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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

AVIANCA HOLDINGS S.A., et al., Main Case No.
Debtors and Reorganized Debtors. 20-11133-mg

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

January 19, 2023
9:58 AM

B E F O R E:
HON. MARTIN GLENN
CHIEF U.S. BANKRUPTCY JUDGE

ECRO: DEIRDRA AND KAREN



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2 Hearing Using Zoom for Government RE: Reorganized Debtors
3 Motion for Order Imposing Sanctions for Violations of Section
4 524 of the Bankruptcy Code and Discharge and Injunction
5 Provisions of their Confirmed Chapter 11 Plan (Doc## 2300,
6 2384, 2644, 2695)

7

8 Hearing Using Zoom for Government RE: Objection of Aerovas Del
9 Continente Americano S.A. Avianca to Claim Number 1729 (Doc##
10 2660, 2687, 2695, 2697)

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A P P E A R A N C E S (All present by video or telephone):

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ALSO PRESENT:

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PAOLA MARIA VILLOTA MARTINEZ, Avianca Holdings S.A.



AVIANCA HOLDINGS S.A.

1 P R O C E E D I N G S

2 THE CLERK: Starting the recording for Thursday,
3 January 19th, 2023 at 10 a.m.

4 Calling Avianca Holdings S.A., case number 20-11133.

5 Can we have counsel for the reorganized debtors make
6 their appearances one at a time, please.

7 MR. SCHAK: I'm happy to start. This is Benjamin
8 Schak, S-C-H-A-K, of Milbank for the reorganized debtors.

9 THE CLERK: Okay. Thank you.

10 MR. RENENGER: This is Aaron Renenger, also for
11 Milbank, also for the reorganized debtors.

12 THE CLERK: All right. Thanks.

13 MS. DEXTER: This is Erin Dexter, also with Milbank,
14 for reorganized debtors.

15 THE CLERK: Okay. If you have to speak on the record,
16 Erin, I think you have to mute on your side so we don't get
17 (indiscernible).

18 All right. Thank you. Is anyone else making an
19 appearance this morning?

20 Mr. Masumoto?

21 MR. MASUMOTO: Good morning. Brian Masumoto for the
22 Office of the United States Trustee.

23 THE CLERK: All right. Thank you. Are there any
24 additional speaking roles this morning?

25 MR. GRIFFIN: Yes. Good morning. This is Ryan



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1 Griffin for ACDAC.

2 THE CLERK: All right. Thank you. Anyone else
3 speaking on the record this morning?

4 MR. SCHAK: We do have an interpreter for a Spanish
5 speaking witnesses. Would you like her to identify herself
6 now?

7 THE CLERK: Yes. I think she's on the phone.

8 THE INTERPRETER: Yes. Good morning. My name is
9 Martaluz Jardon, M-A-R-T-A-L-U-Z, Jardon, J-A-R-D-O-N, licensed
10 court interpreter LCI 2287.

11 THE CLERK: Thank you.

12 THE INTERPRETER: And the reason why I'm on the phone
13 is because I will be interpreting simultaneously for two of the
14 people involved in this lawsuit.

15 THE CLERK: Understood. Thank you.

16 THE INTERPRETER: Thank you. You're welcome.

17 THE CLERK: Any additional appearances this morning,
18 if anyone's speaking on the record?

19 All right. The party that joined us, Elizabeth, can
20 you just give me your last name? Hi. You have to unmute.

21 THE INTERPRETER: Her full name is Elizabeth Riano,
22 R-I-A-N-O, Alarcon, A-L-A-R-C-O-N.

23 THE CLERK: Okay. Thank you.

24 THE INTERPRETER: You're welcome.

25 THE CLERK: All right. Are there any additional



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1 appearances, anyone that has not given their appearance at this
2 time?

3 THE INTERPRETER: So I'm not sure if you asked me for
4 all this. There's two ladies that have us answering some
5 questions from the judge. Do you need the other person's name?

6 THE CLERK: Yes, please.

7 THE INTERPRETER: Okay. One second. So her name
8 is -- I'm going to have -- Paola, P-A-O-L-A, Maria, M-A-R-I-A,
9 Villota, V as in Victor-I-L-L-O-T-A.

10 THE CLERK: Thank you. Thank you.

11 THE INTERPRETER: You're welcome.

12 (Pause)

13 THE CLERK: All right. The party with the 973-415-
14 7916 number. I don't have that number of my roster. Could you
15 just identify yourself? Again the party with the 973-415-7916
16 number, if you could unmute and identify yourself?

17 THE COURT: Deanna, you might explain how, if it's a
18 cell phone, what she has to do to unmute.

19 THE CLERK: Right. It's my understanding that if you
20 press *6 you'll be able to unmute for a cell phone. So again,
21 the 973-415-7916.

22 Oh. They dropped off.

23 THE COURT: Okay.

24 THE CLERK: All right. The 503-706-7318 number. If
25 you could just identify yourself, please. If you could unmute



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1 by pressing *6. Again, the 503-706-7318 number.

