UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

AVIANCA HOLDINGS S.A., et al.,

Debtors.

Chapter 11
Case No. 20-11133(MG)
(Jointly Administered)

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UDI BARUCH GUINDI, DAVID BARUCH, SOSHANA BARUCH, HABIB MANN, GOLAN LP AND ISAAK BARUCH,

Appellants,

-against-

AVIANCA HOLDINGS S.A., et al.,

Appellees.

CIVIL ACTION NO.
1:21-CV-10118-AJN

Oral Argument Requested

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BRIEF FOR APPELLANTS IN OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEALS AS EQUITABLY MOOT

/s/ Glen Lenihan
Glen Lenihan, Esq.
Jonathan A. Lynn, Esq.
OVED & OVED LLP
Attorneys for Appellants
401 Greenwich Street
New York, NY 10013
Tel: 212.226.2700
glenihan@oved.com
jlynn@oved.com

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Creditors-Appellants Udi Baruch Guindi, David Baruch, Soshana Baruch, Habib Mann, Golan LP and Isaak Baruch (collectively, "Appellants" or "Creditors") respectfully submit this memorandum of law in opposition to Debtors-Respondents Avianca Holdings S.A.'s, *et al.* (collectively "Debtors")[1] motion to dismiss this appeal from the order entered by the bankruptcy court on November 2, 2021 (the "Order") confirming Debtors' Further Modified Joint Chapter 11 Plan (as amended or modified in accordance with its terms, the "Plan") as equitably moot.

PRELIMINARY STATEMENT

Debtors failed to meet their burden to demonstrate that this appeal should be dismissed as equitably moot before the Court can consider it on the merits. Indeed, Debtors' motion is nothing more than a claim that "we acted too fast and now you cannot stop us" somehow trumps Creditors' rights to appeal the bankruptcy court's erroneous determination. The Court should deny the motion for at least three reasons.

First, contrary to Debtors' assertion, the Court is not required to determine whether an appeal is equitably moot before considering the appeal's merits. The Second Circuit has repeatedly held that courts are permitted to defer the fact-intensive equitable mootness analysis until after the

[1] The Debtors consist of Avianca Holdings S.A., as well as: 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.; America Central Corp.; 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 Loyalty Bermuda Ltd.; AV Taca International Holdco S.A.; Aviacorp Enterprises S.A.; Avianca Costa Rica S.A.; Avianca Leasing, LLC; Avianca, Inc.; 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.; 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; Nicaragüense de Aviación, Sociedad Anónima; Regional Express Américas S.A.S.; Ronair N.V.; Servicio Terrestre, Aereo y Rampa S.A.; Servicios Aeroportuarios Integrados SAI S.A.S.; 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.; and Technical and Training Services, S.A. de C.V.

court considers the merits of an appeal, particularly where the merits are relevant to crafting an equitable remedy. Because the merits of this appeal rest largely on Debtors' failure to prove the facts necessary to warrant confirming the Plan, which are relevant to the equitable mootness analysis, the Court should defer decision on this motion until after the Court resolves the merits of the appeal.

Second, even if the Court immediately proceeds with this motion, the Court should still deny it because the only support for Debtors' assertion that the Plan has been "substantially consummated" or resulted in a "comprehensive change in circumstances" is their self-serving and unsupported claim that they engaged in various, vaguely defined "corporate transactions." While Debtors baldly label these transactions "complex," they deliberately fail to provide any of the details of those transactions, what makes them so complex, and what portions of the Plan remain to be consummated. This threadbare showing is patently insufficient to meet Debtors' burden to show that they have substantially consummated the Plan or that there has been a comprehensive change in circumstances.

Third, even if the Debtors had met their burden, the appeal would still not be equitably moot because the purportedly "complex" transactions that Debtors try to rely upon, which are almost exclusively issuing shares in new private companies or entering into new, and apparently unused, credit facilities, can be easily unwound without prejudice to any party. Moreover, the equities amply support unwinding the Plan, particularly where Debtors have not made a sufficient showing that they cannot pay Creditors' $8.25 million claims, especially given that Debtors have **nearly $1 billion in cash on hand** (*i.e.*, more than 1,200% larger than the value of Creditors' claims), and the bankruptcy court will soon hear fee applications from various professionals totaling over $142 million (*i.e.*, more than 1,700% larger than the value of Creditors' claims).

RELEVANT FACTUAL BACKGROUND

A. Debtors' Bankruptcy Proceedings and Creditors' Claims

By petitions filed on May 10, 2020 and September 21, 2020, Debtors filed for relief under Chapter 11 of the Bankruptcy Code. *See* Dkt. 2300 p. 138 ¶ 1.[2] Prior to filing this proceeding, Debtor Avianca Holdings S.A. ("AVH") issued 9% senior secured notes ("the 2023 Notes") in the aggregate principal amount of $484,419,000, of which Creditors are holders of 2023 Notes with an aggregate principal amount of $8,250,000. Dkt. 2138 p. 26; Dkt. 2241-1 ¶¶ 2-5; Dkt. 2241-2 ¶¶ 2-4; Dkt. 2241-3 ¶¶ 2-3. The 2023 Notes are secured by liens on aircrafts owned by Debtors along with certain of Debtors' intellectual property rights. *Id.* As set forth more fully in Creditors' appeal brief, Debtors subsequently pledged this same collateral in their efforts to continue operating their business during the bankruptcy proceedings and obtain postpetition credit facilities. Appeal Brief pp. 6-8. This so-called "Shared Collateral" would be used to satisfy claims regarding such postpetition financing.

B. Debtors' Chapter 11 Reorganization Plan

On August 10, 2021, Debtors filed the initial version of the Chapter 11 reorganization Plan, with several modifications following thereafter, including two supplements that, over the span of 2,713 pages, described the corporate transactions that Debtors would need to undertake to effectuate their reorganization. Dkt. 2137, 2185, 2208. On October 24, 2021, Debtors filed the final version of the Plan. Dkt. 2259.

