

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re:
T&T Air, LLC

Debtor

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Case # 17-31125

Chapter 11

EMERGENCY MOTION PURSUANT TO 11 U.S.C. 364
AUTHORIZING DEBTOR TO OBTAIN POST-PETITION SECURED
FINANCING AND GRANTING A SECURITY INTEREST IN
PROPERTY THAT IS ALREADY SUBJECT TO LIENS

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 14 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

THE MOVING PARTY HAS REQUESTED RELIEF ON AN EMERGENCY BASIS. IF YOU OBJECT TO THE MOTION, OR THE REQUESTED RELIEF, YOU SHOULD FILE AN OBJECTION WITH THE COURT IMMEDIATELY.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

COMES NOW, T&T Air, LLC (the "Debtor"), by and through its counsel, and moves this Court to Authorize Debtor to Obtain Post-petition Secured Financing and Grant a Security Interest Pursuant to 364(b) AND IN SUPPORT THEREOF SAYS AS FOLLOWS:

I. Jurisdiction and Venue

1. The Court has jurisdiction to consider this matter under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (M). Venue is proper in this district under 28 U.S.C. §§ 1408 and 1409.

2. The Court has constitutional authority to enter a final order with respect to this Motion. It is an essential part of the public bankruptcy scheme and triggers the “public rights” exception. *See In re Carlew*, 469 B.R. 666, 672 (Bankr. S.D. Tex. 2012)(discussing *Stern v. Marshall*, 564 U.S. 462 (2011)).

II. CONCISE STATEMENT PURSUANT TO FRBP 4001(c)(1)(b)

Debtor seeks permission to enter into a Debtor In Possession credit facility with William Horner. Mr. Horner is a member in Debtor and the guarantor of debtor’s senior secured creditor.

Mr. Horner proposes to provide a Credit Facility in the form of a revolving loan which will roll up of the existing post-petition loans of \$101,000 into a new revolving facility plus an additional \$200,000 in available liquidity. This facility may be enlarged on agreement of the parties and notice to the creditors.

Debtor proposes to grant Mr. Horner an all assets lien subordinate to valid, existing, enforceable pre-petition security interests and superiority administrative status, save only usual carve outs for fees, as security for the DIP Loan. The loan characteristics are summarized as follows:

<u>Characteristic</u>	<u>Effect or Rate</u>	<u>Location</u>
INTEREST RATE	6 %	LOAN TERMS P. 1
MATURITY	SIX MONTHS, OR SALE OF AIRCRAFT N510HF, WHICHEVER IS EARLIER.	CREDIT AGREEMENT P. 9
EVENTS OF DEFAULT	VIOLATION OF COVENANTS, FAILURE TO PROPERLY APPLY FUNDS	CREDIT AGREEMENT IN GENERAL
LIENS AND CLAIMS	ALL ASSETS LIEN PER 11	CREDIT AGREEMENT

	U.S.C. §§ 364(C)(2) AND 364(C)(3)), 503(B), AND 507(B)	PAGE 14
BORROWING LIMITS	\$301,000 AND ADDITIONAL ADVANCES UPON NOTICE	CREDIT AGREEMENT P9, LOAN DOCUMENT
BORROWING CONDITIONS	WEEKLY REPORTING, WRITTEN DRAW REQUEST, OBSERVANCE OF ALL COVENANTS	CREDIT AGREEMENT PAGE 2

In addition, the following provisions are summarized pursuant to 4001(c)(1)(i-xi):

Item	Effect/Rate	Document	Yes/No
		Location	
(i) a grant of priority or a lien on property of the estate under § 364(c) or (d)	All assets	CREDIT AGREEMENT PAGE 14	Yes
(ii) the providing of adequate protection or priority for a claim that arose before the commencement of the case, including the granting of a lien on property of the estate to secure the claim, or the use of property of the estate or credit obtained under § 364 to make cash payments on account of the claim	All Pre-petition claims of secured creditors are undisturbed as Permitted Encumbrances.	CREDIT AGREEMENT PAGE 8	Yes
(iii) a determination of the validity, enforceability, priority, or amount of a claim that arose before the commencement of the case, or of any lien securing the claim;	NONE		No
(v) a waiver or modification of any entity's authority or right to file a plan, seek an extension of time in which the debtor has the exclusive right to file a plan, request the use of cash collateral under § 363(c), or request authority to obtain credit under § 364;	None		No