2 MR. MONES: It is Paul Mones, M-O-N-E-S.

3 THE CLERK: Okay. How do you spell your last name,
4 Paul?

5 MR. MONES: M-O-N for Nancy-E-S for Sam.

6 THE CLERK: Okay. Thank you. I will modify.

7 MR. MONES: Let me come up on Zoom. Thank you.

8 THE CLERK: Okay. No problem.

9 MR. MONES: I'll go on -- will you automatically mute
10 me, or do I have to mute myself?

11 THE CLERK: If you could mute yourself, please, and
12 I'll rename you.

13 MR. MONES: Perfect. Okay.

14 THE CLERK: All right. Are we waiting on any
15 additional parties?

16 Ben, is Evan Fleck that is going to be joining?

17 MR. SCHAK: Sadly, no.

18 THE CLERK: Okay. Just making sure.

19 All right. To anyone's knowledge, are we waiting on
20 anyone else?

21 MR. SCHAK: No.

22 THE CLERK: Okay. Judge, would you like to begin, or
23 do you want to wait for two more minutes?

24 THE COURT: No, we can begin. Thank you.

25 And good morning to everybody. This is Judge Glenn.



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1 We're here for two matters in Avianca. We'll start with the
2 reorganized debtors' motion for order imposing sanctions for
3 violation of Section 524 of the Bankruptcy Code and the
4 discharge injunction in the confirmed plan.

5 Mr. Schak, are you going to begin?

6 MR. SCHAK: I will, Judge, and I'm happy to dive into
7 that or provide a brief update of the general case.

8 THE COURT: Well, why don't you give me an update
9 first, if you could? Thank you.

10 MR. SCHAK: Sure. So I think the last time we were
11 actually live on Zoom was maybe way back in April, and I said
12 something to the effect then that we were nearing the end of
13 the reconciliation process. Today, I think we're even nearer
14 to the end of the reconciliation process.

15 All aircraft claims have been resolved consensually.
16 All claim objections were filed at the December 2nd deadline.
17 And I was counting them up this morning. There are only seven
18 sets of claims left to be resolved, everyone of which is
19 scheduled for a hearing either in this Court or before Judge
20 Jones between now and February 8th. We've been resisting very
21 hard any attempts to push hearings past that February 8th date,
22 which makes us all reasonably confident that we will know the
23 universe of general unsecured claims on or around February 8th.
24 And that's particularly important in this case, because the
25 plan provides a fixed amount of total consideration for all



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1 general unsecured creditors to share, so we need to know that
2 final total amount of unsecured claims before the debtors can
3 make their final distributions of cash and securities to
4 unsecured creditors.

5 To date, there have been about 5.8 million dollars of
6 interim distributions. There's a lot more to come, and we
7 think that the next distribution will be the final one and will
8 occur promptly once that unsecured claims amount has been
9 resolved.

10 On the aircraft side of things, Avianca and its
11 advisors have had to negotiate new documentation for the whole
12 fleet of leases, at least the ones that have been for the
13 aircraft that have been assumed. Each of those has been fairly
14 complex, and some of these transactions are just logistically
15 difficult to close, because the aircraft needs to physically be
16 in a particular jurisdiction at the moment of closing. Avianca
17 is, thank goodness, a working airline once again, so it can be
18 tough sometimes to get the right aircraft to the right
19 jurisdiction at the right moment. But that process has been
20 accelerating over the past few months, and we expect the last
21 handful of lease transactions to close by the end of February,
22 and that, along with the disbursement of the final
23 distributions, will allow us to file a motion to close these
24 cases, which is, I think, going to be our favorite motion of
25 the case.



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1 THE COURT: Mine too.

2 MR. SCHAK: Yeah. And the other very brief update is
3 just on the appeal of confirmation, that has been fully
4 briefed, and it's awaiting argument in the district court.

5 THE COURT: Who is that before?

6 MR. SCHAK: It got changed, and I'm blanking on which
7 district judge is. I'm hoping one of the litigators can hop in
8 and help me on this one.

9 THE COURT: Was it originally before Judge Nathan,
10 who's gone up --

11 MR. SCHAK: It was.

12 THE COURT: Yeah.

13 MR. SCHAK: And then she was elevated, and it just
14 wasn't one that, I guess, was interesting enough for her to
15 keep.

16 MR. RENENGER: Your Honor, we'll circle back and let
17 you know the name of the judge and what was reassigned
18 momentarily. It's been briefed for almost a year at this
19 point, so it's --

20 THE COURT: Okay. Thank you, Mr. Renenger.

21 Go ahead, Mr. Schak.

22 MR. SCHAK: All right. Unless Your Honor has anything
23 else on the general goings on of the case, I'm happy to turn to
24 the first item on the agenda.

25 THE COURT: Go ahead, Mr. Schak.



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1 MR. SCHAK: Okay. Thank you, Your Honor.

