

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

IN RE:

ATA HOLDINGS CORP.,
a/k/a ATA AIRLINES, INC.,
_____ /

CASE NO.: 04-19866-BHL-11

**ATA AIRLINES, INC.'S REPLY TO SIGNATURE FLIGHT
SUPPORT CORPORATION'S RESPONSE TO ATA'S MOTION FOR
ORDER TO SHOW CAUSE FOR VIOLATION OF PLAN INJUNCTION**

Debtor ATA HOLDINGS CORP., a/k/a ATA AIRLINES, INC. ("ATA"), through its undersigned counsel, hereby Replies to SIGNATURE FLIGHT SUPPORT CORPORATION'S ("Signature") Response to Motion for Order to Show Cause for Violation of Plan Injunction (the "Reply"). In support of its Reply, ATA states as follows:

BACKGROUND

1. On November 25, 2008, ATA filed a Motion for Order to Show Cause ("Motion") why Signature should not be held in contempt of Court for violation of the Plan Injunction (Doc. No. 4986).
2. The Motion was set for hearing in this Court on December 18, 2008 (Doc. No. 4987).
3. On or about December 15, 2008, Signature mailed its Response ("Response") to ATA's Motion (Doc. No. 4991).
4. Although both parties presented their arguments at the hearing, the Court had not had an opportunity to review Signature's Response prior to the hearing and ordered the Debtor to reply to Signature's Response within 30 days. The Court further

ordered Signature to file a response to ATA's Reply within 15 days of the date ATA's Reply is filed. See Doc. No. 4992.

REPLY

5. ATA's Motion asserts that Signature is barred from asserting the McCafferty Indemnity Claim against ATA because: (A.) ATA's Chapter 11 Plan of Reorganization and related Confirmation Order discharged any and all Signature claims related to any conduct occurring prior to the Petition Date; (B.) ATA assumed the IATA Agreement and cured any all defaults; (C.) Signature failed to file a Proof of Claim prior to the Claims Bar Date; and (D.) Signature is precluded and permanently enjoined from commencing the District Court Case and is violating the Plan Injunction.

6. Signature's Response asserts that: (A.) its indemnity claim did not arise until after confirmation of the Plan; (B.) this Court should look to Indiana or Florida state law to determine when Signature's indemnity claim against ATA arose; (C.) that 11 U.S.C. § 502(e) precluded Signature from filing a claim; (D.) that ATA did not assume the IATA Agreement and that ATA did not cure all defaults when it assumed certain agreements; and (E.) that Signature did not violate the Plan Injunction.

A. Signature's indemnity claim arose at the time the contract was executed

7. Signature's indemnification rights arose upon the execution of the IATA Agreement and any claims related to the McCafferty lawsuit were pre-petition claims which were cured at assumption or discharged by the bankruptcy confirmation.

8. Bankruptcy law holds that Signature's indemnification claim existed as soon as the contract was executed, albeit contingent. Moreover, the contingent event triggering indemnification became fixed when McCafferty was injured in January 2003

and/or when the McCafferty lawsuit was filed in January 2004. Both events occurred prior to ATA's October 26, 2004 Petition Date and were therefore pre-petition claims.

9. Under contract law, a right to payment based on a written indemnity agreement arises at the time the indemnification agreement is executed. *In re: Manville Forest Products, Corp.*, 209 F.3d 125, 129 (2nd Cir. 2000); *Graff v. Nieberg*, 233 F.2d 860, 863-4 (7th Cir. 1956); *See also In re Houbigant*, 188 B.R. 347, 358-359 (Bankr. S.D. N.Y. 1995) (“[A] contractual indemnification claim exists as a contingent claim against the indemnitor as of the date of the indemnification is executed”).

10. When parties agree in advance that one party will indemnify the other party in the event of a certain occurrence, there exists a right to payment, albeit contingent, upon the signing of the agreement. *In re Mobley*, 377 B.R. 406, 408 (Bankr. M.D. Fla. 2007); *In re Hemingway Transport, Inc.*, 954 F.2d 1, 9 n. 9 (1st Cir. 1992).

11. “Several cases ... have concluded that claims based on a prepetition agreement to indemnify or guarantee an obligation are deemed to be prepetition claims even though the action to enforce such an agreement to indemnify or guarantee the obligation of a debtor arose postpetition.” *In re Mobley*, 377 B.R. at 408; *See also In re Wilbur*, 237 B.R. 203 (Bankr. M.D. Fla. 1999).

12. Therefore, Signature's claim arose prepetition and gave rise to a contingent claim at the time the IATA Agreement was executed. To hold otherwise would allow the party claiming indemnification to lie in wait to “resurrect” the claim at anytime most convenient to them in derogation of the purposes of the Bankruptcy Code.

B. State law does not apply, but if it did, the Court should look to Illinois state law for determining when the indemnity claim arose

13. Where the parties have designated in the contract a specific choice of law to govern the contract, courts generally give effect to the parties' choice of law.

14. Signature opines that its claim is governed by either Indiana or Florida law. However, Paragraph 10 of the Annex to the IATA Agreement executed by Signature, contains an Illinois choice of law provision. Specifically, Paragraph 10 states,

“Notwithstanding the provisions of Article 9 of the Main Agreement¹, this Annex B.1.0 shall be construed, interpreted and enforced in accordance with the laws of the State of Illinois.”

A true and correct copy of Annex B.1.0 to the IATA Agreement is attached hereto as Exhibit “A.”

15. Under Illinois law, a contingent right to payment and the right to sue exists upon execution of an indemnification contract. *Graff v. Nieberg*, 233 F.22d at 863-4.

16. Therefore, under Illinois law, Signature's alleged indemnity claim arose prepetition and is barred by the confirmation order.

C. Signature should have asserted its alleged indemnity claim against ATA prior to the Claims Bar Date

17. The Bankruptcy Code provides that confirmation of a plan discharges the debtor from any debt that arose before the date of the confirmation, regardless of whether a proof of claim is filed, the claim is disallowed, or the plan is accepted by the holder of the claim. *See* 11 U.S.C. § 1141(d)(1)

18. If Signature held a pre-petition contingent or unliquidated indemnification claim against ATA, then it was required to file a proof of claim in the ATA Bankruptcy. The Bankruptcy Code considers contingent and unliquidated debts as claims. *See* 11 U.S.C. § 101(5)(A).

19. Signature alleges that it “could not have asserted a claim for indemnification against ATA’s 2004 Bankruptcy Estate” because it would have been disallowed pursuant to § 502(e)(1)(B). *See* Response at p. 8. This is inaccurate.

20. A claim must be filed before it can be allowed or disallowed. The failure of a creditor to file a claim by claims bar date does not mean that the unfiled claim is disallowed. Signature never filed a claim in this bankruptcy case. Therefore, it did not have a claim that could be allowed or disallowed.

21. The Code's expansive definition of “claim” permits automatic allowance of most “contingent” claims against a debtor’s estate upon timely filing. *See* Bankruptcy Code §§ 101(5), 501, 502(a); Fed.R.Bankr.P. 3002. The bankruptcy court simply estimates the amount of the claim for purposes of its allowance, *see id.* § 502(c)(1), discounting its value to reflect the uncertainty of the contingency.

22. The “sole purpose served by § 502(e)(1)(B) is to preclude redundant recoveries on identical claims against insolvent estates in violation of the fundamental Code policy fostering equitable distribution among all creditors of the same class.” *In re Hemingway Transp., Inc.*, 993 F.2d 915, 923 (1st Cir.), *cert. denied*, 510 U.S. 914, 114 S.Ct. 303, 126 L.Ed.2d 251 (1993).

23. As discussed *supra*, Signature’s claim had arisen prepetition. Signature should have filed a proof of claim. Its failure to do so waived any indemnification rights it may have had regarding the McCafferty Lawsuit.

¹ Article 9 of the IATA Agreement discusses arbitration.

D. ATA cured all defaults when it assumed the IATA Agreement.

24. Section 365 of the Bankruptcy Code provides a debtor with two options regarding executory contracts: (i) reject the contract; or (ii) assume the contract and cure all defaults.

25. When a Debtor assumes an executory contract, it must cure all defaults. *See* 11 U.S.C. § 365(b)(1).

26. ATA assumed the IATA Agreement and cured all pre-petition claims and defaults, including the McCafferty Indemnity Claim by paying Signature \$245,524.76 as **“full and complete cure of any defaults that may exist under the Agreements.”** (Bankr. Doc. No.: 1972, at ¶ 7) (emphasis added); *See also* Order on Motion for Authority to Assume Amended Agreement. (Doc. No. 2066).

27. In contrast, debtor’s rejection of an executory contract is treated as a breach of the contract as of the instant before the debtor filed bankruptcy and requires the creditor to file a proof of claim.

28. Signature’s Response alleges that “ATA did not assume the IATA agreement.” *See* Response at Section VI., p. 8. If true, according to the Plan, all of Signature’s claims under the IATA Agreement would be rejection damages and arise prepetition under the Bankruptcy Code. Signature failed to file a proof of claim prior to the Claims Bar Date and has waived any claim it may have had.

E. Signature knowingly and willfully violated the Plan Injunction and should be sanctioned.

29. Signature’s filing of the Florida District Court Case is a violation of this Court’s Plan Injunction and is an attempt to circumvent this Court’s jurisdiction and

Confirmation Order's prohibition of raising claims involving actions which took place prior to October 26, 2004.

30. Signature was fully aware of the McCafferty Lawsuit and the alleged McCafferty Indemnity Claim prior to the Petition Date and has participated throughout this case.

31. Signature's behavior was deemed prohibited by the Court's January 31, 2006 Confirmation Order. Signature has knowingly and intentionally violated this Court's Orders and thus should be sanctioned for its behavior.

32. For example, on February 28, 2006, less than one month after plan confirmation, Signature mailed ATA a letter which stated, "... we understand ATA is currently in bankruptcy, we intend to pursue a claim for breach of contract of the Ground Handling Agreement [IATA Agreement] at the first opportunity and will request lifting of the stay in order to proceed directly against ATA's insurers." A true and correct copy of the letter is attached hereto as Exhibit "B."

33. Therefore, Signature's filing the of the Florida District Court Case was a clear and knowing violation of Section 362 of the Bankruptcy Code and sanctionable pursuant to Sections 362(k) and 105.

WHEREFORE, ATA CORPORATION respectfully requests that the Court:

(i) enter an Order to Show Cause why Signature should not be held in contempt of Court for violating this Court's Orders;

(ii) enter an Order compelling Signature to dismiss the its claims and to file papers with the United States District Court for the Middle District of Florida

disavowing said claims, and order sanctions in the amount of ATA's attorneys' fees incurred in pursuit of this claim if Signature refuses to withdraw said defenses;

(iii) grant attorneys' fees incurred by ATA as a direct result of Signature's violations of this Court's Orders; and

(iv) grant any other and further relief that the Court deems just and proper.

Dated: January 16, 2009

Respectfully submitted,

/s/ Terry E. Hall

Terry E. Hall, Esquire
Baker & Daniels, LLP
300 North Meridian Street, Ste. 2700
Indianapolis, IN 46204
317-237-0300
Email: terry.hall@bakerd.com

and

/s/ Keith T. Appleby

Keith Appleby, Esquire²
Florida Bar No.: 0011028
Fowler White Boggs P.A.
501 E. Kennedy Boulevard, Suite 1700
Tampa, Florida 33602
(813) 228-7411
Email : kappleby@fowlerwhite.com
Attorneys for ATA

² Keith Appleby appeared pro hac vice in ATA's Chapter 11 Bankruptcy, Case No.: 08-03675-BHL-11 (the "Second ATA Chapter 11 Case").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of January, 2009, a true and correct copy of ATA's Reply was sent via Facsimile, Hand-Delivery and first-class U.S. mail, postage pre-paid, to: **John M. Murray, Esq., Michael E. Beck, Esq.**, Murray, Marin & Herman, P.A., 101 East Kennedy Blvd., Suite 1810, Tampa, FL 33602-5148; and by first-class U.S. mail, postage pre-paid, to: **U.S. Trustee**, 101 W. Ohio St.. Ste. 1000, Indianapolis, IN 46204; **Joseph F. McGonigal**, Office of U.S. Trustee, 101 W Ohio St Ste 1000, Indianapolis, IN 46204.

Terry E. Hall

Attorney