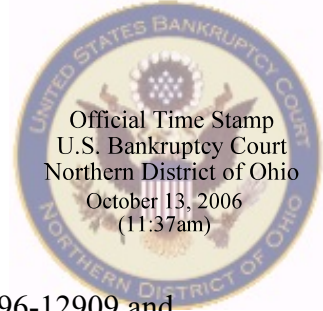


THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re:	)	Case No. 96-12660
	)	(consolidated with 96-12909 and
JAMES E. LUNDEEN, SR., M.D.,	)	jointly administered with 96-12918)
INC., et al.,	)	
	)	Chapter 11
Debtors.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	<b><u>MEMORANDUM OF OPINION</u></b>

These chapter 11 cases were closed in 2002.<sup>1</sup> Creditors Parshotam Gupta, M.D. and Mahendra Patel, M.D., together with the unsecured creditors’ committee, filed consolidated motions asking (1) to reopen the cases; (2) to compel payments to be made; (3) for an accounting and a debtor’s examination; (4) to set aside a fraudulent conveyance; (5) to recover property, assets, and payments; and (6) to waive fee to reopen.<sup>2</sup> For the reasons stated below, the motion to reopen is granted and the remaining motions are denied.

**JURISDICTION**

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. A motion to reopen a chapter 11 cases is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O).

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<sup>1</sup> The cases were assigned to the Honorable David Snow. They were reassigned to the undersigned on July 25, 2000 following Judge Snow’s retirement.

<sup>2</sup> Docket 519.

## **DISCUSSION**

### **I. Factual and Procedural Background**

The movants filed their motion on September 13, 2006 and set it for hearing on the court's regular chapter 11 docket for October 5, 2006. The motion and hearing notice state that they were served by regular mail on James E. Lundeen, Sr., M.D. and attorney Mario Fazio and by electronic filing on attorneys Richard Hardy, Anita Gill, and Lenore Kleinman. The hearing notice required any objecting party to file a written response by September 28, 2006. No party filed a response.

The hearing went forward on October 5, 2006, at which time the debtors' former counsel Steven Davis appeared, together with Mary Ann Rabin (former counsel to the unsecured creditors' committee), David Cummings (attorney to creditors Gupta and Patel) and Lenore Kleinman (representing the United States trustee). The court heard oral argument and took the matter under submission.

For purposes of deciding the motions only, the court accepts as true these uncontested facts proffered by the movants at the hearing:

James Lundeen, Sr., M.D., James Lundeen, Sr., M.D., Inc., and Lundeen Physical Therapy-Akron, Inc. filed chapter 11 cases in 1996. The three cases were jointly administered, some or all of the debtors were substantively consolidated, and the debtors filed a plan which was confirmed by order entered on January 25, 1999. The plan provides that the court retains jurisdiction with respect to controversies in connection with the plan and any default remedies which may be available to creditors under the bankruptcy code. At the request of creditor the

Internal Revenue Service, the cases remained open until July 30, 2002 so that plan payments could be monitored.

Under the plan, the debtors were to fund payments at the rate of \$10,000 each month for the first year, \$15,000 each month for the second year, and \$20,000 each month thereafter for the 10 year duration of the plan. The plan provided that class 1, 2, 3, and 5 creditors would be paid first, followed by total payments of \$1,218,000 to the unsecured creditors (class 6). Although the plan anticipated that payments to unsecured creditors would begin in March 2005, no payments have been made to date.

Dr. Lundeen has served as the plan disbursing agent since March 2001. By letter dated June 20, 2006, Dr. Lundeen's counsel made these representations concerning Dr. Lundeen's earned income, his plan payments, and his plan payments arrearages;

Year	Income	Payments (made)	Payments (Required)	Arrearage
1999	\$597,000	\$100,000	\$100,000	-0-
2000	\$675,000	\$157,000	\$170,000	\$13,000
2001	\$748,000	\$188,000	\$230,000	\$42,000
2002	\$761,000	\$189,000	\$240,000	\$41,000
2003	\$780,000	\$173,000	\$240,000	\$67,000
2004	\$895,000	\$158,000	\$240,000	\$82,000
2005	\$904,000	\$126,000	\$240,000	\$114,000
2006	undisclosed	\$18,855	\$160,000	\$141,145 (to date)

This information states a *prima facie* case that the debtors have not made all required plan payments and that the payment arrearage is \$141,145.

## **II. The Motion to Reopen**

The movants<sup>3</sup> ask that the chapter 11 cases be reopened based on the debtors' failure to comply with the terms of the confirmed plan. Their motion states that reopening is needed to review Dr. Lundeen's conduct as the plan disbursing agent and to appoint a new and independent disbursing agent. At the hearing, movants' counsel stated that examination and supervision of the debtors' activities by the UST may be appropriate.

### **A. 11 U.S.C. § 350(b)**

Reopening of a case is governed by bankruptcy code § 350(b):

A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

11 U.S.C. § 350(b). *See also* FED. R. BANKR. P. 5010 (providing that a "case may be reopened on motion of . . . [a] party in interest . . ."). The party requesting relief under § 350(b) has the burden of demonstrating that cause exists. *In re Cloninger*, 209 B.R. 125 (Bankr. E.D. Ark. 1997); *In re Winburn*, 196 B.R. 894 (Bankr. N.D. Fla. 1996). *See also Rosinski v. Boyd (In re Rosinski)*, 759 F.2d 539 (6th Cir. 1985) (requiring the debtor to advance some justification for the requested reopening). The decision regarding reopening is submitted to this court's discretion. *Rosinski*, 759 F.2d at 540-41. Cause to reopen can include a debtor's failure to

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<sup>3</sup> There is a serious question regarding whether a committee of unsecured creditors continues to exist following plan confirmation and case closing, which raises standing questions. The other two movants, however, are creditors who do have standing to bring this motion. *See* 11 U.S.C. § 1109(b) (providing that a "creditor . . . may raise and may appear and be heard on any issue in a case under [chapter 11]."). Because these creditors have standing, there is no need to resolve the question of whether the committee has standing or to address the effect of the addendum filed after the motion was taken under submission which states that certain unidentified members of the committee are requesting relief. (Docket 521).

comply with the terms of a confirmed plan. *See for example, Donaldson v. Bernstein*, 104 F.3d 547, 552 (3d Cir. 1997); *In re Doty*, 129 B.R. 571, 579-580 (Bankr. N.D. Ind. 1991). The case need not be reopened “where reopening would not result in a ‘sensible allocation of judicial resources’.” *Booth v. Nat’l City Bank (In re Nat’l City Bank)*, 242 B.R. 912, 916 (B.A.P. 6th Cir. 2000).

The movants have stated cause to reopen based on their unopposed representations that the debtors are in substantial default of their plan payments. The court will reopen the case for 30 days to permit the movants or the UST to file any motions or adversary proceedings that they deem appropriate.<sup>4</sup> If nothing is filed within that time frame, the court will close the case without further notice or hearing.

#### **B. The Balance of the Relief Requested**

The movants request this additional relief:

The motion to waive filing fee. They request waiver of the filing fee for reopening so that the fee may be paid by the bankruptcy estate. Although the filing fee may be waived or deferred under certain circumstances, waiver is not appropriate here because the movants chose this forum to address their dispute with the debtors and it is unclear whether there will be any estate assets available to pay the fee. *See* Bankruptcy Court Miscellaneous Fee Schedule ¶ 11. The request to waive the filing fee is, therefore, denied and the fee is to be paid within 10 days after the date on which this order is entered.

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<sup>4</sup> The court notes that there are many thorny issues raised by a fact pattern such as this where the case has been confirmed, there is no remaining “debtor” although the parties refer to such an entity, and there is no clear statement of what property belongs to the reorganized debtor. The court assumes the parties will address these concerns in any filings made.

The motion to compel payments. The movants ask that Dr. Lundeen be compelled to return certain payments. As framed, this relief cannot be requested through a motion, *see* FED. R. BANKR. P. 7001, and the motion is, therefore, denied without prejudice.

The motion for an accounting. This is not appropriately decided in the context of a motion to reopen the case and is denied without prejudice.

The motion to avoid certain transfers as fraudulent and the motion to recover property. Motions to avoid transfers and to recover property from third-parties must be brought by a separate complaint in an adversary proceeding. *See* FED. R. BANKR. P. 7001. These motions are, therefore, denied without prejudice.

The motion for an accounting and a debtor's examination. After reopening, these motions may be refiled by parties with standing stating the legal basis and providing interested parties with notice and an opportunity to be heard. As presented, they are denied.

### **CONCLUSION**

For the reasons stated, the court finds the motion to reopen the chapter 11 cases is granted and all other motions are denied. A separate order will be entered reflecting this decision.



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Pat E. Morgenstem-Clarren  
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re: ) Case No. 96-12660  
JAMES E. LUNDEEN, SR., M.D., ) (consolidated with 96-12909 and  
INC., et al., ) jointly administered with 96-12918)  
Debtors. ) Chapter 11  
 ) Judge Pat E. Morgenstern-Clarren  
 )  
 ) **ORDER**

For the reasons stated in the memorandum of opinion entered this same date, the consolidated motion of creditors Parshotam Gupta, M.D. and Mahendra Patel, M.D., together with the unsecured creditors' committee, asking (1) to reopen the cases; (2) to compel payments to be made; (3) for an accounting and a debtor's examination; (4) to set aside a fraudulent conveyance; (5) to recover property, assets, and payments; and (6) to waive fee to reopen is granted in part. (Docket 519). The motion to reopen is granted and the remaining motions are denied.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Pat E. Morgenstern-Clarren".

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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge