



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
January 31, 2020

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

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In re:	)	Case No.: 19-17670-MKN
	)	Chapter 11
VAC FUND HOUSTON, LLC,	)	
	)	Date: January 21, 2020
Debtor.	)	Time: 1:30 p.m.
	)	

**ORDER ON MOTION (1) TO SELL REAL ESTATE FREE AND CLEAR OF LIENS, CLAIMS AND ENCUMBRANCES AND (2) FOR PERMISSION TO SELL ADDITIONAL HOMES IN THE ORDINARY COURSE OF BUSINESS<sup>1</sup>**

On January 21, 2020, the court heard the Motion (1) to Sell Real Estate Free and Clear of Liens, Claims and Encumbrances and (2) For Permission to Sell Additional Homes in the Ordinary Course of Business (“Sale Motion”), brought by the above-captioned Debtor. The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND**

On December 2, 2019, a voluntary Chapter 11 petition was filed by VAC Fund Houston, LLC (“Debtor”), along with its schedules of assets and liabilities (“Schedules”) and statement of financial affairs (“SOFA”). (ECF No. 1). In its real property Schedule A, Debtor listed fifty-five separate parcels of property located in Texas. In its creditor Schedule D, Debtor listed Genesis Capital LLC, aka Goldman Sachs (“Goldman Sachs”) as having numerous claims in various

<sup>1</sup> In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101, et seq. .

1 amounts secured by deeds of trust against various scheduled parcels of real property. Debtor  
2 lists a value of each of the parcels of real property listed in Schedule A and repeated in Schedule  
3 D, as well as the amount owing on each secured claim listed in Schedule D. Debtor also listed  
4 LendingHome Funding Corporation (“LHF Corporation”) as having numerous separate claims in  
5 various amounts secured by deeds of trust against various separate parcels of real property.  
6 None of the claims of Goldman Sachs or LHF Corporation are designated as contingent,  
7 unliquidated, or disputed. Debtor’s Schedules and SOFA are signed under penalty of perjury by  
8 Christopher Shelton as trustee of VAC Fund Houston Trust, Manager of the Debtor.

9 On December 9, 2019, Debtor filed a motion to approve a stipulation reached with  
10 Goldman Sachs to dismiss the Chapter 11 proceeding without prejudice (“Dismissal Motion”).  
11 (ECF No. 16).

12 On December 18, 2019, the Dismissal Motion was heard on an expedited basis pursuant  
13 to an order shortening time (ECF No. 19) obtained by the Debtor. Prior to the expedited hearing,  
14 an objection to the Dismissal Motion was filed by at least one creditor. (ECF No. 29). At the  
15 hearing on the Dismissal Motion, counsel for the parties advised the court that dismissal would  
16 no longer be sought. After the hearing was concluded, Goldman Sachs filed a notice of non-  
17 consent for use of cash collateral and demand for segregation and accounting of cash collateral  
18 with respect to its real property security. (ECF No. 33). The same day, Debtor belatedly filed  
19 various initial motions (“First Day Motions”) (ECF Nos. 34, 36, 37, and 38) for which an  
20 expedited hearing was scheduled for January 3, 2020. (ECF No. 49). Except for the motion to  
21 authorize employment of bankruptcy counsel, attached to each of the First Day Motions is an  
22 identical Declaration of Jonathan Jorgenson (“First Jorgenson Declaration”). Oppositions to the  
23 First Day Motions were filed by Goldman Sachs (ECF Nos. 57, 58, and 59), along with an  
24 evidentiary objection to the admission of the First Jorgensen Declaration. (ECF No. 63).  
25 Additional opposition to the First Day Motions was filed by the Office of the United States  
26 Trustee (“UST”). (ECF No. 60).

1 On January 2, 2020, Debtor filed the instant Sale Motion, to which is attached the  
2 Declaration of Jon Jorgenson (“Second Jorgensen Declaration”).<sup>2</sup> (ECF No. 67). By the Sale  
3 Motion, Debtor seeks authority under Section 363(f) to sell three scheduled parcels of real  
4 property free and clear of liens: 2402 Encreek Road, Houston, Texas; 14919 Bramblewood  
5 Drive, Houston, Texas; and 2319 Encreek Road, Houston, Texas. There is no dispute that the  
6 first parcel secures the obligation owed to LHF Corporation, while the other two parcels partially  
7 secure separate obligations owed to Goldman Sachs. In addition to approving three specific  
8 sales, Debtor seeks permission to sell its remaining parcels of real property in the ordinary course  
9 of business pursuant to Section 363(c)(1), i.e., without notice or a hearing.<sup>3</sup> On the same date,  
10 Debtor filed an “omnibus reply” to the objections filed by Goldman Sachs to the First Day  
11 Motions, to which is attached the Declaration of Chris Shelton (“Shelton Declaration”). (ECF  
12 No. 69).<sup>4</sup>

13 On January 3, 2020, Goldman Sachs filed an evidentiary objection to the admission of the  
14 Shelton Declaration. (ECF No. 72). On the same date, the First Day Motions were heard, and  
15 some relief was granted. A final hearing on the cash collateral, employment, and utility motions,  
16 including the admission of evidence to determine the value of certain real property securing the  
17 claims of Goldman Sachs, was scheduled for February 21, 2020.<sup>5</sup>

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19 <sup>2</sup> The court assumes that Jon Jorgenson and Jonathan Jorgenson are one and the same.

20 <sup>3</sup> There is no apparent dispute that the Debtor acquired numerous single-family  
21 residences in Texas in the aftermath of Hurricane Harvey that devastated the Houston area in  
22 2017. There is no apparent dispute that the Debtor’s business was created and intended to  
23 generate profits from the renovation, if necessary, and subsequent rental or sale of the same  
24 residential properties.

24 <sup>4</sup> Instead of responding in its omnibus reply to Goldman Sachs’ evidentiary objections to  
25 the admission of the First Jorgenson Declaration, Debtor apparently submitted the Shelton  
26 Declaration.

26 <sup>5</sup> At the initial hearing on the First Day Motions, the court inquired as to why the Shelton  
27 Declaration did not disclose that the declarant apparently is a personal guarantor of many of the  
28 Debtors’ secured obligations, including those that are the subject of the cash collateral and other  
motions before the court. The failure to disclose the information was attributed to oversight. A  
Chapter 11 debtor in possession has a fiduciary duty to all creditors and not to individual

1 On January 9, 2020, an order shortening time was entered to permit the Sale Motion to be  
2 heard on January 21, 2020. (ECF No. 81).

3 On January 15, 2020, an official committee of unsecured creditors (“UCC”) was  
4 appointed. (ECF No. 87).

5 On January 16, 2020, Goldman Sachs filed an objection to the Sale Motion (“Goldman  
6 Sachs Objection”) (ECF No. 92) along with an evidentiary objection to the Second Jorgensen  
7 Declaration. (ECF No. 93). On the same date, Goldman Sachs filed a limited objection to the  
8 Debtor’s proposed cash collateral order submitted in connection with one of the First Day  
9 Motions. (ECF No. 94). Additionally, LHF Corporation filed a statement of conditional non-  
10 opposition to the Sale Motion. (ECF No. 91).

11 On January 17, 2020, an interim order authorizing limited use of cash collateral was  
12 entered, subject to further consideration at the final hearing scheduled for February 21, 2020.  
13 (ECF No. 98).

14 On January 20, 2020, Debtor filed a reply to the Goldman Sachs’ Objection (“Debtor  
15 Reply”). (ECF No. 99). On the same date, a response in support of the Sale Motion was filed by  
16 the UCC (“UCC Response”). (ECF No. 100).

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23 members of the petitioner. See, e.g., In re CWNevada, LLC, 602 B.R. 717, 726 (Bankr. D. Nev.  
24 2019), citing Woodson v. Fireman’s Fund Ins. Co. (In re Woodson), 839 F.2d 610, 614 (9th Cir.  
25 1988). That fiduciary duty also extends to counsel for the debtor in possession. See Everett v.  
26 Perez (In re Perez), 30 F.3d 1209, 1219 (9th Cir. 1994); see also In re J.T. Thompson, USA,  
27 2012 WL 4461650, at \*4 (Bankr. C.D. Cal. Sep. 25, 2012) (“The majority of courts view an  
28 attorney for a debtor in possession as a fiduciary of the bankruptcy estate...An attorney for the  
debtor in possession has fiduciary obligations to the estate stemming from his fiduciary duties to  
the debtor in possession and his responsibilities as an officer of the court...These obligations  
exist and must be discharged whether or not a creditors’ committee or the United States trustee is  
actively involved in the case...”). To put it mildly, a Chapter 11 debtor’s failure to disclose a  
declarant’s personal financial interest in the outcome of a case is a serious oversight.

1 On January 21, 2020, the court granted the Sale Motion with respect to the parcel  
2 securing the obligation to LHF Corporation.<sup>6</sup> The court took the Sale Motion under submission  
3 with respect to the remaining two parcels in light of the objection raised by Goldman Sachs.<sup>7</sup>

4 **DISCUSSION**

5 Debtor bears the burden of proof on the instant Sale Motion, just like it bears the burden  
6 of proof on the use of cash collateral and on final approval of the other First Day Motions.  
7 Goldman Sachs has objected to the admission of the Second Jorgenson Declaration attached to  
8 the Sale Motion as well as the Shelton Declaration submitted in connection with the First Day  
9 Motions. Debtor has not offered the Shelton Declaration into evidence in connection with the  
10 Sale Motion, however, and it will not be considered. Thus, the only evidence offered in support  
11 of the Sale Motion is the Second Jorgensen Declaration as well as matters for which the court  
12 may take judicial notice under FRE 201.

13 Although the Debtor Reply is replete with substantive arguments why the court should  
14 approve the sale of the two remaining parcels over the objection of Goldman Sachs, it is utterly  
15 silent with respect to the evidentiary objections raised in connection with the Second Jorgenson  
16 Declaration. Because the Debtor will not or perhaps cannot overcome the evidentiary objections,  
17 the court will sustain each of them at this point. Thus, the portions of the Second Jorgenson  
18 Declaration in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 15A, 15B, and 15C, identified  
19 by Goldman Sachs, cannot be considered in support of the Sale Motion.<sup>8</sup>

20 As previously mentioned, Debtor has listed fifty-five parcels of real property in its  
21 Schedules along with a stated value. The Sale Motion encompasses three of those parcels. The  
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23 <sup>6</sup> On January 24, 2020, an order was entered approving the sale of that parcel. (ECF No.  
24 105).

25 <sup>7</sup> On January 22, 2020, Debtor filed a notice providing anticipated closing dates for the  
26 sales of all three of the subject parcels.

27 <sup>8</sup> LHF Corporation did not object to the court's consideration of the Second Jorgenson  
28 Declaration and any objection to the admissibility of that content was waived. At this point,  
Debtor has not responded to the objections to the admissibility of the Shelton Declaration, but  
those will be considered in connection with the final hearing on the First Day Motions.

1 Schedules are signed under penalty of perjury and can be treated as admissions. Goldman Sachs,  
2 however, has disputed those values in connection with the Debtor's request for use of cash  
3 collateral, and an evidentiary hearing is scheduled to be conducted on February 21, 2020.

4 Because there is no admissible evidence filed in support of the instant Sale Motion, and the  
5 values set forth in the Schedules are subject to determination at a future evidentiary hearing, the  
6 court is unable to determine the adequate protection that must be afforded to Goldman Sachs  
7 under Section 363(e).

8 Moreover, Debtor seeks to approve a sale of Goldman Sachs' collateral free and clear of  
9 liens under Section 363(f). Unfortunately, neither the Sale Motion nor the Debtor Reply identify  
10 which of the five provisions of Section 363(f) support the proposed sale of these properties.  
11 Absent some justification articulated by the Debtor, counsel for the UCC suggests that the  
12 Debtor should be permitted to sell the parcels pursuant to subsections (f)(1), (f)(4), and (f)(5).  
13 See UCC Response at 3:2-13. Under 363(f)(1), the UCC alleges that Goldman Sachs' objections  
14 in this bankruptcy case, apparently without regard to any possible litigation privilege, amount to  
15 violations of California law applicable under the various loan documents. See UCC Response at  
16 5:6 to 7:8. Because of this alleged misconduct, the UCC suggests that the proposed sales would  
17 be permitted under California law and therefore is permissible as a lien free sale in bankruptcy.  
18 Under Section 363(f)(4), the UCC asserts that because of the same alleged violations of  
19 California law, the enforceability of the various loan documents is in bona fide dispute, thereby  
20 permitting a sale of the subject collateral free and clear of Goldman Sachs' lien against the  
21 specific property. Finally, under Section 363(f)(5), the UCC alleges that the proposed sales of  
22 the specific parcels are in excess of certain release prices previously agreed between the Debtor  
23 and Goldman Sachs. As a result, the UCC maintains that Goldman Sachs could be compelled to  
24 accept those release price amounts in partial satisfaction of its claim. See UCC Response at  
25 7:18-22.

26 While the arguments advanced by the UCC are creative, the court will not reach the  
27 merits of any of them when they are belatedly raised the day before the hearing on the Sale  
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1 Motion. Nor will the same arguments be considered in favor of the Debtor because the Debtor  
2 had ample opportunity to raise them in the Sale Motion as well as the Debtor Reply.

3 Debtor has simply failed to meet its burden of proof with respect to the collateral of  
4 Goldman Sachs encompassed by the Sale Motion. For that reason, sale of the two remaining  
5 properties will not be approved at this time.

6 With respect to the remaining relief requested by the Debtor, the court agrees that the  
7 modified notice process set forth in the UCC Response is appropriate in this case. The court also  
8 will require that notice be given of the anticipated date of closure of any proposed sale.

9 **IT IS THEREFORE ORDERED** that above-captioned Debtor's Motion (1) to Sell Real  
10 Estate Free and Clear of Liens, Claims and Encumbrances and (2) For Permission to Sell  
11 Additional Homes in the Ordinary Course of Business ("Motion"), Docket No. 67, be, and the  
12 same hereby is, **DENIED IN PART AND GRANTED IN PART** as follows:

- 13 1. The Motion is **DENIED WITHOUT PREJUDICE** with respect to the real property  
14 parcels located at 14919 Bramblewood Drive, Houston, Texas, and 2319 Encreek  
15 Road, Houston, Texas.
- 16 2. The Motion is **GRANTED** with respect to the Debtor's sale of its scheduled parcels  
17 of real property in the ordinary course of business on the condition that the Debtor  
18 files and serves with respect to each property a notice of intent to sell ("Notice of  
19 Intent") containing the following information:
  - 20 a. The address of the property to be sold;
  - 21 b. The amount the Debtor paid to purchase the property;
  - 22 c. The amount the Debtor invested, if any, to renovate the property;
  - 23 d. The name and identity of any lender having a lien on the property;
  - 24 e. The amount owed by the Debtor to any lender having a lien on the property,  
25 including principal, interest, and fees;
  - 26 f. The sale price under the proposed contract of sale of the property;
  - 27 g. The conditions, if any, to the proposed contract of sale, including financing; and
  - 28 h. The scheduled date for close of the proposed sale.

1 3. The Notice of Intent must be filed with the court and served no less than 14 calendar  
2 days before the conclusion of any sale.

3 a. Any creditor of the Debtor that objects to a proposed sale, must file an objection  
4 with the court and serve a copy on the Debtor's counsel within 14 calendar days  
5 after the Notice of Intent is filed. Debtor shall attempt to resolve any objection.

6 In the event the Debtor cannot resolve an objection, Debtor must notice the  
7 objection for a hearing before this court, on shortened time if necessary.

8 b. In the event that no objection to a proposed sale is timely filed, Debtor may  
9 proceed to close the sale without further notice, subject to disclosure in any  
10 monthly and quarterly reports, and any other documents that are required in this  
11 Chapter 11 proceeding.

12 **IT IS SO ORDERED.**

13  
14 Copies sent via CM/ECF ELECTRONIC FILING

15 Copies sent to all parties via BNC

16 Copies sent via BNC to:  
17 VAC FUND HOUSTON, LLC  
18 ATTN: OFFICER/MANAGING AGENT  
19 1000 N GREEN VALLEY  
20 HENDERSON, NV 89074

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