

1301 Avenue of the Americas
21st Floor
New York, New York 10019
Tel: 212-907-9700
www.sgrlaw.com



John G. McCarthy
Direct Tel: 212-907-9703
Direct Fax: 212-907-9803
jmccarthy@sgrlaw.com

January 11, 2023

VIA ECF

Honorable David S. Jones
United States Bankruptcy Judge
One Bowling Green, Court Room 701
New York, New York 10004-1408

Re: In re Avianca Holdings S.A. et al., Case No. 20-11133 (MG);
Dkt. Nos. 2657, 2661, and 2663

Dear Judge Jones:

Pursuant to the Court's order of December 13, 2022 [Dkt. No. 2671], the reorganized debtors in the above-captioned case (the "Reorganized Debtors", the "Debtors", or "Avianca") respectfully submit this letter providing background on these cases and the matters before this Court. We also identify relevant portions of the record in Exhibit A attached hereto.

1. General Case Background

Avianca is the second-largest airline group in Latin America and the most important carrier in the Republic of Colombia and in the Republic of El Salvador. It is a code-share partner of United Airlines and a member of the Star Alliance, the world's largest global airline alliance. Avianca has a 100-plus year legacy as a leading provider of air travel and cargo services in Latin America and around the globe.

On May 10, 2020 and September 21, 2020, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases"). The Debtors were compelled to file the Chapter 11 Cases by the COVID-19 pandemic. In March of 2020, the Republic of Colombia announced it would close its airspace to address the spread of COVID-19. Because of this and similar restrictions in the Debtors' primary markets, the Debtors suspended all passenger flights. The suspension of operations devastated ticket sales and ancillary revenues. This effect on revenues, combined with substantial leverage Avianca had incurred under previous management going back a number of years, severely limited the Debtors' access to the financing markets. Accordingly, despite the successful 2019 launch of a transformation plan, an effective debt reprofiling in the second half of 2019, and a significant improvement in Avianca's liquidity position in early 2020, the Debtors were prompted to file these Chapter 11 Cases.¹

¹ Additional information regarding the Debtors' business, capital structure, and the circumstances leading to the filing of these cases is set forth in the *Declaration of Adrian Neuhauser in Support of the Debtors' Chapter 11 Petitions and First Day Orders* [Dkt. No. 20].



Honorable David S. Jones
January 11, 2023
Page 2

On November 2, 2021, the Court entered the *Order (I) Confirming Further Modified Joint Chapter 11 Plan of Avianca Holdings S.A. and Its Affiliated Debtors and (II) Granting Related Relief* [Dkt. No. 2300] (such underlying chapter 11 plan, the “Plan”). The Plan substantively consolidated all but three of the Debtors.² The Plan became effective on December 1, 2021 (the “Effective Date”) and the Debtors became the Reorganized Debtors as of the Effective Date. An appeal of the confirmation order is pending.

2. Relationship Among Parties in Matters at Issues

Pre-petition, Burnham Sterling and Company LLC (“Burnham”) and Babcock and Brown Securities LLC (“Babcock”), or their predecessors, provided broker or arranger services for certain of the Debtors’ aircraft financing transactions, for which they received a fee (the “Initiator Fees”). Burnham and Babcock provided services in connection with four different financing transaction structures, covering twenty aircraft from 2015 to 2019.³ The particular terms of these transactions vary slightly, but certain features are common. In particular, all of Burnham’s and Babcock’s services were rendered pre-petition (no later than the closing of the specific transactions), and Burnham’s and Babcock’s Initiator Fees were to be paid incrementally over the term of each lease.

After the Debtors filed these Chapter 11 Cases, they worked with the commercial counterparties to their aircraft leases to arrange for the Debtors to continue operating their leased aircraft during the Chapter 11 Cases at reduced rates. This effort resulted in court-approved stipulations (the “Second Stipulations”) that governed the Debtors’ use of the aircraft throughout the bankruptcy cases. *See, e.g., Second Stipulation and Order Between Debtors and Aircraft Counterparties Concerning Certain Aircraft* [Dkt. No. 401]; *see also* Exhibit A (referencing all such Second Stipulations). As Burnham and Babcock had no role in ongoing operations of the leases, they were not signatories to the Second Stipulations or part of the negotiation thereof.

