

UNITED STATES BANKRUPTCY COURT
 SOUTHERN DISTRICT OF NEW YORK

Hearing Date: October 26, 2021
Hearing Time: 10:00 am

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

**STATEMENT OF THE UNITED STATES TRUSTEE TO
 MODIFIED 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 statement (the “Statement”) to the Modified Joint Chapter 11 Plan of Avianca Holdings S.A. and Its Affiliated Debtors dated October 12, 2021 (the “Plan”). ECF No. 2209. In support thereof, the United States Trustee respectfully submits as follows:

PRELIMINARY STATEMENT

Acknowledging that this Court overruled his previous objection to the provisions in the Disclosure Statement which provided for creditors to vote to opt-out of the Third-Party Releases contained in the Plan, for the reasons set forth below and in his Objection to the Disclosure Statement, the United States Trustee respectfully reiterates the view that an opt-in provision would provide more clarity on a creditor’s agreement to accept Third-Party Releases in exchange for a *di minimis* distribution under the Plan. Although the results of voting on the Plan are not yet known, as a practical matter, the opt-in procedure would appear to be a more transparent method – particularly where creditors are receiving at most a 1.4 cent distribution on each dollar of their claim – in determining whether releases to be imposed on unsophisticated and unwary



parties has been done so with each creditor's knowledge and consent. Moreover, requiring a creditor who has rejected the Plan to also affirmatively opt-out of the imposition of Third-Party Releases appears to be more or less a trap for unwitting creditors.

While it does not appear that there are any holders of claims who have not been afforded the opportunity to opt-out of the Third-Party Releases, to the extent that there are any such non-consensual releases, the United States Trustee reserves his right to object.

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. On September 15, 2021, the Court issued a Memorandum Opinion Approving Third Amended Disclosure Statement, Solicitation Procedures and Other Relief (the

“Memorandum”). ECF No. 2135. In its Memorandum, the Court overruled the United States Trustee’s objection (ECF No. 2056) to the Debtors’ early versions of the disclosure statement (ECF Nos. 1982 and 2079), wherein the United States Trustee objected to the opt-out procedure regarding Third-Party Releases and urged the Court to require an opt-in procedure that allowed an affected party to affirmatively consent to such Third-Party Releases. Memorandum, ECF No. 2135, p. 18 (“With respect to the United States Trustee objection that an opt-in rather than opt-out procedure must be followed for a consensual release to be effective, the objection is OVERRULED.”).

6. The Court entered an order dated September 15, 2021 (the “Order”) (ECF No. 2136) approving the Debtors’ Third Amended Disclosure Statement for Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors (“Disclosure Statement”) (*see* Solicitation Version, ECF No. 2138) and authorizing the Solicitation Package (including the Third Amend Plan for Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors (*see* Solicitation Version, ECF No. 2137).

7. The Debtors filed a Modified Joint Chapter 11 Plan of Avianca Holdings S.A. and Its Affiliated Debtors dated October 12, 2021. ECF No. 2209.

8. The following table summarizes the classifications of Allowed Claims¹ 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%
2A	Other Secured Claims	Unimpaired	Presumed to accept	100%

¹ Capitalized terms are as defined in the Plan and Disclosure Statement.

Class	Description	Status	Voting Rights	Estimated Recovery
2B	Recharacterization Claims	Impaired	<u>Entitled to vote</u>	Secured Portion: 100% Unsecured Portion: 1.0% - 1.4% ²
3	Engine Loan Claims	Impaired	<u>Entitled to vote</u>	100%
4	Secured RCF Claims	Impaired	<u>Entitled to vote</u>	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	<u>Entitled to vote</u>	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	<u>Entitled to vote</u>	1.0% - 1.4% ³
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	<u>Entitled to vote</u>	1.0%
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

² These estimated recoveries assume that the unsecured portion of any Recharacterization Claim receives treatment as a General Unsecured Avianca claim and that Class 11 votes to accept the Plan.

³ These recoveries assume that the Class 11 votes to accept the Plan.

Class	Description	Status	Voting Rights	Estimated Recovery
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

Disclosure Statement, pp. 4-6.

9. 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.).

10. Article I of the Plan defines “Related Parties (¶ 176),” “Released Parties (¶ 178)” and “Releasing Parties” (¶ 179).

11. Releasing Parties include (i) each of the Released Parties (other than the Debtors and the Reorganized Debtors); (ii) all holders of Claims that vote for the Plan, (iii) all holders of Unimpaired Claims or Interests and do not opt-out of the releases (the “Third-Party Releases”) in Article IX.E of the Plan, and (iv) 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 Third-Party Releases. Plan, ¶ 179.

12. The Solicitation Procedures approved by the Court required the Debtors to provide Releasing Parties in Classes not entitled to vote an opportunity to opt-out of the Third-Party Releases. Order, ECF No. 2136.

STATEMENT

Two classes of unsecured claims were permitted to vote on the Plan. The estimated distribution to Class 11 unsecured creditors is at most, a maximum of 1.4% - that is, about a penny on the dollar. Thus, in return for about a penny on the dollar, each potentially voting creditor is asked to give up any and all rights against Third Parties unless the creditor indicates

on its ballot that it wishes to opt-out of the Third-Party Releases. The United States Trustee advocated that instead of this opt-out procedure for voting, that each creditor be allowed to affirmatively indicate a desire to opt into the Third-Party Releases. This Court overruled the United States Trustee's Objection to the Disclosure Statement on this issue.

In this regard and under the facts herein, the reasoning of the Court's (J. Wiles') opinion in *Chassix Holdings, Inc.*, 533 B.R. 64 (Bankr. S.D.N.Y. 2015) concluded that an opt-in procedure regarding third-party releases should be followed. *Chassix* noted 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." *Id.* at 79. 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.*

Of particular note, as discussed above, a holder of a claim in a class entitled to vote and votes to reject the Plan, must also vote to opt-out of the Third-Party Releases. Plan, ¶ 179. The requirement that a rejecting creditor must also specifically opt-out of the Third-Party Releases is of concern for the reasons articulated by Judge Wiles.

The opt-out procedure is designed to maximize the number of parties upon whom Third-Party Releases may be imposed while "deeming" such releases as consensual. Logically, it would seem that a creditor who voted against a Plan, would not have to also vote to opt-out of the Third-Party Releases. The opt-out procedure capitalizes upon inconsistent logic and careless and inattentive creditors and seems particularly less justified when the distribution is as insignificant as the 1.0% - 1.4% distribution herein to unsecured creditors. Although it does not appear that there will be any holders of claims who have not been afforded the opportunity to

opt-out of the Third-Party Releases, to the extent that there are any such non-consensual releases, the United States Trustee reserves his right to object.

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

Dated: New York, New York
October 19, 2021

Respectfully submitted,

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE, Region 2

By: /s/ Brian S. Masumoto
Brian S. Masumoto
Trial Attorney
201 Varick Street, Room 1006
New York, New York 10014
Tel. (212) 510-0500