

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

IN RE:	:	Case No. 99-04498-CH
ACCESSAIR, INC.	:	
	:	Chapter 7
Debtor.	:	

ORDER—STATUS CONFERENCE PURSUANT TO 11 U.S.C. § 105(d)

A status conference in the above case was held on September 10, 2001. James L. Snyder appeared for the United States Trustee; Benjamin W. Hopkins appeared for the debtor AccessAir, Inc.; Donald F. Neiman appeared for the Ruan Entities; and Anita Shodeen appeared in her capacity as chapter 7 trustee.

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and by order of the United States District Court for the Southern District of Iowa. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

FACTS

1. AccessAir, Inc. (hereinafter Debtor) filed for protection under chapter 11 of the Bankruptcy Code on November 29, 1999.
2. The United States Trustee filed a motion to convert the case to chapter 7 on February 25, 2000. The United States Trustee withdrew this motion to convert after Debtor filed a disclosure statement and plan on May 19, 2000.
3. Debtor filed its Disclosure Statement for Second Amended Joint Plan of Reorganization with Ruan Financial Corp. (hereinafter Ruan) on August 25, 2000.

4. On September 14, 2000, the court entered an order approving the Second Amended Joint Disclosure Statement, and authorized Debtor to proceed to solicit acceptances of the Second Amended Joint Plan. The confirmation hearing was set for November 15, 2000.

5. On November 13, 2000, Debtor and Ruan filed a joint motion to continue the confirmation hearing scheduled for November 15, 2000. Debtor and Ruan advised the court that they were attempting to resolve objections to the plan, and they were completing a stock purchase agreement. Debtor planned to resume scheduled flights on November 15, 2000, and unanticipated issues could arise during this process. The parties stated that a confirmation order should be withheld pending further modifications on the plan. Debtor advised the court that it intended on showing compliance with the confirmation requirements of 11 U.S.C. § 1129(a) at the hearing, but both Debtor and Ruan desired additional dates and deadlines be set. Debtor and Ruan requested the court to reschedule the confirmation hearing and establish appropriate deadlines for the plan modifications.

6. No one objected to this joint motion to continue.

7. On November 15, 2000, the court entered its order requiring Debtor to file an amended plan on or before November 30, 2000, and setting a confirmation hearing for December 28, 2000.

8. On December 1, 2000, Debtor and Ruan filed a modification to the Second Amended Joint Plan (DN 572), which was intended to resolve objections by creditors

C and J Leasing Company, the Internal Revenue Service, and the Federal Aviation Administration

9. On December 26, 2000, Debtor and Ruan filed a motion to continue the confirmation hearing scheduled for December 28, 2000, on the basis that disputed claims existed which could materially impact distributions under the plan. The plan proponents further alleged that they were still in the process of finalizing agreements and documents ancillary to the plan.

10. The Unsecured Creditors' Committee supported this motion to continue and stated that the plan proponents agreed that the plan would be amended to provide that the initial payment to unsecured creditors would be made thirty days after the confirmation of the plan.

11. On December 28, 2000, the court granted the motion to continue (DN 585). The confirmation hearing was continued to February 20, 2001, and the order provided that the amended plan was to be filed on or before January 31, 2001.

12. On January 31, 2001, Debtor and Ruan withdrew the Second Amended Plan of Reorganization, which was filed on August 25, 2000 (DN 607). Debtor advised the court that important modifications to the business plan and the plan of reorganization were required to ensure Debtor's success as an air carrier. Debtor was in the process of phasing out their present aircraft and initiating discussions for the acquisition of smaller "regional jets."

13. On February 20, 2001, a stipulated order was filed (DN 616) whereby Debtor and the U. S. Trustee agreed that an amended plan of reorganization would be filed on or before March 15, 2001.

14. On March 8, 2001, Debtor filed a motion to sell assets free and clear of liens to Sunwest International, LLC (hereinafter Sunwest)(DN 624). On March 14, 2001, the Federal Aviation Administration, the U. S. Department of Transportation (DN 630), and creditor Jeflyn Aviation, Inc., (DN 631) objected to the motion to sell assets.

