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VIA ECF

The Honorable Laura Taylor Swain
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *USAV Secured Lender Group v. Avianca Holdings S.A., et al.*,
Case No. 1:20-cv-08008-LTS

Dear Judge Swain:

We write on behalf of the appellees in the above-captioned proceeding (collectively, the "Debtors") in response to the *Emergency Motion for Stay Pending Appeal, or in the Alternative to Expedite Appeals, and Request to Consolidate Appeals* (ECF No. 6) (the "Motion" or "Mot.") filed last night by the appellants (the "Lender Group" or "Appellants"). While the Debtors intend to object to the Motion,[1] the Debtors do not believe the Motion should be heard on an emergency basis for the reasons described herein.

First, the Lender Group has already filed a substantially identical motion for a stay pending appeal (Bankr. ECF No. 1081, Case No. 20-11133 (MG)) (the "Bankruptcy Court Motion") with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). The Bankruptcy Court Motion was filed only two days ago, on a non-emergency basis, and will be timely briefed and heard by Judge Martin Glenn on October 29, 2020—a mere two weeks from today. The Lender Group's request that this Court order briefing on the Motion before, or alongside, Judge Glenn's consideration of the Bankruptcy Court Motion is thus unwarranted, and wasteful of the resources of the Court and the parties. *See, e.g., DNIB Unwind, Inc. v. Berman*, 2017 WL 3396468, at *5-6 (D. Del. Aug. 8, 2017) ("Only if bringing the motion in the bankruptcy court is impracticable or if the bankruptcy court has failed to rule

[1] For the avoidance of doubt, the Debtors oppose the substantive relief sought in the Motion and believe the Lender Group cannot carry its burden to demonstrate each of (i) irreparable harm to the movant; (ii) likely success on the merits of the appeal; (iii) no risk of substantial injury to the non-movant parties; and (iv) that the public interest is not harmed by the granting of the stay. *See, e.g., In re 1567 Broadway Ownership Associates*, 202 B.R. 549, 553 (S.D.N.Y. 1996) (noting the four-factor test for a stay in Second Circuit and finding that "[f]ailure to satisfy any of these criteria is fatal to the [appellant's] motion").

on the motion seeking a stay may the movant bring the motion to the district court before giving the bankruptcy court an opportunity to consider the relief sought."). Further, Judge Glenn issued the order from which Appellants have appealed (the "Order," Ex. A to ECF No. 7) and, as such, is familiar with the complexities of the case, the parties, and the issues. The Bankruptcy Court should thus be afforded the first opportunity to consider the Appellants' request for a stay pending appeal. *See In re MSR Resort Golf Course LLC*, 2013 WL 766166, at *2 (S.D.N.Y. Feb. 26, 2013) (denying an emergency motion for a stay pending appeal and opining that the bankruptcy court should first decide the motion, noting that "[t]he reviewing court should have the benefit of the learning of the lower court," as the bankruptcy court "is familiar with the issues pertaining to any purported emergency") (internal citation omitted); *see also In re BGI, Inc.*, 504 B.R. 754, 766 (S.D.N.Y. 2014) (finding that "this Court should not be denied the benefit" of the bankruptcy court's analysis first in connection with a motion for a stay pending appeal).

Second, the Debtors do not believe emergency relief is warranted. The nature of the "emergency," according to Appellants,[2] is that the Debtors are considering taking the very measures—replacement of certain credit card processing agreements—contemplated in the Order. Order at 36-37 ("[T]he result of rejection is to relieve the Debtors of their future performance obligations to USAV, including the unperformed obligation . . . 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 . . . ") (emphasis added). The Order was entered by the Bankruptcy Court nearly six weeks ago, however, and the issue was extensively discussed at the August 26, 2020 hearing in the Bankruptcy Court that gave rise to the Order. The Motion implicitly concedes as much, indicating that Judge Glenn inquired on October 5, 2020, "whether it was *still* Avianca's intention to terminate the existing [card processing] agreements." Mot. at 4. And yet, Appellants (i) waited a full *two weeks*—until the last day permitted by the Federal Rules of Bankruptcy Procedure—to file their notice of appeal from the Order, and (ii) did not file a motion for a stay pending appeal until the last 48 hours. The purported "emergency" is thus entirely manufactured.

For these reasons, we ask that the Court allow the Bankruptcy Court Motion to be resolved before considering the Motion. We thank Your Honor for your time and attention to this matter.

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[2] *See* ECF No. 7.

Sincerely,

/s/ Andrew M. Leblanc

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cc: Evan R. Fleck
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