

**UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa**

IN RE:	:	Case No. 99-04498-CH
ACCESS AIR, INC.	:	
	:	Chapter 11
Debtor.	:	

**ORDER—MOTION FOR ADEQUATE PROTECTION OF CREDITOR
PROPERTY AND OBJECTION THERETO**

The City of Colorado Springs, Colorado, filed its Motion for Adequate Protection of Creditor Property on January 31, 2000. The United States, on behalf of the United States Department of Transportation, filed a Statement of Interest in Support of City of Colorado Springs, Colorado's motion for adequate protection. The Port Authority of New York and New Jersey and Metropolitan Airport Authority of Rock Island County, Illinois filed a Joint Statement in Support of the City of Colorado Springs' Motion for Adequate Protection of Creditor Property.

These matters came on for telephonic hearing on March 8, 2000. The City of Colorado Springs was represented by Robert J. Mack; the Port Authority of New York and New Jersey and the Metropolitan Airport Authority of Rock Island County were represented by Jonathon C. Fox; The United States Department of Transportation was represented by Andrea H. Handel; the city of Des Moines, Iowa was represented by Bruce E. Bergman; and Ruan Center Corporation was represented by Donald F. Neiman.

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(b)(1) and § 1334 and by order of the United States District Court for the Southern District of Iowa pursuant to 28 U.S.C. § 157(a). This is a core proceeding pursuant to 28 U.S.C.

§ 157(b)(2)(A). The court upon review of the pleadings, memoranda, and arguments of counsel, now enters its findings and conclusions of law pursuant to Fed. R. Bankr. P. 9014 and 7052.

FINDINGS OF FACTS

1. Access Air, Inc. (hereinafter Debtor) filed a petition for relief pursuant to Chapter 11 of the Bankruptcy Code on November 29, 1999.

2. Debtor scheduled Metro Airport Authority, Port Authority of New York and New Jersey, and City of Colorado Springs, Colorado (hereinafter Creditors), as creditors holding unsecured priority claims. The schedules indicate claims for passenger facility charges (hereinafter PFCs) were incurred February to November 1999 for Metro Airport Authority and Port Authority of New York and New Jersey and June to November 1999 for the City of Colorado Springs. Creditors have not disputed or objected to the classification of their claims.

3. Debtor collected PFCs for the creditors.

4. Debtor admits that PFCs are owed to the creditors. Likewise, Debtor admits that it has yet to submit the quarterly reports required by 14 CFR § 158.65.

5. Debtor commingled PFC revenue with other sources of revenue as allowed by 14 CFR § 158.49.

DISCUSSION

On January 31, 2000, the City of Colorado Springs, Colorado filed a Motion for Adequate Protection of Creditor Property. Subsequently, the United States Department of Transportation, the Port Authority of New York and New Jersey, and the Metropolitan

Airport Authority of Rock Island County, Illinois filed statements in support of the motion. The debtor objects to the motion on procedural and substantive grounds. For the following reasons, the court finds the creditor's motion is procedurally deficient and must be denied.

As an air carrier using the airport facilities of the creditors, the debtor was required to collect PFCs and remit these funds to the creditors. PFCs are "passenger facility charge[s] ... imposed by a public agency on passengers enplaned at a commercial service airport it controls." 14 CFR § 158.3. They are included in the price of an airline ticket issued in the United States. Issuing carriers are responsible for the funds from the time they are collected until they are remitted. 14 CFR § 158.45. The debtor admits that pre-petition PFCs are owed to various creditors and scheduled these claims as unsecured priority claims.

The creditors argue that pursuant to 42 U.S.C § 40117(g)(4) the debtor has no interest in the PFCs. 42 U.S.C. § 40117(g)(4) states:

Passenger facility revenues that are held by an air carrier or an agent of the carrier after collection of a passenger facility fee constitute a trust fund that is held by the air carrier or agent for the beneficial interest of the eligible agency imposing the fee. Such carrier or agent holds neither legal nor equitable interest in the passenger facility revenues except for any handling fee or retention of interest collected on unremitted proceeds as may be allowed by the Secretary.

The bankruptcy estate is comprised of, among other things, "all the legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541 (a)(1). Therefore, the creditors argue that PFC funds are not property of the debtor's estate and cannot use the funds in its reorganization. The creditors are concerned that the funds will be depleted through attorney fees, costs, debtor-in-possession lender actions, and post-petition business activities.

Although the creditors have not cited it as statutory authority, the debtor presumes and the court accepts that the creditors are requesting relief pursuant 11 U.S.C. § 363(e).

Section 363 provides in relevant part:

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

* * *

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest...

