

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

)	
In re:)	
)	Case No. 08-50775
MICHAEL D. VICK,)	Chapter 11
)	
Debtor.)	
)	

**OBJECTION OF JOEL ENTERPRISES, INC., TO DEBTOR’S MOTION
FOR AN ORDER UNDER SECTION 366 OF THE BANKRUPTCY CODE
(I) PROHIBITING UTILITY PROVIDERS FROM ALTERING, REFUSING OR
DISCONTINUING SERVICE, (II) DEEMING UTILITIES ADEQUATELY ASSURED
OF FUTURE PERFORMANCE, AND (III) ESTABLISHING PROCEDURES FOR
DETERMINING ADEQUATE ASSURANCE OF PAYMENT
AND MEMORANDUM IN SUPPORT**

Joel Enterprises, Inc. (“JEI”), by counsel, for its objection to the Debtor’s Motion for an Order Under Section 366 of the Bankruptcy Code (I) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service, (II) Deeming Utilities Adequately Assured of Future Performance, and (III) Establishing Procedures for Determining Adequate Assurance of Payment (the “Motion”), states as follows:

1. Michael D. Vick (the “Debtor”) filed his voluntary petition under Chapter 11 of the Bankruptcy Code on July 7, 2008 (the “Petition Date”).
2. The Debtor has filed the Motion in which he seeks this Court’s authorization (a) to permit Debtor’s counsel to pay from an escrow account he has established with his counsel (called the “Utility Deposit” in the Motion) the Utility Providers (as defined in the Motion and as

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listed on Exhibit A to the Motion) who notify his counsel that they have not been timely paid, (b) to permit Debtor's counsel to add to the list of Utility Providers to be paid from the Utility Deposit without notice or hearing, and (c) to permit Debtor's counsel to provide separate escrow accounts for Utility Providers and to provide additional adequate assurance to Utility Providers without further notice or hearing. It is implicit in the Motion that the Debtor intends to pay the Utility Providers for utility services during the pendency of this case.

3. While JEI understands that some utility services may benefit the Debtor's bankruptcy estate by preserving property of the estate, the Debtor has set forth no facts in the Motion justifying the relief sought.

4. The Motion states that the Debtor has established the Utility Deposit with his counsel in the amount of \$4,654.93, such amount represented to be in excess of the approximate aggregate amount of two weeks' service for the Utility Providers for "his residential properties." The Motion identifies the Utility Providers (located in Virginia, Georgia, and Arizona as reflected on Exhibit A to the Motion); it does not identify the residential properties or who is living in them. Based on information provided by Debtor's counsel, there are six properties—four in Virginia, two in Georgia. Five are identified as being owned by the Debtor; one is identified as being owned jointly by Seven Charms Farm, LLC, and A. Washington.¹ Only two are occupied.

5. The Motion does not identify the source of the monies constituting the Utility Deposit or to be used for payment to the Utility Providers during the pendency of this case. Moreover, because the Debtor has not yet filed his Schedules, JEI cannot determine whether there are any liquid assets of the bankruptcy estate available for the payment of utility services, but assumes that the Debtor is proposing to pay the Utility Providers from estate assets. Upon

¹ Upon information and belief, the Debtor is a member of Seven Charms Farm, LLC, and is the equitable owner of a one-half interest in this property.

information and belief, Debtor's counsel has represented that the Debtor proposes to pay the Utility Providers from exempt assets. Because the Debtor has not yet filed his Schedules or claimed exemptions in any of his assets, JEI is unable to evaluate whether or not the assets from which the Utility Providers are to be paid are exempt.

6. Section 363 of the Bankruptcy Code provides that, "[i]f the business of the Debtor is authorized to be operated under section . . . 1108 . . . of this title and unless the court otherwise orders, the trustee may . . . use property of the estate in the ordinary course of business without notice or hearing."² 11 U.S.C. § 363(c)(1). On the other hand, the Debtor may not use property of the estate outside the ordinary course of business without notice and a hearing. *Id.* §363(b)(1). The Debtor is not currently engaged in any business, as he is incarcerated until sometime in 2009. Prior to his incarceration, he was engaged in business as a professional football player. Upon information and belief, the Debtor does not engage in the business of real estate development or investment, and, the residential properties to which the Utility Providers provide service are either vacant or occupied by the Debtor's family and fiancé. Thus, the Motion, by implication, seeks this Court's authorization for the Debtor's use of property of the estate for the payment of personal living expenses of others outside of the ordinary course of business.

