UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

IN RE:	)	
	)	Case No. 08-12162-ABC
4S DEVELOPMENT, LTD, LLLP	)	Chapter 11
EIN: 94-3362822	)	
	)	
Debtor.	)	

OBJECTION TO PROOF OF CLAIM FILED BY FIRST STATE BANK OF ALTUS PURSUANT TO FED.R.BANKR.P. 3007

COMES NOW the Debtor, by and through its attorneys, Kutner Miller Brinen, P.C., and as its Objection to the Proof of Claim ("Claim") filed by First State Bank of Altus states as follows:

1. The Debtor filed its voluntary Petition for relief under Chapter 11 of the Bankruptcy Code on February 26, 2008. The Debtor remains as a Debtor-In-Possession.

2. On or about July 7, 2008, First State Bank of Altus ("FSB") filed a proof of claim in the Debtors' case in the amount of $5,478,339.81 ("Claim").

3. The Claim is based upon an alleged loan made from FSB to the Debtor on or around April 27, 2006. Exhibit B to the Claim consists of the alleged loan agreement executed by the Debtor in favor of FSB ("Agreement"). The Claim is purportedly secured by the Debtor's interest in approximately 860 acres of real estate located in Routt County, Colorado ("Property"). The Property has been valued at a minimum valued at 11.8 million dollars, although the Debtor believes the Property is worth substantially greater than this amount, as the same Property was valued at over 22 million dollars approximately one year ago.

4. At the outset, the Claim includes alleged interest accrued through the Debtor's petition date (February 26, 2008) in the amount of $591,033.12. Presumably, FSB has accrued an accrual of interest thereafter. However, pursuant to the terms of the Agreement itself, the 8.750% interest rate being charged commenced on April 26, 2006 and ended on April 27, 2006. See, Exhibit B to Claim. Consequently, if the Agreement constitutes a valid debt, the maximum accrual of interest would consist of the amount accrued for the one day which elapsed between April 26 and April 27, 2006. No other interest on the Claim has accrued or is due to FSB.

5. Moreover, the Agreement and the Deed of Trust executed in connection with the Agreement both fail to reflect the actual intent and agreement between the parties, are internally inconsistent and unenforceable. Significant and important discrepancies as to the amount of the debt, the maturity date and interest rate supposedly accruing on the alleged debt highlight this fact.

6. For example, one provision of the Agreement reflects the repayment date was not fixed and rather, was <u>due on demand</u>. In another provision, the Agreement states that the maturity date thereof would be September 30, 2007. In contrast, the Deed of Trust on the Property, attached as part of Exhibit B to the Claim, states that the "note" due to FSB was to mature by September 30, 2007 at the latest. However, the Agreement contemplates payments well past September 30, 2007, by describing quarterly interest payments which would be made at times including, among others, on September 30, 2007. If full repayment was actually to be due on September 30, 2007, there would be no need for an interest only payment to be made on that date, as the Agreement contemplates.

7. Moreover, the Deed of Trust states that interest on the unpaid balance of the advanced sums would accrue at the rate of "twelve percent per annum" while as set forth above, the Agreement asserts the interest accrual to be for one day only and at the contrasted rate of 8.750% per annum. The Deed of Trust should not serve to alter the repayment obligations, if any, created by the Agreement and the inconsistencies between the two documents appear to reflect the invalidity of the Deed of Trust, the Agreement, or both.

8. Moreover, although the Agreement contemplated up to nine million dollars in advances to the Debtor, upon information and belief FSB did not possess the wherewithal or authority to lend that amount to 4S, it was over-leveraged, and lending regulations limited the amount which FSB could lend to the Debtor, and it planned to participate loans to other lenders. FSB concealed this fact from 4S. Had 4S been aware of this fact, it would not have agreed to execute the Agreement because 4S contemplated additional funds would be needed to complete the real estate developments referenced below.

9. In addition to these facts, the Debtor also asserts that for the reasons set forth below, the Claim of FSB should be recharacterized as equity, because the true nature of the Agreement relates to the common interest and relationship of the parties vis-à-vis Mountain Adventure Property Investments, LLC ("MAPI"). Alternatively, the Claim should be equitably subordinated pursuant to 11 U.S.C. Section 510(c).

