Nos. 1:21-cv-10004-AJN, 1:21-cv-10118-AJN

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

In re Avianca Holdings S.A., *et al.*,

Debtors and Reorganized Debtors.

Blake W. Kim Rollover IRA, *et al.*,
Udi Baruch Guindi, *et al.*,

Appellants,

v.

Avianca Holdings S.A., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
CHAPTER 11 CASE NO. 20-11133 (MG)

APPELLEES' REPLY IN SUPPORT OF MOTION TO DISMISS APPEALS AS EQUITABLY MOOT

Dennis F. Dunne
Evan R. Fleck
Benjamin Schak
Milbank LLP
55 Hudson Yards
New York, NY 10001
Telephone: (212) 530-5000

Gregory A. Bray
Milbank LLP
2029 Century Park East
33rd Floor
Los Angeles, CA 90067
Telephone: (424) 386-4000

Aaron L. Renenger
Milbank LLP
1850 K Street NW
Suite 1100
Washington, D.C. 20006
Telephone: (202) 835-7500

Counsel for Appellees

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Appellees, Avianca Holdings S.A. ("Avianca Holdings") and the entities that were Chapter 11 debtors (collectively, the "Debtors"), respectfully submit this reply in support of their motion to dismiss these Appeals as equitably moot.[1]

PRELIMINARY STATEMENT

Rather than defend their failure to seek a stay of the Confirmation Order, Appellants[2]—in the face of overwhelming evidence to the contrary—contend in their opposition brief ("Opp.") that the Plan has not been substantially consummated. It is clear why: if successful, Appellants could avoid the requirement to meet the *Chateaugay* factors—and they meet none.

But the Plan has been substantially consummated. Appellees' evidence and the record clearly establish this fact, and Appellants do not demonstrate otherwise. Instead, relying on a distortion of applicable case law, Appellants merely assert—incorrectly—that Appellees have not provided enough information to determine whether the Plan has been substantially consummated. Nonsense. Appellees provided considerable evidence and information in the Motion and accompanying declaration that establish beyond cavil that, as the Bankruptcy Code requires for substantial consummation:

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[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the *Memorandum of Law in Support of Appellees' Motion to Dismiss Appeals as Equitably Moot* [Dkt. No. 14] (the "Motion or "Mot."). Unless otherwise noted herein, internal quotations from case citations have been omitted.

[2] Only one set of Appellants—the Baruch Appellants—submitted an objection to the Motion. The Burlingame Appellants did not object.

(i) all Avianca Holdings' property of value has been transferred;

(ii) the reorganized Debtors have assumed the management of the property dealt with by the Plan, including through the new board of directors of Reorganized AVH; and

(iii) the reorganized Debtors commenced distributions of cash to holders of certain administrative, priority, and secured claims soon after confirmation of the Plan and continue to make such distributions.

Nevertheless, Appellees herein offer additional details regarding the Plan's consummation and the resulting comprehensive change in circumstances.

As the Plan has been substantially consummated and Appellants have failed to—and, indeed, cannot—overcome the presumption of equitable mootness, the Court should dismiss the Appeals now, before it hears the merits.

ARGUMENT

I. The Court Should Not Defer Consideration of Mootness

Courts in this district regularly treat equitable mootness as a threshold matter in bankruptcy appeals.[3] Courts are particularly inclined to consider mootness prior to the merits where appellants fail to seek a stay of a confirmation order, thereby—as here—allowing the unstayed plan to be consummated. *See, e.g.*, *Food Emp'rs Labor Relations Ass'n v. Great Atl. & Pac. Tea Co., Inc. (In re Great Atl. & Pac. Tea Co., Inc.)*, 2013 WL 1310330, at *6 (S.D.N.Y. Mar. 31, 2013) (dismissal as

[3] *See, e.g.*, *CNH Partners, LLC v. SunEdison, Inc. (In re SunEdison)*, 2018 U.S. Dist. LEXIS 136533, at *12 (S.D.N.Y. Aug. 13, 2018) (equitable mootness is "a threshold matter"); *ACC Bondholder Grp. v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 367 B.R. 84, 89 (S.D.N.Y. 2007) (dismissing appeal as equitably moot before merits hearing); *Perez v. Terrestar Corp. (In re Terrestar Corp.)*, 2013 U.S. Dist. LEXIS 58814, at *23 (S.D.N.Y. Apr. 24, 2013) (same).

equitably moot appropriate where appellant "made no effort to obtain a stay and has permitted such a comprehensive change of circumstances to occur as to render it inequitable for the appellate court to reach the merits"); *Harrington v. LSC Commc'ns, Inc. (In re LSC Commc'ns, Inc.)*, 631 B.R. 818, 821 (S.D.N.Y. 2021) (same); *Ad Hoc Adelphia Trade Claims Comm. v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 222 F. App'x 7, 9 (2d Cir. 2006) (affirming dismissal as equitably moot before appeal merits were heard as "[t]he relief requested by appellants would be inequitable as a consequence of their failure to seek a stay").

