# UNITED STATES BANKRUPTCY COURT
# DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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March 16, 2001

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Re: Trans World Airlines, Inc., et al.
Case No. 01-0056

Dear Counsel:

This is my ruling on the Emergency Motion of the High River Entities for Stay Pending Appeal of Order Authorizing Trans World Airlines, Inc. to Reject Karabu Ticket Program Agreement Pursuant to Section 365(a) of the Bankruptcy Code (Doc. # 952)("Stay Motion") filed at the end of the day on March 14, 2001. At my direction, the Debtor filed an Opposition of the Debtors to the Motion of the High River Entities for a Stay Pending Appeal (Doc. # 974) at Noon on March 16, 2001. For the reasons set forth below, I will deny the Stay Motion.

The factual and procedural history underlying the present motion are set forth in In re Trans World Airlines, Inc., Ch. 11 Case No. 01-56(PJW), slip op. at pp. 2-12 (Bankr. D. Del. March 12, 2001)("March 12 Opinion"). Briefly, they are as follows. Trans World Airlines, Inc. ("TWA" or "Debtor") filed its third chapter 11 case on January 10, 2001. Prior to filing its petition, TWA and AMR Corporation ("American") entered into an asset purchase agreement whereby TWA agreed to sell substantially all of its assets to American. On January 10, 2001, TWA filed a § 363 [1] motion for an order authorizing the sale of its assets ("Sale Motion") to American outside the ordinary course of business and prior to filing a plan of reorganization. On January 26, 2001, TWA

[1] Unless otherwise indicated, all references to "§__" are to a section of the Bankruptcy Code, 11 U.S.C. § 101 et. seq.

filed a § 365 motion ("Rejection Motion") for authority to reject a ticketing program agreement ("Ticket Agreement") it had entered into with Karabu Corp. ("Karabu") and the High River Entities (for convenience of reference, I will hereinafter refer to Karabu and the High River Entities simply as Karabu).

On March 9 and 10, 2001, I held an evidentiary hearing on the Sale Motion and the Rejection Motion. I entered an order authorizing the Sale Motion after closing arguments on March 12, 2001. On the same day, I issued a memorandum opinion on, and entered an order granting, the Rejection Motion. TWA's rejection of the Ticket Agreement is a condition of closing the sale with American.

Bankruptcy Rule 8005 governs the issue and provides in relevant part:

> [n]otwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.[2] Fed.R.Bank.P. 8005.

The granting of a motion for stay pending appeal is discretionary with the court. The movant must show that: (1) it

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[2] Fed.R.Bank.P. 7062 incorporates Rule 62 of the Federal Rules of Civil Procedure and lists several specific matters in which the court may issue a stay pending appeal.

will likely succeed on the merits of the appeal; (2) it will suffer irreparable injury if the stay is not granted; (3) a stay would not substantially harm other parties in the litigation; and (4) a stay is in the public interest. Family Kingdom, Inc. v. EMIF New Jersey Ltd. P'Ship (In re Family Kingdom, Inc.), 225 B.R. 65, 69 (D. N.J. 1998); In re Roth American, Inc., 90 B.R. 94, 95 (Bankr. M.D. Pa. 1988). No factor alone is outcome determinative. In re Roth, 90 B.R. at 95. Rather, proper judgment under Rule 8005 "entails a 'delicate balancing of all elements.'" In re Roth, 90 B.R at 95 quoting In re Hotel Assocs., Inc., 7 B.R. 130, 132 (Bankr. E.D. Pa. 1980).

I find that Karabu fails to establish any of the elements necessary for issuing a stay pending appeal. Karabu presented the same arguments it sets forth in the Stay Motion during the extensive testimony and oral argument surrounding both the Sale Motion and Rejection Motion. The parties extensively briefed the Rejection Motion and in fact, Karabu attaches and incorporates its opposition to the Rejection Motion in its Stay Motion.

Karabu is essentially asking me to reconsider my position on the Rejection Motion. It is not advancing any law or facts additional to those heretofore presented to me and which I have already considered in depth and rejected. I will nevertheless address each of the four factors involved in the stay motion.

**I. Likelihood of Success on the Merits.**

I am not persuaded that Karabu will prevail on appeal. As I stated at the end of oral argument on Monday, March 12, 2001, I do not consider this a close question. Karabu's arguments under both judicial estoppel and *res judicata* are inconsistent with the case law in this Circuit. I discussed both doctrines at length in the March 12 Opinion.

For the reasons summarized below, I believe the likelihood of reversal on appeal is low.

In my March 12 Opinion I concluded that the right of a debtor in possession, in the discharge of its fiduciary duty to the creditor and interest holder constituencies, could not be bound by a prepetition waiver of such a fundamental bankruptcy law right as executory contract rejection--a right designed for the benefit of the bankruptcy estate. The fact that the waiver is in a contract which became a part of the TWA financial structure when its 1995 plan of reorganization was approved in TWA II does not impair this fundamental right of the estate in TWA's present bankruptcy. Absent a finding by the bankruptcy court in TWA II that the waiver provision bound the TWA estate in any subsequent bankruptcy, the waiver provision here stands on no better footing than a waiver provision in a prepetition contract that was not a part of a prior bankruptcy case. To suggest that this waiver provision should be given different treatment because it is found in a document that became a part of TWA's financing in TWA II would open the door to

the mischief of burying provisions such as this one in voluminous contractual documents which typically accompany the plan confirmation process--a process in which no bankruptcy judge can be expected to independently examine the details of every relevant contractual document prior to entering a confirmation order--absent the contract being the subject of a contested matter, which the Ticket Agreement clearly was not.

Karabu argues that it will likely succeed on appeal because "TWA can offer no evidentiary support for the notion that the general unsecured creditors of these estates will benefit from the rejection of the Karabu Contract. Indeed, the rejection can have no conceivable benefit because TWA admits that there will be no recoveries to general unsecured creditors in any event." Stay Motion at p. 4, ¶ 11. The standard under § 365(a), however, requires consideration of the benefit of rejection to the debtor's *estate*. E.g., N.L.R.B. v. Bildisco (In re Bildisco), 682 F.2d 72, 79 (3d Cir. 1982) aff'd, 465 U.S. 513 (1984). The debtor's estate encompasses diverse classes of creditors, including employees, and is not limited to what Karabu has labeled as "general unsecured creditors." The evidence was overwhelming that not approving TWA's sale to American would put this Chapter 11 case in a free-fall context and likely cause a collapse of TWA with a consequential loss of value to TWA's estate, including its approximately 20,000 employees and numerous other group of creditors, secured and

unsecured. Thus, TWA's rejection of the Ticket Agreement as part of the sale transaction is in the best interests of the TWA's estate even if there is little or no dividend to a portion of general unsecured creditors. In this regard, I note that the Official Committee of Unsecured Creditors supported TWA's Rejection Motion.

Karabu also argues it will likely succeed on the merits of its appeal because I should not have deferred to TWA's business judgment in the face of alleged improper insider conduct. Karabu once again maintains that TWA's sale to American was motivated by "the desire of TWA's senior management to retain their jobs, to avoid being replaced by a crisis management team from Jay Alix & Associates as part of TWA's 'self help' plan, and to receive lucrative bonuses." Stay Motion at p. 4, ¶ 12. Chief Judge Sue L. Robinson rejected this argument at the January 26-27, 2001 hearing. I rejected this argument after the March 9-10, 2001 hearings. The record is devoid of any evidence of bad faith. As I commented in my ruling approving the Sale Motion, the benefit to TWA's management under the key employee retention program is not contingent on a successful sale to American. The incentive program accrues to the benefit of TWA's senior management even if some other transaction, i.e., one other than the sale to American, is consummated.

Finally, Karabu argues it will succeed on appeal because the evidence does not support TWA's claim that the Ticket Agreement impairs TWA's revenue and yield management system. Stay Motion at p. 5, ¶ 13. In support of this position, Karabu quotes from a 1998 Missouri state court opinion, arising out of an action between Karabu and TWA over the Ticket Agreement, in which the court found that TWA had not proved its damage claim. There are two fundamental flaws to Karabu's position. First, whatever the record on damages established in the prior state court action is not the record that was set forth before this Court and the state court was obviously not sitting as a bankruptcy court in deciding a § 365 rejection issue. Second, as my March 12 Opinion made clear, TWA's testimony regarding the Ticket Agreement's material adverse impact on its revenue and operations was convincing and not seriously challenged by Karabu in its cross examination of TWA witnesses. And, of course, Karabu offered no testimony on this issue. Karabu offered to introduce the state court opinion into evidence at the hearing on this matter. I found that it was irrelevant then and it is still irrelevant.

**II. Irreparable Harm.**

Karabu argues that absent a stay pending appeal, the business of Karabu and its affiliate, Lowestfare.com, will be irreparably harmed because both entities will be forced out of business. At the outset, I note that there is no record evidence

of Karabu's assertion that TWA's rejection of the Ticket Agreement will put Karabu or Lowestfare.com out of business. Karabu did not present any witness to testify about harm, irreparable or otherwise, to Karabu.

To the extent Karabu and Lowestfare.com are harmed by TWA's rejection of the Ticket Agreement, however, I find the harm does not warrant issuing a stay in the context of a § 365 contract rejection order. In many, if not most, Chapter 11 cases the rejection of an executory contract results in irreparable harm to the nondebtor party to the contract. That is, the deemed prepetition breach (§ 365(g)) results in a prepetition unsecured claim which in most cases does not result in a 100% money judgment recovery. Indeed, in many cases the recovery for such nondebtor parties (as an unsecured non-priority claimant) is a small fraction of the damage claim resulting from the breach and in some cases, possibly this one included, the recovery may be zero.

The debtor's authority to reject an executory contract under § 365(a) is "vital to the basic purpose [of] a Chapter 11" bankruptcy. N.L.R.B. v. Bildisco, 465 U.S. 513, 528, 104 S.Ct. 1188 (1984). Presumably Congress considered the harm, including irreparable harm, to the nondebtor party acceptable when it enacted the statute. For the reasons explained in detail in the March 12 Opinion, I also reject the "balancing of equities" test under § 365 in determining whether a debtor may reject an executory contract.

See, e.g., In re Patterson, 119 B.R. 59, 61 (E.D. Pa. 1990)(fairness to the nondebtor party is irrelevant in determining whether debtor may reject contract).

Karabu cites In re Family Kingdom, 225 B.R. 65 (D. N.J. 1998), as supporting its stay relief. I find that case inapposite. In that case, the District Court granted the *debtor's* motion for a stay pending appeal of the bankruptcy court's order denying the debtor's motion to assume a lease. The District Court found irreparable harm absent a stay because without the ability to assume the lease, the debtor's "substantial investments in [its amusement park] and in rides, and its entire business would be lost, even if ultimately, the appeal is successful." In re Family Kingdom, 225 B.R. at 75. Thus, the court's focus was on preserving the value of the debtor, not on the harm to the nondebtor party to the contested lease.

Furthermore, the outcome in Family Kingdom turned on a question of law that was vulnerable to reversal on appeal, i.e., whether the lessor had terminated the lease prepetition under applicable nonbankruptcy law thereby precluding the debtor from assuming the lease under § 365(c). Id. at 68-69. In contrast, the Rejection Motion is based on a very deferential standard, i.e., the business judgment rule of the debtor-in-possession. Also, as noted above, the Committee of Unsecured Creditors supported the Rejection Motion and concluded it was in the creditors' best interests to

reject the Ticket Agreement. As I previously held, "Karabu's claim that both TWA and the Committee have made an unwise decision as to what is in the best interests of creditors and TWA's other constituents is insufficient as a matter of law to deny the exercise of TWA's business judgment in seeking to reject an executory contract." March 12 Opinion at pp. 37-38.

**III. Harm to TWA if Stay is Granted.**

The evidence is clear that TWA will suffer substantial harm if I grant a stay pending appeal of the Rejection Motion. Rejection of the Ticket Agreement is a condition of closing TWA's sale to American. At the hearing, the parties testified that they intend to close the sale as soon as possible, possibly within the next thirty days. To the extent a stay pending appeal delays TWA's ability to close the sale transaction with American, TWA will suffer harm, especially given that TWA's cash-burn rate is $3,000,000 per day.

The uncontroverted testimony on March 10, 2001 also established that the Ticket Agreement results in substantial lost revenue to TWA. Consequently, for every day that TWA is unable to close the sale transaction, TWA suffers an economic loss from the Ticket Agreement. I also reiterate the Committee's view that if TWA does not reject the Ticket Agreement as part of the American transaction or some other similar alternative, it is unlikely that TWA will find a strategic partner willing to assume the Ticket

Agreement that drains revenues and impairs financial planning and operations.

In its opposition to the stay motion, TWA fairly summarizes this matter as follows:

> "Based on the uncontroverted evidence presented by TWA on March 10, 2001, this Court found that the Karabu Ticket Agreement constituted a material burden on TWA because the Agreement (1) had a significant negative impact on TWA's revenue, (2) rendered TWA incapable of managing its yield; (3) caused TWA to forego certain business opportunities, including online and other discounted ticket sales programs, (4) impeded TWA's efforts to enter into a strategic transaction with another airline, and (5) contributed to TWA's inability to find a solution short of bankruptcy to its financial difficulties. Memorandum Opinion at 8 - 11. These are quintessential grounds for a Debtor to exercise its prerogative under 11 U.S.C. § 365 to reject an executory contract..."

Debtors' Opp. at p. 1.

Accordingly, I find that TWA will suffer substantial harm if I issue a stay pending appeal.

**IV. The Public Interest.**

Karabu argues that a stay pending appeal comports with the public interest and claims that TWA cannot present any legitimate public interest in avoiding the stay. Stay Motion at p. 6, ¶ 19.

I disagree. Karabu asserts that "[a] stay would comport with the public interest because the public would be able to continue purchasing lower priced airline tickets." Stay Motion at p. 6, ¶ 19. By this reasoning TWA should keep the Ticket Agreement

in force for the benefit of the public notwithstanding its material adverse impact on the ability of TWA to continue as a viable operating business. I reject the notion that this is what the case law means in applying the public interest test.

There is substantial public interest in preserving the value of TWA as a going concern and facilitating the sale to American. In approving the Sale Motion I found that the consequences of a free-fall chapter 11 case for TWA would likely be disastrous for various creditor constituencies. The public interest favors a smooth transition of TWA to American and issuing a stay pending appeal does not further this interest.

**Conclusion**

Karabu has not advanced any law or facts not already considered by me and discussed at length in the March 12 Opinion. For the reasons set forth above, I deny Karabu's motion for a stay pending appeal.

SO ORDERED.

Very truly yours,

Peter J. Walsh

PJW:ipm