UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

In Re:	)	Case No. 96-31828
	)	Chapter 11
KERSHAW GOLD COMPANY, INC.,	)	
	)	
Debtor(s).	)	
	)	

JUDGEMENT ENTERED ON NOV 5 1996

MEMORANDUM OF FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF ORDER DISMISSING CASE

This matter is before the court on the Motion of Lancaster Mining Company, Inc. ("Lancaster") to dismiss the bankruptcy case of Piedmont Mining Company, Inc. ("Piedmont") for lack of good faith in filing and pursuant to 11 U.S.C. §§ 1112(b)(1) and (2); and the Motion of Lancaster and Haile Mining Company, Inc. ("Haile") to dismiss the bankruptcy case of Kershaw Gold, Inc. ("Kershaw"), a wholly-owned subsidiary of Piedmont, on identical grounds. These matters were heard together by the court on October 29 and 30, 1996. (This Memorandum is written to apply to both the Piedmont Mining Company and the Kershaw Gold Company, Inc. bankruptcy cases and identical copies are filed in each separate case).

Having considered the evidence, the record and arguments of counsel offered on the motions, the court has concluded that these cases should be dismissed on the basis of § 1112(b)(1) and (2). It

is evident that the continuing loss or diminution of the estate, the absence of a reasonable likelihood of rehabilitation, and the inability of the debtors to effectuate a plan require a such conclusion. Dismissal is also warranted pursuant to the dictates of *Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989). While dismissal is a drastic remedy, the court is convinced that it is mandated in these cases.

After the hearing on October 30 the court announced its decision, orally set out its reasons therefor on the record and entered its Orders Dismissing Case on that date. This Memorandum supplements the oral findings and conclusions and supports the Orders Dismissing Case with the following findings of fact and conclusions of law.

FINDINGS OF FACT

Parties and Procedural Background

1. The debtors Piedmont and Kershaw, its subsidiary, have been in the business of gold exploration and mining in the piedmont region of North and South Carolina, primarily at a property known as the Haile Mine located in South Carolina. In 1992 the debtors entered into a joint venture with Lancaster, a subsidiary of Amax Gold, Inc. for production of the Haile Mine. The parties executed the Haile Mining Venture Agreement and a Management Agreement with

Haile, the mine manager. Disagreements developed and the debtors ceased participation in the venture and initiated litigation.

2. This filing follows a series of litigation filings by the debtors in South Carolina. In March 1995, Piedmont and Kershaw filed a civil action against Lancaster, Haile and Amax Gold Inc. ("Amax") in the Court of Common Pleas of Lancaster County, South Carolina (the "State Court Action"). Piedmont and Kershaw alleged various breach of contract claims in connection with the Haile Mining Venture and Management Agreements, and tortious interference with contracts by Amax. Each defendant responded by filing motions to dismiss pursuant to S.C.R. Civ.P.12(b). The Honorable Don S. Rushing ruled on those motions in his Order dated November 1, 1995. A copy of Judge Rushing's Order was made a part of the record in this case. That Order effectively disposed of the State Court Action by (1) dismissing Piedmont as a party-plaintiff on all claims, (2) dismissing Amax as a party-defendant on all claims with the exception of Kershaw's claim for tortious interference, (3) severing Kershaw's tortious interference claim against Amax into a separate action, and (4) staying all remaining claims pending their submission to an arbitration panel for a determination of arbitrability.

3. The sole claim against Amax which survived Judge Rushing's Order (Kershaw's tortious interference claim which was severed into a separate action) was removed on November 7, 1995, to the United States District Court for the District of South Carolina, Rock Hill Division. A copy of the Notice of Removal was filed in the Lancaster County Clerk of Court's Office on November 8, 1995, thus completely divesting the State Court of jurisdiction over Kershaw's tortious interference action against Amax. While Kershaw initially moved for remand, that motion was withdrawn and Kershaw filed its amended Complaint in the U.S. District Court on January 29, 1996.

