UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

In re:

THE INTOWN COMPANIES, INC., CASE NO.: 14-50374-KKS
CHAPTER: 11

Debtor.
_____/

AMENDED ORDER GRANTING CREDITOR PANAMA ASSETS, LLC'S AMENDED MOTION TO CONVERT OR, ALTERNATIVELY, TO DISMISS WITH PREJUDICE (DOC. 382)[1]

THIS AMENDED ORDER is issued to clarify and set forth in detail the basis for dismissal of this single asset Chapter 11 case.

PROCEDURAL HISTORY

Debtor, a Georgia corporation, owns a motel in Panama City, Florida. It filed this Chapter 11 case on November 11, 2014; it filed its first Chapter 11 Plan on April 21, 2015, an Amended Plan on June 25, 2015, and a Second Amended Plan on December 4, 2015 (Docs. 89, 108 and 191). After its Second Amended Disclosure Statement was approved, and after the hearing at which confirmation of its Second Amended Plan

[1] This Order is being amended pursuant to the *Order Granting, in part, Debtor-in-Possession's Motion to Alter, Amend, or Clarify Order Granting Creditor Panama Assets, LLC's Amended Motion to Convert or, Alternatively, to Dismiss with Prejudice* (Doc. 403).

was denied, Debtor retained new bankruptcy counsel and filed a new Chapter 11 Plan and a new Disclosure Statement.[2]

Early in the case, Debtor filed motions for approval of its use of cash collateral, comprised of rents and income, and to assume an executory contract with its management company, American Motel Management, Inc. ("AMMI").[3] In its cash collateral motion Debtor reported total cash on hand, including petit cash and money on deposit, of about $3,660.00.[4] Debtor's cash collateral motion and its motion to assume the management agreement with AMMI were granted on February 23, 2015.[5] Ultimately, a final order approving Debtor's use of cash collateral was entered, granting Debtor's largest (and effectively only) creditor, Panama Assets, LLC ("Panama Assets"), a continuing post-petition lien on the cash collateral that secured its claim pre-petition, and permitted Debtor to operate, within certain parameters, under a budget attached to

[2] Docs. 377 & 378. Although the Court had already approved the Second Amended Disclosure Statement, the filing of a new disclosure statement and plan effectively restarted the confirmation process.
[3] AMMI is wholly owned and controlled by Debtor's principal, Melton Harrell ("Mr. Harrell,"). (Docs. 11, 13).
[4] The cash collateral motion isn't completely clear, but Debtor reported petit cash of $4,800, and the value of its checking accounts, including deposits made post-petition as a negative $1,138.43. Doc. 11, ¶ 4.
[5] The cash collateral motion was granted on an interim basis. (Doc. 67).

the order.[6] That budget projected that Debtor would operate at a loss in December 2015, and January & February of 2016, and would begin to have positive cash flow in March of 2016.[7] That budget did not provide for debt service payments to Panama Assets, but did include a $6,000 per month management fee to AMMI.[8]

At a hearing on September 18, 2015, the Court approved Debtor's First Amended Disclosure Statement and scheduled an evidentiary confirmation hearing to take place on November 10, 2015.[9] On October 29, 2015, the Court viewed the motel property owned by Debtor.[10] Meanwhile, on October 21, 2015, Debtor filed an emergency motion seeking to spend $177,028 to repave and restripe the parking area of the motel.[11] In that emergency motion, Debtor emphasized that it was "imperative" to repave the parking lot, because "the paving area of the Motel complex is a large area that contains several pot holes [sic], which create dangerous situations for tenants as well as employees and is in dire need of resurfacing."[12] Debtor reported that it had accumulated the

[6] Doc. 78.
[7] Doc. 78, Ex. A.
[8] *Id.*
[9] Docs. 125, 128.
[10] Docs. 132, 136.
[11] Doc. 138.
[12] *Id.* at ¶ 6, 10.

money needed for this repaving, had selected Triangle Asphalt, Inc. to do the work based on a bid dated August 21, 2015.[13] In the statement of need filed in support of its emergency motion, Debtor stated:

> [T]he paving of the parking lot will enhance the value of the property above the appraised value, which was attached to Panama Assets, LLC's Proof of Claim, and provide safety for the tenants and employees.[14]

Panama Assets objected to Debtor's emergency motion to spend $177,028.00 to repave the parking lot on the basis that the money was its cash collateral, the confirmation hearing was only a few days away, the money might be better spent paying $98,000 in past due property taxes, and that it was premature to authorize such an expenditure before knowing whether Debtor's plan would be confirmed.[15] The Court scheduled the matter for an emergency hearing to take place on October 29, 2015; the hearing on confirmation remained scheduled on November 10, 2015.[16]

Having already objected to confirmation, Panama Assets also filed a motion to convert this case to Chapter 7. In that motion, Panama

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[13] *Id.* at p. 7. It is unclear why the bid was done in August, but the matter did not become an "emergency" until October.
[14] Doc. 139, ¶4.
[15] Doc. 141.
[16] Docs. 140, 141, 215.

