

1 UNITED STATES BANKRUPTCY COURT  
2 FOR THE DISTRICT OF ARIZONA

3  
4 **In re** )  
5 **SWIFT AIR, LLC,** ) In chapter 11 proceedings  
6 ) Case No.: 12-14362  
7 **Debtor** ) **UNDER ADVISEMENT DECISION**  
8 ) **DENYING MOTION TO CONVERT**  
9 )

10 On November 19, 2012, the Official Committee of Unsecured Creditors  
11 (Committee) filed a motion to convert (Motion to Convert; Dkt #284) this chapter 11 case  
12 to chapter 7 for cause under §§ 1112 (b)(1), (4)(A), and (4)(B). The Debtor, pointing to a  
13 recent DIP loan and receipt of a term sheet, claims they are on a path towards confirming  
14 a plan of reorganization. The Court concludes that the Debtor has shown a reasonable  
15 likelihood of rehabilitation. Accordingly, the Motion to Convert is denied.

16 **I. Facts**

17 The Debtor is a charter airline holding both a Part 121 Certificate (large aircraft)  
18 and a Part 135 Certificate (small aircraft) (together "Operating Certificates") issued by  
19 the Department of Transportation (DOT). The Debtor's main business is providing  
20 charters to sports teams, currently providing service to the following professional teams:

21 NBA

- Boston Celtics
- Milwaukee Bucks

23 NHL

- Boston Bruins
- Chicago Blackhawks
- St. Louis Blues
- New Jersey Devils

26 From October 2012 to mid-January 2013, the Debtor received minimal compensation  
27 from the NHL due to the NHL lockout. Once the lockout ended, the Debtor's revenue  
28 from this key market segment increased.

1 In addition to flying sports charters, the Debtor provides *ad hoc* travel  
2 arrangements with various charter customers. This portion of the business is provided on  
3 an as needed basis.

4 The Debtor used to provide for ACMI<sup>1</sup>-based contracted for air charter  
5 transportation services to EZjet Air (EZjet), which included non-stop charter flights to  
6 and from New York, New York and Toronto, Canada to Georgetown, Guyana. Effective  
7 November 7, 2012, the Debtor terminated its contract with EZjet because the principal of  
8 EZJet was indicted on financial charges, causing EZjet to cease operations.

9 Under its original restructuring plan (Dkt #246), the Debtor planned to sell  
10 substantially all its assets to Spiral, Inc. including the transfer of the Debtor's Operating  
11 Certificates, a process that could take as long as 90 days. That deal fell through and the  
12 plan is no longer being pursued.

13 On January 22, 2013, the Court held the first half of an evidentiary hearing on the  
14 Motion to Convert. The Court heard testimony from Mark Welch, the Committee's  
15 financial advisor. Based on his review of the Debtor's financials, operating statements,  
16 and other documents, Mr. Welch testified that:

- 17 • The Debtor has continually failed to achieve its accounting projections;
- 18 • The operating reports reveal a significant continuing loss of cash and a material  
increase in accounts payable;
- 19 • There is a continued decline in the Debtor's flight escrow account indicating  
decreasing future revenues;
- 20 • Current liabilities exceed assets resulting in negative current working capital;
- 21 • Between June 27, 2012 (Petition Date) and the January hearing:
  - 21 ○ Cash has declined by \$2.3 million; and
  - 22 ○ The Debtor lost between \$4 and \$6 million in working capital.

22 Since the parties did not complete the evidentiary hearing on the afternoon of  
23 January 22, 2013, the Court set a continued hearing for January 29, 2013. Before the  
24 January 29, 2013 hearing, the Debtor and Committee reached a settlement. Key terms of  
25 the settlement included:

- 26 • The Committee would withdraw the Motion to Convert without prejudice;
- 27 • The Debtor would have until March 1, 2013 to enter into a letter of intent for new  
financing;

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<sup>1</sup> ACMI means Aircraft, Crew, Maintenance & Insurance.

