

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re : Chapter 11
:
G. I. Joe’s Holding Corporation et al, : Case No. 09-10713(KG)
:
: Jointly Administered

Debtors. : **Hearing Date: February 17, 2010 @ 11:00 a.m.**
: **Objection Deadline: February 12, 2010 @ 4:00 p.m**

**THE ACTING UNITED STATES TRUSTEE'S MOTION TO CONVERT THE
DEBTORS' CHAPTER 11 CASES TO CASES UNDER CHAPTER 7
OF THE UNITED STATES BANKRUPTCY CODE**

Roberta A. DeAngelis, the Acting United States Trustee for this District (“U. S. Trustee”), by and through her counsel, hereby files a Motion to Convert the Debtor’s Chapter 11 Cases to Cases under Chapter 7 of the Bankruptcy Code (“Motion”) and in support thereof respectfully represents as follows:

1. Pursuant to 28 U.S.C. § 586, the U. S. Trustee is charged with the administrative oversight of cases commenced pursuant to Title 11 of the United States Bankruptcy Code. This duty is part of the U. S. Trustee’s overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U. S. Trustee has “public interest standing” under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U. S. Trustee as a “watchdog”).

2. Pursuant to 11 U.S.C. § 307, the U. S. Trustee has standing to be heard.

3. On or about March 4, 2009, the Debtors filed voluntary petitions for relief under

Chapter 11 of the Bankruptcy Code.

4. On March 16, 2009, the U.S. Trustee appointed an Official Committee of Unsecured Creditors (“Committee”) in this case.

5. A Modified Order (I) (A) Approving Bid Procedures for the Sale of Substantially All of the Debtors Assets, (B) Scheduling the Auction, (C) Scheduling the Sale Hearing, (D) Approving the Assumption and Assignment Procedures Related to the Sale, and (E) Approving the Form of the Sale Notice; and (II) (A) Authorizing the Sale of Such Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests; (B) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Related Thereto; and (C) Granting Related Relief was entered on March 20, 2009. (Docket No. 102).

6. A Conditional Motion for Order (A) Authorizing Debtors to Enter Into An Agency Agreement in Connection with GOB Sales; (B) Authorizing the Debtors to Conduct GOB Sales at the Debtors' Locations Free and Clear of All Liens, Claims and Encumbrances; (C) Establishing Procedures in Connection with the Rejection of Leases for Nonresidential Real Property; and (D) Granting Ancillary and Other Related Relief was filed by the Debtors on March 30, 2009 (Docket No. 128).

7. On January 19, 2010, A Motion to Allow Administrative Expense; (II) Compelling Immediate Payment of Administrative Expense; (III) Directing Debtors to Pay BMC Group, Inc.’s Future Invoices Upon Receipt or, in the Alternative, Authorizing BMC Group, Inc. Immediately to Withdraw as Notice and Claims Agent for the Debtors; (IV) Granting Relief from the Final DIP Order Pursuant to Rule 60(b); and (V) Granting Leave to BMC to Surcharge Secured Lenders Collateral for Payment of BMC Group, Inc.’s Fees and Expenses was filed by BMC Group, Inc. (Docket No. 549) (the “BMC Motion”).

8. In the BMC Motion, BMC, the Debtors' claims agent, states that the Debtors have failed and refused to pay BMC's invoices, since the commencement of these cases, that BMC has sent monthly invoices to the Debtors, but not a single invoice has ever been paid and that the Debtors owe BMC the sum of \$175,071.70 for March through November 2009. BMC continues to serve as the Debtors' claims and noticing agent, BMC's administrative expense continues to accrue. BMC received and fulfilled a request for service of papers on December 15, 2009, but has not yet invoiced the Debtors. (BMC Motion at paragraph 8).

9. To date, no Plan or Disclosure Statement have been filed.

10. Pursuant to 11 U.S.C. § 704 (7) and (8), made applicable in Chapter 11 cases by 11 U.S.C. §§ 1106(a)(1) and 1107 (a) and Fed. R. Bankr. P. 2015, debtors are required to supply certain reports as prescribed by the United States Trustee and in accordance with the U. S. Trustee Operating Guidelines and Reporting Requirements for Chapter 11 cases.

11. The Debtors failed to comply with the United States Trustee Operating Guidelines and Reporting Requirements for Chapter 11 cases. The Debtors have not filed monthly operating reports ("MORs") since March 2009. The Debtors' failure to file MORs, *inter alia*, hinders the ability to monitor the Debtors' pre-confirmation operations and to determine whether the Debtors can propose a viable Chapter 11 plan and administer these cases. In fact, given the allegations set forth in the BMC Motion, serious concerns are raised about the Debtors continuing in the Chapter 11 cases. For example, in the absence of MORs, it is impossible to determine whether the Debtors are current with their post-confirmation obligations, paid the correct amount of 28 U.S.C. § 1930(a)(6) fees ("Quarterly Fees") or whether there is a substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation.

12. The failure to file MORs, comply with Fed R. Bankr. P 2015(a), pay Quarterly Fees

and other administrative fees is cause for the conversion of the case pursuant to 11 U.S.C. § 1112(b).