4. On November 15 and 21, 1995, Piedmont and Kershaw filed a motion and supplemental motion for the reconsideration of Judge Rushing's November 1, 1995, Order. Piedmont and Kershaw filed a series of briefs in support of these motions, the last of which was filed on December 14, 1995. In the intervening nine months, however, neither Piedmont nor Kershaw has taken any action to advance the resolution of the motions to reconsider or to commence a proceeding in arbitration. The Clerk of Court of Lancaster County attempted to schedule a hearing but Debtor's counsel was not available.

5. Prior to the initiation of Piedmont and Kershaw's action in Lancaster County, South Carolina, a dispute had also arisen among Lancaster, Piedmont and Kershaw concerning the allocation of environmental expenses pursuant to the indemnification provisions of the Option and Earn-In Agreement and the Haile Mining Venture Agreement (the "Lancaster Action"). In accordance with the contractual arbitration provisions of these agreements, Lancaster filed a Demand for Arbitration with the American Arbitration Association on May 24, 1995. The parties mutually selected arbitrators and the arbitration proceedings were commenced on January 15, 1996. Lancaster received an arbitration award on March 4, 1996, granting Lancaster an award of $1,371,408.15 against Piedmont and Kershaw.

6. Lancaster filed an Application for Confirmation of the arbitration award in the U.S. District Court for the District of South Carolina (C.A. No. 0:96-658-23). Piedmont and Kershaw moved to vacate the arbitration award or to stay the confirmation until after Kershaw's tortious interference action against Lancaster's parent company, Amax, was resolved. On March 23, 1996, Magistrate Judge Robert S. Carr issued a Report recommending that Piedmont and Kershaw's motion to vacate the arbitration award or to stay the confirmation proceeding be denied and that Lancaster's Application

for confirmation of the arbitration award and Motion for Judgment thereon be granted.

7. Piedmont and Kershaw objected to the Magistrate Judge's report and requested a *de novo* review by U.S. District Judge Patrick Duffy. Based upon the Magistrate's report, the briefs submitted and oral arguments, Judge Duffy, on August 14, 1996, granted Lancaster's Application for Confirmation, denied Piedmont's and Kershaw's request for a stay and ordered judgment entered in favor of Lancaster against Piedmont and Kershaw in the amount of $1,371,408.15 ("Judgment").

8. Lancaster docketed its Judgment in the Lancaster County Clerk of Court's office on the morning of September 9, 1996. Piedmont and Kershaw filed their respective Chapter 11 cases that afternoon. The automatic stay of 11 U.S.C. § 362 has stayed any further action by Lancaster to collect on its Judgment.

9. On October 1, 1996, the creditors, Lancaster and Haile, filed Notice and Motions for Orders Dismissing the bankruptcy petitions of Piedmont and Kershaw. A hearing date was set for October 28, 1996. On October 7, 1996, Piedmont and Kershaw filed a Joint Motion for Continuance asking that the Motion to Dismiss be deferred until after the resolution of the tortious interference action in the U.S. District Court for the District of South

Carolina. The court heard the motion for continuance on October 22, and denied it; but reset the Motion to Dismiss for hearing October 29 for the convenience of counsel. Thus, the Motion to Dismiss came before the court for hearing on October 29 and 30 and was granted on October 30, 1996.

Factual Background

10. At the hearing on October 29, 1996, the parties appeared through counsel and presented evidence to the Court. Lancaster and Haile presented exhibits including without limitation copies of the Venture and Management Agreements, certified copies of Judge Rushing's Order, Judge Carr's Report and Judge Duffy's Order and Judgment, and copies of both Piedmont and Kershaw's bankruptcy schedules filed in this court. Lancaster and Haile also offered excerpts from the sworn deposition of Norfleet Pruden, Tom Ross (the Corporate Secretary and Controller of Piedmont and Kershaw), Earl Jones (Piedmont's President and COO and Kershaw's Vice-President), Herb Osborne (Piedmont's consultant), and Robert Shields (Piedmont's Chairman, CEO and Treasurer and Kershaw's President). These deposition excerpts were received without objection and admitted. Piedmont and Kershaw offered all of Piedmont's Annual Reports, Piedmont's Press Releases and the 1995

Annual Report of Amax Gold, Inc. The Court heard the testimony of Terry Turner (Site Operation Manager for Haile) and Earl Jones.

