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9 UNITED STATES BANKRUPTCY COURT
10 DISTRICT OF ALASKA

11 In Re:) Case No. 17-00285
12 Aurora Gas, LLC)
13 Debtor.) Chapter 11
14) UNITED STATES TRUSTEE’S MOTION
15) TO CONVERT OR DISMISS CHAPTER 11
16) CASE WITH RECCOMENDATION OF
17) CONVERSION

18 The United States Trustee, by and through her undersigned counsel, hereby moves (the
19 “**Motion**”) the Court for an order converting the above captioned bankruptcy case under
20 § 1112(b) after the September 11, 2017 sale closes on the basis that, after the sale of
21 substantially all operating assets, the above-captioned debtor (the “**Debtor**”) will face no
22 reasonable likelihood of rehabilitation thereby warranting a finding of “cause” under
23 § 1112(b)(4). In support of the Motion, the United States Trustee respectfully represents as
24 follows:

25 **JURISDICTION AND VENUE**

- 26 1. This Court has jurisdiction over the Motion pursuant to 11 U.S.C. §§ 307 and
27 1112(b).
28 2. The United States Trustee brings the Motion pursuant to the United States
Trustee’s authority to supervise the administration of bankruptcy cases under 28 U.S.C.
§ 586(a)(3) and pursuant to 11 U.S.C. § 1112(b)(1).

FACTUAL BACKGROUND

1
2 3. On August 12, 2017 (the “**Petition Date**”), the Debtor sought relief under
3 Chapter 11 of Title 11 of the United States Code.

4 4. On August 15, 2017, the Debtor filed the (“**Cash Collateral Motion**”) seeking
5 financing up to \$1 million dollars from the Binkley Company, LLC (“**Binkley**”) for the purpose
6 of financing its ongoing operations during the initial weeks of the case. ECF No. 13.

7
8 5. Also on August 15, 2017, the “publisher and ultimate owner of” the Debtor Alice
9 Rogoff Debtor filed a declaration (the “**Rogoff Declaration**”) wherein she described the
10 Debtor’s history of substantial operating losses and its current financial perils. ECF No. 12.
11 The descriptions in the declaration strongly suggested that, as of the Petition Date, the Debtors
12 operations were headed toward the brink of administrative insolvency.

13 6. Simultaneously with the Cash Collateral Motion and Rogoff Declaration, the
14 Debtor filed the *Motion for Sale of Assets, Free and Clear of Liens, Pursuant to Section 363(f)*
15 (the “**Sale Motion**”) wherein the Debtor sought the approval of a sale of a majority of its
16 operating assets to Binkley in accordance with 11 U.S.C. § 363. ECF No. 14. Although a draft
17 Asset Purchase Agreement (“**APA**”) was attached to the Sale Motion the testimony given in the
18 case so far suggest that the parties are still actively negotiating exactly which of the Debtor’s
19 assets will be purchased in the event the Sale Motion is approved. Specifically, both the
20 Debtor’s and the Binkley’s counsel have made representations to the Court at subsequent
21 hearings that although the APA provides for the sale of the Debtor’s printing presses, those may
22 now be excluded from the proposed sale. A hearing on the Sale Motion is currently scheduled
23 for September 11, 2017 (the “**Sale Hearing**”).

24 7. On August 17, 2017, the Court held a hearing on the Debtor’s first day motions,
25 including the Cash Collateral Motion (the “**First Day Hearing**”). During the hearing the
26 Debtor’s representative testified that Binkley representatives had taken control over the Debtor’s
27 day to day operations. Upon information and belief, the United States Trustee believes that

1 Binkley hired an experienced editor from the Denver Post to assist them maintaining the
2 Debtor's publication operations and to preserve the value of the paper as a going concern
3 pending the outcome of the Sale Motion.

4 8. On August 22, 2017, the Debtor filed the ("**GCI Stipulation**") which provided,
5 among other things, that GCI was entitled to immediate relief from the automatic stay on
6 October 11, 2017. ECF No. 52. Notably however, the last paragraph of the stipulation provided
7 that the terms contained therein would not be binding on any chapter 7 trustee. *Id.* at ¶ 16.

8 9. On August 28, 2017, the Debtor filed draft schedules and statement of financial
9 affairs. ECF No. 70. The Debtor's draft schedule E/F reflects unsecured claims in excess of
10 \$10 million dollars and the draft schedule A/B reflects personal property assets of
11 \$11,844,040.18, of which approximately \$4.7 million is equipment. The United States Trustee
12 assumes that the value of the Debtor's printing presses, which may not be sold at the Sale
13 Hearing, are contained within the \$4.7 million dollar figure.

14 10. On August 29, 2017, the United States Trustee appointed three unsecured
15 creditors to the official committee of unsecured creditors. ECF No. 71. During the formation
16 meeting the undersigned notified the participants therein that it was her intention to file the
17 instant motion.

18 11. As of the date of the filing of this Motion, it is unclear who will take control as
19 debtor-in-possession after the Sale Hearing. The United States Trustee presumes that Binkley's
20 manager will not remain in control of the debtor-in-possession after the sale, and it is unclear if
21 Ms. Rogoff will step in to liquidate any remaining assets. Accordingly, and for the reasons set
22 forth herein, the United States Trustee asserts that the person best suited to liquidate any
23 remaining assets would be a chapter 7 trustee who is not bound by the GCI stipulation and who
24 will be uniquely qualified to liquidate the estate and/or pursue any claims the estate may have
25 for the benefit of the Debtor's creditors.
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27

1 **AUTHORITY AND ARGUMENT**

2 **A. The § 1112(b)(1) Standard**

3 Bankruptcy Code § 1112(b) provides that “absent unusual circumstances specifically
4 identified by the court that establish that the requested conversion or dismissal is not in the best
5 interests of creditors and the estate, the court shall convert a case under [chapter 11] to a case
6 under chapter 7 or dismiss a case under [chapter 11], whichever is in the best interests of
7 creditors and the estate, if the movant establishes cause.” 11 U.S.C. § 1112(b)(1). Section
8 1112(b) establishes a two-step analysis for addressing questions of conversion or dismissal. *In*
9 *re Kenny G Enterprises, LLC*, 2014 WL 4100429, *12 (B.A.P. 9th Cir. Aug. 20, 2014) (citing
10 *Woods & Erickson, LLP v. Leonard (In re AVI, Inc.)*, 389 B.R. 721, 729 (B.A.P. 9th Cir. 2008)).
11 First, the court must determine whether cause exists for conversion or dismissal. *Id.* Second, if
12 cause exists, the court must determine whether the remedy of conversion or dismissal “better
13 serves the interests of the creditors and the estate.” *Id.*; *Pryor v. United States Trustee (In re*
14 *Pryor)*, 2016 WL 6835372, *5 (B.A.P. 9th Cir. Nov. 18, 2016) (affirming bankruptcy court’s
15 conversion of chapter 11 case on United States Trustee’s motion); *see also In re Owens*, 552
16 F.3d 958, 960-61 (9th Cir. 2009) (court must consider interests of all creditors). The factors
17 enumerated in § 1112(b)(4) as “cause” are non-exclusive, and “bankruptcy courts enjoy wide
18 latitude in determining whether the facts of a particular case constitute cause for conversion or
19 dismissal under § 1112(b).” *In re Kenny G Enterprises, LLC* at *11, *see also In re Bowers Inv.*
20 *Co., LLC*, 553 B.R. 762, 768 (Bankr. D. Alaska 2016). Here, “cause” to dismiss the cases exists
21 under both § 1112(b)(4)(A).
22

23 **B. Cause Exists Under § 111(b)(4)(A)**

24 Cause to convert this case exists under § 1112(b)(4)(A) due to a “substantial or
25 continuing loss to or diminution of the estate and the absence of a reasonable likelihood of
26 rehabilitation” in light of the impending sale of the Debtor’s operating assets. To satisfy cause
27 under this factor “there must be both (1) continuing loss or diminution, and (2) the absence of a
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1 reasonable likelihood of rehabilitation.” *In re Prod. Int’l Co.*, 395 B.R. 101, 110 (Bankr. D.
2 Ariz. 2008), *citing In re Original IFPC Shareholders, Inc.*, 317 B.R. 738 (Bankr. N.D. Ill.
3 2004); and *In re AdBrite Corp.*, 290 B.R. 209 (Bankr. S.D.N.Y. 2003). Both factors are present
4 in this case.

5 As to the first requirement, the Debtor’s un-purchased assets face imminent substantial
6 diminution if the case is not converted to chapter 7 prior to October 11th. The Rogoff
7 Declaration and the testimony at the First Day Hearing made it clear that the Debtor lacks the
8 financial capability to immediately fund any activities beyond the Sale Hearing. Thus, absent
9 an increase in the proposed purchase price sufficient to generate a return to the estate, the
10 Debtor will lack sufficient capital to fund the removal of any remaining equipment from its
11 leased premises in order to liquidate it for the benefit of creditors. This inability to remove the
12 unpurchased equipment (or in the case of GIC the inability to access that equipment after
13 October 11th under the terms of the GCI Stipulation) diminishes the value of that equipment to
14 the estate because inaccessible equipment would be substantially more difficult to market and
15 liquidate for the benefit of creditors. Notably, if the relief requested in this Motion is granted
16 and the case is converted to chapter 7 the value of the unpurchased assets could at least
17 potentially be preserved. A chapter 7 trustee would not be bound by the GCI Stipulation and
18 thus would be better situated to negotiate with the landlords for the removal of the remaining
19 assets for liquidation. Also, a chapter 7 trustee, as a trained bankruptcy professional, would
20 likely be more familiar with certain remedies unique to the bankruptcy process under chapter 5
21 of the Bankruptcy Code which could be used in future negotiations to ensure the maximum
22 recovery for all creditors involved. In sum, the first element of diminution in value is satisfied
23 insofar as, absent a cash infusion on or before October 11th, the estate risks the loss of the
24 ability to market and liquidate potentially valuable assets not purchased at the Sale Hearing.

