IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	
WBW, LLC	)	**Case No. 03-02387-TLM**
	)	
Debtor.	)	**MEMORANDUM OF DECISION**
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INTRODUCTION

On January 12, 2006, the Court heard (1) the request of WBW, LLC ("Debtor") entitled "Motion for Approval of Sale of Real Property and Motion for Approval of Settlement Agreement," Doc. No. 169[1] (the "Debtor's Motion"); (2) the motion of the Office of the United States Trustee ("UST") to convert or dismiss Debtor's case under § 1112(b)[2], Doc. No. 186 (the "§ 1112(b) Motion"); and (3) Debtor's request for approval of its disclosure statement under § 1125, Doc. No. 188. Appearances at hearing, and objections to the subject motions, are reflected in the hearing minutes and on the Court's docket. Each matter was taken

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[1] The Motion was amended, *see* Doc. No. 177, but the amendment appears merely to have corrected Debtor's ECF filing and docketing deficiencies.

[2] Citations are to Title 11, U.S. Code, as extant before enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) ("BAPCPA"), because the instant case was filed prior to BAPCPA's effective dates of April 20, 2005 and October 17, 2005.

under advisement.

The Court determines Debtor's Motion will be denied. The UST's § 1112(b) Motion will be granted, and the case will be converted to chapter 7. Debtor's request to approve the disclosure statement is rendered moot.

The following are the Court's findings and conclusions on the contested matters. Fed. R. Bankr. P. 7052, 9014.

BACKGROUND AND FACTS

WBW-I

The Court previously analyzed the underlying facts, and issued a written Memorandum of Decision on September 8, 2005. *See* Doc. No. 159 (hereafter "*WBW-I*"). In *WBW-I*, the Court refused to approve a compromise under which Sunrise Development, LLC ("Sunrise") would pay Debtor's estate $50,000.00 and deem other obligations satisfied in return for clear title to certain Gallatin County, Montana, real property.

The complicated facts giving rise to the situation and the proposed compromise, and the reasons why the compromise was not approved, are too lengthy to repeat here, and the parties are sufficiently familiar with the same. Thus the Court adopts *WBW-I* and incorporates it fully herein by reference.

Debtor's Motion

In the present Motion, which Sunrise obviously supports, *see* Doc. No. 184,

Debtor seeks once again to settle and compromise issues surrounding Debtor's acquisition and attempted conveyance of the Montana property.

Under the agreement[3] and Motion, Sunrise will pay, as before, $50,000.00 to Debtor in connection with this settlement and Court approval of the conveyance of the Montana property to Sunrise. Sunrise will also withdraw its claims against the estate. Additionally, the Motion seeks approval of Debtor's sale of certain agricultural real property of the estate located in Bingham County, Idaho to Sunrise for $625,000.00.

In return, Sunrise wants an order of this Court giving Sunrise "good, clear, marketable, and insurable title" to the Montana property. Sunrise makes clear also that it is not interested in purchasing the Bingham County property except as part of an approval of the compromise.

The record presented

There was no testimony offered at the January 11 hearing. The parties did, however, agree that the Court could consider the evidence presented at the hearing in July, 2005, which led to the decision in *WBW-I*. It has done so. Additionally, the parties stipulated to admission of a limited number of additional exhibits, as reflected in the hearing minutes. They have been reviewed. Finally, the Court has

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[3] The Settlement Agreement is not attached to the Motion, where one would expect it naturally to be. However, the Settlement Agreement and an "Agreement to Purchase and Sale" [*sic*] are attached to Debtor's "withdrawal of disclosure statement," Doc. No. 162, and also included among 80+ pages of attachments to a notice of hearing, Doc. No. 198.

also taken judicial notice of its files and records, Fed. R. Evid. 201, and it evaluates and construes filings made by Debtor under Fed. R. Evid. 801(d). *See In re Field*, 05.1 I.B.C.R. 11 n.2 (Bankr. D. Idaho 2005) (citing *In re Webb*, 03.1 I.B.C.R. 25, 26 (Bankr. D. Idaho 2003)).

