IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: **Trans World Airlines, Inc., et al.,** **Debtors.**	**Case No. 010-0056 (PJW)** **Chapter 11** **(Jointly Administered)** **[Re: Docket Nos. 2111 and 2148]**

AMENDED OBJECTION TO SECOND QUARTERLY AND SEVENTH MONTHLY FEE APPLICATION OF BLANK ROME COMISKY & McCAULEY LLP

TO THE HONORABLE JUDGE PETER J. WALSH,
UNITED STATES BANKRUPTCY JUDGE:

American Airlines, Inc. and its affiliates (collectively, "American"), as and for its objection to the application of Blank Rome Comisky & McCauley LLP ("BRCM") for payment for services rendered and costs charged on behalf of the Statutory Committee of Unsecured Creditors (the "Committee") of the estates of Trans World Airlines, Inc. ("TWA") and its affiliates in the above-referenced chapter 11 cases (collectively, the "Estate") for the Second Quarterly Period from April 1, 2001 through June 30, 2001 (the "Quarterly Fee Application") and the Seventh Monthly Interim Application for July 1, 2001 through July 31, 2001 (the "July Fee Application"), respectfully represent:

PRELIMINARY STATEMENT

The Committee and its counsel – which represent non-priority creditors, an unsecured class with no viable economic interest in this deeply troubled, and very possibly administratively insolvent, Estate – have commenced and pursued unnecessary

and costly litigation to the substantial detriment of the Estate and, therefore, administrative expense and priority creditors and others. That conduct prompted American, which is one of the largest administrative expense claimants, to object in July to the interim fee application filed by counsel for the Committee for the month of May 2001. Despite that objection, for the four month period after the closing of the asset sale to American, BRCM now seeks more than a million dollars in fees and expenses, a substantial portion of which was unnecessarily and unreasonably incurred. American is thus forced to object to the Quarterly and July Fee Applications as described herein in order to protect its administrative expense claims and those of other similarly situated creditors.

As of April 9, 2001, the Committee's motions to stay the sale to American had been rejected by this Court, the district court and the Third Circuit and, on that day, the sale to American closed (the "Sale"). The Committee had no realistic chance of overturning the Sale thereafter, particularly in light of the overwhelming evidence in the record supporting this Court's findings and patent lack of merit as to any attack on the Court's orders approving the Sale. The Committee recognized, and its counsel admitted in numerous pleadings, that unsecured creditors would not obtain any recovery from the Estate, even after the Estate's receipt of the proceeds of the Sale to American. See e.g., March 12 Tr. 702:10-18. The likelihood of such a recovery diminished still further after the April 9, 2001 closing, when it became apparent that there was a significant risk that the Estate would not even be able to satisfy all of its administrative expense claims, which numbered in the hundreds of millions of dollars.

In light of these facts, it was incumbent upon the Committee and BRCM, as its counsel, to significantly reduce the level of activities and expenditures, and merely protect the limited interests, if any, that unsecured creditors of the Estate might have had – at a reasonable cost to the Estate. Instead, the Committee spent more than a million dollars in the four months after April 9, 2001, litigating, and preparing and threatening to litigate, matters without regard to the lack of merit of its position and, most significantly, despite the fact that its constituents would not be entitled to a distribution under the Bankruptcy Code's priority scheme even if the Committee were successful in such litigation. As a result of BRCM's litigious activities, the Estate, American and others have been forced to incur enormous unnecessary costs. The damage already done to the Estate and its constituents should not be compounded by allowance of the very fees that are the root of such unreasonable and unnecessary expenditures.

As revealed by the Quarterly Fee Application and the July Fee Application, BRCM used an inordinate number of lawyers to staff its representation of the Committee and of that number, BRCM's partners billed almost half of the lawyer time charges for the three months, April through June, and over 61% of the time in July. This top-heavy representation cannot be justified given the nature of the services rendered during this period.

STATEMENT OF THE FACTS

A. The Committee's Wasteful Post-Closing Attacks On the Section 363 Asset Sale To American

1. Prior to this Court's approval of the Sale to American, the parties, including the Committee, had an opportunity to participate in more than ten depositions

and examine approximately 18,000 documents related to the transaction. The parties also attended multiple hearings before Chief Judge Robinson and this Court, during which oral argument was heard and relevant witnesses were presented and cross-examined, including at length by counsel for the Committee. During these proceedings, an extensive evidentiary record was developed enabling the Court and the parties to examine the merits of the proposed transaction with American thoroughly.

2. After carefully considering that extensive evidentiary record, this Court approved the Sale to American on March 12, 2001. (See Sale Approval Order). In so doing, the Court made numerous express findings of fact based on overwhelming evidence relating to American and TWA's good faith. The Court also found that the sale avoided a piecemeal liquidation of TWA that would have been disastrous for TWA's employees, a broad spectrum of creditor constituencies, the City of St. Louis and other municipalities served by TWA, and the flying public. (Id.)

3. Thereafter, the Committee and other parties filed emergency motions to stay the Sale Approval Order pending appeal. In a comprehensive thirty-five page decision, the Court ruled that the Committee had failed to demonstrate any likelihood of success on the merits or make the requisite showing of irreparable harm. Moreover, the Court concluded that a stay would result in a liquidation of TWA that would cause material adverse harm to TWA's diverse constituencies. (Stay Denial Decision at ¶ 72-5).

4. On appeal, the District Court denied the stay in the interests of justice and the Third Circuit also rejected the Committee's motion to stay on April 7,

2001. Accordingly, TWA and American closed the asset-sale transaction on April 9, 2001.

5. As of the April 9, 2001 closing, the Committee was foreclosed, as a practical and legal matter, from impairing or otherwise overturning the Sale in light of section 363(m) of the Bankruptcy Code and applicable mootness principles. Nevertheless, the Committee and its counsel proceeded to expend enormous resources seeking to attack the transaction. Specifically, the Committee continued to pursue, among others, appeals of the orders: (a) Approving the Sale To American of All or Substantially All of TWA's Assets; (b) Appointing Authorized Representatives of Retirees and Modifying Retiree Benefits; and (c) Approving Assumption and Assignment of Certain Executory Contracts and Unexpired Leases and Rejection of Certain Executory Contracts and Unexpired Leases (collectively, the "Sale Appeals").

6. Aside from pursuing the Sale Appeals, the Committee also "implemented a strategy of opening the court record to include additional facts to support an appeal of the Bankruptcy Court's order approving the asset sale." (Fifth Monthly Interim Application, at 8; see also, Fourth Monthly Interim Application, at 10.) That strategy was pursued even though it was obviously unsupportable as a factual and legal matter and could not legitimately result in a distribution to unsecured creditors under the priority scheme mandated by the Bankruptcy Code.

7. The pursuit of the Sale Appeals and other attacks on the Sale after April 9, 2001 account for approximately $150,000 of the fees sought by counsel for the Committee in its Quarterly Fee Application and approximately $40,000 of the fees sought

by counsel in its July Fee Application. (Quarterly Fee App., Exh. B, p. 3; July Fee App., p. 8).

B. The Committee Also Actively Litigated Other Matters In Which The Unsecured Creditors Had No Economic Interest

8. While the Committee pressed its stay applications, it was well aware that, unless a stay of the Sale was granted and a transaction yielding substantially greater value than the American transaction miraculously appeared, the unsecured creditors would not receive any recovery. Indeed, at the March 2001 hearings to approve the Sale to American, the Committee acknowledged that the transaction would not provide unsecured creditors with any recovery. (March 12 Tr. 702:10-18).

