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Hearing Date & Time: October 7, 2020, 2:00 p.m. (prevailing Eastern Time)

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
AVIANCA HOLDINGS S.A., *et al.*,	
Plaintiffs.	
v.	Adv. Proc. 20-01194-mg
G4S FACILITY MANAGEMENT CIA. LTDA. And G4S SECURE SOLUTIONS INTERNATIONAL INC.,	
Defendants.	

REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

[1] 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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TABLE OF CONTENTS AND AUTHORITIES

Comes Defendant G4S Secure Solutions International Inc. ("G4S International"), by and through counsel, and hereby files its Reply in Support of Its Motion to Dismiss Plaintiffs' Amended Complaint for failure to state a claim pursuant to Fed. R. Bankr. P. 7012 and Fed. R. Civ. P. 12(b)(6) (the "Motion"). In further support of this Reply, G4S International states as follows:

INTRODUCTION

In their Response, the Debtors make clear that their case for G4S International's liability is that G4S International participated and/or acquiesced in the alleged efforts of its subsidiary, G4S Ecuador,[2] to violate the automatic stay. This conduct, even if true, does not state a claim for violation of the automatic stay. Nearly two months have passed since the Debtors commenced this action, but they still are unable to present even one case holding that a parent's "involvement," "participation," or "acquiescence" in a subsidiary's alleged stay violations amount to a stay violation by the parent. To the contrary, the automatic stay prevents "acts" in violation of the stay. The Debtors have still not alleged any "act" that G4S International may have committed that violates the automatic stay.

On the other hand, G4S International has presented the Court with cases holding that, even taking the Debtors' allegations as true, they have still failed to state a claim. Indeed, a prior opinion of this Court expressly holds that a parent cannot be held liable merely for acquiescing in its subsidiary's conduct or even for directing a subsidiary to take wrongful action, unless the parent exercises such control over the subsidiary that the parent's corporate veil should be pierced. But not only do the Debtors fail to allege facts supporting a disregard of G4S Ecuador's corporate form, they expressly disclaim any intent to do so. (Response, at 10). G4S International has also presented authority holding that the rendering of legal advice does not state a claim for violation of the

[2] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

automatic stay. Even if every fact alleged in the Complaint was true,[3] the Debtors would have no legal basis to pursue this action, and the Amended Complaint should be dismissed.

ARGUMENT

I. The Debtors Fail to State a Claim Upon Which Relief Can Be Granted.

On pages 5-7 of their Response, the Debtors outline the basis for their claim that G4S International. That claim is that, based on the privilege log produced in discovery, G4S International was "involved in some way" and advised G4S Ecuador regarding bankruptcy law and the debt owed to G4S Ecuador. These allegations simply do not state a claim for violation of the automatic stay.

The only subpart of Section 362(a) that is even possibly applicable is Section 362(a)(6), which prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." G4S International's knowledge of or involvement in G4S Ecuador's alleged decision to pursue collection action against Avianca Ecuador is not an "act to collect, assess, or recover a claim." Despite having filed this action more than two months ago, the Debtors are unable to cite a single case holding that a parent's knowledge of or involvement in or legal advice regarding a subsidiary's stay violations is itself a stay violation.

Conversely, authority from this Court holds that a parent cannot be held liable for the wrongful acts of its subsidiaries, unless the parent participates in the "management of the subsidiary to such an extent that the subsidiary's paraphernalia of incorporation, directors and officers are completely ignored." *LaMonica v. CEVA Grp., PLC (In re Cil Ltd.)*, 582 B.R. 46 (Bankr. S.D.N.Y. 2018), *amended on reconsideration on other grounds*, 2018 Bankr. LEXIS 1770 (Bankr. S.D.N.Y. June 15, 2018). In *LaMonica*, the plaintiff made nearly the same allegations that the Debtors make

[3] To be clear, G4S International denies any allegation that it directed or encouraged G4S Ecuador to take any action in violation of the automatic stay. However, the focus of a motion to dismiss is on the allegations in the complaint, and those allegations – even if credited – do not support a legally actionable claim.

in this case; namely, that the parent should be liable for its subsidiary's conduct because it was aware of that conduct and directed it. This Court rejected those assertions. *Id.* at 167. (citations omitted). "[A]t the very least, a plaintiff seeking to hold a parent company so accountable, must demonstrate direct intervention by the parent in the management of the subsidiary to such an extent that the subsidiary's paraphernalia of incorporation, directors and officers are completely ignored." *Id.* With respect to the plaintiff's position that the parent "was directing" the conduct of its subsidiary, the Court held that even assuming that the parent gave such a direction, that would not amount to the tort of conversion. *Id.* at 169 n.51.

As in *LaMonica*, the Debtors have failed to allege any more than G4S International's involvement in a subsidiary's automatic stay violation. Indeed, the Debtors have not even directly alleged that G4S International directed its subsidiary to violate the automatic stay, instead alleging only that the Court may presume such a direction was given. But in any event, *LaMonica* makes clear that a parent's involvement or acquiescence in wrongful conduct by the subsidiary does not render a parent liable for the acts of the subsidiary unless facts sufficient to disregard the corporate form are proven. No such facts are even alleged here.

While the Debtors attempt to distinguish *LaMonica* on the ground that it involved a claim for conversion, not a claim for violation of the automatic stay, the Debtors offer no explanation for why Judge Garrity's reasoning and holding would not be equally applicable in this case.[4] In both cases, a plaintiff sued a parent entity for directing, or at the least failing to stop, a subsidiary from committing an allegedly wrongful act. Whether brought as a claim for conversion or violation of the

[4] The Debtors also argue that Judge Garrity's rulings with respect to fraudulent transfers and the automatic stay in *LaMonica* are distinguishable from this case. G4S International does not rely on those sections of the opinion, however. *LaMonica* touches on many subjects, not all of which are directly applicable to this action. The Debtors' attempts to distinguish *LaMonica* by citing portions of the opinion that G4S International does not rely on are tantamount to a straw-man argument.

automatic stay, Judge Garrity's analysis is correct that, as a matter of corporate law, a parent is not liable for the acts committed by its subsidiary unless the subsidiary is essentially the parent's alter ego. To do otherwise would make parent corporations strictly liable for the actions of their subsidiaries, which would completely undermine the concept of limited shareholder liability.

At bottom, the conduct that the Debtors complain of is that individuals associated with G4S International provided legal advice to G4S Ecuador. The rendering of that legal advice is not a stay violation, as the Court held in *In re Parker*, 2018 Bankr. LEXIS 239 (Bankr. N.D. Cal. Jan. 30, 2018). The Debtors also attempt to distinguish *Parker* on the ground that G4S International is the parent of G4S Ecuador and therefore can "direct the affairs of G4S Ecuador as it sees fit." But this is nothing more than a restatement of the same flawed position that the Debtors assert elsewhere; that is, because G4S International owns G4S Ecuador, it must accept liability for G4S Ecuador's actions. As G4S International has established, this position is contrary to established corporate law, contrary to prior opinions of this Court, and contrary to the fundamental notion that shareholders do not bear liability for the acts of a subsidiary. The Amended Complaint should be dismissed.

II. G4S International Is Not Using Legal Advice as a "Sword and Shield."

The Debtors further contend that, by logging privileged communications in response to the Debtors' discovery requests, G4S International is using the privilege as both a sword and a shield. But G4S is doing nothing of the sort. The Debtors served G4S International with discovery requests. G4S International found documents that were potentially responsive, but also privileged, so G4S International logged those communications. That is the extent of G4S International's "reliance" upon the documents set forth on the privilege log.

The Debtors cite *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) and *In re Adelphia Commc'ns. Corp.*, 2007 WL 601452 at *3 (Bankr. S.D.N.Y. Feb. 20, 2007) for the position

that a party may not place attorney-client communications "at issue" by relying on a claim or defense that requires inspection of the records at issue. But G4S International has not placed its communications at issue. If anyone has put them at issue, the Debtors have. The Debtors allege in their Amended Complaint that G4S International participated in G4S Ecuador's alleged automatic stay violations, and suggests that G4S International may have directed that conduct. As discussed above, such direction would not be actionable even if given (which it was not). But having made an assertion that G4S International denies, the Debtors may not use that denial to assert that G4S International has placed privileged communications at issue.

Oxyn Telecomms., Inc. v. Onse Telecom, 2003 U.S. Dist. LEXIS 2671 (S.D.N.Y. Feb. 25, 2003) is instructive. In that case, the Court held that a party cannot assert that privileged documents are "at issue" when that party is the one that placed them at issue. *Id*. at 22. ("[I]t cannot be possible for [a defendant] to justify breaching [the plaintiff's] privilege by reason of its own pleading of an affirmative defense. That would give an adversary who is a skillful pleader the ability to render the privilege a nullity.") (citation omitted). This is, however, precisely what Debtors are attempting here.

Perhaps more importantly, the Debtors in effect argue that G4S International's invocation of its privileges has stymied their ability to state a legally valid claim. But as stated in the Motion, a plaintiff must state a claim as a precursor to discovery. It may not use discovery to establish a claim. *See Angiulo v. County of Westchester,* 2012 U.S. Dist. LEXIS 153656, at *10 n.4 (S.D.N.Y. 2012) ("[A]s *Iqbal* makes clear, a plausible claim must come before discovery, not the other way around."). To the extent that the Debtors are alleging that they require discovery to assert a valid claim, that contention should be rejected.

III. Extraterritorial Application of the Automatic Stay Does Not Invalidate the Law of Limited Shareholder Liability.

In the final section of their Response, the Debtors argue that because the automatic stay has extraterritorial effect, this Court should be permitted to enjoin G4S International from "involvement in its foreign subsidiary's violation of the automatic stay." (Response, at 10). The Debtors imply that such relief is appropriate because to do otherwise would permit G4S International to violate the automatic stay through one of its subsidiaries. This argument misstates the facts alleged in the Amended Complaint and G4S International's minimal role in this case.

As alleged in the Amended Complaint, the crux of this dispute is between two Ecuadorian entities, G4S Ecuador and Avianca Ecuador. There is no allegation that G4S International was owed any money by any Debtor or that it took steps to collect any money or property from any Debtor. G4S International's only involvement concerned legal advice related to the matter. There is no allegation that G4S International exercises control over G4S Ecuador such that G4S Ecuador is the alter ego of G4S International. G4S International submits that the only reason it is a party to this case is because the Debtors cannot obtain *in personam* jurisdiction over G4S Ecuador. Thus, this case is not about G4S International using a foreign subsidiary to collect a debt not even owed to G4S International in violation of the stay. This case is about the Debtors' efforts to use G4S Ecuador's upstream ownership by a domestic corporation to do what it could not do otherwise.

While the Debtors decry the injustice of a dismissal of their Amended Complaint, the ramifications of permitting it to go forward would be far worse. G4S International notes that the Debtors operate primarily in foreign nations. Although foreign entities are not barred from filing for bankruptcy in United States courts, it is not unfair to require the Debtors to accept the consequences of attempting to impose United States law in foreign nations. On the other hand, if the Debtors' position that the mere involvement or acquiescence by a parent company in its subsidiary's actions

renders the parent responsible for those actions is accepted, it would represent a drastic departure from established corporate law. To hold an owner liable for its entity's actions, a plaintiff must meet the high standards necessary to pierce the corporate veil. But under the Debtors' concept, the plaintiff must show merely involvement or acquiescence. This is contrary to settled law, and it would impose unanticipated liability on entities large and small.

Finally, the Debtors cite cases and authorities for the argument that the relief they seek is well-known in other legal contexts. These cases do not support their position. For example, in *Alibaba Grp. Holding Ltd. v. Alibabacoin Found*., 2018 U.S. Dist. LEXIS 180884 (S.D.N.Y. Oct 22, 2018), the Court made a finding that the "commonly owned and managed entities, which are lumped together in Defendants' own marketing materials (Dkt. No. 1-2 at 20-22; Dkt. No. 35 ¶1), operate jointly . . . ." *Id*. at *11 n.2. There is no such allegation in this matter. *Michael Grecco Prods. v. GlowImages, Inc*., 2020 U.S. Dist. LEXIS 59905 (D. Del. Apr. 6, 2020) was a judgment by default, and thus no issues similar to those at issue here were actually litigated. The Debtors cite multiple antitrust cases, but the Sherman Act prohibits combinations and/or concerted action in restraint of trade. 15 U.S.C. § 1. Thus, whether or not alleged "involvement" between a parent and a subsidiary may state a claim in the antitrust context, such precedent is of no value in this case. Finally, the Debtors cite to an article regarding parent liability under the Foreign Corrupt Practices Act ("FCPA") for the position that a parent may be held liable for a subsidiary's conduct where it has "control" over the subsidiary. But the article identifies as illustrative the example of a subsidiary that bribed foreign officials. The parent was deemed liable where it identified the subsidiary's president as part of the parent's senior management, the subsidiary's president reported directly to the parent's CEO, and the parent expressly approved the retention of the agent that committed the bribery and approved of one of the payments. U.S. Dep't of Justice & SEC, *A Resource Guide to the U.S. Foreign Corrupt*

Practices Act (Nov. 14, 2012), at 27-28. Such facts are not alleged in this case, and the Debtors do not identify any FCPA case where liability was imposed to a parent based on facts similar to those alleged here. The Debtors have cited no authority support their assertion of the claims in the Amended Complaint, and those claims should be dismissed.

CONCLUSION

For the foregoing reasons, G4S International asks that the Court dismiss this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served this the 2nd day of October, 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 Defendants