

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF FLORIDA  
GAINESVILLE DIVISION

In Re: Case No. 1:11-bk-10249-LMK  
VILLAS AT 39TH, LLC, Chapter 11  
Debtor.

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**ALARION BANK'S  
MOTION TO DISMISS OR CONVERT CHAPTER 11 CASE**

COMES NOW Creditor, ALARION BANK ("Alarion"), by and through its undersigned attorneys, and respectfully requests an Order dismissing this Case pursuant to 11 U.S.C. § 1112(b), or in the alternative, converting this case to Chapter 7, and in support thereof states as follows:

1. On June 1, 2011, the Debtor filed its voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code (Doc. No. 1) (the "Petition"), and has been authorized to continue doing business as a Debtor-In-Possession, pursuant to this Court's Order dated June 2, 2011 (Doc. No. 4).

2. This is a single-asset case, as described in the Petition and the Debtor's Case Management Summary (Doc. 12). The single asset consists of a parcel of real property located at 39 Northwest 39th Avenue, Gainesville, FL 32609 (the "Property").

3. The only other asset disclosed in the petition is the sum of \$43,746.27 in cash, which constitute a portion of the proceeds of a sale of a portion of the Property (the

“Proceeds”), retained in the closing agent’s trust account.<sup>1</sup> Alarion has filed an unsecured claim as to the Proceeds (Claim No. 1).

4. Alarion holds a secured claim against the Debtor, disclosed in the Petition at \$2,324,896.00 (the “Secured Claim”).

5. The only non-priority, non-insider unsecured claims, apart from the unsecured claim of Alarion, total approximately \$15,066.00, some of which amount is disputed. *See* Case Management Summary ¶ VI(c)(i) at page 5. The unsecured claims are relatively tiny, representing approximately one-half of one percent (0.005%) of the Secured Claim.

6. The two non-priority non-insider unsecured claims are held by McDavid & Company CPAs (“McDavid”), and Watson Construction Company (“Watson”).

7. On Thursday, June 30, 2011, McDavid assigned its claim to Alarion. Alarion filed the McDavid claim on July 6, 2011 (Claim No. 18). The McDavid obligation was for accounting services required to file this bankruptcy case; and the McDavid firm was not informed of the Debtor’s intent to file. I.e. the Debtor incurred the accounting fees *knowing they would not be repaid*.

8. The scheduled claim for Watson, marked “disputed,” is also troubling. According to Alarion’s records, the work performed by Watson was under contract with HKW Enterprises, Inc., and not the Debtor. Also, on May 1, 2008, Watson executed a Contractor’s Final Affidavit and Final Waiver of Lien (the “Contractor’s Affidavit”),

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<sup>1</sup> It is Alarion’s position that these funds are in fact property of Alarion and not the Debtor, as disclosed on Schedule B.

which states that Watson is paid in full. A copy of the Contractor's Affidavit is attached hereto as **Exhibit A**.

9. Therefore, this case *has no legitimate unsecured creditors* (apart from Alarion), and the Plan cannot be confirmed.

10. On June 29, 2011, the Debtor filed its Plan and Disclosure Statement (Doc. Nos. 21 and 22).

11. The Plan proposes to do the following: (a) value the Property at approximately \$2.7M; (b) convey the Property to Alarion as the indubitable equivalent of Alarion's Secured Claim; (c) pay the non-Alarion unsecured claims at 75% from new value contributed by the Debtor's principals; (d) pay the Alarion unsecured claim at 100% from the Proceeds; and (e) release the Guarantors from contracts that they individually signed with Alarion.

12. This case has been filed in bad faith, warranting its dismissal.

13. The Plan does not meet the requirements for confirmation: (a) it is not in the best interests of creditors, (b) the Plan is not fair or equitable; and (c) the Plan was not proposed in good faith.

### **BACKGROUND**

14. In May 2007 the Debtor was formed as a special purpose entity to develop, market and sell the Property as a "single family mobile home subdivision on 14.5 acres" plus seven acres of commercial frontage (the "Project").

