appellant sought review of a bankruptcy court's denial of an application for a stay pending appeal, for the proposition that abuse of discretion is the appropriate standard here. It does appear, in light of Rule 8005's [*12] expectation that the bankruptcy court will pass on stay applications in the first instance, that due deference to the lower court's discretionary determination is warranted. Judge Marrero's careful analysis in Akai also, however, reflects his extensive consideration of the relevant legal and factual issues, and this Court has taken the same degree of care in evaluating the parties' arguments concerning the Stay Order.

It is not, in any event, necessary for this Court to determine definitively the appropriate standard of review because, as explained below, the Court finds that the criteria for issuance of a discretionary stay are met but that the Bankruptcy Court, whose remarks at the March 2006 hearing indicate that it anticipated that the Steering Committee would have to seek to make its case for a bond before the District and/or Circuit courts, abused its discretion in granting the stay without imposing a bond requirement.

A party requesting a discretionary stay pending appeal³ must demonstrate: (1) a substantial possibility, although less than a likelihood, of success on the merits; (2) irreparable injury if a stay is denied; (3) no substantial injury to other parties if [*13] the stay is issued; and that

³ Although Fed. R. Bankr. P. 8005, unlike Rule 62(d) of the Federal Rules of Civil Procedure, does not explicitly permit an appellant to obtain an automatic stay pending appeal by filing a supersedeas bond in an amount adequate to protect the interests of the appellee, the availability of such nondiscretionary relief is recognized in the bankruptcy context. See, e.g., 10 Collier on Bankruptcy PP 8005.04, 8005.05 (15th Ed. Rev.).

(4) the public interest favors a stay. See Mohammed v. Reno, 309 F.3d 95, 100 (2d Cir. 2002); Bijan-Sara Crop. v. FDIC (In re Bijan-Sara Corp.), 203 B.R. 358, 360 (2d Cir B.A.P. 1996). If the party seeks the imposition of a stay without a bond, the applicant has the burden of demonstrating why the court should deviate from the ordinary full security requirement. De la Fuente v. DCI Telecomms., Inc., 269 F. Supp. 2d 237, 240 (S.D.N.Y. 2004).

[*14] Prospect of Success on the Merits

In its Stay Order, the Bankruptcy Court found that Appellees had met this aspect of the test by demonstrating a "likelihood of success in their appeals, . . . in light of the risk of harm to the respective parties." (Id. P 3.) The Bankruptcy Court's conclusion that this prong of the analysis was satisfied was neither clearly erroneous nor unreasonable. The standard requires only a showing of a substantial possibility of success on the merits where other factors are also strong.⁴ Such substantial possibility need not rise to the level of a likelihood of success. This Court finds that Appellees have identified issues sufficient to meet the substantial possibility of success standard in connection with, inter alia, their arguments concerning the impact of section 363(m) of the Bankruptcy Code and the scope of the "escrow stipulation" stay order entered by this Court in 2005.

[*15] Irreparable Injury

A party seeking a discretionary stay must also demonstrate the risk of irreparable injury to that party in the absence of a stay pending appeal. Here, the Bankruptcy Court found that the Icahn Group faced such a risk if it were to be deprived of its controlling interest in the Purchasers, citing as well the investment of over \$ 200 million by affiliates of the Icahn Group in those companies since the closing of the sale of the Debtors' assets. Pointing out that the cash infusions in connection with the sale transaction came from Icahn affiliates who are not parties to this appeal, the Steering Committee argues that the Bankruptcy Court erred in considering any potential harm to Icahn Group affiliates

⁴ See Mohammed, 309 F.3d at 101 (approving flexible application of test weighing relative strength of factors in determining how much of a showing of probability of success on the merits is required).

that are not parties to the bankruptcy proceedings, and further argues that the mere prospect of a change in the stock ownership of the Purchaser entities is insufficient to demonstrate harm to those entities. The Court agrees that, to the extent the Bankruptcy Court focused on harm to non-parties to these proceedings in making its irreparable harm determination, the analysis was misdirected. The Court also agrees that potential for change in the shareholder composition [*16] of a corporate entity does not, standing alone, constitute a demonstration of the prospect of irreparable harm.

The Court nonetheless finds the record sufficient to demonstrate a risk of irreparable harm to the Icahn Group in the absence of a stay. It is apparent that Aretex's advocacy of and participation in the transaction approved by the Sale Order were closely bound to its expectation of participation by Icahn entities as funders of the Purchasers and the expectation that Aretex's exchange of its bankruptcy claim for an interest in the Purchasers would give it a stake in entities controlled by, and able to draw on the resources of, the larger Icahn group. A sale of the collateral Securities could leave Aretex with illiquid interests in businesses under different control; it is not clear that a sale or sales resulting in the transfer of a controlling interest in the Purchasers could completely be undone.

Evidence proffered by the Purchasers indicates that suppliers and other market participants look to the stability of management and corporate affiliations in determining whether to do business with the Purchasers, and that share transfers disrupting the current management and [*17] affiliation structures could have a lasting deleterious effect on the Purchasers' business prospects. (1/12/07, Decl. of Joseph Pennacchio ("Pennacchio Decl.")). Furthermore, the prospect of mooted an appeal has been recognized as sufficient to support a finding of irreparable harm. See ACC Bondholder Group v. In re Adelpia Communs. Corp. (In re Adelpia Communs. Corp.), No. 02-41729, M-47 (SAS), 361 B.R. 337, 2007 U.S. Dist. LEXIS 7416, 2007 WL 186796, *4-5 (S.D.N.Y. January 24, 2007). To the extent a sale or sales resulting the transfer of a controlling interest in the Purchaser entities could not be unwound, the Icahn Group's appeal of this Court's 2005 decision and of further decisions following the remand could be mooted. The second factor is therefore satisfied.

Harm to Other Parties

The Bankruptcy Court's finding that the "First Lien Lenders are unlikely to sustain harm from the continuation of the status quo and a stay of a foreclosure sale under applicable state law" appears to have been premised on two factual findings: first, that the registration process for the escrowed Subscription Rights "is continuing" and, second, that the absence of evidence that the Objecting First Lien Lenders had sought to sell any of the Parent [*18] Shares that they had received in connection with the 2005 closing indicated that "the Steering Committee is not as interested in realizing a prompt cash recovery in respect of the securities as it is in obtaining a controlling interest in the business." (Stay Order PP 5-6.)

Neither of these conclusions appears to have a sound factual basis in the record. Before the Bankruptcy Court, Appellees took the position that "International is not obligated to even prepare a Registration Statement until the Common Stock and the Subscription Rights are delivered in accordance with . . . the Asset Purchase Agreement, which requires a pro rata distribution to all First Lien Lenders (including Aretex) and/or Second Lien Lenders (including Aretex)." (Mem. of Aretex, et al., in Resp. to Steering Committee's "Motion to Implement," annexed as Ex. 11 to Levinson Decl.) There is no indication in the record of any "continuing" "process" of registration that could facilitate transfer of the escrowed Subscription Rights. Furthermore, while it is not impossible that the Objecting First Lien Lenders may at least at this point have an undisclosed control agenda, that possibility is not indicative of a lack [*19] of harm from a stay pending appeal. Nor is their failure to attempt to make a sale indicative, in light of the procedural record,⁵ the unregistered nature of the securities and the lack of public information regarding their affairs, of a lack of interest in realizing cash in respect of their secured claim.

Because, as discussed more fully in connection with the bonding issue below, the Objecting First Lien Lenders have only their collateral Securities to look to for realization of the value of their unsatisfied claims against the Debtors, it is neither irrational nor indicative of underhanded dealings for [*20] the Objecting First

⁵ The parties' briefs in connection with this Motion review the stay-related applications and stays that have been imposed since the November 16, 2005, Opinion was issued. See, e.g., Mem. of Aretex LLC et al. in Opp. to Mot. of Steering Comm. to Terminate or Modify Bankr. Court Order at 8-12; Steering Comm.'s Mem. of Law in Supp. of Mot. to Terminate or Modify Bankr. Court Order at 15-17.

Lien Lenders to seek an opportunity to structure a transaction or transactions that would enable them to maximize their recovery in a cash sale of collateral Securities to a third party, or otherwise ensure recovery on their claim commensurate with the full scope of the value of their unsatisfied claims and their rights under the orders entered in this matter. The briefs and other submissions of all parties at the various stages of these proceedings are replete with evidence of the significance of control, or the potential for control, in investment decisions with respect to interests in privately-held entities.

The Icahn Group and the Funds, which have the burden of demonstrating the propriety of the issuance and maintenance of a stay without a bond, have not proffered evidence of the market value of the collateral Securities in a sale scenario relative to the Objecting First Lien Lenders' unsatisfied claims. They have failed to demonstrate that the Objecting First Lien Lenders would suffer no substantial injury in connection with a stay. The Steering Committee, on the other hand, citing dramatic changes in the projections of results appearing in public filings [*21] of the Purchasers' affiliates, asserts that the value of its replacement collateral has eroded and will continue to erode if the Objecting First Lien Lenders are unable to exercise their rights and remedies against the collateral.⁶ Thus, although the

⁶ In this connection, the Steering Committee supplemented its original papers on this motion in late June 2006 with a submission arguing that a June 22, 2006, credit agreement entered into by Home amounted to a "poison pill" by reason of a change of control provision in the agreement. The Court has carefully reviewed the language of the agreement, and has considered as well the responsive supplemental submissions of the Icahn Group on this issue and concludes that, because the agreement does not provide for acceleration of the loan obligation upon a change of control, it is not indicative either of an effort to thwart realization of the Objecting First Lien Lenders' rights under this Court's Orders and the Remand Order, nor is it material to the question of whether the stay should be modified or terminated.

Further submissions in connection with these proceedings have, however, confirmed that the Icahn Group and its affiliates have taken steps since the issuance of the Remand Order that have effected significant changes in the capital structure and business operations of the successor entities. These submissions also indicate clearly that the Purchasers' prospects are currently projected to be far less rosy than the scenarios upon which the valuation in connection with the 2005 transaction was premised. *See* Dec. 11, 2006, Emergency Motion for Temporary Restraining Order, etc.

Bankruptcy Court correctly found a risk of harm to the stay movants, its assessment of lack of harm to the Objecting First Lien Lenders was erroneous. In a balanced application of the discretionary stay criteria this error does not, however, warrant termination of the stay.

[*22] Public Interest

The final criterion, whether the public interest favors a stay, was also considered by the Bankruptcy Court, which concluded that the public interest in the "finality of an arms-length bankruptcy auction" would be served by a stay. While, as explained at some length in this Court's November 16, 2005, Opinion, this Court's view of the ends that can properly be achieved by such an auction differs significantly from that of the Bankruptcy Court, the undersigned agrees that further clarity of the law in this regard is in the public interest, provided that the rights of the Objecting First Lien lenders are appropriately protected.

