IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

IN RE:	)	
	)	
DEEP RIVER WAREHOUSE, INC.,	)	Case No. 04-52749
	)	
Debtor.	)	
	)	

MEMORANDUM OPINION

THIS MATTER came before the Court for hearing on March 2, 2005, on the Motion of GMAC Commercial Mortgage Corporation ("GMAC") for relief from the automatic stay of the Bankruptcy Code (the "Motion for Relief") so that it might foreclose on the sole asset of Deep River Warehouse, Inc. (the "Debtor"), which consists of real property and a warehouse in Guilford County, North Carolina. GMAC argues that it is entitled to relief on the grounds that it is undersecured, it is not receiving adequate protection for the Debtor's continued use of its collateral, the property is not necessary for the Debtor's effective reorganization, and the Debtor has not proposed a Chapter 11 plan that has a reasonable possibility of being confirmed within a reasonable time.

The Court has fully considered the exhibits introduced in evidence, the testimony and demeanor of the witnesses at the hearing, the applicable law, and the arguments of counsel. Having done so, the Court will deny GMAC's motion for relief from the automatic stay and order that the Debtor is to, inter alia, commence adequate protection payments of $17,500.00 per month to GMAC beginning on April 1, 2005.

JURISDICTION

The Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334, and the General Order of Reference entered by the United States District

Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(G) which this Court may hear and determine.

FINDINGS OF FACT

1. In 1986, Scott L. Gwyn ("Gwyn"), the sole shareholder/owner of the Debtor, built a warehouse on a 9.8 acre parcel of land located at 615 Pegg Road in Greensboro, Guilford County, North Carolina (the "Property"). GMAC Appraisal, p. 17. The Property later became the sole asset of the Debtor. The Property consists of an office/warehouse building containing 122,314 square feet of usable space, which is divided into 13,806 square feet of office space and 108,508 square feet of warehouse space. The Property is located approximately four miles southwest of the Piedmont Triad International Airport (the "Airport"). GMAC Appraisal, p. 32.

2. In 1997, Gwyn and Dynex Commercial, Inc. ("Dynex") caused an appraisal of the Property to be prepared (the "Dynex Appraisal"). The Dynex Appraisal, dated April 8, 1997, valued the Property at $4,150,000.00.

3. On June 5, 1997, certain loan documents, including a promissory note, a deed of trust and security instrument, and an assignment of rents (the "Loan Documents"), were executed between the Debtor and Dynex. The principal amount of the promissory note was $2,800,000.00, and it requires the Debtor to make monthly payments of $22,782.71 to Dynex.

4. On June 5, 1997, Chase Bank of Texas, National Association ("Chase Bank") acquired the Loan Documents from Dynex through an "Assignment of Loan and Loan Documents from Dynex Corporation to Chase Bank of Texas, National Association, as Trustee for the Registered Certificate holders of Commercial Capital Access One, Inc., Commercial Mortgage Bonds, Series 2." Chase Bank subsequently changed its name to JP Morgan Chase

Bank as a result of its merger with JP Morgan Bank.

5. GMAC Commercial Mortgage Corporation ("GMAC") is the special servicer for the loan on behalf of the principal, Chase Bank.

6. For 2002, the tax value of the Property was $3,900,000.00.

7. In May of 2003, the Debtor defaulted on the debt to Chase Bank.

8. For 2004, the tax value of the Property was $2,933,800.00. Gwyn testified that the 2004 tax value was originally $4,000,000.00 but that he negotiated with representatives of Guilford County, North Carolina, in order to get the 2004 tax value reduced to $2,933,800.00. At that time, the Debtor had no tenant for the warehouse, and Gwyn testified that he wanted the tax value reduced because he himself had to pay the property taxes on the Property.

9. On April 4, 2004, GMAC, on behalf of Chase Bank, initiated foreclosure proceedings on the Property in Guilford County Superior Court.

10. On August 31, 2004, the Clerk of Guilford County Superior Court authorized a foreclosure sale of the Property. The foreclosure sale was scheduled for September 22, 2004.

11. On September 22, 2004 (the "Petition Date"), the Debtor filed a Chapter 11 bankruptcy petition in this Court.

12. On October 13, 2004, Paul G. Carter, Jr. MAI, SRA of Michael S. Clapp & Associates, Inc. (the "Appraiser"), a certified appraiser licensed in North Carolina, appraised the Property and estimated the value of the Property to be $2,815,000.00. GMAC Appraisal, p. 2. On November 17, 2004, the Appraiser finalized his appraisal report (the "GMAC Appraisal"), which was prepared at the request of GMAC.

13. The Appraiser was not allowed to enter the Property in October of 2004, so the

GMAC Appraisal is based on the "extraordinary assumption" that there had been no changes to the interior of the building since September 19, 2003, which is the date of the Appraiser's last appraisal of the Property. GMAC Appraisal, p. 10, 51.

14. The GMAC Appraisal analyzed the value of the Property using the three generally accepted approaches for valuing real property. The cost approach estimates the reproduction or replacement cost of improvements. GMAC Appraisal, p. 66. Utilizing this approach, the Appraiser determined the value of the land alone was $75,000 per acre for a total of $735,000.00. GMAC Appraisal, p. 81. Furthermore, the reproduction cost of the building is $4,833,964. GMAC Appraisal, p. 83. Since the "effective age" of the building is 21 years, the Appraiser found the economic life of the improvements on the Property to be 37.5 years. Dividing the effective age (i.e., 21 years) by 37.5 years yields a fifty-six percent (56%) rate of depreciation. Thus, forty-four percent (44%) of $4,833,964 equals $2,126,944, which when added to the land value of $735,000.00 yields a total value of $2,861,944.00 under the cost approach.

15. The sales comparison approach compares the subject property to similar properties, making adjustments for property rights conveyed, financing terms, conditions of sale, market conditions, location, and physical characteristics. GMAC Appraisal, p. 85. Utilizing this approach, the Appraiser analyzed four comparable sales of similar properties. Although the Appraiser wrote that "there are few buildings currently listed for sale in this metropolitan area that are truly comparable to the subject building in size, age, and ceiling heights," GMAC Appraisal, p. 101, he found the market value of the Property to be $17.00 per square foot. When this value is multiplied by the area of the warehouse and the land value is added, the sales comparison approach yields a value of $2,814,338.00 for the Property. GMAC Appraisal, p.

