

Edward J. George, Esq.  
Dinsmore & Shohl LLP  
707 Virginia Street, East  
Suite 1300  
Charleston, WV 25301  
Telephone: 304-357-0900

John M. Spires, Esq.  
Dinsmore & Shohl LLP  
100 West Main Street, Suite 900  
Lexington, Kentucky 40507  
Telephone: (859) 425-1000  
Facsimile: (859) 425-1099  
john.spires@dinsmore.com

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

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.	)	
	)	

**SUPPLEMENTAL BRIEF IN RESPONSE TO OCTOBER 1, 2020 ORDER**

<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.



2011133201007000000000007

Comes Defendant G4S Secure Solutions International Inc. (“G4S International”), by and through counsel, and hereby files the following Supplemental Brief pursuant to the Court’s Order entered on October 1, 2020 [DE 18]. In support, G4S International states as follows:

**I. The *McLean* Decisions**

On October 1, 2020, the Court entered an Order directing the parties to file Supplemental Briefs addressing *In re McLean Industries, Inc.*, 68 B.R. 690 (Bankr. S.D.N.Y. 1986) and *In re McLean Industries, Inc.*, 76 B.R. 291 (Bankr. S.D.N.Y. 1987). These opinions concern a debtor’s efforts to obtain compliance with the automatic stay by a creditor relating to the seizure of the debtor’s property overseas.

**A. *McLean I***

In *In re McLean Industries, Inc.*, 68 B.R. 690 (Bankr. S.D.N.Y. 1986) (“*McLean I*”), the Court presented the basic facts underlying the case. The debtor, United States Lines, Inc., a United States company, commenced a bankruptcy case, and following the filing of the petition, a creditor, GAC Marine,<sup>2</sup> filed suits to collect debts against the debtor in Hong Kong. In connection with those cases, GAC Marine seized vessels belonging to the debtor and refused to allow them to leave the port of Hong Kong. The debtor commenced an adversary proceeding against GAC Marine, and the Court initially entered a restraining order compelling GAC Marine to cease its collection actions. GAC Marine defended on the grounds that the Court did not have personal jurisdiction over it.

According to the opinion, the jurisdiction-related facts were as follows. GAC Marine was a subsidiary of a Liechtenstein corporation, GAC, which had its central office in Greece. GAC Marine’s main office was in London, England, but its invoices stated that it also had offices in Hong Kong, Norway, United Arab Emirates, and (importantly for the purposes of this matter) Basking

---

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meaning set forth in the *McLean* opinions.

Ridge, New Jersey. The New Jersey office was also occupied by GAC Shipping, another GAC subsidiary. That office was staffed by individuals named Norman Schmidt, Georgianne Temple, and Marilyn Taylor, who were paid by GAC Shipping with funds supplied by GAC. Schmidt apparently referred to himself as manager of GAC's U.S. office, and also had a business card under the name of GAC Marine. *McLean I*, at 693.

The New Jersey office had an active role in the conduct of GAC Marine's business. The opinion states that Schmidt's obligations for GAC Marine were "sales and contact and follow through." He would solicit sales from clients, and then once the client's needs were identified, the New Jersey office would relay them overseas to obtain pricing information. That pricing information would then be relayed back to the New Jersey office and, if the client accepted them, the purchase would be complete. Invoices from GAC Marine were sent from other employees in the New Jersey office, and those invoices described the offices of GAC Marine as including the New Jersey office. These procedures were apparently followed by GAC Marine in its relations with the debtor. *Id.*

Based upon these facts, the Court determined that it had specific personal jurisdiction over GAC Marine. Specifically, the Court held that:

[I]t is clear that the defendant [GAC Marine] transacts business in the United States. It regularly affords, in the United States, quoted prices and terms for delivery of bunkers abroad. Agreements for the same are reached in the United States upon the acceptance of the quoted prices and terms. Its representative in the United States is apparently empowered to sign letters and to deliver documents on its behalf with respect to U.S. customers. It repeatedly holds itself out to the world as having an office in the United States.

*McLean I*, at 698. The Court further noted that the debts at issue in this case arose from agreements entered into in New Jersey and that the debtor had previously made payments in New Jersey. Finally, the Court determined that it would not be unfair to litigate the case in New Jersey, since the files located with respect to the transaction were there, the Court had a strong interest in resolving the

dispute, and GAC Marine had sought and received payment from the Debtor in New Jersey. *Id.* at 698-99.

The Court also found that it had general jurisdiction over GAC Marine through its affiliation with GAC, its parent, and GAC Shipping, its affiliate. The Court held that GAC Marine had a continuous presence in the United States based on its work with GAC Shipping for the business of GAC. While acknowledging that the presence of a subsidiary does not grant jurisdiction over a parent, the Court held that it would have jurisdiction over a parent if the subsidiary performed acts at the direction of the parent or in the course of the parent's business. *Id.* at 700 ("A corporate parent or affiliate is present for jurisdictional purposes not because of the affiliation but rather because of the intercorporate relationship which is characterized by services in the forum for the parent by the subsidiary beyond mere solicitation, and by frequent communication between them."). In the Court's reasoning, GAC Shipping handled GAC Marine's business in the United States, such that GAC Shipping's continuous contacts with the United States sufficed to grant general jurisdiction over GAC Marine. Thus, even if GAC Marine did not on its own have the requisite contacts with the United States (which it did), the contacts of GAC Shipping would be sufficient to create personal jurisdiction over it.

**B. *McLean II***

In *In re McLean Industries, Inc.*, 76 B.R. 291 (Bankr. S.D.N.Y. 1987) ("*McLean I*"), the Court addressed a motion for a judgment of continuing civil contempt filed by the debtor against GAC Marine, which GAC Marine primarily defended on the ground that it had sold and transferred the claims to a third party, FAL, and therefore had no ability to cease collection efforts on them. While GAC Marine claimed that it transferred the claims on the same day as the hearing in *McLean I*, the evidence showed that GAC Marine took steps to transfer those claims after the hearing in

*McLean I*, including filing applications in Hong Kong and Singapore to transfer the claims and filing a notice to sell one of the debtor's ships.

Under these facts, the Court rejected GAC Marine's claim that it could not comply with the order to cease collection activity. The Court held that, rather than take steps like buying the claims back from FAL or vacating the orders it obtained in foreign courts, it instead arranged for the transfer of the claims so that they could still be pursued by FAL. *McLean II*, at 295.

The Court also rejected additional defenses asserted by GAC Marine. First, it rejected GAC Marine's claim that the Court was improperly extending its jurisdiction, as the Court had already found that subject-matter and *in personam* jurisdiction were present. Second, the Court rejected the point that the mere transfer of the claim was not a stay violation because GAC Marine had done much more than just transfer the claim; it had filed pleadings in foreign courts to allow for the transfer to FAL. Finally, the Court rejected as immaterial GAC Marine's argument that other parties were arresting the Debtor's vessels; the purpose of the contempt order was to ensure GAC Marine's compliance. *Id.* at 296-97.

### **ARGUMENT**

#### **I. *McLean I* Is a Straightforward Application of the Law of *In Personam* Jurisdiction Law, but Its Facts Are Distinguishable.**

In *McLean I*, this Court determined that a defendant that maintained an office in the United States, regularly did business in the United States, and negotiated and agreed to the contracts at issue with a United States debtor was subject to *in personam* jurisdiction in the United States. In light of the facts described in that opinion, the Court's holding should not be considered controversial. But the facts of this case are different than those set forth in *McLean I*.

First, in the present case, G4S International does not question this Court's personal jurisdiction over it. G4S International is a United States company that operates in the United States.

G4S International's contention is instead that it has not violated the automatic stay, and that the Debtor's claims against it are untenable for the reasons stated in G4S International's Motion to Dismiss the Amended Complaint and Reply in Support of same.

Second, to the extent that the Debtors claim the *McLean I* opinion provides a basis for personal jurisdiction over former defendant G4S Ecuador (as defined in G4S International's Motion to Dismiss), the facts of *McLean I* do not support such an argument either. As the Court's factual statement in *McLean I* indicates, the creditor in that case described itself as having an office in the United States, negotiated contracts in the United States, and had individuals in the United States send invoices for the creditor that showed the creditor with a United States address. The debtor in *McLean I* was a United States company, and the opinion suggests that it paid funds to the creditor in the United States and negotiated the contracts at issue in the United States. The documents related to the contract were in the United States. None of these factors are present with respect to G4S Ecuador. Further, the contract that has led to this adversary proceeding was between G4S Ecuador and Avianca Ecuador, another Ecuadorian entity, concerned activities solely taking place in Ecuador, and was negotiated and entered into in Ecuador. Nothing in the Amended Complaint states otherwise.

Third, the opinion's language stating that a parent may be subject to personal jurisdiction based on the acts of its subsidiary in the forum jurisdiction is the opposite of the facts of this case. In *McLean I*, the Court held that a parent could potentially be subject to personal jurisdiction in a forum if it directs a subsidiary to perform acts in that forum. In this case, G4S International, the parent of G4S Ecuador, does not question this Court's personal jurisdiction over it. While a parent may be subject to personal jurisdiction based on the acts of a subsidiary, the fact that a parent is amenable to *in personam* jurisdiction in a forum does not create jurisdiction over a subsidiary unless

the subsidiary is the parent's alter ego. *See ASEA/AFSCME Local 52 Health Benefits Trust v. Abbott Labs.*, 2018 U.S. Dist. LEXIS 101652 (N.D. Ill. 2018) (dismissing claim for lack of personal jurisdiction where subsidiary entity was not amenable to personal jurisdiction in the forum state and was not the alter ego of the parent entity).

Finally, certain language in the opinion may suggest that personal jurisdiction over a foreign affiliate may be appropriate where the domestic affiliate performs services that are necessary for the foreign affiliate: "Thus, in *Frummer*, the court found general *in personam* jurisdiction over a London hotel through the acts of an affiliated corporation owned by the hotel's parent where the affiliate's purpose was to generate business for the hotel through soliciting business and confirming room reservations. GAC Shipping's conduct is similar: it handles GAC Marine's business in the United States." *McLean*, at 700. But in this case, G4S International is not responsible for handling G4S Ecuador's business in the United States. G4S Ecuador operates in Ecuador, and G4S International's primary business consists of providing security for embassies; G4S Ecuador does not play a role in that business line. Accordingly, *McLean I* is distinguishable on this ground as well.

*McLean I* is an uncontroversial opinion concerning *in personam* jurisdiction over a foreign entity, but its facts are distinguishable from those of the present case.

## **II. *McLean II* Concerns Conduct of a Kind Not Alleged in this Case.**

The facts of *McLean II* are also distinguishable from those in this case. *McLean II* concerned the creditor's argument that it could not comply with an order compelling it to stop taking collection action because it had transferred the claims at issue to a third party. This Court found those explanations unavailing and held that the creditor's acts of filing pleadings in foreign courts to effectuate the transfer (from which the creditor obtained consideration from the third party) and the filing of notices to sell the Debtor's property were acts committed in violation of the Court's Orders.

The Court also found that the creditor made no effort to vacate filings it had previously made or to buy back the claims from the third party. Under these circumstances, the Court found the creditor liable for contempt.

Thus, *McLean II* stands for the proposition that a creditor violates the stay by taking action to pursue claims against a debtor, selling claims for profit to other parties that then violate the stay, or failing to unwind prior actions in violation of the automatic stay. But none of that conduct applies to G4S International. G4S International is not owed funds by the Debtors and has taken no collection action against them. The Debtors do not allege otherwise. It therefore has no prior action to remediate and no claims that may be transferred. G4S International is accused of being involved with or acquiescing in its subsidiary's alleged automatic stay violations. G4S International submits that such allegations fail to state a claim, and *McLean II* is not to the contrary.

### **CONCLUSION**

For the foregoing reasons, G4S International submits that *McLean I* and *McLean II* have no bearing on the Motion to Dismiss. The Motion to Dismiss should be granted, and this proceeding should be dismissed.



Respectfully submitted,

/s/ Edward J. George

Edward J. George, Esq.  
Dinsmore & Shohl LLP  
707 Virginia Street, East  
Suite 1300  
Charleston, WV 25301  
(Resident also in New York City)  
Telephone: 304-357-0900  
Email: edward.george@dinsmore.com

-and-

/s/ John M. Spires

John M. Spires, Esq. (*admitted PHV*)  
DINSMORE & SHOHL LLP  
100 West Main Street, Suite 900  
Lexington, Kentucky 40507  
Telephone: (859) 425-1000  
Facsimile: (859) 425-1099  
Email: john.spires@dinsmore.com  
**COUNSEL FOR DEFENDANTS**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served this the 5th 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*