IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re:	)	Chapter 11
	)	
ATA Holdings Corp., *et al.*,	)	Case No. 04-19866
	)	(Jointly Administered)
Debtors.	)	

THE CITY OF CHICAGO'S LIMITED AND PRELIMINARY OBJECTION TO DEBTORS' TRANSACTION MOTION AND BID PROCEDURES MOTION

The City of Chicago ("Chicago"), through its undersigned counsel, hereby objects, on a limited and preliminary basis, to Debtors' Transaction Motion and Bid Procedures Motion.[1] In support of its objection, Chicago states as follows:

INTRODUCTION

Before the Court are Debtors' Transaction and Bid Procedures Motions by which Debtors seek authority to sell, assume and assign certain assets of the estates, deemed the "Midway Assets," through an auction process. The Midway Assets are defined to include, among other things, any and all of Debtors' rights under a use agreement for certain facilities (the "ATA Use Agreement"), including 14 gates, located at Chicago Midway Airport ("Midway").[2] Chicago commends Debtors' efforts to create bidding procedures that balance the many competing interests at stake. However, Chicago must object to the Transaction and Bid Procedures Motions for two critical reasons.

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1 Chicago hereby reserves its right to further object to the Transaction Motion to the extent Debtors seek to assign the agreement at issue herein without the prior consent of Chicago or for any other reason.

2 The "Midway Assets" are defined to include: (a) the ATA Use Agreement, including without limitation all of ATA's rights and interests under the Midway Facilities Lease in and to certain gates, ramp space and associated service facilities at Chicago's Midway, all as more specifically described in the Commitment Letter; (b) 8 non-AIR 21 and 11 AIR 21 arrival and departure slots of ATA at LaGuardia and 4 AIR 21 arrival and departure slots of ATA at Reagan; and (c) ATA's interest in certain airport facility leases or arrangements at outlying stations served from Midway. Transaction Motion, ¶ 29; Procedures Motion, ¶ 11.

First, Chicago is a sovereign Illinois home-rule municipality, and unlike most commercial contracts, the ATA Use Agreement is part of a duly-enacted ordinance. Pursuant to section 365(c)(1) of the Bankruptcy Code and applicable non-bankruptcy law, the ATA Use Agreement may not be assigned to a third party without the consent of Chicago. Even assuming *arguendo* that applicable non-bankruptcy law does not bar the assignment of the ATA Use Agreement, Chicago is entitled to adequate assurance of future performance in any event, which in this case, due to the nature of operating a major public airport, requires that any proposed assignee go through Chicago's approval process. The right to use the 14 gates and facilities at Midway cannot be simply assigned to just any entity that has sufficiently deep pockets. The airline business is highly regulated and Chicago as the operator of an airport is charged with protecting the interests of the public – it must be given assurance of not just future monetary performance but of the potential assignee's ability to operate an airline business in accordance with local and national rules, regulations and guidelines.

While Debtors generally recognize that Chicago's consent is required within the Transaction and Bid Procedures Motions, the proposed Bidding Procedures do not provide a time by which such consent must be obtained by the winning bidder. Because consent is mandatory, the Bidding Procedures approved by the Court should explicitly state that such consent must be obtained prior to the hearing on the Transaction Motion. If any interested party disagrees that Chicago's consent is a requirement of transfer, this issue should be dealt with now – not after the expenditure of enormous amounts of time, effort and financial resources in connection with the auction process. None of the constituency in this case will benefit from delaying the resolution of this issue until after the Transaction Motion is presented to the Court. If Chicago is found to be correct in its position, which is should be, Debtors' estates could forfeited a $1 million break-

up fee if AirTran is not the winning bidder, and it may be necessary for Debtors to conduct a new auction (assuming it is even a viable option at that point).

Second, Chicago has certain non-negotiable preconditions to its consent to any proposed assignment that must be disclosed in any Bidding Procedures approved by this Court. These requirements include:

- Daily Utilization Rate. The assignee must meet Midway's general utilization rate of 1,000 scheduled departing seats per day per Gate (the "Daily Utilization Rate") at all 14 gates subject to ATA's Use Agreement. The assignee will not be entitled to the "Grandfathered Gate" status that certain of ATA's gates enjoy under its use agreement. Grandfathered Gates have a significantly lower daily utilization requirement of one scheduled departure of an aircraft containing no less than 69 seats. The "Grandfathered Gates" provisions contained in the ATA Use Agreement are contractual provisions unique to legacy airlines, *i.e.*, airlines that have been operating out of Midway from the initial renovation of the airport in 1993.

