

Hearing Date: June 30, 2021 at 11:00 a.m. ET
Objection Deadline: June 23, 2021 at 4:00 p.m. ET

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

In re:)	Chapter 11
)	
LATAM Airlines Group S.A., <i>et al.</i> ,)	Case No. 20-11254 (JLG)
)	
Debtors.)	Jointly Administered
)	

**NOTICE OF HEARING ON MOTION OF THE OFFICIAL COMMITTEE
OF UNSECURED CREDITORS FOR (I) LEAVE, STANDING, AND AUTHORITY
TO COMMENCE AND PROSECUTE CERTAIN CLAIMS AND CAUSES OF
ACTION ON BEHALF OF THE DEBTORS' ESTATES AGAINST DELTA AIR
LINES, INC. AND ITS AFFILIATES AND (II) NON-EXCLUSIVE
SETTLEMENT AUTHORITY REGARDING SUCH CLAIMS**

PLEASE TAKE NOTICE that a hearing on the *Motion of the Official Committee of Unsecured Creditors for (I) Leave, Standing, and Authority to Commence and Prosecute Certain Claims and Causes of Action On Behalf of the Debtors' Estates Against Delta Air Lines, Inc. and Its Affiliates and (II) Non-Exclusive Settlement Authority Regarding Such Claims* (the "Motion") will be held before the Honorable Judge James L. Garrity, Jr., United States Bankruptcy Judge, United States Bankruptcy Court for the Southern District of New York, at the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, Room 723, New York, New York 10004. The Hearing will commence on **June 30, 2021 at 11:00 A.M. (Prevailing Eastern Time)**. In light of the COVID19 pandemic, the Hearing will only be conducted telephonically.

PLEASE TAKE FURTHER that parties wishing to participate in the Hearing must make arrangements through CourtSolutions LLC (www.courtsolutions.com). Instructions to register for CourtSolutions LLC are attached to General Order M-543. Any objections to entry of the final order shall be filed no later than **June 23, 2021, at 4:00 P.M.** (Prevailing Eastern Time) (the "Objection Deadline"), and served as required by the Order Implementing Certain Notice and Case Management Procedures (ECF No. 112) (the "Case Management Order").

PLEASE TAKE FURTHER NOTICE that if no objections are timely filed and served with respect to the Motion, the Committee shall, on or after the Objection Deadline, submit to the Court an order substantially in the form annexed as Exhibit A to the Motion, which order the Court may enter with no further notice or opportunity to be heard.

PLEASE TAKE FURTHER NOTICE copies of the Motion can be viewed and/or obtained by: (i) accessing the Court's website at www.nysb.uscourts.gov, or (ii) from the Debtors'

notice and claims agent, Prime Clerk LLC, located at One Grand Central Place, 60 East 42nd Street, Suite 1440, New York, New York 10165, at <https://cases.primeclerk.com/LATAM> or by calling +1 212 257 5450. Note that a PACER password is needed to access documents on the Court's website.

PLEASE TAKE FURTHER NOTICE that the Hearing may affect your rights. Please read the Motion carefully and, if you have one available, discuss it with your attorney. (If you do not have an attorney, you should consider consulting with one.)

PLEASE TAKE FURTHER NOTICE that if you oppose the relief requested in the Motion, or if you want the Court to hear your position on the Motion, then you or your attorney must attend the Hearing. If you or your attorney do not follow the foregoing steps, the Court may decide that you do not oppose the relief requested in the Motion and may enter orders granting the relief requested by the Committee.

Dated: June 16, 2021
New York, NY

Respectfully submitted,

/s/ Allan S. Brilliant _____

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**MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR
(I) LEAVE, STANDING, AND AUTHORITY TO COMMENCE AND PROSECUTE
CERTAIN CLAIMS AND CAUSES OF ACTION ON BEHALF OF THE DEBTORS'
ESTATES AGAINST DELTA AIR LINES, INC. AND ITS AFFILIATES AND (II) NON-
EXCLUSIVE SETTLEMENT AUTHORITY REGARDING SUCH CLAIMS**

C. The Estate Has a Colorable Claim Against Delta Based on Actual Intent to Hinder, Delay, or Defraud Creditors..... 21

II. CONFERRING DERIVATIVE STANDING ON THE COMMITTEE IS LIKELY TO BENEFIT THE DEBTORS' ESTATES..... 24

CONCLUSION..... 25

TABLE OF AUTHORITIES

CASES

Adelphia Recovery Trust v. Bank of Am.,
624 F. Supp. 2d 292 (S.D.N.Y. 2009).....21

Am. Tissue Inc. v. Donaldson, Lufkin & Jenrette Secs. Corp.,
351 F.Supp.2d 79 (S.D.N.Y. 2004)17

ASARCO LLC v. Americas Mining Corp.,
396 B.R. 278 (Bankr. S.D. Tex. 2008)17

In re Adelphia Comm’cns Corp.,
330 B.R. 364 (Bankr. S.D.N.Y. 2005).....2, 15

In re Adler, Coleman Clearing Corp.,
247 B.R. 51 (Bankr. S.D.N.Y. 1999).....17

In re Commodore International Ltd.,
262 F.3d 96 (2d Cir. 2001).....15

In re Am. Hobby Ctr., Inc.,
223 B.R. 275 (Bankr. S.D.N.Y. 1998).....15, 24

In re Dewey & Leboeuf LLP,
2012 WL 5985445 (Bankr. S.D.N.Y. 2012).....15, 16, 24

In re Durso Supermarkets, Inc.,
193 B.R. 682 (Bankr. S.D.N.Y. 1996).....16

In re Fisher,
362 B.R. 871 (S.D. Ohio 2007)20

In re Fleming Packaging Corp.,
No. 03-82408, 2007 WL 4556985 (Bankr. C.D. Ill. Dec. 20, 2007)20

In re Gonzalez,
342 B.R. 165 (Bankr. S.D.N.Y. 2006).....17

In re Great Atlantic & Pacific Tea Co., Inc.,
615 B.R. 71 (Bankr. S.D.N.Y. 2020).....15

In re Housecraft Industries USA, Inc.,
310 F.3d at 71-7224

In re Hydrogen L.L.C.,
2009 WL 2913448 (Bankr. S.D.N.Y. 2009).....24

In re LATAM Airlines Grp. S.A.,
620 B.R. 722 (Bankr. S.D.N.Y. 2020).....4, 8

In re Lehman Bros. Holdings Inc.,
469 B.R. 415 (Bankr. S.D.N.Y. 2012).....23

In re Lyondell Chemical Co.,
541 B.R. 172 (Bankr. S.D.N.Y. 2015).....15

In re Lyondell Chemical Co.,
554 B.R. 635 (S.D.N.Y. 2016).....23

In re M. Fabrikant & Sons, Inc.,
447 B.R. 170 (Bankr. S.D.N.Y. 2011).....20

In re Metro Water & Coffee Servs., Inc.,
157 B.R. 742 (Bankr. W.D.N.Y. 1993)16

In re Sherlock Homes of W.N.Y., Inc.,
246 B.R. 19 (Bankr. W.D.N.Y. 2000)16

In re STN Enterprises,
779 F.2d 901 (2d Cir. 1985).....2, 14, 15, 24

In re Teligent, Inc.,
325 B.R. 81 (Bankr. S.D.N.Y. 2005).....16

In re Triple S Restaurants, Inc.,
422 F.3d 405 (6th Cir. 2005)19

In re Tronox Inc.,
464 B.R. 606 (Bankr. S.D.N.Y. 2012).....17, 20

In re Tronox Inc.,
503 B.R. 239 (Bankr. S.D.N.Y. 2013).....17

In re Vivaro Corp.,
524 B.R. 536 (Bankr. S.D.N.Y. 2015).....23

STATUTES

11 U.S.C. § 101(32)20

11 U.S.C. § 548(a)(1)..... passim

11 U.S.C. § 105.....4

11 U.S.C. § 1103(c)4, 14
11 U.S.C. § 1109.....4, 14
28 U.S.C. § 157(b)4
28 U.S.C. § 1408.....4
28 U.S.C. § 1409.....4

The Official Committee of Unsecured Creditors (the “Committee”) of LATAM Airlines Group S.A. and its debtor-affiliates (collectively, the “LATAM” or the “Debtors”) respectfully submits this Motion for an Order Granting (I) Leave, Standing, and Authority to Commence and Prosecute Certain Claims and Causes of Action on Behalf of the Debtors’ Estates against Delta Air Lines, Inc. and its Affiliates; and (II) Non-Exclusive Settlement Authority with Respect to Such Claims.

PRELIMINARY STATEMENT

1. In November of 2019, LATAM and Delta entered into a contract by which Delta agreed to purchase four A350 airplanes from LATAM for *REDACTED. Thereafter, the COVID-19 pandemic hit, and the value of the airplanes declined. Delta, which by then was LATAM’s second-largest shareholder, wished to avoid its obligation to pay *REDACTED for airplanes that by then were worth far less than the agreed price, so it asked LATAM to terminate the contract. LATAM agreed to do so on the eve of bankruptcy, accepting \$62 million in return for releasing Delta from its obligation to pay *REDACTED. LATAM’s agreement to terminate the contract was executed within hours of the filing of these chapter 11 cases.

2. The relevant facts give rise to fraudulent transfer claims against Delta, which represent valuable assets of the Debtors’ estates. As detailed below, the transaction falls well within recognized application of the relevant fraudulent transfer criteria: among other things, releasing Delta from its obligation to pay *REDACTED constituted a “transfer,” the transfer was made for less than “reasonably equivalent value” at a time when the Debtors were insolvent, and, alternatively, the circumstances demonstrate the presence of multiple “badges of fraud” sufficient to establish liability. The Committee estimates that the recoveries from these claims may well exceed *REDACTED. The Committee asked the Debtors to pursue these claims, but the

*All text marked “*REDACTED” is Redacted Per Amended Standing Order Regarding Redactions Dated February 2, 2021.

Debtors have indicated they will not do so. Accordingly, the Committee seeks derivative standing to prosecute the claims for the benefit of the estates.

3. To obtain derivative standing, the Committee must satisfy two criteria. First, the Committee must offer a “colorable” claim for relief that “on appropriate proof would support a recovery”—a standard that courts have described as “a relatively easy one to make.” *See In re Adelpia Comm’cns Corp.*, 330 B.R. 364, 376 (Bankr. S.D.N.Y. 2005). Second, the Committee must establish that conferring derivative standing “is likely to benefit the reorganization estate.” *In re STN Enters.*, 779 F.2d 901, 904 (2d Cir. 1985). Both of those factors are satisfied here.

4. To begin with, the Debtors’ estates have a colorable claim for a constructive fraudulent transfer under section 548(a)(1)(B) of the Bankruptcy Code (as well as under applicable non-bankruptcy law) because the Debtors received “less than a reasonably equivalent value” in exchange for releasing Delta from its obligation to pay *REDACTED at a time when the Debtors were suffering from acute financial distress. Had the transaction been consummated as agreed, the Debtors would have received *REDACTED in exchange for delivering to Delta airplanes worth far less than the purchase price—netting the estate a sizeable gain. By terminating the transaction, the Debtors instead (a) received \$62 million in cash and (b) retained distressed assets consisting of aircraft that were essentially useless to LATAM—netting the estates a sizeable loss. The precise value of the four aircraft at the time of the termination would be the subject of appropriate valuation, but the Committee believes—and intends to allege—that the aircraft had lost at least half of their value in relation to a pre-pandemic appraised value of *REDACTED. At such a valuation, the Debtors’ loss would be approximately *REDACTED calculated as follows: in exchange for relinquishing the right to obtain *REDACTED from Delta, the Debtors (a) received \$62 million in cash and (b) retained aircraft worth *REDACTED (for a

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net difference of *REDACTED). Conversely, Delta gained approximately *REDACTED: in exchange for paying \$62 million, Delta avoided (a) paying *REDACTED to LATAM and (b) taking delivery of planes worth only approximately *REDACTED. Delta's gain was the Debtors' loss, all at the expense of the Debtors' estates. Although *REDACTED is a significant sum, the Committee believes that the damages may be greater still.

5. In addition, the Debtors' estates also have a colorable claim under section 548(a)(1)(A) of the Bankruptcy Code. The Debtors' board of directors *REDACTED, and the Debtors' internal documents show that they approved the termination *REDACTED.

In addition, numerous of the "badges of fraud" traditionally used to establish "actual intent" in the absence of direct evidence are present here. For example, (a) there was a close relationship between the parties to the conveyance; (b) the consideration received was inadequate; (c) the timing of the transfer was inherently suspicious, *REDACTED

; (d) the transaction was hastily negotiated in only a matter of days; (e) the transaction was unusual and not in the ordinary course of business; and (e) the transfer was part of a series of transactions in the weeks leading up to the Petition Date in which the Debtors gave certain insiders windfalls at the expense of their creditors.

6. Finally, conferring standing on the Committee represents a sensible expenditure of estate resources. Granting standing would benefit the estates because, if the Committee is not given standing to sue, a valuable estate cause of action would not be pursued. In addition, the potential recoveries from the causes of action—in excess of *REDACTED—outweigh the costs associated with pursuing the litigation. Accordingly, the Court should grant the Committee

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standing to commence, prosecute, and (if appropriate) settle the claims against Delta for the benefit of the Debtors' estates.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. Venue is proper under 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. § 157(b). The predicates for relief are Bankruptcy Code sections 105, 1103(c), and 1109(b).

BACKGROUND

8. The following facts are asserted upon information and belief in light of the Committee's investigation to date.¹

A. Delta Enters into Transactions to Become the Second-Largest Shareholder of LATAM, Later Becoming the Debtors' Largest Shareholder.

9. As of the commencement of these chapter 11 cases on May 26, 2020 (the "Petition Date"), Delta Air Lines, Inc. (together with its affiliates, "Delta") held approximately 20% of the common shares of LATAM Airlines Group, S.A. ("LATAM Parent"). Delta's equity holdings made it the Debtors' second-largest shareholder, just behind the Cueto family, which held approximately 21.46% of the shares of LATAM Parent. The Debtors' other major shareholder, Qatar Airways Investments (UK) Ltd. ("Qatar"), held 10%. *See generally In re LATAM Airlines Grp. S.A.*, 620 B.R. 722, 733-35 (Bankr. S.D.N.Y. 2020).

10. LATAM and Delta joined forces strategically on September 26, 2019, when the two airlines entered into a Framework Agreement by which they agreed to form a strategic

¹ The Committee obtained limited discovery relevant to the claims at issue in connection with the Debtors' motions for the approval of post-petition financing (collectively, the "DIP Motion" and the "DIP Financing"). In relation to the DIP Motion, however, the Debtors produced documents associated with the Aircraft Purchase Agreement only to the extent such they also related to the DIP financing. Delta refused to produce any documents related to the Aircraft Purchase Agreement and did not produce any internal documents. In addition, discovery has not yet been obtained as to many of the individuals with material involvement in the matters set forth herein.

partnership. The Framework Agreement contemplated a series of additional agreements over the ensuing months. Delta also agreed to make “transition payments” to LATAM, consisting of an initial \$150 million payment and eight quarterly installment payments of \$25 million each.

11. In accordance with the Framework Agreement, Delta carried out a tender offer by which it acquired its 20% equity stake in LATAM Parent for an aggregate purchase price of \$1.9 billion. The tender offer closed in December 2019. On May 7, 2020, Delta and LATAM signed a Trans-American Joint Venture Agreement (the “JV Agreement”), which links LATAM’s and Delta’s networks and combines the routes of the two airlines between North and South America.

12. As of the Petition Date, Delta was, as noted, LATAM Parent’s second-largest shareholder and arguably its most important business partner. Delta’s equity position entitled it to designate two members of LATAM Parent’s nine-member board of directors.

