

McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP

Gary D. Bressler, Esq.

Michael R. Morano, Esq.

225 Liberty Street, 36th Floor

New York, NY 10281

Tel: (212) 483-9490

Fax: (212) 483-9129

Counsel to Chubb Fianzas Monterrey, Aseguradora de Cauccion, S.A. (formerly ACE Fianza Monterrey, S.A.), and its affiliated sureties

Hearing Date and Time: December 6, 2021, 2021 at 10:00 a.m.

Objection Date: December 1, 2021 at 4:00 p.m.

[As set forth in Notice of Hearing: DE 2173]

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

In re:

GRUPO AEROMEXICO, S.A.B. de C.V., *et al.*¹

Debtors.

Chapter 11

Case No. 20-11563 (SCC)

Jointly Administered

CHUBB FIANZAS MONTERREY, ASEGURADORA DE CAUCION, S.A. (FORMERLY ACE FIANZA MONTERREY, S.A.), ON BEHALF OF ITSELF AND ITS AFFILIATED SURETIES' RESERVATION OF RIGHTS TO THE DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING THE DEBTORS' ENTRY INTO, AND PERFORMANCE UNDER, THE DEBT FINANCING COMMITMENT LETTER, (II) AUTHORIZING THE DEBTORS' ENTRY INTO, AND PERFORMANCE UNDER, THE EQUITY COMMITMENT LETTER, (III) AUTHORIZING THE DEBTORS' ENTRY INTO, AND PERFORMANCE UNDER, THE SUBSCRIPTION AGREEMENT AND (IV) AUTHORIZING INCURRENCE, PAYMENT AND ALLOWANCE OF RELATED PREMIUMS, FEES, COSTS, AND EXPENSES AS SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS [DE 1860], SUPPLEMENT THERETO [DE 2168] AND THIRD DIP AGREEMENT MOTION [DE 2177]; DEBTORS' MOTION TO APPROVE THE (I) SHORTENED NOTICE AND OBJECTION PERIODS FOR DEBTORS' DISCLOSURE STATEMENT MOTION, (II) ADEQUACY OF INFORMATION IN THE DISCLOSURE STATEMENT, (III) SOLICITATION AND VOTING PROCEDURES, (IV) FORMS OF BALLOTS, NOTICES AND NOTICE PROCEDURES IN CONNECTION THEREWITH, AND (V) CERTAIN DATES WITH RESPECT THERETO [DE 1808] AND AMENDMENT THERETO [DE 2189].

¹ The Debtors in these chapter 11 cases, along with each Debtor's registration number in the applicable jurisdiction, are as follows: Grupo Aeromexico, S.A.B. de C.V. 286676; Aerovias de Mexico, S.A. de C.V. 108984; Aerolitoral, S.A. de C.V. 217315; Aerovias Empresa de Cargo, S.A. de C.V. 437094-1. The Debtors' corporate headquarters is located at Paseo de la Reforma No. 243, piso 25 Colonia Cuauhtemoc, Mexico City, C.P. 06500.

Chubb Fianzas Monterrey, Aseguradora de Cauccion, S.A. (formerly ACE Fianza Monterey, S.A.), for itself and on behalf of its affiliated sureties (collectively, the “**Surety**”), by and through its undersigned counsel, hereby submits this Reservation of Rights (the “**Reservation of Rights**”) to:

- 1) Debtors’ *Motion for Entry of an Order (I) Authorizing the Debtors’ Entry Into, and Performance Under, the Debt Financing Commitment Letter, (II) Authorizing the Debtors’ Entry Into, and Performance Under, the Equity Commitment Letter, (III) Authorizing the Debtors’ Entry Into, and Performance Under, the Subscription Agreement and (IV) Authorizing Incurrence, Prepayment and Allowance of Related Premiums, Fees, Costs, and Expenses as Superpriority Administrative Expense Claims* [DE 1860] (“**Commitment Letter Motion**”);
- 2) Debtors’ *Supplement to Debtors’ Exit Financing Motion and Notice of Filing of Revised Equity and Debt Commitment Letters* [DE 2168] (“**Exit Financing Supplement**”);
- 3) Debtors’ *Notice of Presentment of Proposed Order Authorizing Debtors’ Entry into the Third DIP Agreement* [DE 2177] (“**Third DIP Agreement Motion**”);
- 4) Debtors’ *Motion to Approve the (I) Shortened Notice and Objection Periods for Debtors’ Disclosure Statement Motion, (II) Adequacy of Information in the Disclosure Statement, (III) Solicitation and Voting Procedures, (IV) Forms of Ballots, Notices and Notice Procedures in Connection Therewith, and (V) Certain Dates with Respect Thereto* [DE 1808] (“**Disclosure Statement Motion**”); and
- 5) Debtors [Revised] *Notice of Filing of Revised Order Approving (I) Shortened Notice and Objection Periods for Debtors’ Disclosure Statement Motion, (II) Adequacy of Information in the Disclosure Statement, (III) Solicitation and Voting Procedures, (IV) Forms of Ballots, Notices and Notice Procedures in Connection Therewith and (V) Certain Dates with Respect Thereto* [DE 2189] (“**Revised Disclosure Statement Motion**”),

and in support of its Reservation of Rights states as follows:

BACKGROUND

1. On June 30, 2020 (the “**Petition Date**”), the Debtors filed petitions for relief under Chapter 11 of Title 11 of the Bankruptcy Code.

2. Prior to the Petition Date, the Surety issued certain surety bonds and/or related instruments on behalf of certain of the Debtors and/or their non-debtor affiliates in connection with Debtors' business operations (each a "Bond", and, collectively, the "Bonds").

3. Among the Bonds are surety bonds (or related documents or instruments) that serve as security in favor of certain public and private entities in connection with Debtors' payment and/or performance obligations under certain contracts and/or applicable laws/regulations. The Bonds relate to, among other things, payment of taxes, airport real property leases, airport counter spaces, ramp, dispatch and traffic services, among other performance obligations of the Debtors and or their affiliates.

4. In connection with the Bonds, the Debtors and non-debtor affiliates executed an agreement with the Surety on or about September 25, 2018 (the "Agreement"), which provides, in part, that: the Debtors and their non-debtor affiliates will make payment on premium obligations as well as any administrative expenses incurred by the Surety in issuing bonds (i.e., if a bond is subject to any registration requirements); if the Surety deems a partial or total bond claim to be forthcoming, the Debtors and their non-debtor affiliates will provide collateral. The Agreement also sets forth the Debtors' and their non-debtor affiliates' indemnity obligations to the Surety as they are required to reimburse the Surety for any amounts claimed under the bonds or paid by the Surety, as well as reimburse the Surety for costs and expenses incurred in the event that the Surety must intervene in an administrative or judicial action related to the bonds. The Agreement also provides that where a bond implicates a tax obligation, the Debtors and their non-debtor affiliates must provide the Surety with the amounts necessary to make payment (that is, collateral), within five days after the Surety is notified of a claim.

A. Reservation of Rights as to Commitment Letter Motion, Exit Financing Supplement and Third DIP Agreement Motion.

5. On October 13, 2020, the Court entered a *Final Order Granting Debtors' Motion to (I) Authorize Certain Debtors in Possession to Obtain Post-Petition Financing Pursuant to 11 U.S.C. §§ 105, 362, 363 and 364; (II) Grant Liens and Superpriority Administrative Expense Claims to DIP Lenders Pursuant to 11 U.S.C. §§ 364 and 507; (III) Modify Automatic Stay Pursuant to 11 U.S.C. §§ 361, 362, 363, 34 and 507; and (V) Grant Related Relief* (the “DIP Final Order”) which provides in pertinent part that as security for the Loan Parties’ payment and performance under the DIP Facility, the DIP Agent, for itself and the DIP Lenders, is granted a valid security interest and liens upon all of the DIP Collateral. (*See*, DIP Final Order, DE 527 at Decretal ¶ 5).

6. The DIP Final Order also provides that all DIP Obligations are entitled to a super-priority administrative expense claim against the Debtors, which will have priority over any and all administrative expenses. (*See, Id.* at Decretal ¶ 6).

