UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re: Green Box NA Green Bay, LLC, Case No. 16-24179-beh
(Chapter 11)

Debtor.

UNITED STATES TRUSTEE'S MOTION TO DISMISS OR CONVERT CASE TO CHAPTER 7

The United States Trustee Patrick S. Layng, by Attorney Amy J. Ginsberg, moves, pursuant to 11 U.S.C. §1112(b)(1), for an order dismissing Green Box NA Green Bay, LLC's (the Debtor) chapter 11 case because (1) the Debtor's management is not acting in the best interests of the estate; the Debtor cannot propose a confirmable plan; (2) the estate is experiencing substantial and continuing losses; there is no reasonable likelihood rehabilitation; (3) the Debtor's Schedules and Statement of Financial Affairs are incomplete; and (4) the estate is administratively insolvent. In support of this motion, the United States Trustee alleges:

Introduction

1. The Debtor has fundamental, inescapable financial problems, principally it lacks cash. The Debtor had no cash at the time this case was commenced and has not grossed any cash from its operations. In three months, the Debtor reported receiving $450 from its parent company, EARTH, to open the Debtor-in-Possession bank accounts. *See* Docket Entry #57. The Debtor relies on cash from related, non-debtor entities to pays its ordinary operating expenses. Without any cash, the Debtor cannot confirm a plan.

2. Next, the Debtor's primary prospect for cash flow relies on third party investment in its two "Kool Units". The Kool Units recycle used tires into a variety of commercial products,

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including carbon black. The Debtor's ability to reach third-party investors is questionable because: (1) while one Kool Unit is assembled and ready to operate, the second Kool Unit lies unassembled in South Carolina; (2) the Debtor may not control the South Carolina Kool Unit; (3) the Debtor never operated any Kool Unit on a commercial basis; (4) the Debtor does not own the technology or hold a license to operate the Kool Units. *See* Schedule B, Question #60. *See* Docket Entry #14, p. 8. The Debtor has not provided any proof of any ready and willing investors.

3. Finally, the Debtor's management fails to act in the best interest of *this* estate. In order to bolster related tenant Eco-Hub, LLC (Eco-Hub), management defers collecting rent due from Eco-Hub, leaving the Debtor without cash from the use of its paper conversion facility. When management sacrifices estate assets to preserve a non-debtor entity, dismissal of this case is appropriate.

Facts

4. The Debtor is a part of Ron Van Den Heuvel's (Van Den Heuvel) Byzantine business structure: the Debtor owns a paper conversion facility in DePere, Wisconsin; Eco-Hub, LLC (Eco-Hub) uses the paper conversion facility to convert bulk paper rolls into consumer paper products, and Patriot Tissue, LLC sells the consumer paper products to customers.

5. While the Debtor was in receivership in the year prior to commencement of this case, Eco-Hub failed to pay rent to the Debtor, owing the Debtor with $1.386 million in back rent. *See* Docket Entry #14, p. 4. Van Den Heuvel's management left the Debtor without any cash at the commencement of this case.

6. After commencement of this case, secured creditor and member, Stephen Smith (Smith) took control of the Debtor from Van Den Heuvel. Still, Smith continues to allow Eco-Hub to occupy the Debtor's paper conversion facility rent free. *See* Docket Entries #40, #51 and #57.

7. The Debtor's assets--its manufacturing facility in DePere, the two Kool Units, the $1.386 million in accounts receivable (Eco-Hub's back rent), are fully encumbered. *See* Docket Entry #14, Schedule D. One of the Kool Units is in South Carolina and subject to a $200,000 possessory security interest. See Docket Entry #14, Schedule D, page 12. The Debtor does not have any collateral to offer lenders and investors.

8. According to the Debtor's Statement of Financial Affairs, its pre-petition income for 2014, 2015 and 2016 is "unknown." Upon information and belief, in 2014 and part of 2015, Eco-Hub's $74,000 monthly rent accounted for the majority of the Debtor's revenue. *See* Docket Entry #14, Schedule B and Schedule G. However, that revenue stream came to a halt in mid-2015, when the Debtor became subject to a state court receivership.

9. The Debtor's reliance on the Kool Units to generate cash remains speculative. The Debtor's Chairman, Smith testified about the Kool Units at the §341 meetings. Although Smith testified that the Debtor can be paid to recycle tires, minimizing the upfront costs, the Debtor has not entered into any contracts for tire recycling.

10. In addition, the Debtor disclosed that it does not own the second Kool Unit. According to Schedule B, the Debtor is a member of a joint venture, PC-ARM, LLC, which owns the second Kool Unit. Upon information and belief, Advanced Resources Materials, which is part of the PC-ARM joint venture, moved the second Kool Unit to South Carolina to perfect its possessory security interest. Smith also testified that the South Carolina Kool Unit cannot be operated because it is not assembled. To date, operation of the Kool Units have not generated any cash for the estate.

11. The Debtor's ability to operate the Kool Units is further complicated by the fact that it does not own the technology necessary to operate them. According to Schedule B, "Debtor *appears* to have the non-exclusive rights to use certain patents owned by Ron Van Den Heuvel or a controlled entity but has been advised that the IP license fee was never paid nor for that matter liquidated.

Debtor is negotiating this isuuse [sic]. IP is essential to the operation of the business." Docket Entry #14, Schedule B, Question 60 (emphasis added).

12. Another problem in this case concerns the Debtor's Schedules and Statement of Financial Affairs, which are not complete or accurate. Van Den Heuel did not participate in the preparation of the Schedules and Statement of Financial Affairs. In preparing the Debtor's Schedules, Smith relied on an inventory prepared by Van Den Heuvel in 2015. This inventory is not accurate, identifying Eco-Hub as the owner of the Kool Units. Other omissions include information readily available on CCAP, obtainable from a UCC search, a wall-to-wall inventory or by contacting the appropriate government agency.

13. The Debtor's tax situation is also complicated. The Debtor has not filed any tax returns. Tax liability is critical information for creditors and the Court.

14. Upon information and belief, the Debtor sponsored an ERISA retirement plan. The Schedules and Statement of Financial Affairs do not contain any information about the ERISA plan or provide notice to employees who might have claims based on the Debtor's failure to remit funds to the ERISA plan.

15. Schedule F is not complete. Two unscheduled creditors, Ferrellgas, Inc. and Evoqua Water Technologies, LLC, filed proofs of claims. *See* Claims Register, Claims #1 and #4.

Law and Argument

16. The Bankruptcy Code provides that "on request of a party-in-interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause . . . .." 11 U.S.C. § 1112(b)(1).

17. Examples of "cause" to convert or dismiss are provided by statute. 11 U.S. C. § 1112(b)(4). Although this list is different from the pre-BAPCPA list, the fact that the list is

illustrative and not exhaustive has not changed. *In re Attack Props., LLC*, 478 B.R. 337, 344 (N. D. Ill. 2012).

18. Once the movant establishes cause, in the absence of special circumstances, the bankruptcy court must dismiss or convert the chapter 11 case. 11 U.S.C. § 1112(b)(1). *In re TCR of Denver*, 338 B.R. 494, 498 (Bankr. D. Colo. 2006). As set forth below, many grounds exist to establish cause for dismissal of this case.

Cause for Dismissal: Misuse of Estate Assets for the Benefit of Eco-Hub
11 U.S.C. § 1112(b)(1) Cause for Dismissal

19. The Debtor is a fiduciary to the estate and to creditors. The bankruptcy system relies on managing employees to carry out the fiduciary responsibilities of a trustee. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985) (citing *Wolf v. Weinstein*, 372 U.S. 633, 649-52 (1963)).

20. The hallmark of a trustee is accountability and segregation of funds. *In re Nugelt,* 142 B.R. 661, 666 (Bankr. D. Del. 1992). The premise that insiders may simply take what they need or want of the estate's assets is contrary to the Bankruptcy Code and the fiduciary duty owed the estate and its creditors. *Nugelt* at 666.

