The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

Dated: March 30 2007

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 06-33114
	)	
L&M Video Productions, Inc.,	)	Chapter 11
	)	
	)	
Debtor.	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION GRANTING MOTION TO DISMISS

The court held an evidentiary hearing on a Motion for Dismissal or Abstention [Doc. # 8] filed by shareholder/creditor/asset purchaser Cornerstone Church, Inc. ("Cornerstone"). Cornerstone asks the court to dismiss the case due to a lack of corporate authority to seek relief under the Bankruptcy Code. Alternatively, it asks the court to abstain from conducting further proceedings in this case under 11 U.S.C. § 305 or to dismiss the case for cause under 11 U.S.C. § 1112(b). The court held a hearing at which both Cornerstone and Debtor had the opportunity to, and did, present testimony and evidence in support of their positions.

This memorandum of decision constitutes the court's findings of fact and conclusions of law under Fed. R. Civ. P. 52, made applicable to this contested matter by Fed. R. Bankr. P. 9014 and 7052. Regardless of whether or not specifically referred to in this decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons that follow, the court will grant Cornerstone's motion to dismiss under § 1112(b).

FACTUAL BACKGROUND

Debtor filed a Chapter 11 bankruptcy petition on October 30, 2006. It had filed a previous Chapter 11 case on May 19, 2006. In that case, Cornerstone filed a motion for abstention or dismissal that raised substantially the same issues raised in the motion now before the court. On July 6, 2006, after an evidentiary hearing, Debtor's first Chapter 11 case was dismissed due to a lack of corporate authority to seek bankruptcy relief, and the court did not address Cornerstone's arguments regarding cause for dismissal under § 1112(b) or abstention under § 305. The court's opinion dismissing the case set forth the following factual background of Debtor's corporate structure and its relationship with Cornerstone:[1]:

> Debtor is an Ohio corporation that operates a low power television broadcasting station under a license from the Federal Communications Commission ("FCC"). At the time Debtor filed its Chapter 11 petition, the corporation had two shareholders, Cornerstone Church, Inc., ("Cornerstone"), which holds 37% of the common stock, and L&M Broadcasting, Inc., which holds 63% of the common stock [as set forth in Debtor's List of Equity Security Holders filed on May 19, 2006].[2] Lamaree Miller ("Miller") and his wife, Linda Miller, own 100% of the stock in L&M Broadcasting, Inc. Miller organized the Debtor corporation in 1995, was Debtor's president until September 2003, and has managed the television station at all relevant times.
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> As early as 1997, Miller approached Robert Pitts, Vice President of Cornerstone, and requested that Cornerstone provide Debtor with operating capital in the form of a $20,000 loan. He repeated his request several times and Cornerstone loaned Debtor the money each time. Miller explained to Pitts that Debtor's individual shareholders were an obstacle in that they were not willing to invest any additional money in the business. Therefore, over the next few years, Cornerstone purchased all of the shares in Debtor except for those owned by L&M Broadcasting, Inc.
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> In 2003, after learning of a pending sale of Debtor, Cornerstone filed a motion for temporary restraining order in state court. The state action was settled pursuant to an agreement entered into between Cornerstone, Debtor, L&M Broadcasting, Inc., and Lamaree and Linda Miller on September 11, 2003 ("Settlement Agreement"). The Settlement Agreement recognizes Cornerstone's 37% interest in Debtor and required the parties to enter into a close corporation agreement with respect to Debtor. [Cr. Ex. A1, ¶1, 13]. The Settlement Agreement also recognized that Cornerstone is a creditor of Debtor and required Debtor to execute an open-end note that includes all loans made by Cornerstone to

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[1] The court has omitted citations to the record in Debtor's previous Chapter 11 case that are included in the July 6, 2006, opinion but has included citations to the current record before the court where appropriate.

[2] Although the List of Equity Security Holders that was filed with Debtor's petition in this case on October 30, 2006, lists Cornerstone as owning only 26.6% of Debtor's common stock and L&M Broadcasting as owning 73.4% of the common stock, there is no evidence of a change in the ownership interests of the Debtor corporation . Laramee Miller, the majority shareholder of L&M Broadcasting, testified at the hearing on the instant motion and confirmed that the ownership interests of Cornerstone and L&M Broadcasting remain unchanged.

Debtor
and is secured by all of the assets of Debtor.[3] [*Id.*, ¶ 8].