13. During the course of these chapter 11 cases, the Cueto family sold a significant portion of its LATAM stock, reducing its beneficial ownership stake to 16.39% as of February 28, 2021. Accordingly, as of this filing, Delta has become the Debtors’ largest shareholder.²

B. Delta Agrees to Purchase Four Aircraft from LATAM for *REDACTED.

14. Also in accordance with the Framework Agreement, on November 6, 2019, Delta and LATAM entered into an Aircraft Sale and Purchase Agreement (the “APA”). *REDACTED Under the APA, Delta committed to purchase from LATAM four wide-body Airbus A350-900 XWB airplanes bearing manufacturer’s serial numbers *REDACTED (collectively, the “Aircraft”) for an aggregate price of *REDACTED. The Aircraft, with their purchase prices and anticipated delivery dates to Delta, were as follows:

² See

*REDACTED

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MSN	Purchase Price	Delivery Date
	*REDACTED	

15. Payment under the APA was due in two stages. First, upon execution of the agreement, *REDACTED

(See Ex. 1 §§ 1.1, 8.1.)³ Second, upon delivery of each aircraft, Delta was to pay LATAM the balance of the purchase price for that aircraft. (*Id.* § 6.4(1)(i).) Although Delta was required to pay the *REDACTED

. Accordingly, as of the date the parties terminated the APA (described below), *REDACTED

16. *REDACTED

17. Importantly, Airbus A350 airplanes, such as those subject to the APA, are wide-body aircraft that are used for long-haul flights. The A350-900 variant is designed to accommodate between 300 and 350 passengers.⁴ Prior to the COVID-19 pandemic, LATAM deployed A350s primarily (if not exclusively) for international flights.

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³ The Debtors thus far have declined to provide the Committee with an execution version of the APA, citing confidentiality obligations to Delta, and accordingly the Committee relies for purposes of this Motion on the form of agreement that was attached as an exhibit to the Framework Agreement.

⁴ See Airbus, *A350-900*, <https://www.airbus.com/aircraft/passenger-aircraft/a350xwb-family/a350-900.html>.

C. The COVID-19 Pandemic Severely Disrupts Air Travel Across the Globe, Including the Use of A350 Aircraft by LATAM and Delta.

18. On March 11, 2020, the World Health Organization declared the outbreak of the COVID-19 virus to be a global pandemic. Over the following weeks, countries around the world announced severe travel restrictions and/or border closures. (*See Decl. of Ramiro Alfonsín Balza in Support of First Day Motions and Applications in Compliance with Local Rule 1007-2* (ECF 3) (“Alfonsín Decl.”) ¶ 65.) By April 1, 2020, the International Air Transport Association (“IATA”) estimated that customers living in countries with severe travel restrictions accounted for 98% of global passenger revenue. (*Id.*) IATA estimated that more than 8,500 passenger aircraft had been grounded as a result. (*Id.*)

19. *REDACTED

The effects of the COVID-19 crisis on global air travel were—and remain—much more severe than any slowdown in air travel in recent memory, including following the terrorist attacks of September 11, 2001, and the SARS outbreak in 2002-2003.

*REDACTED

20. LATAM’s businesses were severely affected by the worldwide shutdown. As of March 16, 2020, LATAM reduced the capacity of its passenger operations by approximately 70%, representing 90% of international operations and 40% of domestic operations. (Alfonsín Decl. ¶ 67.) By April 2020, the Debtors had reduced their international routes by 95%. (*Id.*) As of the Petition Date, LATAM’s passenger flights were limited to domestic flights in Chile and Brazil and international flights from Santiago and São Paulo to Miami—roughly 4% of

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LATAM's routes prior to the COVID-19 crisis. (Alfonsín Decl. ¶¶ 65, 67.) *REDACTED

D. LATAM Works With Delta and its Other Major Equity Holders to Prepare for a Chapter 11 Filing.

21. *REDACTED

22. *REDACTED

23. *REDACTED

*All text marked "**REDACTED" is Redacted Per Amended Standing Order Regarding Redactions Dated February 2, 2021.

E. *REDACTED

24. In the days leading up to the Debtors' chapter 11 filings, Delta also approached LATAM about terminating the APA (the "Termination Agreement"). On information and belief,

*REDACTED

25. *REDACTED

26. Shortly thereafter, LATAM and Delta finished negotiating the Termination Agreement under which LATAM would release Delta from its obligation to purchase the four aircraft for *REDACTED in return for a payment of \$62 million. *REDACTED

Delta had no prior right to terminate the agreement by paying this fee.

*All text marked "**REDACTED" is Redacted Per Amended Standing Order Regarding Redactions Dated February 2, 2021.

27. *REDACTED

F. The Termination Agreement Resulted in a Loss to the Debtors' Estates of at Least *REDACTED.

28. *REDACTED

29. *REDACTED

*All text marked "**REDACTED" is Redacted Per Amended Standing Order Regarding Redactions Dated February 2, 2021.

*REDACTED

30. *REDACTED

G. LATAM Allows Delta to Terminate the Aircraft Purchase Agreement *REDACTED

31. *REDACTED

*All text marked "**REDACTED" is Redacted Per Amended Standing Order Regarding Redactions Dated February 2, 2021.

