
*In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division*

In the matter of:)
)
TPI INTERNATIONAL) Chapter 11 Case
AIRWAYS, INC.) Number 91-20162
)
Debtor)

**ORDER ON DISCLOSURE STATEMENT AND THE
UNITED STATES TRUSTEE'S MOTION TO CONVERT**

Before the court is the United States Trustee's continued Motion to Convert To A Case Under Chapter 7, as well as the Debtor's Disclosure Statement and objections thereto. The United States Trustee filed its Motion to Convert on September 30, 1994. A hearing to consider the Motion was initially held on November 10, 1994, after which the Court entered an Order on November 15, 1994, denying the Trustee's Motion on an interim basis contingent upon the Debtor filing a Disclosure Statement by December 23, 1994. Debtor timely filed its Disclosure Statement, to which three parties filed objections. A hearing to consider the continued Motion, the Disclosure Statement and the objections thereto, was held in Brunswick, Georgia on January 12, 1995, after which the court took the matter under advisement. For the reasons set forth below, the court will again deny the Trustee's motion on an interim basis conditioned upon Debtor filing an application to employ all professionals and consulting

firms that have not previously been approved by this court and filing a recast Disclosure Statement reflecting the concerns outlined below, not later than 10 days after a written ruling is rendered by the Armed Services Board of Appeals in the litigation that Debtor currently has pending against the United States Air Force.

As noted in the Order entered November 15, the United States Trustee has made a *prima facie* case for dismissal or conversion of this case. The case had been pending in this court for almost four years before Debtor filed, at the insistence of the court, a Disclosure Statement on December 23, 1994. Debtor has yet to file a Plan of Reorganization. Moreover, Debtor does not appear to be engaged in any appreciable business activity and has apparently engaged a number of attorneys and/or consulting firms to represent the estate in various forums without obtaining approval from this court.

This is, however, an unusual case. The primary assets remaining in the estate are a number of speculative but potentially lucrative causes of action against various parties. Moreover, the people most familiar with the suits, the Debtor's President, Fred Catchpole and Debtor's in-house counsel, Jean Niven, have been and continue to pursue these actions on behalf of the estate without any expectation of compensation for their work until all creditors of the estate have been paid in full. And, with the exception of Debtor's bankruptcy counsel, the attorneys representing the estate in these various actions are apparently working strictly on a contingent-fee basis. Debtor argued at the November 15th hearing that it had effected the following arrangements beneficial to the estate: (1) reduced, through the sale and surrender of assets, its approximately \$20,000,000.00 in secured debt to its two primary creditors, NMB Post Bank Groepe ("NMB") and JBQ Aviation Corporation ("JBQ"), to a \$3,000,000.00

unsecured claim held by NMB; (2) worked out a favorable arrangement with NMB to satisfy its \$3,000,000.00 claim whereby NMB and Debtor will split equally any recovery that the Debtor obtains in certain suits in which NMB held or holds a security interest; (3) reduced all other unsecured claims against the estate from approximately \$2,500,000.00 to somewhere within the range of \$200,000.00 to \$500,000.00; and (4) favorably settled a number of lesser legal actions.

Based upon this state of affairs, Debtor made a forceful argument that the upside potential to the estate from its pursuit of these lawsuits is substantial while the downside potential of mounting administrative costs is minimal. Debtor also pointed out that a Chapter 7 trustee would have to operate under a different set of economic restraints, not having, presumably, the benefit of Mr. Catchpole's and Ms. Niven's services. Thus, according to Debtor, a trustee would likely have less freedom to pursue these actions.

I found Debtor's argument persuasive in theory, but was less certain about the factual predicate upon which it rested. Accordingly, I denied the Trustee's Motion on an interim basis conditioned upon Debtor timely filing a Disclosure Statement setting forth in a comprehensive fashion the details of all settlements, the status of all pending litigation, the estate's current financial position and any other relevant information. Debtor filed its Disclosure Statement in compliance with this condition on December 23, 1994.

The United States Trustee, NMB and the United States Attorney for the Southern District of Georgia filed written objections to the Disclosure Statement and appeared at the January 12th hearing to press their respective positions. The Trustee objects on the

ground that Disclosure Statement fails to provide "adequate information"¹ as required under section 1125(a) of the Code. Specifically, the Trustee asserts that it fails to provide a projection of estate income and expenses; a listing of all creditors by address, amount of claim

¹ Section 1125(b), in relevant part, provides that

An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing *adequate information*.

11 U.S.C. § 1125(b) (emphasis added). Section 1125(a)(1) defines "adequate information" as

information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interest of the relevant class to make an informed judgment about the plan .
.

