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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: AVIANCA HOLDINGS S.A., et al.,	Chapter 11
Debtors.[1]	Case No. 20-11133 (MG)
	(Jointly Administered)
AVIANCA HOLDINGS S.A., AEROVÍAS DEL CONTINENTE AMERICANO S.A. AVIANCA, TACA, INTERNATIONAL AIRLINES, S.A., AVIANCA COSTA RICA S.A., and TRANS AMERICAN AIRLINES, S.A.,	Adv. Proc. No. 20-01244 (MG)
Plaintiffs,	**MEMORANDUM OF LAW IN SUPPORT OF MOTION, PURSUANT TO 11 U.S.C. §§ 105(a), 362(a), AND 365(e), AND FED. R. BANKR. P. 7065, FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**
v.	
USAVFLOW LIMITED and CITIBANK, N.A.,	
Defendants.	

[1] 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.

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Plaintiffs Avianca Holdings S.A., Aerovías del Continente Americano S.A. Avianca ("**Aerovías**"), Taca International Airlines, S.A., Avianca Costa Rica S.A., and Trans American Airlines, S.A. (collectively, "**Plaintiffs**"), affiliates of the above-captioned debtors (the "**Debtors**" or "**Avianca**"), respectfully submit this memorandum of law in support of their Motion, Pursuant to 11 U.S.C. §§ 105(a), 362(a), and 365(e), and Fed. R. Bankr. P. 7065, for a Temporary Restraining Order and Preliminary Injunction (the "**Motion**") with respect to defendants USAVflow Limited ("**USAV**") and Citibank, N.A. ("**Citibank**" and together with USAV, the "**Defendants**") pending final resolution of their Complaint for Permanent Injunction and Declaratory Relief (the "**Complaint**")[2] filed contemporaneously with the Motion.

I. PRELIMINARY STATEMENT

This proceeding seeks redress for brazen and continuing violations of the automatic stay. In apparent reliance on a "Trigger Event," i.e., operational disruption caused by COVID-19, Citibank swept the Debt Service Reserve and Collections Accounts post-petition, including amounts that otherwise should be distributed as Additional Purchase Price. The transgression persists on a daily basis: Citibank sweeps the accounts every day and funnels those amounts to the Lenders. Plaintiffs ask for permanent declaratory and injunctive relief reversing the illegal sweeps of Additional Purchase Price to which Aerovías is entitled. Until the Court rules on the merits of those claims, preliminary relief is appropriate.

A. IRREPARABLE HARM

Avianca is resuming domestic and international flights after governmental authorities suspended flying in response to the COVID-19 pandemic. Because it is generating receivables again, it is entitled to excess Collections under the Cash Management Agreement and the

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[2] Capitalized terms not defined herein have the meanings ascribed to them in the Complaint.

RSPA—the two agreements that entitle Aerovías to certain standard payment priorities as well as a reversionary interest in any Collections in excess of amounts needed to make amortization and interest payments on the underlying loan, i.e., Additional Purchase Price. The amounts of Additional Purchase Price are significant. Pre-petition, between 92% and 95% of Collections flowed back to Aerovías as Additional Purchase Price. These amounts were $45.9 million, $45.2 million, and $23.3 million for the first three months of 2020, respectively, and are growing again.

The aggressive conduct comes at a time when Avianca's need to maintain business continuity has unprecedented significance. Avianca is trying to operate and reorganize a major global airline in a market depressed by a worldwide pandemic without the benefit of significant revenue generated by the business. Left unchecked, continued cash sweeps will impede Avianca's restructuring efforts.

More specifically, Avianca is making critical operational decisions based on cash flows. Flights that are disproportionately impacted by the challenged conduct, including any route into the United States, will lose more cash without remittance of Additional Purchase Price. As it tries to rebuild its network, Avianca decides on a daily basis which routes to fly. Assessing the near-term viability of routes is part of that daily rigor. It is inexcusable that route profitability—which otherwise should improve because of easing market forces—nonetheless would be adversely impacted by Citibank's overreach.[3] Similarly, not having access to Additional Purchase Price makes it more difficult for Avianca to comply with the cumulative cash-burn covenant and to maintain minimum cash as required by the DIP Credit Agreement.[4] What is

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[3] See Neuhauser Decl. ¶ 19. The Declaration of Adrian Neuhauser dated October 14, 2020 ("**Neuhauser Decl.**") is being filed simultaneously herewith.

[4] See Neuhauser Decl. ¶ 19; Tecce Decl. Ex. 1, (ECF No. 964 (Debtors' Motion For Entry Of Order (I) Authorizing Debtors To (A) Obtain Postpetition Financing, And (B) Grant Liens And Superpriority Administrative Expense Claims, (II) Modifying Automatic Stay, And (III) Granting Related Relief) DIP

more, there is a real risk the funds will not be recoverable. Citibank's daily sweeps make that more difficult because they are being disbursed immediately to third-party Lenders, further beyond Avianca's reach.

B. SUCCESS ON MERITS

On March 31, 2020, Citibank sent Plaintiffs the March Letter reserving its rights in connection with a purported Trigger Event arising from the closing of Colombian airspace in response to the spread of COVID-19. The March Letter did not alter in any way the standard priority of payments under the USAV Agreements. On May 11, 2020, just one day after the Petition Date, Citibank sent Plaintiffs notice of a purported "Retention Event" relating to the Collection Coverage Ratio. On May 15, 2020, Avianca's counsel wrote Citibank advising of the existence of the automatic stay and directing that Citibank cease taking any steps to take control over estate property. The letter was ignored, and Citibank promptly emptied $13.5 million from the Debt Service Reserve Account, transferred those funds to the Lenders, and began sweeping to the Lenders' accounts, on a daily basis, all the money in the Collections Account. It continues that practice to this day, having taken more than $34 million from the Collections Account and the Debt Service Reserve Account as of the date of the Complaint. The Complaint request an Order:

- declaring Aerovías is entitled to Additional Purchase Price consistent with the standard priority of payments under the Cash Management Agreement;
- declaring that the March Letter is legally ineffective and that Citibank violated and will violate the automatic stay by sweeping Collections from the Collections Account and Debt Service Reserve Account;

Financing, Exhibit G) (the "**DIP Credit Agreement**") at 98, § 7.16 (a) (requiring Debtors to maintain minimum cash balance of $400 million, tested bi-weekly); § 7.16 (b) (requiring compliance with Cumulative Cash Burn not in excess of scheduled amounts in Credit Agreement for each applicable month, tested on last day of each month).

- declaring that the May Notice violated the automatic stay and is void ab initio;
- directing Citibank to reverse the improper post-petition sweeps and return the funds to the Collections Account and Debt Service Reserve Account; and
- directing Citibank and USAV to comply on a going-forward basis with the standard priority of payments under the Cash Management Agreement with respect to future Collections.

Plaintiffs will demonstrate a clear entitlement to this relief. Aerovías' bargained-for rights to the CMA's standard payment priorities, including the payment of Additional Purchase Price, and its reversionary interest in the Collections are valuable estate assets. The Cash Management Agreement (independently of the RSPA) provides Aerovías with rights in the funds in the Collections and Debt Service Reserve Accounts. It governs the distribution of funds from those accounts and remains in full force and effect.

The March Letter did not alter the standard payment priorities. It states only that the Lenders "continue to evaluate their response" to a Trigger Event and has no bearing on Aerovías' rights under the RSPA or the CMA. Defendants' conduct following the letter and leading up to the Petition Date corroborates that conclusion. Defendants never exercised remedies or otherwise indicated an intent to alter the standard payment priorities. Instead, Citibank continued to remit Additional Purchase Price to Aerovías as if no Trigger Event or Event of Default had occurred. The May Notice, which purports to declare a Retention Event under the CMA, is equally ineffective. Citibank sent it after the Petition Date, directly violating the automatic stay.

Aerovías also is entitled to Additional Purchase Price under the RSPA. While Aerovías moved to reject the RSPA in its bankruptcy case, rejection does not eliminate Aerovías' rights to Additional Purchase Price. As a matter of U.S. bankruptcy law, rejection is not tantamount to termination, does not eliminate Aerovías' rights to the standard payment priorities reflected in

the Cash Management Agreement, and does not cause the RSPA to disappear. Moreover, as a matter of Colombian law, rejection of the RSPA, while a breach, does not eliminate Aerovías' entitlement to Additional Purchase Price.

C. BALANCING EQUITIES

Weighing the equities tips the scales decidedly in Avianca's favor. The automatic stay is a fundamental protection that guards against the exercise of illegal self-help at issue here. Whatever claims USAV may have against Avianca are pre-petition claims that will be treated pursuant to a chapter 11 plan confirmed in accordance with the Bankruptcy Code. Undeterred, Defendants will enjoy a windfall by using the cash generated from Avianca's receivables—92% to 95% of which was Additional Purchase Price pre-petition—to satisfy whatever claims USAV may have outside the confines of a chapter 11 plan. At present, Avianca is expending efforts necessary to generate credit card receivables from operations—but is, inequitably, receiving none of the benefits. Instead, the challenged conduct is starving Avianca of cash, impeding its reorganization, and impairing creditor recoveries.

Requiring Defendants to adhere to the standard payment priorities in the Cash Management Agreement will not prejudice their rights. The CMA directs funding of the Debt Service Reserve Account for loan amortization and interest payments before any disbursements are made to Aerovías. And on top of the four months' of interest and amortization payments in the Debt Service Reserve Account, the CMA requires that the balance in the Collections Account be sufficient to fund the current month's interest and amortization before Additional Purchase Price is paid to Aerovías.

Finally, a temporary restraining order is necessary and warranted at this time to preserve Avianca's rights pending the Court's adjudication of Plaintiffs' motion for a preliminary injunction. In the interim, Citibank should be ordered to restore the cash it improperly debited

from accounts in which Plaintiffs have an interest and resume paying excess funds in those accounts to Plaintiffs in compliance with the Cash Management Agreement's priorities, until such time as the Court adjudicates the parties' rights and responsibilities under the USAV Agreements and applicable provisions of the Bankruptcy Code.

II. FACTUAL BACKGROUND

A. USAV AGREEMENTS

On December 12, 2017, Aerovías (i.e., the Seller) entered into the RSPA[5] to effectuate an off-balance sheet financing involving Avianca's credit card receivables generated in the U.S. See Tecce Decl. Ex. 2 at Recitals & § 2.01.[6] USAV, i.e., the Purchaser, was established as a special purpose off-balance sheet vehicle to "purchase" and borrow against the receivables. To finance the transaction, USAV borrowed $150 million under the USAV Loan Agreement with Citibank as Administrative Agent and Collateral Agent, contemporaneously with the execution of the RSPA.[7] At the same time, Aerovías, USAV, and Citibank entered into the Cash Management Agreement, which governs the distribution of the proceeds of the receivables from the Collections Account and Debt Service Reserve Account.[8]

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5 The RSPA is governed by the laws of Colombia. See Tecce Decl. Ex. 2 § 9.09. The salient provisions of the RSPA and CMA appear in a PowerPoint presentation attached to this Memorandum.

6 The Declaration of James C. Tecce dated October 16, 2020 ("**Tecce Decl.**") is being filed simultaneously herewith.

7 The USAV Loan Agreement is governed by New York law. See Tecce Decl. Ex. 3 § 8.9.1.

8 The USAV Loan Agreement provides that "[a]ll Collections will be deposited by the Card Processors . . . into the New York Pass-Through Account," an account under the control of Citibank in its capacity as Collateral Agent (the "**New York Pass-Through Account**"). Tecce Decl. Ex. 3 (USAV Loan Agreement) § 2.3.1. Collections deposited in the New York Pass-Through Account are then transferred each day by the Collateral Agent to an account maintained at Citibank's London branch in its capacity as Collateral Trustee (the "**Collections Account**"). Tecce Decl. Ex. 3 §§ 2.3.2; 1.1. Cash is then disbursed from the Collections Account in accordance with the provisions of the Cash Management Agreement. See Tecce Decl. Ex. 3 (USAV Loan Agreement) §§ 2.3.3-2.4.4.

To aid this Court in understanding the structure of the transactions under the USAV Agreements, Plaintiffs provide Figure 1 below:

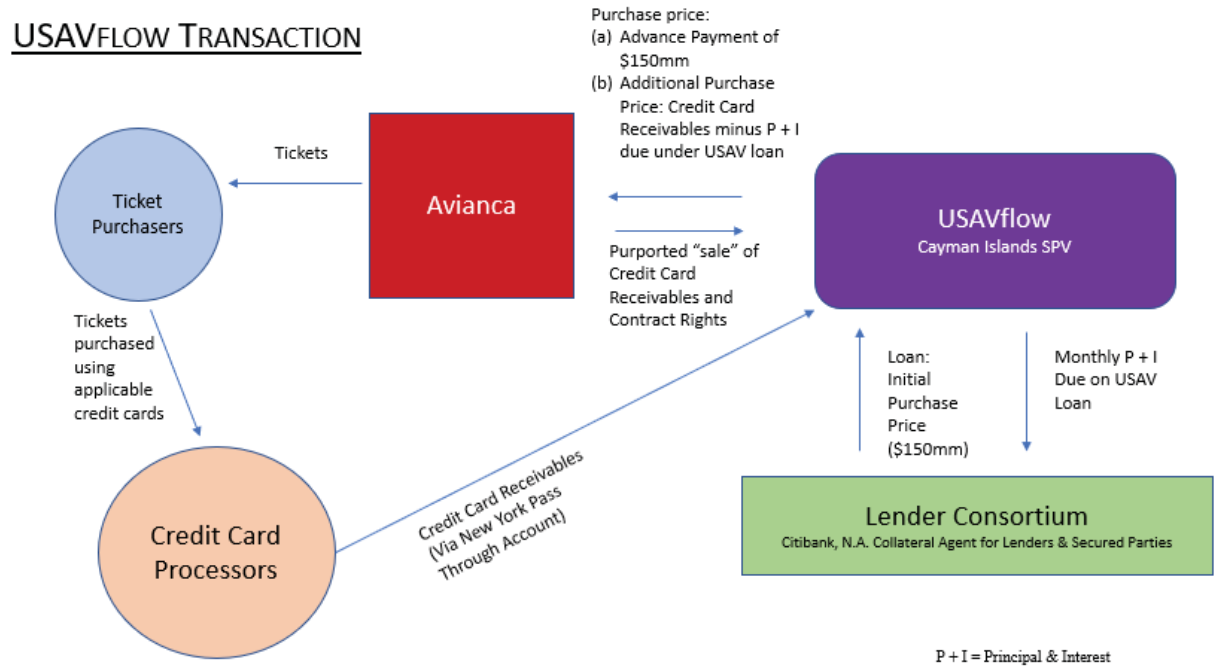

Figure 1

B. PAYMENT PRIORITY PROVISIONS

In order to fund USAV's debt service requirements, the CMA directs Citibank to hold a portion of the Collections on Avianca's credit card receivables in the Collections Account in amounts sufficient to make the required amortization and interest payments under the USAV Loan Agreement and to maintain a reserve against four months of such payments (the "**Debt Service Required Amount**") in the "**Debt Service Reserve Account**." The CMA and RSPA then direct that any surplus above what is required to be repaid or reserved under the USAV Loan Agreement flows back to Aerovías on a daily basis as Additional Purchase Price. See Tecce Decl. Ex. 4 (CMA) § 2.01; Tecce Decl. Ex. 2 (RSPA) § 3.01.

Specifically, under Section 2.01(a) of the Cash Management Agreement, the Collateral Agent is required to disburse the cash in the Collections Account in accordance with the following standard, payment priority waterfall:

- ***first***, if necessary, to the Debt Service Reserve Account (also maintained by Citibank as Collateral Trustee) in order to maintain a balance in the Debt Service Reserve Account that is equal to the Debt Service Required Amount. The Debt Service Reserve Account effectively holds a reserve for four months of future amortization and interest payments, as defined in the USAV Loan Agreement. See Tecce Decl. Ex. 3 (USAV Loan Agreement) § 2.3.3(a);

- ***second***, the remaining cash in the Collections Account may be kept there until the Collections Account balance exceeds the amount of USAV's next monthly amortization and interest payment. See Tecce Decl. Ex. 4 (CMA) § 2.01(b); and

- ***finally***, once USAV's next monthly amortization and interest payment has been funded, Citibank as Collateral Agent must disburse any surplus cash in the Collections Account "to the Seller's Account ... as a payment of the Additional Purchase Price." Tecce Decl. Ex. 4 (CMA) § 2.01(c).[9]

As a result, the Seller (Aerovías) has an interest in all Collections from Avianca's credit card receivables in excess of USAV's monthly debt service requirements, including excess amounts in the Collections Account and the maintenance of the four-month reserve, i.e., the Debt Service Required Amount, as well as a reversionary interest in receivables once the loan is fully repaid. See Tecce Decl. Ex. 2 (RSPA) § 3.01(a). Section 3.01 of the RSPA, which entitles Aerovías to payment of Additional Purchase Price, specifically refers to these waterfall sections of the Cash Management Agreement. Id. § 3.01.

The CMA's standard payment priorities may be modified based on the occurrence of contractually defined events, including a Retention Event or a Trigger Event.

[9] The Cash Management Agreement identifies the "Seller's Account" as that of Aerovías maintained at JPMorgan Chase Bank, N.A. Tecce Decl. Ex. 4 § 1.01.

1. RETENTION EVENT

Under the Cash Management Agreement, a Retention Event occurs when "the Collection Coverage Ratio" is less than 2.5:1.0 on any date of determination. Tecce Decl. Ex. 3 § 1.01.[10] If Citibank as Collateral Agent receives notice that a Retention Event occurred and is continuing, then pursuant to Sections 2.01 and 2.02 of the CMA, it may cease paying Additional Purchase Price to Aerovías and instead "leave undisbursed and remaining in the Collections Account all such remaining cash." Id. §§ 2.01(c)-(d); 2.02(f)-(g). Once the Retention Event is no longer in effect, the Collateral Agent is to resume disbursing that excess cash to Aerovías. Id. §§ 2.01(c); 2.02(f), 2.06(d).

2. TRIGGER EVENT

The RSPA lists various Trigger Events, including if "the capacity or ability of the Seller to operate domestic and/or international flights is materially impaired for any reason …." Tecce Decl. Ex. 2 § 6.01(i)(i). The RSPA provides that "no Additional Purchase Price shall be paid during the continuance of … a Trigger Event," but restores Aerovías' entitlement to Additional Purchase Price when the Trigger Event is no longer continuing. Id. § 3.01(a)(ii).

Under the RSPA, if the Trigger Event is a bankruptcy filing, then USAV becomes entitled automatically to all Collections to the extent necessary to pay Liquidated Damages.[11]

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[10] The "Collection Coverage Ratio" means the ratio "calculated by the Administrative Agent on the second Business Day after each Payment Date, of (a) the amount of Collections deposited in the Collections Account during the immediately preceding Interest Period ending on such Payment Date to (b) the sum of the Interest Amount plus the Principal Payment Amount payable on the next succeeding Payment Date." Id.

[11] See Tecce Decl. Ex. 2 (RSPA) § 6.03 ("Automatic Trigger Event") ("In the case of an [Insolvency Event] … and notwithstanding the availability of other remedies under Section 6.02, the Liquidated Damages shall automatically become and be forthwith due and payable and all amounts deposited in the New York Pass-Through Account, the Collections Account and the Debt Service Reserve Account shall be disbursed to repay such amounts." "**Liquidated Damages**" are defined in Section 6.02 of the RSPA and equal the "**Unwind Amount**," meaning "an amount equal to, at any date of determination, the sum, without duplication, of (a) the Unsettled Balance, plus (b) the accrued and unpaid Surcharge on the Unsettled

For any Trigger Event other than an "Insolvency Event," including an operational impairment under RSPA § 6.01(i)(i), however, the remedies under the RSPA are not automatic. Instead, USAV ***may—if it elects***—exercise remedies in accordance with Section 6.02 ("Remedies") of the RSPA and Sections 2.04 and 2.09 of the CMA. So, after a Trigger Event, USAV can ***either*** terminate the RSPA and demand Liquidated Damages ***or*** continue performing and complying with the RSPA.

If USAV elects to terminate the RSPA, the RSPA's provisions outline the requirements to formally terminate and demand payment of the balance of USAV's loan as Liquidated Damages. Only after the Liquidated Damages remain unpaid following such demand is Citibank entitled to sweep the Collections and Debt Service Reserve Accounts to pay the Liquidated Damages and proceed with respect to future Collections in accordance with a modified payment waterfall, i.e., the "Trigger Event Priority of Payments."[12] See Tecce Decl. Ex. 4 (CMA) § 2.04; see also id. § 2.09(c). But if USAV makes no such election—as is the case here—it must continue performing under the RSPA.