- 1 • If there was no letter of intent by March 1, 2013 or a corresponding motion to  
approve filed by March 11, 2013, the Committee could re-urge the Motion to  
Convert;
- 2 • The Debtor must pay professional fee obligations (\$150,000) for February; and
- 3 • The Debtor must cooperate with information requests propounded by the  
Committee.

4 The Court set March 19, 2013 as a continued evidentiary hearing in the event the Debtor  
5 did not comply with January 29, 2013 settlement terms.

6 The Debtor did not timely enter into a letter of intent or pay professionals as  
7 agreed. Accordingly, the Committee renewed the Motion to Convert on February 15,  
8 2013 (Dkt ## 379, 380).

9 By the end of February, the Debtor filed an emergency motion to incur DIP  
10 financing from Nimbos Holdings, LLC (Nimbos) because the Debtor was close to  
11 running out of cash.<sup>2</sup> Under terms of the proposed DIP loan, Nimbos would immediately  
12 provide \$250,000 in financing and up to \$150,000 upon request. The Committee objected  
13 and asked the Court to convert the case to chapter 7. The Court ordered that it would  
14 approve the DIP financing, but only if \$50,000 was paid to fund the Committee's  
15 professional fees. Eventually, Nimbos, the Debtor, and the Committee agreed to these  
16 terms. The Court signed the order approving DIP financing on March 7, 2013 (March  
17 DIP Loan; Dkt #419).

18 Despite the March DIP Loan, the Committee continued to press its Motion to  
19 Convert. A continued evidentiary hearing was held on March 19, 2013. At that hearing,  
20 Hank Torbert, the largest equity holder of the Debtor, testified regarding a term sheet  
21 (Term Sheet) between the Debtor and Beachside Capital, LLC (Beachside). Though not  
22 definitive, the Term Sheet lays out the basic framework of the proposed transaction  
23 between Beachside and the Debtor.<sup>3</sup> Mr. Torbert further testified that creditors would not  
24 receive a recovery if this case was converted to chapter 7. He also stated that, if there was  
25 no new capital by the end of April, cash flow would become very tight. Finally,

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27 <sup>2</sup> Nimbos also provided DIP financing at the outset of this case (Dkt #196).

28 <sup>3</sup> The Court admitted under seal both the Term Sheet and testimony related to the Term Sheet. The parties  
and the Court are aware of the details of the Term Sheet. While the Court has reviewed the specifics of the  
Term Sheet, it is unnecessary to discuss those details as part of this decision.

1 according to Mr. Torbert, a transaction with Beachside or any other suitor would need to  
2 be approved by the DOT and that process would take approximately 90 days.

3 Jeff Conry, the Debtor's CEO, also testified on March 19, 2013. He stated that  
4 several unanticipated events negatively affected the Debtor's revenue stream, namely the  
5 lengthy NHL strike, EZjet's failure, and delays in mandatory C-checks. In reference to  
6 EZjet, he also testified that:

- 7 • EZjet owes the Debtor almost \$800,000;
- 8 • The Debtor complied with DOT regulations regarding charter flights after EZjet  
shut down;
- 9 • The Debtor was unaware of the alleged fraud perpetrated by EZjet's owner; and
- 10 • The Debtor is cooperating with the FBI's ongoing investigation of EZjet and/or its  
owner.

11 Mr. Conry further testified regarding the Debtor's new business opportunities, including  
12 the prospective of providing flight service to a new NHL team for 2013-14 and planned  
13 increase in Debtor's ACMI business. Mr. Conry stated that the Debtor will break even  
14 over the next 45 days. Mr. Conry also testified that the Debtor has no tangible assets  
15 which would generate cash upon liquidation. The Operating Certificates, according to  
16 Mr. Conry, only have value if the Debtor continues to operate, but are virtually valueless  
17 if the Debtor shuts down. In a similar vein, even if the Operating Certificates do have  
18 value, Mr. Conry states that the claims of Nimbos and the IRS have priority over the  
19 unsecured creditors and their priority claims would exceed the value of the Operating  
20 Certificates, leaving unsecured creditors with nothing.