15. On March 27, 2001, Debtor filed a motion to defer the entry of an order converting or dismissing its chapter 11 case (DN 642). Debtor admitted that cause existed to either convert or dismiss the case, but asked that the court defer to permit Debtor to close a pending transaction with a potential buyer and obtain the requisite approval from the Federal Aviation Administration and the Department of Transportation. Debtor advised the court that it had commenced the process of self-liquidation, but limited operations were still required pending final approvals of the Sunwest transaction. Debtor acknowledged that an administrative insolvency existed. Debtor further stated that it was in the best interest of the estate to defer action under § 1112 pending consummation of the proposed sale of assets to Sunwest.

16. On April 17, 2001 the Ruan Entities (Ruan Center Corp., Ruan Financial Corp., and Ruan Inc.) filed a motion for relief from automatic stay (DN 651)

17. On May 1, 2001, the United States Trustee moved to convert the case to chapter 7 (DN 683). The motion alleged that Debtor was administratively insolvent and

was incapable of paying its post-petition operating expenses in the normal course of business.

18. On May 8, 2001, the court entered a stipulated order granting the Ruan Entities' motion for relief from stay permitting the Ruan Entities to proceed against the assets of Debtor.

19. On May 17, 2001, the court entered an order granting the U. S. Trustee's motion to convert the case, and the case was converted to a chapter 7 case (DN 710). The court directed the U.S. Trustee to appoint a trustee pursuant to § 701(a).

20. On May 18, 2001, The U.S. Trustee gave notice of the appointment of Anita L. Shodeen as the trustee of the case.

21. On July 16, 2001, the court entered an order that on or before July 18, 2001, counsel for the Debtor was to provide the trustee with the names of the officers and directors of Debtor as of May 17, 2001. Those officers and directors were to comply with Local Rule 10(e)(9) and supply the requisite documents and schedules on or before August 10, 2001.

21. On August 13, 2001, counsel for the Debtor advised the court that Debtor had no officers or directors as of May 17, 2001 (DN 765). John Ruan III and Steve Kopf resigned as directors effective February 27, 2001. Don Armington, former director and Chief Administrative Officer of AccessAir, Inc. resigned from those positions effective May 7, 2001. Steve Wilson, director and Chief Operations Officer of AccessAir, Inc., resigned from those positions effective May 7, 2001.

22. The court was further advised that the former officers and directors of the debtor corporation did not feel that it was their responsibility to assist in the preparation and filing of the material required by Local Rule 10(e)(9). They further suggested to the court that the trustee employ Eric Brewer, former controller for Debtor, to prepare and file the required materials.

DISCUSSION

On May 17, 2001, the court granted the U.S. Trustee's motion and converted Debtor's case to one under chapter 7. Debtor did not resist the motion to convert. As a matter of course, the bankruptcy clerk gave Notice of Filings Due After Conversion. The Notice identified various documents required under Local Rule 10 after the conversion of a case to chapter 7. The notice stated that the documents "must be filed" within 15 days of the Order of Conversion, in this case the deadline being June 2, 2001. In a motion filed on June 11, 2001, Trustee indicated that she was uncertain what parties had the duty to prepare the schedules. The court subsequently gave counsel for Debtor until July 18, 2001, to provide Trustee with the names of Debtor's officers and directors as of May 17, 2001. The court then ordered those officers and directors so identified to comply with Local Rule 10(e)(9) on or before August 10, 2001. On August 13, 2001, counsel for Debtor gave notice to the court that Debtor had no officers or directors on May 17, 2001, all having resigned their positions prior to that date.

The court is left with the question of who has the duty to prepare the required documents. For the following reasons, the court designates Donald W. Armington, former director and Chief Administrative Officer, and Steve W. Wilson, former director

and Chief Operations Officer, as representatives of Debtor. Mr. Armington and Mr. Wilson shall prepare the required documents and comply with Local Rule 10(e)(9) and appear for Debtor at the § 341 meeting of the creditors.

Fed. R. Bankr. P. 1019 addresses the conversion of a case commenced under chapter 11 to a chapter 7 case. Fed. R. Bankr. P. 1019(1)(A) provides that the lists, inventories, schedules, and statements for financial affairs filed in the chapter 7 case shall be deemed filed in the chapter 7 case, unless the court directs otherwise. Fed. R. Bankr. P. 1019(4) provides that the debtor in possession shall, forthwith, turn over to the chapter 7 trustee all records and property of the estate in possession or control of the debtor in possession. Fed. R. Bankr. P. 1019(5)(A) provides for the filing of a schedule of unpaid debts incurred after the filing of the petition and the filing and transmission to the U. S. Trustee a final report and account. When the information is inadequate for the administration of the chapter 7 case, the court may order the submission of additional information, as well as the manner and time of its submission. Fed. R. Bankr. P. 1019(1).

Local Rule 10(e)(9) augments Rule 1019 by requiring the debtor in possession to file a new mailing list, new or amended schedules or statements reflecting interests in property acquired since the entry of the order for relief in the chapter 7, and a current inventory of property. "Amendments to the filings shall account for any material additions, deletions or other changes in the nature of the debtor's assets or liabilities." Id. The Local Rule provides the debtor in possession 15 days to provide this information. Id.

When the debtor is an individual, the duty to provide the information lies with that individual. When the debtor is a corporation, where the duty lies is not so clear.

Corporations are legal persons entitled to file for bankruptcy protection, and are identified as the debtor once a petition for relief is filed. In re Muy Bueno Corp., 257 B.R. 843, 847 (Bankr. W.D. Tex. 2001). However, corporations “can only speak and act through their authorized agents and representatives.” Id. Fed. R. Bankr. P. 9001(5) addresses this aspect of the corporate debtor situation. The rule provides in relevant part:

(5) "Debtor." When any act is required by these rules to be performed by a debtor or when it is necessary to compel attendance of a debtor for examination and the debtor is not a natural person: (A) if the debtor is a corporation, "debtor" includes, if designated by the court, any or all of its officers, members of its board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control...

Fed. R. Bankr. P. 9001(5).

By its plain language, the rule authorizes the court to designate an appropriate representative to act for the corporate debtor. Further, more than one individual may be designated to represent the debtor. See In re Muy Bueno Corp., 257 B.R. at 847. The court may designate corporate officers, directors, controlling stockholders, or any other person in control to act for the debtor. Fed. R. Bankr. P. 9001(5).

The broad scope of the rule reaches those individuals who are in control of the corporation or who have a fiduciary duty as a result of their relationship with the corporation; “all of whom have a quite positive duty ‘to aid the honest administration of the estate in all its aspects.’” Greene v. Harris, 240 F.2d 275, 276 (2d Cir. 1957)(quoting Goldie v. Cox, 130 F.2d 695, 708 (8th Cir. 1942) while interpreting former 11 U.S.C. § 25 of the Bankruptcy Act). The rule is consonant with Iowa law which holds that the officers and directors of an insolvent corporation owe a fiduciary duty to its creditors.

State v. Exline Fuel Co., 276 N.W. 41, 43 (Iowa 1937); see also White v. Schaff, No. 00-866, 2001 WL 855307 at * 1-3 (Iowa App. July 31, 2001).

The duty may not be evaded by resignation just prior to bankruptcy, Greene, 240 F.2d at 276, nor by resignation after the bankruptcy is filed. In re Bell Refrigeration Corp., 169 F. Supp. 62, 64 (N.D. Ohio 1958). A person's formal relationship with the debtor does not control the designation of representative. In re Ron San Realty Co., 457 F. Supp. 994,996 (S.D.N.Y. 1978). Those officials recently resigning their posts have the most direct knowledge of the financial affairs of the debtor. Greene, 240 F.2d at 276.

In this case, during the course of the attempted reorganization, counsel for the debtor identified Donald W. Armington as a director and Chief Administrative Officer and Steve W. Wilson as Chief Operating Officer. Both men accompanied counsel to court on various occasions and signed documents filed with the court, including reports of operations.

The court concludes that Mr. Armington and Mr. Wilson have direct knowledge and access to information concerning the financial affairs. The court is also confident that the other former directors and officers, in recognition of their fiduciary duty to aid in the honest administration of the bankruptcy, will provide information and assistance as required by the designated representatives and the appointed case trustee.

ORDER

IT IS THEREFORE ORDERED that Donald W. Armington and Steven W, Wilson are designated as representatives of the Debtor, AccessAir, Inc. The representatives shall comply with Local Rule 10(e)(9) within 15 days following the entry of this order.

FURTHER, said representatives shall appear at the § 341 meeting of the creditors upon notice by the clerk.

RUSSELL J. HILL, JUDGE
U.S. BANKRUPTCY COURT