UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK	**Hearing Date: November 4, 2009** **Hearing Time: 10:00 a.m.**
In re FRGR MANAGING MEMBER LLC, Debtor.	Case No. 09-11061 (MG) Chapter 11 **Notice of Motion**

PLEASE TAKE NOTICE that upon the annexed motion, the United States Trustee for Region 2 (the "United States Trustee") will move this Court before the Honorable Martin Glenn, United States Bankruptcy Judge, in the United States Bankruptcy Court, Alexander Hamilton Custom House, One Bowling Green, New York, New York 10004 on **November 4, 2009, at 10:00 a.m.**, or as soon thereafter as counsel can be heard, for an order converting this Chapter 11 case to a Chapter 7 case, or, in the alternative, dismissing this Chapter 11 case and for such other and further relief as this Court may deem just and proper. The original motion is on file with the Clerk of the Bankruptcy Court.

PLEASE TAKE FURTHER NOTICE that any responsive papers should be filed with the Court and personally served on the United States Trustee, at 33 Whitehall Street, 21st Floor, New York, New York 10004-2112, to the attention of Nazar Khodorovsky, Esq., no later than three (3) days prior to the return date set forth above. Such papers shall conform to the Federal Rules

of Civil Procedure and identify the party on whose behalf the papers are submitted, the nature of the response, and the basis for such response.

Dated: New York, New York
October 9, 2009

DIANA G. ADAMS
UNITED STATES TRUSTEE

By: */s/ Nazar Khodorovsky*
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Case No. 09-11061 (MG)
	:	
	:	Chapter 11
FRGR MANAGING MEMBER LLC,	:	
	:	
	:	
Debtor.	:	
	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF THE UNITED STATES TRUSTEE TO CONVERT THIS CHAPTER 11 CASE TO A CHAPTER 7 CASE OR, IN THE ALTERNATIVE, TO DISMISS THIS CHAPTER 11 CASE

TO: THE HONORABLE MARTIN GLENN,
UNITED STATES BANKRUPTCY JUDGE:

Diana G. Adams, as the United States Trustee for Region 2 (the "United States Trustee"), in furtherance of her duties and responsibilities set forth in 28 U.S.C. § 586(a)(3) and (5), moves this Court for an order pursuant to 11 U.S.C. § 1112(b) converting this Chapter 11 case to a Chapter 7 case, or, in the alternative, dismissing this Chapter 11 case (the "Motion"). In support thereof, the United States Trustee represents and alleges as follows:

Introduction

The United States Trustee brings this motion to convert this chapter 11 case to a case under chapter 7 or, in the alternative, to dismiss this Chapter 11 case, based upon the failure of FRGR Managing Member, LLC (the "Debtor") to engage in any meaningful reorganization activity since at least July 2009. The Debtor does not operate. Its sole valuable asset has been foreclosed upon, and, according to the Debtor's operating reports, the Debtor's sole asset consists of unliquidated claims against its secured creditor. Consequently, because the Debtor currently

has no valuable assets, profit-making operations, or investments that could yield a recovery to its creditors, the Debtor will not be able to reorganize, and, therefore, the Debtor's chapter 11 case should be converted to a chapter 7 case, or, in the alternative, should be dismissed.

BACKGROUND

The Debtor, originally represented in this matter by the law firm of Smith, Gambrell & Russell, LLP, commenced this case by filing a voluntary petition under chapter 11 of the Bankruptcy Code on March 9, 2009 (the "Filing Date"). *See* ECF Doc. No. 1. The Office of the United States Trustee solicited creditors for the formation of an official committee of unsecured creditors, but received insufficient responses from disinterested creditors to form one. *See* Declaration of Nazar Khodorovsky in Support of the Motion (the "Khodorovsky Declaration"), at ¶ 2.

According to the Affidavit of Moses Stern a/k/a Mark Stern pursuant to Rule 1007-2 of the Local Rules of Bankruptcy Procedure (the "Local Rule Affidavit") which was filed on March 12, 2009, the Debtor's sole asset was 100% interest and managing member status with regard to then-non-debtor First Republic Group Realty, LLC ("First Republic"). *See* Local Rule Aff., at ¶¶ 2, 30, ECF Doc. No. 5.

According to the Debtor's Schedule B, however, the Debtor owned neither any interests in incorporated or unincorporated businesses nor any interests in partnerships or joint ventures. *See* Schedule B, ECF Doc. No. 19. According to the Debtor's Schedule A, the Debtor owned no interests in any real property. *See* Schedule A, ECF Doc. No. 19. In response to question 4 of its Statement of Financial Affairs (the "SOFA"), the Debtor disclosed that it was a plaintiff in a pending New York state court lawsuit (the "Action") against Citigroup Global Markets Realty

Corp. ("Citigroup"). *See* SOFA, ECF Doc. No. 20. According to the Debtor's Schedule D, the Debtor owed Citigroup $15 million, which was secured by the Debtor's sole asset, its 100% interest in First Republic (the "Citigroup Collateral"). *See* Schedule D, ECF Doc. No. 19.

By Order signed on April 24, 2009 (the "April 24 Order"), the Court modified the automatic stay to allow Citigroup to foreclose on its collateral and remanded the Action (which the Debtor had removed to this Court) back to New York state court. *See* April 24 Order, ECF Doc. No. 40. Additionally, by order signed on September 18, 2009, the Court authorized the Debtor to employ the firm of Backenroth Frankel & Krinsky LLP as substitute counsel effective as of August 12, 2009. *See* ECF Doc. No. 56. The Debtor is also currently proposing to retain the firm of Hoffinger Stern and Ross, LLP as special litigation counsel. *See* ECF Doc. No. 58.

On June 22, 2009, First Republic filed a voluntary petition under chapter 11 of the Bankruptcy Code, with docket number 09-13983. *See* First Republic ECF Doc. No. 1. According to the First Republic's Motion to Approve Use of Cash Collateral (the "First Republic Cash Collateral Motion"), on June 23, 2009, Citigroup conducted a foreclosure sale of the Citigroup Collateral, was a successful bidder at the sale, and assigned Citigroup Collateral to one of its affiliates. *See* First Republic Cash Collateral Motion, at ¶ 9, First Republic ECF Doc. No. 15.

According to the Debtor's monthly operating report for June 2009 (the "June MOR"), the Debtor had receipts aggregating $0 and disbursements aggregating $0 during June 2009. *See* June MOR, ECF Doc. No. 52. According to the Debtor's monthly operating report for July 2009 (the "July MOR"), during July 2009, the Debtor had receipts aggregating $0 and disbursements aggregating $0. *See* July MOR, ECF Doc. No. 52. According to the July MOR, the Debtor's

sole asset currently consists of "Claims arising from ownership of [First Republic]" and has "Unliquidated Value." *Id.* The Debtor has no cash, bank accounts, or any other liquid assets. *Id.* Finally, according to the Debtor's monthly operating report for August 2009 (the "August MOR"), in August 2009, the Debtor's disbursements aggregated $0. *See* August MOR, ECF Doc. No. 57. The August MOR did not contain any information with regard to the Debtor's receipts during August 2009.

ARGUMENT

A. There is Cause to Convert This Chapter 11 Case to a Case Under Chapter 7 or, In the Alternative, to Dismiss this Case, Because the Debtor's Reorganization is Not Feasible.

Due to the Debtor's inability to reorganize and the consequent loss or diminution of estate assets, the United States Trustee finds material grounds for relief under 11 U.S.C. § 1112.[1] 28 U.S.C. § 586(a)(8). Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "BAPCPA"), these reasons also provide express cause for the conversion or dismissal of this chapter 11 case. 11 U.S.C. § 1112(b)(4)(A).

Section 1112(b) of the Bankruptcy Code, 11 U.S.C. § 1112(b), as revised under the BAPCPA, provides that on request of a party in interest, and after notice and a hearing, "the Court shall convert a case to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, if the movant establishes cause." 11 U.S.C. § 1112(b)(1)(emphasis added).