(vi) the establishment of deadlines for filing a plan of reorganization, for approval of a disclosure statement, for a hearing on confirmation, or for entry of a confirmation order;	None		No
(vii) a waiver or modification of the applicability of non-bankruptcy law relating to the perfection of a lien on property of the estate, or on the foreclosure or other enforcement of the lien;	All liens are perfected by operation of law upon entry Orders. All state law filing formalities are waived.	Credit Agreement Pages 24 and 25	Yes
(viii) a release, waiver, or limitation on any claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence an action;	None		No
(ix) the indemnification of any entity;	Mr. Horner is indemnified by Debtor as to all causes of action not arising out of Gross Negligence of Mr. Horner.	Credit Agreement Page 17	Yes
(x) a release, waiver, or limitation of any right under § 506(c); or	None		No
(xi) the granting of a lien on any claim or cause of action arising under §§ 544, 545, 547, 548, 549, 553(b), 723(a), or 724(a).	Liens on Chapter 5 causes of action are included collateral under the agreement.	Credit Agreement page 22	Yes

Background

3. On February 27, 2017, (the “Petition Date”), the Debtor commenced a case under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”). The Debtor continues to operate its business as debtor in possession pursuant to sections 1101(1), 1107(a) and 1108 of the Bankruptcy Code.

4. The Debtor is a Montana LLC that has been registered as a foreign entity doing business in Texas. The LLC owns one main asset, a 2003 Cessna 560XL airplane, (FAA registration number - N510HF) (the “Plane”). The Debtor had an arrangement with a third party entity whereby the Plane was used in the third party’s business in exchange for payments by the third party. In return, the Third party paid debtor leasing fees and provided for maintenance and upkeep of the Aircraft. The third party’s business is analogous to a timeshare whereby individuals and companies pay a set amount and in exchange receive a number of hours for which they can use the Plane (or others with similar arrangements with the third party entity).

5. During the year before this Chapter proceeding, the Third Party had taken the aircraft out of service due to the aircraft having reached preset service intervals. The engines of the Aircraft were removed and transported to Pratt & Whitney in West Virginia (the manufacturer’s service facility) and the Auxiliary Power Unit (another, third, smaller engine that provides electricity) was also removed and transported to Gulfstream’s service facility in Georgia.

6. The Plane can, therefore, be identified in three distinct parts: 1) The body of the aircraft (or “airframe”); 2) Two Pratt and Whitney PW545A engines (Serial numbers – PCE-DB0672 and PCE-DB0675), and 3) the various electronic components and Auxiliary Power Unit¹ (“APU”).

7. There are numerous liens on the aircraft, engines, and APU. They are reflected on the Attached Exhibit “A” which is the FAA Lien record for the Aircraft and Engines.

8. The Bank of Houston (now Independence Bank) (the “Bank”) financed the initial purchase of the Plane and subsequently filed a UCC, FAA notice and International Convention Notice. Debtor believes that the Bank’s lien is in the approximate amount of \$2,316,576.00.

9. Additionally, as reflected, there are liens asserted junior to the Bank to Duncan Aviation Inc. Alberth Air Parts Ltd. and Gulfstream Aerospace Corporation

10. Pratt and Whitney, Inc., is in possession of the two engines, which have been overhauled, and have, to date, refused turnover requests asserting a lien on the engines under West Virginia Mechanics Lien law. They have not filed a lien notice with the FAA.

11. Only the Bank filed a lien notice with the International Registry for International Interests in Mobile Equipment (Aircraft Equipment) under the Capetown Convention.

12. Debtor is unaware of any other liens against the Plane.

13. Immediately after filing, a Receiver purporting to act on behalf of a judgment creditor took possession of the airframe and moved the airframe. Pursuant to Court order, and subsequent agreement between the Debtor and Receiver, the airframe has recently been returned to the possession of the Debtor.

14. As of this date, the Plane is not in a flyable condition.

15. Based upon preliminary information from the Appraiser hired by the Debtor, Debtor firmly believes that the Aircraft reassembled will bring significantly more in a sale if it is reassembled, certified airworthy and registered than it will bring in pieces.

