ORDERED.

Dated: September 21, 2016

Catherine Peek McEwen
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
www.flmb.uscourts.gov

In re:

AVANTAIR, INC.,

Debtor.

Case No. 08:13-bk-09719-CPM

Chapter 7

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ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT, CERTIFYING CLASS FOR SETTLEMENT PURPOSES ONLY, APPOINTING CLASS REPRESENTATIVE AND CLASS COUNSEL, AND GRANTING RELATED RELIEF

THIS CAUSE came before the Court for hearing on September 19, 2016 at 3:00 p.m. (the "Fairness Hearing") on the *Joint Motion For Entry Of An Order: (I) Approving Settlement And Compromise Of Controversy With The Former Employees Of Avantair, Inc. Pursuant To Bankruptcy Rule 9019; (II) Granting Preliminary Approval Of Class Action Settlement; (III) Conditionally Certifying Class For Settlement Purposes Only; (IV) Approving The Form And Manner Of Service Of Class Notice; (V) Scheduling A Final Approval Hearing; And (VI) Granting Related Relief* (the "Motion") (Doc.2017), pursuant to the *Order Granting Joint Motion for Entry of an Order (i) Approving Settlement and Compromise of Controversy with Former Employees of Avantair, Inc. Pursuant to Bankruptcy Rule 9019; (ii) Granting Preliminary Approval of Class Action Settlement; (iii) Conditionally Certifying Class for Settlement Purposes*

Only; (iv) Approving the Form and Manner of Service of Class Notice; (v) Scheduling a Final Approval Hearing; and (iv) Granting Related Relief (Doc. 2036) (the "Preliminary Settlement Approval Order"). The Court has carefully reviewed the Motion, the Settlement Agreement attached to the Motion (the "Settlement Agreement"), the record in this case, the representations and proffers made at the Fairness Hearing, and applicable law, and is otherwise fully advised in the premises. For the reasons stated on the record, which shall constitute the Court's findings of fact and conclusions of law, it is hereby:

ORDERED AND ADJUDGED that:

1. The Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2).

2. Beth Ann Scharrer, as Chapter 7 trustee for the bankruptcy estate of Avantair, Inc. ("Trustee"), and Mary Peterson and Scott Piwinski ("Plaintiffs"), who seek to represent a class of former employees of Avantair, Inc. ("Avantair" or "Debtor"), and Gustavo Calvillo and Scott Kammerer (the "Individual Claimants") (the Trustee, Plaintiffs, and Individual Claimants are, collectively, the "Parties") have negotiated a potential settlement of the Employee Litigation (as defined in the Settlement Agreement) to avoid the expense, uncertainties, and burden of protracted litigation, and to resolve the Released Claims (as defined in the Settlement Agreement).

3. Settlement "has special importance in class actions with their notable uncertainty, difficulties of proof, and length. Settlements of complex cases contribute greatly to the efficient use of judicial resources, and achieve the speedy resolution of justice[.]" *Turner v. Gen. Elec. Co.*, No. 2:05-CV-186-FTM-99DNF, 2006 WL 2620275, at *2 (M.D. Fla. Sept. 13, 2006). For these reasons, "[p]ublic policy strongly favors the pretrial settlement of class action lawsuits." *In*

re U.S. Oil & Gas Litig., 967 F.2d 489, 493 (11th Cir.1992). "Approval of a class action settlement is a two- step process." *Fresco v. Auto Data Direct, Inc.*, No. 03-cv-61063, 2007 WL 2330895, at *4 (S.D. Fla. May 14, 2007). Preliminary approval is the first step, requiring the Court to "make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." *Id.* In the second step, after notice to the class and time and opportunity for absent class members to object or otherwise be heard, the court conducts a fairness hearing and considers whether to grant final approval of the settlement. *Smith v. Wm. Wrigley Jr. Co.*, 2010 WL 2401149, at *2 (S.D. Fla. June 15, 2010). Ultimately, the Court should approve a class action settlement at the fairness hearing if it is fair, adequate, and reasonable and not the product of collusion. *Bennett v. Behring*, 737 F. Supp. 982, 986 (11th Cir. 1984). When conducting this analysis, the Court "should always review the proposed settlement in light of the strong judicial policy that favors settlements." *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1329 (S.D. Fla. 2001). In determining whether a proposed settlement is "fair, adequate, and reasonable," the following factors are often considered: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved. *Bennett*, 737 F. Supp. at 986; *see also In re Sunbeam*, 176 F. Supp. 2d at 1329.

4. Additionally, because the Trustee is a party to the settlement, the Court must also consider whether the Settlement should be approved pursuant to Bankruptcy Rule 9019. Rule 9019(a) gives the Court broad authority in approving compromises or settlements. *In re Bicoastal Corp.*, 164 B.R. 1009, 1016 (Bankr. M.D. Fla. 1993) (*citing In re Charter Co.*, 72 B.R.

70 (Bankr. M.D.Fla.1987)). The determination of whether to approve a compromise is a matter committed to the sound discretion of the bankruptcy judge. *River City v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602-603 (5th Cir.1980). In exercising this discretion, the court should approve the proposed settlement if it is in the best interests of the estate. *Id.* In determining whether a proposed compromise is in the best interests of the estate, the Bankruptcy Court should consider the following factors: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interests of the creditors and a proper deference to their reasonable views in the premises. *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 (11th Cir. 1990), *cert. denied*, 498 U.S. 959, 111 S. Ct. 387, 112 L. Ed. 2d 398 (1990).

5. The Court has carefully reviewed the Settlement Agreement, as well as the files, records, and the proceedings to date in this case and the Employee Litigation. The terms and conditions of the settlement (the "Settlement") set forth in the Settlement Agreement are hereby incorporated as though fully set forth in this Order, and, unless otherwise indicated, capitalized terms in this Order shall have the meanings attributed to them in the Settlement Agreement.

6. The Settlement is in all respects fair, reasonable, adequate, and proper and in the best interests of the Employee Class. The Settlement satisfies in all respects the standards for approval under Rule 23 of the Federal Rules of Civil Procedure, as incorporated in Rule 7023 of the Federal Rules of Bankruptcy Procedure, and Federal Rule of Bankruptcy Procedure 9019, as set forth above. Pursuant to Federal Rule of Civil Procedure 23(e), the Court grants final approval of the Settlement. Subject to the satisfaction of the Conditions Precedent set forth in the Settlement Agreement and the occurrence of the Final Approval Date (as defined in the

Settlement Agreement), the Court authorizes the parties to the Settlement to take all actions that may be necessary or appropriate to implement the Settlement Agreement. Contingent upon satisfaction of the Conditions Precedent set forth in the Settlement Agreement and the occurrence of the Final Approval Date (as defined in the Settlement Agreement), the releases and other Post-Approval Obligations set forth in paragraph 9 of the Settlement Agreement shall become binding and effective on the all members of the Employee Class except for the Opt Out Employees.

7. The Court has reviewed the Notice Regarding Mailing to Employee Class (Doc. 2072) (the "Settlement Administrator's Notice") filed by the Settlement Administrator. Notice of the Settlement has been provided to members of the Employee Class in the form and manner specified in the Preliminary Approval Order. In addition, a website was established, in compliance with the Preliminary Approval Order. The Court finds that this is the best practicable notice under the circumstances and was reasonably calculated, under all the circumstances, to apprise potential members of the Employee Class of the pendency of the Employee Litigation, to apprise persons who would otherwise fall within the definition of the Employee Class of their right to exclude themselves from the proposed Employee Class, and to apprise member of the Employee Class of their right to object to the proposed Settlement and their right to appear at the Final Approval Hearing. The Court further finds that such notice is reasonable, constitutes due, adequate, and sufficient notice to all persons entitled to receive notice, and meet the requirements of due process.

8. Based upon a review of the docket in this case and the Settlement Administrator's Notice, no written objections were filed to the Settlement. No oral objections to the Settlement were asserted at the Fairness Hearing.

9. Three individuals requested to opt-out of the settlement, David E. Cann, David Buser and Marc Smith (the "Opt Out Employees"), and they shall be excluded from the Employee Class and not be entitled to any of the monetary benefits afforded to the Employee Class under the Settlement.[1]

10. The Employee Class shall consist of: those individuals who received a payroll payment from Avantair for wages with a check date of May 3, 2013 through June 14, 2013, but does not include (i) any defendants in litigation brought by the Plaintiffs, (ii) any present or former officers or directors of Avantair, or (iii) any members of the immediate family of individuals identified in the foregoing clauses (i) and (ii). The Opt Out Employees shall be excluded from the Employee Class.

11. The Court makes the following determinations as to certification of the Employee Class as a settlement class only: (a) The Court certifies the Employee Class for purposes of settlement only, under Fed. R. Civ. P. 23(a) and (b)(3); (b) The Employee Class is so numerous that joinder of all members is impracticable; (c) There are questions of law or fact common to the members of the Employee Class; (d) The claims of the Plaintiffs are typical of the claims of the other members of the Employee Class; (e) Plaintiffs are capable of fairly and adequately protecting the interests of the members of the Employee Class, in connection with the Settlement Agreement; (f) For purposes of settlement, in which there will be no trial and the Court is not presented with trial manageability issues, common questions of law and fact predominate over questions affecting only individual members of the Employee Class; (g) The Employee Class is ascertainable; and (h) Resolution of the claims in this Litigation by way of a class settlement is

[1] Alicia Barbree and Garardo Domias are not class members because they did not work sufficient time to appear in the above defined class. However, they are due wages for time worked during their employment, and shall be paid from the Qualified Settlement Fund in accordance with the Settlement Agreement.

superior to other available methods for the fair and efficient resolution of the claims of the Employee Class.

12. For purposes of settlement only, Mary Peterson and Scott Piwinski (collectively, the "Class Representatives") are certified as representatives of the Employee Class and the law firms of Kwall, Showers, Barack & Chilson, P.A. and David Christian Attorneys LLC (collectively "Class Counsel") are appointed as counsel to the Employee Class. The Class Representatives and Class Counsel have diligently and zealously prosecuted the Employee Claims and have fairly and adequately protect the interests of the Employee Class. Additionally, Gustavo Calvillo and Scott Kammerer provided services to the Employee Class.

13. Class Counsel has requested attorneys' fees in the amount of 33 1/3% of the amounts paid to the Qualified Settlement Fund pursuant to the Settlement, which amounts are to be paid from the Qualified Settlement Fund. Rule 23(h), Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7023, Federal Rules of Bankruptcy Procedure, provides that in a class action, the court may award reasonable attorneys' fees and costs as authorized by law or as agreed to by the parties. "Attorneys' fees awarded from a common fund shall be based on a reasonable percentage of the fund established for the benefit of the class." *Faught v. American Home Shield Corp.*, 668 F.3d 1233, 1242 (11th Cir. 2011) (internal citations omitted). The Court has considered the factors detailed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), and subsequent cases and finds that the proposed 33-1/3% contingency fee to Class Counsel is typical, reasonable, and appropriate.

14. Pursuant to Rule 23, the Class representatives are entitled to a case contribution award of $5,000 each for their work and assistance in the Employee Litigation, and the Individual Claimants are entitled to a case contribution award of $1,500 each for their work and

assistance in the Employee Litigation. The case contribution awards shall be paid from the Qualified Settlement Fund.

15. This Order shall become null and void, and shall be without prejudice to the rights of the Parties, all of whom shall be restored to their respective positions existing immediately before this Court entered this Order, if (i) the approval of the Settlement is reversed on appeal or the Final Approval Date does not occur, pursuant to the terms of the Settlement Agreement; or (ii) the Settlement Agreement is terminated pursuant to the terms of the Settlement Agreement for any reason. In such event, and except as provided therein, the proposed Settlement and Settlement Agreement shall become null and void and be of no further force and effect; the certification of the Employee Class for settlement purposes shall be automatically vacated; neither the Settlement Agreement, the Preliminary Approval Order, nor this Order, shall be used except to establish the parties' return to the status quo ante; and the Parties shall retain, without prejudice, any and all objections, arguments, and defenses with respect to class certification. If the Final Approval Date does not occur, this Order shall be of no force and effect and shall not be construed or used as an admission, concession, or declaration by or against any of the Released Parties of any fault, wrongdoing, breach, liability, or appropriateness of contested class certification, or by or against any Plaintiff or the Employee Class members, or persons who would otherwise fall within the definition of the Employee Class but who request exclusion from the Employee Class, that their claims lack merit or that the relief requested Employee Litigation is inappropriate, improper, or unavailable, or as a waiver by any party of any claims or defenses they may have.

16. The Court shall retain continuing jurisdiction for the purposes of implementing and enforcing the Settlement Agreement and this Order, and any disputes that arise pursuant to the Settlement Agreement and this Order.

Attorney Lynn Welter Sherman is directed to serve a copy of this order on interested parties who are non-CM/ECF users and file a proof of service within 3 days of entry of the order.