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FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
97 JUN 13 PM 3:37
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:	)	Case No. 95-12349
	)	
PARIS CONNECTION BY CAROL, INC.,	)	Chapter 11
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

This consolidated and confirmed Chapter 11 case is before the Court on the Amended Motion of the Preconfirmation Debtor, Paris Connection by Carol, Inc., for conversion of this case to a case under Chapter 7 of the Bankruptcy Code ("Amended Motion"). Carol Porter joined in the Amended Motion and the United States Trustee filed a Memorandum regarding the request for relief. (Docket 67, 68, 83). For the reasons stated below, the Amended Motion is denied.

FACTS

A. The Chapter 11 Case

Paris Connection By Carol, Inc. filed a Chapter 11 case on May 30, 1995. (Case No. 95-12349).[1] Paris Connection Mall of America (Case No. 95-12508), Sawgrass Mills, Inc. (Case No. 95-12507), Carol Rae Enterprises (Case No. 95-12509) and Fantasy Creations by Carol (Case No. 95-12510), related entities, filed Chapter 11 cases on June 7, 1995. All of these cases were substantively consolidated by an Order entered on July 25, 1995. (Docket 25). (The consolidated case is referred to as "Paris Connection" or "Debtor").

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[1] Docket entry references are to the docket for Case No. 95-12349.

Prior to the Chapter 11 filings, the Debtors were engaged in the wholesale and retail marketing of hair products. They were operated by Carol Porter, majority shareholder and an officer in each corporation. Eva Gabor International, Inc. ("EGI") supplied the Debtors with hair extensions and, in turn, received a security interest in various assets. Postpetition, Creditor EGI, Debtor, and Ms. Porter entered into an agreement under which a subsidiary of EGI would purchase the Debtor. Under the agreement, the purchaser would assume the Debtor's liabilities and pay them in accordance with a plan of reorganization to be proposed by EGI. (Movant's Exh. 1) (Disclosure Statement, Section II). EGI then submitted a plan of reorganization (the "Plan") in the consolidated case. (Joint Exh. 4). The Disclosure Statement filed in connection with the Plan included a proposed contract under which Ms. Porter would serve as an independent contractor after confirmation. (Disclosure Statement, Exh. II). As explained in the Disclosure Statement, "EGI has not yet entered into an independent contractor agreement, as described in Exhibit I and with the terms set forth in Exhibit I, with Porter, and EGI does not know whether Porter will, in fact, enter into such an agreement." (Movant's Exh. 1) (Disclosure Statement, Section IV, p. 16). The Court confirmed the EGI Plan by Order entered on October 16, 1995. (Docket 43) (Joint Exh. 5).

B. The Plan

The confirmed Plan provides for the merger of the Debtor into Paris Connection Ltd. ("Paris Ltd."). This merger is to be implemented by cancelling all issued and outstanding shares of Debtor upon confirmation and issuing new shares to EGI. Debtor is then to be merged into Paris Ltd. with Paris Ltd. as the surviving corporation. Paris Ltd. is to continue the operation of the business "in such manner as it shall deem proper in its sole discretion, and shall further

comply with the terms of this plan." (Joint Exh. 4, Plan, Article V). The Plan also provides that Paris Ltd.:

> is . . . named the representative of Debtor's estate, and is hereby granted the powers of a trustee pursuant to 11 U.S.C. §§ 1106(b) [sic], 1123(b)(3)(B), and 101, effective on the Effective Date. Assets of the Debtor and Debtor's estate shall vest in Paris Connection, Ltd. upon the merger of Debtor and Paris Connection Ltd., pursuant to 11 U.S.C. § 1141(b). Except as provided in this Plan, on the Effective Date all assets shall be free and clear of all claims and interests . . . . Subject to the provisions of this plan, Paris Connection, Ltd. shall operate its business, and may use, acquire, and dispose of property free of any restriction of the Bankruptcy Code.

