

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
Commercial Division
(Sitting as a court designated pursuant to the
Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36)

No. 500-11-042345-120

IN THE MATTER OF THE PROPOSED PLAN OF
COMPROMISE AND ARRANGEMENT OF:

**AVEOS FLEET PERFORMANCE INC./
AVEOS PERFORMANCE AÉRONAUTIQUE INC.**

and

AERO TECHNICAL US, INC.

Insolvent Debtors/Petitioner

and

FTI CONSULTING CANADA INC.

Monitor

and

VISION AIRLINES, INC.

Respondent

**MOTION TO DISMISS OR, SUBSIDIARILY, TO STAY VISION AIRLINES
INC.'S MOTION FOR AN ORDER LIFTING THE STAY OF PROCEEDINGS TO
INSPECT AND REPOSSESS CERTAIN ASSETS
(ARTICLES 159, 165(4) C.C.P. AND 3137, 3148 C.C.Q.)**

TO THE HONOURABLE MARK SCHRAGER OF THE SUPERIOR COURT OF THE DISTRICT OF
MONTREAL, PETITIONER AVEOS FLEET PERFORMANCE INC. ("Aveos") RESPECTFULLY SUBMITS
AS FOLLOWS:

I **BACKGROUND**

1. On or around August 13, 2012, the Respondent, Vision Airlines, Inc. ("**Vision**") issued a *Motion for an Order Lifting the Stay of Proceedings to Inspect and Repossess Certain Assets* (the "**Vision Motion**"), by which it seeks various orders in respect of certain assets of Vision currently in Aveos' possession, the whole as appears from the Court record herein;

2. Specifically, Vision seeks declaratory judgments from this Court in view of inspecting certain assets described in Schedule A of the Vision Motion (“**Vision’s Assets**”) and repossessing an engine (as defined in the Vision Motion, “**Vision’s Engine**”), as well as specific orders requiring Aveos to provide access to Vision’s Assets and to release Vision’s Engine, the whole as appears from the Court record herein;

3. The Vision Motion is presentable *pro forma* before the Commercial Division of the Superior Court on September 27, 2012, as appears from the Court record herein;

4. By the present Motion, Aveos seeks the dismissal of the Vision Motion, on the basis that a Quebec court does not have jurisdiction over the dispute purportedly submitted to this Court for adjudication;

5. Subsidiarily, Aveos seeks the dismissal of the Vision Motion on the basis that it is unfounded in law, even if the facts alleged therein were true;

6. As further subsidiary relief, should this Court come to the conclusion that it has jurisdiction to hear the present matter and that the Vision Motion is not unfounded in law, which is not admitted, Aveos respectfully requests that the Vision Motion be stayed pending the resolution of proceedings between Aveos and Vision which are currently pending before the United States District Court for the Northern District of New York and pertaining, *inter alia*, to the same issues raised in the Vision Motion regarding Vision’s Assets, Vision’s Engine and the maintenance work performed in respect thereof;

II EXCEPTION TO DISMISS FOR ABSENCE OF JURISDICTION OF QUEBEC COURTS

7. This Court does not have jurisdiction over the questions of fact and of law pertaining to the Vision Motion, such that Aveos is justified in requesting its dismissal;

8. The parties to the present proceedings unequivocally and specifically attorned to the jurisdiction of the Courts of the State of New York, and similarly agreed that the Engine Technical Services Agreement entered into by and between Aveos and Vision on April 2, 2009, being Exhibit R-1 to the Vision Motion (the “**Services Agreement**”), be governed by and interpreted in accordance with the laws of the State of New York;

9. Indeed, sections 22.1 and 22.2 of the Services Agreement provide that:

22.1 This Agreement shall be governed by and interpreted in accordance with the laws of the State of New York, USA, without regard to conflict of laws rules, irrespective of the place of execution hereof or the location at which any Work hereunder is performed. Subject to the foregoing, the terms of this Agreement shall be interpreted in accordance with the ordinary and usual meaning of the words as they are commonly used in the airline industry.

