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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.*,	)	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.,	)	Adv. Proc. No.: 20-01244 (MG)
Plaintiffs,	)	
v.	)	
USAVFLOW LIMITED and CITIBANK, N.A.,	)	
Defendant.	)	**Re: ECF 2, 3**

USAVFLOW LIMITED'S JOINDER TO USAV LENDER GROUP'S OPPOSITION 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

USAVflow Limited ("USAV"), defendant in the above-captioned Chapter 11 cases, hereby submits this joinder (the "Joinder") to the USAV Secured Lender Group's opposition (the

"Opposition") to the Debtors' *Notice of Hearing and Motion, pursuant to 11 U.S.C. §§ 105(a), 362(a) and 265(e), and Fed. R. Bankr. P. 7065, for a Temporary Restraining Order and Preliminary Injunction and Hearing* [ECF 2] (the "TRO Notice") and the memorandum of law in support thereof [ECF 5] (the "TRO Memorandum", and together with the TRO Notice, the "TRO Motion"). USAV joins in the Opposition's arguments, respectfully requests that any relief afforded to the USAV Secured Lender Group[1] pursuant to the Opposition also be granted to USAV and further states as follows:

A. THE DEBTORS' FAIL TO DEMONSTRATE IRREPARABLE HARM.

1. The Debtors are unable to satisfy the standard for imposition of a temporary restraining order ("TRO"). In particular, the Debtors have not demonstrated that they will suffer irreparable harm in the absence of a TRO halting the sweep of the cash from the Debt Service Reserve and Collection Accounts to USAV and the USAV Secured Lender Group. Although the Debtors claim that pre-petition, they received approximately 92% to 95% of the collections as Additional Purchase Price and that "[r]eturn of the funds and future access to Additional Purchase Price are necessary for Avianca to maximize its flying routes and to help Avianca comply with its obligations under the DIP Credit Agreement," *Motion* at 1 and 15-6, they have not shown that the failure to receive this cash amounts to irreparable harm.[2]

[1] Capitalized terms not defined herein shall have the meaning ascribed to them in the Motion or the Opposition.

[2] While the Motion for the TRO seeks recoupment of the Additional Purchase Price, the Complaint [Case No. 20-11133 (MG) ECF 1101, ECF 1], seeks "injunctive relief of the illegal sweeps." *See* Complaint ¶ 1. Moreover, the Motion contradicts the Complaint and acknowledges that pursuant to the Cash Management Agreement and RSPA, the Debtors would only be entitled (if they are entitled to anything at all) to the Additional Purchase Price. *See* Motion at 2, 5, 7, 8, and 26: (Indicating no legal basis to recover anything more than the Additional Purchase Price: "Nonetheless, Plaintiffs reserve any and all rights to seek to recover additional amounts (beyond Additional Purchase Price), including, but not limited to amounts retained by Defendants in the accounts to amortize the underlying USAV Loan, and nothing herein should be construed as an admission or waiver with respect to any such claims.")

2. Instead, in alleging that they will be irreparably harmed without a TRO, the Debtors do not explain why the Debtors failed to seek the relief they now seek months ago despite the fact that the conduct they now complain of has been ongoing since the Debtors' bankruptcy filing in May of 2020 and was first raised with the Court in connection with the Rejection Motion filed on June 23, 2020. If the need for injunctive relief had been raised at the time, the issue could have been addressed on a full record rather than at a hearing scheduled to take place on less than two business days-notice. This is an emergency manufactured by the Debtors with the apparent purpose of prejudicing the Defendants.

3. Moreover, the Debtors' claim of irreparable harm is undermined by their very own filings with this Court. The Debtors have recently obtained a DIP loan valued at approximately $1.2 billion[3] yet they assert that the amounts being swept to USAV and the USAV Secured Lender Group ($34 million since May 11, 2020) is so material that they will be irreparable harmed without an injunction ceasing this activity. *Motion* at 1-3. In order to receive approval for the DIP loan, the Debtors presented multiple documents demonstrating that, with access to postpetition financing, their month-ending cash balance would be positive. *See e.g.*, Corrected Financial Information, [ECF 1011] (Month-ending cash balance projected to be $800 million at the end of October 2020). *See also* AVH Forecast – Stress Case Assumptions [ECF 1019]. These documents indicate that as a result of receiving the DIP loan and gradually improving economic conditions, the Company will have a positive month-ending cash flow balance well into 2022. These projections undermine the Debtors stated need for immediate receipt of cash from the Receivables. Inexplicably, despite now having access to new financing and despite having months to stop the

[3] *See also* Final Order Authorizing the Debtors to Obtain Postpetition Financing [Case No. 20-11133 (MG), ECF 1031]; *Motion for Entry of an Order Authorizing the Debtors to Obtain Postpetition Financing* [ECF 964].

sweep of cash to USAV and the USAV Secured Lender Group, the Debtors only now argue they are irreparably harmed by the loss of cash generated from the Receivables.

B. THE DEBTORS MISTAKE USAV'S EXERCISE OF OWNERSHIP RIGHTS FOR THEIR CONTINUED PERFORMANCE UNDER THE USAV AGREEMENTS.

4. The relief sought – essentially a seizure of USAV's assets – is inconsistent with this Court's September 4, 2020 memorandum opinion (the "Opinion") granting in part and denying in part the Debtors' motion to reject the USAV Agreements (as defined in the Opinion) as executory contracts (the "Rejection Order") [ECF 850] because the Court held that the Receivables and cash generated therefrom belonged to USAV. *See Opinion*, at 36-7. The Debtors should not be allowed to accomplish through expedited injunctive relief what they could not accomplish through the Rejection Motion – appropriating Receivables that rightfully belong to USAV.

5. The Debtors, admitting that the RSPA has in fact been rejected, argue that nevertheless USAV "must comply with its obligations under the RSPA to remit the Additional Purchase Price, and Citibank must make those disbursements in accordance with Section 2.01 of the Cash Management Agreement." *See* Motion at 24. There is no basis for the Debtors' argument. Having materially breached the RSPA by rejecting that agreement, the Debtors are in no position to compel USAV to perform as if the Debtors were still performing its obligations.

6. First, the Debtors' Colombia law expert, Professor Arrubla admits in paragraph 17 of his Declaration, that USAV has every right under Colombia law to terminate the agreement and not make further Additional Purchase Price payments. Nevertheless, in paragraph 21 of the Arrubla Decl alleges without any factual basis that "USAV has not sought to terminate the RSPA, and to the contrary continues to comply with it..." He then immediately contradicts himself by alleging that USAV is in fact not performing its obligations on the ground that USAV is in breach of the cash waterfall priority provisions stipulated in the RSPA and the Cash Management Agreement.

The simple fact is that receiving cash from the Debt Service Account and Collection Accounts is fully consistent with USAV's (and USAV Secured Lender Group's) rights under the Sections 2.01 and 2.02 of the Cash Management Agreement.[4] The Cash Management Agreement (which is not an executory agreement and has not been rejected) provides that, pursuant to Section 6.03 of the RSPA, upon the occurrence of a Trigger Event, the USAV Secured Lender Group is first-in-line to receive cash generated from the Receivables until it obtains an amount equivalent to the full value of the Receivables purchased under the RSPA. This is a bargained-for right under the RSPA and Cash Management Agreement to which the parties agreed upon their execution. USAV in turn is required by the Transaction Documents to turn these funds over to the USAV Secured Lender Group in order to repay its loans to the Lender Group that have bene accelerated due to the Debtors' bankruptcy. There is simply no basis for the Debtors' expert contention that somehow USAV has elected to continue performing as if no breach has taken place.

7. Second, the Debtors misapply the holding of this Court's decision in *In re Sterling Optical Corp.*, 371 B.R. 680 (Bankr. S.D.N.Y. 2007), to argue that despite the Debtors' rejection of the RSPA, USAV is required to continue to remit the Additional Purchase Price. The facts of *Sterling Optical* are readily distinguishable from the present case. There the buyer had fully recovered its investment (i.e. amount financed plus interest) but argued that because the debtor had rejected the contract, it could not enforce a provision in the agreement requiring turnover of excess proceeds. This Court rejected the buyer's argument, finding: "Under [applicable nonbankruptcy] Illinois law, a party suffering injury is entitled only to a cause of action for damages actually sustained." (citations omitted). *Id*. at 692. However, unlike in *Sterling Optical*, USAV has yet to

[4] USAV is essentially a bystander in the present dispute. It has no control over the Debt Service Reserve and Collection Accounts, and it has not directed any of the cash sweeps at issue. However, as the counter-party and signatory to the RSPA and Cash Management Agreement, the Debtors have named USAV as a defendant in these proceedings solely for the purpose of obtaining declaratory relief.

recover the value of the Receivables that it purchased and is entitled to a remedy for the Debtors' breach. Here, USAV is simply collecting on assets it already owns and that it is rightfully retaining to make itself whole following the Debtors' rejection.

C. THE PURPOSE OF A TEMPORARY RESTRAINING ORDER IS TO MAINTAIN THE STATUS QUO.

8. The relief sought by the Motion cannot be obtained by granting a TRO because it would in materially upset the status quo, which a TRO is meant to preserve. The Debtors seek through a TRO, the precise relief that they would obtain if they obtained a judgment in their favor: turnover of assets owned by USAV, subject to the liens of the USAV Lenders. Even if a TRO was justified in this case, which it is not, a TRO is imposed only to *maintain the status quo* until a preliminary injunction can be more fully considered. *See Garcia v. Yonkers Sch. Dist.*, 561 F.3d 97, 107 (2d Cir. 2009)(citing *Pan Am. World Airways, Inc. v. Flight Eng'rs' Int'l Ass'n, PAA Chapter*, 306 F.2d 840, 842 (2d Cir. 1962); 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2951, at 253 (2d ed. 1995) ("The purpose of a temporary restraining order is to preserve an existing situation *in statu quo* until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction.")(quotations omitted.). Now, at most, a TRO could require Citibank to hold new cash generated from the Receivables in the Collection Account. Citibank should not be required to turn over funds to the Debtors or restore funds that were previously swept, as the Debtors demand. Such relief would go well beyond the purpose of a TRO, which is to preserve the status quo.

9. Finally, granting the TRO would have broader implications for the multi-trillion receivables market and non-controversial forms of receivables financing. Among other things, this Court's *Sterling Optical* decision stands for the proposition that Court's should be wary of interfering with receivables transactions by making decisions that essentially re-write a receivables

transaction to one party's benefit. *See Sterling Optical*, 371 B.R. 680, 684 n.4. Here, entering the TRO would have a cascade of unfortunate effects for the structured finance market – a TRO would bar the USAV Secured Lender Group from exercising its enforcement rights against a non-debtor bankruptcy-remote SPV, USAV, and the collateral owned by that non-debtor. Such an outcome could never have been contemplated by the parties when consummating the USAV transaction, and granting the TRO would force parties to other receivables-sale transactions to reconsider the risks and rewards of these types of arrangements, throwing the receivables markets into great uncertainty and potentially forcing a re-write of numerous sale agreements. For this reason as well, the TRO application should be denied and the present status quo should prevail until the Court can hear each side's fully-developed arguments regarding their respective rights to the Receivables and cash generated therefrom.

WHEREFORE, USAV respectfully requests that the TRO be denied for the reasons stated in the Opposition and this Joinder and that the Court grant any further relief that it deems just and proper.

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New York, New York

/s/ Sheron Korpus

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