109.

16. The income capitalization approach derives a value by using the anticipated future cash flow of the subject property. GMAC Appraisal, p. 110. After analyzing rent from four comparable properties, the Appraiser determined that the market rent for the Property is $2.75 per square foot. After making several adjustments, the Appraiser determined that the stabilized net operating income of the Property is $2.12 per square foot, which yields annual income of $259,643.00. GMAC Appraisal, p. 128. The Appraiser then determined an overall capitalization rate by comparing the net operating income of five comparable properties to the sales prices of those properties. The Appraiser determined that the appropriate overall capitalization rate for the Property is 9.5%. GMAC Appraisal, p. 132. The Appraiser then divided the net operating income of the Property (i.e., $259,643.00) by the overall capitalization rate (i.e., 9.5%) to calculate a value of $2,733,080.00 pursuant to the income capitalization approach.[1] Id.

17. Of the three approaches, the Appraiser placed the most weight on the sales comparison approach and determined that the "as is" market value of the property was $2,815,000.00 on October 13, 2004. GMAC Appraisal, p. 135.

18. On December 3, 2004, GMAC filed its Motion for Relief, which states that the outstanding principal balanced owed to GMAC was $2,563,671.12 and that the "payoff" on December 3, 2004 was $3,148,250.00. This figure consists of principal of $2,563,671.12, pre-petition interest of $431,417.93, advances by GMAC of $42,000.00, late charges of $21,000.00, and outstanding escrow advances for taxes and insurance of approximately $90,000.00.

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[1] This value was reached before adjustments for other factors, none of which the Court deems relevant to the valuation of the Property.

19. On December 10, 2004, the Debtor entered into a new lease of the Property (the "Berco Lease") with Berco of America, Inc. ("Berco"). The terms of the Berco Lease are as follows: the term is five years, beginning on April 1, 2005. The monthly rent for the first three years is $27,792.22; beginning with the fourth year, the monthly rent increases to $29,459.75; beginning with the fifth year, the monthly rent increases to $30,048.94. The Berco Lease is a triple net lease, which requires Berco to pay, among other things, all property taxes, utilities, and maintenance on the Property during the term of the Berco Lease.

20. On December 14, 2003, the Debtor filed a motion that requested the Court to approve the Berco Lease.

21. On December 23, 2004, the Debtor filed a Chapter 11 Plan and Disclosure Statement. The Chapter 11 Plan and the Disclosure Statement state that, on the Petition Date, the Property had a value of $2,300,000.00. The Chapter 11 Plan and the Disclosure Statement further state that the value of GMAC's secured claim (i.e., $2,300,000.00) "was arrived at by taking the Creditor's appraisal of $2,815,000.00 (although the debtor reserves the right to dispute this appraisal and offer other evidence of value) and subtracting the cost of repair to the parking lot of the Real Property, liquidation and marketing expenses." Chapter 11 Plan, p. 5; Disclosure Statement, p. 7.

22. On January 5, 2005, the Motion for Relief came on for hearing for the first time, but the hearing was continued at the request of GMAC.

23. On January 19, 2005, the Motion for Relief came on for hearing and was continued at the request of GMAC.

24. On January 27, 2005, the Motion for Relief came on for hearing and was

continued at the request of GMAC.

25. On February 2, 2005, the Motion for Relief came on for hearing and was continued at the request of GMAC.

26. On February 2, 2005, GMAC and the United States Bankruptcy Administrator filed objections to the Debtor's Disclosure Statement.

27. On February 16, 2005, the Motion for Relief came on for hearing and was continued at the request of GMAC.

28. On February 24, 2005, the Court entered an Order Approving Lease and Subordination, Non-Disturbance and Attornment Agreement, which approved the Berco Lease. Although GMAC initially objected to the Berco Lease, at the hearing on February 16, 2005, GMAC withdrew its objection.

29. On February 28, 2005, the Debtor filed a Second Amended Disclosure Statement (the "Disclosure Statement") and an amended Plan of Reorganization (the "Plan"). In the Disclosure Statement, the Debtor challenges the payoff amount asserted by GMAC;[2] it states, "GMAC contends that the amount due is approximately $3,148,250.00; the Debtor contends that the amount due is approximately $3,022,072.45." Regarding the value of the Property, the Disclosure Statement states, "GMAC has had the Real Property appraised at a value of $2,815,000.00. However, the Debtor is aware of other opinions of value, including the 2001 tax value, and the opinion of the Debtor's realtor at over $3,500,000.00." Disclosure Statement, p. 5.

30. On March 2, 2005, a hearing was held on the Motion for Relief. At the hearing,

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[2]No evidence has been presented by GMAC or the Debtor concerning the correct amount owed to GMAC.

the Appraiser testified as an expert on the value of commercial/industrial property in Guilford County, North Carolina, and surrounding areas. The Appraiser testified that he inspected the outside of the warehouse, inspected the neighborhood surrounding the Property, evaluated the economic and physical factors that should be considered in valuing the Property, determined the best economic use of the Property, and determined the value of the land that is part of the Property.

31. The Appraiser testified that he determined the value of the Property under three valuation approaches: the cost approach, the sales comparison approach, and the income capitalization approach. He established the final value of the Property to be $2,815,000.00, which was an "as-is" market figure as of October 13, 2004. The Appraiser testified that if a third party purchased the property on October 13, 2004 – without the Debtor spending any significant money on the Property for repairs or improvements and taking into consideration the condition of the Property as of October 13, 2004 – he would expect the Property to sell for $2,815,000.00. The Appraiser stressed that he valued the Property as of October 13, 2004 and that he had no opinion as to the value of the Property after October 13, 2004.

32. The Appraiser testified that he had reviewed the Berco Lease and that nothing in the Berco Lease would affect his opinion of value because the rent to be paid under the Berco Lease is similar to what he expected a market lease of the Property to be.

33. The GMAC Appraiser anticipated a marketing time of six to twelve months as of October 13, 2004, such that if the Property were offered for sale on October 13, 2004, then he would expect the Property to be marketed for six to twelve months in order to obtain a sales price of $2,815,000.00. The Appraiser testified that he had no opinion as to the amount of time needed

for marketing the Property if it were offered for sale on March 2, 2005. He testified that he had not done any research since the date of the GMAC Appraisal (i.e., October 13, 2004) and did not know what changes, if any, had occurred in the relevant market since then.

34. The Appraiser testified that, during the six-month period after October 13, 2004, Federal Express had begun construction of a new distribution hub at the Airport, which is approximately four miles from the Property. He further testified that in the six-month period prior to the GMAC Appraisal, there had been a slight to moderate increase in the value of the Property.[3] He also testified, however, that he had no opinion regarding whether the demand for industrial/warehouse type properties in the area had been affected by the development of the Federal Express distribution hub or any other developments since October 13, 2004.

35. The Appraiser compared the income from the Property under a hypothetical lease to the income from the Property under the Berco Lease. The Appraiser admitted that the Berco Lease was a true "triple net" lease, meaning that the Debtor, as landlord, has no expenses under the Berco Lease. The amount of rent under the Berco Lease equates to $2.73 per square foot for a total of $332,000.00 per year, which is greater than the amount that the Appraiser estimated the Property would receive under a hypothetical lease. GMAC Appraisal, p. 128. The GMAC Appraisal deducted $0.70 per square foot for operating expenses under the hypothetical lease of the Property. The Appraiser maintained, however, that his pro forma analysis for expenses (based on the above estimates) would be appropriate in light of the actual terms of the Berco Lease because that lease is only for a five-year term. Berco could break the lease and move out

[3]The Appraiser testified that the Property was still appreciating but that the appreciation was "slow." However, he did not have an opinion concerning whether similar property in the southwest portion of Guilford County had appreciated within the last six months.

or Berco could leave after the five years; in either scenario, the Debtor would have to assume the maintenance of the Property. The Appraiser testified that if the Berco Lease were for a period of twenty to twenty-five years, then he might agree to remove the operating expenses from his $0.70 per square foot calculation.

36. The Appraiser agreed that since Berco will be paying the real property taxes, the insurance, and all maintenance expenses on the Property, the stabilized effective gross income would be somewhat higher than $2.73 per square foot.

37. The Appraiser testified that he applied an overall capitalization rate of 9.5% to the estimated stabilized net operating income of $259,643.00. GMAC Appraisal, p. 132. The Appraiser admitted that an application of the same overall capitalization rate to the actual figure of $2.73 per square foot rent that Berco will pay under the Berco Lease would result in a stabilized value of $3,500,000.00 for the Property. The Appraiser also testified, however, that he did not believe that the $3,500,000.00 figure was an accurate value of the Property because Berco may not operate the property after the Lease expires.

38. The Appraiser testified that he had not examined the Property since October of 2004, so he did not know of any improvements to the Property by Berco or anyone else. He did not know if Berco had invested or would invest $100,000.00 of improvements in the Property as contemplated in the Berco Lease.

39. In discussing the advent of the Dell computer manufacturing plant,[4] the Appraiser testified that he has seen no apparent effects on property values from the Dell deal yet but that it

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[4]On December 22, 2004, Dell announced plans to build a new manufacturing facility on a 189-acre site in Forsyth County, North Carolina, and to begin operation in 2005. The Dell site is approximately twelve miles from the Property.

was "too nebulous and too recent" to have any effect on the local commercial real estate market. He admitted that if Dell built the plant as planned, it would likely have a positive effect on the value of the Property, but he could not quantify what the effect would be.

40. Gwyn testified at the March 2, 2005 hearing as the owner/sole shareholder of the Debtor. Gwyn stated that he had been involved in the development, retail, and sale of commercial property for twenty years in Guilford and Forsyth Counties.

41. Gwyn explained that the property tax value on the Property assessed by Guilford County for 2004 was originally $4,000,000.00. Gwyn appealed the assessment and was successful in negotiating the tax value down to $2,933,800.00 because the warehouse was vacant. He stated that he wanted the tax value reduced from $4,000,000.00 for self-serving reasons–he had no tenant in the Property, so for the first time since 1988, Gwyn himself had to pay the property taxes. Gwyn stated that he and his realtor used properties at the lower end of the market to get the tax value reduced. Gwyn further testified that the tax value of $2,933,800.00 was only a good figure for the payer of the tax bill and that it was not the true value of the Property.

42. Gwyn testified that on April 8, 1997, the Dynex Appraisal was completed. He stated that the Dynex Appraisal valued the Property at $4,150,000.00. Gwyn purportedly examined a copy of the Dynex Appraisal during his testimony, but the Dynex Appraisal was not offered or received into evidence.

43. Gwyn testified that, as the owner of the Property, he believed that the Property was worth $3,500,000.00.

44. Gwyn testified that Berco will begin paying rent under the Berco Lease on April 1, 2005 as scheduled. He stated that Berco is currently upfitting the property and estimated the

total amount of improvements to be $100,000.00. Gwyn testified that he expected Berco to comply with all aspects of the Berco Lease.

45. Gwyn testified that the overall capitalization rate of 9.5% that the Appraiser used was slightly high, and that, when the financial strength of Berco is considered, the overall capitalization rate should be lower, yielding a higher value for the Property.

46. Gwyn stated that the Debtor is attempting to refinance the debt that it owes to GMAC. He further testified that, as part of the Debtor's attempts to refinance the Property, the Debtor has requested its own appraisal of the Property and that it was in progress but had not been completed.