- Payoff off 2003 Loans. In 2003, ATA constructed a jet bridgeway and two expansion gates on part of the premises subject to its ATA Use Agreement. The construction was funded by $7.1 million in loans provided by Chicago pursuant to ATA's Use Agreement ATA's default under the ATA Use Agreement constitutes a default under its loan documents. This default must be cured through the payoff the of the loans in full before the ATA Use Agreement can be assigned to any third party.

- Chicago Must Approve the Proposed Cure. Chicago will not consent to the assignment of ATA's Use Agreement unless it is given the right to also approve the manner and timing of cure. Since the filing of the Bid Procedure Motion, Debtors essentially agreed to this requirement. However, a draft of the revised Bidding Procedures circulated on November 12, 2004, added in the requirement that Chicago's must be "reasonable." This is unacceptable to Chicago. As discussed, Chicago has no legal obligation to consent to the assignment of ATA's use agreement, and it will certainly not agree to adding a objective element to its decision making process in this regard. Thus, any Bidding Procedures approved by the Court should include the following language to Cure Notice: "With respect to Cure in connection with the Midway Facilities Lease, the Cure Notice shall provide that the manner and timing for satisfying the Cure obligations is subject to the approval of Chicago. al of no rights with respect to the Debtors' cure."

As demonstrated below, Chicago's position on the consent requirement is well-grounded in law. Chicago therefore respectfully requests that the Court modify the proposed Bidding Procedures to expressly reflect Chicago's requisite consent and its justifiable preconditions.

STATEMENT OF THE FACTS

I. THE ATA USE AGREEMENT

Chicago is a municipal corporation and home rule unit of local government organized and existing under Article VII, Sections 1 and 6(a), respectively, of the 1970 Constitution of the Sate of Illinois. On July 8, 1998, the City Council of Chicago (the "City Council"), exercising the powers of Chicago as a home rule unit of local government pursuant to the Constitution of the State of Illinois, enacted an ordinance (the "1998 Ordinance") that, *inter alia*, approved a form airport use agreement ("Form 1998 Use Agreement"), a copy of which is attached to and made part of the 1998 Ordinance, and authorized the Mayor of Chicago (the "Mayor") to enter into such Form 1998 Use Agreements with the airlines specified by the Commissioner of the Department of Aviation (the "Commissioner").[3] The 1998 Ordinance provides:

> The form of 1998 Airport Use Agreement presented at this meeting is hereby approved in all respects. The Mayor is hereby authorized to execute and deliver for an on behalf of the City a 1998 Airport Use Agreement with such airlines as the Commissioner shall designate in writing to such officer of the City. Each such 1998 Airport Use Agreement shall be substantially the form of the 1998 Airport Use Agreement presented at this meeting, t*ogether with such changes therein and modifications thereof as shall be approved by the Mayor or the Commissioner, the execution and delivery thereof to constitute conclusive evidence of this City Council's approval of any and all such changes and modifications.*

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3 In addition to approving the Form 1998 Use Agreement, the 1998 Ordinance authorized the issuance of not to exceed $600 million in airport revenue bonds for the purpose of funding the Midway expansion project discussed in Section I of the Statement of Facts.

1998 Ordinance, § 19, a copy of which is attached as Exhibit A (emphasis added).[4] The 1998 Ordinance expressly requires the approval of the Mayor or the Commissioner (*i.e.*, Chicago) in order to change or modify a Form 1998 Use Agreement at either (a) the time of contracting with a specific airline or (b) at any time thereafter. Such approval would be required in order to alter the assignment and transfers provisions of any use agreement.

On or about July 1, 1993, Chicago and ATA entered into the Chicago ATA Use Agreement and Facilities Lease. Pursuant to the 1998 Ordinance, this agreement was amended and restated in approximately July 1998, and the parties entered into the Chicago Midway Amended and Restated Airport Use Agreement and Facilities Lease, effective January 1, 1997, as amended by that First Amendment to Amended and Restated Airport Use Agreement and Facilities Lease, dated as of or about December 10, 1999 (the "ATA Use Agreement"). A copy of the ATA Use Agreement is attached as Exhibit B.[5] The ATA Use Agreement is in substantially the same form as the Form 1998 Use Agreement.

The ATA Use Agreement grants ATA a license to conduct an "Air Transportation Business" at Midway:

> Subject to the terms of this Agreement, the restrictions contained in Section 3.02, the Rules and Regulations and all other applicable laws, rules, regulations, codes, ordinances and orders and the rights of the City to monitor the Airline's compliance with this Agreement in order to ensure that the Airport operates in the most effective and efficient way possible, the Airline shall have the right to conduct an Air Transportation Business at the Airport and to perform only those operations and functions as are incidental or reasonably necessary to the conduct of the Airline's Air

4 The 1998 Ordinance is attached with its Exhibit A (the Form 1998 Use Agreement) only due to the size of the remaining exhibits. However, such exhibits will be made available to any party upon request.

5 The ATA Use Agreement is attached without its exhibits due to their size. However, such exhibits will be made available to any party upon request.

> Transportation Business and as would be permitted at similarly situated airports.

ATA Use Agreement, § 3.01. In addition, Chicago leases to ATA certain property, including 14 gates (the "Gates"), ramp space and associated service facilities (collectively, the "Leased Premises"). *Id*. at § 4.01. With respect to the Gates, the ATA Use Agreement requires that ATA meet the Daily Utilization Rate at all Gates. *Id.* at § 5.06(a). This requirement, however, does not apply to certain "Grandfathered Gates," for which the daily utilization rate is at least one scheduled daily departure of an aircraft with not less than 69 seats. *Id.* at § 5.06(b). ATA has 12 Grandfathered Gates.

The Grandfathered Gates provisions contained in the ATA Use Agreement stem from Chicago's renovation and expansion of Midway beginning in approximately 1997 (the "Expansion Project"). In connection with the Expansion Project, Chicago entered into amended and restated use agreements (*i.e.*, the Form 1998 Use Agreements) with all of the airlines then operating out of Midway pursuant to existing use agreements. As described more fully below, only legacy carriers were granted Grandfathered Gate status on some of their Gates. All non-legacy airlines were required to meet the Daily Utilization Rate at all Gates. *See* 1998 Ordinance.

In addition, the 1998 Ordinance (through the incorporated ATA Use Agreement) specifically forbids any assignment or transfer of ATA's rights without the consent of Chicago:

> The Airline covenants that it will *not* assign, sublet, transfer, convey, sell, mortgage, pledge or encumber (any of the foregoing events being referred to as a "Transfer") the Leased Premises or assigned aircraft parking positions or any part thereof, or any rights of the Airline hereunder or any interest of the Airline in this Agreement . . . *without in each instance having first obtained the prior written consent of the City as set forth below.* In determining whether or not to consent to a Transfer, the City will take into account, among other factors, the balanced utilization of the Airport facilities and operational considerations relating to the

> characteristics of the proposed transferee. *The consent of the City Council of the City on behalf of the City shall be required for any Transfer of (i) all of Airline's Leased Premises, (ii) all rights of the Airline hereunder or (iii) all of the Airline's interest in this Agreement. The consent of the Commissioner on behalf of the City shall be required for any other Transfer.*

Id. at § 4.03(a) (emphasis added).

The ATA Use Agreement contains two interrelated agreements between Chicago and ATA. First and foremost, the ATA Use Agreement permits ATA to operate – within specifically defined parameters and according to extensive well-defined requirements and controls – an "Air Transportation Business." In this way, the ATA Use Agreement acts as a license. Second, and in order to effectuate the principal license agreement, the ATA Use Agreement leases to ATA the use of certain real property at the airport. The two agreements (the principal license and the subordinate lease) form an integrated and inseparable whole. The ATA Use Agreement, as license, lease and integrated whole, is an executory contract and unexpired lease within the ambit of section 365 of the Bankruptcy Code.

II. ATA'S LOAN AGREEMENTS FOR FUNDING EXPANSION GATES

In 2003, pursuant to section 10.05 of the ATA Use Agreement, ATA requested that Chicago issue Midway Airport Revenue Bonds and to loan ATA additional funds from the Airport Development Fund created under section 7.01 of the ATA Use Agreement in order to finance the construction of a jet bridgeway and two expansion gates. Chicago granted ATA's request, and ATA and Chicago entered into a Loan Agreement for Funding ATA Expansion Gates (the "2003 Loan Agreement") and two loan notes substantially in the form attached hereto as Exhibit C. The principal amount of the loans was $7.1 million and the loans were unsecured. The 2003 Loan Agreement provides that in the event ATA defaults under the ATA Use

Agreement, Chicago is entitled to, among other things, accelerate any and all amounts due under the loans.

III. THE BID PROCEDURES MOTION AND TRANSACTION MOTION

On November 2, 2004, Debtors filed their Transaction Motion and the Bid Procedures Motion. Pursuant to the Transaction Motion, Debtors seek authority to sell and assign the Midway Assets to AirTran Airways, Inc. ("AirTran") substantially on the terms and conditions set forth in the commitment letter (the "Commitment Letter) attached to the motion, subject to the receipt of a higher or otherwise better offer at auction. The terms contained in the Commitment Letter were to be incorporated into a "Definitive Agreement" between ATA and AirTran by November 11, 2004.[6] The Definitive Agreement is a "stalking horse" offer that will be used as a starting point for other bidders at the auction proposed in the Bid Procedures Motion. In the event Debtors' receive a higher or otherwise better offer for the Midway Assets, then the Transaction Motion seeks approval to complete the sale and assignment of the Midway Assets to that winning bidder.

