

**United States Bankruptcy Court
District of New Mexico**

Document Verification

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Case Number: 02-17878
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Submitted By:	James E Burke	
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

INVESTMENT COMPANY OF THE SOUTHWEST, INC.,
Debtor.

No. 11-02-17878 SA

**RULING ON DEBTOR'S EMERGENCY MOTION TO COMPEL COMPASS
TO GRANT RELEASES AND FOR EXPEDITED HEARING**

On April 22, 2003, the Debtor in Possession ("Debtor" or "debtor in possession") filed its Emergency Motion To Compel Compass [Bank] to Grant Releases and For Expedited Hearing (doc 63), to which Compass Bank ("Bank") responded on April 28 (doc 67). In the absence of this judge, Judge McFeeley conducted a hearing on the motion on an expedited basis on April 29 (minutes - doc 69) and entered an order granting that part of the motion which sought release prices on property for which sales had been contracted for (doc 72). On May 13, this Court conducted a final hearing on the motion (minutes - doc 74) to determine release prices for the remainder of the property that was the subject of the motion. At the conclusion of the hearing, at which the parties had submitted oral testimony and exhibits, the Court requested the parties to submit some sort of chart that identified the real properties, the debt secured by the properties and the proposed release prices. Unable to agree on a common format, the parties each submitted their own charts on May 16.

Having reviewed portions of the Debtor's schedules (doc 14), the trial exhibits, the Court's notes of the testimony and particularly relying on the charts submitted by the parties, the Court sets the following release prices:

<u>Collateral:</u>	<u>Release Price</u> ¹ :
Woodland Hills lots	\$14,865/lot
Residence ²	\$167,576 ³
Juan Tabo warehouse	\$ 66,868 ⁴
Edith at Industrial	\$110,875
Los Poblanos lot #18	\$159,782
520 Sanchez NW (Montano Village)	\$ 27,980
#1 Corona del Sol	\$ 25,000 ⁵
#2 Corona del Sol	\$ 25,000 ⁶

¹ This is the minimum net figure to be paid to the Bank, at closing. Transaction costs are to be borne by the Debtor, and the Debtor retains whatever is left.

² For this second group of properties, the Debtor essentially proposes to pay off the balances due against each of the properties, putting aside the effect of any foreclosure action.

³ This is the Debtor's proposed release price. The Bank's chart erroneously lists the Debtor's release price at \$145,141.

⁴ This is the Debtor's proposed release price. The Bank's chart erroneously lists the Debtor's release price at \$56,454.

⁵ This is the release figure proposed by the Debtor. The Bank's chart has no proposed release price or other information for this property.

⁶The release figure proposed by the Debtor is \$7,000. The Bank's chart erroneously lists the Debtor's release price at

Eight 2.5 acre lots	\$ 9,100/lot
Menaul Office Complex	\$265,446
Vale NE condo ⁷	\$ 6,250
114 acres, Four Hills	\$ 4,416/acre
Hillcrest Park condo	\$10,000
Retail building (San Pedro)	\$24,000
536 Sanchez NW (Montano Village)	\$ 9,800
5430 6 th St. NW (Montano Village)	\$13,000

The foregoing release prices are to be paid, in addition to the ongoing obligation to pay adequate protection of \$15,000 per month, as required by the order entered by this Court on Compass Bank's motion for stay relief (order - doc 34).

In setting these release prices, the Court has taken into consideration the following: once the Bank is receiving adequate protection for its secured interests, the Debtor-in-possession should be free to use all the estate assets (including encumbered properties) as it deems best for the estate (consistent with its fiduciary obligations to the creditors and parties in interest); while the Debtor provided

\$32,000.

⁷ The Court sees no reason why the release prices for the property encumbered "only" by the transcript of judgment should be limited to 10% of the equity as the Debtor proposes or even 25% of the equity as the Bank proposes. (In its opening statement at the final hearing, the Bank stated that it sought 50% of the equity in these properties.) The Court has selected the higher release price proposed on the charts.

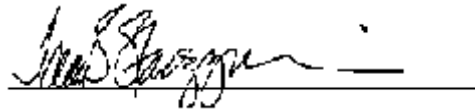
testimony about categories of expenses that the estate is incurring in operating and reorganizing, there was no testimony about the size of those expenses; contrary to the Bank's assertions, there is nothing in the Code or other applicable law that says that a secured claim must be paid before⁸ the estate or even unsecured creditors can receive a distribution from the proceeds of collateral in which the Bank holds an interest -- that is, not only can the estate or other creditors be paid pari passu with the secured creditor, but indeed in some circumstances the proceeds of the secured creditor's collateral could be distributed entirely to parties other than the secured creditor, even without the secured creditor's consent, as long as the secured creditor's interest is "adequately protected"; and by loaning to a borrower at any time, any lender takes on the risk that the borrower will file for Bankruptcy Code protection and thereby in effect modify the terms of the loan and the use of the collateral for months or years beyond what the parties originally contemplated.

⁸ Generally secured claims must be satisfied in full or to the extent of the collateral "before" the unsecured creditors receive a distribution, but in this sense, the term "before" is not used in its chronological sense but instead in the sense of a condition to the unsecured creditors receiving payment.

These release prices should provide the Debtor with sufficient incentive to dispose of the real property in order to continue its development efforts and to ensure that it has no excuse whatever for failing to make a monthly adequate protection payment. They also amply protect the Bank's interest, and, in light of the estimate that it will take about seven years to sell out Woodland Hills, leave the estate to derive the large equity it anticipates from that project after the Bank has been paid in full.

The Court acknowledges the uncertainty inherent in setting prices based on appraisals and other estimates of present and future market value, even when done at the request of the parties. For that reason, this order is entered without prejudice to either party seeking modifications to this order or, for that matter, to the order arising from the Bank's motion for stay relief, and specifically the \$15,000 per month adequate protection payment if there is a substantial reduction in the debt owed to the Bank. At the same time, this order is in effect until modified by the Court, and the parties are required to comply with it. Such compliance by the parties would be in contrast to their general disregard earlier in this case of certain provisions of the order arising from the Bank's motion for stay relief,

in which the Bank refused to provide the accountings called for and the Debtor tendered to the Bank in partial payment of its adequate protection obligations a stale third-party check in the amount of \$24,000. Neither of those actions (or inactions) enhanced the credibility of either party.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on June 5, 2003, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

Daniel J Behles
PO Box 415
Albuquerque, NM 87103-0415

R Thomas Dawe
PO Box 1027
Albuquerque, NM 87103-1027

Leonard K Martinez-Metzgar
PO Box 608
Albuquerque, NM 87103-0608

