

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
CIVIL MINUTES**

Case Title : Council for Refractive Surgery **Case No :** 10-39240 – B – 11
Quality Assurance
Date : 12/13/11
Time : 09:32

Matter : [168] – Motion/Application to Convert Case **OPPOSED**
From Chapter 11 to Chapter 7 [UST-1] Filed
by U.S. Trustee U.S. Trustee (Fee Paid
\$0.00) (jlns)
[168] – Motion/Application to Dismiss
Case/Proceeding [UST-1] Filed by U.S.
Trustee U.S. Trustee (jlns)

Judge : Thomas Holman
Courtroom Deputy : Sheryl Arnold
Reporter : Diamond Reporters
Department : B

APPEARANCES for :

Movant(s) :

U.S. Trustee's Attorney – Jason Blumberg

Respondent(s) :

Debtor(s) Attorney – C. Anthony Hughes

Creditor's Attorney – Steve Williamson for Lauranell Burch

Disposition After Oral Argument (formerly Tentative Ruling) *as modified:

The debtor's opposition is overruled. The motion is granted *in part, and this case is dismissed.

By this motion the United States trustee ("UST") seeks dismissal of this case. Pursuant to 11 U.S.C. § 1112(b)(1), the court shall convert or dismiss a chapter 11 case, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate. Section 1112(b)(2) further limits the foregoing directive in several ways:

Under section 1112(b)(2), the court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that:

(A) There is a reasonable likelihood that a plan will be confirmed within the time limitations specified in the subsection; and

(B) The grounds for converting or dismissing the case include an act or omission by the debtor other than substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; and there exists a reasonable justification for the act or omission demonstrating cause to dismiss the case and the act or omission will be cured within a reasonable time fixed by the court.

In a small business case, the time limitations specified in section 1112(b)(2)(A) are those set forth in

sections 1121(e) and 1129(e). Section 1121(e)(2) requires, inter alia, that "the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief." This case was filed on July 21, 2010. 11 U.S.C. § 348(a). Three hundred days after July 21, 2010 was Monday, May 16, 2011.

The 300 day time deadline of section 1121(e)(2) may be extended under 11 U.S.C. § 1121(e)(3) "only if – (B) a new deadline is imposed at the time the deadline is extended; and (C) the order extending time is signed before the existing deadline has expired." (Emphasis added).

In addition, in a small business case, "the court shall confirm a plan...that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(c)(3)." 11 U.S.C. § 1129(e). The extension provision of section 1129(e) means that the 45 day time deadline of section 1129(e) may be extended "only if – (B) a new deadline is imposed at the time the deadline is extended; and (C) the order extending time is signed before the existing deadline has expired." (Emphasis added).

Section 1112(b)(3) requires that, absent the UST's consent or compelling circumstances that prevent the court from meeting the requirements of the subsection, the court must commence a hearing on the motion within thirty (30) days after it is filed and must decide the motion within fifteen (15) days after the hearing is commenced. This motion was filed on October 18, 2011 and the UST set this motion for hearing on December 13, 2011. The UST's action in setting the hearing more than thirty days after it was filed constitutes the UST's consent to hearing the motion more than thirty days after it was filed.

Section 1112(b)(4) sets forth a non-exhaustive list of examples of "cause."

The court finds, for the reasons stated in the motion, that the UST has established cause for dismissal or conversion under 11 U.S.C. § 1112(b)(4)(J), and for unreasonable delay that is prejudicial to creditors.

For the reasons set forth in the UST's reply filed on December 6, 2011 (Dkt. 181), the court further has identified no unusual circumstances establishing that converting or dismissing the case is not in the best interest of creditors and the estate, and the debtors or any other parties of interest have failed to establish the requirements of section 1112(b)(2)(A) and (B).

As stated above, this case was filed on July 21, 2010. The debtors' plan and disclosure statement (if any) were required by May 16, 2011. The initial combined Chapter 11 plan and disclosure statement was filed on May 17, 2011 (Dkt. 108), and confirmation the plan filed on May 17, 2011 was denied by order entered October 6, 2011. No request for an extension of the 300-day deadline was made before that period expired, and no order extending the 300day filing deadline was signed before that period expired. Accordingly, it is not now possible for the debtor to confirm a plan in this case.

Once "cause" is established, current section 1112(b)(1) states that the court shall dismiss or convert if cause is present, unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate. The court makes no such determination because there does not appear to be significant assets to administer for the benefit of creditors.

The court finds that dismissal of the case is in the best interests of creditors and the estate.

The court will issue a minute order.