ALERTS

Court Rejects Debtors' Attempt to Lock Up Votes for Future Plan in *GOL Linhas* Bankruptcy

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Executive Summary

In an opinion issued on April 22, 2024, Judge Martin Glenn of the Bankruptcy Court for the Southern District of New York rejected the debtors' efforts to "lock up" plan votes in the chapter 11 cases of GOL Linhas Aéreas Inteligentes S.A. and certain of its affiliates. The debtors sought to approve lock-up provisions that would have bound counterparties to vote in favor of the debtors' plan without detailing the specific terms of the plan itself or providing any conditions to terminate the lock-up agreement. While courts widely approve of lock-up provisions commonly seen in the form of restructuring support agreements, Judge Glenn declared the lock-up provisions at issue, "an impermissible lockup, not a common RSA." *See In re GOL Linhas Aéreas Inteligentes S.A.,* No. 24-10118 (MG) (Bankr. SDNY Apr. 22, 2024).

Background

GOL, a Brazilian aerospace company, and certain of its affiliates filed chapter 11 bankruptcy petitions on Jan. 25th, 2024. Thereafter, the debtors filed four motions seeking approval of settlements with certain of their prepetition aircraft lessors. Within each of the settlement agreements, the debtors included a provision requiring the settling creditor to vote in favor of the debtors' plan so long as (i) the terms of said plan were not inconsistent with the terms of the settlement agreement, (ii) the plan provided exculpation for the settling creditors and (iii) the debtors

would meet a minimum liquidity and leverage ratio on the effective date of the plan. The lock-up did not require that the plan comply with any other provisions, leaving the debtors free to formulate a plan with the benefit of knowing that the settling creditors would be obligated to vote in favor of it. Each of the settlement agreements provided that the lock-up provision would not be enforceable if the Court determined that it violated applicable law. This gave the Court the option to approve the settlements without also approving the lock-ups.

The US Trustee and the Unsecured Creditors' Committee objected to the approval of the lock-up provisions within the settlements (but did not object to the approval of the settlements, which resolved disputes regarding unpaid lease payments and provided for the assumption of the leases subject to certain agreed modifications). The objections alleged that the lock-up provisions were improper vote solicitations in violation of Section 1125(b) of the Bankruptcy Code. Section 1125(b) of the Bankruptcy Code states:

An acceptance or rejection of a plan may not be solicited after the commencement of the case…from a holder of a claim… unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.

The US Trustee argued that a lock-up of votes prior to the formulation of a plan would allow the debtors to build "creeping support" for any plan of their choosing and further, that the lock-ups could act as a "poison pill" to thwart any plan opposed by the debtors. Similarly, the Creditors' Committee argued that approval of the lock-ups could open the floodgates for the debtors to gather support for an unknown plan, which would have the effect of disenfranchising creditors.

The debtors defended the lock-ups by arguing that they would allow the debtors the certainty needed to move the cases forward and that the lock-ups were permissible under existing case law. However, none of the cases cited (*In re Grupo Aeroméxico, S.A.B. de C.V.*, No. 20-11563 (SCC) (Bankr. SDNY 2022); *In re AMR Corp.*, No. 11-15463 (SHL) (Bankr. SDNY 2018); and *In re Avianca Holdings S.A.*, No. 20-11133 (MG) (Bankr. SDNY 2023)) resulted in written opinions.

Decision

In a bench ruling, Judge Glenn approved the settlements with the aircraft lessors, but refused to approve the lock-up provisions. Subsequently, Judge Glenn issued a written opinion to discuss the rejection of the lock-ups and to differentiate them from restructuring support agreements, which are commonly approved by bankruptcy courts.

Judge Glenn made clear that his decision takes no issue with existing precedents that except restructuring support agreements from Section 1125's prohibition of solicitation of votes on a plan prior to approval of a disclosure statement. Those precedents provide that an RSA can be approved if it provides (1) the agreeing creditors with meaningful information about the plan they are agreeing to support and (2) the ability to rescind the agreement if the plan does not materially comply with the agreed terms. RSAs create a "'base camp' for parties when there is no obvious path to an easily confirmable plan," by outlining the basic elements of a plan or a timetable of events. Op., at 13. This accomplishes two policy objectives: First, it provides creditors with adequate and accurate information, and second, it encourages productive negotiations. Op., at 13-14.

In contrast, the opinion notes that the lock-ups at issue in the *GOL* settlement agreements complied with neither of those requirements, because the lock-ups were not tied to "*any* adequate information about plan terms," and there was no meaningful ability for the settling creditors to rescind the lock-up agreement because the purported conditions to the lock-up were illusory, "requiring their vote without regard for any legitimate concerns they may have with the plan." Op., at 23, 24. As a result, the settling creditors had effectively agreed to lock-up their vote without adequate information regarding the terms of a plan or meaningful choice as to how to vote on a plan, "essentially disenfranchising their votes at a nascent stage in these cases." Op., at 22. This was an improper solicitation under Section 1125(b).

Takeaways

- RSAs are critical to the bankruptcy process and used regularly by debtors to drive consensus prior to the confirmation process. Their success, however, depends on the level of information shared between the parties and the ability of the creditor counterparty to make a meaningful choice when a plan is proposed.

- While this opinion does not threaten or impair a debtor's ability to negotiate a proper RSA with creditors, it does rebuke an attempt by the debtors to indefinitely lock-up votes on a plan without meaningful disclosure of the contents of the plan and the inclusion of conditions under which the locked-up creditors may terminate the agreement. Debtors, at least in the SDNY, must take heed of these requirements in seeking approval of an RSA or other lock-up agreement.

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