

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT  
BANKRUPTCY JUDGE

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October 27, 2004

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Subject: Cen-Dak Leasing of North Dakota, Inc.,'s  
counterclaim against Marlin Hutterian Brethren in  
*Marlin Hutterian Brethren v. Thomas J. Wipf*  
(*In re Wipf*), Adversary Proceeding No. 03-1060  
Chapter 7, Bankr. No. 03-10306

Dear Counsel:

The matter before the Court is the counterclaim for replevin that Third-party Defendant Cen-Dak Leasing of North Dakota, Inc. ("Cen-Dak"), has brought against Plaintiff Marlin Hutterian Brethren (the "Marlin Colony"). For the reasons set forth below, the Court will vacate its June 15, 2004, order in which it allowed Cen-Dak to file a counterclaim for replevin against the Marlin Colony and it will dismiss the counterclaim without prejudice.

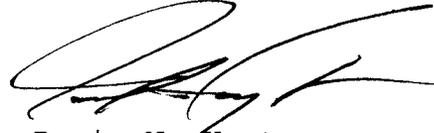
First, when the June 15, 2004, order was entered, the Court did not know that title to the subject potato trailers was unsettled. While the present record indicates that Cen-Dak, not the Marlin Colony, is presently entitled to possession of the trailers, who lawfully holds title to those trailers should be resolved at the same time actual possession is resolved. All the parties necessary to do that are not before this Court. Therefore, the issues of both title to and possession of the subject potato trailers are better resolved by a court that would have jurisdiction over all parties concerned.

In re Wipf  
October 27, 2004  
Page 2

Further, for whatever reason, the Marlin Colony did not file a reply to Cen-Dak's counterclaim.<sup>1</sup> That missing pleading, coupled with the trailer title problems that surfaced at trial and the Marlin Colony's reluctance to allow additional evidence on the title issue, make it difficult for this Court to prepare and present proposed findings and conclusions regarding Cen-Dak's replevin claim to the District Court under 28 U.S.C. § 157(c)(1).

An appropriate order will be entered vacating the June 15, 2004, order, and dismissing without prejudice Cen-Dak's replevin claim. Cen-Dak's September 30, 2004, Motion to Supplement the Existing Record will be rendered moot.

Sincerely,



Irvin N. Hoyt  
Bankruptcy Judge

NOTICE OF ENTRY  
Under F.R.Bankr.P. 9022(e)  
Entered

OCT 27 2004

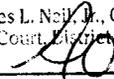
Charles L. Nail, Jr., Clerk  
U.S. Bankruptcy Court  
District of South Dakota

INH:sh

CC: adversary file (docket original; serve parties in interest)

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

OCT 27 2004

Charles L. Nail, Jr., Clerk  
U.S. Bankruptcy Court, District of South Dakota  
By 

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<sup>1</sup> Perhaps the Marlin Colony was waiting for the Court to set a deadline under Fed.R.Bankr.P. 7012(a), though Fed.R.Civ.P. 12(b) and 14(a), which are incorporated by Fed.Rs.Bankr.P. 7012(a) and 7014, would not appear to require such an order.

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