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

In re:)	Chapter 11
)	
AVIANCA HOLDINGS SA., <u>et al.</u> ,)	Case No. 20-11133 (MG)
)	
Debtors. ¹)	(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.,)	
)	
Plaintiffs.)	Adv. Proc. No. 20-01244 (MG)
)	
v.)	
)	
USAVFLOW LIMITED and CITIBANK, N.A.,)	
)	
Defendants.)	
)	

**CITIBANK, N.A.’S (A) MEMORANDUM IN OPPOSITION TO DEBTORS’ MOTION
 FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY
 INJUNCTION AND (B) JOINDER IN SUPPORT OF MEMORANDUM
 OF USAV SECURED LENDERS IN OPPOSITION TO THE TRO MOTION**

¹ The Debtors in these cases and their federal tax identification number (if applicable), are: Avianca Holdings S.A. (N/A); Aero Transporte de Carga Unión, S.A. de C.V. (N/A); Aero Inversiones 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.



Citibank, N.A. as Collateral Agent, Collateral Trustee and Administrative Agent under the USAV Agreements (in all such capacities, “Citibank”),² by and through its undersigned counsel,³ hereby submits this (a) memorandum in opposition to the *Plaintiffs’ 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 “TRO Motion”) and (b) joinder in support of the memorandum of the USAV Secured Lenders in opposition to the TRO Motion (the “USAV Secured Lenders Memorandum”), and in support thereof, states as follows:

BACKGROUND AND JOINDER

Citibank hereby incorporates the statements of fact and objections set forth in the USAV Secured Lenders Memorandum as if fully incorporated herein.

ARGUMENT

I. THE DEBTORS HAVE NOT DEMONSTRATED IRREPARABLE HARM.

Citibank will not repeat the arguments set forth in the USAV Secured Lenders Memorandum as to the absence of any irreparable harm to the Debtors from the continued exercise of Citibank’s rights under the USAV Agreements and the Credit Documents to sweep the credit card receivable collections in the Collection Account, the New York Pass-Through Account and/or the Debt Service Reserve Account (collectively, the “USAV Accounts”) – funds that constitute property of USAV that is subject to the first priority perfected security interest of Citibank for the benefit of itself and the USAV Secured Lenders.

² Unless other specified, all capitalized terms used but not defined herein shall have the respective meanings given those terms in the Plaintiffs’ TRO Motion.

³ Citibank retained Latham & Watkins LLP as its counsel in this adversary proceeding Sunday evening, October 18, 2020. Latham & Watkins is still getting up to speed, which is no mean feat given the highly complex and often arcane nature of the issues presented by the USAV Agreements, the applicability of foreign law and the interplay thereof with the Debtors’ bankruptcy cases.

Suffice it to say that the Debtors recently obtained a DIP financing facility with a \$1.2 billion new money component that the Debtors have acknowledged is sufficient to fund their cases through emergence. Moreover, not surprisingly, the DIP budget does not contemplate the ongoing receipt of any portion of the credit card receivable proceeds that belong to USAV. By comparison, based on the Debtors' recent credit card collections results – around \$2.8 million in the first week of October – the monthly run rate of the credit card receivable collections in question would project to be around \$12 million. Even under the Debtors' view of the world, the first \$4 million or so of such monthly collections, plus expenses (which have been considerable) must first be used to pay the debt service obligations to the USAV Secured Lenders, leaving at most \$8 million per month for the Debtors. It strains credulity that the Debtors' lack of access to such amount of USAV credit card collections prior to the disposition of its preliminary injunction motion somehow constitutes irreparable harm.

II. THE DEBTORS HAVE NOT DEMONSTRATED ANY LIKELIHOOD OF SUCCESS ON THE MERITS.

Notwithstanding the complexity and sheer volume of the USAV Agreements, the Debtors' Complaint and TRO Motion are fundamentally without merit for two simple reasons:

- Citibank's March Notice and its subsequent notice on the Petition Date, both of which declared the existence of a Trigger Event (the first based on a material impairment of the Debtors' ability to operate international flights, and the second based on the Debtors' bankruptcy filing), not only turned off the standard payment waterfall provisions of Sections 2.01 and 2.02 of the Cash Management Agreement (the "Standard Waterfall Provisions") before the Petition Date but also automatically activated, no later than the Petition Date, the Trigger Event waterfall payment provisions of Section 2.04 of the Cash Management Agreement (the "Trigger Event Waterfall Provision"), which essentially requires that all credit card collections be applied first to USAV's loan obligations to the USAV Secured Lenders until payment in full. In both instances, the turning off of the Standard Waterfall Provisions and the activation of the Trigger Event Waterfall Provision was automatic upon the giving of notice by Citibank as Administrative Agent to itself in one or both of its other agency capacities – a notice that excluded the Debtors. The May 15 notice

delivered by the Administrative Agent to the Debtors was purely informational, and had no bearing on Section 2.04 of the Cash Management Agreement becoming the operative payment waterfall, and hence could not have violated the automatic stay.