15. The Debtor solicited and obtained financing for the Project from Alarion, in the form of a note and mortgage in the original total principal balance of

\$2,700,000.00, executed on August 29, 2007 (respectively, the “Original Note” and “Original Mortgage” and collectively with all subsequent loan documents, the “Loan”). A copy of the Original Note is attached herein as **Exhibit B**, and a copy of the Original Mortgage is attached herein as **Exhibit C**.

16. The Debtor’s principals, and the guarantors of the Loan, include four individuals: Thomas C. Spain, Howard K. Wallace, Jr., Edward Jennings, Jr., and Michael J. Cooper (the “Guarantors”).

17. Also on August 29, 2007, the Guarantors executed a Continuing Guaranty Agreement, which provided them among other rights that Alarion “may at its option proceed in the first instance against Guarantors to collect . . . without first proceeding against [the Debtor] . . . and without first resorting to any property held . . . as collateral security . . . and without any marshaling of assets whatsoever.” See Continuing Guaranty Agreement at p. 3, ¶ 12. A copy of the Continuing Guaranty Agreement is attached herein as **Exhibit D**.

18. Subsequently, the Debtor and the Guarantors executed a series of forbearance agreements and continuing guaranties. During this period, from 2008 until the present, Alarion worked with the Debtor in good faith to allow the Debtor to attempt various creative ways to monetize the Project and pay off the Loan.

19. The Debtor has completely reconfigured the Project twice in order to find some commercially viable use for the Property. The first composition of the Project was for single family mobile homes. In the Fall of 2008, the Debtor abandoned this original concept, and re-composed the Project as modular homes. When this second concept

failed to attract buyers, the Debtor has more recently proposed yet a third concept, hoping that “stick built” homes would be the lucky charm. In support of this concept the Debtor offers an optimistic appraisal from the same appraiser who optimistically appraised the previous two failed concepts.<sup>2</sup>

20. In April, 2011, the Debtor sold a sub-parcel to Dollar General, a business located directly on the border of the Property. Dollar General intends to expand its storage area into this new space.

21. A second bordering business, O’Reilly’s Auto Parts, observing the Dollar General sale, offered to purchase a similar sub-parcel adjoining *its* existing location. This sale is the subject of the Debtor’s Motion to Sell Property Free and Clear (Doc. No. 17).

22. There are no other neighboring potential buyers who are ready or willing to purchase any more of the Property.

23. The current agreements to forbear by Alarion include refraining from filing suit against the Debtor or the Guarantors until July 30, 2011 (the “Agreement”). The pending expiration of the Agreement is the stimulus for this bankruptcy case.

24. On May 9, 2011, the Debtor sent a proposal to Alarion (the “Proposal”) demanding that Alarion take title to the Property and release the Guarantors, offering only to provide some continuing consulting services to assist *Alarion* with selling the Property. The Proposal gave Alarion ten days to accept the Proposal or the Debtor

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<sup>2</sup> On July 11, 2007, the appraiser valued 100 residential lots at \$3,060,000 plus \$975,000 for the commercial acreage, for a total of \$4,035,000. On July 7, 2010, the same appraiser valued the remaining 96 lots at \$1,360,000 and the commercial portion at \$1,260,000, for a total of \$2,620,000.

would file a bankruptcy case. A copy of the Debtor's Proposal Letter is attached hereto as **Exhibit E**.

25. Essentially, the Guarantors demanded a shift of the responsibility for liquidating the Property from themselves to Alarion, and a release from their personal liability on the Loan. If Alarion refused, the Guarantors essentially stated that the Debtor would make the bank "eat dirt" in its bankruptcy case.

26. According to the Schedules and the Case Management Summary, and upon information and belief, the Debtor: (a) has no employees; (b) has no vendors or trade creditors; (c) has one or zero unsecured creditors; (d) owns no inventory or other tangible personal property; and (e) has no income and no realistic prospect of generating income. The Debtor is merely a special purpose shell corporation organized to hold the single asset.

#### **LAW AND ARGUMENT - DISMISSAL or CONVERSION**

27. Dismissal of a Chapter 11 bankruptcy case is required pursuant to 11 U.S.C. § 1112(b)(1) where the "movant establishes cause" and the court does not identify any "unusual circumstances" "that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate[.]" 11 U.S.C. § 1112(b)(1).

