

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOSEPH HENRY and MICHAEL MALINKY,

Plaintiffs,

- v s -

1:01-CV-1681

CHAMPLAIN ENTERPRISES, INC., d/b/a
CommutAir; ANTHONY VON ELBE; JOHN
ARTHUR SULLIVAN, JR.; ERNEST JAMES
DROLLETTE; ANDREW PRICE; WILLIAM L.
OWENS; CHAMPLAIN AIR, INC.; and U.S.
TRUST COMPANY OF CALIFORNIA, N.A.,

Defendants.

APPEARANCES:

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Champlain Air, Inc.; and all individual
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DAVID N. HURD
United States District Judge

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LARS C. GOLUMBIC, ESQ.

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

This action has been the subject of two lengthy opinions. See Henry v. Champlain Enters., Inc., 334 F. Supp 2d 252 (N.D.N.Y. 2004) and Henry v. Champlain Enters., Inc., 288 F. Supp. 2d 202 (N.D.N.Y. 2003). This opinion will be brief, direct, and to the point.

Plaintiff has submitted an application for interest, attorneys fees, and expenses. U.S. Trust has opposed. U.S. Trust has applied for two set-offs of damages. Plaintiff has opposed. Based upon a review of all of the submissions and with the discretion granted under ERISA, the applications are considered in the reverse order.

II. DISCUSSION

A. Set-offs

U.S. Trust propounds two bases for set-off: (1) the alleged Section 5.7 payment in February 2004 of \$9 million plus interest in the form of 191,515.8932 (117,028.0000 in principal) shares of common stock from the Sellers to the ESOP pursuant to a Stock Purchase Agreement; and (2) cancel the \$5,480,199 in principal and about \$1,400,000 in interest due and owing on the Note from the ESOP to the Sellers.

There will be no set-off.

U.S. Trust is not a party to either the alleged Section 5.7 Stock Purchase Agreement or to the Note. It has no standing to assert either set-off.

B. Interest

Plaintiff is awarded prejudgment simple interest at the rate of 9% from March 15, 1994, to October 29, 2004, in the sum of \$7,410,937.50. Plaintiff is not awarded either compound interest or "interest overcharge."

Post judgment interest shall be governed by 28 U.S.C. § 1961.

C. Attorney Fees and Expenses

Plaintiff is awarded reasonable attorneys fees and expenses. The analysis set forth in defendant's memorandum at p. 13-14 is adopted. Plaintiff is awarded \$519,326.75 in attorneys fees and \$33,480.86 in expenses for a total of \$552,807.61.

III. CONCLUSION

Based upon this and the other opinions, and pursuant to Fed. R. Civ. P. 54(b), there being no just reason for delay, it is

ORDERED, that

The Clerk is directed to enter judgment:

1. In favor of the plaintiffs Joseph Henry and Michael Malinky on behalf of the CommutAir Employee Stock Ownership Plan and against defendant U.S. Trust Company of California, N.A. in the sum of \$15,713,745.11;

2. Dismissing the First Amended Complaint as against the defendants Champlain Air, Inc., Anthony VonElbe, John Arthur Sullivan, Jr., Ernest James Drollette, and William L. Owens;

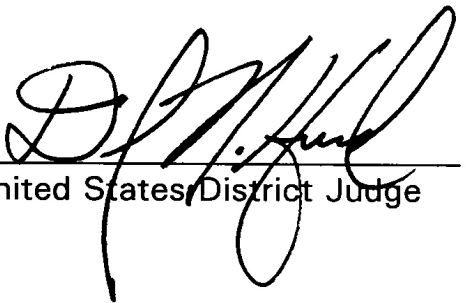
3. Dismissing the third basis of Count One of the First Amended Complaint;

4. Dismissing the first, second, and fourth bases of Count One of the First Amended Complaint as against the defendant Andrew Price;

5. Dismissing the fourth basis of Count One of the First Amended Complaint to the extent it seeks to hold CommutAir liable for failing to supervise, monitor, and perhaps remove the Trustees, Price, and Owens, with respect to their failure to pursue or demand payment from the sellers pursuant to Section 5.7 of the stock purchase agreement; and

6. Dismissing Count Three of the First Amended Complaint, without prejudice.

IT IS SO ORDERED.



United States District Judge

Dated: October 29, 2004
Utica, New York.