

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis  
Bankruptcy Judge  
Sacramento, California

April 3, 2014 at 10:30 a.m.

- 
1. [13-28039-E-7](#) SOHAIL AZIZ MOTION FOR COMPENSATION FOR  
SLC-5 WEST AUCTIONS, INC.,  
AUCTIONEER(S), FEES: \$1,457.76,  
EXPENSES: \$1,475.00  
2-26-14 [[106](#)]

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on February 26, 2014. By the court's calculation, 39 days' notice was provided. 28 days' notice is required. That requirement was met.

**Final Ruling:** The Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Final Application for Fees is granted.** No appearance required.

**FEES REQUESTED**

The Trustee, Sheri L. Carello, seeks an order approving compensation of fees in the amount of \$1457.76, and reimbursement of expenses in the amount of \$1475.00 for a combined total of \$2932.76 for services rendered in this case by West Auctions, Inc. Trustee represents the following in support of her application.

**Description of Services for Which Fees Are Requested**

On November 23, 2013, the Bankruptcy Court granted SLC-1, Trustee's application to employ West Auctions, Inc. to market and manage the sale of Debtor's 2009 Dodge Charger, 2004 Chevrolet Monte Carlo, 2001 Ford Taurus,

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2000 Mazda 626 LX and 2005 Chevrolet Aveo, at public auction. Dckt. No. 66.

The court authorized the employment of West Auctions, Inc. as Auctioneer for the Estate ("Auctioneer"), and ordered Auctioneer's employment subject to the following terms and conditions:

1. The Trustee is authorized to employ West Auctions, Inc. as Auctioneer for the bankruptcy estate, for the purpose of marketing and selling the vehicles as described in the Trustee's Application, at a public auction.
2. An Auctioneer's fee of 12% computed on the gross proceeds and the reimbursement of costs to be paid by the bankruptcy estate from anticipated sale proceeds pursuant to 11 U.S.C. § 328(a).
3. Notwithstanding the above approval of the terms of the estate's employment of West Auctions, Inc., pursuant to 11 U.S.C. § 328(a), the court may allow compensation in an amount or on terms different than those approved above if such terms and conditions prove to have been improvident in light of developments not anticipated at this time.

Order, Dckt. No. 66. Pursuant to the employment order, West Auctions, Inc., is to receive 12% commission on the total sale price, plus reimbursement for expenses. Trustee characterizes the order as permitting the reimbursement of costs "incurred in the transportation and storage of items," but the order does not expressly provide for such expenses.

#### **DISCUSSION**

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the

person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

- (i) unnecessary duplication of services; or
- (ii) services that were not--
  - (I) reasonably likely to benefit the debtor's estate;
  - (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

### **Benefit to the Estate**

Even if the court finds that the services billed by a professional are "actual," meaning that the fee application reflects time entries properly charged as legal services, the professional must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). A professional, which in this case was an attorney, must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the professional is obligated to consider:

- (a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?
- (b) To what extent will the estate suffer if the services are not rendered?
- (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

*Id.* at 959.

A professional's services need not result in material benefit to estate in order for them to be compensable; rather, professional fee applicant must demonstrate only that its services were reasonably likely to benefit estate when services were rendered. *In re Mednet*, 251 B.R. 103 (B.A.P. 9th Cir. 2000).

A review of the application shows that the Auctioneer's services led to a sale that was completed on January 30, 2014. The sale of the 2009 Dodge Charger, 2004 Chevrolet Monte Carlo, 2001 Ford Taurus, 2000 Mazda 626 LX, and 2005 Chevrolet Aveo generated total sales of \$12,148.00. Deductions for fees and expenses total \$2,932.76. The estate will realize net proceeds of \$9,215.24 as a result of West Auction, Inc. efforts in liquidating the 2009 Dodge Charger, 2004 Chevrolet Monte Carlo, 2001 Ford Taurus, 2000 Mazda 13 626 LX and 2005 Chevrolet Aveo.

Trustee indicates that because the sales proceeds were \$12,148.00, then Auctioneer is entitled to an 12% Auctioneer's fee of \$1,457.76. Trustee represents the "expenses" incurred by Auctioneer to be \$1,475.00, without providing any explanation as to what the expenses consisted of, when they were incurred, and why they are reasonable in Auctioneer's work in having effected a sale of the five vehicles of Debtor's estate.

The Declaration of Dennis West, who states that he is a professional appraiser and auction that is doing business under the name West Auctions, Inc., does not explain the \$1,475.00 in expenses claimed in his Declaration and the Motion. West simply testifies that the estate will realize net proceeds of \$9,215.24 as a result of Auctioneer's efforts in liquidating the vehicles, machinery, fixtures and equipment, tools and office equipment. Dckt. No. 108. There is no breakdown of the expenses reported.

#### **FEES ALLOWED**

The court finds that the Auctioneer's fee of a 12% of the commission of the gross total sales proceeds in this case, 12% of \$12,148.00, which comes out to a total of \$1,457.76 in Auctioneer's fees, to be reasonable for the services provided. The total Auctioneer fees in the amount of \$1,457.76 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter xx case.

The Auctioneer also seeks the allowance and recovery of costs and expenses in the amount of \$1,475.00. Trustee's Motion and Auctioneer's Declaration, however, provide no explanation as to what these expenses were, and how the Auctioneer incurred them. In the absence of an explanation of these expenses, the court will not authorize the payment of expenses for the Auctioneer in this Chapter 13 case.

Auctioneer is allowed, and the Trustee is authorized to pay, the following amounts as compensation as a professional in this case:

|                    |             |
|--------------------|-------------|
| Professional Fees  | \$ 1,457.76 |
| Costs and Expenses | \$ 0.00     |

For a total final allowance of \$1,457.76 in Auctioneer's Fees and Costs in this case.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Fees and Expenses filed by Auctioneer having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that West Auctions, Inc., is allowed the following fees and expenses as a professional of the Estate:

West Auctions, Inc., Auctioneer for the Estate  
Applicant's Fees Allowed in the amount of \$1,457.76  
Applicants Expenses Allowed in the amount of \$0.00,

**IT IS FURTHER ORDERED** that the Application is denied as to \$1,475.00 in expenses, with without prejudice.

**IT IS FURTHER ORDERED** that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

2. [13-20051-E-7](#) TYRONE BARBER  
HSM-2

**MOTION TO EXTEND DEADLINE TO  
FILE A COMPLAINT OBJECTING TO  
DISCHARGE OF THE DEBTOR  
2-18-14 [[207](#)]**

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 18, 2014. By the court's calculation, 44 days' notice was provided. 28 days' notice is required. That requirement was met.

**Final Ruling:** The Motion to Extend the Time to File an Objection to Discharge was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re*

*Eliapo*), 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion to Extend the Time to File an Objection to Discharge is granted.**  
No appearance required.

The Chapter 7 Trustee seeks an extension of time to object to the entry of Debtor's discharge. This case was filed as a voluntary Chapter 11 case on December 20, 2012, but was ordered to be converted to a Chapter 7 case at a hearing held on November 19, 2013. The Trustee was appointed as the Chapter 7 Trustee on November 25, 2013, and continues to serve in that capacity.

The deadline to file a complaint objecting to the discharge of the Debtor is set for February 18, 2014. Trustee requests that the deadline for the Trustee to file a complaint objecting to the discharge of the Debtor be extended until May 19, 2014. This Motion was filed before the expiration of the deadline for filing of objections to discharge. Motion filed February 18, 2014, Dckt. 207.