Included in the more than 2,700 pages of explanatory supplements is a document entitled "Description of Restructuring Transactions and Transaction Steps," (the "Transactions

[2] References to "Dkt." in this memorandum refer to the electronic docket entries in *In re Avianca Holdings S.A., et al.*; Case No. 20-11133(MG), venued in the United States Bankruptcy Court, Southern District of New York.

Description") which Debtors attach to their moving brief (the "Moving Brief" or "Mov. Br.") as Exhibit C. The Transactions Description sets forth 21 separate steps, and numerous sub-steps, that Debtors would need to undertake to effectuate their reorganization, such as establishing new corporate entities, obtaining government approvals, making various intercompany asset transfers, assuming certain contracts, and liquidating certain holding companies. Dkt. 2185, pp. 6-15 of 2215.[3] However, the Transactions Description expressly notes that it is intended only to illustrate the "key steps" of the reorganization process, and **not** "to be a comprehensive set of all steps required to be taken." *Id.*, p. 6 of 2215. Thus, the Plan admittedly does not identify any number of additional steps that Debtors must undertake to consummate the Plan. The Plan supplements also include a schedule of 3,233 contracts that would be assumed as part of the reorganization, together with the respective "Cure Amount" that must be paid to bring each such contract out of default. Dkt. 2208, pp. 97-172 of 498.

In the Plan, Debtors propose 23 separate classes of claims, premised upon the substantive consolidation of the Debtors' assets to create a single common pool of assets to pay off creditors. *Id.* pp. 55-56. However, three of the most financially sound Debtors, Aero Transporte de Carga Union, S.A. de C.V. ("Aerounion"), Avifreight Holding Mexico, S.A.P.I. de C.V. ("Avifreight"), and Servicios Aeroportuarios Integrados SAI S.A.S. ("SAI," and collectively with Aerounion and Avifreight, the "Unconsolidated Debtors"), and their assets are not part of the substantive consolidation. Nowhere in the Plan do Debtors explain the reason for this exclusion.

Consistent with this disparate treatment, the Plan baldly states, with no support, that "no value with respect to the Shared Collateral will be available to satisfy 2023 Notes Claims after DIP

[3] Debtors subsequently made minor modifications to the Transactions Description in a supplement to the Plan filed on December 1, 2021. Dkt. 2385 pp. 6-11 of 1034.

Facility Claims are satisfied, thereby rendering the 2023 Notes … effectively unsecured." Dkt. 2209 p. 39. As such, the Plan unfairly and improperly places Creditors and other 2023 Noteholders in "Class 11 – General Unsecured Avianca Claims," which claims are impaired and expected to recover only 1.0-1.4%. *Id.*; Dkt. 2138 p. 5. Moreover, despite getting the benefits of the use of the collateral securing the 2023 Notes through postpetition financing along with the other Debtors, according to the Plan, the Unconsolidated Debtors (Classes 12, 13, 14), and the equityholders of Avifreight and SAI (Classes 20, 21) would remain entirely unimpaired. Dkt. 2138 pp. 40-43. Indeed, the Unconsolidated Debtors' equityholders are even entitled to receive payment of accrued dividends under the Plan. Dkt. 2259 pp. 32, 46-47. Once again, at no point in the Plan do Debtors explain how it is equitable to provide this preferential treatment to the Unconsolidated Debtors' creditors.

C. The Bankruptcy Court Hears Creditors' Objection to the Plan

On October 19, 2021, Creditors filed their objection to the Plan. Dkt. 2231. In that objection, Creditors demonstrated that (i) Debtors failed to meet their burden to prove that the collateral securing the 2023 Notes is insufficient to repay Creditors; (ii) Debtors failed to meet their heavy burden to demonstrate that a substantive consolidation of 37 of the 40 Debtors (the "Avianca Debtors") was proper; and (iii) the Plan violates the absolute priority rule, is not fair and equitable, and unfairly discriminates against Creditors by providing preferential and disparate treatment to creditors whose rights and interests are either equal or subordinate to Creditors.

Debtors filed their response to Creditors' objection on October 24, 2021, and the bankruptcy court held a confirmation hearing on October 26, 2021. As set forth more fully in Creditors' appeal brief, Adrian Neuhauser ("Neuhauser"), the CEO for certain of the Debtors, and Ginger Hughes ("Hughes") of Seabury International Corporate Finance LLC and Seabury

Securities LLC (collectively, "Seabury"), which has acted as Debtors' investment banker and financial advisor, testified for Debtors. As set forth at length in Creditors' appeal brief, both Neuhauser and Hughes made several critical admissions at that hearing that warranted rejecting the Plan. Appeal Brief pp. 11-15.

In short, Neuhauser's testimony demonstrated that Debtors did not, and could not, meet their burden to demonstrate that the value Shared Collateral was insufficient to fully pay Creditors' claims because no such valuation was performed. Indeed, he admitted that that Debtors did not know the value of the Shared Collateral and could not even offer an estimate or fully identify the assets that comprise the Shared Collateral. Dkt. 2370 111:20-23; 116:17-19. Further, Neuhauser testified that Debtors simply assumed that the value of the Shared Collateral was insufficient because they were unsuccessful in soliciting equity investments in Debtors, but admitted that the ongoing COVID-19 pandemic had decimated demand for Debtors' services and that potential investors may have relied on their perception of demand destruction and discounted Debtors' future ability to generate cash flow in determining whether to invest. *Id.*, 113:20-114:25.

