

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

HEARING DATE: December 21, 2004
HEARING TIME: 10:00 a.m.

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In re : Case No. 04-13395 (SMB)
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: :
HOWARD L. MARGULIS, : (Chapter 11)
: :
Debtor. : NOTICE OF MOTION
: :
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PLEASE TAKE NOTICE that upon the annexed application, the United States Trustee for the Southern District of New York will move this Court before the Honorable Stuart M. Bernstein, Bankruptcy Judge, in the United States Bankruptcy Court, Alexander Hamilton Custom House, One Bowling Green, New York, New York 10004 on December 21, 2004 at 10:00 a.m., or as soon thereafter as counsel can be heard, why an order should not be entered converting this Chapter 11 case to a Chapter 7 case or, in the alternative, dismissing this Chapter 11 case, and for such other and further relief as this Court may deem just and proper. The original application and memorandum of law are on file with the Clerk of the Bankruptcy Court.

PLEASE TAKE FURTHER NOTICE that any responsive papers should be filed with the Court and personally served on the United States Trustee, at 33 Whitehall Street, 21st Floor, New York, New York 10004-2112, to the attention of Hollie T. Elkins, Esq., no later than three (3) days prior to the return date set forth above. Such papers shall conform to the Federal Rules of

Civil Procedure and identify the party on whose behalf the papers are submitted, the nature of the response, and the basis for such response.

Dated: New York, New York
November 19, 2004

DEIRDRE A. MARTINI
UNITED STATES TRUSTEE

By: /s/ Hollie T. Elkins
Hollie T. Elkins (HE 5060)
Attorney

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APPLICATION OF THE UNITED STATES TRUSTEE
TO CONVERT THIS CHAPTER 11 CASE TO A
CHAPTER 7 CASE OR, IN THE ALTERNATIVE,
TO DISMISS THIS CHAPTER 11 CASE

TO THE HONORABLE STUART M. BERNSTEIN, CHIEF BANKRUPTCY JUDGE:

The United States Trustee for the Southern District of New York, in furtherance of the duties and responsibilities set forth in 28 U.S.C. § 586(a)(3) and (5), does hereby apply to this Court for an order converting this Chapter 11 case to a Chapter 7 case, pursuant to 11 U.S.C. § 1112(b), or dismissing this Chapter 11 case. In support thereof, the United States Trustee represents and alleges as follows:

1. The debtor, Howard L. Margulis, Esq., (the “debtor”) commenced this individual Chapter 11 case by filing a voluntary petition on May 17, 2004. Upon information and belief, the debtor has continued to work as an attorney since filing for bankruptcy. Upon information and belief, post-petition, the debtor left his job as a partner at Holland & Knight LLP to become a partner in the corporate department at the Salans law firm.

2. The United States Trustee has been unable to appoint a committee of unsecured creditors in this case.

3. Upon information and belief, on January 12, 2004, Sharlene R. Margulis, the debtor's now-former spouse, filed for relief under Chapter 7 of the Bankruptcy Code in New Jersey. See In re Sharlene Robin Margulis, Chapter 7 Case No. 04-11030 (MS). Robert B. Wasserman, Esq. is the Chapter 7 trustee assigned to her bankruptcy case.

4. Upon information and belief, the debtor's liabilities vastly outweigh his assets. As set forth in his petition, the debtor had assets of \$360,581.63, and liabilities of \$1,247,616.58. Given that the secured debt alone amounted to \$777,279.05, it does not appear that the debtor has the financial wherewithal to reorganize.

5. The largest asset scheduled by the debtor, consists of an interest in real property located at 17 Fernwood Court, East Brunswick, New Jersey 08816 (the "New Jersey property"). The New Jersey property is currently occupied by his ex-wife, furthermore, there is a dispute¹ as to whether the debtor has rights to this property, which is also heavily encumbered by two mortgages. Upon information and belief, Robert Wasserman, Esq. the New Jersey Chapter 7 trustee, was unable to sell the property for significantly more than the mortgage amounts, thus even if the debtor was awarded a share in the proceeds of the New Jersey property, there would be very little value, if any, to fund a plan.

¹Howard L. Margulis v. Sharlene Robin Margulis and Robert B. Wasserman, Adversary Proceeding No. 04-02819 (MS). Upon information and belief, the debtor's ex-spouse was the sole titleholder to the New Jersey property, but the debtor made mortgage payments on that property. Note: In this adversary proceeding, the debtor appears to be represented by his bankruptcy counsel as well as an attorney named Susan Adler, Esq. Upon information and belief, the debtor has failed to file an application requesting Court authorization to retain Ms. Adler as his counsel. The United States Trustee therefore reserves her rights to object to the retention of Ms. Adler, as well as the payment of her fees.