(Joint Exh. 4, Plan, Article V). The Effective Date of the Plan is defined as the date twenty days after the order confirming the Plan becomes a final order or such prior date as Paris Ltd. may determine in its sole discretion. (Joint Exh.4, Plan, Article I).

The Plan makes this provision for claims:

Superpriority claims (**Class 1**), administrative expense claims (**Class 2**), priority claims under 11 U.S.C. §§ 507(a)(3) through (a)(7) (**Class 3**), and priority tax claims (**Class 4**) are unimpaired under the Plan. They are to be paid in full on the later of the Effective Date or as they are allowed. Class 4 claims, which include claims of the Internal Revenue Service ("IRS"), are to be paid in deferred cash payments. (Joint Exh. 4, Plan, Articles II, III). Payments to the IRS, under the Order confirming the Plan, are to be made on at least a quarterly basis to begin no later than 60 days after the effective date. Additionally, "the alleged secured tax claim of the Internal Revenue Service shall be deemed an allowed secured tax claim pending resolution of Paris Connection, Ltd.'s proceeding to determine the secured status of said alleged secured tax

claim, and the treatment of said secured tax claim shall be, although in a separate class, identical to the treatment accorded to allowed priority tax claims under the Plan . . . ." (Joint Exhibit 5).

Class 6, general unsecured claims, are defined as impaired under the Plan. Class 6 is to receive a pro rata distribution from an unsecured creditor fund to be created by liquidating certain causes of action under the Bankruptcy Code. Those causes of action include one against Ms. Porter and one against the Ohio State Board of Cosmetology. The action against Ms. Porter is estimated to have a value of $79,492.49. (Movant Exh. 1, Disclosure Statement, Article III).

Class 7 insider claims, including that of Carol Porter, are to receive nothing under the Plan.

Class 8 shareholders' interests are to be cancelled on the Effective Date and are to receive nothing. (Joint Exh. 4, Plan, Articles II, IV).

Finally, the Order confirming the Plan provides that "all fees payable under 28 U.S.C. § 1930, to the extent unpaid, shall be paid in full on the effective date of the plan." (Joint Exhibit 5, ¶ 2(e)). These include the fees of the United States Trustee.

The Plan includes extensive provisions for the retention of jurisdiction in order to interpret the Plan, determine controversies that arise in connection with the Plan , and effectuate performance under the Plan. (Joint Exh. 4, Article VI, ¶¶ 13, 15, 16, 18). The Plan does not, however, provide for any rights or remedies upon default by either Debtor or Paris Ltd.

C. Post-Confirmation

There is no dispute over the fact that, in accordance with the Plan, all issued and outstanding shares of Debtor were cancelled and new shares were issued to EGI. Debtor merged

into Paris Ltd., a Missouri corporation,[2] with Paris Ltd. as the survivor. Paris Ltd. apparently then did business for approximately one year.

D. Request for Conversion

Initially, (1) Glenn Forbes, on his own behalf as an administrative creditor, (2) Paris Connection by Carol, Inc., as the self-styled "Preconfirmation Debtor" (sometimes referred to as the "preconfirmation debtor"), and (3) Carol Porter moved for conversion of the case from Chapter 11 to Chapter 7. (Docket 64). Mr. Forbes represented Debtor in the Chapter 11 case. Following a telephonic status conference, Mr. Forbes and the "preconfirmation debtor" filed the Amended Motion in which they request conversion based on alleged material defaults under the Plan, including: (1) Paris Ltd.'s failure to pay the administrative claim of Mr. Forbes; and (2) its failure to honor the terms of the Plan by not compensating Ms. Porter under an independent contractor agreement. (Docket 65, 67). The United States Trustee filed a Memorandum stating that it did not receive payment of its quarterly fee on the Effective Date of the Plan. (Docket 68). On November 22, 1996, Mr. Forbes withdrew the Amended Motion as it related to payment of his own administrative expense claim, leaving the "preconfirmation debtor" as the sole movant. (Docket 69). Mr. Forbes later stipulated in open court that he had been paid.

The initial hearing on the Amended Motion was held on November 26, 1996.[3] At that time, the "preconfirmation debtor" cited alleged additional Plan defaults as a basis for the requested relief, including: (1) the post-confirmation closing of the business by Paris Ltd.; and

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[2] See Joint Exh. 3 which references the corporate status of Paris Ltd.

[3] Paris Ltd. did not attend the hearing.

(2) the failure to pay United States Trustee fees and the IRS claim as required by the Plan. At the request of the "preconfirmation debtor", the hearing was adjourned to February 26, 1997 to allow discovery in support of the Amended Motion. That hearing went forward as scheduled, at which time the "preconfirmation debtor" stated that Paris Ltd. abandoned the claims which were to have funded a plan distribution to unsecured creditors and relied on that act as an additional plan default. Carol Porter filed her joinder in the Amended Motion on that date and participated through counsel in the hearing. Her stated interest in this matter is based on her personal liability for certain of Debtor's taxes to the extent that they are not paid under the terms of the Plan.

The "preconfirmation debtor", Paris Ltd., IRS, Carol Porter, and the United States Trustee were represented at the hearing. The evidence consisted of stipulations entered into on the record, together with the testimony of Carol Porter and Fred Yellon, an IRS employee.[4]

1. Paris Ltd. stipulated that United States Trustee fees in the amount of $2,000, an obligation under the Plan, would be paid in the event the case is not converted to Chapter 7.

2. The parties stipulated that Paris Ltd. was dissolved effective November 1, 1996 under the laws of the State of Missouri. (Joint Exh. 1). They also stipulated that the estate's claim against the Ohio State Board of Cosmetology had been dismissed. (Joint Exh. 2).

3. The parties stipulated that the IRS received three payments under the Plan totaling $22,051.47. Mr. Yellon then testified that the IRS filed priority and secured claims of $45,583.17 and $171,600.03, respectively. Quarterly payments under the Plan were to be made

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[4] The deposition of Joseph Edward Woods, an employee of Belz Enterprises, was also admitted into evidence. (Movant Exh. 2). His testimony is without context, however, and is essentially irrelevant.

in the amount of $11,852.16. Although five payments were to have been made as of the hearing date, the IRS only received three payments in the reduced amount of $7,350.49 each. This resulted in a shortfall under the Plan of $37,209.33.

4. Additionally, the parties stipulated that Paris Ltd. and Ms. Porter entered into a contract for her services in February of 1996 and that she was paid $26,000 under that contract before her engagement was terminated in June of 1996. (Joint Exhibit 3). This contract differs from the proposed contract which was appended to the Disclosure Statement in two respects. First, it releases Ms. Porter from the cause of action which could have been brought against her and which was to provide a basis for Plan funding to unsecured creditors. Second, it gives Ms. Porter the title of "Special Fashion Consultant". Ms. Porter testified that she began to provide services under the contract in October of 1995. She believes Paris Ltd. owes her $40,000 for services performed under the contract.

DISCUSSION

The "preconfirmation debtor" and Carol Porter, by virtue of her joinder in the Amended Motion, request conversion of this post-confirmation Chapter 11 case under 11 U.S.C. § 1112 (b). Paris Ltd. challenges the Court's jurisdiction to consider this request, questions the "preconfirmation debtor's" authority to seek conversion, and disputes the propriety of the requested relief.[5]

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[5] The parties did not brief the issues presented, confining themselves instead to argument at the two hearings.

A. Jurisdiction

Paris Ltd. argues that this Court has limited jurisdiction with respect to postconfirmation disputes and lacks any jurisdiction to consider the Amended Motion. The argument is based on the proposition that this Court lost all jurisdiction upon substantial consummation of the Plan.

