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The Bankruptcy of D & K Aviation

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THE BANKRUPTCY OF D & K AVIATION

TJ Hatter, Maurice Echols, Michael Mason

I. BACKGROUND OF D & K AVIATION

D & K Aviation, Inc. was incorporated in Delaware in 1997 as an “S” Corporation. The principal place of business of D & K Aviation, Inc. is listed as 1505 Curry Road, Wilmington, OH 45177. The principal operations of D & K Aviation, Inc. (hereinafter referred to as “D & K” or “Debtor”) cannot be exactly determined from its bankruptcy proceeding records, and because it was a small operation that went out of business over five years ago, details of their daily business activities cannot be located. There are however, facts in the bankruptcy proceeding records that will allow one to assume that D & K possibly operated generally as a small private airline that may have chartered private flights for their customers. One of the directors, Lee Webb, is an engineer, and can be assumed to may have provided consulting and/or maintenance services to other airlines as an agent of D & K.¹

The Shareholders and directors of D & K are Kerri Webb, President, Daniel Webb, Vice President, Janet Webb, Secretary and Lee Webb, Treasurer. The bankruptcy proceeding records state that Lee Webb, the Treasurer and engineer, was paid millions of dollars in earned royalties and anticipated payments of royalties through 2005. Lee Webb, Janet Webb, and D & K had various loans with Williamson Saving Bank (hereinafter referred to as (“WSB”), the largest

¹ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 3, (2005).

creditor of D & K, between 1997 through 2004. Lee Webb is stated to have caused most of the funds drawn from a line of credit extend by WSB (Note 411) in 1999, as discussed below, to be placed in D & K's accounts.²

Lee Webb or his family also had ownership interest in three other companies, Coral Bay Entertainment, Inc. ("Coral Bay"), CJ2, Inc ("CJ2"), and TDR Corporation ("TDR") who transacted with D & K. At the time of the Petition Date, Coral Bay owed \$300,000 to D & K, and CJ2 also owed an undetermined amount to D & K. Both companies are out of business and insolvent, and unable to return the money owed to D & K. TDR was still active at the time of the Petition Date, and owns an aircraft that was used by D & K that is still in D & K's hanger. Lee Webb is the principle owner in TDR.³

a.) Assets, Liabilities, other Transactions of D & K

Except for the initial three months after its incorporation in 1997, D & K has not operated with a profit for any year it has been in business; however, WSB had continuously extended D & K credit. The review of the tax returns filed by D & K and the K-1 statements issued to Lee Webb, shows that D & K had six figure losses each year since 1998.⁴ Debtor failed to pay withheld payroll taxes and other taxes in the years 2001, 2002, 2003 (both before and after the Petition Date), and 2004 until conversion to Chapter 7 was ordered.⁵ Debtor also failed to pay

² United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 5, (2005).

³ Id. at 6

⁴ Id. See Exhibit "8", Schedule of Losses.

⁵ Id. At 6

withheld 401-K contributions to the Plan Administrator of the Debtor's 401-K Plan.⁶⁷ The Debtor's unpaid pre-petition tax obligations accumulated pre-petition exceeded over \$350,000 before the Petition Date and grew post-petition to over \$60,000 after the Petition Date through 3-31-2004.⁸

As for assets or collateral, D & K owed an aircraft called the "Pilatus" that was exchanged for an undivided 3/8 interest in a 2000 Cessna Citation Bravo, Model 550 Serial No, 550-0933, with two Pratt & Whitney Model 530 D engines ("Aircraft").⁹ The other owners of the Aircraft were Ballinger Industries, Inc., Amber Aviation, Inc. and Donna Air, LLC., whose ownership rights in the Aircraft were expressed in a Joint Ownership Agreement.¹⁰ Note 411, Exhibit 1, is the home equity line note from WSB that was used for a line of credit up to \$2,100,000.00, which financed the acquisition of the Debtor's 3/8th interest in the Aircraft.¹¹

⁶ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 6, (2005).

⁷ A qualified plan established by employers to which eligible employees may make salary deferral (salary reduction) contributions on a post-tax and/or pretax basis. Employers offering a 401(k) plan may make matching or non-elective contributions to the plan on behalf of eligible employees and may also add a profit-sharing feature to the plan. Earnings accrue on a tax-deferred basis. See <http://www.investopedia.com/terms/1/401kplan.asp> (Last Visited April 26, 2011).

⁸ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 6, (2005).

⁹ In searching for a reasonable pricing of what the Aircraft was worth, the value of the retail value of the Aircraft is between \$3,000,000 and \$4,000,000 at the time of its purchase. See <http://www.controller.com/list/list.aspx?manu=CESSNA&mdltx=CITATION+BRAVO> for current pricing of the Aircraft and similar planes. (Last Visited April 18, 2011). Arguably, Wilmington Savings Bank's 3/8th interest, at most, was only worth about \$1,500,000.

¹⁰ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 4, (2005).

¹¹ For the benefits of fractional interests in aircrafts, See Eileen M. Gleime WHEN LESS CAN BE MORE: FRACTIONAL OWNERSHIP OF AIRCRAFT - THE WINGS OF THE FUTURE 1999 Southern Methodist University School of Law Journal of Air Law and Commerce 64 J. Air L. & Com. 979

The Security Agreement, Exhibit 2, granted WSB's security interest in the undivided 3/8 interest in the Aircraft as secured collateral for the repayment of Note 411.¹²

In purchasing the 3/8th interest in Aircraft, D & K did a "1031 exchange" of the Pilatus airplane it owned to acquire the Aircraft.¹³¹⁴ D & K deferred a tax liability of over \$500,000 due on the sale of the Pilatus.¹⁵ D & K qualified to benefit from the "1031 exchange," because Section 1031 of the Internal Revenue Code allows for capital gains tax deferment when properties of "like-kind" are exchanged for productive use in a trade or business or for investment.¹⁶ It allows business owners and investors to defer the capital gains taxes imposed when selling a business investment. It basically allows the investor to sell the property without owning any capital gains taxes and thus, keep all the money from the sale of the property. Despite this eventual liability Debtor would have to pay, it was not in any of its financial statements.¹⁷

b. Fractional Ownership of Aircrafts

In general terms, fractional ownership programs are multi-year programs covering a pool of aircraft, each of which is owned by more than one party and all of which are placed in a dry

¹² United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 3, (2005).

¹³ Section 1031 of the IRS Code of 1986 authorizes the exchange of one business investment for another. See <http://www.investopedia.com/terms/s/section1031.asp>. (Last Visited April 26, 2011). See Also <http://www.irs.gov/businesses/small/industries/article/0,,id=98491,00.html> (Last Visited April 26, 2011).

¹⁴ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 6, (2005).

¹⁵ Id. at 6.

¹⁶ 26 U.S.C. § 1031

¹⁷ "Tax Fraud, 26 U.S.C. Sections 7202, 7203, 7206 and 7212: A failure to pay taxes on assets removed, failure to file returns, or the filing of a false return in an effort to conceal the scheme." See, Joe B. Brown, Brian Netoles, Sandra Rasnack, &Maureen Tighe, IDENTIFYING BANKRUPTCY FRAUD, CREDIT RESEARCH FOUNDATION (1999). Found at <http://www.crfonline.org.orc/pdf/refl1.pdf> (Last Visited April 19, 2011)

lease exchange pool to be made available to any program participant when the aircraft in which such participant owns an interest is not available.¹⁸ As an integral part of these multi-year programs, a single management company provides the management services to support the operation of the aircraft by the owners, and administers the aircraft exchange program on behalf of all of the participants. By purchasing an interest in an aircraft that is part of the program, an owner gains round-the-clock access to a private jet at a fraction of the cost.

Because fractional ownership allows parties to purchase the percentage of an aircraft reflecting their actual needs, these programs meet the needs of divergent groups, including newcomers to business aviation who do not require full-time use of business aircraft as well as companies seeking to supplement.¹⁹ For an entity that had been struggling to make a profit since its incorporation, and therefore unable to purchase a plane for itself, acquiring a 3/8th interest in a plane was an attractive idea.²⁰

Although fractional ownership programs vary somewhat, the structure of all of the programs are fundamentally similar. Virtually all of the programs involve the acquisition of an interest in an aircraft, the execution of a management agreement with the program manager, the execution of an agreement with the other co-owners of the aircraft and the execution of an interchange agreement with all program participants whereby the interest is placed in a pool of

¹⁸ Gleimer, Eileen M. WHEN LESS CAN BE MORE: FRACTIONAL OWNERSHIP OF AIRCRAFT - THE WINGS OF THE FUTURE 64 J. AIR L. & COM. 979

¹⁹ Id at 981

²⁰ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 40, pg. 10-35, (2005).

aircraft consisting of all aircraft in the program.²¹ The term of the agreements is typically five years during which time the participant pays the manager a fixed monthly management fee and an hourly fee for each hour the participant flies in its aircraft or any aircraft from the interchange pool, and there is no charge for deadhead time. The number of hours allocated to the participant is based on the percentage of its interest in the aircraft. The programs generally allow the participant to require the program manager or its affiliate to repurchase the aircraft after a specified period of time. Although an interest in a specific aircraft is acquired, the participant, through the interchange agreement, has access to the other aircraft in the program if the aircraft in which it owns an interest is not available. The participant may also trade up to a more expensive aircraft or down to a less expensive one with the number of hours deducted from the participant's total allocation being adjusted to reflect the difference in the aircraft.²²

c. WSB's Secured Interest and D & K timely payments

After the exchange, WSB recorded an Aircraft Claim of Lien with the Federal Aviation Agency ("FAA") against the Aircraft for security for repayment of Note 411.²³ Such lien was received by the Federal Aviation Agency between July 27, 2000 and August 16, 2000.²⁴ The FAA recorded the security agreement on August 16, 2000.²⁵ Despite annual losses suffered by D

²¹ Gleimer, Eileen M. WHEN LESS CAN BE MORE: FRACTIONAL OWNERSHIP OF AIRCRAFT - THE WINGS OF THE FUTURE 64 J. AIR L. & COM. 979

²² Id at 998

²³ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 4, (2005).

²⁴ See Exhibit "6" FAA Security Agreement, attached hereto and incorporated by reference herein.

²⁵ See Exhibit "7" Recorded FAA Security Agreement.