6. The debtor scheduled an interest in an art collection with a value of \$ 45,750.00. Upon information and belief, most of the art collection is located in New Jersey, and is being liquidated by Jack Boris, Esq.

7. It appears that the only way in which this debtor would be able to reorganize would be if he made a commitment to fund a plan through a substantial contribution from his post-petition earnings. However, a brief review of the debtors operating reports, indicate that the debtor's post-petition personal expenses are very high, leaving little room for a contribution. On November 2, 2004, the debtor filed his monthly operating reports for the period from July through October 2004. For the period from July through September 2004, the debtor earned a post-petition salary of \$14,516.00, yet his expenditures exceeded his earnings by over two thousand dollars a month, for a loss of approximately \$7,127.00 over this period. The debtor does not appear to have made an effort to reduce his voluntary personal expenses. The debtor only achieved a net personal income for October 2004 in the amount of \$4,875.00, due to an increase in post-petition earnings to \$22,100.00. His lavish post-petition lifestyle includes the following expenses: 1) Food, Clothing, Hygiene: expenditure of \$3,000.00² per month and 2) Rent: expenditure of \$6,450.00 per month. The debtor has also spent \$4,492.50 on college expenses³, as set forth on the combined May-June 2004 Monthly Operating Report. The debtor's failure to adopt a frugal lifestyle while in bankruptcy does not provide much hope for his ability to fund a confirmable plan of reorganization.

²It is likely that this amount is estimated, since the debtor lists the same amount for this category every month.

³Upon information and belief, the debtor has a daughter in college.

8. The debtor has failed to file a confirmable plan or a disclosure statement since this case was commenced over 6 months ago. The debtor's failure to file a confirmable plan, and move towards consummating his case, indicates that there is no likelihood of this debtor's reorganization.

9. Upon information and belief, the debtor has failed to file monthly operating reports in a timely fashion throughout the pendency of this case. Additionally, the reports filed fail to comply with the United States Trustee Guidelines. The debtor has failed to include his monthly disbursements and monthly operating profit/loss on the cover sheet of each operating report. It is therefore unclear at this time as to whether the debtor has fully complied with his duty to pay quarterly fees to the United States Trustee as required by 28 U.S.C. § 1930(a)(6). The failure to pay this administrative obligation is cause to convert a Chapter 11 case to a Chapter 7 case or to dismiss a Chapter 11 case pursuant to 11 U.S.C. § 1112(b)(10).

CAUSE FOR CONVERSION OR DISMISSAL OF THIS

CHAPTER 11 CASE UNDER 11 U.S.C. § 1112 (B) EXISTS HEREIN

10. Section 1112(b) of the Bankruptcy Code describes a variety of factors which may constitute "cause" for the conversion of a Chapter 11 case to a Chapter 7 case or for the dismissal of a Chapter 11 case in its entirety. See 11 U.S.C. § 1112(b) (Collier Pamphlet ed. 1998). Under this provision, the court may find cause in the following circumstances, among others:

- (1) continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
- (2) inability to effectuate a plan; or
- (3) unreasonable delay by the debtor that is prejudicial to creditors.

See 11 U.S.C. § 1112(b)(1-3). However, the list contained in section 1112(b) is not "exhaustive." See In re C-TC 9th Avenue Partnership, 113 F.3d 1304, 1311 (2d Cir. 1997); In re Tornheim, 181 B.R. 161, 163 (Bankr. S.D.N.Y. 1995), appeal dismissed, 1996 WL 79333 (S.D.N.Y., Feb. 23, 1996); In re Mechanical Maintenance, Inc., 128 B.R. 382, 386 (E.D. Pa. 1991); In re Devine, 131 B.R. 952, 955 (Bankr. S.D. Tex. 1991) (the lack of good faith may constitute cause for dismissal); 7 Collier on Bankruptcy ¶1112.04[1] (15th ed. Revised 1996).

