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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF CREDITORS UDI BARUCH GUINDI, DAVID BARUCH, SOSHANA BARUCH, HABIB MANN, GOLAN LP AND ISAAK BARUCH IN OPPOSITION TO CONFIRMATION OF DEBTORS' FURTHER MODIFIED JOINT CHAPTER 11 PLAN

Creditors Udi Baruch Guindi, David Baruch, Soshana Baruch, Habib Mann, Golan LP and Isaak Baruch ("Creditors"), by their counsel, Oved & Oved LLP, submit these Proposed Findings of Fact and Conclusions of Law in further support of their objection to Debtors' Further Modified Joint Chapter 11 Plan (Dkt. 2259) (as amended, supplemented, or modified from time to time, the "Plan"). In support, Creditors respectfully represent as follows:

PROPOSED FINDINGS OF FACT ON PLAN ISSUES

A. Debtors' Representations Concerning the Value of the Shared Collateral and Inducement of 2023 Noteholders to Accept the Plan, which They Otherwise Might Have Rejected

1. 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. The 2023 Notes are secured by liens on aircrafts owned by the Debtors along with certain of the Debtors' intellectual property rights.

2. Creditors are holders of 2023 Notes with an aggregate principal amount of $8,250,000, bearing CUSIP P06048 AB 1 / ISIN USP06048AB19.

3. The solicitation version of Debtors' Disclosure Statement for Joint Chapter 11 Plan of Avianca Holdings S.A. and Its Affiliated Debtors (the "Disclosure Statement") advised creditors entitled to vote on the Plan, including 2023 Noteholders, that:

> The DIP Facility is secured, in part, by the same collateral securing the 2023 Notes (the "Shared Collateral"); however, pursuant to the Final DIP Order, DIP Facility Claims shall be satisfied first from proceeds of the Shared Collateral (the "DIP Marshaling Provision"). As a result of the DIP Roll-Up and the DIP Marshaling Provision, ***no value with respect to the Shared Collateral will be available to satisfy 2023 Notes Claims after DIP Facility Claims are satisfied, thereby rendering the 2023 Notes, as well as any other indebtedness secured by the Shared Collateral on equal footing with the 2023 Notes, effectively unsecured*** pursuant to section 506(a) of the Bankruptcy Code.

Dkt. 2138 pp. 46-47, n. 14 (emphasis added).

4. In other words, Debtors represented to the 2023 Noteholders that the collateral that secured the 2023 Notes prior to this bankruptcy proceeding presently had no value available to satisfy claims arising from the 2023 Notes.

5. The Disclosure Statement further advised 2023 Noteholders that their claims would be made part of "Class 11 - General Unsecured Avianca Claims," which claims are impaired and expected to recover only 1.0% of the amount of their claims. *Id.* pp. 5, 46-47.

6. However, the Disclosure Statement further advised 2023 Noteholders that "**if Class 11 votes to <u>accept</u> the Plan**, in addition to the treatment set forth above, each holder of an Allowed General Unsecured Avianca Claim will also receive its Pro Rata Share of either (x) the Unsecured Claimholder Enhanced Cash Pool or (y) if such holder duly elects to receive the Unsecured Claimholder Equity Packages, the Unsecured Claimholder Enhanced Equity Pool." *Id.* p. 47 (emphasis in original).

7. Thus, after representing to 2023 Noteholders that there was no value in their collateral to satisfy any part of their claims and they were now unsecured, the Disclosure Statement attempted to induce 2023 Noteholders to vote to accept a plan that they might otherwise have rejected by increasing their allowed recovery as unsecured creditors.

B. Debtors Admit They Do Not Know the Value of the Shared Collateral

8. In his declaration, Adrian Neuhauser ("Neuhauser"), Chief Executive Officer of Aviana Holdings S.A. and other unidentified Debtors, stated that he "believe[d] that the amount of the DIP Facility Claims exceeds the value of the Shared Collateral." Neuhauser Decl.[1] ¶ 11.

9. Upon cross-examination, however, Neuhauser admitted that Debtors did not know the value of the Shared Collateral and could not even offer an approximate amount of the value.

