

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Bky. Case No. 02-40303-NCD

Sun Country Airlines, Inc.

Chapter 7

Debtor.

**NOTICE OF MOTION AND
MOTION TO VACATE**

TO: Debtor and Attorney for Debtor; U.S. Trustee; and other parties in interest.

1. Timothy D. Moratzka, Chapter 7 Trustee for the above referenced Debtor ("Trustee"), brings this motion to vacate the Court's order dated October 8, 2004.

2. Hearing on this motion is scheduled for at 10:30 a.m. on Wednesday, November 3, 2004, before the Honorable Nancy C. Dreher in Courtroom No. 7 West, United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415 or as soon thereafter as counsel can be heard.

3. Any objection to the relief requested herein must be filed and delivered not later than Friday, October 29, 2004, which three (3) days before the time set for the hearing (excluding Saturdays, Sundays and holidays), or filed and served by mail not later than Monday, October 25, 2004, which is seven (7) days before the time set for the hearing, (excluding Saturdays, Sundays and holidays). **UNLESS A WRITTEN RESPONSE IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Fed.R.Bankr.P. 5005 and Local Rule 1070-1. This proceeding is a core proceeding. On January 8, 2002, Debtor filed a voluntary petition under Chapter 11 of Title 11 of the United States Code. The case was converted to one under Chapter 7 on June 7, 2002. The case is now pending in this Court.

5. This motion arises under Rule 2004 of the Federal Rules of Bankruptcy Procedure. This motion is filed under Fed.R.Bankr.P. 9014, 9024 and Local Rules 9013-1 and 9013-2. Movant requests relief with respect to this Court's order dated October 8, 2004, ordering that GE Engine Services Inc. ("GE"), may examine William LaMacchia, Jr., William LaMacchia, Sr., Gary Draeger, Tim Wise, Mark Osterberg, and David Wade under Rule 2004 of the Federal Rules of Bankruptcy Procedure (the "Order").

6. The proposed examinations only relate to developing GE's claims against third parties, and not to Debtor's affairs, the administration of its estate, or claims Debtor may have against third parties. Therefore, the examinations are improper and beyond the scope of Rule 2004.

WHEREFORE, Trustee respectfully requests this Court to enter an order

1. Vacating the Order,
2. Denying the Application, and
3. Such other further relief as is just and equitable.

Dated: October 12, 2004

MACKALL, CROUNSE & MOORE

By /e/Timothy D. Moratzka
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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

Sun Country Airlines, Inc.,

BKY Case No. 02-40303-NCD

Debtor.

Chapter 7

VERIFICATION

I, Timothy D. Moratzka, Trustee in the above referenced matter, declare under penalty of perjury that the Trustee's Motion to Vacate is true and correct to the best of my knowledge, information and belief.

/e/Timothy D. Moratzka

Timothy D. Moratzka

UNITED STATES BANKRUPTCY COURT
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Bky. Case No. 02-40303-NCD

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**MEMORANDUM IN SUPPORT OF
TRUSTEE'S MOTION TO VACATE**

Timothy D. Moratzka, Chapter 7 Trustee for the above referenced Debtor ("Trustee"), submits this memorandum of law in support of his motion to vacate.

FACTS

On October 8, 2004, GE Engine Services, Inc. ("GE"), served upon Trustee an application for a Rule 2004 Examination of William LaMacchia, Jr., William LaMacchia, Sr., Gary Draeger, Tim Wise, Mark Osterberg, and David Wade (the "Application"). That same day, the Court granted the application and ordered that GE may examine William LaMacchia, Jr., William LaMacchia, Sr., Gary Draeger, Tim Wise, Mark Osterberg, and David Wade (the "Order"). In essence, the Application sought, and the Order granted, GE permission to conduct a fishing expedition. Trustee believes that while such expeditions are permitted under certain circumstances, it is unwarranted and impermissible under the Federal Rules of Bankruptcy Procedure as applied to the facts of this case.

ANALYSIS

In the Application, GE correctly notes that a Rule 2004 examination may relate to the "acts, conduct or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate." Fed.R.Bank.P. 2004(b).

While these examinations can be in the nature of a fishing expedition, there are limits to the scope of a Rule 2004 examination. *In re Coffee Cupboard, Inc.*, 128 B.R. 509, 514 (Bankr.E.D.N.Y. 1991). An examination having either no relationship to debtor's affairs or no effect on the administration of debtor's estate is improper. *In re Continental Forge Co., Inc.*, 73 B.R. 1005, 1007 (Bankr. W.D.Pa. 1987) (citations omitted).

As stated in the Application, GE has already obtained permission to examine Debtor, William LaMacchia, Sr., the Mark Travel Corporation, the Seabury Group, Jill Fischer, and Gordon Graves. GE states that they desire to examine more people in order "to determine the actual circumstances which gave rise to its claim" and to investigate "the possibility that affiliates of the Debtor may be responsible for payment of some or all of the amount reflected in GE's proof of claim." The Application, ¶ 11. GE claims it is entitled to this information because of alleged false representations made by certain individuals sought to be examined. GE should commence an adversary proceeding so that discovery rights are mutual.

While the veracity of certain statements or representations made by certain individuals may impact GE's claims against third parties, they do not have the requisite impact on the administration of Debtor's estate. Debtor's estate is only impacted if (1) the false representations give rise to individual liability, and (2) that liability is determined in an adversary proceeding. In other words, unless and until individual liability is determined in an adversary proceeding, the proposed examination will have little or no effect on GE's claim or on the administration of Debtor's estate. The Order should therefore be vacated. *See In re Continental Forge Co., Inc.*, at 1007.

CONCLUSION

For the foregoing reasons, Trustee respectfully requests the Court to vacate its order dated October 8, 2004, granting GE's application for a Rule 2004 Examination, and to deny such application.

Dated: October 12, 2004

MACKALL, CROUNSE & MOORE

By /e/Timothy D. Moratzka
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U.S. BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Sun Country Airlines, Inc.,
Debtor(s)

UNSWORN DECLARATION
FOR PROOF OF SERVICE

Bky. No. 02-40303-NCD

Amy J. Ditty, employed by Mackall, Crouse & Moore, attorney(s) licensed to practice law in this court, with office address of 1400 AT&T Tower, 901 Marquette Avenue, Minneapolis, MN 55402-2859, declares that on the date set forth below, I served the annexed **Notice of Motion and Motion to Vacate; Memorandum in Support of Motion and proposed Order** upon the entity named below by faxing copies and mailing copies thereof by enclosing same in an envelope with first class mail postage prepaid and depositing same in the post office at Minneapolis, Minnesota addressed to him as follows:

Mr. James A. Rubenstein Moss & Barnett, P.A. 4800 Wells Fargo Center 90 South Seventh Street Minneapolis, MN 55402-4129	John I. Karesh John Grosz 805 Third Avenue New York, NY 10022-2203
United States Trustee 1015 U. S. Courthouse 300 South Fourth Street Minneapolis, MN 55415	Mr. John R. McDonald Esq. Robins, Kaplan, Miller & Ciresi, L.L.P. 2800 LaSalle Plaza 800 LaSalle Avenue Minneapolis, MN 55402

And I declare, under penalty of perjury, that the foregoing is true and correct.

Dated: October 12, 2004

Signed: /e/Amy J. Ditty

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ORDER

This matter came before this Court for hearing for vacation of an order granting an application for a Rule 2004 Examination. Appearances were noted in the record. Based upon all the files and records, statements of counsel, and the file herein, the Court makes this Order pursuant to the Federal Rules of Bankruptcy Procedure.

IT IS HEREBY ORDERED:

1. The order granting the application for a Rule 2004 examination dated October 8, 2004, is hereby vacated, and
2. The application for a Rule 2004 examination dated October 7, 2004, is hereby denied.

Dated: _____

United States Bankruptcy Judge