22.2 The parties hereby agree to attorn to the appropriate jurisdiction of the Courts of the State of New York, in the event of any disputes or claims whatsoever arising hereunder or as a result of any Work performed pursuant to this Agreement.

10. As will be demonstrated at the hearing of the present Motion, pursuant to the laws of the State of New York, which clearly govern the Services Agreement, section 22.2 thereof constitutes a valid and enforceable 'choice of forum' clause, such that the parties should be precluded from submitting their disputes or claims to this Court.

11. Consequently, on this basis alone, the Vision Motion ought to be dismissed, with costs, as the parties agreed that any disputes or claims would be heard by the Courts of the State of New York with appropriate jurisdiction;

12. The parties not only contemplated the application of New York law and the submission to the jurisdiction of New York Courts; since June 2011, they have also, in fact, been engaged in legal proceedings, in New York, over their respective rights and obligations under the Services Agreement, the whole as more fully set forth herein;

III **EXCEPTION TO DISMISS ON THE BASIS THAT THE VISION MOTION IS UNFOUNDED IN LAW**

13. In the event that this Court should find that it has jurisdiction to adjudicate upon the issues in dispute between Aveos and Vision, which is not admitted, it is respectfully submitted that such jurisdiction ought to be exercised for the purpose of dismissing the Vision Motion, with costs, given that it is unfounded in law, even if its allegations were deemed to be true;

14. As appears from paragraph 9 of the Vision Motion, the relief sought by Vision is predicated on section 6.5 of the Services Agreement;

15. However, even if Vision were entitled to enforce any rights under the Services Agreement, section 6.5 thereof does not confer any right to inspect any of Vision's Assets. It merely grants Vision the right, under certain circumstances, to (emphasis added):

inspect the facilities, inspection system and records of Aveos relevant to the Work performed or to be performed.

16. However, despite the clear language of section 6.5 of the Services Agreement, the fourth and fifth conclusions of the Vision Motion request that this Honourable Court (Emphasis added):

DECLARE that Vision Airlines, Inc. is entitled to inspect the assets described in Schedule A ("Vision's Assets");

ORDER Aveos Fleet Performance Inc. to provide immediate full access to Vision's Assets to Vision Airlines, Inc. (or any person or persons

appointed by Vision Airlines, Inc.) for the purpose of inspecting Vision's Assets.

17. The Services Agreement, Exhibit R-1, only contemplates the possibility for Vision to inspect the facilities, inspection system and records of Aveos, ostensibly in order to ensure that same are appropriate for the purposes of the performance of the Services Agreement. In fact, the Vision Motion itself, at paragraph 9, explains that Vision has to "ensure the proper level of security to its client and, therefore, the proper level of quality in the Services;"

18. Therefore, despite the contractual nature of its recourse, Vision is seeking a form of relief that is not even contemplated in the only contract alleged in the Vision Motion;

19. It is, moreover, evident, namely from the proceedings herein and as indicated in paragraph 20 (ii) of the Vision Motion and Exhibit R-3 in support thereof, that all Work under the Agreement has ceased and that there is no possibility for the performance of further Work or Services as such terms (i.e.: "Work" and "Services") are defined at section 1.1 of the Services Agreement (the "**Work**") pursuant to the Services Agreement;

20. Regarding the repossession of the Vision Engine, as appears from the letter dated July 30, 2012 from Aveos' counsel to Vision's counsel, being Exhibit R-3 in support of the Vision Motion, as is further set forth below and as is otherwise apparent from the Vision Motion itself, Aveos has exercised its right of retention or lien rights pursuant to section 8 of the Services Agreement, and Aveos has advised Vision that it has committed a material breach of its obligations under the Services Agreement;

21. However, while the right of retention or lien rights are clearly established from the Vision Motion itself and its Exhibits, the Vision Motion does not allege any fact or reason for which Aveos should be deprived of such rights; there are no allegations supporting the conclusions sought in respect of the repossession of the Vision Engine;