11. Various entities have extracted gold from the Haile property since the early 1800's. The historic pattern is that mining activity would take place for a while, then ultimately close due to economic unfeasibility; after a period of no activity a new entity would begin operations, then close down. This pattern repeated itself a number of times from the 1800's through today. In the 1970's Earl Jones (an exploration geologist and presently Piedmont's president and Kershaw's vice-president) became convinced of the gold potential of the Haile site. He was involved with the property in a variety of capacities and ultimately purchased an interest in the Haile Mine through Piedmont. In 1985 Piedmont raised money for development of the mine through a public offering of its stock. Following its public offering in 1985, Piedmont began excavation and extraction of gold from oxide ores at the Haile Mine site. Between 1985 and 1990, Piedmont conducted its excavation and extraction of gold at the Haile Mine. It incurred losses in each year except 1990 when it made a small profit. Piedmont decided to stop mining in 1990 and excavation activities ceased in 1991.

12. Piedmont sought out and obtained additional new funding. In 1992 it entered into an Option and Earn-In Agreement ("Option") with a wholly owned subsidiary of Amax. The Option was assigned to Lancaster, which exercised its right to acquire a 62.5% interest in the Haile Mine. In order to acquire this 62.5% interest, Lancaster and its parent, Amax, paid Piedmont approximately $14 million in a combination of cash, shares of Amax's unregistered stock, and assumption of certain Piedmont indebtedness. Thereafter, Piedmont assigned its interest in the Haile Mine property to Kershaw. Lancaster and Kershaw entered into the Haile Mine Venture Agreement on July 1, 1992. Also in July, 1992, Kershaw and Lancaster entered into a Management Agreement with Haile.

13. With Lancaster/Amax's funding, the venture embarked on gold exploration at the Haile Mine for over a year. In 1994 a study indicated that exploitation of the mine would actually yield only a minimal return. Lancaster decided to curtail exploration. Kershaw and Piedmont disagreed. Kershaw/Piedmont ceased participating in venture decision-making and ceased contributing funds to the venture. Rather, they initiated and have pursued litigation since early 1995.

Absence of Business Activity by Debtors

14. Piedmont and Kershaw are not engaged in any ongoing business. Their only activity is litigation and required reporting.

15. Piedmont has three employees, all of whom are executives and one of whom is part-time: Robert Shields its Chief Executive Officer ("Shields"), whose salary is $150,000 per year; Earl Jones its President ("Jones"), whose salary is $100,000 per year and Thomas Ross, its Secretary and Controller ("Ross"), whose salary is $65,000 per year and who was described by Shields as a part-time employee.

16. Kershaw has no employees and no one is compensated as an employee for Kershaw. Its officers are Shields, President, Jones, Vice-President, and Ross, Secretary-Controller.

17. The principal function of Piedmont's officers has been to issue financial reports, to monitor and assist with the litigation between it and Kershaw Gold and Lancaster and its affiliates.

18. Although there was little evidence of Piedmont's or Kershaw's activity since 1991, their own Press Releases suggest that they had few activities beyond reporting information provided to it by Haile, as the manager of the mine.

19. Piedmont's principal office is located at the office of its controller's other business and simply houses financial records.

20. Piedmont made the decision in 1990 to cease mining prior to the Venture or the Option and did cease mining in 1991. Among the reasons Piedmont stopped mining was because it lacked necessary funding and was running out of oxide ore. Shields acknowledged that Piedmont was "using money faster than we were making it."

21. Piedmont had employed as many as 70-100 people in its business in the 1980's; however, employment declined to about 40 in 1990; and to about 25 in 1991. The number of employees was further reduced prior to the Venture in 1992 by the sale of the Debtor's sericite business. When the Venture was entered into on July 1, 1992, the employees at the Haile Mine became employees of Haile Mining.

22. Piedmont had operated the Haile Mine since the mid-1980's but had only made a profit in one year, 1990 (even without consideration of accruing environmental obligations). Gold mining operations create environmental and permit compliance costs and obligations.

23. Since early 1993, there has been no exploration on any property owned by Piedmont or its subsidiary, Piedmont Gold, Inc.

Neither Piedmont nor Kershaw has had any sales this year or for the past several years. 24. Piedmont is the owner of all of the stock of Kershaw and another subsidiary, Piedmont Gold, Inc. No value is listed in Piedmont's Schedules for either the stock of Kershaw or the stock of Piedmont Gold.

25. Piedmont contended at the hearing that its primary business was its interest in its subsidiary Kershaw by virtue of Kershaw's interest in the Haile Mine. However, the evidence is to the contrary. After February, 1995, neither Kershaw nor anyone on its behalf participated in any Venture meetings nor did Kershaw or Piedmont for Kershaw pay any Venture cash calls or other environmental obligations after February, 1995.

26. While the Venture Agreement provides that instructions for the operations of the Venture are to come from the Venture meetings and signed minutes which are to guide the Venture manager regarding the Haile Mine, the evidence shows that Kershaw has failed to participate in such meetings since February, 1995.

27. Terry Turner ("Turner"), the senior site operation manager for Haile Mining Company, the Manager of the Venture, testified about the Venture and confirmed the lack of participation, direction or contributions by Kershaw in the Venture since February, 1995.

28. The debts of the Venture are paid on a current basis by Haile Mining Company. Haile Mining has sent monthly cash calls to both Lancaster and Kershaw, along with other funding requests as appropriate, including ongoing environmental costs for permit compliance and maintenance of the property.

29. Jones, Piedmont's president and Kershaw's vice president, admitted that at least $600,000.00 was owed by Kershaw to the Venture as a result of unpaid cash calls and other payment demands. When Kershaw's portion of the cash calls were not paid, Lancaster paid additional funds to cover the shortfall. Kershaw and Piedmont are liable for all of the environmental claims and cost to cure problems caused by pre-Venture activities.

30. Shields, the chairman and chief executive officer of Piedmont and the president of Kershaw, had been at the Haile Mine site only once this year, and then with the group of arbitrators who heard Lancaster's claims against Piedmont and Kershaw.

31. Jones had only been at the Haile Mine twice in the past year, once in regard to showing an expert witness for part of the debtor's litigation.

32. In addition, Piedmont's stock has been delisted on the NASDAQ exchange.

33. Jones's testimony revealed the problems with any feasible or realistic business of the debtors. Jones described the ups and downs of gold mining. Piedmont historically needed money for the Haile Mine, cash was always tight, the mining operation historically lost money and it was hard to stop production because of the cost associated with the shutdown for environmental compliance and reclamation. Any remaining reserves at the Haile Mine are difficult to reach and are within layers of sulfur, which raises more environmental problems. Jones admitted that he never wanted to go into the production side of mining because of all of the problems and cost.

34. Although Jones referred to the fact that the bankable feasibility study had not been produced, he admitted that the Venture Agreement did not provide a time requirement for its preparation.

35. Jones testified that there is little prospect for sale of the Haile Mine because it has been offered too long and little or no interest has been shown in purchasing it.

36. Piedmont made a proposal in late 1994 to Lancaster to buy out Lancaster's interest in the Haile Mine. Jones described this offer by his own company as "bottom fishing." Piedmont did not have the financing in place to support this offer when it was made.

The offer was rejected by Lancaster who then sought other offers for its interest in the Haile Mine but was unsuccessful in selling its interest.

37. Jones testified at length about his view of prospects for Piedmont and Kershaw. While Jones appeared to be forthright and experienced, there was nothing concrete or of substance to support his conclusory opinions. They constitute generalized, unsubstantiated and unsupported opinions. The court cannot accept his testimony as reliable regarding these debtors' prospects. Jones appeared obsessed with the Haile Mine property and its potential. His optimism regarding the mine's potential appears to be unrestrained by the history and economic realities of developing this property. His testimony about the debtors' potential is more a demonstration of his hopes and dreams than realistic prospects for business rehabilitation. The fact is that, except for legal sophistication and the amount of money involved, it does not appear that much has changed in the debtors' business since the days of picks, pans and mules.

38. Neither Piedmont nor Kershaw have a realistic prospect for a reorganization or financial rehabilitation within a reasonable period of time. While there are gold reserves present on the debtors' properties, the debtors do not have the funding to exploit

them ($20-100 million); nor do the debtors have any prospect for obtaining that funding; nor is there anything of substance to indicate that the operation could be successful if the debtors obtained funding. There also appears to be no prospect for selling the debtors' interest or exploiting it otherwise. It appears that even if the debtors' litigation is "successful," they will even then be in essentially the same situation - with insufficient funding and no prospects for funding or sale in the reasonably foreseeable future.

No Realistic Prospects of Plan

39. No other funding of the debtors is available or planned other than by the consumption of Piedmont's finite and nonrenewing assets to litigate with Lancaster and its affiliates. The testimony of Ross was published for the record and reflected that he had not been told of any other arrangements by either Piedmont or Kershaw to fund, to underwrite or to advance monies to be used in connection with ongoing litigation other than the assets of Piedmont.

40. Other than its interest in Piedmont Gold and Kershaw, on which it placed no value in its bankruptcy schedules, Piedmont's assets consist mainly of the remaining consideration received from Lancaster when it paid Piedmont for its interest in the Venture.

41. Piedmont's assets are not being used to preserve or contribute to any business interest in the Haile Mine but are being consumed to pay Piedmont's officers over $300,000 per year and to pay the litigation costs.

42. Jones indicated that Piedmont could have a plan within three to four months. When prompted, he expressed hope of having a plan within thirty days. However, on cross-examination, Jones admitted that the debtors had no plan at this time and offered no realistic discussion of any recognizable business or plan in prospect. No persuasive evidence was presented of any realistic concept of a plan or the feasibility of any plan.

43. Any possible plan of Piedmont or Kershaw would be based upon contingent and substantial new money. No evidence was presented of any financing which had been sought by the debtors. The evidence presented establishes that cash had always been tight for production at the Haile Mine and Piedmont could not get the financing it needed.

44. The values which Piedmont and Kershaw sought to ascribe to their assets are speculative at best and as set forth above are not established as credible to the court. The values depend somewhat on the excitement for gold, which Jones testified is in a ten year decline. No competent evidence was presented as to the

cost or time involved in the future if debtors sought to operate a mine or where the funding for such activity would be found.

45. While the case is early in the bankruptcy process, based upon the history presented by Piedmont itself, it has been in the same position of speculative wishful thinking of unrealistic potential for years. The debtors have not forecast any realistic prospect for a feasible plan of reorganization.

Interests Involved

46. This is essentially a two-sided dispute between Piedmont and its affiliate and Lancaster and its affiliates. Lancaster is the sole substantial creditor of Piedmont. Lancaster and Haile are the only substantial creditors of Kershaw.

47. Piedmont has 13 other unsecured creditors whose claims total just $3,790.95 in addition to Lancaster. Lancaster has a Judgment from the United States District Court for the District of South Carolina against Piedmont and Kershaw for $1,371,408.15 plus interest. The majority of the other creditors of Piedmont are scheduled for current bills for utilities and services. The debtor's schedules reflect that the Debtor had cash of over $350,000 when it filed and it could have easily paid these claims.

48. Kershaw has no creditors other than Lancaster and Haile. Lancaster has a Judgment against Kershaw and other accruing claims.

49. The court realizes and has considered that there are interests other than those of the sole substantial creditors and the debtors here. The shareholders and the public have some interest in cases such as these. However, no concept of balancing or any other concept of equity supports a finding that it would be fair or appropriate to essentially elevate the interests of the shareholders over the interest of the sole substantial creditors.

50. The court finds no evidence that any of the shareholders or officers of the debtors are willing to provide any financial support in these cases to the debtors while the debtors place Lancaster at risk by continuing to consume the debtors' finite resources.

51. To continue the bankruptcy case and the stay would essentially shift all of the economic risks of this case to Lancaster for the benefit of the debtor and its shareholders.

52. The delays sought by the debtors in filing these cases and in the motions for continuance are prejudicial to Lancaster and Haile. The debtors continue to consume their finite assets for administrative fees, salaries and litigation costs.

