UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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April 2, 2001

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Re: Trans World Airlines, Inc., et al.
Case No. 01-00056 (PJW)

Dear Counsel:

Before the Court are three emergency motions and one joinder for a stay pending appeal of my March 12, 2001 order ("Sale Order") granting the motion ("Sale Motion") of Trans World Airlines, Inc. ("TWA" or "Debtors") to sell substantially all of its assets to AMR Corporation ("American"). The following parties

filed stay motions: High River Entities (Doc. # 1021); the Statutory Committee of Unsecured Creditors of Trans World Airlines, Inc. (Doc. # 1029) ("Committee"); and the *Ad Hoc* Committee of Senior Noteholders (Doc. # 1036). The General Federation of Jewish Labor in Israel-Union of Clerical, Administrative and Public Service Employees filed a joinder (Doc. # 1053) with the Committee's motion. I will hereinafter refer to these motions collectively as the "Stay Motions" and to the parties together as "Objecting Parties". TWA and American filed individual oppositions (Doc. # 1055 and Doc. # 1056 respectively).

The procedural background of this matter and the legal standard for a stay pending appeal under Fed.R.Bank.P. 8005 are set forth in my two recent letter rulings: In re Trans World Airlines, Inc., Ch. 11 Case No. 01-56(PJW), slip op. (Bankr. D. Del. March 12, 2001)(denying High River Entities' emergency motion for stay pending appeal of order granting TWA's motion to reject ticketing program agreement with Karabu Corp. under § 365[1]) and In re Trans World Airlines, Inc., Ch. 11 Case No. 01-56(PJW), slip op. (Bankr. D. Del. March 27, 2001)(denying emergency motion for stay pending appeal of Sale Order by the Equal Employment Opportunity Commission and the United States). Those two rulings also address a number of issues raised by the Stay Motions. Also, on February 21, 2001 in

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

denying Continental Airline's stay motion pending its appeal of the bid procedures order I made findings relevant to a number of the issues raised by the Stay Motions. I incorporate herein by reference those three rulings.

In considering the Stay Motions, I note that the combined pleadings on the motions total approximately 140 pages, that the transcript of the three day hearing on March 9, 10 and 12, 2001 ("Sale Hearing") totals 899 pages, and that voluminous exhibits (including the January 26 and 27, 2001 District Court hearing transcripts and deposition transcripts) have been submitted to me.[2] Given this Court's present caseload, I am unable to address each stay motion individually, nor can I discuss each contested issue.

Accordingly, in the interest of resolving these motions as quickly as possible under the circumstances, in addition to my prior rulings denying stays pending appeal, I will set forth the following findings of fact and conclusions of law which I believe establish that a stay of the Sale Order pending appeal is not warranted under Fed.R.Bank.P. 8005. This opinion applies to all the stay motions and for the reasons set forth below I will deny

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[2] I will refer to the transcripts as follows. "First Day Tr." is the transcript of the January 10, 2001 hearing. "Bid Procedures Tr." is the transcript of the January 26 and 27, 2001 hearing. "Stay Hearing Tr." is the transcript of the February 21, 2001 hearing. "Sale Hearing Tr." is the transcript of the March 9, 10 and 12, 2001 hearing.

each motion.

1. TWA employs approximately 20,000 employees. It maintains its primary domestic hub in St. Louis, Missouri and is currently the eighth largest airline in the United States.

2. TWA filed its first chapter 11 bankruptcy petition in 1992. It filed its second chapter 11 bankruptcy petition in 1995. TWA filed this, its third chapter 11 bankruptcy, on January 10, 2001.

3. TWA has not earned a profit for over a decade. It incurred operating losses of $29.26 million in 1997, $65.16 million in 1998, and $347.64 million in 1999. American Response at 6, n.2.

4. In Spring 2000, TWA retained the firm of Rothschild, Inc. ("Rothschild") as investment banker to address TWA's increasingly perilous financial condition. Sale Hearing Tr. at 175. In consultation with Rothschild, TWA determined it could no longer continue as a standalone airline and that its only feasible means of survival was to enter into a strategic transaction, i.e., a merger with, or sale of TWA as a going concern to, another airline. Id. at 180-83.

5. In their effort to find a strategic partner, TWA and Rothschild approached more than seven airlines, including Delta, Continental, United and U.S.Air. As of January 2, 2001, none of these airlines was prepared to acquire a broad base of TWA's assets or to preserve the company as a going concern. Sale Hearing Tr. at 177; American Response at 6.

6. TWA and Rothschild contemporaneously worked on a "self-help" plan to secure additional time during which TWA could seek a strategic partner. The self-help plan contemplated raising capital and obtaining labor and lessor concessions to avert or delay the impending liquidity crisis. It was an alternative to imminent liquidation and was not intended to enable TWA to emerge from its financial crisis as a standalone viable entity. Sale Hearing Tr. at 182-83.