CONCLUSIONS OF LAW

GMAC argues that relief from the automatic stay should be granted for several reasons. First, GMAC argues that cause exists under Section 363(d)(1) because GMAC has not received any payments from the Debtor since the bankruptcy began, the Debtor has not offered adequate protection, and GMAC is undersecured. Second, GMAC argues that it has satisfied its burden under Section 362(d)(2) because the Debtor admits that it owes at least $3,022,072.00 to GMAC, and the Property is only worth $2,815,000.00. Furthermore, GMAC contends the Property is not necessary for effective reorganization because the Debtor cannot demonstrate a reasonable possibility for reorganization within a reasonable time. Third, GMAC asserts that the Debtor's plan of reorganization is not confirmable for several reasons and cannot be crammed down on GMAC pursuant to the provisions of Section 1129(b). GMAC further argues that the Debtor's plan is not feasible, that it violates the absolute priority rule, and that it fails to comply with the new value exception.

The Debtor counters that GMAC is adequately protected by an equity cushion in the Property. The Debtor argues that the evidence demonstrates that the Property is worth between $3,000,000.00 and $3,500,000.00. Moreover, the Debtor asserts that the Property is appreciating in value because it is being maintained, Berco is improving it, and the market is improving due to significant developments involving Dell and Federal Express. The Debtor asserts that it has offered adequate protection (i.e., monthly payments) in its plan of reorganization. In addition, at the hearing the Debtor offered to make adequate protection payments of $17,500.00 per month beginning in April of 2005.

A. Relief From Stay Under Section 362(d)(1) of the Bankruptcy Code

GMAC has asserts that relief from the automatic stay should be granted "for cause" pursuant to Section 362(d)(1). The basis for GMAC's argument is that it is undersecured and has not received any adequate protection for the secured portion of its claim. This argument requires the Court to determine the value of the Property in order to determine if, and to what extent, GMAC is undersecured.

1. Method of Valuation

In the context of a motion seeking relief from the automatic stay, establishing the value of collateral is essential to a determination of (a) whether the debtor has equity in the property and (b) whether that equity is sufficient to afford the secured creditor adequate protection. 11 U.S.C. § 362(d)(1), (2). While the Bankruptcy Code does not establish a specific method of valuation under Section 362(d)(1), (2), an analogous provision under Section 506(a) provides some guidance on valuation issues. See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.), 484 U.S. 365, 371-72 (1988)

(stating that statutory construction is a "holistic endeavor" and defining value of "entity's interest in property" entitled to adequate protection under §§ 361 and 362 in light of meaning of value of the "creditor's interest" in property under § 506(a)). Section 506(a) addresses the standard for valuing a creditor's secured claim against property of the estate; it provides that value is to be "determined in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a). In a reorganization proceeding under Chapter 11 of the Bankruptcy Code, the "proposed disposition and use" of the property is ascertainable from the debtor's Chapter 11 plan.

In general, the two methods for valuing real property within the context of a motion for relief from the automatic stay are the purchase method and the foreclosure method. 4 Collier on Bankruptcy ¶ 506.03[7][b] pp. 506-66-67 (Alan N. Resnick and Henry J. Sommer eds. Matthew Bender 2004). See also H.R. Rep. No. 595; 95 Cong. 1st Sess.; HR 8200 (Sept. 8, 1977) ("[Matters of valuation] are left to case-by-case interpretation and development . . . there are an infinite number of variations possible . . . [Value does not] mean, in every case, forced sale liquidation value or full going concern value. There is wide latitude between those two extremes."). Whether to choose the purchase method valuation, a foreclosure valuation, or some other standard depends on the particular circumstances of a case. As stated by one bankruptcy court:

> [F]air-market value is the predominant standard of valuation. This is so because generally the property subject to inquiry is either occupied, used in the debtor's business, or otherwise capable of being sold on a "going-concern" basis. On the other hand, forced-sale value is usually only used when the property is vacant, inoperative, or must otherwise be disposed of quickly and cheaply. Every attempt is made to give the debtor the full benefit of his equity in the property, so that he may retain it if necessary or dispose of it in a commercially reasonable manner

and at a price that will benefit creditors as well as the debtor.

In re Cohn, 16 B.R. 140, 144 (Bankr. D. Mass. 1981). See also In re Savannah Gardens-Oaktree, 146 B.R. 306, 309 (Bankr. S.D. Ga. 1992)("[I]n the context of reorganization with prospects for success, the fair market value is the appropriate standard of valuation."); In re Montgomery Court Apartments, Ltd., 141 B.R. 324, 351 (Bankr. S.D. Ohio 1992)("[R]eal property to be liquidated quickly by a Chapter 7 trustee will be valued using a lower standard of valuation than would be used if the real property were to be retained by a debtor for sale under future market conditions."); In re Helionetics, Inc., 70 B.R. 433, 439 (Bankr. C.D. Cal. 1987)("[W]here a reorganization is in process and there is every reason to believe that it will be successful, assets of the debtor should be valued on a going concern basis."). Because the Debtor's proposed Chapter 11 plan of reorganization proposes to retain the Property as a going concern, the proper standard of valuation in this matter is a value that reflects the fair market value of the Property marketed as a going concern.

2. Date of Valuation

Having determined the proper method of valuation, the Court must determine the effective date of that valuation. Although the unsecured portion, if any, of a creditor's claim against property of the estate is not actually determined until the date of valuation, it is appropriate in the context of a motion seeking relief from the automatic stay to value the property subject to the creditor's claim as of the date of the hearing inasmuch as the hearing date provides the best approximation of the extent of the debtor's equity in the property that exists to adequately protect the creditor should its motion be denied. See In re Greenville Auto Mall, Inc., 278 B.R. 414, 421-22 (Bankr. N.D. Miss. 2001)(determining the value of computer equipment as

of the date the automatic stay was lifted); In re Coates, 180 B.R. 110, 118-19 (Bankr. D.S.C. 1995)("[T]he date of the valuation hearing would include the most factually complete and current appraisals for valuation purposes . . . [and] would seem to be the most commercially reasonable date."); In re 499 W. Warren Street Assoc., 151 B.R. 307, 313 (Bankr. N.D.N.Y.1992)("Valuation for the purposes of a lift stay motion must be determined at or near the date of the disposition of same."); 3 Collier on Bankruptcy ¶ 362.07[3][b][vi], pp. 362-91-93 (Alan N. Resnick and Henry J. Sommer eds. Matthew Bender 2004)("[V]aluation at the time protection is sought will often be most consistent with the Code scheme."); cf. In re Waverly Textile Processing, 214 B.R. 476, 479 (Bankr. E.D. Va. 1997)(holding that the date the creditor filed the motion for adequate protection is the proper date for valuing the collateral for adequate protection purposes). See also 11 U.S.C. § 1129(b)(valuing a secured creditor's claim as of the effective date of a Chapter 11 plan for purposes of cram-down); In re Podnar, 307 B.R. 667, 673 (Bankr. W.D. Mo. 2004) ("[T]he date that the debtor files a motion to redeem property . . . is the appropriate date for determining the value of collateral; and, if the redemption is contested, the date of the hearing is appropriate because that date most closely approximates the time frame during which a secured creditor could repossess and sell the collateral after a debtor's bankruptcy filing."). Thus, the Court will determine the value of the Property as of the date of the hearing on GMAC's motion for relief from stay.

3. The Value of the Property

At the hearing on March 2, 2005, the parties presented no valuation of the Property as of March 2, 2005;[5] nor did they present any particular evidence that, taken by itself, was completely

[5]Only Gwyn testified as to the value of the Property on March 2, 2005.

persuasive on this point.

The earliest indication of the value of the Property comes from Gwyn's testimony about the Dynex Appraisal, dated April 8, 1997. Gwyn testified that the Dynex Appraisal was commissioned for Gwyn and Dynex. The Dynex Appraisal valued the Property at $4,150,000.00. Because the Dynex Appraisal was performed seven years prior to the hearing, and because it was merely described by Gwyn, and no copy was ever introduced or admitted into evidence, the Court places a very low probative value on this testimony.

A much more recent indication of value is provided by the 2002 tax value of the Property, which was $3,900,000.00.[6] Furthermore, the 2004 tax value was originally $4,000,000, but Gwyn testified that he negotiated the value down to $2,933,800, which was the value on which the taxing authority finally settled. In the Court's experience, tax values may or may not reflect the current fair market value of a given property; at best, they are some indication of value and do not have high probative value.

The single most persuasive indication of value is the GMAC Appraisal, which placed a value of $2,815,000.00 on the Property as of October 13, 2004. The evidence adduced at the hearing, however, provides four reasons to adjust the value given by the GMAC Appraisal. First, an examination of the GMAC Appraisal indicates that it is limited to facts that may no longer be true. The Appraiser stressed that he had no opinion as to the value of the Property after October 13, 2004. The GMAC Appraisal is specifically based on the "extraordinary assumption" that there have been no changes to the interior of the building since September 19, 2003, the date that the Appraiser last saw the interior of the Property. GMAC Appraisal, p. 10, 51. The Appraiser

[6]Both parties testified to the tax value of the Property, without objection.

testified that he had not examined the exterior of the Property since October of 2004, and that he was not aware of any recent improvements to the Property by Berco or anyone else. Gwyn testified, without contradiction, that Berco was in the process of investing $100,000.00 to improve the Property for Berco's purposes. The Appraiser testified that he had not done any research since October 13, 2004 and did not know what changes, if any, had occurred in the relevant market since then. The Appraiser also testified, however, that, since October 13, 2004, Federal Express had begun construction of a new distribution hub at the Airport, which is approximately four miles from the Property. He further testified that in the six-month period prior to the GMAC Appraisal, there had been a slight to moderate increase in the value of the Property and that the Property was continuing to appreciate "slowly." When questioned about the construction of the Dell computer manufacturing plant approximately 12 miles away from the Property, the Appraiser testified that he had seen no effect on property values from the Dell construction and that it was "too nebulous and too recent" to have any effect on the local market. He admitted that if Dell built the plant as planned, it would likely have a positive effect on the value of the Property, but he could not quantify the effect that it would have.

Second, on December 10, 2004, the Debtor executed the Berco Lease. Although the rent for the first three years under the Berco Lease (i.e., $2.73 per square foot) is very similar to the fair market rent assumed by the Appraiser for the Property (i.e., $2.75 per square foot), the rent during year four (i.e., $2.89 per square foot) and year five (i.e., $2.94 per square foot) indicate a higher value than the Appraiser found in the GMAC Appraisal.

Third, the Appraiser agreed with the Debtor's counsel that since Berco will be paying the real property taxes, the insurance, and all maintenance expenses on the Property, the stabilized

effective gross income would be somewhat higher than $2.73 per square foot. The Appraiser admitted that an application of the same overall capitalization rate to the actual figure of $2.73 per square foot rent that Berco will pay under the Berco Lease would result in a stabilized value of $3,500,000.00 for the Property. However, the Appraiser testified that he did not believe that the $3,500,000.00 figure was an accurate value of the Property because Berco may not operate the property after the Berco Lease expires.

Fourth, the GMAC Appraisal provides that "there are few buildings currently listed for sale in this metropolitan area that are truly comparable to the subject building in size, age, and ceiling heights," GMAC Appraisal, p. 101, which indicates that the GMAC Appraisal is less reliable than it would be if more suitable comparables were available.

The final indication of value was provided by Gwyn, who testified that, as the sole shareholder of the owner of the Property, he believed that the Property was worth $3,500,000.00. Although Gwyn is clearly experienced in matters of commercial real estate in Guilford and Forsyth Counties, he was allowed to state his opinion as an owner, not as an expert.[7]

Taking all of the evidence into account, the Court concludes that the fair market value of the Property was $3,100,000.00 on March 2, 2005.

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[7] Pursuant to Fed. R. Evid. 701, an opinion of a lay witness is admissible if the opinion is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of [expert testimony]." If the requirements of Rule 701 are met, then the general rule is that an owner of real property may give his or her opinion as to its value without having to qualify the owner as an expert. E.g., Hidden Oaks v. City of Austin, 138 F.3d 1036, 1051 (5th Cir. 1998)("[W]e adhere to the general rule that an owner [of real property] always may testify as to value, whether assessed as of the time of trial, or at some definitive point in the past."); In re Petrella, 230 B.R. 829, 834 n.5 (Bankr. N.D. Ohio 1999)("[A]n owner is competent to give his opinion as to the value of his property, often by stating the conclusion without stating a reason.").