Under 28 U.S.C. § 1334(b) the district court has "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." That jurisdiction is, in turn, referred to this Court under 28 U.S.C. § 157(a) and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. Confirmation of a Chapter 11 plan does not alter the statutory basis of this Court's jurisdiction. *In re Holly's, Inc.*, 172 B.R. 545 (Bankr. W.D. Mich. 1994), *aff'd. on other grounds,* 178 B.R. 711 (D.C. W.D. Mich. 1995). Proceedings to invoke a substantive right created by federal bankruptcy law are within the scope of 28 U.S.C. § 1334(b). *In re Wolverine Radio Co.*, 930 F.2d 1132 (6th Cir. 1991). Motions for conversion arise under 11 U.S.C. § 1112(b), invoke a substantive right created by the Bankruptcy Code and, therefore, are within the subject matter jurisdiction of this Court. Additionally, such motions are core proceedings, as a result of which this Court has jurisdiction to enter a final order. *In re Wolverine Radio Co.;* 28 U.S.C. § 157(b)(2)(A) and (O).

While the basic jurisdictional grant remains the same throughout the life of a case, the number of times a court is called upon to exercise its jurisdiction ordinarily decreases after confirmation because at that point there are fewer issues that arise under or relate to the Chapter 11 case. See *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994); *In re Polar Molecular Corp.*, 195 B.R. 548 (Bankr. D. Mass. 1996). There is nothing in the language of

§ 1112(b), however, to suggest that this Court lacks jurisdiction to decide a motion to convert simply because it is filed after substantial consummation. That section states that cause for conversion or dismissal includes "(7) inability to effectuate substantial consummation of a confirmed plan; [or] (8) material default by the debtor with respect to a confirmed plan." The narrow view of post-confirmation jurisdiction proposed by Paris Ltd. would "render meaningless the distinction between § 1112(b)(7) and § 1112(b)(8), and would entirely eviscerate a court's ability to act under § 1112(b)(8) after substantial consummation." *In re Polar Molecular Corp.*, 195 B.R. at 555, fn. 2. Paris Ltd. has not cited to any authority that would support such a result.

Paris Ltd.'s argument instead relies on cases which hold that a court's postconfirmation jurisdiction is circumscribed and "limited to matters involving the execution, implementation, or interpretation of the plan's provisions, and to disputes requiring the application of bankruptcy law." (citations omitted). *In re Eastland Partners Ltd. Partnership.,* 199 B.R. 917, 920 (Bankr. E.D. Mich. 1996) (court lacked postconfirmation jurisdiction over an adversary proceeding for state law claims for interference with a debtor's ability to carry out its plan obligations). See also *In re Almarc Corp.*, 94 B.R. 361 (Bankr. E.D. Pa. 1988) (court lacked postconfirmation jurisdiction over an adversary proceeding against a Chapter 11 debtor for breach of a postpetition contract). The cases cited are, however, inapposite to this motion which expressly requests relief under § 1112(b) of the Bankruptcy Code and requires application of bankruptcy law. Therefore, this Court continues to have jurisdiction to determine the Amended Motion.[6]

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[6] The Plan also provides for the exercise of jurisdiction under these circumstances.

B. Standing

Paris Ltd. challenges the authority of Mr. Forbes to prosecute the Amended Motion on behalf of the "preconfirmation debtor", claiming that there is no such entity as a "preconfirmation debtor" under the provisions of the Plan or under corporate law. Mr. Forbes, at hearing, acknowledged making "a tortured statutory analysis" in reaching his conclusion that the "preconfirmation debtor" continues to exist in this case after confirmation. In support, he cites: (1) case law which holds that after the filing of a Chapter 11 case the debtor and the debtor-in-possession continue to have separate existences; and (2) provisions for Chapter 11 discharge. Analysis of the Bankruptcy Code is not, however, necessary in reaching the conclusion that the Debtor, Paris Connection, no longer exists under the facts of this case.