*REDACTED

32. *REDACTED

H. At the Time the APA Was Terminated, LATAM Was Potentially Insolvent and Unable to Pay Its Debts as they Came Due.

33. At the time of the transfer at issue here, LATAM was in significant financial distress. Although the Committee has not conducted an insolvency analysis at this stage, the Committee alleges that the Debtors were undercapitalized and insolvent at the time of the termination of the APA. In addition, the Debtors asserted in their first day filings that they were unable to pay their debts as they came due. As set forth in the Debtors' first day declaration, as of the Petition Date, LATAM had "deferred or cancelled approximately \$900 million in investments," had "worked to postpone delivery of new planes for its fleet," and had engaged with its creditors and counterparties "to request accommodations based on current circumstances, including deferrals of upcoming payment obligations." (*See* Alfonsín Decl. ¶ 70.) Despite those and other cost-saving measures, however, "LATAM's liquidity position . . . continued to deteriorate, culminating in the filing of these Chapter 11 Cases in order to, among other things, prevent the exercise of remedies against the Debtors' assets, including their fleet, that could

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otherwise result from *the Debtors' inability to pay certain of their debts.*" (*Id.* ¶ 73 (emphasis added).) According to the Debtors, they filed these chapter 11 cases to avoid making required payments that would have put in jeopardy the airline's ability to continue operating. (*Id.* ¶ 75.)

I. International Air Travel Continues to Be Curtailed Throughout the Duration of These Chapter 11 Cases, *REDACTED

34. In the more than twelve months since the Petition Date, international air travel has continued to be subject to severe restrictions and depressed demand. *REDACTED

*REDACTED

35. On or about April 8, 2021, the Debtors announced that they had decided to phase A350 aircraft out of their fleet entirely. On May 20, 2021, the Debtors filed a notice of rejection with respect to the four Aircraft subject to the APA. (ECF 2376.) *REDACTED

5

*REDACTED

*All text marked "**REDACTED" is Redacted Per Amended Standing Order Regarding Redactions Dated February 2, 2021.

J. The Debtors Refuse to Pursue the Claims Against Delta.

36. On May 24, 2021, the Committee served a demand letter on the Debtors, requesting that they consent to the Committee obtaining derivative standing to prosecute the Claims against Delta, subject to Court approval of the Committee's standing. Alternatively, the Committee demanded that the Debtors themselves pursue the claims against Delta, although the Committee noted that it believes that the Debtors are conflicted from doing so. A copy of the Committee's demand letter is attached hereto as Exhibit 11.

37. On June 10, 2021, the Debtors responded to the Committee's demand letter indicating that

***REDACTED**

With respect to the Committee's request for derivative standing, the Debtors stated that

***REDACTED**

(*Id.* at 3.) Accordingly, the Committee now seeks derivative standing to commence, prosecute, and (if appropriate) settle the Claims against Delta.

RELIEF REQUESTED

38. The Committee hereby respectfully requests that the Court grant leave, standing, and authority to the Committee to prosecute, and if appropriate settle (subject to Court approval), the claims addressed herein against Delta. A proposed form of order is attached hereto.

BASIS FOR RELIEF

39. For more than 35 years, the Second Circuit has recognized that sections 1103 and 1109 of the Bankruptcy Code confer an implied, qualified right for creditors' committees under certain circumstances to initiate adversary proceedings on behalf of a debtor's estate, subject to the prior approval of the Bankruptcy Court. *See In re STN Enterprises*, 779 F.2d 901, 904-05

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(2d Cir. 1985); *In re Great Atlantic & Pacific Tea Co., Inc.*, 615 B.R. 71, 722-723 (Bankr. S.D.N.Y. 2020); *In re Lyondell Chemical Co.*, 541 B.R. 172, 200 n.128 (Bankr. S.D.N.Y. 2015). A committee may obtain derivative standing “when the trustee or debtor in possession unjustifiably failed to bring suit or abused its discretion in not suing to avoid a preferential transfer.” *In re STN Enters.*, 779 F.2d at 904. A committee also may obtain derivative standing when the debtor consents. *See In re Commodore International Ltd.*, 262 F.3d 96, 100 (2d Cir. 2001).

40. Courts in the Second Circuit apply a two-part test to determine if the debtor unjustifiably failed to bring suit: (a) whether the “committee presents a colorable claim or claims for relief that on appropriate proof would support a recovery”; and (b) “whether an action asserting such claim is likely to benefit the reorganization estate.” *See In re Am.’s Hobby Ctr., Inc.*, 223 B.R. 275, 282 (Bankr. S.D.N.Y. 1998) (quoting *STN Enters.*, 779 F.2d at 905). In considering whether to allow standing, the court is not required to weigh the evidence or conduct a trial. *See In re Dewey & Leboeuf LLP*, 2012 WL 5985445 at *6 (Bankr. S.D.N.Y. Nov. 29, 2012). Rather, presenting a “colorable claim” requires only a showing that the claim could survive a motion to dismiss. The second factor requires a weighing of the probability of success against the potential delay and expense associated with the litigation. As set forth below, both of those criteria are readily satisfied here.

