UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 94-75715
Dunes Hotel Associates, a South Carolina general partnership,	**JUDGMENT**
Debtor.	Chapter 11

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Motion by Hyatt Corporation and S.C. Hyatt Corporation for Dismissal of Dunes Hotel Associates' Chapter 11 Reorganization Case filed June 27, 1997 and supplemented on July 29, 1997 is granted and this Chapter 11 proceeding is dismissed subject to the provisions of this Order.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
September 26, 1997.

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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 94-75715
Dunes Hotel Associates, a South Carolina general partnership,	**ORDER**
Debtor.	Chapter 11

THIS MATTER is before the Court upon the motion of Hyatt Corporation and S.C. Hyatt Corporation (together, "**Hyatt**") filed June 27, 1997, entitled "Motion by Hyatt Corporation and S.C. Hyatt Corporation for Dismissal of Dunes Hotel Associates' Chapter 11 Reorganization Case, and Memorandum in Support," as supplemented on July 29, 1997 (the "**Motion**"). The Motion requests dismissal pursuant to Sections 1112 and 105 of the United States Bankruptcy Code[1] of the Chapter 11 reorganization case filed November 18, 1994, by Dunes Hotel Associates ("**Dunes**"), the debtor and debtor-in-possession. Dunes filed an objection to the Motion. The Court held a hearing on the Motion on August 21-22, 1997.

Based upon the testimony and other evidence presented at the hearing held before the Court, and consideration of the arguments of counsel and of the pleadings filed in this matter, and taking judicial notice of the Court's prior Orders and findings relating to this Chapter 11 case, as agreed to by both Hyatt and Dunes, the Court concludes that Dunes' Chapter 11 case should be, and by this Order is, dismissed. Accordingly, the Court makes the following Findings

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[1] Further references to the Bankruptcy Code, 11 U.S.C. § 101, et seq., will be by section numbers.

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of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52, made applicable by Fed. R. Bankr. P. 7052.[2]

FINDINGS OF FACT[3]

1. Dunes is a South Carolina general partnership formed in 1972. Through its general partners, Dunes is wholly owned by General Electric Pension Trust ("**GEPT**"). GEPT is a New York common law trust with net assets of approximately $23 billion. Dunes has no employees and conducts no business operations. Dunes' officers are all employees of General Electric Investment Corporation, which manages the assets of GEPT. All decisions regarding Dunes are made by or on behalf of the Trustees of GEPT. Dunes has access to the financial resources of GEPT.

2. Dunes is record title holder of the fee simple interest in real property, improvements and personal property (the "**Hotel Property**") that comprise the 505-room resort/convention hotel commonly known as the Hyatt Regency Hilton Head (the "**Hotel**") on Hilton Head Island, Beaufort County, South Carolina. Dunes leases the Hotel Property to S.C. Hyatt Corporation ("**S.C. Hyatt**"), a South Carolina corporation which is a wholly-owned subsidiary of Hyatt Corporation ("**Hyatt Corp.**"), a Delaware corporation. The lease between

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[2] Any Finding of Fact more appropriately considered a Conclusion of Law in whole or in part should be interpreted as such, and vice versa.

[3] This Court has previously entered several final Orders in this case, familiarity with which is presumed. In particular the findings and conclusions of the Wolf Block Order, and the Lease Order, discussed infra, are part of the record of this matter. The Court will summarize here only those facts that are necessary for an understanding of the issues presently before the Court.

Dunes and Hyatt[4] (the "**Lease**") was executed in 1973. The Lease will expire December 31, 2016 if Hyatt exercises a renewal option.[5]

3. In 1986, Dunes executed a promissory note (the "**Note**") to Aetna Life Insurance Company ("**Aetna**") to evidence a loan of $50 million. Immediately after the borrowing, the amount of $23,623,441 was withdrawn from Dunes by its general partners as capital withdrawals. The Note was secured by a series of "Loan Documents," including a "Mortgage, Assignment of Rents and Security Agreement" on the Hotel Property (the "**Mortgage**"), an "Assignment of Rents and Leases," and an "Assignment of Lease" (together, the "**Assignments**").

4. On July 1, 1994, the Aetna Note came due. Aetna did not grant an extension on maturity and Dunes defaulted on the Note. On August 16, 1994, before it filed a foreclosure action against Dunes, and again on September 2, 1994 Aetna notified Hyatt that Aetna was exercising its rights under the Mortgage and related Loan Documents and demanded that Hyatt remit all future rent to Aetna pursuant to the Assignments. Aetna commenced foreclosure proceedings against Dunes in the South Carolina Court of Common Pleas on August 28, 1994. On September 8, 1994, S.C. Hyatt responded to the Aetna demand for rent through an interpleader action in the Court of Common Pleas alleging that both Dunes and Aetna were

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[4] In 1976, Hyatt Corp. assigned its rights under the Lease to S.C. Hyatt with Dunes' written consent.

[5] On March 28, 1997 this Court determined that the Lease was in fact a lease of real property under South Carolina law ("**Lease Order**") and, accordingly, it is subject to the provisions of Section 365(h) of the Bankruptcy Code upon rejection by Dunes. While Dunes initially appealed that decision, on July 8, 1997 Dunes voluntarily dismissed that appeal with prejudice.

claiming the rent under the Lease. Pursuant to the interpleader, Hyatt began paying rent into an escrow account with the clerk of the South Carolina Court of Common Pleas.

5. Dunes commenced this Chapter 11 case on November 18, 1994 (the "**Pctition Date**"), and has remained since a debtor-in-possession pursuant to Sections 1107 and 1108.

6. Dunes and Aetna negotiated and executed the "Stipulation And Consent Order Conditioning Dunes Hotel Associates' Use Of Hotel Income And Providing Adequate Protection Of Aetna Life Insurance Company's Interest In Hotel Income," dated January 23, 1995 (the "**Adequate Protection Order**"). Under the Adequate Protection Order, Hyatt has paid all rent under the Lease into a "Sequestered Account." There was no evidence as to the current balance of that account. Although the Debtor's monthly operating reports do not so indicate, it appears that Dunes paid Aetna, and later GEPT as successor in interest to Aetna, monthly adequate protection payments out of the Sequestered Account as required by the Adequate Protection Order.[6]

7 Dunes had no creditors other than Aetna and Hyatt.[7]

8. In February 1995, Aetna and S.C. Hyatt filed separate motions to dismiss Dunes' reorganization case (collectively, the "**Case Dismissal Motions**") which this Court denied as

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[6] The Adequate Protection Order specifically preserved all parties' legal positions, including the right to move to dismiss this case.

[7] S.C. Hyatt asserts an unsecured claim arising from certain capital expenses it paid for which it was entitled to be reimbursed under the Lease ("**FF&E**"). S.C. Hyatt filed a proof of claim for approximately $31,000 and reserved the right to amend that proof of claim. Although Dunes proposed in its Plan of Reorganization that S.C. Hyatt could reimburse itself the amount of its filed claim out of rent, that Plan was not confirmed and the claim is presently pending before the Court.

premature by Order and Judgment dated May 31, 1995 ("**First Case Dismissal Order**"). The Court held that Aetna and Hyatt had not met the strict standard of Carolin Corp. v. Miller, 886 F.2d 693 (4th Cir. 1989) for dismissal of a petition at the outset of a case. The Court's decision was based in large part on Dunes' acknowledged equity of more than $5 million dollars in the Hotel Property which was valued as of the Petition Date at $52-53 million, and Dunes' representations that it had access to the enormous financial resources of GEPT with which to reorganize.

9. The Case Dismissal Motions had alleged that lacking any other creditors, Dunes had filed its petition in bad faith to increase GEPT's equity in the Hotel Property at their expense. Both Aetna and Hyatt also alleged that Dunes' case was objectively futile because Dunes could not confirm a plan over their objections. In response, Dunes filed amended Chapter 11 Schedules and Statements in which it claimed the existence of hundreds of unsecured claims against the estate. The newly discovered claims were the trade and tax creditors of Hyatt, which Dunes had previously alleged were Hyatt's sole responsibility under the Lease. Dunes also solicited a de minimis claim of approximately $2,000 for expenses from the law firm of Wolf Block Schorr & Solis-Cohen ("**Wolf Block**"). The Wolf Block claim was related to legal services rendered to, and paid for post-petition by, GEPT. The Court later disallowed the Wolf Block claim.[8]

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[8] The findings of fact and conclusions of law included in that Order and Judgment, were entered September 21, 1995 (the "**Wolf Block Order**"). Although the decision regarding the Wolf Block claim arose from Dunes' motion, Dunes never appealed from that order, which is now res judicata.

10. Shortly after Hyatt filed its first dismissal motion, on February 27, 1995, Dunes filed a complaint (the "**Adversary Proceeding**") against Hyatt. Dunes sought, inter alia, to avoid Hyatt's unrecorded leasehold interest in the Hotel Property pursuant to Section 544(a) of the Bankruptcy Code (the "**Avoidance Claim**"). Subsequently, Hyatt moved to dismiss the Adversary Proceeding for failure to state a claim and Dunes cross-moved for summary judgment on its Avoidance Claim.[9]

11. Dunes filed its "Initial Plan of Reorganization" and its "Disclosure Statement Accompanying Plan Of Reorganization Proposed By Dunes Hotel Associates" (the "**Disclosure Statement**"), on March 20, 1995, while the Case Dismissal Motions were pending. The Initial Plan classified Hyatt's unsecured claim separately from all other alleged unsecured claims, including the Wolf Block claim.

12. Following a contested hearing, the Court approved Dunes' Disclosure Statement on June 6, 1995, conditioned on GEPT's filing a statement of its commitment to fund Dunes' reorganization. On June 29, 1995, the trustees of GEPT submitted a statement (the "**Commitment**"), providing that: "GEPT hereby commits to provide to the Dunes General Partners the full amount which, when contributed to Dunes by the Dunes General Partners, will enable Dunes and Reorganized Dunes to perform the Dunes Plan as confirmed by the Bankruptcy Court."

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[9] Dunes also sought rejection of the Lease under Section 365(a), a declaratory judgment that the Lease was terminated or terminable due to Hyatt's alleged breaches, and turnover and an accounting under Section 542. Dunes has since voluntarily dismissed with prejudice its claim for rejection of the Lease. Upon Hyatt's motion, this Court has referred Dunes' allegations of contract breach to arbitration and dismissed the claim for turnover without prejudice.

13. Both Aetna and S.C. Hyatt cast their ballots against the Initial Plan and the Initial Plan as modified by the Conditional Modification (the "**Modified Plan**"). Wolf Block voted in favor of the Initial Plan.

14. On August 21, 1995, Aetna filed a motion (the "**Initial Plan Motion**") alleging that Dunes' Initial Plan was unconfirmable as a matter of law because Dunes had artificially impaired and gerrymandered the Wolf Block claim to achieve "cram-down."

15. After a full hearing on August 25, 1995, the Court entered a Judgment and Order dismissing the Adversary Proceeding against Hyatt (the "**Adversary Dismissal Order**"). In the Adversary Dismissal Order, upon due notice, the Court converted Hyatt's motion to dismiss to a motion for summary judgment based upon both parties' reference to and reliance on matters outside of Dunes' Complaint, including the Chapter 11 case record, in support of their positions. Relying primarily on Wellman v. Wellman, 933 F.2d 215 (4th Cir.), cert. denied, 502 U.S. 925 (1991), this Court held that Dunes had no standing to pursue avoidance of the Lease because the Bankruptcy Code grants that power to a debtor in possession to benefit creditors and not to provide a solvent debtor and its equity holder a windfall. The Court directed to arbitration all non-core breach allegations of Dunes against Hyatt, as contemplated by the terms of the Lease and as bargained for by the parties. Dunes filed a motion for reconsideration which this Court subsequently denied on the basis of Wellman and the record before it in the Chapter 11 proceedings.

16. Following entry of the Adversary Dismissal Order, Dunes filed a "Clarification" of its Initial Plan which, contrary to the prior unconditional funding commitment, now stated that

GEPT would not fund Dunes' Initial Plan unless Dunes "obtain[ed] avoidance or rejection relief with respect to the [Lease] so that S.C. Hyatt and/or Hyatt will not continue in possession and operation of the Hotel Property."

17. On September 7, 1995, this Court held a hearing on the Initial Plan Motion, the objections to the Wolf Block claim, and a motion by Dunes for temporary allowance of the Wolf Block claim.

18. On September 20, 1995, after consideration of the September 7 hearing record and proposed orders by all parties on all issues, this Court entered an Order denying confirmation of the Initial Plan of Reorganization (the "**Initial Plan Order**"). This Court denied confirmation for lack of an accepting impaired class of claims for purposes of Section 1129(a)(10), and because Dunes had artificially impaired and gerrymandered the Wolf Block claim solely to obtain an affirmative vote. This Court concluded that Dunes' proposed treatment of the Wolf Block claim violated Sections 1129(a)(3) and 1129(a)(10). The next day, on September 21, 1995, this Court entered the Wolf Block Order which disallowed the claim of Wolf Block and held Wolf Block to be an insider under the control of Dunes and GEPT. Wolf Block was therefore ineligible to vote in support of cram-down.

19. Approximately two hours prior to the September 27, 1995 hearing on confirmation of the Modified Plan, Dunes filed the "Debtor's Second Amendment Modifying the Plan Proposed By The Debtor" (the "**Second Amendment**"). Dunes alleged that the Second Amendment created a plan of reorganization (the "**Amended Plan**") which did not impair Hyatt despite providing for avoidance, therefore, Hyatt would be deemed to have accepted it.

20. Under the Amended Plan, GEPT offered to buy Aetna's claim for $48,530,890.47 after confirmation. According to Dunes, this purchase price represented principal, unpaid contract interest and attorney's fees of $700,000, but not default rate interest and late charges. Prior to that hearing, Dunes had always disputed Aetna's position on late charges and default rate and had asserted that Aetna would be unimpaired provided it was paid principal and unpaid contract interest. Indeed, Dunes' March 20, 1995 Disclosure Statement specifically provides that Aetna is not entitled to default interest and asserts that such interest is not recoverable under the Bankruptcy Code or applicable law. Under the Plan of the same date, Aetna is deemed unimpaired by Dunes in spite of the failure for the Plan to provide default interest and late charges. However, at confirmation, Dunes took a contrary position and alleged that nonpayment of default interest and late charges would impair Aetna for voting purposes on Dunes' Amended Plan. A condition precedent to GEPT's proposed post-confirmation purchase of the Aetna Claim was that Aetna first vote its claim in favor of Dunes' Amended Plan. Under the Amended Plan, the estate would continue post-confirmation to permit Dunes to pursue its appeal of the dismissal of its Avoidance Claim.

21. During a recess in the hearing on confirmation of Dunes' Amended Plan, Aetna and Dunes agreed that GEPT immediately would buy the Aetna claim for $49 million, without regard to whether the Amended Plan was confirmed, in exchange for Aetna's altered vote to accept the Amended Plan. The Court approved the purchase and vote change, but reserved ruling on whether the Aetna vote could be counted as an acceptance by an impaired class for cram-

down or whether Aetna had received any "benefit" to which it would not otherwise be entitled under the Mortgage and Loan Documents.

22. In an Order entered January 26, 1996 (the "**Amended Plan Order**"), this Court denied confirmation of the Amended Plan because the Amended Plan failed to meet the good faith requirements of Section 1129 (a)(3) and there was no accepting, non-insider, impaired class as required under Section 1129(a)(10). Specifically, the Court held that GEPT had directed the "Aetna vote" as part of its purchase of Aetna's claim. Because GEPT is an insider, a vote at its direction could not be counted as the acceptance of a non-insider impaired class for purposes of "cram-down." In addition, the Court held that actions taken by Dunes after the purchase of the Aetna claim by GEPT were undertaken solely to bolster its litigation posture against Hyatt.

23. Following this Court's denial of reconsideration of its dismissal of Dunes' adversary proceeding, Dunes appealed to the United States District Court for the District of South Carolina (the "**District Court**"). On July 30, 1996, the District Court entered an Order which affirmed this Court's dismissal of Dunes' Avoidance Claim and the denial of reconsideration ("**Remand Order**").[10] Dunes appealed from the Remand Order on the Avoidance Claim, which appeal the United States Court of Appeals for the Fourth Circuit (the "**Fourth Circuit**") dismissed as premature. Dunes and Hyatt have now completed the arbitration on Dunes' allegations of contract breach and are presently awaiting a decision from

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[10] The District Court's Remand Order also remanded for hearing on the dismissal of Dunes' claim for rejection of the Lease and therefore remanded the entire case to this Court. On July 8, 1997, Dunes voluntarily dismissed with prejudice all rejection claims.

the arbitration panel.[11] This Court has addressed many other disputes between the parties before Hyatt's filing of this Motion.

24. It is clear from the record and this Court's own observations that Hyatt has sustained years of litigation requiring not only the expenditure of legal fees, but the disruption of its business operations. Senior officials of both Hyatt Corp. and S.C. Hyatt Corp., as well as Hotel personnel have testified, been deposed, and responded to discovery requests numerous times. The evidence presented by Hyatt shows that the bankruptcy has adversely affected the operation of the Hotel.

25. After Hyatt filed this particular Motion, Dunes filed another plan of reorganization **("New Plan")** and requested a simultaneous hearing on confirmation and case dismissal, which this Court denied. The New Plan appears to contain features which are nearly identical to those contained in the Amended Plan which this Court did not confirm. For example, the New Plan relies on the Aetna vote as an acceptance by an impaired class despite this Court's prior ruling that it was directed by GEPT, an insider, and in spite of the fact that Aetna assigned its claim absolutely to GEPT almost two years ago. Dunes is also alleging that the claim held by GEPT is impaired even though the fair market value of the Hotel substantially exceeded the amount of Aetna's claim and GEPT's purchase price for that claim.