9. Events following the April 9, 2001 closing further confirmed that unsecured creditors were not entitled to a distribution under the Bankruptcy Code. Hundreds of millions of dollars in administrative expense claims were filed against the Estate. For example, priority and administrative expense tax claims in excess of $100 million and administrative expense claims of American also for more than $100 million were filed against the Estate.[1] At the same time, it also became apparent that the Estate could be administratively insolvent. (June 18 Tr. at 13). Counsel for the Committee has long been aware of that possibility (June 18 Tr. at 13), which also was noted by the Court at the August 17, 2001 hearing. (Aug. 17 Tr. at 16).

[1] American's claim arose because TWA failed to pay undisputed pre-closing cure costs on account of assumed and assigned leases and contracts. To preserve the value of the purchased assets, American was forced to pay TWA's multi-million dollar cure obligations.

10. Unfortunately, the unsecured creditors' negligible financial interest in the outcome of these bankruptcy cases did not dampen the vigor with which Committee counsel litigated even collateral matters relating to the Estate. For example, the Committee wasted resources pursuing its objection to Rothschild, Inc.'s previously court-approved success fee as part of its retention agreement and based upon the results of the American Sale, as well as to the employment agreements of Michael J. Lichty, President and CEO of TWA, and Jill M. Farmer, Secretary and Deputy General Counsel of TWA. The Committee did so even though relatively small amounts were at stake for Ms. Farmer and Mr. Lichty and the unsecured creditors could not possibly benefit from the outcome of its challenge to these employment agreements. Specifically, in connection with the Rothschild-related dispute, the Committee expended approximately $150,000 from April 9 to June 30, 2001, as reflected in the Quarterly Fee Application and approximately $26,000 in July 2001 as reflected in the July Fee Application. (Quarterly Fee App., Exh. B, p. 3; July Fee App., p. 8).

11. The Committee likewise has played a counterproductive and costly role in the Wells Fargo Bank Northwest, N.A. ("Wells Fargo"), Adv. Pro. No. 01-3256, adversary proceeding. That dispute concerns whether the holders of certain secured bonds issued by TWA with a combined principal balance of $190 million are adequately secured. For so long as this matter remained unresolved, the Estate was obligated to pay almost $2 million a month in non-default rate interest to the secured note holders, the vast majority of which exceeded the interest the Estate earned on the funds escrowed for the benefit of the secured note holders.

12. It has long been clear that the unsecured creditors had no legitimate interest for the Committee to protect in the Wells Fargo adversary proceeding given that only administrative expense claimants, not unsecured creditors, would benefit, if at all, from the outcome of the proceeding. Yet, as a result of its work in connection with the Wells Fargo proceeding, the Committee seeks approximately $120,000 in the Quarterly Fee Application and approximately $70,000 in the July Fee Application, all of which reflect expenditures made after April 9, 2001. (Quarterly Fee App. Exh. B, p. 3; July Fee App., p. 4). American is cognizant of the fact that the settlement of the Wells Fargo litigation provides a direct recovery for the benefit of the unsecured creditors. However, that recovery did not flow into or through the Estate. Accordingly, the Estate did not benefit from the settlement, and the Estate (and its administrative expense creditors, like American) should not pay for the cost of attaining that benefit for the Committee's constituents; those costs should be borne by the monies to be received by the beneficiaries of the effort.

C. The Committee's Monitoring Costs Are Excessive

13. Although the Committee was entitled to monitor the business affairs of the Debtors, it was obligated to do so in a manner consistent with the unsecured creditors' marginal financial interest in the outcome of these bankruptcy cases. However, BRCM devoted resources that were disproportionate to the unsecured creditors' limited financial interest.

14. In simply reviewing pleadings and papers filed in the chapter 11 case and preparing memoranda to the Committee relating thereto, BRCM expended approximately $100,000 from April 9 to June 30, and approximately $23,000 in July

2001. These amounts plainly exceed the modest role appropriate to a committee representing claimants not entitled a recovery under the Bankruptcy Code. (Quarterly Fee App., Exh. B, p. 3; July Fee App., p. 9).

D. The Committee Ignored American's Request To Modify Its Fee Applications And Conduct

15. On July 16, 2001, American filed an objection to the Committee's Fifth Interim fee application for May 2001. In that objection, American articulated many of the points set forth herein and requested that BRCM re-submit its application to reflect a more appropriate fee request. BRCM ignored American's objection and submitted its Second Quarterly Fee Application covering April, May and June 2001 and its interim fee application for July 2001 seeking significantly increased compensation.

16. BRCM now seeks approximately $845,000 in compensation for a mere four months of activities in its Quarterly Fee Application and $249,000 for a month's activities in its July Fee Application. (Quarterly Fee App., Exh. B, p. 3; July Fee App., p. 12). Of that amount, approximately $366,000 of the fees associated with the Sale Appeals and the Rothschild dispute plainly was needlessly and unreasonably expended. Further, a substantial portion of the approximately $313,000 of the fees associated with the Wells Fargo proceeding and monitoring efforts also were excessive given the relatively modest economic interest held by unsecured creditors and the fact that the Estate's interests were being protected by Debtors' counsel.

E. On its face, BRCM's Fee Application Supports American's Claim of Over-Lawyering.

17. The excessive nature of the charges of BRCM is borne out by the statistical data that is part of the Second Quarterly Fee Application and the July Fee Application. Attachment B to the Second Quarterly Fee Application, a copy of which is annexed hereto as Exhibit 1, provides certain statistical data underlying the charges for professional services for the period April 1, 2001 -- June 30, 2001. According to Attachment B, sixteen different partners billed 1,217.8 hours; one counsel to the firm billed 7.7 hours; and eighteen associates billed 1,350.1 hours, all during the three month period after the closing of the Sale and the conclusion of the litigation related to the Committee's attempts to stay the closing of the Sale. Thus, a total of 35 lawyers billed 2,575.6 hours, of which approximately forty-eight (48%) percent of the lawyers' time was partner time. The foregoing figures do not include additional time billed by thirteen paralegals, law clerks, librarians and secretarial assistants during the same period.

18. The July Fee Application of BRCM, filed long after American objected to the Fifth Monthly Fee Application of BRCM, showed no regard or restraint for the excesses that preceded the month of July. Attachment B to that application, a copy of which is annexed hereto as Exhibit 2, reflects that twelve partners billed 426.9 hours and thirteen associates billed 267.3 hours, while nine paralegals, law clerks and summer associates added 692.5 hours to the bill for the month of July. As a consequence, nearly sixty-two (62%) percent of all time charges for lawyers for which

Committee counsel seeks compensation were for services rendered by partners, and only thirty-eight (38%) percent of the total lawyer hours were for associates' efforts.

19. American respectfully submits that looked at alone, the sheer number of BRCM lawyers on the case at the stage when the Committee's constituents likely had no economic interest in the outcome of the case, raises serious doubts that the charges to the Estate to which American objects, can be justified. However when that factor is considered with the egregious imbalance of partner to associate time, the scale is not just tipped, it is overturned. Courts in this circuit, including the Third Circuit Court of Appeals, as well as other jurisdictions have long admonished that senior lawyers should not perform services that more junior, less costly lawyers are capable of performing. Ursic v. Bethlehem Mines, 719 F.2d 670, 677 (3d Cir. 1983) ("Nor do we approve the wasteful use of highly priced talent for matters easily delegable to non-professionals or less experienced associates. Routine tasks, if permitted by senior partners in large firms, should not be billed at their usual rates. A Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn."); In re Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833, 854 (3d Cir. 1994) (same); In re Pettibone Corp., 74 B.R. 293, 303 (N.D. Ill. 1987) ("Senior partner rates will be paid only for work that warrants the attention of a senior partner"); In re Pothoven, 84 B.R. 579, 584 (S.D. Iowa 1988) (same). This top-heavy ratio of partner time to associate time for the periods in question leaves little doubt that a significant portion of the charges sought should not be sustained.

