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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

FILED

96 MAY 16 PM 3: 53

U.S. BANKRUPTCY COURT  
DIST. OF SOUTH CAROLINA

IN RE:  
  
Golf Course Marketing Corporation,  
  
Alleged Debtor.

C/A No. 95-76646-W

JUDGMENT

Involuntary Chapter

**ENTERED**  
MAY 17 1996  
R. J. J.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the involuntary petition is granted and the Alleged Debtor, Golf Course Marketing Corporation, is adjudicated a Chapter 7 debtor. The Debtor's motion for abstention and for attorney's fees, costs, and actual and punitive damages is denied.

*John E. Waite*  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,  
May 16, 1996.

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IN RE:

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C/A No. 95-76646-W

ORDER

Involuntary Chapter 7

ENTERED

MAY 11 7 1996

THIS MATTER comes before the Court upon the filing of an involuntary Chapter 7  
bankruptcy petition pursuant to 11 U.S.C. § 303<sup>1</sup> by Himmelsbach Communications, Inc.  
("Himmelsbach"), Michael Owens d/b/a/ Homes and Land Magazine ("Homes"), and Richard B.  
Sheridan ("Sheridan") against Golf Course Marketing Corporation ("GCMC"). After receiving  
the testimony, carefully considering all the evidence and weighing the credibility of the  
witnesses, the Court makes the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. Grover Richard Heckle is the owner of 100% of the stock in GCMC, a South Carolina corporation whose principal business is real estate development, sales and marketing.
2. In 1991, GCMC negotiated a contract with International Paper Realty Company whereby, in 1992, GCMC received an option to purchase, in phases, certain real estate in Horry County, South Carolina adjoining Indian Wells Golf Course (hereinafter, the real estate shall be referred to as the "Property").
3. GCMC subsequently developed a plan to market and develop the Property.

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<sup>1</sup> Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, shall be by section number only.

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4. In 1992, Heckle, his wife and GCMC commenced development of the Property.
5. On or about August 30, 1993, Heckle, Sheridan and Wayne Vereen ("Vereen") formed Sweetwater Development Corporation ("Sweetwater"), a South Carolina corporation, to complete the condominium development on the Property. Heckle, Sheridan and Vereen each own stock in Sweetwater.
6. Subsequently, on or about September 1, 1993, Sweetwater and Heckle entered into a contract whereby Heckle or GCMC was to be the exclusive sales and marketing agent for the Sweetwater condominium development. Pursuant to the exclusive sales and marketing contract, Heckle or GCMC was to receive 12% of the sale price of each Sweetwater condominium.
7. Vereen, doing business as Arthur Vereen Construction, Inc., was the construction contractor for Sweetwater.
8. On or about October 6, 1993, GCMC transferred and assigned to Sweetwater its rights under the option contract for the Property.
9. The relationship between Heckle, Sheridan and Vereen deteriorated during 1994, resulting in Sweetwater's hiring a new sales and marketing agent to replace Heckle and GCMC.
10. Prior to late fall of 1994, Heckle was President of Sweetwater, Sheridan was Vice President and Vereen was Secretary and Treasurer.
11. In late fall of 1994, Sheridan and Vereen voted to replace Heckle as President of Sweetwater.
12. Sometime in 1995, Sheridan and Vereen as shareholders voted to remove Heckle from

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the Board of Directors of Sweetwater.

13. Sheridan and Vereen have, along with others, formed a new corporation, Phoenix Development, Inc. ("Phoenix"). Thereafter, Phoenix purchased the balance of the Property, formerly under option to Sweetwater, from International Paper and subsequently conveyed it to Sweetwater. Sweetwater is proceeding to develop the condominium project.
14. On September 7, 1995, GCMC filed an action in Horry County Court of Common Pleas, Case No. 95-CP-26-2625 against Sheridan, Vereen, Sweetwater and Phoenix ("State Court Litigation").
15. Sweetwater has not paid Heckle or GCMC any sales commissions for Sweetwater closings since September 1994, at Sheridan's direction.
16. On November 27, 1995, Himmelsbach, Homes, and Sheridan filed the within involuntary Chapter 7 petition against GCMC.
17. Also on November 27, 1995, Wachesaw Plantation Club ("Wachesaw"), SMS of Orangeburg ("SMS") and Gordon De Fossett ("De Fossett") filed an involuntary Chapter 7 bankruptcy petition against Heckle.
18. Sheridan asserts a claim against GCMC in the amount of \$111,000.00 for an unsecured loan.
19. Himmelsbach asserts a claim against GCMC in the amount of \$10,374.25 for advertising expenses. GCMC has paid, at least twice, on said account.
20. Homes also asserts a claim against GCMC in the amount of \$9,700.00 for advertising expenses. Again, GCMC has paid, at least once, on said account.

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21. Apart from the three petitioning creditors, the only other debts GCMC admits it owes are to the following parties: Mr. McLoughlin, The Scottsman Group, Inc., Mr. Wise, Mr. Utsey, Mr. Kryza, the Laroses (parents-in-law of Heckle) and Heckle's parents.
22. GCMC disputes that it owes Himmelsbach or Homes any money. GCMC asserts that Sweetwater is responsible for these debts for the reasons at issue in the State Court Litigation.

### CONCLUSIONS OF LAW

Section 303(b) provides that an involuntary bankruptcy case is commenced by a petition filed:

- (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least \$10,000 more than the value of any lien on the property of the debtor securing such claims held by the holder of such claims;
- (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549 or 724(a) of this title, by one or more of such holders that hold in the aggregate at least \$10,000 of such claims.

11 U.S.C. § 303(b). The petitioning creditors have the burden of proving by a preponderance of the evidence, the statutory requirements of § 303. In re Gills Creek Parkway Assoc., L.P., No. 95-74292-W (Bkrtcy. D.S.C. Nov. 3, 1995) and In re Knoth, 168 B.R. 311 (Bkrtcy. D.S.C. 1994). The number of creditors involved in this involuntary petition is critical. The involuntary petition was filed by three creditors, two of which allegedly hold claims in excess of \$10,000.00. Pursuant to § 303(b)(1), if there are less than twelve holders of claims, any one of the claimants whose claim is not contingent or the subject of a bona fide dispute, may file the involuntary petition as long as that claim is at least \$10,000.00. If there are more than twelve creditors, the

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petition will require three claimants, all three of which are not the subject of a bona fide dispute.

At trial, Heckle testified that apart from the petitioning creditors, a Mr. McLoughlin and The Scotsman Group, Inc. were also creditors of GCMC. While Heckle further testified that he could not remember the other creditors of GCMC, he did recall that his in-laws and his parents were also creditors of GCMC.

As the definition of a "person" includes individuals, partnerships and corporations<sup>2</sup>, and because the term "insider" includes a relative of a person in control of the debtor if the debtor is a corporation<sup>3</sup>, the claims of Heckle, his wife, his in-laws and his parents will not be included in a tally of creditors pursuant to § 303(b)(2). See In re Elsa Designs, Ltd., 155 B.R. 859 (Bkrtcy.S.D.N.Y. 1993). Therefore, based upon the testimony of Heckle and the evidence presented, the Court must conclude that GCMC has fewer than 12 eligible creditors.

The number of creditors is a critical issue in this case because the Alleged Debtor primarily asserted at trial that the claim of Sheridan is the subject of a bona fide dispute. As to the claim of Himmelsbach, a petitioning creditor with a claim in excess of \$10,000.00, the Alleged Debtor asserted that it is a debt of Sweetwater and not a debt of GCMC. However, from the preponderance of the evidence presented and weighing the testimony of the witnesses, the Court disagrees with the Alleged Debtor's argument regarding Himmelsbach for the following reasons.

The only alleged dispute of the Himmelsbach claim asserted by GCMC is that it is not a

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<sup>2</sup> 11 U.S.C. § 101(41).

<sup>3</sup> 11 U.S.C. § 101(31)(B).

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debt of GCMC. Originally in its Answer, GCMC did not even dispute this claim. GCMC then amended its answer and alleged that the debt was owed by Sweetwater and not GCMC. However, GCMC, through the testimony of Heckle, admitted that when these advertising expenses were incurred, GCMC and not Sweetwater was the exclusive sales and marketing agent for the development and in conjunction therewith was responsible for advertising the development. GCMC, through the testimony of Heckle, also admitted that it placed advertisements for the development with Himmelsbach, and directly paid, at least twice, on the account. Additionally, it appears that at the time the Himmelsbach account was created, Sweetwater Development Corporation was not even in existence. Therefore, based upon the uncontroverted testimony elicited at trial, the Court finds that the claim of Himmelsbach is in the amount of \$10,374.00 and is a debt of GCMC and not the subject of a bona fide dispute.

Having found that there are fewer than twelve creditors of the Alleged Debtor and that the claim of Himmelsbach is in an amount in excess of \$10,000.00 and is a debt of the Alleged Debtor, pursuant to § 303(h)(1) the Court must now determine whether the Alleged Debtor is paying its debts as such debts become due.

The date of determining whether the alleged debtor is paying his debts as they become due is the date of the involuntary petition, November 27, 1995. In re Knoth, 168 B.R. at 317. The factors that a court should look to in making the determination of whether an alleged debtor is paying include the timeliness of payments on past due obligations, the amount of debts long overdue, the length of time during which the debtor has been unable to meet large debts, a reduction in the debtor's assets, and the debtor's deficit situation. In re Galaxy Boats, 72 B.R. 200, 203 (Bkrtcy.D.S.C. 1986) citing In re Dakota Lay'd Eggs, 57 B.R. 648, 657

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(Bkrcty.D.N.D. 1986).

It appears from the exhibits that the last payments made by GCMC to Homes was in February of 1993 and the last payment to Himmelsbach was in April of 1994. Additionally, The Scotsman Group, Inc. obtained a judgment against GCMC in December of 1994 in the amount of \$42,830.58. Since the replacement of GCMC as the sales and marketing agent in 1994, it appears that GCMC has stopped paying its creditors. Also between the time of these debts and the filing of the involuntary petition, Heckle testified that the physical assets of GCMC had been removed from the premises by Sheridan and have not been returned.

Heckle testified that investors had invested over \$300,000.00 into GCMC and that, over the years, GCMC had received between \$300,000.00 and \$400,000.00 in real estate sales commissions but today the only remaining assets of the corporation are the alleged debts owed it by Sweetwater, Sheridan and Vereen which are the subject of the State Court Litigation. Based upon the evidence presented, the Court finds that GCMC is not generally paying its debts as they become due. Therefore the requirements of § 303(h)(1) have been met.

Based upon the findings that the claim of Himmelsbach is a claim against GCMC in an amount in excess of \$10,000.00 and is not subject to a bona fide dispute along with the finding that GCMC is not paying its debts as they become due, and without having to decide if the claim of Homes is a claim of GCMC or if the claim of Sheridan is in bona fide dispute, the Court finds that cause exists to sustain the involuntary petition.

In addition to its defense of the involuntary petition, the Alleged Debtor has asked this Court to abstain pursuant to § 305(a)(1), which provides that:

The court, after notice and a hearing, may dismiss a case under this title, or may

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suspend all proceedings in a case under this title, at any time if . . . the interests of creditors and the debtor would be better served by such dismissal or suspension.

11 U.S.C. § 305(a)(1). This section applies to involuntary cases, as well as voluntary cases. In re Parasol Inn Joint Venture, No. 85-00442 (Bkrcty. D.S.C. Sept. 16, 1985). As stated in In re ABO-MCB Joint Venture, 153 B.R. 338 (Bkrcty. D.N.M. 1993) in determining whether to dismiss an involuntary Chapter 7 proceeding under § 305, the court should consider fairness, priorities in distribution, capacity for dealing with frauds and preferences, speed, economy, freedom from litigation, the importance of a discharge to the debtor, a pending state proceeding, the small number of remaining creditors, the necessary complexity of the bankruptcy process, efficiency and economy of administration. In re ABO-MCB Joint Venture, 153 B.R. at 341.

Considering these factors, including the rights of the creditors that are not affected by the State Court Litigation and the various allegations among the parties concerning possible fraudulent activities and transfers, it would appear that a Chapter 7 case would best serve the interest of the parties. Accordingly, this Court will not abstain from adjudicating the case.

GCMC has requested that the Court award attorney's fees, costs, actual and punitive damages as a result of the filing of this involuntary petition pursuant to § 303(i). However, because the Court has found that the dismissal of the petition is not warranted, the request for attorney's fees, costs, and actual and punitive damages must be denied.

For the reasons stated within, it is therefore,

**ORDERED**, that the involuntary petition is granted and the alleged debtor, Golf Course Marketing Corporation, is adjudicated a Chapter 7 debtor. It is further

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**ORDERED**, that the Debtor's motion for abstention and for attorney's fees, costs, and actual and punitive damages is also denied.

**AND IT IS SO ORDERED.**

Columbia, South Carolina,  
May 16, 1996.

  
UNITED STATES BANKRUPTCY JUDGE

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