Assets asserted that Debtor would not be able to effectuate substantial consummation of a plan, and that Debtor's real property was continuing to deteriorate.[17] Panama Assets' motion to convert was set for hearing to coincide with the confirmation hearing.[18]

In late November counsel for the parties agreed that it was premature to take the case to confirmation, so Panama Assets withdrew its motion to convert and Debtor withdrew its First Amended Plan and Disclosure statement. The hearing on confirmation, Debtor's emergency motion to use cash collateral to pave the parking lot and Panama Assets' motion to convert, scheduled to take place on December 8 and 9, 2015, was canceled.[19]

Debtor filed its Second Amended Disclosure Statement and Second Amended Plan on December 4, 2015, after which the Court rescheduled a final evidentiary hearing to consider confirmation and Debtor's "emergency" motion to use cash collateral to repave its parking lot.[20]

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[17] Doc. 150, citing Doc. 113, ¶ 22.

[18] The hearings were originally set to begin on November 10, 2015, but on a motion filed by Debtor the Court rescheduled the hearings to take place on December 8 and 9, 2015, and placed a deadline on the parties to provide expert reports on or before November 23, 2015. Docs. 152, 162, 163, 164.

[19] Docs. 171, 172, 183.

[20] Doc. 215. An order approving Debtor's Second Amended Disclosure Statement was entered later, on March 2, 2016. (Doc. 221).

Debtor filed a supplement to its Second Amended Plan just prior to that hearing.[21]

The final evidentiary hearing on confirmation and all pending motions took place over one and a half days, on April 13-14, 2016.[22] After the one and a half day hearing, but before the Court ruled, Debtor objected to Panama Assets' claim, seeking reduction of the default interest and elimination of a prepayment penalty.[23] Also in April of 2016 Panama Assets withdrew its objection to Debtor's "emergency" motion to use $177,000 to repave its parking lot.[24]

On July 19, 2016, the Court announced from the bench that confirmation of Debtor's Second Amended Plan was denied, as were Debtor's motions seeking cramdown pursuant to 1129(b).[25] The order

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[21] Doc. 264. Heard at the same time were Panama Assets' objection to confirmation and Debtor's motions for cram-down as to Panama Assets' claims. Docs. 239 and 229. Prior to the contested confirmation hearing, Panama Assets had filed a timely notice of 1111(b) election. (Doc. 218).

[22] After the hearing, at the Court's direction the parties submitted proposed Findings of Fact, Conclusions of Law and closing arguments on confirmation. Docs. 293-296.

[23] Doc. 279. That objection was sustained in part and overruled in part by order dated May 25, 2016, which reduced Panama Assets' claim by $57,289.39 and allowed its claim in the amount of $3,713,187.00. (Doc. 287).

[24] For an unknown reason, the order granting that motion was not submitted or signed until July of 2016. (Doc. 304).

[25] Doc. 309.

denying confirmation, as well as orders denying Debtor's motions for cramdown were entered in early August of 2016.[26]

Later in August of 2016, Panama Assets moved to convert this case, or dismiss the case with prejudice; the Debtor filed an objection.[27] Before the hearing on September 29, 2016, Debtor's original bankruptcy counsel withdrew, and Debtor employed its present bankruptcy counsel.[28] The parties attempted mediation in December of 2016, but did not reach a settlement.[29]

Debtor filed a new Plan and Disclosure Statement in mid-January of 2017. On February 14, 2017, the Court heard argument on Panama Assets' Amended Dismissal Motion, and considered that matter based on all pleadings and evidence of record as of the date of the hearing. At the conclusion of that hearing, the Court announced that Debtor's Chapter 11 case would be dismissed "for cause," and reserved ruling over whether the case should be dismissed with prejudice. In its order granting the Amended Dismissal Motion the Court did not set forth in detail the basis

