UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

GLOBAL AVIATION SERVICES, LLC. — CASE NO. 00-65848

Debtor

IN RE:

AVIATION RESOURCES, LLC — CASE NO. 00-65847

Debtor — Chapter 11

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APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Under consideration by the Court is a motion filed on shortened notice on February 15, 2001, by Global Aviation Services, LLC ("Global") and Aviation Resources, LLC ("Aviation") (hereinafter jointly referred to as the "Debtors"), seeking approval of an offer to compromise the claim of the Debtors against New Quick Company, Ltd. ("New Quick"), the sole shareholder of Norstar International Holdings, Ltd. ("Norstar") (hereinafter jointly referred to as "NSNQ"). Opposition to the motion was filed on February 27, 2000, on behalf of Frank Arvay ("Arvay") and Arvair, LLC ("Arvair").

The motion was heard at the Court's regular motion term on February 27, 2001, in Utica, New York, and adjourned to March 6, 2001, in Syracuse, New York, in order for the Debtors to provide the Court with additional documentation to support their request. Due to inclement weather, the Court notified the parties that it was cancelling its calendar for March 6, 2001, and

rescheduled the Debtors' motion for March 13, 2001, in Binghamton, New York. As of March 5, 2001, no further opposition had been filed to the Debtors' motion; however, on the morning of March 13, 2001, a supplemental affirmation in opposition was submitted to the Court by Arvay/Arvair.[1]

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a) and 157(b)(1) and (b)(2)(A) and (O).

FACTS

The Debtors filed voluntary petitions pursuant to chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), on November 27, 2000. On December 6, 2000, a motion was filed on behalf of the Debtors for joint administration of the cases. The motion was granted on January 5, 2001, by Order of this Court.

Aviation was organized on July 10, 1998, for the purpose of developing and operating a heavy aircraft maintenance facility at the former Griffiss Air Force Base, Rome, New York. *See* Amended and Restated Operating Agreement ("Amended Operating Agreement"), executed June 28, 2000. It was organized as a limited liability company by Kahnawake Aviation Resources

[1] Arvay/Arvair filed a motion on January 18, 2001, in which it has *inter alia* challenged the corporate authority for the Debtors' chapter 11 filings. That motion was the subject of an extensive evidentiary hearing and is presently pending before the Court for decision.

Authority ("KARA") and Arvay. Arvay allegedly later assigned his membership interest in Aviation to Arvair. Global serves as the operating company for Aviation.

According to the Debtors' schedules, Global holds a claim against New Quick in the amount of $521,110.98. New Quick estimates the claim to be "closer to the $315,000 fixed price statement in the Maintenance Documents." *See* Affidavit of Takeshi Takahashi, Esq. ("Takahashi"), sworn to March 1, 2001. Debtors seek approval to settle the claim for $443,199.23 for "various business reasons . . . which reasons lead the Debtors to believe that said offer is a fair compromise of the outstanding account receivable claim." *See* Debtors' Application, filed February 15, 2001, at ¶ 5.

At the hearing on February 27, 2000, Arvay/Arvair took the position that the Debtors had "failed to provide a justification for the compromise . . . ." Arvay/Arvair pointed out that additional work to be performed by the Debtors on New Quick's planes was not quantified and it was not clear whether costs for storage, electricity and heating, as well as interest, had been considered in the settlement discussion. Arvay/Arvair noted that the compromise contains an assignment of Debtors' claim against Custom Air Transport "(CAT") that was not quantified; nor were the Debtors protected in the event of a CAT counterclaim. Furthermore, Arvay/Arvair argued that the compromise had not received the approval of the Debtors' Managing Board as required by the Amended Operating Agreement.

In response to the Court's request for additional explanations and documentation to support the Debtors' motion, various materials were submitted on behalf of the Debtors for the

Court's review.[2] These included not only Takahashi's affidavit, but also the declaration of Bernard Malach, acting President/CEO/Chairman of the Board of the Debtors ("Malach's Declaration").[3] Attached to Malach's Declaration is a settlement proposal from the Debtors, dated February 7, 2001, as well as a confidential inter-office memorandum, dated February 12, 2001. There is also correspondence from NSNQ's counsel, Robert F. Grondine, identified as "NSNQ Final Settlement Offer," dated February 11, 2001. The documents raise questions concerning whether some of the work performed by the Debtors was properly authorized and the rate at which it was to be charged. Questions concerning interest charges and charges for storage, electricity and heating are also discussed.

Malach, in his declaration, concludes that "if the Norstar Settlement is approved, Global will receive from Norstar a total of $593,735.26 being comprised of the $150,615.88 received prepetition and the $443,119.38 from the NSNQ settlement. In view of the receipt of this aggregate amount, Malach indicates that the Global "management team"[4] was of the view that writing off the CAT Outstanding 8892 Invoice of $36,339.45 and assigning it to New Quick as part of the settlement was reasonable." *See* ¶ 28 of Malach's Declaration.

