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

In re:	Chapter 11
AVIANCA HOLDINGS S.A., *et al.*,[1]	Case No. 20-11133 (MG)
Debtors.	(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,	
v.	Adv. Proc. No. 20-01244 (MG)
USAVFLOW LIMITED and CITIBANK, N.A.,	
Defendants.	

OPPOSITION OF THE USAV SECURED LENDER GROUP TO 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

[1] The Debtors in these chapter 11 cases, and their federal tax identification number (if applicable), are: Avianca Holdings S.A.; Aero Transporte de Carga Unión, S.A. de C.V.; Aeroinversiones de Honduras, S.A.; Aerovías del Continente Americano S.A. Avianca; Airlease Holdings One Ltd.; America Central (Canada) Corp. (00-1071563); America Central Corp. (65-0444665); AV International Holdco S.A.; AV International Holdings S.A.; AV International Investments S.A.; AV International Ventures S.A.; AV Investments One Colombia S.A.S.; AV Investments Two Colombia S.A.S.; AV Taca International Holdco S.A.; Avianca Costa Rica S.A.; Avianca Leasing, LLC (47-2628716); Avianca, Inc. (13-1868573); Avianca-Ecuador S.A.; Aviaservicios, S.A.; Aviateca, S.A.; Avifreight Holding Mexico, S.A.P.I. de C.V.; C.R. Int'l Enterprises, Inc. (59-2240957); Grupo Taca Holdings Limited; International Trade Marks Agency Inc.; Inversiones del Caribe, S.A.; Isleña de Inversiones, S.A. de C.V.; Latin Airways Corp.; Latin Logistics, LLC (41-2187926); Nicaraguense de Aviación, Sociedad Anónima (Nica, S.A.); Regional Express Américas S.A.S.; Ronair N.V.; Servicio Terrestre, Aereo y Rampa S.A.; Servicios Aeroportuarios Integrados SAI S.A.S. (92-4006439); Taca de Honduras, S.A. de C.V.; Taca de México, S.A.; Taca International Airlines S.A.; Taca S.A.; Tampa Cargo S.A.S.; Technical and Training Services, S.A. de C.V.

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STATUTES AND RULES

The group of secured lenders (the "USAV Secured Lender Group" or the "Lenders")[2] hereby submits this opposition (the "Opposition")[3] to the 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 ("TRO") and preliminary injunction [ECF 2][4] (the "Motion"), and the memorandum of law submitted in support thereof [ECF 3] (the "Memorandum"), filed by the Plaintiffs[5] (together with their debtor affiliates, "Avianca") with respect to Defendants USAVflow Limited ("USAV") and Citibank, N.A., as Collateral Agent, Collateral Trustee, and Administrative Agent under the USAV Agreements (in all such capacities, "Citibank").[6]

PRELIMINARY STATEMENT[7]

1. Over the past three months Avianca has waged a multi-pronged litigation attack against USAV and the USAV Secured Lender Group, wasting the precious estate resources that they claim are in short supply, seeking to unwind a transaction through which it voluntarily sold contract rights and related proceeds to an unaffiliated non-debtor entity in exchange for $150 million plus the potential for additional amounts.

2. Avianca has four options: (1) allow the USAV Secured Lender Group's loans to USAV to be paid off from the proceeds of the Lenders' off-balance sheet collateral, (2) pay off such loans through their $1.5 billion in available capital, and repurchasing and repatriating the off-

[2] Avianca does not oppose the Lenders' standing to be heard at the TRO hearing and it appears will stipulate to intervention by the USAV Secured Lender Group in this adversary. *See Letter from J. Tecce* n.2 [ECF 8].
[3] In support of this Opposition, the USAV Secured Lender Group relies on the Declaration of Joshua D. Weedman (the "Weedman Declaration") filed contemporaneously herewith. True and correct copies of the documents referenced herein are attached to the Weedman Declaration unless otherwise indicated.
[4] References to "ECF __" are to docket numbers in Adv. Proc. Case No. 20-01244 (MG). References to "Bk.ECF __" are to docket entries from the main Chapter 11 Case No. 20-11133 (MG).
[5] Capitalized terms not defined herein have the meanings provided in the Memorandum, the USAV Agreements, or the Lenders' objection [Bk.ECF 617], supplemental brief [Bk.ECF 716], or sur-reply [Bk.ECF 718] filed in opposition to the Rejection Motion.
[6] Pursuant to Fed. R. Civ. P. 44.1, as made applicable by Fed. R. Bankr. P. 9017, the USAV Secured Lender Group hereby gives notice that it intends to raise issues of Colombian law and English law and reserves all rights to submit foreign law declarations.
[7] The factual statements set forth in the Lenders' objection, supplemental brief, and sur-reply filed in opposition to the Rejection Motion are incorporated herein by this reference.

balance sheet cash flows (and using these cash flows to repay the DIP draw)[8] (3) agree to a structured de-acceleration of the loans to USAV and a mutually agreeable apportionment of such proceeds, or (4) pursue scorched-earth litigation. The Complaint and Motion mark the newest chapter in Avianca's scorched-earth strategy.

3. Avianca seeks a *mandatory injunction* for the return of over $34 million of the Lenders' property to USAV notwithstanding that Avianca's claim is that it is entitled *only* to "Additional Purchase Price." Even if the Court accepted Avianca's position that the Standard Waterfall Provisions (as defined below) under the CMA still apply (they do not), Avianca's evidence shows that the first month that Additional Purchase Price could have conceivably been due was September. But Avianca's calculations ignore that ***costs and expenses*** are also paid through the waterfall provisions ahead of Avianca. When costs and expenses are taken into account, no Additional Purchase Price could have been due in September. *See infra* ¶¶ 43-44. And Avianca's evidence shows that no Additional Purchase Price is yet due in October. Thus, under Avianca's own evidence, ***not one dime of Additional Purchase Price could have been due and payable to Avianca since the Petition Date***. Accordingly, there (i) could not have been a stay violation, and (ii) is no basis for the request to place money in the accounts.

4. Avianca's assault on the USAV transaction is baseless. Avianca has failed to establish the four elements required to obtain a temporary restraining order ("TRO"), and the Motion certainly cannot withstand the *heightened scrutiny* applicable to the mandatory injunctive relief that it seeks on an emergency basis.

5. *First,* Avianca has not established a substantial likelihood of success on the merits. USAV has pledged its assets to secure its obligations to the Lenders under the Loan Agreement.

[8] Such repayment is permitted by the DIP Credit Agreement, subject to this Court's approval. DIP Credit Agreement §7.12(a).

USAV had used the proceeds of these loans to purchase the credit card receivables from Avianca and move the asset off-balance sheet pursuant to a common securitization-like structure. The non-Debtor borrower under that Loan Agreement is in default, and the entire balance is due and payable, and Citibank is presently enforcing the Lenders' security interests in the non-debtor cash collateral. Avianca's theory is predicated on two false premises: *one*, that Avianca has a present claim for "Additional Purchase Price" against USAV; and *two*, that the existence of such alleged claim somehow means that the enforcement of the USAV Secured Lender Group's senior security interests in the property of USAV by their Collateral Trustee constitutes a stay violation. Both are wrong. The law is clear that creditors of a non-debtor are not enjoined from exercising their rights against their non-debtor borrower.

6. Further, the Debtors have obtained an order from this Court rejecting the sale agreement, or "RSPA," under which the substantive right to any purported claim for Additional Purchase Price would arise. Avianca cannot retain the benefits of that contract while relieving itself of its burdens, in violation of another fundamental principle that a chapter 11 debtor rejects a contract as a whole.

7. *Second,* Avianca has not established any harm, much less the requisite irreparable harm. Avianca's witness advances conclusory statements with no underlying support for the proposition that running routes generating proceeds that flow into USAV's accounts is commercially unviable and would drain it of liquidity. This directly contradicts the facts, including the Debtors' representations to this Court two weeks ago when their financial advisor testified under oath (and its counsel represented) that their $1.2 billion new money DIP facility would provide sufficient liquidity to fund their Chapter 11 cases, which did not assume any Additional Purchase Price. Moreover, a claim for money against the Defendants would repair any allowed

damages (currently nothing) that may arise in the short period before the Complaint can be heard, at which time the Court will benefit from more complete briefing and a more complete record.

