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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.	(Jointly Administered)

[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 Union, S.A. de C.V. (N/A); Aeroinversiones de Honduras, S.A. (N/A); Aerovias 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); Isle& de Inversiones, S.A. de C.V. (N/A); Latin Airways Corp. (N/A); Latin Logistics, LLC (41-2187926); Nicaraguense de Aviacion, Sociedad Anonima (Nica, S.A.) (N/A); Regional Express Americas 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 Mexico, 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 Bogota, Colombia.

JOINDER AND STATEMENT OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN SUPPORT OF THE JOINT CHAPTER 11 PLAN OF AVIANCA HOLDINGS S.A. AND ITS AFFILIATED DEBTORS

The Official Committee of Unsecured Creditors (the "Committee") of Avianca Holdings S.A., *et al.* (collectively, the "Debtors"), by and through its undersigned counsel, hereby submits this statement in support of the confirmation of the *Joint Chapter 11 Plan of Avianca Holdings S.A. and Its Affiliated Debtors,* filed on September 15, 2021 [Docket No. 2137] (together with all schedules and exhibits thereto, and as has been and may be modified, amended or supplemented from time to time, the "Plan")[2] and joins in and adopts the Debtors' arguments set forth in the *Debtors' (I) Memorandum in Support of Confirmation of Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors and (II) Response to Objections Thereto* [Docket No. 2261] (the "Confirmation Brief"). The Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. The Committee believes that the settlement embodied in the Plan maximizes recoveries to holders of General Unsecured Avianca Claims. The Plan represents the culmination of more than a year of negotiations among the Debtors, the Committee, and the Debtors' pre- and postpetition lenders. As a result of these efforts, holders of General Unsecured Avianca Claims—who would receive no recovery in a hypothetical liquidation scenario—will share in a distribution valued at approximately $36,000,000.

2. The Plan is overwhelmingly supported by the class of General Unsecured Avianca Claims, which includes the 2020 Notes and the 2023 Notes. As evidenced in the *Certification of P. Joseph Morrow IV With Respect to the Tabulation of Votes on the Joint Chapter 11 Plan of*

[2] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Plan.

Avianca Holdings S.A. and its Affiliated Debtors [Docket No. 2239], 92% of the holders of General Unsecured Avianca Claims—representing 98% of the total amount of claims held by the class—voted to accept the Plan. That support was echoed by all other classes entitled to vote on the Plan, each of which voted in favor.

3. The Committee has reviewed the substantive objections to the Plan, which were filed by a small number of individual holders of 2023 Notes Claims and include (a) the *Preliminary Objection of Burlingame Investment Partners LP, William B Meier IRA, David M Kang SEP IRA, Blake W Kim Rollover IRA, and Im Jo Degerman Rollover IRA to Confirmation of the Proposed Joint Plan of Reorganization of Avianca Holdings S.A. and its Debtor Affiliates ("Avianca") Under Chapter 11 of the Bankruptcy Code* [Docket No. 2218] and the substantively identical objections filed by William B. Meier [Docket No. 2214], Im Jo Degerman [Docket No. 2222], and David M. Kang [Docket No. 2227] (collectively referred to herein as the "Burlingame Objections"),[3] and (b) the *Objection to Debtors' Third Amended Joint Chapter 11 Plan* [Docket No. 2231] (together with the Burlingame Objections, the "2023 Notes Objections"). The arguments set forth in the 2023 Notes Objections, which (at a high level) allege that the 2023 Notes are improperly treated under the Plan, are misplaced. Moreover, in many instances, they attempt to apply legal principles that are inapplicable under the circumstances of these Chapter 11 Cases.

4. The Committee supports the Plan and believes that the Plan complies with all requirements for confirmation pursuant to section 1129 of title 11 of the United States Code (the "Bankruptcy Code"). For the reasons set forth herein and in the Confirmation Brief, the Court should overrule the 2023 Notes Objections and confirm the Plan.

[3] The Committee notes that all but one of the Burlingame Objections was filed by a party acting in a *pro se* capacity, and agrees with the Debtors' argument in footnote 20 of the Confirmation Brief that the *pro se* objections should be stricken.

RESPONSE TO 2023 NOTES OBJECTIONS

a. The Plan does not violate section 506 of the Bankruptcy Code.

5. The Burlingame Objections incorrectly argue that the Plan violates section 506 of the Bankruptcy Code by treating the 2023 Notes Claims as unsecured, in part because the Debtors did not perform a "fair valuation." Burlingame Objections at ¶ B. To the contrary, the Debtors conducted an extensive, competitive marketing process to determine the value of their estates. *See Bank of Am. Nat. Tr. and Sav. Ass'n v. 203 N. LaSalle St. Partn.*, 526 U.S. 434, 457 (1999) ("[T]he best way to determine value is exposure to a market."). The Debtors contacted over 125 parties to identify the best terms on which they could secure exit financing, which resulted in the Debtors' equity being valued at $800 million and the transaction that is now embodied in the Plan. *See Debtors' Motion for an Order (I) Authorizing Entry into the Equity Conversion and Commitment Agreement and (II) Granting Related Relief* [Docket No. 2070], ¶ 15–17; *see also* Confirmation Brief at ¶ 103.

6. The 2023 Notes Objections also appear to argue that the 2023 Notes remain secured, which is not true. On August 28, 2020, the Debtors and a majority of the holders of the 2023 Notes (the "Consenting Noteholders") executed a restructuring support agreement (the "RSA"),[4] pursuant to which the Consenting Noteholders agreed to direct Wilmington Savings Fund Society, FSB, as trustee and collateral trustee for the 2023 Notes, to, among other things, consent to the Debtors' grant of liens securing their debtor-in-possession financing facility (the "DIP Facility"). Those liens primed the existing liens granted on all of the collateral securing the 2023 Notes, which now partially secures the DIP Facility (such collateral, the "Shared Collateral").

[4] Contrary to the assertions in the Burlingame Objections, the RSA was publicly filed by the Debtors on August 31, 2020, as Exhibit B to the *Debtors' Motion for Entry of an Order Authorizing Incurrence and Payment of Break-Up Fee, Transaction Expenses, and Indemnification Obligations in Connection with Postpetition Financing* [Docket No. 791].

See Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Grant Liens and Superpriority Administrative Expense Claims, (II) Modifying the Automatic Stay, and (III) Granting Related Relief [Docket No. 964] (the "DIP Motion"), ¶ 19. As set forth in the Final DIP Order, the DIP Facility Claims "shall be satisfied first from proceeds of the Shared Collateral." Final DIP Order at ¶ 28.

7. The Shared Collateral only constitutes a portion of the Debtors' assets.[5] Seeing as the fair market value of *all* of the Debtors' assets is insufficient to pay off the DIP Facility in full, the 2023 Notes necessarily are unsecured under section 506 of the Bankruptcy Code, pursuant to which a creditor's claim is secured only to the extent of the value of the collateral securing the claim. 11 U.S.C. § 506(a); *see Declaration of Adrian Neuhauser in Support of Confirmation of Joint Chapter 11 Plan of Avianca Holdings S.A. and Its Affiliated Debtors* [Docket No. 2263], ¶ 10–12. Accordingly, because they are unsecured, the 2023 Notes are "substantially similar" to the other General Unsecured Avianca Claims in Class 11 and properly classified with such claims under the Plan pursuant to section 1122(a) of the Bankruptcy Code. 11 U.S.C. § 1122(a).

b. Substantive consolidation is merited.

8. The 2023 Notes Objections argue that the Avianca Plan Consolidation is improper. The Second Circuit has determined that the critical inquiries for determining whether substantive consolidation is appropriate are whether (a) "creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit" or (b) "the affairs of the debtors are so entangled that consolidation will benefit all creditors." *In re Augie/Restivo Baking Co., Ltd.,*

[5] As set forth in the DIP Motion, the 2023 Notes are secured by liens on, *inter alia*, the Debtors' intellectual property registered in the United States, Colombia, Ecuador, Brazil, Chile, Mexico, Guatemala, Costa Rica, the United Kingdom and European Union, Honduras, Uruguay, Canada, Puerto Rico, and Panama, as well as approximately five Debtor-owned aircraft and the residual interest of the Debtors in other aircraft. DIP Motion at ¶ 18.

860 F.2d 515, 518 (2d Cir. 1988); *see In re Republic Airways Holdings Inc.*, 565 B.R. 710, 717 (Bankr. S.D.N.Y. 2017), *aff'd*, 582 B.R. 278 (S.D.N.Y. 2018).