10. Property of the Debtor's estate includes its 46.76 % membership interest in MAPI. The other members of MAPI are Grassy Creek Holding Company, LLC ("Grassy Creek") (14.25%), Robinson & Sons, LLC (15.41%) ("R&S") and Oasis Development, LLC ("Oasis") (23.58%). MAPI was formed to develop and sell real property in Routt County, Colorado.

11. FSB Bancorp ("FSB Bancorp") indirectly owns and controls Oasis, Altus Ventures, LLC and the claimant at issue, FSB. As the Court is aware, Both Brassy Creek and MAPI filed chapter 11 petitions in this Court, and both cases were converted to Chapter 7. Upon information and belief, neither Oasis nor R&S ever made a capital contribution to MAPI.

12. The members of Oasis are FSB Development Capital, LLC ("FSB Development ") and RK Enterprises, LLC. Upon information and belief, the manager of FSB Development is Global Industrial Management, LLC ("Global"). Upon information and belief, F. Don Anderson ("Anderson") was, at all pertinent times, is an officer of FSB Development, FSB Bancorp, Global and Oasis.

13. In early 2006, the Debtor and Grassy Creek owned substantial tracts of Routt County, Colorado real estate. The properties included Mt. Harris at Grassy Creek, which was owned by Grassy Creek, and the Villages at Hayden and Hidden Springs Ranch, which were owned by the Debtor.

14. In the spring of 2006, the Debtor and Grassy Creek were approached by individuals from Altus Ventures, a subsidiary of FSB. Upon information and belief, Anderson was one of those individuals. The Debtor and Grassy Creek were told Altus Ventures and FSB could fund development of the properties and provide financial and accounting support.

15. Instead of Altus Ventures participating directly, Oasis was substituted as partner. Oasis is represented to be an Oklahoma LLC. The members of Oasis are (i) FSB Development Capital, LLC, another affiliate of FSB Bancorp, and (ii) RK Enterprises, LLC, a Delaware LLC controlled by an individual named Robert L. Keys.

16. Altus Ventures brought in Robinson Construction, Inc. ("Robinson"), a construction contractor and an affiliate of Robinson & Sons, LLC. Altus represented that Robinson could provide "construction services" to develop the infrastructure. In addition, Robinson would make its credit available. The Debtor and Grassy Creek were persuaded by these representations and on March 21, 2006, executed a memorandum of understanding.

17. MAPI was then formed by a written Operating Agreement in May of 2006, which Operating Agreement was drafted by Andrews Davis, P.C., the Oklahoma attorneys for FSB Bancorp, and its affiliates, including Altus Ventures.

18. Under the Operating Agreement, the Debtor and Grassy Creek contributed land to MAPI worth more than $21.5 million dollars. Oasis contributed no cash as capital. Instead, Oasis merely "arranges" loans to MAPI, 4S and Grassy Creek through affiliated entities. One of those "loans" consisted of the Agreement.

19. Robinson contributed no cash into MAPI as capital. Robinson performed construction services, for which it submitted pay applications and was substantially paid.

20. Though not disclosed at the time, it now appears, in retrospect, that the contributions by Oasis and Robinson may have been part of a "Loan to Own" scheme.

21. Oasis has sought to foreclose on its loans through its affiliated and related entities.

22. Robinson has sought to foreclose its mechanic's liens *and* via Robinson & Sons, LLC, sued under $5M promissory note. Written correspondence suggests this was not the intent of the parties, and that the Robinson entity "debts' were supposed to be converted to capital contributions into MAPI.

23. Pursuant to the MAPI Operating Agreement, MAPI was managed by four managers. Two of the managers were representatives of Oasis, one was a representative of 4S and one was a representative of Grassy Creek. The two managers who represented Oasis were ("Anderson") and Robert Keys ("Keys"). The manager representing the Debtor was Shane Sills, while the manager representing Grassy Creek was Roger Johnson.

24. In addition to the managers, Oasis had control of MAPI by a majority of its officers. From May 2006 to August 2007, the President and Chief Executive Officer of MAPI was Anderson and the Chief Financial Officer was William R. Grissom ("Grissom").

25. Both Anderson and Grissom were representatives of Oasis or its affiliates. The only other officer was Ron Sills, who at the time a representative of the Debtor, as Senior Vice President.