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[11] Hyatt initially demanded arbitration under the Lease of Dunes' breach claims and Dunes refused. Hyatt then sought and received an Order compelling arbitration as part of its motion to dismiss the Adversary Proceeding. Despite that Order, Dunes did not agree to go forward with arbitration for months. Largely as a result of Dunes' refusal and the contentiousness of those proceedings, the arbitration that Hyatt demanded under the Lease did not take place for more than two years.

26. At the August 21, 1997 hearing before the Court, Hyatt presented evidence through its valuation expert Gary Bernes, an MAI appraiser, that as of August 7, 1997, the fair market value paid in cash of the Hotel "as is" with the Hyatt Lease in place was $59,750,000. The all cash "as is" Liquidation Value of the subject property was valued at $53,775,000. Dunes' representative conceded that using GEPT's usual valuation standards, the Hotel's fair market value was approximately $60 million with the Hyatt Lease in place, and that Dunes and GEPT had received an offer from Hyatt for purchase of the Hotel for $59,750,000. The Court finds Hyatt's valuation testimony to be credible and convincing and consistent with earlier findings.

27. At the August 21, 1997 hearing, Dunes' representative, Mr. Wiederecht, testified that he participated in the drafting of the New Plan and was aware that the Aetna claim has been assigned to GEPT in full. He also testified that the Operating Statements filed by Dunes continue to contain misstatements as to the number of employees and the payments made to secured creditors that were previously identified in this proceeding. Mr. Wiederecht further testified that Dunes has no assets other than the Hotel; only one secured creditor, GEPT,[12] which is also its equity holder; Dunes conducts no business; Dunes has no employees; there are no outstanding creditors besides Hyatt and GEPT; the case was filed in part to delay foreclosure by Aetna, which is no longer a creditor; and that this case is now essentially a two party dispute.

28. At the August 21, 1997 hearing, Hyatt asserted that neither Dunes nor its counsel have filed a statement pursuant to Section 329 of the Code regarding compensation for its attorneys "in connection with the case" despite the fact that in its Verified Bankruptcy Rule

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[12] Dunes' counsel conceded at the hearing that GEPT was not likely to foreclose on Dunes.

2016(b) Statement of John Dawson, counsel, represented that it would apply for payment with this Court. Dunes' local counsel indicated it would bill Meyers Enterprises, one of Dunes' general partners, on a regular basis. Neither firm has filed Section 329 reports. Further Hyatt asserts that although in its Rule 2014 Statement counsel indicated that it did not represent GEPT in connection with this case, when the cognizant GEPT Trustee, John Myers, was before the Court he was not represented by separate counsel. Moreover, at his deposition in this matter he testified that he was represented by the Streich Lang firm.

29. After nearly three (3) hard-fought years, it is clear to this Court that this case is no more than a litigation tactic to terminate the Lease between Dunes and Hyatt for the benefit of Dunes' equity holder. The cognizant trustee of GEPT acknowledged in a deposition that GEPT would have paid the Aetna Note immediately and in full if Hyatt were off the Hotel Property. Dunes has asserted that certain alleged breaches of the Lease by Hyatt are among the reasons for Dunes' filing. This Court has previously ruled on Dunes' right to file this Chapter 11 case in the first instance. Allegations of breach are not relevant to the subsequent continuation of the case.[13] They are properly to be determined through the Arbitration process originally agreed to by the parties in the Lease.

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[13] The Lease provides for contractual dispute resolution through arbitration. The parties commenced an arbitration proceeding, the record of which is now closed. They are expecting the decision of the arbitration panel within the near future.

CONCLUSIONS OF LAW

Dismissal Standards

Section 1112 of the Bankruptcy Code provides express statutory authority for dismissal of a Chapter 11 reorganization case. Section 1112(b) gives this court broad discretion, see Toibb v. Radloff, 501 U.S. 157, 165 (1991).

Section 1112(b) sets out a non-exhaustive list of ten "causes," any one of which is sufficient for dismissal of a case.[14] In addition to Section 1112, Section 105[15] is generally

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[14] The ten enumerated bases for dismissal listed in Section 1112(b) are:

> (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 of 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.

[15] Section 105 of the Bankruptcy Code provides that a bankruptcy court:

> may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

regarded to provide an "overlaying . . . broad grant of judicial power," including dismissal, to enable a court to prevent abuses of the bankruptcy process and to ensure that bankruptcy is used for the purposes for which it was intended. In re Kestell, 99 F.3d at 148-49. Section 105 also provides the Court with discretion to dismiss a Chapter 11 case *sua sponte*.

> The plain meaning of section 105 goes beyond contempt of court power. It also grants judges the authority to dismiss a bankruptcy petition sua sponte for ineligibility, In re Hammers, 988 F.2d 32, 34-35 (5th Cir.1993), for lack of good faith, In re Van Owen Car Wash, Inc., 82 B.R. 671, 674 (Bankr.C.D.Ca.1988), or for one of the "causes" enumerated in section 1112, In re Finney, 992 F.2d 43, 44 (4th Cir.1993); In re Erchak, 152 B.R. 68 (Bankr. N.D. W.Va.1993).

In re Kestell, 99 F.3d 146 (4th Cir. 1996). Also see In re Long Point Road Ltd., 93-72769-W (Bkrtcy.D.S.C. 12/29/95).

While not enumerated in Section 1112, courts uniformly hold that a debtor's bad faith filing **or** conduct of its case is sufficient "cause" for dismissal under that section. In re Kestell, 99 F.3d at 148; Carolin Corp. v. Miller, 886 F.2d 693, 700 (4th Cir. 1989). Several courts, including the Fourth Circuit in Carolin, have listed various "indicia" of bad faith that might lead to dismissal; however, the analysis is based on the totality of the circumstances of each case. Carolin, 886 F.2d at 70.

Although a case may be dismissed at the outset, as this Court has previously held the standard for such a dismissal "is one of the most stringent articulated by the federal courts." (May 31, 1995 Order at 10.) This hurdle is imposed because it:

> is the only sufficiently stringent test of justification for threshold denials of Chapter 11 relief. Such a test obviously contemplates that it is better to risk proceeding with a wrongly motivated invocation of Chapter 11 protections whose

> futility is not immediately manifest than to risk cutting off even a remote chance that a reorganization effort so motivated might nevertheless yield a successful rehabilitation.

Carolin, 886 F.2d at 701. The test in Carolin requires a showing that the petitioner's Chapter 11 case as initially filed is both objectively futile and filed in subjective bad faith. 886 F.2d at 700-01. Dunes contends that this stringent two-prong standard still controls all determinations of dismissal two and a half years into this case. The Court disagrees.

The Carolin two prong test is so stringent because it is a threshold test. Carolin applies the power to dismiss a case under Section 1112 to include dismissal of a petition at the outset. "Decisions denying access at the very portals of bankruptcy, before an ongoing proceeding has even begun to develop the total shape of the debtor's situation, are inherently drastic and not lightly to be made." Carolin, 886 F.2d at 700. See also Minority Equity Shareholders of Yachting Connections, Inc. v. RTC (In re Yachting Connections, Inc.), 1992 U.S. App. LEXIS 32902 at *5 (4th Cir. Dec. 18, 1992) ("Carolin's inquiry is directed at the bankruptcy petition itself"). In Carolin, the Fourth Circuit held that dismissal of a petition at the threshold "for want of good faith in filing" requires "something more than even the most obvious likelihood of ultimate futility. . . . The something more, as generally recognized, is subjective bad faith on the part of the petitioner." Carolin, 886 F.2d at 700.

Accordingly, the Court's May 31, 1995 Order held that Aetna and Hyatt had not met the stringent requirements for dismissal of a petition at the outset, and this Court declines to

reconsider any issues with respect to good faith in filing the petition. However, such a ruling does not prevent dismissal at this stage of the case.[16]

The criteria in Section 1112 justifying dismissal are all objective tests of whether the attempt at reorganization is futile, Carolin, 886 F.2d at 699, but each of those objective tests may also point to subjective bad faith. Id. The inquiry into objective futility "is designed to insure that there is embodied in the petition `some relation to the statutory objective of resuscitating a financially troubled [debtor].'" Id. at 701 (citation omitted). While threshold dismissal requires both subjective bad faith in filing and objective futility, once the case has moved past that threshold stage, dismissal may be based solely on a failure to meet the objective criteria set out in Section 1112. Carolin, 886 F.2d at 699. Likewise, a debtor's subjective bad faith in the conduct of its case is a sufficient basis for dismissal by itself, and **does not** require a concurrent showing of one of the objective criteria under Section 1112(b). Carolin, 886 F.2d at 699; Phoenix Piccadilly, Ltd. v. Life Ins. Co. of Va. (In re Phoenix Piccadilly, Ltd.), 849 F.2d 1393, 1395 (11th Cir. 1988) (debtor's likelihood of successful reorganization does not overcome bad faith requiring dismissal).

Against this background, the Court must determine whether dismissal of Dunes' case is appropriate. The standard of proof on a motion under Section 1112 is preponderance of the evidence. Fahey Banking Co. v. Parsell (In re Parsell), 172 B.R. 226, 230 (Bankr. N.D. Ohio 1994). See also In re Laguna Assocs. Ltd. Partnership, 147 B.R. 709, 714-15 (Bankr. E.D. Mich.

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[16] In the May 31, 1995 Order, the Court noted that Hyatt and Aetna had raised serious questions as to Dunes' good faith, but that such issues could be addressed at the plan confirmation stage or as the case and adversary proceeding further developed and progressed.

1992) (on creditor motion to lift stay for bad faith in filing, court was unpersuaded by debtor's argument that creditor bore a "heavy burden" to show bad faith), aff'd, 30 F.3d 734 (6th Cir. 1994). This Court's determination is specifically informed and guided by this Court's previously entered Wolf Block and Lease Orders, each of which is now a final and unappealable order, and therefore the findings of fact and conclusions of law contained in those Orders are now res judicata. Federated Dep't Stores, Inc. v. Moitie, 452 U.S.394, 398-99 & n.4 (1981). This Court is further informed and guided by the District Court's Order affirming the dismissal of Dunes' Avoidance Claim. Hovis v. Powers Constr. Co. (In re Hoffman Assocs.), 194 B.R. 943, 951 (Bankr. D.S.C. 1995) (Waites, J.) (determinations of an appellate court are binding on all subsequent proceedings in trial court).

THE PARTIES' CONTENTIONS

Hyatt argues that the history of this case indicates that Dunes' case should be dismissed for three basic reasons: (1) one or more of the grounds listed in Section 1112 are applicable, (2) Dunes' allegedly conducted its case in bad faith and without regard to statutory or administrative requirements with a resulting abuse of the bankruptcy process, and (3) a pre-petition assignment by Dunes of its interest in the Lease warrants dismissal of the case for lack of a material estate. Dunes argues in response that its purpose in seeking relief from the Hyatt Lease is legitimate. Dunes also suggests that Hyatt has no standing in this case because, Dunes alleges, Hyatt's filed claim has been paid and any avoidance that Dunes might achieve will not give rise to a

cognizable claim by Hyatt. The Court will address below the essential contentions of the parties.[17]

I. SECTION 1112 ISSUES

A. Inability to Effectuate a Plan

The inability to effectuate a plan means that the debtor either cannot formulate a plan or cannot carry one out. Hall v. Vance, 887 F.2d 1041, 1044 (10th Cir. 1989). In the present case, Dunes has attempted to confirm two Plans based upon (1) "cram-down" under Section 1129(b), and (2) avoidance or pursuit of avoidance of the Hyatt Lease.

Under Section 1129(a)(10), a plan of reorganization that impairs any creditors must be accepted by at least one class of non-insider, impaired creditors. Dunes' Initial Plan was predicated upon a "cram-down" of the Aetna and Hyatt claims based on the de minimis accepting claim of Wolf Block.[18] As this Court held in denying confirmation of the Initial Plan:

> A review of case law has revealed no attempt at artificial impairment more brazen in its lack of economic justification than that presented by the Initial Plan and the Court therefore rejects the Debtor's transparent artificial impairment scheme. As the artificially impaired Wolf Block Class must be deemed to be unimpaired for purposes of § 1129(a)(10), no accepting impaired class exists, and the Initial Plan cannot be confirmed.

(Initial Plan Order at 27.)

GEPT then bought the Aetna claim and, contrary to its earlier position, Dunes argued that Aetna was now impaired as a result of not receiving default interest and penalties. Dunes

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[17] It is not incumbent upon a bankruptcy court to give an exhaustive explanation of every possible reason for dismissal or its denial. In re Koerner, 800 F.2d 1358, 1367 (5th Cir. 1986)

[18] This Court disallowed the Claim of Wolf Block for both payment and voting purposes. See Wolf Block Order.

changed its position when it became apparent that Hyatt would be impaired by any plan proposing to dispossess it, and that Hyatt would vote against such a plan. Accordingly, Dunes sought to create an artificially impaired creditor in Aetna and thereby meet the "cramdown" requirements of Section 1129(a)(10) of at least one accepting, impaired creditor. Again, the Court denied confirmation, this time on the ground, among others, that the "Aetna vote" had been voted as a condition of the purchase and at the direction of its purchaser, GEPT, an insider; therefore, it could not be counted for acceptance as an impaired class for cram-down. Despite GEPT's ownership of the Aetna claim for almost two years, Dunes recently proposed yet another New Plan of Reorganization premised upon the same affirmative "Aetna vote." Dunes has not proposed a plan that could be confirmed and consummated in a manner consistent with the Court's prior rulings and continues to fail to meet the good faith requirements of Section 1129(a)(3). In re Lumber Exchange Building Ltd. Partnership v. Mutual Life Ins. Co. of N.Y. (In re Lumber Exchange Building Ltd. Partnership), 968 F.2d 647, 650 (8th Cir. 1992) (case dismissed where debtor could not confirm plan without an impermissible classification scheme to effect cram-down); In re Bloomingdale Partners, 170 B.R. 984, 998 (Bankr. N.D. Ill. 1994) (impermissible classification scheme rendered plans unconformable and warranted dismissal); In re Investors Fla. Aggressive Growth Fund, 168 B.R. at 760, 768 (Bankr. N.D. Fla. 1994) (debtor's refusal to pay creditors to create artificially impaired class for cram down was indication of bad faith filing warranting dismissal); In re B&B West 164th Street Corp., 147 B.R. 832, 842 (Bankr. E.D.N.Y 1992) (case dismissed where debtor could not confirm plan over creditor objections); In re 266 Washington Assocs., 141 B.R. 275, 288 (Bankr. E.D.N.Y. 1992)

(dismissal where debtor cannot effectuate a confirmable plan because improper classification prevents cram-down and debtor will not propose an otherwise confirmable plan).

Dunes also cannot effectuate a plan of reorganization because it will not propose any plan in which Dunes does not continue to pursue avoidance of the Lease.[19] Dunes has stated that the removal of Hyatt from the property by avoidance[20] is the "fundamental . . . intractable" issue between Dunes and Hyatt. Dunes cannot, with that constraint, propose a confirmable plan of reorganization because the District Court has ruled that Dunes does not have standing to avoid the Lease, and this Court has previously ruled that avoidance necessarily impairs Hyatt.

B. Hyatt's Creditor Status

In opposition to the Motion, Dunes asserts that Hyatt is not a creditor and therefore has no standing to prosecute a Motion to Dismiss. For the following reasons, this Court concludes that Hyatt has standing to assert the Motion to Dismiss and further that the issue of dismissal is properly before the Court within its own discretion.

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[19] Dunes argues that its Amended Plan and its New Plan do not require avoidance of the Lease, they only preserve Dunes' right to appeal. Dunes hopes an appellate victory will establish its post-petition standing to seek avoidance. Aside from the semantics, Dunes would lose its right to pursue avoidance upon confirmation if this were not "presumed" in this Plan and assigned to the reorganized Debtor. However, the District Court's Order affirming dismissal of Dunes' Avoidance Claim is binding on this Court. The fact of Dunes' appeal does not alter this Court's decision. See Quarles v. United States Trustee, 194 B.R. 94, 96-97 (W.D. Va.) (affirming conversion under Section 1112 despite pending appeals in Fourth Circuit which debtor alleged would enable it, if successful, to effectuate plan), aff'd, 86 F.3d 55 (4th Cir. 1996); In re Parsons, 137 B.R. 879, 881 (Bankr. D.D.C. 1992) (inappropriate to use bankruptcy to forestall creditor's assertion of rights pending appeal; case dismissed).

[20] In addition to avoidance, Dunes seeks termination of the Lease based on allegations that Hyatt breached the Lease. Those matters have been referred to arbitration by this Court, and the Court expresses no opinion as to the merit or outcome of those claims.

In these proceedings, Hyatt has filed a proof of claim for a pre-petition debt of approximately $31,800, later reassessed by Hyatt to be $80,000, based on monies owed to it from the Fixtures, Furnishings and Equipment Replacement Account (**"FF&E Account"**). The FF&E Account is the only Hotel account held by Hyatt in trust for Dunes, and those funds are estate property. There is now a dispute between the Debtor and Hyatt as to whether the claim based on the FF&E account remains or has been paid. In its July 11, 1996 Order dealing with Dunes objection to the claim based on lack of documentation and Hyatt's request for estimation of its claim for the purpose of voting on the plan then before the Court (the confirmation of which was later denied), the Court understood Hyatt's FF&E claim to the extent $31,800 had been voluntarily paid. However, Hyatt now asserts either that such claim was never paid, never paid in full or if paid by reimbursement such transaction has been reversed to avoid allegations of a violation of the automatic stay.

S.C. Hyatt's proof of claim filed March 17, 1995 is still of record, not having been withdrawn or objected to on the basis of being paid. Therefore that claim provides Hyatt with standing.

Perhaps equally important, Hyatt continues to assert that any plan which proposes to dispossess it of the Hotel Property impairs Hyatt's contractual rights and entitles it to vote as a contingent creditor. By contrast, Dunes argues that avoidance of the Lease would render the Lease void, as if it had never existed, been negotiated, or agreed to and that therefore there would be no claim arising from avoidance to give Hyatt standing for voting or dismissal purposes.[21]

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[21] Dunes argues that this Court's dismissal of Dunes' claim for avoidance was based on Section 550, but that Dunes would not seek a recovery of the Hotel Property pursuant to that section in the

1. Avoidable Lease Remains Valid Against Dunes

Avoidance does not eradicate the avoided interest, it merely reduces that interest to the same status as competing interests of the general unsecured creditors. As stated by Professor Carlson:

> [A]ny avoidance theory refers to the strong arm power as an essential element of its mechanism. First, the avoidance theory obliterates the transfer, but only with regard to the trustee's rights as the representative of the general creditors. The strong arm power adheres to the property transferred, but only to the extent necessary to guarantee payment to the general creditors. Hence, the strong arm power, and any other avoidance power, is only a *partial* avoidance power. It subordinates and never obliterates the object of its hostility.

David Gray Carlson, The Trustee's Strong Arm Power Under the Bankruptcy Code, 43 S. Car. L.R. 841, 862-63 (1992) (italics in original, emphasis added). Professor Carlson's view is shared by other commentators. See Thomas H. Jackson, Avoiding Powers in Bankruptcy, 36 Stanford

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event the Fourth Circuit reverses the District Court's affirmance of the Adversary Dismissal Order. Because Dunes unquestionably wants possession of the Hotel which it transferred to Hyatt through the Lease, Dunes must seek recovery of the property under Section 550. Without recovery under Section 550 following avoidance, the Hotel Property could not be revested in the Debtor pursuant to a plan of reorganization. 11 U.S.C. §541(a)(3); In re Colonial Realty Co., 980 F.2d 125, 131 (2d Cir. 1992) (property subject to avoidance does not become property of the estate until recovered pursuant to Section 550); Robinson v. First Fin. Capital Mgmt. Corp (In re Sweetwater), 55 B.R. 724, 730 (D. Utah 1985) (Section 541(a)(3) specifies that property of estate is property recovered, not that may be recovered; prior to recovery all trustee has following avoidance is right to bring recovery action); Westphall v. Norwest Bank (In re Missouri River Sand & Gravel, Inc.) 88 B.R. 1006, 1013 (Bankr. D.N.D. 1988) (avoidance does not cause return of "collateral or interest in collateral to the estate, [that is] implemented by section 550 . . . ."); In re Jameson's Foods, Inc., 35 B.R. 433, 435 (Bankr. D.S.C. 1983) (Davis, J.) (if transfer avoided, recovery permitted under certain circumstances by Section 550 and property so recovered becomes property of the estate through Section 541(a)(3). See also David G. Epstein & Steve Nickles, Basics of Bankruptcy at 1 (July 1997) (published as part of N.Y.U. Workshop on Bankruptcy and Business Reorganization XXIII, August 23 - 28, 1997) (when trustee invalidates transfer, property becomes property of estate through Sections 550 and 541(a)(3)).

L.R. 725, 733-34 (1984) (strong arm powers of 544(a) permit trustee to recover and preserve assets for the benefit of all unsecured creditors).

Courts outside of and within this circuit follow the same logic. In re Wheaton Oaks Office Partners Ltd. Partnership, 27 F.3d 1234, 1244 (7th Cir. 1994) (failure to perfect interest permits trustee to "subordinate or 'avoid' that interest, thus relegating it to a status of a general creditor of the bankruptcy estate"); General Elec. Capital Corp. v. Spring Grove Transport, Inc. (In re Spring Grove Transport, Inc.), 202 B.R. 862, 865 (Bankr. E.D. Va. 1996) (avoidance under 544(a) subordinates creditor's interest and gives trustee priority); Barclays Am./Mortgage Corp. v. Wilkinson (In re Wilkinson), 186 B.R. 186, 193 (Bankr. D. Md. 1995) (following avoidance of deed of trust, transferee's claim becomes unsecured claim); In re Purity Ice Cream Co., 90 B.R. 183, 188 (Bankr. D.S.C. 1988) (Davis, J.) (Where UCC-1 not needed for perfection, "failure to file a UCC-1 financing statement does not subordinate [creditor's] interest in the equipment to that of the debtor pursuant to § 544."); Remes v. Ford Motor Credit Co. (In re Churchwell), 80 B.R. 855, 860 (Bankr. W.D. Mich. 1987) (security interest that is avoided under Section 544(a) is "deemed subordinate" to trustee's interest); Brent Explorations, Inc. v. Karst Enters., Inc. (In re Brent Explorations, Inc.), 31 B.R. 745, 752 (Bankr. D. Colo. 1983) (avoidance under 544 makes transferee an unsecured creditor). The rationale for the trustee's strong arm avoidance powers in the first place is to increase the estate on behalf of all of the debtor's unsecured creditors, including those from whom assets are recovered. Xonics, Inc. v. Nettles & Co. (In re Xonics, Inc.), 63 B.R. 785, 788 (Bankr. N.D. Ill. 1986) (Avoidance "intended to distribute the impact of a business failure over various claimants to debtor's assets to give equal treatment to all, whether in

a liquidation or reorganization proceeding.") See also In re American Reserve Corp., 840 F.2d 487 (7th Cir. 1988) (function of bankruptcy law is to implement single collective proceeding to determine entitlements of all parties in interest). Avoidance might alter Hyatt's rights as against unsecured third party creditors, if there were any, but it does not alter Hyatt's rights as to Dunes.

In this Circuit, it is even clearer that not only is the strong arm power exercised on behalf of creditors only, the avoidance as to creditors does not invalidate the contract as to the original parties, the debtor and the transferee. Pyne v. Hartman Paving, Inc. (In re Hartman Paving, Inc.), 745 F.2d 307, 309 (4th Cir. 1984) (transfer invalid as to subsequent bona fide purchasers or hypothetical lien creditor is still valid as to the parties); see also id. at 311 (Winter, C.J. dissenting) ("debtor-in-possession does not avoid . . . lien as debtor; . . . only in its role as trustee for all claimants against the debtor. [The transferee's] claim remains good against [pre-petition debtor], it is only in demoting it from a secured to an unsecured claim that the [avoidability] does him harm.").[22] The Fourth Circuit approach is entirely consistent with South Carolina law with respect to bona fide purchasers and intervening lien creditors. Leasing Enters., Inc. v. Livingston, 294 S.C. 204, 363 S.E.2d 410, 412-13 (S.C. Ct. App. 1987) (transfer invalid as to bona fide purchaser is still enforceable against transferor) (citing Young v. Young, 27 S.C. 201, 206, 3 S.E. 202, 205 (1887) (improperly executed mortgage creates equitable lien that is "valid for all purposes, and as against all parties, except a purchaser of the land for a valuable consideration and without notice"). As a result, the contract would remain as between Dunes and Hyatt post-avoidance. Any claim based upon that interest arising upon avoidance is recognizable

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[22] It is well worth noting that this was the only issue upon which the majority and the dissent in Hartman agree.

under the Bankruptcy Code and Rules. As discussed below, Hyatt would have a contingent claim upon Dunes' proposed avoidance under its Plan, which claim could be estimated or allowed for voting purposes on any plan which proposes to dispossess Hyatt by avoidance.

2. Contingent Avoidance Claim is Statutory

Consistent with this basic notion, that the avoidance does not render a transaction void ab initio as against a debtor, the Bankruptcy Code and Rules set out a specific procedure for the filing and allowance of a claim by the transferee of an avoided transfer.[23] Pursuant to Section 502(h):

> A claim arising from the recovery of property under section ... 550 ... of this title shall be determined, and shall be allowed under subsection (a), (b) or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.
>
> An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

The very fact of this procedure indicates that Congress intended that such creditors should have a claim against the estate by reason of the avoidance. See 4 Collier on Bankruptcy ¶ 502LH[10] at 502-113-15 (1997) (discussing expansion by Congress of the reach of Section 502(h) bringing it more in line with prior law); Verco Indus. v. Spartan Plastics (In re Verco Indus.), 704 F.2d 1134, 1138 (9th Cir. 1983) (noting that bar to fraudulent transferees' claims had been removed under modern bankruptcy law); County of Sacramento v. Hackney (In re Hackney), 93 B.R. 213,

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[23] It should be obvious that, if Hyatt loses its bargained for right of exclusive possession of the Hotel, it has been harmed and that harm likely is quantifiable.

216 & n.1 (Bankr. N.D. Cal. 1988) (discussing rights of parties from whom preferences are recovered).