- Even if the Standard Waterfall Provisions somehow remained in effect (which is certainly not the case), the undisputed fact remains that all of the credit card receivables (and proceeds) covered by the RSPA are property of USAV and are subject to the first priority lien of Citibank. Pursuant to the Credit Documents among Citibank, the USAV Secured Lenders and USAV, when the Debtors filed for bankruptcy, the USAV loan obligations to the USAV Secured Lenders automatically accelerated, and Citibank was entitled to sweep, and at the direction of Required Lenders in fact has swept and continues to sweep, all credit card collections in the USAV Accounts for application to those loan obligations. Citibank's lien on those funds trumps any unsecured claim of the Debtors against USAV under the USAV Agreements, and Citibank's enforcement of its lien against property of USAV, a non-debtor, cannot possibly violate the automatic stay.

1. The Turning Off of the Standard Waterfall Provisions and the Activation of the Trigger Event Waterfall Provision.

As this Court expressly found in its September 4, 2020 *Memorandum Opinion Granting in Part and Denying in Part Debtors' Motion To Reject the USAV Agreements* [Docket No. 850] (the "Rejection Decision"), Citibank, in what the Court refers to as the March Notice, "declared that a Trigger Event had occurred."⁴ *Id.* at 9. This Court also found that pursuant to the Cash Management Agreement, "[u]pon notice of the parties of major events (including a Retention

⁴ Apparently, the Debtors take issue with this finding of the Court and contend that Citibank's declaration did not constitute notice of a Trigger Event because Citibank did not issue the March Notice at the direction of the Required Lenders and because Citibank reserved its and the Lenders' rights. First, the Required Lenders under the Loan Agreement with USAV in fact did direct Citibank in writing to issue the March Notice. *See* Exhibit referenced in footnote 19 of the USAV Secured Lenders Memorandum. The text of the March Notice made clear that Citibank was declaring the occurrence of a Trigger Event based on information provided by, and a determination made by, "the Lenders" (obviously a threshold higher than Required Lenders) and the reservation of rights paragraph noted that Citibank was acting at the direction of the Required Lenders. Moreover, while the March Notice included customary reservation of rights language, it indisputably was a formal notice that a Trigger Event had occurred. The caption of the letter – "Loan Agreement – Notice of Defaults/Reservation of Rights[;] RSPA – Notice of Trigger Events/Reservation of Rights" makes this crystal clear. Citibank's reservation of rights on behalf of all USAV Secured Lenders with respect to the broad range of remedies available on account of the referenced Events of Default and Trigger Event cannot possibly negate the fact that formal notice to all parties had been given; nor can a reservation of rights negate or modify the automatic turning off of the Standard Waterfall Provisions and/or activation of the Trigger Event Waterfall Provision.

Event or a Trigger Event) . . . , 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.” Id. at 15 (emphasis added).

Pursuant to Sections 2.01 and 2.02 of the Cash Management Agreement, if the Collateral Agent receives notice that “a Trigger Event has occurred and notice has been given . . . by the Administrative Agent (at the direction of the Required Lenders in accordance with the Purchaser Credit Agreement),” the Standard Waterfall Provisions set forth therein are automatically turned off, depriving the Debtors of any continued payment of Additional Purchase Price. Similarly, pursuant to Section 2.04 of the Cash Management Agreement, if the Collateral Agent and the Collateral Trustee receive written notice from the Administrative Agent that “a Trigger Event has occurred and notice has been given . . . by the Administrative Agent (at the direction of the Required Lenders in accordance with the Purchaser Credit Agreement),” then the Trigger Event Waterfall Provision – which requires that all funds in the USAV Accounts be disbursed to the USAV Secured Lenders until they receive full payment pursuant to Section 3.1 of the Security Trust Deed – is automatically activated and remains in place until the notice of Trigger Event has been revoked. See Rejection Decision at 25-25 (noting that the Cash Management Agreement requires a revocation of a Trigger Event notice in order for Additional Purchase Price Payments to resume). Given, as this Court found, that the March Notice declared that a Trigger Event has occurred, it necessarily follows at the very least that the Standard Waterfall Provisions were turned off, and to the extent the March Notice is deemed to have been received by the same Citibank entity in all of its agency capacities, then the Trigger Event Waterfall Provision would