22. Indeed, even when taking all the facts in the Vision Motion (and its Exhibits) as true, there is no legal basis for the orders sought, especially when considering that such orders would entail depriving Aveos of its paramount lien rights/right of retention;

23. In addition, the relief sought by Vision is in all respects tantamount to a request for the issuance of a safeguard order. Yet, the facts alleged in the Motion, even if taken as true, do not give rise to such an exceptional remedy;

24. There is no appearance of right whatsoever for Vision to repossess its engine, because: (i) no allegation is made in respect thereof; (ii) a material breach is being invoked by Aveos; (iii) litigation is currently pending between the parties; and (iv) the Services Agreement does not contemplate any reason for which Aveos could be deprived of its lien rights/retention rights;

25. Moreover, not only does the Vision Motion fail to demonstrate any semblance of urgency, but Vision's conduct in the present matter is inconsistent with any potential allegation

of urgency. As appears from the Vision Motion, litigation has been ongoing between the parties since at least the summer of 2011, and it is only in the summer of 2012 that Vision has decided to take steps towards seeking the repossession of its engine in Quebec and in the face of pending proceedings including a motion for summary judgment filed by Aveos in the United States District Court;

IV STAY OF PROCEEDINGS PENDING THE OUTCOME OF FOREIGN PROCEEDINGS

26. Should this Court find that it has jurisdiction to hear the Vision Motion and that it is not unfounded in law, both of which are not admitted, it is submitted that the Vision Motion should nevertheless be stayed pending the resolution of the U.S. Proceedings (as defined herein at paragraph 26);

27. Indeed, as mentioned above, there are proceedings currently pending before the United States District Court, Northern District of New York, in a matter bearing file number 11 CIV.8:11-CV0950 (GTS/DRH) (the “**U.S. Proceedings**”), the whole as appears namely from the Summons and Complaint, filed in June 2011, communicated herewith, *en liasse*, as **Exhibit A-1**;

28. These proceedings have been instituted by Aveos, as Plaintiff, against Vision, as Defendant, in order to obtain payment of a \$3,959,256.49 debt owed by Vision in connection with the Work performed under the Services Agreement;

29. This debt pertains, in part, to the same Vision Engine referred to in the Vision Motion;

30. Indeed, the Complaint (Exhibit A-1) filed by Aveos (at paragraph 6(d) and 6(f)), as well as the “Statement of Material Facts” filed by Aveos in the U.S. Proceedings, communicated herewith as **Exhibit A-2**, refer to the April 28, 2011 invoices bearing Nos. 04-823011-S and 04-8232-11-I in the amounts of \$1,407,861.00 and \$1,569,631.45, respectively;

31. These invoices have been filed as Exhibit 9 and Exhibit 10, respectively, in support of the Aveos Complaint, and are communicated herewith, *en liasse*, as **Exhibit A-3**;

32. As appears from these invoices, the sums in question pertain to Work performed, *inter alia*, on “Vision Airlines Engine JT9D-7R4, S/N 709632, EVENT VN3-A”, i.e.: the Vision Engine at issue in the Vision Motion;

33. It is therefore clear that the Vision Motion and the U.S. Proceedings have the same object;

34. Regarding invoice No. 04-823011-S (Exhibit 9 filed in support of the Aveos Complaint), in a deposition made by Mr. Bill Acor, Vision’s representative, it was conceded, even while contesting the quantum of \$1,407,861.00, that “somewhere around \$700,000” is nevertheless owed to Aveos, the whole as appears from the Extracts of transcripts of said deposition, **Exhibit A-4**;

35. Aveos hereby communicates, as **Exhibit A-5** in support hereof, Vision's Response to Aveos' Statement of Material Facts as submitted in the U.S. Proceedings;