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[2] Copies of the materials were also provided to Arvay/Arvair's counsel, as well as to the Office of the United States Trustee "for their review and confidential handling . . . ." *See* Letter of Debtors' counsel, Lee E. Woodard, Esq., dated March 1, 2001.

[3] Pursuant to an order of the Honorable Anthony F. Shaheen, Justice, New York State Supreme Court, Oneida County, State of New York, dated November 13, 2000, Bernard John Malach was given the authority to act as CEO/President/Chairman of the Board of Aviation and/or Global, positions previously held by Arvay.

[4] It is unclear whether the "management team" referenced in Malach's declaration is the same as that referenced in a letter of October 13, 2000, from Davis Rice to Arvay and in Justice Shaheen's Order of November 13, 2000, which included Deborah Leopold, Gary LaRorque and Dieter Klusmeyer.

DISCUSSION

Approval of the Board Members

Before considering whether to approve the reasonableness of the settlement, the Court must address itself to Arvay/Arvair's contention that the settlement agreement has not received approval of the Debtors' Managing Board.

Paragraph 6.4 of the Amended Operating Agreement sets forth various powers of the Managing Board which require a majority vote before they may be exercised. Paragraph 6.4(h) references doing and performing any and all other lawful acts as may be necessary or appropriate to conduct the Company's business. Paragraph 6.11 further states that "any document or instrument may be executed and delivered on behalf of the Company by any Board member authorized to do so by a resolution of the Managing Board, including . . . any compromise or settlement with respect to accounts receivable or claims of the Company . . . ." Paragraph 6.22 provides that "Board Members may participate in a meeting by conference telephone or similar communications equipment, by means of which all persons participating in the meeting can hear each other, and such participation will constitute presence in person at such meeting."

According to Malach's Declaration, he conducted a telephone poll of the Managing Board for approval of the settlement. Of the five members eligible to vote, three voted for its approval and two abstained. *See* Malach's Declaration at ¶ 31.

The three members allegedly voting in favor of the settlement are representatives of KARA, including Malach, John "Bud" Morris and Davis Rice. The two members abstaining

include Antal Jonkov and Laszlo Arvay, both of whom represent the interests of Arvay/Arvair. Arvay/Arvair contend that although Arvay agreed to step down as President/CEO/Chairman of the Board, *see* letter of October 13, 2000 from Davis Rice, he remained a member of the Board and should have been polled.

It is the view of this Court that Justice Shaheen, in authorizing Malach to continue to act as President/CEO/Chairman of the Board in place of Arvay by virtue of his order dated November 13, 2000, intended, at least pending a further order, to exclude Arvay totally from the operation and management of the Debtors. Therefore, it was not necessary to seek Arvay's approval of the settlement. The fact that Malach did not solicit Board approval by means of a conference call where everyone could hear one another, while not in strict compliance with the Amended Operating Agreement, in the view of this Court, would elevate form over substance. In all likelihood, it would not have made a difference, given the current makeup of the Managing Board, whether the Board was individually polled or engaged in a conference call for purposes of approving the settlement.

Based on Malach's Declaration and given the circumstances, the Court accepts Malach's statement that he obtained approval from a majority of the Board Members to accept the terms of the settlement as being in the best interests of the Debtors and that such a "poll" satisfies ¶¶ 6.4, 6.11 and 6.22 under the circumstances herein.

Approval of the Settlement

Settlements in bankruptcy cases are viewed with favor by the courts. *See Nellis v. Shugrue*, 165 B.R. 115, 123 (S.D.N.Y. 1994) (citations omitted). Whether to approve a

settlement is a matter of the Court's discretion. *See In re Ashford Hotels, Ltd.*, 226 B.R. 797, 802 (Bankr. S.D.N.Y. 1998); *In re Rinsat, Ltd.*, 224 B.R. 685, 688 (Bankr. N.D. Ind. 1997). "'The benchmark for determining the propriety of a bankruptcy settlement is whether the settlement is in the best interests of the estate.'" *Id.*, quoting *Matter of Energy Co-op, Inc.*, 886 F.2d 921, 927 (7th Cir 1989); *Ashford Hotels*, 226 B.R. at 802 (citations omitted).

In considering whether to approve a settlement or compromise pursuant to Rule 9019(a) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), the Court must consider whether it is fair and reasonable and in the best interest of the estate. The Court cannot simply accept the statement of Debtors' counsel that the settlement is reasonable and "rubber stamp" it. *See id.* at 803 (citations omitted). Instead, the courts generally examine four factors: (1) the probability of success, (2) the inconvenience and the delay in the pending litigation, (3) the possible difficulties of collection and (4) the interest of creditors and deference to their reasonable views. *See In re Adirondack Ry. Corp.*, 95 B.R. 9, 10 (Bankr. N.D.N.Y. 1988), citing *Drexel v. Loomis*, 35 F.2d 800 (8th Cir. 1929); *see also In re Masters, Inc.*, 149 B.R. 289, 292 (E.D.N.Y. 1992) (indicating that "a bankruptcy court must determine whether the compromise is reasonable considering such factors as the likelihood of success in the litigation, the complexity and cost of the litigation, and the paramount interests of the creditors.").

