

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

In Re: Case No. 1:10-bk-10515-LMK
DAVIS HERITAGE GP HOLDINGS, LLC, Chapter 11
Debtor.

**INERVEST CAPITAL LTD'S
MOTION TO DISMISS CHAPTER 11 CASE, OR IN THE
ALTERNATIVE, FOR THE APPOINTMENT OF AN EXAMINER**

COMES NOW Creditor, INERVEST CAPITAL, LTD. ("Inervest"), 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, appointing an Examiner with expanded powers pursuant to 11 U.S.C. §§ 1104(c) and 105, and in support thereof states as follows:

1. On September 26, 2010, 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 September 28, 2010 (Doc. No. 7).

2. Inervest holds a claim against the Debtor and certain additional entities that are directly and indirectly affiliated with the Debtor and the Debtor's principals. Inervest's claim extends to assets owned by those affiliated entities.

BACKGROUND

3. On March 18, 2010, the Circuit Court of Harrison County, Second Judicial District, Mississippi, in case no. A2402-09-00022, entered its judgment in favor of Inervest against the Debtor (the Judgment). A copy of the Judgment is attached hereto and incorporated herein by reference as “**Exhibit A**”.

4. The Judgment is based on a money loan from Inervest to the Debtor for the development of certain real property, plus interest, attorneys’ fees and costs, and is in the total amount of \$8,036,519.38.

5. Post-judgment interest has been accruing on the Judgment at the rate of ten (10%) percent per annum since March 19, 2010 at a per diem rate of \$2,232.36 (the “Per Diem”). As of October 19, 2010, \$455,401.44 in post-judgment interest has accrued.

6. The amount due to Inervest from the Debtor as of the Petition date was \$8,462,900.14.

7. On June 10, 2010, Inervest took the deposition of the Debtor in aid of execution (the “Deposition”). The Debtor’s Managing Member, Stefan Miles Davis, testified for the Debtor.

8. At the Deposition, the Debtor testified to owning eight (8) subsidiary entities (the “Middle Tier LLCs”).¹ The Debtor further testified that each of the eight Middle Tier LLCs owned, in turn, a membership in another similarly named LLC entity (the “Lower Tier LLCs”). In support of this testimony, the Debtor prepared and

¹ One of the entities is not an LLC, but for convenience, we will refer to the various entities collectively as the “LLCs.”

produced a chart demonstrating the ownership interests. A true and correct copy of the chart is attached herein as "**Exhibit B**".

9. The Debtor further testified that each Middle Tier LLC owns no property except a membership interest in each related Lower Tier LLC. Each Lower Tier LLC owns real property having substantial equity.

10. The Debtor also produced its financials as of December 2009 listing the real properties and their values. The 2009 Balance Sheet (the "Balance Sheet") shows the assets and liabilities of the various entities commingled and lumped together into what otherwise appears to be a single entity (i.e. the Debtor). A true and correct copy of the Debtor's 2009 Balance Sheet is attached herein as "**Exhibit C**".

11. The Middle Tier LLCs have not filed any bankruptcy case, nor are they included in this Case. The Lower Tier LLCs have not filed any bankruptcy case, but are disclosed as assets of the Debtor on its Schedule B.²

12. The Debtor testified that, as recently as June 2010, the Lower Tier LLCs are involved in continuing active sales campaigns as to the real properties. According to the testimony, some of the LLCs are actively renting units and collecting rental income.³

² Ininvest argues this disclosure is improper. The Lower Tier LLCs do not belong to the Debtor, at least not directly. The Schedules are extremely misleading in this regard, especially because the Middle Tier LLCs are omitted altogether.

³ The undersigned counsel has requested assurances of Debtor's counsel that sales of the properties have been suspended pursuant to either the state court injunction or the bankruptcy case. Assurances have not been forthcoming, in fact, Debtor's counsel has stated plainly that the Debtor is actively selling and intends to continue selling assets of the Debtor which are subject to Ininvest's lien.

According to Debtor's counsel, at least one of the LLCs continues in the postpetition period to sell condominium units.

13. On July 15, 2010, the Sheriff of Alachua County, Florida, levied on the Debtor's ownership interests in the Middle Tier LLCs. Copies of the judgment lien certificate and the Notice of Sheriff's Levy are attached hereto and incorporated herein by reference as Composite "**Exhibit D**".