The "Trigger Event Priority of Payments" appears in Section 2.04 of the CMA. Under that agreement, the Trigger Event Priority of Payments applies when "a Trigger Event has

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Balance, through the date of payment of the Unsettled Balance in full, plus (c) all other amounts (including enforcement costs and expenses) due and payable to the Agents or the Collateral Trustee (for their own accounts or for the account or benefit of any other Person), including the Indemnified Persons (other than the Purchase), plus (d) any Break Costs."

[12] See Tecce Decl. Ex. 2 (RSPA) § 6.02 ("Upon the occurrence of a Trigger Event, ***the Purchaser may or the Administrative Agent (at the direction of the Requirement Lenders*** ... ***shall prematurely terminate*** … this Agreement …. As a consequence of the early termination … Liquidated Damages shall be due and payable by the Seller ***upon such demand*** …. At any time while the Liquidated Damages ***are not paid in full***, the Seller hereby irrevocably authorizes the Purchaser, the Servicer and the Agents ***to apply the amount of all Collections*** (including, without limitation, all cash standing to the credit of the New York Pass-Through Account, the Collections Account and the Debt Service Reserve Account) to the payment of the Liquidated Damages ***and disburse such Collections in accordance with the Trigger Event Priority of Payments***.") (emphasis added).

occurred and notice has been given by the Purchaser pursuant to Section 6.02 of the RSPA or by the Administrative Agent." Ex. 4 (CMA) § 2.04. See also id. § 2.09(c). Specifically, the CMA provides that upon receipt of a properly-formulated notice of a Trigger Event, the waterfall under the CMA changes and "the cash standing to the credit of the Collections Account and the Debt Service Reserve Account shall be disbursed by the Collateral Trustee ... pursuant to Section 3.1 of the Security Trust Deed." Id. §§ 2.04, 2.09(c). Section 3.1 of the Security Trust Deed, in turn, provides for the application of funds "towards discharge of the Secured Obligations," including payment of the "Unwind Amount," which is the equivalent of Liquidated Damages. Tecce Decl. Ex. 8 (Security Trust Deed between Citibank, N.A., London Branch, as Collateral Trustee, USAV, and others) ("**Security Trust Deed**") § 3.1.

Finally, both the RSPA and the CMA contemplate that Aerovías' entitlement to Additional Purchase Price is restored when the Trigger Event or Retention Event is no longer continuing. See Ex. 2 (RSPA) § 3.01(a)(ii) ("No Additional Purchase Price shall be paid ***during the continuance*** of a Retention Event, an Adjustment Event or a Trigger Event.") (emphasis added); Ex. 4 (CMA) § 2.06(d).

C. PRE-PETITION OPERATION OF USAV AGREEMENTS

During the first three months of 2020, respectively, approximately $48.3 million, $48.8 million, and $25.2 million in credit card receivables were generated under the relevant card processing agreements and were generated deposited in the Collections Account. Thus, between 92% and 95% of Collections flowed back to the Debtors as Additional Purchase Price. These Collections were more than enough to cover the debt service payments due on USAV's loan.

D. CITIBANK ISSUES MARCH LETTER

On March 20, 2020, the Republic of Colombia, announced that it would close its airspace in response to the COVID-19 pandemic. On March 24, 2020, the Debtors announced that they

were suspending all scheduled passenger flights from March 25, 2020. On March 31, 2020, Citibank, as Administrative Agent under the USAV Loan Agreement, sent a letter to USAV and Plaintiffs stating it "has been informed by the Lenders," inter alia, that the Seller "is in breach of certain terms and conditions of the RSPA ..., which have caused Trigger Events under Section 6.01 of the RSPA ... to occur and continue." Tecce Decl. Ex. 5 ("**March Letter**") at 1.[13]

Citibank did not issue the form of notice prescribed in Exhibit A to the Cash Management Agreement, see Tecce Decl. Ex. 4 (CMA) § 2.09(c); did not terminate the RSPA, see Tecce Decl. Ex. 2 (RSPA) § 6.02; and did not make any demand for Liquidated Damages. See id. Indeed, the March Letter said simply that Citibank had been "informed" by an undisclosed quantum of Lenders about a Trigger Event—not that Citibank was, at the direction of the ***Required*** Lenders, declaring a Trigger Event. And, Citibank also said these unidentified Lenders "continue to evaluate their responses to the Specified Events"—not that the Required Lenders intended to exercise remedies.

After issuing the March Letter, and before the Petition Date, Citibank did not take any further action in connection with the purported Trigger Event. To the contrary, USAV and Citibank continued to act as though no Trigger Event or Event of Default had occurred. In April 2020, Citibank paid Additional Purchase Price to Aerovías pursuant to the CMA's standard payment priorities. Between April 1, 2020, and April 9, 2020, the Debtors received daily payments of Additional Purchase Price in the aggregate amount of $255,951.22. Citibank adhered to the CMA's standard waterfall and did not disburse cash in the Collections Account or Debt Service Reserve Account in accordance with the Trigger Event Priority of Payments.

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[13] Citibank claimed "the capacity or ability of the Seller to operate international flights is materially impaired" and that "[a] Trigger Event … under Section 6.01(i)(i) of the RSPA" and Events of Default under Section 6.1.15 and Section 6.1.4 of the USAV Loan Agreement have occurred. Tecce Decl. Ex. 5, Sched. II.

Aerovías did not receive Additional Purchase Price during the monthly period beginning on April 12, 2020 because no excess Collections were generated.

E. BANKRUPTCY FILING & MAY NOTICE

On May 10, 2020, the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code. The next day, in violation of the automatic stay, Citibank purported to give Aerovías and USAV notice of a Retention Event under the CMA, i.e., a shortfall of the Collections Coverage Ratio. See Tecce Decl. Ex. 6 ("**May Notice**").

On May 15, Avianca's counsel advised counsel to Citibank and USAV "that 11 U.S.C. § 362(a) prohibits, inter alia, any act (i) to obtain possession of property of the Debtors' estates or of property from the Debtors' estates, or (ii) to exercise control over property of the Debtors' estates," and asked them to "please contact us before taking any further action pursuant to the Notice [of Retention Event] to discuss the effect, if any, of such action on property of any Debtor's estate." Tecce Decl. Ex. 7 ("**May 15 Letter**") at 1-2.

Flatly ignoring the automatic stay and the May 15 Letter, Defendants proceeded to exercise self-help remedies. Instead of retaining Collections in the Collections Account and the Debt Service Reserve Account, Citibank began conducting daily sweeps of cash from the Collections Account and disbursing it to USAV's Lenders. On May 18, 2020, Citibank swept roughly $13.5 million in cash from the Debt Service Reserve Account and disbursed it to the Lenders. Between the Petition Date and October 8, 2020, Citibank swept an additional $20.8 million from the Collections Account to the accounts of the Lenders.