One of the principal terms of the AirTran Commitment Letter is that AirTran will seek Chicago's consent for the transfer of the ATA Use Agreement:

> Chicago Consent. The AirTran Transaction requires such prior written consent by Chicago ("Chicago") as may be required to the assignment and transfer from ATA to Air Tran of the Midway Facilities Lease [the ATA Use Agreement] and all rights of ATA thereunder (the "Chicago Consent"). ATA and AirTran intend to seek and obtain the Chicago Consent pursuant to and by fully complying with the applicable procedures and information requests of Chicago under Section 4.03 of the Midway Facilities Lease.

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6 Chicago received a draft of the Definitive Agreement late in the day on November 11, 2004 (the "Draft Definitive Agreement"), and it has not been able to fully digest this lengthy document prior to the filing of this Objection. While Chicago will attempt to raise any concerns it has regarding the Draft Definitive Agreement in this objection, it expressly reserves its right to make any additional objections it may have at the hearing on the Bid Procedures Motion, which is scheduled for November 15, 2004.

Transaction Motion, ¶ 30(d). The Commitment Letter, however, does not definitively require such consent as a precondition to assignment and it is also silent with respect to the Daily Utilization Rate.[7]

The Bid Procedures Motion seeks to establish (a) the procedures for qualifying to participate in the auction and (b) the procedures for bidding at the auction. With respect to the bidding requirements, the Bid Procedures provides that a "Qualified Bid" must meet a number of requirements, including the following:

> [I]f and to the extent any bid contemplates the assignment, sublease or transfer of the Chicago Midway Amended and Restated Use Agreement and Facility Lease (the "Midway Facilities Lease") or any of the Debtors' rights thereunder, such bid should state the intention of such Qualified Bidder to fully cooperate with the Debtors (a) by complying with applicable procedures and information requests of Chicago under Section 4.03 of the Midway Facilities Lease, and (b) in seeking the prior written consent of Chicago, which is a necessary condition for the assignment and transfer of the Midway Facilities Lease and/or the Debtors' rights thereunder;

Bid Procedures, p. A-7.[8] Thus, a Qualified Bid must include only a statement of the bidders "intent" to seek prior written consent of Chicago.

While both the Transaction Motion and the Procedures Motion basically acknowledge that the ATA Use Agreement may only be assigned with the consent of Chicago, the Bid Procedures nevertheless do not clearly require that such consent be obtained prior to the hearing on the Transaction Motion. Chicago urges the Court to include this requirement in the Bidding

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7 The Draft Definitive Agreement states that, as a condition precedent to AirTran's obligation to complete the transaction, it shall have obtained Chicago's consent to the assignment and transfer of the ATA Use Agreement. Draft Definitive Agreement, § 5.4(o).

8 The Bidding Procedures quoted and cited herein are the proposed Bidding Procedures attached to the Bidding Procedures Motion. Since that time, there have been substantially changes made to the Bidding Procedures. However, with respect to the consent issue, the current version of Bidding Procedures is substantively the same.

Procedures. Failure to do so, may result in costly litigation and delay if Chicago does not consent to assignment to the winning bidder. This situation, which Chicago prefers to avoid, will not benefit any party involved in this case, and ultimately can only harm the estates.

ARGUMENT

I. THE ATA USE AGREEMENT MAY NOT BE ASSIGNED WITHOUT THE CONSENT OF CHICAGO AND THUS THE WINNING BIDDER SHOULD OBTAIN SUCH CONSENT PRIOR TO THE HEARING ON THE TRANSACTION MOTION

Essentially, Debtors concede that ATA Use Agreement may not be assigned without the consent of Chicago.

Under the Bankruptcy Code, generally, executory contracts and unexpired leases may be assumed and assigned under section 365(f)(1), notwithstanding any language in the contract or lease to the contrary. Section 365(c), however, carves out an exception where applicable law prohibits the assignment and the non-debtor party does not consent to assignment:

> The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if –
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> > (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, and
> >
> > (B) such party does not consent to such assignment or assumption . . . .

11 U.S.C. § 365(c)(1).

Originally, courts limited section 365(c)(1) to personal service contracts; however, the more recent trend has been to expand the coverage of section 365(c)(1) to those contracts in

which the identity of the debtor was essential to the obligation itself. *See, e.g., In re Matter of Midway Airlines, Inc.*, 6 F.3d 492, 495 (7th Cir. 1993). A broad application of section 365(c)(1) is consistent with the legislative history. The drafters of section 365 plainly intended that "executory contracts requiring the debtor to perform duties non-delegable under applicable nonbankruptcy law should not be subject to assignment against the interest of the nondebtor party." Commission Report, H.R. Doc. 137 93d Cong., 1st Sess., at 199 (1973). Likewise, legislative history reveals that "applicable law" includes all relevant non-bankruptcy law that is not derived from the contract itself. *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 348 (1977), *reprinted in* [1978] U.S. Code Cong. & Ad. News 5787, 5963, 6304; S.Rep. No. 95-989, 95th Cong., 2d Sess. 59 (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 5787, 5845.

A. The 1998 Ordinance and ATA Use Agreement As Incorporated Therein Are Applicable Law for Purposes Of Section 365(c)(1)

The 1998 Ordinance, and the ATA Use Agreement as incorporated therein,[9] is a clear example of "applicable law" under section 365(c)(1). The 1998 Ordinance is an act of the City Council that preceded, and is thus not "derived from," the ATA Use Agreement. The 1998 Ordinance is a duly, validly, and unanimously approved ordinance of Chicago, the enactment of which was well within the powers of the City Council. *See e.g.,* 65 ILCS 5/1-1-10 ("It is the policy of this State that all powers granted, either expressly or by necessary implication, by this Code, by Illinois statute, or the Illinois Constitution to municipalities may be exercised by those

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9 The Form 1998 Use Agreement, and thus the ATA Use Agreement, are part of the 1998 Ordinance. *City of Hillsboro v. Grassel,* 249 Ill. 190, 192-193, 94 N.E. 48, 49 (Ill. 1911) ("It is clear, under the decisions construing the present and previous statutes on this question, that under the present act plans, profiles, and specifications attached to the ordinance, and made a part thereof by reference, are as much a part of the ordinance as if they were incorporated in extension in the body of the ordinance itself."); see also *Chicago City Ry. Co. v. City of Chicago,* 323 Ill. 246, 248, 154 N.E. 112, 113 (Ill. 1926); *Ownby v. City of Mattoon,* 306 Ill. 552, 556, 138 N.E. 110, 112 (Ill. 1923).

municipalities, and the officers, employees and agents of each notwithstanding effects on competition"); 65 ILCS 5/1-2-1 ("The corporate authorities of each municipality may pass all ordinances and make all rules and regulations proper or necessary, to carry into effect the powers granted to municipalities . . . ."); *see also City of Chicago v. Roman*, 184 Ill.2d 504, 513, 705, N.E.2d 81, 87 (1998) ("Home rule units have the same powers as the sovereign, except where such powers are limited by the General Assembly."); *Triple A Services*, 131 Ill.2d 217, 230, 545 N.E.2d 706, 711 (1989) (same). Thus, the 1998 Ordinance is applicable, non-bankruptcy law that expressly and unambiguously prohibits ATA from assigning the ATA Use Agreement without the consent of Chicago.

B. Illinois Law Is Also Applicable Law For Purposes Of Section 365(c)(1) And Illinois Law Prohibits The Assignment Of The ATA Use Agreement

Further, common law constitutes "applicable law" for the purposes of section 365(c)(1) of the Bankruptcy Code. *See, e.g., In re Catapult Entertainment, Inc.*, 165 F.3d 747 (9th Cir. 1999) (applying federal patent common law); *In re Buildnet, Inc.*, 2002 WL 31103235 (Bankr. M.D.N.C. Sept. 20, 2002) (applying federal copyright common law). Under Illinois law, the ATA Use Agreement may not be assigned for a number of reasons. First, assignment of the ATA Use Agreement without the consent of Chicago would result in a contract unenforceable against Chicago and that would be void. 65 ILCS 5/8-10-21; *see also Ad-Ex, Inc. v. City of Chicago*, 207 Ill.App.3d 163, 169, 565 N.E.2d 669 (1st Dist. 1990) ("Municipalities are limited to only those powers which are given to them by constitution and statute, and a municipality cannot be bound by a contract that does not comply with the prescribed conditions for the exercise of its power."); *Stanley Magic-Door, Inc. v. City of Chicago*, 74 Ill.App.3d 595, 599, 393 N.E.2d 535 (1st Dist. 1979) (A contract that does not comply with the Illinois Municipal Code "shall be null and void as to the municipality."); *Haas v. Commissioners of Lincoln Park*, 339 Ill. 491, 498,

171 N.E. 526 (1930) (where a charter prescribes how a municipal corporation is to enter into contracts, that method is exclusive and must be followed); *Roemheld v. City of Chicago*, 231 Ill. 467, 470-71, 83 N.E. 291 (1907) (where a statute or ordinance specifies how a city official can bind the city by contract, that method must be followed).

Second, Illinois law prohibits the assignment of licenses such as the ATA Use Agreement without the express consent of both parties. For more than 100 years, Illinois law has consistently defined a license as "'an authority to do some act on the land of another, without passing an estate in the land, and being a mere ***personal privilege***, it can only be enjoyed by the licensee himself, and ***is not therefore assignable*** . . . .'" *South Center Dept. Store, Inc. v. South Parkway Building Corp.*, 19 Ill.App.2d 61, 66, 153 N.E.2d 241, 243 (1st Dist. 1958) (quoting *Holladay v. Chicago Arc Light & Power Co.*, 55 Ill.App. 463, 466-67 (1894)) (emphases added). Illinois law provides that a license is personal and exclusive and is "not assignable unless specifically stated to be so." *Reith v. General Tel. Co. of Illinois*, 22 Ill.App.3d 337, 343, 317 N.E.2d 369, 374 (5th Dist. 1974). Federal law recognizes that states are free to define the extent to which licenses are transferable. *Marusic Liquors, Inc. v. Daley*, 55 F.3d 258 (7th Cir. 1995). Thus, unless a license agreement is expressly stated to be assignable, it is not assignable as a matter of Illinois law. Because the ATA Use Agreement is license, as well as a lease, as a matter of Illinois law and enforceable pursuant to section 365(c)(1), the ATA Use Agreement may not be assigned without the permission of Chicago.

Third, the ATA Use Agreement is a personal services contract where the identity of ATA was paramount to Chicago's decision to enter into the ATA Use Agreement. Although this is evident throughout the ATA Use Agreement, the personal nature of the agreement can be most clearly seen in the Grandfathered Gate provisions. These provisions were included in the ATA

Use Agreement based upon a number factors unique to ATA, including that ATA was a legacy carrier already meeting utilization rates at the Gates at issue, and that ATA's involvement in the Expansion Project required Chicago to accommodate ATA in certain ways so as not to place ATA in default of its use agreement.[10] The Grandfathered Gates are defined as:

> the Gates in the Old Terminal which, as of the date the Airline executed and delivers this Agreement, constitute part of the Airline's Lease Premises and with respect to which the Airline was in compliance with the utilization requirements of Section 5.06 of the 1993 Use Agreement for the period of time required under Section 5.06(e) thereof as of the date the Airline executed and delivers this Agreement; the Gates in the Old Terminal and the New Terminal which, as of the date the Airline executes and delivers this Agreement, are described on Exhibit I as part of the date the Airline executes and delivers this Agreement, are described on Exhibit J as part of the Airline's Final Leased Premises; so long as, in any case, the Airline was a party to a 1993 Use Agreement on January 1, 1997 and the Airline executes this Agreement on or prior to September 1, 1998.

Id. at § 1.01.

Recognizing that the identity of the businesses leasing the Gates at Midway is critical to Chicago and public at large, it was specifically recognized by the parties, and in the 1998 Ordinance and the ATA Use Agreement, that the ATA Use Agreement was nonassignable. "The general right of a party to choose with whom he or she contracts underlies any determination of whether a contract is assignable." *First Illinois National Bank v. Knapp*, 246 Ill.App.3d 152, 155, 615 N.E.2d 75 (1993). Where the personal qualities of either party are

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10 In addition, the legacy carriers such as ATA provided Chicago with significant consideration outside of their use agreements in return for the Grandfathered Gates provisions, including, for example, undertaking monetary obligations that supported the Expansion Project, and by agreeing to enter into amended and restated use agreements, thereby waiving their rights to terminate their original use agreements during the Expansion Project. During the Expansion Project, there were times when the legacy carriers could not possibly meet the normal utilization requirements due to logistical and other factors. It took approximately 5 years to complete the Expansion Project. There is no doubt that the Expansion Project negatively effected the business of the airlines flying in and out of Midway during this period of time due to the conditions and inconvenience of using Midway.

material to the contract, the contract is not assignable without the assent of both parties. *U.S. Fidelity and Guar. Co. v. Old Orchard Plaza Ltd. Partnership*, 333 Ill.App.3d 727, 739, 776 N.E.2d 812, 822 (1 Dist. 2002) (where stipulation was based solely on the "personal qualities" or status of one party, stipulation could not be assigned); *Martin v. City of O'Fallon*, 283 Ill.App.3d 830, 834, 670 N.E.2d 1238, 1241 (5th Dist. 1996) ("Where the personal qualities of either party are material to [a] contract, the contract is not assignable without the assent of both parties."); *First Nat. Bank of Danville v. Taylor*, 329 Ill.App. 49, 56, 67 N.E.2d 306, 310 (3d Dist. 1946) ("In the case of an executory contract, the contract generally is not assignable without the consent of both parties thereof, where the personal acts and qualities of one of the parties form a material and ingredient part of the contract."). AirTran is not a legacy carrier, it cannot stand in the shoes of ATA in this regard, and Chicago would not grant it (or any other non-legacy airline) Grandfathered Gate status under any circumstances.

Furthermore, the requirement that Chicago approve all assignments cannot be waived by the Court. It was the intention of the contracting parties to allow Chicago to retain control over the airlines conducting business at Midway, and this contractual provision should not be abrogated. Pursuant to section 541(a) of the Bankruptcy Code, the estate comprises all legal and equitable interests of the debtor in property as of the commencement of the case. The extent and nature of those interests is governed by applicable non-bankruptcy law and, with few exceptions, cannot be substantively augmented or modified by a bankruptcy filing. When the property in question is an unexpired lease or an executory contract, the estate includes the right to assume that contract pursuant to section 365(a) of the Bankruptcy Code. The debtor can only assume or reject a contract or lease ***in its entirety***. In other words, the debtor may not pick and choose among contractual provisions, rejecting those it deems burdensome and accepting those it views

as beneficial. *In re Village Rathskeller, Inc.*, 147 B.R. 665, 671 (Bankr. S.D.N.Y. 1992) (holding that an executory contract cannot be rejected in part and assumed in part). The contract must be assumed, *cum onere*, taking the bad with the good. *National Labor Relations Board v. Bildisco and Bildisco*, 465 U.S. 513, 531, 104 S.Ct. 1188, 1199 (1984).

In sum, there is no real dispute in this case that the consent of Chicago is required for assignment of the ATA Use Agreement. However, in order to avoid potential conflicts after having gone through the costly auction process, it is essential that the winning bidder for ATA's rights under the ATA Use Agreement obtain the consent of Chicago prior to the hearing on the Transaction Agreement.

II. CHICAGO IS ENTITLED TO PLACE CERTAIN CONDITIONS ON ASSIGNMENT

A. Chicago Will Consent To Assignment Only If The Assignee Agrees To Meet The Daily Utilization Rate At All 14 Gates

Chicago will not consent to an assignment to any party that does not agree to meet the Daily Utilization Rate at each of the 14 Gates subject to the ATA Use Agreement. Utilization is one of the factors specifically identified in the ATA Use Agreement to be considered by Chicago when determining whether to approve a transfer. ATA Use Agreement, § 4.03(a). Chicago's ability to control the number of daily flights at Midway is critical.

Although the Definitive Agreement between ATA and AirTran has not yet been made available to the public, early drafts provided to Chicago allow AirTran to operate the 14 Gates at less than the Daily Utilization Rate. Because the Definitive Agreement reflects the starting point for Qualified Bidders under the Bidding Procedures, either the Bidding Procedures or the Definitive Agreement must be modified to reflect that fact that the winning bidder must agree to meet the Daily Utilization Rate at all 14 of the Gates.

B. The Manner Of Timing Of Cure Under The Ata Use Agreement Is Subject To The Unqualified Approval Of Chicago

The manner of timing of cure under the ATA Use Agreement is subject to the unqualified approval of Chicago. As discussed, Chicago is not required to accept an assignment of the ATA Use Agreement proposed by Debtors, and Chicago is entitled to condition its consent on an unqualified right to approve the manner and timing of cure in the event it agrees to an assignment. Although the Proposed Bidding procedures attached to the Bidding Procedures did not provide any role for Chicago in this regard, Debtors, at Chicago's request, agreed to include the following language in the "Cure Notice" section of the Bidding Procedures:

> With respect to Cure in connection with the Midway Facilities Lease, the Cure Notice shall provide that the manner and timing for satisfying the Cure obligations is subject to the approval of Chicago.

On November 12, 2004, Chicago received a revised draft of the Bidding Procedures that included a reasonableness requirement, so that the language added at the request of Chicago now reads:

> With respect to Cure in connection with the Midway Facilities Lease, the Cure Notice shall provide that the manner and timing for satisfying the Cure obligations is subject to the **reasonable** approval of Chicago.

This change is not acceptable to Chicago for the same reasons that Chicago opposes assignment without its consent. Chicago must retain the right to control the use of Midway. The obligations under the ATA Use Agreement must be complied with in a timely fashion in order for the airport to continue functioning properly. Chicago therefore requests that the Court include the language previously agreed to by the Debtors in the final Bidding Procedures.

III. DEBTORS MUST PROVIDE ADEQUATE ASSURANCE

Even assuming *arguendo* that the assignment of the ATA Use Agreement is not prohibited by applicable non-bankruptcy law, Chicago is still entitled to adequate assurance of future performance prior to any assignment of the ATA Use Agreement, which in this case would require the potential assignee to go through Chicago's approval process.

Section 365(b)(1) of the Bankruptcy Code requires the debtor to provide adequate assurance of future performance, including:

> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

Although the Bankruptcy Code does not define "adequate assurance," it is quite clear that it means something more than just assurance of future financial performance. The Court must ensure that the interests of the non-debtor party are protected as nearly as possible against the possible risks to those interests. *See, e.g., In re United Airlines, Inc..*, 368 F.3d 720, 725 (7th Cir. 2004); *In re Mellor*, 734 F.2d 1396, 1401 (9th Cir. 1984); *In re Martin*, 761 F.2d 472, 477 (8th Cir. 1985). ATA has the responsibility of proving adequate assurance of future performance under the ATA Use Agreement. *In re Gant*, 201 B.R. 216, 220 (Bankr. N.D. Ill. 1996). In order to show that an assignee will be able to perform the ATA Use Agreement, ATA must demonstrate: (1) that the assignee has obtained Chicago's consent to the assignment and (2) that the assignee is able to perform in accordance with the terms of the ATA Use Agreement, including the Daily Utilization Rate.

ATA cannot provide the requisite adequate assurance of future performance because the prospective assignees have not obtained, and are not required to obtain prior to the hearing on the Transaction Motion, Chicago's approval to engage in Air Transportation Businesses at Midway. The ATA Use Agreement specifically requires Chicago's approval in order to transfer any interest therein to another party taking into consideration, among other factors, the balanced utilization of the of the Airport facilities and operational considerations relating to the characteristics of the proposed transferee. ATA Use Agreement, § 403(a). The bottom line is that the ATA Use Agreement is different from other commercial agreements where performance and rent are usually the only relevant considerations. The determination of which airlines to lease gates to involves numerous considerations other than the ability to pay rent. Airline carriers are highly regulated at both the state and federal levels, and Chicago is entitled to assurances that any assignee of the ATA Use Agreement can and will comply with all such regulations. *See, e.g.*, ATA Use Agreement, § 15.02 (Observance and Compliance with Laws), § 15.03 (Compliance with Environmental Laws), § 15.04 (Compliance with FAA Standards), § 15.05 (Anti-Scofflaw), § 17.02-03 (Governing Passenger Facilities Charges), and § 17.05 (Compliance with Securities Exchange Act).

In addition, Chicago must take into consideration the anti-competitive effects of any proposed assignment. Chicago has a statutory duty to protect the interests of the traveling public through Midway and to implement the mandates of the Federal Aviation Act and the Airline Deregulation Act. Because of the important public interests involved, it is essential that Chicago retain the authority to control the allocation of resources at Midway, and that it be allowed to do so through the approval process established under the 1998 Ordinance.

As discussed above, it is simply impractical and unjust to proceed to a hearing on the Transaction Motion unless Debtors can meet these requirements with respect to any proposed assignee. Chicago therefore asks that the Court include in the final Bidding Procedures that the winning bidder must obtain the consent of Chicago prior to the Hearing on the Transaction Motion and that a Qualified Bid must include the agreement to meet the Daily Utilization Rate and to pay off the loans under the 2003 Loan Agreement.

CONCLUSION

For the reasons state above, Chicago respectfully requests that:

1. Any Bidding Procedures approved by the Court (a) provide that the winning bidder must obtain the consent of Chicago to the assignment of the ATA Use Agreement prior to the hearing on the Transaction Motion, (b) provide that any party bidding at the auction must agree to meet the Daily Utilization Rate at all 14 Gates subject to the ATA Use Agreement, (c) provide that either Debtors and the winning bidder must pay off the loans made pursuant to the 2003 Loan Agreement in full as part of Chicago's right to cure under section 365 of the Bankruptcy Code, and (d) not contain any "reasonableness" requirement from Chicago's right of approval of the manner and timing of "Cure."

2. The Court grant Chicago such further and additional relief as it deems appropriate under the circumstances.

Respectfully submitted,

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EXHIBIT "A"

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the Core Group, the 2002 List and the parties listed in the Court's electronic system, by electronic mail, or first class United States mail, postage prepaid, this 12th day of November 2004. Furthermore, a copy of the foregoing was sent on November 12, 2004 via facsimile (exclusive of exhibits) to counsel for Debtor, James M. Carr, pursuant to the Notice of Continued Hearing dated November 8, 2004.

/s/ James E. Rossow, Jr.____
James E. Rossow, Jr.

EXHIBIT "A"