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

In re:	
ATA Holding Corp., *et al.*	Chapter 11 Case No.: 04-19866
Debtors.	(Jointly Administered)

JOINT OBJECTION TO DEBTORS' MOTION FOR AN ORDER AUTHORIZING AND APPROVING PROCEDURE FOR REJECTION AND/OR ABANDONMENT OF AIRCRAFT AND AIRCRAFT ENGINES PURSUANT TO 11 U.S.C. §§ 365 AND 554; REQUEST TO SHORTEN NOTICE AND SCHEDULE HEARING

Wilmington Trust Company ("Wilmington Trust"), not in its individual capacity, but solely in its capacity as loan trustees and as subordination agent with regard to 1996-1, 1997-1, 2000-1 and 2002-1 series of EETCs, files this joint objection (the "Objection") to the Debtors' Motion for an Order Authorizing and Approving a Procedure for the Rejection and/or Abandonment of Aircraft and Aircraft Engines pursuant to 11 U.S.C. §§ 365 and 554; Request to Shorten Notice and Scheduling Hearing (the "Motion"). In support of the Objection, Wilmington Trust states as follows:

PRELIMINARY STATEMENT

1. The Debtors' Motion requesting entry of an order approving omnibus Lease Rejection/Abandonment Procedures[1] should be denied. The Debtors are impermissibly seeking to reject their leases for certain unidentified aircraft and engines. Those procedures should not be approved because the Motion provides inadequate support for the relief sought. The Motion also attempts to elevate 11 U.S.C. §§ 365 and 554 over the express terms of 11 U.S.C. § 1110;

[1] All capitalized terms shall have the meanings ascribed to them in the Motion, unless otherwise defined herein.

however, doing so is statutorily prohibited. In addition, 11 U.S.C. § 1110 precludes the aspect of the Motion seeking abandonment. All of which requires denial of the Motion.

2. Should the Court nonetheless consider the Motion, the relief requested should be modified to address the issues raised herein and to provide certain clarifications and protections. The Lease Rejection/Abandonment Procedures, as currently drafted, are inadequate or seek impermissible relief because they limit or otherwise affect Affected Parties' rights under 11 U.S.C. § 1110, do not identify any Excess Aircraft that the Debtors propose to reject or abandon, do not provide an Affected Party adequate time to object to a proposed rejection of an aircraft or aircraft engine lease, do not provide for the automatic stay to be vacated and improperly seek retroactive relief. Accordingly, the Motion should be denied.

BACKGROUND

3. Wilmington Trust holds or maintains certain interests in 21 aircraft currently in the Debtors' possession (the "Aircraft")[2] pursuant to various aircraft and financing transactional documents (the "Documents").[3]

4. To the best of Wilmington Trust's knowledge, the Debtors continue to utilize the Aircraft in their on-going operations.

5. The Debtors' Motion requests approval of the Lease Rejection/Abandonment Procedures which provide for unilateral rejection or abandonment of aircraft or aircraft engines leases (the "Subject Leases").

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[2] Wilmington Trust holds or maintains interests in the Aircraft identified by the following Tail Numbers: N517AT, N518AT, N519AT, N520AT, N522AT, N515AT, N523AT, N524AT, N525AT, N526AT, N527AT, N528AT, N316TZ, N320TZ, N322TZ, N324TZ, N325TZ, N326TZ, N327TZ, N328TZ, N329TZ.

[3] Such transactional documents include, but are not limited to, trust indentures and mortgages, including assignment of leases, with respect to each Aircraft.

ARGUMENT

6. The Lease Rejection/Abandonment Procedures, as currently drafted, should not be approved by this Court because the Debtors request (i) explicitly contradicts the terms of section 1110 of the Bankruptcy Code and fails to reserve an Affected Parties' rights thereunder; and (ii) fails to make the evidentiary showing required by section 365 of the Bankruptcy Code to reject the Subject Leases and required by section 554 of the Bankruptcy Code to abandon the Subject Leases.

I. The Debtors' Request Explicitly Contradicts The Terms of Section 1110 Of The Bankruptcy Code

A. Section 1110 Controls the Debtors' Use Of The Property In Question

7. The Motion seeks authority to reject the Subject Leases pursuant to section 365 of the Bankruptcy Code. Such request is inconsistent with and contrary to the terms of section 1110 of the Bankruptcy Code.

8. Specifically, section 1110(a) states:

> the right of a secured party with a security interest in equipment described in paragraph (3), or of a lessor or conditional vendor of such equipment, to take possession of such equipment in compliance with a security agreement, lease, or conditional sale contract . . . **is not limited or otherwise affected by any other provision of this title or by any power of the court.**

11 U.S.C. § 1110(a)(1) (emphasis added). Sections 365 and 554 cannot be used to alter the rights granted by section 1110.

9. Further, section 1110 of the Bankruptcy Code grants the Debtors the opportunity to protect their interests in the Subject Leases by taking affirmative action to assume the leases and cure any defaults within sixty (60) days of the petition date. 11 U.S.C. § 1110(a)(2). If the Debtors do not perform under section 1110(a)(2), then Wilmington Trust, or Affected Parties,

may proceed to demand the "surrender and return" of the aircraft or aircraft engine.[4] 11 U.S.C. § 1110(c)(1). In addition, section 1110(c)(2) states that upon "surrender and return of the equipment described in subsection (a)(3), any lease of such equipment, and any security agreement or conditional sale contract relating to such equipment, if such security agreement or conditional sale contract is an executory contract, **shall be deemed rejected**." 11 U.S.C. § 1110(c)(2) (emphasis added). Consequently, section 1110 of the Bankruptcy Code contains a separate and distinct rejection mechanism.

10. Therefore, any termination of the Subject Leases should comply with the requirements of section 1110, not section 365 of the Bankruptcy Code.

B. Section 1110 Requires The Return Of The Aircraft To Wilmington Trust

11. Section 1110(c)(2) requires the surrender and **return** of the equipment to Wilmington Trust. *See* 11 U.S.C. § 1110(c)(2). The Lease Rejection/Abandonment Procedures do not provide for the Debtors return of the aircraft or aircraft engines to Wilmington Trust; rather, the Lease Rejection/Abandonment Procedures state that the Debtors will notify Wilmington Trust, or an Affected Party, of the "identity and location of the rejected and/or abandoned aircraft." Motion ¶ 17(a). Thus, as currently drafted, the Lease Rejection/Abandonment Procedures fail to provide a mechanism for the return of the Aircraft to Wilmington Trust as required by section 1110 of the Bankruptcy Code.

12. The Debtors should be required to comply with the terms of the lease regarding the return of an Aircraft to Wilmington Trust. The Debtors' leases with Wilmington Trust require that, "Lessee will return the Aircraft to Lessor or its designee at such location in the

[4] Currently, the Debtors' initial sixty (60) day period under section 1110 of the Bankruptcy Code expires no later than December 27, 2004. Wilmington Trust will respond by separate motion to the Debtors' motion to extend the deadline imposed by section 1110. Wilmington Trust states that no representations made herein shall be deemed a response to that pleading or shall in any manner affect rights under section 1110 of the Bankruptcy Code.

continental United States chosen by Lessee and reasonably satisfactory to the Lessor . . . ." *See e.g.*, Lease Agreement N523AT dated as of September 29, 1999 and Amended and Restated as of March 10, 2000 between First Security Bank, National Association, not in its individual capacity, except as expressly provided herein, but solely as Owner Trustee, Lessor, and American Trans Air, Inc., Lessee (the "Lease"), Annex B, § A.[5] Therefore, the Debtors should be required to comply with the Lease provision and provide a procedure whereby the Debtors will notify Wilmington Trust of the place, within the continental United States, to retrieve the Aircraft following a proper rejection under section 1110(c)(2) of the Bankruptcy Code.

13. In addition, the Motion does not discuss the return of maintenance records and other documents that are required to be maintained by the Debtors under the laws and regulations of the United States and the Documents. The Lease, however, requires that "[n]ot later than the expiration of this Lease, Lessee shall deliver the Aircraft Documents to Lessor." Lease, Annex B, § E. In fact, the return of such documents is essential should the Debtors be permitted to reject or abandon an Aircraft. Thus, the Lease Rejection/Abandonment Procedures should include a requirement that upon the rejection of an Aircraft, the Debtors will be required to return to Wilmington Trust all documents required by the laws and regulations of the United States at the time the Debtors return the Aircraft.

14. Further, the Lease Rejection/Abandonment Procedures fail to include a provision relating to the return of leased aircraft engines with a rejected Aircraft. The Lease requires that the aircraft, upon return, shall be "fully equipped with two Engines or other engines meeting the requirements of Replacement Engines." Lease, Annex B, § A. Therefore, any procedures

[5] Wilmington Trust is party to twenty-one (21) separate leases with the Debtors and various other parties. For simplicity, Wilmington Trust references the Lease as an example and represents that similar provisions exist in the other Documents. Wilmington Trust will make the Lease available to the Debtors or parties-in-interest upon request.

approved by this Court should include a provision requiring the Debtors to equip the rejected Aircraft with engines that comply with the terms of the Lease.

C. The Motion Does Not Provide A Mechanism To Compensate Wilmington Trust For Post-Petition Use Of The Aircraft And Does Not Preserve Wilmington Trust's Section 1110 Rights

15. The Lease Rejection/Abandonment Procedures do not provide for any payment to Wilmington Trust for the Debtors' post-petition use of Aircraft. Wilmington Trust is entitled to payment from the Debtors for their use of the Aircraft from the petition date until the Effective Date. *See In re Continental Airlines, Inc.*, 146 B.R. 520, 527 (Bankr. D. Del. 1992). Accordingly, the Lease Rejection/Abandonment Procedures, if any are approved, should include a provision that requires the Debtors to compensate Wilmington Trust for the use of the Aircraft from the Petition Date through the Effective Date.

16. Furthermore, section 1110 of the Bankruptcy Code grants Wilmington Trust numerous rights regarding the possession of and compensation for the use of an Aircraft. The Motion only provides that the terms of any agreement entered into between the Debtors and Wilmington Trust pursuant to section 1110 of the Bankruptcy Code will control any disputes between said agreement and the Lease Rejection/Abandonment Procedures. Motion ¶ 23. However, to protect Wilmington Trust's rights, the Lease Reject/Abandonment Procedures should include a provision that reserves all the rights granted to Wilmington Trust under section 1110 of the Bankruptcy Code.

II. The Debtors Failed To Provide Any Evidence To Support Rejection or Abandonment

17. The Motion states that the Debtors have decided to retire certain aircraft and aircraft engines from their fleet to facilitate reorganization. Motion ¶ 5. In order to accomplish this goal, the Debtors must first seek to reject and/or abandon the Subject Leases. However, the

Debtors fail to provide any evidence to support the rejection and/or abandonment of theses leases as required by sections 365 and 554 of the Bankruptcy Code.

18. The burden of proof to approve the Motion is on the moving party, here, the Debtors. The Debtors have woefully failed to satisfy this burden. It is axiomatic that in order to carry a burden of proof, one must at the very least introduce facts sufficient to allow the Court to adjudge the issues to be proved. In this instance, the Motion is virtually devoid of any facts warranting the relief requested.

19. In order to reject an unexpired lease under section 365 of the Bankruptcy Code, the Debtors must prove that the lease is burdensome to their estates. Courts require a debtor to show that in the exercise of its reasonable business judgment such a rejection is proper and will provide a benefit to the estate. *Software Customizer, Inc. v. Bullet Jet Charter, Inc. (In re Bullet Jet Charter, Inc.)*, 177 B.R. 593, 601 (Bankr. N.D. Ill. 1995) ("[c]ourts determining whether to approve a debtor's decision to reject an executory contract apply the 'business judgment rule.'"). The Debtors fail to provide any such evidence in the Motion.

20. The Debtors state "that the rejection of the aircraft and aircraft engines leases which are unnecessary for the Debtors' successful reorganization by virtue of the Debtors' reduced or modified flight schedules is, in fact, a proper exercise of their business judgment." Motion ¶ 9. This statement is conclusory. The Debtors provide no facts to support their contention that rejection of a number of aircraft and/or aircraft engine leases will assist in the Debtors' reorganization. Indeed, the Motion fails to include any presently existing facts, such as the lack of equity in the Subject Leases, to support a finding that the Subject Leases are burdensome to the estate. Therefore, the assertions made in the Motion are not sufficient to

support a finding that the Debtors' exercised their reasonable business judgment in deciding to reject the Subject Leases.

21. In fact, the Debtors state that they are still analyzing what leases to reject and/or abandon. Motion ¶ 5. It is thus impossible for the Court to make a finding that the Debtors have exercised their reasonable business judgment to reject the Subject Leases when, in fact, the Debtors have yet to decide which leases they wish to reject. Therefore, the Debtors are really asking the Court to grant an impermissible advisory opinion that the Debtors have exercised their reasonable business judgment in deciding to reject any Subject Lease.

22. The Debtors' right to abandon property depends on a finding that property is burdensome, or of inconsequential value and benefit, to the estate. Here, the Debtors effectively admit that they cannot make any factual showing in support of abandonment at this time, because in the Motion the Debtors concede that they are still analyzing the financial burdens imposed by each aircraft and the Debtors are currently negotiating with financiers in order to determine which aircraft to keep.

23. The burden to the Debtors' estates of any aircraft will depend on such factors as the value of the aircraft, the amount of debt outstanding or lease payment obligations, the aircraft age, maintenance status and fleet composition. No evidence is presented with respect to any of the foregoing.