2 MR. RENENGER: Your Honor, just briefly, it is before
3 Judge Vernon Broderick.

4 THE COURT: Okay. And that was Mr. Renenger who
5 indicated that. Thanks very much.

6 MR. SCHAK: Benjamin Schak, again, for the record.
7 Your Honor, the first item on the agenda is Avianca's
8 uncontested motion to disallow claims as a sanction for various
9 claimants' violation of the Chapter 11 discharge. On the Zoom
10 session today is our declarant for the motion, Elizabeth Riano
11 Alarcon, who is an in-house labor litigation coordinator at
12 Avianca. Since Ms. Riano is a fluent Spanish speaker, we also
13 do have a live interpreter, Martaluz Jardon, and Ms. Riano is
14 here. She's prepared to answer any questions about the
15 pendency and status of the foreign proceedings, Avianca's
16 attempts at communication with the litigants, or any other
17 topics Your Honor may have questions about.

18 I do a few opening remarks, and then I was planning to
19 turn it over to my litigation colleague, Erin Dexter, to offer
20 Ms. Riano's testimony into evidence, but I'm happy to stage
21 this in whatever order Your Honor prefers.

22 THE COURT: No, just, maybe you could tell me how
23 many -- so these are parties who have filed proofs of claim in
24 the Chapter 11 case, but they've continued prosecuting actions
25 in foreign courts. So how many creditors are we talking about?



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1 MR. SCHAK: We're talking about 160-something. I'm
2 flipping around, not seeing the exact number immediately, but
3 it's a bit over 160.

4 THE COURT: All right. And just briefly, review with
5 me service of process with respect to the current pending
6 motion.

7 MR. SCHAK: Yes. So service of process on the current
8 pending motion was on docket 2645, which is by KCC, which made
9 the mailings. They sent by first class mail to all of these
10 creditors, generally through their counsel, and there are only
11 a few counsels involved here, a notice of this motion. And the
12 email list is on Exhibit B of docket number 2645. There's also
13 a list of first class mailings on Exhibit D, as in dog, of that
14 same docket number 2645. And that was done in early November,
15 November 3rd, November 4th.

16 THE COURT: And can you tell me whether any of the
17 service by mail was returned undelivered?

18 MR. SCHAK: It was not. We would have heard about
19 that from KCC.

20 THE COURT: All right. And could you briefly tell me
21 whether there has been telephone or email communication with
22 representatives of these claimants subsequently, to try and
23 resolve this issue consensually?

24 MR. SCHAK: Not subsequently, Your Honor. The only
25 one who ever got back to us at any point was Mr. Bain (ph.),



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1 who made it very clear to the folks at Avianca that he was not
2 going to withdraw his client's proof of claim.

3 THE COURT: And are all of these claims being -- in
4 which courts are they being litigated? Is this all in
5 Colombia?

6 MR. SCHAK: All in Colombia, except there's one, the
7 client of Ms. dos Santos (ph.), which is in Brazil.

8 THE COURT: And has Avianca or any of its affiliates
9 appeared in the lawsuits in Colombia or Brazil?

10 MR. SCHAK: Yes, Your Honor. Avianca recognizes a
11 reality that this Court's confirmation order is probably not
12 going to get those lawsuits dismissed in Colombia and Brazil,
13 at least in an efficient way, so Avianca is appearing and
14 intends to defend those suits on the merits.

15 THE COURT: Has Avianca moved in any of the courts in
16 which they're pending, seeking recognition and enforcement of
17 the orders entered by this Court or included in the plan?

18 MR. SCHAK: We've not, Your Honor. Avianca, with its
19 local counsel, has made the strategic decision that they're
20 pretty good at defeating these lawsuits on the merits in
21 Colombia, and I guess, also in Brazil, and thinks that that's
22 the most efficient way to dispatch the suits down there.

23 THE COURT: Okay. So Brazil has, within the last year
24 or two, adopted the model law on cross-border insolvency. And
25 has Avianca? Maybe these claims are just -- the claim is too



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1 small to merit going through the trying to open a proceeding in
2 Brazil seeking recognition of enforcement of the order of the
3 Court, but Brazil has adopted the model law.

4 MR. SCHAK: That's correct, Your Honor. Colombia has
5 too. We just made a decision, as for Colombia, at least, very
6 early in the case, that that could open up a can of worms to
7 try to seek enforcement down there.

8 And Your Honor's exactly right. These claims are
9 simply too small by themselves to merit a full recognition
10 proceeding. If, for instance, an indenture trustee from one of
11 the bond issuances tried to go enforce a billion dollars down
12 there, I think would be a very different story, Your Honor.

13 THE COURT: And what's the aggregate amount of all of
14 the claims that have been asserted in litigation in either
15 Colombia or Brazil?

16 MR. SCHAK: That's a fair question. The aggregate
17 amount gets up pretty high. These claims are generally, in
18 U.S. dollars, in the five figures, and there are over 160 of
19 them. I can't do the math quite that quickly, but you're
20 quickly getting up into the territory of seven or even eight
21 figures. But I should say Avianca believes its actual exposure
22 is close to zero.

23 THE COURT: All right. In the proofs of claim that
24 these creditors filed here, did they identify counsel or simply
25 the creditor rather than counsel?



