Docket #0262 Date Filed: 06/09/2020

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
AVIANCA HOLDINGS S.A., *et al.*,[1]	:	Case No. 20-11133 (MG)
Debtors.	:	(Jointly Administered)

ORDER AUTHORIZING DEBTORS TO EMPLOY AND RETAIN SEABURY SECURITIES LLC AND SEABURY INTERNATIONAL CORPORATE FINANCE LLC AS FINANCIAL ADVISOR AND INVESTMENT BANKER TO DEBTORS AND DEBTORS IN POSSESSION *NUNC PRO TUNC* TO THE PETITION DATE

Upon the application (the "Application")[2] of the above-captioned debtors and debtors in possession (collectively, the "Debtors"), pursuant to section 327(a) of the Bankruptcy Code, Bankruptcy Rules 2014(a) and 2016, and Local Bankruptcy Rules 2014-1 and 2016-1, for authority to retain and employ Seabury Securities LLC and Seabury International Corporate Finance LLC ("Seabury") to serve as the Debtors' as financial advisor and investment banker, effective *nunc pro tunc* to the Petition Date, in accordance with the terms and conditions set forth in the

[1] The Debtors in these Chapter 11 Cases, and each Debtor's federal tax identification number (to the extent applicable), are as follows: Avianca Holdings S.A. (N/A); Aero Transporte de Carga Unión, S.A. de C.V. (N/A); Aeroinversiones de Honduras, S.A. (N/A); Aerovías del Continente Americano S.A. Avianca (N/A); Airlease Holdings One Ltd. (N/A); America Central (Canada) Corp. (00-1071563); America Central Corp. (65-0444665); AV International Holdco S.A. (N/A); AV International Holdings S.A. (N/A); AV International Investments S.A. (N/A); AV International Ventures S.A. (N/A); AV Investments One Colombia S.A.S. (N/A); AV Investments Two Colombia S.A.S. (N/A); AV Taca International Holdco S.A. (N/A); Avianca Costa Rica S.A. (N/A); Avianca Leasing, LLC (47-2628716); Avianca, Inc. (13-1868573); Avianca-Ecuador S.A. (N/A); Aviaservicios, S.A. (N/A); Aviateca, S.A. (N/A); Avifreight Holding Mexico, S.A.P.I. de C.V. (N/A); C.R. Int'l Enterprises, Inc. (59-2240957); Grupo Taca Holdings Limited (N/A); International Trade Marks Agency Inc. (N/A); Inversiones del Caribe, S.A. (N/A); Isleña de Inversiones, S.A. de C.V. (N/A); Latin Airways Corp. (N/A); Latin Logistics, LLC (41-2187926); Nicaraguense de Aviación, Sociedad Anónima (Nica, S.A.) (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aereo y Rampa S.A. (N/A); Servicios Aeroportuarios Integrados SAI S.A.S. (92-4006439); Taca de Honduras, S.A. de C.V. (N/A); Taca de México, S.A. (N/A); Taca International Airlines S.A. (N/A); Taca S.A. (N/A); Tampa Cargo S.A.S. (N/A); Technical and Training Services, S.A. de C.V. (N/A). The Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

[2] Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to such terms in the Application.

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Engagement Letter, all as more fully set forth in the Application; and upon consideration of the declaration of the Hughes Declaration and the First Day Declaration; and this Court having jurisdiction to consider the Application and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference M-431*, dated January 31, 2012 (Preska, C.J.); and consideration of the Application and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and notice of the Application having been provided in accordance with the *Order Implementing Certain Notice and Case Management Procedures* [Docket No. 47], and such notice having been adequate and appropriate under the circumstances; and it appearing that no other or further notice need be provided; and it appearing that the relief sought in the Application is in the best interests of the Debtors' estates and their creditors; and the legal and factual bases set forth in the Application establishing just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT**:

1. The Application is approved to the extent set forth herein.

2. The Debtors are authorized, pursuant to section 327(a) of the Bankruptcy Code, Bankruptcy Rules 2014(a) and 2016, and Local Bankruptcy Rules 2014-1 and 2016-1, to retain and employ Seabury as their financial advisor and investment banker in accordance with the terms and conditions of the Engagement Letter, as modified herein, *nunc pro tunc* to the Petition Date, and to pay fees and reimburse expenses to Seabury on the terms set forth in the Engagement Letter.

3. The terms of the Engagement Letter, as modified by this Order, are approved in all respects except as limited or modified herein.

4. Notwithstanding anything to the contrary contained in the Application or in the Engagement Letter,

a. Section 2(B)(ii)(ii) of the Engagement Letter shall be modified to provide as follows: "fifty percent (50%) of such DIP Loan Success Fees shall be creditable to any Debt Success Fees (as defined below) in proportion to the same entities providing any portion of any Debt Financing Transaction;"

b. Section 2(B)(iv) of the Engagement Letter shall be modified to provide that (i) any Equity Success Fee shall apply only to new money cash purchase of equity, not conversion of DIP to equity or pre-petition debt to equity; and (ii) the 90% discount for funds from the government shall also apply to any Equity Success Fee as a result of any Equity Financing Transaction provided by any governmental entity as a result of funds from the government;

c. Section 2(B)(v) of the Engagement Letter shall be modified to provide that no M&A Success Fee shall be earned where a standalone restructuring involves a change of control;

d. Section 2(B)(vi) of the Engagement Letter shall be modified to delete the first proviso ("provided that level shall be increased by TWO HUNDRED AND FIFTY THOUSAND US DOLLARS (US$250,000.00) for each month of the engagement beyond twelve (12) months from the date hereof") in the Success Fee Cap; and

e. Section 2(B)(vii) of the Engagement Letter shall be replaced with the following:

Adjusted Success Fee Cap. For the purposes of calculating the amount of the Success Fee Cap at the conclusion of Seabury's retention, the Success Fee Cap shall be increased (the "***Adjusted Success Fee Cap***") by the ***lesser of*** (A) fifty percent (50%) of the aggregate amount of all Equity Success Fees together with that portion of the DIP Success Fee related to any portion of the DIP that converts to Equity if b.(i) above applies *plus* fifty percent (50%) of the aggregate amount of all M&A Success Fees, if applicable, OR (B) a fifty percent (50%) increase in the Success Fee Cap.