7. However, the DIP Final Order clarifies that nothing in the DIP Loan Documents or the Final DIP Order in any way serves to prime or affect the rights of the Surety. (*See, Id.* at Decretal ¶ 25).

8. Specifically, the DIP Final Order provides a carve-out with respect to the Loan Parties’ liens as follows:

Nothing in the DIP Loan Documents, Interim Order, this Final Order, or the Motion shall in any way prime or affect the rights of Chubb Fianzas Monterrey, Aseguradora de Caucion, S.A. (formerly ACE Fianza Monterrey, S.A.), or its past, present or future parents, subsidiaries or affiliates (the “Surety”) as to: (a) any funds it is holding and/or being held for it presently or in the future, whether in trust, as security, or otherwise, including, but not limited to, any proceeds due or to become due any of the Debtors or their non-debtor affiliates in relation to contracts or obligations bonded by the Surety; (b) any substitutions or replacements of said funds including accretions to and interest earned on

said funds; (c) any bond, guarantee or similar instrument issued by the Surety on behalf of any of the Debtors or any of their non-debtor affiliates; or (d) any letter of credit or cash collateral related to any indemnity, collateral trust, bond or agreements between, among or involving the Surety and any of the Debtors or any of the Debtors' non-debtor affiliates (collectively (a) to (d), the "Surety Assets"). Nothing in the DIP Loan Documents, Interim Order or this Final Order shall affect the rights of the Surety under any current or future indemnity, collateral trust, corporate contract, bond application or related agreements between or involving the Surety and any of the Debtors or any of the Debtors' non-debtor affiliates as to the Surety Assets or otherwise, including, but not limited to, the September 25, 2018 Agreement, together with any amendment(s) thereto, including, but not limited to, the Amendment executed on November 7, 2018. In addition, nothing in the DIP Loan Documents, Interim Order or this Final Order shall prime or otherwise impact: (x) current or future setoff and/or recoupment rights and/or the lien rights of the Surety or of any party to whose rights the Surety has or may become subrogated; and/or (y) any existing or future subrogation or other common law rights of the Surety. Nothing in the DIP Loan Documents, the Interim Order or this Final Order shall affect the rights of the Surety to the extent that any Surety Assets are being held by any of the Debtors and are used by any of the Debtors as part of cash collateral, a concomitant replacement trust claim or replacement lien shall be granted to the Surety equal to the amount of the use of those funds with any replacement trust fund claim to be equal to the amount of trust funds used, and any replacement lien to have the same priority, amount, extent and validity as existed as of the Petition Date. In addition, notwithstanding anything in the DIP Loan Documents, the Interim Order or this Final Order to the contrary, the rights, claims and defenses of the Debtors, any obligee on any bond or similar instrument issued by the Surety and of the Surety, including, but not limited to, the Surety's and any obligee's rights under any properly perfected liens and claims and/or claim for equitable rights of subrogation, and rights of the Debtors and of any successors in interest to any of the Debtors, and any creditors, to object to any such liens, claims and/or equitable subrogation and other rights, including the extent of such liens, claims and rights and the grant of any replacement trust fund claim or replacement lien in connection with such liens, claims and rights, are fully preserved. Nothing herein shall be construed as an admission by the Surety, the Debtors or the DIP Secured Parties, or a determination by the Bankruptcy Court, regarding any claim in respect of the Surety, including in respect of any current or future under any bonds, guarantees or related instruments, or the Surety Assets and the Surety, the Debtors and the DIP Secured Parties expressly reserve any and all rights, remedies and defenses in connection therewith.

(Id.).

9. Consistent with the carve-out in the Final DIP Order, so too, any Order confirming the Debtors' Plan of Reorganization (the "**Plan**") should provide a substantially similar carve out with respect to any liens granted to lenders who provide exit financing, and any underlying Order approving entry into the Commitment Letter or Revised Commitment Letter should not serve to approve exit financing or the granting of liens thereunder.

10. Accordingly, the Surety reserves its rights to propose the following language or similar language, with respect to any liens granted to lenders who provide exit financing, as well as other Plan issues:

Notwithstanding anything to the contrary in the Plan, the Plan Supplement, the Disclosure Statement, the Confirmation Order, the Exit Facility Documents, any bar date notice or Claim objection, or any agreements or documents relating to the foregoing, including, without limitation, any other order of the Bankruptcy Court (including, without limitation, any provision of the foregoing that purports to be preemptory or supervening, grants an injunction, discharge, or release, or requires a party to opt out of any releases) (collectively, for purposes of this section, the "Plan Documents"), nothing in the Plan Documents shall in any way prime, discharge, impair, modify, or subordinate the rights of Chubb Fianzas Monterrey, Aseguradora de Cauccion, S.A. (formerly ACE Fianza Monterrey, S.A.), and/or its past, present, or future affiliated sureties (each as surety in their role as an issuer of surety bonds or related instruments, individually and collectively referred to herein as "Chubb Surety") including, without limitation, as to: (a) any indemnity or collateral obligations relating to bonds or related instruments issued and/or executed on behalf of or at the request of any of the Debtors and/or their non-Debtor affiliates that were or hereby are assumed as part of the Chapter 11 Cases (each such bond, surety guaranty or surety-related product, including any and all rider(s), modification(s) and/or amendment(s) thereto, a "Bond", and, collectively, the "Bonds"); (b) any funds Chubb Surety is holding and/or that are being held for Chubb Surety presently or in the future, whether in trust, as security, or otherwise, including any proceeds due or to become due to any of the Debtors or their non-debtor affiliates in relation to contracts or obligations for which Chubb Surety has issued or may in the future issue any bond or related instrument, including any Bond; (c) any substitutions or replacements of said funds including accretions to and interest earned on said funds; (d) any collateral or letter of credit related to any indemnity, collateral trust, Bond, arrangement, contract or other agreements or arrangements between or involving Chubb Surety and any of the Debtors and/or their non-debtor affiliates or predecessors that were or hereby are assumed as part of the Chapter 11 Cases; or (e) any rights, remedies and/or defenses Chubb Surety may now or in the future have with respect to any and all Bonds; (f) current or future setoff and/or recoupment rights and/or the lien rights and/or trust fund claims of Chubb Surety or any party to whose rights Chubb Surety has or may be subrogated, and/or any existing or future subrogation or other common law rights of Chubb Surety (notwithstanding the provisions set forth in Article IX.G of the Plan, including clause (IV) thereof); and (g) the Debtors' assumption of any indemnity agreement related to any of the Bonds (together

with any amendment(s) or modification(s) thereto, including, but not limited to, the Amendment executed on November 7, 2018, collectively, the “Indemnity Agreement”), which include, without limitation, the September 25, 2018 Agreement,. The Indemnity Agreement and any bonds issued and/or executed by Chubb Surety, including the Bonds, are hereby assumed.

No third party releases in the Plan Documents shall apply to Chubb Surety and/or its Related Parties, or to claims to which Chubb Surety and/or its Related Parties are subrogated, and, to the extent necessary, Chubb Surety and/or its Related Parties shall be deemed to have opted-out of any such releases on behalf of itself/themselves and related to any party to whose rights Chubb Surety and/or its Related Parties has/have or may be subrogated. In addition, notwithstanding anything in the Plan Documents, the rights, claims, and defenses of the Debtors and of Chubb Surety and/or its Related Parties, including, but not limited to, Chubb Surety’s and/or its Related Parties’ rights under any properly perfected lien and/or claims and/or claim for equitable rights of subrogation, and rights of the Debtors and of any successors in interest to any of the Debtors and any creditors, to object to any such liens, claims, and/or equitable subrogation and other rights, are fully preserved, and Chubb Surety and/or its Related Parties shall not be required to file an administrative proof of claim, request for payment, or fee application to protect any such claims.

Nothing in the Plan Documents is an admission by Chubb Surety or the Debtors, or a determination by the Court, regarding any claims under any Bond, and Chubb Surety and the Debtors (on behalf of themselves and their successors and creditors) reserve any and all rights, remedies, and defenses in connection therewith.