11 U.S.C. § 1125(a)(1).

and priority; a detailed analysis of all lawsuits, including the likelihood and expected amount of recovery and a projection of anticipated expenses and professional fees; and a summary of its plan of reorganization. The objections of United States Attorney and NMB, meanwhile, go to specific factual assertions within the Disclosure Statement that are allegedly inaccurate.

After considering these objections and conducting an independent review of the Disclosure Statement, the court directs Debtor to amend and recast its Disclosure Statement to address the following concerns:

- (1) Arrangement with NMB - NMB holds the largest remaining claim in the case, and Debtor asserts that it negotiated a favorable agreement with NMB under which NMB's \$3,000,000.00 claim will be satisfied in full by giving NMB 50% of any recovery from in certain law suits that Debtor is currently prosecuting. In its objection, however, NMB disputes Debtor's characterization of the agreement. It agrees that it will receive 50% of the litigation recoveries but asserts that its claim remains secured by all of Debtor's accounts receivable and insurance claims and that it has not waived the right to participate in any distribution under Debtor's plan of reorganization to the extent that its claim is not satisfied from recoveries in the lawsuits. This arrangement is one of the linchpins in Debtor's argument against conversion. It is, therefore, imperative that the Debtor demonstrate the precise terms of the arrangement and that this arrangement be fully disclosed in the Disclosure Statement. If the parties are unable to agree as to what the arrangement is, then Debtor must institute whatever legal action is necessary to determine the extent of NMB's security interest in Debtor's assets.

Furthermore, Debtor claims that the suits from which NMB's claim is to be satisfied are not longer property of the estate. The court, however, does not agree with this characterization. NMB was never granted relief from stay with respect to these assets and there does not appear to be anything in the file indicating Debtor's intention to abandon these assets to NMB. Thus, unless Debtor can demonstrate otherwise, these lawsuits should be characterized in the Disclosure Statement as property of the estate subject to NMB's security interest. Finally, a copy of NMB's security interest should be attached to the Disclosure Statement.

- 2) Fleming/Rosenfeld Matter - Debtor needs to express an opinion as to the likelihood of recovering any of its \$354,003.92 judgment from Fleming's bankruptcy estate. Has a proof of claim been filed in his case? Debtor should also set forth the precise status of Mr. Hussey's action against Rosenfeld for reimbursement of litigation expenses.
- 3) Ongoing Expenses Being Incurred by Debtor - Debtor reveals that it is using periodic payments made from Alan Slivka to pay office rent of \$140 per month and a telephone bill of approximately \$150-\$200 per month. This raises a question of whether a Debtor who is not currently engaged in business should be making such expenditures.
- 4) United States Airforce and Belgian Suits - Debtor IS ORDERED to estimate the value of these suits, the anticipated costs and the likelihood of recovery. Additionally, it does not appear that Debtor has sought to have either IFR, Inc., the consulting firm representing it in the Air Force litigation, or Mr. Balimaka Mango, its representative in the Belgian litigation, approved to represent the estate. Approval of these and any

other financial arrangements by the estate, is mandatory.

- 5) Settlement of Air Polynesia, d/b/a DHL Cargo, Litigation - Debtor IS ORDERED to provide a final figure as to the costs and fees of this litigation, as well as an explanation as to their necessity.
- 6) Loss of Use/Business Interruption Claims - Debtor IS ORDERED to disclose the exact amount for which these claims were settled and provide an accounting of how this money was spent.
- 7) Funds held by the United States Air Force and/or Dept. of Labor - Debtor IS ORDERED to disclose what steps are being taken to recover this money or see that it is paid to the appropriate parties.
- 8) FAA Litigation - Debtor IS ORDERED to explain why the sovereign immunity question has not been certified for appeal to the Eleventh Circuit.
- 9) Other Litigation - Debtor IS ORDERED to fully disclose the nature and extent of its involvement as a named plaintiff in a mandamus action being pursued in district court against the United States District Attorney for the Southern District of Georgia.
- 10) New/Ongoing Business Activities - Debtor IS ORDERED to prepare a comprehensive business plan. What exactly is Debtor bidding to do for HUD? What are "aircraft brokerage services"? What sort of expenses will be incurred in this activity and what sort

of revenues are expected to be generated? Does Debtor have any expertise in this area?
What comparable companies' experience does Debtor rely upon to make its projections?

- 11) Plan of Reorganization - Debtor IS ORDERED to attach to the amended disclosure statement, at minimum, a summary of its anticipated plan.

A continued hearing on the Motion to Convert will be scheduled for the April 1995 term of Court.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of February, 1995.