There are certainly circumstances in which a debtor continues to exist after confirmation of a plan of reorganization. Indeed, in the majority of cases that is the outcome of reorganization. In this case, however, the Plan provides for the merger of the Debtor into a surviving entity, Paris Ltd. It is undisputed that this merger was implemented under the Plan by cancelling all interests in the Debtor, issuing new shares to EGI, and merging Debtor into Paris Ltd. The new entity which emerged from the reorganization, Paris Ltd., continued the business. Under this negotiated arrangement, the Debtor as it existed preconfirmation no longer exists. Paris Ltd. is represented by counsel in this proceeding and opposes the requested relief. Mr. Forbes is clearly without authority to proceed on behalf of Paris Ltd. He is here attempting to

represent an entity that no longer exists under state law or under the terms of the confirmed Plan.[7] He lacks standing to do so.

The remaining question is whether Ms. Porter may pursue this issue by virtue of having joined in the Amended Motion. Paris Ltd. did not directly address whether Ms. Porter has standing to move to convert or dismiss. Section 1112(b) provides that a party in interest may request this relief. Under 11 U.S.C. § 1109(b), a "party in interest" includes "the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor . . . . " The Plan identifies Ms. Porter as a Class 7 creditor. (Joint Exh. 4, Art. II). She is, therefore, a party in interest with standing to prosecute this motion.[8]

C. 11 U.S.C. § 1112(b)

Conversion of this case is requested based on: (1) material default by the Debtor with respect to the confirmed plan; and (2) an inability to effectuate substantial consummation of the confirmed Plan. Section 1112(b) of the Bankruptcy Code provides, in relevant part:

> (b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States Trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including-
>
> > (7) inability to effectuate substantial consummation of a confirmed plan; [or]

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[7] The Court also notes that since the "preconfirmation debtor" no longer exists, no one would have had the authority to direct Mr. Forbes to file the Amended Motion on behalf of that entity.

[8] Ms. Porter is referred to in the balance of this opinion as "Movant".

> (8) material default by the debtor with respect to a confirmed plan; . . . .

Movant bears the burden of proof by a preponderance of the evidence. *In re Woodbrook Assocs.*, 19 F.3d 312 (7th Cir. 1994).

1. 11 U.S.C. § 1112(b)(7)

Movant cites failure to substantially consummate the confirmed Plan as a ground for relief. "Substantial consummation" is defined in 11 U.S.C. § 1101(2) to mean the:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan.

The evidence establishes the existence of substantial consummation of the confirmed Plan. The Debtors' assets were transferred under the Plan, the business was assumed by the successor entity, and payments commenced under the Plan. Relief under 11 U.S.C. § 1112(b)(7) is, therefore, unavailable.

2. 11 U.S.C. § 1112(b)(8)

Movant also requests relief based on material default with respect to the confirmed Plan. Material default is claimed to exist based on: (1) failure to pay IRS claims and United States Trustee fees; (2) failure to continue Ms. Porter's employment and to pay her under the contract; (3) abandonment of claims that were to provide payments to unsecured creditors ; and (4) the dissolution of Paris Ltd. Paris Ltd. argues that substantial consummation of the Plan precludes a

finding of material default with respect to the Plan. Additionally, it disputes the allegations of material default.

Paris Ltd. contends that relief under 11 U.S.C. § 1112(b)(8) based on material default is not available after a confirmed plan has been substantially consummated. To the extent that this argument is based on the premise that the bankruptcy court loses all jurisdiction upon substantial consummation, that argument is incorrect, as discussed above. The remainder of Paris Ltd.'s argument which is based on a statutory interpretation of § 1112 is not well developed. Section 1112(b)(8) provides that a "material default by the debtor with respect to a confirmed plan" is an independent basis for relief. The interpretation offered by Paris Ltd. merges § 1112(b)(7) and (8) and would negate a court's ability to grant relief based on a debtor's material default. *In re Greenfield Drive Storage Park*, 207 B.R. 913 (B.A.P. 9th Cir. 1997). Where possible, statutes are to be interpreted in such a way as to give effect to every word. *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992). Paris Ltd.'s interpretation flies in the face of this principle. Under appropriate facts, therefore, a debtor's material default under a confirmed plan is a basis for relief under 11 U.S.C. § 1112(b)(8) after substantial consummation.

