

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:)	
)	Chapter 11
ATA HOLDINGS CORP., et al. ¹)	Case No. 04-19866-BHL-11
)	(Jointly Administered)
Debtors.)	
_____)	

**DEBTORS' OMNIBUS OBJECTION TO MULTIPLE MOTIONS BY
WILMINGTON TRUST COMPANY, AS TRUSTEE AND SUBORDINATION
AGENT FOR 1996-1, 1997-1, 2000-1 AND 2002-1 EETCS, FOR ADEQUATE
PROTECTION PURSUANT TO 11 U.S.C. §§ 361 AND 363(e) AND THE
SUBSEQUENT SUPPLEMENT THERETO**

ATA Holdings Corp., et al., as debtors and debtors-in-possession (collectively, the "Debtors"), by counsel, object to the motions (the "Motions;" docket nos. 477, 480 and 482) for adequate protection filed by Wilmington Trust Company ("Wilmington"), as alleged trustee and subordination agent for 1996-1, 1997-1, 2000-1 and 2002-1 enhanced equipment trust certificates ("EETCs"), including Wilmington's later supplement (the "Supplement," docket no. 557), to the Motions.

Because the relief sought in the Motions and the Supplement is improper, unwarranted, and premature, the Debtors request that the Court deny the Motions and the Supplement in their entirety. Alternatively, the Debtors request that the Court schedule any necessary evidentiary hearings on the Motions and the Supplement for sometime in 2005, i.e. after the December 16, 2004 sale hearing and the December 24 (or 27), 2004 expiration of the sixty (60) day period described in § 1110 of the Bankruptcy Code.

¹ The Debtors are the following entities: ATA Holdings Corp., ATA Airlines, Inc., Ambassador Travel Club, Inc., ATA Leisure Corp., Amber Travel, Inc., American Trans Air ExecuJet, Inc., ATA Cargo, Inc. and Chicago Express Airlines, Inc.

In support of their objections, the Debtors state as follows:

I. General Background

1. The Debtors filed voluntary petitions under Chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) on October 26, 2004 (the “Petition Date”). The Debtors are operating their businesses and managing their properties as debtors-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

2. The Debtors currently possess approximately eighty (80) aircraft in their aircraft fleet. These aircraft are either operated pursuant to aircraft operating leases or are financed through single-investor leases or through EETCs; a handful of aircraft are owned by the Debtors but pledged as collateral to secured lenders.

3. On November 23, 2004 Wilmington filed the Motions, requesting “adequate protection” for the Debtors’ postpetition use of the aircraft and aircraft engines listed on **Exhibit A** (collectively, the “Aircraft”). The adequate protection requested in the Motions consists of compliance with the terms of the underlying 1996-1, 1997-1, 2000-1 and 2002-1 EETCs (the “Documents”), as interpreted by Wilmington, and retroactive to the Petition Date.

4. Wilmington seeks the following: (a) maintaining, operating and using the Aircraft in compliance with the requirements and regulations of the Federal Aviation Administration and other applicable laws; (b) maintaining, operating and using the Aircraft in compliance with all provisions of the Documents; (c) payment on a monthly basis of a cash maintenance reserve; (d) periodic cash payments equal to the diminution in value of Wilmington’s interest in the Aircraft due to the Debtors’ postpetition use thereof; (e) satisfaction of all statutory and/or possessory liens; (f) granting Wilmington a

superpriority administrative expense if the adequate protection paid by the Debtors is inadequate; and (g) payment of all fees and expenses under the Documents, including payment of postpetition interest, full rent, and all fees and expenses (including attorneys' fees). Notably, however, most of that wish list is not prescribed by the Documents or the Bankruptcy Code.

5. Wilmington then filed a Supplement to the Motions on December 3, 2004 which added a request for immediate allowance and payment of an administrative expense claim for Aircraft rent arising under the EETCs from the Petition Date through and including the sixtieth day after the Petition Date.

II. Basis For Denying The Motions

6. EETCs are complicated financing agreements which consist of one or more tranches of noteholders. Although Wilmington claims to be able to speak on behalf of the Debtors' 1996-1, 1997-1, 2000-1 and 2002-1 EETCs as trustee and subordination agent, Wilmington has not demonstrated that it has standing to bring the Motions or the Supplement on behalf of those EETCs. As such, the Motions and the Supplement are improper and should be denied.

7. Even if Wilmington has standing to bring the Motions, the relief requested under §§ 363(e) and 361 is improper and premature. Specifically, while § 363(e) of the Bankruptcy Code provides that a non-aircraft lessor may request adequate protection (as that term is defined by § 361 of the Bankruptcy Code) in exchange for a debtor's postpetition use of leased equipment, Congress has legislated specific provisions in § 1110 of the Bankruptcy Code to address adequate protection in the context of aircraft and aircraft equipment.

8. Section 1110 of the Bankruptcy Code applies to aircraft, aircraft engines, propellers, appliances, or spare parts that are subject to a security interest granted by, leased to, or conditionally sold to a debtor (the “1110 Equipment”). *See* 11 U.S.C. § 1110(a)(3)(A)(i). Section 1110 also applies to all records and documents relating to such 1110 Equipment. *See* 11 U.S.C. § 1110(a)(3)(B).

9. The Aircraft listed on Exhibit A likely qualify as 1110 Equipment. Accordingly, because § 1110 of the Bankruptcy Code is the more specific section for 1110 Equipment like the Aircraft, § 1110, and not § 363(e), controls adequate protection as to the Aircraft. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992); *In re Gulevsky*, 362 F.3d 961, 963 (7th Cir. 2004).

10. This is supported by the legislative history behind § 1110 of the Bankruptcy Code:

“Under [§ 365], a secured creditor is entitled to adequate protection if the trustee elects to keep and use his collateral. A lessor is entitled to lease payments under the terms of the lease, and to the curing of past defaults, if the trustee elects to assume a lease. The major differences for transportation equipment security interests is that [§ 1110] defines more precisely what constitutes adequate protection . . . In the case of a lease, the protection is the same afforded other lessors, but the trustee is required to make a decision within 60 days of the order for relief . . . The quick decision requirement applies equally to security agreements and conditional sales contracts, thus providing some additional measure of protection for [the] equipment financier.

H.R. Rep. No. 95-595, at 239-40 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6199.

11. Under the specific provisions of § 1110 of the Bankruptcy Code, the rights of parties like Wilmington to possess their collateral is not affected by the automatic stay or by any other section of the Bankruptcy Code unless, before sixty days after the

debtor's petition date, the debtor cures all defaults and agrees to perform all other obligations as specified in § 1110(a)(2) of the Bankruptcy Code.

12. The statutory trade off, however, is that “a Chapter 11 debtor that is an air carrier is given a sixty (60) day grace period in which to decide whether to continue in possession of equipment by curing defaults. The automatic stay applies for sixty (60) days and may not be lifted until the expiration of the sixty (60) day period.” *In re American Int’l Airways, Inc.*, 47 B.R. 716, 718 (Bankr. E.D. Pa. 1985).

13. The relief requested in the Motions upsets this Congressionally-mandated balance by seeking to prohibit the Debtors’ use of the Aircraft (absent adequate protection) prior to the expiration of the sixty (60) day period under § 1110 of the Bankruptcy Code.

14. Because the relief requested in the Motions is governed by § 1110 of the Bankruptcy Code and § 1110 does not contain any provisions cutting short the sixty day period in which the Debtors may contemplate either rejection of, or cure and performance under, the EETCs, the Debtors respectfully request that the Court deny the Motions in their entirety.

III. Alternative Relief Requested To The Motions

15. Even if the Court should find that Wilmington may be entitled to adequate protection under § 363(e) of the Bankruptcy Code, however, the Debtors have additional objections to the Motions.

16. At this critical juncture of the Debtors’ reorganization, the Debtors’ efforts are centered around preparing for the sale hearing on December 16, 2004 and complying

with the requirements of § 1110 of the Bankruptcy Code prior to the expiration of the sixty (60) day period contained in § 1110.

17. Any hearing on adequate protection would require the introduction of evidence and testimony, including but not limited to expert testimony and evidence as to the value of the Aircraft as of the Petition Date and the value of the Aircraft as of November 23, 2004, the date of Wilmington's requests for adequate protection. *See Agency Servs., Inc. v. Keck, Mahin & Cate*, No. 98 C 4000, 1999 WL 199595 (N.D. Ill. Mar. 30, 1999) (date of request governs beginning of adequate protection allowance); *In re Waverly Textile Processing, Inc.*, 214 B.R. 476 (Bankr. E.D. Va. 1997) (same).

18. Requiring the Debtors' management and professionals to divert their attention from the upcoming sale hearing and the fast-approaching expiration of the sixty (60) day § 1110 period is simply not warranted at this time and could cause substantial harm to the Debtors, their estates, and their creditors.

19. On the other hand, continuing the necessary evidentiary hearings on the Motions until after the sale hearing and the expiration of the 60 day § 1110 period causes little hardship to Wilmington, in that:

- a. The Debtors are continuing to maintain, operate and use the Aircraft in compliance with applicable federal and state laws and regulations;
- b. The Debtors are continuing to maintain and insure the Aircraft, thereby preserving and in some cases increasing the value of the Aircraft since the Petition Date;
- c. The Aircraft, many with useful lives in excess of twenty (20) years, will suffer little wear and tear, and accordingly depreciation, from November 23, 2004 until such time as the Court can conduct an evidentiary hearing on the Motions in 2005.

20. Given the great harm to the Debtors of holding evidentiary hearings on the Motions prior to the sale hearing and the expiration of the 60 day § 1110 period and the lack of hardship to Wilmington of continuing such hearings, the Debtors respectfully request that the Court continue evidentiary hearings on the Motions until the Court can schedule such dates in 2005.

21. Furthermore, the Debtors are under no obligation to cure any statutory and/or common law liens on Aircraft whose leases are or may be rejected; indeed, they cannot do so, as the expense conveys no benefit to the estates and does not aid in the Debtors' reorganization. Therefore, the Motions should be denied to the extent they request such relief.

22. Finally, the EETCs and related documents do not provide for any maintenance reserves. Accordingly, the Motions should be denied to that extent as Wilmington is seeking relief beyond its contractual bargain.

IV. Basis For Denying The Supplement

23. In the Supplement, Wilmington argues that it should be entitled to an administrative expense claim under § 503(a) of the Bankruptcy Code for the Aircraft rent under the EETCs arising from the Petition Date through and including the 59th day afterward.

24. Several bankruptcy courts, including the Northern District of Indiana, have held that a lessor is not entitled to an administrative claim for the first fifty-nine days after the bankruptcy. Instead, the unpaid rent will either be cured when the debtor assumes the lease or will become part of rejection damages should the debtor reject the lease. *See In re Kyle Trucking, Inc.*, 239 B.R. 198, 202 (Bankr. N.D. Ind. 1999); *see also*

In re Rebel Rents, Inc., 291 B.R. 520, 533-34 (Bankr. C.D. Cal. 2003); *In re Food Etc., L.L.C.*, 281 B.R. 82, 89 (Bankr. S.D. Ala. 2001).

25. Here, no assumption of the EETCs has occurred. Accordingly, *In re Kyle Trucking, Inc.* and its progeny would hold that Wilmington is not entitled to any recovery for the first fifty-nine days after the Petition Date.

26. Based upon the foregoing, the Debtors respectfully request that the Court adopt the reasoning in *In re Kyle Trucking, Inc.* and deny the Supplement.

V. Alternative Relief Requested To The Supplement

27. Even if the Court should find that Wilmington may be entitled to adequate protection under the EETCs for the first fifty-nine days after the Petition Date, the Court should still deny the Supplement in part.

28. Although adequate protection in the context of a lease is generally considered the monthly rent payment, such rental rate will not control where it is unreasonable. *See In re MUMA Servs. Inc.*, 279 B.R. 478, 469 (Bankr. D. Del. 2002).

29. The contract rent paid for Aircraft under the EETCs may be above the market rate--in some cases significantly above the market rate.

30. Accordingly, the Debtors request an evidentiary hearing to determine (a) what, if any, periodic payments would be reasonable and necessary to provide “adequate protection,” and (b) what is the appropriate measure of the benefit to the estate under §503(b) of the Bankruptcy Code.

31. As stated previously, the Debtors’ efforts are centered around the sale hearing and the ever-nearer expiration of the 60 day § 1110 period. To require the Debtors to shift focus to determining the proper rental rates for the Aircraft at this stage

of the Debtors' reorganization would be harmful to the Debtors, their creditors, and their estates.

32. Conversely, Wilmington is not harmed by delaying the determination of whether it is entitled to an administrative claim for unpaid rents arising from the Petition Date through and including the fifty-ninth day after the Petition Date.

33. Finally, there is no authority entitling Wilmington to immediate payment of any administrative expense granted for unpaid rents arising in the first fifty-nine days after the Petition Date. *See, e.g., In re Food Etc., L.L.C.*, 281 B.R. at 87-88 (denying superpriority status to lessor); *see also In re MUMA Servs. Inc.*, 279 B.R. at 491-92 (authorizing administrative claim for unpaid rents arising from petition date through fifty-ninth day and ordering immediate payment of claim only as sanction).

WHEREFORE, the Debtors respectfully request that the Court: (1) deny the Motions and the Supplement in their entirety, or schedule any necessary evidentiary hearings thereon in 2005; and (2) grant the Debtors such other and further relief as the Court deems proper.

Dated: December 9, 2004

ATA HOLDINGS CORP., ET AL.,
as debtors and debtors-in-possession,

By: /s/ Michael P. O'Neil
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the forgoing was caused to be served by (a) facsimile or email upon counsel for Wilmington, and (b) BMC Corp. on this 9th day of December, 2004 via electronic transmittal, facsimile or overnight delivery to the Core Group and the 2002 Service List.

/s/ Michael P. O'Neil