

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

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U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

IN RE:

IN PROCEEDINGS UNDER CHAPTER 11

MKT, INC.,

CASE NO. 07-12243

Debtor.

JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

Pending before the Court is the Motion of Fifth Third Bank to Dismiss or Convert Confirmed Chapter 11 Case. There was no opposition to Fifth Third's duly-noticed Dismissal Motion. Also pending before the Court are the fee applications of Kenneth Freeman, Debtor's counsel, and Digital Accounting Services, Debtor's accountant. Fifth Third filed a Limited Objection to the applications. The Court acquires core matter jurisdiction over the instant matter pursuant to 28 U.S.C. §§ 157(a) and (m), 28 U.S.C. § 1334, and General Order Number 84 of this District. After conducting a duly-noticed hearing on the matters and allowing the parties to supplement their pleadings on the fee applications, the Court rules as follows<sup>1</sup>:

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It is undisputed that Fifth Third Bank holds a valid blanket lien against the Debtor's assets in the amount of \$599,000 and that Fifth Third, pursuant to the Debtor's confirmed plan, is entitled to monthly adequate protection payments in the amount of \$7,447.64. It is also undisputed that the Debtor has failed to make all but one of the required adequate protection payments since confirmation on September 8, 2008. Accordingly, it is undisputed that the

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<sup>1</sup> Fifth Third filed a supplement. Neither the Debtor nor Digital Accounting Services filed supplemental pleadings.

Debtor is in default of its obligations pursuant to the terms of the confirmed plan and this is the basis for Fifth Third's motion to dismiss. The Debtor has no opposition to this relief.

With respect to the fee applications, Fifth Third does not object to the amount sought, but objects to payment of the fees from its cash collateral. Because Fifth Third has a blanket lien on all of the Debtor's assets and there was no carve-out for professional fees in the agreed cash collateral orders, Fifth Third argues that the fee applications should be denied because there are no unencumbered funds from which such fees can be paid. The Debtor argues, without citation to any authority, that the cash collateral orders expired when the Debtor's plan was confirmed. The Debtor alternatively argues that the fees will be paid from Debtor's ongoing business operations. However, as established at the hearing on the matter, Fifth Third has a blanket lien on all of the Debtor's assets, including accounts receivable. It is therefore not possible for the fees to be paid from ongoing business operations without the use of Fifth Third's cash collateral.

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The issues for the Court are whether the Debtor's case should be dismissed, whether the fee applications of Debtor's counsel and accountant should be allowed, and if so, whether such fees be paid from Fifth Third's cash collateral.

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Fifth Third moves to dismiss the Debtor's case pursuant to 11 U.S.C. § 1112(b), which states in pertinent part:

11 U.S.C. § 1112(b)

(b)(1) . . . on request of a party in interest, and after notice and a hearing, absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate, 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 interests of creditors and the estate, if the movant establishes cause.

(b)(4) For purposes of this subsection, the term “cause” includes----

- (M) inability to effectuate substantial confirmation of a confirmed plan;
- (N) material default by a debtor with respect to a confirmed plan;

Failure to “make a payment required under the plan is a material default and is cause for dismissal.” *In re AMC Mortgage*, 213 F.3d 917, 921 (6<sup>th</sup> Cir. 2000). It is undisputed that the Debtor is in material default with respect to payment due Fifth Third pursuant to the Debtor’s confirmed plan. Furthermore, the Debtor does not oppose dismissal of its case. Accordingly, due to a material default under the plan, Fifth Third’s Motion is granted and the Debtor’s case is hereby dismissed.

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With respect to the fee applications of Debtor’s counsel and accountant, it is undisputed that, as of the hearing date on the applications, there existed no funds to pay such amounts that are not subject to Fifth Third’s blanket lien. It is also undisputed that there is no carve out for professional fees in any of the three pre-confirmation cash collateral orders or in the Debtor’s confirmed plan. The Debtor makes the conclusory statement that the cash collateral orders “expired” upon confirmation of the plan, yet cites to no statutory or other authority to support such argument. The fee applications of Debtor’s counsel and accountant are hereby allowed in the amounts requested, but are to be paid subject to the availability of unencumbered funds.

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Accordingly, Fifth Third's Motion to Dismiss or Convert Confirmed Chapter 11 Case is hereby granted, without opposition and the Debtor's case is hereby dismissed. Fifth Third's Limited Objection to the fee applications of Kenneth Freeman and Digital Accounting Services is sustained, in part and overruled, in part. The fee applications are allowed in the amounts requested, but subject to the availability of unencumbered funds.

**IT IS SO ORDERED.**

Dated this 16<sup>th</sup> day of  
September, 2009.

  
**JUDGE RANDOLPH BAXTER**  
**UNITED STATES BANKRUPTCY COURT**