In applying its discretion, the Court is to ask "with regard to what is right and equitable under the circumstances and the law, and dictated by the reason and conscience of the judge to a just result." *Ashford Hotels* at 802, quoting *Langnes v. Green*, 282 U.S. 531, 541, 51 S.Ct. 243, 75 L.Ed. 520 (1931). Furthermore,

> [t]here can be no informed and independent judgment as to whether a proposed compromise is

> fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense and likely duration of such litigation the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.

Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968).

The papers initially filed with the Court, consisting of an application of Debtors' counsel, along with an "Agreement in Principle," dated February 14, 2001, were clearly not sufficient to permit the Court to make an informed decision on whether the compromise was fair and equitable. However, upon review of the documents submitted on behalf of the Debtors following the initial hearing on February 27, 20001, the Court concludes that the settlement is both fair and reasonable and in the best interest of the creditors.[5]

The Court has considered not only the terms of the settlement, but also the potential costs and benefits of not settling as it may impact on the best interests of the estate. While Arvay/Arvair's objections have been considered, they are not controlling.[6] *See Rinsat*, 224 B.R.

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[5] Because of the confidential nature of the documents submitted for the Court's review, it has made a conscious effort to avoid specific reference to the discussions among the members of the Debtors' management team and the underlying concerns which formed a basis for the final settlement figure.

[6] Arvay/Arvair has been particularly critical of the Debtors' obligation under the terms of the settlement to assign certain of the claims against CAT to New Quick without the protection of meaningful indemnification rights versus NSNQ in the event of CAT counterclaims. Arvay/Arvair asserts that NSNQ is a foreign corporation with assets likely beyond the

at 688 (citation omitted). Both the Debtors and NSNQ acknowledge that a certain amount of ambiguity may exist with respect to the methods of calculating the charges for the work performed and whether certain work was properly authorized. It appears that both sides have meritorious arguments and have raised several issues which would require them to litigate the matter in this or another forum. This would no doubt result in substantial delay. Conversely, the settlement will provide the Debtors with immediate cash of $443,119.38 to reach an accord with Griffiss Local Development Corporation ("GLDC"), the landlord of the leased facility where the Debtors' conduct their operations. Given the unique nature of the Debtors' business, it is obviously essential for them to continue to have access to the airstrip and hangar facilities if they are to continue to operate. The fact that the Debtors' claim may actually amount to $600,000, as Arvay contends, does not mean that the settlement, as proposed, is not fair and reasonable. Indeed, the Court need only base its decision on "'whether the settlement falls below the lowest possible point in the range of reasonableness.'" *Ashford Hotels*, 226 B.R. at 802, quoting *In re W.T. Grant*, 669 F.2d 599, 608 (2d Cir.), *cert. denied sub nom. Cosoff v. Rodman*, 464 U.S. 822, 104 S.Ct. 89, 78 L.Ed.2d 97 (1983); *In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 426 (S.D.N.Y. 1993), *aff'd*, 17 F.3d 600 (2d Cir. 1994); *In re Purofied Down Products Corp*, 150 B.R. 519, 522 (S.D.N.Y. 1993). Whether the claim is $521,100.98 as the Debtors initially estimated or $600,000 as suggested by Arvay or $315,000 as asserted by New Quick, the fact of the matter is that $443,119.38 certainly falls within the range of reasonableness, particularly when one considers that these Debtors are operating under chapter 11 of the Bankruptcy Code. In light of

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jurisdiction of U.S. courts. While this may be a valid criticism of the indemnification provision in the settlement, it is insufficient to tip the balance of overall reasonableness.

the Debtors' apparent precarious financial position and the need for immediate cash if they are to continue operating, any delay could be fatal to the Debtors and not in the best interest of the creditors.

Approval of the settlement has to be viewed in the context of chapter 11 and Fed.R.Bankr.P. 9019. Upon due consideration of the documents submitted to the Court and the arguments made by counsel for the Debtors and Arvay/Arvair, the Court will grant the Debtors' motion and approve the Settlement Agreement, as amended on March 1, 2001, based on a finding that it is fair and reasonable and in the best interest of the estate.

Based on the foregoing, it is hereby

ORDERED that Debtors' motion seeking approval of the Settlement Agreement, dated February 22, 2001, as amended on March 1, 2001, is granted pursuant to Fed.R.Bankr.P. 9019(a).

Dated at Utica, New York

this 16th day of March 2001

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge