IN THE UNITED STATE BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

In re:

ROXBY MCLURE, LLC, | Case No: 5:23-BK-0213

Debtor in Possession. | Chapter 11

MOTION OF ACTING UNITED STATES TRUSTEE TO DISMISS CASE FOR FAILURE TO PROVIDE PROOF OF INSURANCE

The Acting United States Trustee, John P. Fitzgerald, III, ("UST") by Shari Collias, his counsel, moves the Court to dismiss this case pursuant to 11 U.S.C. § 1112(b), and states that:

1. The debtor filed an emergency petition under Chapter 11 on May 1, 2023. Statements and schedules have not yet been filed with the Court. The Court entered an order on May 4, 2023 [ECF Doc No. 15] directing the debtor to file its Schedules and Statement of Financial Affairs on or before May 26, 2023.

2. The debtor is a real estate holding company which owns the McLure Hotel and a parking garage on 12th Street in Wheeling, Ohio County, West Virginia. This property is encumbered by a deed of trust in favor of FA Management, Inc.

3. No trustee has been appointed in this case. The debtor has been operating as a debtor in possession with the powers, rights and duties of a trustee pursuant to *11 U.S.C. § 1107*. The Operating Order entered in this case on May 2, 2023 [ECF Doc. No. 3] required, among other things, that:

I. INITIAL OPERATING REPORT

The Debtor in Possession shall file, within fourteen (14) days after the date of the entry of this Order, a sworn Initial Operating Report. The Initial Operating Report shall, at a minimum, state (1) the estimated costs of operation for the succeeding thirty (30) days; (2) the estimated cash balance increase or decrease or the profit or loss for the next succeeding thirty (30) days; (3) the amount of cash available for the use in the operation of the Debtor in Possession; (4) an explanation as to how the Debtor in Possession intends to fund the cost of operation for the next succeeding thirty (30) days; (5) the location, indentifying number and balance of all bank accounts including those established pursuant to this Order; (6) a statement of insurance coverage giving policy numbers, carriers and amounts of coverage for general liability, automobile, worker's compensation and any other coverage in force. The Debtor in Possession shall provide a copy of this report to the Assistant U.S. Trustee at U.S. Courthouse, 300 Virginia Street East, Room 2025, Charleston, West Virginia 25301 and to the designated representative of the Creditors' Committee as soon as such Committee is formed and a representative chosen to accept such reports

4. Consistent with the Operating Order, the United States Trustee's Chapter 11 Guidelines require, among other things, that the debtor maintain insurance coverage, and documentation regarding the existence of the coverage must be provided to the UST as early of possible in the case. The extent of coverage, must be adequate, given the circumstances of the case. Depending on the case, the debtor may be required to maintain all or a combination of fire and extended liability insurance, general liability insurance, workers compensation insurance and unemployment insurance, employee health insurance, etc.

5. On May 5, 2023, FA Management, Inc, by counsel, filed a motion for relief from the automatic stay [ECF Doc. No. 22], which alleges, among other things, that the McLure Hotel and parking garage are not insured.

6. The UST conducted the Initial Debtor Interview ("IDI") by telephone in this case on May 9, 2023. Prior to the IDI, the UST requested he be provided with proof the debtor's real and personal property is actively insured. The UST was provided with a policy declaration page indicating the debtor had commercial liability coverage on the hotel and parking garage, which is purportedly effective through March 24, 2024 (See Exhibit A). Jeffrey Morris, representative for the debtor, informed the UST at the IDI that the debtor did not have commercial property insurance in place on either the hotel or the parking garage because the debtor could not afford to pay the premium. Mr. Morris was advised the debtor must obtain commercial property insurance

for the hotel and parking garage and provide proof of it to the UST. Following the IDI, the UST requested via email that he be provided with proof of active commercial property insurance no later than 3:00 p.m. on May 10, 2023.

7. To date, the UST has not received proof the debtor has obtained commercial property insurance on either the hotel or the parking garage. It is imperative the debtor obtain commercial property insurance on these properties and that the debtor provide proof of insurance to the UST in compliance with the Operating Order entered by this Court.

8. Section 1112(b)(1) of the Bankruptcy Code, provides that the court may for cause either convert a Chapter 11 case to a case under Chapter 7 or may dismiss a case, depending upon which is in the best interest of creditors and the estate.