I. THE ESTATES’ FRAUDULENT TRANSFER CLAIMS AGAINST DELTA ARE COLORABLE.

41. The showing that the relevant claims are “colorable” is a “relatively easy one to make.” *Adelphia*, 330 B.R. at 376. “A committee seeking standing need not lay bare its complete proof, but rather is required only to describe a facially valid claim, which will be evaluated under a standard ‘much the same as that undertaken when a defendant moves to

dismiss a complaint for failure to state a claim.” *Dewey & Leboeuf*, 2012 WL 5985445, at *6 (quoting *In re Am.’s Hobby Ctr.*, 223 B.R. at 282). The court “should not conduct a mini-trial.” *Id.* Here, the Committee describes facially colorable claims under section 548 of the Bankruptcy Code and applicable non-bankruptcy law under the frameworks of both constructive and actual fraudulent transfer.⁶

A. The Predicate Elements of a Fraudulent Transfer Under Section 548(a)(1) Are Readily Satisfied.

42. Subject to other applicable requirements, section 548(a)(1) permits the avoidance of “any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition.” 11 U.S.C. § 548(a)(1). Here, there can be no genuine dispute that the termination of the APA constituted a “transfer” of “an interest of the debtor in property.” Courts have held consistently that the prepetition termination of a contract between the debtor and a third-party, where the debtor has not breached the contract, constitutes a “transfer.” *See, e.g., In re Teligent, Inc.*, 325 B.R. 81, 86 (Bankr. S.D.N.Y. Apr. 7, 2005) (ECF 55); *In re Sherlock Homes of W.N.Y., Inc.*, 246 B.R. 19, 22-24 (Bankr. W.D.N.Y. 2000) (termination of exclusive real estate listing contract); *In re Durso Supermarkets, Inc.*, 193 B.R. 682, 698 (Bankr. S.D.N.Y. 1996) (lease termination); *In re Metro Water & Coffee Servs., Inc.*, 157 B.R. 742, 745 (Bankr. W.D.N.Y.

⁶ The Committee here focuses its analysis on relevant provisions of the Bankruptcy Code. The Committee has also reviewed applicable non-bankruptcy fraudulent transfer criteria, particularly applicable New York law, which applies criteria very similar to the relevant federal standards. Because demonstrably colorable claims exist under federal bankruptcy law, and because the relevant federal and non-federal fraudulent transfer laws are very similar, the Committee, in the interests of expediency and of avoiding burdening the court with excessive briefing and analysis, does not lay out the complete basis for pursuing claims under applicable non-bankruptcy law. In some instances, however, applicable non-bankruptcy law is particularly favorable and is, accordingly, cited herein. The Committee intends to pursue relief under applicable non-bankruptcy fraudulent transfer principles and reserves its rights accordingly.

1993) (termination of stadium concession agreement). In addition, the termination took place well within the two-year statutory window.

B. The Estate Has a Colorable Claim Against Delta for Constructive Fraud Under Section 548(a)(1)(B) and Applicable Non-Bankruptcy Law.

43. Under section 548(a)(1)(B), a transaction that satisfies the elements outlined above may be avoided as a constructively fraudulent transfer if (1) the debtor “received less than a reasonably equivalent in value in exchange for such transfer or obligation” and, as relevant here, (2) the debtor either “was insolvent on the date that such transfer was made” or, at the time of the transfer, the debtor “intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor’s ability to pay as such debts matured.” *See* 11 U.S.C. § 548(a)(1)(B). The estates have colorable claims that both of those elements are met here.

1. The Committee will establish that the Debtors received less than a reasonably equivalent value in exchange for terminating the APA.

44. Whether the debtor received “reasonably equivalent value” is assessed at the time of the transfer. *See ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278, 337 (Bankr. S.D. Tex. 2008); *Am. Tissue Inc. v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 351 F.Supp.2d 79, 106 (S.D.N.Y. 2004). Courts evaluate “reasonably equivalent value” in light of “(i) the fair market value of the economic benefit received by the debtor; (ii) the arms-length nature of the transaction; and (iii) good faith of the transferee.” *In re Gonzalez*, 342 B.R. 165, 173 (Bankr. S.D.N.Y. 2006). In the absence of marketplace values, courts often look to expert testimony. *See, e.g., In re Tronox Inc.*, 503 B.R. 239, 291-293 (Bankr. S.D.N.Y. 2013); *In re Adler, Coleman Clearing Corp.*, 247 B.R. 51, 107-110 (Bankr. S.D.N.Y. 1999).

45. The key input into the assessment of “reasonably equivalent value” in this matter is the value of the Aircraft as of the date of transfer. That valuation would be the subject of discovery and appropriate expert testimony. Based on current information, however, the

Committee believes (and alleges) that the value of the aircraft at the time of the transfer was

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47.

***REDACTED**

48.

***REDACTED**

***All text marked "**REDACTED" is Redacted Per Amended Standing Order Regarding Redactions Dated February 2, 2021.**

***REDACTED**

49. It makes no difference that the Aircraft were encumbered by secured debt. It is well-settled that when the transferred asset is subject to debt, sale proceeds used to pay the secured party benefit the estate as a whole (and unsecured creditors) by, among other things, reducing the magnitude of general unsecured deficiency claims. *See In re Triple S Restaurants, Inc.*, 422 F.3d 405, 412 (6th Cir. 2005) (“[E]ven if the primary effect of avoidance would be to send the \$250,000 back to [the secured creditor], that money would offset [the debtor’s] outstanding debt to [the secured creditor], thereby freeing up funds in that amount to pay the unsecured creditors. Avoiding the \$250,000 transfer, in other words, decreases the amount of

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secured debt and increases the Trustee’s ability to pay the remaining creditors. Because such avoidance establishes a benefit to [debtor’s] unsecured creditors, we can—and do—reject [defendant’s] argument that avoiding the transfer would benefit only [the secured creditor.]”); *accord In re Fisher*, 362 B.R. 871, 884–85 (S.D. Ohio 2007), *aff’d*, 296 F. App’x 494 (6th Cir. 2008) (“decreases in the amount of secured debt increase the Trustee’s ability to pay the remaining creditors.”); *In re Fleming Packaging Corp.*, No. 03-82408, 2007 WL 4556985, at *1 (Bankr. C.D. Ill. Dec. 20, 2007); *In re Tronox Inc.*, 464 B.R. 606, 616 (Bankr. S.D.N.Y. 2012).

