Docket #2086 Date Filed: 09/07/2021

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Hearing Date: September 14, 2021
Hearing Time: 10:00 am

In re	:	Chapter 11
AVIANCA HOLDINGS S.A., *et al.*,	:	Case No. 20-11133 (MG)
Debtors.	:	Jointly Administered

OBJECTION OF THE UNITED STATES TRUSTEE TO DISCLOSURE STATEMENT FOR JOINT CHAPTER 11 PLAN OF AVIANCA HOLDINGS S.A. AND ITS AFFILIATED DEBTORS

TO: **THE HONORABLE MARTIN GLENN, UNITED STATES BANKRUPTCY JUDGE:**

William K. Harrington, the United States Trustee for Region 2 (the "United States Trustee"), hereby submits this objection (the "Objection") to the Disclosure Statement for the Chapter 11 Plan of Avianca Holdings S.A. and Its Affiliated Debtors (the "Disclosure Statement"). ECF No. 1982.[1] In support thereof, the United States Trustee respectfully submits as follows:

PRELIMINARY STATEMENT

The Disclosure Statement should not be approved because it fails to provide creditors with sufficient information to allow them to make an informed choice as to whether to approve or reject the Debtors' Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors (the "Plan"). ECF No. 1981. The Disclosure Statement fails to provide adequate information about the non-consensual non-debtor releases that will be imposed under the Plan. Five out of

[1] On September 3, 2021, the Debtors filed an Amended Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors (the "Amended Plan") (ECF No. 2078) and an Amended Disclosure Statement for Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors (the "Amended Disclosure Statement") (ECF No. 2079). The Objection is hereby incorporated, as appropriate, with respect to the Amended Plan and Amended Disclosure Statement.

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twenty-three Classes are entitled to vote, while all remaining non-voting classes will be subject to the Plan's non-consensual releases.

The Plan does not provide for a creditor or interest holder to affirmatively consent to a third party release. Instead, the Plan provides for an Opt-Out procedure (for classes entitled vote) that imposes deemed consent upon any creditor that either (i) abstains from voting or that (ii) votes to reject the Plan but neglects to separately Opt-Out of the releases. Affirmative consent through an Opt-In Form, however, would be the clearest and most transparent procedure with respect to third party releases, and the Disclosure Statement should explain why the Plan provides instead for an Opt-Out procedure. The Disclosure Statement should also affirmatively state that Opt-Out designations will be honored, or, if not, why not.

If, in fact, the Debtors seek to impose releases upon holders of non-voting claims or interests, the Plan must make that intent clear, and provide for a means of allowing the affected party to affirmatively consent to such releases. As Judge Wiles discussed in *Chassix*,[2] creditors whose rights do not simply pass through the bankruptcy process are not truly unimpaired. Accordingly, these classes should be provided with a Notice of Non-voting status with an optional Release Opt-In Form.

Next, the Disclosure Statement should provide adequate information regarding what the Debtors consider to be the rare and exceptional circumstances that would justify this Court imposing a third-party release on an impaired non-consenting creditor. The Disclosure Statement provides no information concerning any unique circumstances that would justify such extraordinary relief. As such, without further clarification, the releases do not appear to comport

[2] *In re Chassix Holdings, Inc.,* 533 B.R. 64 (Bankr. S.D.N.Y. 2015) (Wiles, J.).

with Second Circuit law or the Bankruptcy Code, and the Debtors should provide information to explain why they believe otherwise.

Finally, the Disclosure Statement should explain the basis for the imposition of the Death Trap provision on holders of Class 11 – General Unsecured Avianca Claims, providing for an increased $6 million recovery if Class 11 accepts the Plan.

BACKGROUND

General Background

1. Avianca Holdings S.A. and its affiliated entities ("Avianca" or the "Debtors") commenced voluntary cases under chapter 11 of the Bankruptcy Code on May 10, 2020 (the "Petition Date").

2. The Debtors are authorized to continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. The Debtors' chapter 11 cases are being jointly administered for procedural purposes only pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure. ECF No. 73.

4. Avianca is the second-largest airline group in Latin America. *See* Declaration of Adrian Neuhauser in Support of Chapter 11 Petitions and First Day Pleadings (the "Neuhauser Declaration"), ECF No. 20, ¶ 3.

Plan and Disclosure Statement

5. The Debtors filed their Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors (the "Plan") and accompanying Disclosure Statement on August 10, 2021. ECF Nos. 1981 and 1982, respectively.

6. The following table[3] summarizes the classifications of Allowed Claims[4] and Interests, the estimated respective recoveries and their voting rights:

Class	Description	Status	Voting Rights	Estimated Recovery
1	Priority Non-Tax Claims	Unimpaired	Presumed to accept	100%
2	Other Secured Claims	Unimpaired	Presumed to accept	100%
3	Secured Engine Loan Claims	Impaired	**Entitled to vote**	100%
4	Secured RCF Claims	Impaired	**Entitled to vote**	100%
5	USAV Receivable Facility Claims	Unimpaired	Presumed to accept	100%
6	Grupo Aval Receivable Facility Claims	Unimpaired	Presumed to accept	100%
7	Secured Grupo Aval Lines of Credit Claims	Impaired	**Entitled to vote**	100%
8	Grupo Aval Promissory Note Claims	Unimpaired	Presumed to accept	100%
9	Cargo Receivable Facility Claims	Unimpaired	Presumed to accept	100%
10	Pension Claims	Unimpaired	Presumed to accept	100%
11	General Unsecured Avianca Claims	Impaired	**Entitled to vote**	[ ]%
12	General Unsecured Avifreight Claims	Unimpaired	Presumed to accept	100%
13	General Unsecured Aerounión Claims	Unimpaired	Presumed to accept	100%
14	General Unsecured SAI Claims	Unimpaired	Presumed to accept	100%
15	General Unsecured Convenience Claims	Impaired	**Entitled to vote**	[ ]%

[3] The Amended Disclosure Statement included the Estimated Recovery percentages omitted in the prior Disclosure Statement: Class 11 creditors would receive an Estimated Recovery of 1.0% - 1.4% if the class votes to accept the Plan; Class 15 creditors will receive an Estimated Recovery of $1.0%.

[4] Capitalized terms are as defined in the Plan and Disclosure Statement.

16	Subordinated Claims	Impaired	Deemed to reject	0%
17	Intercompany Claims	Impaired/ Unimpaired	Deemed to reject/ presumed to accept	0%
18	Existing AVH Non-Voting Equity Interests	Impaired	Deemed to reject	0%
19	Existing AVH Common Equity Interests	Impaired	Deemed to reject	N/A
20	Existing Avifreight Equity Interests	Unimpaired	Presumed to accept	N/A
21	Existing SAI Equity Interests	Unimpaired	Presumed to accept	N/A
22	Other Existing Equity Interests	Impaired	Deemed to reject	N/A
23	Intercompany Interests	Impaired/ Unimpaired	Deemed to reject/ Presumed to accept	N/A

7. The Plan provides for releases by Holders of Claims or Interests (Plan, Art. IX.E.), Exculpation (Plan, Art. IX.F.), and an Injunction (Plan, Art. IX.G.). Disclosure Statement, Section V.G. 5-7.

8. Article I of the Plan defines "Related Party (¶ 157)," "Released Parties (¶ 159)" and "Releasing Parties" (¶ 160).

9. Releasing Parties include all holders of Claims that vote for the Plan, all holders of Unimpaired Claims or Interests, and all holders of Claims in Classes entitled to vote but (a) vote to reject the Plan or do not vote either to accept or reject the Plan and (b) do not opt-out of granting the releases in Article IX.E of the Plan. Plan, Art. I.A.160.

10. The Plan provides for alternative recoveries with respect to Class 11 – General Unsecured Avianca Claims, depending on whether the Class rejects or accepts the Plan. If Class 11 does not vote to accept the Plan, it receives a pro rata share of either (A) the Unsecured Claimholder Cash Pool (defined in the Plan as $30,000,000 Art. I.A.206) or (B) the Unsecured Claimholder Equity Package consisting of equity (where the Unsecured Claimholder Equity Pool is defined as 1.75% of the total new Common Equity Art. I.A..210) and warrants.

If Class 11 votes to accept the Plan, the holders of Claims will receive **additional** recoveries consisting of a pro rata share of either (x) the Unsecured Claimholder Enhanced Cash Pool (defined as incremental cash of $6,00,000 Art. I.A.207) or (y) the Unsecured Claimholder Enhanced Equity Pool (defined as an incremental 0.78% of the total New Commons Equity Art. I.A.208). Disclosure Statement, Section V.A.2.b.xi, p. 44.

11. The Disclosure Statement states that the Debtors estimate that the aggregate face value of General Unsecured Avianca Claims is approximately $2.5 billion to $3.5 billion. Disclosure Statement, Section II.D.2, p. 21.

OBJECTION

A. General Standards

Section 1125 of the Bankruptcy Code provides that a disclosure statement must contain "adequate information" describing a confirmable plan. 11 U.S.C. § 1125. The Bankruptcy Code defines "adequate information" as:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records . . . that would enable a such a hypothetical reasonable investor . . . to make an informed judgment about the plan . . . .

11 U.S.C. § 1125(a)(1); *see also Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994); *In re Adelphia Commc'ns Corp.*, 352 B.R. 592, 596 (Bankr. S.D.N.Y. 2006); *Kunica v. St. Jean Fin., Inc.*, 233 B.R. 46, 54 (S.D.N.Y. 1999).

To be approved, a disclosure statement must include sufficient information to apprise creditors of the risks and financial consequences of the proposed plan. *See In re McLean Indus., Inc.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987) ("substantial financial information with respect to

the ramifications of any proposed plan will have to be provided to, and digested by, the creditors and other parties in interest in order to arrive at an informed decision concerning the acceptance or rejection of a proposed plan"). Although the adequacy of the disclosure statement is determined on a case-by-case basis, the disclosure statement must "contain simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and the possible [Bankruptcy Code] alternatives . . . ." *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988).

Section 1125 of the Bankruptcy Code is biased towards more disclosure rather than less. *See In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 300 (Bankr. S.D.N.Y. 1990). The "adequate information" requirement merely establishes a floor, and not a ceiling, for disclosure to voting creditors. *Adelphia*, 352 B.R. at 596 (citing *Century Glove, Inc. v. First American Bank of New York*, 860 F.2d 94, 100 (3d Cir. 1988)). Once the "adequate disclosure" floor is satisfied, additional information can go into a disclosure statement too, at least so long as the additional information is accurate and its inclusion is not misleading. *Adelphia*, 352 B.R. at 596. The purpose of the disclosure statement is to give creditors enough information so that they can make an informed choice of whether to approve or reject the debtor's plan. *In re Duratech Indus.*, 241 B.R. 291, 298 (Bankr. E.D.N.Y. 1999), *aff'd*, 241 B.R. 283 (E.D.N.Y. 1999). The disclosure statement must inform the average creditor what it will receive and when and what contingencies might intervene. *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991).

B. The Disclosure Statement Does Not Provide Adequate Disclosure[5]

(i) The Disclosure Statement Fails to Adequately Explain the Basis For Imposing Third-Party Releases on Creditors That Vote to Reject the Plan or Abstain from Voting, But Do Not Affirmatively Opt-Out of Such Releases

In *Chassix*, the Court (J. Wiles) explained that while courts have often treated a vote in favor of a plan as "consent" to third-party releases, "then by the same logic a creditor who votes to reject a plan should also be presumed to have rejected the proposed third party releases that are set forth in the plan." *Chassix Holdings, Inc.*, 533 B.R. 64, 79 (Bankr. S.D.N.Y. 2015). Therefore, the Court held, an "additional 'opt out' requirement [for a rejecting creditor]. . . . would have been little more than a Court-endorsed trap for the careless or inattentive creditor." *Id*.

Here, the Debtors seek approval of third party releases from creditors that reject the Plan but fail to Opt-Out of the releases. Disclosure Statement, pp. 80-81; Plan, Art. I.A.160 and Art. IX.E. Unless this "deemed consent" to third-party releases is severed from the Plan, the Disclosure Statement should not be approved, as it does not explain why rejecting creditors should have their rights against third-parties further stripped away.