Based on the court's docket, Debtor has filed more than ten amendments to his schedules. Trustee requests additional time to review. Debtor's Meeting of Creditors has been continued twice, and it presently set for February 20, 2014. Trustee is attempting to schedule to Debtor an in-person inspection of certain personal property assets during the week of February 16, 2014. Trustee anticipates the Debtor's cooperation in these matters. Debtor's cooperation in the matter is important to the Trustee's administration of the estate, and Debtor's cooperation is a factor in the evaluation of any possible objection to discharge. For those reasons, Trustee requests that the court extend the deadline to object to Debtor's discharge.

The court may, on motion and after a hearing on notice, extend the time for objecting to the entry of discharge for cause. Fed. R. Bankr. P. 4004(b). The Chapter 7 Trustee explains that he is currently investigating the assets and liabilities of the Debtor and Debtor's pre-petition use of assets of the Estate, as well as Debtor's conduct as Debtor-in-Possession for one (1) year prior to Trustee's appointment. To permit a proper investigation, the Chapter 7 Trustee requests the deadline to object to the entry of discharge be extended to May 19, 2014, which is an extension of approximately 90 days.

The court finds the Trustee's need to perform further investigation of the Debtor's assets, liabilities, and pre-petition use of Estate property to be sufficient cause. Therefore, the motion is granted and the deadline for the Chapter 7 Trustee to object to Debtor's discharge is extended to May 19, 2014.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Extend the Time to File an Objection to Discharge filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted and the deadline for the Chapter 7 Trustee to object to Debtor's discharge is extended to May 19, 2014.

3. [13-35954-E-7](#) ICING ON THE CUPCAKE, MOTION TO SELL  
HLC-2 LLC 2-27-14 [77]

Local Rule 9014-1(f)(2) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors. and Office of the United States Trustee on March 3, 2014. By the court's calculation, 31 days' notice was provided. 21 days' notice is required. That requirement was met.

**Tentative Ruling:** The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and Federal Rule of Bankruptcy Procedure 2002(a)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to deny without prejudice the Motion to Permit the Trustee to Sell Property.** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Bankruptcy Code permits the Debtor to sell property of the estate after a noticed hearing. 11 U.S.C. § 363(b).

BBC Blue Oaks, LLC or its assign(s) ("BBC"), with the consent and joinder of Chapter 7 Trustee, John R. Roberts (Dckt. No. 81), seeks court authorization for the Trustee to sell to BBC two vehicles from the bankruptcy estate of Debtor, Icing on the Cupcake, LLC. In the event of overbids, BBC will to the highest most qualified bidder for \$16,000 cash, subject to overbids, all right, title, claims and interests of the Chapter 7 Estate, and/or Debtor Icing on the Cupcake, LLC, in and to two motor vehicles of the Estate ("Vehicles").

The terms and conditions of the proposed sale are as follows:

1. Description of the Vehicles to be Purchased/Sold: The Vehicles are generally described in Debtor's Schedules B & D as 2011 Toyota Scion, "approx. miles 16,000, condition good" (VIN #JTLZE4FE7CJ008750) (hereinafter, the "Scion") and "2010 Mercedes Sprinter Delivery Vehicle, approx. miles 18,000, condition good" (VIN #D3PE8CC5B5487152) (hereinafter, the "Sprinter").

