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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11 Case No.**
AMR CORPORATION, *et al.*,	:	**11-15463 (SHL)**
Debtors.	:	**(Jointly Administered)**
U.S. BANK TRUST NATIONAL ASSOCIATION,	:	
Plaintiff,	:	**Adversary Case No. 12-01932 (SHL)**
v.	:	
AMERICAN AIRLINES, INC.	:	
Defendant.	:	
U.S. BANK TRUST NATIONAL ASSOCIATION,	:	
Plaintiff,	:	**Adversary Case No. 12-01946 (SHL)**
v.	:	
AMERICAN AIRLINES, INC.,	:	
Defendant.	:	

DEBTORS' RESPONSE TO REQUESTS BY U.S. BANK TRUST NATIONAL ASSOCIATION FOR A STAY OR RESERVE PENDING APPEAL

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AMR Corporation ("**AMR**") and its related debtors, as debtors and debtors in possession (collectively, the "**Debtors**"), hereby respond to the motions by U.S. Bank Trust National Association ("**U.S. Bank**") (ECF Nos. 6672 and 6675) for the imposition of a stay or a reserve pending U.S. Bank's appeals (the "**Appeals**") from (a) this Court's February 1, 2013 Order Pursuant to 11 U.S.C. §§ 105(a), 362, 363, 364, 503(b) and 507 and Fed. R. Bankr. P. 4001 and 6004 (I) Authorizing Debtors to Obtain Postpetition Secured First Priority Aircraft Financing and Grant Security Interests and Liens with Respect Thereto; (II) Authorizing Debtors to Repay Existing Prepetition Debt Relating to Certain Aircraft; (III) Denying Requests By U.S. Bank Trust National Association for Relief from Automatic Stay and (IV) Granting Related Relief (the "**Order**") (ECF No. 6521); and (b) the judgments entered in adversary proceeding nos. 12-1932 (ECF No. 19) and 12-1946 (ECF No. 16) (the "**Judgments**"),[1] and respectfully state as follows:

Preliminary Statement

1. The Order and the Judgments authorize the Debtors to obtain new financing and to repay the Prepetition Notes without "Make-Whole" amounts. The refinancing could produce savings well in excess of $200 million. Those savings are available because interest rates on EETC financings have been dramatically lower (beginning in mid-2012) from what they were just five months earlier.[2] However, there is no guarantee that current low interest rates will continue to be available if the refinancing is delayed. Any delay would cause injury to the

[1] Capitalized terms have the meanings ascribed to them in the Order and in the EETC Motion (as that term is defined in the Order).

[2] As the Debtors indicated in the EETC Motion, interest rates on representative EETC financings consummated after March 2012 have ranged from 4% to 4.7%. EETC Motion ¶ 10. By contrast, the Debtors' own 2011-2 EETC financing, consummated in October 2011 – which the Debtors seek to repay through the Motion – was at interest rates of 8.625%. *Id.* ¶ 7. This represents a large shift in available EETC market interest rates in just five months.

Debtors – not just because interest would continue to accrue on the Prepetition Notes at rates that are far above available market rates, but also because market conditions could change at any time. A significant shift in market conditions could mean that the refinancing opportunity has been lost entirely; even a one percent change in interest rates would reduce the savings by more than $60 million.

2. Under the circumstances, U.S. Bank's request for a stay pending resolution of its Appeals – without any proposed protection to the Debtors for the severe damages they could incur as a result of the stay, and without any meaningful time limit to the stay or any proposal to expedite further proceedings – is wholly inconsistent with Rule 8005 and should be denied. As explained below, no stay should issue without full protection of the Debtors' interests.

3. In addition, this Court has previously rejected U.S. Bank's separate request for a "reserve" pending appeal, and it should do so again. As the Court of Appeals for the Second Circuit has ruled, "neither the Bankruptcy Code nor tenets of due process require that a [debtor] in effect bond an appeal by a losing claimant." *See In re Chateaugay Corp.*, 10 F.3d 944, 960–61 (2d Cir. 1993) (reorganized debtor had no obligation to effectively bond an appeal by a creditor by setting up a reserve for payment of an alleged priority claim; the creditor could protect its position by seeking stay pending appeal, and had no due process right to a reserve).

