

WHITE & WILLIAMS LLP
James C. Vandermark, Esq.
Andrew E. Arthur, Esq.
7 Times Square, Suite 2900
New York, New York 10036-6524
Telephone: (212) 244-9500
Facsimile: (212) 244-6200
E-mail: vandermarkj@whiteandwilliams.com
arthura@whiteandwilliams.com

Counsel to Google LLC

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

In re

AVIANCA HOLDINGS S.A., *et al.*,

Debtors.

Chapter 11

Case No. 20-11133(MG)

(Jointly Administered)

**GOOGLE LLC’S LIMITED OBJECTION AND RESERVATION OF RIGHTS TO THE
POTENTIAL ASSUMPTION OF EXECUTORY CONTRACTS**

Google LLC f/k/a Google Inc. (“**Google**”), by and through its undersigned counsel, files the following limited objection and reservation of rights to the potential assumption and assignment of the Google Contracts (as defined below) and proposed cure amounts, in response to the *Notice of Filing of Plan Supplement* [ECF No. 2185] (the “**Cure Notice**”) filed by the above-captioned debtors and debtors-in-possession (the “**Debtors**”), and states as follows:

PRELIMINARY STATEMENT

Google objects to the proposed cure amounts as set forth by Debtors in the Cure Notice because the proposed cure amounts to be paid to Google - \$0.00, if Google’s executory contracts are assumed, are drastically less than the amount required to be paid to cure the monetary defaults under Google’s Contracts – at least \$1,214,707.86.



BACKGROUND

1. On or about May 10, 2020 (the **“Petition Date”**), the Debtors filed voluntary petitions for Chapter 11 relief in the United States Bankruptcy Court for the Southern District of New York (the **“Bankruptcy Court”**).

2. Prior to the Petition Date, Google entered into certain contracts (the **“Google Contracts”**) with the Debtors. Pursuant to the Google Contracts, Google provides advertising services and other services to and for the benefit of the Debtors, including without limitations the Google Ads services (f/k/a AdWords). The Google’s Ads program is an online advertising program that, among other things, allows advertisers (here, the Debtors) to reach potential customers as they search for designated words and phrases (i.e., keywords) or browse websites with themes similar to the advertiser’s.

3. On January 20, 2021, Google filed proofs of claims asserting claims (the **“Proofs of Claims”**) totaling \$1,214,707.86 for the unpaid services provided to the Debtor’s prior to the Petition Date.

4. On October 5, 2021, Debtors filed the Cure Notice. The contract schedule attached to the Cure Notice includes two alleged contracts between Google and certain of the Debtors, with a proposed cure amount of zero dollars (\$0.00) (the **“Proposed Cure Amount”**). The Cure Notice completely fails to reflect the amounts owed to Google as reflected on the Proofs of Claims.

5. Based on information and belief, the Debtors seek to continue to receive the same services historically provided by Google to the Debtors. Based on the Debtors’ prior participation in Google’s Ads program and the historical services provided by Google to the

Debtors, the Debtors will need to assume and cure the contracts between Google and Debtors to continue to receive the same level of services from Google.

6. Google and the Debtors agreed to extend the time for Google file an objection until October 21, 2021.

BASIS FOR OBJECTION

7. Debtors may assume contracts, but defaults under the contracts must be cured at the time the contract is assumed. Section 365 of the Bankruptcy Code provides:

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee-

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property...;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

8. Bankruptcy Code Section 365(b)(1) makes it clear that defaults must be cured as of the assumption. Such defaults that must be cured include both pre-petition and post-petition defaults. *In re McLean Industries, Inc.*, 96 B.R. 440, 449 n. 11 (S.D.N.Y. 1989) (“assumption creates a post-petition liability and requires cure of pre-petition and post-petition defaults”); *In re Washington Capital Aviation & Leasing*, 156 B.R. 167, 173 (Bankr. E.D. Va. 1993) (“Section

365(b)(1)(A) requires the debtor in possession to cure pre- and post-petition defaults...This conclusion is clear from §365(b)(1) which measures defaults as of the ‘time of assumption’”) (citing *In re Rachels Industries, Inc.*, 109 Bankr. 797, 811-812 (Bankr. W.D. Tenn. 1990)); *In re Bachrach Clothing, Inc.*, 2007 Bankr. LEXIS 2623 * 11 (N.D. Ill. Aug. 2, 2007) (“...365(b)(1) measures defaults as of the time of assumption. Therefore, the debtor was required to cure both pre- and post-petition defaults.”) *aff’d* 396 B.R. 219 (N.D. Ill. 2008).

9. Google objects to the proposed assumption of the Google Contracts on the ground that the Proposed Cure Amount (\$0.00) does not cure the defaults under the Google Contracts. As set forth in the Proofs of Claims, the amount necessary to cure the monetary defaults under the Google Contracts is at least \$1,214,707.86.

10. To the extent that the Debtors seek to assume the Google Contracts, the outstanding monetary defaults must be fully cured by paying Google \$1,214,707.86, along with any amounts due and owing after the Petition Date, through the effective date of assumption.

11. After the filing of this Objection, Google will follow-up with the Debtors to try to resolve the cure amounts for the Google Contracts, to determine the services sought by assumption of the Google Contracts and the respective cure amounts.

RESERVATION OF RIGHTS

12. Google expressly reserves the right to amend, modify and/or supplement this Objection, including without limitation all rights to further object to the proposed assumption and assignment of the Google Contracts, based upon the Debtors further disclosures and supplemental assumption/cure notices, the parties further discussions and exchange of information, and in reply to any responses to this Objection.

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WHEREFORE, for the reasons set forth above, Google respectfully requests that the Court sustain this objection and deny the assumption of the Google Contracts, unless Google is paid the full cure amount of at least \$1,214,707.86 plus all unpaid charges due and owing after the Petition Date, through the effective date of assumption.

Respectfully submitted,

Date: October 21, 2021
New York, NY

By: /s/ Andrew E. Arthur

James C. Vandermark, Esq.

Andrew E. Arthur, Esq.

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CERTIFICATE OF SERVICE

I, Andrew E. Arthur, hereby certify that a true and correct copy of the foregoing Google LLC's Limited Objection and Reservation of Rights to the Potential Assumption of Executory Contracts was filed electronically with the Court on this 21st day of October 2021. Notice of this filing will be sent today to all parties receiving notice via the Court's electronic filing system, including counsel for the Debtors.

Respectfully submitted,

Date: October 21, 2021
New York, NY

By: /s/ Andrew E. Arthur
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