

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

In re:)	Chapter 11
)	
ATA Holdings Corp., et al., ¹)	Case No. 04-19866
)	(Jointly Administered)
Debtors.)	

**AMENDED MOTION ON SHORTENED NOTICE OF ATA AIRLINES, INC. TO
REJECT EXECUTORY CONTRACT WITH SABRE, INC.**

ATA Airlines, Inc., a debtor and debtor in possession ("ATA") in the above captioned chapter 11 cases (the "Chapter 11 Cases"), files this amended motion (the "Amended Motion") for entry of an order (the "Order"), the proposed form of which is attached as Exhibit A, authorizing ATA to reject an executory contract with Sabre, Inc. ("Sabre") pursuant to 11 U.S.C. § 365.

In support of this Amended Motion, ATA states as follows:

JURISDICTION

1. On October 26, 2004 (the "Petition Date"), each of the Debtors filed with the United States Bankruptcy Court for the Southern District of Indiana, Indianapolis Division (the "Bankruptcy Court"), its respective voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. as amended (the "Bankruptcy Code") commencing these Chapter 11 Cases. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

¹ The Debtors are the following entities: ATA Holdings Corp. (04-19866), ATA Airlines, Inc. (04-19868), Ambassadeair Travel Club, Inc. (04-19869), ATA Leisure Corp. (04-19870), Amber Travel, Inc. (04-19871), American Trans Air Execujet, Inc. (04-19872), ATA Cargo, Inc. (04-19873), and Chicago Express Airlines, Inc. (04-19874).

2. No trustee has been appointed. On November 1, 2004, the United States Trustee appointed an official committee of unsecured creditors (the "Committee") pursuant to § 1102(a)(1) of the Bankruptcy Code.

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

4. The statutory basis for the relief sought herein is Section 365(a) of the Bankruptcy Code.

RELIEF REQUESTED

5. For the reasons stated below, ATA requests that the Court enter an order pursuant to Section 365 of the Bankruptcy Code authorizing ATA to reject the Licensed Software Agreement (as defined herein) that in ATA's sound business judgment is an unnecessary burden on ATA, its estate, and creditors.

BACKGROUND

6. ATA and Sabre are parties to that certain Information Technology Services Agreement dated as of October 2, 2003 (as subsequently amended and/or restated, the "Master Agreement"). A copy of the Master Agreement was previously filed under seal as Exhibit B to the Motion Of ATA Airlines, Inc. To Reject Executory Contract With Sabre, Inc. (the "Motion"). Pursuant to the Master Agreement and the Work Orders (as defined herein), Sabre provides ATA with access to, and licenses of, software, along with certain attendant services.

7. The Master Agreement provides that during its term ATA and Sabre will enter into individual work orders (collectively, "Work Orders," and each a "Work Order") for

specific services and/or licensed or hosted software. Each Work Order lists independent agreements along with the fees and charges applicable to the goods or services being provided under each agreement.

8. ATA and Sabre are parties to that certain Work Order No. 1 To The Information Technology Services Agreement with an effective date of October 2, 2003 (as subsequently amended and/or restated, "Work Order No. 1"). A copy of Work Order No. 1 was filed under seal as Exhibit C to the Motion. Work Order No. 1 consists of two distinct agreements: (i) an agreement for access to and use of Hosted Software (as defined in Work Order No. 1) (the "Hosted Software Agreement"); and (ii) an agreement for the use of Licensed Software (as defined in Work Order No. 1) (the "Licensed Software Agreement"). The Licensed Software consists of the Sabre Reservations and Departure Control Interface and Sabre Qik-Schedule.

BASIS FOR RELIEF

9. Soon after ATA received the Licensed Software it informed Sabre the Licensed Software did not function properly and was not needed. ATA has not used the Licensed Software or any ancillary services provided by Sabre pursuant to the Licensed Software Agreement since approximately November of 2004. The Licensed Software Agreement requires ATA to pay a minimum monthly fee of almost \$5,000. In light of the fact that ATA is not utilizing, and has not utilized for some time, the Licensed Software for which it is required to pay nearly \$5,000 a month, the Licensed Software Agreement represents an unnecessary burden on ATA, its estate, and creditors.

**THE LICENSED SOFTWARE AGREEMENT IS SEVERABLE FROM WORK ORDER
NO.1 AND CAPABLE OF INDEPENDENT REJECTION**

10. The structure and plain language of Work Order No. 1 demonstrates that the Licensed Software Agreement is an independent agreement severable from Work Order No. 1, and thus capable of rejection by ATA under Section 365 of the Bankruptcy Code without effect on the Master Agreement, Work Order No. 1, or the Hosted Software Agreement.