21 Since the Petition Date, the Debtor's monthly operating reports show continuing  
22 cash losses and increased accounts payable. The February operating report (Dkt #427)  
23 shows a February net cash basis loss of \$609,567, year to date net cash basis loss of  
24 \$1,279,338, total cash basis net loss since the Petition Date of \$4,443,627, and  
25 outstanding post-petition liabilities of \$6,296,062.80.

## 26 **II. Issues**

27 Should the Court convert this case from chapter 11 to chapter 7 for cause based  
28 on the Debtor's gross mismanagement of the estate?

1           Should the Court convert this case from chapter 11 to chapter 7 for cause based  
2 on the continued losses of the Debtor and the absence of a reasonable likelihood of  
3 rehabilitation?

4 **III. Discussion**

5           A Court must dismiss or convert a chapter 11 case upon the showing of cause.  
6 The Committee has requested conversion due to the "substantial or continuing loss to or  
7 diminution of the estate and the absence of a reasonable likelihood of rehabilitation" or  
8 "gross mismanagement of the estate." §§ 1112 (b)(1), (4)(A), and (4)(B).<sup>4</sup> The Court has  
9 wide discretion when determining whether to convert for cause. *In re Johnston*, 149 B.R.  
10 158, 160 (BAP 9th Cir. 1992). The burden of proof is on the moving party. *In re Hinesley*  
11 *Family Ltd. Partnership No. 1*, 460 B.R. 547, 553 (Bankr. D. Mont. 2011).

12           The Court will first consider gross mismanagement. Under §1112(b)(4)(B), "the  
13 proper standard is one of gross mismanagement, as opposed to mere mismanagement." *In*  
14 *re William A. Smith Const. Co., Inc.*, 77 B.R. 124, 126 (Bankr. N.D. Ohio 1997). Much of  
15 the Motion to Convert focuses on the alleged mismanagement of the estate by the Debtor,  
16 e.g., lack of an additional 737, mandatory C-check of the 767, use of a personal credit  
17 card by the COO, the employment of ASI Advisors LLC as a financial advisor, and the  
18 Debtor's interaction with EZjet. As the case has progressed, these concerns no longer  
19 seem to be the focus of the Committee. To the extent that the Committee still believes  
20 these matters demonstrate gross mismanagement, the Court finds and concludes that there  
21 has not been post-petition gross mismanagement of the estate by the Debtor. Mr. Torbert

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23 <sup>4</sup> 11 U.S.C. § 1112(b)(1), (4)(A) and (4)(B):

24           (b) (1) Except as provided in paragraph (2) and subsection (c), on request of a party  
25 in interest, and after notice and a hearing, the court shall convert a case under this chapter  
26 to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best  
interests of creditors and the estate, for cause unless the court determines that the  
appointment under section 1104(a) of a trustee or an examiner is in the best interests of  
creditors and the estate.

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(4) For purposes of this subsection, the term 'cause' includes--

(A) substantial or continuing loss to or diminution of the estate and the  
absence of a reasonable likelihood of rehabilitation;

(B) gross mismanagement of the estate;

1 and Mr. Conry effectively and convincingly explained the operational challenges faced  
2 by the Debtor since the Petition Date and the management team's reaction to such  
3 challenges. At worst, there may have been mere mismanagement, but the Committee has  
4 not shown gross mismanagement.<sup>5</sup>

5 The principal concern of the Committee and the Court is the substantial and  
6 continuing monetary losses sustained by the Debtor and whether there is a reasonable  
7 possibility of rehabilitation. Section 1112(b)(4)(A) is written conjunctive, which means  
8 the Committee must show both substantial or continuing loss to or diminution of the  
9 estate and the absence of a reasonable likelihood of rehabilitation. *In re Bay Area*  
10 *Material Handling, Inc.*, 76 F.3d 384 (9th Cir. 1996) (unpublished); *In re Products*  
11 *Intern. Co.*, 395 B.R. 101, 110 (Bankr. D. Ariz. 2008). The Committee has shown  
12 substantial and continuing losses to the estate. The most recent operating report shows  
13 almost \$4.5 million in losses since the filing of the case. Moreover, Mr. Conry testified  
14 that the Debtor's accounts payable has increased by roughly \$1.7 million since the filing  
15 of the bankruptcy. Both these factors show that there have been substantial and  
16 continuing losses to the estate.