automatically apply as of that date.⁵ In short, prior to their bankruptcy filing, the Debtors no longer had any contractual claim against USAV for Additional Purchase Price unless and until the Administrative Agent revokes the March Notice or the USAV Secured Lenders receive payment in full pursuant to Section 3.1 of the Security Trust Deed.

Even if Citibank had not declared the occurrence of a Trigger Event prior to the petition date, Section 2.04 of the Cash Management Agreement was automatically triggered by the Debtors' bankruptcy filing. Pursuant to clause (2) of Section 2.04, the Trigger Event Waterfall Provision is automatically triggered by the Collateral Agent and the Collateral Trustee's receipt of notice from the Administrative Agent that "the Liquidated Damages is automatically payable pursuant to Section 6.03 of the RSPA" Section 6.03 of the RSPA in turn provides for the automatic acceleration of the Liquidated Damages upon the Debtors' bankruptcy filing. On May 15, 2020, Citibank as Administrative Agent, at the direction of Required Lenders, gave the requisite notice of this separate Trigger Event to itself as Collateral Agent and Collateral Trustee (see Exhibits referenced in footnote 19 of the USAV Secured Lender Memorandum), and such notice automatically triggered the Trigger Event Waterfall Provision.⁶

Neither (a) the delivery of written directions by the Required Lenders to Citibank to turn off the Standard Waterfall Provisions or enforce the Trigger Event Waterfall Provision nor (b) the delivery of Citibank as Administrative Agent to itself in its other agency capacities can violate the automatic stay for a number of reasons. To begin with, these particular notices were not given to the Debtors and were not required to be given to Debtors in order to trigger the

⁵ Apparently, for the first couple of weeks in April 2020, a portion of the funds in the Collections Account were remitted to the Debtors. But the Debtors' receipt of this windfall certainly does not nullify the automatic applicability of the Trigger Event Waterfall Provision.

⁶ Given this Court's finding in its Rejection Decision that the Cash Management Agreement is not an executory contract subject to Section 365, even the Debtors do not argue that a bankruptcy-based Trigger Event is an unenforceable ipso facto clause.

Trigger Event Waterfall Provision. While it is true that Citibank complied with its obligation under a separate section of the Cash Management Agreement (Section 2.09(b)) by giving the Debtors notice on May 11, 2020 that a Retention Event had occurred, that notice was solely for informational purposes, and it had no legal effect on which of the various payment waterfalls in Article II of the Cash Management Agreement was then effective. To the contrary, pursuant to the express terms of Section 2.04, it was the notices (including the March Notice) by the Administrative Agent to itself in its other agency capacities that caused the turning off of the Standard Waterfall Provisions and/or the activation of the Trigger Event Waterfall Provision under both clauses (1) and (2) of Section 2.04.

Furthermore, the Debtors' interest under the various USAV Agreements is simply an unsecured claim against USAV for payment of the Additional Purchase Price – a contractual claim to receive amounts from USAV, the timing of which are calculated pursuant to the applicable payment schedule in Article II of the Cash Management Agreement. The Debtors have no interest in the credit card receivables purchased by USAV or the proceeds thereof, and there is nothing in any of the USAV Agreements that confers upon the Debtors any property interest in the credit card receivables or the collection proceeds. As a result, the exercise by the USAV Secured Lenders or Citibank of their rights under the USAV Agreements – including the sweeping of the funds in the USAV Accounts – cannot, as a matter of law, constitute enforcement action against the Debtors or their property. To be sure, the occurrence of a Trigger Event and the resulting change in the payment waterfalls may have affected the amount of the Debtors' recovery on its unsecured claims against USAV or the value of its equity interest in USAV. But, as explained at length by the USAV Secured Lender Group in their Memorandum,

the automatic stay does not preclude a secured creditor of a non-debtor from enforcing its rights against that non-debtor, regardless of any economic impact it may have on a debtor.

