

IN THE SUPREME COURT OF THE UNITED STATES

No. A-_____

AVIANCA GROUP INTERNATIONAL LIMITED,
APPLICANT

v.

BURNHAM STERLING AND COMPANY LLC;
BABCOCK & BROWN SECURITIES LLC

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To the Honorable Sonia Sotomayor, Circuit Justice:

Pursuant to Rules 13.5 and 30.2 of this Court, Avianca Group International Limited applies for a 60-day extension of time, to and including July 3, 2025, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The Second Circuit entered its judgment on February 3, 2025. App., infra, 1a-26a. Unless extended, the time for filing a petition for a writ of certiorari will expire on May 4, 2025. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. This case presents the question whether “obligations” of a Chapter 11 debtor-in-possession under a lease of personal property “aris[e]” within the meaning of Section 365(d)(5) of the

Bankruptcy Code when those obligations accrue and become unconditional, as opposed to when payment becomes due under the terms of the lease.

Section 365 of the Bankruptcy Code sets out the consequences of a debtor's assumption or rejection of any executory contract or unexpired lease after the filing of bankruptcy under Chapter 11. As to unexpired leases of nonresidential real property, Section 365(d)(3) requires the debtor-in-possession "timely [to] perform all the obligations of the debtor * * * arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected." 11 U.S.C. 365(d)(3). As to unexpired leases of personal property, Section 365(d)(5) requires the debtor-in-possession "timely [to] perform all of the obligations of the debtor * * * first arising from or after 60 days after the order for relief * * * under an unexpired lease of personal property * * * until such lease is assumed or rejected." 11 U.S.C. 365(d)(5). Section 365(d)(5) was modeled after Section 365(d)(3), both of which were added to the Bankruptcy Code in 1994. App., infra, 14a n.4, 23a-24a & n.7.

2. Applicant is one of the largest airlines in Latin America. App., infra, 3a.* As relevant here, applicant or its subsidiaries contracted with Burnham Sterling and Company LLC and

* Applicant is the successor in interest to Avianca Holdings S.A., which was the debtor and named appellant in the proceedings below but no longer exists as an entity. For ease of reference, this application refers to applicant and its predecessors as "applicant."

Babcock & Brown Securities LLC to broker the financing and leasing of certain aircraft. Id. at 4a-5a. The brokers successfully brokered 20 aircraft leases and, for those services, earned fees characterized as "additional rental payment[s]" payable in installments over the term of each lease. Id. at 5a. The leases deemed the fees to be the unconditional obligations of applicant and designated the brokers as third-party beneficiaries with the power to enforce their rights under the leases. Ibid.

3. On May 10, 2020, due to financial distress caused by the COVID-19 pandemic, applicant and certain of its subsidiaries filed a petition pursuant to Chapter 11 of the Bankruptcy Code in the Southern District of New York. App., infra, 3a. As of that date, the brokers had received some but not all of the fees they were owed under the leases. Id. at 5a-6a. During the pendency of the bankruptcy proceedings, applicant operated its airline business as a debtor-in-possession, retaining the authority to decide whether to assume or reject its unexpired aircraft leases. Id. at 3a. Applicant continued to pay the lessors of the aircraft for rent that came due under the leases after the filing of the Chapter 11 petition, but applicant did not pay the broker fees that became due after the petition date and before the leases were assumed or rejected. Id. at 5a-6a. Over the course of two years, applicant rejected all 20 aircraft leases. Id. at 6a.

The brokers filed multiple proofs of claim in the bankruptcy court. App., infra, 6a. With respect to the two claims at issue in this case, the brokers moved to compel payment by arguing that their fees "first arose" within the meaning of Section 365(d)(5)

when the installment payments came due under the leases, meaning that those "obligations" became due more than 60 days after the filing of the bankruptcy petition. Ibid. Applicant objected, arguing that those claims should be treated as general unsecured claims. Id. at 7a. Applicant argued that its obligation to pay the fees first arose pre-petition, when the leases were executed and the brokers' services were complete, and that the payment schedule in the leases did not alter the nature or timing of the obligations. Ibid.

The bankruptcy court granted the brokers' motion to compel and ordered applicant to pay the brokers over \$4 million. See App., infra, 45a-61a. On appeal, the district court affirmed the bankruptcy court's order. See id. at 27a-44a. The district court rejected applicant's argument that the relevant obligations "'arose' when they became 'unconditional' obligations of [applicant], i.e., upon execution of the [l]ease [a]greements (and before the relevant bankruptcy filing)." Id. at 34a. Instead, the district court held that applicant's "obligation to make the disputed payments 'arose' upon their respective due dates." Id. at 35a.

4. The court of appeals affirmed. See App., infra, 1a-26a. The court agreed with the district and bankruptcy courts that the fees were obligations of the debtor arising under an unexpired lease of personal property, which did not arise pre-petition. See id. at 20a-21a. As the court recognized, however, there is a "deep" split among the federal courts of appeals over the question of when "obligations" of a debtor-in-possession are deemed to "aris[e]" within the meaning of Section 365(d)(3), after which

Section 365(d)(5) is “modeled.” Id. at 14a-15a & nn.4-6 (citations omitted). Several courts of appeals have reached the same conclusion embraced by the court of appeals in this case: namely, that an obligation on the debtor arises when payment becomes due, regardless of when the obligation accrued. See, e.g., Burival v. Creditor Committee, 406 B.R. 548, 550-554 (B.A.P. 2009), aff’d, 613 F.3d 810, 812 (8th Cir. 2010); Centerpoint Properties v. Montgomery Ward Holding Corp., 268 F.3d 205, 209-212 (3d Cir. 2001); Koenig Sporting Goods, Inc. v. Morse Road Co., 203 F.3d 986, 989-990 (6th Cir. 2000). Other courts have reached the opposite conclusion: namely, that an obligation on the debtor arises when it accrues and becomes unconditional, regardless of when payment is due. See, e.g., El Paso Properties Corp. v. Gonzales, 283 B.R. 60, 62 (B.A.P. 10th Cir. 2002); In re Handy Andy Home Improvement Centers, Inc., 144 F.3d 1125, 1126-1129 (7th Cir. 1998).

5. Counsel for applicant respectfully requests a 60-day extension of time, to and including July 3, 2025, within which to file a petition for a writ of certiorari in this case. This case presents a complex question of statutory interpretation, which has divided the courts of appeals. Counsel of record is currently preparing numerous briefs with proximate due dates and is presenting oral argument in other cases during the period for filing the petition in this case. See, e.g., Hohn v. United States, No. 25-____ (U.S.) (petition for a writ of certiorari due Apr. 15, 2025); Kadrey v. Meta Platforms, Inc., Civ. No. 23-3417 (N.D. Cal.) (summary judgment reply brief due Apr. 17, 2025, and hearing May 1, 2025); Baldeo v. Airbnb, Inc., No. 24-1238 (brief of appellee due

Apr. 23, 2025). Additional time is therefore needed to prepare and print the petition in this case.

Respectfully submitted,

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