5. Notwithstanding anything to the contrary contained in the Engagement Letter or the Application, the definition of "Transaction Value," set forth in Section 2(B)(v) of the Engagement Letter, shall be deleted and the following definition of "Transaction Value" substituted in its place:

"*Transaction Value*" means the total value of all consideration (including cash, securities or other property) paid or received or to be paid or received, directly or

indirectly, in connection with an M&A Transaction in respect of assets or outstanding securities on a fully diluted basis (treating any securities issuable upon the exercise of options, warrants or other convertible securities and any securities to be redeemed as outstanding), plus the amount of any debt (including the capitalized principal portion of capitalized flight equipment leases and the equivalent of debt for operating leases, determined by multiplying the annual flight equipment operating lease obligation payments by a factor equal to seven (7)), and any other liabilities (including air traffic liability but excluding deferred gains and credits, post-retirement benefits and other employee benefit liabilities) outstanding or assumed, refinanced or extinguished in connection with an M&A Transaction, and amounts payable in connection with an M&A Transaction in respect of employment or consulting agreements, agreements not to compete or similar arrangements, but net of any balance sheet cash and other current assets. If the M&A Transaction takes the form of a recapitalization or similar transaction, Transaction Value will also include the value of all shares retained by the shareholders of the acquired company. If any portion of Transaction Value is payable in the form of securities, the value of such securities, for purposes of calculating our transaction fee, will be determined based on the average closing price for such securities for the twenty (20) trading days prior to the closing of the M&A Transaction. In the case of securities that do not have an existing public market, our Transaction Fee will be determined based on the fair market value of such securities as mutually agreed upon in good faith by the Company and Seabury prior to the closing of the M&A Transaction. Fees on amounts paid into escrow will be payable upon the establishment of such escrow. Fees relating to contingent payments other than escrowed amounts will be calculated based on the present value of the reasonably expected maximum amount of such contingent payments as determined in good faith by the Company and Seabury prior to the closing of the M&A Transaction, utilizing a discount rate equal to the prime rate published in The Wall Street Journal on the last business day preceding the closing of the M&A Transaction.

6. Notwithstanding anything to the contrary in the Engagement Letter or the Application, to the extent that the Debtors request Seabury to perform any services other than those detailed in the Engagement Letter, the Debtors shall seek further approval by the Court by an application that shall set forth the additional services to be performed and the additional fees sought to be paid.

7. Seabury shall apply any remaining amounts of its prepetition retainer as a credit toward postpetition fees and expenses, after such postpetition fees and expenses are approved pursuant to the first Order of the Court awarding fees and expenses to Seabury.

8. Notwithstanding anything to the contrary in the Engagement Letter or the Application, to the extent that Seabury seeks any termination of services, Seabury shall seek further approval by the Court by an application that shall set forth the termination of services sought.

9. Notwithstanding anything to the contrary contained herein or in the Application or Engagement Letter, Seabury shall file interim and final fee applications for allowance of compensation and reimbursement of expenses pursuant to sections 330 and 331 of the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules, and any other Orders of the Court.

10. Seabury shall not increase its rates absent further order of the Court. The United States Trustee retains all rights to object to any rate increase on all grounds including, but not limited to, the reasonableness standard provided for in section 330 of the Bankruptcy Code, and all rate increases are subject to review by the Court.

11. The Indemnification Provisions are approved; provided, however, that all requests by Seabury for the payment of indemnification shall be made by means of an application to this Court and shall be subject to review by this Court to ensure that payment of such indemnity conforms to the terms of the Engagement Letter and is reasonable under the circumstances of the litigation or settlement in respect of which indemnity is sought; provided, further, however, that in no event shall Seabury be indemnified in the case of its own bad faith, self-dealing, breach of fiduciary duty (if any), gross negligence, or willful misconduct. In the event that Seabury seeks reimbursement from the Debtors for attorneys' fees and expenses in connection with the payment of an indemnity claim pursuant to the Engagement Letter, the invoices and supporting time records for the attorneys' fees and expenses shall be included in Seabury's own applications but determined by this Court after notice and a hearing, and such invoices and time records shall be

subject to the Fee Guidelines and the approval of the Court pursuant to sections 330 and 331 of the Bankruptcy Code without regard to whether such attorneys have been retained under section 327 of the Bankruptcy Code and without regard to whether such attorneys' services satisfy section 330(a)(3)(C) of the Bankruptcy Code.

12. To the extent there may be any inconsistency between the terms of the Application, the Engagement Letter, and this Order, this Order shall govern.

13. Notice of the Application is adequate under Bankruptcy Rule 6004(a).

14. The Debtors are authorized to take all action necessary to effectuate the relief granted in this Order.

15. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, and/or enforcement of this Order.

IT IS SO ORDERED.

Dated: June 9, 2020
New York, New York

Martin Glenn

MARTIN GLENN
United States Bankruptcy Judge