Supersedeas Bond

The purpose of a supersedeas bond in connection with a stay pending appeal is to protect the party that has prevailed below against loss resulting from the stay of execution of the judgment. "Accordingly, when setting supersedeas bonds courts seek to protect judgment creditors as fully as possible without irreparably injuring judgment debtors." [*Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1155 \(2d Cir. 1986\)](#), *rev'd on other grounds*, [481 U.S. 1, 107 S. Ct. 1519, 95 L. Ed. 2d 1 \(1987\)](#). "[T]he party seeking [a] stay [*23] without a bond has the burden of providing specific reasons why the court should depart from the standard requirement of granting a stay only after posting of supersedeas bond in the full amount of the judgment. . . . The bond requirement should not be eliminated or reduced unless doing so 'does not unduly endanger the judgment creditor's interest in ultimate recovery.'" [*De la Fuente*, 269 F. Supp. 2d at 240](#) (citations omitted); *see also* [*Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 \(5th Cir. 1979\)](#) (explaining that a court choosing to depart from the usual full security requirement "should place the burden on the moving party to objectively demonstrate the

(Docket entry 35 in Civil Action 06 Civ. 4128(LTS)), and papers filed in support thereof and in opposition thereto; and Tr. of Dec. 15, 2006, hearing on TRO motion.

reasons for such a departure").

The Bankruptcy Court's analysis of the bonding issue in the instant matter turned these principles on their head, placing the burden on the Steering Committee to justify a bond requirement and refusing to impose a bond for lack of "evidence . . . to *support* a bond requirement." (Stay Order P 9 (emphasis supplied).)

"A court abuses its discretion when its decision rests on a legal error or a clearly erroneous factual [*24] finding, or when its decision does not fall with the range of permissible decisions." [*RJE Corp. v. Northville Industries Corp.*, 329 F.3d 310, 316 \(2d Cir. 2003\)](#) (citing [*Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine*, 311 F.3d 488, 498 \(2d Cir. 2002\)](#)). The Bankruptcy Court's refusal to impose a bond requirement rested on a legal error and thus constituted an abuse of discretion.⁷

[*25] Appellees here, who sought an unbonded stay and advocate its continuation, have the burden of demonstrating why no bond should be required. This they have failed to do. This Court's November 2005

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The authorities cited in the Icahn Group's January 2007 supplemental memorandum on the stay issue for the proposition that the party seeking security has the burden of establishing a rational basis for the amount are inapposite, in that they arise in the preliminary injunction context rather than the supersedeas bond context. See [*International Equity Investments v. Opportunity Equity Partners*, 441 F. Supp. 2d 552 \(S.D.N.Y. 2006\)](#); [*Inflight Newspapers, Inc. v. Magazines In-Flight, LLC*, 990 F. Supp. 119 \(E.D.N.Y. 1997\)](#).

The Icahn Group's reliance on an unpublished decision from the Eastern District of Pennsylvania for the proposition that the harm covered by bond requirement imposed by this Court in connection with the stay could be prospective only is also misplaced. In that case, the district court was considering the scope of a bond in conjunction with a preliminary injunction order that had not yet been entered. The court rejected an application to take into account harm allegedly suffered during the pendency of a separate temporary restraining order that had been issued without a bond and that would be terminated upon the issuance of the preliminary injunction. See [*Scanvec Amiable Ltd. v. Chang*, No. Civ. A. 02-6950, 2002 U.S. Dist. LEXIS 22261, 2002 WL 32341772 \(E.D. Pa. November 1, 2002\)](#). Here, the question before the Court is whether the stay order issued by the Bankruptcy Court should be modified to include a bond requirement. There is no impediment to coverage by the bond of stay-related harm dating back to the issuance of the Bankruptcy Court's stay order.

decision and the Order on Remand hold that the Objecting First Lien Lenders have an unsatisfied secured claim against the Debtors upon which they are entitled to monetary payment. That claim was collateralized by a perfected lien on substantially all of the Debtors' assets prior to the 2005 sale transaction, and is now collateralized by interests in the Securities that were issued in payment for those assets. The Debtors no longer have any significant assets to which the Objecting First Lien lenders can look for payment on their claim to the extent the collateral Securities are insufficient to satisfy the outstanding claims. The only valuation in the record of the collateral Securities was performed prior to the 2005 sale, in aid of a determination that was premised on the expectation that the distribution of the Securities itself would satisfy the objectors' claims. There has been no further valuation presented to the Court that takes into account the subsequent capitalization and corporate [*26] governance changes, or that addresses the ability of the objectors to obtain cash in respect of their claims by selling the Securities.

Since the closing of the sale, the Purchasers have been under the management and control of the Icahn Group and its affiliates, which of course have a significant financial stake in the companies. Appellees' proffer that the financial stake of their affiliates in the enterprise will suffice to protect the interests of the Objecting First Lien Lenders during the pendency of the stay, without the requirement of a bond, is insufficient on the current record to sustain Appellees' burden. The Icahn Group has an obligation to manage the Purchasers with a view to the long term interests of the companies and their shareholders as investors in the enterprise, rather than any specific duty or incentive to protect shorter-term interests of a specific shareholder or lienholder constituency in maximizing the marketability of a block of shares. The actions of management while the stay has been in effect, including the creation of a new class of preferred stock in connection with a solicitation of new capital to facilitate the acquisition of overseas facilities, [*27] demonstrate that both the nature of the capital structure and of the business operations of the enterprise have changed since the closing. The Icahn Group and its affiliates, which control the companies and manage the dissemination of information about them, have offered neither proof of the sufficiency of the collateral to satisfy the underlying claim as of the time the stay was requested, nor proof that the stay of execution of the Objecting First Lien Lenders' state law remedies will not affect adversely the objectors' ability to exercise their right to realize cash in respect of their

unsatisfied claim. A substantial bond requirement is therefore warranted under the established principles governing grants of discretionary stays pending appeal.

The Steering Committee asserts that the bond should be in the amount of \$ 383,328,402, a number that the Steering Committee represents covers the Objecting First Lien Lenders' outstanding principal, interest, and compensable fees plus a factor of 30%. (Steering Comm.'s Jan. 12, 2006, Supp. Br. In Supp., 23). As Appellees point out in their own supplemental submission, the Steering Committee's demand is problematic because, among other things, [*28] it assumes that the collateral Securities have no value at all, an assumption that runs counter to the premise of the 2005 transaction and to the subsequent history of investor willingness to make additional capital investments.

Before turning to the question of an appropriate bond amount, the Court will address two legal arguments Appellees have invoked in support of their argument that no bond should be required. Appellees first argue that, because the Steering Committee has itself appealed the Remand Order, and indeed was the first to file an appeal, it is automatically stayed from seeking to execute on the Remand Order and no protection of the Objecting First Lien Lenders' interests by means of a supersedeas bond is necessary or warranted. In support of this proposition, Appellees cite dicta in a 1863 Supreme Court opinion which held that the district court had lacked jurisdiction to enter certain orders effecting execution of an appealed judgment, and further observed that entry of the orders would not have been warranted had there been jurisdiction because the party seeking execution had appealed from the decree. Bronson v. La Crosse & M. R. Co., 68 U.S. 405, 409, 17 L. Ed. 616 (1863). [*29] The Bronson decision notes that the appellant there had "assert[ed] that the decree [appealed from] is founded in error and for that reason should not be executed, but should be reversed and corrected in the appellate tribunal." Id. at 410.

Although the Fourth Circuit has gleaned from Bronson the principle that "where the prevailing party is the first to take an appeal, no supersedeas bond can be required of the losing party when it subsequently files its own appeal, because the execution of the judgment has already been superseded by the prevailing party's appeal, TVA v. Atlas Machine & Iron Works, Inc., 803 F.2d 794, 797 (4th Cir. 1986), the weight of authority on this issue is more nuanced, holding that an appeal by a prevailing party estops execution or obviates the need

for a supersedeas bond only where execution would be inconsistent with the position taken on appeal. See, e.g., Carter v. U.S., 333 F.3d 791, 793 (7th Cir. 2003) (commenting that "an appeal by the prevailing party does not stay the judgment in his favor unless he is seeking to change the form of the relief that he obtained in the district court"); [*30] Trustmark Ins. Co. v. Gallucci, 193 F.3d 558, 559 (1st Cir. 1999) (rejecting TVA analysis and following Seventh Circuit approach to hold that appeal seeking to increase amount of judgment "is not inconsistent with immediate enforcement of the judgment as it now stands," such that posting of a supersedeas bond would ordinarily be required of a party seeking a stay of execution pending appeal); Northern Indiana Public Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 281 (7th Cir. 1986) (holding that appeal seeking substitution of specific performance for damages judgment precludes execution of damages judgment and obviates need for posting of bond in connection with stay pending appeal absent a showing of good cause for bond requirement); Enserch Corp. v. Shand Morahan & Co., 918 F.2d 462, 464 (5th Cir. 1990) (declining to follow TVA and reading Bronson to "sugges[t] that a lower court judgment may be suspended without bond when the relief sought by the prevailing party on appeal is inconsistent with enforcement of the lower court's judgment").

Here, the Steering Committee's appeal focuses on two issues: the Remand [*31] Order's provisions for the disposition of any cash proceeds of the sale of the collateral Securities; and whether the certificate reflecting the escrowed Subscription Rights should be required to be reissued. Neither of these grounds for appeal is inconsistent with the exercise of remedies with respect to the collateral equity Securities that are in the hands of the parties. The Steering Committee's dual status as prevailing party and appellant thus does not moot the issue of a bond requirement.

Appellees further argue that the law precludes bonding of the principal sort of harm claimed here by the Steering Committee-deterioration of the market value of the collateral Securities during the pendency of the stay. Appellees cite an 1883 case in which the Supreme Court expressed "doubt" as to whether market depreciation could be a ground for damages in connection with an appellate stay, Omaha Hotel Co. v. Kountze, 107 U.S. 378, 392, 2 S. Ct. 911, 27 L. Ed. 609 (1883), and three district court cases that rejected market depreciation as a ground for bonding in connection with stays of sales or foreclosures, stock and/or real property. Other courts have, however, held

that decline in collateral value [*32] is the proper subject of protection during a foreclosure stay. See *Pine Lake Village Apt. Co. v. Hartigan (In re Pine Lake Village Apt.)*, 21 B.R. 395, 397 (S.D.N.Y. 1982); *Gleasant v. Jones, Day, Reavis & Pogue*, 111 B.R. 595, 603 (Bankr. W.D. Tx. 1990). The Court need not dwell long on this issue in any event, however, since the Steering Committee's concern is not pure market deterioration. Rather, the Steering Committee seeks protection against the effects on the marketability and value of the collateral Securities of actions taken by the Icahn Group and their affiliates in the management of the entities, including steps affecting the Purchaser's capital and voting structure. Appellees have cited no authority precluding protection against deterioration attributable to such causes and, until and unless there is a claim under the bond, there is no need for the Court to determine whether a decline in market value due solely to external market conditions would be a compensable element of stay-related damages.

Request for Corporate Governance Restrictions

In addition to modification of the Stay Order to require a bond, the Steering Committee seeks [*33] provisions prohibiting the Icahn Group's exercise of certain incidents of corporate governance authority and the imposition of financial reporting requirements. In light of the shareholder and business constituencies which management of Home and International must consider in making their decisions as to what is in the best interests of the companies, and the Court's prior modification of the Stay Order to permit the Steering Committee to pursue state law remedies in connection with corporate governance issues, this Court declines to impose the requested constraints upon the Icahn Group as a condition of continuation of the Stay Order.

The Icahn affiliates' ability to control the course of the Purchasers' affairs and virtual monopoly on corporate and financial information concerning the companies warrants, however, meaningful protection of the Steering Committee's interests in the value of the collateral Securities by means of a bond.