Thereafter, the Debtors received authorization from the Bankruptcy Court to reject certain of the leases under which Burnham or Babcock served as initiator. Presently, rejection notices have been filed for all but three of the twenty aircraft at issue.⁴

3. Matters At Issue

Administrative Claims. On August 23, 2021, Burnham and Babcock each filed three identical proofs of claim (the “Administrative Claims”) against each of Avianca Holdings S.A. (“Avianca Holdings”), Taca International Airlines S.A. (“Taca”), and Aerovías del Continente Americano S.A. Avianca (“Aerovías”),⁵ seeking administrative status for the unpaid portion of their pre-petition Initiator Fees. Each of Burnham’s proofs of claim seeks \$1,906,075.03 and €115,979.33 (approximately \$123,000); each of Babcock’s proofs of claim seeks \$397,804.25. Whether the asserted Administrative Claims are in fact entitled to administrative status is disputed, and is the primary subject of the present litigation.

² These three Debtors are Avifreight Holding Mexico, S.A.P.I. de C.V., Aero Transporte de Carga Unión, S.A. de C.V., and Servicios Aeroportuarios Integrados SAI S.A.S.

³ These transactions were (i) the Enhanced Aviation Investment Vehicle (“EAIIV”) 2015 transaction, for eight aircraft; (ii) the EAIIV 2016 transaction, for three aircraft; (iii) the Japanese Operating Lease with Call option (“JOLCO”) transaction, for eight aircraft; and (iv) the JOLCO/Export Credit Agency transaction, for one aircraft.

⁴ Negotiations regarding restructured leases for the three remaining aircraft are ongoing between the Reorganized Debtors and the commercial counterparties to the leases (which do not include Burnham or Babcock).

⁵ These three Debtors, together with several others, were substantively consolidated under the Plan.

Honorable David S. Jones
January 11, 2023
Page 3

Secured and Priority Claims. Burnham filed a secured proof of claim on January 20, 2021, against Avianca Holdings asserting amounts for pre-petition initiator services amounting to \$12,511,109.69, but did not attach proof of security to its claim (the “Burnham Secured Claim”). Burnham also filed two proofs of claim against Aerovías and Taca asserting an unsecured, priority claim under section 507(a) for identical services, and for the identical amount, asserted in the Burnham Secured Claim (the “Burnham Priority Claims”). Burnham does not designate which subsection of 507(a) entitles these claims to priority, and the Reorganized Debtors are unaware of any subsection that would apply.

Babcock similarly filed duplicative secured and priority claims, also failing to attach proof of security to the purported secured claim or to designate which subsection of 507(a) entitles its purported priority claim to priority.⁶

Negotiation History. The Reorganized Debtors have attempted to negotiate with Burnham and Babcock for over a year regarding their claims. The parties have not yet been able to come to a resolution, which resulted in the present litigation.

Reorganized Debtors’ Objections. On December 2, 2022, the Reorganized Debtors objected to all of Burnham’s and Babcock’s proofs of claim.⁷ The Reorganized Debtors object to the Administrative Claims on the ground that no administrative treatment is warranted, as all initiator services by Burnham and Babcock were provided pre-petition. The Reorganized Debtors object to the Secured Claims and the Priority Claims on the ground that no proof of security or priority is provided. The Reorganized Debtors also seek to expunge all duplicative claims and contend that all non-duplicative claims should be treated as general unsecured claims.

Motion to Compel. Three days prior to the Reorganized Debtors’ claim objection deadline, Burnham and Babcock filed their *Motion to Compel Compliance with 11 U.S.C. §§ 365(d)(5) and 503(b)* [Dkt. No. 2657] (the “Motion to Compel”), seeking to compel immediate payment of the amounts asserted in their proofs of claim. As the Motion to Compel and the Objections concern the same issue—whether the Reorganized Debtors are liable under all of the asserted claims, and whether certain claims may be treated as something other than general unsecured claims—these matters have been consolidated. The parties have agreed to litigate the Objections and the Motion to Compel under a unified schedule, reflected in the *Notice of Adjournment of Hearing* [Dkt. No. 2678].

We thank Your Honor for your time and attention to this matter. Please let us know if we can be of further assistance.

⁶ Babcock filed a secured claim against Avianca Holdings in the amount of \$2,127,586.36 (the “Babcock Secured Claim” and, together with the Burnham Secured Claim, the “Secured Claims”), and a priority claim, for identical services and the identical amount asserted in the Babcock Secured Claim, against Aerovías (the “Babcock Priority Claim” and, together with the Burnham Priority Claims, the “Priority Claims”).

⁷ See *Reorganized Debtors’ Twenty-Fourth Omnibus Objection to Proofs of Claim* [Dkt. No. 2661]; *Reorganized Debtors’ Twenty-Fifth Omnibus Objection to Proofs of Claim* [Dkt. No. 2663] (together, the “Objections”).

