

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re:) Chapter 11
)
ATA AIRLINES, INC.) Case No. 08-03675-BHL-11
)
Debtor)

MOTION FOR AUTHORITY UNDER 11 U.S.C. § 363 TO SELL CERTAIN L1011 AIRCRAFT AND RELATED ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS, SUBJECT TO HIGHER AND BETTER OFFERS

Hearing:	January 28, 2009 1:30 p.m. EST
Location:	103 U.S. Courthouse 121 West Spring Street New Albany, IN 47150
Telephonic Participation	
Dial-In:	(877) 213-2541
Passcode:	5970866#

ATA Airlines, Inc. (the “Debtor”) files this Motion for Authority under 11 U.S.C. § 363 to Sell Certain L1011 Aircraft and Related Assets Free and Clear of Liens, Claims, Encumbrances, and Interests, Subject to Higher and Better Offers (the “Motion”).

Jurisdiction

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper in this Court under 28 U.S.C. §§ 1408 and 1409.

Background

A. The Bankruptcy Case and the Debtor's Business Operations.

2. On April 2, 2008 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the Bankruptcy Code in the United States Bankruptcy Court

for the Southern District of Indiana, Indianapolis Division (the "Court"). The Debtor continues to manage its property and assets as debtor-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.

3. On April 16, 2008 the United States Trustee appointed the Unsecured Creditors' Committee (the "Committee").

4. Prepetition, the Debtor operated a diversified international passenger airline that operated in two principal business segments: (a) a low cost carrier operation that provided scheduled passenger service that leveraged a code share agreement with Southwest Airlines and (b) a charter operation focusing primarily on providing charter service to the United States government/military.

5. Shortly after the bankruptcy filing, the Debtor decided to cease its business operations, after analyzing its fleet schedules and aircraft fleet, operating costs, relevant business goals and objectives, as well as available financing sources and business combination possibilities. The Debtor is therefore in the process of winding down its business operations and liquidating its assets in an orderly fashion.

B. The Debtor's Marketing Efforts and Results of the Bid Procedures.

6. In furtherance of the orderly liquidation, the Debtor has marketed certain of its owned aircraft (which consist of three L1011 aircraft) and related engines and spare parts to various third parties. As part of those marketing efforts, the Debtor had discussions with at least 15 parties (or their agents) interested in purchasing all or a portion of the L1011 aircraft and related assets. The Debtor ultimately identified several parties with a legitimate interest in purchasing the L1011 aircraft and/or related assets, but none of these parties were willing to submit a written bid proposal.

7. To promote an orderly marketing process for the sale of the L1011 aircraft and to encourage the submission of written offers, the Debtor filed a motion seeking to establish rules and procedures governing the solicitation and submission of bids for the acquisition of the L1011s. On November 21, 2008, the Court entered its order (Docket No. 969) (the "Bid Procedures Order") establishing various solicitation and bid procedures for the acquisition of the L1011 aircraft, including rules concerning the form and content of the bid proposals, a deadline for submitting bid proposals, the requirement of a good faith deposit, and rules concerning due diligence efforts. A copy of the Bid Procedures Order was served on, among others, all parties who had expressed an interest in acquiring L1011 aircraft and/or related assets.

8. As a result of the bid procedures and due diligence process, the Debtor received bid proposals for the acquisition of the L1011 aircraft from two parties by the bid deadline. The Debtor has determined that the offer submitted by Barq Aviation ("Barq") is the highest and best offer for the Assets (as defined below).¹ Barq's bid proposal is embodied in a letter of intent dated December 12, 2008 (the "LOI"). The LOI contemplates the sale of three L1011 aircraft² with the corresponding engines, logs, books, and records (collectively, the "Assets") to Barq. A copy of the LOI is attached to this Motion as Exhibit A.

B. The Sale Transaction.

9. The transactions effectuating, and the terms and conditions governing, the sale of the Assets to Barq are set out in the LOI, and will be memorialized in definitive documents by and between the Debtor and Barq. The LOI provides that pursuant to Bankruptcy Code section

¹ The bid proposal submitted by Barq was substantially higher than the bid proposal submitted by the other bidder. After receiving the bid proposals, the Debtor contacted the low bidder to notify it of the higher offer and to determine whether the low bidder was interested in matching Barq's offer or otherwise participating in an auction for the L1011s. The low bidder informed the Debtor that it was not interested in matching Barq's offer. Contrary to the bid procedures, the low bidder never posted the required deposit amount.

² The three aircraft are identified as: Lockheed L1011-500 (Tail No. N162AT; Manufacturer's Serial No. 1220), Lockheed L1011-500 (Tail No. N163AT; Manufacturer's Serial No. 1229), and Lockheed L1011-500 (Tail No. N164AT; Manufacturer's Serial No. 1238)

363, Barq will purchase from the Debtor all of its rights, title, and interests in the Assets. The Assets are being sold on an "as is, where is" basis. The sale of the Assets shall be free and clear of all liens, claims, interests, and other encumbrances (within the meaning of Bankruptcy Code section 363(f)), with the liens attaching to the sale proceeds with the same validity and priority as they had against the Assets. The sale shall be structured in such a way as to allow the Debtor to maintain operational control over N163AT until the closing of the Debtor's chapter 11 plan.

10. The cash consideration to the bankruptcy estate for the Assets is \$1,550,000.00 (the "Purchase Price"), which is allocated as follows: \$250,000.00 for Lockheed L1011-500 (Tail No. N162AT; Manufacturer's Serial No. 1220); \$500,000.00 for Lockheed L1011-500 (Tail No. N163AT; Manufacturer's Serial No. 1229); and \$800,000.00 for Lockheed L1011-500 (Tail No. N164AT; Manufacturer's Serial No. 1238). The Purchase Price is payable by wire transfer of immediately available funds to the Debtor at the sale closing. Each party will bear their own costs and expenses incurred in connection with the purchase of the Assets.

11. Barq has posted with the Debtor a deposit in the amount of \$760,000 (the "Deposit"). The Deposit will be credited against the amounts payable to the Debtor at the closing. The Deposit shall not be refundable for any reason, except in the event that the Court does not approve the transaction contemplated in the LOI for a reason other than the Barq's breach of the LOI.

12. The respective obligations of the Debtor and Barq to consummate the sale transaction are subject to the specific conditions outlined in paragraph 4 of the LOI, including bankruptcy court approval.

13. Barq is purchasing the Assets in good faith. The LOI is the product of substantial, extensive, and good faith negotiations that were conducted at arm's length and without collusion.

Accordingly, Barq is entitled to the protections afforded under Bankruptcy Code section 363(m). See Official Comm. of Senior Unsecured Creditors v. First Republic Bank, 106 B.R. 938 (N.D. Tex. 1989), citing In re Bleufontaine, Inc., 634 F.2d 1383 (5th Cir. 1981).

Notice of Ability to Submit Competing Offers

14. The transaction described in the Letter of Intent is subject to higher and better offers. In order to maximize the sale price for the Assets, interested parties may submit competing bids to the Debtor before the hearing on this Motion, which is scheduled for January 28, 2009 at 1:30 p.m. prevailing eastern time. If the Debtor receives any competing bids, an auction shall be conducted before the Bankruptcy Court for the Southern District of Indiana, Indianapolis Division at the hearing on this Motion. The address for the Court is 110 U.S. Courthouse, 121 West Spring Street, New Albany, Indiana 47150.

Relief Requested and Applicable Authority

15. The Debtor seeks authority to sell the Assets described in the LOI free and clear of all liens, claims, encumbrances, and interests pursuant to Bankruptcy Code sections 363(b) and 363(f), subject to the terms of the LOI. The Purchase Price is the highest and best offer received by the Debtor for the purchase of the Assets. In the Debtor's business judgment, consummation of the proposed sale is in the best interests of its bankruptcy estate and creditors.

A. The Sale of Assets is Consistent with the Debtor's Business Judgment - Bankruptcy Code Section 363(b).

16. Bankruptcy Code section 363(b)(1) provides that “[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). Courts have uniformly held that approval of a proposed sale of property under § 363(b)(1) is appropriate where the transaction is consistent with the debtor's

reasonable business judgment.³ See Institutional Creditors of Continental Air Lines, Inc. v. Continental Air Lines, Inc. (In re Continental Air Lines, Inc.), 780 F.2d 1223 (5th Cir. 1986); In re Lionel Corp., 722 F.2d 1063 (2d Cir. 1983); Stephens Industries, Inc. v. McClung, 789 F.2d 386 (6th Cir. 1986); In re Ionosphere Clubs, Inc., 100 B.R. 670 (Bankr. S.D.N.Y. 1989).

17. The Debtor has ceased operations, is winding down its business, and no longer has a need for its aircraft. The transaction embodied in the LOI is the highest and best offer the Debtor received for the Assets before the filing of this Motion. The proposed sale to Barq is the result of arm's-length, good-faith negotiations. The sale transaction is not subject to any financing contingencies. The sale will be structured in a way to allow the Debtor to maintain operational control over N163AT until plan confirmation, which will enable the Debtor to maintain its airline operating certificate until the closing of the sale of its business to Southwest Airlines Co. The proposed sale is therefore consistent with the Debtor's business judgment, and is in the best interest of the bankruptcy estate and its creditors.

B. The Assets are Eligible to be Sold Free and Clear of Liens, Claims, Encumbrances, and Interests - Bankruptcy Code Section 363(f).

18. Bankruptcy Code section 363(f) provides that a debtor may sell or otherwise transfer property outside the ordinary course of business free and clear of any interest in such property if:

³ While the courts express the standard for approval of sales outside the ordinary course of business using different terms, they generally apply standards that essentially constitute a business judgment standard. For example, some courts have described the standard as one of "good faith" or "fair and equitable." See, e.g., In re Phoenix Steel Corp., 82 B.R. 334 (Bankr. D. Del. 1987). Other courts seek to determine whether the proposed sale is "in the best interest of the estate." See, e.g., WBQ Partnership v. Commonwealth of Virginia, 189 B.R. 97 (Bankr. E.D. Va. 1995). And, in the context of a sale of substantially all of the assets of the bankruptcy estate, at least one court has required that the purchase price be "fair and reasonable." In re Delaware & Hudson Railway Co., 124 B.R. 169 (D. Del. 1991).

- a. applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- b. such entity consents;
- c. such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- d. such interest is in bona fide dispute; or
- e. such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). Because § 363(f) is drafted in the disjunctive, only one of the specified conditions needs to be met for a sale free and clear of interests.

19. Certain creditors may assert liens or other security interests in the Assets. Any liens, claims and encumbrances in the Assets shall attach to the sale proceeds. The Debtor believes that the Purchase Price is greater than the aggregate amount of all valid liens and security interests asserted against the Assets. The contemplated sale of the Assets therefore satisfies at least one of the elements under § 363(f).

20. Additionally, under § 363(f)(2), a bankruptcy debtor may sell estate property free and clear of interests where the interest holders consent to such a sale. 11 U.S.C. § 363(f)(2). The requisite consent may either be express or implied from the circumstances surrounding the sale. The Debtor anticipates that any secured creditor with consensual liens on the Assets will consent to the transactions embodied in the LOI. To the extent that any creditor with an interest in the Assets received notice of this Motion and does not file any objections, such creditor should be deemed to have implicitly consented to the contemplated transactions. See Veltman v. Whetzal, 93 F.3d 517 (8th Cir. 1996) (failure to object to proposed sale, coupled with agreement to stipulate regarding authority to sell free of interest, constituted consent to the sale free and clear of interests); Hargrove v. Pemberton (In re Tabore, Inc.), 175 B.R. 855 (Bankr. D.N.J.

1994) (failure to object to notice of sale or attend hearing deemed consent to sale for purposes of § 363); In re Shary, 152 B.R. 724 (Bankr. N.D. Ohio 1993) (failure to object to transfer of liquor license issued by state constituted consent to sale). Therefore, either expressly or implicitly, the requirements of § 363(f)(2) for the sale or transfer of the Assets free and clear of interests will be satisfied.

21. The Debtor reserves the right to submit evidence of the satisfaction of the other elements of § 363(f) at the sale hearing, to the extent necessary to support the sale of the Assets free and clear.

Notice of Sale

22. In accordance with the case management procedures established by the Court, notice of this Motion will be served on the parties identified on the Master Service List maintained in this bankruptcy and all known creditors or parties-in-interest who could assert liens or security interests against the Assets. Notice of this Motion will also be served on the known parties who have expressed an interest in acquiring the L1011 assets owned by the Debtor.

Conclusion

23. Based on the foregoing, the Debtor respectfully requests that the Court enter on order (a) granting the Motion; (b) authorizing the Debtor to sell the Assets to Barq; and (c) granting the Debtor such other legal and equitable relief to which it is entitled.

Dated: January 16, 2009

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