23 Civ. 1211 (KPF)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
	:	Hon. Katherine Polk
AVIANCA HOLDINGS S.A. *et al.*,[1]	:	Failla
	:	
Appellants-Debtors and Reorganized Debtors.	:	

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT DEBTORS AND REORGANIZED DEBTORS

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[1] A complete list of each of the Debtors and Reorganized Debtors in these chapter 11 cases may be obtained on the website of the claims and noticing agent at http://www.kccllc.net/avianca. The Debtors' and Reorganized Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Bankruptcy Procedure 8012, the Appellants state the following:

The three Debtors and Reorganized Debtors at issue in this appeal are Avianca Holdings S.A., subsequently known as HVA Associated Corp. ("HVA"); Aerovías del Continente Americano S.A. Avianca ("Aerovías"); and Taca International Airlines, S.A. ("Taca"). HVA has been liquidated under Panamanian law. Taca, Aerovías, and the remaining Debtors and Reorganized Debtors are wholly owned by Avianca Group International Limited ("AGIL"). There is no publicly held corporation that owns 10% or more of the stock of AGIL.

Dated: April 28, 2023

SMITH, GAMBRELL & RUSSELL, LLP

By: */s/ John G. McCarthy*
John G. McCarthy

Counsel for Appellant Debtors and Reorganized Debtors

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I. Basis of Appellate Jurisdiction

This is the timely appeal from the Bankruptcy Court's *Decision Resolving (I) Burnham Sterling and Company LLC and Babcock & Brown Securities LLC's Motion to Compel Compliance with 11 U.S.C. §§ 365(d)(5) and 503(b) and (II) Reorganized Debtors' Twenty-Fourth and Twenty-Fifth Omnibus Objections to Proofs of Claim* entered January 26, 2023 and *Order Granting in Part Burnham Sterling and Company LLC and Babcock & Brown Securities LLC's Motion to Compel Compliance with 11 U.S.C. §§ 365(d)(5) and 503(b) and Overruling in Part Reorganized Debtors' Twenty-Fourth and Twenty-Fifth Omnibus Objections to Proofs of Claim* entered January 31, 2023.[2] The Bankruptcy Court had jurisdiction to hear those matters under 28 U.S.C. §§ 157 and 1334. This Court has jurisdiction to hear this appeal under 28 U.S.C. § 158(a)(1).

II. Statement of the Issue and Standard of Review

A. Issue Presented on Appeal

The issue before this Court is whether the Bankruptcy Court erred in holding that brokerage fees owed by the Appellants to the Appellees in connection with pre-petition lease transactions, which fees became unconditional obligations of the

[2] The Notice of Appeal was timely filed on February 9, 2023. A293. Citations to "A___" refer to the Appendix attached to this brief. (Citations to "B.R.Dkt." refer to the bankruptcy docket below in the main proceeding, No. 20-11133.) The Bankruptcy Court's Decision and Order are included in the Appendix at A296 and A313, respectively.

Appellants upon execution of the leases, but were scheduled to be paid in installments over the term of the leases – including during the post-petition period – are entitled to priority under section 365(d)(5) of the Bankruptcy Code as obligations "arising … after the bankruptcy filing."

B. Standard of Review

The Bankruptcy Court's legal determinations are reviewed *de novo*, and its findings of facts are reviewed for clear error. *See In re Anderson*, 884 F.3d 382, 387 (2d Cir. 2018) (citing *In re U.S. Lines, Inc.*, 197 F.3d 631, 640-41 (2d Cir. 1999)); *see also In re Lyondell Chem. Co.*, 585 B.R. 41, 52 (S.D.N.Y. 2018) ("On appeal, a district court reviews the bankruptcy court decision independently, accepting its factual conclusions unless clearly erroneous but reviewing its conclusions of law de novo.") (internal quotation marks, brackets and citations omitted).

III. Statement of the Case

The facts relevant to the determination of this appeal are undisputed. In 2014, Appellants, Avianca Holdings S.A, subsequently known as HVA Associated Corp. ("HVA")[3] and two of its former affiliates, Aerovías del Continente Americano S.A. Avianca ("Aerovías") and Taca International Airlines, S.A. ("Taca"; HVA, Aerovías, and Taca are, collectively, the "Appellants") contracted with Appellees,

[3] HVA has been liquidated under Panamanian law. Any obligations arising from this dispute will be met by Aerovías and Taca.

Burnham Sterling and Company LLC ("Burnham") and Babcock & Brown Securities LLC ("Babcock"; together with Burnham, the "Initiators"), to arrange the financing and leasing of certain aircraft. A023 at ¶ 9; A0089 at ¶ 9.[4] The Initiators eventually initiated twenty such leases (the "Leases"), and for their wholly pre-petition services rendered in brokering those leases, the Initiators earned fees, styled as "Additional Rental Payments" (the "Initiator Fees") and payable in increments over the life of the lease. A023-A025 at ¶¶ 11-12; A029 at ¶ 22[5]; A089-A090 at ¶¶ 11-13; A093 at ¶ 21. Substantially similar provisions across all twenty Leases provided for the payment of the Initiator Fees (referred to in this Lease as the "Initiator Compensation"). An example of one such provision follows:

> The Lessee shall on each Additional Rental Payment Date pay to the Lessor at the Initiator Account, by way of additional rental payment, installments of the Initiator Compensation .... The Sub-Lessee acknowledges that the Initiator has already provided services prior to the Delivery Date, and accordingly agrees that the *Sub-Lessee's obligations to pay the Initiator Fees hereunder are unconditional*.

A025 at ¶ 12 (emphasis added); *see also* A023 at ¶ 11 (identifying the contracts).

On May 10, 2020 (the "Petition Date"), the Appellants filed voluntary

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[4] The cited paragraphs are within the addenda to proof of claim nos. 4033 and 4038, which claims are included in the Appendix as attachments to *Burnham Sterling and Company LLC and Babcock & Brown Securities LLC's Motion to Compel Compliance with 11 U.S.C. §§ 365(d)(5) and 503(b)* (see A001), and begin at A018 and A084, respectively.

[5] ¶ 22 lists the twenty subject aircraft by manufacturer serial numbers ("MSNs"), which are also set out at A003.

petitions for relief under chapter 11 of the Bankruptcy Code. The Appellants and their other debtor affiliates operated their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code until they effectuated their emergence from bankruptcy on December 1, 2021. A099 at ¶ 6; A130 at ¶ 6.[6] As of the Petition Date, the Initiators had received some, but not all, of the unconditionally owed Initiator Fees. A018; A084; A005 at ¶ 10 (referencing prepetition claims). All of the Leases were eventually rejected.

The Initiators timely filed multiple proofs of claims for Initiator Fees. Two of those claims, both filed in the HVA case, are relevant to this appeal: Burnham's proof of claim no. 4033 (the "4033 Claim"); and Babcock's proof of claim no. 4038 (the "4038 Claim"; together with the 4033 Claim, the "Claims"). A018 and A084.[7] On November 20, 2022, the Initiators filed a motion seeking to compel immediate payment of the amounts asserted in the Claims on the basis that, among other things,

[6] The referenced paragraphs are in the Reorganized Debtors' twenty-fourth and twenty-fifth omnibus objections to proofs of claim, and cite to the *Notice of (I) Entry of Order Confirming Further Modified Joint Chapter 11 Plan of Avianca Holdings S.A. and Its Affiliated Debtors, (II) Occurrence of Effective Date, and (III) Final Deadlines for Filing Certain Claims* (B.R.Dkt. 2384). As part of the confirmed plan, the Appellants' estates were substantively consolidated as HVA Associated Corp.

[7] In addition to these claims, the Initiators filed claims 4022, 4026, 4036, and 4037 in the Aerovías case and claims 4027, 4034, and 4035 in the Taca case that were rendered duplicative by the Appellants' substantive consolidation and consequently expunged. A315 at ¶¶ 6, 8. Additionally, the Initiators each filed secured claims 2055 and 2057 against HVA that were reclassified as unsecured. *Id.* at ¶ 7. These claims are not relevant to the issues before the Court.

the Initiator Fees were entitled to heightened priority under section 365(d)(5) of the Bankruptcy Code, which applies to lease obligations arising sixty days after the order for relief in bankruptcy up to the point that the lease is assumed or rejected. A001; A008-A010. On December 2, 2022, the Reorganized Debtors timely filed objections to the Claims contesting the applicability of section 365(d) to the Initiator Fees and arguing that the Claims should be treated as general unsecured claims.[8] A096; A127. On January 9, 2023, the Initiators filed a consolidated response to the objections and in further support of their motion to compel. A170. On January 18, the Appellants filed their reply. A184.

On January 25, 2023, the Bankruptcy Court heard argument on both the motion to compel and the objections. A232. By decision entered on January 26, 2023 (A296), and order entered on January 31, 2023 (A313), the Bankruptcy Court found that the Initiator Fees were entitled to priority treatment under section 365(d)(5) of the Bankruptcy Code and therefore partially granted the Initiators' motion to compel compliance with section 365(d)(5), denied the Reorganized Debtors' objections in that regard, and ordered that the Reorganized Debtors pay the Initiators

[8] In this case, the distinction between treatment as a priority claim under section 365(d)(5) versus treatment as a general unsecured claim is material. Whereas a section 365(d)(5) claim would be paid in full, a general unsecured claim will receive pennies on the dollar—somewhere between one and two percent of the total claim.

$4,338,484.66. A298-A299; A301-A309; A312; A314 at ¶¶ 1-3. This ruling is now presented for review.

IV. Summary of the Argument

Section 365(d)(5) of the Bankruptcy Code requires debtors to timely pay personal-property lease obligations "arising" during the sixty days after the order for relief, until the lease is assumed or rejected (the "protected period").[9] Since the commencement of the case by filing the voluntary petition constituted the order for relief in the Appellants' cases, sixty days after the bankruptcy filings, or Petition Date, marks the beginning of the protected period. Although the Initiator Fees were fully earned and became unconditional obligations of the Appellants prior to the bankruptcy filings, they were to be paid on a fixed schedule that extended into the protected period. This Court is being asked to decide when the Initiator Fees "arose" for the purposes of section 365(d)(5). Did they arise prepetition when they became unconditional upon execution of the Leases, or did they arise incrementally when the payments came due each month under the Leases, including during the protected

[9] Specifically, section 365(d)(5) provides in pertinent part:

> The trustee shall timely perform all of the obligations of the debtor . . . first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property . . . until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title.

11 U.S.C. § 365(d)(5).

period?

The Bankruptcy Court rejected the Appellants' arguments that the Initiator Fee obligation arose prepetition upon execution of the Leases when liability for those obligations became fixed and unconditional. A301-A309. Instead, the Bankruptcy Court, relying on what it described as a "literal" reading of "unambiguous" statutory language, held that the Appellants' obligations for the Initiator Fees "arose" when those obligations became due under the payment schedules in the Leases. A301; A303; A305-A306. In so holding, the Bankruptcy Court provided neither analysis nor authority for the proposition that an obligation literally and unambiguously arises when the payment is due, as opposed to when that obligation becomes unconditional. The better authority in this circuit, informed by the practice and purpose of bankruptcy law, supports the opposite conclusion: that an obligation wholly earned and for which payment has become unconditional prior to the filing of the bankruptcy petition does not "arise" on its post-petition billing date and is therefore not deserving of the priority treatment afforded by section 365(d)(5).

V. Argument

A. There is no "plain meaning" to support the billing-date approach adopted by the Bankruptcy Court.

To support its conclusion that an obligation literally arises when payment on that obligation comes due, the Bankruptcy Court noted that, "under the leases' terms, no payment was due—and thus the debtor had no *payment obligation* as to any future

scheduled payment—until and unless its due date was reached." A303 (emphasis added). The most glaring problem with the Bankruptcy Court's analysis is that it adds text to clarify language in a statute that it determined to be unambiguous. *See id*. Section 365(d)(5) does not refer to "payment obligations" (*id*.) that arise during the protected period; the statute refers simply to "obligations," and the question over when obligations "arise" has generated a split in authority that seems to belie any notion of statutory clarity. Perhaps even more problematic, by deferring to what it finds to be unambiguous language, the Bankruptcy Court overlooks and ultimately subverts the purpose of section 365(d)(5).

Although it does not cite to it, the Bankruptcy Court's reasoning mirrors the analysis employed by the Third Circuit in adopting what is known as the "billing date" approach to application of section 365(d)(3).[10] *See Centerpoint Properties v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 209 (3rd Cir. 2001). In *Montgomery Ward*, the debtor's real property leases obligated it to reimburse the landlord for taxes. *Id.* at 207. The debtor filed bankruptcy in July of 1997, and one month later, the landlord invoiced the debtor for taxes covering 1995 through 1997. *Id*. The debtor argued that only the prorated

[10] Due to a dearth of case law addressing section 365(d)(5), the Bankruptcy Court looked to those decisions interpreting nearly identical section 365(d)(3) for guidance. A302-A309. *See also CIT Commun. Fin. Corp. v. Midway Airlines Corp. (In re Midway Airlines Corp.)*, 406 F.3d 229, 234 (4th Cir. 2005).

post-petition portion of the 1997 taxes was protected by section 365(d)(3), contending that the other taxes "arose" prepetition regardless of the billing date. *Id*. at 208. The circuit court, overruling the decision of the bankruptcy and district courts below, found the entire tax liability, including the prepetition portion, protected by section 365(d)(3). *Id*. at 208-12.

At the time *Montgomery Ward* was decided, only two circuit courts had considered the issue, though there were a multitude of decisions at the district and bankruptcy court levels. *See Handy Andy Home Improvement Centers, Inc.* v. *National Terminals Corporation (In re Handy Andy Home Improvement Centers, Inc.)*, 144 F.3d. 1125, 1127 (7th Cir. 1998) (where the lease provided for payment of certain taxes by the tenant, finding that taxes for a prepetition period that were billed post-petition did not arise on the billing date and were not protected by section 365(d)(3)); *Koenig Sporting Goods, Inc. v. Morse Road Company (In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986, 989 (6th Cir. 2000) (where debtor rejected lease post-petition two days into lease term and argued it should only be liable for two -days' prorated rent, finding that entire amount of rent arose on the billing date and was protected by section 365(d)(3)). In time, the billing date approach has been carefully considered and rejected by a majority of courts, including several courts in this circuit, which instead looked to when the obligation accrued to determine

whether it "arose" during the section 365(d)(3) protected period.[11] *See In re Door to Door Storage, Inc.*, 2018 WL 1899361, *2 (W.D. Wash. Apr. 20, 2018) (noting that "the majority of Courts . . . have adopted the proration, or accrual method").

Decided before *Montgomery Ward*, the decision of this District Court in *Child World,* offers a particularly instructive and thorough analysis supporting rejection of the billing-date approach. *Child World v. The Campbell/Massachusetts Tr. (In re Child World Inc.)*, 161 B.R. 571, 575-77 (S.D.N.Y. 1993). In that case, the debtor received, post-petition, a tax bill that included taxes assessed for a prepetition period. *Id.*at 572. The landlord claimed the entire amount was covered by section 365(d)(3) since the bill came due during the protected period. *Id.* at 573-574. The debtor argued that its obligation for prepetition taxes arose during the prepetition period, likening it to an unmatured claim. *Id.* Citing to the broad definition of the term "obligation" in Black's Law Dictionary and recognizing the debtor's argument that an obligation is the corollary to a "claim," as that term is broadly defined in the Bankruptcy Code, the Court found section 365(d)(3) sufficiently ambiguous to allow an examination

[11] Often times, these cases involve proration of obligations that indisputably span the petition date (*e.g.*, "stub" rent for the first post-petition month's rent or property taxes for both pre- and post-petition periods). Although the analysis in the proration cases is relevant to the issues on appeal, this Court need not consider proration to rule for Appellants, since the Initiator Fees concern wholly prepetition activity, *i.e.*, brokering leases years before the bankruptcies. The Court need only reject the idea that a debt arises when payment comes due, as opposed to when the debt becomes unconditional.

of legislative history. *Id*. at 575. After summarizing the evolution of the Bankruptcy Code's treatment of unexpired lease obligations, the court concluded that, "[t]he legislative history makes clear that Congress did not intend for courts applying section 365(d)(3) to rely mechanically on the billing date in determining which post-petition, pre-rejection obligations under nonresidential leases must be timely paid." *Id*. at 577 (internal quotations omitted). The court explained:

> Allowing landlords to recover for items of rent which are billed during the postpetition, prerejection period, ***but which represent payment for services rendered by the landlord outside this time period, would grant landlords a windfall payment, to the detriment of other creditors, without any support from legislative history***. This conclusion is reinforced by the policy of narrowly construing statutory priority in order to treat creditors as equally as possible[.]

Id. at 576 (emphasis added).

In contrast, the court in *Montgomery Ward,* albeit reluctantly, found the term "obligation" to be unambiguous. *See Montgomery Ward*, 268 F.3d at 209. The court concluded that the "most straightforward understanding of an obligation in the context of a lease is something that one is legally required to perform" and therefore such obligation "arises when one becomes legally obligated to perform." *Id.* The *Montgomery Ward* court further reasoned that reading the term "obligation" as a corollary to the broadly defined term "claim" would be inconsistent with the fundamental tenet of the text of section 365(d)(3): "that it is the terms of the lease that determine the obligation and when it arose." *Id.*

Using the definition of "obligation" provided by the *Montgomery Ward* court, while following its instructions to look to the Leases in determining when the obligation arose, hardly provides clarity in this case. To the contrary, the ambiguity of the statutory language in section 365(d)(3) is only brought into stark relief. This is because the Leases provide the Appellants' "obligations to pay the Initiator Fees hereunder *are* [not will be, "are"] unconditional." A004 at ¶ 5; A300 (emphasis added). Prior to the execution of the Leases, the Initiators' services were complete; no additional action was required. If for some reason the Leases were terminated, the unconditional Initiator Fees would still be owed, irrespective of whether the Appellants were still obligated to make rental payments. Finding that the Initiator Fees do not "arise" until the billing date, as *Montgomery Ward* prescribes, necessarily imposes a condition on what the parties agreed is an "unconditional" obligation. Clarity simply cannot be imposed here. A tortured devotion to a purported plain meaning is unnecessary where, as here, the ambiguity is obvious. As Judge Posner wrote for the court in *Handy Andy*, "this billing date approach is a possible reading of section 365(d)(3), but it is neither inevitable or sensible." *Handy Andy*, 144 F.3d at 1127.

The Bankruptcy Court finds the Appellants' equally literal reading of the word "arise" (*i.e.*, to refer the point at which the obligations became unconditional) as unpersuasive, noting "neither party identified case law expressly defining 'arising

from' as that phrase is used in section 365(d)(5)." A302-A303. Yet Appellants rely heavily on *Child World*, which is devoted to that very determination. *See Child Word*, 161 B.R. at 574 ("We conclude that §365(d)(3) is ambiguous as to when a debtor-tenant's obligation under a lease to reimburse the landlord for real estate taxes *arises*.") (emphasis added).

Equally odd is the Bankruptcy Court's conclusion, that the plural "obligations" is intended to target separate payments, and not, for example, different types of obligations. A303. In what amounts to its last word on the central question in this case, the Bankruptcy Court likens the Initiator Fees to ordinary rental obligations for future periods which "arise" on the due date. *Id*. But the Initiator Fees, which compensate the Initiators for services already rendered and for which no additional action on the part of the Initiators is required, are significantly and materially different from rental obligations, which require that numerous reciprocal obligations are met, most notably enjoyment of the thing being rented.

Finally, the Bankruptcy Court places outsized significance on *In re R.H. Macy & Co., Inc.*, a prelude of sorts to *Montgomery Ward*. A304; A307; A309. *See Bullocks Inc. v. Lakewood Mall Shopping Center (In re R.H. Macy & Co.)*, 1994 WL 482948 (S.D.N.Y. Feb. 23, 1994). Decided well before *Montgomery Ward*, the decision in *R.H. Macy* does not include any analysis regarding when a claim "arises" for the purposes of section 365(d)(3)—almost certainly because that issue was not

in dispute. *Id*. at *12. In *R.H. Macy*, the debtor received a re-assessment of pre-petition taxes during the post-petition period. *Id*. at *11. The bankruptcy court concluded that the re-assessed taxes constituted a post-petition obligation under section 365(d)(3) that must be timely paid by the debtor, and the district court agreed. *Id*. Notably, as previously indicated, there was no dispute that the debtor's obligation to pay the tax debt arose post-petition. *Id*. at *12. That would seem to mark the end of the analysis, but because the debtor sought to expand the *Child World* holding to "read into 365(d)(3), [a] post-petition benefits analysis," the court addressed whether ambiguity in the term "obligation" supported that approach. *Id*. at *13. The court decided it did not. *Id*. Because there was no question concerning when the obligation in *R.H. Macy* arose—it was uncontested that it arose during the protected period—the decision offers no guidance in determining when an obligation arises, which is the central issue to this appeal. At best, *R.H. Macy* can be seen as drawing a distinction between the word "obligation" and the word "claim." However, this Court need not rely on the disputed ambiguity over the meaning of the term "obligation" when it is the apparent ambiguity over the meaning of the term "arise" that drives this appeal. *See In re McCrory Corp*., 210 B.R. 934, 936-40 (S.D.N.Y. 1997) ("the term 'obligation' itself may be unambiguous", but "[t]he phrase 'arising from and after the order for relief under' is far from clear."). In light of this ambiguity, the Court should, as other courts have, look to the purpose of section

365(d)(5) to aid its determination.

B. Giving priority to the Initiator Fees under section 365(d)(5) subverts the section's intent.

As indicated above, the court in *Child World* offers a succinct yet thorough summary of the history of and policy behind section 365(d). *Child World*¸161 B.R. at 574-576. Prior to the enactment of Section 365(d), "reasonable" lease obligations during the protected period were treated as administrative expenses governed by section 503, which allows priority payment of "actual and necessary costs and expenses of preserving the estate" and certain taxes. *Id.* at 574. The policy in protecting these post-petition debts was to encourage commercial engagement with the debtor to aid in rehabilitation, allowing it to pay current obligations with current revenue. *Id.* Full rent and certain other lease obligations, like taxes, were allowed but prorated over the post-petition, pre-rejection period. *Id.* at 574-575.

Under this scheme, although these post-petition rent obligations were given priority, they were often not paid for a significant amount of time after the bankruptcy filing, leaving commercial landlords with an occupied but non-income producing space and no immediate recourse against the tenant. *Id.* at 575. Unique among creditors, commercial landlords were forced to provide services (the enjoyment of the leased space and related services) without current payment. *Id.* Section 365(d)(3) was added to address this issue by requiring debtors to pay timely these post-petition rent obligations at the contract rate up to the point of rejection,

creating an exemption to the "actual and necessary" showing of section 503 for lease-related obligations arising during the protected period. *Id.* The purpose was to "ensure landlords received 'current payment' for 'current services.'" *Id.* (quoting Sen. Hatch, H.R. Conf. Rep. No. 882, 98th Cong., *reprinted in* 1984 U.S.C. C.A.N. 576).

Nothing in the legislative history suggests that Congress intended to do away with the long standing practice of prorating obligations that spanned the petition date. *Id.; see also McCrory*, 210 B.R. at 939-40 ("neither the language of the statute nor the legislative history reveals a Congressional intent to deviate from the pre-amendment practice"). Even the court in *Montgomery Ward* acknowledged that "there are some aspects to the proration approach that Congress might have found desirable" and that proration was the prior practice, which should not be eroded "absent a clear intention that Congress intended such departure." *Montgomery Ward*, 268 B.R. at 211-212. Likewise, in *R.H. Macy*, the court confessed that it found the policy argument at the heart of *Child World*, *i.e.*¸ current pay for current services, "very persuasive." *See R.H. Macy*¸ 1994 WL 482948, at *13.

The Initiator Fees are prepetition debts—amounts owed for services performed prior to the bankruptcy, no different in that respect from installments on a loan. As such, the Initiator Fees should be treated the same as all other general unsecured prepetition debts; they are not the sort of "current services" that Congress

had in mind when it crafted section 365(d)(5). Worse yet, preferring debt like the Initiator Fees violates the bankruptcy policy of treating like creditors the same. The distribution to general unsecured creditors is approximately one to two percent. A section 365(d)(5) claim, on the other hand, would have to be paid in full. This is exactly the sort of "windfall payment" the *Child World* court guarded against.

Fortunately, the Bankruptcy Court's decision is not commanded by the language of section 365(d)(5); rather, the Bankruptcy Court's insistence on one of at least two possible readings of an inarguably ambiguous statute disregards context. As Judge Posner observed, "statutory language, like other language, should be read in context . . . when context is disregarded, silliness results." *Handy Andy*, 144 F.3d at 1128.

VI. Conclusion and Relief Sought

Appellants request that this Court reverse the decision and order of the Bankruptcy Court and find that, for the purposes of section 365(d)(5), the Initiator Fees arose prepetition upon execution of the Leases.

Dated: New York, New York
April 28, 2023

Respectfully submitted,

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UNITED STATES DISTRICT COURT
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The Honorable Katherine Polk Failla

APPENDIX TO BRIEF OF APPELLANT DEBTORS AND REORGANIZED DEBTORS

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Pursuant to Rule 8018(b)(1) of the Federal Rules of Bankruptcy Procedure, in support of its Brief filed concurrently herewith, Appellants-Debtors and Reorganized Debtors submit this Appendix comprised of the following documents:

Description	Docket No.	App'x Page Range
Burnham Sterling and Company LLC and Babcock & Brown Securities LLC's Motion to Compel Compliance with 11 U.S.C. §§ 365(d)(5) and 503(b)	ECF 2657[1]	A1-A95
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Declaration of John G. McCarthy in Support of the Reorganized Debtors' Twenty-Fifth Omnibus Objection to Proofs of Claim	ECF 2666	A155-A169
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[1] "ECF" refers to docket entries from the main Chapter 11 Bankruptcy Proceeding, U.S. Bankruptcy Court, Southern District of New York, case no. 20-11133 (MG).

Notice of Appeal (including Bankruptcy Court's Decision [ECF 2707] and Order [ECF 2714])	ECF 2720	A293-A317

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Hearing Date & Time: TBD
Objection Deadline: TBD

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

BURNHAM STERLING AND COMPANY LLC AND BABCOCK & BROWN SECURITIES LLC'S MOTION TO COMPEL COMPLIANCE WITH 11 U.S.C. §§ 365(d)(5) AND 503(b)

Burnham Sterling and Company LLC ("**Burnham Sterling**") and Babcock & Brown Securities LLC f/k/a Burnham Sterling Securities LLC ("**Babcock**", and together with Burnham

[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. International 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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); AV Loyalty Bermuda Ltd. (N/A); Aviacorp Enterprises S.A. (N/A). The Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá D.C., Colombia.

Sterling, "**Burnham**"), creditors of Avianca Holdings S.A. and its debtor-affiliates (collectively, the "**Debtors**") under those certain Lease Agreements (as defined below), by and through its undersigned counsel, hereby submits this motion (the "**Motion**") pursuant to sections 365 and 503(b)(1) of title 11 of the United States Code, as amended (the "**Bankruptcy Code**"), for entry of an order substantially in the form annexed hereto as Exhibit A (the "**Proposed Order**"), compelling the immediate payment of the full amount of all accrued and accruing post-petition obligations under the Lease Agreements and awarding an administrative expense claim in the same amount. In support of the Motion, Burnham respectfully states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The bases for the relief requested herein are sections 365(d)(5) and 503(b)(1) of the Bankruptcy Code, Rule 9006 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), and Rule 9013-1 of the Local Bankruptcy Rules for the Southern District of New York (the "**Local Bankruptcy Rules**").

RELIEF REQUESTED

3. By this Motion, Burnham requests that the Court enter an order compelling the Debtors to immediately pay Burnham's accrued and accruing post-petition claims pursuant to Bankruptcy Code sections 365(d)(5) and 503(b)(1) in accordance with the terms of the Lease Agreements, including interest on past due amounts calculated at the rate set forth in the Lease Agreements, and awarding an administrative expense claim in the same amounts.

BACKGROUND

A. Entry into the Lease Agreements

4. The Debtors began contracting with Burnham in 2014 to arrange the financing and leasing of certain aircraft in exchange for certain fees (such services, the "**Initiator Services**" and the related fees, the "**Initiator Fees**"). The Initiator Fees are due and owing under the terms of various lease agreements and ancillary documents related to the following transactions (collectively, the "**Lease Agreements**"):

- EAIV 2015 (Group 1): MSNs 6617, 6692, 6739, 37507;
- EAIV 2015 (Group 2): MSNs 6767, 6511, 37508, 6746;
- EAIV 2016: MSNs 37511, 7284, 7318;
- JOLCO (2017): MSNs 7887, 7928;
- JOLCO (2018): MSNs 65315, 8300;
- JOLCO (2019): MSNs 3988, 3992, 4281, 4284; and
- JOLCO (2017): MSNs 39407

5. Under the Lease Agreements, the Debtors have an unconditional obligation to pay Burnham through the payment of "Additional Rental Payments" on a schedule set forth in the Lease Agreements. By way of example, the Amended and Restated Aircraft Lease Agreement (MSN 3992), dated April 25, 2019, between Aircol 7, as Lessor, and Aerovías Del Continente Americano S.A., as Lessee (the "**MSN 3992 Lease Agreement**"), includes the following provision for the payment of the Initiator Fees (which is referred to in this agreement as the "Initiator Compensation"):

> The Lessee shall on each Additional Rental Payment Date pay to the Lessor at the Initiator Account, by way of additional rental payment, installments of the Initiator Compensation . . . . The Sub-Lessee acknowledges that the Initiator has already provided

> services prior to the Delivery Date, and accordingly agrees that the Sub-Lessee's obligations to pay the Initiator Fees hereunder are unconditional.

See MSN 3992 Lease Agreement § 5.2.

6. Burnham is also expressly authorized to enforce its right to payment under the Lease Agreements against the Debtors:

> The agreement as to the payment of the Initiator Compensation under this Lease is a bilateral matter as between the Lessee and the Initiator, and no consent or act is required by the Lessor for the Initiator to enforce its rights hereunder, or for the Lessee and the Initiator to agree to any amendment or variation of any payment of Initiator Compensation.

See MSN 3992 Lease Agreement § 5.2(f).

7. Burnham is also designated as an express third-party beneficiary under the Lease Agreements, entitled to enforce its rights under such agreements:

> The Initiator shall be entitled to enforce its rights against the Lessee and Lessor under and in connection with this Clause 5.2 as a third party, notwithstanding that the Initiator is not a signatory to this Agreement, pursuant to the Contracts (Rights of Third Parties) Act 1999. For the avoidance of doubt, the Initiator shall have the right to bring a claim directly against the Lessee and/or the Guarantor for any Initiator Compensation and any other amounts payable to the Initiator that become due and unpaid under this Agreement, and such right shall not be reduced, diminished or otherwise affected in any respect detrimental to the Initiator as a result of Initiator not being a party to this Agreement. Any obligation in connection with Initiator's deficiency claim against the Lessee (or Guarantor) shall only be released upon actual receipt by Initiator of the relevant amounts. Any amounts payable by the Lessee to the Initiator in respect of such deficiency claim shall be paid by Lessee (or Guarantor) directly to the Initiator.

See, e.g., MSN 3992 Lease Agreement § 5.2(j).

8. Accordingly, the Lease Agreements indisputably provide Burnham with a right to payment of the Initiator Fees as Additional Rental Payments, along with the right to enforce such Lease Agreements.

B. Chapter 11 Cases

9. On May 10, 2020 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the

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Southern District of New York (the "**Bankruptcy Court**"). The Debtors continue to operate their businesses and manage their properties as debtors-in-possession under Bankruptcy Code sections 1107(a) and 1108. The chapter 11 cases were consolidated for procedural purposes only and are being jointly administered.

10. On November 16, 2020, the Bankruptcy Court entered an order establishing January 20, 2021 as the bar date for filing proofs of claims in the chapter 11 cases for general creditors (the "**Bar Date**"). *See Order (I) Establishing Bar Dates for Filing Proofs of Claim, (II) Approving Proof of Claim Forms, Bar Date Notices, and Mailing and Publication Procedures, (III) Implementing Uniform Procedures Regarding 503(b)(9) Claims, and (IV) Providing Certain Supplemental Relief* [Docket No. 1180]. On the Bar Date, Burnham timely filed proof of claim numbers 2055 and 2057 (the "**Prepetition Claims**"), asserting Burnham's prepetition claims against the Debtors.[2]

11. Since the filing of the chapter 11 cases, the Bankruptcy Court has entered several orders relating to the rejection of certain of the Lease Agreements (collectively, the "**Rejection Orders**"), including the following:

- *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* [Docket No. 1929];
- *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* [Docket No. 1930];
- *Order Authorizing the Debtors to (I) Enter Into New Aircraft Lease and (II) Reject Pre-Petition Aircraft Lease (MSN 8300) and Certain Related Agreements* [Docket No. 2002];

[2] On November 8, 2021, Burnham made its written election to receive the Unsecured Claimholder Equity Package and Warrants with respect to claims 2055 and 2057 pursuant to Article III.B(11) of the Plan (as defined below).

- *Order Authorizing the Debtors 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* [Docket No. 2004];

- *Order Authorizing the Debtors 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)* [Docket No. 2015];

- *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* [Docket No. 2016]; and

- *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* [Docket No. 2017].

12. Pursuant to the Rejection Orders, Burnham has thirty days from the date of each Rejection Order to file a new claim or amend a previously filed claim against any of the Debtors, for "damages based upon or resulting from the assumption, rejection or amendment of any unexpired leases or subleases related to each of the transactions."[3] Burnham complied with such deadline and, on August 23, 2021, timely filed proof of claim numbers 4033, 4034, 4035, 4036, 4037 and 4038 (collectively, the "**Administrative Claims**"). A copy of such Administrative Claims are attached as **Exhibit B**.

13. The Rejection Orders provide that the rejection of the leases will become effective upon the Debtors' entry into a new aircraft lease for such aircraft (the "**Rejection Date**").[4] Under the Rejection Orders, the Debtors are required to file notice of the Rejection Date with the Court promptly upon entry into a new aircraft lease.

[3] Burnham does not believe that the thirty-day deadline imposed by the Rejection Orders applies to the filing of administrative expense claims, which do not arise from the rejection of the applicable agreements.

[4] To the extent applicable, Burnham objects to the effectiveness of any rejection as described in Schedule E of the Plan Supplement.

14. Based on the notices of the Rejection Dates filed with the Court [Docket Nos. 2427, 2500, 2501, 2502, 2503, 2582], and the terms of the applicable leases, the following Initiator Fees accrued post-petition through the applicable Rejection Dates.

MSN	Transaction	Lease Rejection or Maturity Date	Total Due to Burnham Sterling	Total Due to Babcock
6617	2015 EAIV-1	7/18/2022	45,687.49	51,701.85
6692	2015 EAIV-1	5/24/2022	51,409.79	58,255.50
6739	2015 EAIV-1	6/6/2022	52,152.84	59,061.05
37507	2015 EAIV-1	5/11/2022	133,928.25	151,556.87
6767	2015 EAIV-2	12/15/2022	75,331.56	85,249.41
6511	2015 EAIV-2	12/15/2022	75,266.24	85,127.75
37508	2015 EAIV-2	5/25/2022	136,495.09	154,564.77
6746	2015 EAIV-2	6/1/2022	51,799.77	58,644.47
37511	2016 EAIV	8/31/2022	343,358.78	-
7284	2016 EAIV	2/9/2022	93,517.20	-
7318	2016 EAIV	2/16/2022	94,490.27	-
7887	2017 JOLCO	5/12/2022	298,496.43	-
7928	2017 JOLCO	5/9/2022	297,538.76	-
65315	2018 JOLCO	12/1/2021	315,738.05	-
8300	2018 JOLCO	1/27/2022	195,046.54	-
3988	2019 JOLCO	2/4/2022	120,098.42	-
3992	2019 JOLCO	2/26/2022	124,194.22	-
4281	2019 JOLCO	2/9/2022	131,935.38	-
4284	2019 JOLCO	1/27/2022	129,426.38	-
Total			**$2,765,911.46**	**$704,161.68**

15. The Rejection Date with respect to the lease for MSN 39407 has not occurred and thus Burnham's post-petition administrative claim under that lease continues to accrue. As of December 1, 2022, that claim totals $739,700.13 (including interest).

16. As of the date hereof, Burnham has not received payment on account of any of its Administrative Claims.

LEGAL BASIS FOR RELIEF REQUESTED

A. Allowance and Payment of Burnham's Initiator Fees is Required by Bankruptcy Code Section 365(d)(5)

17. Under Bankruptcy Code section 365(d)(5), the Debtors are obligated to "timely perform ***all of the obligations***" on leases of personal property after sixty days after the Petition Date until the leases are assumed or rejected. *See* 11 U.S.C. § 365(d)(5). Specifically, Bankruptcy Code section 365(d)(5) states as follows:

> The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

11 U.S.C. § 365(d)(5).

18. A debtor's obligations under section 365(d)(5) are independent of, and not subject to, the requirements for the allowance of administrative expenses under Bankruptcy Code section 503. *See* 3 Collier on Bankruptcy P 365.04 (16th ed. 2022) (Section 365(d)(5) "is apparently intended to eliminate an argument over whether accrued rent was 'actual' or 'necessary' and, hence, entitled to an administrative priority."); *In re Hayes Lemmerz Int'l, Inc.*, 340 B.R. 461, 472 (D. Del. 2006) ("Unlike parties claiming administrative expense status under section 503(b), [creditors] claiming under section [365(d)(5)] need not prove they conferred any benefit upon the estate.").

19. Accordingly, Burnham need not establish a benefit to the Debtors' estates in order to be awarded an administrative expense claim under section 365(d)(5); rather, Burnham must only

establish that the charges came due during the section 365(d)(5) period. *See In re Stone Barn Manhattan LLC*, 405 B.R. 68, 76 (Bankr. S.D.N.Y. 2009) ("To allow the debtor to extend this abeyance period on commercial personal property lease obligations . . . would be to allow the debtor to circumvent the 60-day limitation . . .")[5]; *see also In re Midway Airlines Corp.*, 406 F.3d 229, 237 (4th Cir. 2005) ("when a lessor seeks an administrative expense for 'all of the obligations' due under a lease, the 'notwithstanding § 503(b)(1)' proviso . . . relieves the lessor from proceeding under § 503(b)(1)(A), which would limit the recovery to an amount representing only the actual and necessary use by the estate"); *In re Wyoming Sand and Stone Co*., 393 B.R. 359, 361 (M.D. Pa. 2008) ("Benefit to the estate is not an issue under § 365(d)(5), and, in the absence of intervening action by the Debtor, the obligation to perform under the lease remains."); *In re Russel Cave Co.*, 247 B.R. 656, 658 (Bankr. E.D. Ky. 2000) (holding that the purpose of section 365(d)(10), 365(d)(5)'s predecessor, "is to mandate the performance of the debtor's obligations under an unexpired lease, beginning on the 60th day after filing"); *In re Lakeshore Const. Co. of Wolfeboro, Inc*., 390 B.R. 751, 756 (Bankr. D.N.H. 2008) ("personal property lessors may assert administrative claims under § 365(d)(5) based upon the terms of the lease and not the benefit to the bankruptcy estate.").

20. Here, the Debtors continued to operate under the Lease Agreements 60 days after the Petition Date through the applicable Rejection Dates. Burnham's claim for Initiator Fees under the terms of the Lease Agreements—the payment of which is classified as "Additional Rental Payments"—indisputably falls within the "all obligations" under a personal property lease that is entitled to an administrative expense claim under Bankruptcy Code Section 365(d)(5). *In re*

[5] As part of the 2005 BAPCPA amendments to the Bankruptcy Code, 11 U.S.C. § 365(d)(10) was moved to subsection (d)(5). However, the language of the provision was not altered, so courts have agreed that case law interpreting old 11 U.S.C. § 365(d)(10) "is equally authoritative under § 365(d)(5)." *In re Stone Barn Manhattan LLC*, 405 B.R. 68, 76 n.8 (Bankr. S.D.N.Y. 2009).

Wyoming Sand and Stone Co., 393 B.R. at 361 (concluding that no showing of a benefit to the estate is required and "the Court has little discretion but to award [the applicable creditor] an allowance for that time period from the 60th day after filing until surrender of the equipment . . ."); *Lakeshore Const. Co*., 390 B.R. at 756 (Section 365(d)(5) imposes a "duty of timely performance on trustees and debtors-in-possession" and "eliminates the 'actual and necessary' test under § 503(b)(1).").

21. Since the Debtors are required to perform "all obligations" under section 365(d)(5), Burnham is also entitled to post-petition default interest due and owing under the terms of the Lease Agreements. Indeed, courts have concluded that the administrative expense treatment afforded by Bankruptcy Code section 365(d)(5) extends to interest payments, attorney's fees, and other similar charges to the extent provided for under the terms of the lease agreement. *See, e.g*., *In re Crown Books Corp*., 269 B.R. 12, 18 (Bankr. D. Del 2001) (holding landlord entitled to collect attorney's fees provided under prepetition agreement in enforcing administrative claim against debtors); *In re Pettingill Enterprises, Inc*., 486 B.R. 524, 537 (Bankr. D.N.M. 2013) (creditor entitled to recover hauling charges under § 365(d)(5) as the debtor was "obligated to pay such costs under the terms of the Rental Contracts and because they accrued more than 60 days after the Petition Date and prior to the rejection of the Rental Contracts").

22. Accordingly, for the foregoing reasons, this Court should enforce Bankruptcy Code section 365(d)(5) as written and compel the Debtors to immediately pay Burnham its section 365(d)(5) claim, plus interest.[6]

[6] Courts have also found that a creditor's section 365(d)(5) claim is entitled to be paid before other administrative claims*. See, e.g., In re Brennick*, 178 B.R. 305, 306-08 (Bankr. D. Mass. 1995) (Chapter 7 trustee was required to pay landlord's claim immediately, and landlord was not obligated to reimburse trustee if there were insufficient funds to pay other Chapter 11 or Chapter 7 administrative expense claimants); *In re Telesphere Commc'ns, Inc*., 148 B.R. 525, 528-30 (Bankr. N.D. Ill. 1992) (claims under Section 365(d)(5) are entitled to immediate payment on superpriority basis).

B. Burnham is Entitled to an Administrative Claim Under Bankruptcy Code Section 503(b)(1)

23. Bankruptcy Code section 503(b)(1) provides that the actual, necessary costs and expenses of preserving the Debtor's estate constitute administrative expenses, and that a party may file a request for payment of administrative expenses. 11 U.S.C. § 503(b)(1); *see In re Patient Education Media, Inc.*, 221 B.R. 97, 101 (Bankr. S.D.N.Y. 1998); *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 531 (1984) ("If the debtor-in-possession elects to continue to receive benefits from the executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services . . . ."). The Second Circuit has recognized the presumption that the payment terms of a lease are a reasonable measure of the administrative expenses to be paid by a debtor. *Farber v. Wards Co., Inc.*, 825 F.2d 684, 689-90 (2d Cir. 1987); *see also In re ID Liquidation One, LLC*, 503 B.R. 392, 399 (Bankr. D. Del 2013) ("[T]here is a presumption that the contract terms and rate represent the reasonable value of the services or goods provided under the contract.").

24. Through the applicable Rejection Dates, the Debtors continued to receive the benefit of the Lease Agreements and the amounts due under such agreements—including the Initiator Fees—constitute the actual and necessary costs of preserving the estates. Accordingly, Burnham is entitled to an allowed administrative expense claim for all amounts due under the Lease Agreements from the Petition Date through the Rejection Date.

<u>RESERVATION OF RIGHTS</u>

25. Burnham expressly reserves its rights to amend or supplement this Motion from time to time and at any time, and requests that the Debtors remain liable for, among other things, certain amounts accruing under the Lease Agreements, which may be unbilled as of the date hereof. Nothing in this Motion is intended to be, or should be construed as, a waiver by Burnham

of any of its rights under the Lease Agreements, the Bankruptcy Code, or applicable law. Burnham expressly reserves all such rights.

NO PRIOR REQUEST

26. No prior request for the relief sought herein has been requested by Burnham.

CONCLUSION

27. Based on the foregoing, Burnham respectfully requests the entry of an order substantially in the form attached hereto as **Exhibit A** compelling the immediate payment of the full amount of all accrued and accruing post-petition obligations under the Lease Agreements and awarding an administrative expense claim in the same amount.

WHEREFORE, Burnham respectfully requests that the Court enter the Proposed Order or grant such other or further relief as the court deems just and proper.

Dated: November 30, 2022
New York, New York

Respectfully Submitted,

O'MELVENY & MYERS LLP

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EXHIBIT A

Proposed Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

ORDER GRANTING BURNHAM STERLING AND COMPANY LLC AND BABCOCK & BROWN SECURITIES LLC'S MOTION TO COMPEL COMPLIANCE WITH 11 U.S.C. §§ 365(d)(5) AND 503(b)

Upon consideration of the Motion[2] of Burnham Sterling and Company LLC and Babcock & Brown Securities LLC f/k/a Burnham Sterling Securities LLC (collectively, "**Burnham**") for entry of an order (the "**Order**") compelling the immediate payment of the full amount of all accrued and accruing post-petition obligations under the Lease Agreements and awarding an administrative expense claim in the same amount; and the Court having jurisdiction over this matter under 28 U.S.C. § 1334 and this being a core proceeding under 28 U.S.C. § 157(b)(2)(A), (M), and (O); and the Court having found that venue of this proceeding and the Motion in this

[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. International 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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); AV Loyalty Bermuda Ltd. (N/A); Aviacorp Enterprises S.A. (N/A). The Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá D.C., Colombia.

[2] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and the Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the "**Hearing**"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefore, it is **HEREBY ORDERED THAT:**

1. The Motion is **GRANTED** in its entirety.

2. The Debtors shall immediately pay all post-petition amounts due to Burnham under the Lease Agreements, by payment of not less than $4,209,773.27, plus other amounts that came due under the terms of the Lease Agreements until the Rejection Date.

3. The foregoing amounts shall constitute allowed administrative claims in favor of Burnham until such time as they have been paid and satisfied.

4. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: [_____], 2022
New York, New York

UNITED STATES BANKRUPTCY JUDGE

Exhibit B

Administrative Claims

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK	PROOF OF ADMINISTRATIVE CLAIM

THIS FORM SHOULD NOT BE USED FOR CLAIMS EXCLUDED BY SAID NOTICE NOR SHOULD IT BE USED FOR ANY CLAIMS THAT ARE NOT OF A KIND AND ENTITLED TO PRIORITY IN ACCORDANCE WITH 11 U.S.C. §§ 503(b) AND 507(a)(2). IT SHOULD NOT BE USED BY ANY PERSON ASSERTING CLAIMS PURSUANT TO SECTION 503(B)(9) OF THE BANKRUPTCY CODE.

Fill in this information to identify the case (Select only one Debtor per claim form):

☐ Aero Transporte de Carga Unión, S.A. de C.V. (Case No. 20-11140)	☐ Aeroinversiones de Honduras, S.A. (Case No. 20-11141)	☐ Aerovías del Continente Americano S.A. Avianca (Case No. 20-11134)	☐ Airlease Holdings One Ltd. (Case No. 20-11142)	☐ America Central (Canada) Corp. (Case No. 20-11143)
☐ America Central Corp. (Case No. 20-11144)	☐ AV International Holdco S.A. (Case No. 20-11145)	☐ AV International Holdings S.A. (Case No. 20-11146)	☐ AV International Investments S.A. (Case No. 20-11147)	☐ AV International Ventures S.A. (Case No. 20-11148)
☐ AV Investments One Colombia S.A.S. (Case No. 20-11135)	☐ AV Investments Two Colombia S.A.S. (Case No. 20-11136)	☐ AV Taca International Holdo S.A. (Case No. 20-11149)	☐ Avianca Costa Rica S.A. (Case No. 20-11150)	☑ Avianca Holdings S.A. (Case No. 11133)
☐ Avianca Leasing, LLC (Case No. 20-11151)	☐ Avianca, Inc. (Case No. 20-11132)	☐ Avianca-Ecuador S.A. (Case No. 20-11152)	☐ Aviaservicios, S.A. (Case No. 20-11153)	☐ Aviateca, S.A. (Case No. 20-11154)
☐ Avifreight Holding Mexico, S.A.P.I. de C.V. (Case No. 20-11155)	☐ C.R. International Enterprises, Inc. (Case No. 20-11156)	☐ Grupo Taca Holdings Limited (Case No. 20-11157)	☐ International Trade Marks Agency Inc. (Case No. 20-11158)	☐ Inversiones del Caribe, S.A. (Case No. 20-11159)
☐ Isleña de Inversiones, S.A. de C.V. (Case No. 20-11160)	☐ Latin Airways Corp. (Case No. 20-11161)	☐ Latin Logistics, LLC (Case No. 20-11162)	☐ Nicaragüense de Aviación, Sociedad Anónima (Case No. 20-11163)	☐ Regional Express Américas S.A.S. (Case No. 20-11137)
☐ Ronair N.V. (Case No. 20-11164)	☐ Servicio Terrestre, Aéreo y Rampa S.A. (Case No. 20-11165)	☐ Servicios Aeroportuarios Integrados SAI S.A.S. (Case No. 20-11138)	☐ Taca de Honduras, S.A. de C.V. (Case No. 20-11166)	☐ Taca de México, S.A. (Case No. 20-11167)
☐ Taca International Airlines S.A. (Case No. 20-11168)	☐ Taca S.A. (Case No. 20-11169)	☐ Tampa Cargo S.A.S. (Case No. 20-11139)	☐ Technical and Training Services, S.A. de C.V. (Case No. 20-11170)	☐ AV Loyalty Bermuda Ltd. (Case No. 20-12255)
☐ Aviacorp Enterprises S.A. (Case No. 20-12256)	☐	☐	☐	☐

Name of Creditor (The person or entity to whom the debtor owes money or property) Burnham Sterling and Company LLC	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your administrative expense claim. Attach copy of statement giving particulars.	Check here if this claim: ☐ replaces or ☐ amends a previously filed administrative expense claim.
Name and Addresses Where Notices Should be Sent: Burnham Sterling and Company LLC 29 River Road Suite 102 Cos Cob, CT 06807	Name and Addresses Where Payment Should be Sent (if different):	

1. BASIS FOR CLAIM:

☐ Goods sold ☑ Services performed ☐ Personal Injury/Wrongful Death ☐ Wages (Dates):__________

☐ Money loaned ☐ Taxes ☐ Retiree Benefits as Defined in 11 U.S.C. § 1114(a)

☐ Other (Specify): ______________________________

2. DESCRIPTION OF CLAIM (IF KNOWN): See Addendum

3. TOTAL AMOUNT OF CLAIM: $ See Addendum __________ (Total)

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4. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor. 5. SUPPORTING DOCUMENTS: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. Do not send original documents. If the documents are not available, explain. If the documents are voluminous, attach a summary. The Debtors may request full copies of your supporting documentation to substantiate the claim. 6. TIME-STAMPED COPY: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.		THIS SPACE IS FOR COURT USE ONLY
Date: August 23, 2021	Sign and print the name and title, if any, of the creditor or other person authorized to file this Claim (attach copy of proof of attorney, if any) Joon-Ho Lee Authorized Signatory	

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KURTZMAN CARSON CONSULTANTS

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

ADDENDUM TO PROOF OF CLAIM OF BURNHAM STERLING AND COMPANY LLC

Burnham Sterling and Company LLC ("**Burnham**"), an unregistered entity providing financial advisory services, asserts the following claims (the "**Claims**") against Avianca Holdings S.A. and its debtor-affiliates (collectively, the "**Debtors**") in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**"), and respectfully states as follows:

I. Background

1. Commencement of the Chapter 11 Cases. On May 10, 2020 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States

[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. International 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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); AV Loyalty Bermuda Ltd. (N/A); Aviacorp Enterprises S.A. (N/A). The Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá D.C., Colombia.

Code, as amended (the "**Bankruptcy Code**"), in the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**").

2. Debtors-in-Possession. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession under Bankruptcy Code sections 1107(a) and 1108.

3. Joint Administration. The Chapter 11 Cases were consolidated for procedural purposes only and are being jointly administered under case number 20-11133 (MG).

4. Bar Date. On October 29, 2020, the Debtors filed the *Notice of Debtors' Application for an Order (I) Establishing Bar Dates for Filing Proofs of Claim; (II) Approving Proof of Claim Forms, Bar Date Notices, and Mailing and Publication Procedures; (III) Implementing Uniform Procedures Regarding 503(b)(9) Claims; (IV) Providing Certain Supplemental Relief* [Docket No. 1138] (the "**Bar Date Motion**"). On November 16, 2020, the Bankruptcy Court granted the *Order (I) Establishing Bar Dates for Filing Proofs of Claim, (II) Approving Proof of Claim Forms, Bar Date Notices, and Mailing and Publication Procedures, (III) Implementing Uniform Procedures Regarding 503(b)(9) Claims, and (IV) Providing Certain Supplemental Relief* [Docket No. 1180] approving the relief sought in the Bar Date Motion and establishing January 20, 2021 at 11:59 p.m. (PT) as the bar date for filing proofs of claims in the Chapter 11 Cases for general creditors (the "**Bar Date**"). On January 20, 2021, Burnham timely filed proof of claim number 2055 by the Bar Date (the "**Prepetition Claims**"). The filing of these Claims is not intended to, and does not, amend the Prepetition Claims filed by Burnham.

5. Rejection Orders. To date, the Bankruptcy Court has entered six orders that impact Burnham (each, a "**Rejection Order**" and collectively, the "**Rejection Orders**"), which include:

- *Order Authorizing the Debtors to (I) Ener 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 [Docket No. 1929], as subsequently modified by the *Order Authorizing the Debtors to (I) Enter Into New Aircraft Lease and (II) Reject Pre-Petition Aircraft Lease (MSN 8300) and Certain Related Agreements*, [Docket No. 2002];

- *Order Authorizing the Debtors 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* [Docket No. 2004];
- *Order Authorizing the Debtors 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)* [Docket No. 2015];
- *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* [Docket No. 2016]; and
- *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* [Docket No. 2017].

6. Pursuant to the Rejection Orders, Burnham has thirty days from the date of each Rejection Order to file a new claim or amend a previously filed claim against any of the Debtors, for "damages based upon or resulting from the assumption, rejection or amendment of any unexpired leases or subleases related to each of the transactions." Burnham does not believe that the thirty day deadline imposed by the Rejection Orders applies to the filing of administrative expense claims—which are not claims currently subject to any bar date and do not arise from the rejection of the applicable agreements. However, for the avoidance of doubt, Burnham has complied with such 30 day deadline, but reserves all rights to amend, supplement, or modify these Claims.

7. Necessity of Addendum. This addendum is annexed to the official administrative proof of claim form that set forth a summary of Burnham's Claims against the Debtors. This addendum provides the parties in interest with relevant information and a description of the Claims.

8. Supporting Documentation. The documentation supporting these Claims are voluminous and may already be in the Debtors' possession.

II. The Claims

A. The Personal Property Leases

9. The Debtors began contracting with Burnham in 2014 to arrange the financing and leasing of certain aircraft in exchange for certain fees (such services the "**Initiator Services**" and such fees the "**Initiator Fees**").

10. Burnham has not been paid the Initiator Fees for the Initiator Services the Debtors benefited from since the Petition Date.