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[2] As part of the BAPCPA amendments, the Bankruptcy Code now requires that, "in any case in which the United States trustee finds material grounds for relief under section 1112 [ ], the United States trustee shall apply promptly [for such] relief." 28 U.S.C. § 586(8). *See also* 11 U.S.C. § 307 (providing that United States Trustee may raise and may appear and be heard on any issue in any case or proceeding under Title 11).

While this new provision of the Bankruptcy Code provides sixteen instances for which cause may be found, this Court may convert or dismiss a chapter 11 case for reasons other than specified in section 1112(b), as long as those reasons provide "cause." *In re State Street Assoc.*, 348 B.R. 627, 639 n. 24 (Bankr. N.D.N.Y. 2006) (while the list of examples of cause has changed, "the fact that they are illustrative, not exhaustive has not") (citing *In re 3 RAM, Inc.*, 343 B.R. 113, 117 (Bankr. E.D. Pa. 2006)).[2]

Here, though, one of Congress' specifically-enumerated factors is present. Namely, the Debtor is not undertaking any meaningful reorganization activity, causing a "substantial loss or diminution of the estate" through the incurring of administrative expenses and quarterly fees without any "reasonable likelihood of rehabilitation" of the estate. *See* 11 U.S.C. § 1112(b)(4)(A). The Debtor's monthly operating reports demonstrate that since at least June 2009, the Debtor's estate has not received any funds or incurred any disbursements, thus evidencing a complete lack of any operations or reorganization activity. *See* June MOR, July MOR, August MOR. Even though the Debtor is not engaging in any operations, and does not receive any revenues or income, it is incurring United States Trustee quarterly fees on an on-going basis, as well as administrative expenses, such as the legal fees of Debtor's attorneys.

In this case, reorganization of the Debtor is not feasible. The Debtor cannot successfully reorganize, first, because the Debtor does not earn any income and, second, because its sole valuable asset, the Citigroup Collateral, has been foreclosed upon. The Debtor's only remaining

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[2] Still applicable is Second Circuit authority providing that the list of factors of pre-BAPCPA section 1112(b) was illustrative, rather than all-inclusive. *In re C-TC 9th Ave. P'ship*, 113 F.3d 1304, 1311 (2d Cir. 1997) (bankruptcy court may dismiss chapter 11 filing upon a finding that case was filed in "bad faith" even without consideration of factors set out in section 1112(b)).

asset consists of unliquidated claims against Citigroup relating to First Republic, which could be prosecuted by a chapter 7 trustee without the estate incurring the on-going administrative expenses (by, for instance, having contingency-fee-based counsel litigate) and quarterly fees.

In the case of *In re Original IFPC Shareholders, Inc.*, the Court held that a dismissal or conversion of a chapter 11 case was proper where a non-operating debtor formed to engage in litigation "has no marketable goods or services and no other types of income-producing investments that would sustain payments to pre-petition and post-petition creditors." *In re Original IFPC S'holders, Inc.*, 317 B.R. 738, 743 (Bankr. N.D. Ill. 2004) ("*IFPC*"). Unlike the present debtor, which merely has unliquidated litigation claims, the debtor in *IFPC* also had an additional valuable asset, a bank account with money in it (which is something the Debtor here utterly lacks). *See IFPC*, 317 B.R. at 741. Nevertheless, the Court held that because that debtor's sole ability to rehabilitate its estate would depend on outcome of an uncertain lawsuit, and because nothing else could restore cash flow, which was being depleted by quarterly fees and administrative expenses, conversion or dismissal would be in order. *See IFPC*, 317 B.R. at 743.