7. TWA and Rothschild did not expect the self-help plan to provide the ultimate solution to TWA's fundamental financial challenges. For example, the plan did not address the fact that TWA is a single hub airline, that it has a limited market presence and lacks broader travel related programs with other airlines, and that it continues to suffer from the material adverse economic burden of its ticketing program agreement with the High River Entities' affiliate, Karabu Corp. Sale Hearing Tr. at 182.

8. In essence, the self-help plan amounted to a gap measure to get TWA to a strategic transaction. It would have enabled TWA to avoid liquidation over the winter of 2000 - 2001, but no more. Despite TWA's obtaining tentative concessions from its lessors and labor unions, TWA was unable to raise the necessary capital infusion and therefore could not implement the self-help plan. Sale Hearing Tr. at 175-77.

9. Throughout 2000, TWA had intermittent discussions with American regarding a possible strategic transaction. On

January 3, 2001, the CEO of American contacted the CEO of TWA with an offer to purchase the assets of TWA as a going concern. Sale Hearing Tr. at 183-84.

10. TWA immediately started negotiations with American the next morning. The negotiations lasted several days and were in the nature of typical merger and acquisition talks. Although TWA was not in the best bargaining position because of its financial condition, it nevertheless obtained meaningful concessions from American during the negotiations. Sale Hearing Tr. at 183-85.

11. One significant concession TWA obtained concerned its retired employees. American's initial proposal was an offer of $ 500 million for substantially all of TWA's assets and its active employees and most of their nonpension post-retirement benefits. Sale Hearing Tr. at 186-88. TWA felt that this was not a reasonable proposal. Over the course of the next several days, TWA bargained until American agreed to add approximately $ 232 million to the transaction and to assume not just the post-retirement benefits of TWA's active employees, but those of its retired employees as well. As a result, American agreed to assume what amounted to approximately $ 509 million in additional liabilities. Sale Hearing Tr. at 187.

12. When I approved the Sale Motion, I found that TWA's transaction with American was at arm's length, negotiated in good faith and for fair value. There is simply no evidence of unlawful insider influence or improper conduct. Nor is there any evidence

of fraud or collusion between American and TWA, or American and other bidders. These findings are consistent with In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143 (3d Cir. 1986). In Abbotts Dairies, the Court of Appeals for the Third Circuit reversed an order approving the sale of substantially all of the debtor's assets under § 363(b) because the bankruptcy court did not make an explicit finding of good faith regarding the buyer's behavior during the course of the sale proceedings. 788 F.2d at 151.

13. According to the Third Circuit, "[t]he requirement that a purchaser act in good faith . . . speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." 788 F.2d at 147 quoting In re Rock Indus. Mach. Corp., 572 F.2d 1195, 1198 (7th Cir. 1978).

14. The Third Circuit rejected the debtor's argument that the bankruptcy court implicitly made a finding of good faith by approving the sale. Id. at 148. The court noted that the evidence could support a finding that the debtor contrived the emergency which allegedly justified the immediate sale of the debtor's assets to the buyer because the debtor's CEO may have permitted the buyer to manipulate the timing of the bankruptcy filing in exchange for a lucrative employment agreement with the

buyer following the sale. Id. The court concluded that this would constitute collusion between the buyer and debtor, or an attempt to take unfair advantage of other buyers, sufficient to destroy the buyer's good faith status if the objecting parties could substantiate their claims. Id.

15. Accordingly, the Third Circuit directed the bankruptcy court on remand to determine (a) whether there was impermissible collusion that would negate the buyer's good faith status; (b) in the event of collusion, whether the buyer paid "value" for the assets purchased; (c) in the absence of value, whether the bankruptcy court had the power to undo the sale to the buyer; and (d) if the court found it had the power to undo the sale, whether it should, in an exercise of its equitable jurisdiction, pursue an alternate remedy. Abbotts Dairies, 778 F.2d at 151.

16. Consistent with this mandate, I found in ruling on the Sale Motion that American did not manipulate the timing of TWA's bankruptcy. In the absence of the American agreement, TWA would have filed for chapter 11 relief days earlier then the January 10, 2001 filing. Sale Hearing Tr. at 380. That filing would have been a "free fall" chapter 11 case with its attendant outcome risks.

17. Neither American nor TWA contrived an "emergency." Before negotiating the Asset Purchase Agreement, TWA ended the year 2000 with $ 100 million in cash, which TWA's testimony established

was $ 50 to $ 100 million less than TWA needed to survive its winter season. TWA's approximate cash balance on January 10, 2001 was $20 - 30 million and TWA needed $ 40 million to fund its operations the next day. First Day Tr. at 54. As this chapter 11 case progressed, TWA had, and continues to have, a cash burn rate of $ 3 million per day.

18. Section 1110 further dictated the time constraints of the bid procedures and the need to bring this matter on for a § 363 sale within 60 days of the petition date. TWA leases approximately 97% of its 180 aircraft. Sale Hearing Tr. at 21. It had to complete the auction and sale process no later than March 12, 2001 to avoid the very real prospect of having its fleet grounded by the § 1110 lessors. The Code imposes this deadline for all airlines filing for bankruptcy and no bankruptcy court has any authority to delay, for "cause" or any other reason, the exercise by aircraft lessors of their § 1110 right to either timely rental payments or repossession. Absent the DIP Financing provided by American as a part of the proposed sale transaction, it is clear that TWA did not have the funds to satisfy its lease obligations.

19. Contrary to the assertions of the movants, the court-approved key employee retention program does not establish collusion between TWA and American because the benefits under the program accrue to TWA's senior management even if some other transaction, i.e., one other than the sale of TWA's assets to

American, including a standalone reorganization, is consummated. Notably, the Committee withdrew its objection to the key employee retention program during the January 27, 2001 hearing. Bid Procedures Tr. at 7.

20. TWA had no other strategic transaction available to it and had no other offer for value to which it could turn. Nor could TWA rely on its self-help plan because TWA was unable to procure adequate capital infusion to implement that plan. Its only alternative was a free fall chapter 11 filing with the high likelihood of a piecemeal liquidation of the enterprise.

21. On January 9, 2001, Rothschild presented the Asset Purchase Agreement to TWA's Board of Directors ("TWA Board"). In accordance with industry practice, Rothschild did not issue a formal fairness opinion because the auction proceeding itself was expected to reflect the fair market value of the assets sold, i.e., the highest and best bid. Sale Hearing Tr. at 188. In this regard, it is worth noting that a § 363(b) sale transaction does not require an auction procedure. The auction procedure has developed over the years as an effective means for producing an arm's length fair value transaction.

22. Rothschild did, however, provide the TWA Board with an analysis of the American transaction. In doing so, Rothschild evaluated the transaction in the context of other comparable transactions in the airline industry. It evaluated publicly traded companies and the multiples at which they were being valued. From

this it concluded that American's offer for TWA was in line with market value, notwithstanding TWA's poor financial performance (i.e., the fact that in 2000 TWA had a negative EBIDTA). Rothschild concluded that American's price was reasonable and reflected the strategic value of TWA to a strategic buyer. Sale Hearing Tr. at 189.

23. In its presentation to the TWA Board, Rothschild compared the American transaction under the Asset Purchase Agreement to a possible liquidation. Rothschild concluded that the American transaction provided higher value than a liquidation scenario. Sale Hearing Tr. at 190.

24. Rothschild determined that the American transaction best served the interests of TWA's creditor constituencies for the following reasons:

(a) The American transaction captured the value of TWA as a going concern. Even though TWA was losing money and had lost money for a number of years, TWA did have important assets including a strategically positioned hub, gates, slots, routes and an experienced work force. Sale Hearing Tr. at 191.

(b) The sale of TWA as a going concern avoided the most likely alternative, which was the piecemeal liquidation of individual assets. Sale Hearing Tr. at 191.

(c) The American transaction addressed the fundamental structural issues TWA faced. These included the fact that TWA was a single hub airline, highly leveraged, and illiquid. The American transaction enabled TWA to become part of a larger, stronger air carrier. Sale Hearing Tr. at 191-92.

(d) Under the Asset Purchase Agreement, TWA's estate was able to convert a group of volatile assets, i.e., assets that could drop precipitously in value, into cash thereby avoiding the risk that the company would deteriorate further. Sale Hearing Tr. at 191-92.

(e) The sale of TWA as a going concern also provided additional benefits in the form of continued employment for TWA's 20,000 employees and significant economic benefits to St. Louis from having a major air carrier continue to operate in the city. Sale Hearing Tr. at 192-93.

25. On January 9, 2001, the TWA Board approved the Asset Purchase Agreement. On January 10, 2001, TWA filed for chapter 11 relief as contemplated under the Asset Purchase Agreement and sought authorization to consummate the transaction, subject to competing bids in an auction process. A condition of the Asset Purchase Agreement was that American would provide TWA's debtor-in-possession financing ("DIP Financing").

26. At its first day hearing on January 10, 2001, TWA requested District Court Chief Judge Sue L. Robinson, sitting in bankruptcy, to establish an expedited schedule to consider TWA's request to obtain permanent DIP Financing from American, to approve the key employee retention program, and to approve a bidding procedures order. First Day Tr. at 7, 43-45. Judge Robinson scheduled a hearing on these matters for January 26 and 27, 2001.

27. During the night and morning of January 26 and 27, 2001, TWA negotiated with the Committee and American over the bidding procedures that would govern the auction. Bid Procedures

Tr. at 7, 91-96. The parties modified the bidding procedures *inter alia* as follows:

> (a) Qualifying bids could also include "alternative transactions" including proposed standalone plans of reorganization.
>
> (b) Multiple bidders could join together and submit combined offers for assets.
>
> (c) Bidders could bid separately on TWA's interest in its computer reservation system, Worldspan, which was valued at approximately $ 200 million.
>
> (d) American would reduce its breakup fee from $ 65 million to $ 55 million.
>
> (e) American would remit $ 4 million of the DIP Financing fees to TWA's estate if the American transaction closed.

28. In light of these modifications, the Committee withdrew its objections to the bidding procedures motion. Specifically, counsel for the Committee stated:

> We withdrew our objections to the sale procedures. The sale, the efforts to do something with this debtor, whether it's a sale or a plan, needs to go forward. . . . If prospective purchasers want to cherry pick and they want to do it in such a group or grouping so it creates a higher better result, creates success -- and I measure success in a very simple way: What is going to be in the pockets of the unsecured creditors? If it does that, and it creates a sufficient amount of recovery, and distribution to all unsecured creditors and not just limited groups that are covered by the American proposal but all unsecured creditors, then it may be the highest and best bid, and that is what we'll be looking for come the next three or four weeks. . .

> But we've got to get that process started. And it can be done in a plan, it can be done in a sale. It can be done in a group sale. Use your imagination, people. Continental Airlines, use your imagination. If you want to buy it, buy it. Northwest, if you want to buy something, buy it. Mr. Icahn, if you want to buy, buy it. But do it. Now is your chance. We tried to open up the process. We hope we've done a good job of opening up the process. We've done the best we could in the time frame we have. But let's get started, let's get moving with it. That's the position of the Creditors' Committee as a Committee. Bid Procedures Tr. at 220-21.

29. Judge Robinson held an all day hearing on Saturday, January 27, 2001 at which the evidence established:

(a) Public perception of TWA's ability to consummate the American transaction directly impacted TWA's revenue. Specifically, when TWA first announced its agreement with American, TWA bookings improved by 40% to 50%. When Continental Airlines and Carl Icahn, along with others, asserted objections during the proceedings, TWA's bookings dropped. Bid Procedures Tr. at 16-17.

(b) TWA was in a liquidity crisis and would have run out of money but for the American DIP Loan. Bid Procedures Tr. at 11-14.

(c) American was the only entity prepared and able to provide TWA with the necessary financing. Bid Procedures Tr. at 16, 19-27.

(d) The terms of the American DIP Financing, including its breakup fee, were fair and reasonable under the circumstances. Bid Procedures Tr. at 16, 19-27.

(e) The bidding procedures were fair and reasonable under the circumstances and were necessary to enable TWA to conduct a

going-concern auction. Bid Procedures Tr. at 81, 86-88.

30. At the end of the January 27, 2001 hearing, Judge Robinson granted TWA's motion for approval of the bidding procedures and the DIP Financing. She entered an order approving the DIP Financing ("DIP Financing Order") on the same day and entered a bidding procedures order ("Bidding Procedures Order") on February 7, 2001.

31. On February 9, 2001, Continental Airlines ("Continental") filed a notice of appeal (Doc. # 350) and on February 14, 2001 a motion for stay pending appeal (Doc. # 429) of the Bidding Procedures Order. On February 21, 2001, I held a hearing on the motion for stay pending appeal. I denied Continental's motion.

32. In so ruling, I found that the Bidding Procedures Order, as modified, was reasonable and appropriate under the circumstances. The expedited time frame and other procedures in the Order were reasonable given that TWA had no real prospect for a standalone reorganization at the outset of the case, was running out of operating funds, and was facing the § 1110 deadline. I found the Bidding Procedures Order was consistent with similar orders I have entered in a number of other chapter 11 cases involving debtors in severe financial distress. Stay Hearing Tr. at 39-40.

33. TWA was and has been in dire financial straights for

a considerable period of time. It had no real prospect for a standalone reorganization. This is TWA's third chapter 11 case in less than ten years and a sale of its business as a going concern is its only real hope for significant recoveries for significant segments of its creditor constituencies. Stay Hearing Tr. at 41-42.

34. Accordingly, I concluded that Continental had little likelihood of success on the merits. I also found that the record overwhelmingly supported a conclusion that a stay of either the Bidding Procedures Order or the DIP Financing Order posed a serious threat of substantial irreparable harm to the TWA estate.

35. The Bidding Procedures Order required that competing bids, to qualify, had to be submitted to TWA by February 28, 2001 in final written form with details, commitments, a $ 50 million good faith deposit, and no "due diligence" outs. Bidding Procedures Order at 4-5.

36. The Bidding Procedures Order established March 5, 2001 as the auction date and March 9, 2001 as the date for the sale hearing. The Order clearly stated that TWA would only consider qualified competing bids received by February 28, 2001. Bidding Procedures Order at 4-5.

37. The only bid TWA received on February 28, 2001 was the American bid.

38. On February 28, 2001, TWA Acquisition Group, Inc. (hereinafter "Icahn/Freeman"), an entity affiliated with Carl Icahn, submitted a two page term sheet which proposed that TWA

should emerge from bankruptcy as a stand-alone entity pursuant to a plan of reorganization. Sale Hearing Tr. at 197-208.

39. The Icahn/Freeman proposal did not comply with the Bidding Procedures Order in form or substance. It made no commitment to TWA; it was not a binding agreement to propose a plan; it had no realistic or detailed plan for preserving TWA as a standalone entity; and it was submitted without the $ 50 million deposit. At best it was simply an opener for discussion. Sale Hearing Tr. at 369. I found the Icahn/Freeman proposal to be completely inadequate as an "alternative transaction" proposal contemplated by the Bidding Procedures Order. Tr. at 368-69; 813-14. I respectfully suggest that that finding is unassailable. Indeed, counsel for Icahn/Freeman stated that "noncompliance of the bidding procedures is something I think the Freeman Group is prepared to stipulate to." Sale Hearing Tr. at 366.

40. Icahn/Freeman did not provide a deposit nor any further information to TWA at any time between February 28, 2001 to March 4, 2001. Sale Hearing Tr. at 197-200.

41. On March 5, 2001, the day of the auction, Icahn/Freeman submitted a "bid" in the form of a draft DIP financing agreement supplemented with miscellaneous financial information which purported to set forth a proposal for TWA to emerge from bankruptcy as a standalone entity. The proposal did not provide Rothschild with sufficient data to allow a meaningful review of its viability. Sale Hearing Tr. at 201.

42. TWA and Rothschild nevertheless suspended the auction until Wednesday, March 7, 2001 at 6 :00 p.m. to consider the Icahn/Freeman proposal. On the evening of March 5, 2001, TWA and Rothschild met with Icahn/Freeman representatives to discuss the proposal. In Rothschild's opinion the meeting raised many more questions. Sale Hearing Tr. at 203-06. TWA asked for detailed projections and assumptions by Wednesday so as to permit further analysis of the proposal. Sale Hearing Tr. at 204.

43. Icahn/Freeman did not provide any further information to TWA by the time TWA resumed the auction at 6:00 p.m. on Wednesday, March 7, 2001. Sale Hearing Tr. at 205.

44. Based on the information provided, TWA concluded that the Icahn/Freeman DIP proposal did not set forth a realistic plan for preserving TWA as a standalone entity for the following reasons:

(a) The term sheet did not provide a realistic source of capital to allow TWA to emerge from chapter 11 pursuant to a plan. The capital sources proposed (e.g., the sale of TWA's interest in Worldspan, a piecemeal sale of gates and slots) were sources TWA had already unsuccessfully attempted to liquidate. Sale Hearing Tr. at 210-11.

(b) The term sheet did not reflect significant severance and restructuring costs associated with a proposed downsizing of the airline by exiting or reducing TWA's exposure at John F. Kennedy Airport in New York, a key city for TWA. Sale Hearing Tr. at 211.

(c) The term sheet presumed an ability to

reinstate various issues of secured debt. It also presumed the ability to obtain further concessions from TWA's labor force and aircraft lessors. TWA and Rothschild felt the presumptions unwarranted based on TWA's prior negotiations with these groups and TWA's poor historical financial performance. Sale Hearing Tr. at 214-15.

(d) The proposed DIP financing included several riders which TWA and Rothschild felt ceded unusual control to the DIP lender, Carl Icahn. The riders included a provision pursuant to which TWA ceded its plan exclusivity period to the DIP lender. It also provided a representative of the DIP lender with observer rights, i.e., the ability to have someone at the company participating in all discussions about its operations and key decisions. Sale Hearing Tr. at 215-16.

(e) The term sheet also failed to indicate how TWA would sustain cash flow during its reorganization. The proposed DIP facility was contingent on TWA obtaining a plan by June 30, 2001, but the term sheet did not provide how TWA would generate operating funds during this time. Sale Hearing Tr. at 217.

(f) The term sheet specified that if TWA was unable to obtain a consensual plan by June 30, 2001, then the DIP facility would expire and TWA would be auctioned off on August 31, 2001. Sale Hearing Tr. at 218.

45. On the afternoon of March 7, 2001, American agreed to increase its purchase price from $ 500 million to $742 million. Shortly thereafter, the TWA Board voted to accept the American proposal. Sale Hearing Tr. at 453, 474.

46. American complied with, and was the only entity that complied with, the Bidding Procedures Order. By February 28, 2001, American had "gone firm" as required under Order by designating the contracts and liabilities it intended to assume while giving up its relevant due diligence closing conditions under the Asset Purchase Agreement.

47. Nothing in the Bidding Procedures Order prohibited American from increasing its purchase price after February 28, 2001. Once qualified, a bidder may increase its bid without violating the terms of the underlying procedures order. The record does not support a finding of why American increased its bid price in the absence of a competing bid. One could speculate that it did so to enhance the prospects for obtaining court approval of the sale transaction. I find nothing improper in such conduct -- it enhanced the value of the transaction to the bankruptcy estate.

48. On March 8, 2001, after TWA had concluded the auction and one day before the final sale hearing, Icahn/Freeman submitted revised DIP financing proposals to TWA. The proposals were still not a commitment to consummate a transaction. Nor did they address TWA's fundamental structural concerns, i.e., under the revised proposals TWA would remain a single hub airline based in St. Louis; it would be even more highly leveraged than before it entered this chapter 11 bankruptcy; it would continue to be burdened by the financially burdensome Karabu ticketing program agreement; and it would not pursue a strategic transaction. Sale

Hearing Tr. at 220-223.