Amount of Bond

The aforementioned absence of relevant valuation information makes the identification of an appropriate bond amount a challenging, but not impossible, task. The Court will not assume that the collateral Securities

are worthless; [*34] thus, the bond will not be set at the \$ 383 million figure advocated by the Steering Committee. Because the Icahn Group has not, however, proffered any information to meet its burden of demonstrating that no bond is required to protect the Objecting First Lien Lenders against deterioration of the value of the collateral Securities against their substantial unsatisfied claim, and because the stay affords the Icahn Group and its affiliates the ability to exercise complete control over the management of the entities, the Court will err, if at all, on the side of greater provision for the protection of the interests of the parties who prevailed upon the first appeal to this Court and in connection with the Remand Order. Accordingly, the Stay Order will be modified to require the posting of a surety bond with this Court in the total amount of \$ 200 million as a condition of the continuation of the stay. Such bond must be filed with the Clerk of Court no later than 4:00 p.m. on May 17, 2007. If the bond is not timely posted, the Stay Order will dissolve automatically at 4:00 p.m. on May 17, 2007.

The Court's determination herein as to the bond amount is without prejudice to the parties' [*35] ability to apply, upon appropriate evidentiary submissions, for an increase or decrease of the bond amount. The pendency of any such application will not, however, stay the bonding requirement or deadline set by this Order Modifying Stay. Any discovery in connection with any such applications shall be overseen by Magistrate Judge Francis in connection with his general pretrial management authority over this matter.

Steering Committee's Request for "Clarification" of Ruling on Earlier Appeal

In a January 2007 supplemental submission, the Steering Committee requests that the Court "clarify that, as of the Closing Date, the Debtors owned (at least briefly) all of the Securities that constitute replacement collateral upon the Closing Date." (Steering Comm. Jan. 12, 2007, Supp. Mem. at 23.) This request is made in aid of the Steering Committee's position on an issue being litigated in Delaware as to the application of a provision of a Stock Pledge Agreement entered into by one or more of the Debtors prior to the 2005 asset sale transaction. The Court declines to make the requested interpretation of its earlier rulings. The issue of the Debtors' ownership of the Securities, [*36] for state law purposes or under the terms of the Stock Pledge Agreement, was neither specifically presented to nor decided by this Court in the 2005 proceedings.

CONCLUSION

For the foregoing reasons, the Steering Committee's motion is granted insofar as it seeks modification of the Bankruptcy Court's April 13, 2006, Stay Order to include the requirement of the posting of a bond, and is denied in all other respects.

The Stay Order is hereby modified to require the posting of a surety bond with this Court in the total amount of \$ 200,000,000 (two hundred million dollars) as a condition of the stay. Such bond must be filed with the Clerk of Court by 4:00 p.m. on May 17, 2007. If the bond is not timely posted, the Stay Order will dissolve automatically at 4:00 p.m. on May 17, 2007.

The foregoing requirement that a \$ 200,000,000 bond be posted is without prejudice to the parties' ability to apply, upon appropriate evidentiary submissions, for increase or decrease of the bond amount. The pendency of any such application will not, however, stay the bonding requirement or the deadline set by this Order Modifying Stay. Any discovery in connection with any such applications shall be [*37] overseen by Magistrate Judge Francis.

SO ORDERED.

Dated: New York, New York

May 9, 2007

LAURA TAYLOR SWAIN

United States District Judge

EXHIBIT M

In Re:

AVIANCA HOLDINGS S.A., et al.

Main Case No. 20-11133-mg

October 5, 2020

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

AVIANCA HOLDINGS S.A., et al.,	Main Case No.
Debtors.	20-11133-mg

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

October 5, 2020

B E F O R E:
HON. MARTIN GLENN
U.S. BANKRUPTCY JUDGE

1
2 Debtors' Motion for Entry of an Order (I) Authorizing the
3 Debtors to (A) Obtain Post-petition Financing and (B) Grant
4 Liens and Superpriority Administrative Expense Claims,
5 (II) Modifying the Automatic Stay and (III) Granting Related
6 Relief. (Doc## 964, 966, 983, 984, 987, 988, 993, 995, 996,
7 998, 999, 1000, 1001, 1003, 1004, 1009, 1013, 1017, 1018, 1019,
8 1020)

9
10 Debtors' Motion for Entry of an Order (I) Authorizing Debtors'
11 Entry Into a Securities Purchase Agreement; (II) Authorizing
12 Debtors' Assumption of the Assumed LifeMiles Commercial
13 Agreements and the Second Amended And Restated Shareholders
14 Agreement; and (III) Granting Related Relief. (Doc # 965, 984,
15 1002, 1003)

16
17 Debtors' Motion for (I) Authorization to File DIP Fee Letters
18 Under Seal and (II) Granting Related Relief. (Doc#967, 984)

19
20 Debtors' Motion for Entry of an Order Directing Certain Orders
21 in Chapter 11 Cases of Avianca Holdings S.A., et al. be Made
22 Applicable to Subsequent Debtors. (Doc# 970, 984)

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11 ADRIANA NEUHAUSER, Avianca

12 STEVEN MALDONADO, Interpreter

13 JOSE GURDIAN, Caoba Capital

14 JOHN LUTH, Seabury Consulting

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AVIANCA HOLDINGS S.A., ET AL.

11

P R O C E E D I N G S

THE COURT: All right. Good morning, everyone. This is Judge Glenn. We're here in Avianca Holdings, 20-11133. Before we get started, I have a few announcements I want to make.

So the order establishing procedures for the remote evidentiary hearing for today, which was previously entered, required everyone to provide their names to Deanna -- not only your name, but what takes an inordinate amount of time is if you don't provide the number -- the telephone number from which you will be calling in if you're using the telephone, and the name associated with that number, and on whose behalf you're appearing.

So in the future, because of the lengthy delay today, I will include in the order, you simply will not be admitted to the hearing if you do not provide the information that you're required to provide in advance, so that we can go through the waiting room much faster. All right, that's point number one.

So the agenda for today -- an amended agenda was filed by Milbank. It's ECF docket number 1020. And it listed, as the first uncontested matter, the subsequent debtors' motion -- the debtors' motion for entry of an order directing certain orders in Chapter 11 cases of Avianca, to be made applicable to the subsequent debtors. That was ECF docket number 970. The certificate of no objection was filed as ECF docket number

1 1003.

2 That motion is granted, so we do not need to hear
3 argument about it today.

4 The other motion on the calendar -- obviously there
5 were two others -- the DIP motion, which is ECF docket number
6 964 and really related to that the LiftMiles (sic) sale motion,
7 which is ECF docket number 965. So let me say at the outset of
8 the hearing, I'm mindful that no objections have been filed to
9 either of those motions. And I appreciate all of the efforts
10 negotiating and documenting this important package of
11 documents.

12 This is a complicated package of agreements. I want
13 to be sure that I understand the transactions before ruling on
14 the pending motions.

15 The business judgment of the debtors is, of course, a
16 key determinant in deciding whether to approve the motions. I
17 don't view my role as second-guessing the debtors' business
18 judgment. But it is important that the record clearly
19 establish the bases on which that business judgment has been
20 exercised.

21 This is a very expensive proposed DIP financing. The
22 DIP financing also includes provisions such as the roll-up and
23 priming, that are disfavored, but at least in this Circuit, not
24 prohibited.

25 I'm satisfied, based on the evidence submitted in

1 support of the motions that the debtors and their legal and
2 financial advisors and professionals have satisfied legal
3 requirements in sufficiently canvassing the market and
4 negotiating the best terms available under the difficult
5 circumstances in which the debtors are operating, with the
6 worldwide COVID-19 pandemic.

7 Once the declarations are admitted into evidence, I do
8 not need to hear further evidence or argument to support those
9 important requirements.

10 We're all faced with questions about how long we will
11 be operating under these difficult conditions. Airlines
12 throughout the world have been severely impacted by COVID-19.
13 The uncertainties presented for airlines by COVID-19 including
14 among other things, when can they safely fly with sufficient
15 number of passengers to make flights economically viable; when
16 will travel restrictions be lifted in countries to which they
17 fly; when will passengers feel safe to fly in sufficient
18 numbers to make flights economically viable; what load factors
19 are required for airlines to restore flight schedules at
20 profitable levels; and how do airlines -- and Avianca in
21 particular -- plan and model forecasts and budgets in light of
22 the uncertainties?

23 In order to approve the motions, I believe the law
24 requires that the debtors establish, among other things, that
25 the debtors need DIP financing in the amount for which they are

1 seeking approval, including the requirement that the debtors
2 maintain liquidity of at least 400 million dollars, and also
3 they need to show that the debtors will be able to remain
4 current on all post-petition obligations, if the DIP financing
5 is approved.

6 Last Thursday, as required by the Court in its
7 September 30th, 2020 order, which was ECF docket number 993,
8 the debtors' counsel filed a cash-flow forecast on which the
9 debtors based their DIP motions.

10 As included in that order, I want to hear evidence
11 today about any stress case analyses performed by the debtors
12 or their professionals regarding the assumptions supporting the
13 cash-flow projections and budgets upon which the DIP loans are
14 predicated. If the forecasts turn out to be too bullish, will
15 Avianca be able to avoid defaults under the terms of the DIP
16 financing?

17 While I didn't include the specific question in that
18 order, I also want to understand what, if any, provisions in
19 the DIP financing documents deal with how and with whom
20 amendments must be negotiated if necessary because of below-
21 forecasted operating performance? What are the requirements
22 for obtaining consents, waivers, or forbearance of covenant
23 requirements?

24 Let me stop now and turn the hearing over to debtors'
25 counsel. I'll also be happy to hear from and permit cross-

1 examination from the committee's counsel, the DIP lenders'
2 counsel, and the United States Trustee. In light of the
3 certificates of no objections, if any other parties-in-interest
4 wish to be heard, I'll consider that request later in the
5 hearing. But let me turn the hearing over now to debtors'
6 counsel.

7 Who's going to argue for the debtors?

8 MR. BRAY: Good morning. Gregory Bray of Milbank LLP,
9 counsel for the debtors. I'll be handling most of the argument
10 today, however my partner Alan Stone will be handling the
11 examination of Mr. John Luth. We submitted the financial
12 projections that you requested. We also submitted a
13 demonstrative with the stress case that you just mentioned.

14 Mr. Luth is prepared to testify about these matters
15 and the matters you just raised. So with your permission, I'll
16 turn this over to Mr. Stone and have Mr. Luth take the virtual
17 stand.

18 THE COURT: Thank you very much, Mr. Bray.

19 MR. STONE: Your Honor, good morning. Alan Stone,
20 Milbank LLP, here on behalf of the debtors.

21 The debtors call John Luth.

22 THE COURT: All right. Deanna, can you administer the
23 oath?

24 THE CLERK: Yes, I will, Judge. Hold on one moment,
25 please.

1 Mr. Luth?

2 MR. LUTH: Yes.

3 (Witness sworn)

4 THE CLERK: Thank you so much.

5 THE COURT: Thank you and good morning, Mr. Luth.

6 THE WITNESS: Good morning, Your Honor.

7 THE COURT: Go ahead, Mr. Stone.

8 MR. STONE: Thank you, Your Honor.

9 DIRECT EXAMINATION

10 BY MR. STONE:

11 Q. Mr. Luth, you re the CEO of Seabury Securities?

12 A. I am.

13 Q. Mr. Luth, could you tell the Court what Seabury Securities
14 is?

15 A. Yes, Seabury Securities is a U.S. investment banking firm.
16 It's a wholly owned subsidiary of Seabury Capital Group, which
17 owns a number of interests, principally in aviation and
18 aerospace. We -- we operate one of the largest global aviation
19 and aerospace advisory practices.

20 We've been in business for twenty-five years. I founded
21 Seabury in 1995. Over the last twenty-five years we've been
22 involved with many of the prominent cases, particularly after
23 9/11. So we were the advisor to America West right after 9/11
24 and organized its ATSB loans, kept it from liquidating.

25 Thereafter we -- we handled the U.S. Airways bankruptcy,

1 Air Canada's CCAA, the equivalent of Chapter 11 in Canada,
2 Northwest Airlines, and a variety of other cases. In total,
3 we've executed over 1,500 engagements, with 300 clients, in
4 over fifty countries in the world. We've done more airline
5 restructuring than any other firm in the world. And we've -- I
6 personally advised on over 125 billion in debt and lease --
7 plane placements or restructurings. That's the nominal. In
8 today's dollars that would be almost twice that amount; given
9 my age -- I've been around for quite a while.

10 And we are -- have extensive experience, of course,
11 specifically, in Chapter 11 cases.

12 Q. Mr. Luth, what did you do before you started Seabury?

13 A. I began my career -- I've got an undergraduate degree from
14 the College of the Holy Cross. I went directly from there to
15 the graduate -- Wharton Graduate Business School, University of
16 Pennsylvania. Graduated in 1976. I started my career at Exxon
17 Corporation, their world headquarters, in corporate finance.

18 And from there joined what was then one of the more
19 prominent banking firms, called Manufacturers Hanover Trust
20 Company. I was in their equipment financing -- global
21 financing group for roughly seven or eight years, and then
22 spent the last three years in the -- their investment banking
23 syndications group, before being recruited to be the vice
24 president and treasurer of Continental Airlines.

25 I was recruited to help them raise a substantial amount of

1 liquidity, which I did, beginning in 1989. Then the Gulf War
2 came about with the invasion of Kuwait, and we scrambled -- had
3 to file Continental for Chapter 11.

4 I progressively took over the roles of my senior
5 executives and ultimately became the most senior financial
6 executive both at the airline and the holding company, as chief
7 financial officer. From there I left and formed Seabury Group
8 in 1995.

9 Q. Mr. Luth, how long have you worked with the debtors?

10 A. On this particular assignment, since -- since April. But
11 our relationship goes back in time -- actually all the way back
12 in time. So we actually managed Avianca's original Chapter 11
13 case in the early part of the first decade of this century,
14 2003/2004, and -- and over time, provided certain advisory
15 services to the company on a -- on a fairly limited basis.

16 We were hired in a -- in a more expansive role in July of
17 2019 when the company was experiencing substantial financial
18 difficulties and its board was changed by virtue of the United
19 Airlines foreclosing or taking measures to foreclose on the
20 shares that had been pledged for a loan.

21 And so we were recruited and hired by the new board in
22 June of 2019 to orchestrate what became a highly successful and
23 very comprehensive out-of-court financial restructuring that
24 was concluded in January of 2020.

25 MR. STONE: At this time, I'm going to ask my

1 colleague, Kristina Lauria, to pull up the Luth declaration,
2 which is docket number 966.

3 MS. LAURIA: Good morning. I will share my screen
4 now. Just give me one moment, please.

5 Q. Mr. Luth, do you recognize this document?

6 A. I do.

7 Q. Is this the declaration that you submitted in this case?

8 A. It is.

9 Q. And do you believe that the statements that you make in
10 this declaration are true?

11 A. I do.

12 Q. And if called to testify today to the matters in the
13 declaration, could you do so?

14 A. Yes.

15 MR. STONE: Your Honor, at this time I'd like to move
16 into evidence the Luth declaration, docket number 966.

17 THE COURT: Are there any objections?

18 All right, the Luth declaration, ECF docket number
19 966, is admitted into evidence.

20 (Declaration of Mr. Luth was hereby received into evidence
21 as Debtors' Exhibit, as of this date.)

22 THE COURT: Go ahead, Mr. Stone.

23 MR. STONE: Thank you, Your Honor.

24 I'm going to now ask Ms. Lauria to pull up the Court's
25 order with the supplemental questions, docket number 993.

1 Q. Mr. Luth, have you seen this order before?

2 A. I have.

3 Q. Okay. And did you prepare today to testify about the
4 questions posed by the Court in this order?

5 A. Yes. I did.

6 Q. Okay. The Court first asked for projections and budgets
7 upon which the DIP was based.

8 MR. STONE: And I'd ask Ms. Lauria to pull up the
9 document that was submitted to the Court, docket number 1011,
10 Exhibit A.

11 Q. Mr. Luth, what is this document?

12 A. This is a line chart showing projected cash balances on a
13 consolidated basis of -- of the debtors, both pre- and post the
14 successful closing of a DIP loan, and -- and the base case
15 forecast that was prepared jointly between the -- the FP&A
16 group -- which is the financial planning group of Avianca --
17 and our own business planning group.

18 It was put together with respect to a set of projections
19 that extended out to mid-decade, and included, as the basis for
20 those financial projections, all the macro and micro
21 assumptions that are necessary for an airline to put forward a
22 set of cash flows, specifically to Judge Glenn's questions with
23 respect to the necessary nature of evaluating whether or not
24 these cash-flows, and therefore the adequacy of the size and
25 duration of the DIP loan, is appropriate in this unprecedented

1 environment.

2 The projections that we assisted the company in putting
3 together, we believe, are appropriate; were suitably cautious
4 in nature; and recognize that these ultimately were put
5 together in -- after a series of -- of prior forecasts,
6 essentially, in July of this year.

7 And so far, the company actually is ahead of these
8 projections, and we believe -- given the very reasonably
9 conservative basis of the company's projected capacity
10 increases, which are to only reach roughly thirty percent of
11 its pre-2019 size, by the beginning of 2021 and roughly less
12 than -- less than fifty percent of its 2019 size by mid-2021,
13 and only grow its capacity thereafter, essentially beginning in
14 2022, that these are reasonable in -- in the nature of
15 assumptions with respect to the macro environment.

16 But equally importantly, while not captured on the slide,
17 the underpinning of these forecasts relate to what the company
18 achieved -- has achieved, frankly, since the new management
19 arrived in July of 2019, which was a rather radical addressing
20 of cost structure, and post the filing for Chapter 11, an even
21 more aggressive approach with respect to ensuring that the
22 vast -- vast majority of its cost inputs are, in fact,
23 variabilized, both with respect to aircraft, which is the
24 nature of (audio interference) agreements, that Your Honor will
25 have seen in prior filings with the Court, as well as ongoing

1 labor discussions and negotiations, and other negotiations with
2 vendors.

3 So the -- it's really important to -- to both recognize
4 that the -- that this has been based on both what we think are
5 a reasonable set of macro and micro forecasts, but also that
6 the tools by which the company intends to manage its affairs
7 really had been radically improved by taking advantage of this
8 Chapter 11 process, and recognizing the necessity of these
9 unprecedented times to -- to really address, again, the cost
10 structure of the company to become as variabilized as possible.

11 Q. Mr. Luth --

12 THE COURT: Mr. Luth -- let me ask you a question, Mr.
13 Luth. When you say that the projections included assumptions
14 that they would be operating at about thirty percent capacity
15 by the beginning of 2021, either now or somewhere in your
16 testimony I do want to hear about what load factors are
17 required in order for flights to be operated profitably. In
18 other words, is the thirty percent that they will operate
19 thirty percent of their flights at what capacity? Basically
20 I'm trying to understand that.

21 And the same, when you say fifty percent -- a little
22 less than fifty percent by mid-2021, are you -- what percentage
23 of their pre-COVID flights are they anticipating being able to
24 operate, and at what load factors?

25 THE WITNESS: So a very good question, Your Honor.

1 And -- and the way you think about it is, of course, correct,
2 that the load factor is an important indication of revenue
3 being carried. But it's one of two factors, right, that you
4 have to take into account, in combination. The other is
5 average fare, and so -- or what we call in the industry,
6 "yield". And so it's a combination of those two things.

7 But directly to your question, the -- the assumptions
8 are that the company will manage its capacity to ensure -- and
9 by that, it means that thirty percent capacity may or may not
10 be the right capacity level at -- as it goes into 2021; it may
11 be lower. But the objective is -- and the forecasts are based
12 on a -- on roughly a load factor that is in around eighty-five
13 percent, and average fares that are starting significantly
14 below the levels that existed pre-COVID, and only gradually
15 building to higher levels, albeit, essentially, that the
16 forecast is that unit revenues will be depressed in 2020 and in
17 2021, and only starting to grow to more normal levels, even
18 with substantial reduction in capacity, by 2022.

19 I would add -- add, Your Honor, just to directly
20 answer this: when we -- when we turn around an airline -- help
21 managements turn around airlines, the first thing you do is --
22 and this is unprecedented now, but I'll give you -- in a normal
23 world, where an airline isn't achieving its profitability --
24 and Avianca certainly was one of those carriers that had too
25 many aircraft chasing too few passengers, right, and therefore

1 had below-target unit revenues. The first thing you do is, in
2 fact, get capacity realigned with demand and recognize -- fly
3 the right size aircraft in the right markets, and fly those
4 markets and serve those markets where you -- where you have
5 economic -- economic sustainability and generally some reason
6 to exist, i.e., have a greater service capability, and
7 therefore command a premium in revenue performance vis-a-vis
8 your competitors.

9 And that allows you to sustain. So the first thing
10 you do in turnarounds is, of course, reduce capacity. And
11 that's really -- even two years out, that is the projection of
12 the company, which is that -- that demand will be constrained
13 for many years to come, and therefore this company -- this
14 airline, fully rebuilt, will likely only be roughly seventy
15 percent of its prior size in 2023 and 2024.

16 THE COURT: Thank you. Go ahead.

17 BY MR. STONE:

18 Q. Okay, Mr. Luth, just to finish up on this chart, what do
19 these three lines indicate?

20 A. So the blue line is the base forecast. And the underlying
21 assumption of that is that the company makes an initial
22 drawing, which is 634 million, shortly after -- some -- some
23 days after approval, hopefully by this Court. And you can see
24 there are -- there are three more upticks in cash balances, and
25 those coincide with drawings in December of 233 million, and

1 drawings of roughly 175 million in each of February and April
2 of 2021.

3 This base-case assumption assumes the company elects to
4 pay in cash interest on a current basis, which is payable on a
5 quarterly basis to the Tranche A lenders, but assumes that
6 in -- it chooses to pay with PIK interest, that is, payment in
7 kind, the Tranche B loans that are outstanding.

8 And in combination, that results in -- in the cash
9 forecast you see, with a very substantial amount of liquidity
10 that is maintained throughout the forecast period. The --
11 which extends to the maturity date of the DIP loan, which is --
12 which is eighteen months from the original petition date, which
13 would be November 10th of 2021.

14 The -- the orange line simply reflects a flex up in
15 liquidity by virtue of the company electing to pay the payment
16 in kind of the Tranche A interest as well as the Tranche B
17 interest.

18 The red line represents the minimum cash covenant that
19 Your Honor referenced in your own questions. And that's --
20 that's a very important, obviously, measurement, to ensure that
21 the company stays above that -- that line.

22 THE COURT: Why the 400-million-dollar minimum cash
23 balance?

24 THE WITNESS: A couple of reasons, Your Honor. First
25 recognize that we are measuring consolidated cash. And

1 excluded from the debtors' cash is cash of -- roughly about 100
2 million dollars of cash that is held at LifeMiles, which is a
3 loyalty program that is not part of the debtors. And so in the
4 negotiations with lenders, we recognized that 100 million of
5 that money was simply not available. So it brings you down to
6 300 million.

7 There is roughly about 100 million of debtors' cash
8 that is tied up in various trusts and other things, and not
9 available for operations. Which brings you down to 200
10 million.

11 And while the company and the airlines could operate
12 at 200, their ability to operate significantly below that level
13 is -- you know, certainly would become challenging and -- and
14 certainly, as you can see the cash -- projected cash balances
15 of the company right now, you know, give you a strong
16 indication, therefore, that the company's liquidity is -- is
17 really challenging -- becoming more challenged.

18 Obviously we don't show the end of October without the
19 draw, but the end of October without the draw would put the
20 company in very serious liquidity challenges.

21 THE COURT: Go ahead, Mr. Stone.

22 MR. STONE: Thank you, Your Honor.

23 BY MR. STONE:

24 Q. Mr. Luth, on a scale of conservative to aggressive, how
25 would you characterize these projections?

1 A. These projections, we believe, are -- are balanced. They
2 neither overstate the need for cash nor understate the need
3 for -- for a cash cushion, you know, for the company to
4 maintain, and we'll -- we'll examine that a little bit later
5 when we go through the demonstratives that we hope address
6 Judge Glenn's additional questions.

7 Q. Thank you.

8 MR. STONE: At this time, Ms. Lauria, if you'd pull up
9 the judge's order again.

10 Q. Question 1, Mr. Luth, is about stress case analyses
11 performed by the debtors or their professionals regarding the
12 assumptions supporting the cash-flow projections. Did you
13 perform such analyses?

14 A. We did.

15 MR. STONE: And Ms. Lauria, if you would pull up the
16 stress cases, which is Exhibit A to docket number 1019. And
17 perhaps we can go to the next page of that exhibit, Ms. Lauria,
18 thank you.

19 Q. Mr. Luth, what does this chart represent?

20 A. So this chart is first, excluding the sensitivities, it's
21 really, again, the -- the same chart we saw a moment ago,
22 except that we've added quite a bit of additional time. We've
23 added essentially thirteen more months to -- to the forecast.
24 And recognize that what we're using here, Your Honor, is -- is,
25 in fact, a multi-year forecast, those used with lenders --

1 prospective lenders and those that, of course, finally make
2 commitments to support this DIP facility, that go all the way
3 out to 2026 and are built on a monthly forecast.

4 And so we were able to use that for these purposes. I
5 will, at the outset, just point out that we've made a
6 simplifying assumption with respect to -- we're going to start
7 with the base case.

8 Again, the DIP loan would mature by its terms November
9 10th, 2021. There is a provision that, subject to certain
10 conditions and consents there could be an additional, you know,
11 sixty days added. We made the simplifying assumptions for all
12 these scenarios that the DIP loan, by its -- under its current
13 terms, would simply be extended, simply to allow us to respond
14 to Your Honor's questions.

15 And the -- and the reason for doing that -- and I should
16 have probably covered this earlier -- is coincidentally, the
17 original forecast put back -- put together in July of last
18 year, assumed that the company -- and projected that the
19 company would have negative cash-flow results, you know,
20 leaving aside financing transactions, through June of 2021, and
21 then emerge at the end of June 2021, and would have a small
22 positive operating cash result in July and essentially
23 thereafter, with one or two months, that are seasonally related
24 to working capital adjustments that might be slightly negative,
25 but on a cumulative basis would remain cash positive.

1 And that, of course, is why the blue line remains
2 essentially steady, and then -- and then ultimately, as the
3 company starts to recover towards more normal unit revenue
4 performance in 2022, starts to make measurable amounts of -- of
5 money and builds ultimately to, in this projected period of
6 time, just under one billion dollars of available cash, but
7 stays at or above roughly 700 million at all times. The --

8 THE COURT: Mr. Luth, when --

9 THE WITNESS: Yes.

10 THE COURT: -- when I ask my question and I gave three
11 alternate assumptions about the period for which they would be
12 cash-flow negative, obviously below that or as part of that
13 would be difference in the assumptions about capacity, load
14 factors, et cetera.

15 And so if you could briefly address, for each of these
16 other cases, how -- what were the assumptions that changed,
17 resulting in the lengthier period of the debtors being cash-
18 flow negative?

19 THE WITNESS: So we've -- we, in each case, added
20 three more months of -- of essentially negative performance,
21 which increasingly was an ever -- was an ever-increasingly
22 negative set of operating assumptions, in order to achieve,
23 essentially, Your Honor's request, which was -- was moving
24 from -- moving to twelve months of negative results, which
25 essentially was adding three more months of negative

1 performance, as shown in the black line. So extending from
2 June, now, to September.

3 And the impact of that was roughly about an eighty-
4 million-dollar shortfall in operating performance over that
5 period, which is a pretty draconian -- you know, roughly a
6 forty to fifty percent reduction in operating results, you
7 know, from a standpoint of either -- either operating at --
8 either not achieving the unit revenues that we talked about,
9 either because of load factor or yield or a combination
10 thereof, or misguessing the marketplace and putting too much
11 capacity in the market.

12 We didn't make an assumption with respect to which of
13 those it was, because in some respects it doesn't really
14 matter.

15 And -- and I will add, by the way, that in each of
16 these cases, there are assumptions that we believe are not
17 realistic, but we wanted to be responsive to Your Honor's
18 request. And -- and so we -- again -- and then after adding
19 the three months of negative results, rather than simply
20 flipping the switch and going back to the base case forecast,
21 we assumed three more months -- so a total of six months --
22 three more months of -- of gradually rebuilding back to the
23 base case, and -- and essentially, therefore, the black line
24 represents six months of underperformance, that, again,
25 cumulatively results in about eighty-five million of -- of

1 negative results.

2 And you can see the differences simply by looking over
3 in the right-hand side at the -- at the resulting cash. It's a
4 reasonable proxy of what's happened during that period of time,
5 because essentially everything else --

6 THE COURT: Do you know -- Mr. Luth, I'm just -- I'm
7 curious. Do you know whether the lenders -- I'm assuming they
8 performed their own stress case analyses -- but did they ask
9 the debtors to provide data on stress case analyses, which of
10 the factors would be reduced, why that was or wasn't, in your
11 view, reasonable?

12 THE WITNESS: Yes. We -- we performed -- so this in
13 some respects a subset, Your Honor, of -- of a number of stress
14 tests that we did, because fundamentally we used two broad
15 assumptions. One assumption was would the -- would the debtors
16 be allowed to start their operations in September -- remember
17 this goes back to early July -- so in early July we had no idea
18 if the company would be permitted to fly in September and
19 October.

20 And so we performed, frankly, a variety of analyses,
21 principally a three-month delay, and then a -- a start of
22 operations. We also, separate from that, did a variety of
23 stress tests that related to, upon emergence, an
24 underperformance for a period of -- of multiple years after
25 exiting Chapter 11. And so we did those stress tests at twenty

1 percent and forty percent decrements to the company's projected
2 cash-flow performance.

3 And then we added the two together, right? And so we
4 did that, you know, combination. And in all those cases we
5 were able to demonstrate for lenders maintaining liquidity.
6 Frankly, the last case shown here, which is an eighteen months
7 case, which is really twenty-one months, because if you --
8 again, it's this underperformance for -- where we're adding
9 nine more months of underperformance, loss making from
10 operations and then adding three more months to rebuild, so
11 about twelve months, essentially, underperformance, to the
12 company's base forecast.

13 That scenario is actually, you know -- is below
14 anything that we performed for the debtors -- sorry, for the
15 lenders. And the reason for that is that these aren't -- these
16 aren't actually what would happen if there were material
17 differences in expectations of performance by the airline. If
18 there were that much material negative performance, certainly
19 if -- certainly our advice to them and our advice will be to
20 the airline, if we're still their advisor at the time, that
21 they should ratchet back the capacity and realign that capacity
22 to ensure that their unit revenues match up and ultimately
23 exceed the unit cost.

24 And again, they can do that by virtue of the
25 variabilization that -- that the debtors, together with

1 ourselves and -- and lawyers, are -- are assisting in
2 effectuating as part of this restructuring process.

3 So again, we would view --

4 THE COURT: You said --

5 THE WITNESS: -- we would view that --

6 THE COURT: Sorry.

7 THE WITNESS: I'm sorry, Your Honor. I was just --

8 THE COURT: No, go ahead. Please finish your answer.

9 Go ahead.

10 THE WITNESS: Yeah, yeah. So if you look at the
11 difference, you can see there's -- over in the right-hand side,
12 this last stress case is some 300 million miss versus the base
13 case.

14 And that -- and during that -- that period of time,
15 obviously, the cash -- the liquidity of the company drops very
16 close to the -- the minimum cash balance. That is a result of
17 simply keeping capacity, in this case, the same, and
18 decrementing performance to align to get to this result. And
19 that isn't what -- what the management group would do.

20 THE COURT: Right.

21 THE WITNESS: The management group would pull back
22 capacity to -- to realign its capacity to demand.

23 THE COURT: You said that so far the company is ahead
24 of projections. Do you know, at the end of September, how many
25 flights they were operating, now many city pairs they were

1 servicing, what their average load factors have been during
2 September or at the end of September -- I understand it's
3 gradually increased. But what's led to the better-than-
4 expected performance against projections, so far?

5 THE WITNESS: Yeah, the company is operating roughly
6 ten percent of its capacity, which is largely in line with what
7 was in the base assumptions, which gradually built up over
8 September, October, November, and December, to thirty percent
9 capacity.

10 The -- the unit costs are behaving as expected with
11 this variabilization cost. And the -- and the unit revenue is
12 actually at or ahead of plan, principally because average fares
13 are coming in at or ahead -- slightly ahead of plan. So the
14 company has -- so far been able to match capacity with demand
15 and be able to drive a unit revenue performance that is at or
16 better than planned.

17 THE COURT: Thank you.

18 MR. STONE: Okay, Ms. Lauria --

19 THE COURT: Mr. Stone.

20 MR. STONE: Yes. Ms. Lauria, if you could pull up,
21 again, the projections that were provided to the Court? And
22 I'd like the other page that has the actual numbers on it.
23 Okay.

24 BY MR. STONE:

25 Q. Mr. Luth, the Court's order also contained questions about

1 the ability of the debtors to make the required payments under
2 the DIP over time. Could you describe what those payments are
3 that are to be made?

4 A. Yes, those payments are shown here -- well, first of all,
5 maybe I'll just do a little bit of a background. So what this
6 shows, Your Honor, is the monthly cash flows of the company.
7 It starts with the operating performance which is EBITDAR,
8 which is earnings before interest, taxes, depreciation,
9 amortization, and rent. So a gross measurement of the
10 company's cash-flow performance before taking into account,
11 then taxes, changes in working capital, security deposits,
12 aircraft rent, which then get to a monthly cash-flow result.

13 And this actually demonstrates what I referred to, Your
14 Honor, as -- as negative. If you look at that particular
15 monthly line, you will see that it's negative under this base
16 case projections, all the way through June of 2021, and then it
17 has a slight positive in July of 2021.

18 And it's that -- you know, those months thereafter that we
19 decremented performance, generally at a ten- to fifteen-
20 million-dollar-a-month, initially, and then worse in -- in
21 later periods, because we needed to do it in higher decrements
22 in order to get to a loss -- operating loss performance.