[26] Docs. 322, 315, 314.
[27] *Creditor Panama Assets, LLC's Amended Motion to Convert or, Alternatively, to Dismiss with Prejudice* (the "Amended Dismissal Motion," Doc. 382). *See, also,* Docs. 326, 384.
[28] Docs. 331, 333.
[29] Doc. 359.

for dismissing the case, having announced its findings of fact and conclusions of law at the hearing.[30] Debtor's motion to alter, amend or clarify the order dismissing the case followed, was granted, and has resulted in the instant order.[31] The instant Order, together with the Court's oral ruling from the bench on February 14, 2017, constitutes findings of fact and conclusions of law pursuant to Rule 7052, Federal Rules of Bankruptcy Procedure, and Rule 52, Federal Rules of Civil Procedure.

FACTS

This case is a two party dispute between Debtor and Panama Assets.[32] Debtor is a single asset real estate entity ("SARE").[33] Panama Assets purchased its claim, which is secured by a first mortgage on Debtor's motel property and lien on cash collateral, after the loan had matured by its own terms.[34] After the parties were unable to agree on terms for renewal of the loan in 2013, Panama Assets filed suit to foreclose. Debtor filed its Chapter 11 petition one day before a scheduled

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[30] Doc. 393.
[31] *Debtor-In-Possession's Motion to Alter, Amend, or Clarify Order Granting Creditor Panama Assets, LLC's Amended Motion to Convert or, Alternatively, to Dismiss with Prejudice* ("Motion to Clarify," Doc. 396) (Order, Doc. 403).
[32] Doc. 309, p. 6; Doc. 390, p. 3.
[33] 11 U.S.C. § 101(51B).
[34] Doc. 309, p. 4.

hearing at which the state court presiding over the foreclosure was to appoint a receiver to take over possession and control of Debtor's motel.[35]

Beginning shortly after filing its Chapter 11 petition, Debtor began paying Panama Assets adequate protection.[36] It paid $7,300 per month through November of 2015, when it increased the payments to $13,991.06.[37] During the pendency of the case, Debtor made some improvements to the motel, including installing Wi-Fi in the lobby, buying new mattresses, and replacing furniture, furnishings, television sets and flooring in some of the rooms. By the confirmation hearing in April of 2016, Debtor had accumulated approximately $160,000 in cash post-petition.[38]

Despite having received authority to do so, Debtor has still not repaved the parking lot surrounding the motel, but has apparently repaired the potholes.[39]

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[35] Debtor's business is not the only source of income of its principal, Mr. Harrell, or of AMMI. Debtor's motel, the American Quality Lodge, is one of six properties that Mr. Harrell owns (possibly together with other family members) through various operating entities.

[36] As a single asset real estate entity, Debtor had to make adequate protection payments during the pendency of the Chapter 11 in order to avoid Panama Assets obtaining relief from the automatic stay.11 U.S.C. § 362(d)(3).

[37] Doc. 309, p. 4-5.

[38] Doc. 309, p. 5.

[39] Having made an in person inspection of Debtor's motel property, the Court saw first-hand that this repair was badly needed. Debtor's principal, Mr. Harrell, testified at the confirmation hearing on April 13 & 14, 2016, that Debtor could "get [the repaving] done

Debtor owes real estate taxes on the motel for 2012, 2013 and 2014; it paid the 2015 real estate taxes post-petition.[40] Before the Panama Assets loan ballooned, Debtor had apparently not missed a payment on the loan for approximately 20 years.[41]

Panama Assets holds an allowed claim in the amount of $3,713,187.[42] The parties stipulated that the value of the property securing Panama Assets' claim was $2,120,000 as of the confirmation hearing.[43]

At the confirmation hearing, Debtor acknowledged that due to Panama Assets' 1111(b) election it would have to refinance the entire amount of Panama Assets' claim within 60 months of plan confirmation. Just prior to the confirmation hearing, Debtor filed a supplement to its Second Amended Plan in which it proposed, for the first time, three sources of additional funds with which to help fund its plan.[44] First,

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immediately." Doc. 284, p. 25. Debtor now asserts that it has made "repairs" to the parking lot. (Doc. 396 at ¶ 24).

[40] Doc. 309, p. 6.

[41] Doc. 309, p. 6.

[42] The Debtor objected to portions of Panama Assets' claim: 1) default interest from August 31, 2013 through November 11, 2014, and 2) a prepayment penalty in the amount of $57,289.38. (Doc. 279). The Court overruled the objection as to the default interest. This resulted in Panama Assets' allowed claim being more than $600,000 greater than the amount Debtor argued should be allowed. (Doc. 279, p. 31).

[43] *Joint Statement of Undisputed Facts*, Doc. 246, ¶ 11.

[44] Supplement to Second Amended Plan. (Doc. 264, p. 5).

Debtor's principal, Melton Harrell, would put in a $50,000 "cash infusion."[45] Secondly, Debtor's principal, Mr. Harrell, would repay "the outstanding debt" he owed to Debtor in the approximate amount of $71,000.00.[46] Third, Debtor's management company, AMMI, would begin making $23,442.53 semi-annual interest payments to Debtor on account of a debt that it has owed Debtor for several years.[47] Debtor did not put on evidence at trial about AMMI's or Mr. Harrell's ability to make such payments, or explain why it has never listed the note receivable from AMMI as an asset in its Schedules or Statement of Financial Affairs.[48]

The Debtor's motel property was in "deplorable condition" as of the Petition date.[49] Although the supplement to Debtor's Second Amended Plan proposed for Mr. Harrell to infuse $50,000 cash upon confirmation, this cash was to "accelerate payments toward the delinquent real property taxes," and not to make capital improvements.[50]

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[45] *Id.* Mr. Harrell brought a $50,000 check to the confirmation hearing.
[46] *Id.*
[47] AMMI has owed Debtor $1,562,835.14 since at least December 31, 2013, the date of a Promissory Note introduced into evidence by Panama Assets at the confirmation hearing. (Doc. 253-15). Debtor has never listed this note as an asset in its Schedules or Amended Schedules; the trial testimony showed that Panama Assets discovered this asset during discovery in this case.
[48] See Doc. 264, p. 5 and Doc 309, pp. 9-10.
[49] Doc. 309, pp. 10-11.
[50] Doc. 264, p. 5; Doc. 309, pp. 9-11.

The roofs on Debtor's motel needed repairs and still need replacing. Panama Assets' roofing expert estimated the cost to replace the roofs at $630,000.[51] Debtor does not dispute that the motel buildings need new roofs but did not present any expert testimony in this regard. Rather, Mr. Harrell testified as to his opinion of the potential types of repairs needed and costs for roof replacement. Panama Assets' roofing expert's testimony was credible and more persuasive than Mr. Harrell's.

The evidence showed that Debtor could not afford to make proposed plan payments, pay its operating expenses, and make necessary capital improvements, including the new roofs.[52]

DISCUSSION

The plan before the Court at the confirmation hearing was the Second Amended Plan, as supplemented (the "old plan").[53] The plan of record at the hearing on Panama Assets' Amended Dismissal Motion was the "Chapter 11 Plan of Reorganization" filed January 16, 2017 (the "new plan").[54] Debtor suggests in its Motion to Clarify that the Court did not fully consider the differences between its old plan and its new plan; it

[51] Doc. 284-1, p. 121.
[52] Doc. 309, p. 13.
[53] Docs. 191, 264.
[54] Doc. 378.

points out that in announcing its ruling the Court did not mention all differences between the two plans.[55]

Debtor is correct that in its oral ruling the Court did not announce all the differences between the old and new plans. But Debtor is incorrect that the Court did not consider those differences. In many ways, the differences between the old and new plans contributed to the determination that this case should be dismissed.

THE OLD PLAN

Debtor's old plan proposed to amortize Panama Assets' $2,120,000 secured claim over twenty (20) years, with interest at 5.25%, and a five year (60 month) balloon of approximately $1,769,234.10. The old plan proposed monthly payments of $14,285.50 to commence on the first day of the month following the effective date.[56]

The old plan proposed to treat the pre-petition secured tax claims of the Bay County Tax Collector as unimpaired by paying them pursuant to 11 U.S.C. §1129(a)(9)(C)(ii).[57]

[55] Doc. 396, ¶¶ 22-23.
[56] Doc. 264, pp. 4-5.
[57] Doc. 191, pp. 10-11.

