

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:

**ANESTHESIA HEALTHCARE PARTNERS, INC.,
AHP ASSOCIATES OF TEXAS, P.A.,
AHP OF CENTRAL GEORGIA, P.C.,
AHP OF ILLINOIS, INC.,
AHP OF NORTH CAROLINA, INC.,
AHP OF NORTHWESTERN LOUISIANA, LLC,
AHPM OF GEORGIA, INC.,
ANESTHESIA HEALTHCARE PARTNERS
OF FLORIDA, INC.,
HBL ANESTHESIA SERVICE, LLC,
MEDFINANCIAL, LLC,**

Case No. 14-59631-wlh

Case No. 14-59632-wlh

Case No. 14-59633-wlh

Case No. 14-59634-wlh

Case No. 14-59635-wlh

Case No. 14-59636-wlh

Case No. 14-59637-wlh

Case No. 14-59639-wlh

Case No. 14-59640-wlh

Case No. 14-59641-wlh

**(Jointly Administered
under Anesthesia Healthcare
Partners, Case no. 14-59631)**

DEBTORS.

CHAPTER 11

UNITED STATES TRUSTEE'S MOTION TO DISMISS OR CONVERT

COMES NOW the United States Trustee for Region 21, in furtherance of the administrative responsibilities imposed by 28 U.S.C. § 586(a), and pursuant to 11 U.S.C. § 1112(b) respectfully moves this Court to enter an order dismissing the above-captioned chapter 11 cases or, in the alternative, converting them to cases under chapter 7 of the Bankruptcy Code.

In support thereof, the United States Trustee represents as follows:

1. The affiliated Debtors commenced these cases by filing separate petitions (the “**Petitions**”) for relief under chapter 11 of the Bankruptcy Code on May 15, 2014, and each has maintained the status of debtor in possession since that date pursuant to 11 U.S.C. §§ 1107(a)

and 1108. The cases are being jointly administered pursuant to an order authorizing joint administration entered on May 22, 2014 [Doc. No. 23].¹

2. Each of the Petitions was signed by Sean M. Lynch (“**Mr. Lynch**”) in the capacity of CEO of the Debtor.² According to the Petition and the Statement of Financial Affairs filed in each case, Mr. Lynch is also the sole owner of each Debtor.

3. Pursuant to an order entered on July 10, 2014 [Doc. No. 86], as modified by an order entered on August 27, 2014 [Doc. No. 146] (together the (the “**Modified Retention Order**”), the Court authorized Debtors to employ Carl Marks Advisory Group, Inc. (“**CMAG**”) “to provide [them] with the services of F. Duffield Meyercord (‘Meyercord’) as Chief Restructuring Officer (‘CRO’)” and with the services of other CMAG personnel considered necessary to enable Meyercord to perform his duties as CRO.

4. Under the terms of the Modified Retention Order, CMAG’s employment is governed by an amended Consulting Agreement attached thereto as Exhibit “A” (the “**Consulting Agreement**”) [Doc. No. 146, pp. 9-23], except to the extent the Consulting Agreement is modified by the Modified Retention Order. The Modified Retention Order provides, *inter alia*, that “CMAG’s responsibilities and scope of employment shall include, but not be limited to, having the authority and decision making power to hire, retain and terminate employees, determining any compensation and severance related thereto, to decide which executory contracts and leases to assume or reject, and anything else generally associated with the day to

¹ All references to the record are to the docket in the lead case, Anesthesia Healthcare Partners, Inc., Case No. 14-59631.

² In the three cases in which the Debtor is an LLC, Mr. Lynch signed the Schedules and Statement of Financial Affairs as Managing Member rather than as CEO.

day management and business operations of the Debtors.” *Id.* at p. 23. However, by its terms, the Consulting Agreement may be “canceled with or without cause by either party on ten (10) business days prior written notice ...” *Id.* at p. 11.

5. On January 13, 2015, Mr. Lynch filed a “Request for Payment of Chapter 11 Administrative Expense, or in the Alternative, Motion Seeking Approval of Employment Contract” [Doc. No. 267], requesting compensation for services rendered during the pendency of the case as Debtors’ CEO. Mr. Lynch asserts in this motion that he received a letter from Debtors’ counsel dated October 29, 2014 (attached thereto as Doc. No. 267-3), advising him that effective November 1, 2014, Debtors would cease paying him any salary, for the stated reason that “[t]he terms of your retention state that you receive monthly payments through the closing date of the sale of all or substantially all the Debtors’ assets[, and it] now appears that there will be no sale of all or substantially all the Debtors’ assets”

6. Under the circumstances set forth above, it is apparent that Debtors have ceded control over their respective bankruptcy estates and the administration of their respective bankruptcy cases to CMAG. Where a chapter 11 debtor is not free to exercise its fiduciary duties as a debtor in possession, cause exists for the appointment of a trustee. *See In re Bellevue Place Associates*, 171 B.R. 615, 624-625 (Bankr. N.D.Ill. 1994) (holding that where debtor in possession was “under the complete control and direction of one secured creditor” by virtue of an agreement ceding control to such creditor, it was unable to fulfill its fiduciary duties as a debtor in possession, and cause existed for appointment of trustee). *Cf. Wolf v. Weinstein*, 372 U.S. 633, 649, 83 S.Ct. 969, 979 (1963) (“[S]o long as the Debtor remains in possession, it is clear that the corporation bears essentially the same fiduciary obligation to the creditors as does the trustee for

the Debtor out of possession.”); *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 355, 105 S.Ct. 1986, 1994 (1985).

7. Although these cases have been pending for over eight months, Debtors have not yet proposed a chapter 11 plan, and upon information and belief they lack the ability to reorganize and do not presently intend to file a chapter 11 plan. Further, there appears to be no possibility that unsecured creditors could benefit from further administration of the case, because SunTrust Bank asserts a blanket lien on Debtor’s assets as security for a claim that, upon information and belief, is substantially greater than the value of those assets. Failure or inability to propose a plan within a reasonable period of time constitutes cause for dismissal or conversion of a chapter 11 case under 11 U.S.C. § 1112(b). See *In re American Capital Equipment, Inc.*, 405 B.R. 415, 426-7 (Bankr. W.D.Pa. 2009) (inability “to effectuate a confirmable plan within a reasonable period of time ... remains a viable basis for conversion given that ‘the list of examples of cause ... under [11 U.S.C.] section 1112(b)[(4)] is not exhaustive’”), quoting 7 COLLIER ON BANKRUPTCY, ¶ 1112.04[5][b] at 1112-38 (Bender 2008)); *In re DCNC North Carolina I, LLC*, 407 B.R. 651, 665 (Bankr. E.D.Pa. 2009) (“Fundamental bankruptcy policy continues to support the proposition that the inability to propose a feasible reorganization or liquidation plan provides ‘cause’ for dismissal or conversion of a chapter 11 case on request of an interested party.”). See also *In re Global Ship Systems, LLC*, 391 B.R. 193, 202 (Bankr. S.D.Ga. 2007); *In re 3 Ram, Inc.*, 343 B.R. 113, 116-17 (Bankr.E.D.Pa.2006); *In re Ameribuild Const. Management, Inc.*, 399 B.R. 129, 131-2 (Bankr. S.D.N.Y. 2009); *In re Pittsfield Weaving Co.*, 393 B.R. 271, 274 (Bankr. D.N.H. 2008).

8. Debtors have filed no monthly operating reports accounting for their receipts,

disbursements and other operating results since November, 2014. Debtors' failure to file such reports in a timely manner is violative of their statutory obligations under 11 U.S.C.

§ 704(a)(2)&(8), made applicable to them as debtors in possession by 11 U.S.C. §§ 1106(a)(1) and 1107, and constitutes cause for dismissal or conversion of the cases under 11 U.S.C. § 1112(b)(4)(F)&(H).

9. Debtor has not paid the chapter 11 quarterly fees due and owing in the case under 28 U.S.C. § 1930(a)(6) for the fourth quarter of 2014, in the combined estimated amount of \$33,150.00. Nonpayment of these statutory fees constitutes cause for dismissal or conversion of the case under 11 U.S.C. § 1112(b)(4)(K).

WHEREFORE, the United States Trustee respectfully moves this Court to enter an order dismissing these cases or, in the alternative, converting them to cases under chapter 7 of the Bankruptcy Code, and granting such further relief as the Court deems just and proper.

GUY G. GEBHARDT
Acting United States Trustee
Region 21

/s/

JAMES H. MORAWETZ
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CERTIFICATE OF SERVICE

I certify that I am over the age of 18 and that on this date I electronically filed the foregoing Notice of Appearance with the Clerk of Court using the CM/ECF system, which will cause electronic notification of such filing to be sent, *inter alia*, to the following:

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This the 3rd day of February, 2015.

/s/
JAMES H. MORAWETZ
Trial Attorney