The essence of Dunes' position is that it can cause harm to Hyatt through avoidance of its leasehold estate, and that Hyatt would then lack any remedy as against Dunes or its estate. Two Courts of Appeals (1st and 9th) have stated that where an interest is avoided pursuant to the trustee's strong-arm powers, the result is a claim arising against the estate. Max Sugarman Funeral Home, Inc. v. A.D.B. Investors, 926 F.2d 1248, 1253 (1st Cir. 1991) (recovery of assets for benefit of creditors gives rise to a claim under 502(h)); In re Verco Indus., 704 F.2d at 1138 Circuit (party from whom property is recovered "would have a claim against [the debtor] for the loss it suffered when the transfer was set aside"). Similar conclusions have been reached by courts in other circuits. In re Spring Grove Transport, 202 B.R. at 867 (creditor, GE Capital Corp., is left with an unsecured claim against the debtor's estate following avoidance under Section 544(a)); In re Wilkinson, 186 B.R. at 193 (following avoidance, previously secured claim "would become an unsecured claim against the estate, but would be entitled with all such claims to the benefit of the asset of the estate under any Chapter 11 plan ... or any [other] distribution."); Capital Center Equities v. Estate of William Gordon (In re Capital Center Equities), 144 B.R. 262, 264 (Bankr. E.D. Pa. 1992) (party whose deed of trust was avoided was "entitled to file an amended proof of claim under 11 U.S.C. § 502(h)."); In re Hackney, 93 B.R. at 216 ("clearly, under 11 U.S.C. § 502(h), the recipient of a preference who is forced to surrender a preference to a bankruptcy trustee has the right to file a claim against the debtor's bankruptcy estate."); In re Brent Explorations, Inc., 31 B.R. at 752 (avoided "agreement was

valid between the debtor and [creditor] but was not perfected against the debtor-in-possession; [b]ecause of the avoidance under 544, [the creditor] is an unsecured creditor as against the estate.") See also Federal Rule of Bankruptcy Procedure 3002(c)(3).

Under Section 101, creditors whose claims are potentially subject to avoidance already have a contingent claim, 11 U.S.C. § 101(10)(B), for which they may file a proof of claim following entry of a final judgment of avoidance (Fed. R. Bankr. P. 3002(a)(3)), subject to disallowance if they fail to turn over the avoided property, and subject to immediate temporary allowance under Bankruptcy Rule 3018(a) for purposes of voting. In re Amarex, Inc., 61 B.R. 301, 302-03 (Bankr. W.D. Okla. 1985) (claims of avoidable transferees are deemed allowable until final adjudication and disallowance prior to such adjudication would disenfranchise parties that should be permitted to vote in accordance with the Bankruptcy Code's goal of creditor participation). See In re Toronto, 165 B.R. 746, 752 n.4 & 754 (Bankr. D. Conn. 1994) (recovery of an avoided transfer makes transferee the holder of an unsecured, pre-petition claim which may be filed under Fed. R. Bankr. P. 3002(c)(3)[24]); Lousberg, Kopp, Kutsunis & Weng, P.C. v. Bonnett (In re Bonnett), 158 B.R. 125, 127 (Bankr. C.D. Ill. 1993) (preference defendant has a claim contingent upon debtor having filed bankruptcy and trustee pursuing preference action); Freedom Ford, Inc. v. Sun Bank & Trust Co. (In re Freedom Ford, Inc., 140 B.R. 585, 588 & n.6 (Bankr. M.D. Fla. 1992) (avoided transferee must have opportunity to participate in confirmation, to file claim, and seek other benefits as creditors) citing Spring Valley Farms v.

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[24] The Toronto court further held that a creditor's original proof of claim together with the filings and pleadings leading to avoidance and recovery would constitute an informal proof of claim. 165 B.R. at 752 n.4.

Crow (In re Spring Valley Farms), 863 F.2d 832 (11th Cir. 1989) (failure to permit avoidance transferee to participate in confirmation process raises significant due process concerns).[25]

It is clear to the Court that even upon avoidance, an event which has not yet occurred and which in fact is contrary to the present law of the case, Hyatt would have a claim which would provide it standing to seek dismissal of the case.

Furthermore, as stated previously, this Court may upon its own authority determine to dismiss a bankruptcy case, sua sponte, particularly when the issues associated with dismissal have been fully litigated at a contested hearing and in the context of a case which has no other creditors to benefit from the reorganization. Under the circumstances of this case, this Court shall additionally consider the merits of dismissal in its own discretion.

Finally, as a related argument, Dunes asserts that Hyatt has no standing to block confirmation of its pending plan of reorganization. This Court disagrees. It is obvious to this Court that Hyatt will not assent to confirmation of a plan that impairs its contractual rights under the Lease to exclusively occupy and possess the Hotel Property and to operate the Hotel. This Court has previously held that the maintenance of the avoidance action which seeks to dispossess Hyatt from the Hotel constitutes an impairment of its rights. This remains true for purposes of the pending plan. Despite Dunes contentions that the pending plan does not require or depend on avoidance, avoidance of the Lease is clearly the entire reason for and aim of the plan. As long as there is pending an action to avoid the Lease through a cause of action uniquely provided by the

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[25] Hyatt offered evidence on the value of its avoidance claim, but the Court did not admit such evidence at this hearing.

Bankruptcy Code, the interests of Hyatt are impaired for voting of a plan.[26] Under the present circumstances and law of the case, Dunes will not be able to effectuate any plan it will propose (unless it were to abandon its efforts to avoid the Lease which Dunes has indicated it will not do). See also In re Woodbrook Assocs., 19 F.3d at 321 (inability to confirm plan over creditors' objection warrants dismissal); In re Investors Fla. Aggressive Growth Fund, 168 B.R. at 768 (debtor's inability to confirm plan over objection of impaired creditor supports dismissal); In re B & B West 164th Street Corp., 147 B.R. 832, 842 (Bankr. E.D.N.Y 1992) (case dismissed where debtor could not confirm plan over creditor objections) and In re Rundlett, 136 B.R. 376, 381 (Bankr. S.D.N.Y. 1992) (debtor cannot effectuate plan without approval of sole impaired class). As the only impaired, non-insider creditor, Hyatt's negative vote would be sufficient to defeat confirmation of any plan which proposes avoidance of Hyatt's Lease. Accordingly, dismissal is appropriate under Section 1129(b)(2).

C. Unreasonable Delay by the Debtor That Is Prejudicial to the Creditors

Section 1112(b)(3), which provides for dismissal where there has been an unreasonable delay by the debtor that is prejudicial to the creditors, can be read in conjunction with Section 1112(b)(2). See In re Great Am. Pyramid Joint Venture, 144 B.R. 780, 791 (Bankr. W.D. Tenn. 1992). Where a debtor has no prospect of effectuating a plan of reorganization, the delay caused is clearly unreasonable. See Quarles v. United States Trustee, 194 B.R. at 97 (delay in proposing a plan that could be effectuated is unreasonable); In re Winslow, 123 B.R. 641, 646 (D. Colo.

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[26] The issuance of any final order allowing avoidance of the Lease may alter the manner in which Hyatt would have to be treated under a Plan for confirmation purposes.

1991) (debtor's repeated proposal of unworkable plans indicated inability to effectuate plan and caused unreasonable delay that was prejudicial).

This case was filed in November 1994. This Court has endeavored to move these contentious proceedings expeditiously and Dunes and Hyatt have expended considerable resources with no signs of flagging. However, the resolution Dunes seeks, it may not have, i.e., use of the bankruptcy process to eliminate Hyatt's contractual entitlement of possession and control of the Hotel Property. Hyatt, as a creditor and the operator of a business that it reasonably believes is impacted negatively by the continuation of this reorganization case, is entitled to have finality through dismissal. See In re Woodbrook Assocs., 19 F.3d at 322. In re B & B West 164th, 147 B.R. at 842. By contrast, it is clear that GEPT controls whether and how to satisfy its claim purchased from Aetna. The Debtor and GEPT have had more than two years to propose a proper reorganization plan and have failed. Dunes is not entitled to any more delay.