The parties entered into the Close Corporation Agreement ("the Agreement") on September 16, 2003. Although Miller and his wife continued to be employed by Debtor, the Agreement removed Miller as Debtor's President and placed certain restrictions on him with respect to the company and its finances.[4] The Agreement also provided that the Board of Directors shall be composed of six members, four of whom shall be designated by Cornerstone and two by L&M Broadcasting, Inc. [Cr. Ex. A2, ¶¶ 5, 6]. The Agreement further provides as follows:

> **The parties hereto agree that this Agreement is subject to the approval of the FCC. Paragraph 5 below empowers Cornerstone to name a majority of the members of the Board of Directors of the Company and thus constitutes a transfer of control. The parties hereby agree that this transfer of control shall be effective only upon receipt of approval of this Agreement from the FCC.** In the event approval from the FCC has not been received within two hundred and seventy (270) days from the date of this Agreement either shareholder shall have the option to terminate this Agreement by providing written notice of termination to the other parties.

[*Id.* at ¶ 1]. Under the Agreement, Debtor's shareholders also adopted amended Articles of Incorporation and an Amended and Restated Code of Regulations (the "Regulations"). [*Id.* at ¶¶ 2, 4 and attached Ex. A & B].

The Regulations provide that "[t]he powers of the corporation shall be exercised, its business and affairs conducted and its property controlled by the Board of Directors," and that unless the number of directors is changed at a meeting of shareholders called for such purpose, there will be three directors of the corporation until changed as provided in the Close Corporation Agreement, that directors may be elected at a special meeting of shareholders called and held for that purpose, and that directors shall hold office until the annual meeting next succeeding their election or until their successors are elected and qualified. [Cr. Ex. A6, Art. III, §§ 1-3, Art. IV, §1.]. The Regulations require written notice of meetings of shareholders and written notice to each director of any special meeting of the Board of Directors unless such notice is waived in writing by the director and the waiver is filed with or entered upon the record of the meeting. [*Id.* Art. II, § 4, Art. III, § 3]. But any action which may be authorized at a meeting of the directors may be authorized without a meeting in a writing signed by all of the directors. [*Id.* Art. III, § 6].

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[3] Although the Settlement Agreement provides that the note will be secured by all of the assets of Debtor, including its FCC broadcast license, [*See* Cr. Ex. 3, ¶ 8], a broadcast license "is not an owned asset or vested property interest so as to be subject to a mortgage, lien, pledge, attachment, seizure, or similar property right." *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986).

[4] Specifically, the Close Corporation Agreement provided that Miller was not permitted "to borrow funds on behalf of the Company, negotiate checks or withdraw funds from the bank accounts of the Company or enter into contracts on behalf of the Corporation without the specific prior written consent of the President or the Board of Directors." [Cr. Ex. A2, ¶ 6].

> In accordance with the Regulations, Pitts became an elected member of Debtor's Board of Directors pursuant to an Action by Written Unanimous Consent in Lieu of Special Meeting of the Shareholders dated September 16, 2003. [Cr. Ex. A4]. The only other members of the Board of Directors are Miller and his wife, Linda. Also on September 16, 2003, pursuant to an Action by Written Unanimous Consent in Lieu of Special Meeting of Directors, Pitts was elected as Debtor's President. [Cr. Ex. A3].
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> Approval of the transfer of control of Debtor was not received within the 270 day period set forth in the Close Corporation Agreement and had not yet been received as of the date of the hearing on the motion before the court. The record does not show whether such approval was ever sought. On January 26, 2005, Cornerstone provided written notice to Debtor, shareholder L&M Broadcasting, Inc. and the Millers of its election to terminate the Agreement pursuant to paragraph one of the Agreement.
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> On January 10, 2005, Teletech, the lessor of a transmitter used by Debtor, having not been paid under its lease and having received a money judgment against Debtor, filed a state court action against Debtor seeking the appointment of a receiver to enforce the judgment. Cornerstone was joined in that action as a party defendant and also filed a cross-claim against Debtor, upon which it received a judgment of more than $650,000. By agreed order entered on February 16, 2005, the state court appointed Ralph DeNune as receiver. The order appointing DeNune was approved by, among others, attorneys for Cornerstone, Debtor and the Millers.
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> DeNune entered into a purchase agreement with Cornerstone for its acquisition of all of Debtor's assets, including the FCC license. Beyond the satisfaction of the claims of certain other creditors, the consideration for the sale essentially consists of Debtor's existing debt to Cornerstone. Unsecured creditors were not generally given notice of or the opportunity to participate in the state court proceedings, and will not be paid anything through the receivership. On October 18, 2005, the state court confirmed DeNune's sale of Debtor's assets to Cornerstone. The sale has not been completed because the FCC has not approved transfer of the license to Cornerstone, pending which the state court authorized Cornerstone to take control of the assets and operate the television station "subject to the supervision of the receiver." The receivership action remains pending in state court.

[Case No. 06-31157, Doc. # 30 (internal citations omitted)].

At the hearing on the instant motion, DeNune testified that at the beginning of the receivership he met with Miller and agreed that Miller would continue as manager of Debtor's television station, which operated under the call letters WNGT. DeNune spoke with Miller regarding revenue generated by the station. Miller revealed only two sources of revenue – PINS Broadcasting in the amount of $4,800 per month and Religious Broadcasting in the amount of $1,800 per month. This revenue fell short of Debtor's monthly break even point by between $5,500 and $6,000, which amount was made up by Cornerstone in

the form of loans to the corporation.[5] In July 2005, the PINS Broadcasting contract expired and revenue fell to $1,800 per month. Thereafter, Cornerstone sporadically loaned funds to the company. However, DeNune testified that he was generally unable to pay Debtor's employees.

Although DeNune authorized Miller to sell air time on WNGT on behalf of Debtor, no funds from such sales were ever turned over to DeNune nor was he or Cornerstone ever made aware that any such sales were made. However, Miller did sell air time on WNGT, and he deposited checks totaling over $80,000 made payable to WNGT into two bank accounts in the name of L&M Broadcasting. Miller used some of the funds in the L&M Broadcasting accounts to pay Debtor's employees and, according to Miller, some other miscellaneous expenses of the Debtor corporation. Miller testified that he had previously conducted business in this manner and continued to do so after the commencement of the receivership. Nevertheless, it is clear that DeNune never authorized Miller to deposit proceeds from the sale of air time into L&M Broadcasting accounts and never authorized him to pay any debts or expenses on behalf of Debtor. In July 2006, DeNune removed Miller as manager of Debtor's television station and moved the station to another location. Matrix Broadcast Group, Inc., a company owned by Cornerstone, took over management of the station subject to DeNune's supervision. Because the FCC has not yet approved transfer of the broadcast license to Cornerstone, the sale of Debtor's assets has still not been completed.

After dismissal of Debtor's previous Chapter 11 case and after being removed as manager of Debtor, Miller provided Pitts with a written notice that a special meeting of the Board of Directors would be held on August 25, 2006. Pitts testified that he attempted to contact Miller by telephone in order to reschedule the date of the meeting but was unsuccessful and never spoke with Miller. Instead, he sent Cornerstone's attorney to attend and observe the meeting. In addition, Miller's wife, Linda, attended the meeting telephonically. Miller testified that, at the meeting, a majority of the directors of the Debtor corporation elected him President and authorized him to file a Chapter 11 petition on behalf of the corporation and to employ counsel to represent the corporation in the bankruptcy case.[6]

The parties agree that Debtor's asset of greatest value is its FCC license. Miller testified that the license has a value significantly higher than the amount approved by the state court for the sale of Debtor's assets and that he has been in contact with potential investors who would be willing to invest funds in the

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[5] Similarly, Cornerstone regularly loaned Debtor funds in order to keep the station running before commencement of the receivership. According to Pitts, although he met with Miller several times each month to determine Debtor's financial status, he too was aware of only two sources of revenue - PINS Broadcasting and Religious Broadcasting.

[6] Although Miller's Statement Regarding Authority to Sign and File Petition states that the meeting of directors occurred on October 26, 2006, he testified at the hearing that the correct date of the meeting is August 25, 2006.

company. One of those investors, Dr. Earl Murray, testified at the hearing that while no commitments had yet been made, a group of six people were willing to invest in the company by obtaining a Small Business Administration loan in the amount of $1.4 million. In light of this testimony, the court was asked after the hearing concluded to hold the instant motion in abeyance pending settlement discussions. [*See* Doc. # 20]. Pursuant to 11 U.S.C. § 543(d)(1), DeNune was excused from compliance with 11 U.S.C. § 543(a)-(b) and authorized to remain in custody and control of the assets as a custodian under 11 U.S.C. § 101(11). *Id.* The parties have since notified the court that such discussions have concluded with no funds forthcoming. [*See* Doc. ## 26, 28].

LAW AND ANALYSIS

Cornerstone first argues that this case should be dismissed because Debtor lacked corporate authority to seek bankruptcy protection. It also asks the court to abstain from exercising jurisdiction over this case under 11 U.S.C. § 305(a), which provides the court discretion to abstain from exercising jurisdiction if "the interests of creditors and the debtor would be better served by such dismissal...," or alternatively, to dismiss the case under 11 U.S.C. § 1112(b), asserting lack of good faith as cause for dismissal. For the reasons that follow, the court will assume authority exists for Debtor filing its bankruptcy petition but will dismiss the case under § 1112(b).

