UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA

IN RE: ATA AIRLINES, INC., Debtor) Case No. 04-19866
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SIGNATURE FLIGHT SUPPORT CORPORATION'S SUR-RESPONSE TO ATA AIRLINES, INC'S MOTION FOR ORDER TO SHOW CAUSE FOR VIOLATION OF PLAN INJUNCTION

SIGNATURE FLIGHT SUPPORT CORPORATION ("Signature"), through undersigned counsel, hereby submits this Memorandum in Sur-Response and Opposition to ATA AIRLINES, INC.'s ("ATA") Motion to Show Cause, and in support thereof state as follows:

I. Signature's Indemnity Action Did Not Arise Pre-Petition

ATA, relying upon Paragraph 10 of the IATA Agreement, contends that Illinois law should apply to the indemnification obligation. However, even if Illinois law is applicable, ATA's interpretation of Illinois law is incorrect. Specifically, ATA cites *Graff v. Nieberg*, 223 F.2d 860 (7th Cir. 1956) for the proposition that a contingent right to payment and the right to sue exists upon execution of an indemnification contract. ATA's interpretation of *Graff* is erroneous. *Graff* pertained to an action to enforce a lien on real property and the Court, relying upon early Illinois case law regarding the relationship between a principal and surety, held that "[w]hen a surety signs a bond, the law raises an implied promise by the principal to reimburse the surety for any loss which he may sustain, and when a loss occurs this implied contract of indemnity relates back, and takes effect from the time when the surety became responsible." *Id.* at 864. *Graff* in no way held that a cause of action for indemnification accrued at the time of execution of the contract. To the contrary, Illinois law is clear that a cause of action on an indemnity agreement does not arise until the indemnitee either has a judgment against him or her

for damages, or has made payments or suffered actual loss. *Hertz Corp. v. Garrott*, 566 N.E.2d 337 (Ill. App. 1990) relying upon *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 535 N.E.2d 530, 539 (Ill. 1989). "It is clear that a cause of action on an indemnity agreement does not arise until the indemnitee either has had a judgment entered against him for damages or has made payments or suffered actual loss. *In re Marriage of Hopwood*, 882 N.E.2d 205, 208 (Ill. App. 2008).

Signature paid the McCafferty settlement on January 31, 2007. Thus, Signature's indemnity claim against ATA "arose" on January 31, 2007 under Illinois law, Indiana law, or Florida law. *Gerill Corp.*, 535 N.E.2d at 530; *TLB Plastics Corp., Inc. v. Procter & Gamble Paper Products Co.*, 542 N.E.2d 1373, 1376 (Ind.Ct.App.1989); *McKenzie Tank Lines, Inc. v. Empire Gas Corp.*, 538 So. 2d 482, 486 (Fla. 1st DCA 1989). Therefore, Signature's indemnity claim "arose" more than one year after ATA's 2004 bankruptcy discharge which occurred on January 31, 2006 pursuant to this court's order in the 2004 Chapter 11 bankruptcy confirmation order. As a result, Signature's claim for indemnification "arose" subsequent to ATA's discharge and was not extinguished by ATA's 2004 bankruptcy.

II. Signature did not violate the plan injunction

Signature has not violated the plan injunction created in ATA's 2004 bankruptcy proceedings. Signature has merely sought to pursue a claim against ATA's insurance proceeds based on a claim for indemnification that Signature believes was not discharged by ATA's 2004 bankruptcy proceedings. Regardless of whether Signature's indemnity claim is governed by Illinois law, Florida law, or Indiana law, at the very least, Signature may pursue its claim against ATA's insurer. It is not disputed that Signature did not file a claim in the bankruptcy estate for the indemnification; Signature maintains that it could not have filed a claim and ATA maintains

that a claim should have been filed nonetheless and the failure to do so waived the claim. *See* ATA's Reply, pg. 5. Regardless, whether a claim should have been filed is not the issue. The issue is whether Signature may proceed with a claim against ATA's insurer despite not filing a claim in ATA's prior bankruptcy estate. Numerous courts, confronted with a tort claimant who seeks to proceed against a discharged debtor only for the purpose of recovering against an insurer, have relied upon §§ 524(a) and 524(e) and the fresh start policy in concluding that the discharge injunction does not bar such a suit. *See In re Jet Florida Systems, Inc.*, 883 F.2d 970, 976 (11th Cir. 1989) (section 524(e) permits a plaintiff to proceed against the debtor to establish liability as a prerequisite to recover from an insurer); *In re Greenway*, 126 Bankr. 253, 255 (Bankr. E.D. Tex. 1991) (discharge order does not bar continuation of state court action to determine liability of debtor solely as a prerequisite to recovery from debtor's insurance carrier); *In re Traylor*, 94 Bankr. 292, 293 (Bankr. E.D.N.Y. 1989) (discharge does not release debtor's insurer from liability); *In re Lembke*, 93 Bankr. 701, 702-03 (Bankr. D.N.D. 1988) (section 524 injunction permits suit to recover from debtor's insurer); *In re White*, 73 Bankr. 983, 984-86 (Bankr. D.D.C. 1987) (injunction issued pursuant to debtor's discharge does not bar a lawsuit against the debtor that will affect only the assets of the debtor's insurer).

