UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BKY 4-87-1104

BURNER SERVICES & COMBUSTION CONTROL CO., INC.,

MEMORANDUM ORDER DISMISSING CASE

Debtor.

At Minneapolis, Minnesota, March 4, 1991.

The above-entitled matter came on for hearing before the undersigned on the third day of January, 1991, on a motion by the Internal Revenue Service (the "IRS") to dismiss or convert this case under 11 U.S.C. Section 1112(b)(8) for material default by the Debtor with respect to a confirmed plan. The appearances were as follows: Michael Urbanos for the IRS; William Cumming for Twin City Pipe Trades Service Association (the "Union"); Teresa Fett for the Trustees of the Boilermaker-Blacksmith National Pension Fund (the "Pension"); and Michael Black for the Debtor. This Court has jurisdiction over the parties to and the subject matter of this case pursuant to 28 U.S.C. Sections 157 and 1334, and Local Rule 103. Moreover, this Court may hear and finally adjudicate this motion because its subject matter renders such adjudication a "core" proceeding pursuant to 28 U.S.C. Section 157(b)(2)(O).

FACTS AND PROCEDURAL HISTORY

Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on April 1, 1987. Debtor's Third Amended Plan of Reorganization (the "Plan") was confirmed by order entered November 3, 1989. The case was closed on January 8, 1990.

The Plan contemplated an orderly liquidation of the Debtor's business and distribution of the proceeds to creditors. Debtor's service business has been sold and payments have been made to creditors pursuant to the provisions of the Plan. Thus, the Plan has been substantially consummated.

The Plan, however, provided that the IRS would be paid its entire priority unsecured claim and $90,000.00 of its secured claim on January 2, 1990, the effective date of the Plan, and that the IRS' administrative expense claim would be paid in full within 60 days after the effective date of the Plan. Debtor has failed to make such payments.

By Order entered October 31, 1990, this case was reopened on application by the IRS. The IRS subsequently filed a motion to dismiss or convert the case. Debtor, the Union and the Pension all filed objections to the motion. At the close of the initial motion hearing held December 3, 1990, I indicated that I had tentatively concluded that converting the case to Chapter 7 would not be in the best interest of creditors.

I gave the parties leave to file supplemental memoranda regarding cause for and/or the potential effect of dismissal. Debtor filed such a memorandum, which I have carefully considered along with the initial memoranda of the IRS and the Debtor and the arguments presented by counsel at the hearing. After doing so and engaging in my own research, however, I am confounded by the cacophony of conflicting voices: quot homines, tot sententiae.(1) It remains unclear to me why Congress provided for postconfirmation dismissal or conversion of a chapter 11 case:

> The reasoning in Code cases which attempt to explain the rationale of the statute . . . is inadequate. Perhaps the failure of adequate explanation is only the natural result of attempts to ascribe reason to the unreasonable.

In re Monica Scott, Inc., BKY 3-89-3116, slip op. at 2 (Bktcy. D. Minn. Jan. 23, 1991) (footnotes omitted).

Footnote 1
This phrase, literally translated, means "so many men, so many opinions," the gist of which is a complete lack of agreement. E. Ehrlich, Amo, Amas, Amat and More 243 (1985).
End Footnote

II. DISCUSSION

The IRS has established cause to dismiss or to convert this case. The IRS, as the moving party, had the burden of showing cause. In re Economy Cab & Tool Co., 44 B.R. 721, 724 (Bktcy. D. Minn. 1984). Debtor's failure to make distributions to the IRS according to the provisions of the Plan was a material default, which constitutes cause for dismissal or conversion. 11 U.S.C. Section 1112(b)(8); In re Depew, 115 B.R. 965 (Bktcy. N.D. Ind. 1989). Once cause is established, I have broad discretion to dismiss or to convert the case, or to do neither. In re Economy Cab & Tool Co., 44 B.R. at 724.

A. Conversion

Converting the case would not be in the best interest of creditors. Confirmation of the Plan vested all property of the estate in the Debtor, since there was no provision in the Plan to the contrary. 11 U.S.C. Section 1141(b); Kepler v. Independence Bank (In re Ford), 61 B.R. 913, 917 (Bktcy. W.D. Wis. 1986); In re T.S.P. Indus., Inc., 117 B.R. 375, 377, motion to alter judgment denied, 120 B.R. 107 (Bktcy. N.D. Ill. 1990); In re NTG Indus., Inc., 118 B.R. 606, 610 (Bktcy. N.D. Ill. 1990). Thus, there would be no estate for a trustee in Chapter 7 to administer. In re T.S.P. Indus., Inc., 117 B.R. at 378. Contra In re NTG Indus., Inc., 118 B.R. at 610.

B. Dismissal

Debtor asserts that the IRS has failed to meet its burden of showing that dismissal would be in the best interest of creditors. The IRS discharged its burden when it established cause for dismissal or conversion, and thus it does not bear the burden of showing that dismissal as opposed to conversion would be in the best interest of creditors. In re Economy Cab & Tool Co., 44 B.R. at 724. Nor are the parties objecting to the IRS' motion subject to the burden of proving the creditors' best interest. Once cause has been shown, I have discretion to dismiss or not to dismiss this case, and therefore it would be meaningless to allocate any burden regarding proof of the creditors' best interest.

Next, Debtor asserts that it would not be in the best interest of creditors to dismiss this case because dismissal would have no effect. It is true that section 349(b)(3) of the Code would not apply, since confirmation has already revested all property of the estate in the Debtor. United States v. Standard State Bank, 91 B.R. 874, 879 (W.D. Mo. 1988), aff'd, 905 F.2d 185 (8th Cir. 1990); In re Searles, 70 B.R. 266, 270 (D.R.I. 1987). But section 349(b) also provides, inter alia, for the reinstatement of various and sundry avoided transfers and voided liens. 11 U.S.C. Section 349(b)(1). Consequently, I conclude that it would be in the best interest of creditors to dismiss this case.

C. Effect of Dismissal

The objecting parties urge me to place various limitations on the effect of dismissal. I conclude that there is cause under 11 U.S.C. Section 349(b) to impose such limitations.

Dismissal of a chapter 11 case does not render void or

avoidable transactions or disbursements made pursuant to a confirmed plan(2). 11 U.S.C. Sections 1141(a) and (c); Kepler, 61 B.R. at 917; In re Kaleidoscope, Inc., 56 B.R. 562, 564 (Bktcy. M.D.N.C. 1986). Consequently, I will condition dismissal by ordering that avoided transfers, voided liens and vacated judgments which involved or were attached to property transferred under the Plan prior to entry of this order and which would otherwise be reinstated or vacated by the dismissal shall not be altered by the dismissal. Such conditions are necessary to protect entities acquiring rights in good faith reliance on the order of confirmation. See 11 U.S.C. Section 1144.

Footnote 2
Similarly, the discharge resulting from confirmation of the plan is not vacated by dismissal. C.f. In re Depew, 115 B.R. at 966-67 (holding that court may dismiss case, but cannot revoke discharge). Consequently, creditor's whose claims were discharged can only sue to enforce or recover for breach of the confirmed plan. Id. at 966. Discharged claims are only reinstated if the discharge is revoked pursuant to 11 U.S.C. 1144. In re T.S.P. Indus., Inc., 117 B.R. at 377.
End Footnote

ACCORDINGLY, IT IS HEREBY ORDERED:

1. This case is dismissed pursuant to 11 U.S.C. Section 1112(b)(8); and

2. Any transfer or lien that would be reinstated and any judgment that would be vacated under 11 U.S.C. Section 349(b), which transfer, lien or judgment involved or was attached to property transferred prior to the entry of this order pursuant to the plan confirmed in this case, shall not be reinstated or vacated.

Nancy C. Dreher
United States Bankruptcy Judge