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Debtors-In-Possession*

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

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In re:	:	Chapter 11
	:	
AVIANCA HOLDINGS S.A., <i>et al.</i> , <sup>1</sup>	:	Case No. 20-11133 (MG)
	:	
Debtors.	:	(Joint Administration Requested)
	:	

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**DEBTORS’ MOTION FOR INTERIM AND FINAL ORDERS PURSUANT  
TO SECTIONS 105(a), 363, AND 364(c) OF THE BANKRUPTCY CODE  
FOR AUTHORIZATION TO ENTER INTO, CONTINUE PERFORMANCE, AND  
PROVIDE CREDIT SUPPORT UNDER HEDGING AND DERIVATIVE CONTRACTS**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

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



Avianca Holdings S.A. and its affiliated debtors in the above-captioned chapter 11 cases (the “Chapter 11 Cases”), as debtors and debtors-in-possession (collectively, the “Debtors”), respectfully represent as follows in support of this motion (the “Motion”):

**RELIEF REQUESTED**

1. By this Motion, the Debtors request that the Court enter an interim and final order pursuant to sections 105(a), 363, and 364(c) of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (as amended, the “Bankruptcy Code”), substantially in the forms attached hereto as **Exhibit A** (the “Proposed Interim Order”) and **Exhibit B** (the “Proposed Final Order”), respectively, authorizing, but not directing, the Debtors to (i) continue entering into, terminating, and/or performing under the Derivative Contracts (as defined herein) in the ordinary course of business; and (ii) perform such ancillary transactions as may be necessary to implement or terminate such contracts, including providing credit support.

**JURISDICTION**

2. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334.

3. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

4. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

5. The bases for the relief requested herein are sections 105(a), 363 and 364(c) of the Bankruptcy Code.

**STATUS OF THE CASE**

6. On the date hereof (the “Petition Date”), each of the Debtors filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

7. Each Debtor is continuing to operate its businesses and manage its properties as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

8. No creditors' committee has yet been appointed in these cases. No trustee or examiner has been appointed.

9. The Debtors have filed a motion requesting joint administration of the Chapter 11 Cases pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (as amended, the "Bankruptcy Rules").

### **BACKGROUND**

10. Avianca is the second-largest airline group in Latin America and the most important carrier in the Republic of Colombia and in the Republic of El Salvador. It is the largest airline in the Republic of Colombia (the third largest Latin American economy), a code-share partner of United Airlines, and a member of the Star Alliance which, with 26 members, is the world's largest global airline alliance. Established in 1919, Avianca has a 100-year legacy as a leading provider of air travel and cargo services in the Latin American market and around the globe. Avianca is well respected throughout Latin America and maintains significant customer brand equity and market share in the regions it services.

11. The Debtors operate an extensive network of routes from their primary hubs in Bogotá and San Salvador (in addition to other focus markets) and offer passenger services on more than 5,350 weekly flights to more than 76 destinations in 27 countries. With approximately 18,900 employees and approximately \$3.9 billion in annual revenues, the Debtors play a key role in the Latin American airline market.

12. Despite an effective debt reprofiling executed in the second half of 2019, a significant improvement in Avianca's liquidity position in early 2020, and the successful 2019 launch of the "Avianca 2021" transformation plan, the Debtors have been compelled to file these Chapter 11 Cases for one principal reason: the COVID-19 pandemic, which has affected the world's population and economies in ways that have never been experienced. The reduction in

travel as a result of the virus, and the measures undertaken to combat the virus, including restrictions on commercial flights and travel, have had and will continue to have an adverse impact on the Debtors. As a result of the ongoing pandemic and its consequences, the Debtors are facing significantly reduced revenues from ticket sales and ancillary revenues, government prohibitions globally on international flights, substantial ongoing contractual obligations to their lessors, lenders and other creditors, and a near complete standstill of the global economy—all with significant continued impact and limited visibility as to the potential market recovery.

13. On March 20, 2020, the Republic of Colombia, consistent with what numerous other governments around the world have done, announced that it would close its airspace to address the spread of COVID-19. As a result of the restrictions imposed by the Colombian government, as well as similar measures in various other of the Debtors' primary markets, on March 24, 2020 the Debtors announced that they were suspending all scheduled passenger flights from March 25, 2020 until at least the end of April 2020; this situation has now been extended and is ongoing, and no date has been established for restart of flights.

14. Nevertheless, notwithstanding the fact that the Debtors' passenger transport business has been grounded, the Debtors must obtain immediate authority to pay certain prepetition claims (including various vendor claims) in order to avoid irreparable harm to their businesses. The Debtors' cargo transport business remains in full operation, and generally has not been subject to the travel restrictions imposed by various governments in the markets which the Debtors operate. Moreover, the Debtors also must continue to operate charter flights, repatriation flights, and "ferry flights" of their passenger aircraft, which involve the repositioning and relocation of various passenger aircraft depending on aircraft parking and storage availability in various locations. The Debtors also continue to perform certain "lead time" operations in

anticipation of a modest near-term resumption of passenger flights. Certain operations must be undertaken sufficiently in advance—such as aircraft maintenance, ticket sales, and ongoing flight training—to allow for passenger flights to timely resume when circumstances permit. The ability of the Debtors to continue their derivatives program is an integral part of maintaining such operations and preparatory activity in a financially responsible manner.

15. Additional information regarding the Debtors’ business, capital structure, and the circumstances leading to commencement of these Chapter 11 Cases is set forth in the *Declaration of Adrian Neuhauser in Support of Chapter 11 Petitions and First Day Motions* (the “First Day Declaration”), which is being filed contemporaneously herewith and is incorporated by reference herein.

### **BACKGROUND RELEVANT TO MOTION**

#### **A. Need for Debtors’ Derivative Contracts**

16. As is the case with all major airlines, the Debtors’ business is sensitive to fluctuations in interest rates and certain commodities prices. Consequently, the Debtors are, and have historically been, parties to numerous derivative contracts to reduce the risks associated with these fluctuations. Such contracts have included options, swaps and forward contracts concerning (i) jet fuel, (ii) interest rates, and (iii) currency (collectively, and together with all similar hedging and derivative contracts, the “Derivative Contracts”). The Debtors’ Risk Committee is charged with determining which instruments should be used to hedge against fluctuations in jet fuel, interest rates, and currency rates, as well as the duration of the corresponding Derivative Contracts. The Debtors’ Treasury Department, in turn, executes on the Risk Committee’s strategy.

17. Generally, Derivative Contracts are governed by and documented in the form of (i) master agreements; (ii) confirmations issued under general terms and conditions; (iii) enabling agreements; or (iv) single transaction agreements. Such contracts usually provide that they may be

terminated upon, among other events, the commencement of a bankruptcy case. Upon such termination, both parties may cease further performance and aggregate amounts owed by each party may be “netted”, thereby providing for a net settlement payment from one party to the other.

18. Derivative Contracts typically include provisions for collateral support and obligations to post margin. Posting of margin requires participants to periodically deposit money with their counterparties based on the mark-to-market values of the Derivative Contracts. A re-evaluation of the credit support requirement occurs periodically throughout the term of each Derivative Contract. Re-evaluation often results in one party having either to provide additional collateral or return some of the existing collateral.

**B. Debtors’ Use of Derivative Contracts**

19. The following is a description of the primary types of Derivative Contracts to which the Debtors are currently, or have historically been, party:

20. Jet Fuel Costs. The Debtors enter into Derivative Contracts in the ordinary course of business to reduce existing or expected risks associated with fluctuations in jet fuel prices. The Debtors’ fuel-hedging program is based on both fixed swaps and options on jet fuel. The payoff on the jet fuel hedges is determined by the difference between a fixed strike price and the average underlying price for jet fuel over a preset period. The mark-to-market valuation is made monthly. These fixed swaps and options allow the Debtors to efficiently hedge their exposure to fluctuations in the price of jet fuel. Based on the Debtors’ 2020 consumption of jet fuel, a 1% increase in fuel cost would generally result in a \$10.3 million increase in the Debtors’ fuel expense.

21. The jet fuel hedges usually have a maximum tenor of 12 months (in very limited circumstances, the tenor could be increased beyond a year, but only with prior authorization from the Debtors’ Board of Directors). The Debtors historically have entered into Derivative Contracts for approximately 10 to 50 percent of their annual jet fuel consumption requirements; and in recent

years, the Debtors have sought to hedge for approximately 10 to 30 percent of their annual jet fuel consumption requirements.

22. The amount of jet fuel that is hedged by the Debtors in any particular year and at any particular time depends on a variety of factors relating to the price of jet fuel and the relative cost of entering into Derivative Contracts to hedge the Debtors' exposure to fluctuations. The Debtors measure periodically their exposure to jet fuel prices variability and calculate their EBIT-at-Risk (VaR) and the VaR reduction based on the jet fuel hedges. At the end of May 2019, the jet fuel Derivative Contracts were projected to reduce the VaR calculated in respect of the next 12 months (including the first half of 2020) by \$10 million.

23. The Debtors do not post collateral for their jet fuel options but do, from time to time, post collateral in connection with their swap arrangements. The Debtors pay a premium upfront for the purchased options and are not required to make additional payments during the term of the contract. As a result, the Debtors' maximum exposure under such options will be the value of the premiums paid, and the Debtors are not at risk for a margin call. On the other hand, the Debtors' exposure under their fixed swaps is determined based on the difference between the specified strike price and the price of jet fuel during the applicable settlement period.

24. Interest Rates. The Debtors historically have entered into swaps to minimize the effects of changes in interest rates on their business or to optimize the amount of floating rate or fixed rate debt within the Debtors' capital structure. An interest rate swap contract obligates one party to make periodic payments calculated by applying a fixed rate of interest to a specified principal amount, known as a notional amount, while the other party is obligated to make periodic payments calculated by applying a floating rate of interest to the same notional amount.

25. The Debtors are currently party to eleven (11) interest rate swaps with two financial institutions. In connection with these swaps, the Debtors maintain a balance account with each counterparty, as well as a credit line to enter into swaps. The swaps are settled on a monthly or quarterly basis, and, if necessary, the Debtors are required to post additional funds in the balance accounts. As of the Petition Date, on a mark-to-market basis, the Debtors' currently have approximately \$1.8 million in exposure under their interest rate swap portfolio.

26. Foreign Exchange Rates. Because of the international nature of the Debtors' business, fluctuations in foreign currency exchange rates may significantly affect their operations. To manage or reduce the risks associated with fluctuations in foreign currency exchange rates, the Debtors historically have entered into forward contracts based on the value of the U.S. dollar relative to international currencies, such as the Colombian peso and Brazilian real. A currency forward contract locks in an exchange rate for the purchase or sale of a currency on a future date. The forward contracts do not involve any upfront payment, but rather only a settlement payment (or deliverables) at a future date.

27. As of the Petition Date, the Debtors are not party to any Derivative Contracts for foreign currencies because the Debtors determined in their business judgment that such Derivative Contracts were not necessary at the time in light of, among other things, the costs of entering into such contracts. During the pendency of these cases, however, circumstances may change and the Debtors may determine, in their business judgment, that entering into Derivative Contracts for foreign currency rates may be necessary.

#### **BASIS FOR RELIEF REQUESTED**

28. A reasonable hedging and derivative contract strategy is necessary to manage responsibly the financial risks attendant to the operation of an airline. The Debtors believe that

entering into and performing under the Derivative Contracts falls within the ordinary course of their business and thus does not require authorization from the Court. However, to make clear to potential counterparties that the Debtors do in fact have such authority, the Debtors seek a confirmatory order of the Court. In addition, to the extent the Debtors will need to provide collateral to secure their obligations under the Derivative Contracts, the Debtors request the Court's permission to post such collateral or provide other credit support.

**A. The Debtors Should Be Authorized to Continue Performance under Prepetition Derivative Contracts**

29. The Debtors seek to perform all obligations arising under the Derivative Contracts, including (i) making all payments when due and (ii) providing credit support as necessary or appropriate, including, but not limited to, posting collateral or margin and/or the prepayment and settlement of the Derivative Contracts.

30. Recognizing the unique status of certain derivative contracts, such as forward contracts, commodities contracts, securities contracts, certain repurchase agreements, and swap agreements, in the financial and commodity markets, Congress added sections 555, 556, 559 and 560 to the Bankruptcy Code, which contain the "safe harbor" provisions that apply to such arrangements and accommodations. These safe-harbor provisions (i) allow a non-debtor party to terminate, liquidate, and apply collateral held under a derivative contract upon the commencement of a bankruptcy case; (ii) protect prepetition payments made under a derivative contract by a debtor to a non-debtor party from the avoidance powers of a trustee or debtor-in-possession (except in particular cases of actual intent to defraud other creditors); and (iii) permit the non-debtor party to set off mutual claims against a debtor under a Derivative Contract without obtaining relief from the automatic stay.

31. Based on the foregoing, counterparties to the Derivative Contracts may seek to terminate these contracts prematurely and discontinue trading prospectively because of, among other things, a perception that the Debtors present an unacceptable level of risk exposure without adequate credit support. The Debtors, accordingly, believe that it is necessary and appropriate to obtain from this Court an order that confirms the Debtors' authority to continue their customary practices regarding the Derivative Contracts in order to overcome such trepidation.

32. Pursuant to sections 105(a) and 1107 of the Bankruptcy Code, the Debtors must preserve their assets and protect the value of their estates. See In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Pursuant to section 105(a), the Court has the power to authorize the Debtors to perform such actions as are necessary to fulfill the requirements of section 1107. The Debtors' existing Derivative Contracts protect the estates against fluctuations in fuel costs and interest rates. The Debtors believe that an order confirming their authority to honor their obligations under the Derivative Contracts is necessary to keep such Derivative Contracts in place.

33. Furthermore, the Derivative Contracts are subject to price fluctuations requiring, in essence, the counterparties to provide the Debtors with post-petition credit. For the reasons described *infra*, the Debtors should be authorized to provide inducements in return for such credit pursuant to section 364(c)(1) and (2) of the Bankruptcy Code.

34. Termination of the Debtors' Derivative Contracts would (a) cause disruption to the Debtors' operations; (b) require the immediate attention of the Debtors' management at a time when their resources are extremely stressed; and (c) expose the Debtors to fluctuations in jet fuel prices and interest rates to which their competitors are not similarly exposed. In light of these foreseeable risks, the Court should authorize the Debtors to continue performing under their Derivative Contracts, and, where necessary, provide credit support.

35. Courts in this District have granted similar relief in cases of similar size and complexity, including in certain airline cases. See, e.g., In re AMR Corp., Case No. 11-15463-SHL (Bankr. S.D.N.Y. Dec. 22, 2011) (authorizing the debtors to comply with the terms of their prepetition derivative contracts and provide credit support relating to both pre- and post-petition derivative contracts); In re Northwest Airlines Corp., Case No. 05-17930-ALG (Bankr. S.D.N.Y. Oct. 7, 2005) (same); See also In re NRG Energy, Inc., Case No. 03-13024-PCB (Bankr. S.D.N.Y. June 30, 2003).

**B. The Debtors Should Be Authorized to Enter into Post-Petition Derivative Contracts**

36. The Debtors believe that entering into additional Derivative Contracts falls within the ordinary course of their business, and thus does not require authorization from the Court. However, to make it clear to potential counterparties that the Debtors do, in fact, have such authority, the Debtors seek an order of the Court confirming such authority.

37. Section 363(c)(1) of the Bankruptcy Code provides, in relevant part, that a debtor-in-possession “may enter into transactions . . . in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.” 11 U.S.C. § 363(c)(1). As hedging is a routine and commercially necessary practice in the airline industry, the Debtors believe that entering into Derivative Contracts is in the ordinary course of their businesses, and therefore, they can consummate such transactions without notice and a hearing. See Med. Malpractice Ins. Ass’n v. Hirsch (In re Lavigne), 114 F.3d 379, 384 (2d Cir. 1997) (“The term ‘ordinary course of business’ generally has been accepted to embrace the reasonable expectations of interested parties of the nature of transactions that the debtor would likely enter in the course of its normal, daily business.” (internal quotation marks and citation omitted)); In re Coordinated Apparel, Inc., 179 B.R. 40, 43 (Bankr. S.D.N.Y. 1995) (holding that

entering into a contract for the manufacture of clothing was within the ordinary course of business of a debtor engaged in the business of manufacturing and distributing clothing).

38. While the Bankruptcy Code does not define “ordinary course,” courts generally apply a two-step inquiry in determining whether this standard has been met. Lavigne, 114 F.3d at 385; In re NextWave Pers. Commc’ns., Inc., 244 B.R. 253, 275 (Bankr. S.D.N.Y. 2000); In re Leslie Fay Cos., Inc., 168 B.R. 294, 304 (Bankr. S.D.N.Y. 1994).

39. The first step, referred to as the “horizontal dimension test,” considers whether the post-petition transaction is of a sort commonly undertaken by companies in the debtor’s industry as ordinary business. Lavigne, 114 F.3d at 385; Comm. of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 618 (Bankr. S.D.N.Y. 1986) (debtor-in-possession’s employment of professional lobbyists post-petition satisfied horizontal dimension test because debtor had used lobbyists extensively in the past and other companies similarly situated to debtor routinely employed such lobbyists); Coordinated Apparel, 179 B.R. at 43 (horizontal dimension test satisfied where debtor, which was clothing manufacturer and distributor, entered into a clothing manufacturing contract post-petition because it was the type of transaction into which similar companies would enter).

40. The second part of the test is the “vertical dimension test,” which considers the creditors’ expectations based on the debtor’s past business practices. Lavigne, 114 F.3d at 385; Coordinated Apparel, 179 B.R. at 43 (vertical dimension test satisfied because “a hypothetical creditor could reasonably expect a debtor engaged in the business of manufacturing and distributing clothing to enter into a contract for the manufacture of clothing”). Under this test, a court considers whether the transaction subjects a hypothetical creditor to an economic risk that is different from that which the creditor accepted when it extended credit. Leslie Fay, 168 B.R. at

304 (“In making this determination, courts look to the debtor’s prepetition business practices and conduct and compare them to its course of conduct post-petition.”); See also Lavigne, 114 F.3d at 385.

41. Pursuant to both the horizontal and vertical dimension tests, the Debtors should be authorized to continue entering into Derivative Contracts. First, companies in the airline industry routinely enter into such contracts. See, e.g., In re AMR Corp., Case No. 11-15463-SHL (Bankr. S.D.N.Y. Dec. 22, 2011); In re Northwest Airlines Corp., Case No. 05-17930-ALG (Bankr. S.D.N.Y. Oct. 7, 2005); In re US Airways Grp., Inc., Case No. 04-13819 (Bankr. E.D. Va. Jan. 27, 2005). Second, as described above, the Debtors routinely entered into such transactions in the past and, accordingly, a hypothetical creditor would not be exposed to a different risk than it expected when it provided credit to the Debtors. Moreover, most of the Debtors’ annual and quarterly public filings make clear that the Debtors regularly enter into Derivative Contracts.

42. Section 105(a) of the Bankruptcy Code provides that a “court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C § 105(a). Such orders are appropriate where they are essential to the debtor’s reorganization efforts and fundamentally fair. See e.g., In re C.A.F. Bindery, Inc., 199 B.R. 828, 835 (Bankr. S.D.N.Y. 1996); In re Fin. News Network, Inc., 134 B.R. 732, 735-36 (Bankr. S.D.N.Y. 1991); Momentum Mfg. Corp. v. Emp. Creditors Comm. (In re Momentum Mfg. Corp.), 25 F.3d 1132, 1136 (2d Cir. 1994) (“It is well settled that bankruptcy courts are courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process.”). In this instance, the Court should use its broad equitable powers to confirm the Debtors’ authority to enter into Derivative Contracts in the ordinary course of business.

43. In view of the Debtors' substantial consumption of jet fuel, the extent of their business operations in foreign countries, and the highly volatile state of the global economy, it is crucial that the Debtors be able to freely hedge jet fuel prices, foreign currency exchange rates, and interest rates. As such, the Debtors believe it is in the best interests of their estates to have the authority to enter into Derivatives Contracts post-petition.

**C. The Debtors Should Be Authorized to Provide Credit Support under Derivative Contracts**

44. In certain circumstances, in the ordinary course of the Debtors' business operations, the counterparties to their Derivative Contracts require that the Debtors' obligations thereunder be secured by various forms of credit support. Industry practice requires "out of the money" parties to Derivative Contracts to provide credit support in the ordinary course of business based upon net mark-to-market valuations. Circumstances may arise that require the Debtors to grant their counterparties such protections with regards to Derivative Contracts entered both pre-petition and post-petition. The Debtors expect that their counterparties may be willing to extend or continue to extend credit in exchange for certain inducements, such as the granting of superpriority claims or liens on certain unencumbered collateral pursuant to section 364(c)(1) and (2) of the Bankruptcy Code.

45. Both are appropriate under section 364(c) of the Bankruptcy Code, which provides, in relevant part:

(c) . . . the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt –

(1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;

(2) secured by a lien on property of the estate that is not otherwise subject to a lien; or

(3) secured by a junior lien on property of the estate that is subject to a lien.

11 U.S.C. § 364.

46. Generally, courts apply a three-part test to determine whether a debtor may obtain credit under section 364(c). The three-part test includes demonstrating that (i) the debtor cannot obtain credit without granting the protections sought, (ii) the credit is necessary to preserve the value of the estate, and (iii) the terms of the credit agreement are fair, reasonable, and adequate given the circumstances of the debtor-borrower and the proposed lender. See In re Aqua Assocs., 123 B.R. 192, 195-96 (Bankr. E.D. Pa. 1991).

47. Courts will evaluate the facts and circumstances of the particular case and accord significant weight to the necessity for obtaining financing. See In re Ames Dep't Stores, Inc., 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990). Debtors are generally permitted to exercise their business judgment consistent with their fiduciary duties when evaluating the necessity of proposed protections for a party extending credit under section 364 of the Bankruptcy Code. Id. at 38.

48. Although the Debtors are seeking relief under section 364(c) of the Bankruptcy Code, none of the consequences that courts are generally concerned about in determining whether it is appropriate to grant section 364 relief exist in these cases. For instance, the Debtors are not seeking a priming lien under section 364(d) of the Bankruptcy Code, as the property on which they would seek to grant liens is unencumbered. See Ames, 115 B.R. at 37. Nor is the purpose of such relief to benefit any particular creditor. See id. at 39. Simply stated, the relief sought herein serves to benefit the Debtors' creditors by maintaining the Debtors' operations and maximizing the Debtors' estates. Accordingly, the Debtors believe that the relief sought represents a fair and efficient mechanism for preserving the viability of the Debtors' businesses, while providing counterparties with sufficient inducement to enter into and continue performing under the Derivative Contracts.

49. Courts in this district have granted similar relief in comparable chapter 11 cases. See, e.g., In re AMR Corp., Case No. 11-15463-SHL (Bankr. S.D.N.Y. Dec. 22, 2011) (authorizing the debtors to comply with the terms of their prepetition derivative contracts and provide credit support relating to both pre- and post-petition derivative contracts); In re Northwest Airlines Corp., Case No. 05-17930-ALG (Bankr. S.D.N.Y. Oct. 7, 2005) (same); In re NRG Energy, Inc., Case No. 03-13024-PCB (Bankr. S.D.N.Y. June 30, 2003) (same).

50. Accordingly, the Debtors request authority to provide credit support as necessary to secure their obligations under their pre-petition and post-petition Derivative Contracts.

#### **RESERVATION OF RIGHTS**

51. Nothing contained herein is intended to be or shall be construed as: (i) an admission as to the validity of any claim against the Debtors; (ii) a waiver of the Debtors' or any appropriate party in interest's right to dispute any claim; or (iii) an approval or assumption of any agreement, contract, program, policy, or lease under section 365 of the Bankruptcy Code. Likewise, if the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended to be and should not be construed as an admission to the validity of any claim or waiver of the Debtors' rights to dispute such claim subsequently.

52. Moreover, the Debtors, by filing this Motion, are not expressing a view as to whether any particular contract falls within the purview of sections 556 or 560 of the Bankruptcy Code or that any particular counterparty is entitled to exercise rights pursuant to those sections.

#### **BANKRUPTCY RULE 6003 IS SATISFIED AND REQUEST FOR WAIVER OF STAY**

53. The Debtors further submit that because the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtors for the reasons set forth herein and in the First Day Declaration, Bankruptcy Rule 6003 has been satisfied and the relief requested herein should be granted.

54. Specifically, Bankruptcy Rule 6003 provides:

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, issue an order granting the following: . . . (b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001 . . . .

Fed. R. Bankr. P. 6003.

55. As described herein, the Debtors' business operations depend on hedging and derivative transactions to reduce the risks associated with fluctuations in jet fuel prices, currency exchange rates, and interest rates. The Debtors need to maintain these Derivative Contracts to avoid a significant disruption to their hedged positions. Accordingly, the Debtors submit that the relief requested herein is necessary to avoid immediate and irreparable harm, and, therefore, Bankruptcy Rule 6003 is satisfied.

56. The Debtors further seek a waiver of any stay of the effectiveness of an order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h). As set forth above, the relief requested herein is essential to prevent immediate and irreparable damage to the Debtors' operations, going-concern value, and their efforts to pursue an efficient resolution to these Chapter 11 Cases.

57. Accordingly, the relief requested herein is appropriate under the circumstances and under Bankruptcy Rules 6003 and 6004(h).

**NOTICE**

58. The Debtors will provide notice of this Motion to the following parties: (a) the Office of the United States Trustee for the Southern District of New York; (b) the holders of the forty (40) largest unsecured claims against the Debtors (on a consolidated basis); (c) the holders of the five (5) largest secured claims against the Debtors (on a consolidated basis); (d) the Internal Revenue Service; (e) the Securities and Exchange Commission; (f) the Federal Aviation Administration; (g) the counterparties to the Derivative Contracts; and (h) any party that requests service pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

**NO PRIOR REQUEST**

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

WHEREFORE, the Debtors respectfully request that this Court enter orders, substantially in the form of the Proposed Interim Order and Proposed Final Order, granting the relief requested herein and granting such other and further relief as is just and proper.

Dated: New York, New York  
May 10, 2020

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**EXHIBIT A**

**Proposed Interim Order**

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

-----X  
In re: : Chapter 11  
: :  
AVIANCA HOLDINGS S.A., *et al.*,<sup>1</sup> : Case No. 20-11133 (MG)  
: :  
Debtors. : (Joint Administration Requested)  
: :  
-----X

**INTERIM ORDER PURSUANT TO SECTIONS 105(a), 363(c),  
AND 364(c) OF THE BANKRUPTCY CODE FOR AUTHORIZATION  
TO ENTER INTO, CONTINUE PERFORMANCE AND PROVIDE  
CREDIT SUPPORT UNDER HEDGING AND DERIVATIVE CONTRACTS**

Upon consideration of the motion (the “Motion”)<sup>2</sup> of the above-captioned debtors and debtors-in-possession (the “Debtors”), seeking entry of an order (this “Interim Order”) pursuant to sections 105(a), 363, and 364(c) of the Bankruptcy Code (i) authorizing, but not directing, the Debtors to continue performing under their existing Derivative Contracts; (ii) authorizing, but not directing, the Debtors to enter into and perform under Derivative Contracts in accordance with their ordinary business practices; and (iii) authorizing, but not directing, the Debtors to provide

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

<sup>2</sup> Capitalized terms not defined herein shall have the meaning ascribed to them in the Motion.

credit support as may be necessary to implement pre-petition or post-petition Derivative Contracts; and this Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated February 1, 2012; and it appearing that venue of these Chapter 11 Cases and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that this proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b); and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and upon the Motion and the *Declaration of Adrian Neuhauser in Support of the Debtors' Chapter 11 Petitions and First Day Orders*, dated as of the Petition Date; and upon the statements of counsel in support of the relief requested in the Motion at the hearing before the Court; and all of the proceedings had before the Court; and this Court having determined that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors and other parties-in-interest; and after due deliberation thereon; and good and sufficient cause appearing therefor,

**IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED and approved on an interim basis as set forth in this Order.
2. The final hearing (the "Final Hearing") on the Motion shall be held on \_\_\_\_\_, 2020, at \_\_:\_\_.m., prevailing Eastern Time. Any objections or responses to entry of a final order shall be filed on or before 4:00 p.m., prevailing Eastern Time, on \_\_\_\_\_, 2020, and shall be served on: (a) the Debtors; (b) proposed counsel to the Debtors; (c) counsel to any statutory committee appointed in these cases; and (d) the Office of the United States Trustee for the Southern

District of New York. In the event no objections to entry of a final order are timely received, this Court may enter a final order without need for the Final Hearing.

3. The Debtors are authorized, but not directed, to continue to perform under their prepetition Derivative Contracts and enter into new Derivative Contracts, as necessary, all in accordance with their past practices, in the ordinary course of business, and without further order of this Court.

4. The Debtors may provide credit support and issue settlement or termination payments, each in the ordinary course of business, with respect to prepetition and postpetition Derivative Contracts, without further order of this Court.

5. Nothing in this Interim Order or the Motion shall constitute a rejection or assumption by the Debtors of any executory contract relating to their Derivative Contracts or otherwise.

6. Notwithstanding the relief granted herein and any actions taken hereunder, nothing herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any party.

7. Each of the financial institutions at which the Debtors maintain their accounts related to the Derivative Contracts is authorized to honor checks and electronic payment requests presented for payment of obligations related to the Derivative Contracts and all fund transfer requests made by the Debtors related thereto to the extent sufficient funds are on deposit in such amounts.

8. Notice of the Motion as provided therein shall be deemed good and sufficient.

9. Bankruptcy Rule 6003(b) has been satisfied because the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtors.

10. Notwithstanding any applicability of Bankruptcy Rule 6004, the terms and conditions of this Interim Order shall be immediately effective and enforceable upon its entry.

11. The Debtors are authorized and empowered to take all actions necessary to implement the relief requested in this Interim Order.

12. This Court shall retain jurisdiction with respect to any matters, claims, rights or disputes arising from or related to the implementation of this Interim Order.

Dated: \_\_\_\_\_, 2020

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UNITED STATES BANKRUPTCY JUDGE

**EXHIBIT B**

**Proposed Final Order**

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

-----X  
In re: : Chapter 11  
: :  
AVIANCA HOLDINGS S.A., *et al.*,<sup>1</sup> : Case No. 20-11133 (MG)  
: :  
Debtors. : (Joint Administration Requested)  
: :  
-----X

**FINAL ORDER PURSUANT TO SECTIONS 105(a), 363(c),  
AND 364(c) OF THE BANKRUPTCY CODE FOR AUTHORIZATION  
TO ENTER INTO, CONTINUE PERFORMANCE AND PROVIDE  
CREDIT SUPPORT UNDER HEDGING AND DERIVATIVE CONTRACTS**

Upon consideration of the motion (the “Motion”)<sup>2</sup> of the above-captioned debtors and debtors-in-possession (the “Debtors”), seeking entry of an order (this “Order”) pursuant to sections 105(a), 363, and 364(c) of the Bankruptcy Code (i) authorizing, but not directing, the Debtors to continue performing under their existing Derivative Contracts; (ii) authorizing, but not directing, the Debtors to enter into and perform under Derivative Contracts in accordance with their ordinary business practices; and (iii) authorizing, but not directing, the Debtors to provide

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<sup>2</sup> Capitalized terms not defined herein shall have the meaning ascribed to them in the Motion.

credit support as may be necessary to implement pre-petition or post-petition Derivative Contracts; and this Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated February 1, 2012; and it appearing that venue of these Chapter 11 Cases and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that this proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b); and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and upon the Motion and the *Declaration of Adrian Neuhauser in Support of the Debtors' Chapter 11 Petitions and First Day Orders*, dated as of the Petition Date; and upon the statements of counsel in support of the relief requested in the Motion at the hearing before the Court; and all of the proceedings had before the Court; and this Court having determined that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors and other parties-in-interest; and after due deliberation thereon; and good and sufficient cause appearing therefor,

**IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED and approved as set forth herein on a final basis.
2. The Debtors are authorized, but not directed, to continue to perform under their prepetition Derivative Contracts and enter into new Derivative Contracts, as necessary, all in accordance with their past practices and without further order of this Court.
3. The Debtors may provide credit support with respect to prepetition and postpetition Derivative Contracts as described in the Motion, without further order of this Court.
4. Nothing in this Order or the Motion shall constitute a rejection or assumption by the Debtors of any executory contract relating to their Derivative Contracts or otherwise.

5. Notwithstanding the relief granted herein and any actions taken hereunder, nothing herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any party.

6. Each of the financial institutions at which the Debtors maintain their accounts related to the payment of obligations related to the Derivative Contracts is authorized to honor checks and electronic payment requests presented for payment of obligations related to the Derivative Contracts and all fund transfer requests made by the Debtors related thereto to the extent sufficient funds are on deposit in such amounts.

7. Notwithstanding any applicability of Bankruptcy Rule 6004, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

8. Notice of the Motion as provided therein shall be deemed good and sufficient.

9. The Debtors are authorized and empowered to take all actions necessary to implement the relief requested in this Order.

10. This Court shall retain jurisdiction with respect to any matters, claims, rights or disputes arising from or related to the implementation of this Order.

Dated: \_\_\_\_\_, 2020

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UNITED STATES BANKRUPTCY JUDGE