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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: Avianca Holdings S.A., *et al.*, Debtors.[1]	Chapter 11 Case No. 20-11133 (MG) (Jointly administered)

RESPONSE OF ASOCIACIÓN COLOMBIANA DE AVIADORES CIVILES ("ACDAC") TO OBJECTION OF AEROVÍAS DEL CONTINENTE AMERICANO S.A. AVIANCA ("AVIANCA") TO CLAIM NUMBER 1729

[1] A complete list of the Debtors and Reorganized Debtors in the above-captioned cases appears in footnote 1 to Avianca's Objection, ECF No. 2660.

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1. Reorganized Debtor Aerovías del Continente Americano S.A. Avianca ("Avianca") objects to Proof of Claim No. 1729 ("the Claim"), asserted by Asociación Colombiana de Aviadores Civiles ("ACDAC"). ECF No. 2660 ("the Objection").[2] Avianca argues the Claim should be disallowed because it is not entitled to a *prima facie* assumption of validity or, alternatively, that it is worth zero.

2. Neither contention has merit. The Claim has *prima facie* validity because it adequately identifies the basis of the liability—a specific provision of a 2017 Arbitration Award that has been assumed by Avianca. And the Claim has positive value because Avianca has failed to make all payments due under that provision.

3. ACDAC therefore asks the Court to overrule the objection, to determine the amount of the claim, and to allow the Claim in the amount determined pursuant to 11 U.S.C. § 502(b).

I. Statement of pertinent facts.

4. ACDAC is a Colombian labor organization and the longtime collective bargaining representative of Avianca pilots. *See* Declaration of Paola María Villota Martínez ("Villota Decl."), Objection Ex. A, par. 5.

5. Debtors have assumed ACDAC's collective bargaining agreement (*convención colectiva*) with Avianca and various other agreements governing the ACDAC-Avianca relationship via the Schedule of Assumed Contracts filed with their Plan Supplement. *See* Notice of Filing of Plan Supplement, ECF No. 2385, Exhibit E-1 (Schedule of Assumed Contracts). One

[2] Proof of Claim No. 1729, including its attachments as discussed below, is reproduced as Exhibit B to Avianca's Objection.

such assumed agreement is the 2017 Arbitration Award ("the 2017 Award") listed as Contract #446 on Debtors' Schedule of Assumed Contracts.

6. ACDAC's Proof of Claim No. 1729 seeks, on behalf of ACDAC's members, amounts owed to ACDAC pilots under Article XXVII of the 2017 Award. *See, e.g.*, *In re Blue Diamond Coal Co.*, 147 B.R. 720, 725–27 (Bankr. E.D. Tenn. 1992) (recognizing labor union's standing to assert contractual claims on behalf of its members); *U.S. Truck Co., Inc. v. Teamsters Nat'l Freight Indus. Negotiating Cmte. (In re U.S. Truck Co., Inc.)*, 89 B.R. 618, 620–23 (E.D. Mich. 1988) (same).

7. A certified translation of Article XXVII of the Arbitration Award is attached to Proof of Claim No. 1729 as Attachment B and is reproduced as Objection Ex. D. In pertinent part, Article XXVII reads:

> PARAGRAPH 1. It is understood that the payment of the operational efficiency incentive (monthly) and the payment of the fuel bonus (semi-annual) shall be paid in 100% of its corresponding value, pursuant to the ruling T069 of 2015.
>
> PARAGRAPH 2. AVIANCA must pay only the difference, should there be one, between the values paid during 2017, and as of the date of issue of this Arbitration Award, and that resulting after quantifying the increments decreed, so that there is no double payment, for the same item.

8. The monthly operational efficiency incentive and the semi-annual fuel bonus referenced in Paragraph 1 of Article XXVII (together, "the Incentives") together constitute a performance-based incentive or bonus scheme that supplements pilots' base salary. *See* Villota Decl., par. 9. The structure of both Incentives is that Avianca establishes a maximum amount that can be earned and then awards a percentage of that maximum amount to each pilot based on the achievement of various performance metrics such as time spent on the tarmac, stability of

landings, and amount of fuel conserved. *See id.*; *see also* Objection Ex. F (spreadsheets calculating a "Final Achievement Factor" percentage for each pilot for each incentive period).[3]

9. Avianca first introduced the Incentives in 2013 as a component of the so-called Voluntary Plan of Benefits that it unilaterally offered to non-union pilots. *See* Villota Decl., par. 6. Although Avianca also bargained with ACDAC in an effort to impose the performance-based Incentives on union pilots, ACDAC rejected the inclusion of these measures in its collective bargaining agreement (*convención colectiva*) with Avianca. *See id.*

10. In February 2015, the Constitutional Court of Colombia found that Avianca illegally discriminated against ACDAC's members by offering greater benefits under the Voluntary Plan of Benefits than were available under ACDAC's collective bargaining agreement. *See* Judgment T069 of 2015 (Attachment A to Proof of Claim 1729, which is reproduced along with its attachments as Objection Ex. B), par. 9.4.4. The court recognized that the effect of Avianca's action was to compel pilots to resign their union membership in order to obtain the greater benefits being offered to non-union pilots. *See id.* It further recognized that this action was taken in the context of ongoing negotiations between Avianca and ACDAC in order to pressure ACDAC to acquiesce to the company's bargaining demands. *See id.*

11. To remedy this violation, the court ordered Avianca to extend to ACDAC pilots "the benefits and increases established in the Voluntary Plan of Benefits," inclusive of the Incentives. *See id.*, Fifth Decree (also excerpted at Objection Ex. C). The court explained that this remedy would enable pilots who resigned from ACDAC to return to the union while retaining the greater "benefits and increases" offered under the Voluntary Plan of Benefits. *See*

[3] The term "Final Achievement Factor" first appears in the 2019–20 spreadsheet. For earlier years, this final percentage for determining Incentive pay appears in a column in Avianca's spreadsheets labeled "FL Total."

id. (requiring Avianca to "guarantee *with inter communis effects* the possibility of returning to ACDAC the workers who resigned from said organization for enjoying the benefits of the PVB [Voluntary Plan of Benefits]" and noting that "[t]his protection includes respect for the benefits that workers acquired by signing the collective agreement."). The court further explained that this remedy would "guarantee that they [*i.e.*, ACDAC pilots] will govern their employment relationship by the collective [bargaining] agreement, a document that includes the original clause as well as the benefits and increases that were extended to that agreement and that are found in the Voluntary Plan of Benefits." *See id.*

12. Following Judgment T069, Avianca began applying the Incentives to ACDAC pilots as well as non-union pilots. *See* Objection, par. 15. According to Avianca, it uses the same methodology for all pilots, meaning that ACDAC pilots, like non-union pilots, receive a percentage of the available maximum incentive amounts based on their attainment of the applicable performance-related metrics. *See id.*; *see also* Vallota Decl., par. 10.

13. In 2017, the parties were directed by the Colombian Ministry of Labor to arbitrate a dispute concerning compensation. *See* Vallota Decl., par. 8. As explained above, the resulting Award did not endorse Avianca's approach to paying the Incentives to ACDAC pilots using the same performance-based metrics applied to non-union pilots under the Voluntary Plan of Benefits. Rather, the 2017 Award expressly mandates that each Incentive "shall be paid in 100% of its corresponding value." *See supra* par. 7.

14. Following the 2017 Award, Avianca did not begin paying the Incentives to ACDAC pilots at 100% of their corresponding value. Rather, it has maintained, through the present, its pre-2017 practice of paying them only the percentages of the available Incentives

earned in accordance with the performance-based metrics applied to non-union pilots under the Voluntary Plan of Benefits. *See* Vallota Decl., par. 10.

II. ACDAC's Claim should be allowed.

A. ACDAC's Claim is entitled to *prima facie* validity.

15. Avianca argues that ACDAC's Claim is not entitled to *prima facie* validity because it lacks sufficient factual allegations or supporting documentation. *See* Objection, par. 14. Not so.

16. A bankruptcy "claim" includes any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed . . . ." 11 U.S.C § 101(5)(A). A timely filed proof of claim executed in accordance with the Federal Bankruptcy Rules constitutes *prima facie* evidence of the validity of the asserted claim. Fed. R. Bankr. P. 3001(f); *In re Avaya, Inc.*, 608 B.R. 366, 369 (Bankr. S.D.N.Y. 2019).

17. "For a proof of claim to be entitled to prima facie validity under Bankruptcy Rule 3001(f), the claim must allege 'facts sufficient to support a legal liability to the claimant.'" *In re Lehman Brothers Holdings Inc.*, 602 B.R. 564, 574 (Bankr. S.D.N.Y. 2019) (quoting *In re Allegheny Int'l Inc.*, 954 F.2d 167, 173 (3d Cir. 1992)). The supporting information required to comply with the Bankruptcy Rules is minimal. The Rules merely require that "when a claim . . . is based on a writing, a copy of the writing shall be filed with the proof of claim." Fed. R. Bankr. P. 3001(c)(1).

18. Once that standard is met, the claim "cannot be defeated by mere formal objection and the sworn proof is to be treated as some evidence even when it is denied." *In re Minbatiwalla*, 424 B.R. 104, 111 (Bankr. S.D.N.Y. 2010) (Glenn, J.) (quoting *In re Sabre Shipping Corp.*, 299 F. Supp. 97, 99 (S.D.N.Y. 1969)). Rather, the burden shifts to the objector to "introduce[] evidence as to the invalidity of the claim or the excessiveness of its amount . . . ."

See id. (quoting 4 COLLIER ON BANKRUPTCY 502.03[3][f] (rev. ed. 2007)); *see also In re Dreier LLP*, 544 B.R. 760, 766 (Bankr. S.D.N.Y. 2016) ("An objector may negate the prima facie validity of such a proof of claim and shift the burden of proof back to a claimant by producing evidence equal in force to the prima facie case . . . which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency." (internal citation and quotation omitted)).

19. ACDAC's claim clears this minimal formal threshold. It identifies and attaches the document—in this case, an assumed contract—on which the Claim is based. It alleges that ACDAC members are owed additional monies with respect to the Incentives pursuant to Article XXVII of the 2017 Award. And it includes a copy of Judgment T069, which explains the basis and background for the 2017 Award. This is all that is required for *prima facie* validity.

20. In short, Avianca's characterization of its Objection as a formal objection to *prima facie* validity is misplaced. Rather, the Objection is properly understood as substantive—an assertion that the company has fulfilled its obligations under Article XXVII of the 2017 Award and that no additional monies are due to ACDAC pilots. But Avianca is also incorrect in that respect, as explained below.

B. ACDAC's Claim has positive value.

21. Avianca argues that the value of ACDAC's Claim for unpaid but owed Incentive payments to ACDAC members would be zero and should be disallowed on this basis. *See* Objection, pars. 21–22. According to Avianca, this is because it applies the same performance-based formula for determining Incentive payment percentages "in an identical fashion" to both ACDAC and non-union pilots and because this is all that is required under the 2017 Award. *See id.* par. 21.

22. But Avianca is wrong about what the 2017 Award requires. The Award's directive is not simply to treat ACDAC and non-union pilots "in an identical fashion" in calculating a "Final Achievement Factor" representing some percentage of the maximum available Incentive payments for each relevant period. Rather, the 2017 Award expressly states that for ACDAC pilots, each Incentive "shall be paid in 100% of its corresponding value." *See supra* par. 7. In other words, no calculation or formula—identical or otherwise—is required. ACDAC pilots are simply entitled under the plain terms of the 2017 Award to 100% of the available Incentive premiums.

23. This plain-text reading of Article XXVII, Paragraph 1, of the 2017 Award is confirmed by Paragraph 2, which Avianca's reading of Paragraph 1 would render entirely superfluous.

24. Paragraph 2 provides that Avianca "must pay only the difference, should there be one, between the values paid during 2017, and as of the date of issue of this Arbitration Award, . . . so that there is no double payment, for the same item." *See supra* par. 7. Avianca acknowledges, however, that at the time of the 2017 Award, it was already treating ACDAC pilots identically to non-union pilots with respect to applying the same performance-based formula for determining Incentive pay. *See supra* par. 12. Thus if Paragraph 1 was merely intended to confirm that Avianca was to keep doing what it was already doing, there would be no need to pay any "difference . . . between the values paid during 2017" and the "100% of [] corresponding value" required under Paragraph 1, and no risk of "double payment." In short, if Avianca were correct about the meaning of Paragraph 1, there would be no need for Paragraph 2.

25. Under ACDAC's straightforward reading of Paragraph 1, however, Paragraph 2 serves a useful function. It recognizes that ACDAC pilots were already receiving Incentive

payments, but that these payments were less than what Paragraph 1 required. And it clarifies that Avianca need only pay the difference between the Incentive percentages it had already paid and the 100% level to which ACDAC pilots were entitled under Paragraph 1 so as to avoid any "double payment."

26. ACDAC's plain-text reading of the 2017 Award is also entirely consistent with Judgment T069. Judgment T069 required Avianca to extend to ACDAC pilots "the benefits and increases" unilaterally given to non-union pilots under the Voluntary Plan of Benefits. *See supra* par. 11. The Incentives constitute one such "increase."

27. At the same time, however, Judgment T069 makes clear that the court's intention in ordering Avianca to extend its non-union "benefits and increases" to ACDAC pilots was *not* to alter or interfere with ACDAC's existing collective bargaining regime. Quite the opposite: the court specifically wished to allow pilots to return to ACDAC without financial penalty—*i.e.*, without losing the "benefits and increases" they gained under the Voluntary Plan of Benefits—while at the same time "guarantee[ing]" that if they did so, their employment relationship with Avianca would go back to being governed by ACDAC's collective bargaining agreement rather than the terms unilaterally imposed by management. *See supra* par. 11.

28. For this reason, the remedy ordered in Judgment T069 cannot be understood to impose on ACDAC and its collective bargaining agreement the performance-based incentive pay scheme that the union rejected during bargaining. *See supra* par. 9. Rather, the Judgment T069 remedy simply required monetary equalization of ACDAC pilots to non-union levels—*i.e.*, extension of the "benefits and increases"—to ensure that pilots who chose to remain or return to ACDAC membership were not penalized financially for being covered by an agreement that did not include performance-based incentives.

29. The 2017 Award, in turn, confirms how such monetary equalization is to occur without intruding on the collective bargaining process. Avianca must simply pay each Incentive at 100% of its corresponding value so that ACDAC pilots retain the "benefits and increases" of the Voluntary Plan of Benefits without being saddled with terms and conditions of employment that have never been bargained with the union.

30. In sum, the plain text of the 2017 Award requires Avianca to pay ACDAC pilots at the maximum level of pay for the Incentives—*i.e.*, "100% of [the] corresponding value." Avianca concedes, however, that it has not done so, but rather has continued to pay ACDAC pilots at the lesser percentages calculated under the incentive formula applied to non-union pilots. *See supra* par. 12. ACDAC pilots are therefore entitled to the difference between the lesser percentages they have received and the full value to which they are entitled under the 2017 Award. And because this is so, ACDAC thus states a positive-value claim, the precise value of which is ascertainable by Avianca using its variable compensation worksheets.[4]

C. Avianca's zero-value arguments are unavailing.

31. Avianca acknowledges that it understands the nature of ACDAC's claim—that ACDAC believes its members are entitled under the 2017 Award to Incentive payments at the 100% level instead of at the performance-adjusted percentages that non-union pilots receive. *See* Objection, par. 18. It offers two defenses to ACDAC's position; both are unavailing.

[4] Although Avianca has shared its Incentive Payment calculation spreadsheets with ACDAC, *see* Objection, par. 15, and while these spreadsheets do appear to indicate the Avianca applies the same formula to all pilots, *see id.* par. 20 n.4, the versions produced to ACDAC do not contain all information necessary to calculate the value of ACDAC's claim. Specifically: 1) they are anonymized and thus do not clearly differentiate between union pilots who are owed additional money and non-union pilots who are not; and 2) they do not indicate the maximum monetary values associated with the Incentive percentages for each relevant calculation period. Avianca certainly has all this information, however, and thus should be readily able to calculate the difference between what ACDAC members earned and what they would have earned had they been paid at 100% of the value of the Incentives.

32. First, Avianca argues that ACDAC's interpretation of the 2017 Award "would convert Avianca's incentive compensation plan—which helps the business by encouraging pilots to fly efficiently—into a non-incentivizing pay raise that ACDAC has never bargained for." *See id.* This assessment is not wrong, but it cuts in ACDAC's favor, not Avianca's, for at least two reasons.

33. As to the fact that ACDAC never bargained for the non-incentivizing pay raise, this is true but irrelevant. As explained above, this pay "increase" was not bargained for, but was ordered by the 2017 Award and Judgment T069 to remedy Avianca's illegal actions in offering additional pay outside of the collective bargaining agreement to encourage pilots to defect from ACDAC. In short, ACDAC would hardly be getting something for nothing, as Avianca suggests, but would instead be getting exactly what the court and the arbitration panel ordered.

34. Similarly, Avianca's suggestion that paying ACDAC pilots at 100% would undercut the effectiveness of its incentive compensation plan is equally irrelevant. The incentive compensation plan is something that *Avianca* never successfully bargained for. Thus regardless of the extent to which that plan may "help[] the business," Avianca lacks the legal authority to impose such a radical change in terms and conditions of employment on ACDAC's members. In short, neither party is entitled to what it did not bargain for, but only one party—ACDAC—is the beneficiary of a separate, court-ordered entitlement.

35. At bottom, Avianca's interpretation of the 2017 Award, if endorsed by this Court, would represent a complete circumvention of the collective bargaining process. After being unable to implement a performance-based incentive plan through bargaining, the company implemented one unilaterally as to non-union pilots. After being told by a court that this was illegal, Avianca now baldly argues that the court-ordered remedy, as confirmed by the 2017

Award and as intended to address the harms caused to ACDAC, actually permits the company to impose on the union the same incentive plan that the company was unable to push through at the bargaining table. That makes no sense.

36. Fortunately, the plain text of the 2017 Award presents a more sensible outcome: simply pay ACDAC pilots at 100% of the value of the Incentives. This achieves the twin goals of Judgment T069: remedying the discrimination against ACDAC pilots vis-à-vis their non-union colleagues, while leaving their terms and conditions of employment subject to the collective bargaining agreement which, to date, does not include the same incentive payment scheme.

37. Avianca's second argument is that ACDAC's position is foreclosed by the four Colombian court judgments included as Objection Exhibits E-1 through E-4. *See* Objection, pars. 18–19. But none of these cases speaks to what the 2017 Award requires because all four cases predate the 2017 Award. *See* Objection, Exhibits E-1 through E-4 (all four decisions issued in 2015).

38. In sum, Avianca's zero-value arguments would require the Court to adopt a reading of the 2017 Award that authorizes the company to impose on union pilots, under the guise of a remedy for discriminating against those same pilots, an incentive compensation plan that their union never agreed to at the bargaining table. The Court should not condone this absurd result. It should instead adopt the plain reading of the 2017 Award articulated in Part II.B, above, and find that additional sums are owed to ACDAC pilots pursuant to that Award.

III. Conclusion and Request for Relief.

39. For the foregoing reasons, ACDAC asks that Avianca's Objection be overruled; that the Court determine the amount of the claim and thereafter allow the Claim in the amount

determined pursuant to 11 U.S.C. § 502(b); and that the Court grant all other just and appropriate relief.

Dated: January 6, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ryan E. Griffin, certify that on January 6, 2023, I filed the foregoing Response of Asociación Colombiana de Aviadores Civiles ("ACDAC") to Objection of Aerovías del Continente Americano S.A. Avianca ("Avianca") to Claim Number 1729 via the Court's electronic filing system and further served it on the Court and on the following parties:

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