26. Oasis, along with its affiliates FSB Development, and claimant FSB handled accounting and all other fiscal matters, including bookkeeping, payroll and taxes for MAPI by utilizing their own resources and the services of their own in-house CPA, Grissom, and his staff.

27. Unknown to the Debtor and Grassy Creek, while Altus was in complete control of MAPI, a pattern of suspicious activity developed. As a result, on August 2, 2007, the Debtor and Grassy Creek, as majority members of MAPI, convened a meeting of the members. At that meeting, additional managers were elected pursuant to the Operating Agreement. On Monday August 6, 2007, a meeting of the managers of MAPI was held, including the new managers, and it was decided to initiate a full review of MAPI's financial books and records, in order to determine if there had been any breach of fiduciary duty, willful misconduct, or gross negligence on the part of FSB Development, Oasis, and their representatives and affiliates.

28. Within two weeks after the appointment of the additional MAPI managers, Anderson and Keys resigned as managers of MAPI.

29. Further, it appears that after the special meeting of the members of MAPI at the end of July 2007, Altus, Oasis and Robinson became concerned about a potential change in MAPI management. They began to take a concerted action prevent a change, or to retaliate if they could not prevent the change.

30. A lengthy email exchange beginning on July 31, 2007, among representatives of Altus, Oasis, and Robinson occurred. In part, excerpts from those emails revealed that Anderson emailed Keys, Paul Doughty (who signed the Agreement on behalf of FSB) stating: "Maybe I am missing something, and the meeting Thursday is about negotiation/control. Are any of us willing to go forward with Ron & Roger in charge? This also true for FSB, Vectra and Textron?. . ."

31. Anticipating the proposed change, Anderson also wrote in the same email: "I would defer to Paul, and believe that Oasis, FSB, RobCon are sufficiently protected, or can be in that position in less than 5 days, to put a full and definitive stop to this. This would be accomplished via a number of alternatives."

32. The following day, Anderson wrote again to Keys, Doughty, Randy Robinson of Robinson & Sons and RobCon and his senior assistant, Kurt Moisan: "I believe that Roger/Ron can change the operating agreement with a majority vote, and they may very well be doing that as we speak." In response, Keys wrote: "Randy is talking with his attorney, but he may foreclose on his collateral too if this gets messy."

33. Apparently concluding the email chain, Anderson wrote again to Keys, Doughty, and Moisan: "I would concur and talked to Kirk about this earlier this morning. I would just want to make sure the Randy has sufficient collateral if this is required. I would like to get you on the phone with Paul and I later today…."

34. In a separate email chain, Anderson wrote to, among others, Keys, Robinson, Grissom, Robinson, Kirk Moisan, and David Bruni (former Vectra Bank loan officer to MAPI, who then joined MAPI at the request of Anderson) relating to the loans on the Colorado project: "Subject: FW: Colorado Loans 8-1-2007.xls. I believe our position is stronger than we think. Don A."

35. In an email chain beginning August 11, 2007, after the change in MAPI management, Anderson wrote to Keys, Robinson, Grissom, and Bruni, among others. Among other things, Anderson asked: "I am more generally wondering what your and Bills thought are about what actions we (Oasis/AV) should take to protect the investments and the underlying assets that have been invested in MAPI, as well as of what you would see as a strategic plan." In response, one of the addressees, John Price, wrote to Anderson: "Is there any plan to attempt to derail the Ron and Roger show? Did Kirk file construction liens? Did Kirk notify both Vectra and Textron on the liens? How quickly can he bring a collection action?"

36. On September 12, 2007, Robinson & Sons, LLC then commenced suit against the Debtor to collect on the alleged $5,000,000 note.

37. Within three weeks after the management change, Robinson filed mechanics' liens on three of the MAPI projects. That action chilled purchased interest in MAPI lots, clouded title to the property and alienated the public.

38. On January 17, 2008, Anderson on behalf of FSB demanded that the Debtor pay in full the $3,128,786.11 allegedly owed under the Agreement within "two weeks" (by January 31, 2008). Anderson on behalf of FSB states they *"shall take legal and other actions deemed necessary or appropriate to protect our interests, i.e., foreclose and liquidation of collateral."* It then commenced a foreclosure on the land subject to the Deed of Trust, leading to the filing of this case to protect the Debtor's assets from the reach of the owner of its estranged partner.