Property values

The only evidence presented as to the value of the Montana property (other than as might arguably be gleaned from the facts addressed in *WBW-I*) is a copy of a December 1, 2005 "short form" appraisal indicating a $615,000.00 value (the "Bishop Appraisal"). *See* Ex. 4A. There was no testimony proffered regarding this document or the opinions of the appraiser.[4]

The Bishop Appraisal notes that the "acquisition cost" of the Montana property is material to the opinion of current value. *Id.* at 2 (including and discussing the "sale" of the subject property in January, 2005 as a comparable). The appraiser asserts that the "disclosure by owner" (evidently meaning Sunrise) was that acquisition cost was $523,258.64. *Id.*[5] The Bishop Appraisal then

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[4] A tax bill, Ex. 2A, was also admitted. Absent testimony, the Court declines to give any value asserted therein much weight. A similar problem exists in regard to tax "inquiries" on the Idaho property, Ex. 3A, which are also given little weight on the issue of property value.

[5] As discussed in *WBW-I*, Debtor acquired this property from prior owners Ken LeClair and Delaney & Co. *via* an exercise of Debtor's exclusive option. Sunrise advanced $523,158.64 (two checks of $261,579.32 each) to Debtor enabling Debtor to do so. *Id.* at 14 n.18, and at 17. Since Sunrise agreed to pay Debtor $10,000.00 (later increased to $50,000.00) for the subsequent conveyance of the property, in addition to deeming the acquisition loan satisfied, the "disclosure" to the appraiser of the "purchase price" appears to be understated as well as being off by $100.00.

adjusts this $523,258.64 figure by $83,721.00 to adjust for the passage of time from January to December, 2005, in establishing a "comparable" for use in the overall appraisal. *Id.*

The value of the 234.68 acre aggregation of Bingham County farm land is alleged to be $700,000.00 pursuant to an appraisal dated December 8, 2005 (the "Sutton Appraisal"). *See* Ex. 5A. As with the Bishop Appraisal, there was no testimony proffered by Sutton or anyone else in regard to this document. Debtor provided no proof that the Bingham County property had been marketed or, if so, in what way or for how long.[6]

DISCUSSION AND DISPOSITION

Debtor's Motion

As discussed and determined in *WBW-I*, Sunrise financed, without Court approval, Debtor's exercise of an exclusive option to purchase the Montana property. As a result, a transaction closed under which title to the Montana property was deeded to Debtor by Delaney & Co. and LeClair. Sunrise arguably had, at that point, an unsecured though undocumented claim for the $523,158.64 lent to Debtor.

Sunrise contemplated a transaction under which Debtor would thereafter

[6] The Sutton Appraisal noted the existence of a "pending sale" from Debtor to Sunrise, stating: "Parties to the transaction have been in negotiation over the past 60 days and arrived at a purchase price of $625,000.00. *The property was not formally exposed to the open market.*" Ex. 5A at 26 (emphasis added).

convey the Montana property to Sunrise for (a) satisfaction of the $523,158.64 "loan" and (b) $10,000.00.[7] This was intended to a be a virtually immediate (or "flip") transaction, occurring just as soon as Debtor closed the acquisition of the property.

Things did not go as Sunrise had planned. Even though the hoped for "sale" by Debtor to Sunrise ultimately closed, with a deed tendered and recorded, the title acquired by Sunrise was and is in significant doubt because of Debtor's bankruptcy, the execution of the deed and other documents by an unauthorized putative agent of Debtor, and the lack of title insurance.

The Motion now proposes to sell Debtor's "claim to" the Montana property in connection with the compromise, and also to sell the Idaho property.[8]

Viewed as a "sale," Debtor will convey its present interest in the Montana property[9] to Sunrise for release of the $523,158.64 claim[10] and receipt of

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[7] The initial settlement proposal bumped this number up to $50,000.00, at least in part in recognition that LeClair and Delaney & Co. had offered as much to Debtor at the time of closing if Debtor would abandon exercise of the option.

[8] Sunrise, in attempting to rebut arguments made by Delaney & Co. and LeClair, contends that the Debtor's Motion presents only questions of approval of sale under § 363, and not a compromise. *See* Doc. No. 184 at 8-10, and at 13 ("The Motion is not a Motion for Compromise of Claim."). This is belied, however, by the caption and language of the Debtor's Motion itself, *see* Doc. No. 169, and by the "Settlement Agreement" which can be found among the attachments to Debtor's pleadings, *see* Doc. Nos. 162, 198. Nevertheless, the Court approaches the resolution of the Motion by viewing it in both sale and compromise contexts.

[9] Debtor's present "claim to" the property is not easily summarized. It did become the owner of the property upon recording the deed from Delaney & Co. and LeClair. (The sellers contest, however, that this is so.) The Sunrise financing was not "secured" and there were no
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$50,000.00. Sunrise will also release a $2,695,000.00 unsecured claim against Debtor for "lost profits." The validity of that claim and value to be realized by its release have not yet been tested.[11]

Viewed as a "sale," Debtor's Motion needed to specify the value of the property to be sold and explain the basis for its valuation. *See* Local Bankruptcy Rule 2002.1(b)(1)(E); *see also* § 363(b), (f); Fed. R. Bankr. P. 2002(a)(2), 2002(c)(1), 6004. Since challenged, Debtor needed to substantiate its assertions of value.

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[9](...continued)
documents establishing any lien on the property in favor of Sunrise. At that point, Debtor could be viewed as the fee owner of the real estate. Debtor then "sold" the property to Sunrise under highly questionable documents and circumstances. Not only was there no Court approval for the sale by this chapter 11 debtor in possession, the transaction documents were signed by Virgil Jahnke on Debtor's behalf. That he was an authorized agent has never been established. As addressed in *WBW-I*, authorization is not just unlikely on the facts, Jahnke's authority was later expressly disclaimed by Debtor. Sunrise had been aware of problems concerning lack of proof of Jahnke's ability to sign for or bind Debtor, which was one reason the transaction stalled. Sunrise elected to close without resolution of the issue and without title insurance. A later "ratification" by Debtor of the Jahnke-executed deed conveying the property to Sunrise was recorded. (A copy of the "WBW, LLC, Unanimous Consent Resolution" is attached to Doc. No. 184 as Ex. 10, and other are attached to Doc. Nos. 162 and 198. It was signed by Mel Heide for Debtor in late July, 2005, after the first motion to approve compromise was taken under advisement and before *WBW-I* was decided and issued.) There are a host of problems as to Debtor's conduct in executing this document and in regard to what Debtor therein alleges and represents. Still, Sunrise argued in its briefing as if this ratification was effective. *See* Doc. No. 184 at 11-12. At the January hearing, however, it argued that, by virtue of an internal reference to Court approval of sale, *id.* at 3 ¶ 4, the ratification was somewhat prospective in nature and its effectiveness conditioned on actually obtaining Court approval.

[10] A proof of claim filed by Sunrise characterizes this as a "secured" claim under § 549(c). However, that provision addresses a defense available in an action to avoid an unauthorized post-petition transfer. There has been no adversary proceeding adjudicated on the question of § 549 liability, and no validation of a § 549(c) "lien" for Sunrise.

[11] The IRS objected to Sunrise's proof of claim. *See* Doc. No. 214.