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1 MR. SCHAK: For all but one of them they identified
2 counsel. For perhaps all but two of them, counsel's also
3 identified in the local complaints that were attached to most
4 or all of these proofs of claim.

5 THE COURT: And were the counsel that they identified
6 served with this motion?

7 MR. SCHAK: Yes. Those are the counsel who we've made
8 service through and who attempted to communicate directly with
9 as well.

10 THE COURT: All right. So if I understand correctly,
11 what you're seeking is what I would describe as a coercive
12 contempt sanction, essentially giving these creditors an
13 additional thirty days after the entry of any order by this
14 Court within which to withdraw their foreign court proceedings
15 in order to be able to proceed with the claim process here; is
16 that correct?

17 MR. SCHAK: That's correct. Your Honor. So it's the
18 one last chance is the idea behind our proposal.

19 THE COURT: All right. So I think what you said, that
20 Ms. Dexter is going to actually proceed with the hearing, I
21 don't know that we need much more. I do want to get any
22 evidence offered and submitted in evidence before I go further.

23 MR. SCHAK: Yes, Your Honor. I'll turn it over to Ms.
24 Dexter, then, who is on mute.

25 THE COURT: Okay. Thank you.



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1 Ms. Dexter?

2 MS. DEXTER: Thank you, Your Honor. Are you able to
3 hear me?

4 THE COURT: Yes, I can.

5 MS. DEXTER: Wonderful. For the record, Erin Dexter
6 from Milbank for the reorganized debtors.

7 As Mr. Schak mentioned, Your Honor, Ms. Riano, who
8 submitted a declaration and supported the motion at Exhibit A
9 to docket 2644 is here today in the event Your Honor has any
10 questions. However, we would like to move her declaration into
11 evidence in support of the motion for sanctions.

12 THE COURT: All right. Are there any objections to
13 the Court admitting into evidence Riano declaration, which is
14 Exhibit A to ECF docket number 2644? Hearing no objection,
15 it's admitted into evidence.

16 (Declaration of Elizabeth Riano Alarcon was hereby
17 received into evidence as Debtors' Exhibit A to docket 2644, as
18 of this date.)

19 THE COURT: Okay. Go ahead, Ms. Dexter.

20 MS. DEXTER: Thank you, Your Honor. Ms. Riano is
21 available in the event Your Honor has any questions for her
22 with the assistance of our translator, Ms. Jardon.

23 THE COURT: All right. Let me ask. Is there anybody
24 who wishes to cross-examine the declarant? And hearing no one
25 say they wish to cross-examine, I don't have any questions.



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1 My question for you, Ms. Dexter, is I'm not aware of
2 any courts that have granted the relief, the specific relief
3 that you're seeking here. Are there cases that you're familiar
4 with where essentially the same sort of relief, a coercive
5 order basically giving a claimant an additional short period of
6 time within which to discontinue actions that -- I think it's
7 really undisputed that the actions that are going on in
8 Colombia and the one in Brazil violate the terms of the plan
9 and the plan injunction? But have any courts that you're
10 familiar with granted the relief that you're seeking here?

11 MS. DEXTER: Your Honor, I'm not able to cite cases to
12 you today. We're happy to submit supplemental briefing after
13 this hearing. We're not seeking any monetary sanctions or
14 other type of contempt, so we were hoping that it would be a
15 fair exercise of the Court's equitable power to grant this type
16 of relief here.

17 THE COURT: And if I understand correctly, you're
18 essentially relying on -- your argument is by filing proofs of
19 claim, they've all submitted to the jurisdiction of the Court.
20 Katchen v. Landy is the leading case on point, correct?

21 MS. DEXTER: That's right, Your Honor. And I invite
22 my colleague, Mr. Schak, to jump in as well, if he has anything
23 to add.

24 MR. SCHAK: I have plenty more citations on that, Your
25 Honor, but it sounds like we're --



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1 THE COURT: I'm clearly -- I'm familiar with Katchen
2 and some of his progeny, and there's no question in my mind
3 that by filing a proof of claim, each of those creditors has
4 submitted that the jurisdiction, certainly, at least, with
5 respect to the matters involved in the claim. I mean, it's the
6 same issue. I mean, it's not a Stern v Marshall, where the
7 issue is different. So it's clear they've submitted to the
8 jurisdiction of the bankruptcy court.

9 All right. So what I'm going to do is I'm going to
10 take it under submission. Shouldn't be a very lengthy period.

11 I do want, because I'm not aware of other decisions
12 that have granted the precise relief, in my view, I've had
13 quite a few cases involving contempt, and I've written on
14 what's the, sort of, the permissible range of contempt
15 sanctions. It's clear beyond dispute that bankruptcy courts,
16 bankruptcy judges have the authority to exercise the contempt
17 power where appropriate. And here, what's also quite clear is
18 that coercive contempt sanctions are the classical remedy that
19 can be awarded by a judge, whether it's the bankruptcy judge or
20 a district judge for contempt.

