

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

EMERGENCY MOTION FOR ORDER (I) APPROVING THE DEBTOR'S SELECTION OF SOUTHWEST AIRLINES CO. AS THE PARTY SUBMITTING THE HIGHEST AND BEST OFFER FOR THE ACQUISITION OF THE DEBTOR'S BUSINESS; (II) APPROVING SOUTHWEST AIRLINES CO.'S BID PROPOSAL, INCLUDING THE BID PROTECTIONS THEREIN; AND (III) AUTHORIZING THE DEBTOR TO ENTER INTO A LEASE AGREEMENT REGARDING CERTAIN SLOTS AT LAGUARDIA AIRPORT

Hearing:	December 2, 2008 11:00 a.m. EST
Location:	U.S. Courthouse 46 E. Ohio Street, Room 310 Indianapolis, IN 46204
Telephonic Participation	
Dial-In:	1-877-213-2541
Passcode:	9880688#

ATA Airlines, Inc. (the "Debtor") files this Emergency Motion for Order (I) Approving the Debtor's Selection of Southwest Airlines Co. as the Party Submitting the Highest and Best Offer for the Acquisition of the Debtor's Business; (II) Approving Southwest Airlines Co.'s Bid Proposal, Including the Bid Protections Therein; and (III) Authorizing the Debtor to Enter into a Lease Agreement Regarding Certain Slots at LaGuardia Airport (the "Motion").

Jurisdiction and Venue

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.

2. On April 2, 2008 (the "Petition Date"), the Debtor filed a voluntary petition (the "Bankruptcy Case") 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 committee of unsecured creditors (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 discontinue its flight 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. Among the assets and authorities the Debtor still possesses as part of its business operations are: a number of executory contracts and unexpired leases; certain intellectual property, including tradenames/trademarks and copyrights; goodwill; manuals, logs, and records related to its operating assets and authorities; authorizations that allow it to operate as a commercial airline; computer databases and software; certain airport

operating authorities;¹ and other miscellaneous tangible and intangible assets (collectively, the "Business"). The Debtor has undertaken steps postpetition to maintain its authorities (including its airline operating certificate) despite the business shutdown in an effort to maximize the value of the company for the benefit of the bankruptcy estate and its creditors.

6. Among the principal assets comprising the Business are the Debtor's fourteen (14) "operating authorizations" at LaGuardia Airport in New York (the "LaGuardia Slots"). "Operating authorizations" (commonly known as "slots") are authorities assigned by the Federal Aviation Administration ("FAA"), or exemptions to such authorizations, permitting a carrier to conduct scheduled arrival or departure operations during specified time intervals. The LaGuardia Slots are subject to various rules and regulations established by the FAA generally designed to manage the traffic congestion at LaGuardia. The LaGuardia Slots are currently governed under an FAA order titled Operating Limitations at New York LaGuardia Airport (as amended, the "LaGuardia Order") (71 FR 77854). The LaGuardia Slots and the status of the FAA rules and regulations governing them are further discussed below.

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

7. In May 2008, the FAA approached the Debtor concerning the Debtor's intentions with respect to continuing or restarting its business operations. The Debtor informed the FAA that it had ceased operations, but was interested in maintaining its operating authorities with any eye toward marketing them for a potential sale. The Debtor subsequently engaged in protracted discussions (on a weekly basis) with the FAA in an effort to convince the FAA to allow the Debtor to maintain the operating authorities and to discuss the contours of a potential sale of the Debtor's business. The FAA indicated during those discussions that it would only recognize the

¹ The Debtor currently holds operating authorities ("slots") at LaGuardia Airport in New York and Ronald Reagan Washington National Airport in Washington, D.C. The Debtor leases 12 of the slots at LaGuardia Airport and two of the Slots at Ronald Reagan Airport to AirTran Airways, Inc. pursuant to separate lease agreements.

continuation of the operating authorities through a sale of the company. The discussions with the FAA have shaped the Debtor's efforts to maintain its operating authorities and its related marketing efforts.

8. After the bankruptcy filing, the Debtor began receiving expressions of interest from various parties regarding an acquisition of the Debtor's business and certain operating authorities. In all, 13 parties (or their agents) contacted the Debtor inquiring about a potential acquisition of the business and related authorizations. The Debtor ultimately identified several parties with a legitimate interest in purchasing the company. The Debtor had discussions and/or negotiations with each of the interested parties, and informed each of the parties during the course of the discussions of the FAA's views concerning the sale of the business. Parallel with these negotiations, the Debtor briefed the FAA on the potential transactions and sought the FAA's input on each transaction. The Debtor also solicited input from its secured lender JPMorgan Chase Bank, N.A. and the Committee concerning the sale process and the identification of possible buyers.

9. To accomplish the sale of the Debtor's business in the most efficient and effective manner and to promote an orderly marketing process, the Debtor filed a motion seeking to establish rules and procedures governing the solicitation and submission of bids for the acquisition of the Business. On October 17, 2008, the Court entered its order (Docket No. 904) (the "Bid Procedures Order") establishing various solicitation and bid procedures for the acquisition of the Business, including rules concerning the form and content of the bid proposals, a deadline for submitting bid proposals, the requirement of a good faith deposit, rules concerning due diligence efforts, and the scheduling of a status conference to discuss the results of the bid

procedures. A copy of the Bid Procedures Order was served on, among others, all parties who had expressed an interest in acquiring the Business or any portion thereof.

C. The LaGuardia Final Rule and Subsequent Clarification.

10. As previously noted, the LaGuardia Slots are currently subject to the rules and regulations in the LaGuardia Order. The LaGuardia Order was meant to be a temporary order, and its duration is linked to the publication of a final rule by the FAA.

11. On October 10, 2008, the FAA published its Congestion Management Rule for LaGuardia Airport (the "Final Rule") (73 FR 60574), purportedly as part of its ongoing effort to address traffic congestion at LaGuardia Airport. Under the Final Rule, the FAA proposed to "grandfather" 85 percent of the total number of slots currently in use at LaGuardia pursuant to cooperative lease agreements. Of the remaining 15 percent of the slots, the FAA proposed to retire a portion of those slots, and the remaining slots would be reallocated pursuant to annual public auctions. In addition, the Final Rule attempts to foster a secondary market in the slots by allowing the carriers to transfer their slots to other carriers, either through the annual auctions or an internet bulletin-board system. The Final Rule is scheduled to become effective in early December 2008, and will remain in place for ten years.

12. While not specifically mentioning the Debtor, the Final Rule ostensibly contemplated that the LaGuardia Slots held by the Debtor would be confiscated, and would either be reallocated or terminated. In particular, the Final Rule provided:

One carrier that held Operating Authorizations in January 2007 is no longer in business, although it continues to hold an air carrier certificate. While those Operating Authorizations are currently being operated by another carrier solely within its marketing control, the FAA believes it is simply cleaner to allocate the slots to the holder of the Operating Authorization only if the carrier is still operating at the airport.

73 FR at 60585.

13. On October 27, 2008, after the entry of the Bid Procedures Order, the FAA issued a clarification to the Final Rule (the "Clarification") designed to address the handling of the LaGuardia Slots held by the Debtor in light of the establishment of the Bid Procedures and the Debtor's ongoing efforts to sell the Business. The Clarification provides that, for purposes of the LaGuardia Order and the Final Rule, the FAA would consider the entity acquiring the Business to stand in the Debtor's shoes with regard to the LaGuardia Slots. Clarification, p. 4. The Clarification further provided that if the acquiring entity is an air carrier, the FAA will allocate the 14 LaGuardia Slots to such entity, even if the acquiring carrier doesn't currently have a presence at LaGuardia. Id.

14. Soon after publication of the Clarification, the Debtor contacted a number of airlines it believed would have an interest in acquiring the Business in light of the FAA's position in the Clarification. The Debtor sent a copy of the Clarification and Bid Procedures Order to its contacts at such airlines, and invited them to participate in the bid procedures if they were interested in purchasing the Business, either as a means of acquiring the LaGuardia Slots or otherwise.

D. The Results of the Bid Procedures.

15. Pursuant to the bid procedures, the Debtor received due diligence inquiries from various interested parties. The Debtor entered into non-disclosure agreements with these parties, and exchanged relevant business and financial information with them in furtherance of a potential sale transaction. As a result of the bid procedures and due diligence process, the Debtor received bid proposals for the acquisition of the Business from three parties by the bid deadline, including Southwest Airlines Co. ("Southwest").

16. On November 5, 2008, the Court held a status conference regarding the results of the bid procedures. The Debtor announced that it received three bid proposals for the acquisition of the Business, and was negotiating with the bidding parties in an effort to harmonize the bid proposals for purposes of determining the "highest and best" offer. The Debtor also announced that it would conduct an auction on November 10, 2008 in Dallas, Texas to allow for competitive bidding for the acquisition of the Business. The Debtor spent a considerable amount of time over the next few days negotiating the bid proposals that would serve as a baseline for competitive bidding at the auction.

17. On November 7, 2008, after negotiating the bid proposals, the Debtor circulated a copy of the harmonized bid proposals to the qualified bidding parties,² along with a document outlining the rules and procedures for the contemplated auction. The following day, one of the remaining bidders withdrew its proposal and confirmed that it was not willing to participate in the auction for the acquisition of the Business. The withdrawal left Southwest as the sole remaining bidder for the Business.

18. On November 10, 2008, the Debtor met with Southwest and its counsel in Dallas for approximately five hours to negotiate the contours of the contemplated acquisition. As part of that negotiation session, the Debtor was successful in getting Southwest to increase materially the purchase price for the Business and also negotiated the exclusion of the Debtor's slot rights at Ronald Reagan Washington National Airport from the assets comprising the Business. The

² One party who submitted a bid proposal did not tender the required good faith deposit or evidence of financial ability to close the transaction by the deadline in the Bid Procedures Order. In an effort to ensure the maximum number of bidders for the sale of the Business, the Debtor continued to have dialogue with the party's counsel regarding the deposit requirement and the contemplated auction. Because the party still hadn't submitted a deposit or evidence of financial ability to close by the close of business on Nov 7, 2008 (four days after the deadline in the Bid Procedures Order), the Debtor informed the party that it would not consider it a qualified bidder for purposes of the auction, and therefore did not furnish it with a copy of the auction rules or other bid proposals.

parties continued to negotiate various terms and conditions of the bid proposal up until the filing of this Motion.

19. The bid proposal negotiated between the Debtor and Southwest is memorialized in a letter agreement dated November 18, 2008 (the “Southwest Proposal”). A copy of the Southwest Proposal is attached to this Motion as Exhibit A. The Southwest Proposal contemplates the sale of the Debtor's business through a stock transaction that will be consummated pursuant to a confirmed chapter 11 plan in this bankruptcy.

Summary of Terms and Conditions of the Southwest Proposal

20. The following are the material terms of the Southwest Proposal:³
- a. Purchase. Southwest will purchase one-hundred percent (100%) of the common stock or similar equity interest (the “Purchased Equity”) issued by the reorganized Debtor under its chapter 11 plan (the “Plan”) in exchange for \$7.5 million (the “Consideration”). The Consideration shall be paid at the closing of the transaction contemplated in the Southwest Bid Proposal.
 - b. Plan Conveyance. Under the Plan, the following shall be transferred to or otherwise vest in the reorganized Debtor, in each case free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options and interests thereon and there against.
 - i. Those certain properties and authorizations listed on Schedule B.1 to the Southwest Bid Proposal (the “Included Assets”), which include all of the Debtor's rights in the fourteen (14) specified "operating authorizations" (also known as departure and landing slots) at LaGuardia Airport in New York (the “LaGuardia Slots”); Air Carrier Operating Certificate; all Certificates of Public Convenience & Necessity; the Debtor's Operations Specifications; transferable trademarks and trade names; Aircraft Manuals and Training Manuals, together with all documents and other records, electronic or otherwise, with respect thereto. Subject to the Debtor's agreement, Southwest may amend Schedule B.1 at any time on or before the date of the hearing on the disclosure statement concerning the Plan (the “Disclosure Statement Hearing”).

³ The description of the transactions contemplated in the Southwest Bid Proposal is for summary purposes only. The Southwest Bid Proposal is the controlling document in the event of any conflict between this Motion and the Southwest Bid Proposal. Interested parties should read the Southwest Bid Proposal to get a complete and accurate description of the contemplated transactions. The Southwest Bid Proposal contemplates that the parties will negotiate and enter into definitive documents regarding the sale transaction.

- ii. Those certain executory contracts and unexpired leases identified on Schedule B.2 to the Southwest Bid Proposal (the “Included Contracts”). Southwest may amend Schedule B.2 at any time on or before the Disclosure Statement Hearing.
- c. Terms and Conditions. Southwest’s payment of the Consideration and performance of its commitments under the Southwest Bid Proposal are subject to certain terms and conditions, unless otherwise waived by Southwest or ATA, each in its sole discretion, including:
 - i. Deadlines. The Southwest Bid Proposal contains various deadlines for the occurrence of certain events, including entry of an order approving this Motion (December 5, 2008); the completion of definitive documents and the filing of the Plan and corresponding Disclosure Statement (December 5, 2008); entry of an order approving the Disclosure Statement for solicitation of votes on the Plan (January 6, 2009); and entry of an order confirming in the Plan (March 2, 2009).
 - ii. Preservation of Assets. The Debtor shall preserve, up to and until the Closing, all of the Debtor's rights, privileges and interests (as constituted on the date of the Southwest Bid Proposal) in the Included Assets and the Included Contracts, including without limitation, satisfying all usage requirements with respect to the fourteen (14) specified “Operating Authorizations,” also known as departure and landing slots, at New York’s LaGuardia Airport (collectively, “ATA’s Slot Rights”); provided, the Debtor shall not have to satisfy any usage requirements related to the two (2) Operating Authorizations at LaGuardia Airport that were leased to Delta Airlines under the Operating Authority Lease Agreement dated May 15, 2007 (the “Delta Slot Rights”); provided further, the Debtor will promptly notify Southwest of any communications between the Debtor and the FAA related to the Delta Slot Rights and cooperate with Southwest as reasonably requested by Southwest to preserve the Debtor’s interest in the Delta Slot Rights.
 - iii. Termination of Slot Leases. Within two (2) business days after the order approving this Motion is entered on the docket in the Bankruptcy Case, the Debtor shall provide notice of termination under section 14(e) of the lease agreements relating to ATA’s Slot Rights (the “Slot Leases”) in order to effectuate termination of the Slot Leases in accordance with their terms as of the soonest possible date (the “Slot Lease Termination Date”).
 - iv. Executory Contracts and Unexpired Leases. The Plan shall provide that the Debtor shall: (a) assume and assign to the reorganized Debtor the Included Contracts (if any), including without limitation, leases associated with ATA’s Slot Rights; and, (b) on or before the date of the Closing,

reject all other executory contracts and unexpired leases, including without limitation, any and all collective bargaining agreements. Southwest shall be solely liable for the payment of any and all cure (within the meaning of 11 U.S.C. § 365) associated with the assumption and assignment of the Included Contracts (if any).

- v. Discharge: Pursuant to the confirmation order, and subject to the requirements and limitations under the Bankruptcy Code, (a) the reorganized Debtor shall receive a complete discharge of all liabilities and interests, including without limitation, any and all prepetition tax liabilities of the Debtor; (b) all creditors of and interest holders in the Debtor shall be enjoined from pursuing such claims and interests against the reorganized Debtor; and (c) there shall be no stamp or other transfer tax paid or payable in connection with the Transaction.
- vi. Regulatory Matters. Southwest shall have obtained, to its reasonable satisfaction, all regulatory approvals and/or assurances such that all of ATA's Slot Rights may pass to the reorganized Debtor and the Purchased Equity may be conveyed to Southwest under the Plan without any degradation of ATA's Slot Rights. Specifically, without limitation, the Federal Aviation Administration's Rule Clarification regarding the Congestion Management Rule For LaGuardia Airport, issued October 27, 2008, shall not have been revised, revoked, amended or cancelled in a manner not acceptable to Southwest. Southwest shall use commercially reasonable efforts to obtain the foregoing regulatory approvals and/or assurances.
- vii. Standard Representations, Warranties and Covenants. Southwest and the Debtor shall each receive representations, warranties, and covenants from each other that are customary in sales of a debtor or debtors under the Bankruptcy Code.
- d. Lease of ATA's Slot Rights. Within two (2) business days after the order approving this Motion is entered on the docket in the Bankruptcy Case, the Debtor and Southwest shall enter into a lease agreement (the "Lease") pursuant to which the Debtor shall lease ATA's Slot Rights to Southwest.
 - i. The term of the Lease shall be ten (10) years, effective as of the Slot Lease Termination Date.
 - ii. Except as provided in paragraph D.4 of the Southwest Proposal, payment for the Lease (the "Lease Payment") shall be made on the Slot Lease Termination Date in accordance with paragraph G.3.b.i of the Southwest Proposal.
 - iii. The Lease shall become effective if and only if:

- through no fault of Southwest, the Closing has not occurred on or before March 5, 2009;
 - through no fault of Southwest, the Closing has not occurred and the Bankruptcy Case has been converted to a case under chapter 7 of the Bankruptcy Code, or
 - an Alternative Transaction (as defined in the Southwest Proposal) has been closed.
- iv. Southwest shall not be obligated to make the Lease Payment and the Lease shall automatically terminate, be null and void and of no legal effect:
- as of the date of the Closing, if the Closing occurs; or
 - as of the Slot Lease Termination Date, if ATA's Slot Rights are not available for use by Southwest in accordance with then-prevailing FAA rules and regulations.
- v. The Lease shall have such other usual and customary terms and conditions mutually satisfactory to the Debtor and Southwest, including without limitation, Southwest's ability to use ATA's Slot Rights in accordance with then-prevailing FAA rules and regulations.
- e. Bid Protection. If the order approving this Motion is entered by the Bankruptcy Court by the deadline contained in the Southwest Proposal and Southwest is not in default hereunder; then:
- i. at the closing of any sale of the Purchased Equity or equivalent transaction, including without limitation, any sale of substantially all of the Included Assets to a party other than Southwest, (an "Alternative Transaction"), the Debtor shall, upon submission of an invoice or invoices by Southwest, reimburse Southwest (the "Expense Reimbursement") for its reasonable and necessary legal fees, expenses and costs incurred in connection with the preparation of the Southwest Proposal, preparation for the auction and pursuit of the sale transaction; provided, such reimbursement shall not exceed \$250,000; and
 - ii. upon the closing of an Alternative Transaction, the Debtor shall pay Southwest a fee in the amount of 5% of the proceeds of the Alternative Transaction (the "Break-Up Fee"), which fee shall be considered to be reasonable and necessary to induce Southwest to act as the purchaser with regard to the sale transaction.

The order approving this Motion shall require that the Expense Reimbursement and the Break-Up Fee be paid out of the proceeds of any Alternative Transaction.

- f. Alternative Transaction. From and after execution of the Southwest Proposal, except as otherwise specifically permitted herein, the Debtor shall immediately terminate any pending discussions or negotiations with any person or entity concerning an Alternative Transaction and neither the Debtor nor any of its officers, directors, employees, agents, representatives or affiliates shall, directly or indirectly, solicit or initiate any inquiry or proposal from, or encourage, solicit or initiate any discussions or negotiations (collectively, "Solicitations") with any person or entity concerning an Alternative Transaction, or agree to endorse or take any other action to facilitate an Alternative Transaction. Notwithstanding the foregoing, nothing contained in paragraph F of the Southwest Proposal shall prohibit the Debtor from furnishing information to, or entering into discussions or negotiations with, any person or entity that makes an unsolicited written proposal for an Alternative Transaction; provided, however, the Debtor agrees to notify Southwest and JPMorgan Chase Bank, N.A. promptly of (a) the interest from a third-party, (b) the identity of such third-party, (c) the nature of the interest expressed by such third-party, and (d) the terms and conditions of any proposal or indication of interest for an Alternative Transaction. The board of directors of the Debtor may consider the Alternative Transaction and, if the board of directors determines that approval of such Alternative Transaction is required for the board of directors to comply with its fiduciary duties or is required to comply with any orders of the Bankruptcy Court, the board of directors may approve such Alternative Transaction.

Relief Requested and Applicable Authorities

21. Pursuant to 11 U.S.C. §§ 105, 363, and 1129, the Debtor requests an order (a) approving the Debtor's selection of Southwest as the party submitting the highest and best offer for the acquisition of the Business; (b) approving the Southwest Proposal, including the Expense Reimbursement and Break-Up Fee (collectively, the "Bid Protections") contained therein; (c) authorizing the Debtor to execute the Southwest Proposal; and (d) authorizing the Debtor to enter into a lease agreement with Southwest regarding the LaGuardia Slots.

22. Because the sale of the Business will be accomplished through a stock transaction, the sale will be implemented in a chapter 11 plan to be filed in the Debtor's bankruptcy. Therefore, the Debtor is not seeking approval of the sale transaction described in

the Southwest Proposal through this Motion. The Southwest Proposal (including the purchase price) is the highest and best offer received by the Debtor for the purchase of the Business. In the Debtor's business judgment, consummation of the proposed sale is in the best interests of its bankruptcy estate and creditors.

A. The Debtor's selection of the Southwest Proposal as the highest and best offer is consistent with its sound business judgment and is in the best interests of the bankruptcy estate and its creditors.

23. Bankruptcy Code section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Additionally, the Bankruptcy Code expressly authorizes the sale of estate property as part of a chapter 11 plan. 11 U.S.C. § 1123(a).

24. As outlined above, the Debtor has expended significant time and effort over the past several months in trying to sell its Business. The Southwest Proposal is the culmination of those efforts. The Southwest Proposal provides fair and reasonable consideration for the transfer of the Business, as well as value for the bankruptcy estate and its creditors. Additionally, the Southwest Proposal is the product of extended good faith, arm's-length negotiations between the Debtor and Southwest.

25. In selecting the Southwest Proposal as the "highest and best" proposal for the acquisition of the Business, the Debtor considered various factors, including: (i) the consideration offered to be paid, including the payment of cure costs associated with the assumption and assignment of executory contracts and unexpired leases (if any); (ii) Southwest's financial ability to close the sale transaction; (iii) the ability to obtain FAA regulatory approval concerning the sale transaction; and (iv) Southwest's ability to fulfill any and all obligations arising under the executory contracts and unexpired leases. The selection and approval of the

Southwest Proposal as the "highest and best" offer is well within the parameters of the Debtor's business judgment. Consequently, the Debtor's selection of the Southwest Proposal as the "highest and best" offer for the acquisition of the Business should be approved, and the Debtor should be authorized to execute the Southwest Proposal.

B. The proposed Bid Protection is fair and reasonable under the circumstances.

26. The payment of termination or breakup fees and expense reimbursements as part of a sale process is a generally accepted practice. Termination fees encourage an initial purchaser to invest the time, effort and money necessary to consummate the purchase of a debtor's assets, despite the possibility that such purchaser may not ultimately acquire the property. The determination of whether a termination fee or expenses should be allowed is made based on whether the fees and expenses are necessary to preserve the value of the estate. In re O'Brien Environmental Energy, Inc., 181 F.3d 527, 534 (3rd Cir. 1999). The considerations that underlie the debtor's business judgment to grant the bid protections are relevant to the bankruptcy court's determination whether to approve such protections. Id. Indeed, many courts have evaluated termination fee arrangements under the business judgment rule standard. Cottle v. Storer Communications, Inc., 849 F.2d 570 (11th Cir. 1988); CRTF Corp. v. Federated Dep't Stores, 683 F. Supp. 422 (S.D.N.Y. 1988); In re Integrated Resources, Inc., 147 B.R. 650, 657 (S.D.N.Y. 1992), appeal dismissed by 3 F.3d 49 (2d Cir. 1993).

27. A business judgment rule standard is applied to validate a debtor's decision to enter into a termination fee and/or expense reimbursement agreement to the extent the following three questions are answered in the negative:

- a. is the relationship of the parties who negotiated a breakup fee tainted by self-dealing or manipulation;
- b. does the fee hamper bidding; and

- c. is the amount of the fee unreasonable relative to the proposed purchase price?

Integrated Resources, 147 B.R. at 657.

28. To determine whether a termination fee encourages rather than hampers bidding, courts must consider whether an agreement to pay such a fee:

- a. attracts or retains a potentially successful bid;
- b. establishes a bid standard or minimum for other bidders to follow; or
- c. attracts additional bidders.

Id. at 662. A termination fee should constitute a fair and reasonable percentage of the proposed purchase price, and should be reasonably related to the prospective purchaser's risk, effort and expenses. Id. at 662; see also In re 995 Fifth Ave. Assoc., L.P., 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989).

29. Application of the business judgment test supports the conclusion that the Bid Protections in the Southwest Proposal are appropriate. The purpose of the Bid Protections is three-fold: (a) to induce Southwest to incur the risk associated with the closing of the sale transaction, (b) to compensate Southwest for the lost opportunity costs in the event the sale transaction does not close, and (c) to reimburse Southwest for the reasonable expenses it has incurred (and will incur) in connection with the sale transaction. Approval of the Bid Protections is critical to Southwest's continuing desire to consummate the sale transaction. Without provisions for the Break-Up Fee and Expense Reimbursement in the event a third party subsequently comes forward, Southwest would not have made its offer. Southwest has invested a substantial amount of time and financial resources in evaluating the Business and negotiating its purchase. Based on the expected value and benefit associated with obtaining a committed purchaser for the Business, the Debtor believes that the Bid Protections are reasonable.

30. The Bid Protections are the product of extended good faith, arm's-length negotiations between the Debtor and Southwest. The proposed Bid Protections are fair and reasonable in amount, particularly in view of the value of obtaining a committed purchaser. Consequently, the Bid Protections provided for in the Southwest Proposal should be approved.

C. The Debtor's entry into the Lease is within its sound business judgment.

31. Under Bankruptcy Code section 363(b), a chapter 11 debtor must seek court approval to use property of the estate outside the ordinary course of business. 11 U.S.C. § 363(b). “The reason for the requirement of obtaining judicial approval [...] is that contracts made by a debtor in bankruptcy that are not in the ordinary course may have an impact on the other creditors in the bankruptcy proceeding.” UAL Corp v. United Airlines, Inc., 443 F.3d 565, 571 (7th Cir. 2006) citing United States v. Goodstein, 883 F.2d 1362, 1367 (7th Cir.1989). To satisfy the requirements of § 363(b)(1), the Seventh Circuit has held that there must be an “articulated business justification” for entering into non-ordinary course transactions. In re Schipper, 933 F.2d 513, 515 (7th Cir.1991)citing In re Continental Airlines, 780 F.2d 1223, 1226 (5th Cir. 1986).

32. While the Debtor does not believe entry into the Lease is outside the ordinary course of its business, its decision to enter into the Lease nonetheless satisfies the business judgment test. Entering into the Lease will allow the Debtor, in certain circumstances, to realize fair value for the LaGuardia Slots even if the sale transaction with Southwest does not close. To that extent, the Lease provides the Debtor will certain downside protection in the event the sale transaction does not close.

33. The Debtor has accordingly determined, as an exercise of its sound business judgment, that entry into the Lease Amendments is in the best interest of the Debtor, its

bankruptcy estate, and creditors. Therefore, the Debtor should be authorized to enter into the Lease.

WHEREFORE, the Debtor respectfully requests that the Court enter an order (a) approving the Debtor's selection of Southwest as the party submitting the highest and best offer for the acquisition of the Business; (b) approving the Southwest Proposal, including the bid protections contained therein; (c) authorizing the Debtor to execute the Southwest Proposal; and (d) authorizing the Debtor to enter into a lease agreement with Southwest regarding the LaGuardia Slots, and (e) granting such other legal and equitable relief to which the Debtor is entitled.

Dated: November 18, 2008

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