2. Acceptance Subject to Court Approval and Overbidding: The sales of the Vehicles to BBC is subject to overbids by interested, qualified third parties and approval of this court. BBC shall be primarily responsible for drafting and prosecution of the appropriate motion. Overbids shall be permitted if made any time prior to the end of the hearing on BBC's motion for approval of this sale (the "Motion").
3. Purchase Price: The total purchase price for the vehicles, subject to court approval and overbids at the hearing on this Motion, is \$16,000 case (the "purchase price") payable by BBC (of by the successful bidder) upon entry of the court order approving the sale.
4. Allocation of Purchase Price for the Scion: In recognition of Debtor's admission in its Schedule D that the Scion is over-encumbered, and therefore the Estate's interest in the vehicle is *de minimis*, and because BBC is purchasing the Scion "subject to" the Toyota Financial Services lien described at Debtor's Schedule D, BBC states that only \$1 of the purchase price shall be allocated to the purchase of the Scion.
5. Allocation of Purchase Price for the Sprinter: The balance of the purchase price shall be allocated to the Sprinter, which according to Debtor's Schedule B is worth \$21,000 (the value of which Trustee acknowledges is disputed by BBC as inflated), and shall be applied as necessary to pay off in full the lien in favor of Daimler Truck Finance estimated in Debtor's Schedule D to be approximately \$8,331 as of the Petition Date.
6. Sale Free and Clear of Liens, as to Sprinter Only: In exchange for the purchase price, BBC or its assign will receive title to the Sprinter free and clear of liens, interests and claims, and shall separately receive title to the Scion subject only to the Toyota Financial Services lien. The lien of Daimler Truck Finance shall immediately be paid in full by Trustee from the purchase price, while the lien of Toyota Financial Services shall remain unaffected by the sale notwithstanding the transfer of the Estate's interest in that vehicle to the Buyer. BBC shall take title free and clear of, and is not responsible in any way for other claims against the Estate and/or relating to the Vehicles.
7. Sale "As-is, where-is, without warranties" : The vehicles shall be purchased by buyer "as-s, where-is" without warranties of any kind except as to title (i.e Trustee warrants that title to the vehicles is held by Icing on the Cupcake, LLC Estate).
8. Delegation of Duty to Prosecute Motion: BBC shall also be primarily responsible for drafting, filing, and noticing the Motion to all creditors, and obtaining court approval of the sale, which motion the Trustee has agreed to support, subject to court approval and any overbids.
9. Break Up Fee: In the event that BBC is outbid by an unaffiliated, unrelated overbidder (the Motion is granted, but one or more of the

vehicles are sold to another bidder) there will be a "break-up fee" paid to BBC from the gross sale proceeds equal to BBC's actual costs of filing and prosecuting the Motion, and insuring the vehicles (pending the outcome of the Motion) and not to exceed \$2,500.

10. Duty to Cooperate: Trustee is responsible for, and shall cooperate with BBC or its assign, or in the event that BBC is outbid, with the successful bidder) effectuating the transfer of title as contemplated and to sign all document and process required to consummate the sale and transfer of title to the vehicles, including a bill of sale, and to immediately pay off all liens against the Sprinter with the purchase price.

BBC and Trustee further request that the order expressly require that all liens against the Sprinter unpaid at closing shall attach to the net sale proceeds in the same order and priority as those liens attached to the Sprinter.

#### **OPPOSITION BY CREDITOR**

Toyota Motor Credit Corporation (hereinafter referred to as "Toyota") opposes the Motion for Approval to Sell Motor Vehicles to BBC Blue Oaks, LLC or to the Highest Qualified Bidder filed by Creditor, BBC Blue Oaks, LLC (hereinafter referred to as "BBC") on the following grounds:

On February 9, 2012, Debtor, Icing on the Cake, LLC ("Debtor") and Shirley Nagasawa, (as Buyer and Co-Buyer) entered into a written Retail Installment Sale Contract with Roseville Toyota, for the financed purchase of the 2012 Scion xB (Vehicle Identification Number JTLZE4FE7CJ008750).

Toyota states that Debtor agreed and became obligated to pay the sum of \$20,639.47, with interest accruing at the contract rate of 3.09% per annum, for the financed purchase of the vehicle. Toyota bases its opposition to the Motion on the grounds that Paragraph 2b of the prevailing Security Agreement which was entered into by the Debtor and Nagasawa, expressly prevents the sale or transfer of the vehicle without written consent of Secured Creditor. Paragraph 2b of the Retail Installment Sale Contract states:

You agree not to remove the vehicle from the U.S. or Canada or to sell, rent, lease or transfer the vehicle without our written permission.

