

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

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In re:	)	Chapter 11
	)	
AVIANCA HOLDINGS S.A., <i>et al.</i> , <sup>1</sup>	)	Case No. 20-11133 (MG)
	)	
Debtors.	)	Jointly Administered
_____	)	
AVIANCA HOLDINGS S.A., <i>et al.</i> ,	)	
	)	
Plaintiffs.	)	
	)	
v.	)	Adv. Proc. 20-01194-mg
	)	
G4S FACILITY MANAGEMENT CIA. LTDA.)	)	
And G4S SECURE SOLUTIONS	)	
INTERNATIONAL INC.,	)	
	)	
Defendants.	)	
_____	)	

**DEFENDANT'S RESPONSE TO DEBTORS' MOTION FOR TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

<sup>1</sup> The Debtors in these 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.



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Comes Defendant G4S Secure Solutions International Inc. (“G4S International”), by and through counsel, and hereby responds to the Debtors’ Motion for Temporary Restraining Order and Preliminary injunction (the “Motion”) [DE 2] and to the Court’s Order to Show Cause [DE 3]. In further support of this Response, G4S International avers as follows:

### **INTRODUCTION**

Through the Motion and the Complaint in this case, the Debtors seek to compel adherence to the automatic stay and impose sanctions upon G4S International, a party that has not violated the automatic stay and is not a creditor of Avianca-Ecuador S.A. (“Avianca Ecuador”), the actual debtor that this adversary proceeding concerns. In their Complaint and in the Motion, the Debtors assert that the Defendants to this action, G4S International and G4S Facility Management CIA. LTDA (“G4S Ecuador”), have violated the automatic stay through attempts to collect a pre-petition debt owed by Avianca Ecuador to G4S Ecuador. In doing so, the Debtors misleadingly lump G4S International and G4S Ecuador together by referring to them collectively as “G4S.” This rhetorical sleight-of-hand obscures the truth: G4S International had and has no relationship with Avianca Ecuador, is not a party to the contract at issue in this case, is not a creditor of Avianca Ecuador or any other Debtor, and has made no effort to collect any debt from Avianca Ecuador or any other party to this case. As a result, the Debtors cannot establish any likelihood of success in their claims against G4S International or that an injunction against it is even necessary.

As stated above, it appears that the Debtors wish to conflate G4S International with G4S Ecuador. But G4S International and G4S Ecuador are distinct entities. The Debtors obliquely allege that G4S International “indirectly owns and controls” G4S Ecuador. G4S International partially owns an Ecuadorian entity that in turn partially owns G4S Ecuador. But G4S International and G4S Ecuador have separate boards of directors and managers, separate bank accounts, no commonly

owned or used property, and are not involved in each other's day-to-day business decisions. The Debtors essentially seek to pierce G4S Ecuador's corporate veil (and then that of G4S Ecuador's owner) to hold G4S International liable for the actions of its indirect subsidiary. The facts of this case plainly negate any cause to pierce the corporate veil.

### **FACTUAL BACKGROUND**

This action appears to concern the Debtors' claims that "G4S" (as G4S International and G4S Ecuador are collectively referred to in the Complaint and Motion) violated the automatic stay by attempting to collect a pre-petition debt. Specifically, the Debtors allege that after the petition in Avianca Ecuador's bankruptcy case was filed, "G4S" attempted to collect amounts related to pre-petition services due under a Facility Agreement (as defined in the Motion). (*See* Motion, at 2-3). The Debtors allege that this action was in violation of the automatic stay imposed by 11 U.S.C. § 362.

The Debtors' telling of the facts, however, omits or misstates several crucial details. First, the "Debtors" did not enter into the Facility Agreement with "G4S" collectively, as the Debtors state in the Motion. (*See* Motion, at 2). The Facility Agreement was entered into solely between G4S Ecuador and Avianca Ecuador, two Ecuadorian entities. (Declaration of Fiona Walters ("Walters Dec."), attached as Exhibit 1, at ¶ 4). It is therefore unclear why all of the Debtors in these jointly-administered cases have joined the Complaint.

Second, and even more importantly, G4S International was not a party to the Facility Agreement, and has taken no steps to collect any debt owed to any entity under the Facility Agreement. (Walters Dec., at ¶¶ 5-6). Any actions taken to collect amounts due under the Facility Agreement would have to be taken by G4S Ecuador, the party that actually entered into the Facility

Agreement with Avianca Ecuador. G4S International is not a creditor of Avianca Ecuador or of any other Debtor.

Finally, despite the Debtors' efforts to conflate them, G4S International and G4S Ecuador are separate and distinct corporate entities. (Walters Dec., at ¶ 8). It is true that G4S Ecuador is an indirect subsidiary of G4S International. However, G4S International is a majority (but not exclusive) owner of non-party G4S Holding (Ecuador) SA, an entity incorporated under the laws of Ecuador and with its principal place of business in Ecuador. (*Id.*, at ¶ 9). In turn, G4S Holding (Ecuador) SA is the majority (but not exclusive) owner of G4S Ecuador, an entity incorporated under the laws of Ecuador and with its principal place of business in Ecuador. (*Id.*). But beyond its ownership of an Ecuadorian company that owns G4S Ecuador, G4S International and G4S Ecuador maintain separate corporate existences. G4S International and G4S Ecuador have entirely separate managers and separate boards of directors. (*Id.*, at ¶ 10). G4S International plays no role in the day to day management of G4S Ecuador, and vice versa. (*Id.*, at ¶ 11). G4S International does not have any shared bank accounts with G4S Ecuador, the entities do not share any office space or own or use any common property, and G4S Ecuador operates in Ecuador, where G4S International has no operations. (*Id.*, at ¶ 12, 13, 15). G4S International does not draw any funds from G4S Ecuador and also has not agreed to pay or otherwise guarantee the obligations of G4S Ecuador. (*Id.*, at ¶ 14, 16). Contrary to the picture that the Debtors paint in the Complaint and the Motion, there is no justification to consider G4S International and G4S Ecuador as a unified entity.

### **ARGUMENT**

#### **I. There Is No Basis to Enter a Temporary Restraining Order or Preliminary Injunction Against G4S International.**

"A party seeking a preliminary injunction must show (1) irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships

decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest.” *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018). Because the second factor is dispositive, G4S International addresses it first.

**A. The Debtors Cannot Show a Likelihood of Success on the Merits or a Serious Question Going to the Merits Against G4S International.**

Simply put, the Debtors cannot prevail on their claims that G4S International is in violation of the automatic stay imposed by 11 U.S.C. § 362 because G4S International has taken no acts in violation of that section. As detailed in Section 362(a)(1)-(8), the automatic stay prevents nearly any type of collection activity of a pre-petition debt against a debtor in bankruptcy. 3 *Collier on Bankruptcy* P 362.03. But it should go without saying that an entity like G4S International that takes no action to collect on a debt cannot be held liable for violation of the automatic stay. The Walters Declaration establishes that G4S International did not take any steps to collect on amounts due under the Facility Agreement, and indeed was not even a party to the Facility Agreement. Rather, G4S Ecuador was a party to that agreement.

The Debtors essentially attempt to combine G4S International and G4S Ecuador as entities by referring to them collectively in the Motion. In this way, the Debtors are actually attempting to pierce G4S Ecuador’s corporate veil (and apparently that of its Ecuadorian parent) to hold G4S International liable for G4S Ecuador’s actions. Unfortunately for the Debtors, the corporate form cannot be disregarded simply through use of the term “collectively.” “It is fundamental that a parent is considered a legally separate entity from its subsidiary, and cannot be held liable for the subsidiary’s actions based solely on its ownership of a controlling interest in the subsidiary.” *N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 766 F.3d 212, 224 (2d Cir. 2014).<sup>2</sup> A subsidiary’s

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<sup>2</sup> While *FirstEnergy* was decided under New York, the veil-piercing law of New York and Florida, where G4S International is located, are virtually identical. *Wm. Passalacqua Builders v. Resnick Developers S.*, 933 F.2d 131, 137 (2d 1991).

corporate veil can only be pierced to attack the parent where “(1) the parent corporation dominates the subsidiary in such a way as to make it a ‘mere instrumentality’ of the parent; (2) the parent company exploits its control to ‘commit fraud or other wrong;’ and (3) the plaintiff suffers an unjust loss or injury as a result of the fraud or wrong.” *Id.*

In weighing whether a subsidiary is a mere instrumentality of a parent, a court must consider the following factors: (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like; (2) inadequate capitalization; (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes; (4) overlap in ownership, officers, directors, and personnel; (5) common office space, address and telephone numbers of corporate entities; (6) the amount of business discretion displayed by the allegedly dominated corporation; (7) whether the related corporations deal with the dominated corporation at arm’s length; (8) whether the corporations are treated as independent profit centers; (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group; and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own. *Id.* As detailed in the previous section, these factors point overwhelmingly to a finding that G4S International did not dominate G4S Ecuador so as to make it a mere instrumentality. The two entities maintain separate boards of directors and managers. They maintain separate offices, property, and contact information. The two entities make their own business decisions without interference from the other. G4S International does not draw money from G4S Ecuador, and the entities do not share bank accounts. G4S International does not pay or guarantee the corporate debts of G4S Ecuador. Finally, while G4S International does not know the details of G4S Ecuador’s business operations, G4S

International has no reason to believe that the G4S Ecuador is undercapitalized or fails to follow corporate formalities.

Even if the Debtors could establish that G4S Ecuador is a “mere instrumentality” of G4S International, it cannot establish the second prong, that G4S Ecuador was used to commit a wrong or unjust act against the Debtors. A plaintiff may be considered injured when a company is rendered unable to pay the claims pending against it by third parties because of another company or individual's domination of the business. *Gardiners Bay Landscape & Design, Inc. v. Postiglione (In re Postiglione)*, 2019 Bankr. LEXIS 1887, at \*12 (Bankr. E.D.N.Y. June 24, 2019). Here, the Debtors cannot show that G4S Ecuador has been rendered unable to pay. G4S International suspects that the only reason that the Debtors have named it as a party to this proceeding is because the Debtors have reservations about their ability to enforce an Order entered in the United States against a foreign entity. This trepidation, however, does not amount to an abuse of the corporate form. Avianca Ecuador, itself a foreign entity, voluntarily chose to do business with a foreign entity, G4S Ecuador. Avianca Ecuador nonetheless chose to file for bankruptcy in the United States. Requiring Avianca Ecuador to accept the consequences of its decisions is not unjust.

G4S International committed no violation of the automatic stay. Despite Plaintiffs’ efforts to conflate G4S International with its down-the-line Ecuadorian subsidiary, there is not a basis here to disregard the subsidiary’s corporate form. The Debtors therefore cannot make a showing of the probable validity of their claims against G4S International, warranting denial of their Motion.

**B. The Other Preliminary Injunction Factors Support Denial of the Motion Against G4S International.**

Even aside from the Debtors’ inability to prove a possibility of success on the merits against G4S International, the Debtors also cannot show irreparable harm if an injunction is not entered or that granting an injunction is in the public interest. As stated previously, G4S International is taking

no action against Avianca Ecuador or any other Debtor for that matter. The Debtors therefore cannot show that they are at any risk of irreparable harm if G4S International is not enjoined or that any preliminary injunction, if entered, would stop such irreparable harm from occurring. Further, granting an injunction would not be in the public interest because doing so would defeat the well-established policy of respect for corporate limited liability protections. Granting the injunction against G4S International would be tantamount to a finding that it is responsible for the alleged actions of its subsidiary. As discussed in previous sections, the law and facts are to the contrary. The public is not served by rejecting the corporate form merely because a chapter 11 debtor deems it appropriate. Because the Debtors have not established any of the factors for the granting of a preliminary injunction, the Motion should be denied.

### **CONCLUSION**

For the foregoing reasons, G4S International asks that the Court deny the Motion.

Respectfully submitted,

/s/ Edward J. George

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-and-

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**COUNSEL FOR DEFENDANT**



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served this the 16th day of July, 2020, electronically in accordance with the method established under this Court's CM/ECF Administrative Procedures upon all parties in the electronic filing system in this case.

/s/ John M. Spires  
*Counsel for Defendant*

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re:	:	Chapter 11
	:	
AVIANCA HOLDINGS S.A., <i>et al.</i>	:	Case No. 20-111133
	:	
Debtors.,	:	(Jointly Administered)
	:	
<hr style="width: 40%; margin-left: 0;"/>	:	Adv. Proc. 20-01194
AVIANCA HOLDINGS S.A., <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	
	:	<b>DECLARATION OF FIONA</b>
v.	:	<b>WALTERS</b>
	:	
G4S FACILITY MANAGEMENT CIA.	:	
LTDA. & G4S SECURE SOLUTIONS	:	
INTERNATIONAL, INC.,	:	
	:	
Defendants.	:	

Fiona Walters, declares and states that the following is true to the best of her personal knowledge, information, and belief:

1. My name is Fiona Walters. I am the President of Defendant G4S Secure Solutions International, Inc. (“G4S International”). I am based in Jupiter, Florida.
  
2. As President of G4S International, I am familiar G4S International’s operations, corporate structure, and corporate organization.
  
3. G4S International is a Florida corporation, with its principal place of business in Jupiter, Florida.
  
4. My understanding is that the issues in this Adversary Proceeding involve an alleged contract between Debtor Avianca-Ecuador S.A. (“Avianca”) and Defendant G4S Facility Management CIA Ltda based in Quito, Ecuador (“G4S Ecuador”).

5. At no time was G4S International a party to the contract between G4S Ecuador and Avianca.

6. Because G4S International is not a party to the contract between G4S Ecuador and Avianca, G4S International has never engaged in any efforts to collect on the debt allegedly owed under the contract.

7. G4S International is not a creditor of Avianca or any of the other Debtors.

8. Additionally, G4S Ecuador is a separate and distinct entity from G4S International.

9. G4S International is a majority (but not exclusive) owner of non-party G4S Holding (Ecuador) SA, an entity incorporated under the laws of Ecuador and with its principal place of business in Ecuador. In turn, G4S Holding (Ecuador) SA is the majority (but not exclusive) owner of G4S Ecuador, an entity incorporated under the laws of Ecuador and with its principal place of business in Ecuador.

10. G4S International and G4S Ecuador have entirely separate managers and separate boards of directors.

11. G4S International plays no role in the day to day management of G4S Ecuador. Moreover, G4S Ecuador plays no role in the day to day management of G4S International.

12. G4S International does not have any shared bank accounts with G4S Ecuador.

13. G4S International has no operations in Ecuador.

14. G4S International does not draw any funds from G4S Ecuador.

15. G4S International and G4S Ecuador do not share common office space or use or own any property together.

16. G4S International has not agreed to pay or otherwise guarantee the obligations of G4S Ecuador.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true  
and correct.

Executed on 07/15/2020

  
\_\_\_\_\_  
Fiona Walters