

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-039418-104

SUPERIOR COURT
(Commercial Division)

IN THE MATTER OF THE JUDICIAL
REORGANIZATION PROCEEDINGS OF:

COMPAÑIA MEXICANA DE AVIACION,
S.A. DE C.V.

Insolvent Debtor / Respondent
/Cross-Plaintiff

And

MARU E. JOHANSEN,

Foreign Representative

And

INTERNATIONAL AIR TRANSPORT
ASSOCIATION,

Petitioner / Cross-Defendant

And

SAMSON BELAIR DELOITTE &
TOUCHE INC.

Information Officer

**INSOLVENT DEBTOR'S CONTESTATION TO MOTION
FOR AN ORDER REGARDING THE FINAL SETTLEMENT OF THE
DEBTOR'S OUTSTANDING BALANCE WITH
THE IATA CLEARING HOUSE AND FOR
THE FINAL DISTRIBUTION OF BSP & CASS PROCEEDS
AND CROSS DEMAND**

IN CONTESTATION TO INTERNATIONAL AIR TRANSPORT ASSOCIATION'S (HEREINAFTER "IATA") MOTION FOR AN ORDER REGARDING THE FINAL SETTLEMENT OF THE DEBTOR'S OUTSTANDING BALANCE WITH THE IATA CLEARING HOUSE AND FOR THE FINAL DISTRIBUTION OF BSP & CASS PROCEEDS, COMPANIA MEXICANA DE AVIACION, S.A. DE C.V. (HEREINAFTER "MEXICANA") STATES AS FOLLOWS:

1. It admits the allegations contained in paragraphs 1 and 2 of the *Motion for an Order Regarding the Final Settlement of the Debtor's Outstanding Balance with the IATA Clearing House and for the Final Distribution of BSP & CASS Proceeds* (hereinafter the "**Settlement and Distribution Motion**") and refers to Exhibit MX-17 previously communicated;
2. It ignores the allegations contained in paragraph 3 of the Settlement and Distribution Motion;
3. It prays act of the admissions contained in paragraph 4 of the Settlement and Distribution Motion and refers to Exhibits MX-1, MX-2, MX-3 and MX-4 previously communicated;
4. It denies the allegations contained in paragraphs 5 to 8 of the Settlement and Distribution Motion;
5. It prays act of the admission contained in paragraph 9 of the Settlement and Distribution Motion;
6. With regards to the allegations contained in paragraph 10 of the Settlement and Distribution Motion, It refers to Exhibit I-1 thereto and to the *Interim Order with respect to the Settlement Motion* (hereinafter the "**Interim Order**") rendered by this Honorable Court on September 19, 2012, which gave effect to the proposed compensation process submitted jointly by the parties (hereinafter the "**Approved Process**"), except with respect to section 5 of such Approved Process, the whole as appears from the court record herein;
7. It admits the allegations contained in paragraph 11 of the Settlement and Distribution Motion;
8. It ignores the allegations contained in paragraphs 12 to 17 of the Settlement and Distribution Motion;
9. It prays act of the allegations contained in paragraph 18 of the Settlement and Distribution Motion;
10. It ignores the allegations contained in paragraphs 19 to 24 of the Settlement and Distribution Motion;
11. It admits the allegations contained in paragraph 25 of the Settlement and Distribution Motion;

12. It ignores the allegations contained in paragraphs 26 to 28 of the Settlement and Distribution Motion;
13. With regards to the allegations contained in paragraph 29 of the Settlement and Distribution Motion, it refers to Exhibit I-3 and denies anything that is not consistent therewith;
14. It ignores the allegations contained in paragraphs 30 and 32 of the Settlement and Distribution Motion;
15. It admits the allegations contained in paragraph 33 of the Settlement and Distribution Motion;
16. With regards to the allegations contained in paragraph 34 of the Settlement and Distribution Motion, it refers to Exhibit I-4 and denies anything that is not consistent therewith;
17. It ignores the allegations contained in paragraphs 35 to 40 of the Settlement and Distribution Motion;
18. With regards to the allegations contained in paragraphs 41 and 42 of the Settlement and Distribution Motion, it refers to Exhibit I-2 and I-3, and denies anything that is not consistent therewith;
19. It admits the allegations contained in paragraphs 43 to 47 of the Settlement and Distribution Motion;
20. It denies the allegations contained in paragraph 48 of the Settlement and Distribution Motion;
21. With regards to the allegations contained in paragraph 49 of the Settlement and Distribution Motion, it refers to Exhibit I-5 and denies anything that is not consistent therewith;
22. It ignores the allegations contained in paragraph 50 of the Settlement and Distribution Motion;
23. It admits the allegations contained in paragraph 51 of the Settlement and Distribution Motion and refers to Exhibit MX-17 previously communicated;
24. It denies the allegations contained in paragraph 52 of the Settlement and Distribution Motion;
25. With regards to the allegations contained in paragraph 53 of the Settlement and Distribution Motion, it refers to Exhibit I-6 and denies anything that is not consistent therewith;
26. It denies the allegations contained in paragraphs 54 to 56 of the Settlement and Distribution Motion;

27. With regards to the allegations contained in paragraphs 57 to 65 of the Settlement and Distribution Motion, it refers to Exhibit I-7, I-8, I-9, I-10, I-11, I-12, I-13, I-14 and I-15, and denies anything that is not consistent therewith;
28. It admits the allegations contained in paragraph 66 of the Settlement and Distribution Motion;
29. It denies the allegations contained in paragraphs 67 of the Settlement and Distribution Motion;
30. It prays act of the admissions contained in paragraph 68 of the Settlement and Distribution Motion;
31. It denies the allegations contained in paragraphs 69 to 72 of the Settlement and Distribution Motion;
32. It prays act of the admissions contained in paragraph 73 of the Settlement and Distribution Motion;
33. It denies the allegations contained in paragraphs 74 and 75 of the Settlement and Distribution Motion;
34. It prays act of the admissions contained at paragraphs 76 and 77 of the Settlement and Distribution Motion;
35. It denies the allegations contained in paragraphs 78 and 79 of the Settlement and Distribution Motion as drafted;
36. With regards to the allegations contained in paragraph 80 of the Settlement and Distribution Motion, it refers to Exhibit I-1 and denies anything that is not consistent therewith;
37. With respect to the allegations contained in paragraphs 81 to 83, it refers to the Interim Order;
38. It admits the allegations contained in paragraph 84 of the Settlement and Distribution Motion;
39. It denies as drafted the allegations contained in paragraph 85 of the Settlement and Distribution Motion;
40. It denies the allegations contained in paragraph 86 of the Settlement and Distribution Motion;

AND FOR FURTHER CONTESTATION, MEXICANA RESPECTFULLY SUBMITS:

41. As part of its membership and participation in IATA, Mexicana, like all other participating airlines, was required to provide IATA with a deposit, the amount of which is established by IATA based on the number and value of flights operated by the airline, to secure the indebtedness which Mexicana may have as a result of inter-line ticket transactions to other airlines or of Mexicana ticket sales by travel agents (hereinafter the "**Reserve**");
42. On August 2nd, 2010 Mexicana voluntarily filed a petition for commencement of a corporate reorganization proceeding before Mexico's "*Juzgado Décimo Primero de Distrito en Materia Civil en el Distrito Federal*" (hereinafter the "**Mexican Court**") under Mexico's *Ley de Concursos Mercantiles* (hereinafter the "**Concurso Law**"), the whole as appears from a certified copy of the said petition, bearing the Seal of the Federal District Court for Civil Matters of the Federal District of Mexico, previously communicated as Exhibit R-1 in support of the Motion for Recognition of Foreign Proceedings;
43. As a result of Mexicana's announcement on August 16, 2010 of its intention to suspend flights, on August 17, 2010, Mexicana and IATA entered into an *Agreement on the refund of tickets* with respect to the reimbursement of ticket holders' claims (hereinafter the "**Agreement on the refund of tickets**"), the whole as appears from a copy of said agreement, previously communicated as Exhibit MX-17;
44. On August 28, 2010, Mexicana suspended all of its flights;
45. On November 16, 2010, Justice Brian Riordan of this Honorable Court rendered an *Order Authorizing the Insolvent Debtor and the Petitioner to Give Effect to an Agreement on the Refund of Tickets* (hereinafter the "**Order giving effect to the Agreement**"), the whole as appears from the Court record herein;
46. Moreover, the Mexican Court approved the Agreement on the refund of tickets on or about October 20, 2010, the whole as appears from Exhibit R-1 in support of the foreign representative's *Motion for Partial Distribution of Sums Held by IATA on Behalf of the Insolvent Debtor* (hereinafter the "**Motion for Partial Distribution**");
47. On January 13, 2011, Justice Brian Riordan of this Honorable Court rendered an *Order Approving an Agreement on the Refund of Tickets* (hereinafter the "**Order approving the agreement**"), the whole as appears from the Court record herein;
48. Over the course of following months, the Mexican Court issued an Order extending the protection of the Concurso Law to the Insolvent Debtor, as appear from the Court record herein;
49. On January 24, 2012, IATA filed the Settlement and Distribution Motion as appears from the Court record herein, the purpose of which was to (i) reach a final determination on the amounts owed by Mexicana to the IATA Clearing House (hereinafter the "**ICH**") in favor of other airlines and IATA itself, (ii) pay such indebtedness through the Reserve after the execution of the IATA Agreement and (iii) distribute the balance of the Reserve to Mexicana;
50. Three elements contained in the Settlement and Distribution Motion have the potential to negatively impact the amount of the Reserve to be remitted by IATA to Mexicana,

namely: (i) some adjustments made by the ICH in reduction of the Reserve, mainly amounts owed to Mexicana by other airlines and incorrect charges by IATA (hereafter the "Adjustments Issue"); (ii) the conversion of a portion of the Reserve from Mexican Pesos to US dollars (hereafter the "Foreign Exchange Issue"); and (iii) the legal fees claimed by IATA and previously deducted in part from the Reserve (hereafter the "Legal Fees Issue");

51. The Settlement and Distribution Motion was heard in part on September 11, 2012. This Honorable Court decided the Adjustments Issue and agreed with Mexicana's request for an interim order setting forth the compensation process, and continued the hearing to December 6, 2013, in order for the Court to then rule on the two remaining issues, namely the Foreign Exchange Issue and the Legal Fees Issue, the whole as appears from the court record herein;
52. As a result, on September 19, 2012, this Honorable Court issued an Interim Order with respect to the Settlement Motion (hereinafter the "**Interim Order**"), which gave effect to the proposed compensation process submitted jointly by the parties (hereinafter the "**Approved Process**"), except with respect to section 5 of the Approved Process, the whole as it appears from the Court records herein;
53. As appears from the Approved Process, Petitioner and IATA had agreed on a process through which Petitioner was provided with the technical possibility to enter all of its admissible claims into the records of the ICH, so that the parties could ultimately determine the sums owed by and to Mexicana through the ICH (hereinafter the "**Final ICH Balance**") and adjust the amount of the Reserve accordingly;
54. As a result of delays which were not caused by Mexicana, it was only on October 1st, 2012, that by letter of even date, the parties established the "Mutually Agreed Date", as October 1st, 2012, the whole as appears from a copy of said letter, previously communicated as Exhibit R-2 in support of Mexicana's *Motion for Partial Distribution*;
55. The Steps provided in sections 3a), 3b) and 3c) of the Approved Process were completed by the parties within the prescribed delays;
56. However, step 3d) of the Approved Process, which required ICH to validate the claims posted by Mexicana and other airlines into the special clearance environment in order to determine Final ICH Balance, was not completed within the period agreed upon by the parties;
57. On April 2nd, 2013, IATA's counsel finally communicated to the undersigned attorneys the Final ICH Balance, the whole as it appears from an email dated April 2nd, 2013 and various schedules prepared by IATA dated March 28, 2013, previously communicated as Exhibit R-3 in support of Mexicana's *Motion for Partial Distribution*;
58. As appears from Exhibit R-3, the Final ICH Balance, namely the total indebtedness of Mexicana towards the ICH is in the aggregate amount of **USD\$720,972.00**;

(1) Foreign Exchange Issue

59. As at July 2011, IATA held the following funds belonging to Mexicana, as appears from a financial statement prepared by IATA dated December 3rd, 2010, but communicated to Mexicana in July 2011, previously communicated as Exhibit MX-2:

Funds held by IATA, but belonging to Mexicana - July 2011						
Currency	USD	MXN ¹	EUR	CLP ²	CRC ³	VEF ⁴
	955,726.77	88,844,260.85	440.26	4,071,852.00	9,781,051.00	499,522.14
	1,230,559.81	1,049,048.63				
Total Held by IATA	2,186,286.58	89,893,309.48	440.26	4,071,852.00	9,781,051.00	499,522.14

60. As appears from Exhibit MX-2, the Mexican Pesos held by IATA on behalf of Mexicana in July 2011 were held in BSP Mexico ("BSP MX") and CASS Mexico ("CASS MX");

61. Notwithstanding;

61.1 The receipt of Mexicana's letter dated December 13, 2011, Exhibit I-15, and;

61.2 IATA's December 2011 decision to agree to temporarily delay the operation to set-off as alleged in paragraph 68 and 73 of the Settlement and Distribution Motion,

it appears that on January 6, 2012, IATA unilaterally decided to convert the Mexican Pesos into US Dollars with an exchange rate of 13,6916 Mexican Pesos per one US Dollar. Consequently, the sum of **MXN89,893,309,49** was converted to **USD\$6,565,581.05** (hereinafter the "**Foreign Exchange Transaction**"), the whole as appears from the Account Statement Details Report, previously communicated as Exhibit MX-18;

62. During the hearing held on September 11, 2012, with respect to the Settlement and Distribution Motion, Ms. Bernice McNeil of IATA confirmed that IATA did not advise or consult with Mexicana prior to processing the Foreign Exchange Transaction;

63. Using the April 17, 2013 conversion rate, namely 12.2245 Mexican Pesos per one US Dollar (subject to confirmation), the sum of MXN89,893,309.49 would have converted to **USD\$7,353,561.15**. Using the April 17, 2013 conversion rate and comparing it with the results of the conversion at the time it was actually made, namely January 6, 2012 it appears that the difference is in the amount of **USD\$787,980.10** or **MXN9,632,968.11**, the whole subject to confirmation of the current rate;

1 Mexican Pesos
2 Chilean pesos
3 Costa Rican Colons
4 Venezuelan Fuertes

64. As previously alleged in paragraph 58 hereof, the Final ICH Balance, namely the total indebtedness of Mexicana towards the ICH is in the amount of **USD\$720,972.00**, as appears from Exhibit R-3 in support of the Motion for Partial Distribution;
65. Moreover, as appears from the table in paragraph 59 hereof and from Exhibit MX-2, as at July 2011, in addition to the Mexican Pesos, Euros, Chilean Pesos, Costa Rican Colons and Venezuelan Fuertes, IATA held **USD\$2,186,286.58**;
66. Therefore, at all times relevant, IATA held sufficient US Dollars to offset the entire ICH Balance without the need whatsoever of converting the Mexican Pesos held by IATA in BSP MX and CASS MX;
67. In light of IATA's stated agreement as of December 2011 to temporarily delay the operation of the setoff until the hearing of the Settlement and Distribution Motion, as alleged in paragraph 68 of said motion, it therefore appears that IATA has unilaterally and without color of right converted the Mexican Pesos it held on behalf of Mexicana into US Dollars;
68. Indeed, the exchange rate between the Mexican Peso and the US Dollar improved substantially since January 6, 2012 such that, as previously alleged, when Mexicana will convert such proceeds back to Mexican Pesos for use in its Mexican operations, it will actually receive MXN9,632,968.11 less than IATA actually held on its behalf in July 2011 (subject to confirmation of the current rate), the whole to Mexicana's detriment and prejudice;
69. Mexicana should not have to suffer the consequences of IATA's unilateral and illegal decision;
70. As a result of the Foreign exchange operation, and using IATA's numbers as reported in the financial statement dated August 28, 2012, the amount of the Reserve is currently as follows, the whole as appears from the said Financial statement, previously communicated as Exhibit MX-4:

Amount of the Reserve	USD\$	EUR	GBP
Reserve (08/28/2012) (Mx-4)	\$8,864,202.31	EUR 71,789.54	GBP 72.06

71. Of the amounts held in US Dollars, the sum of **USD\$6,565,581.05** is derived from the Foreign Exchange Transaction, as appears from Exhibit MX-18. Therefore, US funds held by IATA on behalf of Mexicana and derived from other sources than the Foreign Exchange Transaction are in the aggregate amount of **USD\$2,298,621.31**;

(2) Legal Fees Issue

72. IATA is currently claiming from Mexicana payment of its legal fees in the aggregate amount of USD\$306,352,57. Of this amount, the sum of USD\$152,958.07 has already been deducted by IATA from the funds held in the Reserve, the whole as it appears from the financial statements previously communicated as Exhibits MX-2 and MX-3;
73. As a result, the maximum amount that Mexicana could have to pay to IATA, if IATA was to be entirely successful on this issue, is in the aggregate amount of USD\$153,394.50;
74. That being said, by signing the Agreement on the Refund of Tickets on August 17, 2010, IATA and Mexicana agreed to negotiate and enter into a special agreement superseding all other agreements signed previously by the parties, namely the *IATA Clearing House – Manual of Regulation and Procedure* (Exhibit I-17), the *Counterindemnity Agreement* (Exhibit I-16) and *Resolution 850 – Billing and Settlement Plan* (Exhibit I-2);
75. Section 3 of the *Agreement on the refund of tickets* (Exhibit MX-17) specifies the circumstances under which Mexicana is bound to reimburse IATA's legal fees:
- 3. In consideration for the services rendered or to be rendered by IATA through its BSP under articles 1 and 2, IATA shall be entitled to deduct from the monies withheld by IATA a fee of US 10,000.00 (ten thousand United States dollars) to process the refund applications and for other administrative and other expenses and costs incurred or to be incurred by IATA to perform the services in connection with this agreement plus, in addition, IATA's reasonable and documented supported attorneys fees and expenses...*
76. Section 3 of the *Agreement on the refund of tickets* (Exhibit MX-17) further provides for that any legal fees claimed must be reasonable and documented:
- This deduction shall be deemed to be a final and irrevocable settlement by Mexicana to IATA of administrative and other expenses and costs directly or indirectly incurred by IATA with respect to those tickets processed, including reasonable and documented supported legal fees and expenses.*
77. Pursuant to section 3 of the *Agreement on the refund of tickets*, Mexicana considers that the legal work done in relation to the *Agreement on the refund of tickets* amounts to a total sum of **USD\$53,935.56**;
78. From that amount, Mexicana considers that the reasonable and sufficiently documented legal fees amounts to the total sum of **USD\$44,435.56**;

79. Moreover, Mexicana respectfully asks this Honorable Court to order IATA to reimburse to Mexicana legal fees already deducted by IATA from the Reserve, namely the sum of **USD\$98,522.51**, as more fully detailed in the following table:

Amount pertaining to the Legal Fees Issue that IATA must reimburse to Mexicana	USD\$
Legal fees already deducted by IATA (MX-3)	\$152,958.07
Legal fees pertaining to the <i>Agreement on the Refund of Tickets</i> recognized as reasonable by Mexicana	-\$44,435.56
Fees of USD\$10,000.00, as provided in section 3 of the <i>Agreement on the Refund of Tickets</i>	-\$10,000.00
Total amount that IATA must reimburse to Mexicana	\$98,522.51

AND CONSTITUTING ITSELF CROSS-PLAINTIFF, MEXICANA RESPECTFULLY SUBMITS AS FOLLOWS:

80. In order to fully compensate Mexicana for the sums held by IATA from July 2011 forward, Mexicana respectfully asks this Honorable Court to order IATA to remit to Mexicana either:

OPTION A	OR	OPTION B
MXN 89,893,309.49		USD 7,353,561.15
USD 1,676,191.82 ⁵		USD 1,676,191.82
EUR 71,789.54		EUR 71,789.54
GBP 72.06		GBP 72.06

deduction made of all sums which may have been remitted BY IATA to Mexicana or which have been ordered to be remitted by IATA to Mexicana pursuant to the Motion for Partial distribution;