The value of the Montana property is not addressed through expert opinion except by the written Bishop Appraisal. This appraisal was obtained after the Debtor's Motion was filed and, thus, is obviously not referenced in the Motion. Debtor's Motion states only that "Debtor believes the Montana property may be worth as much as is being paid herein, *including the amount of Sunrise's claim which is being withdrawn, or perhaps more*." Doc. No. 169 at 3 (emphasis added). How much more has never been explained, much less proven through evidence.[12]

The Motion does indicate that the resolution of threatened litigation and withdrawal of the Sunrise claim(s) motivates Debtor to propose and support the sale. *Id.* Still, Debtor has not clearly identified its opinion of the value of the Montana property if the same were to be sold to another party. In fact, it appears Debtor has entertained offers and interest from only one suitor, Sunrise.[13]

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[12] The "claim which is being withdrawn" consists of both the (allegedly) secured $253,158.64 and the unsecured claim of $2.695 million in "lost profits." Sunrise is also agreeing to release Debtor from "any and all claims that it may have arising out of or relating to" the Montana transaction. Doc. No. 198 (at attached Settlement Agreement, at 5). Debtor's Motion can thus be plainly read to indicate a belief that the property is worth at least something exceeding $2.9 million. This likely is not what Debtor intended to say but, like with BAPCPA, interpretive problems can result from careless and imprecise drafting.

[13] The Court obviously appreciates that the litigation is likely to be expensive and the outcome uncertain, that Debtor's precise interest in the property is unclear, and that Debtor's Motion speaks only of selling "its claim to" the Montana Property. *Id.* at 2. Nonetheless, the overall value of the property is material to the issues present in sale and compromise. For example, if the attempted conveyance to Sunrise is avoided under § 549, Debtor would hold the property (though potentially subject to a § 549(c) lien) and have the right to sell it for as much as possible. Perhaps there is equity over the as-yet adjudicated "lien." *Debtor* has presented no

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Viewed as a "compromise," Debtor's current proposal is strikingly similar to that already denied by the Court in *WBW-I*. Sunrise is to pay Debtor $50,000.00. That feature is identical. Sunrise will release its $523,158.64 claim against Debtor arising from its financing of Debtor's exercise of the option. That feature is identical. Sunrise will waive and release other claims against Debtor arising out of this series of transactions and events, including threatened litigation. That feature remains the same as before; the filing of the $2,695,000.00 claim only puts a number to what previously were threatened claims in unestimated amounts. The essential calculus has not changed from what the Court considered – and rejected – in *WBW-I*.

Sunrise and Debtor point out that there is a difference – the Bingham County property is also to be sold as part and parcel of this Motion which embraces both "sale" and "compromise" concepts. However, sale of the Idaho property must stand on its own merits under § 363, the Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules.

In that regard, there was no showing that this sale of property of the estate was proper. Among other things, there was no proof of any marketing of the property. *Accord* Sutton Appraisal, Ex. 5A at 26. There has been no discussion of

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[13](...continued)
affirmative evidence of the Montana property's value; the Bishop Appraisal was commissioned by Sunrise. *See* Ex. 4A at 1 (identifying Bishop's "client").

third party interest or lack of interest in acquiring the property. The proposed sale was private, not public, and the reasons for a private sale as being in the best interests of the estate are found only in Debtor's desire to settle the Montana issues on terms acceptable to Sunrise.

It is suggested that the sale of the Idaho property is not just a sale and should not be viewed solely as such, because it is also part of the "compromise" of disputes. It does indeed appear that Sunrise's willingness to buy this property is an accommodation to Debtor's desire to infuse cash into the estate in order to provide a potential resolution of disputes with the IRS, *see infra* note 14, and to address the UST's § 1112(b) concerns. But Sunrise also has made it abundantly clear that the purchase of the Idaho farm ground is inextricably linked to the settlement, and that it is not at all interested in buying the Idaho property *unless* it also obtains all the relief sought in regard to the Montana property. *See*, *e.g.*, Doc. No. 207 at 2-3, 9-10.

It is not as if Sunrise were offering to buy the Idaho property for *more* than appraised value, *i.e.*, paying a premium to add support to the contention that the proposed compromise has sound economic merit and benefit from the estate's point of view and should therefore be approved. To the contrary, the proposed sales price for the Bingham County property is at least $75,000.00 *less* than appraised value. This could be viewed as indicating that the Montana compromise

is not yet sweet enough for Sunrise and that, in agreeing to take the Idaho property off Debtor's hands, it should get additional economic concession.

If the sale and the compromise are linked, and if paying less than appraised value is meant to be part of the overall calculation of consideration running both directions, the much touted benefit of the $50,000.00 "payment" for the Montana property is ephemeral – it is consumed by the $75,000.00 "discount" on the Idaho property.

What this illustrates is that the sale of the Idaho property has little real relationship to the compromise at all.[14] Here, nothing indicates that Debtor is receiving a better deal for the liquidation of the Idaho property because of its ties to the compromise than Debtor could get in a straight-forward, Code and Rule-compliant motion to sell that property to some other party.

Debtor repeatedly advances the idea that this sale provides "significant cash infusion" into the estate. It said much the same thing in *WBW-I*, touting the

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[14] However, the sale does have a relationship to another compromise, though that compromise has as yet to be documented through proper pleading and has not been approved by the Court. The IRS has been aggressive in policing Debtor's conduct, and was among the first to point out the several shortcomings in Debtors' administration of the case and handling of estate assets. Yet the IRS has, at least according to arguments made at the January 11 hearing, and according to proposed amendments to Debtor's disclosure statement, *see* Doc. No. 216 (misdocketed by Debtor as an "amended chapter 11 plan"), reached a tentative deal with Debtor to settle its claims against the estate for cash, the source of which would be Sunrise's purchase of the Bingham County property. The IRS thus "supports" the sale of that property, not because it is convinced at all of the propriety of the sale or Debtors' compliance with § 363 and the Rules, or of Debtor's conduct in creating the problem or in urging the sale/compromise, but only because of the lure of a potential payoff.

benefit from receipt of the $50,000.00. Setting aside for the moment just how important or unimportant cash infusion is in this aged, nonperforming and seriously troubled chapter 11 case,[15] Debtor has not shown that a sub-appraisal "quick cash" sales price for the Idaho property is either an appropriate recovery on the asset or needed immediately.

In sum, the compromise is materially indistinguishable from that previously considered and rejected. Debtor has not cogently and persuasively explained why the result should be any different. The issues discussed at great length in *WBW-I* remain.

Additionally, the "sales" of the Montana and the Idaho property have not been shown to be proper under § 363, applicable rule and precedent. Debtor has not shown that either asset, and in particular the Idaho property, was exposed to the marketplace, nor has it proven that the amounts offered by Sunrise are equal to fair market value or are otherwise an appropriate return. Debtor has not met its fiduciary duty to the estate and its creditors in attempting to liquidate these assets. These derelictions in Debtor's conduct and management of the estate are in addition to those already noted in *WBW-I*.

The burden falls on Debtor to show the proposed compromise and sales are

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[15] This is a case that has been pending almost three years without generating cash or paying debts, including administrative expenses. Nothing in the record indicates any effort by Debtor to marshal assets for sale, market them, or get cash into the estate for purposes of financing reorganization or a plan to repay creditors.

proper and should be approved. The burden was not met. Debtor's Motion will be denied.

The § 1112(b) Motion

Dismissal or conversion of a chapter 11 case may be ordered upon a showing of "cause." *See* § 1112(b). The listing of examples of cause in § 1112(b) are nonexclusive. *Wiersma v. O.H. Kruse Grain & Milling (In re Wiersma)*, 324 B.R. 92, 114 (9th Cir. BAP 2005); *see also* § 102(3) (providing that words "includes" and "including" are not limiting). As Congress stated when drafting the section:

> Subsection (b) gives wide discretion to the court to make an appropriate disposition of the case when a party in interest requests. The court is permitted to convert a reorganization case to a liquidation case or to dismiss the case, whichever is in the best interests of the creditors and the estate, only for cause . . .. The list [of ten grounds that constitute cause set forth in § 1112(b)] is not exhaustive. The court will be able to consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 405-06 (1977).