In *In re SunEdison*, 576 B.R. 453, 461 (Bankr. S.D.N.Y 2017)(Bernstein, S.), the Court held that creditors that abstained from voting did not consent to non-debtor releases under the Debtor's plan. After examining contract principles, the Court found, among other things, that silence does not constitute consent unless it has the effect to mislead. *Id*. at 459. Accordingly, because creditors that abstain from voting have no duty to speak, the Court stated that "implying a 'consent' to the third party releases based on the creditors' inaction, is simply not realistic or

[5] The United States Trustee reserves all rights to raise any, and all, statutory, constitutional, and caselaw arguments with respect to confirmation of the Plan.

fair, and would stretch the meaning of 'consent' beyond the breaking point." *SunEdison*, 576 B.R. at 461 (quoting *Chassix*, 533 B.R. at 81).

Here the Debtors seek to bind creditors who abstain from voting, and do not Opt-Out of the releases, with third-party releases. There is no basis, however, to conclude that such inaction constitutes consent to the releases. *Id*. Accordingly, unless these third-party releases are severed from the Plan, the Disclosure Statement should not be approved, as it does not explain why creditors that abstain from voting may have their rights against third-parties stripped away.

To the extent the Plan seeks to furnish an opportunity for a creditor who either rejects the Plan or abstains from voting on the Plan to consent to the third-party releases, such consent should be demonstrated through an unequivocal opt-in procedure.

Finally, the Disclosure Statement should make clear whether notwithstanding the Opt-Out designations, the Plan intends nevertheless to impose non-consensual releases pursuant to *Metromedia*. The Plan should affirmatively make clear whether it intends to honor the Opt-Out designations or whether the Plan will seek to impose non-consensual releases regardless of the Opt-Out designations.

(ii) The Disclosure Statement Fails to Adequately Explain the Basis For Imposing Third-Party Releases on Creditors That are Identified as Unimpaired and that are Not Entitled to Vote

Five of the twenty-three classes are entitled to vote, twelve classes are listed as Unimpaired and presumed to accept the Plan (therefore not entitled to vote), four classes are listed as Impaired and deemed to reject the Plan (therefore not entitled to vote), and two classes consist of Intercompany Claims and Interests that are listed as deemed to reject/presumed to accept the Plan. Without being afforded the opportunity to vote on the Plan, the third-party releases (if the Plan is confirmed) may be imposed upon every holder of claims or interests in the

21 classes not entitled to vote on the Plan. Accordingly, the Disclosure Statement should not be approved unless the Debtors amend the Plan to permit non-voting classes to Opt-In with respect to third party releases, or to strike non-voting classes from the definition of Releasing Party. As Judge Wiles discussed in *In re Chassix Holdings, Inc.,* 533 B.R. 64, 81-2 (Bankr. S.D.N.Y. 2015) (creditors whose rights do not simply pass through the bankruptcy process are not truly unimpaired (citing *In re Genco Shipping & Trading Ltd.*, 513 B.R. 233, 270 (Bankr. S.D.N.Y. 2014) ("The Court agrees that simply classifying a party as unimpaired does not mean that they should be somehow automatically deemed to grant a release where the requirements of *Metromedia* have not been met."))). Accordingly, Unimpaired classes should be provided with a Notice of Non-voting status with an optional Release Opt-In Form. *See Chassix*, 533 B.R. at 82.

(iii) The Disclosure Statement Fails to Adequately Explain the Basis For Imposing the "Death Trap" Provision With Respect to Class 11 – General Unsecured Avianca Claims

In order to induce Class 11 creditors to vote for the Plan, if Class 11 votes for the Plan, Class 11 creditors will receive an additional $6 million in recoveries (or the equivalent in equity, if properly elected). The Disclosure Statement should explain why such a Death Trap provision is justified and permissible under the Plan.

WHEREFORE, the United States Trustee respectfully requests that the Court sustain the Objection of the United States Trustee and grant such other relief as is just and proper.

Dated: New York, New York
September 7, 2021

Respectfully submitted,

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UNITED STATES TRUSTEE, Region 2

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