2. The Credit Card Collections Constitute Property of USAV,
and Citibank was Entitled to Enforce Its Lien Rights
Against Such Collections Pursuant to the Credit Documents.

Finally, the Debtors' Complaint and TRO Motion suffer from an even more fundamental flaw. Even if (which is not the case) the Trigger Event Waterfall Provision has somehow not been activated due to the occurrence of a Trigger Event, Citibank is still entitled to cause all funds in the USAV Accounts to be applied on an ongoing basis to the loan obligations owed to the USAV Secured Lenders pursuant to the express terms of the Credit Documents. As security for these loan obligations, pursuant to those Credit Documents, Citibank was granted a first priority security interest in all or substantially all of the assets of USAV, including all three of the USAV Accounts and the funds contained therein and all credit card receivables purchased by USAV. Upon the Debtors' bankruptcy filing, those loan obligations were automatically accelerated, and pursuant to the Credit Agreement, all amounts deposited in the USAV Accounts were required to be applied to the loan obligations until paid in full. In addition, as noted above, in a direction letter dated May 15, 2020, the Required Lenders directed the Administrative Agent to instruct itself as Collateral Agent and Collateral Trustee to exercise their rights under the Credit Documents and cause all funds then or subsequently in the USAV Accounts to be applied to the loan obligations in accordance with Section 3.1 of the Security Trust Deed, and in a separate letter that same day, Citibank, as Administrative Agent, so instructed itself as Collateral Agent and Collateral Trustee, and Citibank in those latter agency capacities fully complied with those instructions as required under the security documents.

Importantly, as this Court expressly held in its Rejection Decision, all credit card receivable proceeds that are deposited at any time in the USAV Accounts constitute property of

USAV, and pursuant to the Credit Documents, are subject to Citibank's first priority lien. As a result, the daily sweep of funds in the USAV Accounts at most constitutes entirely legitimate lien enforcement action by a secured creditor against property of USAV, a non-debtor, pursuant to Credit Documents to which the Debtors are not party, and as such, cannot be mischaracterized as action against property of the Debtors in violation of the automatic stay. See Paragraphs 22 through 29 of the USAV Secured Lenders Memorandum.

In short, both the Trigger Event Waterfall Provision under the Cash Management Agreement and the secured creditor rights of Citibank and the USAV Secured Lenders under the Credit Documents require that all credit card receivable proceeds continue to be remitted to Citibank for the benefit of itself and the USAV Secured Lenders pursuant to Section 3.1 of the Security Trust Deed until all loan obligations are paid in full. This outcome is dictated by the letter and spirit of the USAV Agreements and the Credit Documents and does not run afoul the automatic stay.

III. A TRO WOULD HARM THE PUBLIC INTEREST.

The TRO Motion, if granted, would gravely affect the debt markets. The structured sale/financing transaction at issue here is no different than any other asset-backed, structured transaction where a company seeks to monetize certain assets (or an ongoing stream of assets) by selling them to a bankruptcy remote vehicle ("SPV"), which in turn funds the purchase price by raising its own financing secured by those assets. This is a relatively inexpensive way for a company to raise liquidity because the transaction is structured to insulate the SPV lenders from any credit risk of the transferor. The SPV lenders rely on the fact that their collateral is property of the SPV and that they can enforce against their collateral regardless of the financial condition of the transferor. Trillions of dollars in liquidity are raised through these types of transaction structures. Allowing an opportunistic debtor to invoke the automatic stay to prevent SPV lenders

from enforcing their rights against collateral owned by a non-Debtor SPV would eviscerate this type of financing and greatly harm the credit markets.

CONCLUSION

For the foregoing reasons, Citibank respectfully submits that the TRO Motion should be denied in its entirety.

Dated: October 20, 2020

LATHAM & WATKINS LLP

By: /s/ Richard A. Levy

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CERTIFICATE OF SERVICE

I, Richard A. Levy, certify that on October 20, 2020, I caused true and correct copies of *Citibank, N.A.'s (A) Memorandum in Opposition to Debtors' Motion for a Temporary Restraining Order and Preliminary Injunction and (B) Joinder in Support of Memorandum of USAV Secured Lenders in Opposition to the TRO Motion* to be served by the Court's CM/ECF electronic filing system upon all counsel of record who have consented to electronic notification in this matter.

Dated: October 20, 2020

LATHAM & WATKINS LLP

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