10. Rather, Neuhauser's direct testimony was that Debtors assumed the amount of the DIP Facility Claims exceeds the value of the Shared Collateral because they were unsuccessful in soliciting equity investments in Debtors. *Id.*

11. Neuhauser, however, admitted that potential equity investors would look primarily to future potential earnings of the Debtors in determining whether to make an investment. Moreover, Neuhauser admitted that the ongoing COVID-19 pandemic had decimated demand for the air travel services offered by Debtors and that potential equity investors may have relied on their perception of demand destruction for such services. Neuhauser also acknowledged that investors make investments to achieve some sort of internal rate of return, and their reluctance to make an equity investment could simply reflect that they did not believe such a rate of return was possible, despite believing that an equity investment could generate a positive return.

[1] "Neuahuser Decl." means the Declaration of Adrian Neuhauser in Support of Confirmation of Joint Chapter 11 Plan of Avianca Holdings S.A. and Its Affiliated Debtors. Dkt. 2263.

12. On cross-examination, Neuhauser sought to supplement his direct testimony by stating that Debtors also sought to refinance the DIP financing and successfully obtained an approximate $140 million in additional debt financing through that process.

13. As such, Debtors' quest to solicit additional equity investments and successful attempt to obtain an additional $140 million in refinanced debt are not determinative of the value of the Shared Collateral and do not demonstrate the present value of the Shared Collateral in any amount, and certainly not in an amount that is less than the amount of the DIP Facility Claims.

C. Debtors Are Separate and Distinct Legal Entities with Separate Books and Records

14. The Disclosure Statement provides that the Plan is premised on the substantive consolidation of the Avianca Debtors.[2] Dkt. 2138 p. 64 of 261.

15. Ginger Hughes ("Hughes"), a Managing Director and Partner of Seabury International Corporate Finance LLC and Seabury Securities LLC (collectively, "Seabury"), which has acted as Debtors' investment banker and financial advisor in connection with a potential restructuring (Hughes Decl.[3] ¶¶ 1, 10), testified that the Avianca Debtors:

i. maintain separate books and records, including maintaining journals and sub-journals for the transactions of each of the Avianca Debtors;

ii. properly document and record intercompany transactions, including intercompany payables, receivables, and loans;

iii. observe corporate formalities;

iv. comply with unique local governance and regulatory requirements;

[2] The "Avianca Debtors" means all of the Debtors except Aero Transporte de Carga Union, S.A. de C.V (N/A) ("Aerounion"), Avifreight Holding Mexico, S.A.P.I. de C.V. (N/A) ("Avifreight"), and Servicios Aeroportuarios Integrados SAI S.A.S. ("SAI," and collectively with Aerounion and Avifreight, the "Unconsolidated Debtors").

[3] "Hughes Decl." means the Declaration of Ginger Hughes in Support of Confirmation of Joint Chapter 11 Plan of Avianca Holdings S.A. and Its Affiliated Debtors. Dkt. 2262.

v. each has officers,[4] in addition to other locally required corporate governance positions;

vi. separately owned certain assets; and

vii. maintain documentation for all liabilities, including loan agreements and guarantees, that specify the liabilities of each relevant Avianca Debtor.

16. Hughes testified on cross-examination that the primary reason Debtors seek a substantive consolidation of the Avianca Debtors in the Plan is because of the difficulty in disentangling the finances of the Avianca Debtors.

17. Neither the Disclosure Statement nor the Plan identifies each individual Avianca Debtor's assets and liabilities or how they are being distributed pursuant to the Plan.

D. <u>The Avianca Debtors Do Not Treat the Unconsolidated Debtors Materially Differently</u>

18. In the Hughes Decl., Hughes testified that the "separate corporate existence of many of the Avianca Debtors was driven primarily by local regulatory requirements." Hughes Decl. ¶ 18. At the same time, however, in claiming that Avifreight should not be part of the substantively consolidated Avianca Debtors, Hughes admits that "Avifreight was established ***with the sole purpose of complying with local [Mexican] regulations***." *Id.* ¶ 26 (emphasis added).

19. Hughes further testified that the Avianca Debtors own between 90-92% of the Unconsolidated Debtors. *Id.* ¶ 27.

20. The Disclosure Statement shows that the Unconsolidated Debtors, *i.e.*, Avifreight, Aerounion and SAI, are all indirectly owned by Avianca Holdings S.A., which also directly or indirectly owns the Avianca Debtors. Dkt. 2148, Ex. B, p. 243 of 261.