There has been here a "continuing loss to or diminution of the estate." Section 1112(b)(1). Debtor's conduct has clearly and significantly increased the liabilities of the estate. Indeed, Sunrise now asserts a $2.7 million post-petition claim against Debtor for the manner in which it did (or failed to do) business. Even if this claim is overstated in amount, there is a promise of substantial

litigation cost to the estate.[16] This is in addition to the substantial administrative expense already incurred by the estate.[17]

Debtor did not deal properly with its option interest. As discussed in *WBW-I*, Debtor failed to schedule the option even though it was granted only shortly before filing; it failed to record notice of the bankruptcy filing in Montana real property records; it failed to control and supervise Jahnke; and it totally ignored the restrictions on incurring debt, handling assets and selling property that were imposed on it under the Bankruptcy Code. Had Debtor properly scheduled and administered the option, it could have enhanced the estate. Instead, Debtor's acts caused injury to and diminution of the estate.

The UST also posits, correctly, that the record establishes an "absence of a reasonable likelihood of rehabilitation." Section 1112(b)(1). The problems identified in *WBW-I* with the supervision and control of Debtor remain unaddressed. And, absent some approach for rectifying these problems and instituting competent and Code-compliant management, confirmation of any

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[16] In fact, Debtor pointed to precisely that litigation burden in attempting to justify the settlement.

[17] Debtor's legal fees are large. A good deal of the legal expense has been directly related to the questionable conduct and the resultant litigation, though much was incurred in the litigation with the IRS. The last monthly financial report filed by Debtor (which was for September, 2005) estimates an amount in excess of $50,000.00 for accrued and unpaid chapter 11 legal and accounting administrative expense. *See* Doc. No. 178.

chapter 11 plan, liquidating or reorganizing, is not likely.[18]

In addition, the UST has established, and the record in this case makes clear, that there are other impediments to successful reorganization and other cause for dismissal or conversion. Some support the "absence of a reasonable likelihood of reorganization" or evidence an "inability to effectuate a plan" under the provisions of § 1112(b)(1) and (2) already mentioned. Others reflect "unreasonable delay by the debtor that is prejudicial to creditors." Section 1112(b)(3). Others fall within the general rubric of cause. The Court will touch on but a few.

Chapter 11 debtors in possession are obligated to file monthly financial reports. *See* Fed. R. Bankr. P. 2015(a) (delineating the duties of chapter 11 trustees and debtors in possession, including filing the periodic reports of business operations including receipts and disbursements required under § 704(8)); *see also* Doc. No. 6 (operating guidelines issued by UST clarifying the monthly reporting requirements, as well as addressing other requirements and limitations on a debtor in possession's post-petition actions).

Despite the requirement to timely file monthly reports, Debtor's last filed report was for the month of September, 2005. *See* Doc. No. 178. That report was

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[18] *See*, *e.g.*, § 1129(a)(2) (plan proponent must comply with all provisions of title 11); § 1129(a)(3) (plan must be proposed in good faith); § 1129(a)(5) (disclosure of those serving as officers and others in control of debtor, and of insiders employed or retained); § 1129(a)(11) (feasibility requirement).

filed on November 15, 2005, and was thus untimely. *See* Doc. No. 6 (noting reports are on calendar month basis and due by the 20th of the following month).[19] The October, November and December, 2005, and January, 2006, reports are all past due and unfiled.

As the UST established at hearing, there are serious problems with the adequacy and accuracy of the financial reports and the accounting documents appended to the reports. Debtor's attempts to minimize the magnitude of these problems, to rehabilitate the accounting presentation, and to justify the quality of reporting were wholly ineffective.

The case has pended since June, 2003 – over 2½ years – without an approved disclosure statement much less any confirmation hearing. Passage of time has increased the debt on unserviced secured claims and significant unpaid post-petition real property taxes have accumulated.[20] And, as already noted, Debtor incurred sizable administrative expenses. Debtor's reports all indicate it has consistently lacked the cash flow to deal with any of these post-petition obligations. The reports as a whole support the conclusions that delay has caused prejudice to creditors and that there is an ongoing diminution of the estate.