Debtor proposed to perform the old plan by using income from operations, a $50,000 cash infusion from Mr. Harrell, Mr. Harrell's repayment of approximately $71,000, and AMMI's semi-annual interest payments on its debt to Debtor of approximately $1.5 million.[58]

THE NEW PLAN

The new plan proposes to pay Panama Assets' secured claim in the amount of $2,702,035.33 over twenty-five (25) years, with interest at 5.50%, and a balloon in sixty (60) months. The new plan gives Debtor the right to two (2) additional one-year extensions of the balloon if Mr. Harrell makes a $25,000 principal payment for the first such extension and a $50,000 principal payment for the second extension.[59]

Under the new plan, Panama Assets' unsecured claim will be approximately $690,803.32, and will "become recourse and hold the same rights and privileges of [sic] the Panama Assets secured claim."[60] The new plan proposes that Debtor shall pay interest at the federal judgment rate on Panama Assets' unsecured claim until that claim balloons at the same time as Panama Assets' secured claim.[61]

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[58] Doc. 264, p. 5.
[59] Doc. 378, p. 8.
[60] *Id.*
[61] *Id.*

In the new plan, Debtor proposes a longer payout for the Bay County Tax Collector's pre-petition tax claims, and treats those claims as impaired. Rather than pay past due ad valorem taxes in accordance with 11 U.S.C. §1129(a)(9)(D), the new plan proposes to pay the 2012 and 2013 real estate taxes over 60 months following confirmation, with interest only at 0.25% for the first three years.[62]

Debtor proposes to fund the new plan with income from operations and a $100,000 cash infusion from Mr. Harrell.[63] Under the new plan, AMMI will defer its $6,000 monthly management fee for the first year post-effective date, and will collect only $3,000 per month of its management fee for years two through five.[64] Although Mr. Harrell and AMMI are to give Debtor "Plan Support" agreements,[65] the new plan does not include any debt repayment from AMMI on its $1.5 million note or Mr. Harrell on his $71,000 debt to Debtor.

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[62] Doc. 378, p. 9.
[63] Doc. 378, p. 10.
[64] AMMI is not waiving the management fees; it is deferring Debtor's obligation to pay the "uncollected" fees. By the end of the first year of the new plan, Debtor will owe AMMI $72,000 in accrued management fees; Debtor will owe an additional $144,000 in accrued management fees by year five of the new plan. *See Disclosure Statement* (Doc. 377).
[65] Doc. 377 (new Disclosure Statement), p. 7.

FEASIBILITY

The new disclosure statement projects that Panama Assets' claim balance will be $3,392,838.65 upon the effective date.[66] It is beyond question that the only way for Debtor to make the balloon payment called for in the new plan is to sell or refinance the motel. Debtor's actual cash flow to date, even when considered with the projections in the new plan and disclosure statement, do not support Mr. Harrell's optimistic testimony at the confirmation hearing—that Debtor will be able to refinance this property before the balloon payment comes due for enough to pay Panama Assets' claims in full.[67]

Even if the Court were to give Debtor another chance at confirmation, this time on the new plan, certain facts would not change. Debtor's motel property was appraised during this case at $2,120,000; Debtor stipulated to that value.[68] Debtor's motel is over 40 years old. It does not carry a major brand "flag." It has exterior corridors. There is no Wi-Fi in the rooms. It is occupied predominantly by extended stay

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[66] *Id.* at p. 33.

[67] Debtor presented no evidence at the hearing, and proffers none in the new plan, to prove an ability to sell the property for enough to repay Panama Assets' claim in full on or before the balloon date. Presumably this is because none of Debtor's plans have provided for sale of the motel property.

[68] These facts would not necessarily prevent Debtor from attempting to prove that the property is now worth more than during the first confirmation hearing.

guests, other than during special occasions such as spring break. Most of its revenues are from weekly or longer rentals, with some revenue from less frequent overnight stays by families and other guests.[69]

The new plan's increase of Mr. Harrell's proposed capital contribution from $50,000 to $100,000 may assist Debtor in the short run, but it does not materially affect Debtor's ability to refinance at the end of five, six or seven years. The impact of an additional $50,000 up front lacks significance when compared with the payments Mr. Harrell and AMMI were going to make to fund the old plan. Those payments would have amounted to more than $50,000 during the first year following confirmation, alone.

The "Plan Support Agreements" attached to Debtor's new disclosure statement do nothing to improve, or prove, the feasibility of the new plan. At no time during this case has Debtor offered proof that

[69] In opposition to the Amended Dismissal Motion, and in support of another opportunity to confirm its new plan, debtor cited a case in which the bankruptcy court for the Middle District of Florida confirmed a plan with a ten year balloon over a secured creditor's objection. *In re Treasure Coast Hospitality, LLC*, No.: 3:11-bk-00253-PMG (Bankr. M.D. Fla. August 12, 2013). While there are similarities between the debtor in *Treasure Coast* and the Debtor here (this Debtor owns a motel, while the *Treasure Coast* debtors owned a hotel; both plans depended on refinancing or sale), there are also significant distinctions. The hotel in *Treasure Coast* was a Holiday Inn Express and Suites, a "flag" property, while this Debtor's motel is not. The hotel in *Treasure Coast* was new and needed no deferred maintenance. Further, the creditor in *Treasure Coast* appealed the confirmation, the parties settled on appeal, and ultimately a different plan was confirmed.

either Mr. Harrell or AMMI are financially capable of contributing to a successful plan. Perhaps more importantly, Mr. Harrell and AMMI have been present throughout this case, which has now been pending for two years and five months, yet neither has offered such 'plan support' before now. Nor have either paid any portion of their debts to Debtor. It is entirely unrealistic to expect Panama Assets, or the Court, to be comforted by the fact that now, as opposed to in 2013, 2014, 2015 or 2016, AMMI and Mr. Harrell say they are willing to step up to the plate; especially when these two parties have owed Debtor over $1,600,000 (cumulatively) since well before this case was filed.

Just as the support agreements offered by AMMI and Mr. Harrell do not offer comfort that Debtor will be able to perform under the new plan, the "Excess Cash Payment" attached to the new disclosure statement is not enough to sweeten the pot sufficiently to prevent dismissal.[70] This proposal is meant to show that Panama Assets may receive more than regular debt service post-confirmation. But, that promise is illusory. The projections in the new plan do not show that Debtor will have enough money to reroof the motel or repave the parking

[70] "Excess Cash" is a defined term in the new Disclosure Statement. Doc. 377, p. 46.

lot. If Debtor were to pay those expenses in addition to those in its projections, the chance that Panama Assets would receive more money under the "Excess Cash Payment" proposal appears slim to none.[71]

CRAM DOWN

Panama Assets will not vote in favor of the new plan, so Debtor will be forced to resort to cramdown under 1129(b). Similarly, the new plan's treatment for real property taxes is not in compliance with Section 1129 of the Code,[72] making it likely that the Bay County Tax Collector would vote against the new plan. This would force Debtor to attempt cramdown as to that creditor as well. Cramdown, of course, requires yet another layer of analysis.

"CAUSE" FOR DISMISSAL EXISTS UNDER 11 U.S.C. § 1112(b)

For cause shown, a court shall dismiss or convert a case to Chapter 7, whichever is in the best interests of creditors and the estate. 11 U.S.C.

[71] Debtor's projections do not take into consideration that Debtor's spring break revenues will likely not increase. At trial, the evidence showed that Debtor's spring break revenue had declined in 2016. Witnesses for Debtor testified that this was due to a Panama City Beach ordinance passed in 2015 that prohibited alcoholic beverages on the beach during spring break of 2016. They believed, or were optimistic, that the ordinance was a one-time thing or would be revoked before the next spring break. But that has proven not to be true. Panama City Beach, Florida's "anti-alcohol" ordinance continues "each year," and contains no sunset date. Panama City Beach, FL., Ordinance 1353 (2015).

[72] This, of course, subjects Panama Assets to a further decrease in value in the property securing its claim post-confirmation.

§1112(b)(1). Once cause is shown, a court may not dismiss or convert a case if it finds and specifically identifies unusual circumstances; and the debtor, or any other party, establishes 1) that there is a reasonable likelihood that debtor will confirm a plan within the timeframes in the Code or within a reasonable time; and 2) that the grounds for conversion or dismissal include an act or omission of the debtor for which there exists a reasonable justification and that will be cured within a reasonable period of time fixed by the court. 11 U.S.C. §1112(b)(2).[73]

Section 1112(b)(4) provides a list of sixteen (16) examples of "cause" for dismissal of a case.[74] By virtue of Section 102(3) of the Code, the use of the word "including" in Section 1112(b) does not limit "cause" to the enumerated statutory grounds.[75] Since the Section 1112(b) statutory list is not exhaustive, the court is able to consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases.[76] "In determining whether cause exists to dismiss a case

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[73] That is, unless the actor omission of the debtor includes substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation, as set forth in Section 1112(b)(4)(A).
[74] 11 U.S.C. § 1112(b)(4). *See In re Albany Partners, Ltd.*, 749 F.2d 670, 674 (11th Cir. 1984). Panama Assets argued that this case should be dismissed under 1112(b)(4)(J) and (b)(4)(M), but neither of those subsections apply in this case.
[75] *In re Great Am. Pyramid Joint Venture,* 144 B.R. 780, 790 (Bankr. W.D. Tenn. 1992).
[76] *Id.*

under § 1112(b), a court must engage in a 'case specific' factual inquiry which 'focus[es] on the circumstances of each debtor.'"[77] Panama Assets, as the movant, had the burden to prove by a preponderance of the evidence that "cause" exists to dismiss this case.[78]