36. As appears from the Statement of Material Facts, Exhibit A-2, (namely paragraphs 9, 10 and 47 thereof) Aveos alleges that Vision is not entitled to contest the invoices pertaining to the Vision Engine, due to its failure to follow the procedure for such contestation as provided for in section 5.4.1 of the Services Agreement. Aveos further alleges that Work was performed on the Vision Engine;

37. In Vision's Response, Exhibit A-5, namely at Responses 37 to 40, Vision acknowledges the non-payment of the Aveos invoices, Exhibit A-3. These invoices are related to the Vision Engine over which Aveos claims lien rights/right of retention;

38. In the U.S. Proceedings, Aveos filed a Motion for Summary Judgment, the whole as appears from a copy of the Notice of Motion for Summary Judgment, communicated as **Exhibit A-6**;

39. The Aveos Motion for Summary Judgment is currently under advisement and a decision is pending by the United States District Court.

40. In Aveos' "Memorandum of Law in Support of its Motion for Summary Judgment," a copy of which is communicated herewith as **Exhibit A-7**, Aveos claims, at page 11, that (1) Aveos performed its obligations under the Services Agreement in providing services to Defendant; (2) Aveos incurred additional costs relating to the Agreement in leasing an engine from Pratt & Whitney for Vision to utilize as a spare engine; (3) that Vision has breached the Services Agreement by failing to pay the Aveos invoices as they became due; and (4) Vision's non-payment has caused Aveos to suffer damages;

41. These claims by Aveos overlap entirely with the questions of fact and of law submitted to this Honourable Court pursuant to the Vision Motion and there is a real risk of contradictory judgments between this Court and the foreign court currently seized of the matter;

42. Indeed, the relief sought in the Vision Motion before this Court entails a determination of the parties' respective rights, remedies and recourses, which is precisely what is under advisement by the Court in the U.S. Proceedings;

43. Indeed, in order to determine whether Vision has the rights it seeks to have enforced, this Court must first adjudicate on questions that have already been submitted to a foreign tribunal;

44. Moreover, at paragraph 29 (page 12) of Vision's "Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment," a copy of which is communicated herewith as **Exhibit A-8**, Vision states:

Vision would like to visit Aveos' warehouse to inspect the work performed on these engines, and/or see what parts remain. Vision has asked Aveos "numerous times" and numerous times, "[Vision has] been told no, we cannot go to the facility." [...] Summary judgment should not be granted because payment issues have been settled, Aveos owes Vision these engine parts, but without being able to view the parts, Vision cannot determine what additional work, if any, has been done and how much Vision's engine parts are worth.

45. This statement filed in the U.S. Court unequivocally demonstrates that this Honourable Court is, improperly, being asked by Vision to adjudicate on the very same issues raised and pleaded before the U.S. Court, which issues have been taken under advisement for the purposes of the Motion for Summary Judgment filed by Aveos;

46. The U.S. Proceedings and the Motion for Summary Judgment filed by Aveos will result in a decision which may be recognized in Quebec and homologated by a Quebec Court;

WHEREFORE, MAY IT PLEASE THIS IS HONOURABLE COURT TO:

GRANT the present Motion;

DISMISS Vision Airlines, Inc.'s *Motion for an Order Lifting the Stay of Proceedings to Inspect and Repossess Certain Assets*;

SUBSIDIARILY:

DECLARE that the present proceedings be stayed pending a final judgment or definitive resolution of the proceedings instituted by Aveos Fleet Performance Inc. against Vision Airlines, Inc., in the United States District Court, Northern District of New York, in matter bearing file number 11 CIV.8:11-CV0950 (GTS/DRH);

THE WHOLE, with costs.

Montreal, September 25, 2012



FRASER MILNER CASGRAIN LLP

Attorneys for Petitioner

AVEOS FLEET PERFORMANCE INC./

AVEOS PERFORMANCE AÉRONAUTIQUE INC.