28. A court is empowered to *sua sponte* dismiss a case pursuant to 11 U.S.C. § 305(a) to prevent abuse of the bankruptcy system. *See e.g. In re Joyce, Don & Associates, Inc.* (2008 WL 343265) (Bankr. M.D. Fla. 2008) (Briskman, J.).

29. "Cause" includes, among others, "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A).

30. The term "rehabilitation" as used in § 1112(b)(4)(A) "has a different meaning than 'reorganization,'" and instead means to put back in good condition and reestablish on a sound basis. *In re Lizeric Realty Corp.*, 188 B.R. 499 (Bankr. S.D. N.Y. 1995), as amended, (Nov. 28, 1995); *In re Wright Air Lines, Inc.*, 51 B.R. 96 (Bankr. N.D. Ohio 1985).

31. The Debtor before this Court has no income but is incurring administrative expenses, and has either no, or a negative, cash flow. In similar cases, courts have found sufficient facts exist to establish "continuing loss to or diminution of the estate," justifying dismissal or conversion. *In re Loop Corp.*, 379 F.3d 511 (8th Cir. 2004), *certiorari denied by Loop Corp. v. US Trustee*, 2005 U.S. LEXIS 521 (U.S. Jan. 10, 2005); *In re Schriock Constr., Inc.*, 167 B.R. 569, 575 (Bankr. D. N.D. 1994) (continuing loss to or diminution of the estate can be established by showing that debtor incurred continuing losses or maintained negative cash flow after entry of the order for relief); *In re 3868-70 White Plains Road, Inc.*, 28 B.R. 515, 518 (Bankr. S.D. N.Y. 1983).

32. Where, as here, a Chapter 11 proceeding is merely a two-party dispute more properly resolved in state court, the case should be dismissed. *NW. Place, Ltd v. Cooper (In re NW. Place, Ltd.)*, 73 B.R. 978 (Bankr. N.D. Ga. 1987) (holding that state court litigation already pending between the parties was available and was an appropriate forum for resolution of a two party dispute, and finding that the debtor lacked good

faith by using the bankruptcy court for purposes other than those intended by Congress.).

33. Good faith is an implicit requirement for filing for bankruptcy protection. *Phoenix Piccadilly, Ltd. v. Life Ins. Co. of Va. (In re Phoenix Piccadilly, Ltd.)*, 849 F.2d 1393, 1394 (11th Cir. 1988); *Shell Oil Co. v. Waldron (In re Waldron)*, 785 F.2d 936, 941 (11th Cir. 1986). The bankruptcy laws are “intended to give a ‘fresh start’ to the ‘honest but unfortunate debtor.’” *Marrama v. Citizens Bank of Mass.*, 127 S.Ct. 1105, 1116 (2007). A petition filed in bad faith is subject to dismissal. *State Street Houses, Inc. v. N.Y. State Urban Dev. Corp. (In re State Street Houses, Inc.)*, 356 F.3d 1345, 1347 (11th Cir. 2004); *The Bal Harbour Club, Inc. v. AVA Dev., Inc. (In re Bal Harbour Club, Inc.)*, 316 F.3d 1192, 1195 (11th Cir. 2003); *In re Phoenix Piccadilly, Ltd.*, 849 F.2d at 1395.

34. The circumstantial factors evidencing bad faith are sometimes referred to as the “*Piccadilly* factors,” and have specifically been found to apply to single asset real estate cases like this one. *State Street* at 1347 (affirming that “the *Phoenix Piccadilly* factors are appropriate guidelines for consideration when evaluating whether a Chapter 11 petition in a single asset real estate case was filed in bad faith”). The factors include:

- a) The debtor has only one asset;
- b) The debtor has few unsecured creditors whose claims are small in relation to the claims of the secured creditors;
- c) The debtor has few employees;
- d) The property is the subject of a foreclosure action as a result of arrearages on the debt;

- e) The debtor's financial problems involve essentially a dispute between the debtor and the secured creditors which can be resolved in a state court action; and
- f) The timing of the debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the debtor's secured creditors to enforce their rights.

*In re Phoenix Picadilly, Ltd.*, 849 F.2d at 1394-95.

35. Here, all of the *Picadilly* factors are present. The Debtor is a self-described single-asset case, with only one asset – the Property. The Debtor has no significant unsecured creditors.<sup>3</sup> The *scheduled* unsecured claims represent a tiny fraction of the secured claim – about one-half of one percent (0.005%). However, in reality there are no legitimate unsecured creditors at all. The Debtor has no employees. The secured creditor's lien encumbers all of the Debtor's property. The Debtor's financial problems involve entirely a dispute between the Debtor and the secured creditor, which can be resolved in a state court action, and which are based on the Debtor's arrearage on the secured debt. The timing of the Debtor's filing evidences intent to delay or frustrate the legitimate efforts of the secured creditor to enforce its rights and collect on its debt pursuant to the loan agreement by interrupting the filing of a foreclosure suit upon the expiration of the current forbearance period.

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<sup>3</sup> All of the creditors listed on Schedule F are insiders except: (i) one CPA firm with a \$1,200.00 claim, now assigned to Alarion, and (ii) a construction company with a \$13,866.00 claim, which claim is "disputed" by the Debtor, and which claim has, upon information and belief, essentially been abandoned by that creditor.

36. Furthermore, it appears that this case was filed not for any proper purpose but solely in order to shelter the Debtor's principals from their guarantee liability.

37. Cause for dismissal exists pursuant to 11 U.S.C. § 1112(b). No unusual circumstances are present establishing that dismissal is not in the best interests of the creditors and the estate. In fact, the contrary is true: significant grounds for dismissal of this case are present, including the expense to the Debtor and the secured creditor of litigating this bankruptcy case.

38. This case was filed in bad faith. All of the *Picadilly* factors are present. Additional factors evidencing the Debtor's bad faith are: the two-party nature of the Case; the Debtor's failure to disclose Alarion's large unsecured claim, and the misleading way that the Proceeds are scheduled; the artificial "impairment" of the general unsecured class; and the mischaracterization of Alarion's secured claim as unimpaired, when the Plan clearly tramples on Alarion's rights under the loan agreement to pursue the Guarantors for any shortfall, or without recourse to the collateral, if Alarion so chooses.

39. Perhaps the single most telling factor indicating the bad faith of this case is that the Debtor has already paid its attorneys *almost three times as much* as it proposes paying to the general unsecured class in the Plan.<sup>4</sup> **This case was filed for no reason**

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<sup>4</sup> The Plan proposes a 75% payout to the general unsecured class totaling \$15,066.00, or \$11,300.00 (not accounting for the "disputed" nature of the larger of the two claims). The Schedules disclose that the Debtor has already paid \$30,500.00 toward attorney fees.

**other than to delay and frustrate Alarion's ability to enforce its rights under the loan documents.**

40. This Case is an abuse of the judicial system and the purposes of Chapter 11. The case is due to be dismissed pursuant to 11 U.S.C. §§ 1112(b), 105(a), and 305(a)(1).

WHEREFORE, Alarion respectfully requests the entry of an Order dismissing this Case, or converting it to Chapter 7 and appointing a Chapter 7 trustee; awarding attorney fees and costs; and granting such other and further relief as this Court deems just and proper under the circumstances.

Dated this 6th day of July, 2011.

**CHILDERSLAW** 

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*/s/ Seldon J. Childers, Esq.*

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been furnished this day by CM/ECF or by U.S. Mail to: Debtor, Villas at 39<sup>th</sup> LLC, 2321 N. W. 41<sup>st</sup> Street, Gainesville, FL 32606; Debtor's counsel, Ryan E. Davis, Winderweedle, Haines, Ward & Woodman, P.A. P. O. Box 1391, Orlando, FL 32802; and the U.S. Trustee, 110 E. Park Avenue, Suite 128, Tallahassee, FL 32301; and to the creditors included on the list filed

pursuant to Rule 1007(d) ; provided, however, that the copies of this Motion being mailed to the creditors on the Rule 1007(d) list do not include the Exhibits. Any creditor or party in interest who desires a copy of the Exhibits may request copies by contacting the above attorney for Movant.

/s/Seldon J. Childers, Esq.  
Florida Bar No. 61112