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[19] Financial reports appear of record as Doc. Nos. 17, 30, 32-35, 49-50, 59-65, 80-81, 87-88, 95-96, 105, 109, 114-115, 130, 146-147, 167-168, and 178. As best the Court can tell, five of the reports were timely filed; all the others were late, some by many months.

[20] The narrative portion of the September, 2005 financial report indicates $20,592.00 in estimated post-petition property taxes and $6,159.00 in accrued interest on pre-petition debt. Doc. No. 178 at 3.

In addition to the problems with how assets were scheduled (or not) and handled (or not), and with how Debtor complied with its financial reporting obligations (or not), the UST points out issues with leases of Debtor's real property.

Debtor's original schedule B showed no receivables from leases or otherwise, and its original schedule G showed only one unexpired lease, to SS Farms of real property in Power County.[21] The financial reports show some farm income from SS Farms though, as previously noted, most of the reports show net operating losses and an inability to pay even post-petition real property taxes or the costs of administration.[22] Neither the schedules nor the monthly reports address leases of Debtor's other property.

Debtor's April, 2005 disclosure statement mentioned leases of its property to Travis Christensen (Bingham County farm ground), to Scott Jahnke (Power County farm ground), and to Virgil Jahnke (lease of a house for "in kind" services). Doc. No. 118 at 3. This disclosure statement indicated that the plan was to be funded by the proceeds of property sales and "the income from leases."

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[21] This schedule says it was a one-year lease at $7,000.00 per month. *See* Doc. No. 1 at schedule G. No subsequent filings or reports explain renewal of the lease, renegotiation of the lease, or anything else about the terms and conditions of the alleged contractual relationship.

[22] In December, 2003, Debtor advanced a motion to obtain credit from its manager, Heide. *See* Doc. No. 20. In a supplement to this request, Debtor argued that it could not rely on SS Farms to continue paying, and that the payments received were insufficient to service secured debt. *See* Doc. No. 23 at 1. (The motion to obtain credit was withdrawn at hearing on January 26, 2004.)

Id. at 3, 6-7. The disclosure statement indicated, too, that Debtor was entitled to 25% of Christensen's 2004 potato crop. *Id.* at 3.

However, the schedules were not amended to reflect these were prepetition leases, and nothing in the financial report reflects them as post-petition leases entered into in the ordinary course of Debtor's business.[23] The April through August, 2005 financial reports show no leases or lease income. Doc. Nos. 130, 146-47, 167-68. The September, 2005 report, however, shows receipt of $19,320.60 of "crop sharing rents" from "Christiansen" on leased Bingham County property. Doc. No. 178 at 2.[24] This is the first disclosure in the case of any income from a lease on this property. As noted, this was also the last financial report Debtor filed.

The April, 2005 disclosure statement was "withdrawn" in October, 2005. *See* Doc. No. 162. The next disclosure statement was filed on December 9, 2005. *See* Doc. No. 188. It notes receipt of "approximately $18,000.00" of income from Christensen, but fails to explain any details of the lease arrangement, including

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[23] The Court presumes Debtor would advance an argument of ordinary course under § 363(c)(1). Without it, Debtor would be required to obtain express Court approval on motion, notice and hearing to enter into the leases. *See* § 363(b)(1); Fed. R. Bankr. P. 2002(a)(2), 6004. Clearly Debtor did not pursue that authorization.

[24] Precisely what portion(s) of Christensen's obligations this money represented was not clear.

what else was or would be owed the estate.[25] The Scott Jahnke lease is mentioned, but again there are no details concerning Debtor's arrangement. The disclosure statement does note that, if Scott Jahnke fails to pay rent due by May, 2006, Debtor will file suit to collect.