Similarly, in the matter of *In re Ameribuild Construction Management, Inc.*, the Court held that conversion of a chapter 11 case to chapter 7 was proper where a debtor has "shut its doors years ago," and had no plans to reorganize beyond collecting receivables. *In re Ameribuild Constr. Mgmt., Inc.*, 399 B.R. 129, 132 (Bankr. S.D.N.Y. 2009) (noting that an "intent to reorganize a business . . . is the lifeblood of the Chapter 11 process"). Like the Debtor here, the debtor in the *Ameribuild* case had "no employees, no income, and no business, and not even a bank account." *Id.*

The Debtor here is in a worse situation than either debtor in *IFPC* or *Ameribuild*. Unlike the debtor in *IFPC*, the Debtor lacks liquid assets (such as a bank account) and unlike the debtor in *IFPC*, the Debtor lacks any valuable assets (such as accounts receivable). Just like those two debtors, the Debtor does not operate, does not earn any income and subordinates the outcome of its case to the outcome of uncertain litigation, all the while incurring administrative expenses and quarterly fees. Cause, therefore, exists to convert or dismiss the Debtor's chapter 11 case under 11 U.S.C. § 1112(b)(4).

B. The Court Should Convert this Case to a Case Under Chapter 7.

The United States Trustee advocates the conversion of the case to a chapter 7, rather than its dismissal. According to the July MOR, the Debtor's sole asset consists of "Claims arising from ownership of [First Republic,]" the value of which, according to the Debtor, has not been liquidated. *See* July MOR. A chapter 7 trustee should have an opportunity to evaluate whether these claims have monetary value and may be pursued to ensure a recovery for the creditors of the estate. If the Court, however, is not inclined to convert this case to a case under chapter 7, the United States Trustee recommends that a dismissal would be appropriate given the infeasibility of reorganization in this matter.

Section 1112 requires the Court, "absent unusual circumstances specifically identified by the court," to convert or dismiss a case if the movant establishes "cause." 11 U.S.C. § 1112(b)(1). The United States Trustee, however, is not aware of any unusual circumstances justifying the denial of her motion.[3]

[3] The bankruptcy court must also commence the hearing on the motion not later than 30 days after the filing thereof, and decide the motion not later than 15 days after the commencement of the hearing, unless the United States Trustee consents to a continuance for a specific period of time or compelling circumstances prevent the court

CONCLUSION

WHEREFORE, the United States Trustee respectfully requests that the Court enter a final order converting this Chapter 11 case to a Chapter 7 case pursuant to 11 U.S.C. § 1112(b) or, in the alternative, dismissing this Chapter 11 case, and grant such other and further relief as may be deemed just and proper.

Dated: New York, New York
October 9, 2009

Respectfully submitted,

DIANA G. ADAMS
UNITED STATES TRUSTEE

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from meeting these time limits. 11 U.S.C. § 1112(b)(3). To the extent over 30 days elapse between the time the motion is filed and the date the court may first hear it, the United States Trustee hereby consents to a continuance under section 1112(b)(3).

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Case No. 09-11061 (MG)
	:	
	:	Chapter 11
FRGR MANAGING MEMBER LLC,	:	
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	:	
Debtor.	:	
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DECLARATION OF NAZAR KHODOROVSKY IN SUPPORT OF THE UNITED STATES TRUSTEE'S MOTION FOR AN ORDER CONVERTING THIS CHAPTER 11 CASE TO A CASE UNDER CHAPTER 7, OR, IN THE ALTERNATIVE, DISMISSING THIS CHAPTER 11 CASE

I am a Trial Attorney for the movant, Diana G. Adams, the United States Trustee for Region 2 (the "United States Trustee"). Within her Office, I am responsible for monitoring this chapter 11 case captioned above on her behalf. I make this declaration based on personal knowledge, information and belief formed from records of the Office of the United States Trustee, kept in the ordinary course of its business, and my personal review today of the docket of this case on the PACER information system. If called, I would testify to the following:

1. FRGR Managing Member, LLC(the "Debtor") commenced this case by filing a voluntary petition under chapter 11 of the Bankruptcy Code on March 9, 2009 (the "Filing Date").

2. The Office of the United States Trustee solicited creditors for the formation of an official committee of unsecured creditors, but received insufficient responses from disinterested creditors to form one.

I declare under the penalty of perjury that the information contained in this Declaration is true and correct.

Dated: New York, New York
October 9, 2009

/s/ Nazar Khodorovsky
Nazar Khodorovsky