

Amish R. Doshi, Esq.
DOSHI LEGAL GROUP, P.C.
1979 Marcus Avenue, Suite 210E
Lake Success, New York 11042
Telephone: (516) 622-2335
E-Mail: amish@doshilegal.com

Hearing Date: October 26 2021
Hearing Time: 10:00 AM
Objection Date: October 19, 2021

And

Shawn M. Christianson, Esq.
BUCHALTER, A Professional Corporation
55 Second Street, 17th Floor
San Francisco, California 94105-2126
Telephone: (415) 227-0900

**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

**ORACLE’S LIMITED OBJECTION TO AND RESERVATION OF RIGHTS
REGARDING (1) THE MODIFIED JOINT CHAPTER 11 PLAN OF AVIANCA
HOLDINGS S.A. AND ITS AFFILIATED DEBTORS; AND (2) NOTICE OF FILING OF
PLAN SUPPLEMENT**

Oracle Colombia Limitada and Oracle America, Inc., successor in interest to Hyperion Systems Solutions and Global Knowledge (“Oracle”), a creditor and contract counter-party in the above-captioned Chapter 11 cases, submits this Limited Objection and Reservation of Rights (the “Rights Reservation”) regarding the *Modified Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors* [Dkt. No. 2209] (“Plan”) and the *Notice of Filing of Plan Supplement* [Dkt. No. 2185] (“Plan Supplement”), filed by Avianca Holdings S.A., et al., (“Debtors”).

I. INTRODUCTION

1. Through the Plan and Plan Supplement, among other things, the Debtors seek Bankruptcy Court authority to assume certain executory contracts between the Debtors and Oracle.



2. Because Oracle's agreements are, or pertain to, one or more licenses of intellectual property, they may not be assumed absent Oracle's consent.

3. At this time, Oracle objects to the proposed assumption, as Oracle is unable to identify the contract or contracts which the Debtors intend to assume based on the descriptions provided in the Plan Supplement.

4. Debtors also appear to have omitted certain active agreements with Oracle, which therefore will be rejected automatically by the Plan's terms.

5. As a result, Oracle cannot determine the appropriate cure amount. Oracle has reached out to Debtors' counsel seeking clarification about the contracts to be assumed.

6. Oracle hopes to have reached an agreement about the contracts with the Debtors prior to the confirmation hearing, but at present requests that the Court deny confirmation of the Plan, to the extent it seeks to authorize the Debtors to assume one or more Oracle agreements in the absence of Oracle's prior consent.

II. FACTUAL BACKGROUND

7. The above captioned case was filed on May 10, 2020, and an order directing joint administration was entered shortly thereafter. The Debtors continue to operate as debtors-in-possession.

8. On October 13, 2021, the Debtors filed the Plan. It provides for the deemed rejection of all executory contracts upon the Effective Date, other than those specifically assumed.

9. The Plan states:

Except as otherwise provided herein, each Executory Contract and Unexpired Lease shall be deemed rejected, without the need for any further notice to or action, order, or approval of the Bankruptcy Court, as of the Effective Date, pursuant to section 365 of the Bankruptcy Code, unless such Executory Contract or Unexpired Lease (a) was previously assumed or rejected; (b) previously expired or terminated pursuant to its own terms; (c) is the subject of a motion or notice to reject, assume, or assume and assign filed on or before the Effective Date; (d) is designated specifically as an

Executory Contract or Unexpired Lease on the Schedule of Assumed Contracts; or (e) is designated specifically as an Aircraft Lease on the Schedule of PBH Agreement Extensions and Rejection of Aircraft Leases; provided, that the Debtors reserve the right to seek, following the Effective Date, assumption of an Executory Contract or Unexpired Lease that was deemed rejected.

See, Plan @ VI.A.

10. On October 5, 2021, the Debtors filed the Plan Supplement, which identifies the contracts to be assumed through the Plan. Exhibit “E-5” identifies one Oracle contract with Aerovias Del Continente Americano S.A. Avianca (“Oracle Agreement”), described only as a “Corporate Pricing Agreement,” with a \$0.00 cure amount.¹

11. The Debtors have identified over twenty thousand Corporate Pricing Agreement contracts, each with the same description as the Oracle Agreement. Therefore, it is unclear what specific Oracle agreement the Debtors intend to assume.

12. In addition to the Oracle Agreement, Oracle has several active contracts which are not identified in the Plan Supplement.

13. Since the Plan provides for the rejection of any executory contract or unexpired lease which the Debtors do not expressly assume, the implication is that Debtors intend to reject these contracts.

14. To ensure this is the Debtors’ actual intent, Oracle also seeks clarification on this point.

¹ Exhibit E-5 identifies a Corporate Pricing Agreement with Global Knowledge Colombia Limitada and Exhibit E-1 identifies a contract with Microsystems S.A. Oracle is in the process of reviewing its records to determine whether these agreements are associated with one or more Oracle contracts.

III. ARGUMENT

A. **The Debtors May Not Assume The Oracle Agreement Absent Oracle's Consent Because The Agreement Pertains To One Or More Licenses Of Intellectual Property.**

15. Section 365(c) of the Bankruptcy Code provides, in relevant part:

The trustee may not assume or assign any executory contract ... of the debtor ... if (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor ..., whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and (B) such party does not consent to such assumption or assignment.