8. The credibility of Avianca's claims that it will suffer irreparable harm without urgent injunctive relief is further undermined by its five-month delay in bringing the Complaint. Avianca did not bring this action at the outset of the cases, when the Debtors lacked the certainty of operational funding that has now been afforded to them by their recently approved $1.2 billion new money DIP facility.

9. *Third,* the balance of equities decidedly favors the Defendants. The extraordinary mandatory injunction Avianca seeks will cause clear and immediate harm to USAV and the Lenders. Before the merits have been fully briefed or considered, Avianca seeks to divest the Lenders of at least $34 million of their property, and then, Avianca intends to starve the Lenders of additional property to which they are entitled, pursuant to the valid enforcement of their liens against assets that this Court has already determined are owned by USAV—not the Debtors. Because Avianca could not be owed any Additional Purchase Price even under its own position, Avianca is not seeking to be compensated for any loss, but rather, Avianca is seeking a windfall.

10. *Fourth*, a TRO would harm the public interest by undermining well-established principles of law relied upon by secured creditors who reasonably expect that they can enforce their rights against their borrowers who are not in Chapter 11. Without even briefing these serious public policy issues, Avianca asks this Court to enter a market-moving decision on an emergency basis. Leaving aside the merits of the issues raised in the Complaint, ***the entry of a TRO alone which enjoins secured creditors from exercising their enforcement rights against a non-debtor bankruptcy-remote SPV and the collateral owned by that non-debtor*** would send tremors though the multi-trillion dollar structured finance market, whose investor participants rely upon the

integrity of off-balance sheet structures like the USAV transaction to facilitate investment at a lower cost to borrowers whose creditworthiness would otherwise require more costly financing. The Debtors should not be able to set aside the structure so widely used across the markets to take monies that do not belong to them. The Motion should be denied.

OPPOSITION

I. Applicable Standards

11. Preliminary injunctive relief is an "extraordinary" and "drastic" remedy that should only be granted sparingly. *Moore v. Consol. Edison Co. of N.Y., Inc.*, 124 F. App'x 39, 40 (2d Cir. 2005) (citations omitted); *see Medicrea USA, Inc. v. K2M Spine, Inc*., 2018 U.S. Dist. LEXIS 110286, at *11 (S.D.N.Y. Feb. 7, 2018) ("A TRO 'is one of the most drastic tools in the arsenal of judicial remedies.'") (citations omitted); *Staff Mgmt. Sols., LLC v. Feltman (In re Corp. Res. Servs.)*, 2020 Bankr. LEXIS 1023, at *18 (Bankr. S.D.N.Y. Apr. 15, 2020) ("Because the issuance of a preliminary injunction is considered an extraordinary remedy, the movant bears a heavy burden to show that it is entitled to an injunction.") (citations omitted). The standards for granting a TRO and a preliminary injunction are the same. *Local 1814, Int'l Longshoremen's Ass'n, v. New York Shipping Ass'n, Inc*., 965 F.2d 1224, 1228 (2d Cir. 1992).

12. A party seeking preliminary injunctive relief must show either that "he is likely to succeed on the merits; that he is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in his favor; and that an injunction is in the public interest," or alternatively prove "irreparable harm and either a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *See In re MF Glob. Holdings Ltd.*, 561 B.R. 608, 624 (Bankr. S.D.N.Y. 2016) (citing *ACLU v. Clapper*,

785 F.3d 787, 825 (2d Cir. 2015)); *see also In re OMC, Inc.*, 2010 Bankr. LEXIS 3600, at *6 (Bankr. S.D.N.Y. Oct. 13, 2010) (same) (citation omitted).

13. The moving party must introduce evidence to support its assertions on each element. *BigStar Entm't, Inc. v. Next Big Star, Inc.*, 105 F. Supp.2d 185, 191 (S.D.N.Y. 2000). If the plaintiff fails to meet its burden to establish every element, injunctive relief must be denied. *See Lucky Brand Dungarees, Inc. v. Ally Apparel Res. LLC,* 206 F. App'x 10, 11-12 (2d Cir. 2006); *Goldner v. Edwards*, 2020 U.S. Dist. LEXIS 61063, at *4 (S.D.N.Y. Apr. 6, 2020).

14. Where injunctive relief would disrupt the *status quo* and require affirmative remedial action by the defendant, the movant is held to a heightened standard of scrutiny. *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018); *Int'l Home Care Servs. of N.Y., LLC v. People's United Bank, Nat'l Ass'n*, 2020 U.S. Dist. LEXIS 176084, at *8 (E.D.N.Y. Sep. 24, 2020). Moreover, "[p]reliminary injunctive relief is improper where it would give the plaintiff substantially all the ultimate relief it seeks" here. *Powell v. Fannie Mae*, 2017 U.S. Dist. LEXIS 15720, at *6 (S.D.N.Y. Feb. 2, 2017); *see also Triebwasser & Katz v. American Tel. & Tel. Co.,* 535 F.2d 1356, 1360 (2d Cir. 1976). Each of the factors for preliminary injunctive relief weighs against granting the Motion. As set forth below, Avianca's premature demand for such extraordinary measures should be denied.

II. Avianca Has Not Proved A Likelihood Of Success On The Merits

15. Section 362(a) of the Bankruptcy Code prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). "Property of the estate includes 'all legal or equitable interests of the debtor in property as of the commencement of the case.'" *Sterling Vision, Inc. v. Sterling Optical Corp. (In re Sterling Optical Corp.)*, 371 B.R. 680, 691 (Bankr. S.D.N.Y. 2007) (quoting 11 U.S.C. § 541(a)(1)); *see Mission Prod. Holdings v. Tempnology, LLC*, 139 S. Ct. 1652, 1663

(2019) (stating that Section 541(a)(1) defines "the estate to include the 'interests *of the debtor* in property'" (emphasis added by the Court) (quoting 11 U.S.C. § 541(a)(1))). Here, the subject property, the Lenders' cash collateral (the "Cash Collateral"), is not (and never was) property of the estate, and the Lenders' exercise of their independent enforcement rights against a non-debtor and non-estate property did not and, does not, violate the automatic stay.

A. The Automatic Stay Does Not Prevent Secured Creditors From Exercising Independent Enforcement Rights Against A Non-Debtor And The Collateral Owned By Non-Debtor Secured By First-Priority Liens

16. In December 2017, Aerovías sold to USAV "the Contract Rights to Specified Sales processed by AMEX and Credomatic." *In re Avianca Holdings S.A.*, 2020 Bankr. LEXIS 2351, at *52 (Bankr. S.D.N.Y. Sept. 4, 2020); *see also id.* at *51 (USAV has the "right to receive payment of any sales processed by AMEX under the AMEX Notice and Consent" and "Credomatic under the Credomatic Notice and Credomatic Consent and Agreement"). USAV borrowed the amount of the purchase price from the USAV Secured Lender Group and granted security interests in all of its assets to the Lenders to secure USAV's obligations under the Loan Agreement pursuant to the Security Documents. These pledged assets include the Contract Rights, Collections, and USAV's bank accounts into which the Collections flow (the "Collateral Accounts" and, collectively with the Contract Rights, Collections, and Cash Collateral, the "Collateral").[9]

17. Avianca completely disregards the loans and security, but under the Loan Agreement, an automatic event of default occurs upon the occurrence of an insolvency event in respect of Aerovías (which is not an Obligor) under the Loan Agreement. Weedman Decl., Ex. A, Loan Agreement §6.1.12. Upon such event of default, the secured obligations under the Loan

[9] The Collateral Accounts are under the control of Citibank for the benefit of the Lenders. *See In re Avianca Holdings S.A.*, 2020 Bankr. LEXIS 2351, at n.6; Mem. at n.8. The New York Pass-Through Account is under the control of the Collateral Agent and the Collections Account and the Debt Service Reserve Account are under the control of the Collateral Trustee. The Card Processors deliver all Collections directly to USAV's New York Pass-Through Account, which are then swept daily to USAV's Collections Account located in London. *See* Weedman Decl. Ex. A, Loan Agreement § 2.3; Mem. at n.8.

