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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
GRUPO AEROMÉXICO, S.A.B. de C.V., *et al.,*	)	Case No. 20-11563 (SCC)
Debtors.[1]	)	(Jointly Administered)

LIMITED OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO CERTAIN TERMS OF CLAIMS SETTLEMENT MOTIONS

The Official Committee of Unsecured Creditors (the "Committee") of Grupo Aeroméxico, S.A.B. de C.V., *et al*. (collectively, the "Debtors") submits this limited objection to the (1) *Debtors' Motion for Entry of an Order (I) Authorizing Debtor Aerolitoral, S.A. de C.V. to Assume that Certain Pool Agreement and (II) Approving the Claims Settlement with Embraer Aircraft Customer Services, LLC* [Docket No. 2025] (the "Embraer Motion"); (2) *Debtors' Motion for Entry of an Order (I) Authorizing Debtor Aerovías de México, S.A. de C.V. to Assume (on an*

[1] The Debtors in these cases, along with each Debtor's registration number in the applicable jurisdiction, are as follows: Grupo Aeroméxico, S.A.B. de C.V. 286676; Aerovías de México, S.A. de C.V. 108984; Aerolitoral, S.A. de C.V. 217315; Aerovías Empresa de Cargo, S.A. de C.V. 437094-1. The Debtors' corporate headquarters is located at Paseo de la Reforma No. 243, piso 25 Colonia Cuauhtémoc, Mexico City, C.P. 06500.

Amended Basis) Certain Lease Agreements and (II) Approving the Claims Settlement with BOC Aviation (Ireland) Limited and Related Parties [Docket No. 2028] (the "BOC Aviation Motion); and (3) *Debtors' Motion for Entry of an Order (I) Authorizing Debtor Aerovías de México, S.A. de C.V. to Assume (on an Amended Basis) that Certain Lease Agreement and (II) Approving the Claims Settlement with Aergen Aircraft Sixteen Limited* [Docket No. 2039] (the "Aergen Motion" and, together with the Embraer Motion and the BOC Aviation Motion, the "Claims Settlement Motions"), and respectfully states as follows:

1. Although the Committee does not oppose the economic substance of the claims settlements reflected in the Claims Settlement Motions, the Committee objects to the "Complying Plan" provision contained in each of the proposed orders attached to the Claims Settlement Motions (the "Complying Plan Term"). The Complying Plan Term requires the settling creditor, in exchange for the Debtors' agreement to its claim amount, to vote in favor of any "Complying Plan" proposed by the Debtors. A "Complying Plan" is defined as one that treats the settling creditors' claims "(a) as allowed general unsecured non-priority claims not subject to reconsideration under section 502 of the Bankruptcy Code and (b) no worse than the non-priority unsecured claims of any other aircraft or engine lessor whose claims run solely against the applicable Debtor (other than *de minimis* 'convenience class' claims)." The Claims Settlement Motions themselves, however, do not mention or explicitly seek the relief requested with respect to the Complying Plan Term.[2] Rather, the term is only included as one or two paragraphs in the respective proposed orders attached to the Claims Settlement Motions. The Debtors' failure to include such material relief in the Claims Settlement Motions is both suspect and at odds with

[2] Unlike in the Claims Settlement Motions, in the Debtors' motion to authorize entry into agreements establishing new labor conditions with various unions [Docket No. 1058], the Debtors did explicitly mention Complying Plan Term language as part of the relief requested.

standard bankruptcy procedure, as "[a] motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it." Fed. R. Bankr. P. 8013(a)(2)(A). Because the Complying Plan Term is only ever summarily referenced in the respective proposed orders, the Claims Settlement Motions are squarely in violation of rule 8013 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

2. In addition, given the breadth of the definition of "Complying Plan," settling creditors are effectively assigning their right to vote on a chapter 11 plan to the Debtors in contravention of section 1126(a) of the Bankruptcy Code, which provides that holders of allowed claims or interests are entitled to vote to accept or reject a chapter 11 plan. This result makes the Complying Plan Term unenforceable. Several courts have found, in the context of intercreditor subordination agreements, that a creditor's contractual assignment of its statutory right to vote on a chapter 11 plan is unenforceable because contracts cannot override the plain language of the Bankruptcy Code. *See In re SW Boston Hotel Venture, LLC*, 460 B.R. 38, 52 (Bankr. D. Mass. 2011) ("Although 11 U.S.C. § 510(b) provides for the enforceability of subordination agreements, such agreements cannot nullify provisions of the Bankruptcy Code. To the extent a provision in a subordination agreement purports to alter substantive rights under the Bankruptcy Code, it is invalid."); *In re Croatan Surf Club, LLC*, No. 11-00194-8-SWH, 2011 WL 5909199, at *2 (Bankr. E.D.N.C. Oct. 25, 2011) (finding that creditor was entitled to vote on a chapter 11 plan notwithstanding a subordination agreement in which the creditor forfeited such right, because a contractual subordination agreement cannot override section 1126(a) of the Bankruptcy Code); *Bank of America, Nat'l Ass'n v. N. LaSalle St. Ltd. P'ship (In re 203 N. LaSalle St. P'ship)*, 246 B.R. 325, 330-32 (Bankr. N.D. Ill. 2000) (holding that a senior creditor was not entitled to vote a subordinated creditor's claim despite terms of a subordination agreement, and noting, among other