17 However, the Committee has not shown that there is an absence of a reasonable  
18 likelihood of rehabilitation. Recently, Nimbos advanced \$250,000 to the Debtor and has  
19 indicated that Nimbos, in its sole discretion, may provide access to an additional  
20 \$150,000. Importantly, Mr. Conry testified that the Debtor will not suffer additional  
21 losses over the next 45 days.<sup>6</sup> This cash cushion should give the Debtor time to continue  
22 negotiations with Beachside. While the Beachside Term Sheet does not guaranty  
23 rehabilitation, when combined with the cash cushion provided by the March DIP Loan,

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26 \_\_\_\_\_  
27 <sup>5</sup> As noted in an unreported case, "Use of a gross mismanagement standard implies recognition that every  
28 bankruptcy reorganization involves some degree of mismanagement." *In re Myers*, 1993 WL 836554, at \*1  
(Bankr. D. Mont. 1993).

<sup>6</sup> The Court acknowledges Mr. Welch's observation that the Debtor has continually failed to meet its  
projections. The Debtor is forewarned that the Court will pay particular attention to the Debtor's March and  
April operating statements to substantiate Mr. Conry's testimony. Going forward, the Court expects the  
Debtor to timely file operating reports on the 15th of each month.

1 they give the Debtor a reasonable likelihood of rehabilitation. Therefore, the Court denies  
2 the Motion to Convert without prejudice.

3 In reaching this decision, the Court is mindful of the Debtor's unique business.  
4 Here, because the Operating Certificates -- the most valuable assets of the Debtor --  
5 generally cannot be transferred if the Debtor is not operating, the only chance for any  
6 recovery is if the Debtor is continuing to operate. Conversion is not in the best interest of  
7 estate creditors at this point, especially since the Debtor is confident it will not sustain  
8 additional losses over the next 45 days.

9 Though the Court is not converting the case at this time, it does have serious  
10 concerns regarding the Debtor's path towards confirmation. On average, the Debtor has  
11 lost over \$500,000 per month since the Petition Date. There is no plan currently under  
12 consideration. The Debtor and the Committee are not communicating well. The Term  
13 Sheet is not a concrete commitment from Beachside. Because of these concerns, the  
14 Court will keep close tabs on the Debtor's progress towards confirmation. The Court will  
15 hold a status hearing on April 16, 2013 at 1:30 to discuss the Debtor's rehabilitation  
16 efforts. At the hearing, the Debtor should be prepared to discuss:

- 17 • The Debtor's financial performance since the March evidentiary hearing;
- 18 • The status of negotiations with Beachside;
- 19 • The anticipated plan filing and confirmation dates;
- The Debtor's communication with the Committee; and
- Any other matters relevant to confirmation.

20 At that time, the Court will consider conversion to chapter 7 if it is not satisfied with the  
21 Debtor's progress towards confirmation.

#### 22 **IV. Conclusion**

23 The Committee has not shown post-petition gross mismanagement of the estate  
24 by the Debtor. However, the Committee has shown a substantial and continuing loss to  
25 the estate. Nevertheless, the Debtor has shown a reasonable likelihood of rehabilitation.  
26 The Court denies the Motion to Convert without prejudice. A status hearing regarding the  
27 rehabilitation efforts of the Debtor will be held on April 16, 2013 at 1:30 p.m. If the  
28

1 Court is not satisfied with the Debtor's progress towards confirmation at that time, it will  
2 consider conversion of the case to chapter 7.

3

4 **So ordered.**

5 Dated: March 22, 2013

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10 COPY of the foregoing mailed by the BNC and/or  
11 sent by auto-generated mail to:

12 All interested parties

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DANIEL P. COLLINS  
UNITED STATES BANKRUPTCY JUDGE