& K every year it was in existence, WSB and SBA were paid monthly without fail.²⁶ WSB and SBA were paid in part from funds withheld from employee's pay for taxes or for 401-K contributions. WSB was paid monthly on Note 411 during the term of 7-19-2000 through September 2003. WSB also had two other note obligations from D & K, which were paid off in this period.²⁷

b. "Interesting" Transactions

After filing the Chapter 11 Bankruptcy for D & K, the Webbs furnished 1) the mortgage on their residence at Todd's Run Road, 2) a lien on the title of Webb's motor home and 3) an assignment of a mortgage granted to Lee Webb by his accountant, Pat Smith, who bought property from Lee Webb located on Main Street in Wilmington, Ohio as collateral for a new loan from WSB (Note 002).²⁸ WSB business record requesting payoff on D & K loans dated 2-6-04 for closing 2-12-04, Exhibit "18" and "19," Show post-petition payments made on the Note 002 (The subsequent 2.6 million dollar loan) obligation of Lee and Janet which match the journal entry transfers on the D & K DIP operating account. The preparation and granting of a Security Interest in the Aircraft as collateral protection for payment Note 002 was done contrary to the advice of D & K's counsel. D & K's counsel advised that such a transaction had to be approved by the Bankruptcy Court. Neither D & K nor WSB sought appropriate notice or a hearing to approve such transactions evolving on February 2004 or authorize transfers to be made by Debtor to WSB for application of Note 002. Despite the automatic stay, the prohibition against

²⁶ The proceeding records do not show the name of this Creditor, it is only referred to as SBA, a creditor who extended and "Disaster Note." *See* United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 7, (2005).

²⁷ *Id.* at 7.

²⁸ *Id.* at 9.

paying pre-petition debt or making post-petition transfers without authorization, Lee Webb directed D & K transfers, and WSB accepted the transfers from the DIP account of D & K totaling to \$67,424. And between October 1999 and October 2003, WSB received transfers from the Debtor of no less than \$1,841,017.80.²⁹ Essentially, D & K has paid on a loan from WSB that was issue to Lee and Janet Webb (Note 002), from funds of D & K's DIP account that was partially funded by the credit line of Note 411 that WSB also extended.

II. THE CHAPTER 11

Upon the filing of a voluntary petition, the bankruptcy estate is created and the automatic stay goes into effect, protecting the estate from dismemberment and the debtor from collection procedures by creditors.³⁰ In a small business case, the U.S. trustee will conduct an interview of the debtor prior to the meeting of creditors.³¹ The initial motion in unavailable on Pacer.

a. Motions

Debtor filed a Voluntary Petition for Chapter 11 relief in the United States Bankruptcy Court for the Southern District of Ohio.³² The amount of the outstanding debt claimed due to Creditor on Note 411 at the Petition Date was at \$2,098,020.05 [POC #25] and WSB claimed

²⁹ Id. at 8.

³⁰ 11 U.S.C.A § 541

³¹ 28 U.S.C.A § 586(a) (3) *See Also* Ilene J. Lashinsky, United States Trustee Operating Guidelines and Reporting Requirements for Chapter 11 Cases, U.S. Department of Justice, (2009) found at http://www.azb.uscourts.gov/Documents/UST_Guidelines.pdf (Last Visited April 26, 2011).

³² United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 2, (2005).

another debt of \$252,070.20 [POC # 14].³³

As stated above, at the time of the Petition Date, Coral Bay owed Debtor over \$300,000.00 and CJ2 owed Debtor, a yet to be determined amount of money, for transfers made to CJ2 by Debtor. Both Coral Bay and CJ2 are out of business, insolvent and unable to return the money owed.³⁴ TDR is still active, owning an aircraft that was used by the Debtor and that plane remains in the Debtor's hanger. Daniel Webb, the Vice President of Debtor, is the principal owner in TDR.³⁵

Note 411 matured on July 19, 2003 ("Maturity Date"), but no action was taken by WSB to renew Note 411, nor did WSB take any action against Debtor or Lee Webb to collect Note 411; however, WSB still collected and/or charged interest on such Note 411 through February 12, 2004.³⁶

Despite Note 411 becoming fully due and payable on July 19, 2003, WSB continued to permit D & K, through Lee Webb, to use the line of credit on which Debtor was obligated, even though WSB was furnished tax returns of D & K showing those 6 figure losses each year from 1998 through 2003.³⁷ WSB continued to be paid in excess of \$20,000.00 interest per month after the Maturity Date of Note 411, while D & K failed to pay substantially all of its taxes, transfer

³³ Id. at 5.

³⁴ "There is, of course, a large literature in corporate finance that emphasizes the strategies that equity holders can use to exploit debt-holders when shareholders have limited liability." GEORGE A. AKERLOF, PAUL M. ROMER, ROBERT E. HALL, AND N. GREGORY MANKIW, LOOTING: THE ECONOMIC UNDERWORLD OF BANKRUPTCY FOR PROFIT, BROOKINGS PAPERS ON ECONOMIC ACTIVITY, VOL. 1993, NO. 2 (1993), AT 2, 1-73. AVAILABLE AT [HTTP://WWW.SIGNALLAKE.COM/INNOVATION/LOOTING1993.PDF](http://WWW.SIGNALLAKE.COM/INNOVATION/LOOTING1993.PDF) (LAST VISITED MARCH 2011). SEE ALSO, BREALEY AND MYERS (1984, PP. 501-03).

³⁵ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 5, (2005).

³⁶ Id. at 6.

³⁷ Id. See Exhibit "8."

401-K contributions and pay debt owing to other creditors.³⁸

At this point, WSB had prepared, on or about February 7, 2004, a new note bearing loan number 71750002 (“Note 002”).³⁹ The borrowers were Lee Webb and Janet Webb for the amount of \$2,650,000.00 for a home equity line loan on the Webb residence at Todd’s Run Road. See Exhibit “12”, Note 002. The Collateral furnished by the Webbs for Note 002 was a mortgage on the Todd’s Run property, a lien on the title of the Webb’s motor home and an assignment of a mortgage granted to Lee Webb by his accountant, Pat Smith, who bought property from Mr. Webb located on Main Street in Wilmington, Ohio.⁴⁰

WSB had prepared, on or about February 7, 2004, a separate Security Agreement in which Debtor was to grant a security interest in Debtor’s 3/8th interest in the Aircraft as collateral protection for the repayment of Note 002. See Exhibit “13”⁴¹ Security Agreement For Note 002, attached hereto and incorporated by reference herein. On information and belief, Lee Webb signed said Security Agreement (Exhibit 13) on or about February 10, 2004 indicating he was signing on behalf of the Debtor as its Treasurer, attempting to secure as collateral for Note 002, the Debtor’s 3/8th interest in the Aircraft.

b. The Plan

In the grand tradition of struggling airlines since September 11th 2001, D & K Aviation cited problems in the airline industry after 9/11 as reason the business became unprofitable and

³⁸ Id. at 6.

³⁹ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 13, (2005).

⁴⁰ Id.

⁴¹ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 14, (2005).

led to the bankruptcy.⁴² No inventory or management mistakes were cited, nor was any asset malfunction, pending litigation or accounting error(s) presented. Despite having is \$597,719.84 in unsecured debt, D & K Aviation made their argument for being allowed to reorganize by stating that their bank, Wilmington Savings Bank, was confident that it “is fully secured.”⁴³

The plan and the Disclosure Statement were filed on February 11, 2004, however as the creditor objections notes, both failed to reveal the transactions of Lee Webb and Wilmington Savings Bank affecting the Debtors, which were in place on February 7, 2004. An Amended Plan of Reorganization and Amended Disclosure Statement were filed on June 14, 2004.⁴⁴⁴⁵ The Amended Plan changed Class 3 treatment from the original Plan to cover “any refinancing of indebtedness.” The Amended Disclosure Statement failed to reveal the post-petition transactions between WSB and Lee Webb, even though Class 3 treatment had been changed to cover “refinancing” non-priority debt and \$285,205.80 in unsecured priority debt.⁴⁶

1) Classes

The Plan of Reorganization divides all creditors and claims into one of six Classes. The proposal at the present time is to pay Claims of Classes 1-5 in full prior to paying any claims of Class 6. Class 6 represents unsecured, non-priority debt. Classes 1-5 are administrative expenses, secured debt, and unsecured priority debt. Classes 1-5 will not be impaired by class 6 will be. It is proposed at the present time to pay Class 6 claims 75% during the ordinary course of the debtors business. Classes 1-5 will not be impaired, but Class 6 will be.

⁴² See http://www.msnbc.msn.com/id/3679292/ns/technology_and_science-science/ (Last Visited April 23, 2011).

⁴³ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 40, pg. 6, (2005).

⁴⁴ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 73, pg. 1, (2005)

⁴⁵ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 74, pg. 1, (2005).

⁴⁶ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 40, pg. 6, (2005).

Id. at 3⁴⁷

The classes are organized as follows:

II. Classifications of Claims and Interests

Creditors and claims shall be broken into the following classification which shall be paid as provided in Section III.

a. Class 1

Class 1 shall include the expenses of administration of the attorneys for the Debtor, the attorneys for the Trade Creditors' Committee, the attorneys for the Special Creditors' Committee, and the accountants and agents of the Debtor and either of the creditors' committees.

b. Class 2

Class 2 shall include all expenses of administration other than Class 1 claims.

c. Class 3

The secured claims of Wilmington Savings Bank whether arising before or after the filing of the chapter 11 petition.

d. Class 4

Employee wage claims and employee benefit claims, including claims by Nation Bank and Trust relating to the D & K Aviation, Inc. 401(k), Plan 001.

e. Class 5

⁴⁷ Id. at 6.

Tax claims of government units to the extent they are entitled to priority under 11 U.S.C. § 506 and all other unsecured claims entitles to priority under title II of the United States Code to the extent that they are not Class 4 claims.

f. Class 6

Allowed unsecured, non-priority creditors and claims.

Unlike the majority of corporation reorganization plans, D & K's plan did not include a class for equity interests. Note that this is quite abnormal; perhaps, this oddity contributed to the plan's failure.⁴⁸

2) Funding

The funds necessary for the satisfaction of the creditors' claims will be derived from the operations of the company and from loan proceeds from the refinance of the aircraft through Wilmington Savings Bank, which appeared to be doubling its bet on the company.⁴⁹ The plan also puts forth the following reason not to liquidate:

It is anticipated that the Debtors interest in the (Plane) will just cover the amount of the loan to WSB. The remaining assets of the Debtor consist of some cash, a few items of personal property and about 30 days' worth of accounts receivable at any given time. Collectively these assets would not total over \$60K. The priority unsecured debt is \$285,205.80 and the non-priority unsecured debt totals \$597,729.84. Thus priority unsecured creditors could expect a payout of 21% irrespective of their different classification under the plan of reorganization and not considering administrative expenses necessary to liquidate these assets. Non-priority unsecured creditors could expect to receive zero.

⁴⁸ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 41, pg. 6, (2005).

⁴⁹ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 40, pg. 6, (2005).

Id. at 5⁵⁰

So, armed with the confidence of Wilmington Savings Bank as its primary weapon, the reorganization plan moved forward to define the execution and implementation of its plan:

The funds necessary to pay Debtors' obligations under the Plan will be generated from the ordinary operation of the Debtor's business. All expenses connected with the maintenance and operation of the Debtors' business shall be paid first and monthly distributions shall be made to creditors by the fifteenth (15th) day of the following month.

Id. at 5⁵¹

3) Reservations

The Debtor also reserved all the powers necessary to the operation of its business and the execution of its powers as Debtor in Possession. The Debtor also ensured that all its assets would be free and clear of liens of creditors, rejected any executory contracts not expressly assumed prior to the adoption of this plan, maintained that the Bankruptcy court maintained jurisdiction and applied for the allowance of interim compensation and reimbursement of expenses for their attorneys' fees.⁵²

c. Signs of Trouble

Curiously, the same day that the reorganization plan was filed with the court, the Debtor also filed a Chapter 7 Bankruptcy petition in as well.⁵³ Those documents incorrectly listed or inadvertently omitted information in some of the schedules that the reorganization plan put forth (B, E & F). This is despite the fact that the earliest filing with the court clearly states that this

⁵⁰ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 40, pg. 5, (2005).

⁵¹ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 40, pg. 5, (2005).

⁵² United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 41, pg. 6, (2005).

⁵³ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 44, pg. 6, (2005).

filing was for a Chapter 11.⁵⁴ It was the first hint that things would not go according to the Plan. Shortly after this filing, Keri Webb, the current President of D& K Aviation was ordered to submit to a Rule 2004 Examination under oath (as is allowed under § 343 Examination of the debtor).⁵⁵ ⁵⁶ Nevertheless, the reorganization plan was going to a hearing on approval on Tuesday April 6, 2004. However, the Debtors then put forth a motion to move the reorganization plan hearing, because Mr. Webb was travelling to Florida.⁵⁷⁵⁸ The same day that the Debtor filed the motion to move the reorganization hearing, they also filed a document stating that their Chapter 7 Bankruptcy incorrectly or inadvertently omitted information on Schedule F. So the confusion between whether this was a Chapter 11 or Chapter 7 filing continued.⁵⁹

Over the next few months, Lee Webb was consistently requesting that hearing date of the reorganization plan be pushed back to accommodate his travel schedule however, this finally met with the objection of two of his creditors, Dr. Stephen Greer and Amber Aviation, Inc., after the third attempt.⁶⁰ ⁶¹ ⁶² ⁶³ ⁶⁴ More specifically, the creditors also objected to the disclosure

⁵⁴ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 8, (2005).

⁵⁵ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 45, (2005).

⁵⁶ 11 U.S.C.A § 343

⁵⁷ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 47, (2005).

⁵⁸ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 53, (2005).

⁵⁹ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 54, (2005).

⁶⁰ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 53, (2005).

⁶¹ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 73, (2005).

⁶² United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 74, (2005).

⁶³ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 79, (2005).

statement:

It fails to contain adequate financial information as required...it also fails to contain any future projections of the debtor's financial condition or grounds for such projections. Without adequate information and future projections, the creditors cannot make an informed decision regarding the Debtor's proposed plan or the feasibility of such a plan. Based upon the information provided in the debtor's operating reports, the Creditors are concerned about the Debtor's financial ability to proceed with a Chapter 11 case...the debtor has lost \$184,970.76 since the filing of the case... The creditors do not consider Lee Webb being out of town to be sufficient grounds to delay the hearing.

Id. at 2⁶⁵

III. THE CONVERSION

Until this point, despite the early speed bumps, the court had indulged D & K Aviation Inc., as to its reorganization plan and its ideas for the future. However, the US Trustee quickly changed all of that. In making a motion to convert the case from Chapter 11 to Chapter 7, the attorney for the US Trustee, MaryAnn Wilsbacher stated:

“The court may convert or dismiss a case where no reasonable possibility of effective reorganization exists and/or for unreasonable delay which prejudices the rights of the creditors...Thus, it is well established that debtors who fail to perform their functions may not utilize Chapter 11 to prolong control over their estate when there is no benefit to the public or creditors...Remaining in Chapter 11 is a privilege which carries with it concomitant responsibilities, such as filing a confirmable plan of reorganization within a reasonable amount of time.”

Id. at 3⁶⁶

⁶⁴ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 81, (2005).

⁶⁵ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 81, (2005).

⁶⁶ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 84, (2005).

The U.S. Trustee asserted that D & K Aviation was never going to stand on its own and that the privilege of Chapter 11 should be revoked:

Cause exists for converting this case to Chapter 7 on at least two grounds, if not three. First, the Debtor has experienced losses and has no reasonable likelihood of rehabilitation. A reasonable prospect for rehabilitation is an economic test to determine whether the debtor's continuing losses can be corrected...In this case, there is no question that the Debtor has experienced substantial losses since filing for bankruptcy. The Debtor's own reports show that as of May 2004, the Debtor experience net operating losses totaling \$184,970.76 since filing for bankruptcy. This report also reveals that the Debtor has post-petition liabilities totaling \$124,326.86, which includes \$57,291.88 in post-petition tax liabilities. In light of the fact that this case is quickly approaching its one-year anniversary, it is not likely that the Debtors continuing losses can be corrected. Accordingly, there is no reasonable prospect for rehabilitation.

Id. at 4⁶⁷

Those grounds alone would have been enough for D & K Aviation to have their status change from a Chapter 11 to a Chapter 7. However, the motion also believed there was cause for conversion due to the reorganization plan as well:

Second, the Debtor has an inability to effectuate a plan of reorganization. Section 1112(b)(2) tests whether it is reasonable to expect that a plan can be confirmed within a reasonable period of time...Because no financial information is provided, there can be no determination concerning the feasibility of the Plan. In addition, the Debtor's cash balance as of May 31, 2004, was only \$ 272.39. Such funds are insufficient to pay even the post-petition administrative expenses that have accrued, let alone any plan payments. Moreover, as noted above, the Debtor's post-petition liabilities keep increasing each month and it is unlikely that the Debtor's continuing losses can be corrected. Accordingly, there is no reasonable expectation that a plan can be confirmed within a reasonable period of time.

Id. at 5⁶⁸

⁶⁷ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 84, (2005).

⁶⁸ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 84, (2005).

While these were the two major factors in the US Trustee's motion, it seems likely that the final reason was by far the most compelling:

And, third, by the time of the hearing on this Motion, the Debtor may be delinquent in paying the United States Trustee quarterly fees as required...To date, the Debtor has not paid the quarterly fees due and owing for the 2nd Quarter of 2004, which ended on June 30, 2004. If the debtor fails to pay the quarterly fees due for the 2nd Quarter of 2004 by July 1, 2004, cause will exist to dismiss this case under 11 U.S.C § 1112(b)(10).

Id. at 7⁶⁹

Judge Walter quickly granted the motion converting the case to Chapter 7.⁷⁰ While it was ultimately this decision which ended D & K Aviation's chance of reorganization, it must be said that the courts findings were reality based. D & K's funds amounted to a cash balance of \$ 272.39, which the court points out, was not even enough to satisfy the necessary administrative expenses that accrued, let alone jump start their business.⁷¹ Fundamentally, the court concluded that the Debtors' reorganization plan could not provide adequate protection for the creditors as required.⁷² While it is possible that Wilmington Savings Bank would continue providing credit, at this point it would have been a stretch to conclude that doing so would have been in accordance with the ordinary course of business required.⁷³

a. Dispute

⁶⁹ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 84, (2005).

⁷⁰ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 92, (2005).

⁷¹ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 84, (2005).

⁷² 11 U.S.C.A § 361

⁷³ 11 U.S.C.A § 364

The mounting frustration against the Debtors reached its boiling point when Thomas Noland, a pro se Plaintiff, sued on the basis that D & K took out a new loan from Wilmington Savings Bank in violation of the bankruptcy proceedings. D & K filed its petition under chapter 11 on October 14, 2003. A Chapter 11 plan was proposed but not confirmed and the case was converted to a case under chapter 7 on August 3, 2004.⁷⁴

After filing for bankruptcy, the Webbs were granted a “Home Equity Line of Credit” note (Feb 7, 2004) from Wilmington Savings Bank which had a credit limit of \$2,650,000. D & K was neither the obligor nor guarantor of this note.⁷⁵ However the airplane was used as collateral to this line of credit.

The Webbs then executed a settlement that appears to indicate that Note 002 was meant to “payoff” the balances of the other loans. Beginning in March 16, 2004, five monthly checks aggregating \$56,036.03 were written on the D & K debtor in possession account payable to Wilmington Savings Bank and were applied to payment of Note 002. Judge Walter then had to consider whether or not this note cancelled out the security of the trustee. Ultimately, Judge Walter determined it did not.⁷⁶

First, Judge Walter examined whether or not this is a continuation or a new loan. The plaintiff argued that the Parole Evidence Rule doesn't allow the court to look at new terms however that argument was quickly brushed aside. Since Note 411 was never canceled, and since WSB did not release its security interest in the Airplane as required by federal law upon satisfaction of the debt “is further circumstantial evidence that WSB did not regard the debt as

⁷⁴ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 92, (2005).

⁷⁵ In Re D & K Aviation 346 B.R. 169 (2006)

⁷⁶ Id.

satisfied and believed it still had a valid security interest.”⁷⁷

The Trustee's case for Summary Judgment with respect to the novation issue depends upon the exclusion of any evidence beyond the language of the documents together with a restrictive reading of those documents. But the documents are ambiguous and inconclusive and when viewed more favorably to the non-moving party, tend to suggest a loan consolidation rather than a novation. Because the intentions of the parties as to the effect of Note 002 on Note 411 are not manifest from the documents or from the limited stipulations, there remain genuine issues of material fact to be resolved at trial.

Id at 180⁷⁸

Despite the fact that the line of credit obtained from Wilmington Savings Bank fluctuated from business to personal throughout this case, the plaintiffs’ motion for partial summary judgment was denied. The case was dropped as the liquidation of the business began and Mr. Noland was appointed as a trustee.⁷⁹ The airplane, representing the strongest representation of § 363 collateral, was enough to mollify the bank, which in turn seems to have mollified the Court.

IV. THE CHAPTER 7

The Chapter 11 was converted into a Chapter 7 proceeding on August 18, 2004,⁸⁰ and the Trustee, Thomas R. Noland, was appointed in the proceedings.⁸¹ A trustee is appointed in a

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 100, (2005).

⁸⁰ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 1, (2005).

Chapter 7 case to collect all the assets, liquidate the assets, and pay off the creditors.⁸² On August 18, 2004, Debtor ceased operations. The Cessna Aircraft remained, except for one demonstration flight, at the hanger, at 1505 N. Curry Road, Wilmington, Ohio at the Clinton County Regional Airport until December 8, 2004.⁸³

Now, because Mr. Lee Webb, Treasurer of D & K, caused most, if not all funds drawn on the Note 411 line of credit, to be placed into D & K's accounts, and then "loaned" to other businesses (Coral Bay and CJ2), that were insolvent at the time of the petition date, and value loss to depreciation, the value in Debtor's 3/8th interest in the Aircraft was significantly less than the balance due on Note 411, between two-thirds of one million to one million dollars less.⁸⁴ Therefore, WSB was an under-secured creditor of the Debtor on the Petition Date.⁸⁵

a. Sale of the Aircraft

On September 1, 2004, the Trustee filed a motion pursuant to 11 U.S.C. § 363 (f) and (h) for authorization to sell the Debtor's 3/8 interest in the Airplane or sale of the entire interest in the plane, free and clear of interests, liens and encumbrances with such interests, liens and

⁸¹ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 100, (2005).