The lack of good faith in maintaining and pursuing a Chapter 11 case, warranting either conversion or dismissal, rests on an examination of the totality of the circumstances. See In re Altchek, 124 B.R. 944, 955-957 (Bankr. S.D.N.Y. 1991). (in this individual case, Judge Schwartzberg noted that creditor's could move for conversion or dismissal of the case on the grounds that without a contribution from post-petition earnings, the debtor would be unable to effectuate a plan.). See also In re Hi-Toc Development Corp., 159 B.R. 691, 693 (Bankr. S.D.N.Y. 1993)(circumstances warranted dismissal where real estate taxes and United States Trustee quarterly fees were unpaid, operating reports not filed, and no plan presented by debtor in over 17 months); In re Sal Caruso Cheese, Inc., 107 B.R. 808, 817-818 (Bankr. N.D.N.Y. 1989) (conversion warranted where debtor filed only one misleading operating report and displayed disregard of the strictures of the Code); In re Cohoes Indus. Terminal, Inc., 65 B.R. 918 (Bankr. S.D.N.Y. 1986) (debtor's failure to file proper schedules of assets and liabilities, accurate monthly operating reports, an inability to obtain adequate insurance, inter alia, constituted sufficient cause for either dismissal or conversion under section 1112(b)). Cf. In re Federal Roofing Co., Inc., 205 B.R. 638, 641 (Bankr. N.D. Ala. 1996)("Proof of any one of the factors listed in § 1112(b) is sufficient to warrant and justify conversion.").

11. As noted above, it appears that the debtor has failed to fully comply with his duty to pay the quarterly fees required under 28 U.S.C. § 1930.⁴ See 28 U.S.C. § 1930(a)(6) (Collier Pamphlet ed. 1998). Section 1112(b)(10) of the Code provides that nonpayment of any fees charged under chapter 123 of title 28 is cause to convert or dismiss a Chapter 11 case. See 11 U.S.C. § 1112(b)(10) (Collier Pamphlet ed. 1998); see also In re Tornheim, 181 B.R. at 164 (failure to pay quarterly fees, without more, provides cause to dismiss or convert case); In re Hi-Toc Development Corp., 159 B.R. at 693. The fees assessed pursuant to 28 U.S.C. § 1930(a)(6) fall within the category of fees levied under chapter 123 of title 28. In the present case, this debtor was informed in writing of its obligation to pay these fees and has not paid them in full to date.

As noted earlier, the inability of the debtor to effectuate a plan under Chapter 11 or unreasonable delay by the debtor that is prejudicial to creditors constitute cause for the conversion or dismissal of a Chapter 11 case. See 11 U.S.C. § 1112(b)(2-3). The debtor in this case has not filed a proper plan or disclosure statement since the commencement of this case. Dismissal or conversion under section 1112(b) is appropriate where the debtor's failure to file a plan after a reasonable period of time "indicates its inability to do so whether the reason for the debtor's inability to file is its poor financial condition, the structure of the claims against it or some other reason." See Hall v. Vance, 887 F.2d 1041, 1044 (10th Cir. 1989); see also In re Tornheim, 181 B.R. at 164-65 (where debtors' case was not complex, conversion or dismissal was required because debtors' failure to file a plan showed both unreasonable, prejudicial delay

⁴As amended by Sec. 211 of the Balanced Budget Downpayment Act, I, Pub. L. No. 104-99, 110 Stat. 26, 37-38 (1996)(amending Pub. L. No. 104-91).

and inability to effectuate a plan); In re Hi-Toc Development Corp., 159 B.R. at 693; In re Canon, 129 B.R. 465, 470 (Bankr. S.D. Tex. 1989). Therefore, this Court should find cause for the conversion or dismissal of this case since the debtor has not filed a plan and disclosure statement after a reasonable period of time in this case.

12. In the instant case, an overall assessment of the facts and circumstances of this case indicate a failure on the part of the debtor to properly carry out the debtor's fiduciary obligations to effect a proper Chapter 11 case.

13. No prior application seeking the relief requested herein has been filed by the United States Trustee. The United States Trustee respectfully requests that the Court waive the requirement of filing a separate memorandum of law.

14. Based on the foregoing, it is respectfully submitted that the debtor's delay in filing a plan, and apparent inability to reorganize constitute cause for dismissal or conversion of this Chapter 11 case to a Chapter 7 case, pursuant to 11 U.S.C. § 1112(b).

WHEREFORE, the United States Trustee respectfully requests that the Court enter an order converting this Chapter 11 case to a Chapter 7 case or, in the alternative, dismissing this Chapter 11 case, pursuant to 11 U.S.C. § 1112(b), and granting such other and further relief as may be deemed just and proper.

Dated: New York, New York
November 19, 2004

Respectfully submitted,

DEIRDRE A. MARTINI
UNITED STATES TRUSTEE

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