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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re : **Chapter 11**
: :
DELTA AIR LINES, INC., et al., : **Case No. 05-17923 (ASH)**
: :
Reorganized Debtors.¹ : **(Jointly Administered)**
-----X

RESPONSE BY DELTA AIR LINES, INC. AND THE POST-EFFECTIVE DATE COMMITTEE TO DFO PARTNERSHIP'S MOTION FOR RECONSIDERATION OF ORDER DATED SEPTEMBER 21, 2007 WITH RESPECT TO TIA/SLV OBJECTION 1

Delta Air Lines, Inc. ("**Delta**") and the Post-Effective Date Committee (the "**Committee**"), through their undersigned counsel, submit this response to DFO Partnership's Motion for Reconsideration of Order Dated September 21, 2007 with Respect to TIA/SLV Objection 1 (the "**Motion**") [Docket No. 6722].

¹ The Reorganized Debtors are: ASA Holdings, Inc.; Comair Holdings, LLC; Comair, Inc.; Comair Services, Inc.; Crown Rooms, Inc.; DAL Aircraft Trading, Inc.; DAL Global Services, LLC; DAL Moscow, Inc.; Delta AirElite Business Jets, Inc.; Delta Air Lines, Inc.; Delta Benefits Management, Inc.; Delta Connection Academy, Inc.; Delta Corporate Identity, Inc.; Delta Loyalty Management Services, LLC; Delta Technology, LLC; Delta Ventures III, LLC; Epsilon Trading, Inc.; Kappa Capital Management, Inc.; and Song, LLC.

Preliminary Statement

The issues raised in the Motion have already been considered at length and correctly decided. The Movant, DFO Partnership (“**DFO**”), previously briefed these same issues in its “Response by DFO Partnership To TIA/SLV Objection 1,” dated March 1, 2007 [Docket No. 4822] (the “**DFO Response**”). Delta and the Committee responded to DFO’s arguments in their “TIA/SLV Objection 1: Reply Memorandum of Delta Air Lines, Inc. And The Official Committee of Unsecured Creditors,” dated March 27, 2007 [Docket No. 5458] (the “**Joint Reply**”). The arguments also were addressed during hearings held on March 30, 2007 (the “**March 30 Hearing**”) and August 20, 2007 (the “**August 20 Hearing**”). Copies of the DFO Response, the Joint Reply, the March 30 Hearing transcript, and the relevant portions of the August 20 Hearing transcript are submitted as Exhibits A through D, respectively.

While it is true that the Court has broad power to reconsider its decisions, motions for reconsideration should be limited to legal precedents or factual matters that the parties actually put before the Court in connection with the underlying motion but that the Court overlooked. *See DelleFave v. Access Temporaries, Inc.*, 2001 U.S. Dist. LEXIS 3165, at *1 (S.D.N.Y. Mar. 22, 2001). “A motion for reconsideration is ‘narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court.’” *Titan Pharms and Nutrition, Inc. v. Med. Shoppe Int’l, Inc.*, 2006 WL708552, at *1 (S.D.N.Y. March 20, 2006) (citing *DelleFave*, 2001 U.S. Dist. LEXIS 3165, at *1). A litigant may not use a motion for reconsideration to reargue “those issues already considered when a party does not like the way the original motion was resolved.” *See id.* (internal citation omitted).

Here, DFO has not identified any controlling decisions or factual matters that it previously raised and that the Court allegedly overlooked, and its Motion should be denied.

Argument

I. DFO's Legal Arguments Regarding The Interpretation Of Section 7(c) Have Already Been Fully Considered And Rejected By This Court

The Motion is based almost entirely on DFO's contention that this Court found that Section 7(c) of the relevant tax indemnity agreements is "ambiguous" and that a factual hearing is therefore needed. *See* Motion, ¶ 8. Nothing could be further from the truth.

As this Court noted in its Decision dated May 16, 2007, DFO has acknowledged throughout these proceedings that "the SLV calculations in the Leases do in fact include a tax consequence component resulting in a sum payable under the Leases as part of SLV which is intended to be, and is, equivalent to Delta's obligations under the TIAs." *See* Decision, at 5. Section 7(c) of each of the DFO tax indemnity agreements addresses this overlap in a straightforward way. Section 7(c) states that DFO may not assert a TIA Claim in connection with "any event whereby a party to any of the Operative Documents is required to pay Stipulated Loss Value or Termination Value" *See* Tax Indemnity Agreement for N914DL, submitted as Exhibit E, at § 7(c). Accordingly, the existence of the SLV Claim extinguishes the duplicative TIA Claim.

DFO has argued that Section 7(c) only applies if Delta makes a payment, in cash, equal to the full amount specified in the Stipulated Loss Value tables attached to the underlying Leases, without any deductions for fair market values or for other recoveries. *See* DFO Response at 15-16; DFO's May 31, 2007 Mot. for Recons., at ¶ 2, n.1; August 20 Tr. at 40-41, 46-49, 58. This Court has never found any "ambiguity" in the contracts regarding DFO's contention. Instead, this Court has properly rejected DFO's arguments as a matter of law, based on the language of the contracts. With apologies to the Court for the repetition, DFO's argument fails for the following reasons.

A. DFO's Interpretation Is Contrary To The Plain Language of the Lease

DFO argues that the “default” provisions in Section 15 of the Lease do not “require payment” of SLV, because the Lessee’s payment obligation is offset by fair market value, sales proceeds or other recoveries. However, the Lease itself equates the payment of such “offsetted” amounts with the “actual payment” of Stipulated Loss Value.

Section 15(c) of the Lease provides, for example, that the Lessor may demand payment of the following:

. . . any installment of Basic Rent with respect to the Aircraft . . . plus an amount equal to the excess, if any, of (i) the Stipulated Loss Value for the Aircraft computed as of the date specified in Exhibit B hereto . . . over (ii) the Fair Market Value for the Aircraft . . . and together with such excess, interest, to the extent permitted by applicable law, at the Past Due Rate on the amount of such Stipulated Loss Value, from the date as of which such Stipulated Loss Value is computed to the date of actual payment of such amount;

See Lease excerpts for N914DL, submitted herewith as Exhibit F, § 15(c) (emphasis added).

The Lease itself, through the foregoing interest computation, treats the computation and payment of an “offsetted” amount as the “actual payment” of “Stipulated Loss Value.” If DFO were correct – and if Section 15(c) were interpreted as meaning that the Lessee is not “required to pay” SLV at all – then the foregoing interest computation could never be made, because there never would be an “actual payment” of Stipulated Loss Value.

Paragraph 15(d) of the Lease similarly provides that if the Lessor sells the Aircraft, a similar amount is due, but with the “sale proceeds” (rather than fair market value) applied as an offset. Section 15(d) provides for payment of the following:

. . . an amount equal to the excess, if any, of (i) the Stipulated Loss Value for the Aircraft . . . over (ii) the net proceeds of such sale (after deduction of all expenses of such sale), and together with such excess, interest, to the extent permitted by applicable law, at the Past Due Rate on the amount of such Stipulated Loss Value from the date as of which such Stipulated Loss Value is computed to the date of actual payment;

See Lease, § 15(d) (emphasis added). Section 15(d) confirms that the Lessee’s “net” payment, coupled with sale proceeds, constitutes the “actual payment” of Stipulated Loss Value.

Delta and the Committee made these same points in their Joint Reply and during the March 30 and August 20 Hearings. See Joint Reply at 10-12; March 30 Tr. at 35-36; August 20 Tr. at 41-44. DFO had a full and fair opportunity to address them then.

DFO argues, in its current Motion, that Section 15(c) of the lease only requires the payment of “the excess” of SLV over Fair Market Value. See Motion ¶ 21. However, DFO misses the point. The last four lines of Section 15(c) refer to an interest accrual. The interest accrual is based on a computation of “Stipulated Loss Value.” That interest accrual runs “from the date as of which *such Stipulated Loss Value* is computed to the date of actual payment of *such amount*.” The words “such amount” plainly refer to “Stipulated Loss Value.” The only payment that is called for in Section 15(c) is the “net” amount that is due after SLV is adjusted to take account of the fair market value of the Aircraft.

Section 15 of the Lease therefore plainly treats the actual payment of a “net” amount as the payment of Stipulated Loss Value. As Delta argued on August 20:

Stipulated loss value, what it is, is a guaranteed minimum recovery. As long as you have the fair market value of the aircraft and the difference paid for, you have recovered and been paid stipulated loss value. That’s how the lease works.

See August 20 Tr. at 43.

B. DFO’s Interpretation Would Deprive Section 7(c) Of Any Meaning And Would Render It A Nullity

DFO argues that the Lessee is not “required to pay” Stipulated Loss Value or Termination Value unless the Lessee must pay that amount with no offset for other payments or recoveries. A careful review of the Lease, however, shows that in every situation – including the “Event of Loss” provisions cited by DFO – the Lessee’s obligation to pay SLV or Termination

Value is offset by some other amount. If Section 7(c) were interpreted in the manner that DFO suggests, it would have no meaning and no application whatsoever.

Section 7(c) of the Indemnity Agreement provides, for example, that there is no tax indemnity claim in any event where the Lessee is required to pay “Termination Value.” *See* TIA, § 7(c). DFO has acknowledged, however, that there is only one situation in which the “Termination Value” concept is invoked under the Lease: namely, in the event of an optional termination pursuant to Section 9 of the Lease, which gives the Lessee the option to terminate the Lease due to the obsolescence of the leased Aircraft. *See* Lease, § 9; *see also* DFO Response at 9. Section 9 of the Lease provides that in such an event the Aircraft should be sold, and the Lessee “shall pay to Lessor . . . the amount, if any, by which the Termination Value . . . exceeds the sales price received by Lessor” from the sale of the aircraft. *See* Lease, § 9.

Under DFO’s reasoning, the payment of the “net” Termination Value (after offsets for the sales price), as required in Section 9 of the Lease, would not trigger the exclusion of Section 7(c). Such an interpretation, however, would deprive Section 7(c) of any meaning insofar as it relates to Termination Value, because there is no situation in which “Termination Value” is paid without an offset.

The same is true regarding the reference to “Stipulated Loss Value.” In its initial submissions last spring, for example, DFO argued that the purpose of Section 7(c) was to provide an exclusion only where an “Event of Loss” had occurred. *See* DFO Response at 9, 15-16, 19. However, DFO’s argument is contrary to what the Lease provides. Section 11 of the Lease requires the Lessee to maintain insurance; if an Event of Loss occurs, the insurance proceeds are paid directly to the Owner Participant (or, by virtue of the Indenture, to the Indenture Trustee). The Lease states that these insurance proceeds are then “applied in reduction

of Lessee’s obligation to pay . . . Stipulated Loss Value” with respect to the Aircraft. *See* Lease, § 11(a) (emphasis added). Therefore, even if an Event of Loss occurs, the Lessee’s obligation to pay SLV is offset by a payment from another source.

In every instance in which the Lease refers to “Stipulated Loss Value” and “Termination Value” – whether in the Default provisions, the Event of Loss provisions, the early termination provisions, or otherwise – the Lease provides that the Lessee’s obligation to pay SLV or Termination Value is to be offset by other recoveries and payments, either in the form of sale proceeds, fair market value, insurance proceeds or governmental payments. Thus:

- If a default occurs, the Lessor may elect to recover the difference between Stipulated Loss Value and the fair market value (or the actual sale proceeds if the Aircraft is sold). *See* Lease, § 15.
- If payments are received from governmental authorities, such payments “shall be paid to the Indenture Trustee in reduction of Lessee’s obligation to pay [SLV]” or, “if [SLV is] already paid by Lessee, shall . . . be applied to reimburse Lessee for its payment of such Stipulated Loss Value.” *See* Lease, § 10(c)(i).
- If an Event of Loss occurs, the proceeds of the required insurance are applied “in reduction” of Lessee’s obligation to pay SLV. *See* Lease, § 11(a).
- If a Termination Event occurs, the Lessee must pay the excess of Termination Value over the sale proceeds. *See* Lease, § 9.

If DFO were correct – and if the presence of an “offset” meant that the Lessee is not “required to pay” Stipulated Loss Value or Termination Value – then Section 7(c) would have no meaning at all. It is axiomatic, however, that no contract should be interpreted in a manner that renders any of its provisions meaningless. *See Two Guys from Harrison-N.Y., Inc. v. S.F.R.*

Realty Assocs., 63 N.Y.2d 396, 403, 472 N.E.2d 315, 318 (1984) (“In construing a contract, one of a court’s goals is to avoid an interpretation that would leave contractual clauses meaningless.”) (citations omitted); *Corhill Corp. v. S.D. Plants, Inc.*, 9 N.Y.2d 595, 599, 176 N.E.2d 37, 38 (1961) (“It is a cardinal rule of construction that a court should not adopt an interpretation which will operate to leave a provision of a contract . . . without force and effect.”) (internal quotations and citations omitted).

These same points have previously been briefed and argued. *See* DFO Response at 15-20; Joint Reply at 12-14; March 30 Tr. at 31-33, 35-36; August 20 Tr. at 43-44. The Court adopted them on August 20. *See* August 20 Tr. at 58-59, 64. DFO had a full and fair opportunity to address the issues in the prior hearings.

C. DFO’s Current Argument Also Is Contrary To DFO’s Prior Arguments And Contrary To Common Sense

In its response to TIA/SLV Objection 1, DFO contended that the only circumstance in which Section 7(c) applies is if an “Event of Loss” occurs under Section 10 of the Lease. *See* DFO Response at 15-16. However, Section 7(c) refers generally to “any event whereby a party to any of the Operative Documents is required to pay Stipulated Loss Value or Termination Value.” *See* TIA, § 7(c). If (as DFO contended) the parties had only intended to apply Section 7(c) to one circumstance – an Event of Loss – they would have said so, and they hardly would have chosen such a roundabout and inexact way of accomplishing that objective.

In its current Motion, DFO attempts to make sense of its interpretation of Section 7(c) by arguing that Section 15(e) of the Lease also represents a situation in which the lessee is “required to pay” SLV. *See* Motion ¶ 14. This is hardly a proper ground for a motion for reconsideration, however, because DFO’s current argument is flatly contrary to the position that DFO has previously taken. DFO argued in the DFO Response that:

In fact, although Section 15(e) of the Lease at first appears to require payment of SLV, an examination of the entire provision reveals that such payment triggers a sale of the Aircraft by the Indenture Trustee **and** a return of the net proceeds of sale to the Debtor. Hence the Debtor is not really “required to pay” under this provision at all.

See DFO Response at 19. DFO contended in its initial response that “there is no provision in the remedies section of the Lease under which the Debtor actually is ‘required to pay’ SLV” and that an “Event of Loss” is the *only* circumstance under which Section 7(c) would apply. *Id.* at 16, 19.

A motion for reconsideration is supposed to be based on a point of fact or law that the Court overlooked. DFO’s desire to make a new and contradictory argument about the interpretation of Section 15(e) is not a proper ground for a motion for reconsideration.

Finally, DFO argues that Section 7(c) only applies where SLV is paid in full, without offset for other recoveries, and that this was done to ensure that DFO would actually receive the Tax Portion of SLV from the Indenture Trustee. *See* Motion, at ¶¶ 10, 22-23; *see also* DFO Response at 3-7, 16; Joint Reply at 15-18. This Court has already ruled that such subjective and self-serving allegations are of no relevance in interpreting the contract. *See* Decision, at 10-12. It should also be noted that DFO’s argument about the “purpose” of Section 7(c) makes no sense.

Assume, for example, that the SLV as of a given date were \$100; that the Aircraft was insured in the amount of \$80; that the outstanding debt was \$60; and that the fair market value of the Aircraft was \$50. In those situations the Lease provides as follows:

- (a) If an Event of Loss occurred, (i) insurance proceeds of \$80 would be paid to the Indenture Trustee, (ii) the Lessee would pay \$20 to the Indenture Trustee (the difference between SLV and the insurance proceeds), (iii) the Indenture Trustee would repay the outstanding debts of \$60, and (iv) the Indenture Trustee would pay the \$40 balance to the Owner Participant.

(b) If a default occurred and the Aircraft were sold, (i) the Indenture Trustee would receive \$50 in sale proceeds, (ii) the Lessee would pay \$50 to the Indenture Trustee (the difference between SLV and the sale proceeds), (iii) the Indenture Trustee would repay the outstanding debts of \$60, and (iv) the Indenture Trustee would pay the \$40 balance to the Owner Participant.

In each of the above cases, the Owner Participant's recovery would be the same and would include "full payment" of the "Tax Portion" of SLV. DFO has acknowledged that its TIA Claim would be extinguished under the circumstances described in subparagraph (a), above. In DFO's view, however, DFO would still be able to assert a TIA Claim in the circumstances described in subparagraph (b), because SLV was "offset" by other recoveries. This makes no sense at all.

The only reasonable way to interpret Section 7(c) is to apply its exclusion where, as here, Stipulated Loss Value is recoverable, regardless of whether the "payment" of Stipulated Loss Value is partially accomplished through the application of offsets and other recoveries.

II. The Extrinsic Evidence Proffered By DFO Is Not New Evidence And Is Not Grounds For Reconsideration Of This Court's Order

DFO argues that this Court allegedly found an "ambiguity" in Section 7(c) (which this Court never found) and, on the basis of that alleged ambiguity, it has offered affidavits regarding DFO's subjective "intent" in entering into the underlying contracts. The affidavits are all purportedly based on understandings that the affiants contend they had when the deals were originally done many years ago, and they manifestly are not "new" evidence that was previously unavailable. They therefore are not a proper basis for a motion for reconsideration.

Furthermore, the affidavits are not relevant and are not a justification for reconsideration, because this Court's decision was not based on factual determinations. Instead, this Court interpreted the parties' contract, using established legal principles to do so. In such

circumstances, no extrinsic evidence is needed or proper. *See Schmidt v. Magnetic Head Corp.*, 97 A.D.2d 151, 157, 468 N.Y.S.2d 649, 654 (2d Dep't 1983); *805 Third Ave. Co. v. M.W. Realty Assocs.*, 58 N.Y.2d 447, 451, 448 N.E.2d 445, 447, 461 N.Y.S.2d 778, 780 (1983).

III. The “Net SLV” Claims Calculated Under The Restructuring Agreements Are Consistent With The Remedy Provisions Under The Lease

DFO has argued that this Court committed “clear error” when it decided that the payments required under various Restructuring Agreements for the aircraft were not materially different from the payments required under the remedy provisions of the Lease. *See* Motion, ¶ 2. In making this argument, however, DFO has not identified any matter that the Court allegedly overlooked, or raised any issue that DFO has not had ample opportunity to raise before. Instead, DFO once again simply wishes to rehash points that have been decided adversely to DFO.

As Delta has previously pointed out, the calculations set forth in the Bingham Term Sheet and the Restructuring Agreements are consistent with the manner in which the Lease specifies that SLV be adjusted to take account of the value of the aircraft retained by the Lessee. For example, Section 15(c) of the Lease provides that if a default occurs, the Lessor may seek (i) SLV, plus (ii) unpaid rent, minus (iii) the fair market value of the aircraft. Pursuant to the last paragraph of Section 15 of the Lease, the Lessor may also obtain recovery of any other sums owed under the Operative Documents (including such matters as “swap breakage” costs for deals in which swaps are entered into). Other sub-parts of Section 15 of the Lease similarly provide that fair market value or sales proceeds be deducted from SLV.

The calculation set forth in the Bingham Term Sheet and in the other Restructuring Agreements that are relevant to DFO take the same approach: they take account of (1) SLV, (2) rents and other sums due under other Operative Documents, and (3) the “fair market value” of the aircraft. Since the agreements contemplate that a new lease will be entered into, the “market

value” is represented, for this purpose, by the sum of (a) the present value of the rents that the Lessor will receive under the new lease, plus (b) the present value of the sale proceeds that the Lessor will receive at the end of the lease term.

DFO continues to argue (as both DFO and Northwestern have previously argued) that the remedies set forth in the Bingham Term Sheet and the Restructuring Agreements do not strictly fall under the specific categories enumerated in sub-paragraphs (a) through (e) of Section 15 of the Lease. DFO now argues, for example, that if the remedies were governed exclusively by Section 15(c) of the Lease, the “Fair Market Value” of the aircraft should be zero. *See* Motion ¶ 17. There are three reasons why this argument fails.

First and most importantly, as Delta and the Committee have repeatedly pointed out, Sections 15(a) through 15(e) are not the exclusive remedies of the Lessor under the Lease, but rather merely illustrate the types of offsets that are contemplated under the Lease with respect to payment of SLV. *See, e.g.*, the “Motion by Delta Air Lines, Inc. and the Post-Effective Date Committee for Reconsideration of the Court’s May 16, 2007 Decision Regarding TIA/SLV Objection 2,” dated June 1, 2007 [Docket No. 6237] (a copy of which is submitted as Exhibit G), at 5-8. Section 15(f) of each of the DFO Leases specifically states that after an Event of Default (as defined in the Lease), and provided that such default is continuing, the Lessor may “exercise any other right or remedy which may be available under applicable law” *See* Lease, § 15(f). The concluding paragraph of Section 15 of each DFO Lease also states explicitly that:

Except as otherwise expressly provided above, no remedy referred to in this Section 15 is intended to be exclusive, but each shall be cumulative and in addition to any other remedy referred to above or otherwise available to Lessor at law or in equity; and the exercise or beginning of exercise by Lessor of any one or more of such remedies shall not preclude the simultaneous or later exercise by Lessor of any or all such other remedies.

Lease § 15.

This Court has held that “what the Bingham term sheet provided for was substantially, if not completely identical, or substantially the same – materially the same as the SLV relief provided for in Section 15 of the Lease.” *See* August 20 Tr. at 40. That decision was correct. DFO’s arguments about Section 15(c) are just an effort to argue, yet again, that Sections 15(a) through 15(e) of the Lease constituted the Lessor’s exclusive remedies, a point which is contrary to the plain language of the Lease and which this Court has repeatedly rejected.

Second, DFO’s new interpretation of Section 15(c) of the Lease is simply wrong. The “possession” limitation in the definition of Fair Market Value addresses the narrow possibility that a Lessor might not be able to repossess and exert control over the underlying aircraft because, for example, the aircraft might have been moved to a foreign jurisdiction. Fair Market Value is deemed to be “zero” in that limited circumstance because, if the Lessor has no access to the Aircraft, the Lessor has no ability to turn the hypothetical fair market value into a real recovery. That is not the case here. The Restructuring Agreements all require the rejection of the pre-existing leases. The Lessors (or their assignees) have made the commercial decision to enter into new leases, but they had full control and legal possession of the relevant Aircraft and the full ability to take whatever steps they thought would realize the market values thereof.

Notably, DFO itself previously acknowledged that Section 15(c) does *not* work in the manner that DFO currently contends. DFO currently argues that Section 15(c) does not provide for any reduction to SLV. However, DFO previously argued – in the DFO Response – that Section 15(c) requires that “the Debtor pay the excess of SLV over the Fair Market Value of the Aircraft (*as determined through negotiation with the Debtor or an appraisal process...*).” *See* DFO Response at 17 (emphasis added). This was an important part of DFO’s general argument

that “there is no provision in the remedies section of the Lease under which the Debtor actually is ‘required to pay’ SLV.” *Id.* at 16, 19.

Third, DFO’s current argument is not a proper ground for a motion for reconsideration, because it is a new argument (not a previously made argument), and because – as noted above – the argument is actually contrary to what DFO has previously contended.

Conclusion

For the foregoing reasons, Delta and the Committee therefore respectfully request that the Court deny DFO’s Motion, and that the Court award such other and further relief as may be just and proper.

Dated: New York, New York
October 19, 2007

Respectfully submitted,

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