Honorable David S. Jones
January 11, 2023
Page 4

Respectfully submitted,

/s/ John G. McCarthy

John G. McCarthy

Attached: Exhibit A

cc: Counsel of Record (via ECF)

Exhibit A

RELEVANT COURT FILINGS

Proofs of Claim

- Administrative priority claim by Babcock and Brown Securities LLC f/k/a Burnham Sterling Securities LLC against Avianca Holdings S.A., for \$397,804.2, Claim No. 4038 (Aug. 23, 2021).
- Administrative priority claim by Burnham Sterling and Company LLC against Aerovías del Continente Americano S.A. Avianca, for \$1,906,075.03, Claim No. 4037 (Aug. 23, 2021).
- Administrative priority claim by Babcock and Brown Securities LLC f/k/a Burnham Sterling Securities LLC against Aerovías del Continente Americano S.A. Avianca for \$397,804.25, Claim No. 4036 (Aug. 23, 2021).
- Administrative priority claim by Burnham Sterling and Company LLC against Taca International Airlines S.A., for \$1,906,075.03, Claim No. 4035 (Aug. 23, 2021).
- Administrative priority claim by Babcock and Brown Securities LLC f/k/a Burnham Sterling Securities LLC against Taca International Airlines S.A., for \$397,804.25, Claim No. 4034 (Aug. 23, 2021).
- Administrative priority claim by Burnham Sterling and Company LLC against Avianca Holdings S.A., for \$1,906,075.03, Claim No. 4033 (Aug. 23, 2021).
- Priority claim by Burnham Sterling and Company LLC against Taca International Airlines S.A., for unliquidated amount, Claim No. 4027 (Aug. 13, 2021).
- Priority claim by Burnham Sterling and Company LLC against Aerovías del Continente Americano S.A. Avianca, for unliquidated amount, Claim No. 4026 (Aug. 13, 2021).
- Priority claim by Babcock and Brown Securities LLC against Aerovías del Continente Americano S.A. Avianca, for unliquidated amount, Claim No. 4022 (Aug. 13, 2021).
- Secured claim by Babcock and Brown Securities LLC against Avianca Holdings S.A., for \$2,127,586.36, Claim No. 2057 (Jan. 20, 2021).
- Secured claim by Burnham Sterling and Company LLC against Avianca Holdings S.A., for \$12,511,109.69, Claim No. 2055 (Jan. 20, 2021).

Omnibus Objections and Supporting Declarations

- *Reorganized Debtors' Twenty-Fifth Omnibus Objection to Proofs of Claim*, Dkt. No. 2663 (Dec 2, 2022).
- *Declaration of John G. McCarthy In Support of the Reorganized Debtors' Twenty-Fifth Omnibus Objection to Proofs of Claim*, Dkt. No. 2666 (Dec. 2, 2022).
- *Reorganized Debtors' Twenty-Fourth Omnibus Objection to Proofs of Claim*, Dkt. No. 2661 (Dec. 2, 2022).
- *Declaration of John G. McCarthy In Support of the Reorganized Debtors' Twenty-Fourth Omnibus Objection to Proofs of Claim*, Dkt. No. 2662 (Dec. 2, 2022).

Second Stipulations

- *Second Stipulation and Order Between Debtors and Aircraft Counterparties Concerning Certain Aircraft*, Dkt. No. 1070 (Oct. 8, 2020) (governing aircraft lease for MSN 65315).
- *Second Stipulation and Order Between Debtors and Aircraft Counterparties Concerning Certain Aircraft*, Dkt. No. 423 (July 7, 2020) (governing aircraft lease for MSN 37511).
- *Second Stipulation and Order Between Debtors and Aircraft Counterparties Concerning Certain Aircraft*, Dkt. No. 416 (July 7, 2020) (governing aircraft lease for MSN 3988).
- *Second Stipulation and Order Between Debtors and Aircraft Counterparties Concerning Certain Aircraft*, Dkt. No. 414 (July 7, 2020) (governing aircraft lease for MSN 4281).
- *Second Stipulation and Order Between Debtors and Aircraft Counterparties Concerning Certain Aircraft*, Dkt. No. 413 (July 7, 2020) (governing aircraft lease for MSN 8300).
- *Second Stipulation and Order Between Debtors and Aircraft Counterparties Concerning Certain Aircraft*, Dkt. No. 412 (July 7, 2020) (governing aircraft lease for MSN 4284).
- *Second Stipulation and Order Between Debtors and Aircraft Counterparties Concerning Certain Aircraft*, Dkt. No. 410 (July 7, 2020) (governing aircraft lease for MSN 3992).
- *Second Stipulation and Order Between Debtors and Aircraft Counterparties Concerning Certain Aircraft*, Dkt. No. 405 (governing aircraft lease for MSN 39407).
- *Second Stipulation and Order Between Debtors and Aircraft Counterparties Concerning Certain Aircraft*, Dkt. No. 402 (July 7, 2020) (governing aircraft leases for MSNs 7284 and 7318).
- *Second Stipulation and Order Between Debtors and Aircraft Counterparties Concerning Certain Aircraft*, Dkt. No. 401 (July 7, 2020) (governing aircraft leases for MSNs 37507, 37508, 6511, 6767, 6692, 6739, 6746, and 6617).