AFFIDAVIT

I, the undersigned, **JONATHAN SOLURSH**, of R.e.l. Group Inc., domiciled, for the purposes hereof, at 7171 Cote-Vertu Boulevard west, St-Laurent, Province of Quebec, do solemnly declare:

1. I am the Chief Restructuring Officer of the Aveos Fleet Performance Inc. in the present matter;
2. I have personal knowledge of all of the facts alleged in the present *Motion to Dismiss or, Subsidiarily, to Stay Vision Airlines Inc.'s Motion for an Order Lifting the Stay of Proceedings to Inspect and Repossess Certain Assets*, which are true.

AND I HAVE SIGNED:

JONATHAN SOLURSH

SOLEMNLY DECLARED before me at Toronto,
this 25th day of September, 2012

NOTICE OF PRESENTATION

TO: SERVICE LIST

TAKE NOTICE that the *Motion to Dismiss or, Subsidiarily, to Stay Vision Airlines Inc.'s Motion for an Order Lifting the Stay of Proceedings to Inspect and Repossess Certain Assets* will be presented before the Honourable Mark Schragger of the Superior Court, sitting in and for the Commercial Division for the District of Montreal, in the Montreal Courthouse, located at 1 Notre-Dame Street East, Montreal, in room 16.12, on **September 27, 2012, at 2:15 PM**, or so soon thereafter as counsel may be heard.

DO GOVERN YOURSELVES ACCORDINGLY.

Montréal, September 25, 2012



FRASER MILNER CASGRAIN LLP

Attorneys for Petitioner

AVEOS FLEET PERFORMANCE INC./

AVEOS PERFORMANCE AÉRONAUTIQUE INC.

CANADA

SUPERIOR COURT

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

Commercial Division
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Insolvent Debtors/Petitioner

and

FTI CONSULTING CANADA INC.

Monitor

and

VISION AIRLINES, INC.

Respondent

RESPONDENT'S LIST OF EXHIBITS

Exhibit A-1	<i>En liasse:</i> Aveos Summons and Complaint filed against Vision in June 2011;
Exhibit A-2	Statement of Material Facts as submitted by Aveos in the U.S. Proceedings;
Exhibit A-3	<i>En liasse:</i> Invoices filed as Exhibit 9 and Exhibit 10 in U.S. Proceedings;
Exhibit A-4	Extracts of transcripts of the deposition of Mr. Bill Acor, Vision's representative, in the context of the U.S. Proceedings;
Exhibit A-5	Vision's Response to Statement of Material Facts filed in U.S. Proceedings;
Exhibit A-6	Notice of Motion for Summary Judgment filed in U.S. Proceedings;

Exhibit A-7	Aveos' "Memorandum of Law in Support of its Motion for Summary Judgment, filed in U.S. Proceedings;
Exhibit A-8	Vision's "Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment" filed in U.S. Proceedings.

These Exhibits are available upon request.

Montréal, September 25, 2012



FRASER MILNER CASGRAIN LLP

Attorneys for Petitioners

No. 500-11-042345-120

SUPERIOR COURT (Commercial Division)
DISTRICT OF MONTRÉAL

IN THE MATTER OF THE PROPOSED PLAN OF
COMPROMISE ARRANGEMENT OF :

AVEOS FLEET PERFORMANCE INC./
AVEOS PERFORMANCE AÉRONAUTIQUE INC.
and
AERO TECHNICAL US, INC.

and Insolvent Debtors/Respondents

FTI CONSULTING CANADA INC. Monitor
and
VISION AIRLINES, INC. Respondent

Me Roger Simard / Me Ari Sorek File: 548732-1

**MOTION TO DISMISS OR, SUBSIDIARILY, TO STAY
VISION AIRLINES INC.'S MOTION FOR AN ORDER
LIFTING THE STAY OF PROCEEDINGS TO INSPECT AND
REPOSSESS CERTAIN ASSETS
(ARTICLES 159, 165(4) C.P. AND 3137, 3148 C.C.Q.)**

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