I. Corporate Authority

Cornerstone first argues that this case should be dismissed because Miller lacked authority to file a bankruptcy petition on behalf of Debtor. Cornerstone contends that the court's findings in its July 6, 2006, opinion dismissing Debtor's previous Chapter 11 case presents a "concise and compelling statement as to why the present Chapter 11 case should be dismissed." The court found a lack of corporate authority in the previous case, however, due to Miller's failure to give notice of a special meeting of directors to all of the directors, including Pitts, as is required under Ohio law. *See* Ohio Rev. Code § 1701.61(D). The court also rejected Debtor's argument that a majority of the directors in an action without a meeting authorized it to seek protection under Chapter 11 since Ohio law provides that such an action is authorized only if approved in a writing signed by all of the directors. In the present case, there is no dispute that Pitts received notice of the special meeting of directors held on August 25, 2006, and Debtor does not argue that corporate authorization was obtained in writing without a meeting of the directors.

Nevertheless, Cornerstone argues that the Regulations provide that "all of the directors elected and in office shall constitute a quorum."[7] [Cr. Ex. A6, Art. IV, § 4]. Because a quorum is necessary in order

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[7] Although Cornerstone also refers to Debtor's bylaws, the bylaws are not part of the record before the court.

for the corporation to transact business in the absence of all of the members, *see McDonald v. Dalheim*, 114 Ohio App. 3d 543, 546 (1996), it further argues that any business transacted on August 25, 2006, was ineffective as an act of the corporation since neither Pitts nor Linda Miller were present. However, Linda Miller did appear telephonically at the director's meeting. Under Ohio law, unless a corporation's articles or regulations prohibit telephonic participation at a director's meeting, such participation constitutes presence at the meeting. Ohio Rev. Code § 1701.61(B); *see Fradkin v. Ernst*, 571 F. Supp. 829, 845 (N.D. Ohio 1983). Thus, a majority of the directors were present at the August 25 meeting. And unless a corporation's articles or regulations provide otherwise, a majority of the authorized directors constitutes a quorum. Ohio Rev. Code § 1701.62. There is nothing in the record showing that Debtor's Amended Articles of Incorporation even address the quorum issue. And while the Regulations provide that a quorum exists only if all of the directors are present, the Regulations were not separately signed by the shareholders but were adopted by the shareholders in the Close Corporation Agreement. The Agreement, however, was terminated at Cornerstone's election pursuant to paragraph one of the Agreement. The court questions whether the Regulations survive the termination of the Agreement and the parties have not adequately addressed this issue. Because, for the reasons discussed below, the court finds dismissal under § 1112(b) is warranted, it will not further address the issue of corporate authority and will assume for purposes of deciding the instant motion that corporate authority for filing Debtor's Chapter 11 petition exists.

II. Dismissal Under 11 U.S.C. § 1112(b)

Cornerstone asks the court to dismiss this case under § 1112(b), which provides that the court shall convert the case to a case under Chapter 7 or dismiss the case, "whichever is in the best interests of creditors and the estate, if the movant establishes cause." 11 U.S.C. § 1112(b)(1). Cornerstone asserts as cause for dismissal that there is no likelihood of rehabilitation and that the case was not filed in good faith. "Cause" for dismissal includes "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A). Although § 1112(b)(4) sets forth a specific list of circumstances that the term "cause" includes, the list is not limiting and may include additional circumstances warranting dismissal. *See* 11 U.S.C. § 102(3) (providing the rule of construction for the use of "includes" in Title 11). One of the non-enumerated grounds for dismissal under § 1112(b) is a lack of good faith.[8] *Trident Assoc. Ltd. P'ship v. Metropolitan Life Ins. Co. (In re Trident Assoc. Ltd.*

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[8] This case was commenced under the Bankruptcy Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005("BAPCPA"). Section 1112(b) was amended by BAPCPA. Among the changes made, the list of enumerated grounds for dismissal is different and, inexplicably, changing the disjunctive "or" at the end of the list to the conjunctive "and." However, "cause" is specified as being "inclusive" of the enumerated grounds, just as it was before

P'ship), 52 F.3d 127, 131 (6th Cir.1995); *cf. Marrama v. Citizens Bank of Mass.*, 127 S. Ct. 1105, 1110-11 (2007) (noting that the nonexclusive list of causes justifying dismissal under § 1307(c) does not mention bad faith but recognizing that dismissal for bad-faith is implicitly authorized by the words "for cause" in that section). In *Trident,* the Sixth Circuit set forth a number of factors that may guide a court in deciding a motion under § 1112(b) but emphasized that a bankruptcy court must determine whether the requested relief is appropriate on a case by case basis. *Trident,* 52 F.3d at 131. A debtor's bad faith is shown "only in circumstances where the facts presented evidence a debtor's intent to abuse the bankruptcy process." *In re New Batt Rental Corp.*, 205 B.R. 104, 107 (Bankr. N.D. Ohio 1997).

Cornerstone argues that Debtor's bad faith is demonstrated by the fact that it was not authorized to file a bankruptcy petition and the fact that there is no possibility of reorganization since all of Debtor's assets have been sold in the receivership proceedings in state court. As discussed above, it is not at all clear that Debtor lacked corporate authority to file its Chapter 11 petition. With respect to the likelihood at the time of filing of reorganization, the court notes that while the sale of Debtor's assets has been confirmed by the state court, consummation of the transfer of assets has not occurred and is contingent upon the FCC approving transfer of Debtor's broadcast license, Debtor's primary and most valuable asset. Miller testified that the Chapter 11 petition was filed in an attempt to maximize the value of this asset. And, in fact, a potential investor was present and testified at the hearing on the instant motion as to his willingness and the willingness of a group of other investors to explore investing significantly more than the amount Cornerstone agreed to pay. While investment by that group of investors fell through, on these facts, the court cannot conclude that Debtor intended to abuse the bankruptcy process when it filed its petition.

Nevertheless, the court agrees that cause for dismissal exists under § 1112(b)(4)(A). The circumstances constituting cause that are enumerated in § 1112(b)(4) involve situations "in which it is typically unlikely that the benefits of reorganization will be achieved within a reasonable amount of time or at an acceptable cost" and, thus, situations in which it is unreasonable for a Chapter 11 case to proceed. 7 Alan N. Resnick, et al., *Collier on Bankruptcy* ¶ 1112.04[3] (15th ed. 2005). The court finds such circumstances exist in this case.

Section 1112(b)(4)(A) contemplates a two-fold inquiry: whether there is a continuing diminution of the estate and whether there is a reasonable likelihood of rehabilitation. *In re Citi-Toledo Partners*, 170

BAPCPA. There is thus nothing in BAPCPA's changes to the text of § 1112(b) that would invalidate pre-amendment case law finding that bad faith is grounds for dismissal of a voluntary petition.

B.R. 602, 606 (Bankr. N.D. Ohio 1994). The first element, a continuing diminution of the estate, can be satisfied by showing that the debtor is incurring continuing losses or maintaining a negative cash flow position. *In re Schriock Const., Inc.*, 167 B.R. 569, 575 (Bankr. D.N.D. 19994). Although only one monthly operating report has been filed by Debtor in this case,[9] the undisputed evidence in this case is that Debtor has been unable to operate its television station without an infusion of funds on a monthly basis by Cornerstone since before the receivership commenced; and Debtor does not now contend that it has the funds to operate the station absent such financial support. This negative cash flow and the debt that will continue to accrue in order to broadcast the television station satisfies the court that a continuing diminution of the estate exists.

The court also finds an absence of a reasonable likelihood of rehabilitation. Debtor's only prospect for rehabilitation or reorganization was based on finding someone willing to invest in the company in the form of either an infusion of new equity or of a sale of Debtor's assets in an amount greater than the purchase price by Cornerstone. At filing, as discussed above, potential investors expressed a real and serious interest in such an investment. A fair opportunity for that process to occur was afforded with the consent of the parties and it has now concluded unsuccessfully. Although Miller believes the FCC license is more valuable than what is reflected by the sale agreement between Cornerstone and the receiver, after nearly five months, no other person, including any of Debtor's other creditors, have expressed a willingness on the record of this court to enter into an arrangement that would be more beneficial. Given Debtor's inability to operate its television station without the monthly infusion of funds from other sources and the lack of any likelihood of rehabilitation or reorganization within a reasonable time, the court will grant Cornerstone's motion to dismiss under § 1112(b). As such, the court does not address abstention under 11 U.S.C. § 305.

A separate order granting the motion and dismissing this case under 11 U.S.C. § 1112(b)(4)(A) will be entered by the court.

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[9] Debtor filed a report for November 2006, which was filed January 4, 2007, and reports monthly net income of zero. No reports have since been filed.