⁸² 11 U.S.C.A. § 701

⁸³ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, (2005).

⁸⁴ Id.

⁸⁵ An "unsecured creditor" is a creditor whose claim is secured by depreciating property. Generally, an unsecured creditor is entitled to be protected (compensated), during the period that the bankruptcy stay is imposed, typically in the form of monthly cash payments equal to the estimated monthly depreciation, pursuant to 11 U.S.C. § 361(1). The under-secured creditor is not entitled to receive any additional compensation, directly or indirectly, as WSB and Lee Webb transacted with Note 002. *See United Sav. Ass'n of Texas v. Timbers Of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988); *In re Reddington/Sunarrow, Ltd. P'ship*, 119 B.R. 809 (Bankr. D.N.M. 1990).

encumbrances to attach to the proceeds of the sale.⁸⁶ The Aircraft was subject to a Joint Ownership Agreement, with Joint Owners' interests divided as follows:

D & K Aviation- 37.5%

Ballinger Industries, Inc-25%

Amber Aviation, Inc.-25%

Donna Air LLC-12.5% (id)

The Joint Owners would not permit the Trustee to market the entire interest in the Aircraft, without the necessary filing of an adversary action,⁸⁷ which they indicated they would further oppose. Amber Aviation objected to the motion, arguing that the sale of the entire aircraft was not permitted pursuant to § 363(f) and (h) absent consent, which Amber Aviation did not give.⁸⁸ Donna Air also objected, arguing that 363 § (i) preserved Donna Air's right of first refusal, and thus, precluded Trustee from selling the Airplane.⁸⁹ The Joint Owners agreed that if the Sale of the Aircraft did not occur on or before December 30, 2004 and a voluntary agreement for the sale of the entire Aircraft by the Trustee was not reached a later date, the Court may determine whether the Trustee could sell the entire Aircraft under 11 U.S.C. § 363(b), (f) and

⁸⁶ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 110, (2005)

⁸⁷ An "adversary proceeding" is a lawsuit filed within the bankruptcy case. It is an action commenced by a plaintiff filing a complaint against one or more defendants. An adversary proceeding resembles a typical civil case from state court. *See* Federal Bankruptcy Rule 7001.

⁸⁸ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 112, (2005).

⁸⁹ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 113, (2005).

(h).⁹⁰ After lengthy negotiations thereafter with the Joint Owners, it was finally agreed that a broker would be hired to market only the 3/8th interest of the Debtor and not the entire Airplane.⁹¹ The Trustee then filed an application to employ a broker to sell the aircraft and amended the application.^{92 93} On November 12, 2004, Trustee filed an emergency motion to sell the 3/8th interest in the Aircraft.⁹⁴ Dr. Stephen Greer and Lee Webb objected to the emergency motion and at a hearing on November 24, 2004.⁹⁵ The objections were overruled and an order authorizing the sale of the Debtor's 3/8th interest in the Aircraft was approved and entered on November 24, 2004 ("Sale Order").⁹⁶

The Sale Order provided for purchase of the 3/8th interest of the Debtor in the Aircraft for 1.2 million, subject to adjustment in the price for repairs required upon inspection. The Aircraft inspection concluded on December 17, 2004, requiring \$61,671.91 in repairs.⁹⁷

Closing on the Aircraft occurred on or about December 19, 2004 with a reduction of the sale price for required maintenance pursuant to the Cessna Inspection Report of findings of

⁹⁰ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 156, (2005).

⁹¹ Id.

⁹² United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 138, (2005).

⁹³ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 146, (2005).

⁹⁴ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 142, (2005).

⁹⁵ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 151, (2005).

⁹⁶ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 156, (2005).

⁹⁷ Id. See Exhibit "17" Cessna Inspection Report.

necessary maintenance to be done. On February 23, 2005, the Trustee paid Diversified Powers, Inc. \$22,776.56 in full satisfaction of the employment agreement it had signed in exchange for listing the Aircraft. The Trustee then filed a report of the Sale of Personal Property.⁹⁸ Mike Pickett Aviation South, Inc., an appraiser that had performed professional services in preparation of the Aircraft appraisal and related equipment on behalf of the Debtor's estate, was compensated in the total amount of \$1,996.44.⁹⁹

In a Chapter 7, once the assets of a debtor are reduced to cash, the trustee submits to the U.S. trustee a final report describing the distributions to be made for administrative fees according to the Bankruptcy Code. Distributions follow in an order of priority. First, any unpaid portion of the United States Bankruptcy Court filing fee is paid off. Next, administrative fees are paid. The attorney representing the debtor, as special counsel to the trustee, is given priority; here, the counsel's reasonable attorney fees accumulated to \$40,000.00, and reimbursed expenses of \$12,767.¹⁰⁰ Other cost of administration in a bankruptcy case includes referee's fees, broker and appraisal fees as stated above, clerk's fees, witness fees, and accountant fees, which in this case totaled to \$1,752.¹⁰¹ Services rendered to the bankruptcy estate must specifically be for the bankruptcy, and directly related. These services are all totaled and included in the Final Account.

⁹⁸ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 221, (2005).

⁹⁹ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 307, (2005).

¹⁰⁰ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 272, (2005).

¹⁰¹ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 280, (2005).

Notably, the Trustee's report of sale¹⁰² does not list the value of any other of property sold of D & K. Therefore, if the 3/8th interest (seen as share in stock of the Aircraft) of the Aircraft sold for \$1,200,000, then that sale price would be the primary, maybe even the only, cash that D & K would have remaining in its account. If you deduct all the administrative fees listed above, WSB was only likely to recover \$1,058,738 in the liquidation of D & K.

On April 29, 2008, the Trustee for D & K certified that all funds had been distributed and disbursed, and the Final Account has been reviewed by the United States Trustee.¹⁰³

V. BUST-OUT?

Historically, bankruptcy was considered a form of debtor fraud. The "Act of Bankruptcy," was defined as absconding without paying debts and entailed an intent or purpose to defraud creditors.¹⁰⁴ Seen as a true crime of theft, debtors convicted of bankruptcy in England were either hung or sentenced to prison for seven years, with or without hard labor.¹⁰⁵ Essentially, modern bankruptcy law legalizes what former jurisprudence and all settled principals of free trade sought to prevent, the nonpayment of debt. With this newfound ideology of bankruptcy relief, many economic players are likely to find a benefit in borrowing money, and not paying it back. The mafia, or mob, is traditionally, or stereotypically, associated with "benefiting" from

¹⁰² United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 221, (2005).

¹⁰³ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 314, (2005).

¹⁰⁴ "Acts of Bankruptcy," enumerated by 13 Elizabeth I, c. 7, §1 (1571).

¹⁰⁵ Joseph Pomykala, 1 THE DIVISION AND DESTRUCTION OF VALUE, AN UNABRIDGED HISTORY OF THE EVOLUTION AND DEVELOPMENT OF BANKRUPTCY LAW, Doctoral Dissertation, University of Pennsylvania, 204-205 (1997).

bankruptcy or business fraud. And seemingly, such a benefit was conferred upon the owners of D & K Aviation as revealed the background information and in the following analysis.

Now, in the classical sense, a “Bust-Out” is what occurs when the “mob” moves in to take control of a business with good credit, buys vast amounts of assets on unsecured credit, and then torches the business for insurance proceeds. However, not only the “mob” is capable of conjuring such a scheme. And basically, a Bust-Out can be conducted by anyone who is forming a company that is set up with the purpose to fail. Whereas, the operator(s) will obtain financing from creditors and disburse the funds in secondary “loans” or for the purchasing of assets to be disposed of for cash without the intent to pay back the creditor. Also, the operator(s) may control a series of businesses in the same industry and never pay taxes. The owners usually file Chapter 11 bankruptcy for the company just prior to or at the time the IRS files a lien on the debtor’s assets. The business will operate briefly under the Chapter 11 until it is converted and dismissed, and the operators will later start new businesses with the assets of the debtor that they were able to acquire.

Essentially, this is the economic equivalent to looting. These “looters” will make trades with unaffiliated firms outside of the business, and rather than looking to invest in businesses who will honor their contracts, the looters look for partners who will sign contracts that appear to have high current value if fulfilled but that will not or could not be honored.¹⁰⁶ In this case, it seems that the corporation, D & K, borrowed money that was paid out to outside business

¹⁰⁶ GEORGE A. AKERLOF, PAUL M. ROMER, ROBERT E. HALL, AND N. GREGORY MANKIW, LOOTING: THE ECONOMIC UNDERWORLD OF BANKRUPTCY FOR PROFIT, BROOKINGS PAPERS ON ECONOMIC ACTIVITY, VOL. 1993, NO. 2 (1993), AT 2, 1-73. AVAILABLE AT [HTTP://WWW.SIGNALLAKE.COM/INNOVATION/LOOTING1993.PDF](http://www.signallake.com/innovation/looting1993.pdf) (LAST VISITED MARCH 2011).

accounts, which all afterwards defaulted on their debt.¹⁰⁷

The “Bust-Out” concept seems to be overlooked in this case; however, after shifting through the ins-and-outs of this D & K Aviation case, it seems as though a considerable amount of funds were actually “looted” from D & K’s creditors.

One could gather from movies such as “The God Father,” that mafia families are basically ran like corporations. And the members of such families, typically sharing the same name, play their hands in many areas of economic activity and are also the owners of many business ventures. Similarly and ironically, the shareholders and operators of D & K all share the same last name. With Kerry Webb – President, Daniel Webb – Vice President, Janet Webb – Secretary, and Lee Webb – Treasurer, on the face of this case, the Webbs share in the likeness of a “mafia familia” undertaking a shake-down of the system.

Essentially, persons perpetuating a Bust-Out will obtain financing from creditors and disburse the funds in secondary “loans” or for the purchasing of assets to be disposed of for cash without the intent to pay back the creditor. The Bust-Out activities of the Webbs, arguably beginning at the founding of D & K, become most apparent after the receipt of \$2,650,000 credit extension from Wilmington Savings Bank (“WSB”) in October of 1999.¹⁰⁸ D & K used \$2,100,000 of this credit line to purchase a Cessna aircraft, in which WSB had a secured interest, leaving a \$550,000 un-used balanced. As stated before, Bust-Out perpetrators may control a series of businesses in the same, or different, industries. And similarly, D & K loaned \$300,000 out their remaining credit line from WSB to another family operated business, Coral Bay, an

¹⁰⁷ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 5, (2005).

¹⁰⁸ Id. at 3

“entertainment” firm.¹⁰⁹ D & K also loaned an undetermined amount, likely to be the remaining \$159,009, to a company called CJ2.¹¹⁰ Not surprisingly, both Coral Bay and CJ2 were insolvent at the time of D & K’s bankruptcy.¹¹¹ The above transactions are the most palpable for seeing were D & K’s blatant looting or Bust-Out activities may have began.

Now, along with the secured debt of \$2,650,000 extended to D & K, there was also unsecured debt totaling to \$597,719¹¹², with \$252,070¹¹³ of that claimed by WSB. Noting that the cost of the Cessna was \$2,100,000, that left \$550,000 of credit under the control of D & K, the case states that D & K paid to WSB a total of \$2,195,691¹¹⁴ on the \$2,650,000 debt/note. From these transactions, the value of D & K’s “loot” from WSB is \$706,079¹¹⁵ (cash). However, WSB did not take a loss in the Bankruptcy of D & K, because the trustee ultimately ordered the sell of the Cessna for \$1,200,000¹¹⁶ in Chapter 7 liquidation. Excluding the previous point, mentioned in section IV (a) of this paper, that after distributions of administrative fees that the remaining balance to WSB may have only been \$1,058,738, with D & K payments of \$2,195,691¹¹⁷ to WSB and the sell of the Cessna for \$1,200,000, WSB recovered \$3,395,691 from D & K. And with the \$252,070 of WSB’s unsecured debt subtracted from that \$3,395,691 recovery, WSB profited approximately \$493,620, though it took them about 4 years to recover it.

Not forgetting that Bust-Out businesses avoid taxes with exchanges among their

¹⁰⁹ Id. at 5

¹¹⁰ Id. at 5

¹¹¹ Id. at 5

¹¹² United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 40, (2005).

¹¹³ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 5, (2005).

¹¹⁴ Sum of all the payments made to WSB by D & K

¹¹⁵ Money unaccounted for that was transferred out of Note 411

¹¹⁶ Needs Cite

¹¹⁷ Sum of all payments made to WSB

interrelated businesses, a Bust-Out business usually files Chapter 11 bankruptcy for the company just prior to or at the time the IRS files a lien on the debtor's assets; notably, D & K Aviation deferred a tax liability of \$500,000¹¹⁸ after the sell of an aircraft called the Pilatus when it purchased the Cessna aircraft. As for D & K tax liabilities, 1) D & K Aviation failed to record that \$500,000 tax liability, 2) failed to pay payroll taxes, 3) had \$350,000 prepetition tax liability, and 4) had \$60,000 postposition tax liability.¹¹⁹ If the trustee was unable to recover these funds, D & K Aviation accumulated approximately \$910,000¹²⁰ in avoided taxes.¹²¹ As for the non-payment of D & K's employee taxes, the owners/operators of D & K may be personally sued by the IRS, and criminally prosecuted for their failure to pay such tax liabilities. Now, these avoided taxes may have been paid out of the bankruptcy estate, to the detriment of WSB and the other creditors, however, the proceedings' documents do not reveal the action taken toward D & K's tax liability.

In total, with the \$354,649 of unsecured credit that was under the control of D & K, added to the \$706, 079 looted from WSB, the total cash loot value of D & K's operations is \$1,060,728 (cash). Adding that to the avoided taxes of \$910,000, in which the \$500,000 deferred liability was definitely lost, D & K's owners may have escaped with \$1,970,728, if the IRS does not pursue them for the avoided pay roll tax liability.

¹¹⁸ United States Bankruptcy Court, Southern District of Ohio, Western Division, Case No. 03-38974, Doc 200, pg. 6, (2005).

¹¹⁹ Id. at 6

¹²⁰ Sum of unpaid taxes.

¹²¹ The IRS warns against Pyramiding. "Pyramiding" of employment taxes is a fraudulent practice where a business withholds taxes from its employees but intentionally fails to remit them to the IRS. An often cause is a lack of profit or capital for operating costs, so the business owner uses the trust funds to pay other liabilities. The quarterly employment tax liabilities accumulate (or "pyramid") until the employer has little hope of catching up. Businesses involved in pyramiding frequently shut down or file for bankruptcy and then start a new business under a different name starting the cycle over. See <http://www.irs.gov/newsroom/article/0,,id=122521,00.html> (Last Visited April 28, 2011).

In asking yourself, “who would really want to jeopardize profit from risky business, when they can take a sure \$1,060,728?” Assuredly, most would rather accept the latter. Bankruptcy for profit, it may sound like a funny concept; however, in context, it is more beneficial to business owners, then banking on profits from a successful business venture. In the framework of economic thought, if we agree with the neo-classical economic theory that people as owners or economic players will act as “rational wealth-maximizers,”¹²² once business owners find that their present intake can be maximized by presently held credit that is easily extracted, then they will rationally discount the possibility of future income and take the safe bet of looting. Whoever said, “crime doesn’t pay,” is unfamiliar with white-collar crime. The oversight of the possible fraud in this case is another example of how actions taken to even remotely conceal fraud can be very lucrative. You may ask, “How can people just escape with \$1,970,728?” The answer to that question is simple. As simple as paying yourself as an employee of a business well above what the business is worth, and exploiting the protections of personal liability that incorporating provides it owners/operators.

In concerning Bankruptcy regulation, as of now, it seems that the “criminal” is willing to pay more for the crime’s benefit than society is willing to avoid it; accordingly, the conduct is rationally efficient and the criminal will most likely avoid being caught.¹²³

¹²² Thomas S. Ulen, *Rational Choice Theory in Law and Economics*, *ENCYCLOPEDIA OF LAW AND ECONOMICS*, pp. 790, 793-794 (Boudwijn Bockaert & Gerrit De Geest eds., (1999). *See Also*, Lynn A. Stout, *Taking Conscience Seriously*, in *Moral Markets: The Critical Role of Values In The Economy* 157, 158 (Paul J. Zak ed., 2008).

¹²³ Stewart, Hamish, *Economic Analysis of Law: Which Way Ahead?*, *The University of Toronto Law Journal*, Vol. 53, No. 4, 428, 425-441 (Autumn, 2003).

VI. Conclusion

A view of D & K's revenue streams and accounting would help solidify the analysis of this case. However, with the lack of any other reasonable inferences on why this company was so unprofitable, unable to pay its taxes, unable to satisfy its creditors, but yet its owners/operators owned million dollar homes, the strength of this conclusion is warranted. Arguably, any of our business ventures are essentially a series of "bets." With that being the case, the stakes are high when we enter into business to pursue profit and risk going for broke. So, if D & K Aviation's bet were simply for a "win" while merely risking only to "break-even," why wouldn't they roll their dice? Notably, this case is before the credit crisis of 2008 - 10, that slowed the U.S.'s, as well as the global, economy. Now, banks loathe to take high risks with credit, and the level of scrutiny in obtaining credit today is likely to limit the ability of small companies to play this game, for now.

APPENDIX 1: NOTE 411

Case 3:03-bk-38974 Doc 200-2 Filed 02/15/05 Entered 02/15/05 19:58:14 Desc
Exhibit No. 1-AD&K Loan # 70253411 (Note 411)-Note 2.1 million 7-19-2000. Page 1 of 3

Borrower's Name and Address 311 TULLS RIDGE RD. WILMINGTON, OH 45177		Lender's Name and Address WILMINGTON SAVINGS BANK WILMINGTON, OHIO 45177	
No. 70253411 Date July 19, 2000 Trans. Acct. # Line of Credit \$ 2,100,000.00 Triggering Balance \$ 0.00		Initial Advance \$ 0.00 Minimum Advance \$ 250.00 Minimum Balance \$ 0.00 Draw Period 36 MONTHS Repayment Period 36 MONTHS	
Maturity Date July 19, 2003 Billing Cycle: Ends the 25th day of every month Payment Date the 17th day of every month			

HOMELINE

GENERALLY: This is an agreement about your home equity line of credit. Many of the terms we use in this agreement have special meanings. The term "loan account balance" means the sum of the unpaid principal of loans made under this plan, plus unpaid but earned finance charges, plus any credit insurance premiums that are due. "Transaction Account" means an account you carry with us. The number of this account is listed at the top of the form on the line labeled "Trans. Acct. #." "Line of Credit" means the maximum amount of principal we will ordinarily allow you to owe us under this plan at any time. "Triggering Balance" is the amount you must keep in your transaction account to prevent us from lending you money under this plan.

In addition, we will use the following terms for this home equity plan. "Initial Advance" means the amount of money we will require you to accept as an advance to open the plan. "Minimum Advance" means the smallest amount of money we will advance to you at your request. The "Minimum Balance" is the amount of principal of loans we will require you to maintain outstanding during the plan, if the principal balance outstanding falls below the minimum balance, you may have to pay a fee described below.

If any term of this agreement violates any law or for some other reason is not enforceable, that term will not be part of this agreement. This agreement is subject to the laws of the state where we are located.

TAX DEDUCTIBILITY: You should consult a tax advisor regarding the deductibility of interest and charges under this home equity plan.

REQUESTING A LOAN: You request a loan under this plan whenever you:

- write a check for at least the minimum advance listed above using one of the special checks you have for that purpose.
- request in person or by phone that you be advanced directly an amount at least as large as the minimum advance listed above.

HOW THE LOAN IS ADVANCED: When you request a loan, we will, subject to any limitations contained in this agreement, advance exactly the amount you request, so long as the requested amount equals or exceeds the minimum advance listed in this agreement. We will make the advance by depositing the amount in your transaction account, by advancing the money directly to you, or by paying a designated third person or account, depending on how we agree to make the advance. We will record the amount as a loan in your loan account.

If your request is for less than the minimum advance, we may, at our option, grant the request. However, granting the request does not mean we will be required to grant requests for less than the minimum advance in the future. We always have the option to deny any such request.

However, we will not ordinarily grant any request for a loan which would cause the unpaid principal of your loan account balance to be greater than the line of credit listed in this agreement. We may, at our option, grant such a request without obligating ourselves to do so in the future.

LIMITATIONS: The following additional limitations apply:

- During the draw period, you may not request advances totaling more than \$ 0.00 per _____
- During the draw period, you will be limited to a total of _____ advances per _____

- During the term of the plan, you may not request advances totaling more than \$ 0.00 per _____
- During the term of the plan, you will be limited to a total of _____ advances per _____

HOW FINANCE CHARGES ARE COMPUTED: Finance charges begin to accrue immediately when we make a loan to you. To figure the finance charge for a billing cycle, we apply a daily periodic rate of finance charge to the "principal balance" of your loan account each day.

To figure the "principal balance" for each day, we first take your loan account balance at the beginning of the day and subtract any unpaid finance charges and credit insurance premiums (if any) that are due. Next, we subtract the portion of any payments or credits received that day which apply to the repayment of your loans. (A portion of each payment you make is applied to finance charges and credit insurance premiums, if any.) Then we add any new loans made that day. The final figure is the "principal balance."

The daily periodic rate of **FINANCE CHARGE** is 0.026027 % which corresponds to an **ANNUAL PERCENTAGE RATE** of 9.500 %. The annual percentage rate includes interest and not other costs.

