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

In re

AVIANCA HOLDINGS S.A., *et al.*,¹

Debtors.

Chapter 11

Case No. 20-11133 (MG)
(Jointly Administered)

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

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



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Burnham² submits this reply (i) in response to the Objections³ and (ii) in further support of the Motion to Compel⁴ and respectfully states as follows:

PRELIMINARY STATEMENT

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

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

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

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

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

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

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

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

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

REPLY

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

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

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

11 U.S.C. § 365(d)(5).

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 835.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸ The Aircraft Counterparties are enumerated in Exhibit A of the Stipulation.

not oppose disallowance of claims 4022, 4026, and 4027 as duplicative of claims filed in the Avianca case.

CONCLUSION

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

Dated: January 9, 2023
New York, New York

Respectfully Submitted,

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