23 So that's -- that's what's shown. And then right below
24 that you have new debt issuance. And just to point that out,
25 those are the four drawings that we talked about: the 634-

1 million drawing at the outset of the DIP draw-downs. And then
2 right below that, just to point it out, because it might not
3 otherwise be clear, there are debt repayments.

4 And you might say well, we're in Chapter 11, why are there
5 debt repayments? And the answer is this is the LifeMile
6 subsidiary that is outside of bankruptcy, and there is a
7 continuing servicing of that debt, which is shown there at
8 roughly 12.8 million in quarterly repayments, under roughly a
9 400-million-dollar secured obligation, and interest payments
10 right below it, at roughly 5 million a month.

11 Go to December and you can see that that debt repayment
12 steps up, and that's simply to recognize there's a drawn
13 revolver by LifeMiles that needs to be -- needs to be reduced
14 in order to stay compliant with that underlying debt agreement,
15 which is inherently in the interest of the debtors to see
16 LifeMiles continue to operate successfully and outside of
17 Chapter 11.

18 Finally, the line that we really want to focus in on is
19 then interest fees and payments. And there you will see that
20 there are substantial payments which are fees that are -- and
21 expenses related to the DIP financing of -- we show fifty-one
22 million, but you'd have to subtract off the roughly five
23 million of LifeMiles from that, so roughly forty-six million in
24 total.

25 And -- and then on a quarterly basis, so December, and

1 thereafter, there's interest being paid which is the -- which
2 in December is 25.8 million of that 32.5 million amount shown.
3 That grows in size over a period of time to just under 33
4 million in March, 35 million in June, and 35 million in
5 September. And the reason why those are going up, of course,
6 is that there are multiple draws under the Tranche A and
7 Tranche B facilities. In this case, we're showing only the
8 Tranche A interest payments being made.

9 All of this, obviously, was taken into account to arrive
10 at a -- the base case forecast, which is actually at the
11 bottom, second-to-last line, which is -- which was depicted as
12 the blue line on the bar chart that we covered and reviewed
13 earlier.

14 Q. Okay. Mr. Luth, finally, there was a question about the
15 commitments of the additional lender. What can you tell the
16 Court about that?

17 A. Yes. The -- the -- as Your Honor well noted, the
18 company -- we have structured a facility which effectively is
19 described as a backstop facility. How did that come about?
20 I'll just step back with a little bit of history here.

21 In August, we were in the midst of trying to finalize
22 this -- this DIP financing. We had to execute a number of
23 different deals in order to free up collateral to -- to expand
24 that collateral pool. And Your Honor has already noted that in
25 your prior remarks as to the rationale for this complex

1 transaction.

2 But frankly, you know, we really believed -- as did the
3 Republic of Colombia, that the company needed to have a
4 demonstration of -- of the Republic of Colombia's support.
5 They publicly announced that they were prepared to support up
6 to 370 million participation in a DIP financing, so long as
7 they were part of the senior secured tranche of that facility,
8 and were doing it on at least equal terms to other lenders.

9 That proved very beneficial in our process of closing up
10 commitments, both Tranche A and Tranche B. We ultimately were
11 able to reduce the expected size of the participation to 240
12 million. And frankly, we're -- we were working on finalizing
13 documents and -- and motions for approval when there was an
14 injunction put in place under Colombian law that has enjoined
15 the Republic of Colombia's participation, certainly at the
16 moment, and for some period to come in the future, to
17 participate.

18 And as a -- as a result of that, we virtually scrambled
19 over a weekend, essentially in a matter of -- of less than
20 week, put together an additional lending facility, which is a
21 backstop facility, with a fairly brought participation of key
22 lenders, including one or more Tranche B lenders that stepped
23 up to take a piece of that, and were able to structure that in
24 such a way that it is effectively fully committed and fully
25 drawable, and pari passu with the other Tranche A loan.

1 So we described that as -- as Tranche A-2 loans, as
2 backstop, and the Tranche A-1 loans, of course, are those that
3 are not reserved for any governmental entity.

4 THE COURT: Mr. Luth, let me say -- with respect to
5 the commitment by Colombia, whether it's 240 or 370, and the
6 subsequent injunction, I certainly didn't -- I don't remember
7 seeing anything in any of the papers that I've read in this
8 case -- I read a press account about the injunction being
9 issued.

10 And are you able to tell me or Mr. Stone, can you tell
11 me, what the status of the legal proceedings in Colombia are?
12 What was the basis for the injunction? Is there an appeal
13 pending? It would have been helpful to see that in the papers
14 rather than only learning about it from a press account.

15 MR. STONE: Yes, Your Honor, I can do my best to tell
16 you what the status is. We also do have on the phone, I
17 believe, our lawyer from Colombia, who is actually handling
18 that matter. Although he doesn't speak English, so we'd have
19 to use the translator.

20 But let me give it my best try. As I understand it,
21 the action was brought by citizens of Colombia complaining not
22 necessarily about the ability of the Republic of Colombia to
23 lend, but the process by which they did so.

24 It went through an initial injunction procedure where
25 the court granted the injunction and then there was sort of a

1 reargument process, if you will. And at this point, the court
2 is still considering that, although it does not appear that
3 that initial court will change its mind.

4 As a result, the decision has already been appealed,
5 and as I understand the procedure in Colombia, just as in the
6 U.S., you have to transfer the record to the appellate court.
7 That's a requirement in Colombia, something that probably won't
8 be done for a couple of weeks.

9 After that, theoretically, there's a five-business-day
10 period in which the Court will consider the arguments of the
11 parties, and then the decision thereafter. And the decision
12 part of it is uncertain. The decisions range anywhere from
13 days to months.

14 So there is a fair amount of uncertainty about when
15 this appeal will be decided. And that's what we know so far.

16 THE COURT: Was there a written explanation of the
17 reasons for the ruling?

18 MR. STONE: Yes, Your Honor, there were.

19 THE COURT: Can you provide the Court -- actually file
20 on the docket an English -- the Spanish and an English --
21 certified English translation of the ruling?

22 MR. STONE: We will do that, Your Honor.

23 THE COURT: All right. Go ahead with your
24 questioning, Mr. Stone.

25 MR. STONE: Your Honor, those are the -- that's --

1 yeah, so the one thing I did want to mention with Your Honor
2 also, before we go on, is that it is very important to
3 understand that the injunction itself does not affect this
4 process, meaning the DIP process. It really is about the
5 ability of the Colombian government to participate. It does
6 not at all reflect on what's going on in Your Honor's court.

7 So with that, Your Honor, I don't have any further
8 questions for Mr. Luth, unless Your Honor does.

9 THE COURT: Mr. Luth, one thing that I had difficulty
10 understanding from reading the DIP documents is regarding the
11 unused commitment fees that are going to have to be paid. The
12 cash-flow projections show the draw-downs at various times. I
13 certainly understand about unused commitment fees, but I had
14 trouble translating it into understanding what were the
15 amounts. It looked very, very pricy.

16 THE WITNESS: I --

17 THE COURT: And so I wanted to -- let me finish my
18 question. I wanted to be sure that I understood what's being
19 paid to whom. I certainly understand interest. And I
20 understand unused commitment fees. But it looked like it got
21 very, very pricy, and if anything, an incentive for the debtors
22 to simply draw down, because otherwise they're paying a lot of
23 money for not having drawn down. What are they doing with
24 their excess cash -- they need to keep 400 million dollars;
25 they're not using it all -- what are they doing with their

1 excess cash? What's the net cost to them of this borrowing?

2 THE WITNESS: Those are good questions, Your Honor, I
3 will say.

4 So the -- the commitment fees are -- there are two
5 things to note. One, the commitment fees themselves are
6 different, and -- and dramatically different in cost, from
7 Tranche A versus Tranche B. And that features into the
8 structure of how we have -- the debtors and we have worked
9 together to minimize that cost.

10 But the precise cost which I have in front of me --
11 let me just roughly pull it up for you -- is -- is 3.8 million
12 dollars in total commitment fee payments. So while the --
13 while the percentages look very large, the reality is, because
14 we are drawing a very substantial part of the loan day one,
15 they are -- are relatively modest.

16 With respect to the undrawn commitment fee for
17 Tranche -- for the Tranche B, that is at fifty basis points.
18 And -- and we have -- we draw less of Tranche B as
19 proportionate to Tranche A, initially, and therefore have
20 effectively deferred more of that drawing to later. And as a
21 consequence of both the absolute rate being lower, but also the
22 difference -- the total undrawn commitment fee on Tranche B is
23 only 400,000 dollars so -- over this period of time.

24 So we think we've done the best we can. The -- the --
25 as Your Honor may have noted in other cases, the -- the pricing

1 for undrawn commitment fees have gone up quite considerably in
2 recent years, and certainly in recent times.

3 The -- this is better than, frankly, the market is
4 looking for. And we feel that we -- we achieved a reasonable
5 result here in negotiations on the commitment.

6 THE COURT: All right, thank you very much, Mr. Luth.

7 Mr. Stone, do you have any more questions?

8 MR. STONE: I do not, Your Honor. I'd pass the
9 witness.

10 THE COURT: All right. Does the committee wish to
11 examine the witness?

12 MR. MILLER: Brett Miller, Morrison & Foerster, on
13 behalf of the official creditors' committee. We do not. Thank
14 you.

15 THE COURT: All right. Does counsel for the -- any of
16 the DIP lenders wish to examine the witness.

17 MR. QUSBA: Your Honor, Sandy Qusba, Simpson Thacher &
18 Bartlett, counsel for JPMorgan as one of the proposed DIP
19 arrangers. We do not have any questions for the witness.
20 Thank you.

21 THE COURT: Thank you, Mr. Qusba.

22 Anyone else on behalf of DIP lenders?

23 All right, Mr. Masumoto, do you wish to examine?

24 MR. MASUMOTO: Good morning, Your Honor. Brian
25 Masumoto for the Office of the United States Trustee. Your

1 Honor, I have no questions for this witness.

2 THE COURT: All right. Thank you very much, Mr. Luth.
3 You're excused as a witness.

4 THE WITNESS: Thank you very much.

5 THE COURT: All right, Mr. Stone, is there any
6 argument that you want to make in support?

7 MR. STONE: I'm going to -- I'm going to hand that
8 over to Mr. Bray.

9 THE COURT: Thank you.

10 Mr. Bray?

11 UNIDENTIFIED SPEAKER: Greg, you're on mute.

12 THE CLERK: Judge, I'm asking him to unmute his line.

13 THE COURT: Mr. Bray, can you unmute?

14 MR. BRAY: Yes. I thought I did. It stuck.

15 THE COURT: Okay. That's okay.

16 MR. BRAY: I --

17 THE COURT: We're all working our way through these
18 Zoom hearings, and --

19 MR. BRAY: I understand.

20 THE COURT: Go ahead, Mr. Bray.

21 MR. BRAY: I do have a few comments I'd like to make,
22 but more importantly, I'd certainly like to address any further
23 questions that the Court may have first. I think --

24 THE COURT: I don't have any other questions I want to
25 ask at this point. Go ahead, Mr. Bray.

1 MR. BRAY: Your Honor, as you noted, the -- this is a
2 critical moment for the company, a two-billion-dollar financing
3 which the company very much needs in order to persevere and
4 prosper at the end of the day.

5 Mr. Luth's testimony has set forth, I think, pretty
6 clearly, the need for the funds. As you noted, that there is
7 no opposition to the relief requested in the DIP motion. The
8 companion motion which refers to the LifeMiles acquisition of
9 shares, in fact, not only is there no opposition, any
10 reservation of rights were actually withdrawn. And to the
11 pleasure of the company, the official creditors' committee
12 affirmatively supports the relief requested, which is unusual
13 in the sense that you have both fiduciaries in an airline case
14 rowing the same way. Both feel very strongly that this is in
15 the company's best interests.