In this case, the confirmed Plan requires Paris Ltd. to pay IRS tax claims and United States Trustee fees. The evidence establishes that Paris Ltd. did not do so. Additionally, Paris Ltd., the entity which is required to carry out the Plan, has been dissolved and it is, therefore, clear that the Plan will not be fully consummated. These facts provide a basis for finding a material default under the Plan. See *In re Mobile Freezers, Inc.*, 146 B.R. 1000 (D.C. S.D. Ala. 1992), *aff'd.* 14 F.3d 57 (11th Cir. 1994), *cert. denied,* 513 U.S. 807 (1994). The Plan does not require the employment of Ms. Porter, and the dispute regarding the independent contractor

agreement and her payment is not a basis for finding a Plan default. Finally, there was no evidence to establish that the abandonment of claims which were to have funded payments to unsecured creditors was a Plan default.[9]

The fact that there has been a material default under the Plan is not, however, the end of the analysis. This is because the default is that of Paris Ltd., an entity other than the Debtor. Section 1112(b)(8) requires a material default by the debtor with respect to a confirmed plan. There is no argument or evidence to suggest that the Debtor, Paris Connection, failed to comply with any Plan term or provision. The default does not, therefore, provide an appropriate basis for a finding of cause under that section. The Plan could have included provisions that would govern in the event of default by Paris Ltd., but it did not. In the absence of Plan provisions dealing with default, there is no basis for a finding of cause based on the facts presented and the arguments made.

Additionally, the Court notes that, even with a finding of cause under § 1112(b), conversion is not automatic. Upon determining that cause exists, the court must decide whether conversion or dismissal is in the best interests of the creditors and the estate. Here, the stated basis for the conversion request appears to have been the hope that a Chapter 7 trustee would recover unidentified assets and postconfirmation transfers. No evidence was introduced regarding these matters despite the lengthy adjournment for purposes of conducting discovery. In fact, there was no evidence whatsoever that conversion would benefit creditors or the no-longer-existent bankruptcy estate. Consequently, even if cause existed under 11 U.S.C.

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[9] Ironically, one of the abandoned claims was a potential action against the Movant estimated in the Disclosure Statement to have substantial value.

§ 1112(b), there is no basis in the record to support the conclusion that conversion, as opposed to dismissal, would be the appropriate relief. Movant has, therefore, failed to meet her burden of proof on multiple grounds.

Although Movant did not establish that relief is appropriate under § 1112(b), parties affected by the Plan failure are not without remedy. The confirmed Plan is a binding contract and its terms control the rights and obligations of the parties to it under 11 U.S.C. § 1141(a). *In re Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458 (6th Cir. 1991). As a result, the parties are free to pursue their state law rights and remedies regarding the Plan obligations.

CONCLUSION

For the reasons stated, the Amended Motion to Convert is denied. A separate judgment will be entered in accordance with this Memorandum of Opinion.

Date: 13 June 1997

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by regular U.S. mail on: Lenore Kleinman, Esq.
Glenn Forbes, Esq.
Jerald Meyer, Esq.
Donza Poole, Esq.
Aaron Bulloff, Esq.

By: Joyce L. Gordon, Secretary
Date: 6/13/97

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PARIS CONNECTION BY CAROL, INC.,	)	Chapter 11
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Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**JUDGMENT**

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED that the Amended Motion for Conversion filed by the Preconfirmation Debtor and joined by Carol Porter is denied.

Date: 13 June 1997

Pat E Morgenstern-Clarren
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by regular U.S. mail on: Lenore Kleinman, Esq.
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