24. Accordingly, the Debtors' request for approval of this blanket authority to reject or abandon the Subject Leases pursuant to sections 365 and 554 of the Bankruptcy Code should be denied.

III. The Proposed Procedures, As Discussed In The Motion, Are Deficient In Numerous Respects And Need Various Clarifications And Modifications

25. Should the Court nonetheless consider approval of the Motion, absent the issues discussed above and below being resolved on a consensual basis or by this Court, the Court should refuse to grant the Motion.

26. The Debtors do not attach a proposed order containing the Lease Rejection/Abandonment Procedures; accordingly, Wilmington Trust has no way to evaluate the exact procedures which the Debtors seek to utilize. Despite this deficiency in the Debtors' submission to the Court, the Debtors provide a brief outline of their proposed procedures in the text of the Motion.

27. According to the Motion, in order to effectuate the rejection and abandonment sought therein, the Debtors will:

(a) File a notice (the "Notice") to reject a lease or mortgage for the aircraft or the aircraft engine and serve the Notice upon the affected lessors or secured creditors (the "Affected Parties"), the U.S. Trustee, counsel for the Official Unsecured Creditors' Committee, and counsel for the Air Transportation Stabilization Board ("ATSB"). The Notice will advise the parties of the Debtors' intent to reject and/or abandon the lease or mortgage, specify the identity and location of the rejected and/or abandoned aircraft or aircraft engine, authorize the Affected Party to take possession of the rejected aircraft or aircraft engine after five (5) business days, and notify the parties regarding deadlines to object to the Notice;

(b) Serve the Notice and such service will satisfy the notice and hearing requirements of the Federal Rule of Bankruptcy Procedure 9014;

(c) State that an Affected Party must file and serve on the Debtors an objection to the Notice within five (5) business days after the date of the Notice. If no objection is filed, the rejection and/or abandonment shall be deemed effective as of the date of the Notice (the "Effective Date") and no further hearing shall be required; and

(d) Notify an Affected Party that any deposits held by the Affected Party as a security deposit or other arrangement is not permitted to be used as a setoff or

in any other manner by the Affected Party without a further order of this Court.

Motion ¶ 17(a)-(d).

28. First, Wilmington Trust objects to the Lease Rejection/Abandonment Procedures because they state that the Debtors are seeking to "reject leases or mortgages." Motion ¶ 17(a). A debtor cannot reject a mortgage because it is not an executory contract. *See In re EES Lambert Assoc.*, 62 B.R. 328, 336 (Bankr. N.D. Ill. 1986) (citing *Gloria Mfg. v. Intern Ladies' Garment Workers*, 734 F.2d 1020, 1021-22 (4th Cir. 1984)).

29. Second, the Debtors propose to serve the Notice on the Affected Parties, meaning the affected lessors or secured creditors. Motion ¶ 17(a). However, the proposed definition of an Affected Party is too limited; the Debtors should be required to serve the Notice on all parties whose rights may be affected by the rejection of the Subject Lease, including the Owner Trustee, Owner Participant, Liquidity Provider and Control Person, as provided under and defined in the Documents.

30. Third, the Lease Rejection/Abandonment Procedures should provide that the Debtors shall reinstall the original engines, at their own expense, prior to rejection as provided under section 1110 of the Bankruptcy Code and the Documents.

31. Fourth, the Lease Rejection/Abandonment Procedures should provide that upon rejection, the automatic stay provided in section 362 of the Bankruptcy Code is vacated so that the Affected Parties may enforce their rights and remedies under the Documents and non-bankruptcy law.

32. Fifth, the Lease Rejection/Abandonment Procedures should provide that the Affected Parties rights under section 1110 of the Bankruptcy Code are unaffected by the Lease Rejection/Abandonment Procedures.

33. Sixth, the Lease Rejection/Abandonment Procedures require an Affected Party to file an objection to the Notice within five (5) business days of the Effective Date, which is defined as the date the Notice is filed. Motion ¶ 17(a). The proposed objection time does not give an Affected Party an adequate opportunity to assess the contents of the Notice, the location and condition of the aircraft and/or aircraft engine, or other material factors that are necessary for the adequate evaluation of its rights under the Subject Lease. Therefore, in order to comply with due process, the proposed time to object should be lengthened to at least ten (10) business days from the Effective Date to allow an Affected Party time to review the Notice and take appropriate steps to protect its rights.

34. Seventh, the Lease Rejection/Abandonment Procedures provide that the proposed rejection becomes final as of the date of the Notice, if no objection is filed. To allow the rejection of the Subject Lease to be deemed effective as of the date of the Notice deprives Wilmington Trust and other Affected Parties of their right to notice and a hearing. Granting retroactive effect to the Debtors' rejection of the Subject Lease would contravene the holding that the rejection of a lease is "effective only after approval of the bankruptcy court . . . ." *Paul Harris Stores, Inc. v. Mabel L. Slater Realty Trust*, 148 B.R. 307, 313 (S.D. Ind. 1992). *See also, Constant L.P. v. Jamesway Corp.*, 197 B.R. 33, 37 (S.D.N.Y. 1995) ("[t]he majority of courts . . . have held that the effective date of rejection is the date of the bankruptcy court's order approving the rejection, and that court approval is a condition precedent to effective rejection."). Thus, a rejection of the Subject Leases should only be deemed effective upon a final order from the Court.

35. The Debtors inappropriately rely on *In re Thinking Machine Corp.*, 67 F.3d 1021 (1st Cir. 1995), for the proposition that a bankruptcy court has the "authority to enter retroactive

lease rejection relief and encouraging it when equities favor such action." Motion ¶20. The Debtors, however, fail to state that the First Circuit announced this proposition in dicta after having "decided the precise issue presented on appeal . . . " and only discussed the ability of a bankruptcy court to approve the rejection of a lease under section 365 of the Bankruptcy Code retroactive to the date of the motion. *Id.* at 1028.

36. Even assuming that the *Thinking Machine Corp.* case is of any weight, the Debtors fail to provide evidence of any "equities" that could support a finding for a retroactive effective date. The Debtors merely make another conclusory statement that "the equities in the case clearly favor granting the relief requested." Motion ¶ 20. What equities? The Debtors discuss none.

37. Hence, the Debtors' request for approval of the rejection to be deemed effective as of the date of the Notice should be denied.

38. Eighth, the Lease Rejection/Abandonment Procedures and any order issued pursuant to the Motion should provide that the Debtors are obligated to pay Wilmington Trust for use of the rejected Aircraft until the Effective Date. Similarly, the Debtors should not be permitted to use any Aircraft after the Effective Date without paying for such use. It is well established that "a debtor in possession may not reject (i.e. breach) one obligation under a contract and still enjoy the benefits of that same contract." *In re Comdisco*, 270 B.R. 909, 911 (Bankr. N.D. Ill. 2001), *citing*, *AGV Productions, Inc. v. Metro-Goldwyn-Mayer, Inc.*, 115 F. Supp. 2d 378, 391 (S.D.N.Y. 2000). Wilmington Trust is entitled to rent at the applicable contract rate until the rejected Aircraft are returned in compliance with all applicable return provisions. Further, to the extent that the Debtors do not return the rejected Aircraft in compliance with applicable return conditions upon the Effective Date, the applicable lessor is

entitled to rent at the applicable contract rate. *See GATX Leasing Corp. v. Airlift Int'l Inc. (In re Airlift Int'l, Inc.)*, 761 F.2d 1503, 1508 (11th Cir. 1985) ("Where the debtor is a lessee, the estate is liable for the reasonable value of the use and occupancy of the property during the period between filing and assumption or rejection of the expired lease.").

39. Finally, that aspect of the Lease Rejection/Abandonment Procedures dealing with abandonment should be denied since abandonment is precluded by section 1110 of the Bankruptcy Code.

RESERVATION

40. Wilmington Trust reserves the right to supplement or modify this Objection as warranted and to further address the Motion and the related documents and to respond by further submission to this Court, at oral argument or by testimony to be presented at any hearing. Further, Wilmington Trust expressly reserves its rights under the Documents and under the Bankruptcy Code, including sections 362, 363, 365 and 1110 of the Bankruptcy Code and applicable non-bankruptcy law.

CONCLUSION

41. The Motion seeks a Court order approving the Lease Rejection/Abandonment Procedures; however, the Debtors do not provide a valid statutory basis for the relief sought therein. The Debtors do not meet the evidentiary burden necessary for a court to approve rejection of the Subject Leases under section 365 of the Bankruptcy Code, and, more importantly, ignore the requirements of section 1110 of the Bankruptcy Code. In addition, the Debtors impermissibly seek various procedures, including but not limited to, approval of Lease Rejection/Abandonment Procedures that contain inadequate notice provisions and objection

deadlines as well as an improper request for retroactive approval of the rejection of the Subject Leases. Accordingly, the Motion should be denied.

WHEREFORE, Wilmington Trust respectfully requests that the Court deny the Motion, or in the alternative, unless the Lease Rejection/Abandonment Procedures are modified to address the issues raised herein, the Motion should be denied in its entirety and grant such other and further relief as is appropriate.

Dated: December 15, 2004

Respectfully submitted,

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