21 Here, there has been -- the orders which they have
22 failed to comply with are clear and unambiguous. Their failure
23 is likewise also clear and unambiguous. So there is no issue
24 in the Court's mind that each of these creditors have violated
25 the terms of the plan injunction and the plan, and it's



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1 appropriate for a remedy for such contempt to be imposed. The
2 remedy being sought here is the coercive remedy that would give
3 the creditors an opportunity to cure, come into compliance with
4 the terms of the plan by discontinuing their foreign court
5 actions, in which case the claims allowance process with
6 respect to their proofs of claim can continue.

7 Nothing in what I'm going to rule, should they
8 withdraw their foreign proceedings, will resolve definitively
9 whether their claims should be allowed in the amounts filed or
10 in some other amount, so those issues would all be reserved.

11 So I'm going to take it under submission, and it
12 shouldn't be very long, Mr. Schak, before you get a ruling from
13 the Court.

14 MR. SCHAK: Thank you, Your Honor.

15 THE COURT: And Ms. Dexter, thank you very much for
16 your participation.

17 MS. DEXTER: Thank you, Your Honor.

18 THE COURT: All right.

19 MS. DEXTER: May Ms. Riano be excused?

20 THE COURT: Absolutely.

21 MS. DEXTER: Thank you so much.

22 And thank you, Ms. Riano.

23 THE COURT: Okay. So go ahead, Mr. Schak. Are you
24 going to continue on? The ACDAC claim objection is claim 1729.
25 I'm not going to butcher the full name of ACDAC. I think



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1 everybody's proceeding with initials A-C-D-A-C.

2 MR. SCHAK: That's right, Your Honor. My colleague
3 Aaron Renenger, will handle the objection to the claim filed by
4 the Asociacion Colombiana de Aviadores Civiles.

5 THE COURT: Ah. You're showing me up. You're showing
6 me up. I'll stick with ACDAC.

7 Go ahead, Mr. Renenger.

8 And counsel who's appearing for ACDAC, is that Mr.
9 Griffin? You're appearing for ACDAC?

10 MR. GRIFFIN: Yes. That's correct, Your Honor.

11 THE COURT: Okay. All right. So I'll let Mr.
12 Renenger go first, and then I'll give you an opportunity to
13 speak.

14 Go ahead, Mr. Renenger.

15 MR. RENENGER: And good morning, Your Honor. And I
16 will be joining you in simply using the acronym ACDAC.

17 THE COURT: You're not going to show off the way your
18 colleague did. Go ahead.

19 MR. RENENGER: No, no. But I am going to give him
20 grief about showing off when we're done here.

21 THE COURT: Okay.

22 MR. RENENGER: So Your Honor, the first thing I think
23 I'd just like to do, if okay with the Court, is to admit into
24 evidence the declaration of our witness, Paola Maria Villota
25 Martinez, who is on Zoom and available for cross-examination or



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1 any questions the Court may have. Her declaration is Exhibit A
2 to our objection, which is docket number 2660.

3 THE COURT: All right. Are there any objections to
4 the Court admitting into evidence the Martinez declaration,
5 which is ECF docket number 2660.

6 MR. GRIFFIN: No objection, Your Honor.

7 THE COURT: All right. Thank you. All right. It's
8 admitted into evidence.

9 (Declaration of Paola Maria Villota Martinez was hereby
10 received into evidence as Debtors' Exhibit A to docket 2660, as
11 of this date.)

12 MR. RENENGER: Thank you, Your Honor. Your Honor, the
13 ACDAC claim, which is claim 1729, involves a question of
14 whether the ACDAC pilots -- these are union pilots -- have
15 received the incentive pay to which they are entitled under two
16 orders issued in Colombia, one from a court in 2015 and one
17 from an arbitration panel in 2017. The dispute involves
18 incentive payments, and specifically, it relates to incentive
19 payments available for pilots based on performance. So time
20 spent on ground during a trip, fuel conservation, and stability
21 of landings. The better pilots perform, the more pay the
22 pilots get.

23 When ACDAC filed its claim, it indicated only that
24 Avianca was obligated to pay amounts, "to ACDAC members at one
25 hundred percent of the benefit levels paid to nonunion pilots".



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1 Note the language there. Not a hundred percent of the maximum
2 amounts available, but a hundred percent of the amounts paid to
3 nonunion pilots. Nothing about the language of claim 1729
4 indicated that ACDAC was contending, as it now does in its
5 brief filed last week, that its members were entitled to
6 receive more than the amounts paid to nonunion pilots.

7 ACDAC reiterated this view in several filings between
8 then and now. For example, in its limited objection to the
9 plan -- this is docket number 2237 -- ACDAC quoted the 2017
10 arbitration award, which is the primary language on which it
11 relies. And that quote is, "that the payment of the
12 operational efficiency incentive (monthly) and the payment of
13 the fuel bonus (semi-annual) shall be paid in 100 percent of
14 its corresponding value."

15 But they didn't stop in that plan objection with
16 quoting that language. The plan objection clarified that one
17 hundred percent of the corresponding value means, "the
18 incentive and bonus amounts Avianca pays to nonunion pilots".