13. 11 U.S.C. §1112(b)(1) provides that:

Except as provided in paragraph (2) of this subsection, subsection (c) of this section, and section 1104(a)(3), on request of a party in interest, and after notice and a hearing, absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate, the court shall convert a case under this chapter 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)

14. 11 U.S.C. §1112(b)(4) further states that the term ‘cause’ includes—

- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
- (H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any); and
- (K) failure to pay any fees or charges required under chapter 123 of title 28;

11 U.S.C. § 1112(b)(4)

15. Causes for conversion or dismissal enumerated in 11 U.S.C. §1112(b) are not exclusive and the court has broad discretion in determining cause. King, *Collier on Bankruptcy*, Vol. 7, ¶ 1112.01(a) (15th Rev'd Ed.). The Court may convert or dismiss a case for reasons that are not specifically enumerated in § 1112 of the Code. *First Jersey Nat'l Bank v. Brown*, 951 F.2d 564, 572 (3rd Cir. 1991).

16. Section 1112(b) of the Bankruptcy Code provides that the court may after notice and a hearing convert a case to Chapter 7, or dismiss a case, for cause, whichever is in the best interest

of creditors. Section 102(1) of the Bankruptcy Code provides that “after notice and a hearing” means such notice as is appropriate in the particular circumstances and authorizes an act without hearing in appropriate circumstances.

17. Whether the case should be converted or dismissed is in the court’s sound discretion and is based on what is in the best interest of the creditors and the estate. *In re Shockley*, 197 BR 677, 679 (Bankr. D.Mont. 1996); *In re Mechanical Maintenance*, 128 BR 382, 386 (Bankr. E.D.Pa. 1991).

18. In this case, there appears to be a substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation. The Debtor has failed to pay its claims agent, has failed to file its MORs for nine months and has not proposed a plan in the ten months that it has been in Chapter 11. The cases need to be converted so as to protect the interests of all creditors.

19. The U. S. Trustee reserves and any all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter, substitute and/or modify this Motion and to conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent.

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WHEREFORE, for the foregoing reasons, the United States Trustee respectfully requests that this Court enter an order converting the Chapter 11 cases and such other and further relief that is deemed fair, just, equitable and proper.

**ROBERTA A. DEANGELIS
ACTING UNITED STATES TRUSTEE**

By: /s/Richard L. Schepacarter
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Dated: January 29, 2010

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re : Chapter 11
:
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:
: Jointly Administered

Debtors. : **Hearing Date: February 17, 2010 @ 11:00 a.m.**
: **Objection Deadline: February 12, 2010 @ 4:00 p.m**

**ACTING UNITED STATES TRUSTEE'S NOTICE OF MOTION TO CONVERT THE
DEBTORS' CHAPTER 11 CASES TO CASES UNDER CHAPTER 7 OF THE UNITED
STATES BANKRUPTCY CODE**

PLEASE TAKE NOTICE that on January 29, 2010, Roberta A. DeAngelis, The Acting United States Trustee for Region Three ("UST"), filed the accompanying **Motion to Convert the Debtors' Chapter 11 Cases to Cases under Chapter 7 of the United States Bankruptcy Code** ("Motion") with the United States Bankruptcy Court for the District of Delaware ("Bankruptcy Court").

PLEASE TAKE FURTHER NOTICE that a hearing on the Motion will be held no later than **February 17, 2010 at 11:00 a.m.**, before the Honorable Kevin Gross, United States Bankruptcy Judge for the District of Delaware, 824 Market Street, Court Room #3, 6th Floor, Wilmington, Delaware 19801.

PLEASE TAKE FURTHER NOTICE that any responses to the Motion must be in writing, filed with the Clerk of the Bankruptcy Court, 824 Market Street, 4th Floor, Wilmington, Delaware 19801, and served upon the undersigned, so as to be received on or before **4:00 p.m. on February 12, 2010.**

**ROBERTA A. DEANGELIS
ACTING UNITED STATES TRUSTEE**

Dated: January 29, 2010

BY: /s/Richard L. Schepacarter
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CERTIFICATE OF SERVICE

I certify that on January 29, 2010, I caused to be served a copy/copies of the Acting United States Trustee's Motion for Conversion of the Debtors' Chapter 11 Cases to Cases Under Chapter 7 of the United States Bankruptcy Code, *via* email, fax and/or first class United States Mail (postage prepaid) to the following person(s) listed below:

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/s/Richard L. Schepacarter
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Trial Attorney

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re : Chapter 11
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G. I. Joe's Holding Corporation et al, : Case No. 09-10713(KG)
:
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Debtors. :
: Related to Docket No. _____

**ORDER CONVERTING CHAPTER 11 CASES TO CASES UNDER
CHAPTER 7 OF THE UNITED STATES BANKRUPTCY CODE**

Upon consideration of the Acting United States Trustee's Motion for Conversion of the Debtors' Chapter 11 Cases to Cases under Chapter 7 of the United States Bankruptcy Code filed by the Acting United States Trustee for this District, by and through her counsel, and finding that due and sufficient notice of the Motion having been given under the circumstances; and it appearing that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334 and this is a core proceeding under 28 U.S.C. 157(b)(2); and after due deliberation and sufficient cause appearing therefore, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

The Acting United States Trustee's Motion is hereby **GRANTED** and these Chapter 11 cases are hereby **CONVERTED** to cases under Chapter 7 of the United States Bankruptcy Code.

Date: _____, 2010

**The Honorable Kevin Gross,
Judge, U.S. Bankruptcy Court**