7. Although the courts are divided on this issue, the Debtor, under the circumstances of this case, should not be permitted to use property of his bankruptcy estate for his personal living expenses or for those of his family. *See, e.g., United States v. Sutton*, 786 F.2d 1305 (5th Cir. 1986); *In re Walter*, 83 B.R. 14 (9th Cir. BAP 1988); *In re Vincent*, 4 B.R. 21 (Bankr. M.D. Tenn. 1979). *Contra, e.g., In re Rodriguez*, 41 B.R. 774 (Bankr. S.D. Fla. 1984). *Cf. In re Harp*, 166 B.R. 740 (Bankr. N.D. Ala. 1993). The expenditure of estate funds for personal purposes

² Section 1108 of the Bankruptcy Code provides: "Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise the trustee may operate the debtor's business. 11 U.S.C. § 1108.

does not benefit the bankruptcy estate or the Debtor's creditors to which he owes a fiduciary duty.

8. Even if a debtor in an individual Chapter 11 proceeding may properly use the assets of his bankruptcy estate to pay his personal living expenses, those expenses should be reasonable in nature and amount and should not take into account the debtor's standard of living. *Cf. In re Watson*, 403 F.3d 1 (1st Cir. 2005) (Chapter 13); *In re Dick*, 222 B.R. 189 (Bankr. D. Mass. 1998) (Chapter 13). The Debtor's request for permission to pay utilities from his bankruptcy estate for multiple residences, including residences occupied by others, is unreasonable. The Debtor is not living in any of the residences at present and certainly does not need more than one residence once he is released from prison. Moreover, based on the amount of the Utility Deposit, the Debtor is proposing to use at least \$120,000³ (the estimated bi-weekly cost of the utility services provided by the Utility Providers annualized) from his bankruptcy estate over the course of a year.

9. The Debtor has listed AT&T and Sprint on Exhibit A to the Motion. JEI assumes that these Utility Providers provide land line and cellular telephone service. Under the circumstances of this case, telephone service should not be considered a utility within the meaning of Section 366 because it is not necessary for the Debtor's maintenance of a minimal standard of living—the Debtor is not using telephone service at the residences in light of his incarceration. *Cf. Darby v. Time Warner Cable, Inc. (In re Darby)*, 470 F.3d 573 (5th Cir. 2006) (citing *In re Moorefield*, 218 B.R. 795 (M.D.N.C. 1997)) (cable television service not necessary to maintain a minimal standard of living; utilities are those providers who have a monopoly in a geographical area, thus limiting the debtor's ability to obtain comparable services from other providers).

³ This estimate does not take into account any Utility Providers that the Debtor adds to the list during the pendency of this case.

10. The Debtor should not be permitted to add any Utility Providers to Exhibit A or to pay any Utility Providers from property of the bankruptcy estate without further notice and hearing in this case.

11. The Debtor has given insufficient information about the residential properties covered by the Motion, the basis for paying utilities for residences that are vacant or are occupied by persons other than the Debtor, the extent to which there are any monies in the bankruptcy estate for payment of utilities and other expenses, and how payment of these expenses benefit the Debtor's bankruptcy estate.

WHEREFORE, JEI requests that this Court deny the Motion in its entirety.

JOEL ENTERPRISES, INC.

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CERTIFICATE OF SERVICE

I hereby certify that, on August 11, 2008, the undersigned caused the foregoing Objection of Joel Enterprises, Inc., to Debtor's Motion for an Order Under Section 366 of the Bankruptcy Code (I) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service, (II) Deeming Utilities Adequately Assured of Future Performance, and (III) Establishing Procedures for Determining Adequate Assurance of Payment to be served electronically through ECF or by first class mail, postage prepaid, upon the following persons and the persons listed on Schedule 1 hereto:

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