UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

In Re:	)	Case No. 00-10730
	)	Chapter 11
CONSUMER LIGHTNING PRODUCTS, INC., a/k/a GS Cable, Inc.,	)	
	)	JUDGMENT ENTERED ON JAN 23 2001
Involuntary Debtor.	)	
	)	

ORDER DISMISSING INVOLUNTARY PETITION

This matter is before the court on the involuntary bankruptcy petition filed against the debtor. The court has concluded that the best interests of creditors and the debtor would be better served by dismissal of the petition. Consequently, the court dismisses the involuntary petition pursuant to 11 U.S.C. § 305(a)(1) for the reasons that follow.

Statement of the Case

1. This matter initially came before the court on trial of the claimants' involuntary bankruptcy petition against the debtor. At the conclusion of the trial the court announced its conclusion that this was not an appropriate case for bankruptcy and that the conditions of 11 U.S.C. § 303 (h)(1) and (2) had not been demonstrated by the petitioners. After further consideration, the court concluded that it could not with intellectual honesty find that petitioners had not satisfied § 303(h); but that, nevertheless, this was not an appropriate case for bankruptcy and that the interests of creditors and the debtor would be better

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served by dismissal of the case. After notice to counsel of its consideration of dismissal pursuant to 11 U.S.C. § 305, the court conducted another hearing at which the parties presented further evidence and argument directed specifically at the abstention issue. Based on all of the evidence, the court has concluded that it should abstain from exercising bankruptcy jurisdiction and dismiss the involuntary petition pursuant to Section 305.

Factual Background

2. The involuntary debtor, Consumer Lightning Products, Inc., ("CLP"), is a Delaware Corporation which does business in Henderson and Buncombe Counties, North Carolina, as well as elsewhere. Marilyn Gasque owns 82% of CLP's stock. Her husband Samuel Gasque ("Gasque") is president of CLP. Gasque is the inventor of a type of lightning retardant cable. A corporation wholly owned by Marilyn Gasque owns the patent for that technology, and it was licensed to CLP pursuant to a License Agreement. CLP has been attempting to obtain production and sales of lightning retardant cable. The License Agreement contains an option to purchase the patent which expired November 18, 2000; and further provides for automatic termination of the license if CLP defaults in payments. CLP was in default of the License Agreement prior to the filing of the involuntary petition and Gasque claims that, pursuant to the Licensing Agreement, CLP's license expired on July 1, 2000. The option to purchase had not been exercised.

3. CLP has more than 12 creditors.

4. The petitioning claimants include two people, Craig Fearnside and R. Kelly Calloway, who are minority shareholders and former directors of CLP. Prior to May 2000, both were intimately involved with CLP in raising funds and other aspects. Fearnside and Calloway were terminated as directors in May 2000. They filed the involuntary Chapter 11 petition against CLP, joined by other claimants who appear to be connected with them by blood or interest.

5. The petitioning claimants include the following: Craig Fearnside; R. Kelly Calloway; Dominic Dipietrantonio; Cable Data & Sales; Frank Fearnside III (Craig's father); Frank Fearnside IV (Craig's brother); Nancy Calloway (Kelly's mother); and Medshare, Inc. or Joye Ganger. The claims (or part of them) of a number of the petitioning claimants were disputed by CLP. In addition, CLP had paid some of the claims (although after the petition date).

6. R. Kelly Calloway is an attorney licensed in North Carolina and practicing law in Henderson County. He became a director of CLP in August 1998. He was issued 100,000 shares of stock by CLP which he contended was for legal work done for the Gasques. It appears that Calloway did some legal work for CLP and signed some documents as corporate secretary. Calloway also claimed to have advanced about $22,300 to CLP of which he categorized $20,000 as "personal loans" and the balance was for

expenses paid. Calloway has only two Notes from CLP for $5,000 each (and apparently at least one of them was paid). Calloway also claimed entitlement to payment of $2,000 per month in "director's fees," but there was no corporate resolution authorizing such payments and no "director's fees" were paid to other directors. Calloway received a number of cash payments by CLP. CLP demonstrated that it has paid Calloway more money than he had advanced to CLP. Prior to the filing of the involuntary bankruptcy petition, CLP had sued Calloway in state court. Calloway did not counterclaim in that suit for funds he claimed he was owed in the bankruptcy petition (and prior to the involuntary petition he had made no demand on CLP for any payment). Calloway was terminated as a director May 31, 2000, after a dispute with Gasque.