25 As to the second element, the likelihood of rehabilitation in this case after the Sale
26 Hearing is minimal at best. “Rehabilitation is a more demanding standard than reorganization,
27 and is defined by whether the debtor will be able to reestablish his business on a firm, sound
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1 basis.” *In re Paterno*, 511 B.R. 62, 68 (Bankr. M.D.N.C. 2014) citing *In re Creekside Sr.*
2 *Apartments, L.P.*, 489 B.R. at 53; *In re Westgate Prop., Ltd.*, 432 B.R. 720, 723 (Bankr. N.D.
3 Ohio 2010). “Determining whether there is a likelihood of rehabilitation is not a technical test
4 of whether the debtor can confirm a plan, but rather, whether the debtor’s business prospects
5 justify continuance of the reorganization effort.” *In re Paterno*, 511 B.R. at 68 citing *In re*
6 *Vallambrosa Holdings, LLC*, 419 B.R. at 89. This element can be satisfied on two separate
7 bases. First, the Sale Motion proposes to sell essentially all of the assets the Debtor would need
8 to continue to publish a newspaper making rehabilitation unlikely. Second, the questions
9 surrounding who will be at the Debtor’s helm post-Sale Hearing given the Binkley’s likely post-
10 Sale Hearing departure from management, further diminishes any hope of post-petition business
11 prospects which would otherwise justify the continuance of a reorganization effort. As such,
12 the United States Trustee asserts that the appointment of an independent chapter 7 trustee would
13 be in the best interest of the Debtor’s creditors given the dismal prospects of post-Sale Hearing
14 rehabilitation.
15

16 **C. Lack of Unusual Circumstances**

17 Having established cause, the next query is whether there exist any “unusual
18 circumstances” which would justify not converting or dismissing the case. Aside from
19 § 1112(b)(2), inserted by BAPCPA, § 1112(b) does not define “unusual circumstances” but the
20 bankruptcy court for the District of Montana aptly described the exception as follows:
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22 it clearly contemplates conditions that are not common in most chapter 11
23 cases. Although each chapter 11 case is to some extent unique, and
24 unusual circumstances may exist in any particular case regardless of its
25 size or complexity, the import of section 1112(b) is that, if cause exists,
26 the case should be converted or dismissed unless unusual facts or
27 circumstances demonstrate that the purposes of chapter 11 would be better
28 served by maintaining the case as a chapter 11 proceeding.

In re Fisher, Bankr. No. 07-61338-11, 2008 WL 1775123, at *5 (Bankr. D. Mont. Apr. 15,

1 2008). Here, there are no unusual circumstances which would warrant keeping this case in
2 chapter 11. To the contrary, the unusual circumstances of this case warrant converting the case
3 to one under chapter 7. As set forth above, a chapter 7 trustee would not be bound by the GCI
4 Stipulation and would be well suited to negotiate a liquidation of any un-purchased assets in a
5 manner beneficial to the Debtor's creditors. Further, a chapter 7 trustee would resolve the
6 conundrum of the Debtor's post Sale Hearing management, and ensure that a bankruptcy
7 fiduciary was in place to preserve and recover whatever value they could from any unsold assets
8 and/or pursue any claims the estate may have for the benefit of the Debtor's creditors.
9

10 **D. Conversion is the United States Trustee's Preferred Remedy**

11 Finally, although the decision to convert or dismiss this case is within the Court's
12 discretion under § 1112(b), the United States Trustee asserts that conversion is the more
13 appropriate remedy in this case given the fact that assets will likely remain in the estate for
14 liquidation after the Sale Hearing which should be sold for the benefit of the Debtor's creditors.
15 If the case were dismissed it would be unlikely that the creditors would see any recovery.

16 WHEREFORE, the United States Trustee respectfully requests that the Court enter an
17 Order converting this chapter 11 case to chapter 7 and for such other relief as the Court finds
18 just and proper.

19
20 DATED this 30th day of August, 2017.

21 Respectfully Submitted,

22 Gail Brehm Geiger
23 Acting United States Trustee for Region 18

24 /s/ Kathryn Perkins
25 Kathryn Perkins, Cal Bar 240149
26 Attorney for the United States Trustee
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