

likelihood of rehabilitation, pursuant to 11 U.S.C. § 1112(b)(1); there is an inability to effectuate a plan pursuant to 11 U.S.C. § 1112(b)(2); there is an unreasonable delay that is prejudicial to creditors, pursuant to 11 U.S.C. § 1112(b)(3); and, Debtor-in-Possession has failed to pay fees and charges, pursuant to 11 U.S.C. § 1112(b)(10).

The McIntosh Co. denies all the essential allegations of the motion and prays that the motions to convert be dismissed.

For the reasons set forth below, the motions to convert will be denied.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

FINDINGS OF FACT

1. Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code on August 21, 1990. An order for relief was entered on the same date.

2. As relevant herein, the McIntosh family consists of Dorothy R. McIntosh who is the mother of Steven M. McIntosh and Craig McIntosh. Melvin McIntosh, the father of Steven and Craig, died in 1990.

3. The McIntosh family operates its business through

several closely held corporations. McIntosh & Company, Inc. (herein "McIntosh Co.") was incorporated as a holding corporation. Steven McIntosh is the president and Dorothy McIntosh is the secretary of this corporation.

4. The McIntosh Co. holds stock in Scottish Links, Inc. (herein "Scottish Links"), MFS, Inc. (herein "MFS"), and McRealty, Inc. (herein "McRealty").

5. Steven McIntosh and Dorothy McIntosh are the president and secretary, respectively, of all of these corporations.

6. The Turnbridge Limited Partnership (herein "Turnbridge") was formed by the McIntosh Co. to build condominiums on the real estate which is adjacent to a golf course owned by Scottish Links. McRealty is the general and managing partner for Turnbridge.

7. Scottish Links was formed to design, construct and operate a golf course near Council Bluffs, Iowa. Scottish Links designed and built a golf course which opened for play on June 1, 1987, and then filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on August 28, 1990. That case has been dismissed on the basis that one Bill Campbell has a 50 percent shareholders interest in Scottish Links and he was not given the opportunity to exercise his rights pursuant to shareholder and director interest prior to the filing of the petition. The McIntosh Co. contends that it

is the owner of 100 percent of the outstanding shares of Scottish Links.

8. MFS is a wholly owned subsidiary of the McIntosh Co. It is the operating entity of concessions at the golf course. Its only asset is the contract to operate these concessions. Debtor schedules MFS assets as having no value.

9. McRealty is a wholly owned subsidiary of the McIntosh Co. McRealty is the general/managing partner of Turnbridge. Debtor schedules the value of the investment in McRealty as none.

10. Turnbridge has completed and sold condominium units and has unsold and unfinished units. This project is located on real estate acquired by Turnbridge from Scottish Links through McRealty. Debtor advises that 12 units are unsold and that they have a finished value of \$600,000.00, or \$50,000.00 each. Six units are unfinished and it will take approximately \$100,000.00 to finish them. Debtor believes that the present fair market value of these units is \$500,000.00.

11. Turnbridge also owns 3.8 acres of vacant land which is next to the golf course. Debtor places a net value on this real estate of \$300,000.00. Debtor advises that Turnbridge has a claim against Scottish Links in the amount of \$150,000.00 and owns the clubhouse on the Scottish Links golf course which is valued at \$250,000.00.

12. Debtor places a value on Turnbridge assets in the

amount of \$1,200,000.00.

13. Mechanics liens in the amount of \$60,000.00 have been filed against Turnbridge property and Turnbridge has a present indebtedness to bondholders of approximately \$960,000 for a total indebtedness of approximately \$1,020,000.00.

14. The evidence does not disclose the limited partners of Turnbridge and their financial interests.

15. Debtor lists as an asset a note receivable from Scottish Links in the amount of \$292,000.00 which is secured by a fourth mortgage on the Scottish Links golf course.

16. Debtor listed two parcels of real estate in which it had claimed an interest. Both parcels were encumbered by mortgages held by First National Bank. First National Bank received relief from the automatic stay to pursue foreclosure actions on behalf of the bondholders against both parcels. Foreclosure judgments have been entered and sheriff's sales are scheduled for both parcels.

17. Debtor's other scheduled property includes approximately \$30,000 worth of office equipment, furnishings and supplies. These items have been distributed to other McIntosh entities and the president of Debtor corporation is using the office equipment to conduct the business of Scottish Links.

18. Debtor lists as an asset an investment in Scottish Links stock with a value of \$130,468.92.

19. Debtor has received \$100 in income since the case was filed and recent monthly reports reveal no current income.

20. Real estate taxes continue to accrue on all real estate; interest continues to accrue on all notes and the judgments held by First National Bank; and, federal and state withholding and FICA obligations remain unpaid.

21. Scottish Links is currently indebted to its bondholders in the amount of \$600,000. The bondholders, plus other creditors, have mortgage interest in the golf course in the approximate amount of \$1,027,200. Steven McIntosh places a value of \$1,200,000 on the golf course. Scottish Links also has an interest in surrounding land which Steven McIntosh values at approximately \$400,000.

22. The operation of the golf course is seasonal in nature. The golf season in southern Iowa is about to commence and generally runs into the late fall.

23. The 1990 operation of the golf course resulted in a loss. Steven McIntosh's projections for the 1991 season indicate a profit.