11. As a result, Burnham files these Claims asserting any and all of its rights to Initiator Fees and other fees, remedies, damages, indemnities, and other claims (including contingent or unliquidated claims) against the Debtors arising on or after the Petition Date under, related to, or due under the following contracts (the "**Contracts**" together with the guarantees, Lease Agreements (as defined below), and any and all other related agreements, amendments or supplements thereto or modifications thereof, and any additional documents, agreements or instruments delivered in connection with any such related agreement, amendment, supplement or modification):

- That certain Framework Agreement, dated as of July 30, 2015, among Avianca EAIV 2015-1 Trust and Avianca EAIV 2015-2 Trust, as Borrowers, Octo-Aircraft Leasing LLC, as Owner Participant, Avianca Holdings S.A., as Guarantor, the purchasers identified on Schedule I thereto, Wells Fargo Bank, National Association, as Security Trustee, with Babcock & Brown Securities LLC f/k/a Burnham Sterling Securities LLC and Burnham Sterling & Company LLC as Initiators (the "**2015 EAIV Financing**");

- That certain Loan Agreement, dated as of December 14, 2016, among Avianca EAIV 2016-3 Trust, as Borrower, Uni-Aircraft Leasing LLC, as Owner Participant, Avianca Holdings S.A., as Guarantor, the lenders identified on Schedule I thereto, and Wilmington Trust Company, as Security Trustee, with Burnham Sterling & Company LLC as Initiator (the "**37511 Financing**");

- That certain Loan Agreement, dated as of August 24, 2016, among Avianca EAIV 2016-1 Trust, as Borrower, Tri-Aircraft Leasing II LLC, as Owner Participant, Avianca Holdings S.A., as Guarantor, the lenders identified on Schedule I thereto, and Wilmington Trust Company, as Security Trustee, with Burnham Sterling & Company LLC as Initiator (the "**7284 Financing**");

- That certain Loan Agreement, dated as of October 14, 2016, among Avianca EAIV 2016-1 Trust, as Borrower, Tri-Aircraft Leasing II LLC, as Owner Participant, Avianca Holdings S.A., as Guarantor, the lenders identified on Schedule I thereto, and Wilmington Trust Company, as Security Trustee, with Burnham Sterling & Company LLC as Initiator (the "**7318 Financing**");

- That certain Loan Facility Agreement, dated as of October 26, 2017, among FLIP No. 168 Co., Ltd. & FLIP No. 169 Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as the Original Lenders, Sumitomo Mitsui Banking Corporation, New York Branch, as Facility Agent, and Wilmington Trust, National Association, as Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**39407 Financing**");

- That certain Loan Facility Agreement, dated November 30, 2017, among San Agustin Leasing Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Sumitomo Mitsui Banking Corporation, New York Branch, as Facility Agent and Security Agent, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**7887 Financing**");

- That certain Loan Facility Agreement, dated December 4, 2017, among Los Katios Leasing Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Sumitomo Mitsui Banking Corporation, New York Branch, as Facility Agent and Security Agent, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**7928 Financing**");

- That certain ECA Loan Agreement, dated September 25, 2018, among Malpelo Leasing Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original ECA Lenders, ING Capital LLC, as ECA Facility Agent, and Wilmington Trust SP Services (Dublin) Limited, as Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**65315 Financing**");

- That certain Loan Facility Agreement, dated July 24, 2018, among Condor Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Bank of Utah, as Facility Agent and Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**8300 Financing**");

- That certain Loan Facility Agreement, dated April 24, 2019, among JPA No. 151 Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Woori Bank, Tokyo Branch, as Facility Agent and Security Trustee, with

Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**3988 Financing**");

- That certain Loan Facility Agreement, dated April 25, 2019, among JPA No. 152 Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Woori Bank, Tokyo Branch, as Facility Agent and Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**3992 Financing**");

- That certain Loan Facility Agreement, dated April 23, 2019, among JPA No. 159 Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Wilmington Trust Company, as Facility Agent and Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**4281 Financing**"); and

- That certain Loan Facility Agreement, dated April 24, 2019, among JPA No. 160 Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Wilmington Trust Company, as Facility Agent and Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**4284 Financing**").

12. The Contracts provide that the Debtors have an unconditional obligation to pay Burnham (which is referred to as the "Initiator" in the relevant agreements), Burnham's compensation (*i.e.*, the "Initiator Compensation") through the payment of "Additional Rental Payments" on a schedule set forth in the various lease agreements entered into by the Debtors (each applicable lease agreement or sublease agreement, the "**Lease Agreements**"):

> The Lessee shall on each Additional Rental Payment Date pay to the Lessor at the Initiator Account, by way of additional rental payment, instalments of the Initiator Compensation . . . . The Sub-Lessee acknowledges that the Initiator has already provided services prior to the Delivery Date, and accordingly agrees that the Sub-Lessee's obligations to pay the Initiator Fees hereunder are unconditional.

See e.g., Section 5.2 of that certain Amended and Restated Aircraft Lease Agreement (MSN 3992), dated April 25, 2019, between Aircol 7, as Lessor, and Aerovías Del Continente Americano S.A., as Lessee (the "**MSN 3992 Personal Property Contract**").

13. Burnham is expressly authorized to enforce its right to payment under the Lease Agreements against the Debtors:

> The agreement as to the payment of the Initiator Compensation under this Lease is a bilateral matter as between the Lessee and the Initiator, and no consent or act is required by the Lessor for the Initiator to enforce its rights hereunder, or for the Lessee and the Initiator to agree any amendment or variation of any payment of Initiator Compensation.

See Section 5.2(f) of that certain MSN 3992 Personal Property Contract.

14. Burnham is also designated as an express third-party beneficiary under the Lease Agreements, entitled to enforce its rights under such agreements:

> The Initiator shall be entitled to enforce its rights against the Lessee and Lessor under and in connection with this Clause 5.2 as a third party, notwithstanding that the Initiator is not a signatory to this Agreement, pursuant to the Contracts (Rights of Third Parties) Act 1999. For the avoidance of doubt, the Initiator shall have the right to bring a claim directly against the Lessee and/or the Guarantor for any Initiator Compensation and any other amounts payable to the Initiator that become due and unpaid under this Agreement, and such right shall not be reduced, diminished or otherwise affected in any respect detrimental to the Initiator as a result of Initiator not being a party to this Agreement. Any obligation in connection with Initiator's deficiency claim against the Lessee (or Guarantor) shall only be released upon actual receipt by Initiator of the relevant amounts. Any amounts payable by the Lessee to the Initiator in respect of such deficiency claim shall be paid by Lessee (or Guarantor) directly to the Initiator.

See e.g., Section 5.2(j) of that certain MSN 3992 Personal Property Contract.

15. As set forth below, the Claims are entitled to an administrative expense status under both Bankruptcy Code sections 365(d)(5) and 503(b).

B. Bankruptcy Code Section 365(d)(5)

16. Bankruptcy Code section 365(d)(5) obligates a debtor, after sixty days from its petition date, to "timely perform ***all of the obligations***" on leases of personal property "until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title. . . ." Consequently, pursuant to Bankruptcy Code section 365(d)(5), an administrative claim arises with respect to all unperformed obligations accruing after the first sixty days of the bankruptcy case. And

administrative claims arising under a personal property lease under 365(d)(5) "are based upon the terms of the lease and not the benefit to the bankruptcy estate." *In re Lakeshore Const. Co. of Wolfeboro, Inc.*, 390 B.R. 751 (Bankr. D.N.H. 2008); *In re Wyoming Sand and Stone Co.*, 393 B.R. 359, 361 (M.D. Pa. 2008) ("Benefit to the estate is not an issue under § 365(d)(5), and, in the absence of intervening action by the Debtor, the obligation to perform under the lease remains.").

17. Here, the applicable Lease Agreements obligate the payment of Burnham's fees as "Additional Rent" and indisputably fall within the contractual obligations that give rise to an administrative expense claim under Bankruptcy Code section 365(d)(5). *Wyoming*, 393 B.R. at 361 (concluding that no showing of a benefit to the estate is required and "the Court has little discretion but to award [the applicable creditor] an allowance for that time period from the 60th day after filing until surrender of the equipment . . ."); *see also In re Hayes Lemmerz Int'l, Inc.*, 340 B.R. 461, 472 (Bankr. D. Del. 2006) ("Unlike parties claiming administrative expense status under section 503(b), lessors claiming under section 365(d)(10) need not prove they conferred any benefit upon the estate."); *In re Glob. Container Lines Ltd.*, No. 09-78585 (AST), 2010 Bankr. LEXIS 5596, at *8 (Bankr. E.D.N.Y. Feb. 25, 2010) (noting that section 365(d)(5) "expressly overrides Section 503(b)(1), again, unless the equities require otherwise," requirement of showing a benefit to the estate).

18. Here, the sixtieth day from the Petition Date was July 9, 2020. The Rejection Orders are not yet effective, and will only become effective upon the Debtors entry into a new aircraft lease and new guarantee for each aircraft (the "**Rejection Date**"). Thus, Burnham's Claims continue to accrue until such Rejection Date occurs.

19. Accordingly, for the foregoing reasons, Bankruptcy Code section 365(d)(5) requires the Debtors to pay Burnham administrative fees under the Contracts from the sixtieth day of these Chapter 11 Cases through the Rejection Date.

C. Section 503(b) of the Bankruptcy Code

20. In addition, Burnham is entitled to an administrative expense claim from the Petition Date through the Rejection Date pursuant to Bankruptcy Code section 503(b)(1). Bankruptcy Code section 503(b)(1) provides that the actual, necessary costs and expenses of preserving the Debtors' estate constitute administrative expenses, and that a party may file a request for payment of administrative expenses. 11 U.S.C. § 503(b)(1). Under section 503, the debtor must pay the counterparty to a lease agreement the reasonable administrative expense for the use of leased property that has benefited the bankruptcy estate. *See In re Patient Education Media, Inc.*, 221 B.R. 97, 101 (Bankr. S.D.N.Y. 1998); *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 531 (1984) ("If the debtor-in-possession elects to continue to receive benefits from the executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services . . . ."). The Second Circuit has recognized the presumption that the payment terms of a lease are a reasonable measure of the administrative expenses to be paid by a debtor. *Farber v. Wards Co., Inc.*, 825 F.2d 684, 689-90 (2d Cir. 1987).

21. Here, the use of the leased aircraft pursuant to the terms of the Contracts by the Debtors after the commencement of the Chapter 11 Cases provided a clear and undisputed benefit to the Debtors' estate and Burnham's Claims arising under such Contracts constitutes an administrative expense claim allowable under Bankruptcy Code section 503(b).

D. Claims Amount

22. For the foregoing reasons, pursuant to Bankruptcy Code sections 365(d)(5) and 503(b)(1) the following amounts must be paid as administrative expenses as such obligations arise under the Contracts.

Burnham Sterling & Company LLC				
MSN	**Currency**	**Description**	**(A)**	**(B)**
			5/10/2020 - 8/23/2021	Post-Petition Default Interest
6617	USD	2015 EAIV-1	$24,206.50	$1,193.83
6692	USD	2015 EAIV-1	$29,056.60	$1,469.91
6739	USD	2015 EAIV-1	$29,056.60	$1,452.58
37507	USD	2015 EAIV-1	$77,130.60	$3,795.60
6767	USD	2015 EAIV-2	$34,056.35	$1,689.76
6511	USD	2015 EAIV-2	$34,056.35	$1,665.61
37508	USD	2015 EAIV-2	$77,130.60	$3,848.91
6746	USD	2015 EAIV-2	$29,056.60	$1,443.92
37511	USD	2016 EAIV	$170,625.00	$10,244.79
7284	EUR	2016 EAIV	€55,039.15	€2,359.08
7318	EUR	2016 EAIV	€56,173.40	€2,407.70
39407	USD	2017 JOLCO	$287,741.67	$12,388.94
7887	USD	2017 JOLCO	$171,855.01	$7,177.71
7928	USD	2017 JOLCO	$171,855.01	$7,239.10
65315	USD	2018 JOLCO	$232,560.00	$8,677.12
8300	USD	2018 JOLCO	$155,932.99	$7,052.97
3988	USD	2019 JOLCO	$81,879.80	$1,949.62
3992	USD	2019 JOLCO	$81,879.80	$1,940.38
4281	USD	2019 JOLCO	$69,502.09	$2,878.03
4284	USD	2019 JOLCO	$69,502.09	$2,882.59
	USD	**Grand Total**	**$1,827,083.66**	**$78,991.37**
	EUR	**Grand Total**	**€111,212.55**	**€4,766.78**

III. Reservation of Rights

23. Right to Amend. Burnham expressly reserves the right to amend or supplement the Claims to correct, clarify, explain, expand, supplement or add to any portion of the Claims asserted herein, or otherwise, to both increase the dollar amounts of such Claims and provide additional information and documentation as is necessary to pursue these and such additional claims as are, or may be, held by Burnham, including, without limitation, the right to amend the Claims in the event an objection is made against any of the Claims or a claim is asserted against Burnham. Moreover, Burnham specifically reserves the right to conduct discovery with respect to this matter in accordance with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

24. No Admission. Nothing contained in the Claims shall be deemed an admission by Burnham. Burnham expressly reserves the right to withdraw the Claims as if it had never been filed.

25. Additional Reservations. In addition, the filing of these Claims is not intended, and shall not be deemed or construed as: (a) consent by Burnham to the jurisdiction of the Bankruptcy Court or any other court for any purpose other than with respect to issues directly related to the claims asserted in the Claims; (b) a waiver or release of any right of Burnham to have all disputes with the Debtor resolved through arbitration as may be provided in the documentation governing the Claims, notwithstanding whether or not such matters are designated as "core proceedings" pursuant to 28 U.S.C. § 157(b)(2); (c) consent by Burnham to a trial in the Bankruptcy Court or in any other court of any proceeding as to any and all matters so triable herein or in any case, controversy, or proceeding related hereto, pursuant to 28 U.S.C. § 157 or otherwise; (d) a waiver or release of the right of Burnham to have any and all final orders in any and all non-core matters

or proceedings entered only after de novo review by the United States District Court Judge; (e) a waiver or release of any right which Burnham may have to a jury trial; (f) a waiver of the right to move to withdraw the reference in respect of the subject matter of the Claims, any objection thereto or other proceeding which may be commenced in the Chapter 11 Cases against or otherwise involving Burnham; (g) an election of remedies; or (h) an admission of personal jurisdiction.

IV. Notices Regarding the Claim

26. All notices and correspondence with respect to the Claims (and, if filed, any objections thereto) must be sent to Burnham, and its counsel, at the following addresses:

BURNHAM STERLING AND COMPANY LLC
29 River Road
Suite 102
Cos Cob, CT 06807

With a copy to:

Jason Kaplan
Matthew Kremer
O'MELVENY AND MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036

Furthermore, designation of Jason Kaplan, Esq. and Matthew Kremer, Esq. of O'Melveny and Myers LLP ("**O'Melveny**") to receive all notices and correspondence related to the Claims shall not be construed as an appointment of Jason Kaplan, Esq., Matthew Kremer, Esq. and/or O'Melveny as authorized agents of Burnham, either expressly or impliedly, for purposes of receiving service of process pursuant to Rule 4 of the Federal Rules of Civil Procedure made applicable pursuant to Federal Rules of Bankruptcy Procedure 7004 or other applicable law.

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK	PROOF OF ADMINISTRATIVE CLAIM

THIS FORM SHOULD NOT BE USED FOR CLAIMS EXCLUDED BY SAID NOTICE NOR SHOULD IT BE USED FOR ANY CLAIMS THAT ARE NOT OF A KIND AND ENTITLED TO PRIORITY IN ACCORDANCE WITH 11 U.S.C. §§ 503(b) AND 507(a)(2), IT SHOULD NOT BE USED BY ANY PERSON ASSERTING CLAIMS PURSUANT TO SECTION 503(B)(9) OF THE BANKRUPTCY CODE.

Fill in this information to identify the case (Select only one Debtor per claim form):

☐ Aero Transporte de Carga Unión, S.A. de C.V. (Case No. 20-11140)	☐ Aeroinversiones de Honduras, S.A. (Case No. 20-11141)	☐ Aerovías del Continente Americano S.A. Avianca (Case No. 20-11134)	☐ Airlease Holdings One Ltd. (Case No. 20-11142)	☐ America Central (Canada) Corp. (Case No. 20-11143)
☐ America Central Corp. (Case No. 20-11144)	☐ AV International Holdco S.A. (Case No. 20-11145)	☐ AV International Holdings S.A. (Case No. 20-11146)	☐ AV International Investments S.A. (Case No. 20-11147)	☐ AV International Ventures S.A. (Case No. 20-11148)
☐ AV Investments One Colombia S.A.S. (Case No. 20-11135)	☐ AV Investments Two Colombia S.A.S. (Case No. 20-11136)	☐ AV Taca International Holdo S.A. (Case No. 20-11149)	☐ Avianca Costa Rica S.A. (Case No. 20-11150)	☐ Avianca Holdings S.A. (Case No. 11133)
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☐ Avifreight Holding Mexico, S.A.P.I. de C.V. (Case No. 20-11155)	☐ C.R. International Enterprises, Inc. (Case No. 20-11156)	☐ Grupo Taca Holdings Limited (Case No. 20-11157)	☐ International Trade Marks Agency Inc. (Case No. 20-11158)	☐ Inversiones del Caribe, S.A. (Case No. 20-11159)
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☐ Ronair N.V. (Case No. 20-11164)	☐ Servicio Terrestre, Aéreo y Rampa S.A. (Case No. 20-11165)	☐ Servicios Aeroportuarios Integrados SAI S.A.S. (Case No. 20-11138)	☐ Taca de Honduras, S.A. de C.V. (Case No. 20-11166)	☐ Taca de México, S.A. (Case No. 20-11167)
☑ Taca International Airlines S.A. (Case No. 20-11168)	☐ Taca S.A. (Case No. 20-11169)	☐ Tampa Cargo S.A.S. (Case No. 20-11139)	☐ Technical and Training Services, S.A. de C.V. (Case No. 20-11170)	☐ AV Loyalty Bermuda Ltd. (Case No. 20-12255)
☐ Aviacorp Enterprises S.A. (Case No. 20-12256)	☐	☐	☐	☐

Name of Creditor
(The person or entity to whom the debtor owes money or property)

Babcock and Brown Securities LLC
f/k/a Burnham Sterling Securities LLC

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your administrative expense claim. Attach copy of statement giving particulars.

Check here if this claim:
☐ replaces or ☐ amends a previously filed administrative expense claim.

Claim Number (if known):

Dated:

Name and Addresses Where Notices Should be Sent:

Babcock and Brown Securities LLC
f/k/a Burnham Sterling Securities LLC
29 River Road
Suite 102
Cos Cob, CT 06807

Name and Addresses Where Payment Should be Sent (if different):

1. BASIS FOR CLAIM:

☐ Goods sold ☑ Services performed ☐ Personal Injury/Wrongful Death ☐ Wages (Dates):_____

☐ Money loaned ☐ Taxes ☐ Retiree Benefits as Defined in 11 U.S.C. § 1114(a)

☐ Other (Specify): _____

2. DESCRIPTION OF CLAIM (IF KNOWN): See Addendum

3. TOTAL AMOUNT OF CLAIM: $ See Addendum (Total)

4. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor. 5. SUPPORTING DOCUMENTS: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. Do not send original documents. If the documents are not available, explain. If the documents are voluminous, attach a summary. The Debtors may request full copies of your supporting documentation to substantiate the claim. 6. TIME-STAMPED COPY: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.	THIS SPACE IS FOR COURT USE ONLY
Date: August 23, 2021	Sign and print the name and title, if any, of the creditor or other person authorized to file this Claim (attach copy of proof of attorney, if any) Joon-Ho Lee Authorized Signatory

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AUG 2 3 2021
KURTZMAN CARSON CONSULTANTS

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

ADDENDUM TO PROOF OF CLAIM OF
BABCOCK & BROWN SECURITIES LLC

Babcock and Brown Securities LLC f/k/a Burnham Sterling Securities LLC ("**Babcock**"), an unregistered entity providing financial advisory services, asserts the following claims (the "**Claims**") against Avianca Holdings S.A. and its debtor-affiliates (collectively, the "**Debtors**") in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**"), and respectfully states as follows:

I. Background

1. Commencement of the Chapter 11 Cases. On May 10, 2020 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States

[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. International 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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); AV Loyalty Bermuda Ltd. (N/A); Aviacorp Enterprises S.A. (N/A). The Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá D.C., Colombia.

Code, as amended (the "**Bankruptcy Code**"), in the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**").

2. Debtors-in-Possession. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession under Bankruptcy Code sections 1107(a) and 1108.

3. Joint Administration. The Chapter 11 Cases were consolidated for procedural purposes only and are being jointly administered under case number 20-11133 (MG).

4. Bar Date. On October 29, 2020, the Debtors filed the *Notice of Debtors' Application for an Order (I) Establishing Bar Dates for Filing Proofs of Claim; (II) Approving Proof of Claim Forms, Bar Date Notices, and Mailing and Publication Procedures; (III) Implementing Uniform Procedures Regarding 503(b)(9) Claims; (IV) Providing Certain Supplemental Relief* [Docket No. 1138] (the "**Bar Date Motion**"). On November 16, 2020, the Bankruptcy Court granted the *Order (I) Establishing Bar Dates for Filing Proofs of Claim, (II) Approving Proof of Claim Forms, Bar Date Notices, and Mailing and Publication Procedures, (III) Implementing Uniform Procedures Regarding 503(b)(9) Claims, and (IV) Providing Certain Supplemental Relief* [Docket No. 1180] approving the relief sought in the Bar Date Motion and establishing January 20, 2021 at 11:59 p.m. (PT) as the bar date for filing proofs of claims in the Chapter 11 Cases for general creditors (the "**Bar Date**"). On January 20, 2021, Babcock timely filed proof of claim number 2057 by the Bar Date (the "**Prepetition Claims**"). The filing of these Claims is not intended to, and does not, amend the Prepetition Claims filed by Babcock.

5. Rejection Orders. To date, the Bankruptcy Court has entered six orders that impact Babcock (each, a "**Rejection Order**" and collectively, the "**Rejection Orders**"), which include:

- *Order Authorizing the Debtors to (I) Ener 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 [Docket No. 1929], as subsequently modified by the *Order Authorizing the Debtors to (I) Enter Into New Aircraft Lease and (II) Reject Pre-Petition Aircraft Lease (MSN 8300) and Certain Related Agreements*, [Docket No. 2002];

- *Order Authorizing the Debtors 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* [Docket No. 2004];
- *Order Authorizing the Debtors 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)* [Docket No. 2015];
- *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* [Docket No. 2016]; and
- *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* [Docket No. 2017].

6. Pursuant to the Rejection Orders, Babcock has thirty days from the date of each Rejection Order to file a new claim or amend a previously filed claim against any of the Debtors, for "damages based upon or resulting from the assumption, rejection or amendment of any unexpired leases or subleases related to each of the transactions." Babcock does not believe that the thirty day deadline imposed by the Rejection Orders applies to the filing of administrative expense claims—which are not claims currently subject to any bar date and do not arise from the rejection of the applicable agreements. However, for the avoidance of doubt, Babcock has complied with such 30 day deadline, but reserves all rights to amend, supplement, or modify these Claims.

7. Necessity of Addendum. This addendum is annexed to the official administrative proof of claim form that set forth a summary of Babcock's Claims against the Debtors. This addendum provides the parties in interest with relevant information and a description of the Claim.

8. Supporting Documentation. The documentation supporting these Claims are voluminous and may already be in the Debtors' possession. Nonetheless, such documentation is available upon request.

II. The Claims

A. The Personal Property Leases

9. The Debtors began contracting with Babcock in 2014 to arrange the financing and leasing of certain aircraft in exchange for certain fees (such services the "**Initiator Services**" and such fees the "**Initiator Fees**").

10. Babcock has not been paid the Initiator Fees for the Initiator Services the Debtors benefited from since the Petition Date.

11. As a result, Babcock files these Claims asserting any and all of its rights to Initiator Fees and other fees, remedies, damages, indemnities, and other claims (including contingent or unliquidated claims) against the Debtors arising on or after the Petition Date under, related to, or due under the following contracts (the "**Contracts**" together with the guarantees, lease agreements, sublease agreements, and any and all other related agreements, amendments or supplements thereto or modifications thereof, and any additional documents, agreements or instruments delivered in connection with any such related agreement, amendment, supplement or modification):

> That certain Framework Agreement, dated as of July 30, 2015, among Avianca EAIV 2015-1 Trust and Avianca EAIV 2015-2 Trust, as Borrowers, Octo-Aircraft Leasing LLC, as Owner Participant, Avianca Holdings S.A., as Guarantor, the purchasers identified on Schedule I thereto, Wells Fargo Bank, National Association, as Security Trustee, with Babcock & Brown Securities LLC f/k/a Burnham Sterling Securities LLC and Burnham Sterling & Company LLC as Initiators (the "**2015 EAIV Financing**").

12. The Contracts provide that the Debtors have an unconditional obligation to pay Babcock (which is referred to as the "Initiator" in the relevant agreements) its compensation through the payment of the Initiator Fee on a schedule set forth in Contracts.

> the Owner agrees to pay to the Security Trustee, for account of the Initiator, as and when due, the Initiator Fee.

See e.g., Section 12.15 of that certain Omnibus Amendment No. 1, dated July 30, 2015 of that certain Note Purchase Agreement [Avianca EAIV 2015-1 Trust], dated July 30, 2015, between Wells Fargo Bank Northwest, National Association, as Owner, Avianca Holdings S.A., as Guarantor, and Aerovías Del Continente Americano S.A., as Lessee (the "**2015 EAIV Personal Property Trust Amendment**").

13. Babcock is designated as an express third-party beneficiary under the Contracts entitled to enforce its rights under such agreements:

> The Initiator shall be an express third party beneficiary of (i) the provisions of this Agreement and any other Basic Document that relate to the obligation of the Obligors to pay and the time and manner of payment of the Initiator Fee, any applicable Accelerated Initiator Fee and any applicable Initiator Prepayment Fee (including, without limitation, the obligation of the Lessee under the Lease and/or the Guarantor under the Guaranty, as the case may be, to pay the Initiator Fee, any applicable Accelerated Initiator Fee and any applicable Initiator Prepayment Fee as Supplemental Rent) . . . .

See e.g., Section 12.15 of that certain 2015 EAIV Personal Property Trust Amendment.

14. As set forth below, these Claims are entitled to an administrative expense status under both Bankruptcy Code sections 365(d)(5) and 503(b).

B. Bankruptcy Code Section 365(d)(5)

15. Bankruptcy Code section 365(d)(5) obligates a debtor, after sixty days from its petition date, to "timely perform ***all of the obligations***" on leases of personal property "until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title. . . ." Consequently,

pursuant to Bankruptcy Code section 365(d)(5), an administrative claim arises with respect to all unperformed obligations accruing after the first sixty days of the bankruptcy case. And administrative claims arising under a personal property lease under 365(d)(5) "are based upon the terms of the lease and not the benefit to the bankruptcy estate." *In re Lakeshore Const. Co. of Wolfeboro, Inc.*, 390 B.R. 751 (Bankr. D.N.H. 2008); *In re Wyoming Sand and Stone Co.*, 393 B.R. 359, 361 (M.D. Pa. 2008) ("Benefit to the estate is not an issue under § 365(d)(5), and, in the absence of intervening action by the Debtor, the obligation to perform under the lease remains.").

16. Here, the applicable Contracts obligate the payment of Babcock's fees and indisputably fall within the contractual obligations that give rise to an administrative expense claim under Bankruptcy Code section 365(d)(5). *Wyoming*, 393 B.R. at 361 (concluding that no showing of a benefit to the estate is required and "the Court has little discretion but to award [the applicable creditor] an allowance for that time period from the 60th day after filing until surrender of the equipment . . ."); *see also In re Hayes Lemmerz Int'l, Inc.*, 340 B.R. 461, 472 (Bankr. D. Del. 2006) ("Unlike parties claiming administrative expense status under section 503(b), lessors claiming under section 365(d)(10) need not prove they conferred any benefit upon the estate."); *In re Glob. Container Lines Ltd.*, No. 09-78585 (AST), 2010 Bankr. LEXIS 5596, at *8 (Bankr. E.D.N.Y. Feb. 25, 2010) (noting that section 365(d)(5) "expressly overrides Section 503(b)(1), again, unless the equities require otherwise," requirement of showing a benefit to the estate).

17. Here, the sixtieth day from the Petition Date was July 9, 2020. The Rejection Orders are not yet effective, and will only become effective upon the Debtors entry into a new aircraft lease and new guarantee for each aircraft (the "**Rejection Date**"). Thus, Babcock's Claims continue to accrue until such Rejection Date occurs.

18. Accordingly, for the foregoing reasons, Bankruptcy Code section 365(d)(5) requires the Debtors to pay Babcock administrative fees under the Contracts from the sixtieth day of these Chapter 11 Cases through the Rejection Date.

C. Section 503(b) of the Bankruptcy Code

19. In addition, Babcock is entitled to an administrative expense claim from the Petition Date through the Rejection Date pursuant to Bankruptcy Code section 503(b)(1). Bankruptcy Code section 503(b)(1) provides that the actual, necessary costs and expenses of preserving the Debtors' estate constitute administrative expenses, and that a party may file a request for payment of administrative expenses. 11 U.S.C. § 503(b)(1). Under section 503, the debtor must pay the counterparty to a lease agreement the reasonable administrative expense for the use of leased property that has benefited the bankruptcy estate. *See In re Patient Education Media, Inc.*, 221 B.R. 97, 101 (Bankr. S.D.N.Y. 1998); *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 531 (1984) ("If the debtor-in-possession elects to continue to receive benefits from the executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services . . . ."). The Second Circuit has recognized the presumption that the payment terms of a lease are a reasonable measure of the administrative expenses to be paid by a debtor. *Farber v. Wards Co., Inc.*, 825 F.2d 684, 689-90 (2d Cir. 1987).

20. Here, the use of the leased aircraft pursuant to the terms of the Contracts by the Debtors after the commencement of the Chapter 11 Cases provided a clear and undisputed benefit to the Debtors' estate and Babcock's Claims arising under such Contracts constitutes an administrative expense claim allowable under Bankruptcy Code section 503(b).

D. Claims Amount

21. For the foregoing reasons, pursuant to Bankruptcy Code sections 365(d)(5) and 503(b)(1) the following amounts must be paid as administrative expenses as such obligations arise under the Contracts.

Babcock & Brown Securities LLC				
MSN	**Currency**	**Description**	**(A)**	**(B)**
			5/10/2020 - 8/23/2021	Post-Petition Default Interest
6617	USD	2015 EAIV-1	$27,356.00	$1,374.44
6692	USD	2015 EAIV-1	$32,837.15	$3,211.31
6739	USD	2015 EAIV-1	$32,837.15	$1,686.25
37507	USD	2015 EAIV-1	$87,166.30	$4,363.88
6767	USD	2015 EAIV-2	$38,487.40	$1,952.62
6511	USD	2015 EAIV-2	$38,487.40	$1,907.63
37508	USD	2015 EAIV-2	$87,166.30	$4,463.17
6746	USD	2015 EAIV-2	$32,837.15	$1,670.11
	USD	**Grand Total**	**$377,174.85**	**$20,629.40**

III. Reservation of Rights

22. Right to Amend. Babcock expressly reserves the right to amend or supplement the Claims to correct, clarify, explain, expand, supplement or add to any portion of the Claims asserted herein, or otherwise, to both increase the dollar amounts of such Claims and provide additional information and documentation as is necessary to pursue these and such additional claims as are, or may be, held by Babcock, including, without limitation, the right to amend the Claims in the event an objection is made against any of the Claims or a claim is asserted against Babcock. Moreover, Babcock specifically reserves the right to conduct discovery with respect to

this matter in accordance with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

23. No Admission. Nothing contained in these Claims shall be deemed an admission by Babcock. Babcock expressly reserves the right to withdraw the Claims as if it had never been filed.

24. Additional Reservations. In addition, the filing of these Claims is not intended, and shall not be deemed or construed as: (a) consent by Babcock to the jurisdiction of the Bankruptcy Court or any other court for any purpose other than with respect to issues directly related to the Claims asserted in the Claims; (b) a waiver or release of any right of Babcock to have all disputes with the Debtor resolved through arbitration as may be provided in the documentation governing the Claims, notwithstanding whether or not such matters are designated as "core proceedings" pursuant to 28 U.S.C. § 157(b)(2); (c) consent by Babcock to a trial in the Bankruptcy Court or in any other court of any proceeding as to any and all matters so triable herein or in any case, controversy, or proceeding related hereto, pursuant to 28 U.S.C. § 157 or otherwise; (d) a waiver or release of the right of Babcock to have any and all final orders in any and all non-core matters or proceedings entered only after de novo review by the United States District Court Judge; (e) a waiver or release of any right which Babcock may have to a jury trial; (f) a waiver of the right to move to withdraw the reference in respect of the subject matter of these Claims, any objection thereto or other proceeding which may be commenced in the Chapter 11 Cases against or otherwise involving Babcock; (g) an election of remedies; or (h) an admission of personal jurisdiction.

IV. Notices Regarding the Claim

25. All notices and correspondence with respect to the Claims (and, if filed, any objections thereto) must be sent to Babcock, and its counsel, at the following addresses:

BABCOCK & BROWN SECURITIES LLC
29 River Road
Suite 102
Cos Cob, CT 06807

With a copy to:

Jason Kaplan
Matthew Kremer
O'MELVENY AND MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036

Furthermore, designation of Jason Kaplan, Esq. and Matthew Kremer, Esq. of O'Melveny and Myers LLP ("**O'Melveny**") to receive all notices and correspondence related to the Claims shall not be construed as an appointment of Jason Kaplan, Esq., Matthew Kremer, Esq. and/or O'Melveny as authorized agents of Babcock, either expressly or impliedly, for purposes of receiving service of process pursuant to Rule 4 of the Federal Rules of Civil Procedure made applicable pursuant to Federal Rules of Bankruptcy Procedure 7004 or other applicable law.

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK	PROOF OF ADMINISTRATIVE CLAIM

THIS FORM SHOULD NOT BE USED FOR CLAIMS EXCLUDED BY SAID NOTICE NOR SHOULD IT BE USED FOR ANY CLAIMS THAT ARE NOT OF A KIND AND ENTITLED TO PRIORITY IN ACCORDANCE WITH 11 U.S.C. §§ 503(b) AND 507(a)(2). IT SHOULD NOT BE USED BY ANY PERSON ASSERTING CLAIMS PURSUANT TO SECTION 503(B)(9) OF THE BANKRUPTCY CODE.

Fill in this information to identify the case (Select only one Debtor per claim form):

☐ Aero Transporte de Carga Unión, S.A. de C.V. (Case No. 20-11140)	☐ Aeroinversiones de Honduras, S.A. (Case No. 20-11141)	☐ Aerovías del Continente Americano S.A. Avianca (Case No. 20-11134)	☐ Airlease Holdings One Ltd. (Case No. 20-11142)	☐ America Central (Canada) Corp. (Case No. 20-11143)
☐ America Central Corp. (Case No. 20-11144)	☐ AV International Holdco S.A. (Case No. 20-11145)	☐ AV International Holdings S.A. (Case No. 20-11146)	☐ AV International Investments S.A. (Case No. 20-11147)	☐ AV International Ventures S.A. (Case No. 20-11148)
☐ AV Investments One Colombia S.A.S. (Case No. 20-11135)	☐ AV Investments Two Colombia S.A.S. (Case No. 20-11136)	☐ AV Taca International Holdo S.A. (Case No. 20-11149)	☐ Avianca Costa Rica S.A. (Case No. 20-11150)	☐ Avianca Holdings S.A. (Case No. 11133)
☐ Avianca Leasing, LLC (Case No. 20-11151)	☐ Avianca, Inc. (Case No. 20-11132)	☐ Avianca-Ecuador S.A. (Case No. 20-11152)	☐ Aviaservicios, S.A. (Case No. 20-11153)	☐ Aviateca, S.A. (Case No. 20-11154)
☐ Avifreight Holding Mexico, S.A.P.I. de C.V. (Case No. 20-11155)	☐ C.R. International Enterprises, Inc. (Case No. 20-11156)	☐ Grupo Taca Holdings Limited (Case No. 20-11157)	☐ International Trade Marks Agency Inc. (Case No. 20-11158)	☐ Inversiones del Caribe, S.A. (Case No. 20-11159)
☐ Isleña de Inversiones, S.A. de C.V. (Case No. 20-11160)	☐ Latin Airways Corp. (Case No. 20-11161)	☐ Latin Logistics, LLC (Case No. 20-11162)	☐ Nicaragüense de Aviación, Sociedad Anónima (Case No. 20-11163)	☐ Regional Express Américas S.A.S. (Case No. 20-11137)
☐ Ronair N.V. (Case No. 20-11164)	☐ Servicio Terrestre, Aeréo y Rampa S.A. (Case No. 20-11165)	☐ Servicios Aeroportuarios Integrados SAI S.A.S. (Case No. 20-11138)	☐ Taca de Honduras, S.A. de C.V. (Case No. 20-11166)	☐ Taca de México, S.A. (Case No. 20-11167)
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☐ Aviacorp Enterprises S.A. (Case No. 20-12256)	☐	☐	☐	☐

Name of Creditor (The person or entity to whom the debtor owes money or property)		Check here if this claim:
Burnham Sterling and Company LLC	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your administrative expense claim. Attach copy of statement giving particulars.	☐ replaces or ☐ amends a previously filed administrative expense claim.
Name and Addresses Where Notices Should be Sent: Burnham Sterling and Company LLC 29 River Road Suite 102 Cos Cob, CT 06807	Name and Addresses Where Payment Should be Sent (if different):	

1. BASIS FOR CLAIM:

☐ Goods sold ☑ Services performed ☐ Personal Injury/Wrongful Death ☐ Wages (Dates):__________

☐ Money loaned ☐ Taxes ☐ Retiree Benefits as Defined in 11 U.S.C. § 1114(a)

☐ Other (Specify): ______________________________

2. DESCRIPTION OF CLAIM (IF KNOWN): See Addendum

3. TOTAL AMOUNT OF CLAIM: $ See Addendum (Total)

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KURTZMAN CARSON CONSULTANTS

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4. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor. 5. SUPPORTING DOCUMENTS: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. Do not send original documents. If the documents are not available, explain. If the documents are voluminous, attach a summary. The Debtors may request full copies of your supporting documentation to substantiate the claim. 6. TIME-STAMPED COPY: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.	THIS SPACE IS FOR COURT USE ONLY
Date: August 23, 2021	Sign and print the name and title, if any, of the creditor or other person authorized to file this Claim (attach copy of proof of attorney, if any)

Joon-Ho Lee
Authorized Signatory

RECEIVED
AUG 2 3 2021
KURTZMAN CARSON CONSULTANTS

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

ADDENDUM TO PROOF OF CLAIM OF
BURNHAM STERLING AND COMPANY LLC

Burnham Sterling and Company LLC ("**Burnham**"), an unregistered entity providing financial advisory services, asserts the following claims (the "**Claims**") against Avianca Holdings S.A. and its debtor-affiliates (collectively, the "**Debtors**") in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**"), and respectfully states as follows:

I. Background

1. Commencement of the Chapter 11 Cases. On May 10, 2020 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States

[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. International 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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); AV Loyalty Bermuda Ltd. (N/A); Aviacorp Enterprises S.A. (N/A). The Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá D.C., Colombia.

Code, as amended (the "**Bankruptcy Code**"), in the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**").

2. Debtors-in-Possession. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession under Bankruptcy Code sections 1107(a) and 1108.

3. Joint Administration. The Chapter 11 Cases were consolidated for procedural purposes only and are being jointly administered under case number 20-11133 (MG).

4. Bar Date. On October 29, 2020, the Debtors filed the *Notice of Debtors' Application for an Order (I) Establishing Bar Dates for Filing Proofs of Claim; (II) Approving Proof of Claim Forms, Bar Date Notices, and Mailing and Publication Procedures; (III) Implementing Uniform Procedures Regarding 503(b)(9) Claims; (IV) Providing Certain Supplemental Relief* [Docket No. 1138] (the "**Bar Date Motion**"). On November 16, 2020, the Bankruptcy Court granted the *Order (I) Establishing Bar Dates for Filing Proofs of Claim, (II) Approving Proof of Claim Forms, Bar Date Notices, and Mailing and Publication Procedures, (III) Implementing Uniform Procedures Regarding 503(b)(9) Claims, and (IV) Providing Certain Supplemental Relief* [Docket No. 1180] approving the relief sought in the Bar Date Motion and establishing January 20, 2021 at 11:59 p.m. (PT) as the bar date for filing proofs of claims in the Chapter 11 Cases for general creditors (the "**Bar Date**"). On January 20, 2021, Burnham timely filed proof of claim number 2055 by the Bar Date (the "**Prepetition Claims**"). The filing of these Claims is not intended to, and does not, amend the Prepetition Claims filed by Burnham.

5. Rejection Orders. To date, the Bankruptcy Court has entered six orders that impact Burnham (each, a "**Rejection Order**" and collectively, the "**Rejection Orders**"), which include:

- *Order Authorizing the Debtors to (I) Ener 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 [Docket No. 1929], as subsequently modified by the *Order Authorizing the Debtors to (I) Enter Into New Aircraft Lease and (II) Reject Pre-Petition Aircraft Lease (MSN 8300) and Certain Related Agreements*, [Docket No. 2002];

- *Order Authorizing the Debtors 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* [Docket No. 2004];
- *Order Authorizing the Debtors 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)* [Docket No. 2015];
- *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* [Docket No. 2016]; and
- *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* [Docket No. 2017].

6. Pursuant to the Rejection Orders, Burnham has thirty days from the date of each Rejection Order to file a new claim or amend a previously filed claim against any of the Debtors, for "damages based upon or resulting from the assumption, rejection or amendment of any unexpired leases or subleases related to each of the transactions." Burnham does not believe that the thirty day deadline imposed by the Rejection Orders applies to the filing of administrative expense claims—which are not claims currently subject to any bar date and do not arise from the rejection of the applicable agreements. However, for the avoidance of doubt, Burnham has complied with such 30 day deadline, but reserves all rights to amend, supplement, or modify these Claims.

7. Necessity of Addendum. This addendum is annexed to the official administrative proof of claim form that set forth a summary of Burnham's Claims against the Debtors. This addendum provides the parties in interest with relevant information and a description of the Claims.

8. Supporting Documentation. The documentation supporting these Claims are voluminous and may already be in the Debtors' possession.

II. The Claims

A. The Personal Property Leases

9. The Debtors began contracting with Burnham in 2014 to arrange the financing and leasing of certain aircraft in exchange for certain fees (such services the "**Initiator Services**" and such fees the "**Initiator Fees**").

10. Burnham has not been paid the Initiator Fees for the Initiator Services the Debtors benefited from since the Petition Date.

11. As a result, Burnham files these Claims asserting any and all of its rights to Initiator Fees and other fees, remedies, damages, indemnities, and other claims (including contingent or unliquidated claims) against the Debtors arising on or after the Petition Date under, related to, or due under the following contracts (the "**Contracts**" together with the guarantees, Lease Agreements (as defined below), and any and all other related agreements, amendments or supplements thereto or modifications thereof, and any additional documents, agreements or instruments delivered in connection with any such related agreement, amendment, supplement or modification):

- That certain Framework Agreement, dated as of July 30, 2015, among Avianca EAIV 2015-1 Trust and Avianca EAIV 2015-2 Trust, as Borrowers, Octo-Aircraft Leasing LLC, as Owner Participant, Avianca Holdings S.A., as Guarantor, the purchasers identified on Schedule I thereto, Wells Fargo Bank, National Association, as Security Trustee, with Babcock & Brown Securities LLC f/k/a Burnham Sterling Securities LLC and Burnham Sterling & Company LLC as Initiators (the "**2015 EAIV Financing**");
- That certain Loan Agreement, dated as of December 14, 2016, among Avianca EAIV 2016-3 Trust, as Borrower, Uni-Aircraft Leasing LLC, as Owner Participant, Avianca Holdings S.A., as Guarantor, the lenders identified on Schedule I thereto, and Wilmington Trust Company, as Security Trustee, with Burnham Sterling & Company LLC as Initiator (the "**37511 Financing**");

- That certain Loan Agreement, dated as of August 24, 2016, among Avianca EAIV 2016-1 Trust, as Borrower, Tri-Aircraft Leasing II LLC, as Owner Participant, Avianca Holdings S.A., as Guarantor, the lenders identified on Schedule I thereto, and Wilmington Trust Company, as Security Trustee, with Burnham Sterling & Company LLC as Initiator (the "**7284 Financing**");

- That certain Loan Agreement, dated as of October 14, 2016, among Avianca EAIV 2016-1 Trust, as Borrower, Tri-Aircraft Leasing II LLC, as Owner Participant, Avianca Holdings S.A., as Guarantor, the lenders identified on Schedule I thereto, and Wilmington Trust Company, as Security Trustee, with Burnham Sterling & Company LLC as Initiator (the "**7318 Financing**");

- That certain Loan Facility Agreement, dated as of October 26, 2017, among FLIP No. 168 Co., Ltd. & FLIP No. 169 Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as the Original Lenders, Sumitomo Mitsui Banking Corporation, New York Branch, as Facility Agent, and Wilmington Trust, National Association, as Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**39407 Financing**");

- That certain Loan Facility Agreement, dated November 30, 2017, among San Agustin Leasing Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Sumitomo Mitsui Banking Corporation, New York Branch, as Facility Agent and Security Agent, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**7887 Financing**");

- That certain Loan Facility Agreement, dated December 4, 2017, among Los Katios Leasing Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Sumitomo Mitsui Banking Corporation, New York Branch, as Facility Agent and Security Agent, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**7928 Financing**");

- That certain ECA Loan Agreement, dated September 25, 2018, among Malpelo Leasing Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original ECA Lenders, ING Capital LLC, as ECA Facility Agent, and Wilmington Trust SP Services (Dublin) Limited, as Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**65315 Financing**");

- That certain Loan Facility Agreement, dated July 24, 2018, among Condor Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Bank of Utah, as Facility Agent and Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**8300 Financing**");

- That certain Loan Facility Agreement, dated April 24, 2019, among JPA No. 151 Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Woori Bank, Tokyo Branch, as Facility Agent and Security Trustee, with

Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**3988 Financing**");

- That certain Loan Facility Agreement, dated April 25, 2019, among JPA No. 152 Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Woori Bank, Tokyo Branch, as Facility Agent and Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**3992 Financing**");

- That certain Loan Facility Agreement, dated April 23, 2019, among JPA No. 159 Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Wilmington Trust Company, as Facility Agent and Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**4281 Financing**"); and

- That certain Loan Facility Agreement, dated April 24, 2019, among JPA No. 160 Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Wilmington Trust Company, as Facility Agent and Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**4284 Financing**").

12. The Contracts provide that the Debtors have an unconditional obligation to pay Burnham (which is referred to as the "Initiator" in the relevant agreements), Burnham's compensation (*i.e.*, the "Initiator Compensation") through the payment of "Additional Rental Payments" on a schedule set forth in the various lease agreements entered into by the Debtors (each applicable lease agreement or sublease agreement, the "**Lease Agreements**"):

> The Lessee shall on each Additional Rental Payment Date pay to the Lessor at the Initiator Account, by way of additional rental payment, instalments of the Initiator Compensation . . . . The Sub-Lessee acknowledges that the Initiator has already provided services prior to the Delivery Date, and accordingly agrees that the Sub-Lessee's obligations to pay the Initiator Fees hereunder are unconditional.

See e.g., Section 5.2 of that certain Amended and Restated Aircraft Lease Agreement (MSN 3992), dated April 25, 2019, between Aircol 7, as Lessor, and Aerovías Del Continente Americano S.A., as Lessee (the "**MSN 3992 Personal Property Contract**").

13. Burnham is expressly authorized to enforce its right to payment under the Lease Agreements against the Debtors:

> The agreement as to the payment of the Initiator Compensation under this Lease is a bilateral matter as between the Lessee and the Initiator, and no consent or act is required by the Lessor for the Initiator to enforce its rights hereunder, or for the Lessee and the Initiator to agree any amendment or variation of any payment of Initiator Compensation.

See Section 5.2(f) of that certain MSN 3992 Personal Property Contract.

14. Burnham is also designated as an express third-party beneficiary under the Lease Agreements, entitled to enforce its rights under such agreements:

> The Initiator shall be entitled to enforce its rights against the Lessee and Lessor under and in connection with this Clause 5.2 as a third party, notwithstanding that the Initiator is not a signatory to this Agreement, pursuant to the Contracts (Rights of Third Parties) Act 1999. For the avoidance of doubt, the Initiator shall have the right to bring a claim directly against the Lessee and/or the Guarantor for any Initiator Compensation and any other amounts payable to the Initiator that become due and unpaid under this Agreement, and such right shall not be reduced, diminished or otherwise affected in any respect detrimental to the Initiator as a result of Initiator not being a party to this Agreement. Any obligation in connection with Initiator's deficiency claim against the Lessee (or Guarantor) shall only be released upon actual receipt by Initiator of the relevant amounts. Any amounts payable by the Lessee to the Initiator in respect of such deficiency claim shall be paid by Lessee (or Guarantor) directly to the Initiator.

See e.g., Section 5.2(j) of that certain MSN 3992 Personal Property Contract.

15. As set forth below, the Claims are entitled to an administrative expense status under both Bankruptcy Code sections 365(d)(5) and 503(b).

B. Bankruptcy Code Section 365(d)(5)

16. Bankruptcy Code section 365(d)(5) obligates a debtor, after sixty days from its petition date, to "timely perform ***all of the obligations***" on leases of personal property "until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title. . . ." Consequently, pursuant to Bankruptcy Code section 365(d)(5), an administrative claim arises with respect to all unperformed obligations accruing after the first sixty days of the bankruptcy case. And

administrative claims arising under a personal property lease under 365(d)(5) "are based upon the terms of the lease and not the benefit to the bankruptcy estate." *In re Lakeshore Const. Co. of Wolfeboro, Inc.*, 390 B.R. 751 (Bankr. D.N.H. 2008); *In re Wyoming Sand and Stone Co*., 393 B.R. 359, 361 (M.D. Pa. 2008) ("Benefit to the estate is not an issue under § 365(d)(5), and, in the absence of intervening action by the Debtor, the obligation to perform under the lease remains.").

17. Here, the applicable Lease Agreements obligate the payment of Burnham's fees as "Additional Rent" and indisputably fall within the contractual obligations that give rise to an administrative expense claim under Bankruptcy Code section 365(d)(5). *Wyoming*, 393 B.R. at 361 (concluding that no showing of a benefit to the estate is required and "the Court has little discretion but to award [the applicable creditor] an allowance for that time period from the 60th day after filing until surrender of the equipment . . ."); *see also In re Hayes Lemmerz Int'l, Inc.*, 340 B.R. 461, 472 (Bankr. D. Del. 2006) ("Unlike parties claiming administrative expense status under section 503(b), lessors claiming under section 365(d)(10) need not prove they conferred any benefit upon the estate."); *In re Glob. Container Lines Ltd.*, No. 09-78585 (AST), 2010 Bankr. LEXIS 5596, at *8 (Bankr. E.D.N.Y. Feb. 25, 2010) (noting that section 365(d)(5) "expressly overrides Section 503(b)(1), again, unless the equities require otherwise," requirement of showing a benefit to the estate).

18. Here, the sixtieth day from the Petition Date was July 9, 2020. The Rejection Orders are not yet effective, and will only become effective upon the Debtors entry into a new aircraft lease and new guarantee for each aircraft (the "**Rejection Date**"). Thus, Burnham's Claims continue to accrue until such Rejection Date occurs.

19. Accordingly, for the foregoing reasons, Bankruptcy Code section 365(d)(5) requires the Debtors to pay Burnham administrative fees under the Contracts from the sixtieth day of these Chapter 11 Cases through the Rejection Date.

C. Section 503(b) of the Bankruptcy Code

20. In addition, Burnham is entitled to an administrative expense claim from the Petition Date through the Rejection Date pursuant to Bankruptcy Code section 503(b)(1). Bankruptcy Code section 503(b)(1) provides that the actual, necessary costs and expenses of preserving the Debtors' estate constitute administrative expenses, and that a party may file a request for payment of administrative expenses. 11 U.S.C. § 503(b)(1). Under section 503, the debtor must pay the counterparty to a lease agreement the reasonable administrative expense for the use of leased property that has benefited the bankruptcy estate. *See In re Patient Education Media, Inc.*, 221 B.R. 97, 101 (Bankr. S.D.N.Y. 1998); *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 531 (1984) ("If the debtor-in-possession elects to continue to receive benefits from the executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services . . . ."). The Second Circuit has recognized the presumption that the payment terms of a lease are a reasonable measure of the administrative expenses to be paid by a debtor. *Farber v. Wards Co., Inc.*, 825 F.2d 684, 689-90 (2d Cir. 1987).

21. Here, the use of the leased aircraft pursuant to the terms of the Contracts by the Debtors after the commencement of the Chapter 11 Cases provided a clear and undisputed benefit to the Debtors' estate and Burnham's Claims arising under such Contracts constitutes an administrative expense claim allowable under Bankruptcy Code section 503(b).

D. Claims Amount

22. For the foregoing reasons, pursuant to Bankruptcy Code sections 365(d)(5) and 503(b)(1) the following amounts must be paid as administrative expenses as such obligations arise under the Contracts.

Burnham Sterling & Company LLC				
MSN	**Currency**	**Description**	**(A)**	**(B)**
			5/10/2020 - 8/23/2021	Post-Petition Default Interest
6617	USD	2015 EAIV-1	$24,206.50	$1,193.83
6692	USD	2015 EAIV-1	$29,056.60	$1,469.91
6739	USD	2015 EAIV-1	$29,056.60	$1,452.58
37507	USD	2015 EAIV-1	$77,130.60	$3,795.60
6767	USD	2015 EAIV-2	$34,056.35	$1,689.76
6511	USD	2015 EAIV-2	$34,056.35	$1,665.61
37508	USD	2015 EAIV-2	$77,130.60	$3,848.91
6746	USD	2015 EAIV-2	$29,056.60	$1,443.92
37511	USD	2016 EAIV	$170,625.00	$10,244.79
7284	EUR	2016 EAIV	€55,039.15	€2,359.08
7318	EUR	2016 EAIV	€56,173.40	€2,407.70
39407	USD	2017 JOLCO	$287,741.67	$12,388.94
7887	USD	2017 JOLCO	$171,855.01	$7,177.71
7928	USD	2017 JOLCO	$171,855.01	$7,239.10
65315	USD	2018 JOLCO	$232,560.00	$8,677.12
8300	USD	2018 JOLCO	$155,932.99	$7,052.97
3988	USD	2019 JOLCO	$81,879.80	$1,949.62
3992	USD	2019 JOLCO	$81,879.80	$1,940.38
4281	USD	2019 JOLCO	$69,502.09	$2,878.03
4284	USD	2019 JOLCO	$69,502.09	$2,882.59
	USD	**Grand Total**	**$1,827,083.66**	**$78,991.37**
	EUR	**Grand Total**	**€111,212.55**	**€4,766.78**

III. Reservation of Rights

23. Right to Amend. Burnham expressly reserves the right to amend or supplement the Claims to correct, clarify, explain, expand, supplement or add to any portion of the Claims asserted herein, or otherwise, to both increase the dollar amounts of such Claims and provide additional information and documentation as is necessary to pursue these and such additional claims as are, or may be, held by Burnham, including, without limitation, the right to amend the Claims in the event an objection is made against any of the Claims or a claim is asserted against Burnham. Moreover, Burnham specifically reserves the right to conduct discovery with respect to this matter in accordance with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

24. No Admission. Nothing contained in the Claims shall be deemed an admission by Burnham. Burnham expressly reserves the right to withdraw the Claims as if it had never been filed.

25. Additional Reservations. In addition, the filing of these Claims is not intended, and shall not be deemed or construed as: (a) consent by Burnham to the jurisdiction of the Bankruptcy Court or any other court for any purpose other than with respect to issues directly related to the claims asserted in the Claims; (b) a waiver or release of any right of Burnham to have all disputes with the Debtor resolved through arbitration as may be provided in the documentation governing the Claims, notwithstanding whether or not such matters are designated as "core proceedings" pursuant to 28 U.S.C. § 157(b)(2); (c) consent by Burnham to a trial in the Bankruptcy Court or in any other court of any proceeding as to any and all matters so triable herein or in any case, controversy, or proceeding related hereto, pursuant to 28 U.S.C. § 157 or otherwise; (d) a waiver or release of the right of Burnham to have any and all final orders in any and all non-core matters

or proceedings entered only after de novo review by the United States District Court Judge; (e) a waiver or release of any right which Burnham may have to a jury trial; (f) a waiver of the right to move to withdraw the reference in respect of the subject matter of the Claims, any objection thereto or other proceeding which may be commenced in the Chapter 11 Cases against or otherwise involving Burnham; (g) an election of remedies; or (h) an admission of personal jurisdiction.

IV. Notices Regarding the Claim

26. All notices and correspondence with respect to the Claims (and, if filed, any objections thereto) must be sent to Burnham, and its counsel, at the following addresses:

BURNHAM STERLING AND COMPANY LLC
29 River Road
Suite 102
Cos Cob, CT 06807

With a copy to:

Jason Kaplan
Matthew Kremer
O'MELVENY AND MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036

Furthermore, designation of Jason Kaplan, Esq. and Matthew Kremer, Esq. of O'Melveny and Myers LLP ("**O'Melveny**") to receive all notices and correspondence related to the Claims shall not be construed as an appointment of Jason Kaplan, Esq., Matthew Kremer, Esq. and/or O'Melveny as authorized agents of Burnham, either expressly or impliedly, for purposes of receiving service of process pursuant to Rule 4 of the Federal Rules of Civil Procedure made applicable pursuant to Federal Rules of Bankruptcy Procedure 7004 or other applicable law.

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK	PROOF OF ADMINISTRATIVE CLAIM

THIS FORM SHOULD NOT BE USED FOR CLAIMS EXCLUDED BY SAID NOTICE NOR SHOULD IT BE USED FOR ANY CLAIMS THAT ARE NOT OF A KIND AND ENTITLED TO PRIORITY IN ACCORDANCE WITH 11 U.S.C. §§ 503(b) AND 507(a)(2), IT SHOULD NOT BE USED BY ANY PERSON ASSERTING CLAIMS PURSUANT TO SECTION 503(B)(9) OF THE BANKRUPTCY CODE.

Fill in this information to identify the case (Select only one Debtor per claim form):

☐	Aero Transporte de Carga Unión, S.A. de C.V. (Case No. 20-11140)	☐	Aeroinversiones de Honduras, S.A. (Case No. 20-11141)	☑	Aerovías del Continente Americano S.A. Avianca (Case No. 20-11134)	☐	Airlease Holdings One Ltd. (Case No. 20-11142)	☐	America Central (Canada) Corp. (Case No. 20-11143)
☐	America Central Corp. (Case No. 20-11144)	☐	AV International Holdco S.A. (Case No. 20-11145)	☐	AV International Holdings S.A. (Case No. 20-11146)	☐	AV International Investments S.A. (Case No. 20-11147)	☐	AV International Ventures S.A. (Case No. 20-11148)
☐	AV Investments One Colombia S.A.S. (Case No. 20-11135)	☐	AV Investments Two Colombia S.A.S. (Case No. 20-11136)	☐	AV Taca International Holdo S.A. (Case No. 20-11149)	☐	Avianca Costa Rica S.A. (Case No. 20-11150)	☐	Avianca Holdings S.A. (Case No. 11133)
☐	Avianca Leasing, LLC (Case No. 20-11151)	☐	Avianca, Inc. (Case No. 20-11132)	☐	Avianca-Ecuador S.A. (Case No. 20-11152)	☐	Aviaservicios, S.A. (Case No. 20-11153)	☐	Aviateca, S.A. (Case No. 20-11154)
☐	Avifreight Holding Mexico, S.A.P.I. de C.V. (Case No. 20-11155)	☐	C.R. International Enterprises, Inc. (Case No. 20-11156)	☐	Grupo Taca Holdings Limited (Case No. 20-11157)	☐	International Trade Marks Agency Inc. (Case No. 20-11158)	☐	Inversiones del Caribe, S.A. (Case No. 20-11159)
☐	Isleña de Inversiones, S.A. de C.V. (Case No. 20-11160)	☐	Latin Airways Corp. (Case No. 20-11161)	☐	Latin Logistics, LLC (Case No. 20-11162)	☐	Nicaragüense de Aviación, Sociedad Anónima (Case No. 20-11163)	☐	Regional Express Américas S.A.S. (Case No. 20-11137)
☐	Ronair N.V. (Case No. 20-11164)	☐	Servicio Terrestre, Aeréo y Rampa S.A. (Case No. 20-11165)	☐	Servicios Aeroportuarios Integrados SAI S.A.S. (Case No. 20-11138)	☐	Taca de Honduras, S.A. de C.V. (Case No. 20-11166)	☐	Taca de México, S.A. (Case No. 20-11167)
☐	Taca International Airlines S.A. (Case No. 20-11168)	☐	Taca S.A. (Case No. 20-11169)	☐	Tampa Cargo S.A.S. (Case No. 20-11139)	☐	Technical and Training Services, S.A. de C.V. (Case No. 20-11170)	☐	AV Loyalty Bermuda Ltd. (Case No. 20-12255)
☐	Aviacorp Enterprises S.A. (Case No. 20-12256)	☐		☐		☐		☐	

Name of Creditor
(The person or entity to whom the debtor owes money or property)

Babcock and Brown Securities LLC
f/k/a Burnham Sterling Securities LLC

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your administrative expense claim. Attach copy of statement giving particulars.

Check here if this claim:
☐ replaces or ☐ amends a previously filed administrative expense claim.

Claim Number (if known):

Dated:

Name and Addresses Where Notices Should be Sent:

Babcock and Brown Securities LLC
f/k/a Burnham Sterling Securities LLC
29 River Road
Suite 102
Cos Cob, CT 06807

Name and Addresses Where Payment Should be Sent (if different):

1. BASIS FOR CLAIM:

☐ Goods sold ☑ Services performed ☐ Personal Injury/Wrongful Death ☐ Wages (Dates):_____

☐ Money loaned ☐ Taxes ☐ Retiree Benefits as Defined in 11 U.S.C. § 1114(a)

☐ Other (Specify): _____

2. DESCRIPTION OF CLAIM (IF KNOWN): See Addendum

3. TOTAL AMOUNT OF CLAIM: $ See Addendum (Total)

4. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor. 5. SUPPORTING DOCUMENTS: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. Do not send original documents. If the documents are not available, explain. If the documents are voluminous, attach a summary. The Debtors may request full copies of your supporting documentation to substantiate the claim. 6. TIME-STAMPED COPY: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.	THIS SPACE IS FOR COURT USE ONLY
Date: August 23, 2021	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of proof of attorney, if any)

Joon-Ho Lee
Authorized Signatory

RECEIVED
AUG 2 3 2021
KURTZMAN CARSON CONSULTANTS

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

ADDENDUM TO PROOF OF CLAIM OF
BABCOCK & BROWN SECURITIES LLC

Babcock and Brown Securities LLC f/k/a Burnham Sterling Securities LLC ("**Babcock**"), an unregistered entity providing financial advisory services, asserts the following claims (the "**Claims**") against Avianca Holdings S.A. and its debtor-affiliates (collectively, the "**Debtors**") in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**"), and respectfully states as follows:

I. Background

1. Commencement of the Chapter 11 Cases. On May 10, 2020 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States

[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. International 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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); AV Loyalty Bermuda Ltd. (N/A); Aviacorp Enterprises S.A. (N/A). The Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá D.C., Colombia.

Code, as amended (the "**Bankruptcy Code**"), in the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**").

2. Debtors-in-Possession. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession under Bankruptcy Code sections 1107(a) and 1108.

3. Joint Administration. The Chapter 11 Cases were consolidated for procedural purposes only and are being jointly administered under case number 20-11133 (MG).

4. Bar Date. On October 29, 2020, the Debtors filed the *Notice of Debtors' Application for an Order (I) Establishing Bar Dates for Filing Proofs of Claim; (II) Approving Proof of Claim Forms, Bar Date Notices, and Mailing and Publication Procedures; (III) Implementing Uniform Procedures Regarding 503(b)(9) Claims; (IV) Providing Certain Supplemental Relief* [Docket No. 1138] (the "**Bar Date Motion**"). On November 16, 2020, the Bankruptcy Court granted the *Order (I) Establishing Bar Dates for Filing Proofs of Claim, (II) Approving Proof of Claim Forms, Bar Date Notices, and Mailing and Publication Procedures, (III) Implementing Uniform Procedures Regarding 503(b)(9) Claims, and (IV) Providing Certain Supplemental Relief* [Docket No. 1180] approving the relief sought in the Bar Date Motion and establishing January 20, 2021 at 11:59 p.m. (PT) as the bar date for filing proofs of claims in the Chapter 11 Cases for general creditors (the "**Bar Date**"). On January 20, 2021, Babcock timely filed proof of claim number 2057 by the Bar Date (the "**Prepetition Claims**"). The filing of these Claims is not intended to, and does not, amend the Prepetition Claims filed by Babcock.

5. Rejection Orders. To date, the Bankruptcy Court has entered six orders that impact Babcock (each, a "**Rejection Order**" and collectively, the "**Rejection Orders**"), which include:

- *Order Authorizing the Debtors to (I) Ener 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 [Docket No. 1929], as subsequently modified by the *Order Authorizing the Debtors to (I) Enter Into New Aircraft Lease and (II) Reject Pre-Petition Aircraft Lease (MSN 8300) and Certain Related Agreements*, [Docket No. 2002];

- *Order Authorizing the Debtors 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* [Docket No. 2004];
- *Order Authorizing the Debtors 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)* [Docket No. 2015];
- *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* [Docket No. 2016]; and
- *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* [Docket No. 2017].

6. Pursuant to the Rejection Orders, Babcock has thirty days from the date of each Rejection Order to file a new claim or amend a previously filed claim against any of the Debtors, for "damages based upon or resulting from the assumption, rejection or amendment of any unexpired leases or subleases related to each of the transactions." Babcock does not believe that the thirty day deadline imposed by the Rejection Orders applies to the filing of administrative expense claims—which are not claims currently subject to any bar date and do not arise from the rejection of the applicable agreements. However, for the avoidance of doubt, Babcock has complied with such 30 day deadline, but reserves all rights to amend, supplement, or modify these Claims.

7. Necessity of Addendum. This addendum is annexed to the official administrative proof of claim form that set forth a summary of Babcock's Claims against the Debtors. This addendum provides the parties in interest with relevant information and a description of the Claim.

8. Supporting Documentation. The documentation supporting these Claims are voluminous and may already be in the Debtors' possession. Nonetheless, such documentation is available upon request.

II. The Claims

A. The Personal Property Leases

9. The Debtors began contracting with Babcock in 2014 to arrange the financing and leasing of certain aircraft in exchange for certain fees (such services the "**Initiator Services**" and such fees the "**Initiator Fees**").

10. Babcock has not been paid the Initiator Fees for the Initiator Services the Debtors benefited from since the Petition Date.

11. As a result, Babcock files these Claims asserting any and all of its rights to Initiator Fees and other fees, remedies, damages, indemnities, and other claims (including contingent or unliquidated claims) against the Debtors arising on or after the Petition Date under, related to, or due under the following contracts (the "**Contracts**" together with the guarantees, lease agreements, sublease agreements, and any and all other related agreements, amendments or supplements thereto or modifications thereof, and any additional documents, agreements or instruments delivered in connection with any such related agreement, amendment, supplement or modification):

> That certain Framework Agreement, dated as of July 30, 2015, among Avianca EAIV 2015-1 Trust and Avianca EAIV 2015-2 Trust, as Borrowers, Octo-Aircraft Leasing LLC, as Owner Participant, Avianca Holdings S.A., as Guarantor, the purchasers identified on Schedule I thereto, Wells Fargo Bank, National Association, as Security Trustee, with Babcock & Brown Securities LLC f/k/a Burnham Sterling Securities LLC and Burnham Sterling & Company LLC as Initiators (the "**2015 EAIV Financing**").

12. The Contracts provide that the Debtors have an unconditional obligation to pay Babcock (which is referred to as the "Initiator" in the relevant agreements) its compensation through the payment of the Initiator Fee on a schedule set forth in Contracts.

> the Owner agrees to pay to the Security Trustee, for account of the Initiator, as and when due, the Initiator Fee.

See e.g., Section 12.15 of that certain Omnibus Amendment No. 1, dated July 30, 2015 of that certain Note Purchase Agreement [Avianca EAIV 2015-1 Trust], dated July 30, 2015, between Wells Fargo Bank Northwest, National Association, as Owner, Avianca Holdings S.A., as Guarantor, and Aerovías Del Continente Americano S.A., as Lessee (the "**2015 EAIV Personal Property Trust Amendment**").

13. Babcock is designated as an express third-party beneficiary under the Contracts entitled to enforce its rights under such agreements:

> The Initiator shall be an express third party beneficiary of (i) the provisions of this Agreement and any other Basic Document that relate to the obligation of the Obligors to pay and the time and manner of payment of the Initiator Fee, any applicable Accelerated Initiator Fee and any applicable Initiator Prepayment Fee (including, without limitation, the obligation of the Lessee under the Lease and/or the Guarantor under the Guaranty, as the case may be, to pay the Initiator Fee, any applicable Accelerated Initiator Fee and any applicable Initiator Prepayment Fee as Supplemental Rent) . . . .

See e.g., Section 12.15 of that certain 2015 EAIV Personal Property Trust Amendment.

14. As set forth below, these Claims are entitled to an administrative expense status under both Bankruptcy Code sections 365(d)(5) and 503(b).

B. Bankruptcy Code Section 365(d)(5)

15. Bankruptcy Code section 365(d)(5) obligates a debtor, after sixty days from its petition date, to "timely perform ***all of the obligations***" on leases of personal property "until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title. . . ." Consequently,

pursuant to Bankruptcy Code section 365(d)(5), an administrative claim arises with respect to all unperformed obligations accruing after the first sixty days of the bankruptcy case. And administrative claims arising under a personal property lease under 365(d)(5) "are based upon the terms of the lease and not the benefit to the bankruptcy estate." *In re Lakeshore Const. Co. of Wolfeboro, Inc.*, 390 B.R. 751 (Bankr. D.N.H. 2008); *In re Wyoming Sand and Stone Co.*, 393 B.R. 359, 361 (M.D. Pa. 2008) ("Benefit to the estate is not an issue under § 365(d)(5), and, in the absence of intervening action by the Debtor, the obligation to perform under the lease remains.").

16. Here, the applicable Contracts obligate the payment of Babcock's fees and indisputably fall within the contractual obligations that give rise to an administrative expense claim under Bankruptcy Code section 365(d)(5). *Wyoming*, 393 B.R. at 361 (concluding that no showing of a benefit to the estate is required and "the Court has little discretion but to award [the applicable creditor] an allowance for that time period from the 60th day after filing until surrender of the equipment . . ."); *see also In re Hayes Lemmerz Int'l, Inc.*, 340 B.R. 461, 472 (Bankr. D. Del. 2006) ("Unlike parties claiming administrative expense status under section 503(b), lessors claiming under section 365(d)(10) need not prove they conferred any benefit upon the estate."); *In re Glob. Container Lines Ltd.*, No. 09-78585 (AST), 2010 Bankr. LEXIS 5596, at *8 (Bankr. E.D.N.Y. Feb. 25, 2010) (noting that section 365(d)(5) "expressly overrides Section 503(b)(1), again, unless the equities require otherwise," requirement of showing a benefit to the estate).

17. Here, the sixtieth day from the Petition Date was July 9, 2020. The Rejection Orders are not yet effective, and will only become effective upon the Debtors entry into a new aircraft lease and new guarantee for each aircraft (the "**Rejection Date**"). Thus, Babcock's Claims continue to accrue until such Rejection Date occurs.

18. Accordingly, for the foregoing reasons, Bankruptcy Code section 365(d)(5) requires the Debtors to pay Babcock administrative fees under the Contracts from the sixtieth day of these Chapter 11 Cases through the Rejection Date.

C. Section 503(b) of the Bankruptcy Code

19. In addition, Babcock is entitled to an administrative expense claim from the Petition Date through the Rejection Date pursuant to Bankruptcy Code section 503(b)(1). Bankruptcy Code section 503(b)(1) provides that the actual, necessary costs and expenses of preserving the Debtors' estate constitute administrative expenses, and that a party may file a request for payment of administrative expenses. 11 U.S.C. § 503(b)(1). Under section 503, the debtor must pay the counterparty to a lease agreement the reasonable administrative expense for the use of leased property that has benefited the bankruptcy estate. *See In re Patient Education Media, Inc.*, 221 B.R. 97, 101 (Bankr. S.D.N.Y. 1998); *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 531 (1984) ("If the debtor-in-possession elects to continue to receive benefits from the executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services . . . ."). The Second Circuit has recognized the presumption that the payment terms of a lease are a reasonable measure of the administrative expenses to be paid by a debtor. *Farber v. Wards Co., Inc.*, 825 F.2d 684, 689-90 (2d Cir. 1987).

20. Here, the use of the leased aircraft pursuant to the terms of the Contracts by the Debtors after the commencement of the Chapter 11 Cases provided a clear and undisputed benefit to the Debtors' estate and Babcock's Claims arising under such Contracts constitutes an administrative expense claim allowable under Bankruptcy Code section 503(b).

D. Claims Amount

21. For the foregoing reasons, pursuant to Bankruptcy Code sections 365(d)(5) and 503(b)(1) the following amounts must be paid as administrative expenses as such obligations arise under the Contracts.

Babcock & Brown Securities LLC				
MSN	**Currency**	**Description**	**(A)**	**(B)**
			5/10/2020 - 8/23/2021	Post-Petition Default Interest
6617	USD	2015 EAIV-1	$27,356.00	$1,374.44
6692	USD	2015 EAIV-1	$32,837.15	$3,211.31
6739	USD	2015 EAIV-1	$32,837.15	$1,686.25
37507	USD	2015 EAIV-1	$87,166.30	$4,363.88
6767	USD	2015 EAIV-2	$38,487.40	$1,952.62
6511	USD	2015 EAIV-2	$38,487.40	$1,907.63
37508	USD	2015 EAIV-2	$87,166.30	$4,463.17
6746	USD	2015 EAIV-2	$32,837.15	$1,670.11
	USD	**Grand Total**	**$377,174.85**	**$20,629.40**

III. Reservation of Rights

22. Right to Amend. Babcock expressly reserves the right to amend or supplement the Claims to correct, clarify, explain, expand, supplement or add to any portion of the Claims asserted herein, or otherwise, to both increase the dollar amounts of such Claims and provide additional information and documentation as is necessary to pursue these and such additional claims as are, or may be, held by Babcock, including, without limitation, the right to amend the Claims in the event an objection is made against any of the Claims or a claim is asserted against Babcock. Moreover, Babcock specifically reserves the right to conduct discovery with respect to

this matter in accordance with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

23. No Admission. Nothing contained in these Claims shall be deemed an admission by Babcock. Babcock expressly reserves the right to withdraw the Claims as if it had never been filed.

24. Additional Reservations. In addition, the filing of these Claims is not intended, and shall not be deemed or construed as: (a) consent by Babcock to the jurisdiction of the Bankruptcy Court or any other court for any purpose other than with respect to issues directly related to the Claims asserted in the Claims; (b) a waiver or release of any right of Babcock to have all disputes with the Debtor resolved through arbitration as may be provided in the documentation governing the Claims, notwithstanding whether or not such matters are designated as "core proceedings" pursuant to 28 U.S.C. § 157(b)(2); (c) consent by Babcock to a trial in the Bankruptcy Court or in any other court of any proceeding as to any and all matters so triable herein or in any case, controversy, or proceeding related hereto, pursuant to 28 U.S.C. § 157 or otherwise; (d) a waiver or release of the right of Babcock to have any and all final orders in any and all non-core matters or proceedings entered only after de novo review by the United States District Court Judge; (e) a waiver or release of any right which Babcock may have to a jury trial; (f) a waiver of the right to move to withdraw the reference in respect of the subject matter of these Claims, any objection thereto or other proceeding which may be commenced in the Chapter 11 Cases against or otherwise involving Babcock; (g) an election of remedies; or (h) an admission of personal jurisdiction.

IV. Notices Regarding the Claim

25. All notices and correspondence with respect to the Claims (and, if filed, any objections thereto) must be sent to Babcock, and its counsel, at the following addresses:

BABCOCK & BROWN SECURITIES LLC
29 River Road
Suite 102
Cos Cob, CT 06807

With a copy to:

Jason Kaplan
Matthew Kremer
O'MELVENY AND MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036

Furthermore, designation of Jason Kaplan, Esq. and Matthew Kremer, Esq. of O'Melveny and Myers LLP ("**O'Melveny**") to receive all notices and correspondence related to the Claims shall not be construed as an appointment of Jason Kaplan, Esq., Matthew Kremer, Esq. and/or O'Melveny as authorized agents of Babcock, either expressly or impliedly, for purposes of receiving service of process pursuant to Rule 4 of the Federal Rules of Civil Procedure made applicable pursuant to Federal Rules of Bankruptcy Procedure 7004 or other applicable law.

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK	PROOF OF ADMINISTRATIVE CLAIM

THIS FORM SHOULD NOT BE USED FOR CLAIMS EXCLUDED BY SAID NOTICE NOR SHOULD IT BE USED FOR ANY CLAIMS THAT ARE NOT OF A KIND AND ENTITLED TO PRIORITY IN ACCORDANCE WITH 11 U.S.C. §§ 503(b) AND 507(a)(2), IT SHOULD NOT BE USED BY ANY PERSON ASSERTING CLAIMS PURSUANT TO SECTION 503(B)(9) OF THE BANKRUPTCY CODE.

Fill in this information to identify the case (Select only one Debtor per claim form):

☐ Aero Transporte de Carga Unión, S.A. de C.V. (Case No. 20-11140)	☐ Aeroinversiones de Honduras, S.A. (Case No. 20-11141)	☑ Aerovías del Continente Americano S.A. Avianca (Case No. 20-11134)	☐ Airlease Holdings One Ltd. (Case No. 20-11142)	☐ America Central (Canada) Corp. (Case No. 20-11143)
☐ America Central Corp. (Case No. 20-11144)	☐ AV International Holdco S.A. (Case No. 20-11145)	☐ AV International Holdings S.A. (Case No. 20-11146)	☐ AV International Investments S.A. (Case No. 20-11147)	☐ AV International Ventures S.A. (Case No. 20-11148)
☐ AV Investments One Colombia S.A.S. (Case No. 20-11135)	☐ AV Investments Two Colombia S.A.S. (Case No. 20-11136)	☐ AV Taca International Holdo S.A. (Case No. 20-11149)	☐ Avianca Costa Rica S.A. (Case No. 20-11150)	☐ Avianca Holdings S.A. (Case No. 11133)
☐ Avianca Leasing, LLC (Case No. 20-11151)	☐ Avianca, Inc. (Case No. 20-11132)	☐ Avianca-Ecuador S.A. (Case No. 20-11152)	☐ Aviaservicios, S.A. (Case No. 20-11153)	☐ Aviateca, S.A. (Case No. 20-11154)
☐ Avifreight Holding Mexico, S.A.P.I. de C.V. (Case No. 20-11155)	☐ C.R. International Enterprises, Inc. (Case No. 20-11156)	☐ Grupo Taca Holdings Limited (Case No. 20-11157)	☐ International Trade Marks Agency Inc. (Case No. 20-11158)	☐ Inversiones del Caribe, S.A. (Case No. 20-11159)
☐ Isleña de Inversiones, S.A. de C.V. (Case No. 20-11160)	☐ Latin Airways Corp. (Case No. 20-11161)	☐ Latin Logistics, LLC (Case No. 20-11162)	☐ Nicaragüense de Aviación, Sociedad Anónima (Case No. 20-11163)	☐ Regional Express Américas S.A.S. (Case No. 20-11137)
☐ Ronair N.V. (Case No. 20-11164)	☐ Servicio Terrestre, Aereo y Rampa S.A. (Case No. 20-11165)	☐ Servicios Aeroportuarios Integrados SAI S.A.S. (Case No. 20-11138)	☐ Taca de Honduras, S.A. de C.V. (Case No. 20-11166)	☐ Taca de México, S.A. (Case No. 20-11167)
☐ Taca International Airlines S.A. (Case No. 20-11168)	☐ Taca S.A. (Case No. 20-11169)	☐ Tampa Cargo S.A.S. (Case No. 20-11139)	☐ Technical and Training Services, S.A. de C.V. (Case No. 20-11170)	☐ AV Loyalty Bermuda Ltd. (Case No. 20-12255)
☐ Aviacorp Enterprises S.A. (Case No. 20-12256)	☐	☐	☐	☐

Name of Creditor (The person or entity to whom the debtor owes money or property) Burnham Sterling and Company LLC	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your administrative expense claim. Attach copy of statement giving particulars.	Check here if this claim: ☐ replaces or ☐ amends a previously filed administrative expense claim.
Name and Addresses Where Notices Should be Sent: Burnham Sterling and Company LLC 29 River Road Suite 102 Cos Cob, CT 06807	Name and Addresses Where Payment Should be Sent (if different):	

1. BASIS FOR CLAIM:

☐ Goods sold ☑ Services performed ☐ Personal Injury/Wrongful Death ☐ Wages (Dates):________

☐ Money loaned ☐ Taxes ☐ Retiree Benefits as Defined in 11 U.S.C. § 1114(a)

☐ Other (Specify): ____________________

2. DESCRIPTION OF CLAIM (IF KNOWN): See Addendum

3. TOTAL AMOUNT OF CLAIM: $ See Addendum (Total)

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KURTZMAN CARSON CONSULTANTS

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4. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor. 5. SUPPORTING DOCUMENTS: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. Do not send original documents. If the documents are not available, explain. If the documents are voluminous, attach a summary. The Debtors may request full copies of your supporting documentation to substantiate the claim. 6. TIME-STAMPED COPY: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.	THIS SPACE IS FOR COURT USE ONLY
Date: August 23, 2021 | Sign and print the name and title, if any, of the creditor or other person authorized to file this Claim (attach copy of proof of attorney, if any)	

Joon-Ho Lee
Authorized Signat...

RECEIVED
AUG 2 3 2021
KURTZMAN CARSON CONSULTANTS

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

ADDENDUM TO PROOF OF CLAIM OF
BURNHAM STERLING AND COMPANY LLC

Burnham Sterling and Company LLC ("**Burnham**"), an unregistered entity providing financial advisory services, asserts the following claims (the "**Claims**") against Avianca Holdings S.A. and its debtor-affiliates (collectively, the "**Debtors**") in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**"), and respectfully states as follows:

I. Background

1. Commencement of the Chapter 11 Cases. On May 10, 2020 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States

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[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. International 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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); AV Loyalty Bermuda Ltd. (N/A); Aviacorp Enterprises S.A. (N/A). The Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá D.C., Colombia.

Code, as amended (the "**Bankruptcy Code**"), in the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**").

2. Debtors-in-Possession. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession under Bankruptcy Code sections 1107(a) and 1108.

3. Joint Administration. The Chapter 11 Cases were consolidated for procedural purposes only and are being jointly administered under case number 20-11133 (MG).

4. Bar Date. On October 29, 2020, the Debtors filed the *Notice of Debtors' Application for an Order (I) Establishing Bar Dates for Filing Proofs of Claim; (II) Approving Proof of Claim Forms, Bar Date Notices, and Mailing and Publication Procedures; (III) Implementing Uniform Procedures Regarding 503(b)(9) Claims; (IV) Providing Certain Supplemental Relief* [Docket No. 1138] (the "**Bar Date Motion**"). On November 16, 2020, the Bankruptcy Court granted the *Order (I) Establishing Bar Dates for Filing Proofs of Claim, (II) Approving Proof of Claim Forms, Bar Date Notices, and Mailing and Publication Procedures, (III) Implementing Uniform Procedures Regarding 503(b)(9) Claims, and (IV) Providing Certain Supplemental Relief* [Docket No. 1180] approving the relief sought in the Bar Date Motion and establishing January 20, 2021 at 11:59 p.m. (PT) as the bar date for filing proofs of claims in the Chapter 11 Cases for general creditors (the "**Bar Date**"). On January 20, 2021, Burnham timely filed proof of claim number 2055 by the Bar Date (the "**Prepetition Claims**"). The filing of these Claims is not intended to, and does not, amend the Prepetition Claims filed by Burnham.

5. Rejection Orders. To date, the Bankruptcy Court has entered six orders that impact Burnham (each, a "**Rejection Order**" and collectively, the "**Rejection Orders**"), which include:

- *Order Authorizing the Debtors to (I) Ener 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 [Docket No. 1929], as subsequently modified by the *Order Authorizing the Debtors to (I) Enter Into New Aircraft Lease and (II) Reject Pre-Petition Aircraft Lease (MSN 8300) and Certain Related Agreements*, [Docket No. 2002];

- *Order Authorizing the Debtors 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* [Docket No. 2004];
- *Order Authorizing the Debtors 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)* [Docket No. 2015];
- *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* [Docket No. 2016]; and
- *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* [Docket No. 2017].

6. Pursuant to the Rejection Orders, Burnham has thirty days from the date of each Rejection Order to file a new claim or amend a previously filed claim against any of the Debtors, for "damages based upon or resulting from the assumption, rejection or amendment of any unexpired leases or subleases related to each of the transactions." Burnham does not believe that the thirty day deadline imposed by the Rejection Orders applies to the filing of administrative expense claims—which are not claims currently subject to any bar date and do not arise from the rejection of the applicable agreements. However, for the avoidance of doubt, Burnham has complied with such 30 day deadline, but reserves all rights to amend, supplement, or modify these Claims.

7. Necessity of Addendum. This addendum is annexed to the official administrative proof of claim form that set forth a summary of Burnham's Claims against the Debtors. This addendum provides the parties in interest with relevant information and a description of the Claims.

8. Supporting Documentation. The documentation supporting these Claims are voluminous and may already be in the Debtors' possession.

II. The Claims

A. The Personal Property Leases

9. The Debtors began contracting with Burnham in 2014 to arrange the financing and leasing of certain aircraft in exchange for certain fees (such services the "**Initiator Services**" and such fees the "**Initiator Fees**").

10. Burnham has not been paid the Initiator Fees for the Initiator Services the Debtors benefited from since the Petition Date.

11. As a result, Burnham files these Claims asserting any and all of its rights to Initiator Fees and other fees, remedies, damages, indemnities, and other claims (including contingent or unliquidated claims) against the Debtors arising on or after the Petition Date under, related to, or due under the following contracts (the "**Contracts**" together with the guarantees, Lease Agreements (as defined below), and any and all other related agreements, amendments or supplements thereto or modifications thereof, and any additional documents, agreements or instruments delivered in connection with any such related agreement, amendment, supplement or modification):

- That certain Framework Agreement, dated as of July 30, 2015, among Avianca EAIV 2015-1 Trust and Avianca EAIV 2015-2 Trust, as Borrowers, Octo-Aircraft Leasing LLC, as Owner Participant, Avianca Holdings S.A., as Guarantor, the purchasers identified on Schedule I thereto, Wells Fargo Bank, National Association, as Security Trustee, with Babcock & Brown Securities LLC f/k/a Burnham Sterling Securities LLC and Burnham Sterling & Company LLC as Initiators (the "**2015 EAIV Financing**");
- That certain Loan Agreement, dated as of December 14, 2016, among Avianca EAIV 2016-3 Trust, as Borrower, Uni-Aircraft Leasing LLC, as Owner Participant, Avianca Holdings S.A., as Guarantor, the lenders identified on Schedule I thereto, and Wilmington Trust Company, as Security Trustee, with Burnham Sterling & Company LLC as Initiator (the "**37511 Financing**");

- That certain Loan Agreement, dated as of August 24, 2016, among Avianca EAIV 2016-1 Trust, as Borrower, Tri-Aircraft Leasing II LLC, as Owner Participant, Avianca Holdings S.A., as Guarantor, the lenders identified on Schedule I thereto, and Wilmington Trust Company, as Security Trustee, with Burnham Sterling & Company LLC as Initiator (the "**7284 Financing**");

- That certain Loan Agreement, dated as of October 14, 2016, among Avianca EAIV 2016-1 Trust, as Borrower, Tri-Aircraft Leasing II LLC, as Owner Participant, Avianca Holdings S.A., as Guarantor, the lenders identified on Schedule I thereto, and Wilmington Trust Company, as Security Trustee, with Burnham Sterling & Company LLC as Initiator (the "**7318 Financing**");

- That certain Loan Facility Agreement, dated as of October 26, 2017, among FLIP No. 168 Co., Ltd. & FLIP No. 169 Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as the Original Lenders, Sumitomo Mitsui Banking Corporation, New York Branch, as Facility Agent, and Wilmington Trust, National Association, as Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**39407 Financing**");

- That certain Loan Facility Agreement, dated November 30, 2017, among San Agustin Leasing Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Sumitomo Mitsui Banking Corporation, New York Branch, as Facility Agent and Security Agent, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**7887 Financing**");

- That certain Loan Facility Agreement, dated December 4, 2017, among Los Katios Leasing Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Sumitomo Mitsui Banking Corporation, New York Branch, as Facility Agent and Security Agent, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**7928 Financing**");

- That certain ECA Loan Agreement, dated September 25, 2018, among Malpelo Leasing Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original ECA Lenders, ING Capital LLC, as ECA Facility Agent, and Wilmington Trust SP Services (Dublin) Limited, as Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**65315 Financing**");

- That certain Loan Facility Agreement, dated July 24, 2018, among Condor Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Bank of Utah, as Facility Agent and Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**8300 Financing**");

- That certain Loan Facility Agreement, dated April 24, 2019, among JPA No. 151 Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Woori Bank, Tokyo Branch, as Facility Agent and Security Trustee, with

Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**3988 Financing**");

- That certain Loan Facility Agreement, dated April 25, 2019, among JPA No. 152 Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Woori Bank, Tokyo Branch, as Facility Agent and Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**3992 Financing**");

- That certain Loan Facility Agreement, dated April 23, 2019, among JPA No. 159 Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Wilmington Trust Company, as Facility Agent and Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**4281 Financing**"); and

- That certain Loan Facility Agreement, dated April 24, 2019, among JPA No. 160 Co., Ltd., as Borrower, the financial institutions listed on Schedule I thereto, as Original Lenders, and Wilmington Trust Company, as Facility Agent and Security Trustee, with Burnham Sterling & Company LLC as Initiator and Avianca Holdings S.A. as Guarantor (the "**4284 Financing**").

12. The Contracts provide that the Debtors have an unconditional obligation to pay Burnham (which is referred to as the "Initiator" in the relevant agreements), Burnham's compensation (*i.e.*, the "Initiator Compensation") through the payment of "Additional Rental Payments" on a schedule set forth in the various lease agreements entered into by the Debtors (each applicable lease agreement or sublease agreement, the "**Lease Agreements**"):

> The Lessee shall on each Additional Rental Payment Date pay to the Lessor at the Initiator Account, by way of additional rental payment, instalments of the Initiator Compensation . . . . The Sub-Lessee acknowledges that the Initiator has already provided services prior to the Delivery Date, and accordingly agrees that the Sub-Lessee's obligations to pay the Initiator Fees hereunder are unconditional.

See e.g., Section 5.2 of that certain Amended and Restated Aircraft Lease Agreement (MSN 3992), dated April 25, 2019, between Aircol 7, as Lessor, and Aerovías Del Continente Americano S.A., as Lessee (the "**MSN 3992 Personal Property Contract**").

13. Burnham is expressly authorized to enforce its right to payment under the Lease Agreements against the Debtors:

> The agreement as to the payment of the Initiator Compensation under this Lease is a bilateral matter as between the Lessee and the Initiator, and no consent or act is required by the Lessor for the Initiator to enforce its rights hereunder, or for the Lessee and the Initiator to agree any amendment or variation of any payment of Initiator Compensation.

See Section 5.2(f) of that certain MSN 3992 Personal Property Contract.

14. Burnham is also designated as an express third-party beneficiary under the Lease Agreements, entitled to enforce its rights under such agreements:

> The Initiator shall be entitled to enforce its rights against the Lessee and Lessor under and in connection with this Clause 5.2 as a third party, notwithstanding that the Initiator is not a signatory to this Agreement, pursuant to the Contracts (Rights of Third Parties) Act 1999. For the avoidance of doubt, the Initiator shall have the right to bring a claim directly against the Lessee and/or the Guarantor for any Initiator Compensation and any other amounts payable to the Initiator that become due and unpaid under this Agreement, and such right shall not be reduced, diminished or otherwise affected in any respect detrimental to the Initiator as a result of Initiator not being a party to this Agreement. Any obligation in connection with Initiator's deficiency claim against the Lessee (or Guarantor) shall only be released upon actual receipt by Initiator of the relevant amounts. Any amounts payable by the Lessee to the Initiator in respect of such deficiency claim shall be paid by Lessee (or Guarantor) directly to the Initiator.

See e.g., Section 5.2(j) of that certain MSN 3992 Personal Property Contract.

15. As set forth below, the Claims are entitled to an administrative expense status under both Bankruptcy Code sections 365(d)(5) and 503(b).

B. Bankruptcy Code Section 365(d)(5)

16. Bankruptcy Code section 365(d)(5) obligates a debtor, after sixty days from its petition date, to "timely perform ***all of the obligations***" on leases of personal property "until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title. . . ." Consequently, pursuant to Bankruptcy Code section 365(d)(5), an administrative claim arises with respect to all unperformed obligations accruing after the first sixty days of the bankruptcy case. And

administrative claims arising under a personal property lease under 365(d)(5) "are based upon the terms of the lease and not the benefit to the bankruptcy estate." *In re Lakeshore Const. Co. of Wolfeboro, Inc.*, 390 B.R. 751 (Bankr. D.N.H. 2008); *In re Wyoming Sand and Stone Co.*, 393 B.R. 359, 361 (M.D. Pa. 2008) ("Benefit to the estate is not an issue under § 365(d)(5), and, in the absence of intervening action by the Debtor, the obligation to perform under the lease remains.").

17. Here, the applicable Lease Agreements obligate the payment of Burnham's fees as "Additional Rent" and indisputably fall within the contractual obligations that give rise to an administrative expense claim under Bankruptcy Code section 365(d)(5). *Wyoming*, 393 B.R. at 361 (concluding that no showing of a benefit to the estate is required and "the Court has little discretion but to award [the applicable creditor] an allowance for that time period from the 60th day after filing until surrender of the equipment . . ."); *see also In re Hayes Lemmerz Int'l, Inc.*, 340 B.R. 461, 472 (Bankr. D. Del. 2006) ("Unlike parties claiming administrative expense status under section 503(b), lessors claiming under section 365(d)(10) need not prove they conferred any benefit upon the estate."); *In re Glob. Container Lines Ltd.*, No. 09-78585 (AST), 2010 Bankr. LEXIS 5596, at *8 (Bankr. E.D.N.Y. Feb. 25, 2010) (noting that section 365(d)(5) "expressly overrides Section 503(b)(1), again, unless the equities require otherwise," requirement of showing a benefit to the estate).

18. Here, the sixtieth day from the Petition Date was July 9, 2020. The Rejection Orders are not yet effective, and will only become effective upon the Debtors entry into a new aircraft lease and new guarantee for each aircraft (the "**Rejection Date**"). Thus, Burnham's Claims continue to accrue until such Rejection Date occurs.

19. Accordingly, for the foregoing reasons, Bankruptcy Code section 365(d)(5) requires the Debtors to pay Burnham administrative fees under the Contracts from the sixtieth day of these Chapter 11 Cases through the Rejection Date.

C. Section 503(b) of the Bankruptcy Code

20. In addition, Burnham is entitled to an administrative expense claim from the Petition Date through the Rejection Date pursuant to Bankruptcy Code section 503(b)(1). Bankruptcy Code section 503(b)(1) provides that the actual, necessary costs and expenses of preserving the Debtors' estate constitute administrative expenses, and that a party may file a request for payment of administrative expenses. 11 U.S.C. § 503(b)(1). Under section 503, the debtor must pay the counterparty to a lease agreement the reasonable administrative expense for the use of leased property that has benefited the bankruptcy estate. *See In re Patient Education Media, Inc.*, 221 B.R. 97, 101 (Bankr. S.D.N.Y. 1998); *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 531 (1984) ("If the debtor-in-possession elects to continue to receive benefits from the executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services . . . ."). The Second Circuit has recognized the presumption that the payment terms of a lease are a reasonable measure of the administrative expenses to be paid by a debtor. *Farber v. Wards Co., Inc.*, 825 F.2d 684, 689-90 (2d Cir. 1987).

21. Here, the use of the leased aircraft pursuant to the terms of the Contracts by the Debtors after the commencement of the Chapter 11 Cases provided a clear and undisputed benefit to the Debtors' estate and Burnham's Claims arising under such Contracts constitutes an administrative expense claim allowable under Bankruptcy Code section 503(b).

D. Claims Amount

22. For the foregoing reasons, pursuant to Bankruptcy Code sections 365(d)(5) and 503(b)(1) the following amounts must be paid as administrative expenses as such obligations arise under the Contracts.

Burnham Sterling & Company LLC				
MSN	**Currency**	**Description**	**(A)**	**(B)**
			5/10/2020 - 8/23/2021	Post-Petition Default Interest
6617	USD	2015 EAIV-1	$24,206.50	$1,193.83
6692	USD	2015 EAIV-1	$29,056.60	$1,469.91
6739	USD	2015 EAIV-1	$29,056.60	$1,452.58
37507	USD	2015 EAIV-1	$77,130.60	$3,795.60
6767	USD	2015 EAIV-2	$34,056.35	$1,689.76
6511	USD	2015 EAIV-2	$34,056.35	$1,665.61
37508	USD	2015 EAIV-2	$77,130.60	$3,848.91
6746	USD	2015 EAIV-2	$29,056.60	$1,443.92
37511	USD	2016 EAIV	$170,625.00	$10,244.79
7284	EUR	2016 EAIV	€55,039.15	€2,359.08
7318	EUR	2016 EAIV	€56,173.40	€2,407.70
39407	USD	2017 JOLCO	$287,741.67	$12,388.94
7887	USD	2017 JOLCO	$171,855.01	$7,177.71
7928	USD	2017 JOLCO	$171,855.01	$7,239.10
65315	USD	2018 JOLCO	$232,560.00	$8,677.12
8300	USD	2018 JOLCO	$155,932.99	$7,052.97
3988	USD	2019 JOLCO	$81,879.80	$1,949.62
3992	USD	2019 JOLCO	$81,879.80	$1,940.38
4281	USD	2019 JOLCO	$69,502.09	$2,878.03
4284	USD	2019 JOLCO	$69,502.09	$2,882.59
	USD	**Grand Total**	**$1,827,083.66**	**$78,991.37**
	EUR	**Grand Total**	**€111,212.55**	**€4,766.78**

III. Reservation of Rights

23. Right to Amend. Burnham expressly reserves the right to amend or supplement the Claims to correct, clarify, explain, expand, supplement or add to any portion of the Claims asserted herein, or otherwise, to both increase the dollar amounts of such Claims and provide additional information and documentation as is necessary to pursue these and such additional claims as are, or may be, held by Burnham, including, without limitation, the right to amend the Claims in the event an objection is made against any of the Claims or a claim is asserted against Burnham. Moreover, Burnham specifically reserves the right to conduct discovery with respect to this matter in accordance with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

24. No Admission. Nothing contained in the Claims shall be deemed an admission by Burnham. Burnham expressly reserves the right to withdraw the Claims as if it had never been filed.

25. Additional Reservations. In addition, the filing of these Claims is not intended, and shall not be deemed or construed as: (a) consent by Burnham to the jurisdiction of the Bankruptcy Court or any other court for any purpose other than with respect to issues directly related to the claims asserted in the Claims; (b) a waiver or release of any right of Burnham to have all disputes with the Debtor resolved through arbitration as may be provided in the documentation governing the Claims, notwithstanding whether or not such matters are designated as "core proceedings" pursuant to 28 U.S.C. § 157(b)(2); (c) consent by Burnham to a trial in the Bankruptcy Court or in any other court of any proceeding as to any and all matters so triable herein or in any case, controversy, or proceeding related hereto, pursuant to 28 U.S.C. § 157 or otherwise; (d) a waiver or release of the right of Burnham to have any and all final orders in any and all non-core matters

or proceedings entered only after de novo review by the United States District Court Judge; (e) a waiver or release of any right which Burnham may have to a jury trial; (f) a waiver of the right to move to withdraw the reference in respect of the subject matter of the Claims, any objection thereto or other proceeding which may be commenced in the Chapter 11 Cases against or otherwise involving Burnham; (g) an election of remedies; or (h) an admission of personal jurisdiction.

IV. Notices Regarding the Claim

26. All notices and correspondence with respect to the Claims (and, if filed, any objections thereto) must be sent to Burnham, and its counsel, at the following addresses:

BURNHAM STERLING AND COMPANY LLC
29 River Road
Suite 102
Cos Cob, CT 06807

With a copy to:

Jason Kaplan
Matthew Kremer
O'MELVENY AND MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036

Furthermore, designation of Jason Kaplan, Esq. and Matthew Kremer, Esq. of O'Melveny and Myers LLP ("**O'Melveny**") to receive all notices and correspondence related to the Claims shall not be construed as an appointment of Jason Kaplan, Esq., Matthew Kremer, Esq. and/or O'Melveny as authorized agents of Burnham, either expressly or impliedly, for purposes of receiving service of process pursuant to Rule 4 of the Federal Rules of Civil Procedure made applicable pursuant to Federal Rules of Bankruptcy Procedure 7004 or other applicable law.

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK	PROOF OF ADMINISTRATIVE CLAIM

THIS FORM SHOULD NOT BE USED FOR CLAIMS EXCLUDED BY SAID NOTICE NOR SHOULD IT BE USED FOR ANY CLAIMS THAT ARE NOT OF A KIND AND ENTITLED TO PRIORITY IN ACCORDANCE WITH 11 U.S.C. §§ 503(b) AND 507(a)(2). IT SHOULD NOT BE USED BY ANY PERSON ASSERTING CLAIMS PURSUANT TO SECTION 503(B)(9) OF THE BANKRUPTCY CODE.

Fill in this information to identify the case (Select only one Debtor per claim form):

☐	Aero Transporte de Carga Unión, S.A. de C.V. (Case No. 20-11140)	☐	Aeroinversiones de Honduras, S.A. (Case No. 20-11141)	☐	Aerovías del Continente Americano S.A. Avianca (Case No. 20-11134)	☐	Airlease Holdings One Ltd. (Case No. 20-11142)	☐	America Central (Canada) Corp. (Case No. 20-11143)
☐	America Central Corp. (Case No. 20-11144)	☐	AV International Holdco S.A. (Case No. 20-11145)	☐	AV International Holdings S.A. (Case No. 20-11146)	☐	AV International Investments S.A. (Case No. 20-11147)	☐	AV International Ventures S.A. (Case No. 20-11148)
☐	AV Investments One Colombia S.A.S. (Case No. 20-11135)	☐	AV Investments Two Colombia S.A.S. (Case No. 20-11136)	☐	AV Taca International Holdco S.A. (Case No. 20-11149)	☐	Avianca Costa Rica S.A. (Case No. 20-11150)	☑	Avianca Holdings S.A. (Case No. 11133)
☐	Avianca Leasing, LLC (Case No. 20-11151)	☐	Avianca, Inc. (Case No. 20-11132)	☐	Avianca-Ecuador S.A. (Case No. 20-11152)	☐	Aviaservicios, S.A. (Case No. 20-11153)	☐	Aviateca, S.A. (Case No. 20-11154)
☐	Avifreight Holding Mexico, S.A.P.I. de C.V. (Case No. 20-11155)	☐	C.R. International Enterprises, Inc. (Case No. 20-11156)	☐	Grupo Taca Holdings Limited (Case No. 20-11157)	☐	International Trade Marks Agency Inc. (Case No. 20-11158)	☐	Inversiones del Caribe, S.A. (Case No. 20-11159)
☐	Isleña de Inversiones, S.A. de C.V. (Case No. 20-11160)	☐	Latin Airways Corp. (Case No. 20-11161)	☐	Latin Logistics, LLC (Case No. 20-11162)	☐	Nicaragüense de Aviación, Sociedad Anónima (Case No. 20-11163)	☐	Regional Express Américas S.A.S. (Case No. 20-11137)
☐	Ronair N.V. (Case No. 20-11164)	☐	Servicio Terrestre, Aéreo y Rampa S.A. (Case No. 20-11165)	☐	Servicios Aeroportuarios Integrados SAI S.A.S. (Case No. 20-11138)	☐	Taca de Honduras, S.A. de C.V. (Case No. 20-11166)	☐	Taca de México, S.A. (Case No. 20-11167)
☐	Taca International Airlines S.A. (Case No. 20-11168)	☐	Taca S.A. (Case No. 20-11169)	☐	Tampa Cargo S.A.S. (Case No. 20-11139)	☐	Technical and Training Services, S.A. de C.V. (Case No. 20-11170)	☐	AV Loyalty Bermuda Ltd. (Case No. 20-12255)
☐	Aviacorp Enterprises S.A. (Case No. 20-12256)	☐		☐		☐		☐	

Name of Creditor (The person or entity to whom the debtor owes money or property) Babcock and Brown Securities LLC f/k/a Burnham Sterling Securities LLC	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your administrative expense claim. Attach copy of statement giving particulars.	Check here if this claim: ☐ replaces or ☐ amends a previously filed administrative expense claim. Claim Number (if known):
Name and Addresses Where Notices Should be Sent: Babcock and Brown Securities LLC f/k/a Burnham Sterling Securities LLC 29 River Road Suite 102 Cos Cob, CT 06807	Name and Addresses Where Payment Should be Sent (if different):	Dated:

1. BASIS FOR CLAIM:

☐ Goods sold ☑ Services performed ☐ Personal Injury/Wrongful Death ☐ Wages (Dates):__________

☐ Money loaned ☐ Taxes ☐ Retiree Benefits as Defined in 11 U.S.C. § 1114(a)

☐ Other (Specify): ______________________________

2. DESCRIPTION OF CLAIM (IF KNOWN): See Addendum

3. TOTAL AMOUNT OF CLAIM: $ See Addendum __________ (Total)

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KURTZMAN CARSON CONSULTANTS

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4. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor. 5. SUPPORTING DOCUMENTS: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, or evidence of security interests. Do not send original documents. If the documents are not available, explain. If the documents are voluminous, attach a summary. The Debtors may request full copies of your supporting documentation to substantiate the claim. 6. TIME-STAMPED COPY: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.	THIS SPACE IS FOR COURT USE ONLY
Date: August 23, 2021	Sign and print the name and title, if any, of the creditor or other person authorized to file this Claim (attach copy of proof of attorney, if any) Joon-Ho Lee Authorized Signatory

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KURTZMAN CARSON CONSULTANTS

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

ADDENDUM TO PROOF OF CLAIM OF
BABCOCK & BROWN SECURITIES LLC

Babcock and Brown Securities LLC f/k/a Burnham Sterling Securities LLC ("**Babcock**"), an unregistered entity providing financial advisory services, asserts the following claims (the "**Claims**") against Avianca Holdings S.A. and its debtor-affiliates (collectively, the "**Debtors**") in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**"), and respectfully states as follows:

I. Background

1. Commencement of the Chapter 11 Cases. On May 10, 2020 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States

[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. International 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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); AV Loyalty Bermuda Ltd. (N/A); Aviacorp Enterprises S.A. (N/A). The Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá D.C., Colombia.

Code, as amended (the "**Bankruptcy Code**"), in the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**").

2. Debtors-in-Possession. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession under Bankruptcy Code sections 1107(a) and 1108.

3. Joint Administration. The Chapter 11 Cases were consolidated for procedural purposes only and are being jointly administered under case number 20-11133 (MG).

4. Bar Date. On October 29, 2020, the Debtors filed the *Notice of Debtors' Application for an Order (I) Establishing Bar Dates for Filing Proofs of Claim; (II) Approving Proof of Claim Forms, Bar Date Notices, and Mailing and Publication Procedures; (III) Implementing Uniform Procedures Regarding 503(b)(9) Claims; (IV) Providing Certain Supplemental Relief* [Docket No. 1138] (the "**Bar Date Motion**"). On November 16, 2020, the Bankruptcy Court granted the *Order (I) Establishing Bar Dates for Filing Proofs of Claim, (II) Approving Proof of Claim Forms, Bar Date Notices, and Mailing and Publication Procedures, (III) Implementing Uniform Procedures Regarding 503(b)(9) Claims, and (IV) Providing Certain Supplemental Relief* [Docket No. 1180] approving the relief sought in the Bar Date Motion and establishing January 20, 2021 at 11:59 p.m. (PT) as the bar date for filing proofs of claims in the Chapter 11 Cases for general creditors (the "**Bar Date**"). On January 20, 2021, Babcock timely filed proof of claim number 2057 by the Bar Date (the "**Prepetition Claims**"). The filing of these Claims is not intended to, and does not, amend the Prepetition Claims filed by Babcock.

5. Rejection Orders. To date, the Bankruptcy Court has entered six orders that impact Babcock (each, a "**Rejection Order**" and collectively, the "**Rejection Orders**"), which include:

- *Order Authorizing the Debtors to (I) Ener 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 [Docket No. 1929], as subsequently modified by the *Order Authorizing the Debtors to (I) Enter Into New Aircraft Lease and (II) Reject Pre-Petition Aircraft Lease (MSN 8300) and Certain Related Agreements*, [Docket No. 2002];

- *Order Authorizing the Debtors 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* [Docket No. 2004];
- *Order Authorizing the Debtors 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)* [Docket No. 2015];
- *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* [Docket No. 2016]; and
- *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* [Docket No. 2017].

6. Pursuant to the Rejection Orders, Babcock has thirty days from the date of each Rejection Order to file a new claim or amend a previously filed claim against any of the Debtors, for "damages based upon or resulting from the assumption, rejection or amendment of any unexpired leases or subleases related to each of the transactions." Babcock does not believe that the thirty day deadline imposed by the Rejection Orders applies to the filing of administrative expense claims—which are not claims currently subject to any bar date and do not arise from the rejection of the applicable agreements. However, for the avoidance of doubt, Babcock has complied with such 30 day deadline, but reserves all rights to amend, supplement, or modify these Claims.

7. Necessity of Addendum. This addendum is annexed to the official administrative proof of claim form that set forth a summary of Babcock's Claims against the Debtors. This addendum provides the parties in interest with relevant information and a description of the Claim.

8. Supporting Documentation. The documentation supporting these Claims are voluminous and may already be in the Debtors' possession. Nonetheless, such documentation is available upon request.

II. The Claims

A. The Personal Property Leases

9. The Debtors began contracting with Babcock in 2014 to arrange the financing and leasing of certain aircraft in exchange for certain fees (such services the "**Initiator Services**" and such fees the "**Initiator Fees**").

10. Babcock has not been paid the Initiator Fees for the Initiator Services the Debtors benefited from since the Petition Date.

11. As a result, Babcock files these Claims asserting any and all of its rights to Initiator Fees and other fees, remedies, damages, indemnities, and other claims (including contingent or unliquidated claims) against the Debtors arising on or after the Petition Date under, related to, or due under the following contracts (the "**Contracts**" together with the guarantees, lease agreements, sublease agreements, and any and all other related agreements, amendments or supplements thereto or modifications thereof, and any additional documents, agreements or instruments delivered in connection with any such related agreement, amendment, supplement or modification):

> That certain Framework Agreement, dated as of July 30, 2015, among Avianca EAIV 2015-1 Trust and Avianca EAIV 2015-2 Trust, as Borrowers, Octo-Aircraft Leasing LLC, as Owner Participant, Avianca Holdings S.A., as Guarantor, the purchasers identified on Schedule I thereto, Wells Fargo Bank, National Association, as Security Trustee, with Babcock & Brown Securities LLC f/k/a Burnham Sterling Securities LLC and Burnham Sterling & Company LLC as Initiators (the "**2015 EAIV Financing**").

12. The Contracts provide that the Debtors have an unconditional obligation to pay Babcock (which is referred to as the "Initiator" in the relevant agreements) its compensation through the payment of the Initiator Fee on a schedule set forth in Contracts.

> the Owner agrees to pay to the Security Trustee, for account of the Initiator, as and when due, the Initiator Fee.

See e.g., Section 12.15 of that certain Omnibus Amendment No. 1, dated July 30, 2015 of that certain Note Purchase Agreement [Avianca EAIV 2015-1 Trust], dated July 30, 2015, between Wells Fargo Bank Northwest, National Association, as Owner, Avianca Holdings S.A., as Guarantor, and Aerovías Del Continente Americano S.A., as Lessee (the "**2015 EAIV Personal Property Trust Amendment**").

13. Babcock is designated as an express third-party beneficiary under the Contracts entitled to enforce its rights under such agreements:

> The Initiator shall be an express third party beneficiary of (i) the provisions of this Agreement and any other Basic Document that relate to the obligation of the Obligors to pay and the time and manner of payment of the Initiator Fee, any applicable Accelerated Initiator Fee and any applicable Initiator Prepayment Fee (including, without limitation, the obligation of the Lessee under the Lease and/or the Guarantor under the Guaranty, as the case may be, to pay the Initiator Fee, any applicable Accelerated Initiator Fee and any applicable Initiator Prepayment Fee as Supplemental Rent) . . . .

See e.g., Section 12.15 of that certain 2015 EAIV Personal Property Trust Amendment.

14. As set forth below, these Claims are entitled to an administrative expense status under both Bankruptcy Code sections 365(d)(5) and 503(b).

B. Bankruptcy Code Section 365(d)(5)

15. Bankruptcy Code section 365(d)(5) obligates a debtor, after sixty days from its petition date, to "timely perform ***all of the obligations***" on leases of personal property "until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title. . . ." Consequently,

pursuant to Bankruptcy Code section 365(d)(5), an administrative claim arises with respect to all unperformed obligations accruing after the first sixty days of the bankruptcy case. And administrative claims arising under a personal property lease under 365(d)(5) "are based upon the terms of the lease and not the benefit to the bankruptcy estate." *In re Lakeshore Const. Co. of Wolfeboro, Inc.*, 390 B.R. 751 (Bankr. D.N.H. 2008); *In re Wyoming Sand and Stone Co*., 393 B.R. 359, 361 (M.D. Pa. 2008) ("Benefit to the estate is not an issue under § 365(d)(5), and, in the absence of intervening action by the Debtor, the obligation to perform under the lease remains.").

16. Here, the applicable Contracts obligate the payment of Babcock's fees and indisputably fall within the contractual obligations that give rise to an administrative expense claim under Bankruptcy Code section 365(d)(5). *Wyoming*, 393 B.R. at 361 (concluding that no showing of a benefit to the estate is required and "the Court has little discretion but to award [the applicable creditor] an allowance for that time period from the 60th day after filing until surrender of the equipment . . ."); *see also In re Hayes Lemmerz Int'l, Inc.*, 340 B.R. 461, 472 (Bankr. D. Del. 2006) ("Unlike parties claiming administrative expense status under section 503(b), lessors claiming under section 365(d)(10) need not prove they conferred any benefit upon the estate."); *In re Glob. Container Lines Ltd.*, No. 09-78585 (AST), 2010 Bankr. LEXIS 5596, at *8 (Bankr. E.D.N.Y. Feb. 25, 2010) (noting that section 365(d)(5) "expressly overrides Section 503(b)(1), again, unless the equities require otherwise," requirement of showing a benefit to the estate).

17. Here, the sixtieth day from the Petition Date was July 9, 2020. The Rejection Orders are not yet effective, and will only become effective upon the Debtors entry into a new aircraft lease and new guarantee for each aircraft (the "**Rejection Date**"). Thus, Babcock's Claims continue to accrue until such Rejection Date occurs.

18. Accordingly, for the foregoing reasons, Bankruptcy Code section 365(d)(5) requires the Debtors to pay Babcock administrative fees under the Contracts from the sixtieth day of these Chapter 11 Cases through the Rejection Date.

C. Section 503(b) of the Bankruptcy Code

19. In addition, Babcock is entitled to an administrative expense claim from the Petition Date through the Rejection Date pursuant to Bankruptcy Code section 503(b)(1). Bankruptcy Code section 503(b)(1) provides that the actual, necessary costs and expenses of preserving the Debtors' estate constitute administrative expenses, and that a party may file a request for payment of administrative expenses. 11 U.S.C. § 503(b)(1). Under section 503, the debtor must pay the counterparty to a lease agreement the reasonable administrative expense for the use of leased property that has benefited the bankruptcy estate. *See In re Patient Education Media, Inc.*, 221 B.R. 97, 101 (Bankr. S.D.N.Y. 1998); *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 531 (1984) ("If the debtor-in-possession elects to continue to receive benefits from the executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services . . . ."). The Second Circuit has recognized the presumption that the payment terms of a lease are a reasonable measure of the administrative expenses to be paid by a debtor. *Farber v. Wards Co., Inc.*, 825 F.2d 684, 689-90 (2d Cir. 1987).

20. Here, the use of the leased aircraft pursuant to the terms of the Contracts by the Debtors after the commencement of the Chapter 11 Cases provided a clear and undisputed benefit to the Debtors' estate and Babcock's Claims arising under such Contracts constitutes an administrative expense claim allowable under Bankruptcy Code section 503(b).

D. Claims Amount

21. For the foregoing reasons, pursuant to Bankruptcy Code sections 365(d)(5) and 503(b)(1) the following amounts must be paid as administrative expenses as such obligations arise under the Contracts.

Babcock & Brown Securities LLC				
MSN	**Currency**	**Description**	**(A)**	**(B)**
			5/10/2020 - 8/23/2021	Post-Petition Default Interest
6617	USD	2015 EAIV-1	$27,356.00	$1,374.44
6692	USD	2015 EAIV-1	$32,837.15	$3,211.31
6739	USD	2015 EAIV-1	$32,837.15	$1,686.25
37507	USD	2015 EAIV-1	$87,166.30	$4,363.88
6767	USD	2015 EAIV-2	$38,487.40	$1,952.62
6511	USD	2015 EAIV-2	$38,487.40	$1,907.63
37508	USD	2015 EAIV-2	$87,166.30	$4,463.17
6746	USD	2015 EAIV-2	$32,837.15	$1,670.11
	USD	**Grand Total**	**$377,174.85**	**$20,629.40**

III. Reservation of Rights

22. Right to Amend. Babcock expressly reserves the right to amend or supplement the Claims to correct, clarify, explain, expand, supplement or add to any portion of the Claims asserted herein, or otherwise, to both increase the dollar amounts of such Claims and provide additional information and documentation as is necessary to pursue these and such additional claims as are, or may be, held by Babcock, including, without limitation, the right to amend the Claims in the event an objection is made against any of the Claims or a claim is asserted against Babcock. Moreover, Babcock specifically reserves the right to conduct discovery with respect to

this matter in accordance with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

23. No Admission. Nothing contained in these Claims shall be deemed an admission by Babcock. Babcock expressly reserves the right to withdraw the Claims as if it had never been filed.

24. Additional Reservations. In addition, the filing of these Claims is not intended, and shall not be deemed or construed as: (a) consent by Babcock to the jurisdiction of the Bankruptcy Court or any other court for any purpose other than with respect to issues directly related to the Claims asserted in the Claims; (b) a waiver or release of any right of Babcock to have all disputes with the Debtor resolved through arbitration as may be provided in the documentation governing the Claims, notwithstanding whether or not such matters are designated as "core proceedings" pursuant to 28 U.S.C. § 157(b)(2); (c) consent by Babcock to a trial in the Bankruptcy Court or in any other court of any proceeding as to any and all matters so triable herein or in any case, controversy, or proceeding related hereto, pursuant to 28 U.S.C. § 157 or otherwise; (d) a waiver or release of the right of Babcock to have any and all final orders in any and all non-core matters or proceedings entered only after de novo review by the United States District Court Judge; (e) a waiver or release of any right which Babcock may have to a jury trial; (f) a waiver of the right to move to withdraw the reference in respect of the subject matter of these Claims, any objection thereto or other proceeding which may be commenced in the Chapter 11 Cases against or otherwise involving Babcock; (g) an election of remedies; or (h) an admission of personal jurisdiction.

IV. Notices Regarding the Claim

25. All notices and correspondence with respect to the Claims (and, if filed, any objections thereto) must be sent to Babcock, and its counsel, at the following addresses:

BABCOCK & BROWN SECURITIES LLC
29 River Road
Suite 102
Cos Cob, CT 06807

With a copy to:

Jason Kaplan
Matthew Kremer
O'MELVENY AND MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036

Furthermore, designation of Jason Kaplan, Esq. and Matthew Kremer, Esq. of O'Melveny and Myers LLP ("**O'Melveny**") to receive all notices and correspondence related to the Claims shall not be construed as an appointment of Jason Kaplan, Esq., Matthew Kremer, Esq. and/or O'Melveny as authorized agents of Babcock, either expressly or impliedly, for purposes of receiving service of process pursuant to Rule 4 of the Federal Rules of Civil Procedure made applicable pursuant to Federal Rules of Bankruptcy Procedure 7004 or other applicable law.

Hearing Date & Time: January 19, 2023 at 11:00 a.m. (prevailing Eastern Time)
Objection Deadline: January 6, 2023 at 4:00 p.m. (prevailing Eastern Time)

John G. McCarthy
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Counsel for Debtors and Reorganized Debtors

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 and Reorganized Debtors.	:	(Confirmed)

REORGANIZED DEBTORS' TWENTY-FOURTH OMNIBUS OBJECTION TO PROOFS OF CLAIM

[1] The Debtors and Reorganized Debtors in these chapter 11 cases, and each Debtors' and Reorganized Debtors' federal tax identification number (to the extent applicable), are as follows: Avianca Holdings S.A. (N/A) n/k/a HVA Associated Corp.; 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 Loyalty Bermuda Ltd. (N/A); AV Taca International Holdco S.A. (N/A); Aviacorp Enterprises 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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' and Reorganized Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

THIS OBJECTION SEEKS TO DISALLOW AND RECLASSIFY CERTAIN CLAIMS FILED BY BABCOCK AND BROWN SECURITIES, LCC

Avianca Holdings S.A. and its reorganized debtor affiliates in these proceedings (collectively, the "Reorganized Debtors") hereby file this *Twenty-Fourth Omnibus Objection to Proofs of Claim* (the "Objection") pursuant to *Order Pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 3007 (I) Establishing Claims Objection and Notice Procedures and (II) Granting Related Relief* [Docket No. 1179] (the "Claims Objection Procedures Order"). By this Objection, the Reorganized Debtors object to and seek to (i) disallow certain administrative expense claims filed by Babcock and Brown Securities, LLC ("Babcock") in the cases of Aerovías del Continente Americano S.A. Avianca ("Aerovías") and Taca International Airlines, S.A. ("Taca") as duplicative of an administrative expense claim filed in in the case of Avianca Holdings S.A. ("Avianca"); (ii) reclassify the administrative expense claim filed by Babcock in the Avianca case as a general unsecured claim; (iii) reclassify a secured claim filed by Babcock in the Avianca case as a general unsecured claim; and (iv) disallow a priority claim filed by Babcock in the Aerovías case that duplicates the reclassified claim. The subject claims and the proposed treatment are listed on the attached Schedule 1 to the proposed order attached to this Objection as **Exhibit A** (the "Disputed Claims").[2] In support of this Objection, the Reorganized Debtors respectfully state as follows:

Preliminary Statement

1. Babcock acted as a broker or "initiator" for eight prepetition aircraft transactions. All of Babcock's required services related to these transactions were completed prepetition. The

[2] In the Disputed Claims, Babcock does not provide the calculation for the alleged claim amounts, and the Reorganized Debtors reserve all right to review and object to such calculations in accordance with the Reorganized Debtors' books and records.

transaction documents are structured such that Babcock, as a third-party beneficiary, would receive its fee for these prepetition services (the "Initiator Fee") in increments over the life of the aircraft transaction, styled as "Additional Rent." Accordingly, as of the petition date, Babcock had received some, but not all, of the fee for its completed services.

2. Through the Disputed Claims, Babcock attempts to characterize certain Initiator Fees it is owed as entitled to administrative claim priority under either (i) section 365(d)(5) of the Bankruptcy Code as an obligation under a lease of personal property or (ii) under section 503(b)(1) of the Bankruptcy Code because, it contends, the fees are actual and necessary costs of preserving Avianca's estate. Neither argument is a sufficient basis to afford administrative priority status to the Disputed Claims. Unlike obligations that truly arise under a true lease, the broker fees were all earned prepetition, at the onset of the transaction, and are not true lease obligations. Further, because the services giving rise to Initiator Fees were all completed prepetition, they are not necessary costs of preserving Avianca's estate. For these reasons, the remaining, non-duplicative Disputed Claim that is classified as a purported administrative claim (against Avianca), should be treated as a general unsecured claim in accordance with **Schedule 1**.

3. Babcock has also filed a purported secured claim, which is also incorrectly characterized. Babcock does not provide proof of a perfected security interest to support its purported secured claim and Avianca is not aware of any such secured obligation. Accordingly, the purported secured Disputed Claim should be reclassified as a general unsecured claim as set forth in with **Schedule 1**.

4. Finally, Babcock filed a duplicative purported priority Disputed Claim which should be disallowed and expunged. No statutory basis exists for such claim, and allowing the claim would permit double recovery for Babcock.

Background

5. On May 10, 2020 (the "Initial Petition Date"), certain of the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code and on September 21, 2020 (together with the Initial Petition Date, as applicable to each Debtor, the "Petition Date"), each of AV Loyalty Bermuda Ltd. and Aviacorp Enterprises S.A. filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (collectively, the "Chapter 11 Cases").

6. The Debtors operated their businesses and managed their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code until they effectuated their emergence from bankruptcy on December 1, 2021. See *Notice of (I) Entry of Order Confirming Further Modified Joint Chapter 11 Plan of Avianca Holdings S.A. and Its Affiliated Debtors, (II) Occurrence of Effective Date, and (III) Final Deadlines for Filing Certain Claims* [Docket No. 2384]. The Debtors' chapter 11 cases were jointly administered pursuant to Bankruptcy Rule 1015(b) and the *Amended Order (I) Directing Joint Administration of Chapter 11 Cases and (II) Granting Related Relief* [Docket No. 73] and the *Order Directing Certain Orders in Chapter 11 Cases of Avianca Holdings S.A., et al Be Made Applicable to Subsequent Debtors* [Docket No. 1030].

7. On May 22, 2020, the United States Trustee for the Southern District of New York appointed an official committee of unsecured creditors (the "Committee"). See *Notice of Appointment of Official Committee of Unsecured Creditors* [Docket No. 154]. No trustee or examiner was appointed in the cases.

8. 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* [Docket No. 20].

9. On November 16, 2020, the Court entered the *Order (I) Establishing Bar Dates for Filing Proofs of Claim, (II) Approving Proof of Claim Forms, Bar Date Notices, and Mailing and Publication Procedures, (III) Implementing Uniform Procedures Regarding 503(b)(9) Claims, and (IV) Providing Certain Supplemental Relief* [Docket No. 1180] that, among other things, established the following deadlines for filing proofs of claim in these cases: (a) January 20, 2021, at 11:59 p.m. (prevailing Pacific Time), for all entities (except for those specifically exempt) holding all types of claims against the Debtors that arose or are deemed to have arisen before the Petition Date; (b) February 5, 2021, at 11:59 p.m. (prevailing Pacific Time), for all governmental units holding claims that arose or are deemed to have arisen prior to the Petition Date; (c) the later of (i) the General Bar Date, or (ii) the later of the date that is (x) thirty days after the date of entry of an order authorizing the rejection of a contract or lease, or (y) the applicable rejection date for claims relating to the Debtors' rejection of an executory contract or unexpired lease; and (d) the later of (i) the General Bar Date and (ii) thirty days after the date that Notice of Amended Schedules is served on the affected claimant for claims whose amount or characterization has changed in the amended schedules (the "Bar Dates"). On November 16, 2020, the Court entered the Claims Objection Procedures Order [Docket No. 1179], that established procedures for Debtors to object to multiple claims in a single objection.

10. 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* [Docket No. 2300] (such underlying chapter 11 plan, the "Plan"). The Plan substantively consolidated all of the Debtors except Avifreight Holding Mexico, S.A.P.I. de C.V. ("Avifreight"), Aero Transporte de Carga Unión, S.A. de C.V. ("Aerounión"), and Servicios Aeroportuarios Integrados SAI S.A.S. ("SAI"). The substantively consolidated Debtors are

referred to herein as the "Consolidated Debtors." The Plan became effective on December 1, 2021 (the "Effective Date") and the Debtors became the Reorganized Debtors as of the Effective Date. See *Notice of (I) Entry of Order Confirming Further Modified Joint Chapter 11 Plan of Avianca Holdings S.A. and Its Affiliated Debtors, (II) Occurrence of Effective Date, and (III) Final Deadlines for Filing Certain Claims* [Docket No. 2384]. Pursuant to Section VII.E of the Plan, the Reorganized Debtors may adjust or expunge from the claims register maintained by the Debtors' claims and solicitation agent (the "Claims Register") any claims that have been paid or satisfied without further action, order, or approval of the Court.

11. The Plan provides that the Reorganized Debtors shall serve and file any objections to proofs of claim (each, a "Proof of Claim") that have been filed against the Debtors on or before the date that is the latter of (a) 180 days after the Effective Date (i.e., May 31, 2022), pursuant to Bankruptcy Rule 9006(a)(1)(C)) and (b) such later date as may be fixed by the Bankruptcy Court upon notice and a hearing. On May 10, 2022, the Court entered the *Order Extending the Deadline to Object to Claims* [Docket No. 2572], which extended the deadline for the Reorganized Debtors to serve and file any objections to Proofs of Claim to December 2, 2022.

12. Babcock provided broker/arranger services for eight of the Debtors' aircraft leasing transactions.[3] See, e.g., Framework Agreement (note Burnham Sterling Securities LLC's is listed as the initiator and is the successor entity is Babcock). All of these services were provided on a pre-petition basis. There is a suite of transaction documents that govern each of the eight aircraft, which are substantially similar. Babcock is a third-party beneficiary in each of the eight aircraft transactions. See, e.g., Framework Agreement § 2.8. As compensation for its prepetition broker

[3] The relevant aircraft have the following manufacturer serial numbers ("MSNs"): 6617, 6692, 6739, 37507, 6767, 6511, 37508, and 6746.

services, Babcock is entitled to collect the Initiator Fees, styled as additional or supplemental rent, which the Debtors pay in the first instance to a lessor/owner trust.

Jurisdiction and Venue

13. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

Relief Requested

14. The Reorganized Debtors respectfully request the Court to enter an order (the "Proposed Order"), substantially in the form attached hereto as **Exhibit A**, disallowing and reclassifying or otherwise modifying, as applicable, each Disputed Claim in the amounts provided on the schedule to the Proposed Order.

Basis for Relief Requested

15. Section 502(a) of the Bankruptcy Code provides that any claim for which a proof of claim has been filed shall be deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). As set forth in Bankruptcy Rule 3001(f), a properly executed and filed proof of claim constitutes *prima facie* evidence of the validity and the amount of the claim for the purposes of section 502(a) of the Bankruptcy Code. See In re Allegheny Int'l, Inc., 954 F.2d 167, 173 (3d Cir. 1992). However, a proof of claim is entitled to the presumption of *prima facie* validity only until an objecting party produces evidence to negate such *prima facie* validity. See In re Avaya, Inc., 608 B.R. 366, 369-70 (Bankr. S.D.N.Y. 2019).

16. If an objection is filed, the court, upon notice and a hearing, must determine the validity and/or the amount of the asserted claim. See 11 U.S.C. § 502(b). Once the objecting party refutes an allegation critical to the claim, the burden reverts to the claimant to prove the validity

of the claim by a preponderance of the evidence. Allegheny, 954 F.2d at 173. In other words, once the *prima facie* validity of a claim is rebutted, "it is for the claimant to prove his claim, not for the objector to disprove it." In re Kahn, 114 B.R. 40, 44 (Bankr. S.D.N.Y. 1990) (citations omitted).

17. A debtor in possession has the duty to object to the allowance of any improperly asserted claim. 11 U.S.C. § 1106(a)(1). Section 502(b)(1) of the Bankruptcy Code provides that a claim may not be allowed to the extent that "such claim is unenforceable against the debtor." 11 U.S.C. § 502(b)(1). Bankruptcy Rule 3007(d) and the Claims Objection Procedures Order permit the Debtors and Reorganized Debtors to file an objection to more than one claim on non-substantive bases, such as because such claims "have been satisfied" (Fed. R. Bankr. P. 3007(d)(5); see also, Claims Objection Procedures Order at ¶ 2), such claims are "incorrectly classified" (Claims Objection Procedures Order at ¶ 2(ii)), "do[] not include sufficient documentation to ascertain the validity of the claim" (Claims Objection Procedures Order at ¶ 2(iv)), "the amount claimed is inconsistent with or contradicts the Debtors' books and records and the Debtors, after review and consideration of any information provided by the claimant, deny liability in excess of the amount reflected in the Debtors' books and records" (Claims Objection Procedures Order at ¶ 2), or the claim "ha[s] been amended by subsequently filed proofs of claim" (Fed. R. Bankr. P. 3007(d)(3)).

18. **Disallowance of Duplicate Purported Administrative Expense Claims and Reclassification of Remaining Claim**. Babcock filed three identical claims seeking administrative expense status for Initiator Fees allegedly due post-petition (the "Purported Administrative Expense Claims") in Avianca (Claim 4038), Aerovías (Claim 4036), and Taca (Claim 4034), all of which cases were consolidated upon confirmation. Because the Disputed Claims against Aerovías (Claim 4036), and Taca (Claim 4034) are duplicative of the Disputed

Claim against Avianca (Claim 4038), they should be disallowed and expunged. Failure to disallow two of these duplicate claims would result in Babcock receiving an unwarranted recovery against the Reorganized Debtors' estates, to the detriment of other similarly situated creditors. To avoid the possibility of multiple recoveries by Babcock, the Reorganized Debtors respectfully request that the Court disallow the Purported Administrative Expense Claims filed in the cases of Aerovías (Claim 4036), and Taca (Claim 4034) and expunge them from the Reorganized Debtors' Claims Register, in accordance with Schedule 1.

19. As to the remaining Purported Administrative Expense Claim against Avianca, Babcock contends the Administrative Expense Claims are entitled to priority under both Bankruptcy Code sections 365(d)(5)—as obligations under a lease of personal property not rejected within 60 days of the petition date—and 503(b)—as actual and necessary costs or expenses of preserving the estate. Neither Bankruptcy Code sections 365(d)(5) nor 503(b)(1) apply to Babcock's claim for Initiator Fees.

20. First, Babcock's Initiator Fees*, i.e.*, broker fees, are not "true lease" obligations as contemplated in section 365(d)(5). See e.g., In re Lakeshore Constr. Co. of Wolfeboro, Inc., 390 B.R. 751, 755-66 (Bankr. D.N.H. 2008) ("The provisions in § 365(d)(5) were added to the Bankruptcy Code in 1994 to make it easier for ***lessors*** of personal property to recover ***postpetition*** lease payments prior to acceptance or rejection of a lease by the trustee or debtor-in-possession.") (emphasis added); In re Hayes Lemmerz Int'l, Inc., 340 B.R. 461, 472 (Bankr. D. Del. 2006) (noting the legislative history of § 365(d)(5) "clearly states Congress's intent to give special protection to ***qualified lessors***") (emphasis added). Further, Initiator Fees are distinguishable from other lease-related "obligations" that courts have considered pursuant to section 365(d)(5), such as rent, repair and maintenance charges, utilities, and taxes, which are incurred postpetition in

connection with ongoing use of the leased property. See, e.g., In re Hayes Lemmerz Int'l, Inc., 340 B.R. at 491-92 (finding an administrative expense claim for repair and maintenance obligations appropriate under section 365(d)(5) where damage to leased machines first occurred postpetition, and citing to case law stating that rents and "such other items as common area maintenance charges, utilities, and even taxes" are obligations for the purposes of § 365(d)(5)) (internal citations omitted). Initiator Fees, by contrast, are obligations incurred ***prepetition***. They are brokerage fees related to work Babcock did, as broker, in 2015 to arrange, or "initiate" the aircraft transactions in question. Rather than receiving the initiator fees at that time, the parties agreed to denominate the initiator fees as "Additional Rent" in the transaction documents, thereby nominally labeling as rent something that bears no resemblance to items typically considered rent. The fact that the obligations are labeled as "Additional Rent" in the transaction documents does not bear on the classification of such a claim in bankruptcy. See e.g., In re Pudgie's Dev. of NY, Inc., 202 B.R. 832, 837 (Bankr. S.D.N.Y. 1996) (noting § 365(d)(3) (which courts often look to when construing section 365(d)(5)) should be "strictly construed" and determining that the obligation to pay attorneys' fees, though included in the lease, is not one of the obligations within the scope section 365(d)(3) because it would not "make sense" for attorneys' fees to fall within the scope section 365(d)(3) as such obligation "may fortuitously arise before or after the time period in question"); *In re Child World, Inc.*, 161 B.R. 571, 576 (Bankr. S.D.N.Y. 1993) (holding where landlord submitted a postpetition bill for reimbursement of real estate taxes arising pre and postpetition that "[a]llowing landlords to recover for items of rent which are billed during the postpetition, prerejection period, but which represent payment for services rendered by the landlord outside this time period, would grant landlords a windfall payment, to the detriment of other creditors, without

any support from the legislative history. This conclusion is reinforced by the policy of narrowly construing statutory priorities in order to treat credits as equally as possible").

21. Second, section 503(b)(1)(A) contemplates administrative expense claims only for "the ***actual, necessary costs and expenses*** of preserving the estate[.]" (emphasis added). Indeed, section 503(b)(1) is construed narrowly "to promote the goal of equality of distribution" because "the priority elevates the payment of the administrative claim to the detriment of unsecured creditors." In re Patient Educ. Media, 221 B.R. 97, 101 (Bankr. S.D.N.Y. 1998). Creditors seeking administrative expense treatment under 503(b)(1) must first show that the claim arises from a post-petition transaction, *i.e.*, that it is a transaction between the debtor-in-possession and the creditor; and second, the creditor must show that the estate received a benefit from the transaction. See In re Grubb & Ellis Co., 478 B.R. 622, 624 (Bankr. S.D.N.Y. 2012). As such, a creditor is ***not*** entitled to administrative expense status under section 503(b)(1) simply because the right of payment arose post-petition; rather, services must have been induced by the debtor-in-possession. See id. Babcock's services, for which the Initiator Fees are owed, occurred entirely on a prepetition basis; accordingly, such services were not *necessary* to preserve the estates. Moreover, Babcock makes no attempt to explain how it meets the two-part test for establishing administrative expense status under section 503(b)(1)(A), which burden lies squarely on Babcock's shoulders.

22. Further, the Purported Administrative Expense Claims, as noted above, relate to transactions concerning the financing and leasing of certain aircraft, and after the Petition Date, the Debtors and the lessors entered into a stipulation which modified the terms of each of the subject leases. See., e.g., *Second Stipulation and Order Between Debtors and Aircraft Counterparties Concerning Certain Aircraft* [Dkt. No. 401] (the "Second Stipulation"). The Second Stipulation provided that the rent due for each subject Aircraft would be set on a "power

by the hour" basis ("PBH Agreements"). Rather than paying the rent and maintenance reserves as set forth in the subject leases, the Debtors would pay the lessors the amounts due as set forth in the PBH Agreements. The Second Stipulation and PBH Agreements do not allow for payment of the Supplemental Rent claimed by Babcock in its Administrative Claims.[4]

23. For these reasons, the Court should reclassify and allow the remaining Purported Administrative Expense Claim, filed in the Avianca case (Claim 4038), as a general unsecured claim. The proposed treatment is contained on **Schedule 1** to the Proposed Order.

24. **Reclassification of Secured Claim.** Babcock filed a secured claim for Initiator Fees (the "Purported Secured Claim") in the Avianca case (Claim 2057), as more fully identified on **Schedule 1**. The amount of the Purported Secured Claim appears to reflect Initiator Fee payments due pre-petition. Babcock has provided no proof of a perfected security interest to support its claim. The Southern District of New York has highlighted the importance of complying with Bankruptcy Rule 3001(d) where a security interest is claimed. See In re Lehman Brothers Inc., 2019 WL 13043062 (S.D.N.Y. Sept. 30, 2019) (upholding reclassification of purported secured claims concerning a deferred compensation plan as unsecured claims). The Court there explained that "not all proofs of claim are prima facie evidence of the validity and amount of the claim" and that "[o]ne of the rules with which Claimants must comply – Rule 3001(d) – states that '[i]f a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.'" Id. at *4. The Court noted that the "Basis for perfection" section of the proof of claim form stated "See Addendum", and while the Addendum asserted that the claim was secured, it did not explain or assert how this interest was

[4] In addition, under the well-established principles of recharacterization, it is likely that these transactions are best characterized as financing transactions as opposed to lease transactions. Thus, any Disputed Claims pursuant to true lease obligations should be disallowed. Reorganized Debtors reserve all rights to pursue recharacterization of the transactions to the extent the Disputed Claims are not disallowed and reclassified in accordance with **Schedule 1**.

perfected – nor was such evidence presented elsewhere in the proofs of claim. Id. (finding further, at *5, that other evidence proffered by claimants was insufficient to make the prima facie showing). Accordingly, here, absent proof of a perfected security interest, the Purported Secured Claim should be reclassified as a general unsecured claim (the "Surviving General Unsecured Claim as listed on **Schedule 1** to the Proposed Order").

25. **Disallowance of Duplicate Purported Priority Claim**. Babcock also filed an unsecured claim for the Initiator Fees (the "Purported Priority Claim") in the Aerovías case (Claim 4022), which has, as noted above, been substantively consolidated with the Avianca case. Identical in amount to the Purported Secured Claim, Babcock contends that the Purported Priority Claim is entitled to priority under section 507 of the Bankruptcy Code. Babcock does not specify the particular provision of 507 establishing priority. Instead, Babcock references an annex to its proof of claim, which is likewise silent as to the basis for priority. This Court has disallowed a purported priority claim (based on "services performed" and "money loaned") where the proof of claim "fail[ed] to specify the required statutory basis for filing a priority claim and indeed, no such statutory basis exist[ed]…" In re InterBank Funding Corp., 310 B.R. 238, 248 (Bankr. S.D.N.Y. 2004) (describing the statutory bases under section 507 and finding that claimant failed to demonstrate the existence of any such basis). Similar to the claimant in InterBank, Babcock has failed to establish entitlement to priority treatment under section 507.

26. Stripped of priority, the Purported Priority Claim duplicates the Surviving General Unsecured Claim and should be disallowed and expunged. Failure to disallow this duplicate claim could result in Babcock receiving an unwarranted duplicative recovery against the Reorganized Debtors' estates, to the detriment of other similarly situated creditors. To avoid the possibility of multiple recoveries by Babcock, the Reorganized Debtors respectfully request that

the Court disallow the Purported Priority Claim listed on **Schedule 1** to the Proposed Order and expunge them from the Reorganized Debtors' Claims Register.

Separate Contested Matter

27. Each objection to the Disputed Claims constitutes a separate contested matter as contemplated by Bankruptcy Rule 9014. The Reorganized Debtors request that the order entered with respect to this Objection be deemed a separate final order with respect to each Disputed Claim.

Responses to Objections

28. For any claimant who timely files and properly serves a response to this Objection (each, a "Response") as set forth in the *Notice of Hearing on Reorganized Debtors' Twenty-Fourth Omnibus Objection to Proofs of Claim*, attached as **Exhibit B**, the Reorganized Debtors will schedule such Response to be heard at the omnibus hearing at which this Objection will be heard, which is scheduled for January 19, 2023 at 11 a.m. (prevailing Eastern Time).

29. To the extent no Response is timely filed with respect to a Disputed Claim, the Reorganized Debtors request that the Court enter an order disallowing or reducing, as applicable, all such Disputed Claims.

Notice

30. Notice of this Objection has been provided to all claimants whose proofs of claim are the subject of the Objection, the Office of the U.S. Trustee, and all other parties entitled to notice pursuant to Bankruptcy Rule 2002. The Reorganized Debtors submit that no other or further notice need be given.

Reservation of Rights

31. The Reorganized Debtors reserve the right to modify, supplement and/or amend this Objection as it pertains to any claim identified herein.

No Prior Request

32. No prior request for the relief sought in this Objection has been made to this or any other court.

WHEREFORE, the Reorganized Debtors respectfully request entry of the Proposed Order granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: New York, New York
December 2, 2022

/s/ John G. McCarthy
John G. McCarthy
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Counsel for Debtors and Reorganized Debtors

Exhibit A to Twenty-Fourth Omnibus Claims Objection

Proposed Order

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 and Reorganized Debtors.	:	(Confirmed)

ORDER GRANTING THE REORGANIZED DEBTORS' TWENTY-FOURTH OMNIBUS OBJECTION TO PROOFS OF CLAIM

Upon the *Reorganized Debtors' Twenty-Fourth Omnibus Objection to Proofs of Claim* (the "Twenty-Fourth Omnibus Claims Objection"),[2] whereby the Reorganized Debtors have requested, in accordance with sections 105 and 502 of the Bankruptcy Code, Bankruptcy Rule 3007, and the *Order Pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 3007 (I) Establishing Claims Objection and Notice Procedures and (II) Granting Related Relief* [Docket No. 1179], entry of an order disallowing and expunging or reclassifying the claims identified on the Schedule hereto; and

[1] The Debtors and Reorganized Debtors in these chapter 11 cases, and each Debtors' and Reorganized Debtors' federal tax identification number (to the extent applicable), are as follows: Avianca Holdings S.A. (N/A) n/k/a HVA Associated Corp.; 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 Loyalty Bermuda Ltd. (N/A); AV Taca International Holdco S.A. (N/A); Aviacorp Enterprises 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo y Rampa S.A. (N/A); Servicios Aeroportuarios Integrados SAIS.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' and Reorganized Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

[2] Capitalized terms not otherwise defined herein shall be given the meanings ascribed to them in the Twenty-Fourth Omnibus Claims Objection.

it appearing that the relief requested is in the best interests of the Reorganized Debtors' estates, their creditors and other parties in interest; and the Court having jurisdiction to consider the Twenty-Fourth Omnibus Claims Objection and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Twenty-Fourth Omnibus Claims Objection 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 Twenty-Fourth Omnibus Claims Objection having been adequate and appropriate under the circumstances; and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The Twenty-Fourth Omnibus Claims Objection is granted as set forth herein.

2. The Purported Administrative Expense Claims filed in the case of Aerovías (Claim 4036), and Taca (Claim 4034) and identified in **Schedule 1** attached hereto are disallowed in their entirety for all purposes in these bankruptcy cases and shall be automatically expunged from the Claims Register maintained in these cases.

3. The Purported Administrative Expense Claim filed in the Avianca case (Claim 4038) and identified in **Schedule 1** attached hereto is reclassified as a general unsecured claim.

4. The Purported Secured Claim filed in the Avianca case (Claim 2057) and identified in **Schedule 1** attached hereto is reclassified as a general unsecured claim.

5. The Purported Priority Claim filed in Aerovías case (Claim 4022) identified in **Schedule 1** attached hereto is disallowed in its entirety for all purposes in these bankruptcy cases and shall be automatically expunged from the Claims Register maintained in these cases.

6. The Debtors and their claims agent are authorized to take all actions necessary to effectuate the relief granted in this Order, including updating the Claims Register to reflect the relief granted herein.

7. Any response to the Twenty-Fourth Omnibus Claims Objection not otherwise withdrawn, resolved, or adjourned is hereby overruled on its merits.

8. Except as provided in this Order, nothing in this Order shall be deemed (a) an admission or finding as to the validity of any claim against a Debtor, (b) a waiver of the right of the Reorganized Debtors to dispute any claim against any Debtor on any grounds whatsoever, at a later date, (c) a promise by or requirement on any Debtor to pay any claim, or (d) a waiver of the rights of the Reorganized Debtors under the Bankruptcy Code or any other applicable law.

9. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: New York, New York
December ____, 2022

THE HONORABLE MARTIN GLENN
CHIEF UNITED STATES BANKRUPTCY JUDGE

Schedule 1 to Order

Disputed Claims

Disputed Claims – Babcock and Brown Securities, LLC[5]

Bankr. Case	Filed As	Claim No.	Date POC filed	Amount	Basis	Notes	Treatment
Avianca Holdings S.A., Case No. 20-11133	Admin	4038	8/23/2021	$377,174.85 total (for 5/10/2020-8/23/21); $20,629.40 post-petition default interest	Initiator Fee payments due post-petition	Includes MSNs: 6617 - 2015 EAIV-1 6692 - 2015 EAIV-1 6739 - 2015 EAIV-1 37507 - 2015 EAIV-1 6767 - 2015 EAIV-2 6511 - 2015 EAIV-2 37508 - 2015 EAIV-2 6746 - 2015 EAIV-2	reclassified as general unsecured claim
Taca International Airlines S.A., Case No. 20-11168	Admin	4034	8/23/2021	$377,174.85 total (for 5/10/2020-8/23/21); $20,629.40 post-petition default interest	Initiator Fee payments due post-petition	Includes MSNs (same as above): 6617 - 2015 EAIV-1 6692 - 2015 EAIV-1 6739 - 2015 EAIV-1 37507 - 2015 EAIV-1 6767 - 2015 EAIV-2 6511 - 2015 EAIV-2 37508 - 2015 EAIV-2 6746 - 2015 EAIV-2	disallowed and expunged
Aerovias del Continente Americano S.A. Avianca, Case No. 20-11134	Admin	4036	8/23/2021	$377,174.85 total (for 5/10/2020-8/23/21); $20,629.40 post-petition default interest	Initiator Fee payments due post-petition	Includes MSNs (same as above): 6617 - 2015 EAIV-1 6692 - 2015 EAIV-1 6739 - 2015 EAIV-1 37507 - 2015 EAIV-1 6767 - 2015 EAIV-2 6511 - 2015 EAIV-2 37508 - 2015 EAIV-2 6746 - 2015 EAIV-2	disallowed and expunged

[5] In the Disputed Claims, Babcock does not provide the calculation for the alleged claim amounts, and the Reorganized Debtors reserve all rights to review and object to such calculations in accordance with the Reorganized Debtors' books and records.

Bankr. Case	Filed As	Claim No.	Date POC filed	Amount	Basis	Notes	Treatment
Avianca Holdings S.A., Case No. 20-11133	Secured	2057	1/20/2021	$2,127,586.36	Initiator Fee payments due prepetition	POC form indicates claim is not based on a lease	reclassified as general unsecured claim
Aerovias del Continente Americano S.A. Avianca, Case No. 20-11134	Priority	4022	8/13/2021	$2,127,586.36	Initiator Fee payments due prepetition	Physically signed POC form states that "Wells Fargo Bank, National Association, as Security Trustee" made earlier filing for this claim Annex refers to POC 2057 filed against Avianca 1/20/21, and states that this POC is being filed pursuant to par. 11 of court's 7/23/21 order, dkt no. 1929 (Annex, par. 6-7)	disallowed and expunged

Exhibit B to Twenty-Fourth Omnibus Claims Objection

Notice of Hearing

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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 and Reorganized Debtors.	:	(Confirmed)

NOTICE OF HEARING ON THE REORGANIZED DEBTORS' TWENTY-FOURTH OMNIBUS OBJECTION TO PROOFS OF CLAIM

PLEASE TAKE NOTICE that, on December 2, 2022, Avianca Holdings S.A. and its reorganized debtor affiliates in these proceedings (collectively, the "Reorganized Debtors"), filed their Twenty-Fourth Omnibus Objection to Proofs of Claim (the "Objection") with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").

[1] The Debtors and Reorganized Debtors in these chapter 11 cases, and each Debtors' and Reorganized Debtors' federal tax identification number (to the extent applicable), are as follows: Avianca Holdings S.A. (N/A) n/k/a HVA Associated Corp.; 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 Loyalty Bermuda Ltd. (N/A); AV Taca International Holdco S.A. (N/A); Aviacorp Enterprises 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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' and Reorganized Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

THIS OBJECTION ADDRESSES ONE OR MORE OF THE CLAIM(S) YOU HAVE FILED IN THE REORGANIZED DEBTORS' CASES. **Schedule 1** annexed to the Objection (attached hereto) identifies your claims and the category of claim objections applicable to you. The complete Objection can be viewed and/or obtained by: (i) accessing the Court's website at www.nysb.uscourts.gov, or (ii) free of charge from the Reorganized Debtors' notice and claims agent, KCC, at http://www.kccllc.net/avianca or by calling (866) 967-1780 (U.S./Canada) or +1 (310) 751-2680 (International). Note that a PACER password is needed to access documents on the Court's website. The complete Objection is entitled *Reorganized Debtors' Twenty-Fourth Omnibus Objection to Proofs of Claim*.

The Objection requests that the Bankruptcy Court (i) disallow certain administrative expense claims as improper and duplicative; (ii) reclassify a certain administrative expense claim as general unsecured;.(iii) reclassify a certain secured claim as general unsecured an improperly filed as secured; and (iv) disallow an unsecured priority claim as improper and duplicative. Any claim that the Bankruptcy Court expunges or disallows will be treated as if such claim had not been filed. Any claim that the Bankruptcy Court reclassifies will be treated as if such claim had been filed in the reclassified class.

If you DO oppose the disallowance, expungement, or reclassification of your claim(s) listed in the Schedule then you MUST file a written response to the Objection (the "Response") ON OR BEFORE January 6, 2023 AT 4 P.M. EASTERN TIME (the "Response Deadline") and serve such Response as set forth herein. If you DO NOT oppose the disallowance, expungement, or reclassification of your claim(s) listed in the Schedule then no further action is required by you.

The Response, if any, must include the following: (i) a caption identifying the name of the Bankruptcy Court, the names of the Reorganized Debtors, the case number and the title of the Objection to which the Response is directed; (ii) the name of the claimant and description of the basis for the claim; (iii) a short statement describing the reasons for which the claim should not be disallowed or reclassified as set forth in the Objection; (iv) additional documentation or other evidence upon which you rely in opposing the Objection (if it was not included with the proof of claim previously filed with the Bankruptcy Court); (v) the address(es) to which the Reorganized Debtors must return any reply to your Response, if different from that presented in your proof of claim; (vi) the name, address, and telephone number of the person (which may be you or your legal representative) holding ultimate authority to resolve the claim on your behalf.

The Bankruptcy Court will consider a Response only if the Response is filed with the Court on or prior to the Response Deadline. All Responses must be served on (i) the Bankruptcy Court at Chambers of Honorable Judge Martin Glenn, One Bowling Green, New York, New York 10004-1408, (ii) counsel for the Reorganized Debtors at Milbank LLP, 55 Hudson Yards, New York, New York 10001 (Attn: Evan R. Fleck, Esq., Gregory A. Bray, Esq., and Benjamin Schak, Esq. (efleck@milbank.com, gbray@milbank.com, and bschak@milbank.com)) and Smith, Gambrell & Russell, LLP, 1301 Avenue of the Americas, 21st Floor, New York, New York 10019 (Attn: John G. McCarthy, Esq. and Brian P. Hall, Esq. (jmccarthy@sgrlaw.com, and bhall@sgrlaw.com), and (iii) the Reorganized Debtors, c/o Richard Galindo (richard.galindo@avianca.com).

A HEARING WILL BE HELD ON January 19, 2023 (the "Hearing") to consider the Objection. **THE HEARING WILL BE HELD AT 11A.M. (EASTERN TIME)** at the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, Room 523, New York, New York 10004 in front of the Honorable Martin Glenn. If you file a written Response to the Objection, you or your counsel must attend the Hearing (which attendance may be via Zoom for Government). In light of the COVID-19 pandemic, the Hearing may be conducted via Zoom for Government. Parties wishing to appear at the Hearing, whether in a "live" or "listen only" capacity, must make an electronic appearance through the "eCourtAppearances" tab on the Court's website (http://www.nysb.uscourts.gov/content/judge-martin-glenn) no later than 4:00 p.m. (prevailing Eastern Time) the business day before the Hearing (the "Appearance Deadline"). Following the Appearance Deadline, the Court will circulate by email the Zoom link to the Hearing to those parties who have made an electronic appearance. Parties wishing to appear at the Hearing must submit an electronic appearance through the Court's website by the Appearance Deadline and not by emailing or otherwise contacting the Court. The Court will not respond to late requests that are submitted on the day of the hearing. Additional information regarding the Court's Zoom and hearing procedures can be found on the Court's website. The Reorganized Debtors reserve the right to continue the Hearing on the Objection for your claim(s) at a later date.

If the Bankruptcy Court does NOT disallow, expunge, reduce, or reclassify your claim(s) listed in **Schedule 1** then the Reorganized Debtors may object on other grounds to the claim(s) (or to any other claims you may have filed) at a later date. You will receive a separate notice of any such objection.

Dated: December 2, 2022
New York, New York

/s/ John G. McCarthy

John G. McCarthy
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Counsel for Debtors and Reorganized Debtors

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 and Reorganized Debtors.	:	(Confirmed)

DECLARATION OF JOHN G. MCCARTHY IN SUPPORT OF THE REORGANIZED DEBTORS' TWENTY-FOURTH OMNIBUS OBJECTION TO PROOFS OF CLAIM

[1] The Debtors and Reorganized Debtors in these chapter 11 cases, and each Debtors' and Reorganized Debtors' federal tax identification number (to the extent applicable), are as follows: Avianca Holdings S.A. (N/A) n/k/a HVA Associated Corp.; 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 Loyalty Bermuda Ltd. (N/A); AV Taca International Holdco S.A. (N/A); Aviacorp Enterprises 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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' and Reorganized Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

I, JOHN G. MCCARTHY, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a member of the law firm Smith, Gambrell & Russell, LLP, counsel to Avianca Holdings S.A. and its reorganized debtor affiliates in the above-captioned action (collectively, the "Reorganized Debtors"). I submit this declaration in support of the *Reorganized Debtors' Twenty-Fourth Omnibus Objection to Proofs of Claim* (the "Objection"), filed contemporaneously herewith.

2. Attached to this declaration as **Exhibit A** is a true and correct copy of an excerpt of the *Framework Agreement [Avianca EAIV 2015-1&2 Trusts]*, dated as of July 30, 2015, among Wells Fargo Bank Northwest, National Association, OCTO-Aircraft Leasing LLC, Avianca EAIV 2015-1 Trust, Avianca EAIV 2015-2 Trust, Avianca Holdings S.A., Aerovías Del Continente Americano S.A. Avianca, Wells Fargo Bank, National Association, and the financiers party thereto.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 2, 2022

/s/ John G. McCarthy
John G. McCarthy

Exhibit A

to the Declaration of John G. McCarthy in Support of the Reorganized Debtors' Twenty-Fourth Omnibus Objection to Proofs of Claim

EXECUTION COPY

FRAMEWORK AGREEMENT [AVIANCA EAIV 2015-1&2 TRUSTS]

dated as of July 30, 2015 by

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION,
not in its individual capacity, except as otherwise expressly provided herein,
but solely as owner trustee

OCTO-AIRCRAFT LEASING LLC,
as Trust 1 Owner Participant
and
as Trust 2 Owner Participant

AVIANCA EAIV 2015-1 Trust,
as Borrower

AVIANCA EAIV 2015-2 Trust,
as Borrower

AVIANCA HOLDINGS S.A.,
as Guarantor

AEROVÍAS DEL CONTINENTE AMERICANO S.A. AVIANCA,
as Lessee

WELLS FARGO BANK, NATIONAL ASSOCIATION,
as Security Trustee

and

THE FINANCIERS PARTY HERETO.

Up to $379,160,000 in Secured Notes and Loan Certificates

Burnham Sterling & Company LLC and Burnham Sterling Securities LLC,
as Initiators

DekaBank Deutsche Girozentrale & The Korea Development Bank,
as Arrangers

NEWYORK/#379904.13

by the trust name therefor specified on Schedule IV. The Owner Participants shall be special purpose vehicles, identified in Schedule V hereto (with each being the owner participant for the specified associated Borrower), and will be affiliates of the Guarantor.

2.5 Remedy Coordination. Notwithstanding anything to the contrary in the Basic Documents, any direction to the Security Trustee to accelerate the Loans under a Loan Agreement of any Borrower shall be deemed a direction to the Security Trustee to also demand repayment of the Notes issued under the NPA to which such Borrower is a party pursuant to Section 2.8(a)(y) of such NPA and any direction to the Security Trustee to demand repayment of the Notes issued under the NPA to which a Borrower is a party pursuant to Section 2.8(a)(y) of such NPA shall be deemed a direction to the Security Trustee to also accelerate the Loans under the Loan Agreement to which such Borrower is a party.

2.6 Documentation. The primary documentation to finance each Aircraft (the "**Primary Documents**") will be:

(a) The Guaranty by the Guarantor for the applicable Borrower, substantially in the form of Exhibit A hereto.

(b) The NPA, substantially in the form of Exhibit B hereto, and the Loan Agreement, substantially in the form of Exhibit C hereto, for the applicable Borrower;

(c) The Lease for each Aircraft, each substantially in the form of Exhibit D hereto; and

(d) The Mortgage for the applicable Borrower, substantially in the form of Exhibit E hereto.

In addition, the financing of each Aircraft will be subject to the delivery of the other documentation referred to in Section 7 of the NPA and Loan Agreement for such Aircraft and the satisfaction of the other conditions precedent set forth in the Primary Documents. The Primary Documents for each Borrower and Aircraft will be completed in compliance with the Schedules hereto.

2.7 Fees. The Guarantor agrees to pay to each Financier, as and when due as provided in the Financing Documents (whether or not executed and delivered) the Commitment Fees and Upfront Fees specified therein. In addition, the Guarantor agrees to pay as and when due the agreed fees and expenses of the institution acting as Borrower and Security Trustee.

2.8 Initiator. The Initiator is entitled to compensation under the Primary Documents as and to the extent provided therein. As such, the Initiator is and shall be a third party beneficiary thereunder as and to the extent expressly provided therein and in Section 2.10 hereof. No Financier shall have any fiduciary duty to the Initiator nor shall any Financier be subject to or take on any credit risk of the Initiator, including as to any agreements by the Initiator to pay for certain costs and expenses; any such agreement being a bilateral matter as between the Initiator and the Guarantor.

Hearing Date & Time: January 19, 2023 at 11:00 a.m. (prevailing Eastern Time)
Objection Deadline: January 6, 2023 at 4:00 p.m. (prevailing Eastern Time)

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Counsel for Debtors and Reorganized Debtors

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 and Reorganized Debtors.	:	(Confirmed)

REORGANIZED DEBTORS' TWENTY-FIFTH OMNIBUS
OBJECTION TO PROOFS OF CLAIM

[1] The Debtors and Reorganized Debtors in these chapter 11 cases, and each Debtors' and Reorganized Debtors' federal tax identification number (to the extent applicable), are as follows: Avianca Holdings S.A. (N/A) n/k/a HVA Associated Corp.; 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 Loyalty Bermuda Ltd. (N/A); AV Taca International Holdco S.A. (N/A); Aviacorp Enterprises 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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' and Reorganized Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

THIS OBJECTION SEEKS TO DISALLOW AND RECLASSIFY CERTAIN CLAIMS FILED BY BURNHAM STERLING AND COMPANY LCC

Avianca Holdings S.A. and its reorganized debtor affiliates in these proceedings (collectively, the "Reorganized Debtors") hereby file this *Twenty-Fifth Omnibus Objection to Proofs of Claim* (the "Objection") pursuant to *Order Pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 3007 (I) Establishing Claims Objection and Notice Procedures and (II) Granting Related Relief* [Docket No. 1179] (the "Claims Objection Procedures Order"). By this Objection, the Reorganized Debtors object to and seek to (i) disallow certain administrative expense claims filed by Burnham Sterling and Company LLC ("Burnham") in the cases of Aerovías del Continente Americano S.A. Avianca ("Aerovías") and Taca International Airlines, S.A. ("Taca") as duplicative of an administrative expense claim filed in the case of Avianca Holdings S.A. ("Avianca"); (ii) reclassify the administrative expense claim filed by Burnham in the Avianca case as a general unsecured claim; (iii) reclassify a secured claim filed by Burnham in the Avianca case as a general unsecured claim; and (iv) disallow two priority claims filed by Burnham in the Aerovías case that duplicate the reclassified claim. The subject claims and the proposed treatment are listed on the attached Schedule 1 to the proposed order attached to this Objection as **Exhibit A** (the "Disputed Claims").[2] In support of this Objection, the Reorganized Debtors respectfully state as follows:

Preliminary Statement

1. Burnham acted as a broker or "initiator" for twenty prepetition aircraft transactions. All of Burnham's required services related to these transactions were completed prepetition. The

[2] In the Disputed Claims, Burnham does not provide the calculation for the alleged claim amounts, and the Reorganized Debtors reserve all right to review and object to such calculations in accordance with the Reorganized Debtors' books and records.

transaction documents are structured such that Burnham, as a third-party beneficiary, would receive its fee for these prepetition services (the "Initiator Fee") in increments over the life of the aircraft transaction, styled as "Additional Rent." Accordingly, as of the petition date, Burnham had received some, but not all, of the fee for its completed services.

2. Through the Disputed Claims, Burnham attempts to characterize certain Initiator Fees it is owed as entitled to administrative claim priority under either (i) section 365(d)(5) of the Bankruptcy Code as an obligation under a lease of personal property or (ii) under section 503(b)(1) of the Bankruptcy Code because, it contends, the fees are actual and necessary costs of preserving Avianca's estate. Neither argument is a sufficient basis to afford administrative priority status to the Disputed Claims. Unlike obligations that truly arise under a true lease, the broker fees were all earned prepetition, at the onset of the transaction, and are not true lease obligations. Further, because the services giving rise to Initiator Fees were all completed prepetition, they are not necessary costs of preserving Avianca's estate. For these reasons, the remaining, non-duplicative Disputed Claim that is classified as a purported administrative claim (against Avianca), should be treated as a general unsecured claim in accordance with **Schedule 1**.

3. Burnham has also filed a purported secured claim, which is also incorrectly characterized. Burnham does not provide proof of a perfected security interest to support its purported secured claim and Avianca is not aware of any such secured obligation. Accordingly, the purported secured Disputed Claim should be reclassified as a general unsecured claim as set forth in with **Schedule 1**.

4. Finally, Burnham filed duplicative purported priority Disputed Claims which should be disallowed and expunged. No statutory basis exists for such claims, and allowing the claims would permit double recovery for Burnham.

Background

5. On May 10, 2020 (the "Initial Petition Date"), certain of the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code, and on September 21, 2020 (together with the Initial Petition Date, as applicable to each Debtor, the "Petition Date"), each of AV Loyalty Bermuda Ltd. and Aviacorp Enterprises S.A. filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (collectively, the "Chapter 11 Cases").

6. The Debtors operated their businesses and managed their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code until they effectuated their emergence from bankruptcy on December 1, 2021. See *Notice of (I) Entry of Order Confirming Further Modified Joint Chapter 11 Plan of Avianca Holdings S.A. and Its Affiliated Debtors, (II) Occurrence of Effective Date, and (III) Final Deadlines for Filing Certain Claims* [Docket No. 2384]. The Debtors' chapter 11 cases were jointly administered pursuant to Bankruptcy Rule 1015(b) and the *Amended Order (I) Directing Joint Administration of Chapter 11 Cases and (II) Granting Related Relief* [Docket No. 73] and the *Order Directing Certain Orders in Chapter 11 Cases of Avianca Holdings S.A., et al Be Made Applicable to Subsequent Debtors* [Docket No. 1030].

7. On May 22, 2020, the United States Trustee for the Southern District of New York appointed an official committee of unsecured creditors (the "Committee"). See *Notice of Appointment of Official Committee of Unsecured Creditors* [Docket No. 154]. No trustee or examiner was appointed in the cases.

8. 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* [Docket No. 20].

9. On November 16, 2020, the Court entered the *Order (I) Establishing Bar Dates for Filing Proofs of Claim, (II) Approving Proof of Claim Forms, Bar Date Notices, and Mailing and Publication Procedures, (III) Implementing Uniform Procedures Regarding 503(b)(9) Claims, and (IV) Providing Certain Supplemental Relief* [Docket No. 1180] that, among other things, established the following deadlines for filing proofs of claim in these cases: (a) January 20, 2021, at 11:59 p.m. (prevailing Pacific Time), for all entities (except for those specifically exempt) holding all types of claims against the Debtors that arose or are deemed to have arisen before the Petition Date; (b) February 5, 2021, at 11:59 p.m. (prevailing Pacific Time), for all governmental units holding claims that arose or are deemed to have arisen prior to the Petition Date; (c) the later of (i) the General Bar Date, or (ii) the later of the date that is (x) thirty days after the date of entry of an order authorizing the rejection of a contract or lease, or (y) the applicable rejection date for claims relating to the Debtors' rejection of an executory contract or unexpired lease; and (d) the later of (i) the General Bar Date and (ii) thirty days after the date that Notice of Amended Schedules is served on the affected claimant for claims whose amount or characterization has changed in the amended schedules (the "Bar Dates"). On November 16, 2020, the Court entered the Claims Objection Procedures Order [Docket No. 1179], that established procedures for Debtors to object to multiple claims in a single objection.

10. 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* [Docket No. 2300] (such underlying chapter 11 plan, the "Plan"). The Plan substantively consolidated all of the Debtors except Avifreight Holding Mexico, S.A.P.I. de C.V. ("Avifreight"), Aero Transporte de Carga Unión, S.A. de C.V. ("Aerounión"), and Servicios Aeroportuarios Integrados SAI S.A.S. ("SAI"). The substantively consolidated Debtors are

referred to herein as the "Consolidated Debtors." The Plan became effective on December 1, 2021 (the "Effective Date") and the Debtors became the Reorganized Debtors as of the Effective Date. See *Notice of (I) Entry of Order Confirming Further Modified Joint Chapter 11 Plan of Avianca Holdings S.A. and Its Affiliated Debtors, (II) Occurrence of Effective Date, and (III) Final Deadlines for Filing Certain Claims* [Docket No. 2384]. Pursuant to Section VII.E of the Plan, the Reorganized Debtors may adjust or expunge from the claims register maintained by the Debtors' claims and solicitation agent (the "Claims Register") any claims that have been paid or satisfied without further action, order, or approval of the Court.

11. The Plan provides that the Reorganized Debtors shall serve and file any objections to proofs of claim (each, a "Proof of Claim") that have been filed against the Debtors on or before the date that is the latter of (a) 180 days after the Effective Date (i.e., May 31, 2022), pursuant to Bankruptcy Rule 9006(a)(1)(C)) and (b) such later date as may be fixed by the Bankruptcy Court upon notice and a hearing. On May 10, 2022, the Court entered the *Order Extending the Deadline to Object to Claims* [Docket No. 2572], which extended the deadline for the Reorganized Debtors to serve and file any objections to Proofs of Claim to December 2, 2022.

12. Burnham provided broker/arranger services for twenty of the Debtors' aircraft leasing transactions.[3] All of these services were provided on a pre-petition basis. See, e.g., MSN 65315 Initiator Fee Letter § 5(c) ("The [Debtor] acknowledges that [Burnham] has already provided investment banking services to [the Debtor] prior to the Delivery Date[.]"). There is a suite of transaction documents that govern each of the twenty aircraft. Through each suite of documents for the transactions varies slightly depending on the type of transaction, Burnham is a

[3] The relevant aircraft have the following manufacturer serial numbers ("MSNs"): 6617, 6692, 6739, 37507, 6767, 6511, 37508, 6746, 37511, 7284, 7318, 39407, 7887, 7928, 65315, 8300, 3988, 3992, 4281, and 4284 (the "Aircraft")

third-party beneficiary in each of the twenty aircraft transactions. See, e.g., Framework Agreement § 2.8; MSN 7284 Loan Agreement § 12.5; MSN 7928 Sublease § 26.4; MSN 65315 Initiator Fee Letter § 5. As compensation for its prepetition broker services, Burnham are entitled to collect the Initiator Fees styled as additional or supplemental rent, which the Debtors pay in the first instance to a lessor/owner trust.

Jurisdiction and Venue

13. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

Relief Requested

14. The Reorganized Debtors respectfully request the Court to enter an order (the "Proposed Order"), substantially in the form attached hereto as **Exhibit A**, disallowing and reclassifying or otherwise modifying, as applicable, each Disputed Claim in the amounts provided on the schedule to the Proposed Order.

Basis for Relief Requested

15. Section 502(a) of the Bankruptcy Code provides that any claim for which a proof of claim has been filed shall be deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). As set forth in Bankruptcy Rule 3001(f), a properly executed and filed proof of claim constitutes *prima facie* evidence of the validity and the amount of the claim for the purposes of section 502(a) of the Bankruptcy Code. See In re Allegheny Int'l, Inc., 954 F.2d 167, 173 (3d Cir. 1992). However, a proof of claim is entitled to the presumption of *prima facie* validity only until an objecting party produces evidence to negate such *prima facie* validity. See In re Avaya, Inc., 608 B.R. 366, 369-70 (Bankr. S.D.N.Y. 2019).

16. If an objection is filed, the court, upon notice and a hearing, must determine the validity and/or the amount of the asserted claim. See 11 U.S.C. § 502(b). Once the objecting party refutes an allegation critical to the claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. Allegheny, 954 F.2d at 173. In other words, once the *prima facie* validity of a claim is rebutted, "it is for the claimant to prove his claim, not for the objector to disprove it." In re Kahn, 114 B.R. 40, 44 (Bankr. S.D.N.Y. 1990) (citations omitted).

17. A debtor in possession has the duty to object to the allowance of any improperly asserted claim. 11 U.S.C. § 1106(a)(1). Section 502(b)(1) of the Bankruptcy Code provides that a claim may not be allowed to the extent that "such claim is unenforceable against the debtor." 11 U.S.C. § 502(b)(1). Bankruptcy Rule 3007(d) and the Claims Objection Procedures Order permit the Debtors and Reorganized Debtors to file an objection to more than one claim on non-substantive bases, such as because such claims "have been satisfied" (Fed. R. Bankr. P. 3007(d)(5); see also, Claims Objection Procedures Order at ¶ 2), such claims are "incorrectly classified" (Claims Objection Procedures Order at ¶ 2(ii)), "do[] not include sufficient documentation to ascertain the validity of the claim" (Claims Objection Procedures Order at ¶ 2(iv)), "the amount claimed is inconsistent with or contradicts the Debtors' books and records and the Debtors, after review and consideration of any information provided by the claimant, deny liability in excess of the amount reflected in the Debtors' books and records" (Claims Objection Procedures Order at ¶ 2), or the claim "ha[s] been amended by subsequently filed proofs of claim" (Fed. R. Bankr. P. 3007(d)(3)).

18. **Disallowance of Duplicate Purported Administrative Expense Claims and Reclassification of Remaining Claim**. Burnham filed three identical claims seeking administrative expense status for Initiator Fees allegedly due post-petition (the "Purported

Administrative Expense Claims") in Avianca (Claim 4033), Aerovías (Claim 4037), and Taca (Claim 4035), all of which cases were consolidated upon confirmation. Because the Disputed Claims against Aerovías (Claim 4037), and Taca (Claim 4035) are duplicative of the Disputed Claim against Avianca (Claim 4033), they should be disallowed and expunged. Failure to disallow two of these duplicate claims would result in Babcock receiving an unwarranted recovery against the Reorganized Debtors' estates, to the detriment of other similarly situated creditors. To avoid the possibility of multiple recoveries by Babcock, the Reorganized Debtors respectfully request that the Court disallow the Purported Administrative Expense Claims filed in the cases of Aerovías (Claim 4037), and Taca (Claim 4035) and expunge them from the Reorganized Debtors' Claims Register, in accordance with Schedule 1.

19. As to the remaining Purported Administrative Expense Claim against Avianca, Burnham contends the Administrative Expense Claims are entitled to priority under both Bankruptcy Code sections 365(d)(5)—as obligations under a lease of personal property not rejected within 60 days of the petition date—and 503(b)—as actual and necessary costs or expenses of preserving the estate. Neither Bankruptcy Code sections 365(d)(5) nor 503(b)(1) apply to Burnham's claim for Initiator Fees.

20. First, Burnham's Initiator Fees, *i.e.*, broker fees, are not "true lease" obligations as contemplated in section 365(d)(5). See e.g., In re Lakeshore Constr. Co. of Wolfeboro, Inc., 390 B.R. 751, 755-66 (Bankr. D.N.H. 2008) ("The provisions in § 365(d)(5) were added to the Bankruptcy Code in 1994 to make it easier for ***lessors*** of personal property to recover ***postpetition*** lease payments prior to acceptance or rejection of a lease by the trustee or debtor-in-possession.") (emphasis added); In re Hayes Lemmerz Int'l, Inc., 340 B.R. 461, 472 (Bankr. D. Del. 2006) (noting the legislative history of § 365(d)(5) "clearly states Congress's intent to give special

protection to ***qualified lessors***") (emphasis added). Further, Initiator Fees are distinguishable from other lease-related "obligations" that courts have considered pursuant to section 365(d)(5), such as rent, repair and maintenance charges, utilities, and taxes, which are incurred postpetition in connection with ongoing use of the leased property. See, e.g., In re Hayes Lemmerz Int'l, Inc., 340 B.R. at 491-92 (finding an administrative expense claim for repair and maintenance obligations appropriate under section 365(d)(5) where damage to leased machines first occurred postpetition, and citing to case law stating that rents and "such other items as common area maintenance charges, utilities, and even taxes" are obligations for the purposes of § 365(d)(5)) (internal citations omitted). Initiator Fees, by contrast, are obligations incurred ***prepetition***, at the time of closing. They are brokerage fees related to work Burnham did, as broker, between 2015 and 2019 to arrange, or "initiate" the aircraft transactions in question. Rather than receiving the initiator fees at that time, the parties agreed to denominate the initiator fees as "Additional Rent" in the transaction documents, thereby nominally labeling as rent something that bears no resemblance to items typically considered rent. The fact that the obligations are labeled as "Additional Rent" in the transaction documents does not bear on the classification of such a claim in bankruptcy. See e.g., In re Pudgie's Dev. of NY, Inc., 202 B.R. 832, 837 (Bankr. S.D.N.Y. 1996) (noting § 365(d)(3) (which courts often look to when construing section 365(d)(5)) should be "strictly construed" and determining that the obligation to pay attorneys' fees, though included in the lease, is not one of the obligations within the scope section 365(d)(3) because it would not "make sense" for attorneys' fees to fall within the scope section 365(d)(3) as such obligation "may fortuitously arise before or after the time period in question"); In re Child World, Inc., 161 B.R. 571, 576 (Bankr. S.D.N.Y. 1993) (holding where landlord submitted a postpetition bill for reimbursement of real estate taxes arising pre and postpetition that "[a]llowing landlords to recover for items of

rent which are billed during the postpetition, prerejection period, but which represent payment for services rendered by the landlord outside this time period, would grant landlords a windfall payment, to the detriment of other creditors, without any support from the legislative history. This conclusion is reinforced by the policy of narrowly construing statutory priorities in order to treat credits as equally as possible").

21. Second, section 503(b)(1)(A) contemplates administrative expense claims only for "the ***actual, necessary costs and expenses*** of preserving the estate[.]" (emphasis added). Indeed, section 503(b)(1) is construed narrowly "to promote the goal of equality of distribution" because "the priority elevates the payment of the administrative claim to the detriment of unsecured creditors." In re Patient Educ. Media, 221 B.R. 97, 101 (Bankr. S.D.N.Y. 1998). Creditors seeking administrative expense treatment under 503(b)(1) must first show that the claim arises from a post-petition transaction, *i.e.*, that it is a transaction between the debtor-in-possession and the creditor; and second, the creditor must show that the estate received a benefit from the transaction. See In re Grubb & Ellis Co., 478 B.R. 622, 624 (Bankr. S.D.N.Y. 2012). As such, a creditor is ***not*** entitled to administrative expense status under section 503(b)(1) simply because the right of payment arose post-petition; rather, services must have been induced by the debtor-in-possession. See id. Burnham's services, for which the Initiator Fees are owed, occurred entirely on a prepetition basis; accordingly, such services were not *necessary* to preserve the estates. Moreover, Burnham makes no attempt to explain how it meets the two-part test for establishing administrative expense status under section 503(b)(1)(A), which burden lies squarely on Burnham's shoulders.

22. Further, the Purported Administrative Expense Claims, as noted above, relate to transactions concerning the financing and leasing of certain aircraft, and after the Petition Date, the Debtors and the lessors entered into a stipulation which modified the terms of each of the

subject leases. See., e.g., *Second Stipulation and Order Between Debtors and Aircraft Counterparties Concerning Certain Aircraft* [Dkt. No. 401] (the "Second Stipulation"). The Second Stipulation provided that the rent due for each subject Aircraft would be set on a "power by the hour" basis ("PBH Agreements"). Rather than paying the rent and maintenance reserves as set forth in the subject leases, the Debtors would pay the lessors the amounts due as set forth in the PBH Agreements. The Second Stipulation and PBH Agreements do not allow for payment of the Supplemental Rent claimed by Burnham in its Administrative Claims.[4]

23. For these reasons, the Court should reclassify and allow the remaining Purported Administrative Expense Claim, filed in the Avianca case (Claim 4033), as a general unsecured claim. The proposed treatment is contained on **Schedule 1** to the Proposed Order.

24. **Reclassification of Secured Claim.** Burnham filed a secured claim for Initiator Fees (the "Purported Secured Claim") in the Avianca case (Claim 2055), as more fully identified on **Schedule 1**. The amount of the Purported Secured Claim appears to reflect Initiator Fee payments due pre-petition. Burnham has provided no proof of a perfected security interest to support its claim. The Southern District of New York has highlighted the importance of complying with Bankruptcy Rule 3001(d) where a security interest is claimed. See In re Lehman Brothers Inc., 2019 WL 13043062 (S.D.N.Y. Sept. 30, 2019) (upholding reclassification of purported secured claims concerning a deferred compensation plan as unsecured claims). The Court there explained that "not all proofs of claim are prima facie evidence of the validity and amount of the claim" and that "[o]ne of the rules with which Claimants must comply – Rule 3001(d) – states that '[i]f a security interest in property of the debtor is claimed, the proof of claim shall be accompanied

[4] In addition, under the well-established principles of recharacterization, it is likely that these transactions are best characterized as financing transactions as opposed to lease transactions. Thus, any Disputed Claims pursuant to true lease obligations should be disallowed. Reorganized Debtors reserve all rights to pursue recharacterization of the transactions to the extent the Disputed Claims are not disallowed and reclassified in accordance with **Schedule 1**.

by evidence that the security interest has been perfected.'" Id. at *4. The Court noted that the "Basis for perfection" section of the proof of claim form stated "See Addendum", and while the Addendum asserted that the claim was secured, it did not explain or assert how this interest was perfected – nor was such evidence presented elsewhere in the proofs of claim. Id. (finding further, at *5, that other evidence proffered by claimants was insufficient to make the prima facie showing). Accordingly, here, absent proof of a perfected security interest, the Purported Secured Claim should be reclassified as a general unsecured claim (the "Surviving General Unsecured Claim as listed on **Schedule 1** to the Proposed Order").

25. **Disallowance of Duplicate Purported Priority Claims.** Burnham also filed purported priority claims for the Initiator Fees in the Aerovías case (Claim 4026) and in the Taca case (Claim 4027; together with Claim 4026, the "Purported Priority Claims"), which cases have, as noted above, been substantively consolidated with the Avianca case. Together totaling an amount identical to the Purported Secured Claim, Burnham contends that the Purported Priority Claims are entitled to priority under section 507 of the Bankruptcy Code. Burnham does not specify the particular provision of 507 establishing priority. Instead, Burnham references an annex to each proof of claim, which is likewise silent as to the basis for priority. This Court has disallowed a purported priority claim (based on "services performed" and "money loaned") where the proof of claim "fail[ed] to specify the required statutory basis for filing a priority claim and indeed, no such statutory basis exist[ed]…" In re InterBank Funding Corp., 310 B.R. 238, 248 (Bankr. S.D.N.Y. 2004) (describing the statutory bases under section 507 and finding that claimant failed to demonstrate the existence of any such basis). Similar to the claimant in InterBank, Burnham has failed to establish entitlement to priority treatment under section 507.

26. Stripped of priority, the Purported Priority Claims duplicate the Surviving General Unsecured Claim and should be disallowed and expunged. Failure to disallow these duplicate claims could result in Burnham receiving an unwarranted duplicative recovery against the Reorganized Debtors' estates, to the detriment of other similarly situated creditors. To avoid the possibility of multiple recoveries by Burnham, the Reorganized Debtors respectfully request that the Court disallow the Purported Priority Claims listed on **Schedule 1** to the Proposed Order and expunge them from the Reorganized Debtors' Claims Register.

Separate Contested Matter

27. Each objection to the Disputed Claims constitutes a separate contested matter as contemplated by Bankruptcy Rule 9014. The Reorganized Debtors request that the order entered with respect to this Objection be deemed a separate final order with respect to each Disputed Claim.

Responses to Objections

28. For any claimant who timely files and properly serves a response to this Objection (each, a "Response") as set forth in the *Notice of Hearing on Reorganized Debtors' Twenty-Fifth Omnibus Objection to Proofs of Claim*, attached as **Exhibit B**, the Reorganized Debtors will schedule such Response to be heard at the omnibus hearing at which this Objection will be heard, which is scheduled for January 19, 2023 at 11 a.m. (prevailing Eastern Time).

29. To the extent no Response is timely filed with respect to a Disputed Claim, the Reorganized Debtors request that the Court enter an order disallowing or reducing, as applicable, all such Disputed Claims.

Notice

30. Notice of this Objection has been provided to all claimants whose proofs of claim are the subject of the Objection, the Office of the U.S. Trustee, and all other parties entitled to notice pursuant to Bankruptcy Rule 2002. The Reorganized Debtors submit that no other or further notice need be given.

Reservation of Rights

31. The Reorganized Debtors reserve the right to modify, supplement and/or amend this Objection as it pertains to any claim identified herein.

No Prior Request

32. No prior request for the relief sought in this Objection has been made to this or any other court.

WHEREFORE, the Reorganized Debtors respectfully request entry of the Proposed Order granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: New York, New York
December 2, 2022

/s/ John G. McCarthy
John G. McCarthy
SMITH, GAMBRELL & RUSSELL, LLP
1301 Avenue of the Americas, 21st Floor
New York, New York 10019
(212) 907-9700
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Counsel for Debtors and Reorganized Debtors

Exhibit A to Twenty-Fifth Omnibus Claims Objection

Proposed Order

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 and Reorganized Debtors.	:	(Confirmed)

ORDER GRANTING THE REORGANIZED DEBTORS' TWENTY-FIFTH OMNIBUS OBJECTION TO PROOFS OF CLAIM

Upon the *Reorganized Debtors' Twenty-Fifth Omnibus Objection to Proofs of Claim* (the "Twenty-Fifth Omnibus Claims Objection"),[2] whereby the Reorganized Debtors have requested, in accordance with sections 105 and 502 of the Bankruptcy Code, Bankruptcy Rule 3007, and the *Order Pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 3007 (I) Establishing Claims Objection and Notice Procedures and (II) Granting Related Relief* [Docket No. 1179], entry of an order disallowing and expunging or reclassifying the claims identified on the Schedule hereto; and

[1] The Debtors and Reorganized Debtors in these chapter 11 cases, and each Debtors' and Reorganized Debtors' federal tax identification number (to the extent applicable), are as follows: Avianca Holdings S.A. (N/A) n/k/a HVA Associated Corp.; 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 Loyalty Bermuda Ltd. (N/A); AV Taca International Holdco S.A. (N/A); Aviacorp Enterprises 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo y Rampa S.A. (N/A); Servicios Aeroportuarios Integrados SAIS.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' and Reorganized Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

[2] Capitalized terms not otherwise defined herein shall be given the meanings ascribed to them in the Twenty-Fifth Omnibus Claims Objection.

it appearing that the relief requested is in the best interests of the Reorganized Debtors' estates, their creditors and other parties in interest; and the Court having jurisdiction to consider the Twenty-Fifth Omnibus Claims Objection and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Twenty-Fifth Omnibus Claims Objection 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 Twenty-Fifth Omnibus Claims Objection having been adequate and appropriate under the circumstances; and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The Twenty-Fifth Omnibus Claims Objection is granted as set forth herein.

2. The Purported Administrative Expense Claims filed in the case of Aerovías (Claim 4037), and Taca (Claim 4035) and identified in **Schedule 1** attached hereto are disallowed in their entirety for all purposes in these bankruptcy cases and shall be automatically expunged from the Claims Register maintained in these cases.

3. The Purported Administrative Expense Claim filed in the Avianca case (Claim 4033) and identified in **Schedule 1** attached hereto is reclassified as a general unsecured claim.

4. The Purported Secured Claim filed in the Avianca case (Claim 2055) and identified in **Schedule 1** attached hereto is reclassified as a general unsecured claim.

5. The Purported Priority Claims filed in the Aerovías case (Claim 4026) and in the Taca case (Claim 4027) and identified in **Schedule 1** attached hereto are disallowed in their entirety for all purposes in these bankruptcy cases and shall be automatically expunged from the Claims Register maintained in these cases.

6. The Debtors and their claims agent are authorized to take all actions necessary to effectuate the relief granted in this Order, including updating the Claims Register to reflect the relief granted herein.

7. Any response to the Twenty-Fifth Omnibus Claims Objection not otherwise withdrawn, resolved, or adjourned is hereby overruled on its merits.

8. Except as provided in this Order, nothing in this Order shall be deemed (a) an admission or finding as to the validity of any claim against a Debtor, (b) a waiver of the right of the Reorganized Debtors to dispute any claim against any Debtor on any grounds whatsoever, at a later date, (c) a promise by or requirement on any Debtor to pay any claim, or (d) a waiver of the rights of the Reorganized Debtors under the Bankruptcy Code or any other applicable law.

9. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: New York, New York
December ____, 2022

____
THE HONORABLE MARTIN GLENN
CHIEF UNITED STATES BANKRUPTCY JUDGE

Schedule 1 to Order

Disputed Claims

Disputed Claims – Burnham Sterling and Company LLC[5]

Bankr. Case	Filed As	Claim No.	Date POC filed	Amount	Basis	Notes	Treatment
Taca International Airlines S.A., Case No. 20-11168	Admin	4035	8/23/2021	US$1,827,083.66 total (for 5/10/2020-8/23/21); US$78,991.37 post-petition default interest	Initiator Fee payments due post-petition	Includes MSNs: 6617 - 2015 EAIV-1 (MSN in Babcock Admin POCs; diff't amt) 6692 - 2015 EAIV-1 (MSN in Babcock Admin POCs; diff't amt) 6739 - 2015 EAIV-1 (MSN in Babcock Admin POCs; diff't amt) 37507 - 2015 EAIV-1 (MSN in Babcock Admin POCs; diff't amt) 6767 - 2015 EAIV-2 (MSN in Babcock Admin POCs; diff't amt) 6511 - 2015 EAIV-2 (MSN in Babcock Admin POCs; diff't amt) 37508 - 2015 EAIV-2 (MSN in Babcock Admin POCs; diff't amt) 6746 - 2015 EAIV-2 (MSN in Babcock Admin POCs; diff't amt) 37511 - 2016 EAIV 7284 - 2016 EAIV [EUR currency] 7318 - 2016 EAIV [EUR currency] 39407 - 2017 JOLCO 7887 - 2017 JOLCO 7928 - 2017 JOLCO 65315 - 2018 JOLCO 8300 - 2018 JOLCO 3988 - 2019 JOLCO 3992 - 2019 JOLCO 4281 - 2019 JOLCO 4284 - 2019 JOLCO	disallowed and expunged

[5] In the Disputed Claims, Burnham does not provide the calculation for the alleged claim amounts, and the Reorganized Debtors reserve all rights to review and object to such calculations in accordance with the Reorganized Debtors' books and records.

Bankr. Case	Filed As	Claim No.	Date POC filed	Amount	Basis	Notes	Treatment
Aerovias del Continente Americano S.A. Avianca, Case No. 20-11134	Admin	4037	8/23/2021	US$1,827,083.66 total (for 5/10/2020-8/23/21); US$78,991.37 post-petition default interest	Initiator Fee payments due post-petition	Includes MSNs (same as above): 6617 - 2015 EAIV-1 (MSN in Babcock Admin POCs; diff't amt) 6692 - 2015 EAIV-1 (MSN in Babcock Admin POCs; diff't amt) 6739 - 2015 EAIV-1 (MSN in Babcock Admin POCs; diff't amt) 37507 - 2015 EAIV-1 (MSN in Babcock Admin POCs; diff't amt) 6767 - 2015 EAIV-2 (MSN in Babcock Admin POCs; diff't amt) 6511 - 2015 EAIV-2 (MSN in Babcock Admin POCs; diff't amt) 37508 - 2015 EAIV-2 (MSN in Babcock Admin POCs; diff't amt) 6746 - 2015 EAIV-2 (MSN in Babcock Admin POCs; diff't amt) 37511 - 2016 EAIV 7284 - 2016 EAIV [EUR currency] 7318 - 2016 EAIV [EUR currency] 39407 - 2017 JOLCO 7887 - 2017 JOLCO 7928 - 2017 JOLCO 65315 - 2018 JOLCO 8300 - 2018 JOLCO 3988 - 2019 JOLCO 3992 - 2019 JOLCO 4281 - 2019 JOLCO 4284 - 2019 JOLCO	disallowed and expunged

Bankr. Case	Filed As	Claim No.	Date POC filed	Amount	Basis	Notes	Treatment
Avianca Holdings S.A., Case No. 20-11133	Admin	4033	8/23/2021	US$1,827,083.66 total (for 5/10/2020-8/23/21); US$78,991.37 post-petition default interest	Initiator Fee payments due post-petition	Includes MSNs (same as above): 6617 - 2015 EAIV-1 (MSN in Babcock Admin POCs; diff't amt) 6692 - 2015 EAIV-1 (MSN in Babcock Admin POCs; diff't amt) 6739 - 2015 EAIV-1 (MSN in Babcock Admin POCs; diff't amt) 37507 - 2015 EAIV-1 (MSN in Babcock Admin POCs; diff't amt) 6767 - 2015 EAIV-2 (MSN in Babcock Admin POCs; diff't amt) 6511 - 2015 EAIV-2 (MSN in Babcock Admin POCs; diff't amt) 37508 - 2015 EAIV-2 (MSN in Babcock Admin POCs; diff't amt) 6746 - 2015 EAIV-2 (MSN in Babcock Admin POCs; diff't amt) 37511 - 2016 EAIV 7284 - 2016 EAIV [EUR currency] 7318 - 2016 EAIV [EUR currency] 39407 - 2017 JOLCO 7887 - 2017 JOLCO 7928 - 2017 JOLCO 65315 - 2018 JOLCO 8300 - 2018 JOLCO 3988 - 2019 JOLCO 3992 - 2019 JOLCO 4281 - 2019 JOLCO 4284 - 2019 JOLCO	reclassified as general unsecured claim

Bankr. Case	Filed As	Claim No.	Date POC filed	Amount	Basis	Notes	Treatment
Avianca Holdings S.A., Case No. 20-11133	Secured	2055	1/20/2021	$12,511,109.69	Initiator Fee payments due prepetition	POC form indicates claim is not based on a lease **The $12,511,109.69 claim amount is the total of priority claim nos. 4026 and 4027 below**	reclassified as GUC
Aerovias del Continente Americano S.A. Avianca, Case No. 20-11134	Priority	4026	8/13/2021	$11,473,701.87	Initiator Fee payments due prepetition	The physically signed POC form states that "various other parties to the contracts referenced in the annex" made earlier filing for this claim Annex refers to POC 2055 filed against Avianca on 1/20/21, and states that this POC is being filed pursuant to par. 11 of court's 7/23/21 order, dkt no. 1929 (Annex, par. 6-7)	disallowed and expunged
Taca International Airlines S.A., Case No. 20-11168	Priority	4027	8/13/2021	$1,037,407.82	Initiator Fee payments due prepetition	The physically signed POC form states that "Condor Ltd. (as Lessor)" made earlier filing for this claim Annex refers to POC 2055 filed against Avianca on 1/20/21, and states that this POC is being filed pursuant to par. 11 of court's 7/23/21 order, dkt no. 1929 (Annex, par. 6-7)	disallowed and expunged

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Exhibit B to Twenty-Fifth Omnibus Claims Objection

Notice of Hearing

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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 and Reorganized Debtors.	:	(Confirmed)

NOTICE OF HEARING ON THE REORGANIZED DEBTORS' TWENTY-FIFTH OMNIBUS OBJECTION TO PROOFS OF CLAIM

PLEASE TAKE NOTICE that, on December 2, 2022, Avianca Holdings S.A. and its reorganized debtor affiliates in these proceedings (collectively, the "Reorganized Debtors"), filed their Twenty-Fifth Omnibus Objection to Proofs of Claim (the "Objection") with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").

[1] The Debtors and Reorganized Debtors in these chapter 11 cases, and each Debtors' and Reorganized Debtors' federal tax identification number (to the extent applicable), are as follows: Avianca Holdings S.A. (N/A) n/k/a HVA Associated Corp.; 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 Loyalty Bermuda Ltd. (N/A); AV Taca International Holdco S.A. (N/A); Aviacorp Enterprises 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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' and Reorganized Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

<u>THIS OBJECTION ADDRESSES ONE OR MORE OF THE CLAIM(S) YOU HAVE FILED IN THE REORGANIZED DEBTORS' CASES.</u> **<u>Schedule 1</u>** annexed to the Objection (attached hereto) identifies your claims and the category of claim objections applicable to you. The complete Objection can be viewed and/or obtained by: (i) accessing the Court's website at www.nysb.uscourts.gov, or (ii) free of charge from the Reorganized Debtors' notice and claims agent, KCC, at http://www.kccllc.net/avianca or by calling (866) 967-1780 (U.S./Canada) or +1 (310) 751-2680 (International). Note that a PACER password is needed to access documents on the Court's website. The complete Objection is entitled *Reorganized Debtors' Twenty-Fifth Omnibus Objection to Proofs of Claim*.

The Objection requests that the Bankruptcy Court (i) reclassify an improperly filed as secured; and (ii) disallow two unsecured priority claims as improper and duplicative; and (iii) disallow certain administrative expense claims as improper and duplicative. The subject claims and the proposed treatment are listed on the attached Schedule 1 to the proposed order attached to this Objection as **<u>Exhibit A</u>** (the "<u>Disputed Claims</u>"). Any claim that the Bankruptcy Court expunges or disallows will be treated as if such claim had not been filed. Any claim that the Bankruptcy Court reclassifies will be treated as if such claim had been filed in the reclassified class.

If you DO oppose the disallowance, expungement, or reclassification of your claim(s) listed in the Schedule then you MUST file a written response to the Objection (the "<u>Response</u>") ON OR BEFORE January 6, 2023 AT 4 P.M. EASTERN TIME (the "<u>Response Deadline</u>") and serve such Response as set forth herein. If you DO NOT oppose the disallowance, expungement, or reclassification of your claim(s) listed in the Schedule then no further action is required by you.

The Response, if any, must include the following: (i) a caption identifying the name of the Bankruptcy Court, the names of the Reorganized Debtors, the case number and the title of the Objection to which the Response is directed; (ii) the name of the claimant and description of the basis for the claim; (iii) a short statement describing the reasons for which the claim should not be disallowed or reclassified as set forth in the Objection; (iv) additional documentation or other evidence upon which you rely in opposing the Objection (if it was not included with the proof of claim previously filed with the Bankruptcy Court); (v) the address(es) to which the Reorganized Debtors must return any reply to your Response, if different from that presented in your proof of claim; (vi) the name, address, and telephone number of the person (which may be you or your legal representative) holding ultimate authority to resolve the claim on your behalf.

The Bankruptcy Court will consider a Response only if the Response is filed with the Court on or prior to the Response Deadline. All Responses must be served on (i) the Bankruptcy Court at Chambers of Honorable Judge Martin Glenn, One Bowling Green, New York, New York 10004-1408, (ii) counsel for the Reorganized Debtors at Milbank LLP, 55 Hudson Yards, New York, New York 10001 (Attn: Evan R. Fleck, Esq., Gregory A. Bray, Esq., and Benjamin Schak, Esq. (efleck@milbank.com, gbray@milbank.com, and bschak@milbank.com)) and Smith, Gambrell & Russell, LLP, 1301 Avenue of the Americas, 21st Floor, New York, New York 10019 (Attn: John G. McCarthy, Esq. and Brian P. Hall, Esq. (jmccarthy@sgrlaw.com, and bhall@sgrlaw.com) and (iii) the Reorganized Debtors, c/o Richard Galindo (richard.galindo@avianca.com).

A HEARING WILL BE HELD ON JANUARY 19, 2023(the "Hearing") to consider the Objection. **THE HEARING WILL BE HELD AT 11 A.M. (EASTERN TIME)** at the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, Room 523, New York, New York 10004 in front of the Honorable Martin Glenn. If you file a written Response to the Objection, you or your counsel must attend the Hearing (which attendance may be via Zoom for Government). In light of the COVID-19 pandemic, the Hearing may be conducted via Zoom for Government. Parties wishing to appear at the Hearing, whether in a "live" or "listen only" capacity, must make an electronic appearance through the "eCourtAppearances" tab on the Court's website (http://www.nysb.uscourts.gov/content/judge-martin-glenn) no later than 4:00 p.m. (prevailing Eastern Time) the business day before the Hearing (the "Appearance Deadline"). Following the Appearance Deadline, the Court will circulate by email the Zoom link to the Hearing to those parties who have made an electronic appearance. Parties wishing to appear at the Hearing must submit an electronic appearance through the Court's website by the Appearance Deadline and not by emailing or otherwise contacting the Court. The Court will not respond to late requests that are submitted on the day of the hearing. Additional information regarding the Court's Zoom and hearing procedures can be found on the Court's website. The Reorganized Debtors reserve the right to continue the Hearing on the Objection for your claim(s) at a later date.

If the Bankruptcy Court does NOT disallow, expunge, or reclassify your claim(s) listed in **Schedule 1** then the Reorganized Debtors may object on other grounds to the claim(s) (or to any other claims you may have filed) at a later date. You will receive a separate notice of any such objection.

Dated: December 2, 2022
New York, New York

/s/ John G. McCarthy
John G. McCarthy
SMITH, GAMBRELL & RUSSELL, LLP
1301 Avenue of the Americas, 21st Floor
New York, New York 10019
(212) 907-9700
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Fax: (212) 907-9800

Counsel for Debtors and Reorganized Debtors

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 and Reorganized Debtors.	:	(Confirmed)

DECLARATION OF JOHN G. MCCARTHY IN SUPPORT OF THE REORGANIZED DEBTORS' TWENTY-FIFTH OMNIBUS OBJECTION TO PROOFS OF CLAIM

[1] The Debtors and Reorganized Debtors in these chapter 11 cases, and each Debtors' and Reorganized Debtors' federal tax identification number (to the extent applicable), are as follows: Avianca Holdings S.A. (N/A) n/k/a HVA Associated Corp.; 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 Loyalty Bermuda Ltd. (N/A); AV Taca International Holdco S.A. (N/A); Aviacorp Enterprises 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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' and Reorganized Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

I, JOHN G. MCCARTHY, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a member of the law firm Smith, Gambrell & Russell, LLP, counsel to Avianca Holdings S.A. and its reorganized debtor affiliates in the above-captioned action (collectively, the "Reorganized Debtors"). I submit this declaration in support of the *Reorganized Debtors' Twenty-Fifth Omnibus Objection to Proofs of Claim* (the "Objection"), filed contemporaneously herewith.

2. Attached to this declaration as **Exhibit A** is a true and correct copy of an excerpt of the *Framework Agreement [Avianca EAIV 2015-1&2 Trusts]*, dated as of July 30, 2015, among Wells Fargo Bank Northwest, National Association ("Wells Fargo Bank Northwest"), OCTO-Aircraft Leasing LLC, Avianca EAIV 2015-1 Trust, Avianca EAIV 2015-2 Trust, Avianca Holdings S.A., Aerovías Del Continente Americano S.A. Avianca ("Aerovías"), Wells Fargo Bank, National Association, and the financiers party thereto.

3. Attached to this declaration as **Exhibit B**, **redacted for commercially sensitive information**, is a true and correct copy of an excerpt of the *Initiator Fee Letter (MSN 65315)*, dated as of September 28, 2018, from Aerovías to Burnham Sterling & Company LLC.

4. Attached to this declaration as **Exhibit C** is a true and correct copy of an excerpt of the *Loan Agreement (MSN 7284)*, dated as of August 24, 2016, among Wells Fargo Bank Northwest, Tri-Aircraft Leasing II LLC, the lenders identified on Schedule I thereto, and Wilmington Trust Company ("Wilmington").

5. Attached to this declaration as **Exhibit D, redacted for commercially sensitive information**, is a true and correct copy of an excerpt of *Aircraft Sub-Lease Agreement for One (1) Airbus Model A320-251N Aircraft, Bearing Manufacturer's Serial No. 7928 and Registration Mark N765AV with Two CFM International S.A. Model Leap-1A26 Engines*, dated as of December 4, 2017, among Wilmington and Aerovías.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 2, 2022

/s/ John G. McCarthy
John G. McCarthy

Exhibit A

to the Declaration of John G. McCarthy in Support of the Reorganized Debtors' Twenty-Fifth Omnibus Objection to Proofs of Claim

EXECUTION COPY

FRAMEWORK AGREEMENT [AVIANCA EAIV 2015-1&2 TRUSTS]

dated as of July 30, 2015 by

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION,
not in its individual capacity, except as otherwise expressly provided herein,
but solely as owner trustee

OCTO-AIRCRAFT LEASING LLC,
as Trust 1 Owner Participant
and
as Trust 2 Owner Participant

AVIANCA EAIV 2015-1 Trust,
as Borrower

AVIANCA EAIV 2015-2 Trust,
as Borrower

AVIANCA HOLDINGS S.A.,
as Guarantor

AEROVÍAS DEL CONTINENTE AMERICANO S.A. AVIANCA,
as Lessee

WELLS FARGO BANK, NATIONAL ASSOCIATION,
as Security Trustee

and

THE FINANCIERS PARTY HERETO.

Up to $379,160,000 in Secured Notes and Loan Certificates

Burnham Sterling & Company LLC and Burnham Sterling Securities LLC,
as Initiators

DekaBank Deutsche Girozentrale & The Korea Development Bank,
as Arrangers

NEWYORK/#379904.13

by the trust name therefor specified on Schedule IV. The Owner Participants shall be special purpose vehicles, identified in Schedule V hereto (with each being the owner participant for the specified associated Borrower), and will be affiliates of the Guarantor.

2.5 Remedy Coordination. Notwithstanding anything to the contrary in the Basic Documents, any direction to the Security Trustee to accelerate the Loans under a Loan Agreement of any Borrower shall be deemed a direction to the Security Trustee to also demand repayment of the Notes issued under the NPA to which such Borrower is a party pursuant to Section 2.8(a)(y) of such NPA and any direction to the Security Trustee to demand repayment of the Notes issued under the NPA to which a Borrower is a party pursuant to Section 2.8(a)(y) of such NPA shall be deemed a direction to the Security Trustee to also accelerate the Loans under the Loan Agreement to which such Borrower is a party.

2.6 Documentation. The primary documentation to finance each Aircraft (the "**Primary Documents**") will be:

(a) The Guaranty by the Guarantor for the applicable Borrower, substantially in the form of Exhibit A hereto.

(b) The NPA, substantially in the form of Exhibit B hereto, and the Loan Agreement, substantially in the form of Exhibit C hereto, for the applicable Borrower;

(c) The Lease for each Aircraft, each substantially in the form of Exhibit D hereto; and

(d) The Mortgage for the applicable Borrower, substantially in the form of Exhibit E hereto.

In addition, the financing of each Aircraft will be subject to the delivery of the other documentation referred to in Section 7 of the NPA and Loan Agreement for such Aircraft and the satisfaction of the other conditions precedent set forth in the Primary Documents. The Primary Documents for each Borrower and Aircraft will be completed in compliance with the Schedules hereto.

2.7 Fees. The Guarantor agrees to pay to each Financier, as and when due as provided in the Financing Documents (whether or not executed and delivered) the Commitment Fees and Upfront Fees specified therein. In addition, the Guarantor agrees to pay as and when due the agreed fees and expenses of the institution acting as Borrower and Security Trustee.

2.8 Initiator. The Initiator is entitled to compensation under the Primary Documents as and to the extent provided therein. As such, the Initiator is and shall be a third party beneficiary thereunder as and to the extent expressly provided therein and in Section 2.10 hereof. No Financier shall have any fiduciary duty to the Initiator nor shall any Financier be subject to or take on any credit risk of the Initiator, including as to any agreements by the Initiator to pay for certain costs and expenses; any such agreement being a bilateral matter as between the Initiator and the Guarantor.

Exhibit B (REDACTED)

to the Declaration of John G. McCarthy in Support of the Reorganized Debtors' Twenty-Fifth Omnibus Objection to Proofs of Claim

upfront fee equal to [redacted], (the "**Initiator Upfront Fee**"), which is [redacted] of the Equity Contribution [redacted]

4. We agree that payment of the Initiator Upfront Free hereunder shall be made to you in full, without any set-off, deduction or withholding of any kind (except as required by law), and in immediately available, freely transferable, cleared funds to the following account:

[redacted]

5. Additional Rental

(a) Definitions.

(i) "**Additional Rental Payment Date**" means each originally scheduled "Payment Date" under the Sublease, notwithstanding any subsequent amendment of the Sublease and notwithstanding the early termination of the leasing of the Aircraft under the Lease or the Sublease or the purchase of the Aircraft or the termination of the Sublease.

(ii) "**Discount Rate**" means the Fixed Rate minus the ECA Applicable Margin;

(iii) "**Equity Fee**" means each payment instalment set out in column (A) of Schedule 1 to this Letter Agreement;

(iv) "**Guarantee (Initiator)**" means the unconditional and irrevocable guarantee granted, or to be granted, by the Avianca Holdings SA ("**Guarantor**") in favour of the Initiator relating to the obligations of the Sublessee pursuant to the Sublease.

(v) "**Initiator Account**" means the Dollar current account of the Sublessor number [redacted] with Wilmington Trust Company, or such other account as the Initiator may from time to time designate in writing to the Sublessee;

(vi) "**Initiator Compensation**" means each instalment of the Equity Fee;

(b) The Sublessee shall on each Additional Rental Payment Date pay to the Sublessor at the Initiator Account, by way of additional rental payment, instalments of the Initiator Compensation in accordance with Schedule 1 to this Letter Agreement.

(c) The Sublessee acknowledges that the Initiator has already provided investment banking services to Sublessee prior to the Delivery Date, and accordingly agrees

that the Sublessee's obligations to pay the Initiator Compensation hereunder are unconditional.

(d) If an Initiator Acceleration Event occurs, the Initiator will be entitled (without being obliged to first take any other action or make any claim against the Guarantor), at its option, to declare by written notice to the Sublessee that an Initiator Acceleration Event has occurred and that the Accelerated Initiator Fee is due and payable on the date specified in such notice, whereupon the Sublessee agrees to pay to the Initiator Account on the date so specified the Accelerated Initiator Fee. Following payment in full of the Accelerated Initiator Fee, the Sublessee shall have no further obligation to pay any Initiator Compensation under the Sublease. The Initiator Compensation payable under this Letter Agreement, once paid, shall not be refundable in any circumstances.

For purposes of this Clause (d):

"Accelerated Initiator Fee" means, as of the date when a notice is served declaring the same to be due and payable pursuant to this clause (d), the present value of the sum of the remaining instalments of Initiator Compensation payable from the date of such notice to the final scheduled date of the last instalment of Equity Fee due on the final Additional Rental Payment Date, discounted to present value using the Discount Rate, plus accrued interest thereon from the date of such notice to the date of actual receipt at the Default Rate.

"Initiator Acceleration Event" means any of the following:

(i) The ECA Loan under the ECA Loan Agreement being accelerated or declared to be due and payable prior to its stated maturity, whether by reason of an Event of Default, a Mandatory Prepayment Event or otherwise;

(ii) the Termination Amount being expressed to fall due and payable under the Lease for any reason;

(iii) the Lease Period ending under the Lease or the Sublease Period ending under the Sublease for any reason; or

(iv) the Sublessee fails to pay any amount of Initiator Compensation on the due date and such amount remains unpaid more than three (3) Business Days after its due date.

(e) The Parties hereby agree that failure by the Sublessee to pay any amount of Initiator Compensation on the due date (if such amount remains unpaid for three (3) Business Days) shall constitute an "event of default" under this Letter Agreement.

(f) Sublessor agrees to account to Initiator for all amounts received into, and standing to the credit of, the Initiator Account from time to time upon the request of the Initiator.

Exhibit C

to the Declaration of John G. McCarthy in Support of the Reorganized Debtors' Twenty-Fifth Omnibus Objection to Proofs of Claim

Execution Version

LOAN AGREEMENT (MSN 7284)

dated as of August 24, 2016

among

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION,
not in its individual capacity, except as otherwise expressly provided herein, but solely as owner trustee (referred to herein as Avianca EAIV 2016-1 Trust),
as Borrower

TRI-AIRCRAFT LEASING II LLC
as Owner Participant

AVIANCA HOLDINGS S.A.,
as Guarantor

THE LENDERS IDENTIFIED ON SCHEDULE I HERETO,

and

WILMINGTON TRUST COMPANY,
as Security Trustee

Up to Euro equivalent of $28,000,000 in Secured Tranche A Loans

Up to $5,000,000 in Secured Tranche B Loans

Burnham Sterling & Company LLC,
Initiator

be binding upon each Lender at the time outstanding, each future Lender and, only if signed by an Obligor, such Obligor.

12.5 Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. The Initiator shall be a third party beneficiary of this Agreement and each other Basic Document.

12.6 Assignments and Participations.

(a) No Obligor may assign any of its rights or obligations hereunder, under the Loan Certificates or under the other Basic Documents without the prior consent of all of the Lenders.

(b) Subject to Section 12.6(f), each Lender may assign or transfer any or all of its Loans, provided that, (i) each such assignment by a Lender of its Loans or Commitment shall be made in such manner so that the same portion of its Loans and Commitment is assigned to the respective assignee; (ii) no assignment shall be permitted if the assignee shall be entitled (including on the basis of any change in Applicable Law that has been announced but is not yet effective) to any greater indemnification or compensation under Section 5 (immediately after giving effect to such assignment) than the assignor was entitled to (immediately prior to giving effect to such assignment) or which would otherwise result in an increase of any Obligor's obligations (including, without limitation, in respect of Taxes) (as determined by reference to laws enacted or in effect as of the effective time of such assignment) or restrict any Obligor's rights under any Basic Document; (iii) the costs of effecting such a transfer or assignment shall be borne by the assigning or transferring Lender; (iv) such assignment shall be effected by the execution and delivery by the assignee and assignor of an agreement in the form of the Loan Certificate Assignment Agreement (wherein, inter alia, such additional Lenders shall agree to use a single common counsel for all matters involving the Loans); (v) no assignment shall be permitted to an airline which is a competitor of Lessee or an Affiliate of a competitor of Lessee; and (vi) no Obligor's obligations under any Basic Document shall be increased nor shall any Obligor suffer or incur any additional obligation (in each case, including without limitation in respect of Taxes) and no Obligor's rights under any Basic Document shall be diminished, as a result thereof. Prior to the applicable Commitment Termination Date, the Lenders may not assign their Commitments without the prior written consent of the Borrower, not to be unreasonably withheld. Upon execution and delivery by the assignee to the Borrower and the Security Trustee of the Loan Certificate Assignment Agreement pursuant to which such assignee agrees to become a "Lender" hereunder (if not already a Lender) having the Commitment and/or Loan Certificates specified in such instrument, and upon consent thereto by the Borrower and the Lenders (to the extent required above), the assignee shall have, to the extent of such assignment (unless otherwise provided in such assignment with the consent of the Borrower, the Security Trustee and the Lenders), the obligations, rights and benefits of a Lender hereunder holding the Commitment

Exhibit D (REDACTED)

to the Declaration of John G. McCarthy in Support of the Reorganized Debtors' Twenty-Fifth Omnibus Objection to Proofs of Claim

(a) all tasks with a threshold / interval of 144 months, 48,000 Flight Hours and / or 24,000 Cycles or lower system, zonal inspection program tasks and structural program tasks (as may be escalated from time to time), all other tasks which for planning and access reasons would be performed at this check, all lower level checks, cabin refurbishment, out of phase work and cleaning and repair; and

(b) all C Check and other tasks sufficient to clear the Aircraft for a full C Check interval as applicable in the then latest revision of the Maintenance Planning Document.

"**Holding Company**" means, in relation to any person, any other person of which it is a Subsidiary.

"**IDERA**" means the irrevocable deregistration and export request authorisation executed and delivered by the the Sub-Lessor in favour of the Security Agent pursuant to the Cape Town Convention and filed with the Aviation Authority in the form Schedule 9 (Form of IDERA) to the Lease.

"**Indemnitee**" has the meaning given to it in Clause 23.1 (General Indemnity).

"**Initiator**" means Burnham Sterling & Company LLC.

"**Initiator Account**" means the Dollar current account of the Sub-Lessor number [redacted] with Wilmington Trust Company, or such other account as the Initiator may from time to time designate in writing to the Sub-Lessee;

"**Initiator Fees**" means, together, each instalment of Debt Fee and Equity Fee;

"**Inspection Agent**" means SMBC Aviation Capital Limited or any replacement inspection agent appointed for the purposes of this Agreement by the Lessor and notified to the Sub-Lessee in writing from time to time.

"**Insurance Claims Threshold**" means $1,000,000 or the equivalent in any other currency.

"**Insurances**" means any and all contracts or policies of insurance required to be effected and maintained in accordance with the provisions of this Agreement, which expression includes, where the context so admits, any relevant reinsurance(s).

relating to the enforcement of rights and interests relating to the Aircraft, the Airframe and/or any Engine.

26.4 **Third Parties**

Any person which is a Relevant Person, a Financing Party, an Indemnitee, a Tax Indemnitee or an Additional Insured from time to time and is not a party to this Agreement, and the Initiator (in connection with its rights under Clause 5.2 of this Agreement) shall be entitled to enforce such terms of this Agreement as provided for the obligations of the Sub-Lessee to such Financing Party, Indemnitee, Tax Indemnitee or Additional Insured, or to the Initiator, as the case may be, in each case, subject to the provisions of Clauses 26.1 (*Law*) and 26.2 (*Jurisdiction*) and the Contracts (Rights of Third Parties) Act 1999 (the "**Third Parties Act**"). The Third Parties Act applies to this Agreement as set out in this Clause 26.4 (*Third Parties*). Save as provided above, a person who is not a party to this Agreement has no right to use the Third Parties Act to enforce any term of this Agreement and, subject to the other provisions of the other Operative Documents, the parties to this Agreement do not require the consent of any third party (including, without limitation, any Indemnitee, Tax Indemnitee or Additional Insured who is not a party to this Agreement) to amend or rescind this Agreement at any time.

IN WITNESS WHEREOF this Agreement has been duly executed by the duly authorised representatives of the parties hereto on the date first above written.

O'MELVENY & MYERS LLP
Peter Friedman, Esq.
Matthew Kremer, Esq.
7 Times Square
New York, NY 10036
Telephone: (212) 326-2000
Facsimile: (212) 326-2061
Email: pfriedman@omm.com
mkremer@omm.com

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

BURNHAM STERLING AND COMPANY LLC AND BABCOCK & BROWN SECURITIES LLC'S CONSOLIDATED REPLY (I) IN RESPONSE TO REORGANIZED DEBTORS' TWENTY-FOURTH AND TWENTY-FIFTH OMNIBUS OBJECTIONS TO PROOFS OF CLAIM AND
(II) IN FURTHER SUPPORT OF MOTION TO COMPEL

[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. International 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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); AV Loyalty Bermuda Ltd. (N/A); Aviacorp Enterprises S.A. (N/A). The Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá D.C., Colombia.

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Burnham[2] submits this reply (i) in response to the Objections[3] and (ii) in further support of the Motion to Compel[4] and respectfully states as follows:

PRELIMINARY STATEMENT

1. Burnham is entitled to immediate payment of its accrued (and accruing) administrative claims for its post-petition Initiator Fees under the clear and unambiguous terms of Bankruptcy Code section 365(d)(5) and the applicable Lease Agreements. The Debtors dispute that Burnham has an administrative claim because Burnham is not a "lessor" and its fees are for "broker's fees" and "not true lease" obligations. *See* Burnham Claim Objection ¶ 20. But the Debtors are injecting limitations into Bankruptcy Code section 365(d)(5) that do not exist. Section 365(d)(5) does not state that only lessors are entitled to priority, or that only certain types of lease obligations are covered. Rather, section 365(d)(5) provides that a debtor must timely perform "all" of its obligations under a personal property lease that arise on or after 60 days from the petition date, until such lease is assumed or rejected, notwithstanding any benefit (or lack thereof) to the estate. Section 365(d)(5) places no limit on to whom a debtor must perform its obligations—only that those obligations arise under a personal property lease. Here, Burnham's Initiator Fees, which are classified as Additional Rental Payments under the Lease Agreements, (i) constitute obligations of the Debtors (ii) under a personal property lease (iii) that accrued 60 days after the

[2] Burnham Sterling and Company LLC ("**Burnham Sterling**") and Babcock & Brown Securities LLC f/k/a Burnham Sterling Securities LLC ("**Babcock**", and together with Burnham Sterling, "**Burnham**") are creditors of Avianca Holdings S.A. and its debtor-affiliates (collectively, the "**Debtors**") under those certain Lease Agreements.

[3] Objections refers to, collectively, the *Reorganized Debtors' Twenty-Fourth Omnibus Objection to Proofs of Claim* [Docket No. 2661] (the "**Babcock Claim Objection**") and *Reorganized Debtors' Twenty-Fifth Omnibus Objection to Proofs of Claim* [Docket No. 2663] ("**Burnham Claim Objection**").

[4] *Burnham Sterling and Company LLC and Babcock & Brown Securities LLC's Motion to Compel Compliance with 11 U.S.C. §§ 365(d)(5) and 503(b)* [Docket No. 2657] (the "**Motion to Compel**"). Capitalized terms used but not otherwise defined in this reply have the meaning ascribed to them in the Motion to Compel.

petition date. As such, the requirements of Bankruptcy Code section 365(d)(5) are satisfied and Burnham is entitled to an administrative claim for such amounts.

2. The Debtors' argument that Burnham's claims fall outside of Bankruptcy Code section 365(d)(5) because the initiator services were completed pre-petition is also flawed. *See* Babcock Claim Objection ¶ 20. This argument rests on two misunderstandings: one legal and one contractual. Debtors are arguing that as a matter of law, because the initiator services were performed pre-petition, they could not have provided a post-petition benefit to the Debtors' estate, which is ordinarily a requirement for an administrative expense claim. But Congress explicitly dispensed with the "benefit to the estate" requirement in section 365(d)(5). *See* 11 U.S.C. § 365(d)(5) ("The trustee shall timely perform all of the obligations of the debtor . . . under an unexpired lease of personal property . . . until such lease is assumed or rejected *notwithstanding section 503(b)(1) of this title* . . . ." (emphasis added)). A debtor's obligations under Bankruptcy Code section 365(d)(5) are not subject to the requirements for the allowance of administrative expense claims under Bankruptcy Code section 503, and thus Burnham expressly does not need not prove it conferred any benefit to the estate. All it must show is that the obligations owed to it accrued under a personal property lease 60 days after the petition date, which Burnham has done.[5]

[5] The Debtors reserve their rights to pursue recharacterization of the transactions as financing transactions as opposed to lease transactions to the extent Burnham's claims are not disallowed and reclassified. Burnham Claim Objection 12 n. 4; Babcock Claim Objection 12 n. 4. Accordingly, Burnham reserves its rights to oppose such recharacterization, including on the grounds that *seriatim* claims objections are improper. In addition, Burnham reserves the right to argue that the Court should not allow the Debtors to retroactively reject their obligations under Bankruptcy Code section 365(d)(5) at this time. Bankruptcy Code section 365d)(5) gives a debtor a 60 day grace period to determine whether to reject a personal property lease, continue under it, or request bankruptcy court relief to modify the contract's terms. After that time, Bankruptcy Code section 365(d)(5) mandates that "all obligations" be honored. Courts have long recognized that a trustee cannot remain idle after the 60-day grace period, making no payments on the lease obligations in the interim, "and then ask for a retroactive modification of his obligations when the lessor seeks an administrative expense." *In re Midway Airlines Corp*., 406 F.3d 229, 240 (4th Cir. 2005). The same is true here.

3. The Debtors also argue Burnham is not entitled to an administrative expensive claim because, as a matter of contract, its entitlement to Initiator Fees arose pre-petition, relying on inapposite cases. The cases cited by the Debtors for disallowance of an administrative expense claim generally follow a similar fact pattern: services were or could have been rendered pre-petition *and* only billed "fortuitously" post-petition (and not in accordance with a predetermined schedule). That is not the situation here. The U.S. Bankruptcy Court for the Southern District of New York noted this distinction, holding that "*those obligations arising under the lease in a contractually determined time frame*," clearly fall within the purview of Bankruptcy Code section 365(d)(5). *In re Pudgies' Dev. of NY, Inc.*, 202 B.R. 832, 837 (Bankr. S.D.N.Y. 1996) (emphasis added). Burnham's Additional Rental Payments—which, like other rental obligations, are paid on a fixed basis in accordance with a schedule set forth in the Lease Agreements—are squarely the kind of lease obligations entitled to administrative priority under Bankruptcy Code section 365(d)(5), as recognized by this Court in *Pudgies.*

4. For all of these reasons, and the reasons that follow, the Motion to Compel should be granted and the Objections denied.

REPLY

A. Burnham is Entitled to an Administrative Claim under Bankruptcy Code Section 365(d)(5).

5. As detailed in the Motion to Compel, under the various Lease Agreements, the Debtors have an unconditional obligation to pay Burnham its Initiator Fees through the payment of "Additional Rental Payments" on a schedule set forth in the Lease Agreements. Motion to Compel ¶ 5. Under section 365(d)(5), the Debtors are obligated to "timely perform all of the obligations" on leases of personal property from sixty days after the Petition Date until the leases are assumed or rejected. *See* 11 U.S.C. § 365(d)(5). Specifically, section 365(d)(5) states:

> The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

11 U.S.C. § 365(d)(5).

6. Burnham's claim for Initiator Fees under the terms of the Lease Agreements indisputably falls within the ambit of "all obligations" arising from and after the 60th day following the order for relief under a personal property lease that the Debtors were obligated to "timely perform." Timely performance of a post-petition obligation, of course, means payment of amounts due and owing, or if such payment is not made, allowance of an administrative expense claim. Here, the Debtors continued to operate under the Lease Agreements from 60 days after the Petition Date through the applicable Rejection Dates and during this time, the Initiator Fees continued to accrue as each Additional Rental Payment period passed without the required payment being made.

7. Despite clearly meeting the statutory test for administrative priority under Bankruptcy Code section 365(d)(5), the Debtors assert that Burnham's claims should be reclassified as general unsecured claims because (i) Burnham is not a "lessor" and its claims are not truly "lease obligations" and (ii) Burnham's initiator services were rendered prepetition. As detailed below, these arguments fail under the plain terms of Bankruptcy Code section 365(d)(5) and prevailing case law.

a. The Timing of the Initiator Services is Irrelevant to Burnham's Section 365(d)(5) Claim.

8. In the Objection, the Debtors contend that because the Initiator Fees were "earned prepetition" that Burnham is not entitled to administrative priority under Bankruptcy Code section 365(d)(5). *See* Burnham Claim Objection ¶ 2. In other words, because Burnham did not provide a post-petition benefit to the estate, the Debtors argue that Burnham is not entitled to priority. But this inquiry is wholly irrelevant for purposes of Bankruptcy Code section 365(d)(5). A debtor's obligations under Bankruptcy Code section 365(d)(5) are independent of, and not subject to, the requirements for the allowance of administrative expenses under Bankruptcy Code section 503. *VFS Leasing Co. v. Wyoming Sand & Stone Co. (In re Wyoming Sand & Stone Co.)*, 393 B.R. 359, 361 (M.D. Pa. 2008) ("Benefit to the estate is not an issue under § 365(d)(5), and, in the absence of intervening action by the Debtor, the obligation to perform under the lease remains.").[6] Accordingly, Burnham need not establish a benefit to the Debtors' estates in order to be awarded an administrative expense claim under section 365(d)(5); rather, Burnham must only establish that the charges came due during the section 365(d)(5) period, which it has done so.

9. Indeed, courts regularly allow claims under Bankruptcy Code section 365(d)(5) when there was clearly no benefit to the estate. *See Wyoming Sand & Stone Co*., 393 B.R. at 361–62 (allowing the creditor's administrative claim for two months of lease payments accrued during the section 365(d)(5) period even though the leased vehicle was not operated); *Lakeshore Const. Co*., 390 B.R. at 756 (holding that actual and necessary use of the property in question is not

[6] *See also CIT Commc'ns Fin. Corp. v. Midway Airlines Corp. (In re Midway Airlines Corp.)*, 406 F.3d 229, 237 (4th Cir. 2005) ("[W]hen a lessor seeks an administrative expense for 'all of the obligations' due under a lease, the 'notwithstanding § 503(b)(1)' proviso' . . . relieves the lessor from proceeding under § 503(b)(1)(A), which would limit the recovery to an amount representing only the actual and necessary use by the estate."); *In re Lakeshore Const. Co. of Wolfeboro, Inc*., 390 B.R. 751, 756 (Bankr. D.N.H. 2008) ("[P]ersonal property lessors may assert administrative claims under § 365(d)(5) based upon the terms of the lease and not the benefit to the bankruptcy estate.").

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required under section 365(d)(5)). Courts have reached similar conclusions under section 365(d)(3), upon which section 365(d)(5) was modeled.[7] *See In re Compuadd Corp*., 166 B.R. 862, 866 (Bankr. W.D. Tex. 1994) ("Even though the Debtor-in-possession was never in physical possession of any of its 100 plus shopping center locations, those landlords who filed motions compelling payment of rent and other charges under § 365(d)(3) are entitled an order requiring it to pay the rent and other charges under the lease which came due and owing during the sixty-day period following the petition date.").

10. The Debtors rely on two cases for the proposition that payment obligations that relate to pre-petition services are not available for relief under Bankruptcy Code section 365, both of which harm rather than help the Debtors. First, the Debtors cite to *In re Pudgies' Dev. of NY, Inc.*, 202 B.R. at 832 for the basis that certain fees, like attorney's fees, are not entitled to priority under Bankruptcy Code section 365(d)(3) (and thus by extension, section 365(d)(5)). However, there, the court held that attorney's fees were not entitled to priority under section 365(d)(3) only because they were not automatically due post-petition based on a set schedule, but rather could "fortuitously arise before or after the" 60th day after the debtor's petition without regard to a pre-determined schedule. *Id.* In reaching this decision, the court emphasized that the "statutory obligation of 'timely' performance is unambiguous with respect to" the amounts due there because the "language employed in section 365(d)(3) suggests a Congressional purpose to grant" lease parties a "preferred position with respect to *those obligations arising under the lease in a contractually determined time frame*. Thus, the statute refers in the first sentence to 'all the obligations . . . arising from and after the order for relief . . . until such lease is assumed or

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[7] *See In re Midway Airlines Corp., 406 F.3d at 234* ("Section 365(d)(10) [the predecessor to Section 365(d)(5)] is modeled on a very similar provision of the Code, § 365(d)(3), which requires that a trustee timely perform all obligations under a lease of nonresidential real property after an order for relief is entered. . . . As a result, in construing § 365(d)(10), courts often look to decisions construing § 365(d)(3).").

rejected.'" *Id.* at 837 (emphasis added). The Initiator Fees owed are precisely the kind of lease obligations contemplated by Congress and the court in *Pudgie*: the Initiator Fees are due on a fixed, contractually agreed to schedule as Additional Rental Payments pursuant to the Lease Agreements. Those payments came due and owing post-petition through the applicable Rejection Dates by virtue of the contract terms. Unlike the attorney's fees in *Pudgie*, it was not fortuity that made amounts due post-bankruptcy, it was the express contractual intent of the parties.

11. Notably, in *Pudgie*, the Court also determined that the lease counterparties were entitled to administrative priority for all other obligations under the lease (with rent being the "primary," but not exclusive obligation), notwithstanding that the claim accrued under a lease for abandoned property that provided no benefit to the estate. Specifically, the Court concluded:

> I agree with the majority view on this issue. The statute, in mandatory language, requires performance of "all the obligations." Rent is the primary obligation. There is no statutory predicate for the "actual" and "necessary" test of section 503(b)(1)(A) because section 365(d)(3) requires payment "notwithstanding section 503(b)(1)." The debtors' plaint that the abandoned premises did not confer any benefit upon the estate rings hollow because the debtors themselves elected to retain possession of the abandoned premises in the speculative but unsubstantiated hope of reaping a profit by assigning their leaseholds, and in any event the statutory language excludes a benefit test.

Id. at 835.

12. Second, the Debtors misguidedly rely on *Child World, Inc. v. The Campbell/Massachusetts Tr. (In re Child World, Inc.)*, 161 B.R. 571 (Bankr. S.D.N.Y. 1993). In that case, the applicable lease of nonresidential property required the Debtor to reimburse a trust for taxes related to the leased property. The trust billed the Debtor for the applicable taxes after the Petition Date, claiming that the full amount—whether related to pre or post-petition periods—was entitled to priority under Bankruptcy Code section 365(d)(3). The Court declined to afford administrative status to tax obligations that were incurred prepetition, but which only came due

post-petition when the lease obligations were billed to the debtor. *Id.* at 576. By contrast, the Additional Rental Payments for which Burnham seeks administrative expense claims all arose and came due during the post-petition, pre-rejection period in accordance with the timing set forth in the Lease Agreements. Thus, *Child World* is inapposite to the facts here.

13. For these reasons, the timing that Burnham's services were rendered is irrelevant to Burnham's entitlement to an administrative claim under the plain terms of Bankruptcy Code section 365(d)(5), which does not require a showing of a benefit to the estate and which looks at the contract terms to determine which obligations arise "from or after" 60 days from the petition date, which clearly includes Burnham's claims.

b. Administrative Priority Under Bankruptcy Code Section 365(d)(5) is Not Limited to Lessors.

14. The Debtors also argue that the benefits under Bankruptcy Code section 365(d)(5) are not available to Burnham because it is not a "lessor." But section 365(d)(5) includes no such limitation. It only requires that "all of the obligations of the debtor" are performed within the specified period without respect to who may insist on compliance. 11 U.S.C. § 365(d)(5). Section 365(d)(5) should not be read to include language it clearly does not. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93–100 (2012) (quoting *Petteys v. Butler*, 367 F.2d 528, 538 (8th Cir. 1966)) ("The absent provision cannot be supplied by the courts."); *Rotkiske v. Klemm*, 140 S. Ct. 355, 360–61 (2019) (citing *Iselin v. U.S.*, 270 U.S. 245, 251 (1926)).

15. Moreover, it is indisputable that Burnham can enforce its rights under the Lease Agreements, in the same manner of the lessors thereunder, as a third-party beneficiary. *See, e.g.*, Sec. 5.2(j) of that certain MSN 3992 Personal Property Contract; Motion to Compel ¶ 7. Thus

there is no basis to conclude that the lessors of the aircraft under the Lease Agreements can enforce their rights under Bankruptcy Code section 365(d)(5), but Burnham cannot.

16. Accordingly, for the foregoing reasons, this Court should enforce Bankruptcy Code section 365(d)(5) as written and allow Burnham's administrative claims.

B. The Post-Petition Stipulations Do Not Impact Burnham's Administrative Claims

17. The Debtors argue that the Lease Agreements were modified by the *Second Stipulation and Order Between Debtors and Aircraft Counterparties Concerning Certain Aircraft* [Docket No. 401] (the "**Stipulation**") such that the Additional Rent Payments due to Burnham were no longer provided for in the contracts. Burnham, however, was not a party to such Stipulation and it has no impact on its claims under Bankruptcy Code section 365(d)(5). Section 365(d)(5) provides that a debtor "shall timely perform all of the obligations of the debtor . . . first arising from or after 60 days after the [petition date] . . . *until such lease is assumed or rejected* . . ." The Stipulation did not constitute an assumption or rejection of the Lease Agreements. In fact, the Stipulation expressly contemplates that assumption or rejection of the Lease Agreements may occur in the future. *See* Stipulation ¶ G ("[E]xecution of this Stipulation is not an assumption or cure under any applicable provision of the Bankruptcy Code."); *Id.* ¶ C ("The Debtors may, subject to any requirement by the Court that a further order or notice is necessary, at any time upon 15 days' notice to the Aircraft Counterparties, reject the Aircraft Agreements . . . ."). Thus, notwithstanding the Stipulation, Burnham's claims under the Lease Agreements continued to accrue until the applicable Rejection Dates, as required by the plain terms of section 365(d)(5).

18. Moreover, the fact that the Aircraft Counterparties (as defined in the Stipulation) elected to modify their claims under the Lease Agreements and adopt a "power by hour" model

for rent payments has no bearing on Burnham's claims for its Initiator Fees under the Lease Agreements. Indeed, the Stipulation itself confirms that it is not binding on Burnham:

> This Stipulation shall be binding, *nunc pro tunc*, as of the Petition Date, upon (i) the Debtors and any trustee or examiner that may be appointed in the pending chapter 11 cases, and their respective successors and assigns, (ii) the Aircraft Counterparties and their respective successors and assigns and (with respect to those Aircraft Counterparties that are trusts or trustees) trust beneficiaries who so direct or authorize the trusts or trustee of the trusts to enter into this Stipulation and (iii) the trustee in the event that any of the above-captioned cases are converted to cases under chapter 7 of the Bankruptcy Code.

Stipulation ¶ I. Burnham is not an Aircraft Counterparty under the Stipulation or trust beneficiary.[8] Thus, the Stipulation has no bearing on Burnham's claims.

C. Burnham Does Not Oppose Reclassification of its Secured Claims or Disallowance of Duplicative Claims.

19. Burnham filed secured claims 2057 and 2055 in the Avianca case for pre-petition Initiator Fees due to Burnham. Debtors argue these claims are not secured. Burnham does not oppose reclassification of these claims as general unsecured claims.

20. Burnham filed claim number 4036 in the Aerovías case, claim number 4034 in the Taca case, and claim number 4038 in the Avianca case for post-petition administrative expenses related to the Initiator Fees due to Burnham. Debtors argues claims 4036 and 4034 filed in the Aerovías case and Taca case, respectively, are duplicative of claim 4038 filed in the Avianca case. Burnham does not oppose disallowance of claims 4036 and 4034 as duplicative of claim 4038.

21. Burnham filed unsecured priority claims 4022 and 4026 in the Aerovías case and unsecured priority claim 4027 in the Taca case for pre-petition Initiator Fees due to Burnham. Debtors argue that these claims are duplicative of claims filed in the Avianca case. Burnham does

[8] The Aircraft Counterparties are enumerated in Exhibit A of the Stipulation.

not oppose disallowance of claims 4022, 4026, and 4027 as duplicative of claims filed in the Avianca case.

CONCLUSION

22. Based on the foregoing, Burnham respectfully requests the entry of an order substantially in the form attached as Exhibit A to the Motion to Compel, compelling the immediate payment of the full amount of all accrued and accruing post-petition obligations under the Lease Agreements and awarding an administrative expense claim in the same amount.

Dated: January 9, 2023
New York, New York

Respectfully Submitted,

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Counsel for Debtors and Reorganized Debtors

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 and Reorganized Debtors.	:	(Jointly Administered)

REPLY IN SUPPORT OF
REORGANIZED DEBTORS' TWENTY-FOURTH AND TWENTY-FIFTH OMNIBUS OBJECTIONS TO PROOFS OF CLAIM

[1] The Debtors and Reorganized Debtors in these chapter 11 cases, and each Debtor's and Reorganized Debtor's federal tax identification number (to the extent applicable), are as follows: Avianca Holdings S.A. (N/A) n/k/a HVA Associated Corp.; 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 Loyalty Bermuda Ltd. (N/A); AV Taca International Holdco S.A. (N/A); Aviacorp Enterprises 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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' and Reorganized Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

The Reorganized Debtors[1] hereby submit this reply (the "Reply") in support of the *Reorganized Debtors' Twenty-Fourth Omnibus Objection to Proofs of Claim* [ECF No. 2661] (the "Twenty-Fourth Objection") and the *Reorganized Debtors' Twenty-Fifth Omnibus Objection to Proofs of Claim* [ECF No. 2663] (the "Twenty-Fifth Objection" and, together with the Twenty-Fourth Objection, the "Objections"), and in response to *Burnham Sterling and Company LLC and Babcock & Brown Securities LLC's Consolidated Reply (I) In Response to Reorganized Debtors' Twenty-Fourth and Twenty-Fifth Omnibus Objections to Proofs of Claim and (II) In Further Support of Motion to Compel* [ECF No. 2689] (the "Response"). In support of the Reply, the Reorganized Debtors respectfully state as follows:

PRELIMINARY STATEMENT

1. The Response significantly narrows the dispute before the Court. In it, Burnham and Babcock (the "Claimants") concede that (i) they have filed numerous duplicative claims, (ii) there is no support for either their Purported Priority Claims or Purported Secured Claims, and (iii) their Purported Administrative Expense Claims are not "actual, necessary costs and expenses of preserving the estate" pursuant to section 503(b)(1) of the Bankruptcy Code. All that remains in dispute is whether the initiator fees, which the Claimants concede are on account of services rendered entirely prepetition, are entitled only to unsecured status, as the Reorganized Debtors contend, or administrative status, as the Claimants contend.

2. The Claimants' sole argument for administrative treatment is that the initiator fees, though in fact payment for services rendered years prepetition, are denominated as "supplemental" or "additional" rent under various transaction documents related to aircraft leases, and are therefore entitled, without further analysis or inquiry, to administrative status under section 365(d)(5) of the

[1] Terms not defined herein shall have the same meaning ascribed to them in the Objections.

Bankruptcy Code. The Claimants are wrong, and the Court should reject the Claimants' attempt to elevate form over the substance of the Debtors' obligations.

3. Despite the "supplemental rent" label, the Claimants' initiator fees are not rent. The Claimants did not provide any ongoing services to the Debtors during the Chapter 11 Cases, and the required payments do not resemble an obligation typically associated with a personal property lease. In this context, section 365(d)(5) should not be treated as a back door to administrative status simply because the lease documents label the initiator fees as "rent." The Claimants' approach would encourage parties to denominate all payments as lease obligations, even when those payments have nothing to do with the ongoing operation of leased property.

4. No cases identified by the parties have addressed this specific issue in the context of section 365(d)(5). However, case law interpreting section 365(d)(3), a parallel provision for real, rather than personal, property, clarifies that lease "obligations" within the meaning of the statute are limited to those essential to the ongoing operation of the lease: namely, rental payments made to landlords. Merely denominating the obligation as "rent" will not suffice. This Court should find that personal property lease "obligations" protected under section 365(d)(5) are similarly limited to obligations integral to the ongoing function of the lease.

5. In addition to failing to establish that the claims on account of the initiator fees are entitled to administrative status, the Response also mischaracterizes certain arguments raised in the Objections. The Reorganized Debtors do not contend that a "benefit to the estate" must be demonstrated to warrant administrative treatment under section 365(d)(5). The Reorganized Debtors only noted the need to establish a "benefit to the estate" in response to the Claimants' initial position that the initiator fees are "actual, necessary costs and expenses of preserving the estate" under section 503(b)(1) of the Bankruptcy Code, and were entitled to administrative

priority for that additional reason.[2] Recognizing that this argument cannot be supported, the Claimants have abandoned it in their Response. The Claimants' concession renders the Reorganized Debtors' "benefit to the estate" argument moot.

6. Accordingly, all Claimants' non-duplicative Disputed Claims should be treated as general unsecured claims, as appropriate for the prepetition nature of such claims.

REPLY

I. Initiator Fees Are Not "Lease Obligations" Within the Meaning of Section 365(d)(5).

7. The Claimants do not dispute that they provided all initiator services before the Petition Date and did not provide any services during these Chapter 11 Cases. The question now before the Court is whether an obligation unrelated to the lessee's ongoing possession of personal property, but arising in a lease document (or in a document related to a lease transaction), must receive administrative status under section 365(d)(5). While neither party to this dispute has identified case law interpreting "obligation" under section 365(d)(5), courts have considered parallel language in section 365(d)(3), concerning "obligations" under leases of real property.[3] Those cases, including those that the Claimants cite in their Response, support the conclusion that the Claimants' fees for prepetition services should be treated as general unsecured claims.

a. Initiator Fees Are Not Protected Obligations Under Section 365(d).

8. *In re Child World Inc.*, despite the Claimants' attempts to distinguish it, is particularly instructive here, for the parties in that case similarly "focused their disagreement on

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[2] "[Claimant] is entitled to an administrative expense claim from the Petition Date through the Rejection Date pursuant to Bankruptcy Code section 503(b)(l). Bankruptcy Code section 503(b)(l) provides that the actual, necessary costs and expenses of preserving the Debtors' estate constitute administrative expenses, and that a party may file a request for payment of administrative expenses. 11 U.S.C. § 503(b)(l)." Proofs of Claim 4043, 4046, and 4038, ¶¶ 19-20 (Burnham); Proofs of Claim 4033, 4035, and 4037, ¶¶ 20-21 (Babcock).

[3] As Claimants note, courts often look to decisions construing section 365(d)(3) when construing section 365(d)(5). *See* Response at n.7; *see also CIT Commun. Fin. Corp. v. Midway Airlines Corp.* (*In re Midway Airlines Corp.*), 406 F.3d 229, 234 (4th Cir. 2005).

the interpretation of the word 'obligations.'" *Child World v. The Campbell/Massachusetts Tr. (In re Child World Inc.)*, 161 B.R. 571, 572 (S.D.N.Y. 1993). In that case, the "rent" of the leased real property in question consisted of a monthly base charge, a percentage of the gross profits, and a proportion of the real estate taxes. *See id.* at 572. After the petition date, the lessor demanded payment of real estate taxes under section 365(d)(3), even though certain of those taxes arose prepetition. *See id.* at 572-574. The bankruptcy court held that Child World was required to reimburse the lessor for the full amount of real estate taxes, even though the majority of those taxes arose prepetition, finding that "the billing date in the lease determines when an obligation arises" under section 365(d)(3). *Id.* at 573.

9. But on appeal, the district court disagreed. It reversed, holding that a mechanical application of when "obligations" came due under a lease was not what Congress intended in drafting section 365: "[t]he legislative history makes clear that Congress did not intend for courts applying § 365(d)(3) to rely mechanically on the billing date in determining which postpetition, prerejection obligations under nonresidential leases must be timely paid." *Id.* at 575-77 (internal quotations omitted). The district court went on to state:

> Allowing landlords to recover for items of rent which are billed during the postpetition, prerejection period, ***but which represent payment for services rendered by the landlord outside this time period, would grant landlords a windfall payment, to the detriment of other creditors, without any support from legislative history***. This conclusion is reinforced by the policy of narrowly construing statutory priority in order to treat creditors as equally as possible[.]

Id. at 576 (emphasis added).

10. The Claimants seek just such a "windfall" here. They argue that they must receive administrative treatment "for services rendered . . . outside [the postpetition, prerejection] period"—indeed, for services rendered entirely prepetition. *Id.* But as the Southern District of New York noted, section 365(d)(3) was not enacted to protect, mechanically, any payments that

happen to come due during the postpetition, prerejection period. Rather, section 365(d)(3)'s special provision for lease obligations is meant to protect "the landlord [that] is forced to provide ***current services***—the use of its property, utilities, security, and other services—without current payment," for "[n]o other creditor is put in this position." *Id.* at 572 (emphasis added). This is not applicable to the Claimants. All services the Claimants provided—arranging the financing of the leases—were completed prepetition. The Disputed Claims arising from those services should be afforded the same status afforded to other claims arising from prepetition services: a general unsecured claim.

11. Another case cited heavily in the Response, *In re Pudgie's Dev. of NY, Inc.*, 202 B.R. 832 (Bankr. S.D.N.Y. 1996), is similarly instructive. There, the bankruptcy court also recognized that not all contractual obligations arising from a lease are protected under section 365(d)(3). *See id.* at 836-837. The bankruptcy court held that attorneys' fees, although contracted for in a lease agreement, were ***not*** "obligations" within the scope of section 365(d)(3). *Id.* at 837. The court reasoned that construing such fees as a qualifying "obligation" would not "make sense," for such an obligation "may fortuitously arise before or after the time period in question [the postpetition, prerejection period]"; this "fortuitous" timing is insufficient to merit such a significant difference in claim status. *Id.*

12. The same logic applies on all fours here. All of the Claimants' services were completed prepetition, but certain portions of the fees for those services were "fortuitously" billed postpetition—a simple choice made by the parties in designing the fee payment schedule. But the Claimants did not provide the type of "current services," nor were they forced to shoulder current burdens, that would merit administrative treatment of their claims under section 365(d)(5). *See Child World*, 161 B.R. at 572.

13. The applicable case law therefore recognizes a distinction between "obligations" necessary for the lease's ongoing operation (principally, rent) and ancillary obligations that may arise in a lease document—and may even be denominated as "rent"—but are not entitled to administrative treatment (prepetition taxes;[4] lessor's attorneys' fees related to lease enforcement[5]). The Claimants decline to acknowledge this distinction, relying only on the mechanical claim that the initiator fees arise from leases, and therefore qualify: because "the Initiator Fees are due on a fixed, contractually agreed to schedule as Additional Rental Payments ***pursuant to the Lease Agreements*** . . . [t]he Initiator Fees owed are precisely the kind of lease obligations contemplated by Congress and the court in *Pudgie* [sic]." *See* Response ¶ 10 (emphasis added).

14. But Claimants neglect to mention the initiator fees at issue here do not, in fact, always arise in a "Lease Agreement." Instead, depending on the transaction, the Debtors' obligation to pay the initiator fees arises under either a loan agreement, a side letter, or a sublease agreement.[6] The fact that such fees do not arise under a lease agreement, but in a side letter or in a different document within the transaction's closing set, is a further indication that the initiator fees are not among those core lease obligations Congress sought to protect in section 365(d)(5).

b. Whether the Initiator Fees Provide a Benefit to the Estates Is Now Irrelevant, as the Claimants Do Not Invoke Section 503(b)(1).

15. To save their argument, Claimants muddy the instruction of *Pudgie's*. They focus on the court's rejection of the debtor's argument in that case, which was that the debtor was not

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[4] *See Child World*, 161 B.R. at 572 (real estate taxes included as portion of the rent), 576 (real estate taxes accrued prepetition were not protected "obligations" under section 365(d)(3)).

[5] *See Pudgie's*, 202 B.R. at 836-837 (landlord's "counsel fees incurred to enforce the lease are to be considered part of the rent"; however, "the obligation to pay attorneys' fees is not one of the obligations within the scope of section 365(d)(3)").

[6] *See, e.g.*, **Exhibit A** (relevant excerpts of Loan Agreement governing aircraft in the EAIV 2015 transaction); **Exhibit B** (relevant excerpts of MSN 7284 Loan Agreement) (EAIV 2016 transaction); **Exhibit C** (MSN 65315 Initiator Fee Letter) (JOLCO 2018 transaction) (filed under seal); **Exhibit D** (relevant excerpts of MSN 7887 Sub-Lease Agreement) (JOLCO 2017 transaction).

required to provide timely prerejection lease payments for abandoned leased property because the property did not provide a benefit to the estate. *See id.* at 834.

16. This issue—whether the initiator fees provided a benefit to the estates—is no longer relevant here. The Reorganized Debtors do not argue, and have never argued, that the Claimants' services must provide a benefit to the estate in order to satisfy section 365(d)(5).

17. The Objections did raise a "benefit to the estate" argument in relation to the Claimants' initial position that the initiator fees were entitled to administrative treatment under section 503(b)(1). As the Claimants have abandoned this argument, however, there need be no further discussion of whether Claimants' services provided any postpetition benefit.

18. What section 365(d)(3) does require, as the Claimants' cases confirm, is that the relevant obligation be of the kind that section is intended to protect—payment for "current services." *Child World*, 161 B.R. at 572. For example, the obligation that the *Pudgie's* debtors sought to avoid was rent itself, owed to the lessor—the primary "obligation" under any lease—which squarely falls within the purview of section 365(d)(3). *See id.* That makes the *Pudgie's* holding regarding rent entirely distinguishable, for here, the initiator fees arose from ancillary, prepetition services. *See* Objections ¶ 22. Any initiator fees that happened to fall due, "fortuitously," during the postpetition but prerejection period, are not entitled to the same administrative treatment as traditional rent owing to a lessor. *See Pudgie's*, 202 B.R. at 837.

II. The Lease Parties Did Not Continue to Operate Under the Lease Agreements Following Their Entry into the Second Stipulations and PBH Agreements.

19. The Claimants also argue that the Second Stipulations, entered into postpetition by the Debtors and their aircraft lessors, do not impact their Purported Administrative Claims: that notwithstanding the Second Stipulations, which modified the obligations under the various aircraft lease agreements, the Debtors' obligations to continue making current payments to Claimants

remained in force. *See* Response ¶¶ 17-18. But the Second Stipulations did have meaningful effect. They modified the terms of each of the lease agreements at issue, and—once so-ordered by the Court—they took precedence over the lease agreements and suspended the operation thereof, including payment of the initiator fees. *See* Objections ¶ 22.

20. It is telling that only now, years after the approval of the Second Stipulations, the Claimants raise issues with them. The Claimants had every opportunity to object or to be heard at the time the Second Stipulations were filed and approved: the Second Stipulations were filed openly on the docket. The Debtors even raised a clarification regarding the Second Stipulations at an omnibus hearing before the Court at the request of a different party in interest. *See* Hr'g Tr. (July 15, 2020) at 18:7-25, 19:1-15 [ECF No. 620]. The Claimants had ample notice and opportunity to make arguments regarding the Second Stipulations. They did not.

21. Moreover, that the Claimants are not party to the Second Stipulations further demonstrates that any remaining "obligation" owed to the Claimants was not necessary to the ongoing operation of the lease, and further supports that those obligations are not the type of lease "obligations" that section 365(d)(5) protects.

III. No Claims Warrant Secured or Priority Status, and Duplicative Claims Should Be Expunged.

22. The Response narrows the set of Disputed Claims and acknowledges that no claim is entitled to secured or priority status.

23. *First*, the Claimants concede that they have filed duplicative Disputed Claims. *See* Response ¶¶ 20-21. Accordingly, the parties agree that all of the following duplicative Disputed Claims should be disallowed in their entirety and be automatically expunged from the Claims Register: Proofs of Claim 4022 (filed as a priority claim), 4026 (filed as a priority claim), 4027

(filed as a priority claim),[7] 4034 (filed as an administrative claim), and 4036 (filed as an administrative claim).

24. *Second*, the Claimants concede that there is no support for the claimed status of their Purported Secured Claims, and that any such non-duplicative Claims should be reclassified as general unsecured Claims. *See* Response ¶ 19. As such, Proofs of Claim 2055 (filed as a secured claim) and 2057 (filed as a secured claim) should be reclassified as general unsecured claims.[8]

25. The Claimants fail to address in their Response two additional duplicative Disputed Claims. In the Twenty-Fifth Objection, the Reorganized Debtors argued that as Claim 4035 (filed as an administrative claim against Taca) and Claim 4037 (filed as an administrative claim against Aerovías) are duplicative of Claim 4033 (filed as an administrative claim against Avianca), Claims 4035 and 4037 should be disallowed and expunged, particularly as Taca, Aerovías, and Avianca have been substantively consolidated. *See* Twenty-Fifth Objection ¶¶ 10, 18. The Claimants do not address this argument in the Response and therefore do not contest that Claims 4035 and 4037 are duplicative of Claim 4033. For this reason and reasons set forth in the Twenty-Fifth Objection, Claims 4035 and 4037 should be disallowed and expunged.

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[7] As Claimants have agreed that all of the Purported Priority Claims are duplicative of other Claims, no surviving Claims are alleged to have priority status. Accordingly, no dispute remains over the priority status of any Claims.

[8] The Claimants "reserve the right to argue that the Court should not allow the Debtors to retroactively reject their obligations," citing to *In re Midway Airlines Corp.*, 406 F.3d at 240. *See* Response at n.5. The Reorganized Debtors have not sought such relief, because unlike the debtors in *In re Midway Airlines Corp.*, the Debtors sought the court-approved Second Stipulations, whereby the Debtors continued to pay rent to the lease counterparties pursuant to the PBH Agreements. In contrast, the debtors in *In re Midway Airlines Corp.*, "did nothing for thirteen months" and "should have asked the bankruptcy court to reduce its obligations under the lease immediately after the [60-day] grace period because it needed more time to decide whether to assume the lease, but could not afford to make full payments." *Id.* at 241.

NOTICE

26. Notice of the Reply has been provided to (i) the Claimants at the addresses and email addresses listed on their Disputed Claims; (ii) the Office of the U.S. Trustee; and (iii) all other parties entitled to notice pursuant to Bankruptcy Rule 2002. The Reorganized Debtors submit that no other or further notice need be given.

RESERVATION OF RIGHTS

27. The Reorganized Debtors reserve the right to amend, modify, or supplement this Reply, and to file additional replies or objections to the Disputed Claims on any other ground that bankruptcy or non-bankruptcy law permits. In the event that the Claimants pursue the Disputed Claims in any forum other than this Court, the Reorganized Debtors also expressly reserve the right to contest the Disputed Claims on the grounds set forth in this Reply or on any other ground.

WHEREFORE, the Reorganized Debtors respectfully request entry of the Proposed Order, attached to each of the Objections as Exhibit A thereto, and such other and further relief as the Court may deem just and appropriate.

Dated: January 18, 2023
New York, New York

/s/ John G. McCarthy

John G. McCarthy
SMITH, GAMBRELL & RUSSELL, LLP
1301 Avenue of the Americas, 21st Floor
New York, New York 10019
(212) 907-9700
Fax: (212) 907-9800

Counsel for Debtors and Reorganized Debtors

Exhibit A

Excerpts of EAIV-2 Loan Agreement

EXECUTION COPY

LOAN AGREEMENT [AVIANCA EAIV 2015-2 TRUST]

dated as of July 30, 2015

among

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION,
not in its individual capacity, except as otherwise expressly provided herein, but solely as owner trustee (referred to herein as Avianca EAIV 2015-2 Trust,
as Borrower

OCTO-AIRCRAFT LEASING LLC
as Owner Participant

AVIANCA HOLDINGS S.A.,
as Guarantor

THE LENDERS IDENTIFIED ON SCHEDULE I HERETO,

and

WELLS FARGO BANK, NATIONAL ASSOCIATION,
as Security Trustee

Up to $178,000,000 in Secured Loan Certificates

Burnham Sterling & Company LLC,
Initiator

(i) Subject to the terms and conditions of this Agreement, on the Drawdown Date of the Series of Loan Certificates relating to a Designated Aircraft specified in the relevant Notice of Issuance, each Lender agrees, and hereby directs the Security Trustee, to pay the amount of its Commitment Amount for such Designated Aircraft to the Borrower by wire transferring such amounts to the Manufacturer's account identified by the Borrower in such Notice of Issuance, or to such other account as the Borrower shall direct the Security Trustee in writing, immediately prior to the transfer of title to such Designated Aircraft to the Borrower.

2.3 Termination of Commitments.

(a) The amount of each Lender's Commitment in respect of a Designated Aircraft shall be automatically reduced to zero on the Commitment Termination Date for such Designated Aircraft.

(b) The Borrower shall have no right at any time to terminate the aggregate unused amount of the Commitments.

(c) The Commitments once terminated may not be reinstated.

2.4 Fees.

(a) The Borrower agrees to pay to the Security Trustee, for account of the Lenders, the Commitment Fee on the amount of their respective unfunded Commitments; provided, that any Lender not having complied with its obligation to fund any of its Commitment as and when required to do so hereunder shall not be entitled to receive the same until it has funded such amounts.

(b) The Borrower agrees to pay to the Security Trustee, for account of the Lenders, as and when due, the Upfront Fee. The Upfront Fee, once paid, shall not be refundable under any circumstance.

(c) Subject to paragraph (d) below, the Borrower agrees to pay to the Security Trustee, for account of the Initiator, as and when due, the Initiator Fee.

(d) If an Initiator Fee Event of Default occurs and is continuing, the Initiator may, for such long as such Initiator Fee Event of Default is continuing, at its option, declare by written notice to the Borrower (copied to the Guarantor) that (i) an Initiator Fee Event of Default has occurred which is continuing and (ii) the Accelerated Initiator Fee in respect of a Loan Certificate specified in such Notice is due and payable on the date specified in such notice, whereupon the Borrower agrees to pay to the Security Trustee on the date so specified, for the account of the Initiator, the Accelerated Initiator Fee with respect to such Loan Certificate. Following payment in full of the Accelerated Initiator Fee in respect of a Loan Certificate, the Borrower shall have no further obligation to pay any Initiator Fee or Initiator Prepayment Fee with respect to such Loan Certificate.

(e) The Borrower agrees to pay to the Security Trustee, for account of the Initiator, at any time a Loan Certificate is prepaid in full in accordance with Section 2.7 hereof, accelerated in accordance with Section 10 hereof or becomes subject to a mandatory

prepayment under Section 2.8 hereof, the Initiator Prepayment Fee associated with such prepayment, in each case, in accordance with the applicable section of this Agreement, unless such prepayment or acceleration is in respect of a Loan Certificate in respect of which the Accelerated Initiator Fee has been paid to the Initiator, in which case, no Initiator Prepayment Fee shall be payable.

(f) The fees payable to the Initiator under the previous paragraphs (c), (d), and (e), once paid, shall not be refundable under any circumstance.

2.5 Several Obligations; Remedies Independent. The failure of any Lender to fund its Commitment Amount and make the relevant Loan evidenced by a Loan Certificate on the Drawdown Date thereof shall not relieve any other Lender of its obligation on such date, but no Lender shall be responsible for the failure of any other Lender to fund its Commitment or any part thereof and make its Loans hereunder, and no Lender shall have any obligation to any other Lender for such Lender's failure to fund any part of its Commitment or make any Loan when required hereunder. The amounts payable by the Borrower at any time hereunder and under the Loan Certificates to each Lender shall be a separate and independent debt and each Lender shall be entitled solely through the Security Trustee to protect and enforce its rights to receive such payments arising out of this Agreement and the Loan Certificates, and it shall not be necessary for any other Lender to consent to, or be joined as an additional party in, any proceedings for such purposes. Nothing in this Section 2.5 or in any of the Basic Documents is intended to give any Lender any right to exercise remedies in respect of any Collateral or to exercise any other remedies other than through the Security Trustee. In the event any Lender shall fail to fund any Commitment Amount or make any Loan as and when required to do so hereunder, Borrower, upon consultation with Lessee and the other Lenders may, but shall not be required to replace such Lender upon such terms as it shall deem advisable.

2.6 Loan Certificates; Amortization.

(a) Each Loan Certificate in respect of an Aircraft shall be substantially in the form of Exhibit A hereto, dated the Drawdown Date thereof, payable to each Lender in a principal amount equal to its Commitment for the relevant Series and Tranche. Annex A to the Loan Supplement for each Series of Loan Certificates (including any Loan Certificates issued by exchange in accordance with Section 2.1(c)) shall be prepared by the Lenders in consultation with the Borrower and shall reflect an amortization of the principal amount of each Tranche of such Series as provided in Section 3.1. Such Annex A as so prepared shall be prima facie evidence of the amounts referred to therein absent manifest error.

(b) No Lender shall be entitled to have its Loan Certificates subdivided, by exchange for promissory notes of lesser denominations or otherwise, except in connection with a permitted assignment of all or any portion of such Lender's Loan Certificates pursuant to and in accordance with the provisions of Section 12.6 hereof.

2.7 Voluntary Prepayments.

(a) The Borrower shall have the right to prepay all of the Loan Certificates, in full or in part, in amounts, with respect to any partial prepayment, of no less than

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered as of the day and year first above written.

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION, not in its individual capacity, except as expressly set forth herein, but solely as owner trustee

By: _____
Name: Michael Arsenault
Title: Vice President

OCTO-AIRCRAFT LEASING LLC, as Owner Participant

By _____
Name:
Title:

AVIANCA HOLDINGS S.A., as Guarantor

By _____
Name:
Title:

WELLS FARGO BANK, NATIONAL ASSOCIATION, as Security Trustee

By _____
Name: Michael Arsenault
Title: Vice President

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered as of the day and year first above written.

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION, not in its individual capacity, except as expressly set forth herein, but solely as owner trustee

By:_____
Name:
Title:

OCTO-AIRCRAFT LEASING LLC, as Owner Participant

By _____
Name: **Elisa Murgas de Moreno**
Title: **Secretary General- Officer**

AVIANCA HOLDINGS S.A., as Guarantor

By _____
Name: **Elisa Murgas de Moreno**
Title: **Secretary**

WELLS FARGO BANK, NATIONAL ASSOCIATION, as Security Trustee

By _____
Name:
Title:

IN WITNESS WHEREOF, the parties hereto have caused this Loan Agreement to be duly executed and delivered as of the day and year first above written.

LENDERS

DEKABANK DEUTSCHE GIROZENTRALE, as a Lender

By _____
Name: Jurgen Hamper
Title: Executive Director

By _____
Name: Jens Epping
Title: Vice President

THE KOREA DEVELOPMENT BANK, as a Lender

By _____
Name: Hanvit Kim
Title: Manager

SIEMENS FINANCIAL SERVICES INC., as a Lender

By _____
Name:
Title:

IN WITNESS WHEREOF, the parties hereto have caused this Loan Agreement to be duly executed and delivered as of the day and year first above written.

LENDERS

DEKABANK DEUTSCHE GIROZENTRALE, as a Lender

By _____
Name: Jurgen Hamper
Title: Executive Director

By _____
Name: Jens Epping
Title: Vice President

THE KOREA DEVELOPMENT BANK, as a Lender

By _____
Name: Joong Gun Kim
Title: Team Head

SIEMENS FINANCIAL SERVICES INC., as a Lender

By _____
Name:
Title:

IN WITNESS WHEREOF, the parties hereto have caused this Loan Agreement to be duly executed and delivered as of the day and year first above written.

LENDERS

DEKABANK DEUTSCHE GIROZENTRALE, as a Lender

By _____
Name: Jurgen Hamper
Title: Executive Director

By _____
Name: Jens Epping
Title: Vice President

THE KOREA DEVELOPMENT BANK, as a Lender

By _____
Name: Hanvit Kim
Title: Manager

SIEMENS FINANCIAL SERVICES, INC., as a Lender

By _____
Name: Dhairyasheel Borde
Title: Vice President

Kevin S. Keaton
Director, Operations

SCHEDULE II

CERTAIN DEFINED TERMS

"**Accelerated Initiator Fee**" shall mean, in respect of a Loan Certificate, the present value, as of the date of the relevant Accelerated Initiator Fee is declared to be due and payable in accordance with Section 2.4(d) of this Agreement, of the sum of the remaining installments of Initiator Fee for the Aircraft Allocated To such Loan Certificate payable in respect of such Loan Certificate from the date such Accelerated Initiator Fee is declared to be due and payable in accordance with Section 2.4(d) of this Agreement to (and including) the Maturity Date for such Loan Certificate, plus accrued interest thereon calculated using the applicable Post-Default Rate. Such present value shall be determined by discounting the amounts of such installments semi-annually (assuming a 360-day year of twelve 30-day months) from their respective Payment Dates to the date such Accelerated Initiator Fee is declared to be due and payable in accordance with Section 2.4(d) of this Agreement at a rate equal to the Fixed Rate or Floating Rate for each Loan Certificate, as the case may be.

"**Applicable Margin**" shall mean (1) in the case of a Tranche A-1 Loan Certificate, 1.90% per annum, (2) in the case of a Tranche A-2 Loan Certificate, 1.836% per annum, and (3) in the case of a Tranche A-3 Loan Certificate, 1.83% per annum.

"**Commitment Fee**" shall mean 0.50% per annum, payable on each Drawdown Date, accruing from the date of the Framework Agreement to but excluding such Drawdown Date. Such amount shall be calculated on the basis of a year of 360 days and the actual number of days elapsed, in respect of the aggregate of the unutilized Commitment Amounts.

"**Initiator Fee**" shall mean, in respect of an Aircraft and each Payment Date occurring after the Drawdown Date for such Aircraft, an amount equal to 0.15% of the Commitment Amount (non-amortizing) for such Aircraft, payable on such Payment Date.

"**Initiator Fee Event of Default**" shall mean the failure of the Borrower to pay the Initiator Fee as and when due and such failure continues for a period of 30 days.

"**Initiator Prepayment Fee**" shall mean, in respect of a Loan Certificate as at any date of determination, the present value, as of the date of the relevant prepayment of such Loan Certificate, of the installments of Initiator Fee for the Aircraft Allocated To such Loan Certificate that, but for such prepayment, would have been payable on the Payment Dates after such prepayment. Such present value shall be determined by discounting the amounts of such installments semi-annually (assuming a 360-day year of twelve 30-day months) from their respective Payment Dates to the date of such prepayment at a rate equal to the Fixed Rate or Floating Rate applicable to each Tranche of Loan Certificates.

"**Prepayment Fee**" shall mean, in respect of a Loan Certificate as at any date of determination, the sum of (i) the Initiator Prepayment Fee, plus (ii) the Break Amount, if expressed as a positive number, plus (iii) LIBOR Break Amount.

"**Upfront Fee**" shall mean, in respect of each Designated Aircraft, an amount equal to (1) 0.25% of the Commitment Amount for such Aircraft in the case of a Tranche A-1 Loan

Exhibit B

Excerpts of MSN 7284 Loan Agreement

Execution Version

LOAN AGREEMENT (MSN 7284)

dated as of August 24, 2016

among

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION,
not in its individual capacity, except as otherwise expressly provided herein, but solely as owner trustee (referred to herein as Avianca EAIV 2016-1 Trust),
as Borrower

TRI-AIRCRAFT LEASING II LLC
as Owner Participant

AVIANCA HOLDINGS S.A.,
as Guarantor

THE LENDERS IDENTIFIED ON SCHEDULE I HERETO,

and

WILMINGTON TRUST COMPANY,
as Security Trustee

Up to Euro equivalent of $28,000,000 in Secured Tranche A Loans

Up to $5,000,000 in Secured Tranche B Loans

Burnham Sterling & Company LLC,
Initiator

(ii) may request to reschedule the Drawdown Date for the Designated Aircraft subject to the generally applicable policies and procedures of such Lenders (including the fixing of the interest rate in accordance with this Section 2.2) and the applicable Lenders shall use reasonable efforts to accommodate such request.

(i) Subject to the terms and conditions of this Agreement, on the Drawdown Date of the Loans relating to the Designated Aircraft specified in the Notice of Borrowing, each Lender agrees, and hereby directs the Security Trustee, to pay the amount of its Commitment Amount for the Designated Aircraft to the Borrower by wire transferring such amounts to the Manufacturer's account identified by the Borrower in such Notice of Borrowing, or to such other account as the Borrower shall direct the Security Trustee in writing, immediately prior to the transfer of title to the Designated Aircraft to the Borrower.

2.3 Termination of Commitments.

(a) The amount of each Lender's Commitment in respect of the Designated Aircraft shall be automatically reduced to zero on the Commitment Termination Date for the Designated Aircraft.

(b) The Borrower shall have no right at any time to terminate the aggregate unused amount of the Commitments.

(c) The Commitments once terminated may not be reinstated.

2.4 Fees.

(a) The Borrower agrees to pay to the Security Trustee in accordance with the relevant Fee Letter, (i) for account of the Senior Lenders, the Tranche A Commitment Fee on the amount of their respective unfunded Tranche A Commitments and (ii) for account of the Junior Lenders, the Tranche B Commitment Fee on the amount of their respective unfunded Tranche B Commitments; provided, that any Lender not having complied with its obligation to fund any of its Commitment as and when required to do so hereunder shall not be entitled to receive the same until it has funded such amounts.

(b) The Borrower agrees to pay to the Security Trustee in accordance with the relevant Fee Letter, (i) for account of the Senior Lenders, as and when due, the Tranche A Upfront Fee and (ii) for account of the Junior Lenders, as and when due, the Tranche B Upfront Fee; provided, that any Lender not having complied with its obligation to fund any of its Commitment as and when required to do so hereunder shall not be entitled to receive the same until it has funded such amounts. The Upfront Fees, once paid, shall not be refundable under any circumstance.

(c) The Borrower agrees to pay to the Security Trustee, for account of the Initiator, as and when due, the Initiator Fee.

(d) The Borrower agrees to pay to the Security Trustee, for account of the Initiator, at any time a Loan is prepaid in full in accordance with Section 2.7 hereof, accelerated in accordance with Section 10 hereof or becomes subject to a mandatory prepayment

under Section 2.8 hereof, the Initiator Prepayment Fee associated with such prepayment, in each case, in accordance with the applicable section of this Agreement and subject in all cases to the terms of the Intercreditor Agreement.

(e) The fees payable to the Initiator under the previous paragraphs (c) and (d), once paid, shall not be refundable under any circumstance.

2.5 Several Obligations; Remedies Independent. The failure of any Lender to fund its Commitment Amount and make the relevant Loan evidenced by a Loan Certificate on the Drawdown Date thereof shall not relieve any other Lender of its obligation on such date, but no Lender shall be responsible for the failure of any other Lender to fund its Commitment or any part thereof and make its Loans hereunder, and no Lender shall have any obligation to any other Lender for such Lender's failure to fund any part of its Commitment or make any Loan when required hereunder. The amounts payable by the Borrower at any time hereunder and under the Loan Certificates to each Lender shall be a separate and independent debt and each Lender shall be entitled solely through the Security Trustee to protect and enforce its rights to receive such payments arising out of this Agreement and the Loan Certificates, and it shall not be necessary for any other Lender to consent to, or be joined as an additional party in, any proceedings for such purposes. Nothing in this Section 2.5 or in any of the Basic Documents is intended to give any Lender or the Initiator any right to exercise remedies in respect of any Collateral or to exercise any other remedies other than through the Security Trustee. In the event any Lender shall fail to fund any Commitment Amount or make any Loan as and when required to do so hereunder, Borrower, upon consultation with Lessee and the other Lenders may, but shall not be required to replace such Lender upon such terms as it shall deem advisable.

2.6 Loan Certificates; Amortization.

(a) Each Tranche A Loan Certificate in respect of the Designated Aircraft shall be substantially in the form of Exhibit A-1 hereto, dated the Drawdown Date thereof, payable to each Senior Lender in a principal amount equal to its Tranche A Commitment. Each Tranche B Loan Certificate in respect of the Designated Aircraft shall be substantially in the form of Exhibit A-2 hereto, dated the Drawdown Date thereof, payable to each Junior Lender in a principal amount equal to its Tranche B Commitment. Annex A to the Loan Supplement for the Loan Certificates (including any Loan Certificates issued by exchange in accordance with Section 2.1(a)(iii) or 2.1(b)(iii)) shall be prepared by the applicable Lenders in consultation with the Borrower and Lessee and shall reflect an amortization of the principal amount of each Tranche as provided in Section 3.1. Such Annex A as so prepared shall be conclusive evidence of the amounts referred to therein absent manifest error.

(b) No Lender shall be entitled to have its Loan Certificates subdivided, by exchange for promissory notes of lesser denominations or otherwise, except in connection with a permitted assignment of all or any portion of such Lender's Loan Certificates pursuant to and in accordance with the provisions of Section 12.6 hereof.

2.7 Voluntary Prepayments.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered as of the day and year first above written.

WELLS FARGO BANK NORTHWEST, NATIONAL ASSOCIATION, not in its individual capacity, except as expressly set forth herein, but solely as owner trustee

By: _____
Name: Lane Molen
Title: Vice President

TRI-AIRCRAFT LEASING II LLC, as
Owner Participant

By _____
Name: Elisa Murgas de Moreno
Title: Secretary General- Officer

Loan Agreement (MSN 7284) – Signature Page

AVIANCA HOLDINGS S.A., as
Guarantor

By _____
Name: Elisa Murgas de Moreno
Title: Secretary

Loan Agreement (MSN 7284) – Signature Page

WILMINGTON TRUST COMPANY, as
Security Trustee

By _____
Name:
Title:

Matthew C. Bosnjak
Financial Services Officer

IN WITNESS WHEREOF, the parties hereto have caused this Loan Agreement to be duly executed and delivered as of the day and year first above written.

LENDERS

NORDDEUTSCHE LANDESBANK GIROZENTRALE ACTING THROUGH ITS NEW YORK BRANCH, as a Senior Lender

By _____
Name: Claudia Ziemer
Title: Senior Director

By _____
Name: Oliver Gruenke
Title: MANAGING DIRECTOR

TAMWEEL AVIATION FUNDING L.P.,
as a Junior Lender

By _____
Name: Mamoun Kuzbari
Title: Director

By _____
Name:
Title:

SCHEDULE II

CERTAIN DEFINED TERMS

"**Applicable Margin**" shall mean, in the case of a Tranche A Loan, 2.00% per annum.

"**Bail-In Action**" shall mean the exercise of any Write-Down and Conversion Powers by the applicable EEA Resolution Authority in respect of any liability of an EEA Financial Institution.

"**Bail-In Legislation**" shall mean, with respect to any EEA Member Country implementing Article 55 of Directive 2014/59/EU of the European Parliament and of the Council of the European Union, the implementing law for such EEA Member Country from time to time which is described in the EU Bail-In Legislation Schedule.

"**EEA Financial Institution**" shall mean (a) any credit institution or investment firm established in any EEA Member Country which is subject to the supervision of an EEA Resolution Authority, (b) any entity established in an EEA Member Country which is a parent of an institution described in clause (a) of this definition, or (c) any financial institution established in an EEA Member Country which is a subsidiary of an institution described in clauses (a) or (b) of this definition and is subject to consolidated supervision with its parent.

"**EEA Member Country**" shall mean any of the member states of the European Union, Iceland, Liechtenstein, and Norway.

"**EEA Resolution Authority**" shall mean any public administrative authority or any person entrusted with public administrative authority of any EEA Member Country (including any delegee) having responsibility for the resolution of any EEA Financial Institution.

"**EU Bail-In Legislation Schedule**" shall mean the EU Bail-In Legislation Schedule published by the Loan Market Association (or any successor person), as in effect from time to time.

"**Fee Letter**" means, either or both, as the context may require, of the Senior Fee Letter and the Junior Fee Letter.

"**Fixed Rate**" shall mean in respect of (A) a Tranche A Loan, the fixed rate of interest determined by the Senior Lenders pursuant to Section 2.2(b) of the Loan Agreement, taking into account such Senior Lender's Hedging Transaction and Applicable Margin, and (B) a Tranche B Loan, 7.00% per annum. The Fixed Rate for each Tranche shall be as specified on the face of the Loan Certificates evidencing the Loans.

"**Funding Breakage**" shall mean the amount, if any, required to compensate each Lender for any losses, costs or expenses (excluding loss of profit) which it may incur as the result of any payment or prepayment (by acceleration or otherwise) of principal or interest on any Loan held by it not being made on the date irrevocably scheduled therefor (including a prepayment that is not received by the Security Trustee on the date specified in a notice delivered by the Borrower pursuant to Section 2.7 of the Loan Agreement) or the failure to make any such payment on the

date scheduled therefor, including, without limitation, losses, costs or expenses incurred in connection with unwinding or liquidating any deposits, refinancing or funding arrangements with its funding sources (a) to the extent any payment is made on a day other than a Payment Date, from such date of payment to the next Payment Date with respect to the Senior Lenders and the Loans, (b) from the date of an acceleration of the Loans following the occurrence of a Loan Event of Default to the Maturity Date with respect to the Lenders and the Loans, in each case as reasonably determined by such Lender in accordance with customary industry practices applicable to loans similar to the relevant Loan(s), which determination shall be conclusive absent manifest error, (c) as a consequence of any prepayment of the Loans, in each case as reasonably determined by the applicable Lender in accordance with customary industry practices applicable to loans similar to the relevant Loan(s), which determination shall be conclusive absent manifest error, (d) if for any reason the Drawdown Date for any Tranche A Loan does not occur on the Proposed Drawdown Date for such Tranche A Loan (or, if for any reason such Drawdown Date shall not occur on a Proposed Drawdown Date, the applicable Cutoff Date) other than as a result of the failure of any Lender to comply with the terms of Section 2.2 of the Loan Agreement or (e) if for any reason the Drawdown Date for all Loans in respect of the Designated Aircraft does not occur on or prior to the Commitment Termination Date (or such earlier date as requested in writing by the Borrower) other than as a result of the failure of any Lender to comply with the terms of Section 2.2 of the Loan Agreement.

"**FX Breakage**" shall mean the amount, if any, required to compensate the Quoting Bank for any losses, costs or expenses which it may incur, including, without limitation, losses, costs or expenses incurred in connection with unwinding or liquidating the FX Hedge or any related deposits, refinancing, funding or currency arrangements, if for any reason the Drawdown Date for any Loan does not occur on the Proposed Drawdown Date for such Loan.

"**Initiator Fee**" shall mean, in respect of the Aircraft and each Payment Date occurring after the Drawdown Date for the Aircraft, an amount equal to the sum of 0.15% (payable in Euro) of the Tranche A Commitment Amount and 0.15% (payable in USD) of the Tranche B Commitment Amount for the Aircraft, in each case payable quarterly in arrears, in equal installments, on each such Payment Date.

"**Initiator Prepayment Fee**" shall mean, in respect of a Loan as at any date of determination, the present value, as of the date of the relevant prepayment of such Loan, of the remaining installments of Initiator Fee for the Aircraft Allocated To such Loan that, but for such prepayment, would have been payable on the Payment Dates after such prepayment. Such present value shall be determined by discounting the amounts of such installments semi-annually (assuming a 360-day year of twelve 30-day months) from their respective Payment Dates to the date of such prepayment at a rate equal to the Fixed Rate applicable to the Tranche A Loans.

"**Junior Fee Letter**" shall mean that certain Junior Fee Letter dated as of August 24, 2016 among the Borrower, the Junior Lenders and the Guarantor.

"**Prepayment Fee**" means, either or both, as the context may require, of the Tranche A Prepayment Fee and the Tranche B Prepayment Fee.

Exhibit C

MSN 65315 Initiator Fee Letter

[FILED UNDER SEAL]

Exhibit D

Excerpts of MSN 7887 Sub-Lease Agreement

Execution Version

30 November 2017

WILMINGTON TRUST COMPANY,
NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS OWNER TRUSTEE FOR AVIANCA JOLCO I TRUST
AS SUB-LESSOR

AND

AEROVÍAS DEL CONTINENTE AMERICANO S.A. AVIANCA.
AS SUB-LESSEE

AIRCRAFT SUB-LEASE AGREEMENT FOR
ONE (1) AIRBUS MODEL A320-251N AIRCRAFT,
BEARING MANUFACTURER'S SERIAL NO. 7887
AND REGISTRATION MARK N764AV
WITH TWO CFM INTERNATIONAL S.A. MODEL
LEAP-1A26 ENGINES

THIS AIRCRAFT SUB-LEASE AGREEMENT (this "**Agreement**") is made on 30 November 2017

BETWEEN:

(1) **WILMINGTON TRUST COMPANY**, a Delaware trust company, not in its individual capacity, but solely as Owner Trustee for AVIANCA JOLCO I TRUST (the "**Sub-Lessor**"); and

(2) **AEROVÍAS DEL CONTINENTE AMERICANO S.A. AVIANCA**, a *sociedad anónima* organized under the laws of Colombia (the "**Sub-Lessee**")

WHEREAS:

(A) Pursuant to the Lease (as hereinafter defined), the Sub-Lessor has leased from the Lessor (as hereinafter defined) one (1) Airbus Model A320-251N aircraft bearing Manufacturer's Serial No. 7887 on the terms and conditions contained in the Lease.

(B) The Sub-Lessor has agreed to sublease to the Sub-Lessee, and the Sub-Lessee has agreed to sublease from the Sub-Lessor, the Aircraft on the terms and conditions set out herein.

IT IS AGREED as follows:

1. **DEFINITIONS AND INTERPRETATION**

1.1 **Definitions**

In this Agreement, the following words and expressions shall have the respective meanings shown opposite them:

"**A Account**" means the Dollar current account of the Lessor number [redacted] with the Account Bank ([redacted]) or such other account as the Lessor (with the agreement of the Security Agent) may from time to time designate in writing to the Sub-Lessor.

"**A Additional Rental**" means, in respect of any Rental Payment Date, the amount of interest payable under the Loan Agreement on the corresponding Payment Date (as defined in the Loan Agreement).

"**A Basic Rental**" means, in respect of any Rental Payment Date, the amount shown opposite such Rental Payment Date in Column (2) (*A Rental*) of Exhibit 1 to the Lease Schedule Supplement.

"**A Rental**" means the aggregate of the A Basic Rental and the A Additional Rental.

Critical Part shall include any Landing Gear, Engine, Engine accessory, life limited Part and hard time component.

"**Cycle**" means one take off and landing of the Aircraft, such period elapsing from the moment the Aircraft wheels leave the runway on take off until the time that the Aircraft wheels next touch the runway.

"**Damage Notification Threshold**" means $1,000,000 or the equivalent in any other currency;

"**Debt Fee**" means each payment instalment set out in column (A) of Schedule 3;

"**Default Rate**" means the rate *per annum* which is two per cent. (2.00%) *per annum* over the Interest Rate (as defined in the Loan Agreement).

"**Delivery**" means the time at which the Aircraft is delivered from the Sub-Lessor to the Sub-Lessee hereunder.

"**Delivery Date**" means, in respect of the Aircraft, the date on which Delivery takes place.

"**DER**" means designated engineering representative.

"**De-registration Power of Attorney**" means the de-registration power of attorney from the Sub-Lessee and/or the Sub-Lessor authorising certain individuals indicated by the Security Agent to do anything or act or to give any consent or approval which may be required to obtain de-registration of the Aircraft and export the Aircraft from the State of Registration substantially in the form of Schedule 6 (*Form of De-registration Power of Attorney*) or such other form as is necessary or desirable in the State of Registration or as may be issued following the end of the Security Period pursuant to Clause 15.5(d).

"**Discount Rate**" means the Fixed Rate minus the Margin;

"**Dollars**" and the sign "**$**" and "**USD**" mean the lawful currency for the time being of the United States and in respect of all payments to be made under this Agreement in Dollars, means funds which are for same day settlement in the New York Clearing House Interbank Payments System (or such other US Dollar funds as may at the relevant time be customary for the settlement in New York City of international banking transactions denominated in United States dollars).

"**EASA**" means the European Aviation Safety Agency and any successor thereof.

"**Engine**" means either or both (as the context may require) of the two (2) engines installed on the Airframe at the Delivery Date and described in Schedule 1 (Aircraft *Description*) (or any other engine which replaces such engine or is substituted therefor and of which title vests in the Lessor in accordance with the terms of this Agreement) whether or not installed on the Airframe or installed or not installed on any other airframe for so long as title thereto shall remain vested in the Lessor in accordance with the terms of this Agreement, together in each case with any and all Parts incorporated in, installed on or attached to, such Engine (or any other engine which replaces such Engine or is substituted therefor and of which title vests in the Lessor in accordance with the terms of this Agreement) when delivered and leased hereunder or from time to time thereafter, or which, after removal therefrom, remain the property of the Lessor and all replacements, renewals and additions made in accordance with the terms of this Agreement.

"**Engine Manufacturer**" means CFM International, S.A..

"**Engine Performance Restoration Shop Visit**" means at a minimum, in respect of an Engine, the performance of off-wing engine maintenance and repair accomplished for that Engine including the complete visual inspection and repair as necessary in accordance with the Engine Manufacturer's then current revision of the engine manual and workscope planning guide (or equivalent) of all the modules of such Engine, including (without limitation) complete destacking of the fan, compressor, combustion and turbine modules, complete deblading of all rotor assemblies and complete visual, dimensional and non-destructive testing (NDT) inspection of all parts to overhaul level inspection, with repair and replacement, as required, followed by re-assembly, balancing and testing.

"**Engine Warranties**" means the warranties granted by the Engine Manufacturer in relation to the Engines, as more particularly defined in the Engine Warranties Agreement.

"**Engine Warranties Agreement**" means the engine warranties agreement entered, or to be entered, into between the Engine Manufacturer, the Sub-Lessee, the Sub-Lessor, the Lessor and the Security Agent in relation to the warranties relating to the Engines.

"**Equity Fee**" means each payment instalment set out in column (B) of Schedule 3;

"**Event of Default**" means any of the events and/or circumstances referred to in Clause 18 (*Events of Default*).

"**Excepted Reason**" means:

(a) all tasks with a threshold / interval of 144 months, 48,000 Flight Hours and / or 24,000 Cycles or lower system, zonal inspection program tasks and structural program tasks (as may be escalated from time to time), all other tasks which for planning and access reasons would be performed at this check, all lower level checks, cabin refurbishment, out of phase work and cleaning and repair; and

(b) all C Check and other tasks sufficient to clear the Aircraft for a full C Check interval as applicable in the then latest revision of the Maintenance Planning Document.

"**Holding Company**" means, in relation to any person, any other person of which it is a Subsidiary.

"**IDERA**" means the irrevocable deregistration and export request authorisation executed and delivered by the the Sub-Lessor in favour of the Security Agent pursuant to the Cape Town Convention and filed with the Aviation Authority in the form Schedule 9 (Form of IDERA) to the Lease.

"**Indemnitee**" has the meaning given to it in Clause 23.1 (General Indemnity).

"**Initiator**" means Burnham Sterling & Company LLC.

"**Initiator Account**" means the Dollar current account of the Sub-Lessor number [redacted] ([redacted]) with Wilmington Trust Company, or such other account as the Initiator may from time to time designate in writing to the Sub-Lessee;

"**Initiator Fees**" means, together, each instalment of Debt Fee and Equity Fee;

"**Inspection Agent**" means SMBC Aviation Capital Limited or any replacement inspection agent appointed for the purposes of this Agreement by the Lessor and notified to the Sub-Lessee in writing from time to time.

"**Insurance Claims Threshold**" means $1,000,000 or the equivalent in any other currency.

"**Insurances**" means any and all contracts or policies of insurance required to be effected and maintained in accordance with the provisions of this Agreement, which expression includes, where the context so admits, any relevant reinsurance(s).

including making any filing, recording or registration with the Aviation Authority, Aerocivil or any other Government Entity or as required to comply with any applicable law.

4.3 **Delivery Cut-Off Date**

If for any reason Delivery shall not have occurred at or before 11:59 p.m. (Tokyo time) on [●] or such later date as the Sub-Lessor, the Lessor, the Security Agent and the Sub-Lessee may agree, the obligations of the Sub-Lessor to lease the Aircraft under this Agreement shall (unless otherwise agreed by the Sub-Lessor, the Lessor and the Sub-Lessee) automatically terminate and the Sub-Lessee shall be released from its obligation to lease the Aircraft hereunder, but without prejudice to any other accrued liabilities or obligations of the Sub-Lessee.

5. **PAYMENT PROVISIONS**

5.1 **Rental Payments**

(a) The Sub-Lessee shall on each Rental Payment Date during the Lease Period pay to the Sub-Lessor instalments of the Rental.

5.2 **Additional rental**

(a) On each Additional Rental Payment Date, the Sub-Lessee shall pay to the Initiator Account, by way of additional rental payment, the corresponding amount of Debt Fee as set out in Schedule 3; and

(b) On each Additional Rental Payment Date, the Sub-Lessee shall pay to the Initiator Account, by way of additional rental payment, the corresponding amount of Equity Fee as set out in Schedule 3.

(c) The Sub-Lessee acknowledges that the Initiator has already provided services prior to the Delivery Date, and accordingly agrees that the Sub-Lessee's obligations to pay the Initiator Fees hereunder are unconditional.

(d) If an Initiator Acceleration Event occurs, the Initiator will be entitled (without being obliged to first take any other action or make any claim against the Guarantor), at its option, to declare by written notice to the Sub-Lessee that an Initiator Acceleration Event has occurred and that the Accelerated Initiator Fee is due and payable on the date specified in such notice, whereupon the Sub-Lessee agrees to pay to the Initiator Account on the date so specified the Accelerated Initiator Fee. Following payment in full of the Accelerated Initiator Fee, the Sub-Lessee shall have no

further obligation to pay any Initiator Fee under this Agreement. The Initiator Fees payable under this Agreement, once paid, shall not be refundable in any circumstances.

For purposes of this Clause 5.2(d):

"**Accelerated Initiator Fee**" means, as of the date when a notice is served declaring the same to be due and payable pursuant to Clause 5.2(d), the present value of the sum of the remaining instalments of Initiator Fee payable from the date of such notice to the final scheduled date of the last instalment of Debt Fee and Equity Fee due on the final Additional Rental Payment Date, discounted to present value using the Discount Rate, plus accrued interest thereon from the date of such notice to the date of actual receipt at the Default Rate.

"**Initiator Acceleration Event**" means any of the following:

(i) The Loan under the Loan Agreement being accelerated or declared to be due and payable prior to its stated maturity, whether by reason of an Event of Default, a Mandatory Prepayment Event or otherwise;

(ii) the Termination Value or the Special Termination Value being expressed to fall due and payable under the Lease for any reason;

(iii) the Lease Period ending under the Lease or the Lease Term ending under this Agreement for any reason; or

(iv) the Sub-Lessee fails to pay any amount of Initiator Fee on the due date and such amount remains unpaid more than three (3) Business Days after its due date.

(e) The Parties hereby agree that failure by the Sub-Lessee to pay any amount of Initiator Fee on the due date (if such amount remains unpaid for three (3) Business Days) shall constitute an "event of default" under this Agreement.

(f) Sub-Lessor agrees to account to Initiator for all amounts received into, and standing to the credit of, the Initiator Account from time to time upon the request of the Initiator.

(g) The agreement as to the payment of the Initiator Fees under this Sub-Lease is a bilateral matter as between the Sub-Lessee and the Initiator, and no consent or act is required by the Sub-Lessor for the Initiator to enforce its rights hereunder, or for the Sub-Lessee and the Initiator to agree any amendment or variation of any

payment of Initiator Fees. For the avoidance of doubt, the Initiator acknowledges and agrees that no consent or act is required by the Initiator for the Sub-Lessor (or any assignee) to enforce its rights under this Agreement, or for the Sub-Lessor and the Sub-Lessee to agree any amendment or variation of this Agreement, the Lease or any other Operative Document, provided that no such amendment may reduce, terminate or amend the Initiator's rights under this Agreement or the Guarantee (Initiator).

(h) Any amendment to the terms of the Lease or this Agreement shall not affect the obligation of the Sub-Lessee to make payments to the Initiator in the manner and on the dates set out in this Agreement unless consented to by Initiator in writing.

(i) The Initiator acknowledges that neither the Lessor nor any Financing Party shall have any fiduciary duty to the Initiator.

(j) The Initiator shall have no right to exercise any remedy (including the right to terminate this Agreement) with respect to any Collateral or (other than to claim against the Guarantor under the Guarantee (Initiator)) to take action under any other Operative Document.

(k) The Initiator shall be entitled to enforce its rights against the Sub-Lessee under and in connection with this Clause 5.2 as a third party, notwithstanding that the Initiator is not a signatory to this Agreement, pursuant to the Contracts (Rights of Third Parties) Act 1999.

5.3 **Rental Payable in Addition**

For the avoidance of doubt: (a) if a date on which any Termination Value, Special Termination Value or Purchase Option Price falls due is also a Rental Payment Date, the Rental due on such Rental Payment Date shall also be payable; and (b) the leasing of the Aircraft shall cease upon the occurrence of a Total Loss with respect to the Aircraft or the Airframe, **provided** that the Rental shall continue to be due and payable up until and including the date on which all amounts payable on the Total Loss Payment Date pursuant to Clause 17.1 have been fully paid and discharged.

5.4 **Currency of Payments**

All payments hereunder:

SCHEDULE 3
INITIATOR FEES

	(A)	(B)	(C)
Rental Payment Date	**Debt Fee (US$)**	**Equity Fee (US$)**	**Total Fee ($)**
12/4/2017	0	0	-
12/31/2017	4,522.50	5,653.13	10,175.63
3/31/2018	15,075.00	18,843.75	33,918.75
6/30/2018	15,242.50	19,053.13	34,295.63
9/30/2018	15,410.00	19,262.50	34,672.50
12/31/2018	15,410.00	19,262.50	34,672.50
3/31/2019	15,075.00	18,843.75	33,918.75
6/30/2019	15,242.50	19,053.13	34,295.63
9/30/2019	15,410.00	19,262.50	34,672.50
12/31/2019	15,410.00	19,262.50	34,672.50
3/31/2020	15,242.50	19,053.13	34,295.63
6/30/2020	15,242.50	19,053.13	34,295.63
9/30/2020	15,410.00	19,262.50	34,672.50
12/31/2020	15,410.00	19,262.50	34,672.50
3/31/2021	15,075.00	18,843.75	33,918.75
6/30/2021	15,242.50	19,053.13	34,295.63
9/30/2021	15,410.00	19,262.50	34,672.50
12/31/2021	15,410.00	19,262.50	34,672.50
3/31/2022	15,075.00	18,843.75	33,918.75
6/30/2022	15,242.50	19,053.13	34,295.63
9/30/2022	15,410.00	19,262.50	34,672.50

	(A)	(B)	(C)
Rental Payment Date	**Debt Fee (US$)**	**Equity Fee (US$)**	**Total Fee ($)**
12/31/2022	15,410.00	19,262.50	34,672.50
3/31/2023	15,075.00	18,843.75	33,918.75
6/30/2023	15,242.50	19,053.13	34,295.63
9/30/2023	15,410.00	19,262.50	34,672.50
12/31/2023	15,410.00	19,262.50	34,672.50
3/31/2024	15,242.50	19,053.13	34,295.63
6/30/2024	15,242.50	19,053.13	34,295.63
9/30/2024	15,410.00	19,262.50	34,672.50
12/31/2024	15,410.00	19,262.50	34,672.50
3/31/2025	15,075.00	18,843.75	33,918.75
6/30/2025	15,242.50	19,053.13	34,295.63
9/30/2025	15,410.00	19,262.50	34,672.50
12/31/2025	15,410.00	19,262.50	34,672.50
3/31/2026	15,075.00	18,843.75	33,918.75
6/30/2026	15,242.50	19,053.13	34,295.63
9/30/2026	15,410.00	19,262.50	34,672.50
12/31/2026	15,410.00	19,262.50	34,672.50
3/31/2027	15,075.00	18,843.75	33,918.75
6/4/2027	10,887.50	13,609.38	24,496.88
6/30/2027	4,355.00	-	4,355.00
9/30/2027	15,410.00	-	15,410.00
12/31/2027	15,410.00	-	15,410.00

	(A)	(B)	(C)
Rental Payment Date	**Debt Fee (US$)**	**Equity Fee (US$)**	**Total Fee ($)**
3/31/2028	15,242.50	-	15,242.50
6/30/2028	15,242.50	-	15,242.50
9/30/2028	15,410.00	-	15,410.00
12/31/2028	15,410.00	-	15,410.00
3/31/2029	15,075.00	-	15,075.00
6/30/2029	15,242.50	-	15,242.50
9/30/2029	15,410.00	-	15,410.00

The Sub-Lessor:

SIGNED for and on behalf of:
WILMINGTON TRUST COMPANY

(not in its individual capacity but solely as Owner Trustee for Avianca JOLCO I Trust)

By:

Name:
Title: Matthew C. Bosnjak
Financial Services Officer

The Sub-Lessee:

SIGNED for and on behalf of:
AEROVÍAS DEL CONTINENTE AMERICANO S.A. AVIANCA

By:

Name: Roberto Held Otero
Title: CFO

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

In the Matter of:

AVIANCA HOLDINGS S.A., et al. Main Case No.

Debtors and Reorganized Debtors. 20-11133-mg

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

January 25, 2023

B E F O R E:

HON. DAVID S. JONES

U.S. BANKRUPTCY JUDGE

ECRO: ELECTRONICALLY RECORDED

Reorganized Debtors' Twenty-Fourth Omnibus Objection to Proofs of Claim

Reorganized Debtors' Twenty-Fifth Omnibus Objection to Proofs of Claim

Motion Filed by Burnham Sterling and Company LLC and Babcock & Brown Securities LLC to Compel Compliance with 11 U.S.C Sections 365(d)(5) and 503(b)

Transcribed by: JoAnna Sargent
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BY: PETER M. FRIEDMAN, ESQ.

MATTHEW P. KREMER, ESQ.

P R O C E E D I N G S

THE COURT: Good morning, everyone. It's Judge Jones here for 10 a.m. calendar on the Avianca matter. We have your appearances formally, but since I'm covering for Judge Glenn solely for purposes of this proceeding, let me just -- and I haven't spoken to you all directly on this case. Let me ask just for the people who anticipate participating today to introduce themselves. So I'll just call names in the order that people's faces appear on the screen. Mr. Friedman can start us off.

MR. FRIEDMAN: Good morning, Your Honor. It's Peter Friedman from O'Melveny Myers on behalf of Burnham Sterling and Company.

THE COURT: Great, and nice to see you. So you're the -- are you going to be the lead for the initiators? You there, Mr. Friedman?

MR. FRIEDMAN: Yes, I am.

THE COURT: Okay.

MR. FRIEDMAN: I will be speaking on behalf of the initiators.

THE COURT: Okay. That's great. Let me also say lovely to see you. I'm going to do a little disclaimer explaining that I know Mr. Friedman from a prior life once I hear from everybody.

Ms. Dexter, are you appearing, also -- or go ahead.

MS. DEXTER: Yes, Your Honor. Erin Dexter from Milbank on behalf of Avianca and the reorganized Debtors. My co-counsel, Michael Holbein, will be taking lead for the reorganized debtors this morning.

THE COURT: Okay, great.

And so hello to you, Mr. -- well, both of you. Hi, Mr. Holbein.

MR. HOLBEIN: Morning.

THE COURT: And Mr. McCarthy?

MR. MCCARTHY: I'm Mr. Holbein's partner. He'll be taking the lead, Your Honor.

THE COURT: Okay. Great. And I see Mr. Schak.

MS. SCHAK: Good morning, Your Honor. I'm also from Milbank for the debtors. I'm in the restructuring group at Milbank, and I'm available if Your Honor has any questions about the general course or status of the bankruptcy case.

THE COURT: Okay, great. Thanks very much. So nice to see you all. Let me just say a thing or two at the outset. First, as I just mentioned, I worked closely with Mr. Friedman on the General Motors bankruptcy when I was an attorney for the government and he was in private practice, but providing invaluable assistance to the government in the car cases.

I've considered closely whether there's a conflict or appearance issue, and the answer is no, but partly to make that even more so, I just wanted to inform all participants of my

prior dealings with Mr. Friedman. We're going back over 10 years now, so it's stale, although a vivid memory.

So having said that, let me also let you know the state of my preparation coming in and what I anticipate for today. So I find the key legal issue this turns on very interesting, and I've done quite thorough reading on that. I will tell you, I come in -- if I were to view this as a pure, isolated legal question of whether lease obligations, even that arose pre-petition, and even that are for services that occurred pre-prepetition, and even where the ultimate recipient is someone other than the lessor, I still have the current leaning that those fall within the plain terms and plain meaning of the governing part of the Bankruptcy Code so that the debtors are going to have a -- have to really persuade me why that's wrong and for example, why the Child World case say is correctly decided and overrides what I perceive to be the plain meaning of the statute.

So I try to not hide the ball on people. I'm sure that's an unwelcome first utterance for your judge to say, but that is what I'm thinking.

I do want to reality test the assumption on which the initiators are proceeding that what is at issue here can be fairly deemed lease obligations. And partly, I'd like to just emerge understanding from people the actual state of the facts. So where in documentation does the obligation to make payments

on account of the initiators' fees arise? To what extent is it directly in documents denoted leases? To what extent is it directly in documents that are incorporated in leases? If so, what's the incorporation wording in the lease itself or other basis asserted to deem it a lease obligation if it doesn't appear in the actual lease instrument?

So I'm looking for help on that. I will tell you, in preparation, unless I'm overlooking it, I don't think I got exhaustive documentation, which I'm actually grateful for. But I suspect you have pretty voluminous deal documents. But I'd like to either emerge with a clear answer to that based on representations at argument, or it's possible I'll need to actually eyeball something that I don't have, unless you alert me to something that I'm missing. I've seen the excerpts attached to I think it's the debtors' reply, and that's the documentation I focused on mainly.

Okay. So I think, with those main thoughts, let me turn it -- let's see. Let me let the lawyers get started. I guess each side is in a sense a movement. We have claim objections, and we have a motion by the initiators. I think it makes sense to start with the debtors first, and then we can hear from Mr. Friedman. That's a bit of a coin flip, but you filed your objections first. And also, I'm sort of identifying things I hope to hear from you about.

Oh, let me also say one disclaimer. You're welcome to

present whatever you like. My utterances to date have been to orient you to my thinking coming in so that you can tailor your remarks accordingly. But I am not in any way restricting what you have to say. Also, I don't have any particular time limitations today, although I don't want to just have this go on needlessly long, whatever that means. So that means you don't have to feel rushed, but don't feel, like, unpurposeful either, okay?

Oh, yeah. Mr. Friedman, go ahead.

MR. FRIEDMAN: Your Honor, I did want to introduce my colleague, Matthew Kremer, who's on the phone.

THE COURT: Okay.

MR. FRIEDMAN: I think Mr. Kremer actually can do a better job than I can on walking you through the very granular question you asked about the documentation.

THE COURT: Okay, great.

MR. FRIEDMAN: So if it's okay with you, we may tag team if that's permissible.

THE COURT: Yeah, that's fine. I will tell you I have no problem tag teaming. Just keep it orderly. Mr. Kremer's turned his video on. Nice to see you.

MR. KREMER: You as well.

THE COURT: Now you're forewarned, and you're welcome to do that. The same goes for the debtors' side if there's somebody other than the main speaker who's well-situated to

field something, I'm happy to hear from that person as well. Okay. Let me turn it to Mr. Holbein, please.

MR. HOLBEIN: Thank you, Your Honor. Michael Holbein for reorganized debtors on these 24th and 25th omnibus claim objections. I want to step back based on what the Court is just announced is sort of his predisposition with regard to this issue, so and with the specific request to point to the documents because those are the same questions that I had. But I think we can actually step back and look at -- if we want to look at the first thing that was filed, we can look at the motion to compel payment that was filed by the claimants.

And it quotes one of the lease agreements. And there were four basic transactions governing 20 lanes with separate lease agreements. But I think that -- and I can be corrected by lead counsel on this. We're conflict counsel for this, and so our familiarity with it is only a little bit longer than Your Honor's. But the provision in question, it says that these obligations, these initiator fees, are upon execution of the lease unconditional obligations to pay.

And so unlike, say, other payments do under a lease or obligations do under a lease, which are generally contingent upon corresponding obligations on both sides, which is why 365, which talks about executory contracts, also talks about unexpired leases. It's not like that. These are fees that were -- according to the contracts as emphasized by the

claimants, these are fees that, to quote the contract here, and this is on 3, page 3 of their motion at document 2657, "The sublessee acknowledges that the initiator has already provided services prior to the delivery date and accordingly agrees the sublessee's obligation to pay the initiator fees here under are unconditional."

If that is not the arising of an obligation, I don't know what would be. The issue then becomes, when is that payment due? And I think that's where these cases can get confusing, because when you look at the factual scenarios presented by these courts, inevitably, you're going to end up with discussions of proration. You're going to end up with discussions of how obligations are accrued. Not the case here.

And so one can disagree with the conclusion of Child, disagree with the holding altogether, and still identify within Child World the framework, the policy framework, behind saying this thing was earned pre-petition. It was done, and the obligation to pay it isn't contingent on anything else happening. In fact, reading from the same motion, next paragraph quoting the lease agreement, "No consent or act is required by the lesser for the initiator to enforce its rights hereunder." So let's --

THE COURT: I'm sorry. I want to back -- this is helpful. Thank you. Let me back up, though, and ask a couple of framing questions to make sure I've got it right. Were the

initiators Avianca's agents or retained professionals, essentially, in some form? I think yes, right?

MR. HOLBEIN: They were brokers.

THE COURT: Yeah. So they were serving as brokers for the benefit of Avianca or at Avianca's behest to arrange leases for aircraft, right? So they're not brokers engaged by the lessors to go find me an airline. It's the reverse. They were retained by Avianca to go find us an airplane, correct?

MR. HOLBEIN: Correct.

THE COURT: Okay.

MR. HOLBEIN: And the documents are pretty clear that that's the obligation to run that way.

THE COURT: Right.

MR. HOLBEIN: For lessee to initiate. So --

THE COURT: Okay. So let's see. I think I'm tracking. Let me see if I had another question because that flows very nicely into what you just told me. And so the documentation typically is a contract that goes bilaterally, Avianca, initiator, but that is integrated with lease terms as to payment obligations, or -- well, let me just back up. Explain to me how those three players are knit together.

MR. HOLBEIN: Sure. I would say often, if not usually, these fees are paid at closing as part of the closing of the financing transaction. The incremental payment coinciding with rent is a departure from our understanding of

the norm and sort of takes on the form of financing. And I don't want to again get into another confusing issue of financing versus true lease. That's not what I mean. I just mean that you have an obligation that is fully -- like, we all know what it is. There's no question about how much it is and who owes it. We've just agreed that it'll get paid in increments over time.

And unlike, for example, rent that you -- because you could claim it's -- well, rent, you know what's it's going to -- you have a rent schedule. Yes, but that is conditioned upon enjoyment of use of the thing being rented among other things, right? And so here, that's not the case. This is done. Burnham has nothing. Burnham and Babcock have nothing to do but cash a check.

And so that's why it helps to look at Child World. You don't need to embrace Child World as the sort of the righteous characterization of the law, but you can look at it and say, yeah, when Congress was trying to fix this 503(d)(1) problem, this is what they meant. And Your Honor's familiarity has caused me to dive out right in the middle of my outline.

THE COURT: Okay.

MR. HOLBEIN: Stepping back a bit, there are very few cases that we're looking at here. We're looking at Child World. We have this Pudgie's case, which is kind of helpful, but maybe not. And then last night, claimant's counsel brought

to our attention two unpublished decisions that they provided based on our reliance on Child World, which we cited December 2nd.

THE COURT: Who are claimants? Who do you mean by claimants?

MR. HOLBEIN: The initiators. People who filed --

THE COURT: Okay.

MR. HOLBEIN: -- the claim that are seeking administrative expense status under 365.

THE COURT: Got it. Okay.

MR. HOLBEIN: (d)(3). So right, initiators, Burnham Babcock claimants. I'm sorry, I've thought of them as claimants just because I thought of this as simply omnibus objections.

THE COURT: Yeah. No, that's fine. I just wanted to make sure -- you know, I wanted to make sure I had it right.

MR. HOLBEIN: Yeah. Yes, Your Honor. So we're on the same page with that. Burnham and Babcock have brought to our attention, reorganized debtors' attention, two cases, unpublishes decisions. And so you know, we've had a chance to review them, and I think the Court will agree, only in as much as there is allowance of an administrative claim are they helpful or 365(d)(5) claim.

And again, we're skipping a step here. And I think the Court knows, but we're talking about (d)(5) because there

are cases on (d)(5) and not (d)(3) just because there aren't and they read the same.

THE COURT: Right.

MR. HOLBEIN: But --

THE COURT: Sorry, this is another item on my punch list. It seems that the case law treats or analyzes 365(d)(3) and (d)(5) identically, right? The wording is pretty -- the wording tracks, and you can apply case law for either of those sections to the other, right?

MR. HOLBEIN: For our purposes, for the --

THE COURT: Yeah.

MR. HOLBEIN: I mean, there may be a distinction that is not related to what we're talking about, but --

THE COURT: Okay.

MR. HOLBEIN: -- for our purposes, I think that those cases are very instructive. And they tend to hover in the bankruptcy court district court level, so not providing the clear guidance that a court could rely on. If I could, I'll give Your Honor the cites for those two cases.

THE COURT: Yeah, please do.

MR. HOLBEIN: And I don't know -- well, I could talk about them. Your Honor can break and read them.

THE COURT: Well, let me ask, is one of them Macey, by chance?

MR. HOLBEIN: It is.

THE COURT: Okay. Yeah, my clerk dug that up, and we were very excited about, and it's written by a jurist who went on to big things, then district Judge Sotomayor. So and I had already come to the statutory leaning that I described, so I was very excited to see she agreed. Anyway --

MR. HOLBEIN: Good. I'd love to talk about that.

THE COURT: Yes, please do. That'd be helpful. Tell me what the other cases is, though.

MR. HOLBEIN: The other case is called Urban Retail Properties v. Loews Cineplex. It is found -- I only have the Westlaw cite. The West Law cite is 2002 WL535479.

THE COURT: I'm sorry. 535479?

MR. HOLBEIN: That's it.

THE COURT: Okay, okay. What district?

MR. HOLBEIN: That is the Southern District of New York District Court.

THE COURT: Okay. Okay. So yeah, tell me what you want to tell me about these cases. I'm sure I'll be hearing about them from Mr. Friedman and --

MR. HOLBEIN: Sure, sure. So I think we start with the Macey's case. And what's interesting about that is that we have this sort of preamble of a discussion between counsel and the court regarding obligations under the Code under 503, under 365, even the consequences, because there does seem to be some unfamiliarity with the bankruptcy process evidence there with

what happens if it's rejected? What happens if it's assumed inured to these taxes?

But what I think we can kind of stop our analysis with here is the court's conclusion, which is consistent with counsel's argument that there is no dispute that the obligation here to pay the tax does not arise until the taxing authority says it does. So there you had an acquisition in 1988, pre-petition. Post-petition, in 1992, California goes back, and based on that pre-petition event issues a different tax assessment.

The lease provides that that tax liability would be paid by the tenant, but it didn't exist until it was reassessed. As counsel for the landlord notes in that opinion, there was no obligation to pay until it was reassessed, and the reassessment occurred post-petition. So there would have -- this is from that opinion at page 8, which is kind of before the opinion in the discourse There would have been no obligation. In fact, there would have been no way of even determining whether the State of California intended to make reassessment or how much that assessment might be, just not the facts of this case. We know what it is. We knew what it was pre-petition.

THE COURT: Right. You're telling me this to say that what the initiators have here is not a true -- well, is more pre-petition claim like than was the case in Macey's because in

Macey's, at least, it sprang into existence only after the petition date?

MR. HOLBEIN: Yes, and --

THE COURT: Okay.

MR. HOLBEIN: -- because that is a way to describe it. But for the purposes of the law, what's important is 365(d) says arise. It doesn't say do. It says arise. And so claimants have presented their argument as strict construction reading of the statute. Right? But in reality, we know when this claim arose. They tell us it was unconditional as of the execution of the document. So there it is. It's arisen; it's just not due yet.

This is a pre-petition liability. And I think it's a distraction. It's an interesting distraction, but it's still a distraction in Macey's is the focus on the definition of the term claim versus obligation. Counsel for the debtors -- Babcock there, I think, was what it was -- tried to argue that -- Bullock (ph.) argued that obligation is just the other side of the coin to claim for debtor credit. Right? And the court didn't really have time for that.

But this was -- the Court was taking issue there. Judge Sotomayor was taking issue -- then Judge Sotomayor was taking issue with the Child's court's characterization of the obligation versus a claim. If you look at Child, what the court is doing is it's saying, no, we're looking at the

definition of a claim because we can say it doesn't have to be due. It still exists. It's a thing that has arisen.

And so this this distinction is really unnecessary one. They can quibble over claim or obligation. We're not, at least initially here, getting to the second prong of 365(d)(3), which is under obligations under a lease. We're at the first prong, obligations arising within or from -- first arising from 60 days after the order for relief. So we're looking at that. When did it arise? Not whether it's a claim or an obligation and whether there's a difference. And interesting, but unnecessary, especially here when you have a situation where that obligation could not have arisen any time other than post-petition, as clearly stated by opposing counsel and is apparently even not disputed based on the court's holding.

So in my reading of Macey's, it's limited. It's another case that says maybe proration's not the right idea. Maybe there are facts and circumstances, and maybe policy would compel even a different outcome with different facts. And I think the judge is pretty clear about that.

THE COURT: So let me ask, though, say a future debtor generates an obligation to pay someone -- we'll call that someone an initiator -- in connection with -- sort of tied to a transaction or an arrangement that's being made that centers on a lease. So it's really a three-way negotiation, plus any financers about these arrangements. And the future debtor

could pay the initiator up front in full, but says, you know what? For whatever reason, we want to pay you over time. And then maybe, you know, the debtor says this, and then maybe initiator says, fine, but I want to really lock it in as a lease obligation. And that gives me a bundle -- that gives me known predictable payout schedule, and it gives me some protections in the event you go bankrupt in the future because of 365(d)(5). So why isn't that a permissible thing to be done? And why isn't that what exists here?

MR. HOLBEIN: It places form over substance because under that situation, the obligations still arose when it rose. And I think, again, it's important there to remember where this -- we're elevating this claim, even above regular administrative expenses when we apply 365(d)(3). And so we're not saying, hey, creditor you don't get paid. We're just saying, hey, creditor, you get to stand in line with everybody else who relied on the credit worthiness of the debtor in making a financial decision. And as a result, you have an unsecured claim. Should have taken it up front, I guess. But the fact of the matter is, it's been --

THE COURT: Well, so that's -- yeah, I mean, I can say what you're trying to do is deprive them of the benefit of the bargaining negotiated, which is, okay, we won't take the money up front, but we're going to take it as lease payments, as part of the lease obligations because we're smart and well

represented, and we know that 365(d)(5) says lease obligations have to be paid in real time until and unless the lease is rejected. So what's the response to that?

MR. HOLBEIN: Respectfully, I would say if they were smart and well represented, the contract would say that these obligations arise each month. Right?

THE COURT: I'm sorry, arise each month?

MR. HOLBEIN: Obligations arise each month. I mean, if you want to track the statute, if you want to give a -- have a bulletproof entitlement to an administrative expense. But that's not what they say. They say unconditional. That's not a ton of wiggle room in unconditional. So yes, bankruptcy is a place where creditors don't often end up in the cherry position they thought they had negotiated. But the fact of the matter is that when -- and this is where it is important to look at the policy.

When we look at the policy behind provisions like (d)(3), it isn't to protect people who are trying to enhance what would otherwise be an unsecured debt into something better. It's to protect people who become unwitting partners with the debtor in post-petition letting of property or premises. And so you're still left with, when does this claim arise?

THE COURT: Got it. Yeah. Can I just -- can I circle back to my friend, the statute, here just to make sure? I

think the language you're -- I want to make sure I'm hearing you right. I think the part of 365(d)(5) that is your friend here or that you're steering me to is that the obligations of the debtor that fall within the statute are those first arising from or after 60 days after the order for relief. And you're telling me this was completely fully arisen prior to the petition, and therefore, it doesn't fall within that temporal period? Is that right?

MR. HOLBEIN: Right. Correct. It was --

THE COURT: Okay.

MR. HOLBEIN: -- by the terms of the agreement an unconditional obligation as of the execution of the agreement. Unconditional.

THE COURT: Okay.

MR. HOLBEIN: There were, you know.

THE COURT: So if I'm being a textualist, I'm going to decide what obligations of the debtor arising means temporally where the obligation was fully existing and unconditional for work that was completed, and yet the payment stream is forward-looking, right?

MR. HOLBEIN: Right. And I think that's where you'll find the distinction with the other case that they cite, the (indiscernible) --

THE COURT: Okay.

MR. HOLBEIN: -- case. That case involved the

construction of a theater or theaters in a shopping center that spanned the petition date. So it was a year contract, roughly, entered pre-petition that allowed for payment of one million dollars, and it is a lease payment of one million dollars in construction reimbursements upon completion, occupancy, whatever the triggers.

Those triggers undeniably occurred three months post-partition. Much of the work was performed three months post-petition. Much of it was also performed pre-petition. But the right to that payment, it wasn't due. It arose upon completion. If they don't get to completion, they don't have a right to payment, at least under the lease, if they have a quantum meruit claim. But under the lease, that right to payment did not arise until that completion, which occurred post-petition.

THE COURT: Okay. Can I ask you a -- I always interrupt people by asking if I can ask something. I know I can ask you something. I will now ask you the question. Is it fair to characterize the payment obligations of debtor to initiators as required by the leases?

MR. HOLBEIN: Yes.

THE COURT: Okay. That is extremely helpful, and I'm grateful for your answer. I think your arguments aren't challenging that, but you just spared me a lot of agonizing parsing. So that's great, and that might take Mr. Kremer off

the hook when the initiators' turn comes, too, but we'll see. Okay. So thank you.

So what I'm really thinking about is, does the fact that the work was complete pre-petition, the obligation was locked in by documents signed as being -- I think you said unconditional was the word, and the fact that that obligation had fully arisen pre-petition in the sense that it was locked in and due to be paid, albeit subject to a lease-tied rent delivery schedule that spans into the post-petition period, right?

MR. HOLBEIN: That's correct.

THE COURT: Okay, got it. And let me ask also -- I think for purposes of analyzing this motion, I want to make sure there's not a dispute on what period is covered. So I think it's clear that if there now has been or ever in the future is a rejection or an assumption, that'll terminate the running. And we're looking at obligations to -- the payment obligations to begin starting, I guess, 60 days after the petition date, right?

MR. HOLBEIN: That's correct. And there are presentations.

THE COURT: Okay, okay. So if you can live with it and the initiators can, I would love to just write a decision that just defines the disputed asserted payment obligations as being those scheduled to be paid during that time window, and

the parties will be able to work out what that translates to, I hope.

Mr. Friedman's nodding. That's great.

Is that workable, Mr. Holbein?

MR. HOLBEIN: I think so, yes.

MR. FRIEDMAN: Your Honor, we -- it's Peter Friedman. We would agree to meet and confer with Mr. Holbein and you know, in good faith, if that is the way the Court works things out.

THE COURT: Okay. And it may -- obviously, you won't have to if I rule for Avianca because then the answer --

MR. FRIEDMAN: Right.

THE COURT: -- will be zero. So okay, so that's all helpful.

So. Mr. Holbein, I may be bumping you off things you affirmatively wanted to say while I'm going through my punch list. Let me say on the claim objection piece, it seems to me it's undisputed that the initiators are going to be okay with your view that the pre-petition claim portion is unsecured, not properly secured, and should be classified. And I'm persuaded by that until and unless I'm told otherwise. I think that's conceded.

And then the other piece is your effort to clean up duplicative claims. I think is agreed to. I think the initiators' response didn't mention two specific claim numbers.

They didn't mention -- I'm going to just seek to pin that down. But I'll assume -- in principle, I'm fine with both those things. Okay?

MR. HOLBEIN: Correct. I actually emailed initiator counsel yesterday about the two unmentioned, and they confirmed that those were, in fact, disallowed as duplicative. So we're really --

THE COURT: Okay.

MR. HOLBEIN: -- have claims in dispute, 4038 and 4033.

THE COURT: Okay, great. And while I've got you -- I mean, while we're on this point, yeah, from my preparation, I think the two that -- I'm just going to put their numbers on the transcript. The two that have now been confirmed as not in dispute are 4035 and 4037. Both are agreed to be duplicative. Do I have that, right?

MR. HOLBEIN: Yes, yes, Your Honor. Duplicative of --

THE COURT: Right?

MR. HOLBEIN: -- 4033.

THE COURT: Okay. So that that's helpful. Let's see. There's another argument you raised that I didn't find that compelling, honestly, but I want to give you a chance to speak to it, and that is the effect of the stipulation regarding the claims to the extent that's a game changer. Do you want to say anything about that?

MR. HOLBEIN: I don't know that it's necessarily a game changer, more that it adds flavor to the equities portions of this to the extent that bankruptcy courts as courts of equity are concerned with fair treatment of parties and delivering the benefit of the bargain, et cetera. You have these renegotiated. They knew about it. They didn't object. They weren't a party to it, but they didn't say anything. And it wasn't, in fact, until a few days before the deadline to object to claims that we even see this issue rise. So I --

THE COURT: Yeah, I got it. Can I ask -- and I know you're not leading with this, but it does strike me that the stipulation didn't purport to eliminate whatever obligation existed as to the initiator, so I don't see why they would have objected.

MR. HOLBEIN: And that goes to your very first question to me, which was, where do the obligations run? Do they run from the lessee to the initiator -- the lessor to the initiator? And they do. These are direct obligations of the lessee to the initiator. And so I understand the Court's position on that.

THE COURT: Okay, got it. That's helpful. All right. So I think that I have covered all my punch list of things I wanted to raise with you. And I have not let you go through whatever orderly progression you wanted necessarily. So let me ask you to -- or give you a chance to pause, reflect, and see

if there's anything else you want to emphasize. I think you've done a great job, and it's been a very good discussion, helpfully focusing me on the time of arising of the obligation.

MR. HOLBEIN: Right. If I have -- my closing thought is that there's a lot of noise around this issue that doesn't relate to the issue in this case, the facts of this case. And so there are infinite permutations of how these obligations accrue, come due, whether you prorate. And so often, in the opinions that I've read on this, the court will drift into general generalities and discussions of generalities when that generality is really more suited to the type of obligation before it. And then when you step away and try to insert another obligation, it just doesn't make sense.

So I would just caution against sort of the sweeping language in some of the -- applying some of the sweeping language in some of these cases in light of the larger sort of more 10,000-foot view of what was being accomplished here. And then in the context of this, is this really who Congress meant to protect?

We're not saying that they don't get paid. We're not saying that they go to jail. We're not saying that they've committed some unforgivable sin. We're just saying, hey, you don't get this really prime treatment that we've kind of reserved for people whose (sic) involuntarily have their neck on the line so that we can reorganize a debtor.

I would encourage the Court to look past what I see is noise in those issues that are relevant in other contexts, but just aren't relevant here based on the fact as embodied in the agreement that we're arguing here.

THE COURT: Okay. I got it. Let me try to give you a takeaway statement and see if it's partly -- it's a mash-up of encapsulating my own thinking and trying to characterize yours. So and see if you think this is a fair assessment. So I think we have a situation where Avianca retained the services or somehow got the services of the initiators in a commercial agreement for which they owed the initiators the -- the retention was pre-petition. The service was pre-petition. The payment obligation was entered into literally in or else in conjunction with the leases in a way that fairly read is now a term of the leases requiring a future-looking payment stream from Avianca to or for the benefit of the initiators. And the question --

I do think those are therefore fairly described as obligations of the debtor under a lease. But the real question is, are they arising in that relevant period for 365(d)(5), which is starting 60 days after the petition date and running through assumption or rejection?

And you've given me a lot to think about, well, all of the cases really tend to be for matters that were not comparably, I'll say, in the can colloquially before the

petition date and that this is different. So do I have that -- is that a fair statement of what I have to figure out?

MR. HOLBEIN: It is. And I think that because of that, it necessitates that the Court parse some of the "when due" language that you'll see because it doesn't make sense in this context.

THE COURT: Got it. Okay. Thanks very much. I think we've covered what you wanted to, and you look reasonably satisfied. So let me turn to Mr. Friedman. Thanks very much for your argument.

MR. FRIEDMAN: Good morning, Your Honor. Is Peter Friedman from O'Melveny Myers. I wanted to just start one quick point on the stipulation issue, which is if you look at -- I think the natural conclusion has to be it can't affect -- it could not have affected us and that the debtors knew that because if you look at docket number 2699-4, which is Exhibit D to the reply brief, and you look on -- it's page 9 of 14 of what was submitted and at the bottom says page 43, the very top paragraph, which I think is probably -- it's not a full paragraph on that page, but it's paragraph G. Says you can do a bunch of things about amending the lease agreements provided that no such amendment may reduce, terminate, or amend the initiators' rights under this agreement or guarantee.

So I think it was obvious from the relevant documentation that without the initiators being a party to any

agreement, whatever they did between and among themselves couldn't change the obligation owed to the initiator. And so I think for that reason, it's just -- it doesn't make sense to interpret that second stipulation as affecting the rights of our clients.

So Your Honor, there are a few things that I thought were important to address about, so what does this statute mean, and what is the procedural posture? It is true that we filed claims, but we also, as you noted, filed a motion to compel because that's really what 3605(d)(5) is about. It's actually not even about giving claims to a creditor. It's about timely performance by the debtor of its obligation where a debtor decides to not reject or assume within a specified time period.

Remember, the debtor had total control. If the debtor decided to reject within the first 60 days, end of story. We don't get into this statute. So if the debtor felt like somebody was getting an unearned benefit, it was completely within its power to make a determination. We don't want to pay that obligation. We don't want to have to continue to perform under this contract.

Because I think that's really what -- the statute is remarkably unilateral in that it imposes all burdens on the debtor and none on the counterparty. And we know that sort of for a bunch of different reasons. We know it because what the

statute says, we know it because what the statute doesn't say, and we know it because of what the statute strips out.

So it strips out 503(d)(1), right? It just says the creditor doesn't have to do anything. Creditor doesn't have to give anything of value. What else doesn't it say? Doesn't use words like "rent", which appears six other times in 365. Like, the word "rent" appears six times.

THE COURT: Yeah. Let me just jump in for a minute and say, Mr. Holbein, when we're done, I'm going to -- when Mr. Friedman's done, I'm going to come back to you. And I definitely want to hear about the point that 365(d)(5) eliminates any benefit to the estate requirement that exists for admin claims, that notwithstanding concept and how strongly that cuts against you.

Okay, sorry. Go ahead, Mr. Friedman, because I thought that was a good point you raised.

MR. FRIEDMAN: Yeah. So and then, you know, what does the statute say? It says all obligations. All means all. It says timely perform. And so I think the straightest line is to -- and the right way to look at statute, the least confusing way to look at the statute is the debtor has to perform the contract from everything 60 days forward.

THE COURT: Yeah.

MR. FRIEDMAN: If (indiscernible) she was --

THE COURT: I'm going to need law telling me what --

yeah, as you know from my upfront comments, I find that reading the statute pretty appealing. And I guess the question that I think Mr. Holbein has zeroed in on is, is this particular obligation one that arises? Well, I'll just -- let me reword just to literally quote the statute. One that is first arising from or after 60 days after the order for relief in this case, and why?

MR. FRIEDMAN: So okay, so I would say that actually, Macey's, read correctly, does mean that same thing because the obligation in that case to pay property taxes is in the contract. Right? It says that it's something they have to cover, and so that it later came due, and it had to be paid, and I think that's really what the focus of 365(d)(5) is.

Although I think Pudgie's gets way too into the weeds as opposed to a very straightforward application, I think that case also talks about the issue of mere fortuity on the one hand, that something could have come due at a certain time versus schedules of payments. So I think that also is supportive of our position.

So the Court is correct that we don't have a -- we did not burden you with all the documentation, and if counsel needs additional time to look at the lease, if you don't want to prejudice him, I happen to have the master lease. I think it's 37511, right in front of me.

THE COURT: Can I say right now I don't know -- yeah,

actually, that's helpful in case anyone on the other side wants to look at it and refer to it. Right now, I think, based on the very helpful, and forthright, and candid in the best sense of the term sort of acknowledgments I've got, I think the issues have been defined without reference to the -- needing to get into the documentation further. But --

MR. FRIEDMAN: Yeah.

THE COURT: Unless you tell me otherwise.

MR. FRIEDMAN: What I would just say is, Your Honor, from our view, when you look at that, the language in section 3C of that agreement is "lessee shall pay all supplemental rent" to whom -- or "to other such person to whom such money may be owed under the basic documents promptly as the same shall become due and owing". And then it has a schedule for when those payments are made.

And likewise again, if you look at Exhibit D that was provided, we look at -- it's page 7 of 14 of, again, docket number 2699-4 5.2 sub A. "On each additional rent payment due, the sublessee shall pay the initiator account by way of additional rent payment." The corresponding amount of debt fee is set out in schedule 3, and schedule 3 happens to be the last page of that exhibit. I think it's the -- sorry, it's pages 10 through 12 of that exhibit, and it has a schedule --

THE COURT: Right.

MR. FRIEDMAN: -- when payments come do. And

that's --

THE COURT: Yeah, I'm looking at it. Let me just insert we're looking at pages 10 of 14 through 12 of 14 of ECF number 2699-4. And it's a chart with a schedule, a list of dates, and payment amounts due on each of those dates. Okay.

MR. FRIEDMAN: So Your Honor, absent some other permissible default under the agreement, we could not have said -- the debtor would not have been obligated to make that payment to us on any date in particular. Right? If there'd been a default, maybe it would have been accelerated. But the debtor had no -- the debtor was not obligated to cut us a check. And we think that's --

THE COURT: Right.

MR. FRIEDMAN: -- the right --

THE COURT: So in other words, you --

MR. FRIEDMAN: -- reading of the obligation.

THE COURT: Yeah. So what you've pointed me to is the negotiated as a term that's integrated with the lease of the payment obligations to the initiators on dates certain that span the post-petition period, right?

MR. FRIEDMAN: Right. And that's the way we think about it. And you know, Mr. Holbein makes a fair point that some leases are different. You have the apartment that maybe somebody leases, nonresidential real property. But under 360, you -- under 365(d)(3), since the lessor doesn't have to

provide any value to the estate, maybe the debtor's not even in the apartment under that circumstance or the building under that circumstance and is providing no value. And I think everybody would agree that under a lease where at least physical premises were leased, even if the debtor isn't in it, they have to make -- the debtor has to make the payments. That's the whole purpose of the statute if the debtors moved out. And the --

THE COURT: Right.

MR. FRIEDMAN: -- lessor has got the property, and for whatever reason, the debtor has chosen not to reject it. There's still an obligation to pay whether or not they're using the premises.

THE COURT: Okay.

MR. FRIEDMAN: And so that's the way we think about the case. And I think what Judge Sotomayor's opinion really counsels for is, what is the straight line? The Bankruptcy Code is littered with special priorities for different people who may not like it. Right? But utilities get benefits. 507 has a whole series of ways in which certain people are preferred over others. That's Congress' choice.

And I think what Judge Sotomayor is saying, frankly, on the list of things that might be slightly offensive, this one isn't even close to the most offensive there. But kind of interestingly, right, the statute does have a provision to deal

with equities. Right?

THE COURT: Yeah.

MR. FRIEDMAN: Mr. Holbein said you should think about the equities. They didn't avail themselves of the equities. Right? They didn't come back and say, Your Honor, we can't restructure if we have to make this additional rent payment at the time. Right? And that would've, I think, been a -- I would have found it far-fetched in the context of multibillion restructuring. I think that would have been the time to raise equities.