The Debtors received no notice of these extraordinary cash sweeps and learned the reason for them only weeks later, after making inquiries to Citibank on June 5, 2020. On June 8, 2020, Citibank advised that: "as a result of certain Events of Default under the Loan Agreement and

Trigger Events under the [RSPA], Citi has … disbursed the cash in the Debt Service Reserve Account as required by Section 3.1 of the Security Trust Deed." Tecce Decl. Ex. 9, at 1.

Citibank's conduct, however, suggest the Debtors' bankruptcy filing was the real impetus for its sweeping of funds. After Citibank referenced the supposed Trigger Event in the March Letter, it performed as though no Trigger Event had occurred. In April 2020, Citibank continued to remit Additional Purchase Price to the Seller. It was only following Avianca's bankruptcy filing that Citibank began diverting the funds in the Collections Account and Debt Service Reserve Account –conduct consistent with the RSPA's "Automatic Trigger Event" provisions applicable to an ipso facto "Insolvency Event." See Tecce Decl. Ex. 2 (RSPA) § 6.03 (referencing id. § 6.01(h)).

F. DECISION GRANTING MOTION TO REJECT RSPA

On June 23, 2020, the Debtors filed the Rejection Motion with respect to the USAV Agreements. In opposing the Rejection Motion, the Lenders argued that Aerovías is no longer entitled to any Additional Purchase Price because of the occurrence of a Trigger Event.[14] In the Rejection Decision (In re Avianca Holdings S.A., 618 B.R. 684 (Bankr. S.D.N.Y. Sept. 4, 2020)), the Court granted the Rejection Motion as it relates to the RSPA and the Undertaking Agreement (as defined in the decision), but not as to the other USAV Agreements, including the CMA. The Court made numerous observations, including that the March Letter "did not invoke any remedies, but simply reserved Citibank's rights to pursue available remedies under the

[14] See Declaration Of Jorge Suescún Melo In Support Of Objection To USAV Secured Lender Group To Debtors' Motion For Entry Of An Order Authorizing Rejection Of Certain Executory Contracts [ECF No. 618] ¶ 12 ("[T]he ongoing contingent obligation of USAV to pay period payments of Additional Purchase Price no longer exists because a 'Trigger Event' occurred."); Tr., Hr'g Aug. 26, 2020 at 82:19-83:5 (arguing "there is no obligation" to make Additional Purchase Payments " because it was eliminated pre-petition through a trigger event"); 89:16-22 (arguing the Debtors "have expressly admitted they're not entitled to any additional purchase price payments …. I don't see how there could really be any dispute about the matter").

RSPA," (id. at 691); that the RSPA "is an executory contract that the Debtors may reject," (id. at 701); and that "[t]he result of rejection here is not a recession [sic] of the RSPA," (id. at 707).

III. ARGUMENT

A. STANDARDS APPLICABLE TO REQUESTS FOR INJUNCTIVE RELIEF

Section 105(a) of the Bankruptcy Code "is a broad grant of power which exceeds the limits of the automatic stay[] and empowers the Court to use its equitable powers to assure the orderly conduct of the reorganization proceedings." Keene Corp. v. Acstar Ins. Co. (In re Keene Corp.), 162 B.R. 935, 944 (Bankr. S.D.N.Y. 1994) (internal quotations and citations omitted). Federal Rule of Bankruptcy Procedure 7065 expressly permits the bankruptcy court to issue temporary restraining orders and preliminary injunctions in adversary proceedings. See Fed. R. Bankr. P. 7065 (incorporating Fed. R. Civ. P. 65 in adversary proceedings).

B. CONTINUED SWEEPS OF ADDITIONAL PURCHASE PRICE WILL CAUSE AVIANCA IRREPARABLE HARM

Ordinarily, a party seeking preliminary relief must demonstrate irreparable harm and either (i) the likelihood of success on the merits, or (ii) a sufficiently serious question regarding the merits to make it a fair ground for litigation with the balance of hardship tipping decidedly in its favor.[15] However, section 105(a) of the Bankruptcy Code relaxes the "irreparable harm" element of injunctive relief and does not require a showing that a legal, monetary remedy is inadequate. Instead, injunctive relief will be given "[w]here there is a showing that the action sought to be enjoined would burden, delay or otherwise impede the reorganization proceedings or if the stay is necessary to preserve or protect the debtor's estate or reorganization prospects ...." Alert Holdings Inc. v. Interstate Protective Services, Inc. (In re Alert Holdings, Inc.), 148

[15] See Kamerling v. Massanari, 295 F.3d 206, 214 (2d Cir. 2002); Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 972 (2d Cir. 1989); Kaplan v. Bd. of Educ., 759 F.2d 256, 259 (2d Cir. 1985).

B.R. 194, 200 (Bankr. S.D.N.Y. 1992); accord LTV Steel Comp., Inc. v. Bd. of Educ. (In re Chateaugay Corp., Reomar, Inc.), 93 B.R. 26, 29 (S.D.N.Y. 1988) ("[T]he usual grounds for injunctive relief such as irreparable injury need not be shown in a proceeding for an injunction under 105(a)"); Ball v. Sandview Composite Ltd. (In re Soundview Elite Ltd.), 543 B.R. 78, 120 (Bankr. S.D.N.Y. 2016) ("Courts in the Second Circuit have recognized a limited exception to the irreparable harm requirement for issuance of a preliminary injunction in the bankruptcy context when the action to be enjoined is one that threatens the reorganization process or which would impair the court's jurisdiction with respect to the case before it."); In re Lyondell Chem. Co. v. CenterPoint Energy Gas Servs., Inc. (In re Lyondell Chem. Co.), 402 B.R. 571, 590 (Bankr. S.D.N.Y. 2009) (same).

Regardless, Avianca faces a real prospect of irreparable harm. Avianca is resuming domestic and international flights after governmental authorities suspended flying in response to the COVID-19 pandemic. Amounts of Additional Purchase Price historically were, and will again be significant. Such payments are especially needed at this critical time. Return of the funds and future access to Additional Purchase Price are necessary for Avianca to maximize its flying routes and to help Avianca comply with its obligations under the DIP Credit Agreement. Creditor recoveries, and the reorganization effort more generally, depend on it.[16]

Accordingly, Plaintiffs have shown irreparable harm. See Thomas B. Hamilton Co. Inc. v. Citizens & So. Nat'l Bank (In re Thomas B. Hamilton Co. Inc.), 969 F.2d 1013, 1020 (11th Cir. 1992) (observing "rehabilitation will be virtually impossible for any merchant who relies heavily on credit card sales" if payments are not processed); Velo Holdings Inc. v. Paymentech,

[16] See Neuhauser Decl. ¶¶ 18-20; ECF No. 964, Ex. G (DIP Credit Agreement) at 98 (p. 315 of ECF PDF) §§ 7.16(a), 7.16(b).