Bankruptcy Code § 524(e) provides,

> [E]xcept as provide in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

The injunction set forth in § 524(a)(2) enjoins creditors from attempting to collect from the debtor, or the debtor's assets, debts that have been discharged in bankruptcy. *Patronite v. Beeney (In re Beeney)*, 142 B.R. 360, 362 (9th Cir. BAP 1992). Subsection (e) makes clear that this injunction applies only to the debtor's personal liability and does not inhibit collection

efforts against other entities. *Id.* Further, pursuant to § 524(e), the discharge injunction is only intended to protect the debtor and the debtor's property. *Id.* at 363-64. It does not protect third parties who may be co-liable with the debtor on a particular debt. *Id.*

In re Jet, supra, involved a plaintiff who had sued the debtor for defamation but failed to file a proof of claim prior to the to the bar date for filing proofs of claims. 883 F.2d at 972. The bankruptcy court subsequently issued a permanent injunction under § 524 and barred the plaintiff from continuing his suit. *Id.* On appeal, the district court held that the purpose of the § 524(a) injunction did not preclude a suit tailored solely to determining the debtor's liability as a precondition for recovery against the debtor's liability insurer. *Id.* at 973. The court further held that § 524(c)'s limitation on the effect of discharge permitted the plaintiff to proceed against the debtor. *Id.* at 976.

Likewise, the same conclusion was reached in the case of *In the matter of: Coho Resources, Inc.*, 345 F.3d 338 (5th Cir. 2003). In that action, the insurer, Chubb, asserted that Plaintiff was forever barred from proceeding against the insurer because Plaintiff failed to file a proof of claim in the insured's Chapter 11 proceedings. *Id.* at 342. The Court stated that it "squarely rejected Cubb's argument; it is entirely without merit." *Id.* The Court held that § 524(e),

> operates as an injunction against actions against a *debtor* subsequent to a discharge of a debt. The bankruptcy discharge and § 524 injunction serve to 'give the *debtor* financial fresh start.' As a general rule, a creditor must file a proof or notice of claim during bankruptcy proceedings to preserve its claim against the *debtor*. If a creditor neglects to files such notice, the § 524 injunction 'will act to shield the *debtor* from the creditor.'

Id. (emphasis in original). The Court further stated that the discharge and injunction are expressly designed to protect only the *debtor*, and do not affect the liability of any other entity for the debt. *Id.* at 342-43. "Accordingly, courts are in 'near unanimous agreement' that §

524(e) 'permits a creditor to bring, and proceed in, an action nominally directed against a discharged debtor for the sole purpose of proving liability on its part as a prerequisite to recovering from an insurer.'" *Id.* at 343.

Signature has maintained all along that it did not wish to proceed against the assets of the bankruptcy estate. In fact, Signature's motion to lift the stay and the order on that motion authorizes Signature to proceed only as to applicable insurance proceeds. Section 524(a) explicitly renders judgments void only for "the personal liability of the debtor." *See In re Jet Systems, Inc.*, 883 F.2d at 973. "Accordingly, the statutory language, on its face, does not preclude the determination of the debtor's liability upon which the damages would be owed by another party, such as the debtor's liability insurer." The overwhelming and near unanimous opinions of the courts conclusively establish that Signature has not violated the § 524 plan injunction and that Signature is legally authorized to pursue its claim for indemnification against ATA's insurer.

WHEREFORE, Signature respectfully requests that this Court deny ATA's Motion to Show Cause.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on January 26, 2009, the foregoing was mailed via Fed Ex to the Clerk of the Court; **Keith Appleby, Esquire**, Fowler, White, Boggs, P.A., 501 E. Kennedy Blvd., Suite 1700, Tampa, Florida 33602; and **Terry Hall, Esquire**, Baker & Daniels, LLP, 300 N. Meridian St., Suite 2700, Indianapolis, IN 46204.

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