11. While it is true that a debtor must accept its contracts *cum onere* and may not accept the benefits and reject the burdens of its agreements, "[i]f a single contract contains separate severable agreements the debtor may reject one agreement and not another." Stewart Title Guar. Co. v. Old Republic Nat'l Title Ins. Co., 83 F.3d 735, 741 (5th Cir. 1996); See also, In re Mirant Corp., 318 B.R. 100, 104 (N.D. Tex. 2004).

12. State law determines whether agreements are severable, and Texas law governs in this instance². In re Mirant, 318 B.R. at 104. Under Texas law, a contract is divisible, or severable, when one party's performance consists of more than one distinct and separate item and the price paid by the other party is apportioned to each item." Stewart Title, 83 F.3d at 739 (internal quotations omitted). Work Order No. 1 requires two distinct performances from Sabre, the provision of Hosted Software and the provision of Licensed Software. The plain language of Work Order No. 1 apportiones the total price paid by ATA among the Hosted Software and Licensed Software. The apportionment of the total price among Hosted Software and Licensed Software is further evidenced by Sabre's own invoices, which provide a line item break down of the amounts owed for the Licensed Software and the amounts owed for the Hosted Software.

² Section 15.15 of the Master Agreement, made applicable to Work Order No. 1 by Section 4 of Work Order No. 1, provides that Texas law governs the agreements between the parties.

13. The determination of whether a contract is severable "depends primarily on the intention of the parties, the subject matter of the agreement, and the conduct of the parties." Id. (internal quotations omitted). "The issue as to severability is whether or not the parties would have entered into the agreement absent the severed parts." Id. (internal quotations omitted). The question is would ATA and Sabre have entered into Work Order No. 1 had it only contained the Hosted Software Agreement, and not the Licensed Software Agreement? "[T]hat the terms of a transaction are set forth in one instrument is not conclusive evidence that the parties intended to make only one contract, but is only a factor in determining intent." In re Gardinier, Inc., 831 F.2d 974, 976 (11th Cir. 1987). Nothing in Work Order No. 1 suggests that the parties would not have entered into Work Order No. 1 had it not contained both the Licensed Software Agreement and the Hosted Software Agreement. Moreover, nothing in Work Order No. 1 or in the Master Agreement indicates that a Work Order is more than a vehicle by which separate agreements are entered into under the course of dealing standards set forth in the Master Agreement. The Licensed software is merely an add-on to the Hosted Software that allegedly provides a more user friendly interface.

14. Prior to the renegotiation of the Master Agreement in 2003 goods and services provided to ATA by Sabre were contained in separate work orders. Following the execution of the Master Agreement, all of the goods and services being used by ATA at the time of execution were included on a single work order, Work Order No. 1. The inclusion of both the Licensed Software Agreement and the Hosted Software Agreement under the umbrella of Work Order No. 1 was a matter of convenience rather than an expression of the parties' intent to treat the Hosted Software Agreement and the Licensed Software Agreement as an indivisible unitary agreement.

15. The second severability factor, the subject matter of the agreement, also weighs in favor of severability. The Hosted Software Agreement deals with software accessible through a data line and hosted at a data center maintained by Sabre. The Licensed Software Agreement is for software installed on computers at various ATA owned or operated locations, and is just an add-on to the Hosted Software. The removal of the Licensed Software does not affect the functionality of the Hosted Software, as demonstrated by the fact that ATA continues to use the Hosted Software, but has not used the Licensed Software since November, 2004. The two types of software contemplated by Work Order No. 1 are clearly capable of being separated and do not need to be treated as a single subject matter.

16. The final factor considered by Texas courts is the conduct of the parties. This factor also weighs in favor of severing the Licensed Software Agreement from the Hosted Software Agreement. "[A] type of conduct that is particularly telling in an inquiry such as this is the method of payment arranged by the parties." Stewart Title, 83 F.3d at 740. "Where the subject matter of the contract is divisible and the consideration is apportioned, these qualities are consistent with and indicative of a severable contract." Id. (internal quotations omitted). The consideration paid by ATA under Work Order No. 1 is clearly apportioned among the Hosted Software Agreement and the Licensed Software Agreement. The plain language of Work Order No. 1 establishes distinct and independent pricing mechanisms for the Hosted Software and Licensed Software, and Sabre's own invoices clearly distinguish between the amounts owed for each type of software.

17. An application of the relevant factors shows that the Licensed Software Agreement is severable from the Hosted Software Agreement under Texas law. As such, ATA is

entitled to reject³ the Licensed Software Agreement independent of and without effect on the Master Agreement, Work Order No. 1 and the Hosted Software Agreement.

18. A debtor has broad powers to relieve itself of burdensome executory contracts and unexpired leases. "[T]he authority to reject an executory contract is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization." NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984), see also, Precision Indus. Inc. v. Qualitech Steel SBQ, LLC, 327 F.3d 537, 545 (7th Cir. 2003); In re Chateaugay Corp., 10 F.3d 944, 954-55 (2d Cir. 1993). As illustrated in Bildisco, the central purpose of the rejection provisions of § 365 is to relieve a debtor from the burden of a disadvantageous executory contract or lease in aid of the debtor's effort to reorganize.

19. "[T]he bankruptcy courts are necessarily entrusted with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization." Pioneer Inv. Serv. Co. v. Brunswick Associates Ltd. P'ship, 507 U.S. 380, 389 (1993). The federal interest to promote reorganization evidenced by Section 365 of the Bankruptcy Code takes precedence where the case for a single interdependent agreement is weak or not supported. See Id.; In re Bridgeport Jai Alai, Inc., 216 B.R. 651, 657-58 (Bankr. D. Conn. 1997) ("Therefore, even if the application of Connecticut law results in the conclusion [that the two agreements] are indivisible contractual arrangements, that result would not prevail against an overriding federal interest, which in this case is the qualified rights and obligations provided by § 365.").

³ As more fully explained below, ATA has meet the required burden to reject the Licensed Software Agreement.

20. Under Texas law the Licensed Software Agreement and the Hosted Software Agreement are severable agreements, each capable of rejection without effect on the other. Moreover, the purposes of the Bankruptcy Code weigh in favor of relieving ATA's estate from the burdensome obligations of the Licensed Software Agreement. The Hosted Software Agreement continues to provide important benefits to ATA and estate, while the Licensed Software Agreement imposes significant burdens without any benefit.

REJECTION OF THE LICENSED SOFTWARE AGREEMENT

21. Section 365(a) of the Bankruptcy Code provides that a debtor "subject to the court's approval, may assume or reject any executory contract or an unexpired lease." 11 U.S.C. § 365(a). The assumption or rejection of an unexpired lease or executory contract by a debtor is subject to review under the business judgment standard. See, e.g., Control Data Corp. v. Zelman (In re Minges), 602 F.2d 38, 43 (2d Cir. 1979) (Act case); In re Gucci, 193 B.R. 411, 414-15 (S.D.N.Y. 1996); In re Federated Dept. Stores, Inc., 131 B.R. 808, 811 (S.D. Ohio 1991) ("Courts traditionally have applied the business judgment standard in determining whether to authorize the rejection of executory contracts and unexpired leases"); In re Cutters, Inc., 104 B.R. 886, 889 (Bankr. M.D. Tenn. 1989). This standard is satisfied when a debtor demonstrates that rejection will benefit the estate. See, e.g., In re Riodizio, Inc., 204 B.R. 417, 424 (Bankr. S.D.N.Y. 1997); In re Stable Mews Assoc., Inc., 41 B.R. 594, 596 (Bankr. S.D.N.Y. 1984).

22. If the debtor's business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease or executory contract. See, e.g., Group of Institutional Investors v. Chicago, M., St. P. & P.R.R. Co., 318 U.S. 523, 550-51 (1943); Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp., 872 F.2d 36, 39-40 (3d Cir. 1989); In re Child World, Inc., 142 B.R. 87, 90 (Bankr. S.D.N.Y. 1992); see also Allied Tech., Inc. v. R.B.

Brunemann & Sons, Inc. (In re Allied Tech., Inc.), 25 B.R. 484, 495 (Bankr. S.D. Ohio 1982)

("Court approval of a debtor in possession's decision to assume the lease should only be withheld if the debtor's judgment is clearly erroneous, too speculative or contrary to the provisions of the Bankruptcy Code").

23. The business judgment rule has vitality in chapter 11 cases and shields a debtor's management from judicial second-guessing. See, e.g., Official Comm. Of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992); see also Committee of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp (In re Johns-Manville Corp.), 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) ("[T]he Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a debtor's management decisions.").

24. The Licensed Software Agreement costs ATA, its estate, and creditors nearly \$5,000 a month, but provides no benefit in return, placing the rejection of the Licensed Software Agreement squarely within ATA's sound business judgment.

WHEREFORE, the Debtors request that the Court enter an order, substantially in the form attached hereto as Exhibit A, authorizing ATA to reject the Licensed Software Agreement without effect on ATA's future ability to assume or reject the Master Agreement, Work Order No. 1 or the Hosted Software Agreement.

Respectfully submitted,

BAKER & DANIELS

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served this 9th day of May 2005, by electronic mail on the Core Group, 2002 List, Appearance List and Sabre.

/s/ Jeffrey C. Nelson