If you're going to raise equities under a statute which talks about equities, I think you have to really make a showing of equities. And the Midway case says when you have to do it. You can't do it two years later, when this will literally have no effect on other creditor recoveries. I don't think anybody's saying that if we get our admin claim -- I want to be careful. If the debtor had to timely perform its claim, its obligations, that's going to hurt anybody else, so --

THE COURT: Got it. Yeah, let me just put in the record -- and partly to make sure I've got it right and also in case anyone ever reads a transcript. If I'm reading the schedule right that we just referenced, it calls for quarterly payments through the middle of -- well, through the first quarter of 2027, including debt and equity components, whatever that means, in the rough amount of 33-, $34,000, a quarter. So

we're looking -- by my thumbnail calculation, that's something like 130,000 bucks a year or so. Do I have that right?

MR. FRIEDMAN: Per plan. I think --

THE COURT: Oh, okay. So there's a multiplier? Yeah, what's the dollar value of the dispute?

MR. FRIEDMAN: I think we think that it's -- we think it's --

Mr. Kremer --

MR. KREMER: Yeah, I can jump in here. So Your Honor, just for the record, we were previously advised that all aircrafts besides one had been rejected, all of the applicable leases. Debtors' counsel has since advised that that was actually mistaken, and there's three aircrafts that continue to not yet be rejected. And it's their expectation that those will be rejected by the end of this month.

So we recalculated our claim last night using those additional three aircrafts that continue to accrue. And roughly, the number in dispute is approximately 4.5 million dollars. However, that does include the first 60 days, which, as we've discussed for purposes of this dispute, we would --

THE COURT: Have to consider that.

MR. KREMER: Yeah, we would zero those out, and --

THE COURT: Okay.

MR. KREMER: So yes, approximately, I would say, probably four million lessees are up to 60 days, but again,

that's subject to actually running to that.

THE COURT: Okay. For the court reporter, who has to catch up to this after the fact, that was Matthew Kremer speaking, K-R-E-M-E-R.

And thank you. Okay. I don't think that affects my legal analysis, but I just -- it's helpful to understand the dynamics here.

Okay. So Mr. Friedman, is there any -- I think that the case law doesn't directly tell me or define what a statutory phrase arising from or after 60 days means, right? I mean, I think that's sort of implicit in the analysis of various courts, but I don't think there's just an existing canned case law driven definition of that, right?

MR. FRIEDMAN: No. The closest I can point you to, I think, is a line in one of the cases that we sent to Mr. Holbein last night, the Urban Property (sic) v. Loews Cineplex case, and it's the 2002 Westlaw 535479 SDNY case, and it's at 7 and 7. And look, let me say this, Judge. I don't know whether this is what Judge Sweet meant when he said it because judges write lots of things, and lawyers place tremendous significance on words that -- who knows? But on pages 6 and 7 says, the words "obligation" and "arise" are significantly unambiguous on their face and indicate that obligations must be paid in full when the governing lease indicates the obligor is required to pay. And the way I read that is the obligation to pay here is

on the date that that the check has to be cut. Mr. Holbein --

THE COURT: Okay.

MR. FRIEDMAN: -- views it differently, but I think that's to me a clear indication of the when the payment has to -- the requirement of payment.

THE COURT: Okay. I got it. So let me -- just like I did to Mr. Holbein, let me ask you some of my other questions, even though I'm interrupting your intended flow, maybe. One is that your -- at least your proposed order in connection with your motion says direct the immediate payment of the amounts due. I think I would substitute the word "timely", but that's not your biggest concern.

But the other thing you say is and give us an administrative claim. And I don't see how -- I think that doesn't work, and I want to give you a chance to explain to me on what basis I should be doing that because it seems to me -- and in fact, you're arguing that you don't need to satisfy the post-petition benefit to the state requirement to get a administrative claim under 503(b). And so I'm not sure on what basis I would be granting initiators an allowed administrative claim as opposed to simply directing the payment to occur.

MR. FRIEDMAN: So Your Honor, I think we -- a couple things. One is that the debtors assume that they will make the payments, but to the extent the payment isn't immediately made, I think having an administrative claim or some other payment

obligation is helpful. We did make an assertion under 503(b)(1). Since I owe you a duty of candor, it's probably not our strongest argument.

THE COURT: Yeah, I mean, I'll just tell you I don't see how you've got a 503(d) satisfying admin claim. At this minute, I guess -- and it's maybe a little indirect to say, ah, but if I direct -- if they pay you as you wish under 365(d)(5) and then they fail to, ah, well, then you'll have sort of a springing admin claim later. I think that's the reality of the situation, though.

MR. FRIEDMAN: I think that's right, Your Honor. The other the other component is that there was a court order saying that we had to file proofs of claim in connection with lease rejections. And so we did not want to be in a position -- even though I actually believe we could have risked it and not filed one because of the way the statute is worded to say that the debtor has an obligation to compel. I did not want to not file proofs of claims.

THE COURT: No, I'm not troubled by the filing. I'm just thinking about what you're seeking here and whether it actually makes sense. What I've said is kind of where I would come out if I were to rule for you. And I just want to extract from you a word that you agree with my exchange with Mr. Holbein earlier that there's not a dispute as to the reclassification of the pre-petition component from secured to

unsecured and that there's not a dispute as to which elements are duplicative and therefore appropriately expunged. Is that correct?

MR. FRIEDMAN: Mr. Kremer's telling me that I can say yes, that is correct.

THE COURT: Okay. Great.

MR. FRIEDMAN: Yes.

THE COURT: I appreciate it, and that's just very helpful to have clarity on. Okay. All right, so now I have run through my punch list, running ahead of maybe where you want to be. Let me just give you a chance to make any other points you want. We may have covered all of your content as well, but I'll give you the shot.

MR. FRIEDMAN: No, Your Honor. I think everything's been covered, and I don't have anything further.

THE COURT: Okay, great.

MR. FRIEDMAN: Thank you.

THE COURT: Thank you for your arguments.

Mr. Holbein, let me hear from you by way of rebuttal, particularly on the question I flagged in the middle -- or early in Mr. Friedman's arguments.

MR. HOLBEIN: 503(1) issue?

THE COURT: Sure.

MR. HOLBEIN: Abandonment of that standard? I don't think it -- and I understand it. I agree with it, and I don't

think it changes the outcome for us because, again, we come back to this issue of when it arises whether or not it was necessary. We're not saying that it -- they don't get paid because it was unnecessary, although it was to the post-petition operations. The debtor, we're saying it doesn't get paid because it didn't arise.

And I think I would quibble with the claimant's counsel's reading of the Macey's case because it -- and it really isn't anything like it. It didn't just later come due. At the time they filed for bankruptcy, it didn't exist. Like, there would have been no way to demand payment. So it's just not on that issue on point. Whether you want to glean some guidance from the overall language is a different issue.

I think the -- I also want to clarify something I said earlier about the equities. What I meant was not the equities in favor of the debtor. I meant that if the claimants were to appeal to the Court's equities, it should consider the fact that they've remained silent for so long.

THE COURT: Okay.

MR. HOLBEIN: And then the excerpt from the Urban Properties cases run by counsel claimants was that the terms "obligations", "arise" is sufficiently unambiguous. That whole sentence actually says -- many courts have reasoned that the terms "obligation" and "arise" -- so although that -- that's not the whole right there. The Urban Developments or Urban

Retail case goes off also on the fact that that trigger, that the arising of the debt is the completion of the project.

So again, you don't have to disagree with the holding in Urban Retail to still say, look, this claim didn't arise. I think the most important thing to consider -- and what I hope is probably my closing thought on this is that if you step back and you look at what was being accomplished and why, you say, okay, here are entities or individuals who are forced to surrender something to the perspective reorganization of the debtor. And so we're going to accommodate that.

So where you're a lessor a personal property, you're without your thing while the debtor has it and uses it. If you are the lessor of a nonresidential real property, you are without your premises, and the debtor gets to figure out what it's going to do with it. Here, Burnham and Babcock aren't without anything, right? But what changed for them upon rejection? They don't get a thing back that they can then relet or --

THE COURT: Right. Well, they're going to tell me that what they're without is their negotiated, agreed-upon, robustly protected payment on a set schedule as a condition of the lease.

MR. HOLBEIN: But if that is the outcome, artful drafting has superseded the intent of the statute, and that is inconsistent with the intent because the intent is to protect

those people who are without. They're without their premises. They're without their property. Not to reward creditors on unsecured claims who bootstrap their claim to the timing of a lease.

THE COURT: Okay. Let me ask -- that is a point well taken that I'll consider. Not necessarily saying it carries the day, but I get it, and I definitely will process that.

Another basic background or question occurs to me that may or may not matter. So obviously, you're not paying the initiators amounts due, right, post-petition? Otherwise, we wouldn't be here. Is Avianca paying the actual lessors for use of the planes?

MR. HOLBEIN: There were stipulations regarding --

THE COURT: Yeah, there were modifications, right?

MR. HOLBEIN: Payment by use, power by the hour. There's an aviation term regarding how those payments were made. But it's my understanding that, yeah, and they were subsequently modified.

THE COURT: Okay. Got it. All right. Are you making any argument apart from your equity's point that you just raised based on earlier demand letters or prosecution of this issue by the initiators?

MR. HOLBEIN: To the extent that the initiators are requesting attorneys' fees, certainly, and that sort of allowing your cake to bake and get bigger doesn't seem to me

equitable. But I think it's more demonstrative of what the transaction was and inasmuch as that this isn't a party who's sitting there going, where is my tractor? Where is my retail space? I got it.

THE COURT: Right. I understand. Look, one way of looking at it is just they agreed to a payment schedule, and bummer for them. The obligor went bankrupt, and they, like any other person who's owed money by an obligor, even on a payment schedule, has an unsecured claim. Right? I mean, that's -- and they can get paid. I don't know what the payout rate is on Avianca, but whatever. They'll get whatever they get, right?

MR. HOLBEIN: Yes, Your Honor. You have it. You have my position.

THE COURT: Okay. All right. Thanks. I think that closes it out.

MR. KREMER: Your Honor?

THE COURT: Mr. Friedman? Yeah, I was going to ask you if you have a burning need to say something more.

MR. FRIEDMAN: Just two --

THE COURT: Sure.

MR. FRIEDMAN: -- two very narrow points. One is just the statute says they have to timely perform again. It's a remarkable statute that imposes no obligation on the creditor. But even more, I don't fault Mr. Holbein because, as he said, he's been in this since, like, very recently. But I think the

Milbank lawyers on the phone would have to acknowledge we have been in a constant dialogue with them for the last almost two years about our claims and what would be -- and our desire --

THE COURT: Okay.

MR. FRIEDMAN: -- to be paid. I won't reveal any of those contents.

THE COURT: I'll just take --

MR. FRIEDMAN: But I can say it's ongoing.

THE COURT: Okay, thanks.

MR. FRIEDMAN: It's been ongoing.

THE COURT: What I'm going to absorb from this is that I'm not really going to draw any particular legal conclusions based on failure to prosecute or sitting on the hands or anything like that. And Mr. Friedman tells me that's not what they've been doing, and I tend to believe that. That's fine.

Let me ask the following question. I have hopes of deciding this very quickly. I'm going to reserve. But is there any particular practical need for a decision by a particular time? I'll ask Mr. Holbein first.

MR. HOLBEIN: Your Honor, I would have to defer to lead counsel on that.

THE COURT: Okay. Yeah, I'd like to know if there is.

MS. SCHAK: Benjamin Schak for Milbank, Your Honor, for the record. There's no hard-and-fast date, Your Honor. I will say, in order to marry it to the very, very final strokes

of claims resolution, I think we have this and perhaps four or five more buckets of claims.

One of those buckets is currently reserved by Judge Glenn, and the other few are either going to be settled or on for a hearing on February 8th. And pretty shortly after that, we do hope to make final distributions to all unsecured creditors, which because of how the plan works, it's sort of a POP plan. We have to know the entire unsecured claims space in order to make the final distribution.

THE COURT: Okay, got it. That's helpful. And my question really was for the debtors' side because the initiators just want to be paid sooner rather than later. So that's fine. I will reserve. I'm going to -- I've done a lot of work, as you can probably tell, on this. So I hope to be able to get something out fast. I have a number of big things sort of right around the corner. Basically, I am going to set myself the ambition of deciding something very quickly. And if I fail on that, you'll get pushed behind some other things that are going to be very insistent in demanding my time and attention. But I'll try to act faster than that. All right?

And if you check my local rules, I'll just tell you -- it'll tell you you're welcome to nudge me any time you have a practical need for a decision. And particularly, I don't think this will be a risk, but if something been sitting dormant for 60 days, you're welcome to ping me. You're also welcome to

ping me earlier if you develop a practical need. All right?

I think that covers this for today. Let me thank both sides for really excellent and very helpful arguments. I appreciate the forthrightness with which you both went about your tasks. As I said up front, it's very interesting issue, and I'll try to get you a sound and fast decision to the best of my ability. Thank you. Take care.

MR. HOLBEIN: Your Honor --

MR. FRIEDMAN: Thank you, Your Honor. Okay.

(Whereupon these proceedings were concluded)

C E R T I F I C A T I O N

I, JoAnna Sargent, certify that the foregoing transcript is a true and accurate record of the proceedings.

JoAnna Sargent

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Date: January 25, 2023

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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 and Reorganized Debtors.	:	(Confirmed)

NOTICE OF APPEAL

Avianca Holdings S.A. and its reorganized debtor affiliates in these proceedings (collectively, the "Reorganized Debtors"), pursuant to Rules 8002 and 8003 of the Federal Rules

[1] The Debtors and Reorganized Debtors in these chapter 11 cases, and each Debtors' and Reorganized Debtors' federal tax identification number (to the extent applicable), are as follows: Avianca Holdings S.A. (N/A) n/k/a HVA Associated Corp.; 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 Loyalty Bermuda Ltd. (N/A); AV Taca International Holdco S.A. (N/A); Aviacorp Enterprises 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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' and Reorganized Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

of Bankruptcy Procedure, give notice of their appeal of the Court's *Decision Resolving (I) Burnham Sterling and Company LLC and Babcock & Brown Securities LLC's Motion to Compel Compliance with 11 U.S.C. §§ 365(d)(5) and 503(b) and (II) Reorganized Debtors' Twenty-Fourth and Twenty-Fifth Omnibus Objections to Proofs of Claim* [Docket No. 2707] entered January 26, 2023 and *Order Granting in Part Burnham Sterling and Company LLCs and Babcock & Brown Securities LLC's Motion to Compel Compliance with 11 U.S.C. §§ 365(d)(5) and 503(b) and Overruling in Part Reorganized Debtors' Twenty-Fourth and Twenty-Fifth Omnibus Objections to Proofs of Claim* [Docket No. 2714] entered January 31, 2023. The parties to this appeal and their respective counsel are:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

--x

DECISION RESOLVING (I) BURNHAM STERLING AND COMPANY LLC AND BABCOCK & BROWN SECURITIES LLC'S MOTION TO COMPEL COMPLIANCE WITH 11 U.S.C. §§ 365(d)(5) AND 503(b), AND (II) REORGANIZED DEBTORS' TWENTY-FOURTH AND TWENTY-FIFTH OMNIBUS OBJECTIONS TO PROOFS OF CLAIM

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[1] The Debtors and Reorganized Debtors in these chapter 11 cases, and each Debtor's and Reorganized Debtor's federal tax identification number (to the extent applicable), are as follows: Avianca Holdings S.A. (N/A) n/k/a HVA Associated Corp.; 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 Loyalty Bermuda Ltd. (N/A); AV Taca International Holdco S.A. (N/A); Aviacorp Enterprises 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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' and Reorganized Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

Before the Court are two claim objections and one motion centering on the same dispute between the Reorganized Debtors, which this decision refers to as Avianca, and two entities that served as brokers or initiators of aircraft leases by which Avianca leased aircraft that were necessary to Avianca's business as an airline. Those entities are Burnham Sterling and Company LLC and Babcock & Brown Securities LLC, referred to in this decision as the "Initiators."

The dispute involves services rendered by the Initiators in furtherance of Avianca's entry into aircraft lease agreements before Avianca commenced its Chapter 11 case in this Court. The terms of the leases that the Initiators helped arrange extended well past Avianca's bankruptcy petition date. The express terms of the leases and/or documents incorporated into the main lease documents required Avianca to compensate the Initiators for their services through scheduled lease payments that, like the leases themselves, extended well past Avianca's eventual petition date, and Avianca acknowledged at oral argument that the required payments are fairly characterized as payments due under the leases.

The Initiators each filed timely proofs of claim, among other things asserting secured prepetition claims for unpaid pre-petition amounts due, and/or administrative claims for unpaid amounts that, under the agreed payment schedule imposed by the relevant leases, were due to be paid after Avianca's petition date. Avianca filed objections to the Initiators' Proofs of Claim raising essentially identical arguments, namely, that the claims were not secured and therefore should be reclassified as general unsecured claims; that the Initiators were not entitled to administrative claims on account of amounts that became due after the petition date but that were earned entirely in the pre-petition period; and that various duplicative claims should be expunged in favor of one allowed, general unsecured claim per Initiator creditor. [*See* Reorganized

Debtors' Twenty-Fourth Omnibus Obj. to Proofs of Claim [ECF No. 2661]; Reorganized Debtors' Twenty-Fifth Omnibus Obj. to Proofs of Claim [ECF No. 2663]].

Meanwhile, the Initiators filed a motion of their own, to "compel compliance with 11 U.S.C. § 365(d)(5) and 503(b)" [Burnham Sterling and Company LLC and Babcock & Brown Securities LLC's Mot. to Compel Compliance with 11 U.S.C. §§ 365(d)(5) and 503(b) [ECF No. 2657]]. That motion sought an order compelling immediate payment of amounts asserted in the Initiators' proofs of claim, at least those that became due after Avianca's petition date. The motion also sought an order deeming those amounts to constitute an allowed administrative claim against the estate.

For the reasons that follow, the Court grants in part the Initiators' motion to compel insofar as they seek an order requiring the timely payment of certain post-petition amounts due; denies the Initiators' motion insofar as it seeks allowance of an administrative claim for those amounts; and correspondingly denies the part of Avianca's claim objection that argues that the Initiators are not entitled to relief under section 365(d)(5), while granting the portion of the claim objection that seeks reclassification of the Initiators' pre-petition claim and expungement of duplicative claims.

By way of brief overview of the Court's analysis, Code section 365(d)(5) provides that the Initiators are entitled to "timely perform[ance]" of "all" of Avianca's lease obligations that "aris[e]" beginning 60 days after Avianca's petition date until the assumption or rejection of the relevant lease or leases. The governing agreements establish that the post-petition payment obligations were and are obligations of the debtor under a lease. Further, those payment obligations required payments on specified post-petition dates, and therefore, notwithstanding Avianca's contentions to the contrary, the lease-imposed payment obligations at issue "arose" on

the various dates that the leases made them due. The Initiators are not, however, entitled to an allowed administrative claim pursuant to section 503(b), because those payments have not been shown to constitute "actual, necessary costs and expenses of preserving the estate," nor have the Initiators provided a post-petition service or conferred a benefit on the estate, as is ordinarily required as a condition of the allowance of an administrative claim. Finally, as noted, the Court sustains Avianca's claim objections to the extent it challenges the Initiators' assertion of secured status for their proofs of claim, and to the extent it seeks to expunge duplicative claims.

BACKGROUND

The facts that are central to this dispute are not contested, and are summarized only in salient part here. The parties' pleadings and exhibits provide more detailed histories of the transactions at issue. Counsel also provided helpful clarifications and factual background during argument on January 25, 2023, which this decision relies on without formal citation to the transcript, as the drafting of this decision had been substantially completed before the transcript became available.

As is typical of many airlines, Avianca leased at least many of the aircraft it used to carry out its business operations. Avianca retained or contracted for the Initiators to assist Avianca in locating suitable aircraft for Avianca to lease on acceptable terms, and the Initiators did so. The result was the leases that play a role in this dispute, all of which were entered into before Avianca's bankruptcy petition. The Initiators' work in furtherance of the lease transactions was completed before the petition date, and there is no contention that the Initiators performed any relevant services for Avianca at any time after Avianca's petition date. The claim objections and Initiators' motion all concern payment obligations that are imposed by aircraft lease agreements and do not concern any obligations arising at or after the time of any lease's rejection.

Rather than pay the Initiators contemporaneously for their services, Avianca and each aircraft's owner/lessor negotiated and agreed to adopt as requirements of the relevant leases that Avianca's obligations to the Initiators would be paid in specified amounts on specified dates running over time. Avianca acknowledged at oral argument that the terms of the relevant leases require these payments to be made according to pre-agreed schedules. By way of slightly more detailed example, the Initiators explain that section 5.2 of the lease agreement labeled "MSN 3992" provides that "[t]he Lessee shall on each Additional Rental Payment Date pay to the Lessor at the Initiator Account, by way of additional rental payment, installments of the Initiator Compensation . . . . [T]he . . . obligations to pay the Initiator Fees hereunder are unconditional." [Initiators' Mot. to Compel [ECF No. 2657] at 3–4]. And Avianca's papers acknowledge that its obligations to the Initiators were "styled as additional or supplemental rent, which the Debtors [*i.e.*, Avianca] pay in the first instance to a lessor/owner trust." [Debtors' 24th Omnibus Claim Obj. [ECF No. 2661] at 7].

Further, Avianca does not dispute (and the Initiators confirm) that the Initiators seek payment of amounts that, according to the relevant leases and related documents, first became due on or after 60 days following Avianca's petition date, do not extend past the date of any assumption or rejection of any aircraft lease, and have not been paid.

Avianca has objected to the Initiators' assertion that their claim is secured, and the Initiators do not oppose the request to reclassify the claim as unsecured. The Initiators likewise do not oppose the portion of Avianca's claim objection that seeks to expunge certain duplicative claims.

The Court heard argument on the claim objections and the Initiators' motion to compel on January 25, 2023.

DISCUSSION

A. The Initiators' Entitlement to Payment Is Pursuant to Lease Obligations That Arose After Avianca's Petition Date

The Initiators' position flows from the literal meaning of Code section 365(d)(5), which provides, with inapplicable exceptions omitted: "The trustee shall timely perform all of the obligations of the debtor . . . first arising from or after 60 days after the order for relief in a [Chapter 11 case] under an unexpired lease of personal property . . . , until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based upon the equities of the case, orders otherwise with respect to the obligations or timely performance thereof." 11 U.S.C. § 365(d)(5). The Initiators observe (as is not contested) that the parties' dispute relates to "an unexpired lease of personal property" and that the leases have not been, at least for the periods for which the Initiators seek compensation, "assumed or rejected." The Initiators also observe that the payment obligations at issue are "obligations of the debtor . . . under" the governing leases and associated transaction documents. Avianca acknowledged at argument, at a minimum, that the lease agreements require the scheduled payments that the Initiators seek to compel.

In opposition, Avianca emphasizes that the Initiators' entitlement to the payments flows from work that the Initiators performed and completed before Avianca's petition date, such that in Avianca's view all the Initiators have is a contractually required payment schedule on account of a prepetition obligation—thus merely an unsecured prepetition claim, not something that should support an administrative claim under the Code [Debtors' 24th Omnibus Claim Obj. [ECF No. 2661] at 11], and "not 'true lease' obligations as contemplated in section 365(d)(5)" [*id.* at 9]. Avianca's papers did not pinpoint any inaccuracy in the Initiators' analysis of the governing statutory text, but emphasized policy considerations and legislative history, arguing

that the purpose of section 365(d)(5) was to protect commercial landlords or lessors who otherwise suffered prejudice when debtors languished in bankruptcy without paying rent and other obligations to landlords or lessors, thus unfairly jeopardizing the economic health of parties that were legally obliged to have continuing dealings with a debtor. [*Id.* at 9–10 (citing *In re Hayes Lemmerz Int'l, Inc.*, 340 B.R. 461, 472 (Bankr. D. Del. 2006) (describing Congressional intent in enacting section 365(d)(5) as being to "give special protection to qualified lessors"); *In re Pudgie's Dev. of NY, Inc.*, 202 B.R. 832, 837 (Bankr. S.D.N.Y. 1996) (opining that the similarly drafted section 365(d)(3) should be "strictly construed" and holding that a prepetition lease's requirement that the lessee pay attorney fees was not entitled to full repayment under section 365(d)(3) notwithstanding that the fees were not billed until after the petition date, where the payment obligation "may fortuitously arise before or after the time period in question"); *In re Child World, Inc.*, 161 B.R. 571, 576 (Bankr. S.D.N.Y. 1993) ("Allowing landlords to recover for items of rent which are billed during the postpetition, prerejection period, but which represent payment for services rendered by the landlord outside this time period, would grant landlords a windfall payment, to the detriment of other creditors, without any support from the legislative history."))].

At argument, Avianca sharpened its efforts to harmonize these observations with the text of section 365(d)(5), arguing that the fact that the Initiators' services were complete and the payment dates agreed to before Avianca's petition date means that Avianca's payment obligation "arose" before the petition date, and is not an obligation of the debtor that, in the words of section 365(d)(5), was "first arising from or after 60 days after the order for relief" (*i.e.*, Avianca's bankruptcy petition filing date). The Court, however, finds this argument unpersuasive. Neither party identified case law expressly defining "arising from" as that phrase

is used in section 365(d)(5), but the Initiators correctly observe that, under the leases' terms, no payment was due—and thus the debtor had no payment obligation as to any future scheduled payment—until and unless its due date was reached. Further, the statute refers to plural "all obligations" of the debtor "arising" under "a lease" (a singular noun), which signals that each separate payment requirement under "a" lease constitutes a separate "obligation," not merely one portion of a singular, overarching "obligation" embodied in the underlying lease document. The Court is satisfied that both the plain meaning of the statutory terms and the commercial realities of the parties' arrangement here was that there are multiple payment "obligations" that "arise" on their respective due dates as specified in the applicable leases—just as the obligation to pay rent for future periods undisputedly "arises" for purposes of section 365(d)(3) and (d)(5) not upon the signing of the lease, but upon the due dates specified by the lease.

Meanwhile, as to whether the payment obligations can be said to be among "all of the obligations of the debtor" under the leases, the parties agreed at oral argument that the payment obligations at issue are imposed under the leases at issue, which are unexpired leases of personal property. The Court acknowledges the policy and equitable concerns emphasized by Avianca as voiced in *Pudgie's* and *Child World*, and those decisions as well as Avianca here correctly characterize at least a substantial animating concern voiced in relevant legislative history of protecting lessors with ongoing obligations to a debtor, which may apply with less force to payment obligations to parties other than the lessor even when those obligations are imposed by the terms of the lease. But the Bankruptcy Code expressly and unambiguously requires timely payment of "all of the obligations of the debtor" under a lease, not merely "rent" and not merely payments to "lessors." 11 U.S.C. § 365(d)(5). And equitable or policy concerns and legislative history do not control if the statute's express, unambiguous language dictates a different result.

Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) ("In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop. Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'") (citations omitted); *In re R.H. Macy & Co., Inc.*, No. 93 CIV. 4414, 1994 WL 482948, at *4, *12 (S.D.N.Y. Feb. 23, 1994) (Sotomayor, J.) ("The problem that I have is that I am persuaded by the policy arguments set forth by Judge Goettel in Childworld [sic]. * * * Unlike Judge Goettel, I cannot create an ambiguity [in section 365(d)(3)] where I see none exists . . . . I must interpret 'obligation' according to its ordinary meaning. . . . I decline, as did the court in [another case], to read into an unambiguous, clear statute a revision based on policy considerations. I feel compelled to follow the clear and unambiguous terms of the statute[.]"). Or, as the Initiators put it, "Section 365(d)(5) should not be read to include language it clearly does not." [Burnham Sterling and Company LLC and Babcock & Brown Securities LLC's Consolidated Reply (I) in Resp. to Reorganized Debtors' Twenty-Fourth and Twenty-Fifth Omnibus Objs. to Proofs of Claim and (II) in Further Supp. of Mot. to Compel [ECF No. 2689] at 8 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93–100 (2012); *Rotkiske v. Klemm*, 140 S. Ct. 355, 360–61 (2019); *Iselin v. United States*, 270 U.S. 245, 251 (1926))].

The case law invoked by Avianca does not overcome this textual analysis to support the result it seeks, both because reliance on equity and policy cannot overcome an express statutory command, and because the cases Avianca relies on are materially distinguishable.

In *Pudgie's*, the Court relied on the fact that the contracts in question—unlike those at issue here—did not require payments to be made on a date certain or according to a set schedule,

such that the payment obligation could arise "fortuitously" either within or outside the statutorily required full-pay period—thus not constituting the type of payments that the statute should be read to mean in requiring "timely" payment of post-petition lease obligations. 202 B.R. at 837. The Court declined to deem such a haphazard payment schedule a requirement for rent payments within the time frame specified by section 365(d)(3) (which all parties and the Court agree has no material analytical differences from subsection (d)(5) except that it applies to real property leases rather than personal property leases). *Id.* As the Initiators emphasize, however, this distinctive factual characteristic that justified the Court's decision in *Pudgie's* is absent here; rather, the lease obligations here concededly make payment for the benefit of the Initiators due as part of each periodic rent payment due under the governing leases. [Initiators' Mot. to Compel [ECF No. 2657] at 3–4]. In fact, *Pudgie's* supports the Initiators' position here because it emphasizes that the statute affords a "preferred position with respect to those obligations arising under the lease in a contractually determined time frame," 202 B.R. 837—exactly what exists here.

Meanwhile, the outcome of *Child World* arguably supports Avianca's position, but it is at least partially distinguishable, and, to the extent it can be said to call for a denial of the Initiators' motion, the Court respectfully declines to follow it because such a reading would be contrary to the unambiguous command of section 365(d)(5) for reasons already stated. *Child World* concerned a debtor-tenant's lease obligation to reimburse a trust-landlord for taxes related to the leased property. The trust billed the Debtor/tenant for tax amounts due without regard to whether the obligations arose before or after the petition date. The Court held that section 365(d)(3) did not require the debtor to make reimbursements for taxes that accrued before the petition, notwithstanding that the bills were sent after the petition date. 161 B.R. at 576–77. The

Court reasoned that these obligations did not come due during the statutorily covered post-petition period. *Id.* In so holding, the Court relied on legislative history reflecting the policy objective of ensuring that landlords would be paid by "debtor-tenants" for "current services," *id.* at 576, and opined that payments that were billed post-petition for "services rendered by the landlord outside this time period [] would grant landlords a windfall payment, to the detriment of other creditors, without any support from the legislative history." *Id.*

The Initiators observe that here, unlike in *Child World*, Avianca's payment obligations not only arise under the leases, but by the leases' terms are due and at all pre- and post-petition times were always due *on dates specified by the leases* that fall within the period that the Code dictates must be timely paid in full. The Court can conceive of no construction that makes these payment obligations under the leases anything other than Avianca payment "obligations" under the leases whose "timely" payment necessarily falls within the post-petition time frame addressed by section 365(d)(5). *Supra* at 7–8. Thus, unlike *Child World*, there is no element of happenstance or timing uncertainty here that could arguably bring the payment obligation outside the scope of section 365(d)(5).

Child World thus is materially distinguishable on its facts, and the materiality of its factual difference from the present situation resulted in a legal analysis that did not assume that the plain terms of section 365(d)(3) squarely govern. In other words, the Court in *Child World* did not deem present or analytically contend with the existence of unambiguous statutory language that compelled a ruling in favor of the landlord. Yet here, for the reasons explained above, the statute's unambiguous terms control and mandate the "timely" payment of an explicit lease obligation that the Initiators seek to enforce. *See supra* at 6–9. In keeping with that analysis, to the extent *Child World* is deemed to hold that timely full-payment obligations under

section 365(d)(3) or (d)(5) exist only as to landlords or lessors themselves (which overstates the holding of *Child World*), or to hold that lease payments that are due post-petition but that are owed on account of pre-petition events do not constitute such obligations, the Court respectfully declines to follow such a holding, because the statute itself calls for full and timely payment of "all of the obligations of the debtor" under the lease in question, not merely "rent" or "those obligations that are directly payable to the landlord or lessor." Reference to legislative history or policy concerns is insufficient to override Congress's explicit command. *See R.H. Macy*, 1994 WL 482948, at *12.

Not only are the legislative history and policy concerns identified by Avianca not sufficient to override the unambiguous and squarely applicable statutory text, there are also policy and statutory considerations that point in favor of the Court's ruling today. First, section 365(d)(5) requires timely payment of lease obligations "notwithstanding section 503(b)(1) of this title," which provides that administrative claims "shall be allowed" if they are "actual, necessary costs and expenses of preserving the estate. . . ." 11 U.S.C. § 503(b)(1)(A). Thus, section 365(d)(5) omits any benefit to the estate requirement, unlike the standard that governs the requested allowance of administrative claims. This reality, in turn, lessens the persuasiveness of objections that requiring full payment of all of a debtor's lease obligations results in a "windfall," because Congress in enacting section 365(d)(5) explicitly *required* at least some degree of what otherwise might be a windfall by saying that payments required by leases are due without regard to the limits on availability of administrative claims under section 503(b).

Moreover, section 365(d)(5) has been in effect since 1994. *See In re Oreck Corp.*, 506 B.R. 500, 503 n.6 (Bankr. M.D. Tenn. 2014) (noting that § 365(d)(5) was "formerly § 365(d)(1) as enacted in 1994"). The parties to the leases and related transaction documents at issue here

are sophisticated, major financial concerns, including a major international airline, presumably sophisticated international aircraft leasing brokers, and (according to document excerpts attached to Avianca's reply) major financial institutions including Wilmington Trust and Wells Fargo Bank. The leases and transaction documents post-date the statute's enactment. The parties' decision to term Avianca's obligations to the Initiators "lease" obligations, in a way that squarely fits within section 365(d)(5), can only have been intentional. The Court has no basis to speculate why the parties chose to proceed this way, but enforcing such a conscious negotiating decision that renders Avianca's recurring payment obligations to the Initiators "obligations of the debtor" under a "lease" does not strike the Court as a windfall that can be said to contravene the intent of Congress nearly 30 years after it enacted section 365(d)(5) using words that perfectly describe the parties' negotiated arrangements here. Indeed, as the Initiators observed at argument and Avianca did not dispute, although section 365(d)(5) includes language authorizing courts to excuse payments otherwise required by the section "after notice and a hearing and based on the equities on the case," Avianca has not proposed such a hearing, nor has it invoked that portion of the statute in its response to the Initiators' contentions.

The Court pauses to note that, although the parties' briefs do not meaningfully discuss cases interpreting sections 365(d)(3) or (d)(5) besides *Pudgie's* and *Child World*, the Court's own research has identified several other such cases, and the Court has considered them. *Child World* itself cites more than ten of these cases on both sides of the issue, noting that some of them "interpreted § 365(d)(3) as providing that the billing date determines when lease obligations arise" even though the taxes which were billed post-petition had accrued during "a period which was almost entirely prepetition," but opining that "[a] substantial majority of [the cases] concluded that under § 365(d)(3), rent should be prorated to cover only the postpetition,

prerejection period, regardless of the fortuity of the billing date." 161 B.R. at 576 (collecting cases). The Court need not spend any time discussing these other cases other than to note that they exist. The parties did not cite any of these cases, and even if they had, the Court's own review has identified no analytically relevant difference between these cases and *Child World* which would compel the Court to alter its conclusion that the outcome here is dictated by the unambiguous, plain language of the statute. Quite simply, the Court considers then-Judge Sotomayor's analysis in *R.H. Macy*, 1994 WL 482948, at *11–13, to be both correct, and squarely on point here. *See supra* at 9.

Finally, in addition to seeking to compel payment pursuant to section 365(d)(5), the Initiators' motion seeks allowance of an administrative claim pursuant to Code section 503(b). Allowance of such a claim, however, requires a two-part showing: "first, there must be a postpetition transaction, making it a transaction between the debtor-in-possession and the creditor; and second, the estate must receive a benefit from the transaction. . . . In other words, to qualify for administrative priority, a debtor's obligation to make a payment must have arisen out of a *postpetition* transaction between the creditor and the debtor." *In re Grubb & Ellis Co.*, 478 B.R. 622, 624–25 (Bankr. S.D.N.Y. 2012) (citations omitted). The showing the Initiators have made is that they are entitled to payment under section 365(d)(5), but they have not established a post-petition transaction or benefit to the estate as required to support allowance of an administrative claim under section 503(b). The motion's request for allowance of an administrative claim is therefore denied.

B. Post-Petition Stipulations Do Not Extinguish the Initiators' Entitlements

Avianca also argues that it entered into various post-petition stipulations which it contends, without citing any law, "modified the terms of each of the lease agreements at issue, and—once

so-ordered by the Court—[] took precedence over the lease agreements and suspended the operation thereof, including payment of the initiator fees." [Reply in Supp. of Reorganized Debtors' Twenty-Fourth and Twenty-Fifth Omnibus Objs. to Proofs of Claim [ECF No. 2699] at 7–8; *see also* Debtors' 24th Omnibus Claim Obj. [ECF No. 2661] at 11–12]. Although Avianca refers to several such stipulations, it cites only one, which it calls the "Second Stipulation," as apparently illustrative of the rest. [Debtors' 24th Omnibus Claim Obj. [ECF No. 2661] at 11–12 (citing Second Stipulation and Order Between Debtors and Aircraft Counterparties Concerning Certain Aircraft [ECF No. 401])]. But Avianca fails to cite any specific provision of the Second Stipulation that purports either to (a) relieve Avianca of its obligations to the Initiators specifically, or (b) supersede or suspend the entirety of the underlying lease agreements more generally. Having reviewed the Second Stipulation itself, the Court has identified no such provisions, nor did Avianca identify any such provision when asked at oral argument.

On the contrary, the Court agrees with the Initiators that, because the Second Stipulation expressly and repeatedly contemplates the potential future "assumption of the applicable Original Aircraft Agreements [including the leases] pursuant to section 365 of the Bankruptcy Code" and/or the potential future "reject[ion of] the Aircraft Agreements [including the leases]" [Second Stipulation [ECF No. 401] at 2–10], the Second Stipulation cannot have extinguished the leases, and that the stipulation is insufficient to relieve Avianca of its lease obligations to the Initiators given the explicit wording of section 365(d)(5). As the Initiators rightly point out, section 365(d)(5) requires the performance of lease obligations "arising from or after 60 days after the [petition date] . . . *until such lease is assumed or rejected*" [Initiators' Reply [ECF No. 2689] at 9 (quoting 11 U.S.C. § 365(d)(5)) (alterations in original)], which the Second Stipulation made clear would not occur until some future date. Avianca counters that the Initiators could and should have

objected "at the time the Second Stipulations were filed and approved" [Debtors' Reply [ECF No. 2699] at 8], but Avianca has not shown that the Initiators had reason or need to object. Rather, the Second Stipulation does not purport to alter the Initiators' rights under the leases, so the Initiators had no need to object to it.

The Court does not reach the Initiators' additional argument that they cannot be bound by the Second Stipulation because they are not parties to it. [Initiators' Reply [ECF No. 2689] at 9–10]. The Initiators do not appear on the Second Stipulation's list of parties on whom it is binding [Second Stipulation [ECF No. 401] at 9)], but the Initiators are third-party beneficiaries under the original leases, and neither the Initiators nor Avianca has briefed the issue of whether and to what extent a Court-approved, post-petition stipulation may modify the express rights of a third-party beneficiary under a pre-petition lease agreement. For purposes of the present dispute, it is sufficient that the Second Stipulation, by its terms, does not purport to modify the Initiators' rights under the leases and under section 365(d)(5), even assuming that it could do so. Therefore, for the reasons stated above, the Court denies Avianca's claim objection to the extent it is premised on the Second Stipulation purportedly relieving Avianca of its obligations to the Initiators. The Court accordingly also rejects the argument that the Second Stipulation defeats the Initiators' motion to compel.

C. The Initiators' Duplicative Claims Should Be Expunged, and Their Claims Are Not Secured

Requiring far less discussion is Avianca's objection to the Initiators' assertion that their pre-petition claim was secured as opposed to unsecured, and Avianca's objection to various duplicative claims asserted by the Initiators. [Debtors' 24th Omnibus Claim Obj. [ECF No. 2661] at 8–9, 12–14]. The Initiators concede that their pre-petition claim is not secured, and that duplicative claims can be expunged in favor of one already-filed proof of claim that accurately

sets forth pre-petition amounts due to the Initiators. [Initiators' Reply [ECF No. 2689] at 10–11]. The Court grants Avianca's objection to the extent it seeks to reclassify the Initiators' claim for pre-petition amounts due to general unsecured status, and the Court grants Avianca's request to expunge duplicative claims. The parties confirmed at oral argument that there is no remaining dispute on these aspects of the claim objection, and they have reached agreement on which claims are to be expunged as duplicative.

CONCLUSION

For the reasons stated above, the Initiators' motion to compel compliance with section 365(d)(5) is granted, and the Court will direct payment of amounts due under that section. The Court, however, denies the Initiators' motion to the extent it seeks allowance of an administrative claim pursuant to Code section 503(b). The Court sustains Avianca's claim objections to the extent they seek to reclassify the Initiators' secured claim and expunge duplicative claims, but denies the objections to the extent they seek to disallow the Initiators' request for payment of post-petition amounts due to them under the leases as required by Code section 365(d)(5).

The parties are to confer and, on or before January 27, 2023, if practicable, jointly submit a proposed order implementing the rulings in this decision.

It is so ordered.

Dated: New York, New York
January 26, 2023

s/ David S. Jones
Honorable David S. Jones
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

ORDER GRANTING IN PART BURNHAM STERLING AND COMPANY LLC AND BABCOCK & BROWN SECURITIES LLC'S MOTION TO COMPEL COMPLIANCE WITH 11 U.S.C. §§ 365(d)(5) AND 503(b) AND OVERRULING IN PART REORGANIZED DEBTORS' TWENTY-FOURTH AND TWENTY-FIFTH OMNIBUS OBJECTIONS TO PROOFS OF CLAIMS

Upon consideration of (i) *Burnham Sterling and Company LLC and Babcock & Brown Securities LLC's Motion to Compel Compliance with 11 U.S.C. §§ 365(d)(5) and 503(b)* [Docket No. 2657] (the "**Motion to Compel**"),[2] (ii) *Reorganized Debtors' Twenty-Fourth Omnibus Objection to Proofs of Claim* [Docket No. 2661] (the "**Babcock Claim Objection**") and (iii) *Reorganized Debtors' Twenty-Fifth Omnibus Objection to Proofs of Claim* [Docket No. 2663]

[1] The Debtors and Reorganized Debtors in these chapter 11 cases, and each Debtor's and Reorganized Debtor's federal tax identification number (to the extent applicable), are as follows: Avianca Holdings S.A. (N/A) n/k/a HVA Associated Corp.; 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 Loyalty Bermuda Ltd. (N/A); AV Taca International Holdco S.A. (N/A); Aviacorp Enterprises 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); Nicaragüense de Aviación, Sociedad Anónima (N/A); Regional Express Américas S.A.S. (N/A); Ronair N.V. (N/A); Servicio Terrestre, Aéreo 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' and Reorganized Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

[2] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

("**Burnham Claim Objection**" together with the Babcock Claim Objection, the "**Objections**"), and all responses and pleadings filed in connection with the Motion to Compel and Objections; and the Court having jurisdiction over this matter under 28 U.S.C. § 1334 and this being a core proceeding under 28 U.S.C. § 157(b)(2)(A), (M), and (O); and the Court having found that venue of this proceeding and the Motion to Compel and Objections in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that notice of the Motion to Compel and Objections were appropriate under the circumstances and no other notice need be provided; and the Court having reviewed the Motion to Compel and the Objections and having heard the statements in support of **and in opposition to [DSJ 1/31/2023]** the relief requested therein at a hearing before this Court (the "**Hearing**"); and this Court having issued a written opinion regarding the Motion to Compel and Objections [ECF No. 2707], it is **HEREBY ORDERED THAT:**

1. The Motion to Compel is **GRANTED** in part and **DENIED** in part.

2. The Objections are **SUSTAINED** in part and **OVERRULED** in part.

3. The Reorganized Debtors shall pay Burnham the amount of $4,338,484.66 (the "**Payment Amount**") under the Lease Agreements, which Payment Amount shall be made be to UMB Bank, N.A. (not in its individual capacity but solely as paying agent) no later than February 15, 2023; provided that if payment is not made on such date, interest shall accrue on the Payment Amount as set forth in the Lease Agreements.

4. For the purposes of this Order, the Rejection Date with respect to the Lease Agreement related to MSN 39407 will be deemed to occur on March 15, 2023. To the extent the Rejection Date for the foregoing Lease Agreement occurs before or after the assumed Rejection

Date, the Reorganized Debtors and Burnham shall, as applicable, compensate or reimburse the other party accordingly.

5. Upon receipt of the Payment Amount, Burnham shall withdraw claims 4033 and 4038 in the Avianca case.

6. Claims 4026, 4036, and 4037 in the Aerovías case and claims 4027, 4034, and 4035 in the Taca case are disallowed in these bankruptcy cases as duplicative of claims 4033 and 4038 filed in the Avianca case and shall be automatically expunged from the Claims Register maintained in these cases.

7. Claims 2055 and 2057 in the Avianca case are reclassified as General Unsecured Avianca Claims in Class 11 (as defined in the Plan) for pre-petition amounts.

8. Claim 4022 in the Aerovías case is disallowed in these bankruptcy cases as duplicative of claim 2057 filed in the Avianca case and shall be automatically expunged from the Claims Register maintained in these cases.

9. The Reorganized Debtors and their agents are authorized to take all actions necessary to effectuate the relief granted in this Order, including updating the Claims Register maintained in these cases to reflect the relief granted herein.

10. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: New York, New York
January 31, 2023

s/ David S. Jones
HONORABLE DAVID S. JONES
UNITED STATES BANKRUPTCY JUDGE

JS 44C/SDNY
REV.
10/01/2020

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for use of the Clerk of Court for the purpose of initiating the civil docket sheet.

PLAINTIFFS

(Appellants) - Avianca Holdings S.A., et al.

ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER
John G. McCarthy of Smith, Gambrell & Russell, LLP
1301 Avenue of the Americas, 21st Floor, New York, New York 10019
Tel: (212) 907-9700

DEFENDANTS

(Appellees) - Burnham Sterling Company LLC and Babcock & Brown Securities LLC

ATTORNEYS (IF KNOWN)
Matthew Kremer of O'Melveny & Myers LLP
7 Times Square, New York, New York 10036
Tel: (212) 326-2000

CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE)
(DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

28 U.S.C. § 158 - Appeal from a Bankruptcy Decision, dated January 26, 2023 and Bankruptcy Order, dated January 31, 2023.

Has this action, case, or proceeding, or one essentially the same been previously filed in SDNY at any time? No ☑ Yes ☐ Judge Previously Assigned

If yes, was this case Vol. ☐ Invol. ☐ Dismissed. No ☐ Yes ☐ If yes, give date _____ & Case No. _____

IS THIS AN INTERNATIONAL ARBITRATION CASE? No ☒ Yes ☐

(PLACE AN [x] IN ONE BOX ONLY)

NATURE OF SUIT

TORTS

CONTRACT

[ ] 110 INSURANCE
[ ] 120 MARINE
[ ] 130 MILLER ACT
[ ] 140 NEGOTIABLE INSTRUMENT
[ ] 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT
[ ] 151 MEDICARE ACT
[ ] 152 RECOVERY OF DEFAULTED STUDENT LOANS (EXCL VETERANS)
[ ] 153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS
[ ] 160 STOCKHOLDERS SUITS
[ ] 190 OTHER CONTRACT
[ ] 195 CONTRACT PRODUCT LIABILITY
[ ] 196 FRANCHISE

REAL PROPERTY

[ ] 210 LAND CONDEMNATION
[ ] 220 FORECLOSURE
[ ] 230 RENT LEASE & EJECTMENT
[ ] 240 TORTS TO LAND
[ ] 245 TORT PRODUCT LIABILITY
[ ] 290 ALL OTHER REAL PROPERTY

PERSONAL INJURY

[ ] 310 AIRPLANE
[ ] 315 AIRPLANE PRODUCT LIABILITY
[ ] 320 ASSAULT, LIBEL & SLANDER
[ ] 330 FEDERAL EMPLOYERS' LIABILITY
[ ] 340 MARINE
[ ] 345 MARINE PRODUCT LIABILITY
[ ] 350 MOTOR VEHICLE
[ ] 355 MOTOR VEHICLE PRODUCT LIABILITY
[ ] 360 OTHER PERSONAL INJURY
[ ] 362 PERSONAL INJURY - MED MALPRACTICE

ACTIONS UNDER STATUTES

CIVIL RIGHTS

[ ] 440 OTHER CIVIL RIGHTS (Non-Prisoner)
[ ] 441 VOTING
[ ] 442 EMPLOYMENT
[ ] 443 HOUSING/ ACCOMMODATIONS
[ ] 445 AMERICANS WITH DISABILITIES - EMPLOYMENT
[ ] 446 AMERICANS WITH DISABILITIES -OTHER
[ ] 448 EDUCATION

PERSONAL INJURY

[ ] 367 HEALTHCARE/ PHARMACEUTICAL PERSONAL INJURY/PRODUCT LIABILITY
[ ] 365 PERSONAL INJURY PRODUCT LIABILITY
[ ] 368 ASBESTOS PERSONAL INJURY PRODUCT LIABILITY

PERSONAL PROPERTY

[ ] 370 OTHER FRAUD
[ ] 371 TRUTH IN LENDING
[ ] 380 OTHER PERSONAL PROPERTY DAMAGE
[ ] 385 PROPERTY DAMAGE PRODUCT LIABILITY

PRISONER PETITIONS

[ ] 463 ALIEN DETAINEE
[ ] 510 MOTIONS TO VACATE SENTENCE 28 USC 2255
[ ] 530 HABEAS CORPUS
[ ] 535 DEATH PENALTY
[ ] 540 MANDAMUS & OTHER

PRISONER CIVIL RIGHTS

[ ] 550 CIVIL RIGHTS
[ ] 555 PRISON CONDITION
[ ] 560 CIVIL DETAINEE CONDITIONS OF CONFINEMENT

FORFEITURE/PENALTY

[ ] 625 DRUG RELATED SEIZURE OF PROPERTY 21 USC 881
[ ] 690 OTHER

PROPERTY RIGHTS

[ ] 820 COPYRIGHTS
[ ] 830 PATENT
[ ] 835 PATENT-ABBREVIATED NEW DRUG APPLICATION
[ ] 840 TRADEMARK
[ ] 880 DEFEND TRADE SECRETS ACT

LABOR

[ ] 710 FAIR LABOR STANDARDS ACT
[ ] 720 LABOR/MGMT RELATIONS
[ ] 740 RAILWAY LABOR ACT
[ ] 751 FAMILY MEDICAL LEAVE ACT (FMLA)
[ ] 790 OTHER LABOR LITIGATION
[ ] 791 EMPL RET INC SECURITY ACT (ERISA)

IMMIGRATION

[ ] 462 NATURALIZATION APPLICATION
[ ] 465 OTHER IMMIGRATION ACTIONS

ACTIONS UNDER STATUTES

BANKRUPTCY

[X] 422 APPEAL 28 USC 158
[ ] 423 WITHDRAWAL 28 USC 157

SOCIAL SECURITY

[ ] 861 HIA (1395ff)
[ ] 862 BLACK LUNG (923)
[ ] 863 DIWC/DIWW (405(g))
[ ] 864 SSID TITLE XVI
[ ] 865 RSI (405(g))

FEDERAL TAX SUITS

[ ] 870 TAXES (U.S. Plaintiff or Defendant)
[ ] 871 IRS-THIRD PARTY 26 USC 7609

OTHER STATUTES

[ ] 375 FALSE CLAIMS
[ ] 376 QUI TAM
[ ] 400 STATE REAPPORTIONMENT
[ ] 410 ANTITRUST
[ ] 430 BANKS & BANKING
[ ] 450 COMMERCE
[ ] 460 DEPORTATION
[ ] 470 RACKETEER INFLUENCED & CORRUPT ORGANIZATION ACT (RICO)
[ ] 480 CONSUMER CREDIT
[ ] 485 TELEPHONE CONSUMER PROTECTION ACT
[ ] 490 CABLE/SATELLITE TV
[ ] 850 SECURITIES/ COMMODITIES/ EXCHANGE
[ ] 890 OTHER STATUTORY ACTIONS
[ ] 891 AGRICULTURAL ACTS
[ ] 893 ENVIRONMENTAL MATTERS
[ ] 895 FREEDOM OF INFORMATION ACT
[ ] 896 ARBITRATION
[ ] 899 ADMINISTRATIVE PROCEDURE ACT/REVIEW OR APPEAL OF AGENCY DECISION
[ ] 950 CONSTITUTIONALITY OF STATE STATUTES

Check if demanded in complaint:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $_____ OTHER _____

Check YES only if demanded in complaint
JURY DEMAND: ☐ YES ☐ NO

DO YOU CLAIM THIS CASE IS RELATED TO A CIVIL CASE NOW PENDING IN S.D.N.Y. AS DEFINED BY LOCAL RULE FOR DIVISION OF BUSINESS 13?
IF SO, STATE:

JUDGE _____ DOCKET NUMBER_____

NOTE: You must also submit at the time of filing the Statement of Relatedness form (Form IH-32).

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(PLACE AN x IN ONE BOX ONLY)

ORIGIN

[X] 1 Original Proceeding
[ ] 2 Removed from State Court
  [ ] a. **all parties represented**
  [ ] b. **At least one party is pro se.**
[ ] 3 Remanded from Appellate Court
[ ] 4 Reinstated or Reopened
[ ] 5 Transferred from (Specify District)
[ ] 6 Multidistrict Litigation (Transferred)
[ ] 7 Appeal to District Judge from Magistrate Judge
[ ] 8 Multidistrict Litigation (Direct File)

(PLACE AN x IN ONE BOX ONLY)

BASIS OF JURISDICTION

IF DIVERSITY, INDICATE CITIZENSHIP BELOW.

[ ] 1 U.S. PLAINTIFF [ ] 2 U.S. DEFENDANT [X] 3 FEDERAL QUESTION (U.S. NOT A PARTY) [ ] 4 DIVERSITY

CITIZENSHIP OF PRINCIPAL PARTIES (FOR DIVERSITY CASES ONLY)

(Place an [X] in one box for Plaintiff and one box for Defendant)

	PTF	DEF		PTF	DEF		PTF	DEF
CITIZEN OF THIS STATE	[ ] 1	[ ] 1	CITIZEN OR SUBJECT OF A FOREIGN COUNTRY	[ ] 3	[ ] 3	INCORPORATED and PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE	[ ] 5	[ ] 5
CITIZEN OF ANOTHER STATE	[ ] 2	[ ] 2	INCORPORATED or PRINCIPAL PLACE OF BUSINESS IN THIS STATE	[ ] 4	[ ] 4	FOREIGN NATION	[ ] 6	[ ] 6

PLAINTIFF(S) ADDRESS(ES) AND COUNTY(IES)

DEFENDANT(S) ADDRESS(ES) AND COUNTY(IES)

DEFENDANT(S) ADDRESS UNKNOWN

REPRESENTATION IS HEREBY MADE THAT, AT THIS TIME, I HAVE BEEN UNABLE, WITH REASONABLE DILIGENCE, TO ASCERTAIN THE RESIDENCE ADDRESSES OF THE FOLLOWING DEFENDANTS:

COURTHOUSE ASSIGNMENT

I hereby certify that this case should be assigned to the courthouse indicated below pursuant to Local Rule for Division of Business 18, 20 or 21.

Check one: THIS ACTION SHOULD BE ASSIGNED TO: [ ] WHITE PLAINS [X] MANHATTAN

DATE 2/9/2023 John G. McCarthy /PC
SIGNATURE OF ATTORNEY OF RECORD

ADMITTED TO PRACTICE IN THIS DISTRICT
[ ] NO
[X] YES (DATE ADMITTED Mo. Feb Yr. 1992)
Attorney Bar Code # JM-2635

RECEIPT #

Magistrate Judge is to be designated by the Clerk of the Court.

Magistrate Judge ______________________ is so Designated.

Ruby J. Krajick, Clerk of Court by ____________ Deputy Clerk, DATED ______________.

UNITED STATES DISTRICT COURT (NEW YORK SOUTHERN)