81. On February 21, 2013, Mexicana issued a letter addressed to IATA, confirming its wish that the funds held in the Reserve be remitted in trust to the undersigned attorneys (the "**Letter of Direction**"), the whole as it appears from Exhibit R-4 in support of the Motion for Partial Distribution;

⁵ The sums of 1,676,171.82 is calculated as follows:

	USD\$
USD\$ from other sources	2,298,621.31
Minus: Final ICH Balance	(720,972.00)
Plus: Net reimbursement of legal fees	98,522.51
Balance:	1,676,171.82

82. The present contestation and cross-demand is well founded in fact and in law;

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO:

- [1] **DISMISS** the *Motion for an order regarding the final settlement of the debtor's outstanding balance with the INTERNATIONAL AIR TRANSPORT ASSOCIATION clearing house and for the final distribution of BSP & CASS proceeds;*
- [2] **GRANT** the present *Contestation and Cross-Demand;*
- [3] **AUTHORIZE** INTERNATIONAL AIR TRANSPORT ASSOCIATION to deduct the sum of **USD\$720,972.00** from the Reserve, representing the amount of Final ICH Balance, namely the total indebtedness of COMPAÑIA MEXICANA DE AVIACION, S.A. DE C.V. towards the ICH;
- [4] **ORDER** INTERNATIONAL AIR TRANSPORT ASSOCIATION to pay to COMPAÑIA MEXICANA DE AVIACION, S.A. DE C.V., either:

OPTION A	OR	OPTION B
MXN 89,893,309.49		USD 7,353,561.15
USD 1,676,191.82		USD 1,676,191.82
EUR 71,789.54		EUR 71,789.54
GDP 72.06		GDP 72.06

deduction made of all sums which may have been remitted by INTERNATIONAL AIR TRANSPORT ASSOCIATION to COMPAÑIA MEXICANA DE AVIACION, S.A. DE C.V. or which have been ordered to be remitted by INTERNATIONAL AIR TRANSPORT ASSOCIATION to COMPAÑIA MEXICANA DE AVIACION, S.A. DE C.V. pursuant to the foreign representative's *Motion for Partial Distribution of Sums Held by IATA on Behalf of the Insolvent Debtor*, the whole payable to the order of "Borden Ladner Gervais, LLP in trust" in their capacity as attorneys for COMPAÑIA MEXICANA DE AVIACION, S.A. DE C.V.;

- [5] **THE WHOLE** with costs.

Montreal, April 18, 2013



BORDEN LADNER GERVAIS, LLP
Attorneys for Insolvent Debtor / Respondent
/ Cross-Plaintiff **COMPAÑIA MEXICANA DE AVIACION, S.A. DE C.V.**

SUPERIOR COURT
(Commercial Division)
DISTRICT OF MONTRÉAL
No.: **500-11-039418-104**

**IN THE MATTER OF THE JUDICIAL
REORGANIZATION PROCEEDINGS OF:
COMPANIA MEXICANA DE AVIACION, S.A. DE C.V.**

Insolvent Debtor

-and-

MARU E. JOHANSEN

Foreign Representative / **Petitioner**

-and-

INTERNATIONAL AIR TRANSPORT ASSOCIATION

Respondent

SAMSON BELAIR DELOITTE & TOUCHE INC.

Information officer

**INSOLVENT DEBTOR'S CONTESTATION TO
MOTION FOR AN ORDER REGARDING THE
FINAL SETTLEMENT OF THE DEBTOR'S
OUTSTANDING BALANCE WITH THE IATA
CLEARING HOUSE AND FOR THE FINAL
DISTRIBUTION OF BSP & CASS PROCEEDS
AND CROSS DEMAND**

ORIGINAL

1000 De La Gauchetière Street West
Bureau / Suite 900
Montréal, QC, Canada H3B 5H4
Tel. 514.879.1212
Fax : 514.954.1905
big.com

BLG

Borden Ladner Gervais

B.M. 2545

Mtre. François Gagnon
File : 289149-0000010