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DEPUTY CLERK
IN RE:

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
SEP 19 1996
CLERK

C/A No. 96-72431-W

Upchurch Hardwoods of North Carolina, Inc.,
Debtor.

JUDGMENT
Chapter 11

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the motion of Inco, Incorporated filed August 14, 1996 to convert this Chapter 11 proceeding to Chapter 7 is granted.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
October 16, 1996.

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IN RE:

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Upchurch Hardwoods of North Carolina, Inc.,

ORDER

Debtor.

Chapter 11

THIS MATTER comes before the Court upon Inco, Incorporated's Motion to Convert to a Proceeding under Chapter 7 filed August 14, 1996. The Motion was brought under 11 U.S.C. § 1112(b)¹ for cause, including no reasonable likelihood of rehabilitation, diminution of the estate's assets, and unreasonable delay by the Debtor that is prejudicial to creditors. Inco, Incorporated's ("Inco") Motion is based on the undisputed fact that the Debtor was not an operating business when it filed this Chapter 11 petition, had no intent to resume business operations, is sustaining substantial monthly losses, and has not filed a plan or disclosure statement.²

The United States Trustee filed a response joining in Inco's Motion to Convert. The United States Trustee supports conversion of this case because the Debtor's Monthly Reports reflect the Debtor (a) is incurring substantial monthly losses; (b) has been unable to pay post-petition secured debt during any month since filing; (c) has large unidentified monthly "corporate overhead" expenses; (d) has unidentified post-petition accounts payable and receivable with

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

² As of the date of this Order, which is after the 180 day deadline to file a plan and disclosure statement pursuant to Local Rule 1112(c), the Debtor has not filed a plan or disclosure statement.

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affiliates; (e) has unidentified post-petition accounts receivable from employees; and (f) has not had a profitable month since filing its Chapter 11 petition. The United States Trustee also observed that the Debtor has represented several times that a plan and disclosure statement would be filed, but none has been forthcoming even though the exclusivity period for the Debtor to file a plan and disclosure statement expired on August 7, 1996 and the deadline pursuant to Local Rule 1112 expired on October 7, 1996.³

The Debtor filed a timely objection to Inco's Motion to Convert on the grounds that its primary asset, a lease of a lumber mill located in Scotland Neck, North Carolina and certain equipment had value as a going concern, and it has been attempting to sell it as such. The Debtor also asserts that it is taking appropriate steps to protect the physical assets located at the Williamston, North Carolina plant site, in which the lease was terminated pre-petition, by filing a motion for their turnover.

Based upon the pleadings before the Court, the arguments and evidence presented by counsel for the Debtor, Inco, and the United States Trustee at the hearing, and taking judicial notice of the Schedules filed by the Debtor, the Court makes the following Findings of Fact and Conclusions of Law.

³ Rule 1112(c) of the Local Rules for the United States Bankruptcy Court for the District of South Carolina provides as follows:

A disclosure statement and plan shall be filed by the debtor not later than 180 days after the entry of the order for relief. The debtor may file a motion for an extension of time to file a plan and disclosure statement. The debtor shall prosecute its disclosure statement and plan in a timely manner.

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I. FINDINGS OF FACT

1. The Debtor filed this Chapter 11 proceeding on April 9, 1996.
2. Inco holds a general unsecured claim in the amount of \$342,454.43 as of April 9, 1996.
3. The Debtor is a corporation that was formerly engaged in the business of producing wood chips, lumber, and dust at a mill site in Scotland Neck, North Carolina.
4. The Debtor's primary assets are the lease on the mill site in Scotland Neck, North Carolina and miscellaneous mill equipment and fixtures.
5. The Debtor's president, Michael Upchurch, testified that the Debtor was not an operating business at the time it filed its Chapter 11 petition and had not been operational for approximately one month prior to filing the petition. Michael Upchurch further testified that the Debtor did not intend to resume operations at the Scotland Neck property.
6. Triangle Bank holds a properly perfected deed of trust on Debtor's interest in the Scotland Neck lease and a security interest on the equipment, fixtures, and accessories located on the real property. On July 2, 1996, Triangle Bank moved for relief from the automatic stay on the basis that the Debtor had not made payments on the lease, had taken no action to market and sell the mill operation as a going concern or the assets of the operation, and was not making adequate protection payments to Triangle.
7. A Consent Order resolving Triangle Bank's Motion for Relief from Stay provides that the Debtor is to make interest payments to Triangle Bank on its debt and gives the Debtor until December 31, 1996, to assign and/or sell the lease and mill equipment. If the Debtor fails to procure an assignment and/or sale by that date, Triangle Bank may file an affidavit of default and obtain relief from the automatic stay.

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8. On May 31, 1996, the Debtor filed a Motion to Extend Time to Accept or Reject Executory Contracts, including the lease of the mill site in Williamston, North Carolina. The lessor of the Williamston mill site filed an objection to the Motion on the grounds that the lease had terminated pre-petition, and there was no lease to assume. The Debtor and lessor ultimately agreed that the lease had terminated pre-petition but that an issue exists as to the ownership of the improvements at the site.
9. The lease and improvements are not listed as assets of this Debtor in its Schedules. The lease and improvements are listed as assets of Upchurch Hardwoods, Inc., Bankruptcy Case No. 96-72436-W, also filed April 9, 1996. On September 9, 1996, Upchurch, Inc. filed an adversary proceeding for turnover of these improvements in its Chapter 11 case. An issue exists as to whether these improvements are assets of this Debtor or Upchurch, Inc. However, since the site lease was terminated pre-petition, the sale of the assets appears to be their only viable disposition.
10. The Debtor's Schedule B reflects the Debtor has \$1,659,483.17 in personal property secured by \$672,596.12 in debt.⁴ Thus, the Debtor's Schedules reflect equity in its assets. However, in its objection to the Motion to Convert and at the hearing on the Motion, Debtor asserted there was no equity in its assets. Therefore, an issue exists as to whether there is equity in the Debtor's assets.
11. The Debtor's president, Michael Upchurch, testified that his attempts to transfer or sell

⁴These figures do not include values for the Williamston property because they are not listed in the Debtor's Schedules. A review of Upchurch, Inc.'s Schedules reflects that there appears to be equity in these assets.

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the lease and equipment at the Scotland Neck site amounted to several conversations in the spring of 1996 with one individual, telephone conversations a week before this hearing with a second individual and another telephone conversation several days before this hearing with a third individual; however, the Debtor did not present any contracts or produce testimony from any potential purchasers or their agents at the hearing on the within motion. Michael Upchurch also testified that he has no experience in selling business operations, liquidating equipment, or collecting accounts receivable.

12. The Debtor's Statement of Income and Expenses dated May 9, 1996, reflects the Debtor has no business income but is incurring monthly expenses of \$29,797.06 for interest, insurance, debt service, and other expenses.
13. The Debtor's Monthly Reports reflect the following losses:
 1. \$12,282.74 for the month of April 1996;
 2. \$9,923.84 for the month of May 1996;
 3. \$17,240.60 for the month of June 1996;
 4. \$14,243.15 for the month of July 1996; and
 5. \$10,908.53 for the month of August 1996.
14. The Debtor's Monthly Reports reflect the Debtor has not been able to pay post-petition secured debt during any month since this petition was filed.
15. The Debtor's Monthly Reports reflect it has post-petition accounts receivables from employees but does not identify the legal obligation or transaction from which the receivables arise. The Debtor's comptroller, William Smoak, who is responsible for maintaining the corporation's books and records and completing its Monthly Reports,

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testified he could not identify which employees received the transfers or the purposes of the transfers.

16. The Debtor's comptroller further testified the Debtor had several employees when it filed its petition, but currently has only one employee. Additionally, the Debtor has made advances to employees post-petition.
17. The Debtor's Monthly Reports reflect the following post-petition transfers between the Debtor and affiliate entities, which are also in Chapter 11 bankruptcies:
 1. A transfer of \$5,883.41 to Upchurch Hardwoods of South Carolina, and a transfer from Upchurch, Inc. of \$6,538.94 for the reporting period ending April 30, 1996;
 2. A transfer from Upchurch, Inc. of \$4,700.00 for the reporting period ending May 28, 1996;
 3. A transfer of \$5,939.11 to Upchurch, Inc., and a transfer from Upchurch Hardwoods of \$5,882.41 for the reporting period ending July 2, 1996; and
 4. A transfer of \$2,980.11 to Upchurch, Inc., and a transfer from Upchurch Timber of \$2,108.01 for the reporting period ending July 30, 1996.
18. The Debtor's comptroller testified he did not specifically know the purpose of each of the post-petition transfers between the Debtor and its affiliates.
19. The Debtor's comptroller testified that the Debtor would borrow funds from Upchurch, Inc. on an as needed basis when it was unable to make its post-petition payment obligations and needed cash.
20. The transfers between Debtor and its affiliates were not authorized by the Court.
21. The Debtor's Monthly Reports reflect the following receivables have been collected:

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1. None for the reporting period ending April 30, 1996;
 2. \$5,531.88 for the reporting period ending May 28, 1996;
 3. \$21,513.61 for the reporting period ending July 2, 1996;
 4. \$100.00 for the reporting period ending July 30, 1996; and
 5. \$11,798.86 for the reporting period ending August 27, 1996.
22. The Debtor's Schedules filed May 9, 1996, reflect the Debtor has pre-petition accounts receivable of \$292,353.04. However, the Debtor's Monthly Report for the reporting period ending April 30, 1996, reflect the Debtor has \$110,950.83 in pre-petition accounts receivable, although it did not collect any receivables during the month of April 1996. Debtor has collected \$27,145.41 in outstanding receivables in the approximately 19 weeks since the petition was filed.
23. The Debtor has not filed a proposed disclosure statement or plan, although it has represented to the Court that the plan and disclosure statement would be forthcoming, most recently at a hearing on August 14, 1996, when they were to have been filed within two weeks.
24. The one hundred eighty (180) day period for filing a proposed disclosure statement and plan under the Local Bankruptcy Rules elapsed on October 7, 1996.

II. CONCLUSIONS OF LAW

Pursuant to § 1112(b), a Chapter 11 case can be converted to a Chapter 7 case for cause based on one of the specifically enumerated grounds.⁵ Section 1112(b) provides as follows:

⁵ Apart from the specifically enumerated grounds in § 1112(b), a Chapter 11 case may be converted to a Chapter 7 case during the early stages of a case if any reorganization is

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(b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including--

- (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
- (2) inability to effectuate a plan;
- (3) unreasonable delay by the debtor that is prejudicial to creditors;
- (4) failure to propose a plan under section 1121 of this title within any time fixed by the court;
- (5) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan;
- (6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;
- (7) inability to effectuate substantial consummation of a confirmed plan;
- (8) material default by the debtor with respect to a confirmed plan;
- (9) termination of a plan by reason of the occurrence of a condition specified in the plan; or
- (10) nonpayment of any fees or charges required under chapter 123 of title 28.

11 U.S.C. § 1112(b).

Because § 1112(b) is written in the disjunctive, only one of the enumerated grounds is needed to convert a Chapter 11 case to a Chapter 7 case. However, in this case, based upon the evidence presented including the testimony of the president and of the comptroller of the Debtor corporation, it appears that several of the grounds are present.

As stated in the Findings of Fact, as of the date of this Order, the Debtor has failed to file

objectively futile and the case was filed in subjective bad faith. Carolin Corp. v. Miller, 886 F.2d 693 (4th Cir. 1989).

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a plan and disclosure statement pursuant to § 1121 within the time fixed by the Court through Local Rule 1112(c). This alone is grounds for conversion; however, based upon the evidence presented and a review of the Debtor's Monthly Reports, it also appears that the Debtor does not have the ability to effectuate a plan. It is uncontroverted that the Debtor does not intend to resume business operations and continues to suffer losses as reflected in its Monthly Reports. There is an absence of employees except for principals, an absence of ongoing business activity, little or no cash flow, a continuing post-petition diminution of its assets, and allegations of unapproved transfers and incurrance of debt by the Debtor or its principal.

Additionally, the testimony of the principals of the Debtor reflected that the sole source of funding a plan of reorganization would be through the liquidation of its assets. The testimony at trial indicated that the prospects for a sale of the Debtor's assets within a reasonable time period were purely speculative. Apart from the liquidation of its assets, there is no available sources of income to sustain a plan of reorganization and in fact, a plan of reorganization has yet to be proposed by the Debtor. For all of these reasons, cause exists pursuant to § 1112(b) to convert or dismiss this Chapter 11 case.

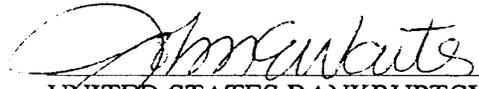
In addition to the liquidation of the assets of the estate, because of the outstanding account receivables from related companies, the allegations of improper transfers of funds and the employee loans, it appears that there may be potential value reliazable by a Chapter 7 Trustee. For these reasons, conversion of this Chapter 11 case rather than dismissal is in the best interests of all creditors. See In re Superior Siding & Window, 14 F.3d 240 (4th Cir. 1994). For all of the reasons stated within, it is therefore,

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ORDERED, that Inco Incorporated's Motion to Convert to a proceeding under Chapter 7 is granted.

AND IT IS SO ORDERED.

Columbia, South Carolina,
October 16, 1996.


UNITED STATES BANKRUPTCY JUDGE

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