14. On July 27, 2010, the Circuit Court for Alachua County, Florida entered an *Order on Plaintiff's Verified Motion for Proceedings Supplemental to Judgment, For Impleader and Related Relief* (the "Injunction Order"). A copy of this Order is attached hereto as "**Exhibit E**" (the Verified Motion on which the Injunction Order was based is attached to the Order itself.) The Injunction Order impleaded certain of the LLCs and enjoined them from "directly or indirectly transferring or further encumbering the assets described in the Motion."

15. On September 26, 2010, the Debtor filed its Chapter 11 Petition. Attached to the Petition is the Rule 1007(d) List of Creditors Holding Twenty Largest Unsecured Claims. The substantial majority of the creditors listed therein are *not* in fact creditors of the Debtor, and do not appear on the Debtor's Schedule F.

16. On October 11, 2010, the Debtor filed its schedules in this case (Doc. No. 18) (the "Schedules").

17. The Middle Tier LLCs are absent from the Schedules.

18. The Schedules disclose ownership by the Debtor only of the Lower Tier LLCs, as their "General Partner." Upon information and belief based on the Debtor's

own sworn testimony, this disclosure is misleading and false. Furthermore, the Schedules state the aggregate value of the Debtor's ownership interests in the Lower Tier LLCs as \$718,572.55, even though the Debtor's December 2009 financial statements indicate that the real property is properly valued at more than \$10 million.

19. According to the Schedules, and upon information and belief, the Debtor: (a) has no employees; (b) has no vendors; (c) owns no inventory or other tangible personal property; and (d) has no income and no realistic prospect of generating income. The Debtor is merely a shell corporation organized to hold the membership interests in the Middle Tier LLCs.

LAW AND ARGUMENT - DISMISSAL or CONVERSION

20. 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).

21. 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.).

22. "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).

23. The Debtor before this Court has no income, is incurring administrative expenses, and (if the Schedules are accurate) 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).

24. 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).

25. 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) (State court litigation already pending between the parties was available and was an appropriate forum for resolution of a two party dispute. The court found that the debtor lacked good faith by using the bankruptcy court for purposes other than those intended by Congress.).

26. 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) (citation omitted). 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.

27. The circumstantial factors evidencing bad faith, sometimes referred to as the “*Piccadilly* factors,” include:

- a) The debtor has only one asset in which it does not hold legal title;
- 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 Piccadilly, Ltd., 849 F.2d at 1394-95. This list of factors is “non-exhaustive and not to be rigidly applied....” *In re State Street Houses, Inc.*, 356 F.3d at 1347.

28. Here, all or almost all of the *Picadilly* factors are present. The Debtor owns no significant assets except its membership interests in the Middle Tier LLCs, which it does not even list in its Schedules or disclose to the Court. The Debtor has no significant unsecured creditors.⁴ The Debtor has no employees. All of the Debtor's property is the subject of Inervest's judgment lien (arising from the Debtor's failure to repay money that it borrowed from Inervest). The Debtor's financial problems involve entirely a dispute between the Debtor and Inervest, which can be resolved in a state court action. The timing of the Debtor's filing evidences an intent to delay or frustrate the legitimate efforts of Inervest to enforce its rights and collect its judgment debt.

29. Furthermore, upon information and belief, it appears that this case was filed in order to shelter the Debtor's principals from guarantee liability as to creditor Wachovia Bank, which does not even appear to have a secured claim against the Debtor.

30. 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 continuing efforts of the Debtor and/or its Members and affiliates to sell the assets of the Lower Tier LLCs while the Debtor hides behind the automatic stay, and attempts to hide the Lower Tier LLCs and their assets as well.

31. There is no reasonable prospect for rehabilitation of the Debtor. The Schedules evidence nothing capable of rehabilitation. Even assuming that all of the debt

⁴ All of the creditors listed on Schedule F are insiders except: (i) one law firm with a \$1,300 claim, and (ii) two mortgagees whose claims are fully secured, based on the Debtor's deposition testimony, by properties owned by one or more of the non-debtor LLC's.

and assets are accurately listed, the Debtor owes \$23 million and owns assets worth \$2.6 million

32. This case was filed in bad faith. All or almost 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 its interests in the Middle Tier LLCs, the gross undervaluation of the memberships, the misleading and incorrect disclosure of an ownership interest in the Lower Tier LLCs,⁵ and the misleading list of twenty largest creditors filed with the Petition.

33. 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).

LAW AND ARGUMENT - APPOINTMENT OF EXAMINER

34. If the Court does not dismiss or convert this Case, Ininvest requests the appointment of an Examiner with expanded powers. 11 U.S.C. §1104(a)(3).

35. The court *shall* appoint an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the

⁵ The misleading disclosure is apparently contrived to convince the Court and the U.S. Trustee that the assets held by the Lower Tier LLCs are protected by the automatic stay, thereby hindering, delaying, and defrauding the proper collection efforts of Ininvest.

debtor, if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate. 11 U.S.C. §1104(c).⁶

36. In the event that this Court does not dismiss this case, then appointment of an Examiner with expanded powers is in the best interest of creditors, equity security holders, and other interests of the estate.

37. First, the Debtor is unlikely to identify and pursue valuable preference and fraudulent conveyance actions. The Debtor is equally unlikely to pursue claims against its insiders. An Examiner with expanded powers could tell if the Debtor, either itself or via its various affiliated LLCs, is paying excessive compensation to Members, owners and/or insiders; could determine whether the Debtor is misusing cash that its affiliates are currently collecting from their rental properties and/or sales of units, and could determine whether the Debtor and/or the LLCs are selling, transferring or encumbering their property in violation of court orders including the Injunction Order.

38. Additional grounds for appointment of an Examiner are that the Debtor's various sworn disclosures are in conflict. For example, the Debtor's June 2010 sworn testimony and exhibits produced at deposition materially conflict with the sworn disclosures on the Debtor's Schedules and Statement of Financial Affairs. The conflicts go to the heart of the case: what property does the Debtor own; which LLCs or entities and what property are subject to the automatic stay, what constitutes property of the estate, and what property has been properly disclosed or omitted.

⁶ Notably, the standard is *not* "best interests" of creditors and other parties but only "interests."

39. The Debtor's poor record-keeping and apparent commingling (as evidenced by the Balance Sheet) constitute gross mismanagement, and make it impossible for the creditors, the Court, or the U.S. Trustee to determine what property is subject to bankruptcy administration.⁷

40. Finally, an Examiner must be vested with the authority to take possession of assets that he or she believe to be at risk of diminution, transfer, or further encumbrance. The Debtor's sworn testimony, and the statements of Debtor's counsel, that the only significant assets of the Estate - the real properties owned by the Lower Tier LLCs - are involved in active sales campaigns, including post-petition, and the obfuscation demonstrated by the misleading Schedules, demonstrate a clear and present danger of diminution of the assets subject to Inervest's liens.

41. An Examiner should be appointed to review the Debtor's books and records, to determine exactly what property is owned by the Debtor and the various subsidiaries, to identify whether or not the Debtor is complying with its responsibilities under the Code and pursuant to the Injunction Order, and to identify and pursue causes of action against insiders.

42. Inervest has been required to retain the services of its undersigned counsel to represent it in this case, to file the instant Motion, to investigate the facts and take action to try to protect its claim. In the event that the Court finds that the Debtor filed this case in bad faith and/or that the Debtor misrepresented its assets or their

⁷ For example, the "Stratford Mill" property is disclosed in some places as a very small fractional ownership, but certain other financial statements show large (over \$1M) returns to the Debtor. An examiner is required to resolve the contradictions in the Debtor's sworn testimony.

values to the Court, Inervest requests the entry of an order granting it reasonable attorneys' fees and costs for pursuit of this Motion and any related litigation.

WHEREFORE, Inervest respectfully requests the entry of an Order dismissing this Case, or converting it to Chapter 7 and appointing a Chapter 7 trustee; or in the alternative, appointing an Examiner with expanded powers; awarding attorneys' fees and costs; and granting such other and further relief as this Court deems just and proper under the circumstances.

Dated this 28th day of October, 2010.

CHILDERSLAW 

Sixth Street Executive Center
1330 NW Sixth Street, Suite C
Gainesville, Florida 32601
tel 866.996.6104
fax 407.209.3870
net jchilders@smartbizlaw.com

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

SPECIE LAW FIRM, LLC

P. O. Box 358318
Gainesville, FL 32635-8318
352-317-7699
877-887-9642
karen@specielaw.com

/s/ Karen K. Specie, Esq.
Florida Bar No. 260746

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a true and correct copy of the foregoing has been filed with the Court and furnished by CM/ECF notice to the Debtor's attorney, the office of the United States Trustee, and all counsel of record. In addition, a copy was sent to the Debtor via regular U.S. Mail at the address on file with the Clerk: DAVIS HERITAGE GP HOLDINGS, LLC, 20725 S.W. 46th Avenue, Newberry, FL 32669, 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 attorneys for Movant.

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