23 Civ. 1211 (KPF)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
	:	Hon. Katherine Polk
AVIANCA HOLDINGS S.A. *et al.*,[1]	:	Failla
	:	
Appellants-Debtors and Reorganized Debtors.	:	

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANTS DEBTORS AND REORGANIZED DEBTORS

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[1] A complete list of each of the Debtors and Reorganized Debtors in these chapter 11 cases may be obtained on the website of the claims and noticing agent at http://www.kccllc.net/avianca. The Debtors' and Reorganized Debtors' principal offices are located at Avenida Calle 26 # 59 – 15 Bogotá, Colombia.

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To resolve this appeal, the Court must determine when the Initiator Fees arose. To make that determination, the Court must determine what it means for an obligation to arise, and where that meaning is ambiguous, as it has been shown to be, the Court should look to legislative intent and the policies reflected in the relevant statute to provide clarity. Once it does so, the Court will find that the wholly earned and unconditional Initiator Fees arose when the Leases were executed and not when those payments became due under a schedule. As such, the Initiator Fees are not entitled to protection under section 365(d)(5) of the Bankruptcy Code.

For the entirety of its brief, Burnham argues against a position that the Appellants have not taken. Specifically, the Appellants do not contend that the word "obligation" is a corollary to the word "claim." *See* Appellee's Brief, p. 8. Rather, the Appellants cite a case where a court considered that argument as a basis to find the term "obligation" sufficiently ambiguous to warrant an examination of legislative history of section 365. *See* Appellants' Brief, p. 11. Upon such consideration, that court concluded that, "[t]he legislative history makes clear that Congress did not intend for courts applying section 365(d)(3) to rely mechanically on the billing date in determining which post-petition, pre-rejection obligations" are entitled to protection. *See Child World, Inc. v. The Campbell/Massachusetts Tr. (In re Child World Inc.)*, 161 B.R. 571, 577 (S.D.N.Y. 1993). That case is presented in

contrast to the Third Circuit's reluctant finding that the term "obligation" is unambiguous. *See* Appellants' Brief, p. 11 (discussing *Centerpoint Properties v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 209 (3rd Cir. 2001)). The presence of an ambiguity is important, as it warrants an exploration of intent, and shows that the Bankruptcy Court's appeal to a plain meaning was misplaced. *See* Appellants' Brief, pp. 7-8 ("The most glaring problem with the Bankruptcy Court's analysis is that it adds text [*i.e.*, the word 'payment'] to clarify language in a statute that it determined to be unambiguous.").

The parties agree that an obligation is "anything that a person is bound to do, or forbear from doing."[2] Appellee's Brief, p. 8. The Appellants were unconditionally "bound" to pay the Initiator Fees when the Appellants entered into the various Leases. That is exactly what the Leases unambiguously provide. Burnham argues that because "the payment *obligation* [Burnham's word, emphasis added] was unmatured and contingent on the [passage of time]", the Appellant's position is contrary to the meaning of the word "obligation." So according to Burnham, calling an "unmatured payment *obligation*" an "obligation" offends a plain reading of the word "obligation." Burnham's so-called plain reading creates the paradox of a contingent unconditional obligation. This cannot be right. For the avoidance of any

[2] This is not a new position. It was conceded at oral argument before the Bankruptcy Court. *See* A252, line 24 – A255, line 11 (in Appendix to Appellant's Brief).

doubt, the Appellants have not and are not suggesting that "obligation" means "claim." Burnham's pages devoted to attacking this non-argument are, at best, unnecessary.

Again, the issue before the Court is when the obligation "arose." *See* Appellants' Brief, p. 14 ("However, this Court need not rely on the disputed ambiguity over the meaning of the term 'obligation' when it is the apparent ambiguity over the meaning of the term 'arise' that drives this appeal.") This issue is simply not addressed in *In re R.H. Macy & Co.,* the case Burnham offers to refute the argument that was not made, and as such, the analysis provided in that case is simply irrelevant.

Burnham eventually reaches the issue before this Court—when does the Appellants' obligation for the Initiator Fees arise—and in support of its contention that such obligations arise on the payment date, Burnham offers a dictionary definition of the operative term, a further appeal to plain meaning: something arises when it "comes into being or to attention". *See* Appellee's Brief, p. 12. But, this dictionary definition supports the Appellants' position. Maybe it supports Burnham's position, too. It is not clear. That is the problem. Does the obligation arise when it "comes into being," that is when it became unconditional upon entry into the Leases, as there is no greater state of "being," commercially speaking? Or, does it arise when the obligation comes "to attention," whatever that means?

Burnham has made the Appellants' point, "[t]he phrase 'arising from and after the order for relief under' is far from clear." *In re McCrory Corp*., 210 B.R. 934, 936-40 (S.D.N.Y. 1997). Such ambiguity warrants an examination of the legislative history and policy, and as Appellants have shown and Burnham has not refuted, such an examination leads to the inescapable conclusion that the Appellants' obligations for the Initiator Fees arose when those obligations became unconditional.

Burnham contends that this Court's holding in *Urban Retail Properties v. Lowes Cineplex Entertainment Corp.* provides the opposite answer, but in making this argument, Burnham omits significant factual distinctions and consequently overstates the applicability of that holding to this case. In *Urban Retail*, the debtor contracted for the construction of a movie theatre in a leased shopping center, with a one-time reimbursement for construction costs payable upon completion of the project. *See Urban Retail Properties v. Loews Cineplex Entertainment Corp.*, 2002 WL 535479, *1 (S.D.N.Y. Apr. 9, 2002). The project was completed after the debtor filed bankruptcy, and the debtor sought to avoid paying the reimbursement on the basis that the obligation arose prepetition. *See id*. The Court reviewed the split of authority in this district between those courts that adopted the proration/accrual approach for obligations that span the petition date and those courts that adopted the

alternate billing-date approach.[3] *See id.* at *6. The Court reasoned that the billing-date approach was "persuasive given the facts of the [] case," namely that payment of the reimbursement was conditioned on completion of the construction and opening of the theatre, both of which occurred post-petition. *See Id.* at *7. No such condition exists here. The Appellants' obligation for the Initiator Fees was unconditional upon execution of the various Leases. *Urban Retail* is simply not helpful in answering the question before this Court.[4]

Burnham also dismisses the unconditional nature of the Initiator Fees as insignificant to the analysis by curiously citing to a case interpreting "hell or high water" language in the context of a finance lease. *See* Appellee's Brief, pp. 12-13; *Wells Fargo Bank, N.A. v. BrooksAmerica Mortg. Corp.*, 419 F.3d 107, 110 (2nd Cir. 2005). Distilled, Burnham's argument goes: "hell or high water" clauses are common and mean the obligation is unconditional; the unconditional obligation to pay is not enforceable until the rent payment comes due; therefore, that's when the

[3] There is indeed a split, something the Appellants have acknowledged, though the better law of this Circuit is on the Appellants' side. Still, it is of no particular challenge for Burnham to find cases outside this circuit to support its position. *See, e.g., In re F&M Distributors,* 197 B.R. 829 (E.D. Mich. 1995); Appellant's Brief, p. 13. It is likewise of no particular consequence.

[4] This assumes the *Urban Retail* court was right to reject the proration approach. Recall, although the analysis in the proration cases is relevant to the issues on appeal, this Court need not adopt proration to rule for Appellants, since the Initiator Fees concern wholly prepetition activity, *i.e.*, brokering leases years before the bankruptcies. The Court need only reject the idea that a debt arises when payment comes due, as opposed to when the debt becomes unconditional.

obligation arises. *See* Appellee's Brief, pp. 12-13. Here, Burnham simply repackages its billing-date theory and attempts to bolster it with a new case. Interestingly, as indicated above, the case Burnham cites deals with such clauses in the context of "finance leases." Equally interesting, finance leases are not protected under section 365, since such "leases" are really sales contracts. *See, e.g., Liona Corp. v. PCH Assoc. (In re PCH Assoc.)*, 804 F.2d 196, 198-200 (2nd Cir. 1986) ("section 365(d)(3) … appl[ies] solely to a 'true' or 'bona fide' lease"); *International Trade Admin. v. Rensselaer Polytechnic Inst*., 936 F.2d 744, 748 (2nd Cir. 1991) (same); and *In re PSINet, Inc.*, 271 B.R. 1, 38 (Bankr. S.D.N.Y. 2001) ("[I]t is indeed necessary, as a prerequisite to determining whether an equipment lessor has rights under section . . . to first determine whether the agreement denominated as a lease is indeed a true lease."); *see also* 3 COLLIER ON BANKRUPTCY ¶ 365.02[3] (Richard Levin & Henry J. Sommer eds., 16th ed.) ("[T]he courts have been vigilant to limit the application of section 365 to true leases, not disguised financing arrangements. Every appellate court, other than the Third Circuit that has considered the issue holds that substance controls and that only a 'true lease' counts as a 'lease' under section 365.") (citing additional cases). Consequently, in a bankruptcy, such "hell or high water" obligations in a finance lease would have to be treated as prepetition claims, just like any other non-lease contract claim for future payment. Burnham is free to

argue that the Leases were finance leases (*i.e.*, disguised sales/secured transactions), but if so, Appellants win for a different reason.

In Burnham's final section of its brief, it retreats from a position taken only pages earlier by rejecting any examination of legislative history. Compare Appellee's Brief, p. 2 (where Burnham contends in the Preliminary Statement that a finding that the Initiator Fees arose when payment became due "is what Congress intended") and p. 14. Still focused on the obligation-claim dichotomy that Appellants are not arguing, Burnham places significance on the distinction between sections 503(b) and 365(d)(5), namely the former's requirement of a benefit to the estate. The Appellants do not seek to impose a "benefit to the estate" requirement on section 365(d)(5), and nowhere in the Appellants' brief can such an argument be found. To be clear, the Appellants argue that when confronted with an ambiguous statute, the Court should look to legislative history and policy to determine the intent. Here, as Appellants plainly stated:

> Nothing in the legislative history suggests that Congress intended to do away with the long standing practice of prorating obligations that spanned the petition date. *Id.; see also McCrory*, 210 B.R. at 939-40 ("neither the language of the statute nor the legislative history reveals a Congressional intent to deviate from the pre-amendment practice"). Even the court in *Montgomery Ward* acknowledged that "there are some aspects to the proration approach that Congress might have found desirable" and that proration was the prior practice, which should not be eroded "absent a clear intention that Congress intended such departure." *Montgomery Ward*, 268 B.R. at 211-212. Likewise, in *R.H. Macy*, the court confessed that it found the policy argument at the heart

> of *Child World*, *i.e.*, current pay for current services, "very persuasive." *See R.H. Macy*, 1994 WL 482948, at *13.

Appellants' Brief, p. 16.

The better logic commands a finding that the Initiator Fees arose when those obligations became wholly earned and unconditional, or in the words of Burnham's dictionary, came into being. As such, Appellants seek reversal of the Bankruptcy Court's order.

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Respectfully submitted,

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