The testimony also demonstrated that it was improper to substantively consolidate the Avianca Debtors. Specifically, contrary to the requirements of substantive consolidation, Neuhauser and Hughes admitted at the hearing and in prior declarations that each of the Avianca Debtors (i) maintain separate books and records; (ii) properly document and record intercompany transactions; (iii) observe corporate formalities; (iv) comply with unique local governance and regulatory requirements; (v) has their own officers and other locally required corporate governance positions; (vi) separately owned certain assets; and (vii) maintain documentation for all of their own liabilities. Dkt. 2370 107:22-108:25; Dkt. 2262 ¶¶ 1, 10.

At a minimum, the evidence demonstrated that if substantive consolidation was appropriate for the Avianca Debtors, then it was also appropriate for the Unconsolidated Debtors, as Hughes admitted that the Unconsolidated Debtors are not treated materially differently from the Avianca Debtors. For example, Hughes testified that the "separate corporate existence of many of the Avianca Debtors was driven primarily by local regulatory requirements," which is equally applicable to Avifreight. Dkt. 2262 ¶¶ 18, 26 ("Avifreight was established with the sole purpose of complying with local [Mexican] regulations"). Hughes further testified that the Debtors all have common ownership, with the Avianca Debtors owning 90-92% of the Unconsolidated Debtors, which are indirectly owned by Avianca Holdings S.A., which in turn also directly or indirectly owns the Avianca Debtors. *Id.* ¶ 27; Dkt. 2148, Ex. B, p. 243 of 261. Moreover, the Unconsolidated Debtors are part of Debtors' consolidated financial statements and future financial projections. Dkt. 2370 130:6-15; 131:9-12; *see also* 110:3-6; Dkt. 2138, Ex. D, pp. 250-58.

D. <u>The Subsequent Bankruptcy Court Proceedings</u>

Notwithstanding the above-described failures by Debtors to meet their burdens of proof, on November 2, 2021, the bankruptcy court entered the Order confirming the Plan, improperly holding that (i) Creditors had the burden of demonstrating the value of the Shared Collateral, and finding that Debtors' unsupported assumptions regarding the Shared Collateral's value was somehow sufficient; (ii) substantive consolidation of 37 of the 40 Debtors was appropriate; and (iii) the Plan did not violate the absolute priority rule. *See generally* Dkt 2300 pp. 138-192. As demonstrated at length in Creditors' appeal brief, these were critical errors that require reversal. Appeal Brief pp. 16-30. Creditors filed their notice of appeal on the bankruptcy court docket on November 16, 2021, on notice to all participants in the bankruptcy proceedings, and pressed for as quick a resolution as possible, including filing their appeal brief at the earliest possible moment.

The confirmation of the Plan, however, is not the end of proceedings in the bankruptcy court. Indeed, numerous parties, including Debtors, continue litigating various aspects of the bankruptcy. For example, Debtors continued to object to various proofs of claim, some of which have been upheld by the bankruptcy court. *See, e.g.*, Dkt. 2335, 2336, 2337, 2338, 2399, 2443, 2451, 2452. Debtors also continued to modify the Plan by filing additional supplements. Specifically, on December 1, 2021, nearly one month after the Plan had been confirmed, Debtors supplemented the Plan with another 159 pages of information regarding, among other things, specific aircraft leases that would be assumed or rejected. *See generally* Dkt. 2378. Later that same day, Debtors filed a massive 1,034-page Plan supplement, including modifications to the Transactions Description, and more than 200 additional contracts that would be assumed together with the respective Cure Amounts. *See generally* Dkt. 2385.

The various professionals working on the bankruptcy have also submitted numerous fee applications, which have not yet been resolved and plainly will affect Debtors' assets. The bankruptcy court has scheduled a hearing for March 3, 2022 regarding 18 such fee applications that seek a total of **more than $43 million** for the period of June-November 2021 alone, and approximately **$142 million** for the entirety of the bankruptcy proceedings. *See generally* Dkt. 2446, 2447, 2448, 2449, 2456, 2461, 2464, 2465, 2466, 2468, 2476, 2477, 2470, 2471, 2472, 2473, 2474, 2475, 2479. Thus, the amount of professional fees sought is more than **1,700%** larger than the value of Creditors' claims. In fact, Debtors' primary litigation counsel, Milbank LLP, is seeking nearly **$52 million** in fees, an amount far in excess of the Creditors' claims and that constitutes more than one-third of all fees being sought. Dkt. 2476. Similarly, Seabury seeks more than **$26 million** in fees for its services as Debtors' financial advisor and investment banker. Dkt. 2465. Notably, it is not just the bankruptcy professionals that are profiting from this bankruptcy:

according to Debtors' most recent monthly operating report, AVH had a "cash balance" of **$990,844,000** – **nearly one billion dollars** – at the end of October 2021, **an amount more than 1,200% larger than the value of Creditors' claims**. Dkt. 2424.

E. Debtors' Motion to Dismiss the Appeal

On January 4, 2022, Debtors filed their motion to dismiss this appeal as equitably moot. Aside from Debtors' brief, the sole support for the motion is a declaration from Richard Galindo (the "Galindo Dec."), the Debtors' general counsel, who makes the bald assertions in completely conclusory terms without any specifics that the Plan has either been substantially consummated or resulted in a comprehensive change in circumstances to the point that the Court cannot possibly craft any equitable relief. Mr. Galindo's sole basis for these assertions is his vague claim that Debtors have engaged in various "corporate transactions," which he repeatedly labels as "complex" to try to give the impression that they cannot be unwound.

Notably, however, Mr. Galindo does not provide the critical details necessary for the Court or another party to evaluate these supposed transactions. For example, while Mr. Galindo cites various amended "credit facilities" the reorganized Debtors entered into, he never states whether the Debtors have drawn down any of that credit. Galindo Dec. ¶ 12. Likewise, while Mr. Galindo claims that the Debtors have assumed "thousands of executory contracts and unexpired leases," while rejecting numerous others, he makes no effort to explain which of the more than 3,400 contracts that were to be assumed he is referring to, whether Debtors have cured any of the respective defaults by paying the Cure Amounts, or even identifying how many contracts Debtors have yet to assume or reject. *Id.* ¶ 13. Moreover, while Mr. Galindo asserts that distributions have begun to certain classes of claims, he implicitly concedes that distributions have not begun for many entire classes of claims, such as the general unsecured claims. *Id.*

Tellingly, Mr. Galindo also fails to attach a single exhibit to his declaration to support his conclusory and self-serving assertions. In fact, the only documents attached to the motion are three exhibits to Debtors' brief: (i) an organizational chart for purposes of the Rule 7.1 disclosure statement, (ii) the bankruptcy court's Order, and (iii) the Transactions Description from October 5, 2021. Incredibly, however, despite attaching the Transactions Description, neither Debtors' brief nor the Galindo Dec. makes any attempt to demonstrate which of the more than 20 "key steps" described therein have been performed, and which have not. Rather, Debtors merely make vague references to their non-specific corporate transactions in the hopes that the Court will simply accept these conclusory statements and not wade through thousands of pages of Plan materials to eventually discover the massive scope of work that still remains. Indeed, there are at least eight "key steps" in the Transactions Description that Debtors completely ignore, demonstrating that they have not yet substantially consummated the Plan or that there has been a sufficient change in circumstances to render this appeal moot.

Specifically, even assuming that Debtors' vague references to "corporate transactions" could demonstrate compliance with any step in the Transactions Description, Debtors do not demonstrate whether or how they have complied with:

- Steps 5 and 8, which provide for various newly-created holding companies to transfer subscriber shares in other newly-created holding companies to yet other newly-created holding companies;
- Steps 6 and 9, which require Debtors to obtain all necessary governmental approvals required to put the Plan into effect;
- Step 10, which requires Debtors to capitalize or write-off historic advances for future capital contributions in certain subsidiaries;
- Step 19, which requires Debtors to issue new shares to "general unsecured creditors," and not just the "Tranche B lenders" referred to in the Galindo Dec. Galindo Dec. ¶ 11;

- Step 20, which requires debtor Avianca Group International Limited to adopt a "management incentive plan;" or
- Step 21, which requires Debtors to dissolve and liquidate certain holding companies.

Similarly, Article V.J.3 of the Plan requires Debtors to appoint new boards of directors for each of their subsidiary entities. However, the Galindo Dec. only mentions a single board of directors, which is not for any of the subsidiary entities, again demonstrating that the Plan is not substantially consummated. Galindo Dec. ¶ 8.

ARGUMENT

I.

THE COURT SHOULD DENY THE MOTION

"Equitable mootness is a prudential doctrine that is invoked to avoid disturbing a reorganization plan once implemented," where granting the appellant any effective relief "would be inequitable." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143-44 (2d Cir. 2005). In order for equitable mootness to apply, an appellee bears the burden to demonstrate that a reorganization plan has been "substantially consummated" or resulted in a "comprehensive change in circumstances," at which point the appeal is presumed to be equitably moot unless the appellant demonstrates that (i) "the court can still order some effective relief," (ii) "such relief will not affect the re-emergence of the debtor as a revitalized corporate entity," (iii) the "relief will not unravel intricate transactions" and make an unmanageable situation for the bankruptcy court, (iv) "the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings," and (v) the appellant diligently pursued a stay of the objectionable order, if the failure to do so would render it inequitable to reverse the order on appeal. *In re Delta Air Lines, Inc.*, 374 B.R. 516, 522-23 (S.D.N.Y. 2007) (*citing In re Chateaugay Corp.*, 10 F.3d 944, 952 (2d Cir. 1993)).

Determining whether an appeal is equitably moot is a fact-intensive inquiry, which must be exactingly analyzed. *See In re Baker*, 2005 U.S. Dist. LEXIS 36969, *22 (E.D.N.Y. Aug. 31, 2005) (whether an appeal is equitably moot because the plan has been substantially consummated is an issue of fact); *In re Block Shim Dev. Company-Irving*, 113 B.R. 256, 258 (N.D. Tex. 1990) (noting that the "mootness doctrine is not to be applied in an uncritical manner," but must be analyzed "with care and skillful precision").

Here, Debtors' motion is a transparent attempt to deprive Creditors of their day in court by precluding judicial review of an improper Order. The motion fails for at least three reasons: (A) it is premature, as the merits of this appeal are highly relevant to determining whether an equitable remedy is proper; (B) Debtors have failed to meet their burden to demonstrate that the Plan has been substantially consummated or resulted in a comprehensive change in circumstances; and (C) even if they had, the Court would still be fully capable of providing fair and equitable relief.

A. The Court Should Defer Any Consideration of Equitable Mootness Until It Considers the Merits of the Appeal

The Court should deny Debtors' motion as premature and defer any consideration of whether this appeal is equitably moot until the merits of the appeal can be addressed. It is well settled that equitable mootness is not a threshold issue that must be determined before the Court proceeds with an appeal, contrary to Debtors' argument. Mov. Br. pp. 12-13, n.7. To the contrary, the Second Circuit has consistently held that "a court is not inhibited from considering the merits [of an appeal] before considering equitable mootness." *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 144 (equitable mootness "bears only upon the proper remedy, and does not raise a threshold question of" the court's "power to rule"); *In re MPM Silicones, LLC*, 874 F.3d 787, 804 n.17 (2d Cir. 2017) (Court summarily denied debtors' motion to dismiss on equitable mootness grounds without prejudice to raising the issue "in their merits brief"). Indeed, the Second Circuit has held

that "[o]ften, an appraisal of the merits is essential to the framing of an equitable remedy." *In re Metromedia Fiber Network, Inc.*, 416 F.3d at 144; *see also One2One Communs., LLC v. Quad/Graphics, Inc.*, 805 F.3d 428, 451 (3d Cir. 2015) ("Considering the equities after the merits, at the remedial stage, offers several advantages over abstaining from hearing the appeal altogether," including judicial economy, as deciding the merits may be simpler than deciding the issue of mootness).