Appellants made no effort to stay the Confirmation Order. Their only comment on the matter is a blatant misrepresentation: that "the bankruptcy court refused to issue a stay." Opp. at 23. Appellants fail to mention that they did not ask for one. As a matter of equity and judicial efficiency, the Court should consider the Motion before hearing the merits of the Appeals.

II. Appellants Cannot Demonstrate Lack of Substantial Consummation

a. Appellants' Arguments are Not Supported by Case Law

Appellants lead with an astonishing, unsupported argument that Appellees "failed to meet their threshold burden to demonstrate that the Plan has been substantially consummated." Opp. at 14. Appellants contend, citing no case law, that Appellees failed to provide "necessary details" concerning the steps taken since confirmation, including "what makes them so complex." *Id.* at 2, 16. This

blinks reality—misrepresenting both the applicable burden of proof and what evidence is already before the Court. Appellees need only show that Bankruptcy Code section 1101(2) (defining substantial consummation) is satisfied, which they have proven through considerable evidence in the Motion and supporting declaration. This showing is precisely what case law in this Circuit requires.[4]

Appellants do not meaningfully engage with governing case law applying the definition of substantial consummation. *See* Opp. at 15. In one case Appellants cite, substantial consummation was not found where an individual debtor "failed to refinance its properties," which "was the only proper step that could be taken to insure even the remote possibility that this plan could even be substantially consummated"; indeed, "***none*** of the anticipated transactions [had] taken place." *In re Baker*, 2005 U.S. Dist. LEXIS 36969, at *23 (E.D.N.Y. Aug. 31, 2005) (emphasis added). In another, a transfer of property "central to the [] Plan" had not occurred. *In re Airport Lumber*, 1995 U.S. Dist. LEXIS 19670, at *10-12 (N.D.N.Y. Dec. 29, 1995); *see also Motor Vehicle Cas. Co. v. Thorpe*

[4] *See, e.g.*, *Official Comm. of Unsecured Creditors v. Sabine Oil & Gas Corp. (In re Sabine Oil & Gas Corp.)*, 2017 WL 477780, at *3-4 (S.D.N.Y. Feb. 3, 2017) ("[T]he Court has no difficulty concluding that [a]ppellees have satisfied the requirements of Section 1101(2)" where appellees' motion and supporting declaration established that "[c]ontracts, obligations, and leases have been transferred to the Reorganized [Debtors]; management has been transferred to the new boards of directors . . . ; [most] common stock has been distributed . . . ; billions of dollars in debt have been cancelled, and hundreds of millions of dollars in new credit facilities have been established."); *see also In re Adelphia Commc'ns Corp.*, 367 B.R. at 94 (dismissing appeal as equitably moot and finding substantial consummation based on Debtors' brief, which "catalog[ued] all of the steps that have been taken since . . . the Plan went effective").

Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d 869, 878, 882 (9th Cir. 2012) (the plan was not substantially consummated where only $135 million of nearly $600 million in settlement proceeds had been transferred—the central property transfer under the plan). In another, the (out of circuit) court found no substantial consummation by relying on an interpretation at odds with guidance from this court. *Compare In re Dean Hardwoods, Inc.*, 431 B.R. 387, 392 (Bankr. E.D.N.C. 2010) (distribution must commence to substantially all creditors for the plan to be substantially consummated), *with In re MF Global Holdings Ltd.*, 2014 WL 231130, at *3 (S.D.N.Y. Jan. 24, 2014) ("[I]n this district there is no requirement that distribution commence to every class of creditors or that the distributions be substantial; . . . 'commencement of distribution' is ***satisfied as soon as a single payment is made to any creditor in any class***.") (emphasis added). None of these cases is remotely analogous.

Instead, substantial consummation occurs where the Plan has been largely implemented, or numerous contemplated steps have been taken, such that a comprehensive change of circumstances has occurred. *See Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 138, 144 (2d Cir. 2005) (the plan was "largely implemented" where the debtors issued stock, made cash distributions, and entered into new contracts); *Six W. Retail Acquisition, Inc. v. Loews Cineplex Entm't*

Corp., 286 B.R. 239, 243 (S.D.N.Y. 2002) (dismissing the appeal where "numerous steps to implement the Plan have been consummated"); *Whitman Corp. v. Home Holdings, Inc. (In re Home Holdings, Inc.)*, 2001 U.S. Dist. LEXIS 2797, at *16 (S.D.N.Y. Mar. 13, 2001) (the plan was substantially consummated where "many of the transactions provided for in the Plan [had] been implemented and completed"). That is manifestly the case here, as described immediately below.

b. The Debtors' Post-Confirmation Actions Establish Substantial Consummation and a Comprehensive Change of Circumstances

Appellees provided a detailed, albeit non-exhaustive, list of the steps taken to consummate the Plan (Mot. at 9-11; *see also id.* at Ex. C (the "Transaction Steps")) and a declaration describing the status of post-confirmation transactions.[5] This progress plainly meets (and exceeds) the definition of substantial consummation as described in section 1101(2)(A)-(C) of the Bankruptcy Code:

- *Subsection (A) (the transfer of substantially all property to be transferred under the Plan).* The Debtors transferred substantially all of their property to Reorganized AVH (*see* Galindo Decl. ¶ 9), including contracts, intellectual property, and guarantor obligations (*see id.* ¶¶ 8, 10); they have also converted approximately $837 million of the Tranche B Loans into equity interests in Reorganized AVH, a primary transaction

[5] Appellants attempt to make hay of the lack of "documents attached" to the Motion, stating that "the sole support for the [M]otion is a declaration from Richard Galindo, the Debtors' general counsel." Opp. at 9-10. But declarations are evidence, signed under penalty of perjury, and are a useful tool for the provision of succinct information to the court (in lieu of hundreds of thousands of pages of documents). *See, e.g.*, *Compania Internacional Financiera S.A. v. Calpine Corp. (In re Calpine Corp.)*, 390 B.R. 508, 515, n.9 (S.D.N.Y. 2008), *aff'd*, 354 F. App'x 479 (2d Cir. 2009) (relying on declaration submitted by the debtors to determine equitable mootness). If the Court requests any transaction documents, Appellees will readily provide them.

under the Plan that has been substantially completed (*see id.* ¶ 11).

- *Subsection (B) (assumption of the business by the Debtors' successor).* Reorganized AVH and its Board of Directors has been established (*see id.* ¶ 8); Reorganized AVH adopted organizational documents, submitted them to the relevant authorities, and took critical corporate actions (*see id.* ¶¶ 10, 11).

- *Subsection (C) (commencement of distribution to creditors).* The Reorganized Debtors have commenced distributions of cash to holders of certain administrative, priority, and secured claims (*see id.* ¶ 13).

Although this showing is more than sufficient to establish substantial consummation, Appellants identify certain Transaction Steps on which they claim to lack information. *See* Opp. at 10-11. Each is either complete or underway. Steps 5 and 8 (transferring shares to new holding companies), 6 and 9 (obtaining all governmental approvals), and 10 (capitalizing historic advances for future capital contributions) are all complete. *See Second Declaration of Richard Galindo in Support of Appellees' Motion to Dismiss Appeals as Equitably Moot* ¶ 5 ("Sec. Galindo Decl."). The remaining three identified steps, 19 (distribution of shares to general unsecured creditors), 20 (establishment of a management incentive program), and 21 (dissolution of the holding company structure), are in progress.[6] *See id.* ¶ 6. In fact, nearly all of the 21 steps (and numerous sub-steps)

[6] Step 21, the dissolution of the former holding companies, involves multi-month waiting periods under U.K. and Panamanian law, which waiting periods have already begun. *See* Sec. Galindo Decl. ¶ 6. For Step 20, the design of the management incentive plan is underway. *See id.* For Step 19, the Debtors executed a warrant instrument for the issuance of equity warrants to electing general unsecured creditors. *See id.* That these time-consuming steps have begun does not cut against, but instead supports, a finding that the Plan has been substantially consummated.

in the Transaction Steps document have been completed. This is a comprehensive change of circumstances for the Reorganized Debtors and the many stakeholders that have invested or loaned tens of millions of dollars in reliance on the Confirmation Order's finality.[7]

III. Appellants Do Not Meet the *Chateaugay* Factors

As the Plan has been substantially consummated, the Appeals must be dismissed unless Appellants prove ***all*** five *Chateaugay* factors. *See In re Adelphia Commc'ns Corp.*, 367 B.R. at 94. Appellants can establish none.

a. Appellants' Failure to Seek a Stay Is Conclusive

The Bankruptcy Court never "refused to issue a stay" of the Confirmation Order (Opp. at 23); on the contrary, no party ever requested a stay, despite having a ***full month*** prior to the effective date of the Plan to do so.

Nor did the Confirmation Order prevent Appellants from seeking a stay pending an appeal, as Appellants imply. Attempting to justify their inaction, Appellants provide an incomplete citation from the Confirmation Order (*see* Opp. at 23), which they then misinterpret. The full sentence is a standard provision merely stating that the order is immediately effective: "The terms of this

[7] Appellants also argue that the Bankruptcy Court's continued administration of the case (hearing fee applications, claims objections, and related matters) indicates that the Plan has not been substantially consummated. *See* Opp. at 16. Not so. These matters occur post-confirmation in every large Chapter 11 case. That Appellants resort to invoking these commonplace tasks as evidence of lack of consummation indicates how little support for their position there is.

Confirmation Order shall be immediately effective and shall not be stayed *pursuant to Bankruptcy Rules 3020(e), 6004(h), 6006(d), or 7062*." Confirmation Order ¶ 67 (emphasis added on omitted text). Importantly, the order does ***not*** mention Bankruptcy Rule 8007, which governs stays pending appeal. Appellants' unexcused failure to seek a stay is fatal to the Appeals. *See* Mot. at 19-24.

b. Appellants Do Not Meet the Remaining Factors

Appellants also fail to establish the remaining *Chateaugay* factors.

The far-reaching relief requested will unravel the Plan. Appellants seek a re-valuation of the Shared Collateral, the security for Appellants' claims, which necessarily would upend the Plan's entire distribution scheme. The Shared Collateral also secured loans that were converted into equity under the Plan.[8] A re-valuation would undermine this conversion—a key feature of the Plan—as it was premised upon the determined value of the Debtors, inclusive of the Shared Collateral. Appellants also seek reclassification of their claims as something other than general unsecured claims. But this would only be possible upon highly disruptive (and unlikely) events: if the Shared Collateral was re-valued and assigned an immensely higher value, which would be necessary in order for value to flow to the 2023 Noteholders after satisfying those creditors, including the DIP lenders, who have senior claims to the Shared Collateral. This would affect

[8] *See* Confirmation Order, Exhibit B ¶ 12.

distributions to thousands of institutions and individuals, again upending the Plan's distribution scheme. It is difficult to imagine more disruptive relief.[9]

No effective remedy may be crafted without violating the Code. Appellants request that the Court grant them, ***and only them***, additional relief beyond what other holders of 2023 Notes received. This violates Bankruptcy Code section 1123(a)(4), which requires that a plan "provide the ***same treatment for each claim or interest of a particular class***, unless the holder of a particular claim or interest agrees to a less favorable treatment" (emphasis added).[10]

Sufficient notice to affected parties has not been provided. The Debtors are not the only parties affected by the far-reaching relief Appellants seek. *See* Mot. at 25. Wider notice than service on "the participants in the bankruptcy proceeding" was warranted (Opp. at 24); its absence compels dismissal of these Appeals.[11]

CONCLUSION

For the foregoing reasons, the Appeals should be dismissed with prejudice as equitably moot.

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[9] *See Tuttle v. Allied Nev. Gold Corp. (In re Allied Nev. Gold Corp.)*, 569 B.R. 213, 223-24 (D. Del. 2017) (appeals challenging valuation have been "rejected under the doctrine of equitable mootness because the proposed relief *(i.e.*, revaluation of the company) would likely topple the delicate balances and compromises struck by the plan.").

[10] *See In re W.R. Grace & Co.*, 475 B.R. 34, 134 (D. Del. 2012) (granting favorable treatment to the objector, and not to other creditors in the same class, is "expressly forbidden by the Code").

[11] *See In re Calpine Corp.*, 390 B.R. at 522 (finding that adverse parties included the reorganized debtors' creditors and others who participated in and relied upon transactions approved in the plan, and finding that the appellants' assertion that service of their notice of motion to the list of all interested parties involved in the reorganization was not enough to satisfy this factor).

Dated: New York, New York
February 1, 2022

Respectfully submitted,

/s/ *Evan R. Fleck*

Dennis F. Dunne
Evan R. Fleck
Benjamin Schak
MILBANK LLP
55 Hudson Yards
New York, New York 10001
Telephone: (212) 530-5000
Facsimile: (212) 822-5567

Gregory A. Bray
MILBANK LLP
2029 Century Park East, 33rd Floor
Los Angeles, CA 90067
Telephone: (424) 386-4470
Facsimile: (213) 892-4770

Aaron L. Renenger
MILBANK LLP
1850 K Street NW, Suite 1100
Washington, D.C. 20006
Telephone: (202) 835-7505
Facsimile: (202) 263-7505

Counsel for Appellees