49. Icahn/Freeman's revised proposals were not viable or meritorious alternative transactions. The proposals were nonconforming bids and as counsel admitted, they were procedurally defective. As such, neither TWA nor this Court were required to consider them.

50. Icahn/Freeman continuously revised its proposals, from its initial two page term sheet submitted on February 28, 2001 through the date of the Sale Hearing. It made no effort to comply with the terms of the Bidding Procedures Order by presenting a reorganization proposal, as defined and permitted by the Order, to TWA by February 28, 2001. Icahn/Freeman had the opportunity to present its DIP financing proposal to TWA under the Bidding Procedures Order but it elected not to do so. Instead, Icahn/Freeman attempted to present its DIP financing proposal to TWA's Board and then to this Court as an alternative transaction after March 5, 2001.

51. Bidding procedures are necessary to permit the debtor, typically in consultation with the creditors' committee, to evaluate competing proposals and to decide which is the highest and best and then come in to the court and offer one of the proposals for approval under § 363. Icahn/Freeman attempted to circumvent this procedure.

52. Icahn/Freeman's counsel admitted that "to make this deal work from our perspective, you needed three things. You

needed a financial restructuring, you needed an operational restructuring and you needed a business restructuring." Sale Hearing Tr. at 720. Towards this end, Icahn/Freeman proposed at the sale hearing to put on testimony from an expert consultant to describe a computer based model showing how TWA could be turned into a profitable enterprise on a stand alone basis. Sale Hearing Tr. at 723.

53. It is obvious that the Bidding Procedures Order did not permit a "bidder" to proceed in this manner, i.e., by making a presentation of a business plan to this Court with a view to having the Court direct TWA to pursue negotiations with the Icahn/Freeman group to come up with a plan of reorganization and put the American transaction on hold pending the outcome of those negotiations. Adopting such a procedure would effectively nullify the Bidding Procedures Order and turn the § 363(b) sale hearing into some type of open forum for any party in interest to propose a solution to TWA's problems. The result would be procedural confusion.

54. Icahn/Freeman's counsel requested an opportunity to put witnesses on "for this Court to consider the availability of an alternative transaction or the availability or probability of being able to get to a plan of reorganization." Sale Hearing Tr. at 351. I denied that request as being fundamentally inconsistent with § 363(b) sale procedures. It is not the function of a bankruptcy court to independently exercise a business judgment as to which proposal among competing proposals should be adopted by

the debtor in effecting a § 363(b) sale. As noted above, the bid procedure is designed to have transaction proponents present their proposals to the board of directors of the debtor who, with the assistance of the professionals, including financial advisors, decide which of the competing proposals is the highest and best offer. Once the debtor's board of directors has made its decision, exercised in the context of its fiduciary duty to the estate, the debtor then seeks the approval of the bankruptcy court for a particular transaction. Any party in interest may object to the proposed transaction and indeed such a party may argue that the debtor's proposed transaction is not the best for the estate. However, it is not appropriate for a "bidder" to come into the hearing with a proposal which has not been properly presented to the debtor's board of directors and its advisors pursuant to a court ordered bidding procedure, but instead to seek to have the bankruptcy court exercise its independent business judgment and direct the debtor accordingly. Indeed, to allow such procedure would, in my opinion, be an abuse of discretion. (I should note that in very limited circumstances it may be appropriate for the court to consider a disputed competing bid where the asset to be sold is easily defined, e.g., a single parcel of real estate or leasehold interests, and the purchase is for a cash dollar amount payable by a financially responsible purchaser. In such a situation what is best for the estate may be a simple matter of arithmetic which would not require the exercise of any discretion

by the court.)

55. Furthermore, TWA considered the DIP financing alternative and in the exercise of its business judgment, rejected the DIP financing as a solution to its financial crisis. TWA had spent a year looking for a strategic alternative prior to commencing the present chapter 11 case. TWA concluded that if it accepted the DIP proposal and chose not to go forward with the American transaction, then there was no certainty that three months later TWA would not be back in the same position, i.e., facing liquidation, but under much worse conditions, with greater debt and forced to liquidate assets without the benefit of any enterprise value. Sale Hearing Tr. at 309-10.

56. The Committee and Icahn/Freeman argue that this Court abused its discretion by approving a firm sale of TWA assets to American as an alternative to a speculative, untimely and nonconforming Icahn/Freeman proposal that had yet to be effectively negotiated with TWA and, indeed, some of the provisions of which were being revised by counsel for Icahn/Freeman on the final day of the hearing -- even during argument following the conclusion of evidence. Faced with those two alternatives, I chose the former, not only because it was the only procedurally correct course of action but because the alternative represented a high risk gamble of the TWA enterprise.

57. I made a number of specific findings regarding § 363(b) when I approved the sale of substantially all of TWA's

assets to American and I reaffirm them here:

(a) First, nothing in § 363 suggests that disparate treatment of creditors, such as is likely to occur here, disqualifies a transaction from court approval. The purpose of a § 363(b) sale is to transform assets -- and in TWA's case, volatile assets -- into cash in an effort to maximize value. Distribution of the value generated in accordance with § 1129 and other priority provisions occurs and is intended to occur subsequent to the sale.

(b) Many § 363(b) sale transactions have the effect of causing disparate treatment of similarly situated creditors. For example, when a debtor sells off a significant division of its business as part of a chapter 11 reorganization to reorient the debtor's business, the creditors of the sold division, including its employees, typically benefit disproportionately to other similarly situated creditors. Likewise, where there is a § 363 sale of substantially all of the debtor's business as a going concern, there is bound to be disparate treatment of similarly situated creditors.

(c) The treatment of creditors in a § 363(b) context is dictated by the fair market value of those assets of the debtor that the purchaser in its business judgment elects to purchase. A purchaser cannot be told to assume liabilities that do not benefit its purchase objective. Thus, the disparate treatment of creditors occurs as a consequence of the sale transaction itself and is not an attempt by the debtor to circumvent the distribution scheme of

the Code.

(d) The purpose of a § 363(b) sale is to maximize the benefit to the debtor's entire estate. Where a sale results in disparate treatment of similarly situated creditors the sale may appear to be at the expense of individual creditor constituencies. However, if the sale is in the best interests of the estate it follows that the entire estate suffers in the absence of the sale. In other words, a sale under § 363(b) is intended to benefit the estate by minimizing loss of value to the estate. There is nothing in the statute that requires a § 363(b) sale to provide a pro rata distribution to all unsecured creditors or even any distribution to all unsecured creditors. Had Congress intended that result it could have easily drafted the section to so provide. Indeed, by § 363(d) Congress explicitly circumscribed sale transaction so as not to be inconsistent with non-debtor parties' rights arising out of § 362. Furthermore, it is worth noting that the plan provisions of chapter 11, specifically § 1123 (a)(5) (B) and (D), provide that as a means of implementing a plan the debtor may engage in selling or transferring all or part of the property of the estate. Section 363(b) makes no reference to § 1123 and vice versa, so it seems quite clear that § 363(b) has application with respect to the sale of some or substantially all of the estate’s assets independent of the plan provisions, including § 1123.

58. Section 363 is not the only Code provision that has this effect. For example, pursuant to § 365, the assumption,

assignment and cure by a debtor of a lease of non-residential real property also generates disparate treatment because the landlord of the assumed lease is made whole while the similarly situated landlord of a rejected lease suffers a loss.

59. In TWA's case, a sale pursuant to § 363 is the only viable alternative for preserving and capturing the enterprise value of TWA's assets. The Debtors cannot continue to operate the business for the time required to confirm and consummate a plan of reorganization without serious risk of immediate and material decline in the value of the business and its assets. In my experience, in a free fall large chapter 11 case the time lapse between the petition date and a plan confirmation is, at best, a six to nine month process. It is highly unlikely that TWA could survive in that context. Consequently, the consummation of the sale of substantially all of TWA's assets to American is in the best interests of the TWA estate.

60. The sale of the purchased assets outside of a plan of reorganization does not impermissibly restructure the rights of the TWA's creditors nor does it dictate the terms of a liquidating plan. The terms of the Asset Purchase Agreement are significantly different than those the Court of Appeals for the Fifth Circuit found objectionable in Pension Benefit Guaranty Corp. v. Braniff Airways (In re Braniff Airways), 700 F.2d 935 (5th Cir. 1983). In that case, the sale provided for the transfer of the debtor's cash, airplanes and equipment, terminal leases and landing slots to the

buyer in return for travel scrip, unsecured notes, and a profit participation in the buyer's proposed operation. Braniff Airways, 700 F.2d at 939. Under the agreement between the debtor and buyer, the scrip could only be used in a future reorganization of the debtor and could only be issued to the debtor's former employees, shareholders and certain unsecured creditors. Id.

61. The Fifth Circuit found this provision of the transaction "not only changed the composition of [the debtor's] assets, the contemplated result under § 363(b), it also had the practical effect of dictating some of the terms of any future reorganization plan. The reorganization plan would have to allocate the scrip according to the terms of the [purchase agreement] or forfeit a valuable asset." Id. at 939-40.

62. The Objecting Parties do not indicate any provision in the Asset Purchase Agreement that has a similar practical effect, i.e., one that dictates the terms of TWA's future reorganization plan.

63. It is true, of course, that TWA is converting a group of volatile assets into cash. It may also be true that the value generated is not enough for a dividend to certain groups of unsecured creditors. It does not follow, however, that the sale itself dictates the terms of TWA's future chapter 11 plan. The value generated through the Court approved auction process reflects the market value of TWA's assets and the conversion of the assets into cash is "the contemplated result under § 363(b)." Braniff

Airways, 700 F.2d at 739-40. The Objecting Parties do not allege nor does the evidence suggest that the $ 742 million cash American is paying for TWA's assets and its assumption of hundreds of millions of dollars of TWA liabilities, including liabilities to a large body of employees and former employees, is unfair or below market value.

64. In Braniff Airways, the Fifth Circuit also found objectionable an agreement between the debtor and its creditors pursuant to which the secured creditors were required to vote a portion of their deficiency claim in favor of any future reorganization plan approved by the majority of the unsecured creditors' committee. 700 F.2d at 940. The Court found that "such an action is not comprised by the term 'use, sell, or lease,' and it thwarts the Code's carefully crafted scheme for creditor enfranchisement where plans of reorganization are concerned." Id. Neither the Asset Purchase Agreement nor the Sale Order contains any provision that dictates creditor voting rights.

65. Finally, the Fifth Circuit found objectionable a provision in the Braniff Airways sale which provided for the release of claims by all parties against the debtor, its secured creditors, and its officers and directors. 700 F.2d at 940. The Sale Order does not contain a similar provision. It does not attempt to abrogate or vitiate claims against TWA's estate.

66. The Objecting Parties' reliance on the Sale Order's injunctive relief for the benefit of the buyer, American, as

evidence of a sub rosa plan is misplaced. The Sale Order's injunctive relief in this regard is authorized by the "free and clear" language of § 363(f). See In re Trans World Airlines, Inc., Ch. 11 Case No. 01-56(PJW), slip op. (Bankr. D. Del. March 26, 2001). This is a different issue than that in Braniff Airways, where the debtor attempted to effect a release of claims against its own estate, thereby effectively ruling on the allowability of such claims. This the Braniff court found exceeded the scope of § 363(b). Authorizing a sale of assets "free and clear" however, falls squarely within the language and purpose of § 363(f).

67. Accordingly, I conclude that neither the Asset Purchase Agreement or the Sale Order constitute an impermissible sub rosa plan.

68. I find that Icahn/Freeman did not submit an appropriate alternative offer that TWA, let alone this Court, was required to consider. The only qualified proposal before TWA pursuant to the Bidding Procedures Order was the one from American. TWA's acceptance of the American bid was well within its sound business judgment.

69. I also find, with respect to the § 1113 objections, that nothing in the Bankruptcy Code or case law requires that a debtor must resolve its § 1113 issues prior to consummating a going concern sale under § 363.

70. There is absolutely no evidence that TWA is attempting to bypass the requirements of § 1113. As I found

before, the simple fact is that TWA is a failing enterprise whose likely end, in my opinion, will be either a partial survival as a part of American or a liquidation resulting in no enterprise value and a consequent material loss to all nonpriority general unsecured creditor classes.

71. The end result of what will happen during TWA's § 1113 negotiations is dictated by TWA's inability to survive as a standalone enterprise. There simply is no evidence to suggest that TWA is proceeding in bad faith regarding its § 1113 obligations.

72. Given TWA's precarious financial history, I found that a rejection or denial of the Sale Motion would have resulted in an immediate and precipitous decline in the financial affairs of TWA with a very high probability, if not certainty, of liquidation. A liquidation would result in material adverse harm to TWA's diverse creditor constituencies and loss of enterprise value. I find that issuing a stay pending appeal poses the same risks.

73. Furthermore, the record is devoid of any evidence that the Objecting Parties would be better off if I issue a stay pending appeal. The Committee has failed to make a showing that its constituents would fare better if TWA were liquidated or if TWA were to attempt a standalone reorganization. The mere allegation that an alternative transaction is possible does not establish that the offer accepted by TWA's Board is not the best and highest offer. Consequently, I find that the Objecting Parties have failed to make a showing of irreparable harm for purposes of Fed.R.Bank.P.

8005. Accord In re Lykes Bros. Steamship Co., 221 B.R. 881, 885 (Bankr. M.D. Fla. 1997)(no irreparable harm to creditor if prevailing on appeal will not provide satisfaction of creditor's claim).

74. Finally, there is a substantial public interest in preserving the value of TWA as a going concern and facilitating a smooth sale of substantially all of TWA's assets to American. This includes the preservation of jobs for TWA's 20,000 employees, the economic benefits the continued presence of a major air carrier brings to the St. Louis region, and preserving consumer confidence in purchased TWA tickets American will assume under the sale.

75. I also believe the Sale Order implements the public interest that favors an organized rehabilitation (albeit here as only a part of a larger viable enterprise) of a financially distressed corporation which lies at the core of chapter 11. I conclude that the alternative to the Sale Order in this case is a free-fall chapter 11 leading to a liquidation with the subsequent substantial disruption of diverse economic relationships and likelihood of material adverse harm to a very broad spectrum of creditor constituencies.

Accordingly, for the reasons summarized above, I deny the Stay Motions.

SO ORDERED.

Very truly yours,

Peter J. Walsh

PJW:ipm