Agreement automatically become due and payable without any notice or demand. *Id.* §6.1(x). Thus, upon Aerovías' chapter 11 filing, non-debtor USAV's obligations to the Lenders became automatically due and payable. An event of default under a loan agreement with a non-debtor borrower that occurs as a result of another entity's bankruptcy filing is an enforceable against that non-debtor. *In re Lehman Bros. Holdings*, 553 B.R. 476, 499 (Bankr. S.D.N.Y. 2016).

18. The event of default constitutes an "Enforcement Event" as defined in the Security Agreement between USAV, as Chargor, and Citibank, N.A. London Branch, as Collateral Trustee and Citibank N.A., as Account Bank (the "English Security Agreement") under which USAV granted security to Citibank as Collateral Trustee over the Collateral Accounts and Debt Service Reserve Account (the "English Collateral Accounts"), which includes rights to the Cash Collateral. Weedman Decl. Ex. B, English Security Agreement § 1.1 (definition of Enforcement Event including an automatic acceleration of the Loans pursuant to Section 6.1(x) of the Loan Agreement, which includes a bankruptcy event of Aerovías, and a Trigger Event as defined in the CMA); Weedman Decl. Ex. C, CMA § 1.01 (definition of Trigger Event cross referencing RSPA); Weedman Decl. Ex. E, RSPA § 6.01(h) (Insolvency Event in respect of Aerovías a Trigger Event). The Collateral Trustee's lien over the English Collateral Accounts and the Cash Collateral became enforceable upon that Enforcement Event, which entitled Citibank "without notice to apply, transfer or set-off any or all of the credit balance from time to time on any Blocked Accounts [i.e. the English Collateral Accounts] in or towards the payment or other satisfaction of all or part of the Secured Obligations in accordance with the Security Trust Deed" upon which event Citibank began enforcing and applying funds in accordance with the English Security Documents. Weedman Decl. Ex. B, English Security Agreement §§7.02, 8.1-8.2; *id.* § 7.2 (requiring application of monies on deposit in the English Collateral Accounts to be applied in accordance

with the Security Trust Deed); Weedman Decl. Ex. D, Security Trust Deed § 3.1 (requiring monies on deposit from time to time in the English Collateral Accounts to be applied to the Secured Obligations (including the Loans) until such loans and other secured obligations are satisfied).[10]

19. Avianca claims that it has interests "*in any Collections* in excess of amounts needed to make amortization and interest payments on the underlying loan, i.e., Additional Purchase Price," as well as "*the Collections and Debt Service Reserve Accounts*," which, ***even if reversionary***—constitute property of the bankruptcy estate." Mem. at 2, 17-18. Avianca is wrong. The English Collateral Accounts and the Cash Collateral are owned by USAV—not the Debtors—and that Cash Collateral is subject to the Lenders' first-priority liens granted by the non-debtor USAV to secure USAV's obligations to them under the Loan Agreement. The Cash Collateral is not property of the estate and the Lenders' enforcement against the non-debtor USAV and its property does not violate the automatic stay. Indeed, after repayment of all the secured obligations owing to the finance parties, pursuant to the English Security Agreements, any additional sums received must be paid solely to USAV ("fourthly, the balance, if any, in payment or distribution to the Company," not the Debtors). Weedman Decl. Ex. D, Security Trust Deed § 3.1(d).

20. Moreover, even if Avianca had a claim for Additional Purchase Price or otherwise (which as explained below, they do not), all Avianca would hold against USAV would be a claim

[10] The right to enforce against the English Collateral Accounts and the Cash Collateral is not subject to or in any way inhibited by the CMA. *See* Weedman Decl. Ex.A, Loan Agreement § 6.01 ("*without limiting the rights of the Agents, the Collateral Trustee and the Lenders under the Credit Documents* and applicable Law, all amounts deposited in the New York Pass-Through Account, the Collections Account and the Debt Service Reserve Account shall be applied to repay such amounts in accordance with the Cash Management Agreement and the Security Documents) (emphasis added); Weedman Decl. Ex. B, English Security Agreement §7.3 ("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 "the Account Bank shall hold all sums standing to the credit of the Blocked Accounts to the order of the Collateral Trustee . . . ."); Security Trust Deed (no substantive reference to the CMA at all). In fact, the Collateral Trustee is not party to the CMA at all and therefore not subject to its terms.

for payment. *See* Weedman Decl., Ex. E, RSPA §§2.05, 3.01(e).[11] Avianca's claim *would not be is an interest in the property of non-debtor USAV*, but rather just a claim against USAV, and the claim would be unsecured, and junior in all respects to the presently accelerated and enforceable secured claims of the Lenders against USAV. Again, Avianca has utterly ignored the loan documents and the Lenders' rights thereunder.

21. This Court's recent decision in *In re Robinson*, 2019 Bankr. LEXIS 103 (Bankr. S.D.N.Y. Jan. 11, 2019) is directly on point. That case involved a creditor of a debtor that had guaranteed secured loans to three non-debtor borrowers (dormant taxicab companies) that were, in turn, owned by the debtor. *Id.* at *1-3. The "core collateral" for the creditor's loans consisted of "three taxi medallions, … separately owned by each … [non-debtor] Companies." *Id.* at *2. The loans made to the non-debtors were in default. *Id.* at *3. This Court held that "[t]he automatic stay *does not apply to the Collateral* because the Companies are not debtors and the Companies, rather than Debtor, own the Collateral." *Id.* at *3-4 (emphasis added) (citing *Boise Cascade Corp. v. Wheeler*, 419 F. Supp. 98, 101-02 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 554 (2d Cir. 1977) ("A corporation's property rights are entirely distinct from those of its shareholders and … even complete ownership of capital stock does not operate to transfer the title to corporate property.")).

22. Here too, the automatic stay does not apply to the Collateral Accounts or the Cash Collateral because USAV is not a debtor and USAV, "rather than Debtor[s], own[s] the Collateral." *Robinson*, 2019 Bankr. LEXIS 103, at *4. As in *Robinson*, certain Debtors (but not Aerovías) guaranteed secured loans made by the Lenders to non-debtor USAV, which owns and

[11] Weedman Decl., Ex. E, RSPA §§2.05 ("[T]he Seller understands, acknowledges, and agrees that: (a) its remedies in the case of a failure by the Purchaser to make one or more payments of Additional Purchase Price hereunder shall be limited to the r*ight to make a claim against the Purchaser for payment of any Additional Purchase Price payments that are past due and unpaid*, and (b) the *Seller shall not be entitled to and shall not attempt to, under any circumstances, reclaim any right, title, or interest in, to or under any of the Contract Rights or the Receivables*"), §3.01(e) ("[T]he Seller hereby irrevocably consent [sic] and agrees that its *sole remedy* [for a breach of the obligation of USAV to pay Additional Purchase Price] shall be a *claim for monetary damages* hereunder")

granted the Lenders security interests in, the Collateral Accounts and the Cash Collateral. USAV is in default under the Loan Agreement, the full outstanding balance under the Loan Agreement is due and payable, and the Lenders are enforcing against their non-debtor borrower, USAV.

23. Nor do the Debtors have any "reversionary interest" in the Collateral, as they claim. There is no mechanism in the RSPA, the CMA, or any of the other USAV Agreements that provide for the Contract Rights, the Collections, or any of USAV's Collateral Accounts to revert back to the Debtors after the loans have been repaid. Avianca has not even attempted to identify any such right. Further, unlike in *Robinson*, USAV is an "orphaned" special purpose vehicle so it is not even a wholly-owned subsidiary of the Debtors. *See Robinson*, 2019 Bankr. LEXIS 103, at *4 (noting that courts in the Second Circuit have held that a stay in a shareholder's case does not apply to a debtor's wholly-owned non-debtor corporation) (citations omitted). Instead, the Debtors have a purchase option *for USAV's shares* that will become exercisable (at a nominal price) only *after* the Lenders' loans have been repaid in full. *See* Weedman Decl. Ex. F, Option Agreement §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…."). An option for purchasing USAV is not a "reversionary interest" in USAV's property, and it does not create a reversionary interest in the Collateral Accounts and Cash Collateral.[12] Hence, USAV and the Collateral are not property of the estate. *See also* Weedman Decl. Ex. E, RSPA §§2.06 (Seller acknowledged and agreed that the Contract Rights and Collections will "*under no circumstances be considered property of the Seller*" (emphasis added)).

[12] The Debtors' rights under the Option Agreement are estate property, but those rights are not presently enforceable, and they are contingent upon the satisfaction of the loans. The fact that the Debtors have an option for USAV's shares after the loans are repaid does not transform USAV's assets into property of the estate. Further, the Lenders have not located any case extending the automatic stay to an unaffiliated non-debtor based on a debtor's contingent future right to buy the shares of that non-debtor.

24. In another decision, this Court found that the automatic stay did not prevent nonjudicial enforcement by a homeowners' association on its senior lien on property in which the debtors held a more junior lien. *Invest Vegas, LLC v. 21st Mortg. Corp. (In re Residential Capital, LLC)*, 556 B.R. 555 (Bankr. S.D.N.Y. 2016). This Court noted that the definition of property of the estate, although broad, "does not include the property of others in which the debtor only has a security interest." *Id.* at 560 (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 n.8 (1983)). In addition, this Court cited with approval a district court case from the Fourth Circuit which held that "the debtor's junior lien interest did not convert the underlying secured property owned by a non-debtor into property of the estate, subject to the provisions of the automatic stay." *Id.* at 559 (citing *In re March*, 140 B.R. 387 (E.D. Va. 1992), *aff'd*, 988 F.2d 498 (4th Cir. 1993)).

25. The Court then turned to what it considered to be the central question: "whether the HOA Lien Sale, in rendering the Debtor's property—a more junior lien on the Subject Property—valueless, violated the automatic stay." *Id.* at 561. In holding that the senior lienholder's enforcement did not violate the automatic stay, this Court stated:

> [T]he Subject Property was never part of the Debtors' bankruptcy estates. In fact, only the Real Property Instruments [evidencing the Debtors' junior lien] were part of the Debtors' bankruptcy estates and therefore subject to the protections afforded by the automatic stay. Under *Whiting Pools*, because the Subject Property itself was ***not*** property of the Debtors' bankruptcy estates, ***the HOA Lien Sale***—despite effectively extinguishing the value of the Real Estate Instruments that were property of the Debtors' estates—***did not violate the automatic stay***. The Defendant's contention that, because the Real Estate Instruments were part of the Debtors' estates, the automatic stay protected the value of the Real Estate Instruments is unavailing. The Court declines to adopt the rule as advanced by the Defendant that the protections of the automatic stay extend to protect the *value* of the property of a debtor's estate.

Id. (emphasis added and in original).

26. This Court's decision in *Invest Vegas* makes clear that *even if* the Debtors held a junior lien in the Collateral (it does not), that security interest would not make the Collateral estate property, and that the automatic stay categorically does not prevent the Lenders from exercising their presently enforceable, first-priority security interests under the loan documents which the Debtors ignore. Thus, even if the Debtors had an existing right to Additional Purchase Price under the RSPA (and they do not), the fact that the Collateral Trustee's enforcement against USAV and its property under the loan documents might have rendered the Debtors' unsecured claim for Additional Purchase Price "valueless" did not and does not violate the automatic stay.[13] (Nor has any "economic interest" of the Debtors been rendered valueless because the Debtors will receive all proceeds when they exercise their option to buy USAV after the loans are repaid.)

27. Avianca failed to address this Court's decision in *Invest Vegas*, and instead cites to authority which is entirely distinguishable. For example, Avianca's reliance on this Court's decision in *Sterling* to argue that the estate has an interest in the Collateral itself is clearly misplaced. In *Sterling*, the this Court's conclusion that "[t]he 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" was based on the unique facts present in that case. 371 B.R. at 691. *First*, the sale and transfer in *Sterling* was made directly to a lender, *see id.* at 683, instead of to a non-debtor SPV, as here. *Second*, the proceeds were deposited into a special "reserve"

[13] The weight of authority agrees with this Court's view as expressed in *Robinson* and *Invest Vegas*. *See, e.g.*, *In re Everchanged*, 230 B.R. 891, 893-94 (Bankr. S.D. Ga. 1999) (holding that where the debtor was not the owner of record but merely held an option to purchase property and was liable on the mortgage, the debtor's reliance on the automatic stay was misplaced); *In re Geris*, 973 F.2d 318, 319-21 (4th Cir. 1992) (holding that the automatic stay did not prevent foreclosure on non-debtor property where the debtor had a subordinate deed of trust and was obligated to the senior lien holder on the senior note); *In re Le Peck Constr. Corp.*, 14 B.R. 195, 196 (Bankr. E.D.N.Y. 1981) (holding automatic stay was not implicated where senior lien holder sought to foreclose on property where debtor held a mechanics' lien); *In re Holiday Lodge*, 300 F.2d 516, 519 (7th Cir. 1962) (reversing trial court and holding that the "District Court had no jurisdiction to restrain state court proceedings to enforce a lien on property that did not belong to the debtor"); *see also Kresiler v. Goldberg*, 478 F.3d 209, 214 (4th Cir. 2007) (holding that ejectment proceedings against debtor's subsidiary was not an action in violation of the automatic stay). None of the cases cited by Avianca supports a conclusion that contractual rights of a debtor against a third-party purchaser can transform that purchaser's property into property of the estate.

account for *the debtor's* benefit in which the creditor only held a lien and security interest in granted by *the debtor*. *See id.* at 691. Here, the proceeds and accounts are owned by a *non-debtor SPV* and are subject to liens and security interest granted by *the non-debtor SPV*. *Third*, the Court found that the terms of the relevant agreement provided "that the Reserve *would belong to the Debtor*, and that *upon satisfaction of all of the Debtor's obligations* to Sanwa, *the entire Reserve*, plus interest, *would be released to the Debtor*." *Id.* at 690 (emphasis added). Here, the *proceeds* do not belong to the Debtors and they are never released to the Debtors. Rather, the mechanism for the Debtors to receive the value of the Contract Rights and Collections is through exercising its option right to purchase USAV's shares following payment in full of USAV's loan obligations to the Lenders, allowing the Debtors to own the company that owns the proceeds.

28. As importantly, however, *Sterling* involved a lender that had ***already been repaid in full*** and ***was seeking to retain additional value in excess of the amounts loaned***. 371 B.R. at 683 (stating that the proper characterization of the transaction was "hotly contested because the payments received by Sanwa under the franchisee notes ultimately exceeded the amount loaned (if it was a secured loan), or the purchase price Sanwa paid to Optical (if it was a sale)"). The Court acknowledged that the debtor had no *contractual* right to the surplus because the relevant agreement had previously been rejected as an executory contract. *See id.* at 694 ("[T]he Letter Agreement was an executory contract that was rejected, thereby preventing the Debtor from enforcing its *contractual* right to recover the surplus …." (emphasis added)). Nonetheless, the Court found that the debtor retained "equitable (*non-contract*) rights" to recover the surplus proceeds that survived rejection because "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 other words, *Sanwa is not entitled to the windfall recovery it now seeks to retain*." 692 n.13, 693 (emphasis added).