Adequate protection is not defined in the Bankruptcy Code. However, § 361 provides:

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by-

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

Whenever a bankruptcy trustee or a debtor-in-possession proposes to use property of the bankruptcy estate in which a creditor has an interest, and the creditor requests adequate protection, the court shall condition or prohibit the use of the property to the extent that the creditor is adequately protected. Martin v. Commodity Credit Corp. (In re Martin), 761 F.2d 472, 475 (8th Cir. 1985). "'Adequate protection' is mandated by

certain provisions of the Code when requested by an entity with an interest in property in which the estate has an interest. When an entity is stayed from enforcing its interest, when the estate proposes to use, sell or lease property in which the entity has an interest, and when property on which the entity has a lien is to be used as collateral for a loan, the entity is entitled to adequate protection as a matter of right.” 3 Collier on Bankruptcy, ¶ 361.02 (Lawrence P. King et al. Eds., 15th ed. rev. 1979 & Supp. 1999).

However, adequate protection is not available to the unsecured creditor. 1 David G. Epstein et al., Bankruptcy § 3-27 (1992) citing In re Tellier, 125 B.R. 348, 349 (Bankr. D. R. I. 1991). The purpose of adequate protection is to ensure that a secured creditor receives the benefit of its bargain. In re Martin, 761 F.2d at 476 (citing S.Rep. No. 989, 95th Cong., 2d Sess. 53, reprinted in 1978 U.S.Code Cong. & Ad.News 5787, 5839; H.R.Rep. No. 595, 95th Cong., 2d Sess. 339, reprinted in 1978 U.S. Code Cong. & Ad.News 5963, 6295); Unsecured Creditors' Committee v. Jones Truck Lines, Inc., 156 B.R. 608, 610 (W. D. Ark. 1992).

In this case, the debtor scheduled the creditors as holding unsecured priority claims. Debtor objects to the adequate protection motion on the grounds the creditors have not established that they have an interest in property and have not identified any property in which they claim an interest. The creditors have not alleged that they are secured creditors. The creditors argue that the debtor has no legal or equitable interest in the PFCs, and is not a co-owner of property.

The court concludes that a motion for adequate protection is inappropriate at this time. If the court accepts the debtor's position, the creditors are unsecured and have no property interest to protect. If the court accepts the creditor's position, the PFCs are not

property of the estate and the court cannot authorize the debtor to use the property in the first instance. As the Department of Transportation correctly points out, "[Bankruptcy law] simply does not authorize a trustee to distribute other people's property among a bankrupt's creditors." DOT Statement in Sup. at 7, citing Universal Bonding Ins. Co. v. Gittens & Sprinkle Enters., Inc., 960 F.2d 366, 372 (3rd Cir. 1992), quoting Pearlman v. Reliance Ins. Co., 371 U.S. 132, 135-36 (1962).

Essentially, the creditors, through their motion, are asking the court to determine their interest in property, order funds set aside to satisfy their interests, and enjoin the debtor-in-possession from spending those funds prior to the court's determination of their interests. The issues raised and the relief requested are appropriately addressed within the rules and protections provided by adversary proceedings. "A motion procedure cannot be used to circumvent the requirement of an adversary proceeding." GMAC Mortgage Corp. v. Salisbury (In re Loloee), 241 B.R. 655, 660 (B.A.P. 9th Cir. 1999), citing Bear v. Coben (In re Golden Plan), 829 F.2d 705, 711-12 (9th Cir. 1986).

Bankruptcy Rule 7001(2) provides that an adversary proceeding is required to determine the "validity, priority, or extent of a lien or other interest in property." Haber Oil Co., Inc., v. Swinehart (In re Haber Oil Co., Inc.), 12 F.3d 426, 437 (5th Cir. 1994); In re Morabito Bros., Inc., 188 B.R. 114, 116-17 (Bankr. W. D. N. Y. 1995). Rule 7001(1) requires an adversary proceeding to recover money. Smith v. Wheeler Technology, Inc. (In re Wheeler), 139 B.R. 235, 240 (B.A.P. 9th Cir. 1992); In re Dow Corning Corp., 192 B.R. 428, 430 (Bankr. E. D. Mich. 1996). Rule 7001(7) requires an adversary proceeding to "obtain an injunction or other equitable relief." Feld v. Zale Corp. (In re Zale Corp.),

62 F.3d 746, 762-64 (5th Cir. 1995); Great Western Bank v. Snow (In re Snow), 201 B.R. 968, 977 (Bankr. C. D. Cal. 1996).

While the court is cognizant that the creditors raise colorable issues and arguments and is reasonably concerned that assets may become depleted, the parties have not waived the procedural requirements of an adversary proceeding. In fact, the debtor has strenuously asserted that those procedures must be followed. The court is unwilling to venture into that quagmire of difficulties that is "apt to arise if the bankruptcy court too easily permits parties to circumvent the rules governing adversary proceedings." In re Haber Oil Co., 12 F.3d at 440; see also In re Zale Corp., 62 F.3d at 765.

ORDER

IT IS THEREFORE ORDERED that the City of Colorado Springs, Colorado's Motion for Adequate Protection of Creditor Property is DENIED without prejudice.

Dated this _____ day of March, 2000.

Russell J. Hill, Chief Judge
U. S. Bankruptcy Court