9. The Bankruptcy Court for the District of Delaware described the Court's discretion in finding cause to grant a motion to convert or dismiss as follows:

> Courts have wide latitude in determining whether cause exists to convert or dismiss. The section provides ten enumerated examples which constitute statutory cause. However the court is not limited to the statutory examples and cause may be determined from the facts and circumstances of the case. In the Matter of Nugelt, Inc., 142 B.R. 661, 665 (Bankr. D. Del. 1992) (citations omitted).

10. This provision of the Bankruptcy Code describes a number of factors, any one of which may constitute "cause" for either the conversion of a Chapter 11 case to a Chapter 7 case or the dismissal of a Chapter 11 case in its entirety. See 11 U.S.C. § 1112(b)(4)(A)-(P), as amended, *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, Pub. L. 109-8 ("BAPCPA"). The factors to be considered by the court include, but are not limited to, the following circumstances:

(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;

(B) gross mismanagement of the estate;

(C) failure to maintain appropriate insurance that poses a risk to the estate or to the public;

(D) unauthorized use of cash collateral that is substantially harmful to 1 or more creditors;

(E) failure to comply with an order of the court;

(F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;

(G) failure to attend the meeting of creditors convened under section 341(a) or any examination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor;

(H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any);

(I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;

(J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;

(K) failure to pay any fees or charges required under chapter 123 of title 28….

See *11 U.S.C. § 1112(b)(4).* The list contained in section 1112(b) is not "exhaustive." See In re TCR of Denver, LLC, 338 B.R. 494, 500 (Bankr. D. Colo. 2006).

11. Congress intended BAPCPA's changes to Section 1112(b) to "make it broader, more strict as to debtors, and more encompassing." TCR of Denver, at 500.

12. There is "cause" to dismiss or convert this case under *§1112(b)(4)(A)*, *1112(b)(4)(B), §1112(b)(4)(J)* and *§ 1112(b)(4)(M).* The debtor may avoid conversion or dismissal only by establishing **all** *[emphasis added]* of the following conjunctive conditions set forth in *11 U.S.C. §1112(b)(2)*:

(1) there are unusual circumstances such that dismissal or conversion is not in the best interest of creditors. [*11 U.S.C. §1112(b)(2)*]; and

(2) there is a reasonable likelihood that a plan will be confirmed within the statutory time frames established in sections 1121(e) and 1129(e). [*11 U.S.C. §1112(b)(2)(A)*] and

(3) there is a reasonable justification for the acts and omissions of the debtor, and that they will be cured within a reasonable period of time fixed by the court. [*11 U.S.C. §1112(b)(2)(B)*].

The debtor has not shown there are unusual circumstances for failure to maintain commercial property insurance on the McLure Hotel and the parking garage, and for failure to provide the UST with proof of property insurance coverage[1], which lists the UST as a notice party. In addition, the debtor has not demonstrated there is a reasonable justification for its failure to obtain insurance that can be cured within a reasonable period of time fixed by the Court.

13. The debtor cannot be permitted to remain in Chapter 11 without maintaining active property insurance coverage under the 11 U.S.C. §1112(b).

WHEREFORE, the United States Trustee requests that the Court enter an order dismissing this case, and for such other relief as is proper.

Respectfully submitted,

JOHN P. FITZGERALD, III
Acting United States Trustee

By Counsel

/s/ *Shari Collias*
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[1] The UST contends inability to obtain sufficient funds to pay for required insurance coverage is not an "unusual circumstance".

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May 2023, I filed the **MOTION OF ACTING UNITED STATES TRUSTEE TO DISMISS CASE FOR FAILURE TO PROVIDE PROOF OF INSURANCE** with the Clerk of the Court using the CM/ECF System, which will send notice to all parties who have requested notice via CM/ECF or via regular, U.S. mail, postage pre-paid:

Salene Mazur Kraemer
Attorney for the Debtor
(via electronic mail)

Roxby McLure, LLC
1200 Market Street
Wheeling, WV 25003

David L. Delk
(*via electronic mail*)

W. Eric Gadd
(*via electronic mail*)

/s/ *Shari Collias*
Shari Collias (#4997)