19 So again, note the language. ACDAC was not contending
20 then that they believed that the 2017 award required Avianca to
21 pay to ACDAC pilots one hundred percent of the maximum
22 allowable amounts. Rather, at that time, ACDAC was clear that
23 its pilots were simply entitled to the incentive amount
24 actually paid to nonunion pilots.

25 In its March 9th, 2022 response to the debtor's



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1 sixteenth omnibus objection, -- this is docket number 2550 --
2 ACDAC repeatedly affirmed that they were simply seeking equal
3 incentive pay. Paragraph 9 of that pleading stated it
4 incentive payments are "subject to mandatory equalization
5 between ACDAC and non-union pilots".

6 In paragraph 10 they wrote, "Avianca has not begun
7 paying these benefits to ACDAC pilots at one hundred percent of
8 their corresponding value (i.e., the full amount at which these
9 benefits are paid to non-union pilots)." Here, again, ACDAC is
10 explaining their interpretation, at that time, of the 2017
11 arbitration award.

12 Later in that same pleading, paragraph 11, they wrote
13 that they needed Avianca's records to be able to do a
14 calculation of the amounts owed to ACDAC pilots. They argue
15 that such a calculation, "would require examining Avianca's
16 payroll records to determine the full value of these benefits
17 as paid to nonunion pilots since they were first extended in
18 2013 and the lesser value of these benefits that has been paid
19 to ACDAC pilots since that time".

20 This is a particularly noteworthy admission, because
21 it reveals the gravamen of ACDAC's claim that their pilots were
22 being paid less.

23 Now, last week, in their response to our objection,
24 ACDAC asserted, for the first time in this case, that its
25 pilots are entitled to be paid more than the pilots that are



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1 not members of the ACDAC union. Specifically, they now contend
2 that ACDAC pilots are entitled to, "the maximum level of pay
3 for the incentives". And they acknowledge that's regardless of
4 their performance. So whether they conserve fuel, whether they
5 stay on the ground for much longer than they're required to,
6 whether every landing is a poor landing, the ACDAC pilots
7 should get all of the pay as if they were performing at one
8 hundred percent efficiency level in those metrics.

9 Now, there are several important arguments to note
10 here. First, ACDAC appears no longer to be contending that
11 Avianca has paid incentive payments to union pilots at less
12 than those paid to nonunion counterparts. Indeed, Avianca
13 attach proof to its objection that it provided identical
14 incentive pay to all of its pilots. In light of that proof
15 Avianca, or rather ACDAC, has now shifted to its argument
16 seeking more pay rather than less.

17 I guess I would first observe, Your Honor, that this
18 new argument really amounts to a new claim that we believe is
19 beyond the bar date, and for that reason alone should be should
20 be denied. Section 502(b)(9) of the Code provides that a claim
21 that is not timely filed will be deemed disallowed. The bar
22 date was January 20th, 2021. If ACDAC's view was that it was
23 entitled to one hundred percent of the maximum allowable bonus,
24 it should have made that claim much earlier on, and I've just
25 noted, it didn't. That's not at all what ACDAC was previously



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1 arguing.

2 We would also urge the Court not to treat this latest
3 argument as an amendment to the proof of claim. They've not
4 filed an amendment, and they've not sought that it be treated
5 as an amendment, and even if they did, we would ask Your Honor
6 to exercise your discretion to not permit an amendment at this
7 late date, given that they could have made this argument years
8 ago.

9 But Your Honor, just diving down, then, into the
10 details of a language, and I think this, sort of, more the
11 merits, as opposed to the procedural arguments, ACDAC's reading
12 of the Court judgment in 2015, which I'll refer to as T-69
13 (ph.), and the 2017 arbitration award is illogical and just
14 wrong on its face.

15 THE COURT: Let me ask you this. Mr. Renenger, let me
16 ask you this.

17 MR. RENENGER: Sure.

18 THE COURT: Is there ongoing litigation in Colombia
19 regarding the interpretation of the 2017 arbitration award?

20 MR. RENENGER: Not that we're aware of, Your Honor.

21 THE COURT: All right.

22 MR. RENENGER: There were some court cases about the
23 interpretation of the 2015 T-69 judgment that pre-dated 2017.
24 And those cases, there were seven of them in total, I believe,
25 the court, in each of those cases, agreed with the



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1 interpretation that Avianca is advancing today.

2 THE COURT: I mean, effectively --

3 MR. RENENGER: And I think that --

4 THE COURT: Is effectively, what you're asking this
5 Court to do is to grant comity to the court and arbitration
6 decisions that were rendered in Colombia. You believe that
7 those are the binding rulings; is that correct?

8 MR. RENENGER: I think in part, Your Honor. I also
9 think the Court can look at the language of the rulings as
10 submitted to Your Honor, translated into English and submitted
11 to Your Honor, and see that the language simply cannot support
12 the argument that ACDAC is now advancing.

13 THE COURT: Yeah. I mean, I have some question about
14 the earlier award, but in the reply, the reply provides copies
15 of the translations of the relevant portions of the court
16 judgment, which confirm that Avianca has properly characterized
17 the judgments.