4. No Cause Exists for Relief From Stay Under Section 362(d)(1); Adequate Protection

No "cause" exists under Section 362(d)(1) to allow GMAC to foreclose on the Property. Although the Debtor and GMAC failed to present evidence at the March 2, 2005 hearing concerning the amount owed to GMAC,[8] even if GMAC's position is correct, then GMAC is only slightly undersecured. At the hearing, the Debtor proffered adequate protection payments of $17,500.00 per month. To the extent that adequate protection[9] is appropriate, the Debtor's offer is certainly adequate.

Section 361 of the Bankruptcy Code is the primary provision protecting a secured creditor's interest in its collateral whenever the debtor attempts to use or diminish it over the creditor's objection. 11 U.S.C. § 361. By its terms, Section 361 provides three methods to adequately protect a secured creditors interest: making periodic cash payments to the extent that the debtor's use of the creditor's collateral decreases the value of the creditor's interest; providing a replacement lien to the extent that the creditor's interest in the collateral has decreased; and granting such other relief–other than the grant of an administrative expense claim–that will result in the "indubitable equivalent of such entity's interest in such property." 11 U.S.C. § 361(1-3). See also Grundy Nat'l Bank v. Tandem Mining Corp., 754 F.2d 1436,

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[8]In its Motion for Relief, filed December 3, 2004, GMAC asserts that its "payoff" was $3,148,250.00. In its Disclosure Statement, filed February 28, 2005, the Debtor asserts that it owes GMAC only $3,022,072.72.

[9]A secured creditor's interest in its collateral that is property of the bankruptcy estate is, in general, protected by the Fifth Amendment to the United States Constitution from untoward diminishment. United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 793 F.2d 1380, 1390-91 (5th Cir. 1986)("In general, the Fifth Amendment requires only that the value of the secured position of a creditor be maintained . . . ."), aff'd, 484 U.S. 365 (1988).

1440-41 (4th Cir. 1985)(affirming the bankruptcy court's award of adequate protection periodic payments after denying the creditors motion for relief from the automatic stay), overruled on other grounds, Timbers of Inwood Forest Assocs., Ltd., 484 U.S. at 382 (1988)(holding that an undersecured creditor is not entitled to adequate protection payments as reimbursement for its lost opportunity costs for deprivation of the proceeds that it would receive at an early foreclosure sale); Riggs Nat'l Bank v. Perry, 729 F.2d 982, 987 (4th Cir. 1984)("In connection with [the bankruptcy court's] refusal to terminate the stay, [it] ordered that payments be brought and kept up to date, that prepaid insurance for six months in advance be kept in force, and that, should the debtor fail to comply, upon five days written notice and presentation of an affidavit the stay would be lifted without further notice.

Beginning April 1, 2005,[10] and continuing each month thereafter, the Debtor shall pay $17,500.00 to GMAC as adequate protection. Although no party has suggested that appropriate insurance on the Property has been lacking, the Debtor shall maintain, as further adequate protection for GMAC, appropriate insurance on the Property, of such kinds and in such amounts as are required by the Loan Documents. Should the Debtor fail to make the adequate protection payments in a timely manner or fail to maintain appropriate insurance on the Property, GMAC may request an expedited hearing on the matter.

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[10] GMAC will not be heard to complain that adequate protection payments do not start until April 1, 2005. Although the Petition Date was September 22, 2004, GMAC did not file its Motion for Relief until December 3, 2004. On January 5, 2005, the Motion for Relief came on for hearing for the first time, but the hearing was continued at the request of GMAC. The hearing was continued again on January 19, 2005, January 27, 2005, February 2, 2005, and February 16, 2005 at the request of GMAC. That the Motion for Relief was not heard until March 2, 2005 is largely due to GMAC's own actions.

B. Relief From Stay Under Section 362(d)(2) of the Bankruptcy Code

GMAC asserts that relief from stay should be granted pursuant to Section 362(d)(2). The basis for GMAC's argument is that it is undersecured and that the Property is not necessary for effective reorganization because the Debtor cannot demonstrate a reasonable possibility for reorganization within reasonable time. In support of its argument under Section 362(d)(2)(B), GMAC argues that the Plan is not confirmable for several reasons, including the fact that it is not feasible, that it violates the absolute priority rule, and that it fails to comply with the new value exception.

1. Lacks of Equity in the Property Pursuant to Section 362(d)(1)(A)

GMAC has the burden to demonstrate that the Debtor has no equity in the Property. 11 U.S.C. § 362(g)(1). Thus far, GMAC has failed to carry that burden. As addressed above, the Debtor disputes the amount that GMAC is owed. Until such time as GMAC carries its burden under Section 362(d)(1)(A), relief from stay will not be granted.

2. Property Necessary to an Effective Reorganization Pursuant to Section 362(d)(1)(B)

Although GMAC has the burden to demonstrate that the Debtor has no equity in the Property, the Debtor bears the burden of proof on all other issues, in particular the issue of whether the Property is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2). See Timbers of Inwood Forest Assocs., Ltd., 484 U.S. at 375 ("Once the movant under § 362(d)(2) establishes that he is an undersecured creditor, it is the burden of the debtor to establish that the collateral at issue is 'necessary to an effective reorganization.'")