11 U.S.C. § 365(c).

16. Federal law makes non-exclusive intellectual property licenses non-assignable absent consent of the licensor. *See In re Catapult Entertainment, Inc.*, 165 F.3d 747 (9th Cir. 1999), *cert. dismissed*, 528 U.S. 924 (1999) (patent law renders non-exclusive patent licenses personal and non-assignable under Bankruptcy Code § 365(c)(1)); *see also In re Trump Entm't Resorts, Inc.*, 526 B.R. 116, 126 (Bankr. D. Del. 2015) (“Non-exclusive patent and copyright licenses create only personal and not property rights in the licensed intellectual property and so are not assignable.”); *See, In re Patient Educ. Media*, 210 B.R. 237, 243 (Bankr. S.D.N.Y. 1997); *See, In re Adelphia Communications Corp, et al.*, 359 B.R. 65 (Bankr. S.D.N.Y. 2007).

17. The Oracle Agreement is, or pertains to, a non-exclusive license of copyrighted software. Therefore, the Debtors must obtain Oracle's consent before assuming the Oracle Agreement.

18. At this time, for the reasons discussed, Oracle does not consent to Debtors' assumption of the Oracle Agreement.

B. The Debtors Have Not Provided a Description Of The Oracle Agreement.

19. No specific Oracle agreement is identified in the Plan Supplement. The Debtors only generally describe the Oracle Agreement as a “Corporate Pricing Agreement.”

20. No governing license agreement or support renewal is identified. It is therefore not clear which agreement or agreements the Debtors wish to assume.

21. Although the Debtors and Oracle are exchanging information, no definitive decision has been made regarding which contracts are being assumed.

22. To properly identify the Oracle contracts which the Debtors wish to assume, Oracle requests that the Debtors provide (a) a specific contract name and date; (b) a contract identification number, if any; (c) whether the targeted contracts pertain to support or support renewals; and (d) the governing license agreement for each contract.

23. This information will also allow Oracle to evaluate whether the agreements have expired, or are in default and, if so, to determine the appropriate cure amount.

C. Prior to Assuming the Oracle Agreement, The Debtors Must Cure All Amounts Outstanding.

24. Before assuming an executory contract, the Debtor must (a) cure (or provide adequate assurance of a prompt cure of) any defaults under the subject contracts, and (b) provide adequate assurance of future performance under the contract. 11 U.S.C. § 365(b)(1). Absent the foregoing, the executory contracts may not be assumed.

25. The Plan Supplement identifies a cure amount of \$0.00 for the Oracle Agreement.

26. Given the limited contract description contained in the Plan Supplement, Oracle has been unable to determine the appropriate cure amount.

27. Oracle reserves all rights regarding the cure amount until the targeted contract or contracts are more fully described.

28. Absent Debtors' cure of any outstanding amounts due Oracle, the Debtors may not assume Oracle's agreements.

D. The Debtors Have Not Provided Adequate Assurance.

29. Section 365(b)(2) of the Bankruptcy Code also obligates the Debtors to provide adequate assurance of future performance under the contract before the executory contract can be assumed.

30. In light of the Debtors' failure to provide either adequate assurance of prompt payment of any cure amount that may be owed, or future performance under the contract, Oracle is unable to determine whether Debtors have complied, or will comply, with all of the requirements of section 365(b) of the Bankruptcy Code.

31. Accordingly, Oracle reserves its rights to be heard regarding all assumption and cure issues.

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IV. CONCLUSION

32. For the reasons set forth above, Oracle respectfully requests that the Court deny confirmation of the Plan, solely to the extent it authorizes the Debtors to assume the Oracle Agreement in the absence of obtaining Oracle's prior consent, and curing of all outstanding amounts due and owing to Oracle.

Dated: October 19, 2021
Lake Success, New York

Respectfully submitted,

By: /s/ Amish R. Doshi
Amish R. Doshi, Esq.
DOSHI LEGAL GROUP, P.C.
1979 Marcus Avenue, Suite 210E
Lake Success, NY 11042
Tel: (516) 622-2335
E-Mail: amish@doshilegal.com

Shawn M. Christianson, Esq.
BUCHALTER, A Professional Corporation
55 Second Street, 17th Floor
San Francisco, California 94105-2130
Telephone: (415) 227-0900

Peggy Bruggman, Esq.
Alice Miller, Esq.
ORACLE AMERICA, INC.
500 Oracle Parkway
Redwood City, California 94065

Attorneys for Oracle

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2021, I served a copy of *Oracle's Limited Objection To And Reservation Of Rights Regarding (1) The Modified Joint Chapter 11 Plan Of Avianca Holdings S.A. And Its Affiliated Debtors; And (2) Notice Of Filing Of Plan Supplement* on the parties listed on the below service list by attaching a pdf copy of said document and sent to the email address next to their names. In addition, the parties entitled to receive notice by the Court's CM-ECF system were sent an email notification of such filing by the Court's CM-ECF System.

/s/ Amish R. Doshi _____

SERVICE LIST

By E-Mail Only

Evan R. Fleck - efleck@milbank.com Gregory A. Bray - gbray@milbank.com Benjamin Schak - bschak@milbank.com Brian Masumoto - brian.masumoto@usdoj.gov Gregory – Zipes - Gregory.zipes@usdoj.gov Brett H. Miller - bmiller@willkie.com Todd M. Goren - tgoren@willkie.com
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