Rejection of Aircraft Leases (MSNs 6692, 6739, 6746, 7887, 7928, 37507, and 37508)

- *Notice of Rejection of Aircraft Leases (MSNs 6692, 6739, 6746, 7887, 7928, 37503, 37507, and 37508)*, Dkt. No. 2582 (June 8, 2022).
- *Schedule of Aircraft Leases with no Previously Court-Approved Letter of Intent to Be Amended and Assumed, or Entered Into, Subject to Entry into Final Documentation*, Dkt. No. 2378 (Dec. 1, 2021) (authorizing Debtors to reject aircraft leases for MSNs 37507 and 37508 and enter into new aircraft leases for MSNs 37507 and 37508).
- *Debtors' Motion for an Order Authorizing Them to (I) Enter Into New Aircraft Leases and (II) Reject Pre-Petition Aircraft Leases with EAIV 2015 (MSNs 6511, 6617, 6692, 6739, 6746, and 6767) and Certain Related Agreements*, Dkt. No. 1950 (July 29, 2021).
- *Order Authorizing the Debtors to (I) Enter Into New Aircraft Leases and (II) Reject Pre-Petition Aircraft Leases with EAIV (MSNs 6511, 6617, 6692, 6739, 6746, and 6767) and Certain Related Agreements*, Dkt. No. 2015 (Aug. 17, 2021).
- *Debtors' Motion for an Order Authorizing Them to (I) Enter Into New Aircraft Lease and Letter of Intent and (II) Reject Pre-Petition Aircraft Lease with Wilmington Trust Company (MSN 7928) and Certain Related Agreements*, Dkt. No. 1865 (July 6, 2021).
- *Order Authorizing the Debtors to (I) Enter Into New Aircraft Lease and Letter of Intent and (II) Reject Pre-Petition Aircraft Lease with Wilmington Trust Company (MSN 7928) and Certain Related Agreements*, Dkt. No. 1929 (July 23, 2021).

- *Debtors' Motion for an Order Authorizing Them to (I) Enter Into New Aircraft Lease and Letter of Intent and (II) Reject Pre-Petition Aircraft Lease with Wilmington Trust Company (MSN 7887) and Certain Related Agreements*, Dkt. No. 1864 (July 6, 2021).
- *Order Authorizing the Debtors to (I) Enter Into New Aircraft Lease and Letter of Intent and (II) Reject Pre-Petition Aircraft Lease with Wilmington Trust Company (MSN 7887) and Certain Related Agreements*, Dkt. No. 1930 (July 7, 2021).

Rejection of Aircraft Leases (MSNs 4281 and 4284)

- *Notice of Rejection of Aircraft Leases (MSNs 4281 and 4284)*, Dkt. No. 2503 (Feb. 28, 2022).
- *Debtors' Motion for an Order Authorizing Them to (I) Enter Into New Aircraft Leases and (II) Reject Pre-Petition Aircraft Leases (MSNs 4281 and 4284) and Certain Related Agreements*, Dkt. No. 1949 (July 29, 2021).
- *Order Authorizing the Debtors to (I) Enter Into New Aircraft Leases and (II) Reject Pre-Petition Aircraft Leases (MSNs 4281 and 4284) and Certain Related Agreements*, Dkt. No. 2016 (Aug. 17, 2021).

Rejection of Aircraft Leases (MSNs 3988 and 3992)

- *Notice of Rejection of Aircraft Leases (MSNs 3988 and 3992)*, Dkt. No. 2502 (Feb. 28, 2022).
- *Debtors' Motion for an Order Authorizing Them to (I) Enter Into New Aircraft Leases and (II) Reject Pre-Petition Aircraft Leases (MSNs 3988 and 3992) and Certain Related Agreements*, Dkt. No. 1948 (July 29, 2021).
- *Order Authorizing the Debtors to (I) Enter Into New Aircraft Leases and (II) Reject Pre-Petition Aircraft Leases (MSNs 3988 and 3992) and Certain Related Agreements*, Dkt. No. 2017 (Aug. 17, 2021).

Rejection of Aircraft Lease (MSN 8300)

- *Notice of Rejection of Aircraft Lease (MSN 8300)*, Dkt. No. 2501 (Feb. 28, 2022).
- *Debtors' Motion for an Order Authorizing Them to (I) Enter Into New Aircraft Lease and (II) Reject Pre-Petition Aircraft Lease (MSN 8300) and Certain Related Agreements*, Dkt. No. 1943 (July 29, 2021).
- *Order Authorizing the Debtors to (I) Enter Into New Aircraft Lease and (II) Reject Pre-Petition Aircraft Lease (MSN 8300) and Certain Related Agreements*, Dkt. No. 2002 (Aug. 16, 2021).

Rejection of Aircraft Leases (MSNs 7284 and 7318)

- *Notice of Rejection of Aircraft Leases (MSNs 7284 and 7318)*, Dkt. No. 2500 (Feb. 28, 2022).
- *Motion for an Order Authorizing Them to (I) Enter Into New Aircraft Leases and (II) Reject Pre-Petition Aircraft Leases with EAIV 2016 (MSNs 7284 and 7318) and Certain Related Agreements*, Dkt. No. 1942 (July 28, 2021).

- *Order Authorizing the Debtors to (I) Enter Into New Aircraft Leases and (II) Reject Pre-Petition Aircraft Leases with EAIIV 2016 (MSNs 7284 and 7318) and Certain Related Agreements*, Dkt. No. 2004 (Aug. 16, 2021).

Rejection of Aircraft Leases (MSNs 6511 and 6767)

- *Notice of Rejection of Aircraft Leases (MSNs 6511 and 6767)*, Dkt. No. 2427 (Jan. 5, 2022).
- *Debtors' Motion for an Order Authorizing Them to (I) Enter Into New Aircraft Leases and (II) Reject Pre-Petition Aircraft Leases with EAIIV 2015 (MSNs 6511, 6617, 6692, 6739, 6746, and 6767) and Certain Related Agreements*, Dkt. No. 1950 (July 29, 2021).
- *Order Authorizing the Debtors to (I) Enter Into New Aircraft Lease and Letter of Intent and (II) Reject Pre-Petition Aircraft Leases with EAIIV 2015 (MSNs 6511, 6617, 6692, 6739, 6746, and 6767) and Certain Related Agreements*, Dkt. No. 2015 (Aug. 17, 2021).

Rejection of Aircraft Lease (MSN 6617)

- *Notice of Rejection of Aircraft Leases (MSNs 6617 and 3113)*, Dkt. No. 2685 (Jan. 5, 2023).
- *Debtors' Motion for an Order Authorizing Them to (I) Enter Into New Aircraft Leases and (II) Reject Pre-Petition Aircraft Leases with EAIIV 2015 (MSNs 6511, 6617, 6692, 6739, 6746, and 6767) and Certain Related Agreements*, Dkt. No. 1950 (July 29, 2021).
- *Order Authorizing the Debtors to (I) Enter Into New Aircraft Leases and (II) Reject Pre-Petition Aircraft Leases with EAIIV (MSNs 6511, 6617, 6692, 6739, 6746, and 6767) and Certain Related Agreements*, Dkt. No. 2015 (Aug. 17, 2021).

Aircraft Lease (MSN 65315) (Not Rejected)

- *Stipulation and Order Regarding Certain Aircraft Lease Between the Reorganized Debtors and Aircraft Counterparties (MSN 65315)*, Dkt. No. 2630 (Sept. 21, 2022) (changing effective date of rejection of lease for MSN 65316).

Aircraft Lease (MSN 39407) (Not Rejected)

- *Schedule of Aircraft Leases to Be Assumed Subject to Entry into Definitive Documentation in Accordance with Previous Court-Approved Letters of Intent and Approval Orders*, Dkt. No. 2378 (Dec. 1, 2021) (authorizing Debtors to reject aircraft lease for MSN 39407).

Aircraft Lease (MSN 37511) (Not Rejected)

- *Schedule of Aircraft Leases to Be Assumed Subject to Entry into Definitive Documentation in Accordance with Previous Court-Approved Letters of Intent and Approval Orders*, Dkt. No. 2378 (Dec. 1, 2021) (authorizing Debtors to reject aircraft lease for MSN 37511).