

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**

In re:)
)
ADAM AIRCRAFT INDUSTRIES, INC.,) Case No. 08-11751 MER
)
Debtor.) Chapter 7

**ROBERT SCOGGIN'S OBJECTION AND REQUEST FOR HEARING
REGARDING FIRST INTERIM APPLICATION OF LINDQUIST &
VENNUM FOR COMPENSATION AND REIMBURSEMENT**

Robert Scoggin, individually and on behalf of those similarly situated, submits this Objection and Request for Hearing Regarding Lindquist & Vennum's First Interim Application for Compensation and Reimbursement. Mr. Scoggin requests the Court to disapprove the payment of fees and expenses to Lindquist & Vennum at this time, or limit the amount to be paid, and/or condition any payment upon adequate provisions for disgorgement of sums paid in the event of the administrative insolvency of the Debtor's estate. As grounds therefor Mr. Scoggin states:

Background

Mr. Scoggin has filed in this chapter 7 case a Class Proof of Claim on behalf of himself and approximately 800 similarly situated former employees of the Debtor who were terminated pre-petition in violation of the federal Worker Adjustment and Retraining Notification Act ("WARN Act"). Mr. Scoggin has also filed a class action adversary proceeding against the Debtor on the same grounds and on behalf of the same class: *Scoggin v. Adam Aircraft Industries, Inc.*, Adv. No. 08-1366 MER ("the Adversary Proceeding"). This Court is currently considering the Trustee's objection to the Class Proof of Claim, Mr. Scoggin's motion for class certification in the Adversary Proceeding, the Trustee's motion for summary judgment in the Adversary Proceeding, and related matters, all of which were argued at a hearing on September 29, 2008.

The disputed issues in this case include: (1) whether the WARN Act claims of Mr. Scoggin and the putative class members are entitled to administrative priority under Code section 503(b)(1)(A)(ii); and (2) whether the fees and costs incurred by counsel for Mr. Scoggin and the class should likewise be accorded administrative priority in the event the WARN Act claims are successful. As the Court will recall from the prior briefing and

the hearing, there is persuasive authority for Mr. Scoggin's position that these claims are entitled to administrative priority.

Mr. Scoggin believes that until the Warn Act claims are adjudicated, it is premature for the Court to determine the administrative priority issues. Nevertheless, it is important for the Court to recognize the potential for WARN Act administrative claims in this case on the order of magnitude of \$8 million (800 class members with claims averaging perhaps \$10,000 each).

In paragraph 3 of his Motion for Summary Judgment in the Adversary Proceeding, the Trustee asserted that "[a]llowance of an administrative claim as requested in the Complaint would dilute the estate to the point of administrative insolvency" Mr. Scoggin does not believe that this is an appropriate consideration in the Court's determination of the matters in dispute in the Class Proof of Claim and the Adversary Proceeding. Mr. Scoggin believes that the WARN Act and class action issues must be determined on their own merits, without regard to the possible consequences for the solvency of the estate.

The prospect of administrative insolvency is highly relevant, however, to Lindquist & Vennum's ("L&V's") current application for approval of \$613,000 in attorney's fees and costs, and for payment of \$325,000 of this amount. Mr. Scoggin does not object to the amount of fees and expenses requested by L&V. Mr. Scoggin does object, however, to the Debtor's *payment* of these fees and costs in light of the prospect of administrative insolvency.

Applicable Law

Under Code section 507(a), the highest priority claims involved in this case are administrative claims under Code section 503(b). Code section 726(b) mandates *pro rata* distribution of assets among creditors in the same statutory class. Accordingly, all administrative claims must be paid *pro rata*.

When a bankruptcy estate becomes administratively insolvent, such that professionals who received interim awards of fees have obtained more than a *pro rata* payment of their administrative claims, a bankruptcy court will order the professionals to disgorge the fees received to the extent necessary to achieve *pro rata* payment among all administrative claimants. *Specker Motor Sales Co. v. Eisen*, 393 F.3d 659, *passim* (7th Cir. 2004); *In re Kids Creek Partners, L.P.*, 236 B.R. 871, *passim* (Bankr. N.D. Ill. 1999).