Toyota states that it has not given written consent for the sale or transfer of the vehicle and will not give written consent to do so without payment in full on the loan obligation, for which Shirley Nagasawa still remains liable. Toyota asserts that, based on the automated Kelley Blue Book Auto Market Report, the vehicle still has a retail, replacement value to Debtor of \$15,150.00. Toyota opposes the Motion on the further ground that BBC is only offering \$1 of the purchase price to be allocated this vehicle. Toyota contends that the current payoff on the subject account is \$13,547.85, plus any accrued interest and attorney's fees incurred by Toyota for its efforts to enforce its rights under the terms of the Security

Agreement.

Toyota further opposes the Motion to Sell the Debtor's interest in the vehicle, as such effort is being undertaken without the apparent right or consent of the non-filing Co-Debtor Shirley Nagasawa . Toyota requests that the Motion to Sell be denied; or, in the alternative, that Toyota receive the full payoff of the account.

#### **RESPONSE OF MOVANT BBC**

Toyota has objected to the transfer of the Estate's interest in the Scion to BBC or, in the event of overbids, to the highest most qualified bidder on the grounds that such transfer is not permitted under the applicable loan documents, and seeks reimbursement of attorney's fees and costs from BBC and/or from the Debtor.

BBC states that efforts to negotiate a settlement with Toyota (which would have allowed the sale of the Estate's interest in the Scion to proceed with Toyota's consent) have failed and BBC has agreed to withdraw the Motion as it affects Toyota, and withdraws the Motion as it affects Toyota. In exchange for the withdrawal of the Motion as it affects the Scion, Toyota through its attorney Austin Nagel, has agreed to withdraw all affirmative relief requested in the Opposition.

Furthermore, on March 27, 2014, attorney Jennifer Wang contacted George C. Hollister, Counsel for BBC Blue Oaks, LLC, on behalf of Mercedes Benz Financial Services USA, LLC ("Mercedes Benz"), and verbally represented that the current loan balance secured by the Sprinter is currently \$25,465, and not the \$8,331 referenced in Debtor's Schedule D. Dckt. No. 107. Wang stated that her instructions are to oppose any sale wherein the full balance is not paid as a condition to the transfer of the title free and clear of liens and encumbrances. BBC states that the efforts to confirm the loan balance owed to Mercedes Benz and negotiate a settlement with Mercedes Benz are ongoing.

In the likely event that no settlement is reached which would allow the Motion to proceed as to the Sprinter on the terms and conditions referenced in the Motion, BBC states that it shall then withdraw the Motion as it affects Mercedes Benz and the Sprinter vehicle without the need for Mercedes Benz to file any opposition. The Motion as it affects Mercedes Benz will only proceed with the express written consent of Mercedes Benz and failing that, the Motion will be voluntarily withdrawn in its entirety at or prior to the April 3, 2014 hearing date.

#### **DISCUSSION**

The Trustee and BBC request approval to sell the real property free and clear of all liens on the subject real property pursuant to 11 U.S.C. § 363(f)(2) and (3). Pursuant to 11 U.S.C. § 363(f)(2), the Trustee may sell property free and clear of any interest in such property of an entity other than the estate if such an entity consents. Under 11 U.S.C. § 363(f)(3), the Trustee may sell property free and clear of any interest in such property of an entity other than the estate only if such interest is a lien, and the

price at which such property is to be sold is greater than the aggregate value of all liens on such property.

The Movants have withdrawn the request to sell the 2012 Toyota Scion, thereby rendering the Objection of Toyota Motor Credit Corporation moot.

Movants also state that with respect to the purposed sale of the Mercedes Benz that they will be proceeding with the sale only if Mercedes Benz Financial Services, USA consents to the sale.

No consent having been provided to the court, the Motion is denied without prejudice.

The court shall issue a Minute Order substantially in the following form shall be prepared and issued by the court:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to sell property filed by the Trustee and Buyer having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Sell is denied without prejudice.