things, that "[i]t would defeat the purpose of the Code to allow parties to provide by contract that the provisions of the Code should not apply"). Similarly, here, the Debtors are attempting—and should not be able—to use the contractually agreed Complying Plan Term to override the plain language of section 1126(a) of the Bankruptcy Code.

3. Moreover, creditors do not have an approved disclosure statement to review and assess, and the proposed plan on file is substantively incomplete (including with respect to the treatment of many classes of general unsecured creditors). If the Complying Plan Term is approved by the Court, creditors who agree to it will be required to vote in favor of any "Complying Plan," the definition of which has nothing to do with how much value the plan actually apportions to general unsecured creditors or how their individual claims are actually treated thereunder. Certain courts have invalidated post-petition plan support agreements where, as here, votes on a chapter 11 plan are committed before the court's approval of a disclosure statement and creditors are not permitted to change their votes as the information available to them changes. *See In re Stations Holding Co.* No. 02-10882 (MFW), 2004 WL 1857116 (Bankr. D. Del. Aug. 18, 2004), Sept. 25, 2002 Confirmation Hr'g Tr. at 27 (noting that post-petition lock-up agreement constituted an improper solicitation because it did not provide creditors with the "right to change their vote if the disclosure statement … cause[d] them to want to change their vote"); *see also In re NII Holdings, Inc.*, No. 02-11505 (MFW), 2002 Bankr. LEXIS 2123 (Bankr. D. Del. Oct. 25, 2002), Oct. 22, 2002 Confirmation Hr'g Tr. at 60-61 (holding that the votes of certain parties who executed post-petition lock-up agreements were invalid because the votes were obtained before the approval of a disclosure statement).[3] Similarly, here, creditors bound to the Complying Plan

[3] Although at least one court has disagreed with that approach, its holding is distinguishable because the Complying Plan Term is not being agreed to by creditors who have an understanding of the material contours of a plan and their treatment thereunder. *Cf. In re Indianapolis Downs, LLC.*, 486 B.R. 286, 297 (Bankr. D. Del. 2013)

Term would be forced to vote in favor of any "Complying Plan" the Debtors propose, without having any understanding of how that plan will ultimately propose to treat their respective claims and without any ability to vote against the plan if information becomes available to them through a Court-approved disclosure statement or otherwise that would cause them to reconsider their vote.

4. To assure that the Debtors' value is maximized and that the fundamental tenets of the bankruptcy process are not violated, the Complying Plan Term should be struck from the proposed orders attached to the Claims Settlement Motions prior to the entry of any such orders.[4] If the Debtors want to pursue approval of the Complying Plan Term, they should file a separate motion explicitly seeking that approval and the basis therefor in accordance with Bankruptcy Rule 8013.

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(declining to designate votes under a post-petition plan support agreement because, among other reasons, the agreement provided "the financial terms of, and creditor treatment under," a dual track plan of reorganization).

[4] Indeed, in connection with a prior motion to approve a claims settlement with one of their lessors, the Debtors originally included Complying Plan Term language in the proposed order attached to the motion, but after the lessor disputed inclusion of that language because it was not part of the settlement, the Debtors submitted a revised proposed order to the Court striking that language.

Certain orders containing the Complying Plan Term have previously been entered in these chapter 11 cases and the Committee did not object thereto at the time. However, in addition to the Complying Plan Term being unenforceable for the reasons set forth above—given the current posture of the cases—it is inappropriate for the Debtors to manufacture creditor support for *any* chapter 11 plan that meets the low bar set by the definition of "Complying Plan." In short, only creditors themselves should control how they vote on a chapter 11 plan.

Dated: November 12, 2021

By: /s/ Brett H. Miller
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