LLC (In re Velo Holdings Inc.), 475 B.R. 367, 386 (Bankr. S.D.N.Y. 2012) ("The Debtors' businesses and any chance for an orderly sale process would suffer immediate and irreparable harm if Paymentech terminated the [credit card] Processing Agreements."); id. ("[I]f Paymentech is now permitted to terminate the Processing Agreements, the sale process currently underway would be severely impacted, thwarting any prospective recovery for creditors in this case"). See also RMP Capital Corp. v. Bam Brokerage, Inc., 21 F. Supp. 3d 173, 182-83 (E.D.N.Y. 2014) (irreparable harm would result if debtor could not obtain alternative financing free of creditors' security interest); In re Lyondell Chem. Co., 402 B.R. at 58 (loss of DIP financing would "doom" reorganization).

C. PLAINTIFFS ARE LIKELY TO PREVAIL ON MERITS

1. CONTRACT RIGTHS AND INTEREST IN RECEIVABLES ARE ESTATE PROPERTY PROTECTED BY AUTOMATIC STAY

Aerovías has an interest in the receivables Avianca generates pursuant to the priority of payments "waterfall" in the CMA and its right to receive Additional Purchase Price. And, Aerovías' interests in the Collections and Debt Service Reserve Accounts—even if reversionary—constitute property of the bankruptcy estate. See e.g., In re Sterling Optical Corp., 371 B.R. 680, 691 (Bankr. S.D.N.Y. 2007) ("The Debtor's right to the surplus held or that might thereafter accumulate in the Reserve ... would constitute property of the Debtor's estate under § 541 of the Bankruptcy Code."); Official Comm. of Unsecured Creditors of HMKR, Inc. v. Homemaker Indus., Inc. (In re HMKR, Inc.), No. 99-10968, 2003 WL 21696521, at *5 (Bankr. S.D.N.Y. July 18, 2003) ("'Congress intended property of the estate to include all interests of a debtor, including a debtor's contract right to future, contingent property.' Thus, … [the debtor's] contingent contractual right … to obtain … payment of the Excess L/C Proceeds … for [its] account would be property of the estate.") (internal citation omitted) (subsequent history

omitted); Banner v. Bagen (In re Bagen), 186 B.R. 824, 828 (Bankr. S.D.N.Y. 1995) (Congress defined estate property broadly "to encompass contingent future payments that were subject to a condition precedent on the date of bankruptcy. … Accordingly, [the debtors' contingent] fees which may be paid postpetition … should be includable in his bankruptcy estate.") (internal citations omitted), aff'd, 201 B.R. 642 (S.D.N.Y. 1996)); In re Constable Plaza Assocs., L.P., 125 B.R. 98, 103 (Bankr. S.D.N.Y. 1991) (holding the debtors' estate included residual interest in rents assigned to a creditor as "additional security").[17]

Similarly, Aerovías' right to the payment priorities in the Cash Management Agreement constitutes estate property. As such, the automatic stay prohibits the unilateral termination or modification of those rights. See, e.g., In re Enron Corp., 300 B.R. 201, 212 (Bankr. S.D.N.Y. 2003) ("'Courts have consistently held that contracts rights are property of the estate, and that therefore those rights are protected by the automatic stay.'") (citation omitted); In re Computer Commc'ns, Inc., 824 F.2d 725, 730-31 (9th Cir. 1987) (holding that termination of an executory contract violates the automatic stay); In re Broadstripe, LLC, 402 B.R. 646, 656 (Bankr. D. Del. 2009) ("Although [the debtor's counterparty] attempted to terminate … by sending the [pre-petition] notice of termination … , the termination process was stayed by operation of the automatic stay pursuant to § 362(a)."); In re Bd. of Dirs. of Compañía General De Combustibles, S.A., 269 B.R. 104, 113 (Bankr. S.D.N.Y. 2001) (executory contract may not be terminated without seeking relief from the automatic stay).

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[17] C.f., In re Elrod, 42 B.R. 468, 474 & n.8 (Bankr. D. Tenn. 1984) (real estate investment account in which debtor held only legal title and in which debtor's former wife and child held equitable interest through an express trust created by state court which attached account for child support was not property of estate; noting "[t]his is not to say … that the debtor would have no interest in the property once the trust terminated by reason of either the attainment of majority or death of the child. The debtor's estate would … continue to hold whatever reversionary rights the debtor would have in this regard").

2. ACCOUNT SWEEPS AND WITHHOLDING ADDITIONAL PURCHASE PRICE VIOLATE AUTOMATIC STAY

Notwithstanding the imposition of the automatic stay imposed by Avianca's chapter 11 filing, Citibank altered the standard payment priority provisions under the Cash Management Agreement (in which Aerovías has an interest), emptied the Debt Service Reserve Account, and swept the Collections Account on a daily basis, taking excess Collections payable as Additional Purchase Price and distributing them to the Lenders. The automatic stay prohibits these actions. Nor are they authorized by either the March Letter, the May Notice, or the commencement of the Chapter 11 Cases.

(a) MARCH LETTER DOES NOT AUTHORIZE ACTIONS AGAINST ESTATE PROPERTY

The March Letter was nothing more than a notice of the possibility that remedies may be exercised in the future. It did not terminate or modify Avianca's rights in the Collections. Indeed, the purported Trigger Event referenced in the March Letter, material impairment of flight operations, has no automatic effect.[18] C.f., In re Velo Holdings Inc., 475 B.R. 367, 381 (Bankr. S.D.N.Y. 2012) ("[T]he January 20 Letter states that the Processing Agreements '*will be terminated'*, not that they are terminated. Thus, on its face, the January 20 Letter does not evidence a clear an unambiguous intent to terminate or reason for termination"); In re Avianca Holdings S.A. (Rejection Decision), 618 B.R. 684, 691 (Bankr. S.D.N.Y. Sept. 4, 2020)

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[18] Compare Tecce Decl. Ex. 2 (RSPA) § 6.03 (only an ipso facto "Insolvency Event" described in RSPA § 6.01(h) constitutes an "Automatic Trigger Event"). Rather, as in Velo, the RSPA contains a condition subsequent, since it provides USAV and the "Required Lenders" (directing Citibank) with the "option either to terminate the contract upon the occurrence of an event [of default] or not to terminate - and ... the contract does not expire by its own limitation upon such occurrence[.]" 475 B.R. at 382 (citing In re St. Casimir Dev. Corp., 358 B.R. 24, 38 (S.D.N.Y. 2007)); see Tecce Decl. Ex. 2 (RSPA) § 6.02 ("Upon the occurrence of a Trigger Event, the Purchaser ***may*** or the Administrative Agent (at the direction of the Required Lenders …) shall prematurely terminate ….").

(observing "March Notice did not invoke any remedies, but simply reserved Citibank's rights to pursue available remedies under the RSPA.").

