IT IS ORDERED as set forth below:

Date: November 25, 2009

W. H. Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
	:	
ROAN VALLEY, LLC	:	
	:	09-13229-WHD
	:	
Debtor.	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 11 OF THE
	:	BANKRUPTCY CODE

O R D E R

Before the Court is a Motion to Dismiss Case for Cause, filed by the Empire Financial Services (hereinafter the "Movant") in the above-styled bankruptcy proceeding. Roan Valley LLC (hereinafter the "Debtor") opposes the Movant's motion. This matter constitutes a core proceeding over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(A); § 1334.

FINDINGS OF FACT

The Debtor's business is the development and management of a 720-acre golf course community near Mountain City, Tennessee, known as Red Tail Mountain. The Debtor purchased Red Tail Mountain in 2005 with the intent to enhance and further develop the property. Red Tail Mountain consists of a golf course, clubhouse, and at least 122 residential lots currently available for sale. (Movant's Exh. 15). While the Debtor manages the marketing and selling of the residential lots within Red Tail Mountain, the Debtor leaves the management and operations of the clubhouse and golf course to Roan Valley Golf, LLC, the Debtor's wholly owned subsidiary.

To fund these endeavors, the Debtor, through a series of transactions, borrowed approximately $18 million from the Movant. As of November 9, 2009, the combined payoff on the two notes currently outstanding was roughly $17,267,500, with an interest per diem of $2,678.47. (Movant's Exhs. 2 and 4). In exchange for financing, the Debtor granted the Movant a security interest in virtually all of the Debtor's assets (Movant's Exhs. 1, 3, and 8), and four of the Debtor's principals personally guaranteed the debt. (Movant's Exhs. 10-13). The Movant's secured claim dwarfs all other claims against the Debtor's bankruptcy estate.

The Debtor has experienced significant financial difficulty over the past two years. In 2008, the Debtor generated $1,262,022 in revenue from the sale of residential lots. In 2009, however, the Debtor has generated only $100,000 in revenue, after selling just a single

lot in the first ten months of the year. Roan Valley Golf, the Debtor's subsidiary, has had an equally difficult time with the management of the golf course and other amenities. Roan Valley Golf suffered a loss of roughly $300,000 over the first eight months of 2009, and is projected to continue incurring substantial losses over the next sixteen months. (Movant's Exh. 37).

Red Tail Mountain's value is uncertain. The last available appraisal of Red Tail Mountain, which occurred in 2007, valued the project at $36,876,000. Since that time, circumstances, such as the relative erosion of real estate values over the past two years, strongly suggest a substantial deterioration in the value of Red Tail Mountain. Further, the Debtor has entered into contracts with prospective purchasers to sell lots in Red Tail Mountain for sales prices 30-40% below the lots' individual 2007 appraisal values. (Movant's Exhs. 26-28). In fact, the Debtor's own balance sheet, using cost-basis valuations, lists total assets (including all of its real property) at roughly $16,705,000, far below the value reflected in the 2007 appraisal. (Movant's Exh. 35). Finally, in its Schedules, the Debtor lists the Red Tail Mountain Property's value at $25,000,000.

CONCLUSIONS OF LAW

Section 1112(b) of the Bankruptcy Code establishes a mechanism by which parties in interest can request dismissal of a Chapter 11 case.

> 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 . . . to Chapter 7 or dismiss a case under this chapter, whichever is in the best interest of the creditors and the estate, if the movant establishes cause. 11 U.S.C. § 1112(b)(1).

11 U.S.C. § 1112(b). Section 1112(b)(2) adds further complexity to the analysis, providing that, absent unusual circumstances, the Court may **not** convert or dismiss the case, despite a finding of cause, if the Debtor shows: (1) there is a reasonable likelihood a plan will be confirmed within the statutorily mandated time-frame, or if no time-frame exists, within a reasonable time; (2) the grounds for converting or dismissing the case include acts or omissions by the debtor other than substantial losses to the estate; and (3) there exists a reasonable justification for the act or omission demonstrating cause, and the act or omission can be cured within a reasonable time fixed by the court. *See id*. § 1112(b)(2).

Together, sections 1112(b)(1) and (2) delineate the burdens of proof placed upon both the moving party and the debtor. The moving party must first establish "cause" to dismiss or convert a case. *See id*. § 1112(b)(1). If the moving party establishes cause, then the burden shifts to the debtor, who must then either show "unusual circumstances" justifying the case continuing in Chapter 11, or show the existence of the three elements enumerated by section 1112(b)(2). *See id*. § 1112(b)(1)-(2). Finally, if the debtor shows the existence of the three elements within section 1112(b)(2), the movant must then show unusual circumstances that justify dismissal or conversion of the case, despite the debtor's proffer of evidence. *See id.*

With the relative burdens of proof in mind, the Court must first determine whether the Movant has shown sufficient cause to justify dismissal of the Debtor's bankruptcy case. A precise definition of "cause" is slippery and elusive. Section 1112(b)(4) provides a range of scenarios which tend to indicate the existence of cause.[1] Pertinent to the case at hand, section 1112(b)(4)(A) states that the term "cause" includes "substantial and continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." Section 1112(b)(4)(A) requires a two-part inquiry: (1) the Court must determine whether there has been a substantial loss to or diminution of the estate; and (2) the Court must determine whether there is an absence of a reasonable likelihood of rehabilitation. The purpose behind section 1112(b)(4)(A) paints the perfect context; Congress wanted to "preserve estate assets by preventing the debtor in possession from gambling on the enterprise at the creditor's expense when there is no hope of rehabilitation." *Loop Corp. v. United States Trustee*, 379 F.3d 511, 516 (8th Cir. 2004), *cert. den.,* 543 U.S. 1055 (2005), (quoting *In re Lizeric Realty Corp.,* 188 B.R. 499, 503 (Bankr. S.D.N.Y. 1995)).

First, the Court must determine whether there has been a substantial loss to or diminution of the estate. To satisfy this portion of section 1112(b)(4)(A), the Movant must

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[1] Section 1112(b)(4) lists sixteen separate, non-exclusive grounds for a finding of cause. While the statute joins these factors with the conjunction 'and', both common sense and case law dictate that the chosen conjunction does not indicate a desire by Congress to require a Court to find that all fourteen factors are met before finding that cause exists to dismiss a case. *See In re Gonic Realty Trust*, 909 F.2d 624, 626-27 (1st Cir. 1990); *see also In re Vallambrosa Holdings*, 2009 WL 2868677 at *4 (Bankr. S.D. Ga. 2009).

show that the Debtor continues to incur losses or maintains a negative cash flow position after the filing of the bankruptcy petition. *In re Fall,* 405 B.R. 863, 867 (Bankr. N.D. Ohio 2008).

In this case, the Debtor has suffered substantial losses since the filing of the bankruptcy estate, with the prospect of even larger losses looming if the case continues. The Debtor has sold no lots since the filing of the bankruptcy petition, while generating additional interest debt of $2,678.47 per day, or roughly $160,000 between the filing of the petition and the date of the hearing on the Motion. (Movant's Exhs. 2 and 4). While the Debtor produced three contracts for the sale of various lots just before filing the petition, each contract contained substantial omissions, such as a lack of earnest money or requisite specificity. (Movant's Exhs. 26-28). Neither party offered any indication that these three contracts will be corrected and honored, or that the Debtor had other potential buyers interested in the lots. Based upon this lack of evidence, as well as the testimony presented regarding the state of the second-home market, the Court must assume that no other buyers exist.

Additionally, the Debtor's wholly owned subsidiary, Roan Valley Golf, was projected to lose over $100,000 from the date of the filing of the petition through November 9th, 2009 through its operation of the golf course and clubhouse. (Movant's. Exh. 38). Since the golf course is now closed until the Spring, and with additional maintenance costs imminent, further losses are inevitable. Based upon the rapid rate of interest accrual, the lack of purchasing prospects, and the dismal performance of the Debtor's wholly owned subsidiary,

the Court finds that the Debtor's estate has experienced substantial losses since the filing of the bankruptcy petition.

Second, the Court must find an absence of a reasonable likelihood of rehabilitation. Rehabilitation does not merely equate to reorganization, or even the likelihood of confirming a Chapter 11 plan. Instead, in this context, the phrase rehabilitation means "to put back in good condition; re-establish on a firm, sound basis." *In re Fall,* 405 B.R. at 868 (quoting *In re V. Companies,* 274 B.R. 721, 725 (Bankr. N.D. Ohio 2002)). Rehabilitation "contemplates the successful maintenance or reestablishment of the debtor's business operations." *In re Vallambrosa Holdings*, 2009 WL 2868677 at *4 (Bankr. S.D. Ga. 2009) (quoting *Loop Corp v. United States Trustee*, 290 B.R. 208, 113 (D. Minn 2003)); *see also In re AdBrite Corp.,* 290 B.R. 209, 216 (Bankr. S.D.N.Y. 2003).