Moreover, and *A Foritori*, the aircraft cannot possibly be operated for a profit unless these steps occur.

16. The Bank has recently filed a Motion for Relief and the Debtor and Bank have agreed upon adequate protection payments. There are no operating revenues flowing into the Debtor in order to make adequate protection payments.

17. Based on preliminary information received from the appraiser, Debtor believes that if the airframe is sold without its engines and APU the recovery will be significantly less than would occur with the Plane reassembled. Debtor believes that the value of the separated APU is similarly less the amount owed thereon to Gulfstream. Debtor believes further that the value of the newly overhauled engines is less than the amount Debtor believes is owed to Pratt and Whitney. (P & W has not yet filed a proof of claim.) The engines are, however, in short supply and replacement will be both costly and difficult.

18. To the date of this Motion, Debtor has been borrowing funds, in the form of deposits made by William Horner to Counsel's IOLTA Account, necessary to pay fees, costs, appraiser fees, rent deposits, rent, insurance premiums and miscellaneous expenses. All these funds have been lent to the Debtor by one of its LLC members, Mr. William Horner. It is intended by the parties that these loans will qualify for allowance as Administrative Expenses under 11 U.S.C. 503(a).

19. Mr. Horner has hired counsel, Mr. Chris Adams, who has indicated that Mr. Horner is not willing to continue lending money to support reorganization and reassembly of the Aircraft without assurances in the nature of a security interest. Negotiations have occurred between the Debtor and Mr. Horner.

20. Debtor has attempted to find alternative financing but is unable to find a lender willing to lend with the disassembled aircraft as collateral.

21. Mr. Horner has indicated his willingness to lend money to the Debtor in order to fund administration and reassembly of the aircraft on terms which are summarized as follows:

- a. Name of Lender: William Horner.
- b. Amount of Loan: As requested by Debtor, up to a total of Two Hundred Thousand Dollars (\$200,000).
- c. Applicable Interest Rate: 6% per annum.
- d. Payment Terms: Payment due at closing of sale of aircraft. Payments of accrued interest each month on the 17th day of each month.
- e. Security: Debtor shall execute a Security Agreement and Lender shall record Notice thereof with the FAA providing Lender with a security interest in All Assets of the Debtor.
- f. Priority: Lender shall be entitled to administrative priority under 11 U.S.C. 503(a) for all amounts advanced to the Debtor both prior to and subsequent to the grant of this Motion.
- g. Restrictions: Lender shall not be restricted, nor under any duty to refrain, from negotiating with holders of secured claims to acquire assignment of the rights, including secured interests in property of the estate, of any creditor. Upon successfully completing any such transaction with a secured creditor in this case, lender shall notify

the court thereof by filing a notice of assignment with the Court and Lender shall, thereupon, be substituted to rights of any such assignor with the same character, security, and priority as previously held by said assigning creditor.

III. Legal Argument

22. The Bankruptcy Code authorizes a debtor in possession to incur either super priority senior secured debt (“priming” liens) or liens of equal value to any pre-petition secured creditors if (a) the debtor is unable to obtain financing from another source and (b) the interests of the secured creditors whose liens are being primed by the post petition financing are adequately protected. 11 U.S.C. § 364(d)(1).

Debtor is Unable to Obtain Financing from Another Source

23. Section 364(d)(1) does not require that a debtor seek credit from every possible source, but a debtor must show that it made a reasonable effort to obtain post-petition financing from other potential lenders on less onerous terms and that such financing was unavailable. *Suntrust Bank v. Den-Mark Constr., Inc.*, 406 B.R. 683 (E.D.N.C. 2009).

24. Debtors in possession are generally permitted to exercise their basic business judgment consistent with their fiduciary duties when evaluating the necessity of proposed protections for a party extending credit under section 364 of the Bankruptcy Code. *In re Ames Dep’t Stores, Inc.*, 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990).

