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

IN RE:	)	Chapter 11
	)	
ATA HOLDINGS CORP., *et al.,*	)	Case No. 04-19866
	)	(Jointly Administered)
	)	
Debtors.	)	

OBJECTION OF REORGANIZED COMPANIES
TO THE COMPENSATION APPLICATION OF COMPASS ADVISERS LLP

The Reorganized Companies[1] object to the "First And Final Application Of Compass Advisers, LLP For Allowance Of Compensation For Services Rendered And Reimbursement Of Expenses As Financial Advisor And Investment Banker To The Official Committee Of Unsecured Creditors Of ATA Holdings Corp., Et Al., For The Period From November 4, 2004 Thorough February 28, 2006 And For Other Relief" (the "Compass Application"). In support of their objection, the Reorganized Companies say:

1. The Reorganized Companies object to the Compass Application insofar as it seeks to recover a $1,000,000 "Additional Services Fee" and the attorneys' fees incurred by Compass in seeking such enhanced compensation.

2. The Compass Application is replete with claims by Compass Advisers, LLP ("Compass") that Compass should be given most (if not sole) credit for a variety of successes in these chapter 11 cases. Compass characterizes itself as being "instrumental in proposing, acting upon and driving to fruition many of the key events that created value, preserved value or prevented the dissipation of value in these Cases". Compass Application ¶ 12

[1] The Reorganized Companies are the debtors in these cases who were proponents of the confirmed and effective Amended Joint Chapter 11 Plan For The Reorganizing Debtors (the "Plan") and their newly formed direct and indirect holding companies all as defined in the Plan.

at p. 5. If and to the extent Compass intends by that and other assertions in the Compass Application to claim that the successful reorganization achieved in these cases would not have occurred but for the efforts of Compass the Reorganized Companies deny all such assertions. The successful reorganization occurred as a result of the combined efforts of the Debtors' management and many professionals engaged by a variety of parties in the cases. It would be inaccurate, unfair and inappropriate to single out one professional firm to receive special credit for the success achieved in these cases. The Reorganized Companies do not contend that Compass failed to capably perform the services for which Compass was engaged by the Official Committee of Unsecured Creditors (the "Committee"). The Reorganized Companies believe that Compass generally provided very good financial advisory and investment banking services for the Committee and thereby fulfilled its duties to the Committee. However, to the extent the Compass Application goes beyond asserting that Compass fully performed the services that it was engaged to discharge and asserts that Compass in addition performed other material services above and beyond those contemplated by its engagement agreement and the Court's order approving the engagement of Compass in a manner that justifies "bonus" compensation, the Reorganized Companies deny all such assertions.

3. Compass was employed by the Committee under an engagement letter agreement dated November 4, 2004 (the "Compass Engagement Letter"). The Compass Engagement Letter was in fact executed on or around December 23, 2004 (the date the Committee filed its application for authority to employ Compass). The Compass Engagement Letter provided for a flat monthly fee of $125,000 plus an opportunity for Compass to earn an "Incentive Fee" based upon the ultimate recoveries by unsecured creditors in these cases. That potential Incentive Fee was capped at $1.25 million. Compass does not contend that it earned

any part of the Incentive Fee. Instead Compass apparently contends that it performed services beyond those envisioned by the Compass Engagement Letter that justify an additional $1 million of compensation beyond what it earned under the Compass Engagement Letter. The Reorganized Companies deny that contention.

4. Under the Compass Engagement Letter, Compass was to provide to the Committee "financial advisory and investment banking services which shall include but not be limited to" (emphasis added) eight specific categories of financial advisory and investment banking services and a ninth catchall category. The ninth category provides that Compass was to "render such other financial advisory and investment banking services as may be agreed upon by Compass and the Committee in connection with the foregoing". Compass does not appear to contend that any services it provided in these cases were anything other than "financial advisory" or "investment banking" services that Compass and the Committee agreed that Compass would provide. Therefore the argument by Compass that it performed services that were outside and beyond those provided for by the Compass Engagement Letter appears to be flatly wrong.[2]

5. The Compass Engagement Letter also provides that should Compass and the Committee later agree that Compass should perform services above and beyond the "financial advisory" or "investment banking" services covered by the Compass Engagement Letter that Compass and the Committee would execute an agreement to modify the Compass Engagement Letter or enter into a one or more separate agreements to address such other

[2] Remarkably Compass asserts as a significant basis for its Additional Services Fee claim that Compass provided "additional services" not contemplated by the Compass Engagement Letter in connection with the December 2004 auction sale that resulted in a sale of Midway Gates and the other "Southwest Transactions" with Southwest Airlines Company. See Compass Application ¶ 28.a. However, the auction and the resulting Southwest Transactions were completed and approved by this Court before the Compass Engagement Letter was executed, the Committee filed its application to employ Compass and the Court approved the employment of Compass on February 8, 2005.

services and any additional compensation arrangements and all such modifications and agreements would then be subject to prior approval by the Bankruptcy Court. See Compass Engagement Letter, paragraph 5 at B-6. The Compass Engagement Letter provides examples of the types of additional services that would need to be the subject of further agreements and applications to the Court. Paragraph 5 of the Compass Engagement Letter says that such additional services might include "transactions such as business acquisitions, divestitures, private debt or equity placements, public debt or equity financings or other corporate transactions for which it is customary to pay a transaction, success or incentive fee . . . ." To the extent Compass now contends that it performed any of those "additional services" not contemplated by the Compass Engagement Letter the Reorganized Companies deny that contention. There were no "business acquisitions" or "divestitures" in these cases. The Court of course approved the Debtors' engagement of Jefferies & Company, Inc. ("Jefferies") to serve as the Debtors' investment banker to assist in raising debt and equity capital needed for the reorganization. In connection with the placement of that debt and equity the role of Compass was to serve as the financial advisor and investment banker for the Committee. As such Compass was tasked with monitoring the work performed by Jefferies, as contemplated by the Compass Engagement Letter. That is precisely what Compass did. Moreover had Compass and the Committee agreed that they wished for Compass to perform some "additional services" for additional compensation that was not provided for by the Compass Engagement Letter, the Compass Engagement Letter sets forth a process by which they would seek Court approval for any such agreed expansion of the role of Compass. That process was not followed with respect to the alleged "additional services". Compass does not allege that it reached any written agreement with the Committee to perform or be compensated for any additional services. Moreover the Committee did not seek

approval from the Bankruptcy Court to expand the role of Compass to include any "additional services". However, in connection with the sale of the assets of C8 f/k/a Chicago Express, when the Committee and the Debtor decided that Compass should provide investment banking or brokerage services beyond those specified in the Compass Engagement Letter they entered into a separate written agreement with Compass and applied to the Court to obtain the Court's approval of Compass' widened responsibility and additional compensation.

6. As noted above, the Reorganized Companies believe that the services that Compass performed for which it now seeks an Additional Services Fee are included as part of the tasks that Compass agreed to perform pursuant to the original Compass Engagement Letter. However to the extent Compass contends that it performed additional services beyond those provided for in the Compass Engagement Letter then, of course, Compass as a sophisticated experienced professional engaged in many chapter 11 cases knew all along that it would not be entitled to obtain compensation unless the Committee first came to the Court and sought approval from the Court pursuant to Bankruptcy Code §§ 327(a), 328(a) and 1103(a) of any enhanced engagement. Since the Committee did not seek to employ Compass for such additional services Compass is not entitled to receive the "Additional Services Fee". See In re Carolina Sales Corp., 45 B.R. 750 (Bankr. E.D. N.C. 1985).

7. Compass appears to recognize that it may not receive compensation for the performance of services for which it was not employed by the Committee with Court approval. Compass Application ¶ 93 at p. 39. Therefore Compass has developed the unsustainable position that Compass may now seek Court approval for an expanded retroactive employment nunc pro tunc, based on the notion that the failure to seek earlier authorization was a result of "excusable neglect".

8. Initially it should be noted that the Bankruptcy Code does not authorize a professional to seek authority for someone to employ the professional. Only trustees, debtors in possession, and committees may seek authority to employ professionals. Even if it were somehow appropriate for an ex post facto application to be filed seeking to approve an expanded employment of Compass, the Committee, not Compass, would be the party to file such an application.

9. Moreover, the notion that the failure to ask for prior Court approval of an expansion of Compass' role is a product of "excusable neglect" simply does not wash. A conscious and deliberate action, such as Compass' purposeful failure to seek the Court's prior approval of the Additional Services, cannot constitute excusable neglect. In re Anicom, 273 B.R. 756, 763 (Bankr. N.D. Ill. 2002) . See also In re Celotex Corp., 232 B.R. 493 (M.D. Fla. 1999), aff'd sub nom. Sunset Vine Tower v. Celotex Corp., 196 F.3d 1262 (11th Cir. 1999) (deliberate decision not to file timely proof of claim because of doubts about evidentiary basis therefor); Agribank v. Green, 188 B.R. 982, 989 (C. D. Ill. 1995) (intentional deferral of filing proof of claim until liquidation of exact amount after closing of state court foreclosure sale): In re LAN Assocs. XIV, L.P., 193 B.R. 730, 737 (Bankr. D. N.J. 1996) (conscious decision to not timely file a proof of claim because it appeared doing so would be futile). The Supreme Court in Pioneer Inv. Servs. Co. v Brunswick Assocs., 507 U.S. 380 (1993) provides as an example of an extremely rare situation where a conscious failure to timely act can constitute excusable neglect--a circumstance when a party chooses to miss a deadline to render first aid to an accident victim discovered on the way to the courthouse. Pioneer, 507 U.S. at 388. The decision that Compass consciously made to fail to seek the Court's approval to perform the Additional Services does

not meet the very extreme standard that would excuse obtaining prior approval. See Compass Application FN 8 at p. 38.

Anicom notes that when a late filing is based on a conscious and deliberate decision, the preferred excuse is rarely a sufficient one, even if it is a strategic decision based on an honest business judgment. Anicom, 273 B.R. at 763. Deliberate decisions not to take timely action such as the decision Compass contends that it made (even if taken in good faith) simply do not fall within the excusable neglect exception. Compass's election to limit the scope of its retention to the areas described in the Compass Retention Letter due to "uncertainty concerning the ultimate recovery of creditors" does not rise to excusable neglect. As Compass admits, there simply was no neglect (let alone "excusable" neglect) involved.

In the same paragraph that Compass admits that it consciously decided to bypass the Court because of "uncertainty concerning the ultimate recovery of creditors," Compass states that the Additional Services were not included because of "unforeseen circumstances." This statement, however, rings hollow in light of Compass's earlier admission. The circumstances were certainly foreseen--it was simply a matter of Compass making the tactical decision that it was better off asking for an additional $1 million after the result in these cases was known than before.

10. The Reorganized Companies believe that Compass is in fact trying to renegotiate the compensation structure of the Compass Engagement Letter. Because Compass is not entitled to recover an Incentive Fee on the basis Compass negotiated with the Committee it now seeks to be paid a "bonus" based on some other criteria. Compass negotiated for retention under Bankruptcy Code § 328(a) on the fee bases set forth in the Compass Engagement Letter. The Court approved the retention of Compass under Bankruptcy Code § 328(a) on the terms of

the Compass Engagement Letter. As part of the Compass Engagement Letter, Compass expressly agreed with the Committee that its flat monthly fee of $125,000 and any Incentive Fee earned would be paid without regard to the number of hours that Compass professionals worked on the cases. See Compass Engagement Letter ¶ 2(a) and 3. Compass cannot now be heard to say that it should be paid more because its hourly yield is allegedly too low. No one would have expected Compass to offer to give back some of its compensation had its hourly rate yield turned out to have been more favorable. Based upon Bankruptcy Code § 328(a), the Compass Engagement Letter in paragraph 3 includes the following limiting language:

> "It is understood and agreed that Compass' employment is pursuant to section 327(a) and 328(a) of the Bankruptcy Code and that terms and conditions of employment are reasonable as of the date hereof, and that allowance and compensation to Compass different from that provided herein shall be appropriate only if these terms and conditions later prove to have been improvident in light of developments not capable of being anticipated at this time."

Because Compass was engaged under Bankruptcy Code § 328(a) (as opposed to Section 330) its request for an Additional Services Fee, which is in reality a disguised request for a bonus, is clearly improper. In re Nucentrix Broadband Networks, Inc., 314 Bankr. 574, 579-581 (Bk.Ct. N.D. Tex. 2004). The entire discussion of "Factors To Be Considered In Awarding Fees" in ¶¶ 78 through 92 of the Compass Application would be applicable were Compass to be compensated under Bankruptcy Code § 330. However the Compass Engagement Letter and the Court's order approving the employment of Compass specify that Compass is to be compensated under Bankruptcy Code § 328(a) and therefore none of that lengthy discussion of "Factors" in the Compass Application is apposite.

In Nucentrix a financial advisor/investment banker, Houlihan Lokey, requested bonus compensation based upon the achievement of an extraordinary result. The Nucentrix court

denied the request (even though it allowed a request by the debtor's counsel for a bonus) because, like Compass, Houlihan Lokey (unlike debtor's counsel) was to be compensated under Bankruptcy Code § 328(a) based upon an agreed compensation structure not under the more flexile standard "reasonable compensation" specified by Section 330(a). Nucentrix explained the standard for a request to award compensation different from the compensation structure approved by an order approving a professional's employment under Bankruptcy Code § 328(a) as follows:

> "It is not enough that developments in a bankruptcy case be unforeseen. *Daniels v. Barron (In re Barron)*, 225 F.3d 583, 585 (5th Cir.2000) Rather, the bankruptcy court is charged to follow the plain meaning of the statute, which requires the developments to be incapable of being anticipated to depart from the previously approved compensation scheme. *Id.*"

Just as in Nucentrix there is no fact or circumstance that would justify the Compass request for an Additional Services Fee that was incapable of being anticipated at the time that Compass was engaged.

11. The ruling of this Court in an order entered on January 22, 2002 (the "A.G. Order") in In re A.G. Financial Service Center Inc., Case No. 99-92144-BHL-11, with respect to a fee enhancement request by lawyers for a creditors' committee has application here. A copy of A.G. Order is attached hereto. In A.G. Financial Service Center, compensation for the committee's counsel was based on the "reasonable compensation" standard of Bankruptcy Code § 330 (not § 328(a)) and therefore as explained in Nucentrix the Court had more flexibility in considering a request for a bonus than it has with respect to the Compass Application. Notwithstanding that greater flexibility the Court denied the bonus request even though counsel had "been an exemplary advocate for the Creditors' Committee. It cannot be disputed that without their tenacity, the unsecured creditors in this case would have fared far worse. Counsel

achieved tremendous results and displayed impressive expertise in their handling of this case." A.G. Order at p. 5. The Court determined that the request did not represent "that rare and exceptional case as to warrant an enhancement . . ." largely because counsel did not bear any substantial risk that it would not be paid its fees on the hourly fee basis for which it bargained on assuming the engagement. Here Compass assumed virtually no risk that it would be paid in accordance with the terms of the Compass Engagement Letter; Compass was routinely paid each month 80% of its monthly flat fee and 100% of its expenses and if Compass had earned its bargained for Incentive Fee the Reorganized Companies would have had to pay that administrative claim as a pre-condition to confirmation of a chapter 11 plan. The reasoning of the A.G. Order further supports the denial of any bonus for Compass.

12. Because Compass contends that it is not seeking the Additional Services Fee pursuant to the Compass Engagement Letter, no basis exists for Compass to be reimbursed for its attorneys' fees and expenses in seeking to recover the Additional Services Fee. Virtually all of the Compass Application is devoted to Compass' argument in support of the Additional Services Fee claim.

13. For all of these reasons and based upon evidence to be heard at the hearing on the Compass Application, the Reorganized Companies object to the request by Compass for a $1,000,000 Additional Services Fee and ask that the Court deny that request and ask that the Court further deny the request by Compass to recover its attorneys' fees and expenses incurred in making the request for the Additional Services Fee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served this 30th day of May, 2006 by electronic mail, facsimile, hand delivery or overnight mail on the Core Group, 2002 List, and Appearance List.

/s/ James M. Carr