Within the context of Section 362(d)(2), an "effective reorganization" contemplates a

plan that is feasible, meaning that there exists a "probability of actual performance of provisions of the plan. . . . The test is whether things which are to be done after confirmation can be done as a practical matter under the facts." Clarkson v. Cooke Sales and Service Co. (In re Clarkson), 767 F.2d 417, 420 (8th Cir. 1985). See also In re Bergman, 585 F.2d 1171, 1179 (2nd Cir. 1978) ("Sincerity, honesty, and willingness are not sufficient to make the plan feasible, and neither are any visionary promises."); In re Grandfather Mt. Ltd. P'ship., 207 B.R. 475, 485 (Bankr. M.D.N.C. 1996)("The test of whether the Debtor can accomplish what the plan proposes is a practical one and, although more is required than mere hopes and desires, success need not be certain or guaranteed."); In re Atrium High Point Ltd. P'ship, 189 B.R. 599, 609 (Bankr. M.D.N.C. 1995)("Factors to be considered by a court in its calculus of the feasibility of a debtor's plan include the debtor's prior performance, the adequacy of capital structure, the earning power of the business, economic conditions, the ability of management, and any other related matter that determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan."); In re Cheatham, 91 B.R. 377, 380 (Bankr. E.D.N.C. 1988)("[I]n estimating future performance "'mathematical certitude' is neither expected nor required.' While findings as to the earning capacity of an enterprise are essential to a determination of feasibility, a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made.").

That the Plan proposed by the Debtor can be confirmed is far from certain. The Court has repeatedly noted various issues concerning confirmation of the Plan, including issues concerning the feasibility of the Plan, the classification of GMAC's unsecured claim (if any), and the

Debtor's attempt to demonstrate a new value exception to the absolute priority rule.[11] The Court,

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[11]One of the requirements necessary for a court to confirm a Chapter 11 plan of reorganization is that the plan be accepted by each class of creditors. 11 U.S.C. § 1129(a)(8). Any class that is not impaired is deemed to have accepted the plan. §1129(a)(8). "A class is impaired if there is 'any alteration of a creditor's rights, no matter how minor.'" In re Woodbrook Assocs., 19 F.3d 312, 321 n.10 (7th Cir. 1994)(quoting Windsor on the River Assocs. Ltd. v. Balcor Real Estate Fin., Inc. (In re Windsor on the River Assocs., Ltd.), 7 F.3d 127, 130 (8th Cir. 1993). Should an impaired class of creditors object to the plan, the court may nevertheless confirm the plan over the objection of that class if, inter alia, "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property." 11 U.S.C. § 1129(b)(2)(B)(ii). This provision of the Bankruptcy Code is commonly referred to as the absolute priority rule. Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship, 526 U.S. 434, 442 (1999). In short, the absolute priority rule commonly means that a junior class of creditors–such as equity holders–cannot receive any property under the plan if a senior class of creditors–such as general unsecured creditors–are not paid in full. Id.

Dicta in a Supreme Court opinion provided a corollary to the absolute priority rule of Section 1129(b)(2)(B)(ii). In Case v. Los Angeles Lumber Products Co., 308 U.S. 106 (1939), the Court stated:

> It is, of course, clear that there are circumstances under which stockholders may participate in a plan of reorganization of an insolvent debtor. . . . [T]his Court stress[ed] the necessity, at times, of seeking new money "essential to the success of the undertaking" from the old stockholders. Where that necessity exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made. . . . [T]he creditor cannot complain that he is not accorded "his full right of priority against the corporate assets." To the extent of the inadequacy of their contributions the stockholders would be . . . "in the position of a mortgagor buying at his own sale".
>
> [W]e believe that to accord "the creditor his full right of priority against the corporate assets" where the debtor is insolvent, the stockholder's participation must be based on a contribution in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder."

Id. at 121-22 (citations and footnote omitted). Thus, if a junior claimant invests new capital in a reorganized venture, that junior claimant's interest is not "on account of" the claimant's prior, pre-petition interest, but the junior claimant's interest is on account of the new infusion of capital. Sixty years later, the Supreme Court again addressed the "new value" corollary to the absolute priority rule. In Lasalle St. P'ship, 526 U.S. at 451-54, the Supreme Court stated that it rejected the "starchy" position that an old equity holder could never receive an interest in a reorganized debtor in violation of the absolute priority rule. Instead, the Court opined that so long as a transaction was at full value then it posed no threat to the bankruptcy estate making it

however, cannot conclude at this time that confirmation of the Plan, or some amended version of the Plan, is not possible or even that it is unlikely. The Debtor filed the Plan in a timely manner.[12] It negotiated with Berco and GMAC and obtained Court approval of the Berco Lease, which appears to provide the Debtor with sufficient income to fund the Plan. The Debtor might even be able to refinance the debt to GMAC. Even if GMAC were to demonstrate that the Debtor has no equity in the Property, the Debtor has carried its burden of showing that the Property is necessary to an effective reorganization under Section 362(d)(1)(B).

C. Relief From Stay Under Section 362(d)(3) of the Bankruptcy Code

Section 362(d)(3) provides that, with respect to an act against single asset real estate, a creditor secured by such collateral shall obtain relief from the automatic stay unless the debtor,

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irrelevant whether the new value came from an old equity holder or a unrelated third party. Id. at 453-54 ("A truly full value transaction would pose no threat to the bankruptcy estate . . . ."). The Court further opined that as for an old equity claimant that subsequently contributes new value, the degree of causation between the two positions that is sufficient to implicate the absolute priority rule "would presumably occur . . . whenever old equity's later property would come at a price that failed to provide the greatest possible addition to the bankruptcy estate, and it would always come at a price too low when the equity holders obtained or preserved an ownership interest for less than someone else would have paid." Id. at 453. Accordingly, whenever a former junior claimant realizes some premium based on the claimant's former position, then the absolute priority rule is violated. Id. at 458 (holding that granting former equity holders the exclusive right–without benefit of market valuation–to contribute new value was a distribution of a property right on account of their former position that fell withing the prohibition of the absolute priority rule).

Accordingly, the question then becomes: what is a fair transaction as contemplated by the market test of Lasalle St. P'ship whereby a former junior claimant may contribute new value without running afoul of the absolute priority rule? The market test ensures that a new value contributor does not receive a greater value in the reorganized venture than the consideration paid. See, e.g., In re CGE Shattuck, LLC, No. 99-12287, 1999 Bankr. LEXIS 1880 (Bankr. D.N.H. 1999)(requiring the debtor to amend its plan to provide for a competitive market determination of the value of the new equity).