7. Craig Fearnside is an accountant and for at least part of the time relevant here was licensed as a certified public accountant in North Carolina. He served as a director of CLP and received 100,000 shares of CLP stock. He loaned no money of his own to CLP, but raised funds for the company through loans or investments by others. He was paid about $22,000 by CLP and claims to be owed more for "director's fees." There is no corporate resolution authorizing payment of director's fees, and no such fees were paid to other directors by CLP. CLP sued Fearnside in state court and he did not counterclaim for any amount owed to him. It

does not appear that Fearnside is owed anything by CLP. He was terminated as director of CLP on May 31, 2000.

8. Dominic Dipietrantonio is a resident of Ontario, Canada, and is owner and general manager of Deca Cable, a manufacturer of wire and cable. Dipietrantonio loaned CLP $19,000 represented by two Notes (he also loaned money to the Gasques individually). Those Notes have not been paid by CLP and are due. Dipietrantonio and CLP have a dispute pending in an arbitration proceeding in Canada. In addition, Dipietrantonio has sued CLP and others in North Carolina state court and is the subject of counterclaims by CLP and the other defendants. Both of those proceedings were pending prior to the filing of the involuntary bankruptcy petition against CLP.

9. Frank Fearnside III is the father of Craig Fearnside and is a resident of Henderson County. He loaned CLP $28,000 upon solicitation by Craig. Fearnside III received a Note representing the debt that was prepared at least in part by Calloway. The language of the Note is different from Fearnside III's understanding of the terms of the loan and there is a dispute between him and CLP about how much is owed. CLP made a payment to Fearnside III after the date of the involuntary petition and apparently claims that his debt has now been paid in full. Regardless of the present dispute, as of the date of the involuntary petition, CLP owed Fearnside III some amount not in

dispute which was past due. Fearnside III is the only one of the petitioning claimants who made a demand for payment on CLP prior to the filing of the involuntary petition.

10. Frank Fearnside IV is the brother of Craig Fearnside. He gave a check to CLP for $5,000 which was not represented by a Note or other writing. He claimed to be owed $7,500 in the involuntary petition. CLP asserts it paid his claim in full, although after the filing of the petition. It appears that there was some non-disputed debt owing to Fearnside IV on the date of the petition.

11. Cable Data & Sales (in the person of James Duke) was the "National Sales Coordinator" for CLP. It claimed $4,374 in the involuntary petition for unpaid invoices for services performed for CLP. CLP determined the amount it owed to be $1,142 and paid that. There is some dispute about the amount owed, if any, by CLP. Cable Data & Sales was an independent sales agent for CLP but produced very little, if any, sales. CLP terminated its relationship with Cable Data & Sales in May 2000.

12. Nancy Calloway is a resident of West Virginia and is the mother of Kelly Calloway. Upon solicitation by Calloway, she made two loans to CLP of $5,000 each. In February 1999 she made a $5,000 loan and received a Note by CLP. In April 2000 she made another $5,000 loan through Calloway by way of an advance on her VISA card. After the date of the petition, CLP paid the Note and offered to pay any other amount that she could document. The trial

of this petition was the first occasion Nancy Calloway made any documentation of her claim for the second loan. However, it appears that CLP owed her undisputed sums on the date of the petition.

13. Medshare, Inc. was listed on the involuntary petition as a creditor in the amount of $918. In fact, its president Joye Ganger had made a $900 loan to CLP at the request of Fearnside. CLP paid her in full after the date of the petition. There was an undisputed debt to Ganger as of the petition date.

