IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	
	)	
ADAM AIRCRAFT INDUSTRIES, INC. EIN: 161643299,	)	Case No. 08-11751 MER Chapter 7
	)	
Debtor.	)	

RESPONSE TO OBJECTION CONCERNING FIRST INTERIM APPLICATION OF LINDQUIST & VENNUM P.L.L.P. FOR ALLOWANCE OF COMPENSATION AND REIMBURSEMENT OF EXPENSES

Lindquist & Vennum P.L.L.P ("L&V" or "Applicant"), as counsel for Jeffrey A. Weinman, the Chapter 7 Trustee (the "Trustee"), for its Response to Objection Concerning First Interim Application for Allowance of Compensation and Reimbursement of Expenses (this "Response"), states:

1. The objection to L&V's First Interim Application for Allowance of Compensation and Reimbursement of Expenses (the "Interim Fee App"), filed by Robert Scoggin ("Scoggin"), is intended to hold L&V's legitimate fees hostage to his own uncertain claim for an administrative expense. Scoggin has no allowed or allowable claim for an administrative expense in this bankruptcy case, whether in his own right or on behalf of a class of other former employees. At most, Scoggin and any putative class have garden-variety prepetition claims that are junior in right to all proper administrative expenses.

2. Despite Scoggin's intimations otherwise in his objection, it is not the Trustee who has "raised the specter of an administratively insolvent estate." Scoggin can blame only himself – he is the one who filed proof of claim for more than $11 million and commenced an adversary proceeding seeking allowance of that $11 million claim as an administrative expense. The record in this case clear that the Trustee sold substantially all of the Chapter 7 estate's assets for $10 million. It is those two simple figures that conjure Scoggin's specter, not the Trustee.

3. Counsel is well aware that an *interim* fee award in *any* bankruptcy case may be subject to equitable disgorgement and "reexamination and adjustment during the course of the case." *Callister v. Ingersoll-Rand Fin. Corp. (In re Callister)*, 673 F.2d 305, 307 (10th Cir. 1982). That is a known quantity in the calculus of representing debtors and trustees in bankruptcy.

4. Here, however, the request for approval of $587,834.00 in fees and $25,205.65 in costs from the February 15, 2008, petition date through September 30, 2008, to be allowed as an administrative expenses is limited in light of the prior stipulations between the Trustee and the Debtor's senior secured lender. Under the cash collateral stipulation and order (docket entries numbered 87 and 142), L&V's fees and expenses up to $375,000.00 are payable from the lender's collateral proceeds – not from general estate funds that would go to other administrative expense claims.[1]

5. A fundamental point lost on Scoggin is that "surcharges and administrative expenses under the Bankruptcy Code are distinct charges against estate property that serve very

1 The $375,000 cap in the cash collateral stipulation is almost precisely equal to L&V's fees and expenses through the sale closing date, which totaled $376,779.44.

different purposes." *Rappaport & Segal v. Miller (In re Inteliquest Media Corp.),* 326 B.R. 825, 832 (B.A.P. 10th Cir. 2005). Whereas professional compensation as an administrative expense "is an assessment against the estate as a whole . . . a surcharge under 11 U.S.C. § 506(c) is . . . an assessment against a secured party's collateral . . . ." *Id.* Administrative claimants other than the Trustee cannot surcharge a creditor's collateral under § 506(c). *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 14 (2000).

6. Here, the Court has approved the stipulations with the Debtor's lender authorizing the agreed § 506(c) surcharge for L&V's fees through the sale of substantially all of the estate's assets. That same stipulation provides that the estate will receive a minimum carve-out for the benefit of the estate – free and clear of the lenders' secured claims – of 9% of the net sale proceeds. Although the precise amount of that carve-out is not yet known, it is estimated that the estate will received something on the order of $800,000.00 free and clear to pay unsecured creditors and general, non-sale related, administrative expenses. Such agreements for carve-outs and use of collateral for professional fees "are the warp and woof of reorganization practice." *Costa v. Robotic Vision Sys., Inc. (In re Robotic Vision Sys., Inc.)*, 367 B.R. 232, 237 (B.A.P. 1st Cir. 2007).

7. In light of the surcharge for L&V's fees, just $238,039.65 of L&V's fees and costs are "true" administrative expenses under § 503(b) that, in the event of administrative insolvency and if the equities so require, may be allocated equitably on a pro rata basis among other claimants holding allowed administrative claims. Compared to the carve-out, the estate is

nowhere near administrative insolvency at this point, with a more than half-million dollar cushion.

8. Of course, Scoggin's counsel has made no secret of the fact that they intend to seek payment of their own fees from the estate as an administrative expense (most likely on what they hope is a significant contingency fee based on the $11 million proof of claim). As of today, however, Scoggin holds his own individual proof of claim and nothing more. That claim is for all of $13,973.08 – hardly enough to cause administrative insolvency, even if it were presumed to be allowed as an administrative expense today. *See In re Kaiser Steel Corp.*, 74 B.R. 885, 891 (Bankr. D. Colo. 1987) (allowing interim compensation based on *current* state of record as to administrative solvency).

9. The law as to mandatory or discretionary disgorgement, briefed by Scoggin in his Objection, has little application at this stage of the case, particularly since Scoggin does not hold an allowed administrative expense claim for anything. By its nature, "[d]isgorgement is a harsh remedy, one that should be applied only when mandated by the equities of the case." *In re Anolik*, 207 B.R. 34, 39 (Bankr. D. Mass. 1997). Whether disgorgement is necessary is a decision to be made on a case by case basis. *Id.*; *see also In re Barron*, 73 B.R. 812, 815 (Bankr. S.D. Cal. 1987) (recognizing that interim compensation awards are subject to "flexible structure [to] accommodate the special circumstances of each case and achieve equitable results."). "Compelling circumstances" must exist to warrant discretionary disgorgement of interim fees in an administratively insolvent Chapter 7 case. *In re Kids Creek Partners, L.P.*, 236 B.R. 871, 875 (Bankr. N.D. Ill. 1999) (requiring disgorgement of interim compensation in Chapter 7 case to

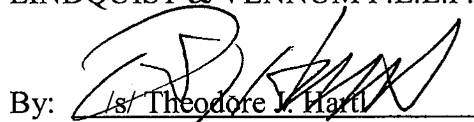
pay "superpriority" claims that primed general Chapter 7 administrative expenses); *see also In re LTV Steel Co., Inc.*, 288 B.R. 775, 779 (Bankr. N.D. Ohio 2002) (noting that disgorgement is appropriate only in "extreme situations").

10. Precluding interim compensation until all administrative expenses in a case are known and allowed creates a disincentive for bankruptcy professionals to work for the benefit of creditors and administrative claimants alike. Nothing in the Bankruptcy Code precludes compensation on an interim basis pending a determination of whether all administrative claims will be paid. In fact, the Bankruptcy Code expressly authorizes interim compensation "to prevent bankruptcy professionals from having to wait until conclusion of the bankruptcy case for compensation and reimbursement." *Kids Creek*, 236 B.R. at 875. On the record in this Chapter 7 case as it exists today, the interim compensation should be awarded to L&V, subject to any further order of the Court, as is always the case.

WHEREFORE, for all of the foregoing reasons, Lindquist & Vennum P.L.L.P. requests that the Court summarily overrule Scoggin's objection, award the interim fees and expenses, and authorize the Trustee to make disbursements from estate funds available.

Dated this 15th day of December, 2008.

LINDQUIST & VENNUM P.L.L.P.



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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 2008, a true and correct copy of the foregoing **RESPONSE TO ROBERT SCOGGIN'S OBJECTION TO FIRST INTERIM APPLICATION OF LINDQUIST & VENNUM P.L.L.P. FOR ALLOWANCE OF COMPENSATION AND REIMBURSEMENT OF EXPENSES** was deposited in the United States mail, postage prepaid, addressed to the parties on the attached list:

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