VARIABLE RATE: The annual percentage rate may change, and will be EXACTLY SAME AS the following "base rate": the highest base rate on corporate loans at large U.S. money center commercial banks that The Wall Street Journal publishes as the prime rate. The annual percentage rate may increase if this "base rate" increases. An increase will take effect MONTHLY.

An increase will result in an increase in the finance charge and it may have the effect of increasing your periodic minimum payment. The annual percentage rate will not increase more often than once a month. A decrease will have the opposite effect of an increase disclosed above.

If the base rate changes more frequently than the annual percentage rate, we will always use the base rate in effect on the day we adjust the annual percentage rate to determine the new annual percentage rate. In such a case, we will ignore any changes in the base rate that occur between annual percentage rate adjustments.

The "annual percentage rate" referred to in this section is the annual rate which corresponds to the periodic rate applied to the balance as described above. ~~THE ANNUAL PERCENTAGE RATE WILL NEVER EXCEED 21% AND WILL NEVER BE LOWER THAN 9%.~~ **PERCENTAGE RATE** will never exceed 21% and will never be lower than 9%. The Annual Percentage Rate will never be lower than 9%.

HOW YOU REPAY YOUR LOANS: On or before each payment date, you agree to make a minimum payment to reduce your debt. The minimum payment amount is 1.000 % of your loan account balance on the last day of the billing cycle, or \$100.00, whichever is greater.

FROM PAYMENT (Note 1) the margin is listed in this agreement. You must pay the minimum payment on the minimum payment date. The minimum payment will not fully repay the principal that is outstanding on your line. At that time, you may have to pay the entire balance in a single balloon payment.

We are not obligated to refinance your loan at that time, but will consider your request to do so. If you refinance this account at maturity, you may have to pay some or all of the closing costs normally associated with a new loan even if you obtain financing from us.

ADDITIONAL REPAYMENT TERMS: If your loan account balance on a payment date is less than the minimum payment amount, you must pay only the loan account balance.

If you fail to make a payment, we may, but are not required to, advance money to you to make the payment. All the terms of this agreement would apply to such a loan.

You can pay off all or part of what you owe at any time. However, so long as you owe any amount you must continue to make your periodic minimum payment.

The amounts you pay will be applied first to any charges you owe other than principal and finance charges, then to any finance charges that are due, and finally to principal.

ROUNDING RULE: The minimum payment will be rounded

to the nearest \$0.00.

☐ **AUTOMATIC WITHDRAWAL:** If checked, you authorize us to automatically withdraw your payment from your transaction account on each payment date. If your transaction account does not have enough money in it to make the minimum payment, we may, but are not required to, lend you money to make the payment. All the terms of this agreement will apply to such a loan. If your loan account balance is less than the minimum payment amount, we will withdraw only the amount necessary to reduce your loan account balance to zero.

SECURITY: To secure the payment of what you owe, we have the right of set-off. This means we can pay the amount you owe us out of money that we are required to pay you (such as money in your savings or checking account). However, we cannot use in this way money in your IRA or other tax-deferred retirement account. State law may further limit our right of set-off.

However, we will have no right of set-off if you can obtain credit under this plan by using a debit or a credit card.

We have also secured your obligations under this plan by taking a security interest (by way of a separate security agreement, mortgage

or other instrument dated July 19, 2000 } in the following property, described by item or type:
AIRPLANE DESCRIBED AS

Any present or future agreement securing any other loan you have with us also will secure the payment of this loan. Property securing another loan will not secure this loan if such property is your principal dwelling and we fail to provide any required notice of right of rescission. Also, property securing another loan will not secure this loan to the extent such property is in household goods.

Filing fees \$

You may buy property insurance from anyone you want who is acceptable to us.

GUARANTY: BY SIGNING BELOW, I UNCONDITIONALLY GUARANTEE THE PAYMENT OF ANY AMOUNTS OWED UNDER THIS NOTE AND ANY SECURITY AGREEMENT. I ALSO AGREE THAT ALL THE OTHER TERMS OF THE NOTE AND ANY SECURITY AGREEMENT WILL APPLY TO ME.

LEE F. WEBB

(Note 4.1) Note 2. Admission 7-19-2000. Page 2 of 2

change the terms of this agreement. However, we may change the terms in the following circumstances:

- If this is a variable rate plan, we may change the index and margin if the original index described in this agreement becomes unavailable. Any new index will have a historical movement similar to the original, and, together with a new margin, will produce a similar interest rate.
- We may make changes that you have agreed to in writing.
- We may make changes that unequivocally benefit you.
- We may make changes to insignificant terms of this agreement.

If we are required to send notice of a change in terms, we will send the notice to your address listed in this agreement. (You should inform us of any change in address.)

ADDITIONAL CHARGES: You agree to pay the following additional charges:

- A late charge on any payment not paid by the 17th day of the month of 5% of the payment.
- An additional fee of \$0.00 per year in order to participate in this plan. We will add this amount to your loan account balance on an annual basis.
- If your account is closed before there will be a prepayment penalty.

• Application Fee	\$ 0.00	• Points	\$ 0.00
Appraisal	\$ 0.00	• Official Fees	\$ 0.00
Property Survey	\$ 0.00	• Title Search	\$ 0.00
Credit Report Fees	\$ 0.00	• Title Insurance	\$ 0.00
Documentation Fees	\$ 0.00	• Taxes	\$ 0.00
Termination Fee	\$ 0.00		
Other		\$ 0.00	

ATTORNEY'S FEES: If permitted by law, you agree to pay all our costs, including reasonable attorney's fees, that we incur in legal proceedings to collect or enforce this debt should you be in default.

NOTICE: Review the following page for additional terms and for information about your rights in the event of a billing error.

SIGNATURES: By signing below, you agree to the terms of this agreement and you promise to pay any amounts you owe under this agreement. You also state that you received a completed copy of the agreement on today's date. D & K AVIATION, INC.

Signature

LEE F. WEBB, TREASURER

Signature

By:

DEFAULT: You will be in default on this agreement if any of the following occur:

- (1) You engage in fraud or material misrepresentation, by your actions or failure to act, in connection with any phase of this home equity line of credit;
- (2) Subject to any right to cure you may have, you do not meet the repayment terms;
- (3) Your action or inaction adversely affects the collateral or our rights in the collateral, including but not limited to: (a) failure to maintain required insurance on the dwelling; (b) your transfer of the property; (c) failure to maintain the property or use of it in a destructive manner; (d) commission of waste; (e) failure to pay taxes on the property or otherwise fail to act and thereby cause a lien to be filed against the property that is senior to our lien; (f) death; (g) the property is taken through eminent domain; (h) a judgment is filed against you and subjects you and the property to action that adversely affects our interest; or (i) a prior lien holder forecloses on the property and as a result, our interest is adversely affected.

REMEDIES: We may terminate your account, require you to pay the entire outstanding balance in one payment and charge you a termination fee (if provided for in this agreement), and fees related to the collection of the amount owing, if you are in default in any manner described above. In that instance, we may take other action short of termination, such as charging you a fee if you fail to maintain required property insurance and we purchase insurance. If we elect to terminate and accelerate the amounts owing on your account, we may use our right to set-off, unless prohibited.

Even if we choose not to use one of our remedies when you default, we do not forfeit our right to do so if you default again. If we do not use a remedy when you default, we can still consider your actions as a default in the future.

SUSPENSION OF CREDIT AND REDUCTION OF CREDIT LIMIT: We may temporarily prohibit you from obtaining additional extensions of credit, or reduce your credit limit if:

- (1) The value of the dwelling securing this home equity line of credit declines significantly below its appraised value for purposes of this line;
- (2) We reasonably believe you will not be able to meet the repayment requirements due to a material change in your financial circumstances;
- (3) You are in default of a material obligation of this agreement, which shall include, but is not limited to, your ongoing obligation to supply us with information we feel we need to assess your financial condition;
- (4) A governmental action prevents us from imposing the annual percentage rate provided for in this agreement;
- (5) The action of a governmental body adversely affects our security interest to the extent that the value of the security interest is less than 120% of the home equity line;
- (6) The annual percentage rate corresponding to the periodic rate reaches the maximum rate allowed under this plan (if provided for in this agreement); or
- (7) A regulatory agency has notified us that continued advances would constitute an unsafe business practice.

In the event that we suspend your right to additional advances or reduce your credit line, we will send you notice of our decision at the address listed in this agreement. (You should inform us of any change in your address.) If we have based our decision to suspend or reduce your credit privileges on an assessment of your financial condition or performance under this plan, and you believe that your situation has changed, you must request that we re-evaluate your situation, and reinstate your credit privileges.

CREDIT INFORMATION: You agree to supply us with whatever information we reasonably feel we need to decide whether to continue this plan. We agree to make requests for this information without undue frequency, and to give you reasonable time in which to supply the information.

You authorize us to make or have made any credit inquiries we feel are necessary. You also authorize the persons or agencies to whom we make these inquiries to supply us with the information we request.

YOUR BILLING RIGHTS KEEP THIS NOTICE FOR FUTURE USE

This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

Notify Us in Case of Errors or Questions About Your Bill

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us at the address listed on your bill. Write to us as soon as possible. We must hear from you no later than 60 days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights. In your letter, give us the following information:

- Your name and account number.
- The dollar amount of the suspected error.
- Describe the error and explain, if you can, why you believe there is an error. If you need more information, describe the item you are not sure about.

If you have authorized us to pay your bill automatically from your savings, checking or other account, you can stop the payment on any amount you think is wrong. To stop the payment your letter must reach us three business days before the automatic payment is scheduled to occur.

Your Rights and Our Responsibilities After We Receive Your Written Notice

We must acknowledge your letter within 30 days, unless we have corrected the error by then. Within 90 days, we must either correct the error or explain why we believe the bill was correct.

After we receive your letter, we cannot try to collect any amount you question, or report you as delinquent. We can continue to bill you for the amount you question, including finance charges, and we can apply any unpaid amount against your credit limit. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question.

If we find that we made a mistake on your bill, you will not have to pay any finance charges related to any questioned amount. If we didn't make a mistake, you may have to pay finance charges, and you will have to make up any missed payments on the questioned amount. In either case, we will send you a statement of the amount you owe and the date that it is due.

If you fail to pay the amount that we think you owe, we may report you as delinquent. However, if our explanation does not satisfy you and you write to us within ten days telling us that you still refuse to pay, we must tell anyone we report you to that you have a question about your bill. And, we must tell you the name of anyone we reported you to. We must tell anyone we report you to that the matter has been settled between us when it finally is.

If we don't follow these rules, we can't collect the first \$50 of the questioned amount, even if your bill was correct.

APPENDIX 2: Reorganization Plan

FILED
FEB 11 2004
Michael D. Webb, Clerk
U. S. Bankruptcy Court

**In the United States Bankruptcy Court
Southern District of Ohio
Western Division at Dayton**

In Re:

D&K Aviation, Inc.

Debtor

Case No. 03-38974

Chapter 11

Judge: Lawrence Walter

Plan of Reorganization

Now comes D&K Aviation, Inc., by and through counsel, and proposes the following plan of reorganization pursuant to 11 U.S.C.

1. Definitions

The following terms shall have the meanings indicated unless the context otherwise requires:

"Administrative Claims" means claims pursuant to 11 U.S.C. Section 503, accruing from and after the date of filing, excluding fees and expenses of professional persons retained or to be compensated pursuant to the Code.

"Allowed Claims" means a claim which has been scheduled pursuant to 11 U.S.C. Section 521(1), other than a claim scheduled as disputed, contingent or unliquidated, or which has been filed pursuant to 11 U.S.C. Section 501(a), and with respect to which no objection to the allowance thereof has been made within any period of limitation fixed by the Court, or as to which any objection has been overruled by a Final Order.

"Allowed Priority Tax Claim" means the portion of an allowed claim entitled to priority under Section 507(a)(7) and post petition tax claims entitled to priority as an administrative expense.



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"Allowed Unsecured Claim" means an allowed claim where the claimant does not hold a valid, perfected and enforceable lien or security interest, as defined in 11 U.S.C. Section 101(31) and (41); provided, however, that interest and other charges accruing, arising or imposed after the date of filing herein, if any, shall not be part of an allowed unsecured claim unless otherwise stated herein.

"Claim" means a claim against the Debtor as defined in 11 U.S.C. Section 101(4).

"Claimant" means the holder of an allowed claim.

"Code" and "Bankruptcy Code" means 11 U.S.C. Sections 101, et. seq.

"Confirmation Date" means the date of entry by the Bankruptcy Court of an order confirming the Plan of Reorganization in accordance with the Code.

"Court" means the United States Bankruptcy Court for the Southern District of Ohio, Western Division at Dayton.

"D&K" of "D&K Aviation" means the Debtor, D&K Aviation, Inc.

"Debtor" means D&K Aviation, Inc.

"Disputed Claim" means a claim against the estate of the Debtor which (a) is listed on a "Schedule of Unresolved Claims" which may be filed with the Court by Debtor on or before one hundred eighty (180) days after the Effective Date.

"Effective Date" shall mean a date eleven (11) days after the entry of the Court confirming the Plan becomes final and non-appealable.

"Final Order" means an order or judgment which has not been reversed or stayed and as to which the time to appeal or to seek review or rehearing has expired and as to which no appeal or petition for review or rehearing is pending.

"Petition Date" means February 24, 1999, the date that his Chapter 11 case was commenced.

"Plan" means this Plan in its present form, or as it may be amended or supplemented.

"Pro Rata" means the same proportion that a claim in a particular category bears to the aggregate amount of all claims in that category.

II. Classification of Claims and Interests

Creditors and claims shall be broken into the following classifications which shall be paid as provided in Section III.

a. Class 1

Class 1 shall include the expenses of administration of the attorneys for the Debtor, the attorneys for the Trade Creditors' Committee, the attorneys for the Special Creditors' Committee, and the accountants and agents of the Debtor and either of the creditors' committees.

b. Class 2

Class 2 shall include all expenses of administration other than Class 1 claims.

c. Class 3

The secured claims of Wilmington Savings Bank whether arising before or after the filing of the chapter 11 petition.

d. Class 4

Employee wage claims and employee benefit claims, including claims by National Bank and Trust relating to the D&K Aviation, Inc. 401(k), Plan 001.

e. Class 5

Tax claims of governmental units to the extent they are entitled to priority under 11 U.S.C. § 506 and all other unsecured claims entitled to priority under title 11 of the United States Code to the extent that they are not Class 4 claims.

f. Class 6

Allowed unsecured, non-priority creditors and claims.

III. Provisions for Satisfying the Claims of Creditors

The perfected claims will be satisfied in the following manner:

a. Class 1

The claims of all Class 1 creditors, upon allowance by the court, will be paid in cash in full upon confirmation or from time to time prior to or after confirmation as the Court shall approve. This Class is not impaired.

b. Class 2

The claims of all Class 2 creditors shall be assumed by the reorganized Debtor and shall be paid in full as soon as practicable after Confirmation. This Class is not impaired.

c. Class 3

The secured claims of Wilmington Savings Bank shall be assumed by the reorganized Debtor and shall be paid according to their contractual terms including any refinance of said indebtedness.

d. Class 4

Class 4 creditors shall be paid in full on their allowed priority claims as soon as practicable after confirmation. The deficiency payments to national Bank and Trust for the D&K Aviation, Inc. 401(k), Plan 001 shall be paid in installments with interest as appropriate under the provisions of the plan over the course of 12 months following the confirmation of this Plan of Reorganization. This class is not impaired.

e. Class 5

Tax claims of governmental units entitled to priority under 11 U.S.C. § 507(a)(8) shall receive deferred cash payments over a six-year period from the date of assessment of the claims, with interest as provided in the Internal Revenue Code.

All other claims entitled to priority under title 11 of the United States Code shall be paid in full as soon as practicable after confirmation. This class is not impaired.

f. Class 6

All Class 6 claims shall be paid pro rata 75% of their allowed, liquidate, non-contingent, undisputed claims. Their interest shall be subordinated to the interests of Classes 1-5 and shall not be paid until those classes are paid in full. Unliquidated and contingent



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claims shall be settled, if possible or litigated, and paid as Class 6 claims. This class is impaired.

Notwithstanding any other provisions of this plan of reorganization, disputed claims of any Class shall be paid upon their allowance by the court.

IV. Execution and Implementation of the Plan

The funds necessary to pay Debtors' obligations under the Plan will be generated from the ordinary operation of Debtors' business. All expenses connected with the maintenance and operation of the Debtors' business shall be paid first and monthly distributions shall be made to creditors by the fifteenth (15th) day of the following month.

The Debtor shall have all powers necessary to the operation of its business and the execution of its powers as Debtor in Possession, including, but not limited to, the following:

- a. Release, convey or assign any right, title or interest in or about the Debtor's Property subject to Court approval, if necessary;
- b. Pay and discharge any costs, expenses, fees, or obligations deemed necessary to preserve the Debtor's Property or any part thereof, including paying all attorney fees and expenses incurred in connection with litigation on behalf of the Debtor.
- c. Deposit Debtor's funds and draw checks and make disbursements thereof;
- d. Employ and have such attorneys, accountants, engineers, agents, tax specialists and clerical and stenographic assistance as may be deemed necessary.
- e. File or continue the prosecution of preference actions and settle those adversary proceedings without the necessity of obtaining Court approval;
- f. Take any action required or permitted by this Plan;
- g. Commence or defend litigation on behalf of Debtor;
- h. Settle, compromise or adjust by arbitration or otherwise any disputes or controversies in favor of or against the Debtor's Estate;
- i. Waive or release rights of any kind;
- j. Appoint, remove and act through agents, managers and employees and confer upon them such power and authority as may be necessary or advisable;



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- k. In general, without in any manner limiting any of the foregoing, deal with the Debtor's Property or any part or parts thereof in all other ways as would be lawful for any person owing the same to deal therewith, whether similar to or different from the ways above specified, at any time or times hereafter; and
- l. Have instituted on behalf of the Debtor all claims and/or causes of actions which could be brought by a trustee or debtor-in-possession under the Bankruptcy Code, and prosecute or defend all appeals on behalf of Debtor.

Upon confirmation, the Debtor shall be vested with its assets, subject only to outstanding liens which are not avoidable by the Debtor under the provisions of title 11 of the United States Code, and entitled to manage its affairs without further order of the court.

V. Liens Rights and Discharge of Debtor

All assets sold pursuant hereto shall be sold free and clear of liens of creditors, unless otherwise ordered; however, such liens, to the extent they attached to the asset sold prior to the petition date or consensually in the ordinary course of the Debtor's business after the petition date, shall be transferred to the money received from such sale.

Liens placed on the aircraft by Aviation Law Center for the benefit of AvFuel Corporation and Multi Service Corporation, are non-consensual liens filed after the petition date and shall not attach to the Debtor's interest in the aircraft.

Except as otherwise provided in this Plan, upon confirmation Debtor shall be discharged of all debts (except those required to be made pursuant to the provisions of the Plan), Debtor shall be discharged from any debt that arose before the date of confirmation and any debt of any kind specified in Sections 501(q), 502(h), or 502(I) of Title 11 of the United States Bankruptcy Code to the full extent permitted by Section 114(d)(1)(A) of said Title.

The Debtor shall retain and may enforce all causes of action existing in favor of the debtor.

VI. Acceptance & Rejection of Leases and Executory Contracts

Any and all other executory contracts of the Debtor which are not expressly assumed prior to the confirmation date or are not as of such date the subject of pending applications to assume shall be deemed to be rejected by the Debtor. Claims, if any, arising from the rejection of executory contracts shall be filed within thirty (30) days of the confirmation data or be forever barred from enforcement or assertion in this Court.

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The Debtor is specifically accepting the following leases and executory contracts:

Maintenance Contract with Cessna
Lease Agreement with Lee Webb for hanger space

VII. Modification of the Plan

The Debtor may propose amendments or modifications of this plan at any time prior to confirmation, with leave of the court, upon notice to the creditors' committees. After confirmation, the Debtor may, with approval of the court, and so long as it does not materially or adversely affect the interests of creditors, remedy any defect or omission, or reconcile any inconsistencies in the plan, or in the order of confirmation, in such manner as may be necessary to carry out the purposes and effect of this plan.

VIII. Jurisdiction of the Court

Subject to Article IV 4, the court will retain jurisdiction until this plan has been fully consummated, including, but not limited to, the following purposes:

- a. The classification of the claim of any creditor and the re-examination of claims which have been allowed for purposes of voting, and the determination of such objections as may be filed to creditors' claims. The failure by the Debtor to object to, or to examine any claim for the purposes of voting, shall not be deemed to be a waiver of the Debtor's right to object to, or re-examine the claim in whole or in part.
- b. Determination of all questions and disputes regarding title to the assets of the estate, and determination of all causes of action, controversies, disputes, or conflicts, whether or not subject to action pending as of the date of confirmation, between the debtor and any other party, including but not limited to, any right of the Debtor to recover assets pursuant to the provisions of title 11 of the United States Code.
- c. The correction of any defect, the curing of any omission, or the reconciliation of any inconsistency in this plan or the order of confirmation as may be necessary to carry out the purposes and intent of this plan.
- d. The modification of this plan after confirmation pursuant to the Bankruptcy Rules and title 11 of the United States Code.
- e. To enforce and interpret the terms and conditions of this plan.

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- f. Entry of any order, including injunctions, necessary to enforce the title, rights, and powers of the Debtor and to impose such limitations, restrictions, terms and conditions of such title, rights, and powers as this court may deem necessary.
- g. Entry of an order concluding and terminating this case.

IX. Special Provisions

a. Notices

Any notices to the Debtor, Attorney for the Debtor, creditors, attorneys for creditors, or any other person requiring notice for any reason of hearing or proceeding under this Plan shall be made by regular mail.

b. Debtor Able to Carry out Plan

The Debtor represents that it is able to carry out this Plan.

c. Defaults Not Cured Are Waived

Any default of the Debtor which is not proposed to be cured as set forth herein is deemed waived by confirmation of this Plan.

d. Payments Under Plan May Be Accelerated

Any payment under the Plan may be accelerated by the Debtor without any further notice or approval by the Court. The Debtor shall not be required to accelerated future payments on account of any initially accelerated payment.

e. Effect of Confirmation Order

The entry of an Order Confirming the Plan shall serve as an Order concluding these proceedings except for the purposes above outlined.

APPENDIX 3: Sale of the Plane

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	:	Case No. 03-38974
	:	
D & K Aviation, Inc.	:	Chapter 7
	:	
Debtor	:	Judge Walter

AGREED ORDER AUTHORIZING THE TRUSTEE TO SELL THE 3/8TH INTEREST OF DEBTOR IN 2000 CESSNA CITATION BRAVO TO AEROSOLUTIONS GROUP, INC., PURSUANT TO THE TERMS OF THE PURCHASE AGREEMENT, THE SALE TO BE FREE AND CLEAR OF INTERESTS, LIENS AND ENCUMBRANCES WITH SUCH INTERESTS, LIENS AND ENCUMBRANCES TO ATTACH TO THE PROCEEDS OF THE SALE FOR FURTHER DETERMINATION OF THE COURT OF CLAIMS AGAINST SUCH PROCEEDS AND DISTRIBUTION OF SUCH FUNDS

1. The Court held a hearing on November 23, 2004, on the motion, pursuant to 11 U.S.C. § 363 (b) and (f) for an order approving the contract to purchase and for the Trustee to sell the Debtor's 3/8th interest a 2000 Cessna Citation Bravo SN 550-0933 and its two Pratt & Whitney Model 530 D engines, free and clear of interests, liens, encumbrances or claims with liens, interests or encumbrances to attach to the proceeds of such sale ("Sale Motion") The Motion also provides the sale proceeds shall be subject to further determination by the Court as to the validity, perfection, enforceability, avoidability and priority of claims attaching to the proceeds of sale, including, but not limited to fees under 11 U.S.C. § 326 and professional fees under 11 U.S.C. §§ 327 and 503 and 506 (c) in concert with application of distribution rights

under 11 U.S.C. §§ 724 or 726. Thomas R. Noland, appeared as counsel for the Trustee, Gary Powers appeared as the proposed broker for the Aircraft, Walter Reynolds appeared on behalf of Ballinger Industries, Inc. and Donna Air LLC, Patricia Friesinger appeared on behalf of Amber Aviation, Inc., Ronald Pretekin appeared on behalf of Wilmington Savings Bank and Mitchell Allen appeared as counsel for the Debtor.

2. The Court approved an expedited hearing on the Motion and finds that the Trustee has provided appropriate notice to all creditors of the Motion, the time to object to the Motion and of the hearing date.

3. The Court further finds that a limited objection to the Sale Motion was filed by Amber Aviation, Inc. (“Amber”) which the Trustee and other interested parties have reached agreement to permit the sale to proceed in accordance with the terms and conditions of this Order. The Court further finds that D&K Aviation represented by Mitchell Allen appearing as Debtor’s counsel filed an objection to the Motion. The Court at hearing determined that Mr. Allen had filed the objection at the last minute at the urging of Lee Webb. The Court further inquired if Mr. Allen was satisfied by the proffer of evidence made by the Trustee as to establish cause for the Court to approve such Motion, which Mr. Allen agreed the proffer was sufficient

for finding of cause to approve the Motion and represented he had not witnesses or evidence to offer.

4. The Court further finds from the proffer of evidence made by the Trustee, the consent of the co-owners to the Motion subject to the terms of this Agreed Order, the appearance of counsel for Wilmington Savings Bank indicating it satisfied as the purchase price being offered and did not oppose the sale, that good cause has been shown to grant the relief requested in the Motion, subject to the terms and conditions of this Order and the objection filed by Mr. Allen on behalf of Debtor shall be overruled.

5. The Court further finds that all co-owners of interests in the 2000 Cessna Citation Bravo, serial number 550-0933 and the two attached Pratt & Whitney Model 530 D engines (“Aircraft”), have been given appropriate notice and have agreed to the terms and conditions of this Order as evidenced by the signature of their counsel on this Order. The Court further finds that the ownership interests in the Aircraft are subject to a Joint Ownership Agreement (“JOA”) entered into between D&K Aviation, Inc. as an owner of an undivided 37.5% interest in the Aircraft. Ballinger Industries, Inc as an owner of an undivided 25% interest in the Aircraft, Amber Aviation, Inc., as a owner of an undivided 25% interest in the Aircraft, and Donna Air LLC, as an owner of an undivided 12.5% interest in the Aircraft (“Owners”). The rights of the Owners in the JOA are disputed.

6. The Court finds that the Owners have agreed to the Motion subject to the terms and conditions of this Order. The Owners submit to jurisdiction of this court and waive any right to an adversarial proceeding but consent to the Court making determinations of the rights of Owners under the JOA and the right of the Owners under any applicable state or federal law or regulation, should the sale not close, pursuant to Rule 9014 as a Contested Matter, should the

sale not close. The Court further finds the Owners agree, should the closing on the sale of the Aircraft not occur on or before December 30, 2004 and a voluntary agreement for the sale of the entire Aircraft by the Trustee is not reached by January 14, 2005, the Court may, subject to its calendar availability, hold a hearing on or before February 18, 2005 to determine the merits as to whether the Trustee may proceed to sell the Aircraft in its entirety under 11 U.S.C. Sections 363 (b) (f) and (h) and assume and assign the interests of the Debtor in the JOA under 11 U.S.C. Section 365 (f) and (k) or other applications sections of federal or state laws or regulations. In such event, the Owners hereby preserve all rights in their respective filed objections.

7. The Court further finds that the Trustee has noticed all known parties that may claim lien or encumbrance in the Aircraft and no objections have been filed by those parties to the Motion; therefore

IT IS ORDERED:

A. The Trustee is authorized to sell Debtor's 3/8th interest in the Aircraft to AeroSolutions, Inc. for the sum of \$1,200,000, subject to the Purchase Agreement Terms, including, but not limited to, adjustment of the price downward on a dollar for dollar basis should maintenance be required after inspection to meet current CESCO maintenance program requirements, such service is performed and the costs are paid by the Purchaser. Purchaser shall pay the costs for the inspection of the Aircraft. The sale of the Aircraft is further subject to the further terms and conditions below.

B. The objection filed by Mitchell Allen as counsel for the Debtor is OVERRULED.

C. The Trustee and Amber Aviation, Inc. (“Amber”) agree that the sale of the Aircraft shall proceed to close if the Purchaser agrees to close on the purchase of the 3/8th interest of Debtor in the Aircraft and that the interest of Amber in such Aircraft, under agreement for sale, closes simultaneously with the sale of the 3/8 interest of the Debtor to the Purchaser. The Trustee may proceed with the closing on Debtor’s 3/8th interest in the Aircraft should Amber not agree to sell its interest in the Aircraft and not close. Should the sale of Amber’s interest not occur, other than due to Amber’s actions, then the sale of the interest of the Debtor’s 3/8th interest to the Purchaser shall be subject to further hearing before the Court to determine whether Amber can prevail on its objection to the sale which shall be heard on an expedited basis without the necessity of an adversary proceeding to determine whether the Trustee can satisfy the requirements of 11 U.S.C 363 (b), (f), (h) and Section 365 (f) and (k).

D. The sale of the interest of the Debtor in the Aircraft shall be made free of all interests, liens, taxes, and encumbrances with such interests, liens, taxes and encumbrances attaching to the sale proceeds; however, the title to be delivered shall be by an appropriate bill of sale in conformity with regulations for transfer under 49 USC 44107 and 14 CFR 49.1 et al., and the Trustee and the Estate make no representations or any warranties concerning the Aircraft.

E. All sale proceeds from closing of the Estate’s 3/8th interest shall be remitted to the Trustee subject to a further order of this Court authorizing the payment of sale proceeds, including brokerage fees.

F. The Trustee subsequently shall file necessary pleadings no later than February 15, 2005, to determine the rights in the sale proceeds, including the rights of WSB, and other creditors

claiming liens on the Aircraft and the rights of the Trustee for fees under 11 U.S.C. § 326 and professional fees under 11 U.S.C. §§ 327 and 503 and 506 (c) in concert with application of distribution rights under 11 U.S.C. §§ 724 or 726, should the sale close on or before December 30, 2004.

G. The Trustee shall file a report with the Court no later than January 5, 2005, apprising the Court whether the sale of the Aircraft did in fact close, or whether further proceedings in accordance with this Order shall be necessary.

IT IS SO ORDERED

/s/ Thomas R. Noland
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APPENDIX 4: Case Closed

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

In Re:	:	Case No. 03-38974
	:	
D and K Aviation, Inc.	:	Chapter 7
	:	
Debtor(s)	:	Judge Lawrence S. Walter

FINAL ACCOUNT AND APPLICATION FOR DISCHARGE OF TRUSTEE, RELEASE OF SURETY AND CLOSING OF THE ESTATE

The case trustee certifies, under penalty of perjury, to the Court and the United States Trustee that all estate funds have been distributed and dividends disbursed in accordance with the dividend distribution report (Form 5A), all checks have been negotiated as evidenced by the attached bank statement and canceled checks or any remaining estate monies have been paid into the court and the estate has been fully administered.

WHEREFORE, the case trustee certifies, under penalty of perjury, that this estate has been fully administered and no funds or assets of this estate remain, within the purview and meaning of Section 350 of the United States Bankruptcy Code.

THEREFORE, the trustee requests that pursuant to FRBP 5009 that the statutory duties delineated in Section 704 of the United States Bankruptcy Code be deemed discharged, that the surety on the bond of the trustee be released with respect to this case except for any liability which may have accrued prior to this date and that this Court enter an order closing this estate.

Dated: April 22, 2008

/s/ Thomas R. Noland
Thomas R. Noland #0018239
Case Trustee
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937. 222.1203 / 937.222.1046 fax
trustee@shsedayton.com

REVIEWED BY UNITED STATES TRUSTEE

The United States Trustee has reviewed the Final Account, Certification that the Estate has been Fully Administered and Application for Discharge of the trustee in accordance with the standards set forth in the Amended Memorandum of Understanding dated April 1, 1999 and has no objection to the trustee's certification that the estate has been fully administered and is ready to close.

OFFICE OF THE UNITED STATES TRUSTEE

By: /s/ Melody M. Shade
Melody M. Shade, Office of the U.S. Trustee

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