50. Accordingly, the Committee asserts a colorable claim that LATAM received less than reasonably equivalent value in exchange for the termination of the APA.

2. LATAM was in financial distress at the time of the transfer.

51. The Committee has colorable claims under at least two of the prongs of section 548(a)(1)(B)(ii). First, although the Committee has not yet conducted a solvency analysis, the Committee believes that it is at least colorable that the Debtors were insolvent at the time of the transfer. *See* 11 U.S.C. § 548(a)(1)(B)(ii)(I). Under section 101(32), the term “insolvent” is defined as a “financial condition such that the sum of such entity’s debts is greater than all of such entity’s property, at fair valuation” 11 U.S.C. § 101(32). The Debtors recently asserted that “current evidence points to insolvency.” *See* ECF 2183 at 13. In addition, New York fraudulent transfer law “presumes that the debtor who transfers property without fair consideration is insolvent, and the burden shifts to the transferee to rebut it.” *In re M. Fabrikant & Sons, Inc.*, 447 B.R. 170, 195 (Bankr. S.D.N.Y. 2011), *aff’d*, 480 B.R. 480 (S.D.N.Y. 2012), *aff’d*, 541 F. App’x 55 (2d Cir. 2013).

52. Second, LATAM intended to incur, and believed it would incur, debts that it would not be able to pay as they matured. *See* 11 U.S.C. § 548(a)(1)(B)(ii)(III). As set forth in the Debtors’ first day declaration, LATAM had “deferred or cancelled approximately \$900

million in investments,” had “worked to postpone delivery of new planes for its fleet,” and had engaged with its creditors “to request accommodations based on current circumstances, including deferrals of upcoming payment obligations.” Alfonsín Decl. ¶ 70. Despite those and other cost-saving measures, “LATAM’s liquidity position . . . continued to deteriorate, culminating in the filing of these Chapter 11 Cases in order to, among other things, prevent the exercise of remedies against the Debtors’ assets, including their fleet, that could otherwise result from *the Debtors’ inability to pay certain of their debts.*” *Id.* ¶ 73 (emphasis added). The Debtors explained in their first day declaration that filing the chapter 11 cases was necessary to avoid making required payments that would have put in jeopardy the airline’s ability to continue operating.

C. The Estate Has a Colorable Claim Against Delta Based on Actual Intent to Hinder, Delay, or Defraud Creditors.

53. A claim for actual fraud requires proof that the debtor made the transfer “with actual intent to hinder, delay, or defraud” one or more of its creditors. 11 U.S.C. § 548(a)(1)(A).

54. Courts recognize that actual intent often is not subject to direct proof. Instead, the plaintiff is allowed to rely on the presence of so-called “badges of fraud.” *See, e.g., Adelpia Recovery Trust v. Bank of Am.*, 624 F. Supp. 2d 292, 335 (S.D.N.Y. 2009) (“due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on ‘badges of fraud’ to support his case, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent”) (citation omitted).

55. This is a rare case, however, in which there is ample *direct* evidence of LATAM’s “actual intent to hinder, delay, or defraud” its secured and unsecured creditors. *See* 11 U.S.C. § 548(a)(1)(A).

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56.

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57. Even if there were not such direct evidence, the Committee establishes a colorable claim based on the “badges of fraud.” The traditional badges include: (1) a close relationship between the parties to the conveyance; (2) inadequacy of consideration received; (3) retention of control of the property by the transferor; (4) suspicious timing of the conveyance after the debt

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was incurred; (5) the use of fictitious parties; (6) information that the transferor was insolvent as a result of the conveyance; (7) the existence of a pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; (8) the general chronology of the events and transactions under inquiry; (9) a questionable transfer not in the usual course of business; and (10) the secrecy, haste, or unusualness of the transaction. *In re Vivaro Corp.*, 524 B.R. 536, 554 (Bankr. S.D.N.Y. 2015). While the presence of “a single badge of fraud may spur mere suspicion, the confluence of several can constitute conclusive evidence of an actual intent to defraud, absent ‘significantly clear’ evidence of a legitimate supervening purpose.” *In re Lyondell Chemical Co.*, 554 B.R. 635, 653 (S.D.N.Y. 2016) (citation omitted). Here, multiple badges of fraud are present:

- Badge 1: There was “a close relationship between the parties to the conveyance.” Delta was LATAM’s second-largest shareholder, holding approximately 20% of the common shares of LATAM Parent. In addition, Delta had the right to designate two members of LATAM Parent’s nine-member board of directors. Delta also was LATAM’s most important business partner.
- Badge 2: For the reasons set forth above, the consideration received was inadequate.
- Badge 4: The timing of the transfer was inherently suspicious. *REDACTED
- Badge 7: The transfer was part of a “a pattern or series of transactions” in which the Debtors gave certain of their major shareholders windfalls at the expense of their creditors in the days and weeks leading up to their chapter 11 petitions. In particular, *REDACTED
- Badges 8 and 10: As described above, the “general chronology of events” and the *REDACTED are consistent with fraudulent intent. *See In re Lehman Bros. Holdings Inc.*, 469 B.R. 415, 447-48 (Bankr. S.D.N.Y. 2012) (“each transaction occurred on a rushed basis prior to LBHI’s bankruptcy, with little or no negotiation, and was unprecedented in the prior course of business between the parties, and the industry generally”).