Alternatively, the March Letter did not comply with the requirements in the CMA and the RSPA for effectuating an alteration of the payment priorities because of a Trigger Event or termination of the RSPA. The March Letter merely stated Citibank, as Administrative Agent, had been "informed" by an undisclosed quantum of Lenders that a Trigger Event had occurred and was continuing and reserved rights in connection with that information. See Tecce Decl. Ex. 5 (March Letter) at 2 ("[T]he Agents … and the Lenders … continue to evaluate their response to the Specified Events …. [They] fully and specifically reserve any and all rights, powers, privileges and remedies under the Loan Agreement and the other Credit Documents").

If Citibank wanted to take action with respect to a Trigger Event, Citibank needed to supply notice in the form called for in Section 2.06(e) or Section 2.09(c) of the CMA and Section 2.3.5 of the Loan Agreement for declaring a Trigger Event and adjusting payment priorities.[19] Such notices clearly evidence an intent to declare an event "at the direction of the Required Lenders." Citibank did no such thing. The March Letter refers to an undisclosed quantum of Lenders who are "continuing to evaluate their response."

Having failed to comply with the requirements of the CMA, the March Letter is not an effective notice of a Trigger Event. See Luxottica Group S.P.A. v. Bausch & Lomb, Inc., 160 F.

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[19] The Cash Management Agreement requires the Administrative Agent to "deliver a notice, substantially in the form of Exhibit A" to the Cash Management Agreement. Tecce Decl. Ex. 4 § 2.09(c); accord Tecce Decl. Ex. 3 (USAV Loan Agreement) § 2.3.5. The March Letter does not comply with the form appearing at Exhibit A of the Cash Management Agreement, which states: "[t]he Administrative Agent [**at the direction of the Required Lenders** . . .], **hereby notifies** the Seller, the Purchaser, the Servicer, the Collateral Agent [and the Collateral Trustee] that a [Retention Event/Adjustment Event/**Trigger Event**] **has occurred and is continuing**." Tecce Decl. Ex. 4 (CMA) at Ex. A (brackets in original, emphasis added). Among other things, the March Letter avoids this formulation and instead says only that the Administrative Agent "has been informed by the Lenders." Compare Tecce Decl. Ex. 4 (CMA) § 2.09(c), with, Tecce Decl. Ex. 5 (March Letter) at 2.

Supp. 2d 545, 550-51 (S.D.N.Y. 2001) (explaining "when a party invokes a remedy of forfeiture based on failure to respond to a notice of default, that notice is scrutinized and any material defect will defeat the claim" and holding that notice addressed to only one of four required recipients that was not sent by overnight mail as required was not effective) (collecting authorities); Filmline (Cross-Country) Prod. v. United Artists, 865 F. 2d 513, 518-19 (2d Cir. 1989) (noting "New York rule requiring termination of a contract in accordance with its terms" and finding termination notice that did not, as agreement required, notice opportunity to cure was "inoperative").

USAV's and Citibank's conduct following the March Letter corroborates the conclusion that neither had an intention of declaring a Trigger Event. See, e.g., In re Velo Holdings, 475 B.R. at 380 ("[E]xtrinsic evidence overwhelmingly establishes that the January 20 Letter did not result in a prepetition termination of the Process Agreements"). Through April 2020, Citibank continued to disburse Additional Purchase Price to Aerovías pursuant to the CMA's standard payment priorities for as long as there were excess Collections available.

Similarly, with respect to the RSPA, upon the occurrence of a Trigger Event, USAV has a choice to make: it either elects to terminate the contract pursuant to Section 6.02 and demand Liquidated Damages, or it continues performance. And, if USAV elects to terminate, it must issue proper notices, demand Liquidating Damages, and await their nonpayment before sweeping accounts.[20] None of these things happened. USAV did not elect to terminate and instead continued performing as though no Trigger Event or Event of Default had occurred.

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[20] These steps would require relief from the automatic stay to effectuate. See, e.g., In re Margulis, 323 B.R. 130, 132, 135 (Bankr. S.D.N.Y. 2005) (finding that option under settlement terminated when not exercised pre-petition and that automatic stay did not prevent option from lapsing post-petition; noting, however, that (a) "[t]he effectiveness of the termination does not depend on the timing of the default but on whether termination requires an act prohibited by the automatic stay;" (b) "[w]hen termination of the contract

Accordingly, in no event did the March Letter (a) terminate the RSPA; (b) impair Aerovías' rights under that agreement, the CMA, or otherwise, to Additional Purchase Price; (c) entitle Citibank or USAV to alter the waterfall payment priorities under those agreements; or (d) entitle Citibank to sweep the Collections and Debt Service Reserve Accounts.

(b) MAY NOTICE IS VOID AB INITIO

Citibank sent the May Notice after the bankruptcy filing and thereby violated the automatic stay. See In re Margulis, 323 B.R. 130, 133 (Bankr. S.D.N.Y. 2005). In any event, the May Notice asserting that a Retention Event had occurred would not permit Citibank to sweep any of the accounts even if the May Notice were valid. See Compl. ¶ 56; see also Tecce Decl. Ex. 4 (CMA) §§ 2.01(d), 2.02(g) (providing that upon declaration of a Retention Event, cash otherwise payable as Additional Purchase Price is to remain in the Collections Account).

Citibank appears to be justifying its actions on the March Letter and purported Trigger Event. But the timing of the sweeps suggests it is merely pretext for Citibank's exercise of self-help based on Avianca's bankruptcy petition and financial condition. After acting for weeks as if no Trigger Event or Event of Default had occurred, Citibank began exercising purported remedies just one day after the Petition Date. Citibank acted as if in consequence of an ipso facto "Insolvency Event" based on the Chapter 11 filing under Section 6.03 of the RSPA.[21]

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requires an affirmative act, the contract remains executory because such an act is stayed under 11 U.S.C. § 362(a);" (c) "[c]laimant did not have to send a notice of default or take action to trigger the termination of the option …. [it] terminated with the passage of time and … the automatic stay was not implicated;" and (d) "[t]he termination … did not result from his insolvency or financial condition [or] the commencement of the case …. it was caused by his failure to pay …") (internal quotations omitted); In re St. Casimir Dev. Corp., 358 B.R. 24, 44 (S.D.N.Y.) (holding that letter did not terminate partnership agreement that merely provided notice of the non-debtor's intent to terminate the agreement when, among other things, non-debtor could not effectively terminate agreement unless it took additional affirmative steps, which it failed to do).

[21] See Tecce Decl. Ex. 2 (RSPA) § 6.03 ("In the case of [an Insolvency Event], the Liquidated Damages shall automatically become and be forthwith due and payable and all amounts deposited in the New York Pass-

Section 365(e)(1) of the Bankruptcy Code prohibits terminating any contract on the basis of a bankruptcy filing. And, pursuant to section 541(c) of the Bankruptcy Code, such provisions do not provide a basis for excluding contract rights from estate property.