16 Your Honor, I could spend time going through our prima
17 facie case, if you would like me to do that, establishing the
18 elements of 364(e) that we've met -- or 364 that we've met. As
19 you noted, there is a priming element here. It's consensual.
20 You have addressed the other issue that is -- at least has to
21 be addressed, which is the roll-up. We've covered that
22 extensively in our papers.

23 I think that the basis for the roll-up is clear. This
24 is an unusual situation. Without the two roll-ups, we'd have
25 no collateral with which to support the DIP. Mr. Luth's

1 testimony was crystal clear that unsecured financing is not
2 available under these circumstances.

3 For those reasons, we believe that the approval of the
4 roll-up on the terms outlined in the motion is appropriate.

5 Let me just turn for a moment to the -- to the sale
6 of -- the purchase with Advent. I don't want to spend too much
7 time. I think the motion pretty clearly lays out the reasons
8 for the acquisition, the business judgment of the debtors that
9 it was in the estates' best interests to acquire these shares,
10 not only to provide them as additional collateral, but because
11 the terms of the acquisition are favorable to the company.
12 It's always better to own a hundred percent of something,
13 particularly something that's so critical to your future, as
14 compared to seventy percent.

15 So I think that our business judgment has been
16 established there, and I don't think that we need to spend too
17 much more time on that.

18 Your Honor, I don't want to belabor this point --
19 these points. I know you have a tendency -- not a tendency --
20 it is a fact that you read the papers very carefully. I don't
21 want to repeat what we've said in the papers. So unless you
22 have any questions or comments, I will -- I will stand down.

23 THE COURT: Well, let me -- I do have some questions I
24 want to ask. And I'm sure you've read Judge Garrity's LATAM
25 decision when he initially turned down --

1 MR. BRAY: Yes, sir.

2 THE COURT: -- the DIP facility. And here, like
3 there, there's an option on the part of the debtors to pay in
4 equity at the end. How do you -- now, obviously Judge Garrity
5 was faced with objections and it was the objections that he
6 sustained. Here, you've been able to work out a consensual
7 agreement.

8 But could you tell me how your -- this proposed DIP
9 should be distinguished from the LATAM DIP that Judge Garrity
10 refused -- declined to approve when he wrote his opinion?

11 MR. BRAY: Your Honor, in respect of the option -- the
12 equity conversion option, I would note three differences.
13 First, as you said, there are no objections in this case, and I
14 think everyone, including the committee, understands the wisdom
15 of having the option to potentially convert at least the
16 Tranche B DIP facility into equity.

17 Second, we have made it very clear in the papers and
18 in the -- in the DIP financing order, that this is an option
19 between the company and the lenders. Said another way, it's
20 not the Tranche B lenders that can flip the switch; it's the
21 company. But it's not our intention and we've made it clear,
22 that we're not attempting to divest the Court of its final
23 approval over any such exercise of an option through a plan,
24 most likely. If for some reason the company were to conclude
25 it's necessary to file a motion in respect of the option, the

1 company will do that.

2 But we certainly don't intend to exercise it in a
3 vacuum. And I think as Mr. Luth testified in his declaration,
4 before we exercise any such option, there will be a further
5 market test. And we will --

6 THE COURT: Yeah, you would have -- if I'm correct,
7 you would have -- the company would have the ability either to
8 do a rights offering to try and raise that money to go to the
9 public market to do it, 1145; it could very well be exempt from
10 registration requirements.

11 So as I -- in thinking it through, the company would
12 have a lot of options other than simply converting the debt to
13 equity; is that a fair statement?

14 MR. BRAY: That is a fair statement, Your Honor.
15 Circumstances are fluid. I mean, I think we're saying the same
16 thing. The company wanted to have as much flexibility as it
17 possibly can. We viewed the option as one of a means of
18 flexibility to exit from bankruptcy. But to your point, Your
19 Honor, the capital market situation is fluid. If there are
20 better options, a rights offering, taking out the existing debt
21 with new debt, if there's another party interested in acquiring
22 equity, we've left all of those doors open for us to consider,
23 as fiduciaries, in connection with confirmation of a plan.

24 THE COURT: All right. Anything else you want to add,
25 Mr. Bray?

1 MR. BRAY: The only other difference -- distinction I
2 would made, Your Honor, is that the roll-up here -- or I
3 shouldn't say that -- the option being extended here is not to
4 equity on account of old equity. The parties who have the
5 rights -- who would have the right -- or who would exercise or
6 become equity holders are lenders -- they're pre-petition
7 lenders. They are about to become, with your blessing, post-
8 petition DIP lenders. And they would be converting in that
9 capacity. I think that's the other distinguishing feature from
10 LATAM, Your Honor.

11 THE COURT: Judge Garrity -- the objection in LATAM
12 and Judge Garrity's opinion focused on insiders getting or
13 keeping control through the option of paying with equity. And
14 your position here is that these are lenders, and they have --
15 if the company were to exercise the option, they could wind up
16 with equity?

17 MR. BRAY: Yes, that's correct, Your Honor. And you
18 raised another good point, which is the company went to great
19 lengths in terms of corporate governance here, to make sure
20 that there was no -- I'll use the term -- "undue influence"
21 exercised by the -- by the interested parties.

22 It was the disinterested directors who were consulted
23 with and who made the decisions here. So we believe that we
24 observed very good corporate governance to avoid the appearance
25 or the reality of improper insider influence in respect of the

1 terms of this option.

2 THE COURT: Thank you very much, Mr. Bray.

3 Mr. Miller, do you want to be heard on behalf of the
4 committee?

5 MR. MILLER: Yes, Your Honor. Brett Miller, Morrison
6 & Foerster, on behalf of the official committee of unsecured
7 creditors.

8 As we noted in our statement in support, this is a
9 uniquely complex DIP financing. A number of us on the
10 committee side believe this is probably the most complex DIP
11 financing we've ever worked on with multiple moving parts that
12 needed to fit together like a puzzle.

13 THE COURT: It was for me, Mr. Miller. Mr. Miller, I
14 can just say that it was the most complicated one I've had to
15 deal with. So go ahead.

16 MR. MILLER: Yes. And in dealing with the puzzle
17 pieces, we compliment the debtors in getting to the final
18 puzzle which is before you today.

19 And in doing that, the committee needed to spend a
20 significant amount of time not only on the DIP financing but
21 also the pre-petition financing facilities -- the stakeholder
22 facility, the Advent transaction, et cetera, in order to
23 understand the collateral package and how that puzzle gets put
24 together to get to this absolutely necessary DIP financing.

25 We spent an extraordinary amount of time reviewing

1 Judge Garrity's decision in LATAM. And like Mr. Bray just
2 mentioned, we definitely believe there are different facts and
3 circumstances here, and we're not concerned that this in any
4 way runs afoul of the LATAM decision.

5 The optionality of the equity conversion is important,
6 and as you noted, there are a number of different options, such
7 as a rights offering, which can be helpful for the company
8 later, and also advantageous for the creditors.

9 So with all that, the creditors absolutely support
10 this proposed transaction and respectfully request that you
11 enter the order that's before you today. Thank you.

12 THE COURT: All right. Does anybody on behalf of any
13 of the DIP lenders want to be heard?

14 I'm not hearing one.

15 Mr. Masumoto, do you want to be heard?

16 MR. MASUMOTO: Good afternoon, Your Honor. Brian
17 Masumoto for the Office of the United States Trustee. No, no
18 questions or arguments at this time.

19 THE COURT: Thank you.

20 Mr. Bray, I do have another question. Let me come
21 back to you. And I really -- I raised this in my earlier -- my
22 remarks right at the start of the hearing, and I indicated that
23 while I hadn't included the question in the order that I
24 entered, I also want to understand what, if any, provisions in
25 the DIP financing documents deal with how and with whom

1 amendments must be negotiated if necessary, because there's a
2 below-forecasted operating performance. And what are the
3 requirements for obtaining consents, waivers, or forbearance of
4 covenant requirements.

5 Those were the questions I asked right at the outset.
6 If you can, can you address that?

7 MR. BRAY: Yes, I can, Your Honor. Generally, with
8 respect to the type of covenants that you seem to be concerned
9 with, the financial covenants, a waiver, or an amendment would
10 require a majority of each tranche of lenders. So as you know,
11 there's a Tranche A and a Tranche B. So essentially, more than
12 fifty percent of each tranche would have to consent to a waiver
13 or an amendment with respect to the type of covenants that
14 you're referring to.

15 THE COURT: How many lenders do you anticipate in each
16 tranche?

17 MR. BRAY: Your Honor, I would be guessing on that.
18 It's a lot. I don't have the exact number; I'm sorry.

19 THE COURT: No, that actually -- this is one of my
20 concerns. I mean, I think Mr. Luth testified quite clearly,
21 and I have much greater comfort that the debtors will be able
22 to comply with the covenants' conditions of the loans, but bad
23 things sometimes happen, and we're living at a time of such
24 great uncertainty, with COVID, that I began worrying if -- one
25 of the reasons I asked for the stress cases analyses, but also,

1 okay, so what happens if things don't turn out the way everyone
2 reasonably projects now, what do you got to do to fix it? And
3 I take it the agent doesn't have authority to amend covenants'
4 conditions? You actually have to get affirmative approval of a
5 majority of the creditors in tranche -- lenders in Tranche A
6 and Tranche B?

7 MR. BRAY: Well, Your Honor, the arrangers will
8 facilitate the amendment process, as needed; that's part of
9 their job. They've been very efficient about that so far. So
10 while -- do we literally need an amendment signed by each
11 lender? The answer is no. The agent has the authority, with
12 the consent of the lenders, to do that, and we're quite
13 comfortable that the agent and the arrangers will be able to
14 manage that process.

15 And as you mentioned, hopefully you have concluded,
16 from Mr. Luth's testimony, that the company has been very
17 cautious in the projections that's it's relied upon and very
18 careful in terms of the financial covenants that it's agreed
19 to, to try to minimize risk.

20 Your point is right that nothing is perfect and things
21 change, particularly in this environment, but we are confident
22 that, in our business judgment, we will be able to manage the
23 amendment process, working with the arrangers, if need be.

24 THE COURT: Is it a requirement of a majority in
25 amount or majority in number or both?

1 MR. BRAY: It's amount, Your Honor.

2 THE COURT: Okay.

3 MR. QUSBA: Your Honor, it's Sandeep Qusba, from
4 Simpson Thacher, counsel for JPMorgan --

5 THE COURT: All right.

6 MR. QUSBA: -- as proposed lender.

7 THE COURT: Go ahead, Mr. Qusba. Nice to see you.

8 MR. QUSBA: Nice to see you as well, Your Honor. I
9 think, if I'm reading this allocation schedule correctly on the
10 DIP financing, we're going to probably have in the thirty-ish
11 range, three-zero, range of lenders. Obviously there could be
12 trading in the future, and that number could either consolidate
13 or expand, depending on how trades are done. But at least
14 initially, we're talking about in the thirty range, if I'm
15 reading this correctly.