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- Badge 9: The termination of the APA constitutes “a questionable transfer not in the usual course of business.” The Committee believes discovery will show that parties to aircraft purchase agreements generally do not release their counterparties from the agreement in circumstances where market conditions have changed.

58. Notably, the presence of only a few of the above-cited badges of fraud would be enough to make the Committee’s claim at least “colorable.” Here, even without the benefit of full discovery, it is already apparent that numerous of the badges of fraud traditionally used to establish “actual intent” are present. Accordingly, the Committee readily meets its burden of describing a colorable claim of under section 548(a)(1)(A).

II. CONFERRING DERIVATIVE STANDING ON THE COMMITTEE IS LIKELY TO BENEFIT THE DEBTORS’ ESTATES.

59. Finally, conferring derivative standing on the Committee is “is likely to benefit the reorganization estate.” *See STN Enters.*, 779 F.2d at 905. In evaluating this element, courts weigh the potential benefits from the litigation against the costs, such as legal fees, and assess whether “the prosecution of the claims represents a sensible expenditure of the estate’s resources.” *Dewey & Leboeuf*, 2012 WL 5985445, at *6. This standard does not require the Court to “conduct a minitrial.” *Am. ’s Hobby Ctr.*, 223 B.R. at 282.

60. The granting of derivative standing is likely to benefit the Debtors’ estates because, in light of the Debtors’ refusal to pursue the relevant claims, if the Committee is not given standing to sue, a valuable estate cause of action would likely be lost. That would be a waste to the detriment of creditors. *In re Hydrogen L.L.C.*, 2009 WL 2913448 at *2 (Bankr. S.D.N.Y. May 7, 2009) (“The suit by the Committee is necessary because the Debtor is conflicted from bringing the suit itself . . . and is beneficial because if the Committee did not have standing to sue, potentially valuable estate causes of action would be wasted.”) (citation omitted); *In re Housecraft Industries USA, Inc.*, 310 F.3d 64, 71-72 (2d Cir. 2002) (finding creditor derivative standing to be appropriate because otherwise fraudulent transfers would not

be recovered). In addition, the potential recoveries from the estates' causes of action—which are significantly in excess of *REDACTED—vastly outweigh the costs associated with pursuing the litigation.

CONCLUSION

61. For the reasons set forth above, the Committee respectfully requests that the Court enter an order granting it standing to commence, prosecute, and (if appropriate) settle the Claims against Delta.

Dated: June 16, 2021
New York, NY

Respectfully submitted,

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*Counsel to the Official Committee of
Unsecured Creditors*

Exhibit A

Proposed Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

In re:)	Chapter 11
LATAM Airlines Group S.A., <i>et al.</i> ,)	Case No. 20-11254 (JLG)
)	
Debtors.)	Jointly Administered
)	

**ORDER GRANTING MOTION OF THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS FOR (I) LEAVE, STANDING, AND
AUTHORITY TO COMMENCE AND PROSECUTE CERTAIN CLAIMS
AND CAUSES OF ACTION ON BEHALF OF THE DEBTORS’ ESTATES
AGAINST DELTA AIR LINES, INC. AND ITS AFFILIATES AND (II) NON-
EXCLUSIVE SETTLEMENT AUTHORITY REGARDING SUCH CLAIMS**

Upon the motion (the “Motion”)¹ of the Official Committee of Unsecured Creditors (the “Committee”) appointed in the above-captioned jointly administered chapter 11 cases of LATAM Airlines Group S.A. and each of its affiliated debtors in possession (collectively, the “Debtors”), for leave, standing and authority to prosecute certain claims on behalf of the Debtors’ estates against Delta Air Lines, Inc. and its Affiliates and non-exclusive settlement authority; and it appearing that (i) the relief requested in the Motion is appropriate; (ii) this Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334; (iii) this proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b); (iv) venue of the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and (v) notice of the Motion was appropriate under the particular circumstances and no other or further notice need be given; and after due deliberation and sufficient cause appearing therefore;

IT IS HEREBY ORDERED THAT:

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

1. The Motion is GRANTED as set forth herein.
2. All objections, if any, to the Motion or the relief requested therein, that have not been withdrawn, waived, or settled, are overruled.
3. The Committee shall be, and hereby is, granted, on behalf of the Debtors' estates, leave, standing and exclusive authority to prosecute the claims set forth and described in the Motion (the "Claims").
4. The Committee is granted non-exclusive authority to settle the Claims on behalf of the Debtors' estates, subject to the further order of this Court approving such settlements.
5. The Committee is authorized and empowered to take all actions necessary to implement the relief granted in this Order.
6. This Order shall be effective and enforceable immediately upon entry.
7. This Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Order.

New York, New York
Dated: _____, 2021

THE HONORABLE JAMES L. GARRITY, JR.,
UNITED STATES BANKRUPTCY JUDGE

Exhibit 1

Filed Under Seal

Exhibit 2

Filed Under Seal

Exhibit 3

Filed Under Seal

Exhibit 4

Filed Under Seal

Exhibit 5

Filed Under Seal

Exhibit 6

Filed Under Seal

Exhibit 7

Filed Under Seal

Exhibit 8

Filed Under Seal

Exhibit 9

Intentionally Omitted

Exhibit 10

Filed Under Seal

Exhibit 11

Filed Under Seal

Exhibit 12

Filed Under Seal