

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

IN RE:)	Chapter 11
)	
ATA HOLDINGS CORP., <i>et al.</i> ,)	Case No. 04-19866
)	(Jointly Administered)
)	
Debtors.)	
_____)	

**OMNIBUS OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS TO THE MOTIONS OF WILMINGTON TRUST COMPANY, AS
TRUSTEE AND SUBORDINATION AGENT WITH REGARD TO CERTAIN
SERIES OF THE DEBTORS' EETCS, FOR AN ORDER REQUIRING THE
DEBTORS TO PROVIDE ADEQUATE PROTECTION PURSUANT TO
SECTIONS 361 AND 363(e) OF THE BANKRUPTCY CODE AND
SUPPLEMENTS THERETO AND JOINDER IN THE DEBTORS' OBJECTION**

The Official Committee of Unsecured Creditors (the "Committee") of ATA Holdings Corp. and its affiliated debtors and debtors in possession (collectively, the "Debtors"), by and through its undersigned co-counsel, hereby submits this omnibus objection and joinder to the Debtors' objection (the "Objection") to (i) Motion and Memorandum of Law of Wilmington Trust Company, as Trustee and Subordination Agent with Regard to the 1996-1 and 1997-1 series of ATA EETCs, for an Order Requiring the Debtors to Provide Adequate Protection Pursuant to Sections 361 and 363(e) of the Bankruptcy Code, filed with the Court on November 23, 2004, and Supplement thereto, filed with the Court on December 3, 2004 (the "1996-1 and 1997-1 Series Motion"); (ii) Motion and Memorandum of Law of Wilmington Trust Company, as Trustee and Subordination Agent with Regard to the 2001-1 series of ATA EETCs, for an Order Requiring the Debtors to Provide Adequate Protection Pursuant to Sections 361 and 363(e) of the Bankruptcy Code, filed with the Court on November 23, 2004, and Supplement thereto, filed with the Court on December 3, 2004 (the "2001-1 Series Motion"); and (iii) Motion

and Memorandum of Law of Wilmington Trust Company, as Trustee and Subordination Agent with Regard to the 2002-1 series of ATA EETCs, for an Order Requiring the Debtors to Provide Adequate Protection Pursuant to Sections 361 and 363(e) of the Bankruptcy Code, filed with the Court on November 23, 2004, and Supplement thereto, filed with the Court on December 3, 2004 (the “2002-2 Series Motion,” and together with the 1996-1 and 1997-1 Series Motion and 2001-1 Series Motion, the “Motions”).¹ In support of its Objection, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

By the Motions, Wilmington Trust requests that the Court order the Debtors to provide Wilmington with a comprehensive and overreaching adequate protection package for its alleged interests in each of (i) nine Boeing 737-83N Aircraft and eighteen CFM International model engines used in such aircraft, (ii) four Boeing 757-200 Aircraft and eight Rolls Royce engines used in such aircraft, and (iii) eight Boeing 757-23N Aircraft and sixteen Rolls Royce engines used in such aircraft (collectively, the “Aircraft”), that were financed or acquired by the Debtors through “a number of transactions involving Enhanced Equipment Trust Certificate (“EETC”) programs pursuant to various transactional documents in which Wilmington Trust acted as trustee, indenture trustee, and subordination agent.” Motions at ¶ 5. Although Wilmington Trust may have standing to seek adequate protection under one or more of the numerous EETC transactions in which it claims to have played one or more roles,² Wilmington Trust has failed to establish the validity, priority or extent of the interests for which it seeks adequate protection as required under section 363(o) of the Bankruptcy Code. In fact Wilmington Trust has not even precisely identified its alleged interests in the Aircraft, let alone shown interests requiring

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motions.

adequate protection under sections 363(e) and 361 of the Bankruptcy Code. As an initial matter, therefore, Wilmington Trust has failed to meet the threshold requirements for adequate protection.