24. The McIntosh Co. has no employees and Steven and Dorothy McIntosh are the only officers of the company.

25. The quarterly fees to the United States Trustee have been paid by Steven McIntosh from his personal funds.

DISCUSSION

I. Operation of Business.

The United States Trustee and the First National Bank contend that Debtor does not operate an ongoing business and therefore is not eligible for relief under Chapter 11 of the Bankruptcy Code.

Wamsganz v. Boatmen's Bank of DeSoto, 804 F.2d 503 (8th Cir. 1986) and In re Toibb, 902 F.2d 14 (8th Cir. 1990) are cited as authority for this proposition.

The facts in this case are distinguishable from the facts in both Wamsganz and Toibb.

A "holding company" is a recognized business entity. North American Co. v. S.E.C., 327 U.S. 686, 66 S. Ct. 785, 90 L. Ed. 945 (1946); In re Van Dyke, 95 B.R. 636 (Bankr. N.D. Iowa 1988); 18 Am. Jur. 2d, CORPORATIONS § 37.

The McIntosh Co. is a holding company and operated as one at the time of the filing of the petition. This fact distinguishes the instant case from the Wamsganz and Toibb cases.

The facts reveal that Debtor is currently not operating. However, this appears to be a temporary matter as the McIntosh Co.'s business interest are substantially of a seasonal nature.

This Court refuses to extend the Wamsganz holding to require a conversion of this Chapter 11 case when Debtor's business affairs paused for a temporary period.

II. Continuing Loss and Absence of Reasonable Likelihood of Rehabilitation.

11 U.S.C. § 1112(b)(1) provides that the court may dismiss or convert a case under Chapter 11 to a case under Chapter 7, whichever is in the best interest of creditors and the estate, for cause, including continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation.

The burden of proof is upon the movants to show that there is both a continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation.

In re Economy Cab & Tool Co., Inc., 44 B.R. 721, 724 (Bankr. D. Minn. 1984).

While movants have shown a present negative cash flow and a loss in the estate, they have failed to show the absence of a reasonable likelihood of rehabilitation. There is no showing that Debtor is suffering a loss by reason of actual depreciation in the value of property of the estate and that the continuing losses cannot be corrected. While there may be doubt about rehabilitation, Debtor has shown that rehabilitation may be possible. This case is still in the early stages and Debtor should be given the opportunity to show that it can work out an arrangement with its creditors and show that reorganization is possible. The recent change

in circumstances in the affairs of Scottish Links supports this conclusion. Accordingly, the respective motions must be denied on this ground.

III. Inability to Effectuate a Plan.

11 U.S.C. § 1112(b)(2) provides that a case may be dismissed or converted from Chapter 11 to Chapter 7 if there is an inability to effectuate a plan.

The movants have failed to show that a Chapter 7 liquidation would maximize the amount to be received by the creditors. There is no showing that the assets are declining in value. A Chapter 7 trustee is authorized to operate debtor's business interests for only a short time (11 U.S.C. § 721), and it now appears better for the creditors in the estate for the Debtor-in-Possession to continue to operate the business. Accordingly, the respective motions must be denied upon this basis.

IV. Unreasonable Delay that is Prejudicial to Creditors.

11 U.S.C. § 1112(b)(3) provides that this case may be dismissed or converted to a Chapter 7 case if there is unreasonable delay by the debtor that is prejudicial to creditors.

The mere expiration of Debtor's exclusive 120-day period for proposing a plan does not itself justify its conversion or

dismissal because the 120-day period is not a deadline. Theatre Holding Co. v. Mauro, 681 F.2d 102 (2nd Cir. 1982); In re Powell Bros. Ice Co., 37 B.R. 104 (Bankr. D. Kan. 1984).

The 120-day period expired December 19, 1990, and Debtor has not filed a disclosure statement and plan. There has been no showing that the delay herein is unreasonable considering the nature of Debtor's seasonal business.

Debtor proposes to file a plan during the summer of 1991.

This is unreasonable and the better course to follow is to set a deadline for the filing of the plan so this case may move ahead.

V. Failure to Pay Fees and Charges.

28 U.S.C. § 1930 sets forth a schedule of fees to be paid by parties commencing a case under the Bankruptcy Code. These fees include quarterly fees to be paid during the pendency of a Chapter 11 case.

The required fees in this case have been paid by Steven McIntosh. Under the facts and circumstances of this case, this is not a sufficient reason to convert the case to a Chapter 7 proceeding.

CONCLUSION AND ORDER

This Court concludes that movants have failed to show cause for conversion as set forth in 11 U.S.C. § 1112(b).

Accordingly, the motions to convert must be denied. However, the Court should establish a deadline for the filing of a disclosure statement and plan as required by 11 U.S.C. § 1121 and 1125.

IT IS ACCORDINGLY ORDERED that the United States Trustee's motion to convert from Chapter 11 to Chapter 7 is denied.

FURTHER, First National Bank's motion to dismiss, amended to motion to convert, is denied.

FURTHER, the McIntosh & Co., Inc. is ordered to file a disclosure statement and a plan within forty-five (45) days from the date of entry of this order.

Dated this 5th day of April, 1991.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE