

NOT FOR COMMERCIAL 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., )  
)  
Debtors. ) Chapter 11  
)  
) Judge Pat E. Morgenstern-Clarren  
)  
) **MEMORANDUM OF OPINION**  
) **RE: MOTION TO CONVERT**

Two of the three debtors in this jointly administered chapter 11 proceeding, debtors James E. Lundeen, Sr., M.D., Inc. and Lundeen Physical Therapy-Akron, Inc., move postconfirmation to convert their cases to chapter 7.<sup>1</sup> Creditors Parshotam Gupta, M.D., Mahendra Patel, M.D., Floyd Heller, M.D., and Jerold Ladin (the objecting creditors) oppose this request.<sup>2</sup> The parties presented oral argument on this matter on February 19, 2008. For the reasons stated below, the motion to convert is denied.<sup>3</sup>

**JURISDICTION**

This court has jurisdiction, *see* 28 U.S.C. § 1334, 28 U.S.C. § 157(a) and General Order No. 84 entered by the United States District Court for the Northern District of Ohio, and this is a core proceeding, *see* 28 U.S.C. § 157(b)(2)(A) and (O).

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<sup>1</sup> Docket 661, 670.

<sup>2</sup> Docket 665.

<sup>3</sup> In the court's view, the value of this opinion is solely to decide the issue in these cases and not as an addition to the general jurisprudence. For that reason, the opinion is not intended for commercial publication.

## FACTUAL BACKGROUND

Three related debtors—James E. Lundeen, Sr., M.D., James E. Lundeen, Sr., M.D., Inc., and Lundeen Physical Therapy-Akron, Inc.—filed these chapter 11 cases in 1996. The court appointed a trustee on October 28, 1996.<sup>4</sup> The United States trustee selected Harold Corzin as trustee; after completing his service, he filed his final report and was discharged on July 26, 2000.<sup>5</sup>

The debtors' joint plan of reorganization, confirmed in January 1999, provides that plan creditors will be paid based on the debtors' on-going business operations. The plan does not provide for the debtors to re-assume the status of debtors in possession postconfirmation.

The cases were closed in 2002 and reopened in 2006 at the request of the objecting creditors and others. Certain creditors then filed an adversary proceeding against Dr. Lundeen and his wife, Cynthia Lundeen, seeking to enforce the plan. *See Parshotam Gupta, M.D., et al v. James E. Lundeen, Sr., M.D., et al*, adv. no. 07-1084. The trial in that proceeding was stayed when creditors filed involuntary chapter 7 petitions against Dr. Lundeen and the two corporate debtors on the eve of trial.

The two corporate debtors now move to convert their chapter 11 cases to chapter 7.

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<sup>4</sup> Docket 71.

<sup>5</sup> Docket 73, 486, 500.

## **DISCUSSION**<sup>6</sup>

### **A. 11 U.S.C. § 1112(a)**

Chapter 11 debtors have the right to convert to chapter 7 as follows:

- (a) The debtor may convert a case under this chapter to a case under chapter 7 of this title unless –
  - (1) the debtor is not a debtor in possession;
  - (2) the case originally was commenced as an involuntary case under this chapter; or
  - (3) the case was converted to a case under this chapter other than on the debtor's request.

11 U.S.C. § 1112(a).

### **B. The Positions of the Parties**

The movants argue that they have an absolute right to convert their cases under § 1112(a). The objecting creditors counter that § 1112(a) does not give debtors an absolute right to convert. They contend that the corporate cases cannot be converted because those cases cannot be separated from Dr. Lundeen's individual case, based, among other things, on the terms of the confirmed joint plan of reorganization.

### **C. The Motion**

A chapter 11 debtor has the right to convert to chapter 7 unless: (1) the debtor is not a debtor in possession; (2) a party other than the debtor previously converted the case to chapter

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<sup>6</sup> The debtors' chapter 11 cases were filed before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 which is generally effective October 17, 2005. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109-8, § 1501(b)(1), 119 Stat. 23, 216 (stating that, unless otherwise provided, the amendments do not apply to cases commenced under title 11 before the effective date of BAPCPA). Therefore, all references to the bankruptcy code in this opinion are to the pre-BAPCPA version.

11; or (3) the case is an involuntary chapter 11. 11 U.S.C. § 1112(a). In this case, the movants are not entitled to relief under § 1112(a)(1) because they lost their status as debtors in possession when the trustee was appointed, and they did not regain it.

The term “debtor in possession” is defined as the debtor, unless a trustee has been appointed. 11 U.S.C. § 1101(1). A debtor in possession is a fiduciary of the estate, the creditors, and the court. *In re Sal Caruso Cheese, Inc.*, 107 B.R. 808 (Bankr. N.D.N.Y. 1989). If a trustee is appointed, the trustee takes on the fiduciary role of the debtor in possession. In this case, the debtors became the debtors in possession when they filed their cases. They ceased to be the debtors in possession on October 28, 1996, when the court appointed a trustee. Trustee Corzin served as the trustee until after the plan was confirmed. The plan did not have any provision that the debtors would once again become the debtors in possession. Once the plan was confirmed, therefore, the role of debtor in possession ceased to exist. As a result, the debtors never regained their status as debtors in possession, a prerequisite to having the right to convert a chapter 11 case to chapter 7.

The vast majority of cases agree with the conclusion that there is no debtor in possession after a plan is confirmed, unless the plan provides otherwise. As noted above, a debtor in possession serves as a fiduciary. Even a debtor who has functioned as a debtor in possession throughout the case (unlike this case) does not continue to perform in that role after plan confirmation unless that role is spelled out in the plan. Consequently, the debtor is generally not considered to be a debtor in possession at that point. *See Ice Cream Liquidation, Inc. v. Calip Dairies, Inc. (In re Ice Cream Liquidation, Inc.)*, 319 B.R. 324, 333 (Bankr. D. Conn. 2005) (debtor in possession status ceases on the effective date of confirmed plan); *In re T.S.P. Indus.*,

*Inc.*, 120 B.R. 107, 109 (Bankr. N.D. Ill. 1990) (postconfirmation, the debtor is no longer the debtor in possession); *In re NTG Indus., Inc.*, 118 B.R. 606, 610 (Bankr. N.D. Ill. 1990) (unless plan provides otherwise, debtor is no longer debtor in possession after confirmation); *In re Marill Alarm Sys., Inc.*, 100 B.R. 606, 607 (Bankr S.D. Fla. 1989) (debtor loses its status as debtor in possession once plan is confirmed); *In re Pero Bros. Farms, Inc.*, 91 B.R. 1000 (Bankr. S.D. Fla. 1988) (debtor lost its ability to convert under § 1112(a) once plan confirmed); *In re Grinstead*, 75 B.R. 2, 3-4 (Bankr. D. Minn. 1985) (there is no debtor in possession status postconfirmation); *see also Gordon Sel-Way, Inc. v. United States (In re Gordon Sel-Way, Inc.)*, 270 F.3d 280, 289 and 291 (6th Cir. 2001) (noting that the chapter 11 debtor's status as a debtor in possession expired after the plan was confirmed); *but see Abbott v. Blackwelder Furniture Co. of Statesville, Inc.*, 33 B.R. 399, 401 (W.D. N.C. 1983); *In re Schuler*, 119 B.R. 191, 192 (Bankr. W.D. Mo. 1990).

The debtors lost their status as debtors in possession when the trustee was appointed. The confirmed plan did not reinstate the debtors to the role of debtors in possession with a fiduciary relationship to creditors and the court. They are, instead, reorganized debtors whose relationship with their plan creditors is controlled by the terms of the confirmed plan. That plan is a final judgment in the chapter 11 proceedings, *see Browning v. Levy*, 283 F.3d 761, 772 (6th Cir. 2002), and governs their financial relationship going forward. Consequently, the debtors are not debtors in possession within the meaning of § 1112(a) and they may not convert their cases under that section.<sup>7</sup>

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<sup>7</sup> As a result of this decision, it is not necessary to resolve the creditors' argument that a debtor does not have an absolute right to dismiss under § 1112(a). Also, the parties' arguments regarding whether it possible or appropriate to differentiate between the three related debtors at this point and to convert only the two corporate cases are mooted by this decision.

**CONCLUSION**

For the reasons stated, the debtors' motion to convert their cases to chapter 7 is denied. A separate order will be entered to memorialize this decision.



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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

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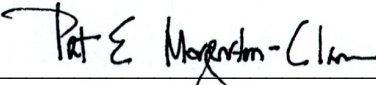
UNITED STATES BANKRUPTCY COURT  
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JAMES E. LUNDEEN, SR., M.D., ) (consolidated with 96-12909 and  
INC., et al., ) jointly administered with 96-12918)  
Debtors. ) Chapter 11  
) Judge Pat E. Morgenstern-Clarren  
)  
) **ORDER**

For the reasons stated in the memorandum of opinion entered this same date, the motion of debtors James E. Lundeen, Sr., M.D., Inc. and Lundeen Physical Therapy-Akron, Inc. to convert their cases to chapter 7 is denied. (Docket 661).

IT IS SO ORDERED.

  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge