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Blake Kim
2309 Hillside Drive
Burlingame, CA 94010
Tel: (650) 393-4782
Fax: (650) 276-7477
Email: blakekim@burlingameinvest.com
*Pro Se, Blake W Kim Rollover IRA, Creditor*

Christopher Shenfield, Esq. (CA Bar No. 184374)
533 Airport Blvd, Suite 400
Burlingame, CA 94010
Tel: (650) 373-2054
Email: chris@shenfieldlaw.com
*Attorney for Burlingame Investment Partners, LP, William B Meier IRA, David M. Kang SEP IRA, and Im Jo Degerman Rollover IRA, Creditors*

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

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| In re:<br><br>AVIANCA HOLDINGS S.A., et al.,<br><br>Debtors[1] | Chapter 11<br>Case No. 20-11133 (MG)<br><br>(Jointly Administered)<br><br>Related Docket No. 1981 |

**[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

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This matter comes before the Court on the motion of Debtors seeking confirmation of the proposed "Further Modified Joint Chapter 11 Plan of Avianca Holdings S.A. and Its Affiliated Debtors" [Docket No. 2259] and Related Plan Documents (the "Plan")[2], as well as the objections of Creditors Burlingame Investment Partners LP, William B Meier IRA, David M Kang SEP IRA, Blake W Kim Rollover IRA, and Im Jo Degerman Rollover IRA ("the Burlingame Creditors") to Confirmation of the Proposed "Joint Plan of Reorganization of Avianca Holdings S.A. and Its Debtor Affiliates under Chapter 11 of the Bankruptcy Code [Docket No. 2218] and Related Objection Documents[3] (the "Burlingame Objections").

[2] Related Plan Documents include:• Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors [Docket No. 1981]; • Amended Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors [Docket No. 2078]; • Second Amended Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors [Docket No. 2109]; • Third Amended Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors [Docket No. 2129]; • Third Amended Joint Chapter 11 Plan of Avianca Holdings S.A. & its Affiliated Debtors (Solicitation Version) [Docket No. 2137]; • Fourth Amended Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors [Docket No. 2209]; • Disclosure Statement for Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors [Docket No. 1982]; • Amended Disclosure Statement for Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors [Docket No. 2079]; • Second Amended Disclosure Statement for Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors [Docket No. 2111]; • Third Amended Disclosure Statement for Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors [Docket No. 2131]; Third Amended Disclosure Statement for Joint Chapter 11 Plan of Avianca Holdings S.A. and its Affiliated Debtors (Solicitation Version) [Docket No. 2138]; • Memorandum Opinion Approving Third Amended Disclosure Statement, Solicitation Procedures and Other Relief [Docket No. 2135]; • Notice of Filing of Plan Supplement [Docket No. 2208]; • 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]; • Declaration of Ginger Hughes in Support of Confirmation of Joint Chapter 11 Plan of Avianca Holdings S.A. and Affiliated Debtors [Docket No. 2262]; and • Declaration of Adrian Neuhauser in Support of Confirmation of Joint Chapter 11 Plan of Avianca Holdings S.A. & Affiliated Debtors [Docket No. 2263].

[3] Related Objection Documents include • Preliminary Objection of William B Meier 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. 2214]; •Preliminary Objection of Blake W Kim 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. 2215]; •Preliminary Objection of Blake W Kim 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. 2215]; • Preliminary Objection of 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. 2222]; • Preliminary Objection of David W Kang SEP 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. 2227]; Notice of Filing of Exhibits B and C to the Preliminary Objection of the Burlingame Creditors [Doc 2281].

The motion of Debtors seeking confirmation of the Plan and the Objections of the Burlingame Creditors, *inter alia*, were heard by the Court on October 26, 2021.[4]

**FINDINGS OF FACT**

**I. THE CHAPTER 11 CASES**

1. On May 10, 2020 (the "Petition Date"), the Debtors commenced these Chapter 11 Cases. Filing included each of the Debtors, except AV Loyalty Bermuda, Ltd. and Aviacorp Enterprises, S.A. On September 21, 2020, the remaining two Debtors filed chapter 11.

2. On May 22, 2020, the United States Trustee for the Southern District of New York (the "U.S. Trustee") appointed an official committee of unsecured creditors in these Chapter 11 Cases pursuant to section 1102 of the Bankruptcy Code (the "Committee"). The Committee is comprised of seven members: (i) Caja de Auxilios y Prestaciones de la Asociacion Colombiana de Aviadores Civiles Acdac ("CAXDAC"), (ii) The Boeing Company, (iii) Puma Energy, (iv) SMBC Aviation Capital, Ltd., (v) KGAL Investment Management GmbH & Co KG, (vi) Delaware Trust Company, (vii) Colombian Pilots Union ("ACDAC").

**II. PRE-PETION SECURED NOTES DUE 2023**

3. In August 2019, the Debtors reprofiled their financial debt by exchanging 8.375% Senior Notes due 2020 (the "2020 Unsecured Notes") for a new issuance of Senior Secured Notes (the "2020 Secured Notes"). The aggregate principal amount of the 2020 Secured Notes was further subject to an automatic mandatory exchange for an equivalent principal amount of the 2023 Notes.

[4] Appearances for the Burlingame Creditors included Blake Kim as Pro Se for the Blake W Kim Rollover IRA [Doc 2215] Christopher Shenfield, attorney for the remaining Burlingame Creditors [Doc 2218].

4. As of the Petition Date, the aggregate principal amount of the 2023 Notes was approximately $484,419,000 secured by intellectual property and some aircraft (the "Shared Collateral"). [Docket 964]

5. As acknowledged by Debtors at the hearing held before the Court on October 26, 2021, the Burlingame Creditors are holders of 2023 Notes.

**III. DIP ROLL-UP and RSA**

6. The offer for the DIP roll-up was announced on August 20, 2020 from the Ad Hoc Group of holders of the 2023 Notes via the Indenture Trustee. The letter provided two options: 1) Consenting Noteholders without contributing New Money will get 80% haircut to rollover to Tranche A Notes; or, 2) New Money Contributing Noteholders will get 66% haircut on their 2023 Notes to rollover to Tranche A Notes. [Exhibit A of Doc 2215 and 2218]

7. The letter also stated that noteholders who do not participate in the rollover will retain their existing Notes and retain their 2023 Notes Collateral only junior in priority to the liens of Tranche A and Tranche B. [Exhibit A of Doc 2215 and 2218].

8. On August 28,2020, the Debtors executed the RSA. Exchange for agreements and concessions, the Debtors agreed to (i) stipulate the validity and priority of the Existing Notes, and (ii) roll up approximately $220 million of the Existing Notes for the benefit of all holders of the 2023 Notes. [Doc 964]

**IV. THE DIP AGREEMENT**

9. On October 3, 2020, the Debtors filed the Notice of Revised DIP Credit Agreement. The Notice was to the DIP lenders and other various parties in interest. [Doc. 1017 p.2, paragraph 2]. On

Section 2.06 (b), the Agreement stated that no money will be used against the Existing Notes in any manner and will validate the perfection and priority of the due amount, or the liens, or underlying collateral. The Agreement also said no money will be used in any way relating to this Agreement or any other DIP document and the Existing Notes. [ Doc. 1017, p. 219]

10. On October 5, 2020, the Debtors received the final order to obtain Debtor-in-Possession (DIP) financing [Doc 1031]. The DIP Agreement authorized for a credit facility of $1.99 billion ("the DIP Credit Facility"). The DIP Agreement primed the DIP loans by priming of all liens on the Existing Notes, liens on the Shared Collateral. Moreover, the DIP Agreement waived the Equitable Doctrine of Marshalling for the DIP lenders. [Doc 964, p. 136].

**V. AVIANCA HOLDINGS S.A.**

11. On September 8,2020, the Debtors filed Schedules of Assets and Liabilities for Avianca Holdings SA with assets of $539 million and liabilities of $927 million. This is the asset liability profile at the petition date. On the asset side, the intercompany stocks, internet domain names & websites, and good will were undetermined. Cash &cash equivalent was $33.5 million, Deposits were $18.5 million, Accounts Receivable was $484.4 million, and Other intangible or intellectual property was $2.9 million. [Doc 869]

12. Seven entities were listed under intercompany stocks with following ownerships: 1) Aerovías del Continente Americano S.A. Avianca (5.02%), 2) American Vacations S.A.S (50%), 3) AV International Holdco S.A. (100%) , 4) AV International Investments S.A. (100%), 5) AV Investments One Colombia S.A.S. (100%), 6) AV Investments Two Colombia S.A.S. (>1%), 7) Regional Express Américas S.A.S. (5.2%) [Doc 869]

13. Liabilities were categorized $9.1 million non-priority, $58.7 million Credit Agricole (10 spare engines), $375 million UMB Bank (credit card receivables), $484.4 million WSFS (2023 Bonds). [Doc 869]

14. On May 11, 2021, the Debtors filed Amended Statement of Financial Affairs for Avianca Holdings S.A. with supplemental attachments for payments and transfer to creditors within 90 days before the petition. There was $25 million insurance payment to Wilmington Trust Company, $16.8 million to Aerovias del Continente Americano SA, $5.2 million to Taca International Airlines SA, and $1.7 million to various individuals. [Doc 1668]

**VI. THE PLAN AND DISCLOSURE STATEMENT**

15. On August 10, 2021, the Debtors filed the Disclosure Statement (DS) [Doc 1981] and Plan [Doc 1982]. The DS described that the 2023 Notes have no collateral as a result of the DIP Roll-Up and the Equitable Doctrine of Marshalling was waived. Neither the DS nor the Plan performed any valuation on the collateral that is shared by the 2023 Notes and DIP lenders. Neither the DS nor the Plan performed any enterprise valuation or waterfall analysis.

16. On August 31, 2021, the Debtors filed exhibits to the Disclosure Statement, including the Financial Projections, Liquidation Analysis, and Additional Financial Materials. The analyses and projections of these Exhibits were mostly as of March 2021, seven months prior to the Confirmation Hearing. [Doc 2021]

17. On September 14, 2021, the Disclosure Statement hearing took place. On September 15, 2021, the third amended Disclosure Statement was approved, Solicitation and Voting Procedures, and Forms of Ballots were approved. And, established procedures for allowing certain claims for

voting purposes. And, scheduled Confirmation Hearing. And, established Notice and Objection procedures. [Doc 2136]

18. Blake Kim as Pro Se [Doc 2215] and Burlingame, et. al. represented by Christopher Shenfield [Doc 2218] objected to the Plan confirmation.

19. Blake Kim filed additional supporting exhibits [Doc 2281].

**VII. DECLARATION OF ADRIAN NEUHAUSER AND GINGER HUGHES**

20. On October 24, 2021 Adrian Neuhauser (AD) and Ginger Hughes (GH) gave their declarations in support of the Confirmation. [Doc 2263 and 2262]

21. AD is the President and CEO of Avianca Holdings S.A. ("Avianca") since April 2021. He was the CFO from July 2019 to April 2021. Prior to Avianca, AD was a Managing Director for Credit Suisse. From 2016 to 2019, he was based in Chile covering Latin American airlines. [Doc 2263]

22. AD is familiar with the affairs of Avianca including its books and records. He has reviewed the Plan and its supplemental documents. He believes the DIP Facility Claims exceeds the Shared Collateral. He believes the marketing process for new equity investment did not show better alternative than the Tranche B DIP Facility conversion into equity. [Doc 2263]

23. GH is a Managing Director and Partner of Seabury International Corporate Finance LLC and its affiliates ("Seabury"), the investment banker and financial advisor to the Debtors. She supports the Confirmation. [Doc 2262]

24. Seabury prepared the Liquidation Analysis (LA) of Avianca. The LA was performed under chapter 7 scenario using the unaudited book values as of March 31, 2021, except Cash and cash equivalent ("Cash"). Cash is based on pro forma using the Exit Facility closing. [Doc 2262]

25. GH submitted that under a chapter 7 liquidation, impaired classes including the general unsecured claims will receive less recovery than the Plan. She believes the Liquidation Analysis demonstrates the Plan is fair under section 1129(a)(7). [Doc 2262]

26. GH stated that substantive consolidation, excluding Aerounion, Avifreight, and SAI, is appropriate for the Debtors. Many of the Debtors have separate corporate existence. Except for the three, other Debtors are highly integrated and expensive to disentangle. She provided examples of cross-entity guarantees.

27. GH believes untangling provides little benefit to all stakeholders. She also believe the Tranche B Lenders may not convert to equity if the Plan does not settle with all the Debtors. [Doc 2262]

28. GH asserted that SAI, Aerounion, and Avifreight maintains separate operation from other Avianca debtors. She cited back office separations of the above three with the other Avianca debtors. Aerounion has distinct management accordingly. Avianca Holdings (AH) is a 90% shareholder in SAI and a 92% shareholder in Aerounion. [Doc 2262]

**CONCLUSIONS OF LAW**

29. The Debtors breached agreements stated on the Revised DIP Credit Agreement ("Agreement") [Doc 1017, p. 219]. The Agreement did not distinguish the parties for the Existing Notes. Although there was a clear distinction between the Consenting and Non-Consenting parties of the Existing Notes, the Agreement simply stated "the Existing Notes". Secondly, the Agreement directly impacts all the Existing Notes (including the Burlingame Creditors' 2013 Notes) since the

collateral supporting all the Existing Notes was being primed. As a result, third-party beneficiary to contracts should apply.

30. The Debtors exercised unfair treatment of similarly situated creditors. First, in the DIP rollup to to execute the RSA, which supports the Plan, the Ad Hoc Group of the 2023 Notes received very little haircut if at all on their 2023 Notes. Other similarly situated 2023 Noteholders were offered significant haircut if they chose to roll up their notes [Doc 2281 -Exhibit B]. This violates Code 1129.

31. In *In re Heritage Highgate, Inc., et al.* 679 F.3d 132 (3d Cir. 2012) ("*In re Heritage Highgate"*), the Third Circuit court clarified the burden of proof for secured claims. The Third Circuit held that a burden-shifting approach applies for Section 506(a). *Id.* at 136. First, the debtor has to first overcome the presumed validity and amount of the secured claim. *Id.* If the debtor "establishes with sufficient evidence that proof of the claim *overvalues* a creditor's secured claim because the collateral is of *insufficient value*, the burden shifts" to the creditor "to demonstrate by a preponderance of the evidence both the extent of its lien and the value of the collateral securing its claim." *Id.* The *In Re Heritage Highgate* court held that the value of collateral is based on the fair market value of the collateral at the time of confirmation. *Id.* at 142.

32. The Debtors failed to carry their burden under *In Re Heritage Highgate.* First, the Debtors did not perform any fair valuation for the collateral of the 2023 Notes or enterprise value of the firm. The Debtors argued that they performed a market test that focused on determining equity value of the firm. However, that is not the same as determining the value of the collateral or the value of the firm which is the Enterprise Value. In so doing, Debtors breached the Code 506(a)(1).

33. Proposed financial arrangements may not cannot be structured in such a manner as to prevent confirmation of any plan other than the Debtor's. *In re Latam Airlines Grp. S.A.*, 620 B.R. 722 (Bankr. S.D.N.Y. 2020) (citing *In re Latam Airlines Grp. S.A.*, 2020 WL 5506407 Sept. 10, 2020). The Debtors were not fair and equitable, again breaching 1129(b), by providing 100% recovery to many lower classes and similarly situated classes. The Debtors argued that the lower classes receiving 100% recovery are not part of the substantive consolidation because 1) they have separate book and records and 2) distinct management for Aerounion. However, the Debtors could not prove the separation of management overlap which is a requirement. The Exhibit B of our objection shows that SAI has the CEO of Avianca as a board member. In other words, there is a clear evidence of sharing of management, which is in violation of the corresponding rule.

34. The Debtors' disregard to their own Plan and usage of the DIP Agreement to circumvent the Absolute Priority Rule, which is one of the tenets of Bankruptcy Code, makes the Plan fundamentally flawed. *In Motorola, Inc. V. Official Comm. Of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d. 452, Second Circuit ruled that the most important consideration in determining whether a pre-plan settlement of disputed claims should be approved as being "fair and equitable" is whether the terms of the settlement comply with the Bankruptcy Code's distribution scheme.

35. The Debtors made certain payments and transfers to affiliates 90 days prior to the petition date from Avianca Holdings SA, the debtor to the 2023 Notes. $25 million in insurance payments and $22 million to its affiliates. If annualized, the total amount would be $188 million. This reduces the recovery of the 2023 Noteholders and, therefore, he constitutes a breach of Code 548.

36. If the 2023 Notes are found to be General Unsecured Claims, the Debtors are breaching Code 1122 by consolidating disparate creditors from different Debtors. The 2023 Noteholders' debtor, Avianca Holdings (AH), has much different asset-liability profile from other debtors. AH is a holding company with many valuable assets such as stocks of SAI, Aerounion, and AVI Freight as stated by Ginger Hughes. The most valuable assets of a holding company are its stock holdings. On Exhibit C [Doc 2281], SAI's company report from a third party showed that EBITDA of SAI enjoyed 728% growth in two years.

37. Although the asset-liability profile of AH on the petition date as evidenced above, excluded all its stock holdings of affiliates (including the 3 entities not consolidated), the assets far exceeded the liability since most of the 2023 Notes were rolled up to DIP. Moreover, if the assets that were transferred out of AH is considered (approximated another $188 million), the recovery for the 2023 Notes would be even greater. Lastly, all the subsidiary stock values would further increase the recovery value of the 2023 Notes.

38. On the other, many of the debtors that Avianca would like to consolidate under one common pool have very little or no assets. Of the approximate, $3 billion classified under the General Unsecured Claims (GUC), AH's portion of the GUC is approx. $200 million. This is less than 7%.

39. The Debtors cited the difficulty and greater costs in untangling various affiliates from substantive consolidation among other reasons. In re Owens Corning, the Third Circuit emphasized that substantive consolidation is a remedy that should be invoked sparingly and only under very narrowly defined circumstances. The bankruptcy court is a court of equity, not of convenience. Traditionally, courts of equity have been empowered to grant a broader spectrum of relief in keeping

with fundamental notions of fairness. The bankruptcy court can exercise its discretion to produce fair and just results so that fraud will not prevail. And, technical considerations should not prevent substantial justice from being done.

40. In a recent chapter 11 case that is still ongoing, the Debtors of Mallinckrodt plc submitted a Plan proposal that is highly prejudicial against select unsecured noteholders whom were consolidated with the other general unsecured claims from the Debtors' affiliates. The Debtors cited separate legal entities that had separate management and books and records, thus no requirement for substantive consolidation of the Debtors affiliates. However, the Debtors' treatment of the noteholders was highly prejudicial since the assets of certain affiliates were very small to non-existent while their liabilities were very large. Thus, the general unsecured claims for these affiliates should have no recovery value while the Debtors that guaranteed the notes had valuable assets for the Notes.

41. The Debtors' initial proposal on the GUC class were amended to provide several subsets of the GUC class and separate recovery pool for each subset of the GUC class. *See In re Mallinckrodt plc, et al,* Case No. 20-12522 (Bankr. D. Del.)

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**CONCLUSION**

For the foregoing reasons, the Plan cannot be confirmed as proposed with respect to the Burlingame Creditors. Pending resolution of the Burlingame Creditors' objections to the Plan, the Court orders that Plan confirmation with respect to the Burlingame Creditors be continued for a period of sixty days (60) days from the date of entry of this order to allow the parties time to seek a resolution of the Burlingame Creditors's objections through mediation and/or to conduct discovery on the issues raised by the Burlingame Creditors. A further hearing shall be set by the Court to occur after expiration of said period, at such time and place as further ordered by the Court.

**IT IS SO ORDERED**

Dated: _____
New York, New York

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MARTIN GLENN
United States Bankruptcy Judge