D. Denial of Confirmation of Dunes' Plans

Section 1112(b)(5) provides that a Chapter 11 case may be dismissed because of "denial of confirmation of every proposed plan and denial of a request made of additional time for filing another plan or a modification of a plan." As indicated above, the Court has denied confirmation for Dunes' Initial Plan and Amended Plan. In response to Hyatt's Motion to dismiss this case, Dunes filed a New Plan that is an echo of its Amended Plan which was not confirmed by this Court. Dunes argues that the Court should not prejudge the confirmability of its New Plan, and in the very next breath, argues that this Court should not dismiss the case because Dunes has put forward a confirmable plan. The Court notes that the New Plan is unconfirmable on its face,

based on (1) continual pursuit of avoidance, (2) Hyatt's impairment and right to vote, and (3) lack of additional non-insider creditors. In effect, Dunes is arguing for reconsideration of the denial of confirmation of its Amended Plan under the guise of a New Plan. Dunes sought a hearing on confirmation of this New Plan simultaneous with this Court's consideration of this Motion. This Court denied that request for a hearing reserving a hearing on Dunes' New Plan for a later date, if necessary. However, this Court has the discretion to say enough is enough. In re Woodbrook Assocs., 19 F.3d at 322; Cothran v. United States (In re Cothran), 45 B.R. 836, 838-39 (S.D. Ga. 1984) (repeated denial of confirmation of debtor's plans and lack of any progress toward confirmable plan warranted dismissal). "Chapter 11 provides a reasonable opportunity for corporate reorganization[;] it does not guarantee reorganization nor does it permit an indefinite suspension of creditors' rights and remedies pending the unsuccessful attempts of any party to effect a reorganization of debt." In re Woodbrook Assocs., 19 F.3d at 322, quoting In re BGNX, Inc., 76 B.R. 851, 853 (Bankr. S.D. Fla. 1987). As in the Woodbrook case, Dunes has "taken two bites at the apple and each time took a risk in formulating a plan" that had dispossession of Hyatt as its essence. In re Woodbrook Assocs., 19 F.3d at 322. A third bite is not warranted, accordingly, dismissal of this case is also appropriate under Section 1112(b)(5).

II. The Debtor's Bad Faith In Maintaining the Case and Pursuit of Reorganization Plans

The good faith standard in bankruptcy:

> prevents abuse of the bankruptcy process by debtors whose overriding motive is to delay creditors without benefitting them in any way or to achieve reprehensible purposes.

In re Little Creek Dev. Co., 779 F.2d 1068, 1072 (5th Cir. 1986); accord In re Kestell, 99 F.3d at 147; Carolin, 886 F.2d at 698. The good faith requirement is a continuing test of whether the debtor[27] uses the bankruptcy process for the purposes for which it is intended. Carolin, 886 F.2d at 698. Failure to do so is an abuse of the bankruptcy process under Section 105. In re Kestell., 99 F.3d at 140. In addition lack of good faith is "cause" for dismissal under Section 1112. In re Kestell, 99 F.3d at 148; Carolin, 886 F.2d at 700.

In this Court's Order denying the Case Dismissal Motions filed in early 1995, the Court determined that it would not treat a solvent debtor's invocation of the powers to avoid or reject contracts as a per se indication of bad faith in filing a petition, certainly at least not while an independent third party creditor, like Aetna, could benefit from the reorganization. (Case Dismissal Order at 16.) It has now been determined that Dunes improperly seeks to use these extraordinary powers solely for its own and its equity holder's benefit, rather than for the benefit of creditors.[28] The duration of the Court's patience for such an exercise need not be limitless.

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[27] A debtor in possession, such as Dunes, is a fiduciary of its unsecured creditors and must act in their interests and for their benefit. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 355 (1985) (debtor in possession has same fiduciary responsibilities to creditors as trustee); accord Wolf v. Weinstein, 372 U.S. 633, 649 (1963); Bowers v. Atlanta Motor Speedway (In re Southeast Hotel Properties Ltd. Partnership), 99 F.3d 151, 152-53 n.1 (4th Cir. 1996); Kremen v. Hartford Mut. Ins. Co. (In re J.T.R. Corp.), 958 F.2d 602, 605 (4th Cir. 1992). A debtor is also subject to sanctions under Fed. R. Bankr. P. 9011 for abuse of the bankruptcy process in the filing and conduct of its case. Carolin, 886 F.2d at 699-700; County of Chesterfield v. Tamojira, Inc. (In re Tamojira, Inc.), 197 B.R. 815 (Bankr. E.D. Va. 1995).

[28] Dunes and GETP's ability to pay off the Aetna claim and their attempted manipulation of that claim for confirmation voting purposes clearly demonstrates their primary goal of the case. Events have also confirmed the Court's view that Dunes had no creditors who needed or would benefit from successful avoidance of the Lease.

A. Dunes' Use of Bankruptcy as a Litigation Tactic Supports Dismissal of Its Case

The laws of bankruptcy "are intended as a shield, not as a sword." In re Penn Central Transp. Co., 458 F. Supp. 1346, 1356 (E.D. Pa. 1978). "The bankruptcy code is not intended to insulate financially secure [parties] from the bargains they strike." Barclays-American/Business Credit, Inc. v. Radio WBHP (In re Dixie Broadcasting, Inc.), 871 F.2d 1023, 1028 (11th Cir.) (bad faith for solvent debtor to use bankruptcy to get out of valid arm's length contract), cert. denied, 493 U.S. 853 (1989).

It is an abuse of bankruptcy to use a Chapter 11 case primarily as a litigation tactic. In re C-TC 9th Ave. Partnership, 193 B.R. 650, 654 (Bankr. N.D.N.Y. 1995) ("Where the primary purpose of the filing of a Chapter 11 case is as a litigation tactic, the petition may be dismissed for lack of good faith."), aff'd, 196 B.R. 666 (N.D.N.Y. 1996), aff'd, 113 F.3d 1304 (2d Cir. 1997); In re Moog, 159 B.R. 357, 361 (Bankr. S.D. Fla. 1993) (same); In re Marsh Fairway Corp., 148 B.R. 721, 723 (Bankr. D.N.H. 1992) (case dismissed, debtor was using Chapter 11 to forward "plan of litigation"); In re HBA East, Inc., 87 B.R. 248, 260 (Bankr. E.D.N.Y. 1988). Since GEPT bought the Aetna claim, Dunes' only remaining purpose in this case is to terminate the Lease. To ask this Court to maintain this case for such a purpose for more than two years after it has been determined that such an avoidance under the Bankruptcy Code is impermissible is an abuse of the bankruptcy process. Clearly, the termination or avoidance of the Lease has always been the driving purpose behind Dunes' petition (based upon representations by the cognizant GEPT Trustee in September 1995 that funds were always available to pay Aetna, but GEPT would not do so while Hyatt was Dunes' lessee). See, e.g., Shell Oil Co. v. Waldron (In re

Waldron), 785 F.2d 936, 939-40 (11th Cir.) (rejection not intended as a weapon for solvent debtors to profit by getting out of contracts), cert. dismissed, 478 U.S. 1028 (1986); Argus Group 1700, Inc. v. Steinman (In re Argus Group 1700, Inc.), 206 B.R. 757 (E.D. Pa. 1997) (solvent debtor's use of bankruptcy as tactic in two-party litigation was in bad faith and cause for dismissal); Furness v. Lilienfield, 35 B.R. 1006, 1009 (D. Md. 1983) (Chapter 11 is not intended as means to evade contractual liability); In re Albrechts Ohio Inns, Inc., 152 B.R. 496, 501-02 (Bankr. S.D. Ohio 1993) (debtor may not manipulate Bankruptcy Code solely to reject its contracts); In re Reiser Ford, Inc., 128 B.R. 234 (Bankr. E.D. Mo. 1991) (court dismissed case where debtor tried to use bankruptcy solely to get out of enforceable contract); In re Newsome, 92 B.R. 941, 944 (Bankr. M.D. Fla. 1988) (remedial provisions of bankruptcy "were never designed to accomplish" sole purpose of getting out of a contract which debtor "now considers to be burdensome and oppressive," especially when debtor doesn't truly need bankruptcy protection to readjust debts); In re Southern Cal. Sound Sys., Inc., 69 B.R. 893, 898 (Bankr. S.D. Cal. 1987) (case filed for the sole purpose of rejecting a contract and thereby avoiding specific performance dismissed as having been filed in bad faith). As this Court held previously:

> While this Court had recognized in an earlier Order that it is not bad faith under § 1112 for a debtor to file bankruptcy to preserve or defend its equity in the Hotel Property, that is very different indeed from using §§ 544 and 550 or § 365 to affirmatively avoid an otherwise binding contract solely in order to create additional equity or value for the sole benefit of the Debtor, its general partners or GEPT.

(Adversary Dismissal Order at 47-48 n.28.) It is an abuse of bankruptcy for Dunes, a solvent debtor, to use the Bankruptcy Code as a litigation tool to break a profitable lease because that lease is not as profitable as Dunes would like or to assert alleged breaches which have been

properly referred to arbitration. Accordingly, Dunes' case should be dismissed under Sections 105 and 1112. See In re Kestell 99 F.3d at 148-49.

B. Dunes' Failure to Meet Administrative Requirements or Comply with Court Orders

Failures to meet administrative and disclosure requirements imposed by the Bankruptcy Code and Rules and the failure to comply with the Orders of the Court may be considered as support for dismissal of a case. Hyatt alleges that Dunes and its counsel have failed to meet important administrative and disclosure requirements.