29. The Lenders have not been made whole. The Lenders do not seek any windfall, but only to be repaid. It is the Debtors that seek a windfall in taking the proceeds needed for, and dedicated to, repaying the $150 million paid to the Debtors and funded by the Lenders pursuant to a generally understood and accepted off-balance sheet structured transaction. The facts here do not give rise to any equitable claim for restitution and none of USAV, Citibank, or the Lenders have interfered with the Debtors' equitable rights. After USAV's loan obligations to the Lenders have been paid in full, the Debtors will be entitled to exercise its option to buy USAV's shares. The Lenders make no claim to value in excess of their loans.[14]

B. Additional Purchase Price Is Not (And Will Never Be) Payable

1. The Plan Language Of The RSPA And The CMA Show That No Additional Purchase Price Is Payable

30. Even if Citibank had breached a provision of the CMA, that breach would not invalidate the actions of the Lenders and the Collateral Trustee (which are not party to or bound by the CMA) under their Security Documents entered into with USAV (not Avianca). But

[14] The other cases Avianca cites only undermine its novel theory that a claim for money somehow would create a "reversionary interest" in the Collateral or, alternatively assume that the USAV transaction is a financing rather than a sale. *See, e.g.*, *In re HMKR, Inc.*, 2003 WL 21696521, at *5 (Bankr. S.D.N.Y. July 18, 2003) ("[The debtor's] estate under section 541 of the Bankruptcy Code included [the debtor's] '*unsecured contractual right* running to [FFIC] … to have the issuer of the [L/C] receive for the account of [the debtor] … the [Excess L/C Proceeds]" but "*the L/C proceeds themselves* would not be property of [the debtor's] chapter 11 estate until the contingency … occurred" (emphasis added)) (citing *In re Palm Beach Heights Dev. & Sales Corp.*, 52 B.R. 181, 183 (Bankr. S.D. Fla. 1985) ("Any claim, contingency, or chose in action against the trust fund is the property of the estate, but the fund itself is not … until such time as the debtor establishes that all prior claims in the fund have been paid and that a residuum remains to which it is entitled.")); *In re Bagen*, 186 B.R. 824, 829 (Bankr. S.D.N.Y. 1995) ("Accordingly, [the debtors' contingent] fees which *may be paid* postpetition, but were nevertheless *earned and rooted in his prepetition past*, should be includable in his bankruptcy estate." (emphasis added)); *In re Constable Plaza Assocs., L.P.*, 125 B.R. 98, 102-03 (Bankr. S.D.N.Y. 1991) (stating the obvious proposition that a debtor retained a residual interest in the rents assigned to a creditor as "additional security" for a mortgage "for any rents beyond the amount of the mortgage debt. Avianca also cites to *In re Elrod*, for the proposition that the fact that a debtor holds "reversionary rights" does not turn the underlying property—there, a real estate investment account—into property of the estate. 42 B.R. 468, 474 & n.8 (Bankr. D. Tenn. 1984). The Debtors do not have any "reversionary rights" in the Collateral, but if it did, *Elrod* would dictate that the Collateral itself is still not estate property.

Citibank acted in accordance with the express requirements of the CMA at all times, and its actions did not modify or terminate the Debtors' rights. And USAV took no action at all.

31. Avianca's claim that the March Trigger Event Notice "*did not alter in any way the standard priority of payments* under the USAV Agreements" is completely wrong. Mem. at 3. The terms of the CMA are unambiguous that the March Trigger Event Notice immediately ***turned off*** the standard payment provisions set forth in Sections 2.01 and 2.02 of the CMA (the "Standard Waterfall Provisions") (including further disbursements of Additional Purchase Price).

32. The Standard Waterfall Provisions are clear that if "***the Collateral Agent has*** … ***received written notice*** from any Notice Party … that a Trigger Event has occurred and is continuing and notice has been given by … the Administrative (at the direction of the Required Lenders in accordance with the Purchaser Credit Agreement)" (a "Trigger Event Notice"), then "*the Collateral Agent shall [not] disburse*" and amounts unless the Collateral Agent receives written notice from the Administrative Agent (at the direction of the Required Lenders) that the Trigger Event Notice has been "revoked or is otherwise of no further force or effect" (a "Trigger Event Waiver"). Weedman Decl. Ex.C, CMA §§2.01-02 (emphasis added).

33. The March Trigger Event Notice satisfied all such requirements (and no Trigger Event Waiver has been granted). Avianca ignores that ***the Collateral Agent*** was expressly copied on written notice delivered by the Administrative Agent (a "Notice Party") which specified that a Trigger Event had occurred and was continuing. *See* March Trigger Event Notice [ECF 6-5]. Avianca also ignores that the Standard Waterfall Provisions specify only that notice of a Trigger Event must be "*given by*" the Administrative Agent (at the direction of the Required Lenders). There is no requirement in the Standard Waterfall Provisions that a Trigger Event Notice must use the magic words "Required Lenders" and, in any event, the Administrative Agent *was* directed by

the "Required Lenders" to deliver the March Trigger Event Notice. *See* March 31 Direction Letter, Weedman Decl. Ex. G.

34. Avianca argues the March Trigger Event Notice was ineffective, claiming that a Trigger Event Notice must be "***substantially*** in the form of Exhibit A" to the CMA in order to have any legal effect. Mem. at 20 n.19 (emphasis added) (quoting CMA §2.09(c)). The March Trigger Event Notice was "***substantially*** in the form of Exhibit A" and it contained *more information* than what was required, *not less*. Further, the Standard Waterfall Provisions do not require that the Collateral Agent receive written notice in the form of Exhibit A. Section 2.09(c) merely imposes a duty on the Administrative Agent running to the Lenders: *if the Required Lenders direct the Administrative Agent to deliver notice in the form of Exhibit A*, then the Administrative Agent must comply with such direction.

35. Section 2.01(c) of the CMA does not give the Debtors any rights or benefits. But even if it did, that section would only provide an information right and does not impose any limitation on the ability of the Lenders to direct the Administrative Agent to send notice to the Collateral Agent and/or the Collateral Trustee pursuant to Sections 2.01 through 2.04 of the CMA (together, the "Waterfall Provisions") in order to turn on or turn off any of the Waterfall Provisions. Section 2.09(c): it only requires, if directed by the Required Lenders, delivery of a Trigger Event Notice to the other Notice Parties, including the Debtors, *within one business day after receipt of such notice*. Such an *ex post reporting* obligation could not alter the *operative effect* of a notice earlier received by the Collateral Agent and/or the Collateral Trustee in accordance with the Waterfall Provisions of the CMA.[15]

[15] Nor is the notice referred to under Section 2.06(e) of the CMA a prerequisite for modifying any of the Waterfall Provisions—that is a completely separate covenant requiring notice to the Debtors regarding the amount of Liquidated Damages and other amounts and is therefore unrelated to application of the Waterfall Provisions. Thus, the CMA is clear that the Waterfall Provisions stand and operate by themselves and in accordance with their own terms.

36. Accordingly, after the March Trigger Event Notice was delivered, the Standard Waterfall Provisions could be restored *only* if the Collateral Agent receives a Trigger Event Waiver from the Administrative Agent (at the direction of the Required Lenders) declaring that the March Trigger Event Notice has been "revoked or is otherwise of no further force or effect." *See* CMA §§ 2.01-02; *In re Avianca Holdings S.A.*, 2020 Bankr. LEXIS 2351, at *34 (noting the fact that the CMA "calls for the *resumption* of payment of the Additional Purchase Price" only if Citibank "*revokes* any Trigger Event Notice" (emphasis added)). Avianca never requested, and neither USAV, the Administrative Agent, nor the Lenders ever provided, a Trigger Event Waiver. And the Lenders have no obligation (and cannot be compelled) to direct that a Trigger Event Waiver be delivered to the Collateral Agent. As a result, as of the Petition Date, USAV did not, does not, and never will have any obligation to pay Additional Purchase Price.

37. Avianca ignores the distinction between ***turning off*** the Standard Waterfall Provisions (including further disbursements of Additional Purchase Price) and ***turning on*** the Trigger Event Waterfall Provision. ***No provision of the RSPA or the CMA required the Lenders to turn on the Trigger Event Waterfall Provision at the same time as the Standard Waterfall Provisions were turned off***. The only "modification" of Avianca's rights occurred when the Standard Waterfall Provisions (and thus the right to Additional Purchase Price) were turned off pre-petition. The Lenders did not, as Avianca claims, need to turn on the Trigger Event Waterfall Provision to achieve that result.[16]

38. On May 15, 2020, the Lenders made the decision to exercise their independent enforcement rights under the Security Documents against non-debtor USAV and the Collateral.

[16] As Citibank notes in its papers, the March Notice arguably operated to *Turn On* the Trigger Event Priority Waterfall. Even if it did not, however, it undoubtedly *Turned Off* the Standard Priority Waterfall and therefore the Debtors had no right to Additional Purchase Price from that date forward, as explained below.