There is a split of authority regarding whether a bankruptcy court may exercise its discretion in deciding whether or not to order the disgorgement of fees in order to achieve a *pro rata* distribution, or whether disgorgement is mandatory to adhere to the *pro rata* payment scheme of the Code. *See In re Wilson-Seafresh, Inc.*, 263 B.R. 624, 630-31

(Bankr. N.D. Fla. 2001) (collecting cases; holding that disgorgement is mandatory). There is no doubt that in some cases, disgorgement of previously paid fees may involve difficult equitable issues.

[T]he process of essentially going back to the beginning of the case to determine what equality of distribution might mean in terms of dollars, and then mounting an effort to achieve it does indeed involve, if not a "parade of horrors" a parade of difficulties and obstacles that not many would want to undertake and the cost/benefits of which would be difficult to measure, and the ultimate outcome of which would be difficult to predict.

See In re World Waste Services, Inc., 345 B.R. 810, 816 (Bankr. E.D. Mich. 2006).

For these reasons, in ruling on an application for payment of an administrative expense, a bankruptcy court should consider the ability of the claimant to respond to an order to disgorge the payment in the event that the debtor's estate proves to be administratively insolvent. *See, e.g., In re Haven Eldercare, LLC*, 382 B.R. 180, 185 n.6 (Bankr. D. Conn. 2008) (disapproving proposed payment arrangement for professionals where the record did not demonstrate the financial wherewithal of the professionals or any alternative method to assure their ability to disgorge, such as posting of a bond or placing the fee/expense payments in a trust account until such time as they are finally allowed); *In re LTV Steel Company, Inc.*, 288 B.R. 775, 778-79 (Bankr. N.D. Ohio 2002) (disapproving payment of a large administrative claim until all administrative claims were resolved, to preserve *pro rata* distribution scheme).

Analysis

Because the Trustee in this case has raised the specter of an administratively insolvent estate, the parties and the Court must consider the possibility of future disgorgement of professional fees and other administrative fees or costs paid on an interim basis. In order to minimize future disputes, potential inequity, and the hardship involved in the disgorgement of fees, the Court should place limits and conditions on the payment of administrative claims at this time. It is better to withhold payments now than to require disgorgement of payments later.

Mr. Scoggin and his counsel do not currently have sufficient information to propose any specific limits or conditions upon the payment of L&V's current request. A hearing will be necessary to establish the estate's assets and projected administrative claims. Undersigned counsel will work with the Trustee's counsel to cooperatively develop the information necessary for a hearing and to avoid the necessity of formal discovery. Mr. Scoggin reserves the right to conduct formal discovery should this prove necessary.

The limits and conditions the Court may wish to consider in ruling on L&V's application include disapproving any payment of the requested fees and expenses at this time, limiting the amount of the payment, and/or requiring satisfactory assurances of the ability of L&V to disgorge any amount paid. As noted, Mr. Scoggin does not object to the amount of fees and expenses requested by L&V.

WHEREFORE, Robert Scoggin, on behalf of himself and the putative class of similarly situated persons, objects to Lindquist & Vennum's First Interim Application for Compensation and Reimbursement and requests a hearing on the same.

Respectfully submitted this 10th day of November, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2008, I served a the foregoing **ROBERT SCOGGIN'S OBJECTION AND REQUEST FOR HEARING REGARDING FIRST INTERIM APPLICATION OF LINDQUIST & VENNUM FOR COMPENSATION AND REIMBURSEMENT** electronically via the Court's ECF/PACER system upon:

John C. Smiley, Esq.
Theodore J. Hartl, Esq.
Scott T. Varholak, Esq.
Lindquist & Vennum P.L.L.P.
600 17th St., #1800 South
Denver, CO 80202-5441

and via U.S. Mail upon:

Office of the United States Trustee
999 18th St., Suite 1551
Denver, 80202

s/ Susan Tablack
