THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 99-17499
	)	
TRIANGLE DEVELOPMENT, INC.	)	Chapter 11
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

This Chapter 11 case was filed on September 28, 1999. More than two years later, the Debtor has not filed a proposed plan of reorganization, has outstanding fees due to the United States Trustee, and has a history of untimely filing of monthly operating reports. The United States Trustee moves to convert this case to a case under Chapter 7 of the Bankruptcy Code on the grounds of: (1) unreasonable delay that is prejudicial to creditors; (2) failure to pay fees; and (3) failure to file operating reports. The Debtor opposes the motion and asks for more time in which to present a plan. (Docket 151, 170).

JURISDICTION

The Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2).

FACTS AND DISCUSSION

I.

Motions to convert are governed by Bankruptcy Code § 1112(b), which provides in relevant part:

> (b) [With exceptions not relevant here], on request of . . . the United States trustee . . . , 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 –
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> * * *
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> (3) unreasonable delay by the debtor that is prejudicial to creditors; [and]
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> * * *
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> (10) nonpayment of any fees or charges required under chapter 123 of title 28.

11 U.S.C. §§ 1112(b)(3) and (10). The grounds listed in § 1112(b) as cause to convert or dismiss are not exclusive. *See In re Gonic Realty Trust*, 909 F.2d 624, 626 (1st Cir. 1990). *See also, Michigan Nat'l Bank v. Charfoos (In re Charfoos)*, 979 F.2d 390, 392 (6th Cir. 1992) (noting that bad faith is also cause for dismissal). A debtor's failure to file required operating reports can, therefore, constitute cause under § 1112(b) even though it is not specifically mentioned in the list. *See In re Berryhill,* 127 B.R. 427, 433 (Bankr. N.D. Ind. 1991).

The decision as to whether relief is appropriate under § 1112(b) is made on a case-by-case basis. *Laguna Assocs. Ltd. P'ship v. Aetna Cas. & Sur. Co. (In re Laguna Assocs. Ltd. P'ship)*, 30 F.3d 734, 737 (6th Cir. 1994). The movant has the burden of proving by a preponderance of the evidence that cause exists to convert. *See In re Woodbrook Assocs.*, 19 F.3d 312, 316 (7th Cir. 1994).

II.

These witnesses testified at the hearing: Lushion White, who has been the Debtor's President for the last year; Christopher Sonson, bankruptcy analyst with the office of the United States Trustee; Rory Osborne Turner, a member of the Debtor's Board of Trustees; Ronald

Colvin, President of the Lake County NAACP; and Alfred E. Edwards, Sr.,[1] the Debtor's founder and former President, Chairman, and CEO who currently serves as an informal consultant to the Debtor.[2]

These findings of fact reflect the Court's weighing of all of the evidence presented at the hearing, including determining the credibility of the witnesses. In doing so, the Court considered the witnesses' demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression. *See* FED. R. BANKR. P. 7052, incorporating FED. R. CIV. P. 52. When the Court finds that a witness's explanation was satisfactory or unsatisfactory, it is using this definition:

> The word satisfactory 'may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation–he believes what the [witness] says with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.'

United States of America v. Trogden (In re Trogden), 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990) (discussing the issue in context of Bankruptcy Code § 727) (quoting *First Texas Savings Assoc., Inc. v. Reed*, 700 F.2d 986, 993 (5th Cir. 1983)).

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[1] Mr. Edwards was referred to variously as "Jr.," "Sr.," and the "III". Counsel confirmed at the hearing that all testimony referred to the same individual.

[2] Mr. White, Mr. Edwards, and Brenda Montgomery Lewis (who served as the Debtor's President immediately before Mr. White's service) all filed for protection under the bankruptcy laws as well. *See In re Lushion White*, Case No. 00-16942 (Chapter 13 filed September 15, 2000; case dismissed and then reinstated); *In re Alfred Edwards*, Case No. 99-17318 (Chapter 7 filed September 21, 1999; discharge entered and case closed); and *In re Brenda Montgomery*, Case No. 00-16590 (Chapter 13 filed September 1, 2000 and dismissed before confirmation); Case No. 01-11473 (Chapter 13 filed February 26, 2001 and dismissed for lack of funding); and Case No. 01-17653 (Chapter 13 filed August 7, 2001; motion to dismiss with sanctions pending).

III.

According to the Debtor's President Lushion White, the Debtor does not have any employees and has not engaged in any significant activity over the last year. When the Debtor moved out of its office at 40th and Payne about two years ago, he does not know what happened to the contents of that office or the value of the property that was removed. The Debtor does not maintain a separate office, mailing address or telephone number. Mr. White does not know if the Debtor has received mail in the last year or who has authority to receive mail addressed to the Debtor.

Mr. White does not know if the Debtor currently owns any real property. He does not have possession of the Debtor's accounting records and does not know if the Debtor has filed tax returns or paid real estate taxes since the bankruptcy filing. He also does not know if the Debtor has filed a proposed plan of reorganization or disclosure statement, nor does he know what any contemplated plan would pay to unsecured creditors. Mr. White signed the Debtor's Operating Report for the period ending December 2001, but he does not know who prepared it or where the information came from. He looked at the Report for perhaps 30 seconds before signing it in the office of the Debtor's counsel.

In short, Mr. White has very little knowledge of the Debtor's finances or activities.

Rory Osborne Turner, an architect with an international practice and a member of the Debtor's Board of Trustees, also testified. He stated that the Board has not met in the last year (he does not know when it last met) and he is not familiar with the Debtor's financial situation or when the Debtor last engaged in any activity. Nevertheless, he feels that the Debtor can get "re-started" in about three months, although he does not know how much money that would take or why it has not started yet. He has had architectural contracts with the Debtor in the past; he has

not, however, had discussions about doing any future work for the Debtor. Mr. Turner was knowledgeable and articulate about general community development issues, but he was not able to contribute anything of substance on the issue of the Debtor's current financial state and activities or the specifics of any potential plan of reorganization.

Alfred Edwards, Sr. testified that he is the person most knowledgeable about the Debtor, for whom he serves as some kind of informal, unpaid consultant. Despite that claim, he does not know if the Debtor currently owns any real estate, has paid any real property taxes since the Chapter 11 filing or has filed tax returns. Mr. Edwards identified these areas as ultimately being important to the Debtor's reorganization: (1) the current and ongoing involvement of Messrs. White and Turner in the Debtor's day-to-day operations; (2) the Debtor beginning the "Venus Project," which involves building houses in the Hough neighborhood; (3) a $300 million contract for development in Hough; and (4) the pursuit of litigation against National City Bank and others. As discussed below, the Court did not find his testimony to be credible on any of these issues.

First, Mr. Edwards spoke with great enthusiasm about Mr. White's experience and involvement with the Debtor. Similarly, he testified that he had been working very hard with Mr. Turner over the last 4-5 months on the "Venus project" for the Debtor. He claimed that the Debtor signed a contract a few years ago with Stanley and Venus Boyd to develop houses, that the Boyds had been patiently waiting ever since to go forward, that blueprints had been finalized, and they would break ground in May or June 2002 (this now being February 2002). Mr. Edwards testified further that he and Mr. Turner are familiar with "every penny" that will go into the project and the details (including the lay-outs, flooring, carpets, and appliances) and that Mr. White will join Mr. Turner in overseeing it. According to Mr. Edwards, there is a reasonable

expectation that the project will be profitable. He did not, however, offer any financial analysis to support that expectation.

It is difficult to reconcile the testimony of Alfred Edwards with that of Messrs. Turner and White. Neither Mr. Turner nor Mr. White testified specifically about the Venus project and, in fact, both men stated candidly that they knew very little about the Debtor's current operations or plans. Additionally, Mr. Turner said that he did not have any contracts with the Debtor to participate in any projects. If Mr. Turner really were intimately involved with a large, breaking project, he most likely would have discussed it in his lengthy testimony. Having observed the witnesses, the Court finds the testimony of Messrs. Turner and White to be more credible than that of Mr. Edwards.

With respect to the alleged $300 million contract for other development in Hough, the contract was not offered into evidence and the terms were not explained. There was no credible testimony about the manner in which the Debtor would carry out this contract or any profit to be realized from it.

Mr. Edwards did try to explain why the Debtor had not moved forward with litigation against National City Bank that he believes will, in part, fund the Debtor's to-be-announced plan of reorganization. He attributed the delay to his need to do "due diligence." Mr. Edwards did not provide any convincing details about exactly what he meant by this or why whatever it was he was doing would have taken two and a half years to date with no tangible progress. He did specifically mention that it took time for him to get the NAACP involved. Ronald Colvin, President of the Lake County NAACP, however, also testified. According to Mr. Colvin, he spoke with Mr. Edwards a few years ago about a potential lending discrimination lawsuit against a Cleveland lending institution. Mr. Colvin referred Mr. Edwards to experienced counsel at that

time. There was nothing in Mr. Colvin's testimony that meshes with Mr. Edwards's saying that part of the delay in pursuing the lawsuit related to the NAACP. Moreover, the Debtor did not provide any details about the facts that led it to believe that a lawsuit would be successful or the amount that might be recovered.

The Court also notes that Mr. Edwards's ongoing connection to the Debtor is ill-defined. He testified that he had been "appointed" a consultant to the Debtor by the Edwards Family Trust in October 1999, shortly after the bankruptcy filing and his resignation as the Debtor's President. While the Edwards Family Trust is a shareholder of the Debtor, it is not clear to the Court why the Trust would have the authority to appoint a consultant for a Chapter 11 Debtor (even if unpaid) and why the Trust is directing any of the Debtor's operations or participating in decision-making, as Mr. Edwards's testimony seems to indicate.[3]

Returning to the Debtor's arguments about other potential litigation, the Debtor contends that it has judgments against certain individuals that it will collect and use to fund a plan. These judgments were entered by default against Arthur Fayne and Bill Hampton in July 2001.[4] The Debtor has not collected the judgments, although it represents that it is about to retain counsel to do so. The Debtor did not provide a satisfactory explanation for why concrete steps have not been taken to date. When a party permits judgment to be taken against it by default, it is rarely a good sign. Frequently, it means that the party has so few collectible assets that it is not economical to defend against the claim. Such judgments do not improve with age. And again,

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[3] Mr. Edwards also seemed to be saying that other non-Debtor operations, including a paving company and a publishing company, will be involved in the Debtor's reorganization. Once again, however, no details were provided and the other entities are not legally affiliated with the Debtor, at least as disclosed by the petition and schedules.

[4] *See Triangle Development, Inc. v. Hough Area Partners in Progress, Inc., et al.*, Adv. Pro. No. 00-1491. (Docket 34, 38).

even if money may eventually be collected, the potential for the Debtor to have some funds is not the same as having a viable plan of reorganization. *See* 11 U.S.C. § 1123 (stating the specific requirements that a proposed plan must meet in order to be confirmed by the Court).

There are three matters on which the parties agree. First, that the Debtor owes statutory fees to the United States Trustee for at least the last three quarters. *See* 28 U.S.C. § 1930(a)(6). Mr. Edwards explained that the fees have been forwarded to counsel with the instruction to hold them until this Motion is resolved. The Debtor did not point to any Bankruptcy Code provision to support this approach to paying fees that are due and owing. Second, the parties agree that the Debtor did not schedule any significant personal property, when in fact shortly before the hearing on the Motion to Convert it admitted owning such property. Compare Schedule D (Docket 1) to Inventory (Hearing Exh. D). At trial, Mr. Edwards admitted that the value was about $10,000.00. Third, the parties agree that the Debtor did not timely file the monthly Operating Reports for June, July, August, September, October, and November 2001. The Court file shows that Mr. White signed all six of them on January 2, 2002 (the same date on which he signed the December Report) and that they were all filed on January 14, 2002, a few days before the hearing on this Motion. (Docket 161, 162, 163, 164, 165, 167). This is part of a pattern of delay that has plagued this case from the beginning. (See Docket 86 through 100, which are the Operating Reports for October 1999 through December 2000, all filed on January 29, 2001.)

IV.

This case has been pending for almost two and a half years. The United States Trustee proved that the Debtor has no employees, is not operating, has not fully disclosed its assets, has not filed a disclosure statement or plan of reorganization (much less had one confirmed), and has not paid United States Trustee fees for at least the last three quarters.

Also, the Debtor has not filed its monthly Operating Reports on time and did not offer a satisfactory explanation for that failure. The Operating Report for the period ending December 31, 2001 was signed under penalty of perjury by Lushion White, who had inadequate knowledge of its contents. Mr. White also signed the six other Operating Reports filed the same date. It is logical to infer based on his testimony that he did not have any greater knowledge of the information in those Reports than he did of the December Report. Filing Operating Reports that are signed by someone without knowledge is really no better than not filing the Reports at all. In fact, it is probably worse because at least a missing Operating Report does not give misinformation. This deficiency points up another one, which is that the Debtor does not have a knowledgeable person in charge of the company.

In addition to these financial issues, the Debtor did not offer a satisfactory explanation for its lack of tangible progress on the road to reorganization to date. The testimony that supported the Debtor on this issue was long on rhetoric and short on substance. The delay in moving this case toward reorganization has been unreasonable and detrimental to the creditors, who as a group are no closer today to having their claims paid or resolved than they were on the day the case was filed.

For all of the reasons discussed in this Memorandum of Opinion, the Court finds that the United States Trustee proved that cause exists to convert or dismiss this case, whichever is in the best interests of creditors and the estate, based on unreasonable delay by the Debtor that is prejudicial to creditors, failure to pay fees to the United States Trustee, and failure to timely file the monthly Operating Reports. Having found cause, Bankruptcy Code § 1112(b) requires the Court to determine whether conversion or dismissal is appropriate. The United States Trustee requests conversion and no party in interest advocated dismissal. Conversion is clearly the better

course because a Chapter 7 Trustee can investigate the Debtor's finances and operations and move promptly to collect and distribute any assets, including the judgments, all of which will benefit the creditors and the estate. The case will, therefore, be converted from Chapter 11 to a case under Chapter 7 of the Bankruptcy Code.

A separate Judgment will be entered reflecting this decision.

Date: 19 February 02

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by telecopy and mail on: Joan Kodish, Esq.
Dean Wyman, Esq.

By: Joyce L Gordon, Secretary

Date: 2/19/02

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 99-17499
	)	
TRIANGLE DEVELOPMENT, INC.	)	Chapter 11
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**JUDGMENT**

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

IT IS, THEREFORE, ORDERED that the United States Trustee's Motion to Convert is granted and the Debtor's Opposition to it is overruled. (Docket 151, 170). IT IS FURTHER ORDERED that this case is converted to Chapter 7.

Date: 19 Feb 2002

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by telecopy and mail : Joan Kodish, Esq.
Dean Wyman, Esq.

By: Joyce L Gordon, Secretary

Date: 2/19/02

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 99-17499
	)	
TRIANGLE DEVELOPMENT, INC.,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the Memorandum of Opinion filed this same date, the Notice of Withdrawal of Application for Compensation filed by Joan Kodish (treated as a motion) is denied. (Docket 154). Additionally, the Motion to Dismiss the Objection of the United States to Application for Compensation filed by Joan Kodish is denied. (Docket 155).

IT IS SO ORDERED.

Date: 7 May 2002

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Alexander Jurczenko, Esq.
Joan Kodish, Esq.
Dean Wyman. Esq.

By: Joyce L. Gordon, Secretary

Date: 5/7/02