Bankruptcy Code Section 1112(b)(4)(A) states that "cause" includes "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." The continuing loss to the estate consists of Debtor's failure to repave the parking lot, failure to replace the roofs on the buildings, failure to pay pre-petition real estate taxes (thus causing those claims to continue to accrue interest), and failure to make any effort to collect the debts due from Mr. Harrell and AMMI. The absence of a reasonable likelihood of rehabilitation is shown by Debtor's own projections in the new plan and disclosure statement: Debtor will not have the money needed to repave the parking lot, reroof the motel, and make other needed capital improvements.

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[77] *In re Creekside Sr. Apartments, LP.*, 489 B.R. 51, 60 (6th Cir. BAP 2013) (citing *United Savs. Ass'n of Tex. V. Timbers of Inwood Forest Assocs., Ltd.*, 808 F.2d 363, 371-71 (5th Cir. 1987) (en banc), *aff'd*, 484 U.S. 365 (1988)).
[78] *In re Chris-Marine U.S.A., Inc.*, 262 B.R. 118 (Bankr. M.D. Fla. 2001).

"Rehabilitation is a different and much more demanding standard than reorganization."[79] The test is not a technical one to decide whether the Debtor can confirm a plan, but rather whether there is a reasonable expectation of success for the Debtor's new plan.[80] Rehabilitation within the meaning of 11 U.S.C. § 1112(b)(1) has been defined to mean that the debtor would be reestablished on a firm, sound basis.[81]

Many years ago, faced with dismissal of a chapter 11 in which the plan was dependent on the debtor being able to refinance, this Court called the goal of selling or refinancing the "veritable pot at the end of the rainbow," stating:

> Plans which extensively rely on sale or refinance of real property that constitutes a debtor's primary or sole significant asset, and where that asset has been a marginal performer to date, are inherently speculative and invite close judicial scrutiny of the assumptions underlying the plan. . . . While a proponent need not demonstrate the success of the plan with absolute certainty, more than simple optimism about future market conditions is needed to support the confirmation of a plan whose success depends on a future sale or refinance of the debtor's principal asset.[82]

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[79] *In re Creekside Sr. Apartments, L.P.*, 489 B.R. at 61 (quoting *In re Brutsche*, 476 B.R. 298, 301 (Bankr. D.N.M. 2012)).
[80] *In re Green Box NA Green Bay, LLC*, No. 16-24179-BEH at *18 (Bankr. E.D. Wisc. October 15, 2016).
[81] *In re D & F Meat Corp.,* 68 B.R. 39, 41 (Bankr. S.D.N.Y. 1986) (citations omitted).
[82] *In re Investors Fla. Aggressive Growth Fund, Ltd*, 168 B.R. 760, 765-766 (Bankr. N.D. Fla. 1994) (citation omitted).

Debtor's only "evidence" that it will be able to refinance the debt to Panama Assets within the balloon period was testimony of Mr. Harrell and one of his long-term employees. That testimony was, essentially, that Mr. Harrell had successfully refinanced other similar properties in the past, so they believe he will be able to do so with this property. That optimism is not enough to carry the day.

Additional cause for dismissal may be delay that is prejudicial to creditors. Fed R. Bankr. P. 1001 provides that "[t]hese rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding." If a confirmable reorganization plan has not been submitted within a reasonable time, the case should be dismissed or converted to chapter 7.[83] "The Bankruptcy Code does not guarantee successful reorganization, nor does it provide a framework within which a debtor may indefinitely operate. It only provides a breathing period for the debtor to attempt to reorganize."[84]

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[83] *Matter of Sundale Associates, Ltd.,* 48 B.R. 288 (S.D. Fla. 1984); see, e.g., *In re BGNX, Inc.,* 76 B.R. 851 (Bankr. S.D. Fla. 1987). *See, also, In re Jackson v. U.S., On Behalf of I.R.S.,* 131 F.3d 134 (4th Cir. 1997).

[84] *In re Jones,* 115 B.R. 351, 352-353 (Bankr. N.D. Fla. 1990).

Another confirmation hearing on the new plan will not be speedy or inexpensive. This Court must balance the rights of the Debtor with its sole creditor. Chapter 11 cases have been dismissed where the debtors have had less time than this Debtor within which to confirm a plan.[85] This Debtor has been given a reasonable opportunity to achieve rehabilitation and conclude this Chapter 11 case without delay.

PROOF OF BAD FAITH INSUFFICIENT TO DISMISS WITH PREJUDICE

Panama Assets urges this Court to rule that Debtor filed its petition in bad faith, pointing out the presence of multiple *Phoenix Picadilly* factors.[86] A debtor's lack of good faith in filing a petition may constitute cause for dismissal.[87] "A court has broad discretion to evaluate the totality of the circumstances in each case and to determine whether those circumstances indicate a lack of good faith."[88]

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[85] A debtor's inability to make significant progress toward confirmation inherently carries the risk of unreasonable and undue delay, which is nearly always prejudicial to creditors. *In re Brooks,* 488 B.R. 483, 490 (Bankr. N.D. Ga. 2013) (citing cases that dismissed Chapter 11 cases for cause where plans had not been confirmed for 14 months, 16 months, two years and three years). *See, also, In re BGNX, Inc.,* 76 B.R. 851, 853 (Bankr. S. D. Fla. 1987) (case pending for more than a year with no confirmed plan).
[86] *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393 (11th Cir. 1988).
[87] *In re Campus Housing Developers, Inc.*, 124 B.R. 867, 869 (Bankr. N.D. Fla. 1991).
[88] *In re Chris-Marine U.S.A., Inc.*, 262 B.R. at 124.

Without question, some *Phoenix Picadilly* factors are present here: Debtor's motel was in foreclosure; this is a two-party dispute; Debtor and Panama Assets were unable to agree on repayment terms pre-petition; the motel is Debtor's sole asset; and there is no equity in Debtor's property. But, Debtor has filed operating reports, made some improvements to its motel, made adequate protection payments, improved its cash position since the petition date, and filed and attempted to confirm a Chapter 11 plan. So, Debtor has shown some good faith during the pendency of this case. Based on the totality of the circumstances, I do not find that Debtor filed the petition in bad faith.

CONCLUSION

The "cause" for dismissal of this case is that Debtor has had ample time and opportunity to confirm a workable, feasible Chapter 11 plan and has been unable (or unwilling) to do so. Debtor's principals and insiders, Mr. Harrell and AMMI, have enjoyed the cash Debtor has been generating from its operations for years, in part by deferring much-needed maintenance (roofs and parking, among others), not paying real property taxes, and not repaying the $1.6 million they owe. The deferred maintenance has adversely affected Panama Assets' interest in Debtor's

property by decreasing its value and increasing cash necessary for remediation. Had AMMI and Mr. Harrell paid their debts to Debtor, or not taken loans from Debtor to begin with, the $1.6 million that they owe would have been more than sufficient to repave the parking lot, reroof the buildings and pay the real estate taxes.

The new plan is, in essence, so much smoke and mirrors. On the one hand it appears better because Mr. Harrell's cash infusion has increased by $50,000 and AMMI will defer monthly maintenance fees. On the other hand the new plan is worse: it does not require Mr. Harrell and AMMI to repay the $1.6 million that they owe; it lengthens the amortization of the secured debts of Panama Assets and the tax collector; and gives Debtor the right to extend the due date of the balloon payment by up to two years. Under the new plan, Debtor will become indebted to AMMI for the deferred management fees, with no right to setoff against the debt due from AMMI. Meanwhile, AMMI and Mr. Harrell will continue to benefit from Debtor's cash flow.

Under these facts it would be unfair and inequitable to force Panama Assets into another expensive, prolonged confirmation process.

Panama Assets has proven by a preponderance of the evidence that cause exists to dismiss this case.

For the reasons stated, it is

ORDERED:

1. Sufficient "cause" exists to dismiss this case. Dismissal, rather than conversion, is in the best interests of creditors and the estate. 11 USC § 1112(b)(1) and (b)(4).

2. Debtor has not demonstrated, pursuant to 11 U.S.C. §1112(b)(2), that this Court should deny dismissal.

3. The Amended Dismissal Motion (*Creditor Panama Assets, LLC's Amended Motion to Convert or, Alternatively, to Dismiss with Prejudice,* Doc. 382) is GRANTED; this case is DISMISSED, without prejudice.

DONE and ORDERED on 14th day of April, 2017.

KAREN K. SPECIE
Chief U.S. Bankruptcy Judge

cc: all parties in interest