14. Katy Strickland is a resident of Henderson County and is a friend of Calloway. In December 1998 she made a $5,000 loan to CLP's predecessor and received a Note. She has not been paid any money for the Note. CLP contends that she was issued stock in CLP in payment of the Note, and that the stock certificate was given to Calloway for delivery to Strickland. Strickland was not listed as a petitioning creditor and her debt is in dispute.

15. Benson Slossman, a resident of Buncombe County, is himself or in a representative capacity a creditor of CLP. He testified unwillingly and only upon command of a subpoena by the petitioning creditors. Slossman's family trust and four other unrelated individuals have loaned CLP a total of more than $250,000 in five separate loans from January 2000 through October 2000. None of these loans was due at the time of the first hearing; and by the second hearing they had been paid. In addition, Slossman's

company is CLP's landlord. CLP has not timely paid its rent, but that has been resolved by an agreement.

16. CLP has about $43,000 in unpaid invoices to its outside accountants, but their work has not been completed and it is unclear whether those invoices were due to be paid on the petition date. CLP had no unpaid bills due to its outside attorneys. CLP had some unpaid trade debt to AmeriCable, although it is unknown how much or whether it was due at the time of the petition. A former employee has made a claim against CLP, but that is the subject of a dispute. At the time of the second hearing, CLP had about $30,000 in debts to a number of trade and other creditors most of which had not been paid in six months. Individuals in addition to the petitioning claimants have provided substantial funds to CLP by way of loan or other investment.

17. Fearnside and Calloway fell into dispute with Gasque over the propriety of withdrawals that Gasque had made from CLP. On May 31, 2000, the board of directors of CLP was reconstituted at a meeting of the shareholders and Fearnside and Calloway were not re-elected and their service as directors of CLP was terminated as of that date. It appears from the testimony of CLP's treasurer that Gasque's withdrawals were valid. He demonstrated that Fearnside's recapitulation of withdrawals by Gasque was factually flawed, that the corporate resolutions authorized Gasque to take a substantial

salary and that Gasque had been paid far less than he was entitled to receive.

18. By far the most substantial asset of CLP is the License Agreement to use and option to purchase the patent for lightning retardant cable. CLP contends that the license expired by its terms on July 1, 2000 as a result of CLP's default in payments. The involuntary petitioners contend that these rights could be "assumed" by CLP in a bankruptcy proceeding.

19. CLP is an infant "start up" company that is financially strapped and is surviving on borrowed money. Gasque himself, and his former businesses, have had financial problems in the past, and he is no stranger to defaults on obligations and bankruptcy. But, CLP, though struggling financially, appears to have value based on Gasque's invention. CLP also appears to have the potential for further financial support, a potentially valuable product, and the potential for a viable business. To this end, CLP has not demonstrated the behavior that typically precipitates an involuntary bankruptcy filing, such as pre-petition transfers or payments that unfairly prejudice the rights of creditors. In fact, CLP made post-petition payments to the some members of the pool of petitioning creditors (apparently for the purpose of gerrymandering the petitioners) and has paid the loans by Slossman and others.

20. From the testimony and appearance of the petitioning claimants it appears that they are following the lead of Fearnside

and Calloway. It also appears that the involuntary petition is an attempt by minority shareholders Fearnside and Calloway to escape state court litigation and to gain control of CLP (and its patent rights), rather than an effort to collect debts and pay creditors. The "prize" is clearly the patent rights, and any effort to pay creditors is ancillary to obtaining these rights.

21. At the second hearing, the petitioning creditors sought to demonstrate that Gasque was a "con man" primarily through the testimony of Neilson Henry and Warren Holiday. Both Henry and Holiday had been involved with Gasque in previous ventures in the early 1990's, but had no involvement with CLP. Holiday holds a judgment against Gasque for over $100,000. This came out of litigation by Holiday in which he sought to recoup money he had invested in a company in which Gasque was president. The litigation was resolved, and the judgement resulted from Gasque's default in performance of the Settlement Agreement. Henry was involved with other of Gasque's prior ventures in South Carolina, had filed an involuntary bankruptcy petition against one of those entities (which was dismissed by that court), and has maintained something of a crusade against Gasque. Henry testified about Gasque's former improprieties notwithstanding the fact that he had previously signed a statement that he had no knowledge of any such improprieties. The court finds nothing in Holiday's testimony that is relevant to the issues here. And, the court cannot find

anything probative from Henry's inconsistent statements. The court makes no findings on the propriety of any of Gasque's actions and does not intend dismissal of this case as any vindication of anything he has done. The court simply finds that those matters are not significant to its determination in this Order.

Section 303(b)(1) Petitioning Claimants

22. Section 303(b)(1) defines eligible petitioning claimants as:

> three or more entities, each of which is either a holder of a claim against [the debtor] that is not contingent as to liability or the subject of a bona fide dispute ... if such claims aggregate at least $10,775....

23. The relevant time for determining eligibility is the date of the involuntary petition. Consequently, the fact that CLP has paid the debts of certain of the petitioning claimants after the filing of the petition is not relevant to the determination of eligibility. See United States Optical v. Corning, 991 F.2d 792, *6 (4th Cir. 1993) (unpublished decision).

24. In order for a claimant to be disqualified as "subject to a bona fide dispute," the dispute must involve the entire debt. In re Fox, 162 B.R. 729, 732 (Bankr. E.D. Va. 1993); IBM Credit Corp. v. Compuhouse Sys., 179 B.R. 474, 478 (W.D. Pa. 1995).

25. Some or all of the claims of Calloway, Fearnside, Fearnside III, Dipietrantonio, and Cable & Data Sales are not subject to inclusion in the § 303(b)(1) calculation. But, it

appears that the eligible petitioning creditors are sufficient in number and amount of undisputed claims on the date of the petition to satisfy § 303(b)(1):

Fearnside III -- $18,000+
Joye Ganger - $918
Dipietrantonio - $19,000
Nancy Calloway - $10,000
Fearnside IV -- $5,000

26. The court has substantial concerns about the petitioning claimants' motivation in filing this involuntary petition. It appears to be an effort to use the bankruptcy system to avoid state court litigation and to gain control of the debtor. However, the debtor bears the burden of demonstrating the existence of bad faith by a preponderance of the evidence and, in the absence of such a showing, the filing is presumed to have been in good faith. United States Optical v. Corning, 991 F.2d 792, *3 (4th Cir. 1993) (unpublished decision). The court's concerns notwithstanding, the debtor has failed to carry its burden of demonstrating petitioners' bad faith.

27. For the above reasons, the court must conclude that the petitioning claimants have established their eligibility and satisfied the requirements of 11 U.S.C. § 303 (b)(1) for filing the involuntary petition against CLP.

Section 303(h) - Standard for Relief

28. Section 303(h) provides that:

> ...the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if -- (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute;...

29. The "generally not paying" its debts as they become due standard is a form of insolvency test, but is different than the definition of insolvency in 11 U.S.C. § 101. It is not a balance sheet test of assets and liabilities, and it is not an "equity insolvency" test. See Collier on Bankruptcy, § 303.14[1] at 303-81 and -82. The test is a factual determination. Id. The petitioning claimants have the burden of demonstrating entitlement to relief under this standard. In re Reid, 773 F.2d 945, 947 (7th Cir. 1985).

30. The time for determining whether the debtor is "generally paying" its debts is the date of the petition. In re Sims, 994 F.2d 210, 222 (5th Cir. 1993). The fact that a creditor has not made demand for payment is not relevant to this determination. In re West Side Community Hosp., 112 B.R. 243, 256 (Bankr. N.D. Ill. 1990). Of course, at least the disputed portion of debts that are the subject of bona fide disputes are not considered for this purpose.

31. Courts have articulated a variety of factors for determining when a debtor is "not generally paying" its debts as they come due. See, Collier on Bankruptcy, § 303.14 [1][b] at 303-

83 to -86. Here, it appears that under any such articulation it must be concluded that CLP was not generally paying its undisputed debts and they came due. Substantially all creditors who had loaned money to CLP were not being paid and had not been paid for some time. While Gasque vaguely suggested that these loans were really in the nature of equity investments, there is no evidence to support that assertion. The fact is that CLP has not had sufficient cash flow to pay its debts as they have come due.

Section 305 - Abstention

32. Section 305(a) provides that:

> The court, after notice and a hearing, may dismiss a case under this title...at any time if -- (1) the interests of creditors and the debtor would be better served by such dismissal....

Notwithstanding that this involuntary proceeding may qualify for relief under § 303, the court has concluded that it is appropriate in these circumstances to forgo the exercise of bankruptcy jurisdiction pursuant to § 305(a) (1).

33. The court recognizes that abstention is an extraordinary remedy and should be used only with appropriate care. The exact factors to be considered and the weight to be given each of them is highly sensitive to the facts of each individual case. In re Mazzocone, 200 B.R. 568, 575 (E.D. Pa. 1996). However, it seems particularly appropriate to consider its application in the context of an involuntary bankruptcy because the test of § 305(a) looks at

the interests of both the creditors (all of them and not just the petitioners), and of the debtor (who is in this bankruptcy proceeding involuntarily).

34. The courts have dismissed cases pursuant to section 305(a) in a variety of situations: (1) Where a group of dissident creditors attempts to obtain favorable treatment. In re Wine and Spirits Specialities, 142 B.R. 345, 347 (Bankr. W.D. Mo. 1992); In re Luftek, 6 B.R. 539, 547-48 (Bankr. E.D.N.Y. 1980); (2) Where there is no bankruptcy purpose to be served. In re Duratech Ind., Inc., 241 B.R. 291, 300 (Bankr. E.D. N.Y. 1999), aff'd. 241 B.R. 283 (E.D.N.Y. 1999); (3) Where state law proceedings may provide relief; See Realty Trust Corp., 143 B.R. 920, 926 (Bankr. D. N. Mar. I. 1992); In re Nahas, 95 B.R. 387, 388 (Bankr. W.D.Pa. 1989); and (4) Where the bankruptcy is essentially a two-party dispute. In re Rookery Bay, Ltd., 190 B.R. 949, 951 (Bankr. M.D. Fla. 1995). All of these factors are present in some form in this case.

35. This involuntary petition was filed by a small group of creditors (led by dissident minority shareholders/former directors) who represent only a small part of CLP's debt. Creditors such as Slossman who advanced substantially more funds to CLP and who had a far greater stake in CLP's future did not join the petition and did not willingly participate in the proceeding.

36. The involuntary petition appears to be driven largely by Calloway, Fearnside and Dipietrantonio, all of whom appear to have

interests that may conflict with other creditors. For example, a business such as CLP depends on borrowed funds to develop its product and business. Continuation in a bankruptcy case may severely chill CLP's ability to raise the funds it needs to develop its potential, and so could jeopardize its ability to repay other creditors. Such a result would be particularly egregious where, as here, it is produced by creditors with much less at stake than the creditors who are not petitioning for bankruptcy relief. See H.Rep No. 595, 95th Cong., 1st Session 325 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6281 (stating that the "paradigm" application of abstention occurs under section 305(a) when "an arrangement is being worked out by creditors and the debtor out-of-court, there is no prejudice to the rights of creditors in that arrangement, and an involuntary case has been commenced by a few recalcitrant creditors to provide a basis for future threats to exact full payment.").

37. The central purpose of the Bankruptcy Code "is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy . . . a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." Grogan v. Garner, 498 U.S. 279, 286 (1991). If there is any bankruptcy purpose to be served by this case, it is insignificant to other apparent goals of the petitioning claimants. While Fearnside and Calloway did not admit to any unstated agenda, it is apparent from the circumstances and

their actions that their goals are for other than "bankruptcy" purposes. In fact, it appears that Fearnside and Calloway are not owed anything by CLP, so debt collection cannot be one of their purposes. They both failed to assert counterclaims in a state court lawsuit filed against them by CLP, and attempt to assert such a claim in their petition. In re Jr. Food Mart of Arkansas, Inc., 241 B.R. 423, 427 (Bankr. E.D. Ark. 1999) ("dissatisfaction with another court's ruling, or the perceived untimeliness of rulings, is not a reason to file a bankruptcy case . . . it is not the province of the bankruptcy court to either oversee or manage a case more properly within the purview of the state courts simply because a party to the litigation is dissatisfied for procedural or other reasons.").