In addition, the Lenders directed the Administrative Agent pursuant to a direction letter dated May 15, 2020 (the "May 15 Letter"), to take the action required to honor the Trigger Event Waterfall Provision under Section 2.04 of the CMA based on the Liquidated Damages being "automatically due and payable." Weedman Decl. Ex. G, May 15 Letter. There is no dispute among the parties that the Liquidated Damages are due and payable, as Avianca has repeatedly advocated here. *See* Compl. ¶¶ 40-41(explaining that USAV "automatically" becomes entitled to Liquidated Damages upon a Trigger Event (under and as defined in the RSPA) caused by a bankruptcy filing and "may" elect the same after a Trigger Event other than an insolvency event). Because *turning off* the Standard Waterfall Provisions was sufficient to cut off disbursements of Additional Purchase Price (which happened pre-petition on March 31, 2020), there simply were no rights of Avianca that could have been modified by honoring the Trigger Event Waterfall Provision on May 15, 2020. Prior to the May 15 Letter, the status quo was simply that the Proceeds continued to accumulate in USAV's accounts. But Avianca never had any property interest in such proceeds (which the Court has ruled belongs to USAV) and at that point no longer had any right to disbursements of Additional Purchase Price due to the Unwaived Trigger Events and the March Trigger Event Notice.

39. The Complaint claims, erroneously, that any "modification" of Avianca's "rights to the standard payment priority … based upon the Debtors' bankruptcy filings … violated section 365(e)(1) of the Bankruptcy Code." Compl. at 23. *First*, as addressed above, the relevant "modification" occurred pre-petition when the Standard Waterfall Provisions were *turned off*, not when the Trigger Event Waterfall Provision was honored. *In re Lehman Bros. Holdings*, 553 B.R. at 499-500 (is on point in finding no *ipso facto* violation because "[a] modification of LBSF's *right to receive a distribution* from the Collateral's liquidation proceeds"—i.e., "the right to receive an

actual payment"—"was *not modified as a result of the enforcement of the [waterfall provisions]*"; thus, any modification was already effective before the bankruptcy filing as a result under the express terms of the agreements). Here too, Avianca entered chapter 11 without the Standard Waterfall Provisions being effective, so application of the Trigger Event Waterfall Provision could not have modified any rights that Avianca no longer had. *Second*, this Court held that the CMA is not an executory contract, so Section 365(e)(1) is entirely inapplicable to its terms. *See* 11 U.S.C. § 365(e)(1) (providing that section 365(e)(1) only applies to a provision of an executory contract which purports to modify rights and obligations "*of such contract*" (emphasis added)). *Third*, the May 15 Letter did not "effect a forfeiture, modification or termination of *the Debtor's interest in property*." *id.* § 541(c)(1) (emphasis added). Avianca never had an "interest in property" in the Collateral, and Avianca's contractual right against USAV for Additional Purchase Price was already cut off by the March Trigger Event Notice. In any event, Avianca's right would just be an unsecured claim for money. *See* Weedman Decl. Ex. E, RSPA §2.05 (stating that the Seller's "*remedies … shall be limited to* the right to make *a claim against the Purchaser* for payment of any Additional Purchase Price payments that are past due and unpaid"). Any claim held by Avianca has nothing to do with the Lenders' senior secured and effective enforcement rights against USAV and the Collateral as permitted under the Security Documents.

2. There Is No Independent Right to Additional Purchase Price Under The CMA

40. Avianca erroneously claims that it is "entitled to Additional Purchase Price under the [CMA]—independently of the RSPA." Mem. at 23 (emphasis added). Any right to Additional Purchase Price arises exclusively under the RSPA. See Weedman Decl. Ex. E. RSPA §3.01(a) ("In consideration of the Sale and Transfer of the Contract Rights, the Receivables and the Collections derived therefrom, the Purchase shall pay a purchase price … in an amount equal to

the [$150 million] Advance Payment and Additional Purchase Price ….”). As the Court has previously found, the CMA is essentially a framework and intercreditor agreement that provides the mechanics and timing for *disbursements* from USAV’s accounts in accordance with applicable entitlements to such disbursements, which are entitlements that arise under the RSPA. *See In re Avianca Holdings S.A.*, 2020 Bankr. LEXIS 2351, at 20-21 (“The [CMA] governs the disbursement of funds to the parties, including in the case of a ‘Trigger Event’ ….”); RSPA § 3.01(a)(ii) (“Additional Purchase Price shall be due and payable in installments, as provided … under the Cash Management Agreement.”). If the Debtors have no entitlement under the RSPA, the CMA correspondingly provides that disbursements to the Debtors from the USAV accounts shall not be made. *See* Weedman Decl. Ex. E. 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”); Weedman Decl. Ex. C, CMA § 2.01 (where notice of a Trigger Event (including one that results in Liquidated Damages being due under RSPA § 6.03) or an Adjustment Event has occurred and such notice has not been revoked, no Additional Purchase Price is disbursed); *id.* §2.01(d) (same with respect to a Retention Event); *id.* § 2.02, 2.02(g) (same); *id.* § 2.03 (same with respect to Adjustment Event); *id.* § 2.04 (Trigger Event Priority Waterfall).

41. Accordingly, Avianca’s claim to a *second* right to Additional Purchase Price under the CMA is baseless. The fact is that the Debtors do not presently and will not ever have such a right because it was cut off prepetition as described above. This does not mean, however, that they can never regain access to proceeds from the Contract Rights. Nor does it mean the Lenders will receive a windfall in excess of the Loans. The Debtors can, after payment in full of the Loans, regain access to *all* proceeds of the Contract Rights and Collections by exercising its option on the shares of USAV. *See supra* ¶ 23. This is the essence of the off-balance sheet nature of the

transaction the Debtors wish to destroy. They cannot avoid the consequences of the documents governing the USAV transactions or their earlier decision to reject the RSPA under which their singular right to Additional Purchase Price previously existed.

3. Avianca Has No Right To Additional Purchase Price Because The RSPA Was Rejected

42. "A debtor 'may not reject (i.e., breach) one obligation under a contract and still enjoy the benefits of that same contract.'" *Sterling*, 371 B.R. at 692 n.13 (quoting *In re Comdisco, Inc.,* 270 B.R. 909, 911 (Bankr. N.D. Ill. 2001)). In *Sterling*, this Court recognized that rejection of an executory contract "prevent[ed] the Debtor from enforcing its contractual right to recover surplus …." *Id.* at 694. Avianca cannot reject an agreement from which a substantive right to payment arises but still continue to collect that payment. *Sterling*, 371 B.R. at 693.[17] When a debtor rejects an executory contract, that decision is one to both relieve the estate of the contract's burdens and to forego any further benefits. *See Sterling*, 371 B.R. at 692 n.13 (noting that the debtor would not be able to enforce provisions of an agreement it previously rejected). That is the trade-off that debtors face in determining whether rejection is in their business judgment. Moreover, it is axiomatic that a chapter 11 debtor may not cherry pick which provisions of a contract it rejects, but rather must reject as a whole. *See, e.g., In re Atl. Comput. Sys.*, 173 B.R. 844, 849 (Bankr. S.D.N.Y. 1994) ("under section 365 of the Code, a debtor may not 'cherry pick' pieces of contracts it wishes to assume."). The Lenders did not have time to address the mistakes made by Avianca's foreign law expert, but will do so later.

[17] Avianca analogizes the CMA to a subordination agreement, claiming that its "entitlement to Additional Purchase Price pursuant to the payment priorities reflected in the [CMA] should survive rejection." Mem. at 24. In support, Avianca cites to *In re Lehman Bros., Inc.*, 2018 U.S. Dist. LEXIS 166806, at *20-21 (S.D.N.Y. Sept. 26, 2018). There, the court merely found that if a rejected contract contains a subordination clause, then damages for breach under the contract's terms will continue to be subordinated. *Id.* at *21. That case does not support Avianca's position that it can reject one executory contract but revive the benefits of that rejected contract by relying on a separate intercreditor and subordination agreement. Nor would the fact that "the subordination provisions" still apply create any substantive right to payment. But the Court should note that Avianca's payment priority under the CMA is *permanently* fixed as junior to the Lenders. There is no payment waterfall in which Avianca ranks ahead of the obligations that USAV owes to the Lenders.

4. Even If Avianca Could Claim Additional Purchase Price, Under Its Own Theory None Is Owing

43. No Additional Purchase Price is owed even under Avianca's theory. Avianca requests disgorgement of over $34 million from Citibank and a declaration that the Standard Priority Waterfalls are restored. *See* ECF 7 (the "Proposed Order") at 2-3. But under the Standard Waterfall Provisions, in all cases, Additional Purchase Price is not payable until the costs and expenses of Citibank, USAV, and USAV's administrator, CMA § 2.02(a), interest accrued on the Loans, *id.* §2.02(b),[18] monthly amortization of the Loans, *id.* §2.02(c),[19] and indemnifiable expenses under any transaction document, including Lender expenses, *id.* § 2.02(d), are paid. Even after that, the Debt Service Reserve Account must be topped up. *Id.* § 2.02(e).

44. The Debtors would not have been entitled to Additional Purchase Price at any time during the pendency of these cases. Since the Petition Date, six amortization payments of $3.125 million would have been due and owing (in the aggregate $18.75 million). Assuming, for the sake of simplicity, LIBOR at 0%, outstanding principal of $70 million (after giving effect to the application of the cash collateral in the Debt Service Reserve Account), and annual (360 day) interest margin of 6.75%, interest expense would have equalled almost $400,000 per month. Add on top of that the expenses that remain unpaid, the proceeds collected from the credit card processing receivables would need to exceed well over $4 million per month for any Additional Purchase Price to be payable to Avianca, even if such Additional Purchase Price were accruing.

45. Based on Avianca's evidence and under its theory, and even excluding the indemnified expenses payable prior to any payments owing to Debtors, the earliest possible time that *any* Additional Purchase could have been owing, would have been September, and its evidence

[18] Interest is accruing at L + 6.675%. Weedman Decl. Ex.A, Loan Agreement §§ 2.5.1, 2.5.6.
[19] The monthly amortization amount is $3,125,000. Weedman Decl. Ex. A, Loan Agreement § 1.1 (definition of "Principal Payment Amount"); *id.* §2.4.1 (requiring payment of the Principal Payment Amount).

does not show that Avianca is owed any in October. In any event, not less than $20 million in amortization and interest ($18.75 million *plus* $2.8 million) would clearly be the Lenders property, and the rest of the proposed disgorgement of $34 million would need to be kept in the Debt Service Reserve Account. *See* Loan Agreement § 2.3.3 (requiring four months of amortization and interest expense in reserve). Thus, the extraordinary mandatory relief Avianca seeks during the proposed TRO period would not result in *any* value returning to the Debtors.

III. Avianca Will Not Suffer Irreparable Harm

46. Irreparable harm is the "single most important prerequisite" for the issuance of preliminary injunctive relief. *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (quoting *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005)); *Staff Mgmt.*, 2020 Bankr. LEXIS 1023, at *21 (same).

47. Where irreparable injury is lacking, courts, there is no need for further analysis. *Grand River,* 481 F.3d at 66 (moving party must first demonstrate irreparable injury is likely "before the other requirements for … an injunction will be considered."); *L&M Bus Corp. v. Bd. of Educ. of the City Sch. Dist. of N.Y.*, 2018 U.S. Dist. LEXIS 58352, at *8 (E.D.N.Y. Apr. 15, 2018) ("[I]rreparable harm is the most important and first element that a court must find to support … a TRO—more important even than a likelihood of success on the merits.") (citations omitted); *In re First Republic Grp. Realty, LLC*, 421 B.R. 659, 678 (Bankr. S.D.N.Y. 2009) ("Irreparable injury is a requirement for issuing a preliminary injunction and [because] the Court has found it lacking here … the Court need go no further in its analysis").

48. Typically, "[a]n irreparable harm is one that cannot be remedied through a monetary award." *In re First Republic Grp. Realty, LLC*, 421 B.R. at 678 (citing *Polymer Tech. Corp. v. Mimran*, 37 F.3d 74, 82 (2d Cir.1994)); *Staff Mgmt.*, 2020 Bankr. LEXIS 1023, at *21 (denying motion for preliminary injunction, in part, because "[a]n irreparable harm is one that

cannot be remedied through a monetary award."). Where a monetary remedy is "actually and not theoretically available," any alleged threat of irreparable harm is undermined. *Id.*

49. Contrary to Avianca's suggestion, Section 105(a) does not "relax" the "irreparable harm" element of injunctive relief. Mem. at 15-16. While courts have held that debtors may establish this element by reference to harm to their ability to reorganize, "the threat to the reorganization process must be imminent, substantial and irreparable."[20] *In re Calpine Corp.*, 365 B.R. 401, 410 (S.D.N.Y. 2007) (citation omitted); *see also In re Wolf Fin. Group, Inc.*, 1994 Bankr. LEXIS 2350, at *15 (Bankr. S.D.N.Y. Dec. 15, 1994) (preliminary injunction denied where debtors failed to show sufficient irreparable harm to their restructuring); *In re Pick-Your-Own, Inc*., 2019 Bankr. LEXIS 3604, at *4, *7 (Bankr. W.D.N.Y. Nov. 21, 2019) (same); *In re SDNY 19 Mad Park, LLC*, 2014 Bankr. LEXIS 3877, at *7 (Bankr. S.D.N.Y. Sept. 11, 2014) (same); *see also In re Shelly's, Inc*., 87 B.R. 931, 935 (Bankr. S.D. Ohio 1988) (denying debtor's TRO request pursuant where the harm alleged was "at bottom, financial … a loss capable of recoupment in an action at law" and did not rise to the level of "irreparable harm and inadequacy of legal remedies").

50. Avianca has not shown any irreparable harm that could not be remedied through a monetary award. The loss Avianca alleges is financial, and the financial wherewithal of Citibank is not in question. Accordingly, Avianca has failed to plead any irreparable harm that could not be remedied through damages, let alone harm of the magnitude required to meet the heightened standards applicable to the extraordinary mandatory injunctive relief it seeks.

[20] In each of cases cited by Avianca, the debtors demonstrated severe, irreparable and imminent harm to the reorganization, which could not be remedied by money damages. *In re Alert Holdings, Inc.*, 148 B.R. 194, 200-01 (Bankr. S.D.N.Y. 1992) (enjoining defendants' actions, so as to prevent ongoing "irreparable" reputational damage to debtor); *In re Chateaugay Corp. Reomar, Inc.*, 93 B.R. 26, 29 (S.D.N.Y. 1988) (injunction required to prevent prosecution of debtor in state court which would "irreparably harm debtor's reorganization" and deprive bankruptcy court of its jurisdiction over estate property); *In re Soundview Elite Ltd.*, 543 B.R. 78, 120 (Bankr. S.D.N.Y. 2016) (injunctive relief to freeze assets necessary to prevent irreparable harm from trustee misconduct); *In re Lyondell Chem. Co.*, 402 B.R. 571, 582 (Bankr. S.D.N.Y. 2009) (injunction necessary to prevent actions against foreign non-debtors where debtors established that an "involuntary proceeding against any of the European nondebtor entities would be a disaster"). Avianca faces no such severe consequences here during the proposed restraining period.

51. Avianca also has not demonstrated that its reorganization will be imminently jeopardized without the requested relief. In fact, the quantum of the loss that Avianca alleges the Debtors will suffer absent injunctive relief is relatively small in the context of their restructuring. As discovery will show, Citibank's cash sweeps have typically been just a few hundred thousand dollars per week. Although Avianca alleges that these amounts may grow as flight capacity increases, Avianca has not produced evidence to support that these amounts will increase in the next 14 days before the Complaint can be heard materially beyond their historical levels. In any case, the quantum of the alleged harm in question pales in significance to the Debtors' recently approved $1.2 billion new money debtor-in-possession financing facility. *See* Bk.ECF 1031.