In this case, the Court finds it highly unlikely that the Debtor will successfully rehabilitate its business through continuation of the bankruptcy case. The Debtor has sold only one lot during the first ten months of 2009, grossing only $100,000 for the lot. In addition, the golf course, ran by the Debtor's wholly owned subsidiary has hemorrhaged resources for all of 2009, with no concrete expectations for gains in the foreseeable future. Thus, the Court finds that rehabilitation is highly unlikely, particularly within the current macroeconomic climate. In sum, since the Moving party has shown that the Debtor has experienced substantial losses since the filing of the Debtor's petition, and that the likelihood

of rehabilitation is low, the Court finds that the Movant has established 'cause' as defined under section 1112.

Alternatively, the Court believes that the Debtor's case was most likely filed in bad faith, which is another basis for finding cause to dismiss a case. While section 1112(b)(4) lists examples of what constitutes cause, this list is not exhaustive, a point emphasized by the pertinent legislative history, which states, "[t]he court will be able to consider other factors as they arise, and use its equitable powers to reach an appropriate result in individual cases." *In re Albany Partners*, 749 F.2d 670, 674 (*citing* H.R.Rep. No. 595, 95 Cong., 1st Sess. 406 (1977), U.S.Code Cong. & Admin. News 1978, 5787, 6362). The Eleventh Circuit Court of Appeals has made it clear that the cause requirement of section 1112(b) extends to cases in which a debtor has filed a bankruptcy petition in bad faith. *See In re Phoenix Piccadilly, Ltd.,* 849 F.2d 1393, 1394 ("A case under Chapter 11 may be dismissed for cause pursuant to section 1112 of the Bankruptcy Code if the petition was not filed in good faith.").

A determination of bad faith is a question of fact and must be made on a case-by-case basis. *See In re SB Properties, Inc.*, 185 B.R. 198, 204 (E.D. Pa. 1995). While no particular test exists for determining if a case was filed in bad faith, courts have considered the following factors: (1) Whether the debtor has few or no unsecured creditors; (2) whether there has been a previous bankruptcy petition by the debtor or a related entity; (3) whether the prepetition conduct of the debtor has been improper; (4) whether the petition effectively allows the debtor to evade court orders; (5) whether there are few debts to non-moving

creditors; (6) whether the petition was filed on the eve of foreclosure; (7) whether the foreclosed property is the sole or major asset of the debtor; (8) whether the debtor has no ongoing business or employees; (9) whether there is no possibility of reorganization; (10) whether the debtor's income is sufficient to operate; (11) whether there was no pressure from non-moving creditors; (12) whether reorganization essentially involves the resolution of a two-party dispute; (13) whether a corporate debtor was formed and received title to its major assets immediately before the petition; and (14) whether the debtor filed solely to create the automatic stay. *In re Curtis L. Stuart*, 2005 WL 3953894 at *4 (Bankr. N.D. Ga. 2005) (Bihary, J.); *SB Properties,* 185 B.R. at 198; *In re Northwest Place, Ld.*, 108 B.R. 809, 814 (N.D. Ga 1988); *In re Grieshop*, 63 B.R. 657, 662-3 (N.D. Ind. 1986); *In re Gil Elisade*, 172 B.R. 996, 1000 (Bankr. M.D. Fla. 1994).

While this list of factors is often conclusive, it is not exhaustive in nature; "courts may consider any factors which evidence 'an intent to abuse the judicial process and the purposes of the reorganization provisions' or, in particular, factors which evidence that the petition was filed 'to delay or frustrate the legitimate efforts of secured creditors to enforce their rights.'" *Phoenix Piccadilly*, 849 F.2d at 1394 (quoting *Albany Partners*, 749 F.2d at 674). Finally, dismissal for cause is an unusual remedy absent some sort of "smoking gun" which clearly indicates "an overt intent to inconvenience or frustrate creditors' rights beyond the congressionally permitted limits." *In re Park Forest Development Corp.*, 197 B.R. 388, 393-94 (Bankr. N.D. Ga. 1996).

In this case, six factors clearly favor a finding that the Debtor filed its petition in bad faith. First, the Debtor has relatively few unsecured creditors, whose claims are dwarfed by the Movant's unsecured claim. Second, the Debtor filed its petition just before a scheduled foreclosure sale on Red Tail Mountain, which constituted the vast majority of the Debtor's assets at the time of the filing of the petition. Third, any possibility of reorganization seems bleak, as evidenced by the Debtor's terrible sales performance over the past year. Without any prospect of steady income in the future, the Court cannot envision a successful reorganization of the Debtor's business or that the Debtor had any real expectation of maintaining adequate protection for the Movant's collateral. Fourth, the Debtor's income is clearly insufficient to operate the Debtor's business. The Debtor's current loan agreements with the Movant require that all proceeds from any lot sales go toward paying the Movant's debt. Even if sales were made, no funds would be available from these sales to actually run the Debtor's business. In addition, Roan Valley Golf projects a cash flow deficit of roughly $740,000.

Fifth, the Debtor conceded that it filed a petition primarily to create the automatic stay, and thereby avoid the Movant's attempts to foreclose on a large portion of the Debtor's property. Finally, and perhaps most telling, the Debtor's bankruptcy case appears to be nothing more than another twist in a two-party dispute between the Debtor and the Movant. The Movant's claim is four times larger than the combination of all other claims against the Debtor. The record shows that while the two parties have agreed to modifications to the

contractual arrangements in the past, the Debtor's failure to produce any sort of revenue has crippled the parties' attempts at reconciliation. After hearing the evidence, the Court believes the Debtor, through the mechanism of bankruptcy, is simply groping for one final compromise with the Movant.

The absence of several indicia of bad faith, however, suggests that the Debtor's petition was not filed in bad faith. First, the Debtor has not filed a bankruptcy petition in the past, and there is no evidence that the petition allows the Debtor to avoid any kind of court order. Second, the Debtor, through its subsidiary, Roan Valley Golf, has several employees involved in ongoing business for the Debtor. Third, there is no evidence that the Debtor was formed and received title to its major assets just before the petition. Most importantly, there is no 'smoking gun', or evidence of an overt attempt to frustrate the Movant's rights beyond Congressionally permitted limits. Instead, the Debtor appears to be the victim of poor management and terrible macroeconomic conditions, an unfortunate recipe for business failure. In sum, while the Court finds that many of the indicia of bad faith exist in the present case, other factors tend to indicate that the Debtor suffers more from bad management, rather than from bad faith. In light of the Court's finding that cause exists under section 1112(b)(4), the Court need not render an opinion regarding whether the Debtor's filing was in bad faith.

Since the Movant has shown cause to dismiss the Debtor's case, section 1112(b) shifts the burden of proof to the Debtor. In order for the Debtor to avoid dismissal of the bankruptcy case, the Debtor must meet one of two burdens of proof. First, the Debtor can

avoid dismissal by showing "unusual circumstances" justifying its presence in Chapter 11 despite the Court finding cause for dismissal. 11 U.S.C. § 1112(b)(1). Alternatively, the Debtor can avoid dismissal by showing: (1) a plan will likely be confirmed within the statutorily mandated time-frame, or if no time-frame exists, within a reasonable time; (2) the grounds for converting or dismissing the case include circumstances other than substantial losses to the estate; and (3) reasonable justification exists for the circumstances demonstrating cause, and the circumstances can be cured within a reasonable time. 11 U.S.C. § 1112(b)(2).

In this case, the Debtor failed to proffer sufficient evidence to rebut the Movant's showing of cause. In regard to section 1112(b)(1), the Court, after a thorough search of the record, finds no mention by the Debtor of any sort of unusual circumstances justifying the Debtor's continuation in Chapter 11. In addition, the Debtor cannot rebut a finding of cause under section 1112(b)(2), because the grounds for dismissal of the case include substantial losses on the part of the Debtor since the filing of the petition. Since the Debtor cannot rebut the Movant's showing of cause, the Court must dismiss the case under section 1112(b).

CONCLUSION

For the reasons discussed above, Empire Financial Services Motion to Dismiss for Cause is **GRANTED**. The Debtor's case is hereby **DISMISSED**.

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