20. American respectfully submits that there is no excuse for the excessive number of lawyers who billed this file during the period after it was well known that the Committee's constituency was likely "out of the money," with little

chance, if any, to recover even one percent of their claims. Nevertheless, Committee counsel employed the most senior and expensive lawyers within the firm in droves to bill this file.

ARGUMENT

21. The Bankruptcy Code authorizes a bankruptcy court to award a professional "reasonable compensation for actual, necessary services." 11 U.S.C. § 330(a)(1). Professionals seeking such an award have an obligation to exercise billing judgment, including to make a good faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary. In re Metro Transportation Co., 107 B.R. 50, 52 (E.D. Pa. 1989). "When attorneys fail to exercise this sort of billing judgment in advance, the Bankruptcy Court is within its discretion to act as 'client,' 'objecting' to excessive fees which it deem overstep the 'actual and necessary' standard imposed by Section 330(a)(1)." Id. at 52-53. Indeed, a bankruptcy court has an affirmative duty to review fee applications based on the court's "inherent obligation to monitor the debtor's estate and serve the public interest." In re Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833, 841-42 (3d Cir. 1994). Thus, a bankruptcy court, on its own motion or on the motion of any party in interest, may under 11 U.S.C. § 330(a)(2) award compensation that is less than the amount of compensation requested by a professional. See e.g., In re Drexel Burnham Lambert Group, Inc., 133 B.R. 13, 24 (Bankr. S.D.N.Y. 1991).[2]

[2] Because "its time is precious, the reviewing court need only correct reasonably discernible abuses, not pin down to the nearest dollar the precise fee to which the professional is ideally entitled." Busy Beaver, 19 F.3d at 845.

22. In determining the amount of fees to be awarded, the court must consider "(i) the nature of the services, (ii) the extent of the services, (iii) the value of the services, (iv) the time spent on the services, and (v) the cost of comparable services in nonbankruptcy cases." Busy Beaver, 19 F.3d 833 at 840, citing 11 U.S.C. § 330(a)(3). The statute further dictates that a court "shall not allow compensation for (i) unnecessary duplication of services; or (ii) services that were not (a) reasonably likely to benefit the debtor's estate; or (b) necessary to the administration of the case." 11 U.S.C. § 330(a)(4). In re Smith Technology Corp., 1999 WL 1427681 * 5 (D. Del. Dec. 23, 1999). Moreover, "the bankruptcy court may discount evidence presented by the fee applicant, since courts 'are themselves experts on the value of services rendered in a bankruptcy proceeding and are not bound by the evidence offered.'" Zolfo, Cooper & Co. v. Sunbeam-Oster Company, Inc., 50 F.3d 253, 258 (3d Cir. 1995).

23. Thus, a fee application should include only those fees that were necessarily and reasonably incurred in the performance of legitimate duties. See First Merchants Acceptance Corp. v. J.C. Bradford & Co., 198 F.3d 394, 403 (3d Cir. 1999). Fees are not necessarily or reasonably incurred when the class represented were not, even with the expenditures on their behalf, entitled to receive a distribution under the Bankruptcy Code. See In re Auto Parts Club Inc. v. United States Trustee, 211 B.R. 29, 34 (B.A.P. 9th Cir. 1997).

24. In Auto Parts, the bankruptcy court found that the fees requested by counsel for the unsecured creditors' committee were not necessary because the majority of the fees were incurred after the debtor decided to sell its business, a decision which counsel knew or should have known made it unlikely that unsecured creditors

would receive any distribution given the range of bids and the extensive administrative claims against the estate. Even though unsecured creditors were not likely to receive a distribution, the committee nevertheless aggressively pursued the case in the vain hope that the debtor could still reorganize or at least sell its assets for an amount that would produce a substantial distribution to the unsecured creditors. The bankruptcy court held that this was unreasonable and that counsel instead should have drastically scaled back its services once the decision was made to sell the debtor's assets. On appeal, the Bankruptcy Appellate Panel agreed that it was not reasonable for counsel for the committee to have believed that the unsecured creditors would receive anything from a sale, and concluded that counsel should have scaled back their efforts based on the reasonable expected recovery, not the potential optimum recovery. See also Unsecured Creditors' Committee v. Puget Sound Plywood, Inc., 924 F.2d 955, 959 (9th Cir. 1991) (concluding that counsel had an obligation to consider the potential for recovery and balance the effort required against the result that might be achieved and affirming the bankruptcy court's fee award of only one third of the requested fees); In re Kitchen Factors, 143 B.R. 560 (B.A.P. 9th Cir. 1992) (upholding reduction of fees by 50% where special counsel for debtor incurred $12,562 in fees in an attempt to recover a $12,000 debt, ruling that fee reduction was appropriate because counsel failed to scale back its activities in light of the substantial risk that litigation costs would consume any benefit to the estate); In re Taxman Clothing Co., 49 F.3d 310, 316 (7th Cir. 1995) (ordering reduction of fees that were incurred in pursuit of a preference suit that should have been abandoned once it became reasonably obvious that further litigation would cost more than it was likely to bring into the estate).

25. In this instance, a significant portion of the work for which Committee counsel seeks compensation was clearly unnecessary and unreasonable. Their request for approximately $190,000 for the baseless post-April 9, 2001 attacks on the Sale transaction should be denied given that there was no realistic prospect of overturning the transaction or obtaining any genuine relief for unsecured creditors in light of Section 363(m) and applicable mootness principles. Similarly, the substantial fees requested in connection with the Committee's attacks on the propriety of Rothschild, Inc.'s compensation and the employment of certain other TWA professionals are unreasonable and unnecessary, since the outcome of that relatively insignificant dispute could not have yielded a distribution to unsecured creditors.

26. Further, the fees sought by BRCM in connection with the Wells Fargo adversary proceeding are excessive and should be substantially reduced. At the outset the Committee could have appropriately conducted a prompt investigation to determine whether unsecured creditors could benefit from a litigated outcome to the proceeding. Such an investigation would have revealed almost immediately that they could not benefit both in light of the merits of the claims against the secured creditors' positions and the relative solvency (or lack thereof) of the Estate. The Committee apparently did not adopt that approach, and its request for approximately $190,000 in fees for this matter should be reduced to an amount that is more consistent with a level of involvement that would have been appropriate in light of the minimal interest of the constituency represented. Further, should the parties fail to settle the Wells Fargo dispute, counsel for the Committee should not be entitled to future fees associated with that proceeding.

27. Likewise, the Committee's interest in these bankruptcy cases should have diminished significantly after April 9, 2001, and its counsel's monitoring fees should have been greatly reduced as a result. That did not happen. The approximately $123,000 sought is excessive in light of the modest economic interest held by the unsecured creditors, and this amount, too, should be reduced.

CONCLUSION

28. It has long been clear that the unsecured creditors represented by the Committee and its counsel have no right to receive a distribution under the priority scheme mandated by the Bankruptcy Code. Instead of accepting a modest and appropriate role in these bankruptcy cases, the Committee and its counsel pursued a fruitless and scorched earth litigation strategy to the substantial detriment of the Estate and its various constituencies, including the administrative expense claimants. That harm should not be compounded by the unnecessary and unreasonable fee applications

submitted by counsel for the Committee.

WHEREFORE American respectfully requests that the Court grant an order denying counsel for the counsel for the Committee's Quarterly and July Fee Application with respect to that portion of its applications as described herein.

Dated: November 8, 2001
Wilmington, Delaware

RESPECTFULLY SUBMITTED,

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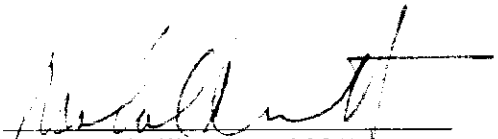

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