Even if Wilmington Trust can meet the threshold for adequate protection, the Motions must be denied because section 1110 of the Bankruptcy Code alone defines adequate protection with respect to the Aircraft. Section 1110 of the Bankruptcy Code is designed to provide adequate protection to the secured creditor, lessor or conditional vendor in the context of qualifying aircraft equipment solely in the form of the cure of any past defaults and compliance with the terms of any relevant security agreement, lease or conditional sales contract, or the return of the aircraft within 60 days of the petition date. By the Motions, Wilmington Trust is, in effect, attempting to shorten the Debtors' legislatively mandated time to decide whether to accept or reject certain agreements under section 1110 of the Bankruptcy Code. There is no justification for adequate protection that goes beyond or differs from the extraordinary protections afforded aircraft financiers under section 1110 of the Bankruptcy Code.

Even if the Court were to rule that additional relief may potentially be available to Wilmington Trust, the Court should postpone discovery and any evidentiary hearing on the Motions until after the 60 day stay provided for in section 1110 (the "Section 1110(a) Period") has expired. Prior to any evidentiary hearing, the parties would need to conduct extensive fact and expert discovery concerning the valuation of the Aircraft, as well as discovery concerning any diminution in the value of that collateral from the filing date of the Motions. Discovery and hearing preparation on those valuation issues would divert the Debtors' management and professionals from the critical task of negotiating consensual agreements for the continued use of

² The Committee lacks sufficient information at this time to determine whether or not Wilmington Trust has standing to seek the relief requested in the Motions.

some of the Aircraft prior to the expiration of the Section 1110(a) Period on December 24, 2004.³ Any consensual agreements concluded on or before December 24th may dramatically reduce the number of pieces of Aircraft at issue and hence the number of parties involved in discovery and any evidentiary hearing, thus lowering the costs of litigation for the parties and reducing the hearing time needed before the Court. In the event that certain of the Aircraft are not covered under section 1110 of the Bankruptcy Code, or that the Debtors do not reach consensual agreements by December 24th with respect to any particular Aircraft, the Debtors should be afforded the opportunity to investigate and formulate a response to the Motions.

Moreover, based upon conversations between the Debtors' professionals and the Committee's professionals, the Debtors expect to establish through discovery and during the evidentiary hearings that Wilmington Trust is already more than adequately protected from any decline in the value of the Aircraft.

By the Motions, Wilmington Trust is also seeking an allowed administrative claim under section 503(b) of the Bankruptcy Code for all post-petition rent due under the Documents during the first sixty days of the Debtors' chapter 11 cases. As discussed below, several bankruptcy courts, including the Northern District of Indiana, have held that a lessor is not entitled to an administrative claim for this period. 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. Accordingly, Wilmington Trust's request should be denied.

The Committee also joins in the arguments set forth in the Debtors' Omnibus Objection to Multiple Motions by Wilmington Trust Company, as Trustee and Subordination Agent for

³ On December 6, 2004, the Debtors filed their Motion for Order Authorizing Entry Into 1110(a) Elections and 1110(b) Stipulations Extending Time to Comply with 11 U.S.C. § 1110 and Request to File Stipulations and Aircraft Agreement Modifications Under Seal (the "1110(a) Motion"), by which the Debtors seek authority to enter into

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 (the “Debtors’ Objection”).

For these reasons, each as more fully discussed below, the Committee respectfully requests that the Court deny the Motions or, in the alternative, postpone discovery and evidentiary hearings on the Motions until after the expiration of the Section 1110(a) Period.

BACKGROUND

1. On October 26, 2004 (the “Petition Date”), each of the Debtors commenced with this Court a voluntary case under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtors’ chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

2. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtors are authorized to operate their businesses and manage their properties as debtors in possession. No trustee or examiner has been appointed in these chapter 11 cases.

3. On November 1, 2004 (the “Committee Formation Date”), pursuant to section 1102(a) of the Bankruptcy Code, the United States Trustee for the Southern District of Indiana appointed the Committee.

4. On November 2, 2004, the Debtors filed an Emergency Motion to Establish (A) Procedures for Approval of Transaction, (B) a Break-up Fee, and (C) Forms of Notice (the “Bidding Procedures Motion”), together with a Motion for Order Pursuant to 11 U.S.C.

agreements under section 1110(a) of the Bankruptcy Code with respect to their aircraft equipment or to consensually extend the Section 1110 Period by agreement, as provided in section 1110(b) of the Bankruptcy Code.

§§ 105(a), 363, 365 and 1146(c) and Fed. R. Bankr. P. 2002, 6004 and 6006 Approving the AirTran Transaction or, if Applicable, One or More Alternative Transactions (the “Sale Motion”). The Court entered its Order approving the Bidding Procedures Motion on November 19, 2004.