39. Based on the above chronology, the Agreement and Deed of Trust, the Debtor asserts that the FSB Claim is, in reality, an equity investment and capital contribution to the Debtor made to further the goal of persuading the Debtor to join MAPI and to contribute its Property into MAPI, and to substitute for the Oasis and Altus Venture capital contribution which it was to make into MAPI. The Debtor understood that MAPI would eventually repay any amounts under the Agreement from the sale of its property. There is a lack of a consistent fixed maturity date, interest accrual and payment schedule, a close identity between FSB and the Debtor, by virtue of the MAPI relationship and the Agreement itself contemplated the funds being given to 4S were to be used to develop property to benefit MAPI and pay off prior 4S owners (to help streamline the operations of MAPI). Consequently, the Claim should be recharacterized as an equity investment. ***In re Autostyle Plastics, Inc.***, 269 F.3rd 726 (6th Cir. 2001); ***Sender v. Bronze Group, Ltd.***, 380 F.3rd 726 (10th Cir. 2004).

40. Alternatively, as a result of its conduct, FSB should not be entitled to hold an allowed secured claim in the Debtor's bankruptcy case. It is consistent with the provision of the Bankruptcy Code to equitably subordinate the FSB lien position to the claims of all administrative, priority and unsecured creditors of the estate. That lien, once subordinated, should be transferred to the estate pursuant to 11 U.S.C. § 510(c)(2). Id.

WHEREFORE, the Debtor objects to the proof of claim filed by First State Bank of Altus, and for such further and additional relief as the Court deems just and proper under the circumstances.

Dated: January 23, 2009

Respectfully submitted,

By: */s/David M. Miller*
David M. Miller, #17915

KUTNER MILLER BRINEN, P.C.
303 E. 17th Avenue, Suite 500
Denver, CO 80203
Telephone: (303) 832-2400
Telecopy: (303) 832-1510
Email: dmm@kutnerlaw.com

CERTIFICATE OF SERVICE

I do hereby certify that on January 23, 2009, I caused a true and correct copy of the **OBJECTION TO PROOF OF CLAIM FILED BY FIRST STATE BANK OF ALTUS** to be placed in the United States Mail, postage prepaid, first-class, addressed to the following:

Joanne C. Speirs, Esq.
U.S. Trustee's Office
999 18th Street, Suite 1551
Denver CO 80202

Philipp C. Theune, Esq.
Theune Law Offices, PC
1763 Franklin Street
Denver, CO 80218-1124

John H. Bernstein, Esq.
Kutak Rock LLP
1801 California St, Suite 3100
Denver CO 80202

Peter A. Cal, Esq.
Christian H. Hendrickson, Esq.
Sherman & Howard LLC
633 17th St., Suite 3000
Denver CO 80202-3622

Virginia M. Dalton, Esq.
Pearlman & Dalton PC
1775 Sherman St., Suite 2828
Denver CO 80203-4323

J. Brian Fletcher, Esq.
Jessop & Company PC
303 E. 17th Ave., Suite 930
Denver CO 80203-1264

Arthur T. DiMeo, Esq.
Brian E. Onorato, Esq.
Katz, Look & Moison, P.C.
1120 Lincoln Street, Suite 1100
Denver, CO 80203

EMC Mortgage Corporation
P. O. Box 829009
Dallas, Texas 75382-9009

Kate E. Manka, Esq.
Kutak Rock LLP
1801 California Street, Suite 3100
Denver, CO 80202-2658

American Express Bank FSB
c/o Becket and Lee LLP
POB 3001
Malvern PA 19355-0701

Sara E. Walsh, Esq.
Lathrop & Gage, L.C.
Republic Plaza
370 17th Street, Suite 4560
Denver, CO 80202-5607

Randall F. Scherck, Esq.
Lathrop & Gage, L.C.
7701 Forsythe Boulevard, Suite 400
Clayton, MO 63105

Caroline C. Fuller, Esq.
Fairfield & Woods, PC
Wells Fargo Center
1700 Lincoln Street, Suite 2400
Denver, CO 80203

Philip J. Giacinti, Jr., Esq.
Procopio, Cory, Hargreaves &
Savitch LLP
4704 Harlan Street, Suite 300
Denver, CO 80212

Ralph Cantafio, Esq.
PO Box 774567
Steamboat Springs, CO 80477

/s/Allison McKnight
Allison McKnight