9. As set forth in further detail in paragraphs 85–92 of the Confirmation Brief and the *Declaration of Ginger Hughes in Support of Confirmation of Joint Chapter 11 Plan of Avianca Holdings S.A. and Its Affiliated Debtors* [Docket No. 2262] (the "Hughes Declaration"), the Avianca Debtors have operated in a manner that justifies substantive consolidation: in particular, many of the most significant General Unsecured Avianca Claims are subject to cross-entity guarantees, and the separate corporate existence of many of the Avianca Debtors was driven principally by local regulatory requirements. The Avianca Debtors also act under one umbrella brand of "Avianca" and it is common for the Avianca Debtors to routinely transfer assets and incur intercompany liabilities based on the Avianca Debtors' needs as a whole. *See* Confirmation Brief at ¶ 89; *see also* Hughes Dec. at ¶ 22. Moreover, the Committee—which was closely involved in the negotiation of the Plan—agrees with the Debtors' assertion that untangling the Debtors' separate operations would be difficult, time-consuming, and expensive, with little benefit to any stakeholder, including holders of General Unsecured Avianca Claims, given the value available for distribution in these Chapter 11 Cases. *See* Confirmation Brief at ¶ 89.

10. Relatedly, if the Avianca Plan Consolidation is approved, then the Plan will constitute a single chapter 11 plan for all 37 consolidated Avianca Debtors. The assets and liabilities of those entities—including all general unsecured claims against them—will be treated as if they belong to a single debtor. *See In re Republic Airways*, 565 B.R. at 716 ("Substantive consolidation has the effect of consolidating assets and liabilities of multiple debtors and treating them as if the liabilities were owed by, and the assets held by, a single legal entity."). On the other hand, claims against Aerounión, Avifreight, and SAI ("the Unconsolidated Debtors")—each of

which has completely different assets and liabilities than the Avianca Debtors (and each other)—exist only against the applicable Debtor. The general unsecured claims against those entities are unimpaired simply because these Debtors are solvent and unconsolidated, not because of improper claims classification or a violation of the absolute priority rule (as the 2023 Notes Objections suggest).

11. Moreover, contrary to the argument made in the 2023 Notes Objections, the exclusion of the Unconsolidated Debtors from the Avianca Plan Consolidation is appropriate because these entities are not hopelessly entangled with the other Avianca Debtors. As described in the Hughes Declaration, these three unconsolidated entities maintain separate operations, as well as separate accounting and treasury systems. *See* Hughes Dec. at ¶ 27. Further, the Unconsolidated Debtors are not marketed by the Debtors as part of the "Avianca" brand. Thus, the Committee agrees with the Debtors' conclusion that the exclusion of the Unconsolidated Debtors from the Avianca Plan Consolidation is appropriate and warranted. *See* Confirmation Brief at ¶ 111.

c. The Plan does not otherwise violate the Bankruptcy Code or any contract.

12. The Burlingame Objections contain several arguments that are wholly unsupported by law or facts. Among other allegations, they make a conclusory statement that the Debtors have breached the DIP Credit Agreement, specifically by "using the 'DIP Loan Proceeds, Cash Collateral or Carve-Out Expenses'" to object, contest, or raise defenses to the validity, perfection, or priority of the 2023 Notes. As an initial matter, and as the Debtors note, none of the objecting parties have standing to raise such an argument because they are not parties to the DIP Credit Agreement. Nevertheless, the Debtors have not taken any such action, and the Burlingame Objections do not cite evidence in support of that argument. Similarly, the Burlingame Objections

provide no factual or legal support for their assertion that certain prepetition payments disclosed on Avianca Holdings, S.A.'s Statement of Financial Affairs violated section 548 of the Bankruptcy Code, nor is the Committee aware of any such violation.

13. Finally, the 2023 Notes Objections include arguments that holders of the 2023 Notes are not receiving the "indubitable equivalent" of their claims, that the Plan is not fair and equitable, and that the Plan unfairly discriminates against certain holders of General Unsecured Avianca Claims. These assertions should be disregarded because they are not legally relevant—the General Unsecured Avianca Claims are neither secured nor being crammed down under section 1129(b) of the Bankruptcy Code.

CONCLUSION

14. For the reasons set forth herein and in the Confirmation Brief, the Committee respectfully requests that the Court confirm the Plan and overrule the objections thereto.

Dated: October 25, 2021

By: /s/ Brett H. Miller

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