Applying these principles, courts across the country routinely defer considerations of equitable mootness until the merits of the appeal can be resolved and a more fulsome record developed. *See, e.g.*, *In re Windstream Holdings, Inc.*, 2020 U.S. Dist. LEXIS 204199, *5-7 (S.D.N.Y. Nov. 2, 2020) ("The Court declines to determine whether the bankruptcy appeal is equitably moot in advance of, and separate from, the merits of the appeal."); *In re Kaspar*, 2021 U.S. Dist. LEXIS 62973, *50-51 (S.D.N.Y. Mar. 31, 2021) ("The Court is not yet prepared, based on the limited factual record and briefing before it, to dismiss the Town's appeal as equitably moot"); *In re Tenorio*, 2018 Bankr. LEXIS 456, *13-17 (9th Cir. BAP Feb. 8, 2018) (resolving issue of equitable mootness together with the merits of the appeal after deferring motion to dismiss); *In re Envirodyne Indus.*, 29 F.3d 301, 303-04 (7th Cir. 1994) (resolving the merits of the appeal while declining to determine whether appeal was equitably moot, because "we cannot tell whether that is the case" based on the current record).

Here, Court should defer the issue of equitable mootness until it can address the merits of the appeal. As noted above, this appeal largely concerns Debtors' failure in the bankruptcy court to prove facts sufficient to justify substantively consolidating the Avianca Debtors, but not the Unconsolidated Debtors, or that the value of the collateral securing the 2023 Notes is insufficient to fully satisfy Creditors' claims along with the other secured creditors. These missing facts are

highly relevant for the Court to craft an equitable remedy in this matter, as they greatly affect the asset pool to satisfy claims, and whether further proceedings are even necessary.

Accordingly, the Court should deny the motion for this reason alone.

B. Debtors Have Not Demonstrated that the Plan Has Been Substantially Consummated or Resulted in a Comprehensive Change in Circumstances

Even if the Court accepts Debtors' invitation to possibly deny Creditors their day in court, which it should not, the Court should still deny the motion because Debtors have utterly failed to meet their threshold burden to demonstrate that the Plan has been substantially consummated or resulted in a comprehensive change in circumstances.

While courts have not developed a formal test for the "comprehensive change in circumstances" standard, courts generally apply the same analysis as in substantial consummation. *In re Delta Air Lines, Inc.*, 374 B.R. at 522. "Whether a plan has been substantially consummated is a question of fact." *In re Lafayette Hotel Pshp.*, 1997 U.S. Dist. LEXIS 14771, *6 (S.D.N.Y. Sept. 26, 1997). In order for a reorganization plan to be "substantially consummated" as defined in the Bankruptcy Code, a debtor bears the burden to "demonstrate that all of the following have occurred:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan.

In re Airport Lumber, 1995 U.S. Dist. LEXIS 19670, *9 (N.D.N.Y. Dec. 29, 1995); *accord In re Lafayette Hotel Pshp.*, 1997 U.S. Dist. LEXIS 14771, at *6; 11 U.S.C. § 1101(2); *In re H & L Developers*, 178 B.R. 77, 80 (Bankr. E.D. Pa. 1994) ("All three elements must be present to support a finding of substantial consummation.").

Even assuming Debtors have sufficiently alleged the third element, they do not, because they cannot, satisfy the first two because they cannot demonstrate that they transferred "all or substantially all" of property called for in the Plan, or assumed management over the management of such property. *See In re Baker*, 2005 U.S. Dist. LEXIS 36969, at *23 (plan was not substantially consummated where debtor "failed to refinance its properties as required under the confirmed plan"); *In re Airport Lumber*, 1995 U.S. Dist. LEXIS 19670, at *10-12 (plan was not substantially consummated because debtor had not transfer property owed to one of its major creditors); *In re Thorpe Insulation Co.*, 677 F.3d 869, 882 (9th Cir. 2012) (finding that a plan was not substantially consummated where "only $135 million has been transferred" of the plan's "$600 million in settlement proceeds"); *In re Dean Hardwoods, Inc.*, 431 B.R. 387, 393 (Bankr. E.D.N.C. 2010) (substantial consummation had not occurred because debtor's post-confirmation report showed that half of the classes in the plan had not received any distributions or transfers, and noting that "substantial means something more than halfway, more than mere preponderance; when used with the word 'all,' there is a suggestion of completeness") (*citing In re Heatron, Inc*, 34 B.R. 526, 529 (8th Cir. 1983));

Here, as demonstrated above, Debtors' motion not only rests entirely on a certification that is not supported by any documents, but it completely ignores wide swathes of the transactions called for in the Plan, including the appointment of new boards of managers for their subsidiaries and at least 8 items that Debtors themselves refer to in the Transactions Description as "key steps" to implementing the Plan, such as obtaining necessary governmental approvals, capitalizing or writing-off historic advances for future capital contributions in certain subsidiaries, issuing new shares to "general unsecured creditors," adopting a "management incentive plan," and dissolving and liquidating certain holding companies.

Nor can Debtors rely on their vague references to purportedly complex "commercial transactions" to meet their burden, as these references are woefully lacking in necessary details. As noted above, Debtors do not even provide copies of the documents referenced in the Galindo Dec., and do not state which contracts have been assumed under the Plan, whether the defaults under such contracts have been cured, or whether any funds have actually been lent pursuant to Debtors' amended credit facilities. Absent these critical details, the Court cannot determine how much of the Plan has been consummated, or the extent to which any party has changed its circumstances in reliance on the Plan.

Moreover, Debtors' argument is further refuted by the fact that significant proceedings have been, and continue to be, underway in the bankruptcy court since the Plan was confirmed, including challenges by Debtors to certain proofs of claim, Debtors supplementing the Plan, and pending fee applications for tens of millions of dollars.

Unsurprisingly, Debtors do not cite a single case where a court found that a plan had been substantially consummated despite (i) the debtors only vaguely describing the purported transactions that had occurred, (ii) where their own documents revealed numerous significant steps of the plan that had not been effectuated, and (iii) where there were myriad ongoing proceedings in the bankruptcy court regarding plan consummation. To the contrary, all the cases Debtors cite to support the contention that the Plan has been substantially consummated are entirely inapposite for at least two reasons.

First, in almost all the cases Debtors cite, the appellants **did not dispute** that the plans had been substantially consummated. *See, e.g., In re Metromedia Fiber Network, Inc.*, 416 F.3d at 144 (Mov. Br. p. 15) ("Appellants have not argued" that the plan was not substantially consummated); *In re Sunbeam Corp.*, 2004 U.S. Dist. LEXIS 909, *8 (S.D.N.Y. Jan. 27, 2004) (Mov. Br. p. 16)

(appellants did not dispute debtor's "contention that substantial consummation" had occurred); *In re Loral Space & Comms.. Ltd.*, 342 B.R. 132, 138 (S.D.N.Y. 2006) (Mov Br. pp. 15-16) (same); *In re Revere Copper & Brass Inc.*, 78 B.R. 17, 20 (S.D.N.Y. 1987) (Mov. Br. p. 16) (appellants' only response to substantial consummation argument was that enforcing the plan would be "draconian and entirely unnecessary"). Here, by contrast, Creditors not only dispute, but have demonstrated that Debtors failed to meet their burden to show that the Plan has been substantially consummated.

Second, the debtors in the cases Debtors cite each provided highly specific and detailed information regarding how they completed all or substantially all steps required to consummate their reorganization plans, as opposed to the vague, conclusory, and incomplete statements provided by Debtors here. *See, e.g., In re Metromedia Fiber Network, Inc.*, 416 F.3d at 144 (Mov. Br. p. 15) (debtors detailed their completed transactions, including issuing "substantially all" of the publicly-traded stock for the reorganized debtors, a primary creditors' "full receipt" of newly-issued stock in exchange for forgiveness of significant claims, and "a host" of other transactions "as part of the [debtors'] day-to-day operations"); *In re Sunbeam Corp.*, 2004 U.S. Dist. LEXIS 909, *8 (S.D.N.Y. Jan. 27, 2004) (Mov. Br. p. 16) (same, including fully assuming or rejecting all outstanding contracts or leases, issuing employee stock options, adopting new bylaws, and using the proceeds of a $380 million credit facility to obtain working capital, repay debt, and provide cash collateral for letters of credit); *In re Revere Copper & Brass Inc.*, 78 B.R. 17, 20 (S.D.N.Y. 1987) (Mov. Br. p. 16) (same, including the specific amounts paid out towards numerous categories of claims, the issuance of new shares and promissory notes, cancelling outstanding public debentures and issuing new replacement debentures, and new SEC filings regarding the debtors' changed financial condition and capital structure as a result of the reorganization); *Six W.*

Retail Acquisition, Inc. v. Loews Cineplex Entm't Corp., 286 B.R. 239, 244 (S.D.N.Y. 2002) (Mov. Br. p. 16) (same, including fully repaying and terminating debtor in possession and postpetition financing facilities, merging and/or dissolving more than a hundred corporate entities, cancelling debtors' publicly traded common stock and bonds, and cancelling all intercompany debt); *In re Loral Space & Comms.. Ltd.*, 342 B.R. 132, 138 (S.D.N.Y. 2006) (Mov Br. pp. 15-16) ("[s]ubstantially all of the property proposed to be transferred, and ***all*** equity interests proposed to be cancelled have been transferred and cancelled, respectively; the Reorganized Debtors have assumed ***all*** business operations and ***all*** property dealt with by the Reorganization Plan; and distributions under the plan have nearly been completed") (emphasis added). Here, as demonstrated above, Debtors have not done anything close to this.

Accordingly, Debtors have failed to meet their burden to demonstrate that the Plan has been substantially consummated or resulted in a comprehensive change in circumstances.

C. The Court Would Still Be Capable of Awarding Fair and Equitable Relief, Even If the Appeal Were Presumptively Moot

Even if Debtors had met their burden to show that the appeal was presumptively equitably moot, which they have not, the Court should still deny the motion because Creditors can demonstrate that they satisfy all five *Chateaugay* factors, such that the Court is fully capable of awarding equitable relief without disturbing the bankruptcy process.

As noted above, it is irrelevant if an appeal is presumed to be equitably moot where an appellant demonstrates that the five of the factors set forth in *Chateaugay* are present, *i.e.*, (i) the court can still order some effective relief, (ii) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity, (iii) the relief will not unravel intricate transactions and make an unmanageable situation for the bankruptcy court, (iv) the parties that would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the

proceedings, and (v) the appellant diligently pursued a stay of the objectionable order, if the failure to do so would render it inequitable to reverse the order on appeal. *In re Chateaugay Corp.*, 10 F.3d at 952.

Creditors satisfy the first three factors because the Court can easily craft relief that will be effective and will neither harm Debtors' re-emergence nor unravel intricate transactions. As noted above, this appeal concerns whether the Debtors sufficiently met their burden to demonstrate that (i) the value of the Shared Collateral was insufficient to satisfy any part of Creditors' claims, (ii) substantive consolidation was appropriate for the Avianca Debtors, but not the Unconsolidated Debtors, and (iii) whether the Plan discriminates against Creditors in violation of the absolute priority rule.

With respect to the first issue, the Court is fully capable of reversing the Order, or the parts of it holding that Creditors are unsecured creditors, and directing further proceedings regarding the value of the Shared Collateral. Such relief would not adversely affect any other parties in the bankruptcy or otherwise disturb the bankruptcy proceedings because that relief does not involve a determination that the Shared Collateral actually is sufficient to pay Creditors. Moreover, even if the bankruptcy court held that the Shared Collateral is sufficient, such that Creditors are secured creditors, Debtors have nearly **$1 billion in available cash**, a minor portion of which could easily be distributed to satisfy Creditors without affecting any other party. Similarly, the Court can direct further consideration of the substantive consolidation and discrimination issues without disturbing the bankruptcy in any meaningful way, and which would not award Creditors any relief that would come at the expense of any other party. Even if the Court fashioned relief in the form of vacating these limited portions of the Plan, that would still be perfectly acceptable. Indeed, as noted above, despite repeatedly referring to various mysterious corporate transactions as "complex," and baldly

asserting that such transactions cannot be undone, Debtors have provided no indication that this is actually the case.

In *One2One Communs., LLC*, 805 F.3d 428, the Court considered factually similar circumstances and rejected the assertion that an appeal was equitably moot. In rejecting the mootness argument, the Court held:

> Here, the Plan did not involve intricate transactions and the Debtor did not present sufficient evidence that the Plan would be difficult to unravel. Instead, the Debtor identified various post-confirmation transactions entered into in the ordinary course of the reorganized Debtor's business. **These routine transactions, including the investment by the Plan Sponsor, the commencement of distributions, the hiring of new employees and entering into various agreements with existing and new customers are likely to transpire in almost every bankruptcy reorganization where the appealing party is unsuccessful in obtaining (or fails to seek) a stay**. Further, the Plan did not involve the issuance of any publicly traded securities, bonds, or other circumstances that would make it difficult to retract the Plan. Accordingly, the District Court abused its discretion in finding that the first and fourth factors favored the Debtor.

Id. at 436-37 (emphasis added).

Here, just as in *One2One Communs., LLC*, the Plan does not involve any particularly complex transactions. Rather, it consists largely of shuffling shares between the various Debtors and newly-created holding companies, receiving a capital investment, and entering into new or amended credit facilities. These are precisely the sort of "routine transactions" that occur in almost every bankruptcy reorganization. *Id.* Likewise, this case does not require Debtors to issue publicly-traded securities. *Id.*; *see* Dkt. 2185 pp. 6-10 of 2215. The worst that can be said for such transactions is that Debtors might be required to issue some new shares or repay portions of funds they may have drawn down (although Debtors conspicuously fail to state that they have drawn down on any credit facility), which is hardly likely to destroy Debtors' chance of re-emerging from bankruptcy. *See In re Lafayette Hotel Pshp.*, 1997 U.S. Dist. LEXIS 14771, at *14 (equitable mootness inapplicable where the "reorganization plan at issue here is a simple matter"); *In re*

Tenorio, 2018 Bankr. LEXIS 456, at *16-17 (rejecting equitable mootness and noting that "[t]his case is not so complex that we cannot unwind the transaction" at issue). This is particularly true given the disparity between Creditors' relatively small $8.25 million claims and the overall multi-billion dollar bankruptcy proceedings, ensuing Plan, and nearly $1 billion in cash that Debtors have on hand. *See In re Chateaugay Corp.*, 167 B.R. 776, 779 (S.D.N.Y. 1994) (rejecting equitable mootness, and noting that "[i]t is difficult to conceive how" possibly being forced to distribute $6 million "could unravel the Debtors' reorganization, which involved the transfer of billions of dollars, and which has resulted in the revival of Debtors into a multi-billion dollar operation with $200 million in working capital").

None of the cases Debtors cite mandates a different result because they are all inapposite. For example, *In re Calpine Corp.*, the reorganization plan was too complex to reasonably unwind in part because the plan required the debtor to issue publicly-traded, rather than private, securities and bonds that had already begun trading on public exchanges. *See In re Calpine Corp.*, 390 B.R. 508, 516 (S.D.N.Y. 2008) (debtor engaged in numerous actions to consummate the plan, including "issuing approximately 417 million shares of New Calpine Common Stock to thousands of creditors," "causing the stock of New Calpine to begin trading on the NYSE on February 7, 2008," and "issuing 48.5 million Warrants to Old Calpine Shareholders").

Debtors also cite two cases that are inapposite because the courts in each expressly noted that the plans had been fully consummated in all material respects. *See Ahuja v. Lightsquared Inc.*, 644 Fed. Appx. 24, 27 (2d Cir. 2016) (noting that it was undisputed that "the final step in the substantial consummation of the Plan was performed"); *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1048 (7th Cir. 1993) ("In short, all material aspects of the Plan have been implemented. SPE's capital structure has been revised, and the reorganized entity has reentered the stream of

commerce."). As demonstrated above, this is far from the case here, where numerous aspects of the Plan remain to be completed or even begun. Moreover, the court in *Ahuja* noted that, despite not being unable to fully unwind the Plan, it could still craft some form of equitable relief involving money damages, including "remanding with instructions to the bankruptcy court to order the return of any funds that were erroneously disbursed, so long as 'that can be done manageably and without imperiling [the debtor's] fresh start.'" *Ahuja*, 644 Fed. Appx. at 27-28. Here, too, the Court need not reverse the entire Plan in order to provide Creditors relief. For example, the Court can remand the case to the bankruptcy court solely for a determination of the value of the Shared Collateral and whether Creditors' claims should be considered fully secured.

In re Great Atl. & Pac. Tea Co. is inapposite because that case involved a significantly larger $76 million claim that had been discharged and which would have ruined the debtors' ability to obtain investors if it were found non-dischargeable. *Id.*, 2013 U.S. Dist. LEXIS 47610, *22-23 (S.D.N.Y. Mar. 31, 2013) (noting that an investor would "never" agree to close on a deal without knowing whether such a large claim would be discharged). The same is true in *In re Metromedia Fiber Network, Inc.*, where the court held that "if appellants' claims are substantial (as they urge)," investors would likely have not invested had such claims not been released. *Id.*, 416 F.3d at 145. Here, by contrast, not only are Creditors' $8.25 million claims relatively de minimis as compared with this multi-billion dollar bankruptcy involving Debtors presently holding nearly $1 billion in cash, but the Plan was approved knowing that Creditors would receive at least some payment, if not precisely how much.

Next, Debtors cite *In re Charter Communs., Inc.* for the proposition that a court "could not grant monetary damages to an appellant asserting misclassification of its claim without unwinding the reorganization plan to reclassify claims." Mov. Br. p. 22, n. 9 (citing *In re Charter Communs*,

Inc., 691 F.3d 476, 488 (2d Cir. 2012)). This argument fails. In *Charter*, the entire plan would have had to be unwound to reclassify the claims because all of the Charter entities had been jointly valued together, rather than separately. *In re Charter Communs., Inc.*, 691 F.3d at 487-88. That has no application here because, even if the Avianca Debtors were properly substantively consolidated, Appellants' claims can be reclassified by simply requiring Debtors to properly determine the Shared Collateral's value, which would not require unwinding the entire Plan.

Finally, *In re Nuverra Envtl. Sols., Inc.* is inapposite because Creditors are not requesting preferential treatment from others in their class of creditors, as was the case there, but rather that their claims be re-classified based on the improper (*i.e.*, complete lack of a) valuation of the Shared Collateral. *Id.*, 590 B.R. 75, 85 (D. Del. 2018).

Creditors also satisfy the fifth factor. The fact that bankruptcy court refused to issue a stay (*see* Dkt. 2300 at ¶ 67("The terms of this Confirmation Order shall be immediately effective and shall not be stayed")) and that Creditors, therefore, did not obtain a stay of the Order is not fatal to their appeal, because all Creditors need demonstrate is that it would not be inequitable for the Court to fashion relief for Creditors in such circumstances. *STL Transport, Inc.*, 1987 U.S. Dist. LEXIS 4389, at *8 (W.D.N.Y. May 19, 1987) ("The failure of the Department to seek a stay pending appeal is not dispositive of the issue" of an appeal being equitably moot); *In re 183 Lorraine St. Assocs.*, 198 B.R. 16, 25 (E.D.N.Y. 1996) ("an appellant's failure to obtain a stay does not automatically render a subsequent appeal moot."). Here, there is no inequity involved with the Court unwinding any of the relevant transactions or otherwise reversing the Order, because as noted above, the "reorganization plan at issue here is a simple matter." *In re Lafayette Hotel Pshp.*, 1997 U.S. Dist. LEXIS 14771, at *14. Indeed, as the Court in *Lafayette* held, "notwithstanding [appellant's] unexcused failure to seek a stay, appellant is entitled to have the Bankruptcy Court's

Confirmation Order reviewed on its merits." *See also In re Jorgensen*, 66 B.R. 104, 106-07 (9th Cir. B.A.P. 1986) (appeal from confirmation of a plan was not moot despite the failure to obtain a stay pending appeal, where the relevant sales and transfers of property had only just begun and was not more than half completed).

Indeed, there is no lack of equity in awarding Creditors relief in these circumstances given that Debtors have not made, and could not make, a sufficient showing that they cannot pay Creditors' relatively small claims when Debtors have nearly $1 billion in cash on hand. As noted above, the Court is currently scheduled to hear fee applications from 18 separate professional firms seeking to recover a total of more than $142 million, which is 1,700% larger than Creditors' claims, including $52,000,000 just from Debtors' primary counsel, Milbank LLP. In fact, the court in *Chateaugay Corp.* reached this same conclusion. *See In re Chateaugay Corp.*, 167 B.R. at 779 (rejecting equitable mootness, and noting that "[i]t is difficult to conceive how" possibly being forced to distribute $6 million "could unravel the Debtors' reorganization, which involved the transfer of billions of dollars, and which has resulted in the revival of Debtors into a multi-billion dollar operation with $200 million in working capital").

Finally, Creditors also satisfy the fourth *Chateaugay* factor, as every relevant party has had ample notice of this appeal and sufficient opportunity to participate in it since Creditors filed their notice of appeal on notice to the participants in the bankruptcy proceeding. Even if that were not sufficient, which it is, Debtors are ultimately the only parties that are truly affected by this appeal, as Creditors are primarily arguing only that Debtors failed to meet evidentiary burdens in the bankruptcy court. No other party could be affected by this, because Debtors will still be able to present their evidence and try to obtain the same result. *See In re 183 Lorraine St. Assocs.*, 198

B.R. at 25 (appellants satisfied the fourth factor "where all relevant parties are before the court on these appeals and have briefed the issues").

CONCLUSION

For the reasons set forth herein, Creditors respectfully request that the Court deny the motion in full.

Dated: New York, New York
January 25, 2022

/s/ Glen Lenihan

Glen Lenihan, Esq.
Jonathan A. Lynn, Esq.
OVED & OVED LLP
Attorneys for Appellants
401 Greenwich Street
New York, NY 10013
Tel: 212.226.2700
glenihan@oved.com
jlynn@oved.com