For the avoidance of doubt, Sections 4.5, 5.10, 6.1(d), 6.3, 7.2(a), and 8.11 of the Plan shall not apply to Chubb Surety or any beneficiary of or obligee relating to the Bonds or the claims of Chubb Surety or said beneficiaries and/or obligees. Further, notwithstanding Section 8.14 of the Plan, the Debtors shall not assert Preference Actions as counterclaims or defenses to the claims of any beneficiary under or obligee on any of the bonds issued by Chubb Surety, including the Bonds.

The definition of ‘Insurance Policies’ shall include the following language: “Insurance Policies shall not include surety bonds, surety indemnity agreements or surety-related products.”

Nothing herein shall limit Chubb Surety from cancelling, terminating, not renewing or refusing to increase the amount of any bonds, including the Bonds, and nothing herein shall require Chubb Surety to issue new bonds or similar instruments.

As to any executory contracts or leases between or among any Debtor or Reorganized Debtor and a beneficiary under or obligee on any Bond, the Debtor and/ or Reorganized Debtors must give such beneficiary and/or obligee, and Chubb Surety, notice of the dollar amount of any proposed Cure, with an opportunity to object and cannot rely on a cure amount of zero based on said contract or lease not being contained on a list of said contracts and leases to be assumed.

The Debtors shall pay for any and all fees and costs incurred by Chubb Surety with regard to this matter through the Effective Date, which have not been previously paid or reimbursed by the Debtors and/or non-their non-debtor affiliates. Upon, and in strict compliance with, the request of Chubb Surety, one or more of the Reorganized Debtors and/or any new entity formed as part of a

restructure in connection with the implementation of the Plan, shall execute an indemnity agreement in favor of Chubb Surety in a form that is acceptable to Chubb Surety.

Upon the effective date of the Plan, the Debtors, Reorganized Debtors and any new entities created upon emergence shall, upon the written request of Chubb Surety, furnish Chubb Surety with collateral security in a form and amount that are, in the sole and exclusive discretion of Chubb Surety, acceptable to Chubb Surety (“Collateral Obligation”). The Collateral Obligation shall exist until Chubb Surety receives written evidence satisfactory to Chubb Surety of the termination of any and all actual or potential past, present or future liability or exposure under any and all bonds, including the Bonds. The obligations to execute a new indemnity agreement and the Collateral Obligation are not in lieu of any other rights Chubb Surety may now or in the future have.

Notwithstanding any provision in the Plan Documents, upon request, Chubb Surety shall have access to the specific portions of any and all books and records held by the Debtors and/or reorganized debtors relating to Chubb Surety’s Bonds, and Chubb Surety shall receive no less than thirty (30) days’ written notice by the entity holding such books and records prior to destruction or abandonment of any such books and records. Without limitation to any other rights of Chubb Surety, if a claim or claims are asserted against any Bond(s) and/or related instruments, then Chubb Surety shall be granted access to, and may make copies of, the specific portions of any books and records related to such Bonds upon Chubb Surety’s request.

11. To the extent that the Debtors do seek a determination as to both the imposition of exit financing liens as well as the priority of such liens, the Surety hereby reserves its right to assert such objection, when and if such objection is appropriate.

12. The Surety is otherwise supportive of the Commitment Letter Motion, the Exit Financing Supplement and the Third DIP Agreement Motion.

B. Disclosure Statement Motion.

13. The Surety reserves its rights with respect to the proposed *Order Approving the (I) Shortened Notice and Objection Periods for Debtors’ Disclosure Statement Motion, (II) Adequacy of Information in the Disclosure Statement, (III) Solicitation and Voting Procedures, (IV) Forms of Ballots, Notices and Notice Procedures in Connection Therewith and (V) Certain Dates with Respect Thereto* [DE 1808-1 and corresponding Revised Order [DE 2189]] with respect to Solicitation and Voting Procedures; specifically, with respect to Exhibit 1 of the proposed Order, the *Solicitation and*

Voting Procedures at section C.4, *Notices in Respect of Executory Contracts and Unexpired Leases*. (DE 2189 at p. 25 of 329).

14. The Solicitation and Voting Procedures provide that counterparties to executory contracts and unexpired leases may file an objection to any proposed assumption and/or rejection of said contract or lease by January 10, 2022 [unless another date is so specified]. *Id.*

15. The proposed [second revised] Plan [DE 2184] states at Section 7.2 in pertinent part, that “If a counterparty to an Executory Contract or Unexpired Lease receives an Assumption Notice, but such Executory Contract or Unexpired Lease is not listed therein, or does not receive such a notice, the proposed Cure Amount for such Executory Contract or Unexpired Lease shall be deemed to be zero dollars (\$0).” (DE 2184 at Section 7.2(a), pp. 73 of 99).

16. The Surety is concerned that a Bond beneficiary that is a counterparty to an executory contract or lease, may not realize that the cure amount for such executory contract or lease is deemed to be zero dollars, and may therefore give up its cure rights against the Debtors.

17. To the extent that the Surety makes payment under a Bond to the beneficiary that is a counterparty to an executory contract or lease that is deemed to have a zero dollars cure amount, the Surety steps into the shoes of the counterparty, and therefore the Surety may lose the benefit of a more appropriate cure amount.

18. Accordingly, the Surety reserves its rights to object at the appropriate time, to any notice of cure deemed to be of zero value, proffered to a counterparty that is a Bond beneficiary (or as to the Surety, for that matter).

GENERAL RESERVATION OF RIGHTS

19. The submission of this Reservation of Rights by the Surety is not intended as, and shall not be construed as: (a) the Surety’s admission of any liability or waiver of any defenses or limitation of any rights of Surety with respect to any claims against any one or more of the Bonds

or under any indemnity agreement in favor of the Surety, including the Indemnity Agreement; (b) the Surety's waiver or release of any right to exoneration it may have against anyone with respect to any of the Bonds; (c) the Surety's waiver or release of its right to be subrogated to the rights of one or more of the parties paid in connection with the Bonds; (d) an election of remedy; or (e) consent to the determination of any of the Debtors' liability to the Surety by any particular court, including, without limitation, the Bankruptcy Court.

20. The Surety reserves the rights to object and put forth any argument in relation to any plans of reorganization, disclosure statement and/or solicitation and voting procedures proposed by the Debtors, and to raise any arguments by any other party in their objection(s) to this Disclosure Statement Motion.

21. The Surety reserves the right to object and put forth any argument in relation to any motion filed by the Debtors for the Bankruptcy Court's authorization of assumption and assignment of executory contracts and unexpired leases, and to raise any arguments by any other party in their objection(s) to the Disclosure Statement Motion.

22. The Surety expressly reserves, and does not waive, any and all of its rights, claims, defenses, limitations, and/or exclusions in connection with its and any of the Debtors' or its affiliates' rights and obligations under the Indemnity Agreement, the Bonds, applicable law, or otherwise. Surety further reserves all rights to assert any and all such rights, claims, defenses, limitations and/or exclusions in any appropriate manner or forum whatsoever (including, without limitation, any of its rights to have any non-core matter relating to the interpretation of its contractual rights and Debtors' contractual obligations adjudicated by the United States District Court).

23. The Surety further reserves all of its rights to raise any issues contained in this Reservation of Rights and any other related issues in any procedurally appropriate contested matter and/or adversary proceeding, including, without limitation, (i) objections to confirmation of any plan; (ii) a separate adversary proceeding requesting any appropriate declaratory and/or injunctive relief; (iii) or an objection to any subsequent motion seeking approval of an asset sale to any prospective asset purchaser with respect to any contractual rights that may be adversely affected by a sale motion or the confirmation of any plan.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Surety respectfully reserves its rights, accordingly.

**McELROY, DEUTSCH, MULVANEY
& CARPENTER, LLP**

Dated: December 1, 2021

/s/ Gary D. Bressler

Gary D. Bressler, Esq.
Michael R. Morano, Esq.
225 Liberty Street, 36th Floor
New York, NY 10281
Telephone: (212) 483-9490
Facsimile: (212) 483-9129
E-mail: gbressler@mdmc-law.com
mmorano@mdmc-law.com

*Counsel to Chubb Fianzas Monterrey, Aseguradora
de Caucion S.A. (formerly ACE Fianza Monterrey,
S.A.), and its affiliated sureties*