5. On November 23, 2004, Wilmington Trust filed the Motions. Pursuant to the Motions, Wilmington Trust seeks adequate protection in the form of the Debtors’ compliance with the terms of the Documents, retroactive to the Petition Date, including, but not limited to:

- (i) maintaining, operating and using the Aircraft in compliance with the requirements and regulations of the FAA and any other laws with respect to the Aircraft;
- (ii) maintaining, operating, and using the Aircraft in compliance with all provisions of the Documents;
- (iii) payment on a monthly basis of cash maintenance reserves, including reserves for airframe, engine, landing gear, and APU maintenance at a rate to be determined at hearings on the Motions;
- (iv) periodic cash payments equal to the diminution in value of Wilmington Trust’s interests in the Aircraft;
- (v) payment or satisfaction of all statutory or possessory liens against the Aircraft;
- (vi) to the extent adequate provided by the Debtors is insufficient, the allowance of a superpriority administrative expense claim pursuant to section 507(b) of the Bankruptcy Code for all amounts owed to Wilmington Trust; and
- (vii) payment of all fees and expenses due under the Documents, including (i) payment of post-petition interest on any owned Aircraft under the mortgage transactions and payment of full rent due under the lease transactions; and (ii) payment of all fees and expenses of Wilmington Trust, including the payment of all fees and expenses of its counsel and other professional advisors.

6. Wilmington Trust further requests that the Debtors be required to show that they can comply with any order granting adequate protection notwithstanding any lien or priority

right of payment granted under any and all orders authorizing the Debtors to obtain post-petition financing.

ARGUMENT

A. Wilmington Trust Has Not Identified Its Interests in the Aircraft

7. In order to be entitled to adequate protection, as a threshold matter, Wilmington Trust must demonstrate, under section 363(o) of the Bankruptcy Code, the validity, priority and extent of its interests in the Aircraft. See 11 U.S.C. § 363(o). The Motions, however, lack any specific facts regarding Wilmington Trust's alleged interests. There is no way to ascertain whether Wilmington Trust holds protectable interests under section 363(e) of the Bankruptcy Code based upon the general representations of Wilmington Trust that it acted, at various times, as trustee, indenture trustee and subordination agent under a multitude of complex financing documents for each of twenty-one aircraft and forty-two aircraft engines at issue.

8. There is similarly no effort by Wilmington Trust to show that its role as trustee, indenture trustee and subordination agent under the relevant EETCs afford it the standing to assert its claim for adequate protection under the relevant Documents.

B. Section 1110 Of The Bankruptcy Code Defines Adequate Protection For Equipment Covered Thereunder

9. For equipment covered under section 1110 of the Bankruptcy Code, Congress has legislated that section 1110, and not section 363(e), defines what constitutes adequate protection.

The legislative history for section 1110 explains Congress's intent:

“Under [section 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 the lease. The major difference for transportation equipment security interests is that [section 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 sale 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 (emphasis added).

10. Specifically, with respect to aircraft equipment financiers, section 1110 provides that the secured party’s (or lessor’s) right to repossess the aircraft equipment is not affected by the automatic stay or by any power of the court to enjoin the party from repossessing the equipment, unless, before sixty days after the petition date, the debtor in possession cures all defaults and agrees to perform the obligations of the debtor. See 11 U.S.C. § 1110(a)(2). Conversely, Congress intended debtors to have “. . . sixty days to contemplate the wisdom of meeting the terms of section 1110. This sixty day period gives the debtor or trustee the opportunity to reassess his situation in light of bankruptcy and to choose whether to enter into a section 1110 agreement as if he was entering into a new contract.” Seidle v. GATX Leasing Corp., 778 F.2d 659, 662 (11th Cir. 1985).

11. In enacting section 1110 of the Bankruptcy Code, Congress carefully balanced the parties’ interests: the Debtors are permitted (on the one hand) to use aircraft collateral for sixty days, and thereafter (on the other hand), the stay terminates and the secured party may retake its collateral (unless the Debtors otherwise comply with section 1110). The Motions attempt to upset this carefully legislated balance. According to Wilmington Trust, the Debtors’ use of the Aircraft during the first sixty days of the Debtors’ chapter 11 cases is subject to the provision of adequate protection – a concept nowhere to be found in section 1110. If the Debtors’ rights under section 1110 to enjoy a sixty day period in which to contemplate their courses of action

were subject to being shortened or modified, Congress would have explicitly provided for such limitation in section 1110. See, e.g., 11 U.S.C. §§ 365(d)(1), (3), (4) and (10) (providing that, under certain circumstance, timeframes within which to assume, reject or perform under a contract can be shortened or extended for cause). Thus, the Court should deny the Motion in order to preserve the Debtors' Congressionally mandated section 1110 rights.

C. Discovery And Any Evidentiary Hearings On The Motions Should Be Postponed Until After The December 24, 2004 Expiration Of The Section 1110(a) Period

12. Following the United States Supreme Court's ruling in United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 382, 108 S.Ct. 626, 636, 98 L.Ed.2d 740 (1988), courts have uniformly required an undersecured movant seeking adequate protection to show a decline in the value of its collateral. See In re Continental Airlines, Inc., 146 B.R. 536, 539 (Bankr. D. Del. 1992) (citing In re Forest Ridge II, Ltd., 116 B.R. 937, 950 (Bankr. W.D.N.C. 1990). Whereas, if the movant is oversecured, many courts hold that the equity cushion alone provides adequate protection. See id. Moreover, adequate protection may only be awarded from the date that movant seeks relief. See In re Haiflich, 63 B.R. 314, 316 (Bankr. N.D. Ind. 1986); In re Continental Airlines, Inc., 146 B.R. at 539-540; In re Best Products Co., Inc., 138 B.R. 155, 157 (Bankr. S.D.N.Y. 1992) aff'd, 149 B.R. 346 (S.D.N.Y. 1992). That is, a secured creditor is only entitled to adequate protection to the extent that the collateral declined in value after such creditor filed its motion for adequate protection.

13. Any contested evidentiary hearings on the Motions would, therefore, require the parties to address both the value of the Aircraft on November 23, 2004, the date of the filing of the Motions, and the value of the Aircraft as of the date of the hearings, which would entail production of the flight, inspection and maintenance records for each piece of Aircraft equipment

and the completion of an expert valuation for each piece of Aircraft equipment as of such dates, in order to determine whether and the extent to which diminution in value had in fact occurred.

14. Wilmington Trust makes no attempt to address these disputed factual issues, much less to submit any evidence of diminution in the value of the Aircraft. Requiring the Debtors to divert their management and professionals to prepare for discovery and an evidentiary hearing on these issues between now and December 24th would divert the Debtors' restructuring team from the critical task of identifying the aircraft equipment it will need after December 24th and renegotiating security and/or lease agreements on those pieces of equipment at terms that are commensurate with current market rates. Failure to complete this renegotiation process within the Section 1110 Period could seriously jeopardize the Debtors' reorganization.

15. Moreover, postponing discovery and evidentiary hearings on the Motions until after the expiration of the Section 1110 Period would have the additional benefit of narrowing the scope of discovery, as well as of any evidentiary hearing. The Committee understands that the Debtors expect to reach consensual agreements prior to the December 24th expiration of the Section 1110 Period with respect a large number of their aircraft equipment. Such agreements may obviate or reduce the need for discovery and the presentation of evidence as to the value of the Aircraft and any claimed diminution of value, reducing the litigation costs for the parties and conserving judicial resources.

16. Scheduling evidentiary hearing on the Motions after the expiration of the Section 1110 Period is also necessary to provide the Debtors and the Committee with sufficient time to take discovery and try the extremely complex factual issues raised in the Motion, including with respect to the value of the Aircraft and the extent to which Wilmington Trust's interests in the Aircraft under the Documents entitle it to adequate protection.

D. Wilmington Trust Is Adequately Protected

17. The Court should deny the Motions because, to the extent Wilmington Trust asserts an interest in the Aircraft that is entitled to adequate protection, such interests are already adequately protected against any decline in the value of any piece of the Aircraft equipment that could result from the imposition of the automatic stay.

18. Specifically, the Committee understands that the Debtors can and will demonstrate that the Debtors are (i) continuing to maintain the Aircraft in compliance with applicable federal and state laws and (ii) continuing to maintain and insure the Aircraft, thereby preserving (and in some cases increasing) the value of the Aircraft since the Petition Date.

19. Not only does Wilmington Trust request that the Debtors maintain the Aircraft as agreed under the Documents, Wilmington Trust also requests that the Debtors be required to pay the following cash amounts: (i) periodic debt payments due or accruing under the Documents;⁴ (ii) unspecified amounts on unspecified dates equal to any diminution in value of Wilmington Trust's alleged interests in the Aircraft; (iii) Wilmington Trust's fees and expenses in unspecified amounts;⁵ (iv) monthly payments for an undetermined "maintenance reserve;"⁶ and (v) payment of all statutory or possessory liens against the Aircraft. In addition, Wilmington Trust requests a

⁴ There is no factual basis before the Court at this time to conclude that these payments correspond with any diminution in value for which Wilmington Trust may be entitled to adequate protection.

⁵ With respect to Wilmington Trust's request for the payment of its and its counsel's and professionals' fees and expenses, there is no legal basis for such award. To the extent that the Documents constitute leases, there is no basis for the payment of fees at any time prior to assumption of such leases. 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). To the extent that the Documents constitute loans, Wilmington Trust is not entitled to fees or post-petition interest if (a) it is undersecured on the particular loan facilities, see United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988) (holding that undersecured creditor was not entitled to interest) or (b) it is oversecured such that the equity cushion itself constitutes adequate protection. See In re James Wilson Assoc., 965 F.2d 160, 171 (7th Cir. 1992).

⁶ To the extent that such a reserve is not provided for in the Documents, Wilmington Trust is attempting to bootstrap a better deal in bankruptcy than existed outside of bankruptcy.

superpriority administrative claim to the extent their interests fail to be adequately protected. In short, Wilmington Trust is requesting that the Debtors perform under the Documents as if they had entered into a section 1110(a) agreement with respect to the Aircraft as of the Petition Date. These requests are flawed and Wilmington Trust is not entitled to such relief as adequate protection.

20. In support of its need for adequate protection to protect against diminution, Wilmington Trust asserts that each “hour and cycle of operation” reduces the value of the Aircraft. The Aircraft, however, have very long useful lives – exceeding twenty years in most cases and thirty years in some cases. Any wear and tear that will occur between the filing of the Motions, or from the Petition Date for that matter, and the end of the Section 1110 Period (December 24, 2004) is negligible. Moreover, because the Debtors are continuing to follow their maintenance program, some Aircraft equipment may actually increase in value during the course of these cases, depending on where in the maintenance cycle a particular piece of Aircraft equipment was as of the filing of the Motions.

21. Given the foregoing and the limited duration of time between the filing of the Motions and the expiry of the Section 1110 Period (approximately one month), Wilmington Trust is more than adequately protected for diminution in value, if any, occurring from the Debtors use of the Aircraft, by its ability to assert an administrative priority claim, to the extent permitted under section 503 of the Bankruptcy Code, for any such diminution in value.

E. Wilmington Trust Is Not Entitled To Immediate Allowance And Payment Of Claims Under Section 503(b) Of The Bankruptcy Code

22. By Supplements to the originally filed Motions, Wilmington Trust seeks additional adequate protection in the form of the immediate allowance and payment of monthly

rent for the Debtors' use of the Aircraft during the first sixty days following the Petition Date under section 503(b) of the Bankruptcy Code. As noted above, 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. at 202; see also In re Rebel Rents, Inc., 291 B.R. at 533-34; In re Food Etc., L.L.C., 281 B.R. at 89. Here, no assumption of the EETCs has occurred. Accordingly, Wilmington Trust's request should be denied.

JOINDER

23. The Committee agrees with the arguments set forth in the Debtors' Objection and, accordingly, joins in support of the Debtors' Objection.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the Committee objects to the Motions, and the Committee respectfully requests that this Court (i) deny the Motions in their entirety or, in the alternative, continue the Motions until after December 24, 2004 and (ii) grant the Committee such other and further relief as this Court deems just and proper.

Dated: December 9, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon the Core Group and the 2002 list by U.S. Mail, postage prepaid and on Andrew Silfen and Mary Joanne Dowd of Arent Fox PLLC via Facsimile on the 9th day of December 2004.

/s/ C.R. Bowles, Jr.

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