18 MR. RENENGER: Thank you, Your Honor. I don't think
19 any party had previously submitted the interpretation of the
20 entirety of the 2017 arbitration award. We felt it was
21 important to do that, because ACDAC relies on just one, or
22 really two sentences in that opinion. And when you read the
23 full opinion, it becomes, like, inescapably clear that the
24 arbitration panel could not have meant what ACDAC now contends.

25 And let me just point you to that language, Your



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1 Honor. And it's found in -- this is Exhibit A to our reply,
2 and it's page 5. Numbered at the bottom, it's page 5. Written
3 on screens, page 8 of the PDF. And while you're pulling that
4 language up, Your Honor and I'll read it to you in a moment,
5 let me just observe that the language of the 2017 award, even
6 the portion upon which ACDAC relies, is qualified by the last
7 clause of the sentence that ACDAC primarily relies on, and that
8 is "Pursuant to Ruling T-69".

9 So the sentence reads, "It is understood the payment
10 of the operational efficiency incentive (monthly) and the
11 payment of a fuel bonus (semi-annual) shall be paid in one
12 hundred percent of its corresponding value, pursuant to ruling
13 T-69 of 2015".

14 So what the 2017 opinion gives was, by its own terms,
15 intended to be consistent with what the 2015 opinion gave. Not
16 more than. Consistent with what the 2015 opinion gave. And
17 the new piece of evidence attached to our reply, which I think
18 really drives home this point so forcefully, again, is on page
19 5 of that document, the very first paragraph at the top of the
20 page under the heading. And it reads, "For the purpose of
21 issuing the arbitral award to resolve this collective dispute,
22 the took into consideration the statements made by the
23 constitutional court in judgment T-69 of 2015, which obligated
24 each and every member of the ACDAC trade union organization to
25 receive the same and equal benefits enjoyed by nonunionized



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1 workers in the so-called voluntary benefits plan".

2 So that language shows that the 2017 tribunal
3 understood the 2015 judgment to give exactly the same benefits.
4 Not more. Exactly the same benefits given to nonunionized
5 workers. And all the language then does, that ACDAC now
6 relies on, is concludes that, indeed, Avianca must continue to
7 make those payments. And if they haven't made those
8 payments -- it's the second sentence that ACDAC relies on -- if
9 there's any discrepancy, and the language there is Avianca must
10 pay the difference, should there be one. Or the latest

11 translation says and easements that might arise between the
12 amounts that have been paid and the amount required to be paid.

13 So the judgment didn't conclude that Avianca failed to
14 pay something. The judgment simply said if they have, they've
15 got to do it.

16 And Your Honor, I guess I would rest there. I can go
17 through the language of T-69.

18 THE COURT: No, that's okay. Let me hear from Mr.
19 Griffin.

20 Go ahead, Mr. Griffin.

21 MR. GRIFFIN: Thank you. Good morning, Your Honor.
22 Ryan Griffin for ACDAC. I guess let me try to follow the same
23 order as Mr. Renenger and start with the procedural issues.

24 This is not a new claim or an amended claim. This is
25 the same thing that ACDAC has been saying from the beginning.



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1 We put in the language of the 2017 arbitration award attached
2 to the claim. And that language, we think, is clear. It says
3 one hundred percent of the corresponding value. And we've said
4 throughout what that means in our filings. We've said that
5 means the full amount of these increases, as paid to the
6 nonunion pilots ,to equalize with the full levels due to pay --
7 the obligation to pay the full value.

8 So from the beginning we've been seeking the same
9 thing. We haven't changed our position. And I think, before
10 addressing the merits arguments, it might be helpful there to
11 explain a little bit the background of this full value and why
12 that is. Why that's what the 2017 arbitration award says, and
13 why that makes sense.

14 And so this is recounted in our brief. I don't want
15 to go through every detail of it. But very quickly, in 2013
16 the company offered a package of benefits, including these two
17 incentive payments that are at issue here to its nonunion
18 pilots, while it was bargaining with ACDAC.

19 The judgment that Mr. Renenger mentioned from 2015, T-
20 69, found that the company violated Colombia labor law in doing
21 so, because it was essentially encouraging union pilots to
22 defect from the union to receive these higher benefits. And
23 they said, you're not allowed to do that. And as a remedy for
24 that, what the Court said was, okay, you have to give the union
25 pilots these benefits.



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1 And the company is focused on language from that
2 decision that says, okay, you just have to equalize them. You
3 have to pay the union pilots under the same variable pay
4 scheme, the same incentive pay scheme, that they're already
5 applying to the nonunion.

6 THE COURT: Well, there was nothing in the award that
7 said that the union pilots get better treatment than the
8 nonunion pilots. It appeared to me to say equalize the
9 treatment. Union pilots shouldn't get worse treatment.

10 MR. GRIFFIN: That's part of it, but that's not the
11 whole thing. And I think the hundred percent of the
12 corresponding value language does more than that. And so the
13 reason is the, the other key from the T-69 judgment is that
14 what the court was trying to do was not only to make sure that
15 union pilots didn't come out worse economically, but it was
16 also protecting and preserving the union's bargaining status in
17 the collective bargaining relationship.