The disclosure statement also notes that Debtor believes Virgil Jahnke has "earned his keep" with "in kind" services and owes nothing to the estate for being provided a place to live for the several years this case has been pending. At the same time, though, Debtor notes that Jahnke's conduct and problems not only led to the initial filing of the bankruptcy but also that he created the problems in Montana, acted without authority, and even self-dealt himself an option from Sunrise.

The Debtor has never explained lack of income production from the properties during the pendency of the case. The leases were never properly scheduled or reported, and it is impossible to determine the time periods covered thereby. That $19,000.00 was received from Christensen in late 2005 raises more questions than it answers, particularly given that Debtor appears to have another and further claim against Christensen on the 2004 potatoes. The two Jahnke leases are just as unexplained and problematic. The UST pointed out these issues

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[25] Debtor indicated that the $18,000 received was something separate from the 25% interest it held in the 2004 potatoes which apparently remained in storage. Thus yet another question of proper stewardship and handling of Debtor's assets is raised.

in its objection to approval of the disclosure statement. *See* Doc. No. 215. In response, *see* Doc. No. 217, Debtor essentially protested that these objections were hyper-technical and picayune, and that sufficient detail was provided in the disclosure statement and other pleadings. Debtor's characterization of the objections was wrong, and its contentions of adequate disclosure and explanation are unpersuasive.

WBW-I raised clear and unmistakable warnings concerning Debtor's conduct in this case. It noted the lack of management and supervision, and the neglect of the duties of a debtor in possession. But for those failures, the events at the heart of the recent litigation would never have occurred.

There was no evidence presented that these issues and defects have been cured or eliminated. In fact, the Court's concerns, as articulated in *WBW-I*, are simply enhanced by Debtor's attempts to sell the Idaho property without compliance with the requirements of the Code and Rules, without marketing the property, without proving that fair market value is to be received, and without justifying the discount from appraised value.

The record shows not just Debtor's failure to comply with the requirements of the Code and Rules. It also shows Debtor lacks reasonable prospects for reorganization, and that there has been an ongoing injury to the estate and its creditors from Debtor's conduct.

Debtor argues in defense of the delay and in support of a continued chapter 11 opportunity that sale of property, key to any plan, could not have occurred until the IRS issues were resolved through negotiation or litigation. Debtor perhaps discounts the utility of § 363(f).[26] In any event, it was incumbent on Debtor to aggressively pursue a resolution or an adjudication. The delay cannot be pawned off as solely the "fault" of others. And, even while pursuing a litigated or negotiated solution to the IRS disputes, Debtor could have marketed the properties, but it did not; it could have ensured income from the properties was appropriately collected in the interim, but it has not. Obligations of stewardship have been ignored.

Cause under § 1112(b) is well supported by the entirety of the record. Though particularly true when viewed through the prism of what transpired in Montana, as explained in *WBW-I*, the balance of the record likewise supports these conclusions. Cause therefore exists under § 1112(b). The Court concludes that it is in the best interests of the estate and its creditors to convert the case to a chapter 7 liquidation. That result, frankly, is not just warranted but overdue.

The Disclosure Statement

The Court has no doubt that Debtor's last proposed disclosure statement

[26] Debtor did attempt one § 363(f) sale. *See* Doc. No. 40. The UST quickly identified patent defects in the motion and multiple failures in Debtor's compliance with the Code and Rules. Doc. No. 41. The motion was ultimately withdrawn. *See* Doc. No. 78.

could not be approved. It does not, in the Court's view and given the history of this case, come close to providing "adequate information" under the standards of § 1125. The failures are many. However, the conversion of the case to chapter 7 moots that issue and, thus, any need for further discussion.

CONCLUSION

All objections to Debtor's Motion will be sustained, and that Motion will be denied. The § 1112(b) Motion will be granted and the case will be converted to chapter 7. The UST shall submit an appropriate form of order.

DATED: March 3, 2006

TERRY L. MYERS
CHIEF U. S. BANKRUPTCY JUDGE