[4] Neuhauser testified that he was the Chief Executive Officer of only certain, but not all of the Debtors. Thus, Debtors do not all share corporate officers.

21. Thus, the Avianca Debtors and the Unconsolidated Debtors all have common ownership.

22. Hughes testified in response to cross-examination that the assets and liabilities of the Unconsolidated Debtors are part of Debtors' consolidated financial statements.

23. Moreover, the Financial Projections for the Reorganized Debtors,[5] annexed as exhibit D to the Disclosure Statement, included future financial projections "on a consolidated basis" for all Debtors, including the Unconsolidated Debtors, thus, demonstrating that the Unconsolidated Debtors' financials are not more or less entangled with the Avianca Debtors than those entities the Plan seeks to substantively consolidate.

24. Hughes testified that the Unconsolidated Debtors were in much stronger financial shape than the Avianca Debtors. Because the Plan spares the Unconsolidated Debtors from substantive consolidation, the equity holders of the Unconsolidated Debtors would remain entirely unimpaired and, in fact, receive payment of accrued dividends. Dkt. 2259, pp. 32, 46-47.

E. Less than One-Third of the Amount of the 2023 Notes Voted to Accept the Plan

25. The Disclosure Statement states that approximately $129.9 million in principal of the 2023 Notes remains presently outstanding. Dkt. 2138 p. 27 of 261.

26. The Certification of P. Joseph Morrow IV with respect to the Tabulation of Votes on the Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors sets forth than only $41,760,000 worth of 2023 Notes voted to accept the Plan. Dkt. 2239 p. 9.

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[5] The Disclosure Statement states that the "'Reorganized Debtors' means, collectively, (i) Reorganized AVH [Avianca Holdings S.A.], (ii) each Debtor other than AVH as Reorganized pursuant to this Plan, and (iii) the direct and indirect subsidiaries of Reorganized AVH, or any successors thereto, by merger, consolidation, or otherwise, in each case on or after the Effective Date." Dkt. 2138 p. 169 of 261. The Plan provides that it "constitutes a separate chapter 11 plan of reorganization for the Avianca Debtors and each Unconsolidated Debtors." *Id.* p. 181 of 261. Thus, the Unconsolidated Debtors are being reorganized.

27. Thus, less than one-third of the amount of the 2023 Notes entitled to vote on the Plan voted to accept the Plan.

PROPOSED CONCLUSIONS OF LAW

28. Creditors submitted their objection to the Plan on October 19, 2021. Dkt. 2231. We will not repeat in full all of the arguments made in the objection, and will focus on certain issues put into focus by the evidence adduced at the October 26, 2021 confirmation hearing.

A. Debtors Failed to Meet Their Burden to Demonstrate the Value of the Shared Collateral

29. Debtors failed to meet their burden to establish that the value of the Shared Collateral is less than the amount of the DIP Facility Claims such that there is no value available to satisfy any part of the 2023 Notes claims. *In re Heritage Highgate, Inc.*, 679 F3d 132, 139-40 (3d Cir. 2012) ("a burden-shifting framework controls valuations of collateral to decide the extent to which claims are secured pursuant to § 506(a) … [other courts have held that the debtor] bears the burden of proof").[6]

30. As set forth above, Debtors admitted they do not know the value of the Shared Collateral and could not even approximate its value. Indeed, the purported evidence set forth by Debtors concerning the value of the Shared Collateral is not actually evidence of such value at all. Rather, the only thing Debtors demonstrated is that certain equity investors, using valuations metrics concerning future project performance and demand, and constrained by required internal rates of return, decided not to invest in Debtors. Similarly, Debtors' success in obtaining an additional $140 million of debt financing through a refinance does not demonstrate the value of the Shared Collateral, let alone that it is worth less than the amount of the DIP Facility Claims.

[6] It does not appear that the Second Circuit Court of Appeals has ruled on this burden issue.

31. Alternatively, even if the Court disagrees with the Third Circuit that Debtors bear the initial burden as a matter of law, here, the circumstances dictate that Debtors bear the burden of demonstrating the value of the Shared Collateral as it relates to the amount of the DIP Facility Claim. *Id.* at 140 ("The circumstances will dictate the assignment of the burden of proof on the question of value").