18 And so what it said is you need to equalize these
19 benefits so that pilots who stayed with the union don't lose
20 out and so that the pilots who left the union for higher pay
21 can come back to the union and come back to their collective
22 bargaining agreement as bargained and represented by the union.
23 And the key to that piece is that the collective bargaining
24 agreement doesn't include these incentives, because the union
25 never agreed to go from a from a straight pay scheme to a



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1 variable or an incentive pay scheme. And so what the Court was
2 saying was, well, you've got to give them some money, so that
3 there's no economic harm for being in the union. But you've
4 also got to -- you also have to let -- the purpose of that is
5 to go back to the collective bargaining regime as it existed.

6 And when you understand that background, then I think
7 the hundred percent language in the 2017 award makes a lot more
8 sense. What that award was clarifying was, no, it's not enough
9 to just pay them under the same variable -- pay the ACDAC
10 pilots under the same variable pay scheme. That's what Avianca
11 was already doing in 2017 when that award was issued. And what
12 the arbitration is saying is, okay, that's nice, but that's not
13 enough, because, in effect, what you're doing by doing that is
14 imposing on the union and on its collective agreement this
15 whole different variable pay scheme that has never been
16 bargained, has never been agreed to at the bargaining table.
17 And the arbitration answer for how you get around that is,
18 well, you just pay them at the maximum levels. Then nobody
19 from the union is losing out, and nobody from the union is
20 having a pay scheme that they never bargained for imposed on
21 them.

22 The inverse result, the one the company is seeking, is
23 just illogical. Essentially, the company says, we tried to
24 push this on the union in 2013. The court told us that was a
25 violation of law, and we couldn't do it. But as a remedy, the



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1 court said, okay, you get to push this on the union. And
2 that's just not right.

3 And so with all that background, we think when you
4 read the arbitration award, one hundred percent is clear. It
5 means you pay the max levels to the union pilots. You don't
6 apply, essentially, the incentive themed deductions that take
7 away from those max levels. And we think that's confirmed by
8 the second clause, which says Avianca shall pay only the
9 difference if there is one. Because if the arbitration -- it
10 was known already in 2017 when that arbitration came out that
11 the company was applying the same scheme to both. And that
12 language is just -- that clause doesn't -- there's no reason
13 for that clause to be there, if all it meant was you need to
14 pay union pilots under the same scheme. That second clause
15 only makes sense if what the arbitration panel says is, no,
16 you've got to pay them at the hundred percent level. You've
17 got to pay the union pilots at the hundred percent level

18 THE COURT: All right, Mr. Griffin. I have your
19 arguments.

20 Mr. Renenger, do you have a brief reply?

21 MR. RENENGER: Yes. Very brief, Your Honor. Mr.
22 Griffin cited a bunch of history for which there is no
23 evidence. What the ACDAC union submitted as evidence is the
24 language from the 2017 opinion, and only the two sentences, and
25 a translation of the 2015 opinion. This idea of what was in



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1 the arbitrator's mind and what they were trying to do because
2 of the history of the collective bargaining, none of that is in
3 evidence, Your Honor. And so it's just pure argument at this
4 point.

5 And again, with respect to that second clause, and I
6 made this point earlier, but I'll circle back because of where
7 Mr. Griffin ended, it's actually quite easy to give that second
8 sentence that ACDAC cites to meaning if there has been any
9 shortcoming in pay, it should be filled.

10 What Mr. Griffin has not presented to you is what were
11 the arguments made by the parties in 2017? And in fact, when
12 you look at the opinion, that opinion covers, like, forty
13 something different issues. It talks about submission to the
14 parties that were made, about how to interpret the different
15 provisions. Nowhere has ASDAC provided evidence that the
16 tribunal was asked to consider this issue with the background
17 that he just gave, as if everyone agreed and knew at that time
18 that Avianca was paying to union pilots the same amounts paid
19 to nonunion pilot.

20 The language, I think, on its face doesn't mean what
21 he says, and the interpretation he tries to give it is far from
22 the most obvious interpretation. That's all I have.

23 THE COURT: All right. I have the arguments of both
24 parties. I'm going to take the matter under submission. I
25 hopefully will be fairly quick in trying to resolve it.



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1 So that completes our obvious Avianca agenda for this
2 morning.

3 Mr. Schak, anything else that we need to take up
4 today?

5 MR. SCHAK: Nothing further, Your Honor. Thank you.

6 THE COURT: All right. All right. The Court is in
7 recess until 11:00.

8 MR. SCHAK: Thank you, Your Honor.

9 (Whereupon these proceedings were concluded at 10:40 AM)

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I N D E X

E X H I B I T S

DEBTORS'	DESCRIPTION	MARKED	ADMITTED
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to 2644	Elizabeth Riano Alarcon		
Exhibit A	Declaration of Paola		23
to 2660	Maria Villota Martinez		



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C E R T I F I C A T I O N

I, Hana Copperman, certify that the foregoing transcript is a true and accurate record of the proceedings.

Hana Copperman

Hana Copperman (CET-487)
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Date: January 20, 2023



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