16 And again, I think, given the majority-in-amount rule
17 under our credit agreement, I think, certainly within that
18 sphere of lenders, amendments should be reasonably possible to
19 get and solicit rather quickly. Obviously, it will depend on
20 the economic terms and what's going on at the time, but it's
21 not an unwieldy syndicate such that it really becomes
22 problematic with respect to collecting signatures and getting
23 consents and modifying documents in a particular way. So
24 again, I --

25 THE COURT: Is it fully syndicated?

1 MR. QUSBA: It --

2 THE COURT: Is it fully syndicated at this point --

3 MR. QUSBA: It is fully --

4 THE COURT: -- Mr. Qusba?

5 MR. QUSBA: It is fully syndicated at this point.

6 We're ready to go. We're ready.

7 THE COURT: Thank you very much, Mr. Qusba.

8 MR. QUSBA: Thank you, Your Honor.

9 THE COURT: All right. After, certainly, reading Mr.
10 Luth's declaration, hearing his testimony today, reviewing the
11 cash-flow projections which have now been provided to the
12 Court, and -- let me see. My notes don't reflect --

13 Mr. Stone, do you want to offer ECF 1011, the cash-
14 flow statement, into evidence? Maybe I missed it, but I don't
15 think it was admitted into evidence.

16 MR. STONE: Yes, we were using them as demonstratives,
17 but we are not at all adverse to having them entered into
18 evidence. That would be fine, Your Honor.

19 THE COURT: All right. Is there any objection to
20 admitting Exhibit 1011, the cash flow statement, into evidence?

21 All right. Hearing none, it's admitted into evidence.

22 (Cash flow statement, ECF 1011 was hereby received into
23 evidence as Debtors' Exhibit, as of this date.)

24 THE COURT: With respect to the stress case analyses,
25 that I do consider to be a demonstrative, and doesn't need to

1 be admitted into evidence. I think Mr. Luth's testimony
2 carefully reviewed the stress case analyses, with an
3 explanation about capacity and unit costs, so I'm satisfied
4 with that.

5 So based on all of the evidence, the motion filed in
6 support of approval of the debtor-in-possession financing, the
7 motion for approval of the purchase of securities of the
8 frequent flyer program, I'm satisfied that the debtor has
9 established that both motions reflect an appropriate exercise
10 of business judgment on the part of the debtors.

11 I'm satisfied that the evidence today has established
12 that, in rendering its business judgment to go ahead with the
13 DIP loan and with respect to the purchase of the securities in
14 the frequent flyer program, the debtor acted upon an
15 appropriate evidentiary basis for the assumptions that were
16 applied, and so I'm pleased to be able to approve both motions
17 today.

18 Mr. Bray or Mr. Stone, I don't know whether you've
19 sent Word copies of the order. I think there were revised
20 orders that were submitted.

21 If you'll make sure that Word versions of them have
22 been sent to MG.chambers@nysb.uscourts.gov, those will be
23 entered today. And I'm pleased we've been able to get to this.

24 Let me ask -- and I should have -- Mr. Fleck, before
25 we -- I think that concludes the hearing with respect to --

1 MR. BRAY: Your Honor?

2 THE COURT: Go ahead, Mr. Bray.

3 MR. BRAY: One housekeeping matter.

4 THE COURT: Yes, go ahead.

5 MR. BRAY: There's a sealing motion that's the last
6 item on the agenda.

7 THE COURT: Right, yes.

8 MR. BRAY: There's no objection to that. I would
9 request the Court also approve that motion.

10 THE COURT: Mr. Masumoto, do you have anything you
11 want to say on the sealing motion?

12 MR. MASUMOTO: Brian Masumoto for the Office of the
13 United States Trustee.

14 Your Honor, as long as unredacted copies were
15 circulated, the redacted letter is acceptable.

16 THE COURT: All right. Does anybody else want to be
17 heard with respect to the sealing motion?

18 All right. The sealing motion is granted as well.

19 Mr. Bray, is there any other housekeeping on the
20 specific matters on the agenda for today?

21 MR. BRAY: No, Your Honor. We will submit the orders
22 that you requested. There are a couple of little cleanup
23 changes in the orders we will also make, but there are no
24 substantive changes. And we'll get those to you today.

25 THE COURT: All right. Let me come back, and Mr.

1 Fleck, I don't know whether you're the appropriate person to
2 deal with this. If you just can give me a case update, at this
3 point, and one question I have is obviously I ruled on the
4 rejection motion. I know that an appeal has been filed from
5 it. I don't know what the status in the district court is.

6 At the time of the argument of the rejection motion,
7 you or your colleagues had indicated the debtors' intention to
8 go forward and try and negotiate and agree upon new credit card
9 financing agreements. And there's been complete radio silence,
10 at my end, at least. Maybe you can give me an update, overall,
11 on the case as a whole. I think Mr. Luth has already indicated
12 that the company is operating better than what was projected so
13 far, but perhaps you can update me on anything else in the
14 case.

15 MR. FLECK: Sure. Thank you, Your Honor. For the
16 record, Evan Fleck of Milbank, on behalf of the debtors.

17 We do have an omnibus hearing next week and had
18 planned to give Your Honor and parties-in-interest a more
19 comprehensive update, but I'm happy to respond to the question,
20 of course, now.

21 As it pertains to the USAVflow matter, first of all,
22 we were pleased to have resolved the informal comments from
23 those parties as it pertains to the DIP. As is not unusual,
24 what's before Your Honor is not always indicative of what's
25 happening behind the scenes, and there is quite a bit of work

1 happening behind the scenes with respect to that matter, the
2 USAVflow matter and what follows from Your Honor's decision, in
3 addition to the appeal that was taken, and I believe there is a
4 determination that needs to be made whether the matter will
5 proceed before the magistrate or Judge Swain, and there is also
6 a timing determination, some decisions that need to be made.
7 We have an adversary proceeding that's pending before Your
8 Honor that relates to the matter, and a motion to dismiss is
9 scheduled to be heard next week.

10 So there is quite a bit. I don't really have any
11 public reports, at this point, with respect to next steps, but
12 we will talk to the debtors and see if there's something to
13 report to the Court, specifically with respect to Your Honor's
14 question on next steps with the processing agreements, and we
15 propose to do that either in connection with next week's
16 omnibus hearing or with the argument on the motion to dismiss.

17 We -- go ahead, Your Honor.

18 THE COURT: Mr. Fleck, let me just say, in looking at
19 the papers, it was my understanding that the parties to the
20 adversary proceeding were willing to stay it, pending further
21 developments in the appeal or otherwise. If that remains the
22 case, what I would ask you to do is work out a stipulation --
23 proposed stipulation and order with the parties to the
24 adversary. I'm certainly prepared to stay the action pending
25 the appeal or further order of this Court.

1 So it may be that at some point, whether or not the
2 appeal has been resolved, either the debtors or the other
3 parties to the adversary will request that the stay be lifted
4 and the matter go forward. But I'm certainly prepared, if the
5 parties are prepared to do that, to -- you ought to try and
6 work out a stipulation and order, submit that, hopefully before
7 the hearing next week, and at least that matter can be resolved
8 for now.

9 MR. FLECK: Understood, Your Honor. We will talk to
10 the parties, and I think they're all actually on the line.
11 We'll talk with them promptly offline to see if there is a
12 meeting of the minds with respect to the adversary proceeding.
13 And we'll contact chambers or file something, as you suggested,
14 quickly.

15 THE COURT: Okay.

16 MR. FLECK: We do also, and I believe supplemental
17 briefing was filed during the course of today's hearing in
18 connection with the other matter that we have before Your
19 Honor, the G4S matter, and we have a hearing scheduled for Your
20 Honor this week on the 7th.

21 THE COURT: Yes, I noted that your firm was the
22 counsel that had gotten the injunction in the U.S. Lyons (ph.)
23 matter.

24 MR. FLECK: Yes, Your Honor.

25 So I believe that's now fully briefed and looking

1 forward to argument later this week on that matter.

2 Mr. Luth spoke to the current status with respect to
3 flying, which has continued to improve. And if it's okay with
4 the Court, I'll provide more of an update on that matter as we
5 move forward at the next hearing. There are other --

6 THE COURT: That's fine.

7 MR. FLECK: -- sort of things that you'd expect in
8 terms of the case. So much of the energy of the debtors has
9 been really focused on the DIP matter over the course of the
10 last number of weeks. Now that we've passed over that
11 important milestone, we'll be moving forward, together in
12 consultation with the committee, with respect to a bar date and
13 some other matters, to really put into focus the next phase of
14 these cases.

15 THE COURT: That's fine. And I said at the outset, I
16 mean, this is the most complicated DIP that I've had to deal
17 with as a judge, and I'm sure the amount of effort that went
18 into it, from all of the parties and advisors, and I very much
19 appreciate the work that was done to get us to today.

20 And again, Mr. Luth, I appreciated your explanations
21 and testimony today.

22 I'm glad you were able to -- Mr. Fleck, that you and
23 your colleagues were able to work out the issues regarding the
24 DIP on a consensual basis.

25 MR. FLECK: Well, that's always our goal, Your Honor.

1 It was an ambitious one in this case, in particular, given how
2 many participants --

3 THE COURT: It seemed to keep getting pushed back a
4 little bit every time the motion was promised, but I'm glad the
5 time was well spent.

6 MR. FLECK: We had some headwinds along the way, but
7 yes, we were able to pull it together. And on behalf of the
8 debtors, we, first of all, really appreciate Your Honor's
9 flexibility, the courtroom staff, Mr. Masumoto, the committee,
10 and all of the other parties here really for working
11 cooperatively. I think everybody rose to the occasion.

12 This is such an important moment for these debtors.
13 It really is existential, and I think people understood that
14 and worked cooperatively with that in mind to get to a place of
15 consensus. Even where there were issues that seemed binary, we
16 were able to find consensus, and so hats off to really all of
17 the parties who are on the line and others who were involved.
18 And again, thank you to Your Honor.

19 I would, if we may, just in terms of timing, Your
20 Honor, because of the complexities associated with the DIP and
21 the current liquidity position of the debtors, if it's possible
22 to have the order entered as early as end of today, we would
23 certainly appreciate --

24 THE COURT: If you get it to us today, it'll be
25 entered today, Mr. Fleck.

1 MR. FLECK: Thank you, Your Honor. We appreciate
2 that.

3 THE COURT: All right. Thank you very much, and we're
4 adjourned.

5 Oh, let me just -- one last thing, when you give the
6 report at the omnibus hearing, I would like to hear a little
7 bit more detail about how many city pairs are being served, the
8 number of flights that the debtor is actually flying, what the
9 load capacities have been at this stage. Okay?

10 MR. FLECK: Understood. We will do that.

11 THE COURT: All right. Thank you very much everybody,
12 and we're adjourned.

13 MR. FLECK: Thank you, Your Honor.

14 IN UNISON: Thank you, Your Honor.

15 (Whereupon these proceedings were concluded)
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I N D E X

WITNESS	EXAMINATION BY	PAGE
John Luth	Mr. Stone	16

E X H I B I T S

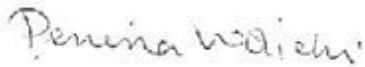
DEBTORS'	DESCRIPTION	MARKED	ADMITTED
--	Declaration of Mr. Luth		19
--	Cash flow statement		55

RULINGS:	PAGE	LINE
Debtors' motion for order directing certain orders in Chapter 11 cases be made applicable to subsequent debtors, is granted.	12	2
Debtor-in-possession financing motion granted.	56	16
Order authorizing debtors' entry into a securities purchase agreement granted.	56	16
Authorization to file DIP fee letters under seal granted.	57	18

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C E R T I F I C A T I O N

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