3. REJECTION OF THE RSPA DID NOT EVISCERATE AEROVÍAS' ENTITLEMENT TO ADDITIONAL PURCHASE PRICE

Aerovías is entitled to Additional Purchase Price under the Cash Management Agreement—independently of the RSPA—pursuant to the standard priority of payment provision in the CMA. Tecce Decl. Ex. 4 (CMA) §§ 2.01, 2.02. For that reason alone, rejection of the RSPA is irrelevant.

Moreover, as a matter of law, rejection is not tantamount to termination and instead "merely frees the estate from the obligation to perform [—] it does not make the contract disappear." In re Lavigne, 114 F.3d 379, 387 (2d Cir. 1997). See also Mission Prods. Holds, Inc. v. Tempnology, LLC, 139 S.Ct. 1652, 1661-1664 (2019) ("Rejection of a contract—any contract—in bankruptcy operates not as a rescission but as a breach. … 'What the legislative record [reflects] is that whenever Congress has been confronted with the consequence of the view that rejection terminates all contractual rights, it has expressed its disapproval.'") (brackets in original) (citation omitted); id. at 1662 ("[R]ejection of the photocopier contract" means "the dealer [debtor] will stop servicing the copier. It means, too, that the law firm has an option about how to respond—continue the contract or walk away, while suing for whatever damages go with its choice," and "the firm's damages suit is treated as a pre-petition claim on the estate, which will likely receive only cents on the dollar.").

Through Account, the Collections Account and the Debt Service Reserve Account shall be disbursed to repay such amounts.").

Certain contract provisions may survive rejection, e.g., those providing for subordination. By analogy, Aerovías' entitlement to Additional Purchase Price pursuant to the payment priorities reflected in the Cash Management Agreement should survive rejection. See In re Lehman Bros., Inc., No. 17-6246 (AT), 2018 WL 10454936, at *6-7 (S.D.N.Y. Sept. 26, 2018) (explaining "assuming the agreements are … rejected, executory contracts, the Court holds that the subordination provisions still apply," noting "rejection 'does not embody [ ] contract-vaporizing properties'" and rejecting argument that by enforcing subordination provisions debtor "is 'cherry-picking' the clauses which it rejects and enforces") (citations omitted).

Finally, as a matter of Colombian law, the breach occasioned by rejection does not terminate the contract or extinguish Avianca's rights. See Mission, 139 S.Ct. at 1664 n. 2 ("Congress … left to state law … the post-rejection relationship between the debtor and counterparty.") (citation omitted).

Under Colombian law (a) breach of the RSPA by rejection did not automatically terminate the RSPA; and (b) absent USAV terminating the RSPA, which it has not sought to do, USAV must comply with its obligations under the RSPA to remit Additional Purchase Price, and Citibank must make those disbursements in accordance with Section 2.01 of the Cash Management Agreement. See Arrubla Decl.[22]

Indeed, a contrary result puts Citibank and USAV in a better position than if the contract had not been breached by rejection because they are extinguishing Aerovías' reversionary interest in the receivables after the USAV loan is serviced. See In re Sterling Optical Corp., 371 B.R. at 692-93 ("[E]ven though the Letter Agreement was an executory contract that was

[22] The Declaration of Jaime Alberto Arrubla-Paucar dated October 15, 2020 ("**Arrubla Decl.**") is being filed simultaneously herewith.

rejected pursuant to the Rejection Stipulation, rejection merely constituted a 'breach' of the Letter Agreement giving Sanwa an unsecured prepetition claim. The Letter Agreement was not terminated. Illinois state law determines the effect of rejection."); id. at 693 ("But [non-debtor counterparty] Sanwa would not be entitled to be put in a better position than if the Letter Agreement was actually performed (i.e., it received the contracted-for amount from collections on the Franchisee Notes).").

In any event, even if it wanted to, Citibank could not now seek relief from the stay to serve a new notice of a Trigger Event because one is not presently occurring. Avianca has resumed international flights, and the closure of the airspace that impaired Avianca's capacity or ability to operate internationally has ended. See Neuhauser Decl. ¶¶ 17-18.

D. EQUITIES FAVOR GRANTING PRELIMINARY INJUNCTIVE RELIEF

Even if Avianca could not demonstrate a likelihood of success on the merits (which it clearly can), the Court may still issue immediate injunctive relief because Avianca has raised a sufficiently serious question regarding the merits to make it a fair ground for litigation, and a balancing of the equities tips decidedly in Plaintiffs' favor. See, e.g., In re Netia Holdings S.A., 278 B.R. 344, 357 (Bankr. S.D.N.Y. 2002) (holding that "even if it had not found a likelihood of success and were weighing issuance of a preliminary injunction based ruling solely on the existence of serious issues, the balance of hardships would tip sharply in the Foreign Debtors' favor," supporting issuance of a preliminary injunction).

The potential harm to Avianca's estate occasioned by Citibank's sweeping the accounts is substantial and will starve the Debtors of the cash generated by Avianca's business as it seeks to emerge from bankruptcy and the COVID-19 pandemic. Conversely, Defendants will not be harmed by adhering to the standard payment priorities in the Cash Management Agreement. Those provisions protect the Lenders by accumulating cash in the Collections Account for the

purpose of funding USAV's payment obligations to the Lenders, maintaining the Debt Service Required Amount in the Debt Service Reserve Account as an additional funding reserve, and giving priority to USAV's monthly loan payments.

Accordingly, the equities favor injunctive relief. See, e.g., See Aim Int'l Trading, LLC v. Valcucine SpA., IBI LLC, 188 F. Supp. 2d 384, 388 (S.D.N.Y. 2002) (equities favored plaintiffs when preservation of status quo would destroy their business and when defendants could not show prejudice); Kukui Gardens Corp. v. Holco Capital Grp., Inc., No. CIV 08-00049 ACK/KSC, 2009 WL 3110154, at *2 (D. Haw. Sept. 28, 2009) (equities favored plaintiffs when depleting funds would severely harm them and "Defendants will face little hardship based on the temporary nature of this order"); Nilson v. JPMorgan Chase Bank, N.A., 690 F. Supp. 2d 1231, 1258 (D. Utah 2009) (finding "no significant harm … if the Tax Refunds are held in trust pending an expedited trial on the merits").

RESERVATION OF RIGHTS

On June 23, 2020, Avianca commenced an adversary proceeding against USAV seeking a declaration that the USAV Agreements should be re-characterized as a loan. See Avianca Holdings S.A., et al. v. USAVflow Limited (In re Avianca Holdings S.A., et al.), Adv. Proc. No. 20-01189 (MG) (Bankr. S.D.N.Y.). The outcome of that dispute has no bearing on the relief requested in the Complaint. Nonetheless, Plaintiffs reserve any and all rights to seek to recover additional amounts (beyond Additional Purchase Price), including, but not limited to amounts retained by Defendants in the accounts to amortize the underlying USAV Loan, and nothing herein should be construed as an admission or waiver with respect to any such claims. Plaintiffs also reserve all potential causes of action resulting from Defendants' conduct before and after the Petition Date.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that their motion for a temporary restraining order and a preliminary injunction should be granted.

Dated: October 16, 2020
New York, New York

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