[12]The Plan was originally filed on December 23, 2004, which was within the requisite 90-day period,

within 90 days after the order for relief, (a) has filed a plan of reorganization that "has a reasonable possibility of being confirmed within a reasonable time" or (b) has commenced monthly payments equal to the interest, at a fair market rate, on the creditor's value in the property. Thus, in single asset real estate cases, when a party moves for relief solely under Subsection 362(d)(3), a creditor does not have to prove that the debtor has a lack of equity in the property. 11 U.S.C. § 362(d)(3) (directing the court to grant relief in single asset cases unless the debtor files a confirmable plan or commences monthly payments to the secured creditor without mentioning the amount of equity or lack thereof as a basis for granting relief). Once the creditor shows that it is secured by single asset real estate, the burden is on the debtor to either pay the creditor in a timely manner or prove that the debtor has filed a plan of reorganization that "has a reasonable possibility of being confirmed within a reasonable time." 11 U.S.C. § 362(d)(3); see Timbers of Inwood Forest Assocs., Ltd., 484 U.S. at 375-76 (when a debtor is attempting to show that property is necessary to an effective reorganization under Section 362(d)(2)(B), the debtor must prove that the property is essential to the debtor's reorganization and that the reorganization is in prospect. "This means . . . that there must be 'a reasonable possibility of a successful reorganization within a reasonable time.'").

Like the standard for finding that property is necessary for an "effective reorganization" under Section 362(d)(2)(B),[13] a finding that the debtor has filed a "plan of reorganization that has a reasonable possibility of being confirmed" under Section 362(d)(3)(A) also requires that the debtor submit a feasible plan. The legislative history of Section 362(d)(3) provides:

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[13]See In re 68 W. 127 St., LLC, 285 B.R. 838, 847-48 (Bankr. S.D.N.Y. 2002)(stating that the standards in §§ 362(d)(2)(B) and 362(d)(3)(A) are similar, if not identical).

> Section 202 would terminate the automatic stay in single asset filings 90 days after the commencement of the chapter 11 proceedings if the debtor has not filed a feasible plan of reorganization. . . . The provision, which does not apply to small residential properties, will ensure that the automatic stay is not abused while giving the debtor an opportunity to create a workable plan of reorganization.

140 Cong. Rec. S4504 (daily ed. April 11, 1994)(comments of Senator Grassley). This passage indicates that Section 362(d)(3) was not intended to deprive debtors of the opportunity to confirm "feasible" and "workable" plans of reorganization, even if those plans involve single asset real estate. The Debtor has carried its burden of showing that the Plan has a reasonable possibility of being confirmed within a reasonable time under Section 362(d)(3)(A). Therefore, Section 362(d)(3) does not provide a basis for granting the Motion for Relief.

CONCLUSION

Based upon the findings of fact and conclusions of law set forth in this memorandum opinion, the Motion for Relief is denied. The Debtor is required to make monthly adequate protection payments of $17,500.00 to GMAC, beginning on April 1, 2005. As further adequate protection for GMAC, the Debtor shall maintain appropriate insurance on the Property, of such kinds and in such amounts as are required by the Loan Documents. Should the Debtor fail to made the adequate protection payments in a timely manner or fail to maintain appropriate insurance on the Property, GMAC may request an expedited hearing on the matter.

The Court finds that the value of the Property on March 2, 2005 is $3,100,000.00. Consistent with the Court's Order of March 3, 2005, the Debtor shall have to and including March 24, 2005, to file any amendment to the Disclosure Statement and the Plan.[14] Any party in interest

[14]Since the Plan provides for the Property to be retained and operated on a going concern basis, a purchase method valuation should be used. Because value changes over time, a

shall file a response to any amendment to the Disclosure Statement by March 31, 2005. At 11:00 a.m. on April 6, 2005, an evidentiary hearing will be held in Winston-Salem on the adequacy of the information contained in any amended Disclosure Statement. If the parties cannot agree upon the amount of the debt owed by the Debtor to GMAC, then the Court will determine the correct amount of the debt upon a motion, appropriate notice, and a hearing.

A judgment in accordance with this memorandum opinion will be entered contemporaneously herewith.

This 14 day of March, 2005.

THOMAS W. WALDREP, JR.
United States Bankruptcy Judge

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valuation established at one hearing is never res judicata to an issue of valuation at a subsequent hearing. Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 219 (4th Cir. 1994)("[E]stimates of value made during bankruptcy proceedings are 'binding only for the purposes of the specific hearing and . . . do not have a res judicata effect' in subsequent hearings.")(quoting In re Snowshoe, Inc., 789 F.2d 1085, 1088-89 (4th Cir. 1986)). "If the purpose of the valuation is to determine the amount of amount of a secured claim for purposes of a Chapter 11 plan, the value should be determined as of, or close to, the effective date of the plan." In re Savannah Gardens-Oaktree, 146 B.R. 306, 308 (Bankr. S.D. Ga. 1992). Nonetheless, the Court's determination of the value of the Property for purposes of the Motion for Relief should provide guidance to the parties concerning future hearings.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

IN RE:	)	
	)	
DEEP RIVER WAREHOUSE, INC.,	)	Case No. 04-52749
	)	
Debtor.	)	
	)	

JUDGMENT

For the reasons stated in the memorandum opinion entered this date, it is ORDERED, ADJUDGED and DECREED that the Motion for Relief from Stay filed by GMAC is hereby denied. Beginning on April 1, 2005 and continuing each month thereafter, the Debtor shall make adequate protection payments to GMAC in the amount of $17,500.00 and shall maintain adequate insurance on the Property.

At 11:00 a.m. on April 6, 2005, an evidentiary hearing will be held in the United States Bankruptcy Court, 226 South Liberty Street, Winston-Salem, North Carolina concerning the adequacy of the information contained in any amended Disclosure Statement. If the parties cannot agree upon the amount of the debt owed by the Debtor to GMAC, the Court will determine the correct amount of the debt upon a motion, appropriate notice, and a hearing.

This the 14 day of March, 2005.

THOMAS W. WALDREP, JR.
United States Bankruptcy Judge