32. As set forth above, the Disclosure Statement represented to the 2023 Noteholders that there is no value in the collateral available to satisfy any part of the 2023 Notes claims and, as such, they were "effectively unsecured."

33. The Disclosure Statement also offered the 2023 Noteholders a greater recovery in exchange for voting to confirm the Plan.

34. Thus, a large number of 2023 Noteholders likely relied on Debtors' representation that the value of the collateral securing the 2023 Notes was insufficient to satisfy the notes in deciding to vote to accept the Plan in exchange for an increased recovery, rather than expend legal fees objecting to the Plan given that Debtors represented there was no other avenue for recovery. *See ACC Bondholder Group v. Adelphia Communs. Corp. (In re Adelphia Communs. Corp.)*, 361 B.R. 337, 363 (S.D.N.Y. 2007) ("Such an inducement may well have led some claimants to approve the Plan when they otherwise may have rejected it. As a result, creditors opposing the Plan may have been prejudiced by a quid pro quo exchange of Plan approval for valuable releases and exculpations.").

35. In these specific circumstances, where Debtors used their (i) conclusory and unsupported representations that the value of the Shared Collateral was less than the amount of the DIP Facility Claims and (ii) promise of a greater recovery if the class voted to accept the Plan to induce 2023 Noteholders to refrain from objecting, the Court should find that Debtors bear the burden to proof that their representation regarding the Shared Collateral's value in the Disclosure

Statement was, in fact, accurate and true. *Id.* ("Where the receipt of valuable benefits in a plan is conditioned on a vote to accept that plan, there is a very real possibility of dissuading or silencing opposition to the plan").

36. As such, Debtors have failed to show that the 2023 Noteholders are not presently secured creditors, and the Plan misclassifies the 2023 Noteholders as unsecured creditors. *See* 11 U.S.C. § 1122.

37. Accordingly, the Court should reject the Plan.

B. <u>Debtors Have Not Met Their Burden to Show that Substantive Consolidation is Proper</u>

38. The Court should reject the Plan for the independent reason that Debtors have failed to show that the substantive consolidation of 37 of the 40 Debtors is proper.

39. Substantive consolidation "has the effect of consolidating the assets and liabilities of multiple debtors and treating them as if the liabilities were owed by, and the assets held by, a single entity." *ACC Bondholder Group*, 361 B.R. at 359. The "sole purpose of substantive consolidation is to ensure the equitable treatment of all creditors." *In re Augie/Restivo Baking Co.*, 860 F.2d 515, 518 (2d Cir. 1988). "Because of the dangers in forcing creditors of one debtor to share on a parity with creditors of a less solvent debtor, we have stressed that ***substantive consolidation is no mere instrument of procedural convenience*** … but a measure vitally affecting substantive rights to be used sparingly." *Id.* (emphasis added) (internal citations and quotations omitted).

40. Courts consider the following factors in determining whether to approve substantive consolidation:

- The presence or absence of consolidated financial statements;
- The unity of interest and ownership among various corporate entities;

- The degree of difficulty in segregating and ascertaining individual assets and liabilities;
- The transfers of assets without formal observance of corporate formalities;
- The commingling of assets and business functions;
- The profitability of consolidation at a single physical location; and
- The disregard of legal formalities.

In re Extended Stay, Inc., 2020 Bankr. LEXIS 2128, *139-40 (Bankr. S.D.N.Y. Aug. 8, 2020).

41. Here, as set forth above, many of these factors simply do not exist here. The Avianca Debtors maintain separate books and records, observe corporate formalities, each comply with varying local requirements, each has officers and many have distinct officers, individually own certain assets, document and record intercompany transfers and loans, and document their separate liabilities.

42. Moreover, Debtors have failed to identify each individual Debtor's assets and liabilities, how they were being distributed, and how that ensures that all creditors receive equitable treatment, especially given that the 2023 Noteholders, supposedly, no longer can look to their collateral to satisfy their claims. *ACC Bondholders Group,* 361 B.R. at 360 (Southern District of New York held there was a substantial possibility that the Bankruptcy Court improperly confirmed a Plan where "[n]either the Plan nor the Confirmation Order identifies each individual Debtor's assets and liabilities and how they are being distributed pursuant to the Plan"); *see also In re Adelphia Communs. Corp.*, 368 B.R. 140, 218 (Bankr. S.D.N.Y. 2007) ("the Second Circuit made clear that entanglement of related debtors' affairs was by itself insufficient to warrant substantive consolidation").

43. As such, substantive consolidation is not warranted and the Court should reject the Plan.

C. Alternatively, the Unconsolidated Debtors Should be Part of the Substantive Consolidation

44. In the event the Court finds that substantive consolidation is appropriate, the Court should still reject the Plan because Debtors deliberately except the three most financially sound Debtors from substantive consolidation and deprive creditors like the 2023 Noteholders of meaningful avenues of recovery.

45. As set forth above, the Unconsolidated Debtors are not materially different from the Avianca Debtors. Indeed, they all share common ownership, certain of the Avianca Debtors are entitled to dividends or distributions from the Unconsolidated Debtors, the assets and liabilities of the Unconsolidated Debtors are part of Debtors' consolidated financial statements, and the Unconsolidated Debtors were included in the future financial projections for the Debtors that was submitted with the Disclosure Statement.

46. As such, excepting the Unconsolidated Debtors from substantive consolidation is a deliberate tactic to spare the assets of the Unconsolidated Debtors from satisfying the claims of the 2023 Noteholders.

47. Accordingly, the Court should reject the Plan.

D. The Plan Because Violates the Absolute Priority Rule and Is Unfair and Inequitable

48. Debtors improperly dissuaded 2023 Noteholders from objecting to the Plan by representing that the value of the Shared Collateral was less than the amount of the DIP Facility Claims, but admitted at the Confirmation Hearing that Debtors do not know even the approximate value of the Shared Collateral. Cognizant that the 2023 Noteholders would rely on the information and statements in the Disclosure Statement in deciding how to vote, Debtors then offered the 2023 Noteholders an enhanced recovery in exchange for voting to accept the Plan.

49. As also set forth above, by seeking to spare the Unconsolidated Debtors, and their assets, from substantive consolidation, the Plan provides that the general unsecured creditors and

equity holders of the Unconsolidated Debtors will not only be unimpaired, but they will receive accrued dividends. This is entirely unfair and inequitable to Creditors and plainly violates the absolute priority rule.

50. Nonetheless, as set forth above, less than one-third of the amount of the 2023 Notes permitted to vote on the Plan voted to accept the Plan.

51. It has been long recognized that all creditors are "entitled to be paid before the stockholders could retain [shares] for any purpose whatever." *In re DBSD N. Am., Inc.*, 634 F.3d at 94 (modification in original). A plan "would not be fair and equitable which … admitted the stockholders to participation, unless at very least the stockholders made a fresh contribution in money or in money's worth in return for a participation reasonably equivalent to their contribution." *Id.* (internal quotation marks omitted).

52. Despite this well-settled, bedrock principle of bankruptcy, the Plan seeks to provide not only the general unsecured creditors of the Unconsolidated Debtors with a full, unimpaired recovery, but would also leave their equity holders fully unimpaired, while Creditors receive literally a penny on the dollar.

53. As the Second Circuit held in *In re DBSD B. Am., Inc.*, under the subject plan, "Sprint does not receive 'property of a value … equal to the allowed amount' of its claim. Rather, Sprint gets less than half the value of its claim. The plan may be confirmed, therefore, only if the existing shareholder, whose interest is junior to Sprint's, does 'not receive or retain' 'any property' 'under the plan on account of such junior … interest.' We hold that the existing shareholder did receive property under the plan on account of its interest, and that the bankruptcy court therefore should not have confirmed the plan." The same is true here. Creditors would receive 1.0%-1.4%, while the equity holders of the Unconsolidated Debtors are completely unimpaired and fully retain their shares in the entities post-bankruptcy.

54. Thus, the Plan violates the absolute priority rule by providing a full recovery to the Unconsolidated Debtors' equity holders, who are junior to Creditors.

55. Accordingly, the Court should reject the Plan.

CONCLUSION

56. For the foregoing reasons, Creditors respectfully request that the Court reject the Plan.

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By: /s/ Glen Lenihan

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