38. The timing of this petition, following closely Calloway and Fearnside's termination as CLP directors, bespeaks an effort to gain control of CLP and its patent rights. This is particularly significant because all of the relevant grounds for the petition had existed for many months prior to the termination of Calloway and Fearnside as directors, but they took no action.

39. A product of a Chapter 11 bankruptcy may be an opportunity to attempt to remedy CLP's default on the patent license and perhaps exercise the option. Of course, that is not a right that these unsecured creditors had pursuant to their Notes or state law. The function of the Bankruptcy Code is to facilitate

economic rehabilitation, not to provide a vehicle through which claimants may obtain greater rights than state law permits. Butner v. United States, 440 U.S. 48 (1979) ("property interests are created and defined by state law . . . there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a state . . . prevents a party from receiving a windfall merely by reason of the happenstance of bankruptcy.").

40. Other than the purported right to remedy CLP's arrearage on the patent license, it is hard to project much content for this Chapter 11 if it was to proceed except for the litigation of the four state (and Canadian) proceedings in either the bankruptcy court or the District Court. It appears that the existing state and Canadian proceedings are fully sufficient to resolve the respective rights of at least Calloway, Fearnside and Dipietrantonio with CLP. State law and state proceedings are adequate to provide remedies to anyone who might have been aggrieved by Gasque's or CLP's actions.

41. While this is technically not a "two-party dispute," it is tantamount to one. The petitioning claimants are associated with Fearnside and Calloway by blood, friendship or business connections. They all appear to be functioning as one unit with Fearnside and Calloway as their representatives. It appears that

none of these parties has rights that cannot be enforced through state court proceedings.

42. The court's resolution of this matter is consistent with the approach of other reported bankruptcy decisions. In the case of In re 801 South Wells St. Ltd. P'ship, 192 B.R. 718 (Bankr. N.D. Ill. 1996), two junior mortgagees filed an involuntary Chapter 11 petition against the debtor. The debtor's sole asset was an apartment building serving as collateral for the petitioning creditors' loans to the debtor. Both loans were undersecured and neither debtor would realize any of the proceeds from a sale of the apartment building under state law. The petitioners' plan of reorganization proposed to convert the apartment building into condominium units, sell the condominiums to the public, and distribute the proceeds of the sale to an entity the petitioning creditors would create. The court abstained pursuant to Section 305(a)(1) because the petitioning creditors attempted to use the bankruptcy code for "no legitimate purpose" and to receive more money through the use of the bankruptcy process than they were entitled to under state law. Id. at 723, n.1.

43. In summary, the court has concluded that the interests of creditors and the debtor would be better served by dismissal of this case for the following reasons: The debtor has not sought bankruptcy relief and is not seeking to avoid enforcement of any creditors' rights against it; the petitioning creditors appear to

be using the bankruptcy case for purposes other than traditional bankruptcy relief; the efforts of petitioning creditors may be inconsistent with and conflict with the interests of other creditors and the debtor; the state courts can give full effect to the creditors' rights against CLP (at least in part in the presently existing litigation); and, continuing the debtor in bankruptcy may adversely affect its ability to conduct its business to the detriment of the debtor and all of its creditors.

44. For all of the above reasons, the court has concluded that it should dismiss this bankruptcy case.

It is therefore **ORDERED** that the involuntary Chapter 11 bankruptcy petition against Consumer Lightning Products, Inc., Case No. 00-10730 (Bankruptcy W.D.N.C.) is hereby dismissed.

George R. Hodges

Dated as of date entered

George R. Hodges
United States Bankruptcy Judge