21. In the instant matter, by failing to collect rent from Eco-Hub, management diverts funds from the Debtor to Eco-Hub, breaching its fiduciary duty to the estate. Eco-Hub leased the Debtor's facility for $74,000 per month, while that lease expired, management should not allow Eco-Hub to use its facility rent free. The failure to collect rent from Eco-Hub amounts to a breach of fiduciary duty to the estate. Moreover, management's failure to collect current rent from Eco-Hub amounts to a breach of fiduciary duty to maximize estate assets. *In re Fall*, 405 B.R. 863, 869 (Bankr N.D. Ohio 2009).

22. Management's diversion of rent from the estate is cause for dismissal of this case. *See In re Fall* at 869-870; 11 U.S.C. § 1112(b).

Cause for Dismissal: The Debtor Cannot Propose a Confirmable Plan

11 U.S.C. § 1112(b)

23. Even after the 2005 BAPCPA amendments to the Bankruptcy Code, bankruptcy courts continue to hold that cause to convert or dismiss a case includes failure to propose a confirmable plan. "The very purpose of § 1112(b) is to cut short this plan and confirmation process where it is pointless." *In re Local Union 722 Int'l. Bhd. of Teamsters,* 414 B.R. 443, 446 (Bankr. N.D. Ill. 2009) (citing *Matter of Woodbrook Associates*, 19 F.3d 312, 316 (7th Cir. 1994)); *In re DCNC North Carolina I, LLC*, 407 B.R. 651, 665 (Bankr. E.D. Pa. 2009) ("Fundamental bankruptcy policy continues to support the proposition that the inability to propose a feasible reorganization or liquidation plan provides "cause" for dismissal or conversion of a chapter 11 case on request of an interested party . . . . [T]he inability . . . to effectuate a plan, by itself, provides cause for dismissal or conversion of a chapter 11 case."). S*ee also*, *In re SHAP,* 457 B.R. 625, 628 (Bankr. E.D. Mich. 2011).

24. In order to confirm a plan, the Debtor must be able to fund it. Income projections must not be speculative. *In re Cherry*, 84 B.R. 134, 139 (Bankr.N.D. Ill. 1988).

25. In May 2016, the Debtor reported that it had no cash, no cash flow, and a -$17,153 net operating loss. *See* Docket Entry #40. Similarly, in June 2016, the Debtor reported that it had no cash, no cash flow, $34,306 in accounts payable, $18,903 in accrued attorney's fees and a net loss of -$36,056. *See* Docket Entry #51. The Debtor's downward trend continued in July, 2016. In July 2016, the Debtor reported that it received $450 from its parent company EARTH, which funded the opening of its bank accounts, accrued $41,212 in accounts payable and a net operating loss of -$7,234. The Debtor failed to account for Eco-Hub's unpaid rent in all of its MORS. As time passes, the Debtor's accounts payable and receivable increase. There is no evidence this trend will change.

26. Smith testified at the § 341 meeting that Eco-Hub still does not pay rent to the Debtor because its cash flow is insufficient to pay the rent. Smith has not provided any information indicating when that Eco-Hub will generate sufficient cash flow to pay rent.

27. The Debtor claims that the Kool Units are ready to generate cash flow and that used tires for recycling in the Kool Units can be obtained at no cost. Despite this opportunity to generate cash, since the commencement of this case, the Debtor has yet to recycle any tires on a commercial basis or sell any carbon black. In addition, the second Kool Unit is in South Carolina, is not assembled and subject to a $200,000 possessory security interest of Advanced Resources Materials. In addition, the Debtor cannot operate the Kool Units until it obtains a license to use the necessary technology. The Debtor's ability to generate cash from recycling tires in the Kool Units remains speculative.

28. Smith argues that the Kool Units' unique process will generate cash from third-party investors. However, until investors deposit cash into the Debtor's bank account, the interest of third-party investors also remains speculative. Anticipation of investment cannot fund a chapter 11 plan.

29. The Debtor's total lack of cash, combined with failure to generate any cash from its paper conversion facility or from operating the Kool Units, demonstrates that the Debtor cannot fund a plan, which constitutes cause for dismissal of this case. 11 U.S.C. § 1112(b)(1)(M).

Cause for Dismissal: Continuing Loss or Diminution of the Estate and Absence of a Reasonable Likelihood of Reorganization
11 U.S.C. § 1112(b)(1)(A)

30. Continuing or substantial loss to the estate and the absence of a reasonable likelihood of reorganization is grounds for dismissal or conversion of a chapter 11 case. 11 U.S.C. § 1112(b)(4)(A).

31. Cause for dismissal under this section of the United States Bankruptcy Code requires the movant to prove two elements—(1) continuing or substantial loss to the estate; and (2) the absence of a reasonable likelihood of reorganization. *In re Creekside Senior Living Apartment, LP*, 489 B.R. 51, 61 (6th Cir. BAP 2013).

32. Continuing loss or diminution of the estate can be proven in this case in several ways: (1) by negative cash flow: *In re Loop Corp. v. U.S. Trustee (In re Loop Corp.),* 379 F.3d 511, 515 (8th Cir. 2004), *cert. denied*, L*oop Corp. v. United States Tr.,* 543 U.S. 1055 (2005); (2) failure to collect post-petition rent: *In re CCN Realty Corp.*, 23 B.R. 261, 264 (Bankr. S.D. N.Y. 1982); and (3) reliance on a non-debtor to pay ordinary business expenses: *In re Hassen Imps. P'ship v. City of W. Convina (In re Hassen Imps. P'ship)*, 2013 Bankr. LEXIS 3870 at *40 (9th Cir. BAP 2013) (inability to pay obligations without outside money establishes loss to the estate.)

33. In the instant matter, the movant can establish substantial and continuing operating losses to the estate by all three methods discussed above, meeting the first prong of 11 U.S.C. § 1112(b)(4)(A). In its monthly operating reports (MORs), the Debtor reported accrued net operating losses: May 2016, -$17,153 and June 2016, -$36,056 and July 2016. -$6,793. *See* Docket Entries #41, #51 and 57. Next, the Debtor did not report collecting any post-petition rent in May or June of this year nor did it take any action to collect the more than $1 million in back rent. *See* Docket Entries #40, #51 and #57. Finally, the Debtor relies on other entities to pay its operating expenses. EARTH, which owns 79% of the Debtor, used $450 to fund the initial deposits opening the Debtor's bank accounts. *See* Docket Entry # 57, page 4. Eco-Hub paid the Debtor's counsel's retainer, and other entities pay its utilities, insurance, maintenance and repairs. *See* Docket Entry #4.

34. The second element of 11 U.S.C. §1112(b)(4)(A), the absence of a reasonable likelihood of rehabilitation, can be demonstrated when the debtor (1) does not have unencumbered assets to serve as assets for refinancing: *Paccar Financial Corp. v. Pappas*, 17 B.R. 662, 666 (Bankr. D.

Mass. 1982); (2) has no operating income: *CCN Realty Corp* at 262; and (3) is unable to service its debt at the outset of the case and remains unable to do so for the foreseeable future: *In re Fall*, 405 B.R. 863, 869 (Bankr. N.D. Ohio 2009).

35. Like the first prong of 11 U.S.C. §1112(b)(4)(A), the evidence demonstrates the absence of a reasonable likelihood of the Debtor's rehabilitation. Rehabilitation signifies more than reorganization; "rehabilitation means to put back in good condition, reestablish on a firm-sound basis." *Loop Corp*. at 108; *In re Fall* at 868. As one court stated, "[T]his is not a technical [test] to see if the debtor can confirm a plan, but rather, whether the debtor's business prospects justify continuance of the reorganization effort." *In re Original IFPC Solutions, Inc*., 317 B.R. 738, 742 (Bankr. N.D. Ill. 2004).