25. To show that the credit required is not obtainable on an unsecured basis, the Debtors need only demonstrate “by a good faith effort that credit was not available” without the protections afforded to potential lenders by sections 364(c) or (d) of the

Bankruptcy Code. *Bray v. Shenandoah Fed. Sav. & Loan Ass'n (In re Snowshoe Co.)*, 789 F.2d 1085, 1088 (4th Cir. 1986); *Ames*, 115 B.R. at 37-40 (debtor in possession must show that it has made a reasonable effort to seek other sources of financing under sections 364(a) and (b) of the Bankruptcy Code). Thus, “[t]he statute imposes no duty to seek credit from every possible lender before concluding that such credit is unavailable.” *Snowshoe*, 789 F.2d at 1088; *see also In re Sky Valley, Inc.*, 100 B.R. 107, 113 (Bankr. N.D. Ga. 1998) (finding that “it would be unrealistic and unnecessary to require [the debtor] to conduct such an exhaustive search for financing” where the debtor “suffers some financial stress and has little or no unencumbered property”), *aff’d sub nom., Anchor Sav. Bank*, 99 B.R. at 117.

26. As discussed above, Debtor’s only significant asset is purportedly subject to the Prepetition Liens. Because of the Debtor’s prepetition debt, obtaining the financing needed as unsecured debt is not a viable option. Notwithstanding the Debtor’s efforts, no entity offered the Debtor financing on an unsecured or junior secured basis.

Secured Creditors’ Interest in the Property is Adequately Protected

27. If a Debtor is unable to obtain credit under the provisions of section 364 (c) of the Bankruptcy Code, the debtor may obtain credit secured by a senior or equal lien on property of the estate that is already subject to a lien (a/k/a a “priming lien”). 11 U.S.C. § 364 (d). Such relief may be granted so long as there is adequate protection of the secured creditor’s interests in the property on which the senior lien is supposed to be granted. 11 U.S.C. § 364(d)(1)(B).

28. Although the Bankruptcy Code does not explicitly define “adequate protection,” examples of adequate protection are identified in section 361 of the Bankruptcy Code.

29. “Bankruptcy courts have broad flexibility under section 361 of the Bankruptcy Code in deciding what constitutes adequate protection. This section specifies the means by which adequate protection may be provided. It does not require the court to provide it. To do so would place the court in an administrative role. Instead, the trustee or debtor in possession will provide or propose a protection method. If the party that is affected by the proposed action objects, the court will determine whether the protection provided is adequate. The purpose of this section is to illustrate means by which it may be provided and to define the contours of the concept.” H.R. Rep. No. 95-595, at 338, 95th Cong., 1st Sess. (1977); *see also Resolution Trust Corp. v. Swedeland Dev. Group, Inc. (In re Swedeland Dev. Grp., Inc.)*, 16 F.3d 552, 564 (3d Cir. 1994) (“[A] determination of whether there is adequate protection is made on a case by case basis.”).

30. The principal purpose of adequate protection is to safeguard the interest of the secured creditor in the particular collateral against diminution in the value of such interest. *In re DeSardi*, 340 B.R. 790, 804 (Bankr. S.D. Tex. 2006) (“The purpose of adequate protection is to assure that the lender’s economic position is not worsened because of the bankruptcy case.”).

31. Here, appropriate and sufficient safeguards are in place to protect the Secured Creditors’ pre-bankruptcy positions from a diminution in the value of their interests in the Plane.

32. The mechanism of the Loan proposed between Mr. Horner and the Debtor is such that all pre-petition security interests, to the extent that they are allowed, are preserved. Mr. Horner is placed in line ahead of unsecured creditors and, to the extent that he acquires any claims, or collateral interests, in any of the fuselage, engines, APU or other parts of the aircraft by acquiring the rights of secured creditors, he is substituted to their position in the case and their priority with respect to their secured interests in property which can be used, sold or leased by the Estate.

33. No harm is done to creditors by virtue of the approval of Loans extended to the Debtor by ledger entry by Mr. Horner heretofore as those advances would certainly constitute costs and expenses allowable to Mr. Horner under 11 U.S.C. 503(b).

34. Emergency relief is necessary because of the need to fund adequate protection payments and continue the process of reorganization.

WHEREFORE, T&T Air, LLC, the Debtor, respectfully moves this Court to grant the Debtor permission to enter into a Promissory Note and Security Agreement according to the terms of this Motion and grant William T. "Bill" Horner a secured lien on all assets of the Debtor and Estate and for such other relief as the Court may deem just and proper.

DATED: June 29, 17

Respectfully Submitted,
WYATT & MIRABELLA, PC

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