1. Failure to Comply With Section 329 Requirements.

Hyatt alleges that Dunes has failed to meet the requirements of Section 329 of the Bankruptcy Code. Section 329, in conjunction with the language of Rules 2016(b) and 2017 of the Federal Rules of Bankruptcy Procedure, subjects to court examination compensation paid or promised to the debtor's attorney after entry of the order for relief. The last sentence of Rule 2016(b) also specifically requires that a supplemental statement be filed and transmitted to the U.S. Trustee within 15 days after any payment or agreement not previously disclosed. This is true regardless of whether payment is from the Debtor's estate or a third party. Id at 329-4; Grunewaldt v. Mutual Life Ins. Co. (In re Coones Ranch Inc.), 7 F.3d 740 (8th Cir. 1993) (an attorney who should have known an attempt at reorganization was futile has rendered no service to the debtor's estate and should therefore not be compensated for her services). To date, Dunes has not provided the Court or U.S. Trustee with the means for a review. When this case was

commenced, counsel asserted that its fees would be paid by either the Dunes estate or Meyers Enterprises, its general partner. Under the terms of its representation letter with Dunes' and Meyers, the Streich Lang firm states it will apply to the Court from time to time for payment of its fees. That has not been done in the entire history of the case. The Court assumes counsel has been getting paid.[29] The Court does not know the extent of any agreement between Dunes and counsel and any third party, the total fees paid to date, whether there is a contingency arrangement based on successful litigation against Hyatt, or whether the terms of the original agreement have been modified.

> [T]he policy requiring timely disclosure of such matters under § 329 and Rule 2016(b) is central to the integrity of the bankruptcy process and are not to be taken lightly nor easily dismissed even in specific instances where compliance with § 327 is no longer in issue, where creditors did not object to the fee applications or even where there is a confirmed plan in the case.

In re TJN, Inc., 194 B.R. 400, 403 (Bankr. D.S.C. 1996) (Waites J). Dunes responds by asserting that it has fully complied with all administrative requirements and that no party has been misled regarding its counsels source of compensation. The Court does not have complete information to conclude these allegations and therefore, as stated at the hearing and through this Order, the Court requests the U.S. Trustee to undertake an expedited review of the allegations herein and file a written report or appropriate pleading within 10 days of the entry of this Order.

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[29] Local counsel, the Nexsen Pruet firm, specifically disclosed that it would seek payment from Meyers on a regular basis. Streich Lang makes no similar representation. Neither firm has apprised the Court of amounts paid.

2. Failure to Provide Supplemental Information Regarding Disinterestedness.

Hyatt has also asserted that Dunes' counsel have not met the requirements of disinterestedness by alleging that Dunes' attorneys have apparently represented GEPT in these proceedings though in their Court filings they stated they do not represent GEPT in connection with this case. Since GEPT is now not just an equity holder, but also the sole secured creditor in the case, Dunes' attorneys in effect represent a creditor, a shareholder and the Debtor in the same proceeding. Without review of Dunes' counsels' fees, the Court cannot determine whether there is disinterestedness in this case, or whether Dunes' attorneys are placing the interests of GEPT in front of the interests of Dunes' estate and its unsecured creditor, Hyatt, to which Dunes owes certain fiduciary duties. Moreover, a conflict of interest in connection with the representation of parties in a bankruptcy case may not be waived. In re Ginco, Inc., 105 B.R. 620, 622 (D. Colo. 1988) (disallowing dual representation of corporate debtor and the principal shareholder and citing the House Report, which emphasized compliance with Section 327 in order to eliminate the abuses and detrimental practices that had been found to prevail where "the bankruptcy system operates more for the benefit of attorneys than for the benefit of creditors"); Roger J. Au & Son, Inc. v. Aetna Ins. Co., 64 B.R. 600 (N.D. Ohio 1986) (attorney simultaneously representing debtor and its sole shareholder disqualified for creating appearance of impropriety); In re Kendavis Indus. Int'l, Inc., 91 B.R. 742 (Bankr. N.D. Tex. 1988) (serious conflicts of interest present in the representation of the debtor and its equity holders); In re Kendavis Indus. Int'l, Inc., No. 385-30348-HCA-11, Slip op., 1988 Bankr. LEXIS 1382 (Bankr. N.D. Tex. August 19, 1988) (50% reduction in fees for conflict of interest and failure to file a statement with the court on

compensation paid). The Court does not have complete information to conclude these allegations and therefore, as stated at the hearing and through this Order, the Court requests the U.S. Trustee to undertake an expedited review of the allegations herein and file a written report or appropriate pleading within 10 days of the entry of this Order.

3. Failure to Comply With Code Reporting or Court Requirements.

Hyatt also asserts that Dunes has failed to properly complete and therefore failed to properly disclose information required by its Schedules and Statement of Affairs and monthly operating reports and further that Dunes has filed post petition tax returns that are contradictory to its prior returns and accredited financial statements. Dunes has admitted deficiencies in information in the monthly reports regarding adequate protection payments.

Finally, Hyatt points out that Dunes resisted the arbitration proceeding ordered by this Court and failed to report its progress as required. In the Adversary Dismissal Order directing arbitration of Dunes' claims of breach of contract, this Court directed Dunes to provide written quarterly reports on the progress of the arbitration. Dunes has yet to file such a report. This Court has had to ask counsel during hearings on other matters in order to remain minimally informed.

C. Dunes' Plans Were Not Proposed in Good Faith

The Initial and Amended Plans both failed to meet the good faith requirements for confirmation. Dunes solicited, artificially impaired, and improperly classified the Wolf Block

claim to achieve confirmation of the Initial Plan. GEPT bought the Aetna claim for full value in order to direct the voting of that claim by Aetna on the Amended Plan to accomplish a result precluded by an order of the Court. The Third Amended Plan similarly pursues a result banned by two Orders of the District Court. Such bad faith in the proposal of a plan supports dismissal. See In re Kestell, 99 B.R. at 150 (debtor's favoritism in plan to certain creditors and use of bankruptcy to pursue personal antagonisms were basis for dismissal); In re Bloomingdale Partners, 170 B.R. at 998 (impermissible classification scheme rendered plans unconformable and warranted dismissal); In re B & B West 164th Street, 147 B.R. at 842 (where debtor cannot confirm plan without gerrymandering claim, case must be dismissed). For all the foregoing reasons, this Court holds that Dunes' Chapter 11 case can and should be dismissed for Dunes' bad faith in conduct of its case.[30]

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[30] Hyatt also argues that the Assignment of Lease to Aetna was effective as a conveyance of an interest in real property under its own terms more than 90 days prior to the Petition Date, and therefore the Lease never became "property of the estate". Hyatt asserts that therefore there are no material assets around which Dunes could then or can now reorganize. The issue of the affect of the assignment has been presented to this Court both as part of the hearings that lead to the Adversary Dismissal Order and the hearing on this Motion to Dismiss. The Court did not rely on the assignment argument earlier and considering the ruling herein need not now. The present issue before the Court is whether the assignment, if absolute, divests Dunes of the Lease so that it is not part of its property subject to being reorganized and if so, does Dunes have any other property around which to reorganize. Without greater deliberation, the Court finds no reason to rule upon the assignment arguments now. The Assignment of Lease argument may bear considerably upon the arbitration proceeding, which has been referred from this Court and in which a ruling is expected at any time. Therefore, this Court shall again defer any ruling on this argument until it is necessary to do so but may do so without further hearing or briefing.

CONCLUSION

Considering the totality of circumstances surrounding this case, the record and law established in the case to date, this Court finds that sufficient cause exists to dismiss this case at this time pursuant to Section 1112(b) and Section 105 of the Bankruptcy Code.

While Hyatt has requested that this Court in its discretion presently retain jurisdiction pursuant to Section 349 for the limited purpose of review and enforcement of any award resulting from the arbitration proceeding and for any motion for damages arising from Dunes' filing and conduct of this bankruptcy case, this Court declines to do so.

The matter referred to arbitration is a straightforward two party commercial dispute. This Court's familiarity with the parties and the history of Dunes' case in bankruptcy does not automatically mandate that this Court serve to consider the enforcement of the arbitration panel decision. The District Court may choose to make that review or may refer it to this Court. Moreover, there is no way to know at this time whether the parties will require a court's intervention to enforce the decision of the arbitration panel. Similarly, Hyatt has not filed a motion for damages arising from Dunes' filing and maintenance of this Chapter 11 case. The Court sees no present reason to leave open Dunes' bankruptcy case in anticipation of an enforcement motion that may not occur and a damages motion that has not been filed. If necessary, the Court may consider reopening the case pursuant to Section 350.

The Court shall presently retain jurisdiction and delay closing to receive and consider the expedited report from the U.S. Trustee regarding the employment and compensation issues addressed herein. Additionally, any fees due to the Clerk of Court pursuant to 28 U.S.C.

§1930 and the appendix thereto, shall be paid within ten (10) days of the entry of this Order, unless otherwise ordered by the Court. Any fees due to the United States Trustee pursuant to 28 U.S.C. §1930(a)(6) shall be paid within ten (10) days of the entry of this Order, unless otherwise ordered by the Court. The Debtor shall not submit for filing another petition for relief under the Bankruptcy Code (11 U.S.C. §101, et seq.) so long as any fees referenced in this paragraph remain unpaid.

AND IT IS SO ORDERED.

John F. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
September 26, 1997.