Applicable Standards

4. U.S. Bank's requests are governed by Fed. R. Bank. P. 8005 and 7062. Rule 8005 authorizes a stay or other relief pending an appeal from the Order, but only on such terms as "will protect the rights of all parties in interest," including the Debtors. Fed. R. Bankr. P. 8005. The most basic of such protections is the posting of a bond or other security to protect the Debtors against the losses they could incur as a result of a stay. *See In re Adelphia Commc'ns Corp.*, 361

B.R. 337, 351, 368 (S.D.N.Y. 2007) (requiring creditors to post $1.3 billion bond to obtain stay pending appeal of order confirming a plan of reorganization). Rule 7062 similarly requires a bond or other security as a condition to a stay of the Judgments. *See* Fed. R. Bankr. P. 7062.

5. The posting of a bond, or of alternative security against damages, is particularly crucial because many courts have held that a party's rights to recover damages from a stay (after prevailing on appeal) are limited to the amount of the bond or alternative security that was specified at the time the stay was issued. *See, e.g.*, *Edlin v. M/V Truthseeker & Damia*, 69 F.3d 392, 394 (9th Cir. 1995) (holding that recovery for damages during pendency of appeal is limited to the amount of the supersedeas bond); *In re Ridgemont Apartment Assocs., Ltd.*, 127 B.R. 934, 938–39 (Bankr. N.D. Ga. 1991) (same); *see also Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith*, 910 F.2d 1049, 1054–56 (2d Cir. 1990) (damage recovery limited to posted bond when injunction is issued); *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 804–05 (3d Cir. 1989) (same). For this reason, it is important not only that security be provided, but that the amount of the security be sufficient to cover all of the potential damages that could result from the issuance of the stay. *In re WestPoint Stevens, Inc.*, No. 06 Civ. 4128, 2007 WL 1346616 at *10 (S.D.N.Y. 2007) (holding that the court should "err, if at all, on the side of greater provision for the protection of the interests" of the party who will be subject to the stay), *rev'd in part on other grounds*, 600 F.3d 231 (2d Cir. 2010).

6. In its submissions, U.S. Bank has attempted to minimize the importance of security pending appeal, but at least two of the cited decisions involved cases in which no party opposed the issuance of a stay and no party requested security.[3] In reality, courts have repeatedly

[3] *See In re Sphere Holding Corp.*, 162 B.R. 639, 640, 644 (E.D.N.Y. 1994) (no party opposed a stay, and court noted that the appeals did not involve any "need to protect against

confirmed the importance of protecting the rights of the prevailing party when a stay is requested. Accordingly, the ordinary rule is that a court granting a stay should not deviate from the requirement that "full security" be provided. *See In re DJK Residential, LLC*, Nos. 08-10375 (JMP), M-47 (GEL), 2008 WL 650389 at *5 (S.D.N.Y. 2008) (when granting a stay pending appeal, the court generally will not deviate "from the ordinary full security requirement"); *In re Taub*, 470 B.R. 273, 280 (E.D.N.Y. 2012) (courts will not deviate "from the ordinary full security requirement" and will require bond to protect against the entire potential damages); *In re Adelphia Commc'ns Corp.*, 361 B.R. 337, 350-51 (S.D.N.Y. 2007) ("[i]f a stay pending appeal is likely to 'endanger [the non-moving parties'] interest in the ultimate recovery,' and there is no good reason not to require the posting of a bond, then the court should set a bond at or near the full amount of the potential harm to the non-moving parties").

7. Rule 8005 also permits the Court to impose other conditions that will protect the parties against the risks of delay, such as imposing limits on the duration of a stay. *See, e.g.*, *Ohanian v. Irwin (In re Irwin)*, 338 B.R. 839, 843–44 (E.D. Cal. 2006) (imposing a stay of only limited duration); *Haskell v. Goldman, Sachs & Co. (In re Genesis Health Ventures, Inc.)*, 367 B.R. 516, 519, 522 (Bankr. D. Del. 2007) (granting stay of limited duration). Similarly, the Court has broad authority to condition a stay on "such terms as will protect the rights of all parties in interest," Fed. R. Bankr. P. 8005, and pursuant to that power it may condition a stay upon the moving party's use of available procedures to expedite further proceedings.

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diminution in the value of property pending appeal"); *In re Westwood Plaza Apartments, Ltd.*, 150 B.R. 163 (Bankr. E.D. Tex. 1993) (granting stay on conditions requested by appellee, under which appellee agreed to forego a bond).

Argument

8. The Decision was based on the plain wording of the parties' contracts, which clearly and unambiguously state that the Prepetition Notes may be paid during these cases without payment of any Make-Whole Amounts. The Debtors therefore reject the suggestion that there is any merit (let alone a likelihood of success) in U.S. Bank's Appeals. However, the Debtors recognize that the applicable case law permits many factors to be considered, and they understand U.S. Bank's concern that a closing of the refinancing would render the Appeals moot. What the Rules do not permit, however, is for U.S. Bank to free itself of the ordinary risks that a losing party faces on appeal in the absence of a stay, or to request a stay on terms that are entirely inconsistent with the requirement that the interests of the Debtors (as the prevailing parties) be fully protected.

I. The Request For A Stay (Without Any Proposed Protection Of The Debtors' Interests) Is Wholly Inconsistent With Rule 8005 And Should Be Denied.

9. The proposed New EETC would permit the sale of new Notes having much lower interest rates than the Prepetition Notes. As the Debtors have stated before, the savings from the new financing are expected to be well in excess of $200 million. Any stay of the refinancing would cause injury to the Debtors – not just from the fact that interest would continue to accrue on the Prepetition Notes at rates that are far above available market rates, but also because market conditions could change at any time, potentially resulting in the loss of the entire refinancing opportunity. Although U.S. Bank has scoffed at the risk that this might happen, U.S. Bank's position is belied by the sudden and radical changes in available EETC interest rates that occurred in 2012. *See* footnote 2, above.

10. U.S. Bank's proposal – that the Debtors be subjected to these potential losses, with no bond or other security and therefore no compensation for the severe injuries they might suffer – is wholly inconsistent with the terms of Rule 8005 and should be rejected out of hand. At a minimum, any stay would need to be accompanied by a bond or other security that would protect the Debtors against all of the potential losses specified above.

11. U.S. Bank has complained that a bond would be costly, but a bond is not the only way in which U.S. Bank can provide security against the Debtors' potential losses.[4] The Debtors owe principal payments on the Prepetition Notes that exceed $1.3 billion; those obligations can serve as alternative security (in lieu of a bond) against the damages that the Debtors might suffer. All that would be required is an agreement by U.S. Bank (or an Order by this Court in the absence of such an agreement) that the Debtors' obligations to pay interest and principal on the Prepetition Notes shall substitute for a bond as security against damages pending appeal, and that the Debtors would have the same rights to collect such damages (by way of reduction in future payments) as they would have had to collect on a bond or cash deposit. In that way, the Debtors would have security in the event they prevail on appeal; meanwhile, U.S. Bank would be spared the expense of a bond, and the entire arrangement would be costless to U.S. Bank and the Noteholders if they were to prevail in their Appeals.

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4 U.S. Bank has also argued that the costs of a bond would be an indemnifiable expense, but the provisions cited by U.S. Bank do not support that contention. U.S. Bank has relied on Section 4.2(c) of the Participation Agreements, which provide indemnity against liabilities and costs incurred by reason of the acquisition, use, etc. of the underlying Aircraft. *See* Participation Agreement, § 4.2(c). This provision does not cover the expenses of litigation between the Trustee and the Debtors over the interpretation of the Indentures. In fact, it is well-established under New York law that an indemnity does *not* cover the costs of litigation between the indemnitor and the indemnitee unless the indemnity provision explicitly so states. *See Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487 (N.Y. 1989).

II. Any Stay Should Be Accompanied By Conditions That Will Expedite The Appeals

12. Even if a stay were to be granted, U.S. Bank's motions are objectionable because U.S. Bank has not proposed any meaningful limitations on the period during which a stay would be in effect, or any meaningful ways in which appeals would be expedited to limit the risks to the parties. Any proper request for a stay should include an agreement to expedited procedures, and any stay should be limited in duration, to give the parties time to be heard while at the same time enforcing the need to expedite the Appeals. For example:

- U.S. Bank should agree (or the Court should order) that the Appeals be certified for direct appeal to the Court of Appeals pursuant to 28 U.S.C. § 158(d).
- U.S. Bank should agree (or the Court should order) that any stay is conditioned upon a briefing schedule under which all appellate briefs are served by early to mid-March. (The relevant issues have already been exhaustively briefed; further time simply is not needed, and a longer schedule would not be consistent with the emergency that U.S. Bank has depicted in its submissions.)
- U.S. Bank should agree (or the Court should order) that U.S. Bank provide a pay-off arrangements letter that will specify the amounts it believes that would be due if the Prepetition Notes were to be repaid on March 1, thereby identifying any calculation issues that might require further resolution and permitting those matters to be resolved by this Court while the Appeals are pending (as opposed to constituting a cause for additional delays in the future).
- Any stay should be limited in duration (for example, to April 12 – obviously with the right to revisit that date if circumstances so required) in order to allow time for the Appeals to be decided while at the same time enforcing the need to move quickly.

However, U.S. Bank has offered no such terms. Instead, U.S. Bank wishes to plod along at a relaxed pace and with a stay of indefinite duration, allowing the Prepetition Notes to continue to accrue interest at above-market rates while providing no protection to the Debtors and their estates for the losses that are accruing.

III. The Request For A Reserve Pending Appeal Is Improper

13. U.S. Bank has repeated its prior request that the Debtors be required to post security to protect U.S. Bank pending an appeal. This request is backwards. This Court has ruled in favor of the Debtors, and in the absence of a stay pending appeal the Debtors are entitled to close the proposed EETC financing in accordance with its terms and to terminate U.S. Bank's interests in the underlying collateral. *See In re Pappas*, 215 B.R. 646, 650 & n.5 (2d Cir. B.A.P. 1998) (when order was not stayed pending appeal, the Appellee "was clearly entitled to rely on it" because "[a]bsent a stay pending appeal, the prevailing party is entitled to treat the order of the bankruptcy court as final." (collecting cases)); *In re Stratford Fin. Corp.*, 264 F. Supp. 917, 918 (S.D.N.Y. 1967) ("The filing of a petition to review an order of a Referee in Bankruptcy in no way serves to stay its effect or operation." (citing *In re Autocue Sales & Distrib. Corp.*, 162 F. Supp. 17, 19 (S.D.N.Y. 1958)). In fact, the importance of a debtor's ability to complete a refinancing (despite the presence of an appeal) is codified in Section 364(e) of the Bankruptcy Code, which provides that a refinancing may be completed in the absence of a stay (notwithstanding any appeal) and which squarely puts the burden on an opposing party to obtain a stay if it wishes to preserve its rights on appeal. *See* 11 U.S.C. § 364(e).

14. In its papers, U.S. Bank has cited *Gleasman v. Jones, Day, Reavis & Pogue (In re Gleasman)*, 111 B.R. 595 (Bankr. W.D. Tex. 1990), for the proposition that this Court would commit error by "failing to provide for a reserve or denying a stay . . ." *See* Motion for Reserve

or Stay Pending Appeal ¶ 20 (ECF No. 6672). In fact, the words "failing to provide for a reserve" do not appear at all in the passage quoted by U.S. Bank; they have simply been added to the quotation in U.S. Bank's papers. *See* 111 B.R. at 602. Furthermore, the Court in *Gleasman* granted a stay only upon the posting of a bond to protect the prevailing party, and in doing so it stressed the "strong policy" against granting stays without the provision of such security. *Id*. at 602.

15. If U.S. Bank wishes to protect itself pending an appeal, then U.S. Bank must seek a stay of this Court's Order pending appeal, and it is the Debtors (not U.S. Bank) who would be entitled to the posting of security as a condition to the entry of such a stay. *See In re Chateaugay Corp.*, 10. F.3d 944, 960–61 (2d Cir. 1993).

Conclusion

For the foregoing reasons, the Debtors respectfully request that the Court deny U.S. Bank's request for a stay or for a reserve pending appeal, and that the Court grant such other relief as is just and proper.

Dated: New York, New York
February 15, 2013

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