36. The Debtor does not have any unencumbered assets to provide collateral for new financing. *See* Docket Entry #14. When Smith obtained his General Business Security Agreement and filed his UCC-1 in the fall of 2015, while the Debtor was in receivership, Smith perfected a lien on all the Debtor's assets, leaving the Debtor without collateral for a new lender.

37. To date, the Debtor has not reported any operating cash flow. Without rent revenue, the Debtor does not have cash to pay its ordinary business expenses including taxes, utilities, insurance, repairs and maintenance or its administrative expenses. *See* Docket Entries #40, #51, and #57, May, June and July, 2016 MORs.

38. For years, the Debtor survived by obtaining cash from new investors, including Smith. The Debtor received $800,000 from Araujo in April 2011; $1 million from the Wisconsin Economic Development Corp in October 2011; $3.2 million from Clifton Equities in October 2012; $9 million from Ability Insurance in December 2013; and $4.7 million from Smith's company, Glen Arbor, during 2014-2016. *See* Docket Entry #14.

39. Despite these cash infusions, the Debtor failed to pay more than $300,000 in property

taxes, accrued payroll taxes, never filed a Federal tax return, and owes more than $68,000 for employee health insurance premiums, among other debts. *See* Docket Entry #14, Schedules E/F.

40. In order to proceed in chapter 11, "courts require the Debtor to do more than manifest unsubstantiated hopes." *In re Canal Place Ltd. Partnership,* 921 F.2d 569, 577 (5th Cir. 1991); *See also Tennessee Publishing Co. v. American Nat'l Bank,* 299 U.S. 18, 22 (1936).

41. In this case, the Debtor offers little hope of rehabilitation. Although the Debtor now argues that its Kool Units establish firm footing for its financial future, no concrete information about refinancing or outside investment has been presented to the court.

42. The Debtor's financial circumstances changed little, if any, since the filing of its petition. Accordingly, the Debtor does not have a reasonable likelihood of rehabilitation.

43. Therefore, there is cause for dismissal of this case pursuant to 11 U.S.C. § 1112(b)(4)(B).

Cause for Dismissal: The Debtor Failed to Comply With its Statutory Duties to Complete Schedules and Statement of Financial Affairs
11 U.S.C. § 1112(b)(4)(F)

44. Unexcused failure to satisfy timely any filing or reporting requirement established by the Bankruptcy Code is grounds for conversion or dismissal. 11 U.S.C. § 1112(b)(4)(F).

45. The Bankruptcy Code requires the Debtor to file a complete and thorough disclosure of the Debtor's assets, liabilities, and financial affairs within 14 days of the filing of the petition. 11 U.S.C. § 521(a), Fed. R. Bankr. P. 1007(c). *See In re Justice*, 2002 Bankr. LEXIS 1857 at *12 (Bankr. D. S.C. 2002).

46. The person preparing these documents must do so with reasonable diligence. *In re Gaulden,* 522 B.R. 580, 589 (Bankr. W.D. Mich. 2014) ("A debtor must answer all questions contained in the schedules and other disclosure documents accurately so that creditors have a complete understanding of a debtor's financial condition." *See also* L*ewis v. Summers (In re Summers),* 320 B.R. 630,

642-44 (Bankr. E.D. Mich. 2005). In this case, the Debtor has not used reasonable diligence in preparing its Schedules and SOFA.

47. Three months after commencement of the case, the Debtor's Schedules and SOFA remain incomplete. Smith's assertion that he has no information about the Debtor's financial performance in 2014, 2015 and 2016 is disingenuous; during those years he invested $4 million in the Debtor. During his testimony at the hearing on cash collateral, Smith stated that he performed his "due diligence" before he invested in the Debtor. Presumably, during his due diligence process, Smith received and reviewed documents related to the Debtor's finances, assets and liabilities. Smith needs to use his own resources to compile information for the Debtor's Schedules and Statement of Financial Affairs.

48. During the § 341 meeting, Smith asserted that only Van Den Heuvel would have all the information pertaining to the Debtor's assets, liabilities, and financial affairs but failed to explain why he did not obtain accurate and complete information from Van Den Heuvel prior to filing the Schedules and SOFA. Pre-petition Smith applied sufficient power to oust Van Den Heuvel from the Debtor's management. Smith also possessed the ability to obtain the necessary information to complete the Schedules and Statement of Financial Affairs.

49. The Debtor's response to SOFA Question #4 is insufficient. Question #4 requests information about any payment or transfer of property within a year of filing that benefited an insider. The vague response indicates that Van Den Heuvel received "various payments of rent from subtenants" in an "unknown" amount and was used to "pay labor, insurance, and material."

50. Over three months into this bankruptcy the following information remains unclear: bank accounts used by Debtor in 2014, 2015, 2016; whether the Debtor has any liabilities arising from any retirement plan; the validity of claims made by Ferrellgas, Inc. and Evoqua Water; how much rent was collected by Van Den Heuvel from subtenants, where that money was deposited, and what "labor,

insurance, and material" bills were paid; whether Van Den Heuvel transferred the Debtor's assets to related non-debtor businesses; and whether the Debtor has a claim against Van Den Heuvel personally or against another Van Den Heuvel business. As a result, creditors' picture of the Debtor's pre-petition financial information remains incomplete.

51. On SOFA Question #7, "legal actions within one year prior to filing," Smith failed to list all the actions reported on CCAP.

52. Upon information and belief, the Debtor sponsored a retirement plan. The Schedules and SOFA do not contain any information about the Debtor's employees' retirement plan. The Debtor's former employees do not have notice to pursue their claims.

53. Accordingly, there is cause for dismissal because the Debtor's Schedules and Statement of Financial Affairs are incomplete. 11 U.S.C. §1112(b)(4)(F).

Other Cause for Dismissal
11 U.S.C. § 1112(b)(1)

54. Finally, administrative insolvency is cause for dismissal. *In re Hassen Imports Partnership,* 2013 Bankr. LEXIS (BAP 9th Cir. 2013).

55. According to the Debtor's MORs, this estate is administratively insolvent. The Debtor has no cash flow to pay any administrative expenses, including attorney's fees and post-petition expenses. *See* Docket Entries #40 and #51.

56. The estate's administrative insolvency is cause for dismissal of this case. 11 U.S.C. § 1112(b)(1).

57. Another hurdle presented is the Debtor's failure to file tax returns since its inception in 2011. A confirmable plan must provide for payment of delinquent taxes within 60 months of the date of the filing of the petition. 11 U.S.C. § 1129(a)(9)(C). Although more than three months have

elapsed since the filing of this bankruptcy, the Debtor has yet to retain an accountant to prepare its delinquent tax returns. The critical tax issue remains at a standstill.

Conclusion

58. This case should not proceed because it is a half-hearted effort by management to buy time, which is particularly demonstrated by the incomplete Schedules and Statement of Financial Affairs. The Debtor's management's failure to collect its only source of revenue—rent--from a related, non-debtor entity, Eco-Hub, demonstrates management's disinterest in the estate. Without complete Schedules and Statement of Financial Affairs, the Debtor cannot file an adequate disclosure statement or confirm a plan. This case should be dismissed and the Debtor left to deal with its creditors outside of the bankruptcy forum.

59. The foregoing issues constitute cause for dismissal of this case. 11 U.S.C. § 1112(b)(1), (b)(4)(A) and (b)(4)(F).

WHEREFORE, the United States Trustee requests that the Court dismiss this case. The United States Trustee does not intend to file a brief in connection with this pleading, but reserves the right to file a responsive brief or pleading, if necessary.

Dated: August 26, 2016.

PATRICK S. LAYNG
United States Trustee

AMY GINSBERG
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