52. Importantly, the Debtors' position regarding the supposed harm directly contradicts prior testimony they adduced and their counsel's representations to this Court. Two weeks ago, the Debtors told this Court that the DIP Facility alone, which does not include any Additional Purchase Price, would provide the Debtors with "necessary and *sufficient* liquidity for the Debtors to fund their operations during the pendency of these chapter 11 cases and to fund the administration of these chapter 11 cases." *See* Bk.ECF 964 ¶ 48; Bk.ECF 966 ¶ 29 (same). The evidence submitted in support of the DIP motion shows that, after the initial $634 million draw, the Debtors would have an ending cash position in October 2020 of $815 million. *See* Bk.ECF 1011, Ex. A; Bk.ECF 1039 DIP Hr'g Tr. 25:8-10 ("[I]n the cash forecast you see, with a very substantial amount of liquidity that is maintained throughout the forecast period."). In these circumstances, Avianca cannot credibly claim that the cash proceeds flowing into the USAV structure, or that has been swept by the Lenders' security trustee, are funds that are needed to meet the costs associated with its reorganization.

53. Avianca suggests that the relief requested would "help" the Debtors comply with their obligations under the DIP Credit Agreement, *see* Mem. at 2, 16, but this bare assertion does not carry Avianca's burden to show irreparable harm and runs contrary to its prior submissions to this Court. The Debtors previously told this Court that approval of DIP Facility of $1.2 billion would allow them to maintain a minimum liquidity of $500 million for this entire case. Bk.ECF 964 ¶ 52; Bk.ECF 966 ¶ 33. The Debtors did not argue, when seeking approval of the DIP facility, that the funds swept from the Collections Account and Debt Service Reserve Account would have any bearing on their ability to meet this minimum liquidity threshold. Avianca now submits, without evidence, that the cash sweeps that have been ongoing for five months somehow make it "harder" for it to meet the $400 million minimum cash balance required under the DIP facility. Compl. ¶ 63. But it is not any "harder" for the Debtors to comply with the DIP facility's requirements now than it was when the Debtors sought approval of the DIP Credit Agreement just weeks ago.

54. Avianca's assertion that its compliance with the cumulative cash burn covenant under the DIP Credit Agreement is in jeopardy is equally untrue. Pursuant to the DIP Credit Agreement, the Cumulative Cash Burn is calculated by reference to the Consolidated Cash of the Debtors. DIP Credit Agreement § 7.16(b). The cash held by "off-balance sheet" non-debtor USAV is wholly irrelevant to the cash burn testing under the DIP Credit Agreement. Accordingly, the Debtors' ability to comply with the terms of their DIP Credit Agreement is not premised on their access to property they sold to a third party many years ago. The Debtors made no assertion of any potential problem with the covenant when they sought and obtained approval of the DIP facility.

55. Finally, the credibility of Avianca's claims that it will suffer irreparable harm without urgent injunctive relief is undermined by its five month delay in bringing the Complaint. "A claim of irreparable harm is undercut by a party's unreasonable delay in seeking injunctive relief." *In re First Republic Grp. Realty, LLC*, 421 B.R. at 679-80 (irreparable harm "undermined" by unreasonable delay "in the face of a clear and constant danger that the escrow funds would be depleted"); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (same).

IV. The Balance Of The Equities Weighs Against A TRO

56. As set forth above, Avianca has failed to adduce any compelling evidence that the Debtors' ability to reorganize will be jeopardized or that it will otherwise suffer irreparable harm in the next 14 days if the emergency relief is not granted. By contrast, the mandatory injunction Avianca seeks would cause serious and potentially irreparable harm to USAV and the USAV Secured Lender Group. The relief requested would immediately disgorge the Lenders of at least $34 million of their property. The Lenders received this property pursuant to their security trustee's valid enforcement of their liens against assets that this Court determined (in what is now a final order) are owned by USAV, not the Debtors. *See In re Avianca Holdings S.A.*, 2020 Bankr. LEXIS 2351, at *51-52. The relief requested would also immediately require Citibank to divert property owned by USAV, which the Lenders are entitled to receive, to Avianca.

57. Divesting USAV and the Lenders of their property before the merits have been fully briefed or addressed is plainly improper, especially where Avianca has not demonstrated that it will suffer any harm in the absence of the extraordinary relief requested. *Clune v. Publishers' Ass'n of N.Y. City*, 214 F. Supp. 520, 531 (S.D.N.Y. 1963) (mandatory injunctions "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.").

V. A TRO Would Harm The Public Interest

58. Avianca conspicuously fails to address the very serious public policy ramifications of the extraordinary relief they request. *In re MF Glob. Holdings Ltd.*, 561 B.R. at 624-25 (applying public interest test), citing *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 825 (2d Cir. 2015). Avianca seeks the issuance of a mandatory injunction requiring the security trustee of lenders to a bankruptcy-remote SPV to turn over property held pursuant to valid and perfected liens that it is enforcing. This would have a seismic effect on the debt markets. Even temporarily restraining secured creditors from enforcement against off-balance sheet non-debtor assets could cause significant market disruption by calling into question a fundamental principle upon which these transactions are premised. Asset-backed transactions using bankruptcy-remote special purpose entities as financing vehicles, and involving true sales, such as this, are now "a very significant means for raising capital." *Sterling*, 371 B.R. 680, 684 n.4; *see also Sec. Inv'r Prot. SIPA Liquidation Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 480 B.R. 501, 525 (Bankr. S.D.N.Y. 2012) (acknowledging the "prevalence of special purpose offshore entities engaging in financial and commercial activities in the United States"). As of July 2019, the outstanding issuances in connection with structured financing transactions in the United States, including receivables sales, was $*11.7 trillion*.[21] Of that amount, approximately $*800 billion* of these transactions involved consumer credit-related receivables, including the sale of auto loans and credit card receivables (usually through securitization) to special purpose vehicles or investors. *See id.*

59. The public interest in preserving of the integrity, certainty, and stability of the debt capital markets is well-established. *NML Capital, Ltd. v. Republic of Argentina*, 144 F. Supp. 3d 513, 521 (S.D.N.Y. 2015) (recognizing the "public interest of enforcing contracts [and]

[21] *See* Brendan Beer, et al., *Oaktree Insights Strategy Primer: Investing in Structured Credit*, Oaktree Capital L.P. 1 (July 2019), available at https://www.oaktreecapital.com/docs/default-source/default-document-library/investing-in-structured-credit.pdf.

maintaining confidence in debt markets"); *In re Doctors Hosp. of Hyde Park, Inc.*, 507 B.R. 558, 721 (Bankr. N.D. Ill. 2013) (declining to unwind receivables structured finance transaction and noting that "[d]iscretion would undermine the securitization market. Some degree of certainty is essential for the market's functioning ….") (citations and quotations omitted). In light of the increasing need for liquidity precipitated by the COVID-19 crisis, the public interest in protecting access to sources of financing is particularly strong. The major disruption to systemically important financing structures at issue here weighs against granting the extraordinary injunctive relief requested by the Debtors. The Debtors should not be allowed blithely to set aside structures that are critical to the capital markets in support of their effort to take proceeds dedicated to repaying less than $70 million remaining on the loans used to finance the $150 million purchase price they received in 2017.

VI. The Extraordinary Nature Of The Relief Justifies Imposing A Bond On Avianca

60. If the Court determines that the extraordinary mandatory injunctive relief Avianca seeks is warranted, Avianca ought to post security in the amount of proceeds that USAV is required to turn over to Avianca. Avianca seeks to enjoin secured creditors of a third party from enjoying the benefits of their interests in property, and seeks to take back money already properly paid out to them. While courts may grant a debtor injunctive relief without requiring a bond, cases that have considered the issue have noted that it may be appropriate where the injunction results in harm to the enjoined creditors. *Cf. In re Lyondell Chem. Co.,* 402 B.R. at 594-95 (declining to require debtors to post bond because creditors would not otherwise recover funds during period of the injunction and thus the bond would not protect the creditors from injury); *Caesars Entm't Operating Co. v. BOKF, N.A.*, 561 B.R. 441, 457 (Bankr. N.D. Ill. 2016) (declining to require debtors to post bond where "the chances that these creditors sustain any damage from that delay [in asserting their rights] are consequently remote."). Here, it is a certainty that the Defendants

and the Lenders would suffer immediate damage if the relief requested is granted. Every dollar the Lenders are deprived of is a dollar of material harm. Accordingly, Avianca should be required to post a bond in an amount to be determined that is sufficient to protect the USAV Secured Lender Group from that harm.

CONCLUSION

61. For the reasons set forth above, the Motion should be denied.

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New York, New York

Respectfully submitted,

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