Purpose For Filing Bankruptcy Cases

53. The debtors unconvincingly assert that the motivating factor in filing the cases was to forestall the threat of business

disruption. The evidence is to the contrary that the filings were motivated by a desire to obtain a stay of Lancaster's Judgment without posting a bond for the purpose of delaying and hindering Lancaster and obtaining tactical advantage in other litigation.

54. The debtors' resort to bankruptcy is just another step in Piedmont and Kershaw's ongoing litigation process.

55. Upon receipt of the arbitration award of $1,371,408.15 against Piedmont and Kershaw Gold, Lancaster filed an Application for Confirmation in the United States District Court for the District of South Carolina. Piedmont and Kershaw filed a motion to stay the confirmation proceeding or to vacate the arbitration award pending resolution of their other litigation. The Magistrate Judge denied that motion and recommended confirmation of Lancaster's award. Piedmont and Kershaw objected to the Magistrate Judge's report and again sought in the District Court a stay of the confirmation proceeding pending resolution of the other litigation.

56. On August 14, 1996, the District Court granted Lancaster's Application for Confirmation, denied Piedmont's request for a stay and ordered judgment entered thereon in favor of Lancaster against Piedmont and Kershaw in the amount of $1,371,408.15 ("Judgment") and denied the motions of Piedmont and Kershaw for a stay of the confirmation proceedings.

57. Lancaster docketed its Judgment in the Lancaster County Clerk of Court's Office on the morning of September 9, 1996. Piedmont and Kershaw subsequently filed their respective Chapter 11 cases that afternoon, thus staying any further action by Lancaster to collect on its judgment.

58. On September 10, 1996, Piedmont and Kershaw filed a Notice of Appeal of the Judgment.

59. Had Piedmont and Kershaw not filed bankruptcy the previous day, they would have been required to pay the judgment, risk execution or post a *supersedeas* bond.

60. The effect of the filing of this case was to get a stay pursuant to 11 U.S.C. §362 from the bankruptcy court, after being denied the same by the District Court, without the posting of a bond or without doing any more than paying the filing fee.

61. Piedmont and Kershaw unsuccessfully sought a continuance of the hearing on the Motion to Dismiss to stay the effect of entry of the Judgment until such time as the Debtors can play out their litigation strategies in their other cases. This argument, which is the same that was denied by both Judge Carr and Judge Duffy, was denied in this court.

62. Following the filing of the petitions, Piedmont issued a press release concerning the reason for the bankruptcy filings.

The best statement of the debtors' purpose in filing bankruptcy is contained in this press release of Piedmont in which Shields is quoted as follows:

> "We have determined that this action is necessary in order for us to continue to vigorously pursue our claims against Amax Gold. Recent efforts to mediate our dispute with Amax Gold have not been fruitful, so we must now resort to bankruptcy protection to assure that we will have the opportunity for our claims to be heard by a court....The bankruptcy filing automatically stays the enforcement of the judgment."

There is nothing in the press release about any intentions concerning business operations or anything other than about litigation.

63. All of the circumstances and the debtors' actions and statements at the time of filing demonstrate that what Piedmont and Kershaw seek is a delay as a substitute for an appeal bond or an injunction so that they can pursue other litigation.

64. It is not appropriate to use Chapter 11 as a bond or a delay or as a litigation tactic.

65. No permissible reorganization purpose is served by these cases and it would be both futile and an abuse of the bankruptcy process for Piedmont or Kershaw to remain in Chapter 11.

66. The debtors' motivation in filing bankruptcy was to frustrate, hinder and delay their sole substantial creditors without any intent or ability to reorganize.

CONCLUSIONS OF LAW

67. The court recognizes that dismissal of a bankruptcy case is a drastic measure with serious consequences. The court has concluded that dismissal of this case is required on account of a) the continuing diminution of the estate without a reasonable likelihood of rehabilitation; b) the debtors' inability to effectuate a plan; and c) the debtors' bad faith in filing their petitions.

68. The evidence clearly establishes continuing loss to and diminution of the estate and the absence of a reasonable likelihood of rehabilitation, within the meaning of 11 U.S.C. § 1112(b)(1). The debtors' resources are being spent on salaries, fees and costs for pursuing litigation with no realistic prospect that whatever potential exists can be realized even if the litigation is "successful."

69. The evidence further establishes the inability of the debtors to effectuate a plan or even the realistic prospect of an effective reorganization or rehabilitation within any reasonable period of time, within the meaning of 11 U.S.C. §1112(b)(2). The

debtors' operations have historically been unsuccessful. Their need for cash is tremendous. Yet, there are no plans or prospects for raising funds or operating successfully. To the extent they exist at all, debtors' plans are wholly speculative.

70. The Fourth Circuit set out the standards for dismissal for lack of good faith filing in Carolin Corp. v. Miller, 886 F.2d 693 (4th Cir. 1989). There the Court required "that both objective futility and subjective bad faith be shown in order to warrant dismissals for want of good faith filing." 886 F.2d at 700-701. The Court described the "objective futility" element as follows:

> The objective futility inquiry is designed to insure that there is embodied in the petition "some relation to the statutory objective of resuscitating a financially troubled [debtor]." [Citation omitted]. It should therefore concentrate on assessing whether "there is no going concern to preserve...and...no hope of rehabilitation, except according to the debtor's 'terminal euphoria.'" [Citation omitted].

886 F.2d at 701-702. It described the "subjective bad faith" element as follows:

> The subjective bad faith inquiry is designed to insure that the petitioner actually intends "to use the provisions of Chapter 11...to reorganize or rehabilitate an existing enterprise , or to preserve going concern values of a viable or existing business." [Citation omitted]. Put obversely, its aim is to determine whether the petitioner's real motivation is "to abuse the reorganization process" and "to cause hardship or to delay creditors by resort to the Chapter 11 device merely for the purpose of invoking the automatic stay, without

an intent or ability to reorganize his financial activities." [Citation omitted].

886 F.2d at 702.

71. The futility of the debtors remaining in Chapter 11 cases was as clearly established by the economic evidence. Piedmont and Kershaw have neither an ongoing business to protect nor a realistic prospect of an effective reorganization or rehabilitation within any reasonable period of time. There are no business operations, there have not been for some time, and there are no realistic prospects for such operations within any reasonable period of time. There are no substantial creditors other than Lancaster and Haile and no substantial activity other than litigation. Any potential for these debtors is too speculative to support remaining in Chapter 11.

72. It is also clear that Piedmont and Kershaw filed their petitions in subjective bad faith. The evidence establishes that these cases are essentially two-sided disputes. It is a fair inference that people intend the effects of what they do; and here, the effect of filing and continuing these bankruptcy cases is simply stay and delay. Moreover, the Chairman of Piedmont and President of Kershaw announced that the purpose in filing was to obtain a stay of Lancaster's Judgment in order to continue other

litigation with those creditors. Plainly, the evidence shows that the debtors are attempting to use their cash and liquid assets otherwise available to satisfy their creditors to fund continued litigation. This bankruptcy is just another step in that ongoing litigation process. Within this case, the debtors have sought indefinite continuance of this hearing until its pending litigation has been concluded, which would have constituted an effective denial of the motions for dismissal. It is not a proper purpose to use the bankruptcy court in an effort to hinder and delay the debtors' sole substantial creditor when there is no realistic prospect of reorganizing or rehabilitating the debtors, and there is no persuasive and credible evidence of any realistic plans or purpose to reorganize or rehabilitate the debtors.

73. A finding of "bad faith" does not require an element of malfeasance or moral turpitude and there is no evidence of such intent here. It is sufficient for a finding of subjective "bad faith" that these debtors have filed bankruptcy cases for the improper purposes noted above.

74. Based upon the totality of the evidence, both objective futility and subjective bad faith on the part of the debtors has been established.

75. Cause exists and has been shown for the dismissal of this Chapter 11 case within the meaning of 11 U.S.C. § 1112(b) and Carolin.

Dated: November 5, 1996.

George R. Hodges
United States Bankruptcy Judge