UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

IN RE:	)	
	)	
TCR of Denver, LLC	)	05-45287-SBB
Tax Identification No.: 37-1474350	)	Chapter 11
	)	
Debtor.	)	

UNITED STATES TRUSTEE'S RESPONSE TO ISSUES PRESENTED UNDER THE COURT'S ORDER ON REVISIONS TO 11 U.S.C. § 1112(b)

The United States Trustee ("UST"), by and through undersigned counsel, hereby files his Response to Issues Presented Under the Court's Order on Revisions to 11 U.S.C. § 1112(b) ("Response"). In support of his Response, the UST states as follows:

I. ISSUES PRESENTED

1. Whether 11 U.S.C. § 1112(b) requires a party in interest to establish *all* of the items constituting "cause" before a case *shall* be dismissed by the Court.

2. Whether a Chapter 11 debtor *may or can voluntarily* dismiss a case without demonstrating "cause" under 11 U.S.C. § 1112(b)(4)?

II. STATEMENT OF THE CASE

In the Bankruptcy Abuse and Consumer Protection Act of 2005, ("BAPCPA"), Congress amended 11 U.S.C. § 1112(b). In its Order Directing the Filing of Briefs ("Order"), the Court states that:

> [I]n the amended 11 U.S.C. § 1112(b)(4)(O), those items listed as "cause" are stated in the conjunctive "and" versus the former language of the statute, which used the disjunctive "or." This is clearly a deliberate and specific change in the language of the statute . . . Congress has purposefully limited the role of this Court in deciding issues of conversion or dismissal, such that this Court has no choice, and no discretion, but to convert or dismiss a case

> under Chapter 11 if "cause" is shown under 11 U.S.C. §1112(b)(4), unless the provisions of 11 U.S.C. § 1112(a)(3) apply. (citations omitted).

The Court further states in its Order that:

> [I]t would appear that the use of the word "includes," as defined in the rules of construction of the Code, is not limiting. Moreover, in conjunction with the word "and" instead of "or" it does seem that, perhaps, all of the factors must be met by a moving party in interest, *including a debtor-in-possession*, before a case can be dismissed under Chapter 11. (citation omitted). Specifically, as the authors of *Collier on Bankruptcy* noted:
>
> 'It was not intended that the definitions of words used in the 1898 Act which read "shall include" should exclude other meanings. However, it was intended that words so defined would be held to include what was expressed.' (citation omitted).
>
> Using this analysis, it would appear that all of the specifically identified factors demonstrating "cause" under 11 U.S.C. §1112(b)(4) must be shown, *plus*, there may be other factors to supplement the specifically delineated factors.

The UST's Response follows.[1]

III. STATEMENT OF THE FACTS

TCR of Denver, LLC ("Debtor") initially sought protection under the debt reorganization provisions of Chapter 11 of the Bankruptcy Code. Shortly after filing, the UST discovered that the Debtor was unable to maintain the appropriate insurance for its sole asset, a townhouse development project known as Stanford Commons located at 9791 West Stanford Avenue, Denver, Colorado ("Property"). Further, the UST discovered that the Debtor's Property had

[1]The UST notes that the language in 11 U.S.C. §1112(b)(4) is similar to amended 11 U.S.C. §1208(c). The language in 11 U.S.C. §1307(c), however, is dissimilar. Pursuant to this Court's Order, the UST's Response addresses only the unique text in 11 U.S.C. §1112(b)(4).

numerous City of Denver Ordinance zoning violations, creating a potential threat to public safety. The UST contacted Debtor's counsel and advised that if Debtor failed to produce proof of insurance, the UST would move to dismiss Debtor's case.

Since the Debtor promptly filed a motion under 11 U.S.C. § 1112(b) seeking permission for voluntary dismissal of its case,[2] the filing of such a motion by the UST was unnecesary. Debtor, however, failed to file a Notice pursuant to Local Bankruptcy Rule 202. Then, U.S. Capital, Inc. (the largest creditor and holder of the promissory note of the Property) ("U.S. Capital"), filed a Request for Emergency Action on Debtor's Motion to Dismiss Bankruptcy and a Request for Emergency Relief From Stay to Maintain Receiver in Place and For Receiver to Prosecute Motion to Borrow Funds and Obtain Insurance.

On December 27, 2005, the Court set a hearing on the Debtor's Motion to Dismiss for January 17, 2006, "because Debtor failed to comply with 11 U.S.C. Section 1112(b)(1)." On December 28, 2005, the Court entered an Order granting U.S. Capital's requested relief in connection with U.S. Capital's Request for Emergency Relief From Stay to Maintain Receiver in Place and For Receiver to Prosecute Motion to Borrow Funds and Obtain Insurance. On December 30, 2005, the Court entered a *sua sponte* Order requesting the parties, including the UST, to file legal briefs on issues presented in connection with the recent revisions to 11 U.S.C.

[2] The Debtor's motion does not mention that the Debtor has not been able to maintain appropriate insurance. Instead, Debtor states it "has received notice that the main secured creditor in the case objects to debtor's plan to sell the Property at fair market value for cash and distribute the proceeds to creditors. This creditor's objection will make it very difficult, if not impossible, to confirm a plan in this case." Debtor's Mot. for Voluntary Dismissal at ¶2.

§ 1112(b).[3]

IV. SUMMARY OF ARGUMENT

In BAPCPA, Congress amended 11 U.S.C. § 1112(b). In the amended 11 U.S.C. § 1112(b)(4)(O), those items listed as "cause" include a nonexclusive list of examples that are stated in the conjunctive "and" versus "or," as set forth in the former language of the statute. As amended, cases can continue to be dismissed for cause if the moving party establishes any of the non-exhaustive factors set forth in section 1112(b)(4). This interpretation of amended section 1112(b) is consistent with Supreme Court and the Tenth Circuit decisions ruling the term "and" in federal statutes can be disjunctive. And as the Supreme Court and the Tenth Circuit also have ruled, a disjunctive reading of "and" is particularly appropriate when, as here, "and" is used in a statute in conjunction with "includes." A disjunctive reading also is consistent with the rules of construction mandated by section 102 of the Code. And a conjunctive construction would make the statute absurd as the United States Trustee cannot identify even a single case where all section 1112(b)(4)'s definitions of cause were met.

Further, just as in pre-BAPCPA cases, the Debtor must demonstrate "cause" under 11 U.S.C. § 1112(b)(4). In the instant case, the parties agree that dismissal is in the best interest of creditors and the estate.

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[3]The Court's Order is a result of (1) Debtor's Motion for Voluntary Dismissal of Chapter 11 Case; (2) U.S. Capital's Request for Emergency Action on Debtor's Motion to Dismiss; and (3) the recent revisions to the United States Bankruptcy Code, as a result of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

V. ARGUMENT

A. 11 U.S.C. § 1112(b) DOES NOT REQUIRE A MOVANT TO ESTABLISH ALL OF THE GROUNDS CONSTITUTING CAUSE FOR CONVERSION OR DISMISSAL.

1. A Disjunctive Interpretation Of "And" Is Appropriate When "And" Appears In Conjunction With "Including."

Amended 11 U.S.C. § 1112(b)(4), provides cases can be dismissed for cause, then lists some things that constitute cause, and separates the last two items on that list with an "and." Previously, a shorter list was separated by the term "or." Despite the change, 11 U.S.C. § 1112(b) does not require a movant to establish all of the grounds constituting "cause" before a case should be dismissed.

First, the Supreme Court and the Tenth Circuit have construed 'or' as meaning 'and,' and 'and' as meaning 'or.'"[4] Kerlin's Lessee v. Bull, 1 Dall. 175 (1786) (Supreme Court ruled an "and" must be construed as "or"); United States v. Fisk, 70 U.S. 445, 447 (1865) (again ruling an "and" was disjunctive); U.S. v. Mungia-Sanchez, 365 F.3d 877 (10th Cir. 2004) (ruling "and" meant "or" in the United States' criminal sentencing guidelines).[5] See also Thomas v. City of

[4]"The terms 'and' and 'or' are often misused in drafting statutes." 1A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 21:14 (6th ed. 2003). The inappropriate use of these words is found in many statutory enactments. Id. "There has been, however, so great laxity in the use of these terms ["and" and "or"] that courts have generally said that the words are interchangeable and that one may be substituted for the other, if consistent with the legislative intent. Id. (citations omitted).

[5]Accord Bruce v. First Federal Savings and Loan Ass'n of Conroe, Inc., 837 F.2d 712 (5th Cir. 1988) (holding that "and" should be given a disjunctive rather than conjunctive meaning in interpreting list of requirements under the Thrift Institutions Restructuring Act (TIRA)); Peacock v. Lubbock Compress Co., 252 F.2d 892, 893-95 (5th Cir. 1958), cert. denied, 356 U.S. 973 (1958) (interpreting the phrase "ginning and compressing of cotton" to mean "the performance of either or both"); United States v. Cumbee, 84 F. Supp. 390, 391 (D. Minn. 1949) (reading "and" to mean "or" in the phrase "this subchapter and Part VIII" of another subchapter); See also 82

Grand Junction, 13 Colo. App. 80 (1899) (Court substituted "and" for "or").[6] This reading is consistent with the dictionary reading of "and." It makes clear that the word can sometimes mean "or."[7]

Reading section 1112(b)'s "and" in the disjunctive also is consistent with the rules of statutory construction mandated by section 102 of the Code and the structure of section 1112(b). First, under the Rules of Construction, the word "or" is "not exclusive." 11 U.S.C. § 102(5). Second, the use of the word "includes" in section 1112(b) is not limiting, 11 U.S.C. § 102(3). Third, the plain language of section 102(3) is consistent with the way courts have interpreted it

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C.J.S *Statutes* § 331 (2005) ("Conjunctive words used in a statute may be construed as disjunctive.") (citations omitted).

[6]The Court in Thomas stated the following:

> [T]o carry out the intention of the legislature, another word may be read for the word used, where the word used would manifestly defeat the legislative intent and the substitution of the other would carry it out. These may be said to be exceptions to the general rule as above announced, [that all words and phrases used in a statute shall be understood and construed according to the approved and common usage of the language, and that some meaning shall be given to every word used], . . . Especially with reference to the words 'or' and 'and' has it been frequently necessary to invoke this latter rule. As said by Mr. Sutherland: 'The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. . . 'To carry out the intention of the legislature, it is occasionally found necessary to read the conjunctions 'or' and 'and,' one for the other. (quotations omitted).

[7]Although "and" is defined as "[a] conjunction connecting words or phrases, expressing the idea that the latter is to be added to or taken along with the first," it is "[s]ometimes construed as 'or.'" BLACK'S LAW DICTIONARY 79 (5th ed. 1979). According to Garner's Modern American Usage, "[o]ddly *and* is frequently misused for *or* where a singular noun, or one of two nouns is called for . . . ." Bryon A. Garner, Garner's Modern American Usage 44 (2003).

within the context of section 1112(b), where case law clearly establishes that a lack of good faith constitutes sufficient cause for dismissal regardless of whether it is specifically articulated in section 1112(b). In re Zahniser, 58 B.R. 530, 534 (Bankr.D. Colo. 1986) (citation omitted). See In re Muskogee Environmental Conservation Co., 236 B.R. 57, 66 (Bankr.N.D. Okla. 1999) (citations omitted). This supports a disjunctive reading of section 1112(b). (Although lack of good faith is not enumerated under 11 U.S.C. § 1112(b)(4), it constitutes cause under 1112(b)). As stated below, committee reports dated in 1998 and 1999 expressly state that the list of causes under 11 U.S.C. § 1112(b) is not exclusive. Accordingly, the factors listed under 11 U.S.C. § 1112(b)(4) that establish "cause" should remain nonexclusive.

The use of the term "includes" in 11 U.S.C. § 1112(b) is not limiting. The rules of construction under 11 U.S.C. § 102 state that the terms "includes" and "including" are not limiting, 11 U.S.C. § 102(3).[8] Congress codified the ruling of the Supreme Court in American Surety Co. v. Marotta, 287 U.S. 513 (1932) in 11 U.S. C . § 102(3). In Marotta, the court analyzed the language in a bankruptcy statute containing the definition of "creditors," and clarified the difference between the definitions "shall mean" and "shall include." The court explained that "include" is "[f]requently, if not generally, used as a word of extension or enlargement rather than as one of *limitation or enumeration*." Marotta, 287 U.S.S. 513, 517 (emphasis added). The Court stated that "shall mean" is limiting and is the same as saying "shall include only" and that if Congress wanted "include" to have a restrictive effect, it would have stated either "shall mean" or "shall only include" in the statute at issue therein. Id.

[8]Although 11 U.S.C. § 102 states that the terms "includes" and "including" are not limiting, 11 U.S.C. § 102 neither defines the word "and" nor defines the word "and" when it appears in conjunction with "including." See 11 U.S.C. § 102(3).

The Tenth Circuit case, U.S. v. Mungia-Sanchez, 365 F.3d 877 (10th Cir. 2004)[9] is particularly instructive inasmuch as the court held that "and" can be disjunctive and noted that such a disjunctive interpretation is particularly appropriate when "and" appears in conjunction with "includes." The court stated as follows:

> In particular, the use of the word 'and' in the definition of a crime of violence in the USSG § 2L1.2 commentary is not sufficient to establish that the test is conjunctive. 'Although the word 'and' is usually a conjunctive, to ascertain the clear intention of the legislature[,] . . . courts are often compelled to construe 'or' as meaning 'and' and again 'and' as meaning 'or.''(quotation marks and citations omitted); (Despite the Sentencing Commission's use of the conjunctive 'and' between subparts (I) and (II), we read the two subparts as presenting alternative definitions of 'crime of violence rather than a two-pronged test requiring satisfaction of both subparts.'').
>
> The Commission's *use of the word 'includes' to introduce subpart II supports this disjunctive reading. 'The 'and' in § 2L1.2 is followed by 'includes' which is an illustrative construction, not a limiting construction.'* (emphasis added) (citation and quotation omitted).
>
> Moreover, subpart II of the 'crime of violence' definition lists several offenses that do not require the proof of the use or threatened or attempted use of force, for example 'extortionate extension of credit' and 'burglary of a dwelling.'(citation and quotation omitted). The fact that those offenses are 'crimes of violence' indicates that the definition is disjunctive; the contrary reading-that an offense must satisfy both subparts-would mean, nonsensically, that those offenses could not be crimes of violence, even though they are specifically listed as such. (citations and quotation omitted).

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[9]Munguia pleaded guilty to unlawfully re-entering the United States after having been deported and convicted of an aggravated felony that is a crime of violence. Id. At 878. Munguia argued that the district court erred in applying the 16-level enhancement under the Sentencing Guidelines because a conjunctive test should be applied to determine what constitutes a crime of violence. Id. at 879. The Sentencing Guidelines use the word "includes" to introduce the enumerated terms under "crime of violence" which are separated by "and." Id. at 880.

As the Court in Munguia noted, "and" is sometimes conjunctive and sometimes disjunctive. This is just as true in the Bankruptcy Code as in other parts of federal law. Indeed, there are places in the Bankruptcy Code where "and" is conjunctive, but "and" as used in section 1112(b), is not conjunctive. In the instant case, given the use of "and" in conjunction with "including," particularly given the express definition of "including" in section 102(3), the text of section 1112(b) must be read as meaning that "and" in 11 U.S.C. § 1112(b)(4) is disjunctive.[10]

Finally, as recently as 2004, the Justice Department filed a brief in opposition to a petition for a *writ of certiorari* with the Supreme Court arguing to the Court that a use of "and" in conjunction with "includes" in the United States Sentencing Guidelines was disjunctive.[11] Like

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[10]Prior to November 2001, the Sentencing Guidelines at § 2L1.2(b)(1) provided a 16-level sentencing enhancement for any defendant convicted of illegal re-entry following deportation for any aggravated felony. In response to concerns that a blanket 16-level enhancement was disproportionately harsh for some felonies prompted the Sentencing Commission to amend the Guidelines and provide graduated enhancements for subcategories of aggravated felonies. In other words, the Guidelines in Munguia were changed to obviate the "and" problem, which Munguia relied upon. In contrast, BAPCPA were changed to substitute "and" for "or." Despite this distinction, there is nothing in the legislative history of section 1112(b) stating that the use of "and" rather then "or" was intended to make the statute conjunctive.

[11]See Brief for the United States in Opposition ("Brief"), 2004 WL 1882583, (U.S. Aug. 9, 2004), attached hereto as **Exhibit 1**. The Supreme Court denied the petition for writ of certiorari. 2004 U.S. LEXIS 6029 (U.S. Oct. 4, 2004). The government's Brief argued "and" in this provision as disjunctive:

> The applicable Sentencing Guideline for illegal reentry, Section 2L1.2, provides for a 16-level enhancement of the base offense level of 8 "[i]f the defendant previously was deported" after a conviction for a "crime of violence." Sentencing Guidelines 2L1.2(b)(1)(A) (2002). At the time of petitioner's sentencing, the accompanying commentary to that Section provided that the term "crime of violence"
> (I) means an offense under federal, state, or local law that has an element the use, attempted use, or threatened use of physical force

section 1112(b), the Sentencing Guidelines use the word "includes" to introduce the enumerated terms under "crime of violence" which are separated by "and." See note 11, supra. Relying on several circuit court holdings construing "and" and "includes" as disjunctive, the United States argued that "the use of 'includes' to introduce subpart II [of the enumerated terms under "crime of violence"] 'inherently weighs against the notion that subpart II is a separate prong that must be satisfied, since it plainly indicates that the list to follow is not exhaustive.'" 2004 WL 18825383 at *3 (quotation omitted). Similar reasoning is applicable to the conundrum facing the court in the instant case. Moreover, if a movant had to satisfy all the factors enumerated in 11 U.S.C. § 1112(b)(4), no party in interest would ever have their case dismissed under this section–a conclusion that is at odds with the principle that the term 'includes' 'signals illustration rather than exhaustion.' See 2004 WL 18825383 at *3 (quotation omitted).

To the extent, this Court were to find amended section 1112(b)(4) ambiguous, this Court should turn to section 1112(b)'s legislative history. See In re Geneva Steel Co., 281 F.3d 1173, 1178 (10th Cir. 2002). It establishes that reading "and" in section 1112(b) in the disjunctive is consistent with Congress' intent.[12] Although the legislative history of 11 U.S.C. § 1112(b) does

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> against the person of another; **and**
> (II) includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.

Id. at *2 (Sentencing Guidelines, 2L1.2 comment (n.1(B)(ii)) (2002) (emphasis added).

[12]See In re Carbaugh, 278 B.R. 512, 522 (10th Cir. BAP 2002) (The plain meaning of legislation should be conclusive, except in the "'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"); United States v. Ron Pair Enter., Inc., 489 U.S. 235, 242 (1989) (quotation omitted)). To give a statute a meaning other than the plain one, the Court must find that a literal reading of the statute would

not clearly state why "or" was changed to "and" in section 1112(b)(4)(O),[13] the legislative history, however, does make clear that Congress amended section 1112(b) to make it broader, which is inconsistent with reading its use of "and" as a disjunctive. The legislative history for 11 U.S.C. § 1112(b) and versions of this section leading up to enactment are entitled "Expanded Grounds for Dismissal or Conversion and Appointment of the Trustee." Congress could not have meant to "expand" the section by adding another five or six grounds for showing cause to dismiss a case and then limit the actual use of the statute by stating that such party must prove all causes. See 151 Cong. Rec. H1993 (daily ed. Apr. 14, 2005) (statement of Rep. Sensenbrenner); 151 Cong. Rec. S2531 (daily ed. Mar. 11, 2005).[14] In fact, committee reports dated in 1998 and 1999 expressly state that the list of causes under 11 U.S.C. § 1112(b) is not exclusive. See H.R. Rep. No. 106-123, pt. I, at 1 (Apr. 29, 1999); H.R. Rep. No. 105-540, at 1 (May 18, 1998).

2. Interpreting 11 U.S.C. § 1112(b)(4) In the Conjunctive Would Lead To An Absurd Result.

Interpreting 11 U.S.C. § 1112(b)(4) in the conjunctive would render section 1112(b) "absurd."[15] The United States Trustee has never encountered a case that would satisfy all of

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actively frustrate the purpose of Congress as revealed in the unambiguous legislative history. Id. Absent affirmative congressional intent to the contrary, judicially created doctrines under prior law remain viable, with silent abrogation particularly disfavored. See In re Geneva Steel Co., 281 F.3d 1173 (10th Cir. 2002).

[13]See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in 11 U.S.C. § 1112).

[14]Every time a report lists the "causes" for dismissal, it ends with the word "and," not "or."

[15]See, e.g., Holy Trinity Church v. United States, 143 U.S. 457, 460 (1892) ("If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity"); United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1940)("[E]ven when

section 1112(b)'s disjunctive definitions of cause and doubts one has ever existed. Moreover, a conjunctive reading of the statute is difficult to reconcile with section 1112(b)'s various substantive bases for conversion or dismissal. For instance, there would never be a situation where the debtor had failed to file a disclosure statement, or file or confirm a plan (§ 1112(b)(4)(J)) where there is also an inability to effectuate substantial consummation of a confirmed plan (§ 1112 (b)(4)(M)) or a material default with respect to a confirmed plan (§ 1112(b)(4)(N)) or a termination of a confirmed plan (§1112(b)(4)(O)). Simply stated, unless a disclosure statement has been filed and approved and a plan filed and confirmed, the later defaults/results can never occur. Even if the causes for dismissal or conversion could somehow be read to get around the obvious and necessary predicates, Congress could not have meant to narrow the instances of dismissal or conversion to only those cases where the "perfect storm" of all these causes could be demonstrated.[16] Reading this statute in this way would render section 1112(b) a nullity. And courts are not to interpret statutes that way. 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45:12 (6th ed. 2003) (citations omitted).

B. A DEBTOR CANNOT VOLUNTARILY DISMISS A CASE UNDER 11 U.S.C. § 1112(b)(4) WITHOUT CAUSE BEING SHOWN

"Section 1112(b)(4) prescribes the general procedure for the conversion or dismissal of a

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the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed that purpose, rather than the literal words.") (citations and quotations omitted). See also, 82 C.J.S. *Statutes* § 331 n.83-84 (2005).

[16]For example, under a conjunctive interpretation, skilled debtors' counsel could advise debtors to simply maintain appropriate insurance at all costs or make certain it stays in scrupulous compliance with any one ground for "cause" set forth under section 1112(b)(4). Then the debtor would be able to effectively defeat any attempt to dismiss or convert their case.

chapter 11 case upon the motion of any party in interest (including the debtor), or, in certain instances, by court upon its own motion." 7 *Collier on Bankruptcy* ¶ 1112.01[2][a] (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. Rev. 2005). Section 1112(b) states in part as follows:

> [o]n request of a party in interest, and after notice and hearing, absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, if the movant establishes cause. (emphasis added).

11 U.S.C. § 1112(b)(1).

As stated above in the first argument, section 1112 does not define "cause." Section 1112(b)(4) enumerates sixteen situations, any one of which may be sufficient for a Debtor to justify dismissal of the case. As stated above, the list enumerated in 11 U.S.C. § 1112(b)(4) is not exclusive.

Just as in pre-BAPCPA cases, a court may dismiss a chapter 11 case for reasons other than those specified in section 1112(b) so long as the reasons are sufficient to satisfy "cause." See 7 *Collier on Bankruptcy* ¶ 1112.01[2][a]. It has long been recognized that the court may dismiss a chapter 11 case on grounds of bad faith. Id. at ¶ 1112.02[1]. On the other hand, the existence of cause does not mandate dismissal in every case. Id. Rather the decision to dismiss remains with the discretion of the court. "As the House Report explains: 'Subsection (b) gives wide discretion to the court to make an appropriate disposition of the case when a party in interest requests.'" Id. at ¶ 1112.04[1]. Legislative history is silent as to whether Congress' intent has changed. Thus, one can infer that Congress did not deviate from its intention to afford courts wide discretion to dismiss chapter 11 cases under BAPCPA.

Similar to pre-BAPCPA, section 1112(b) offers a choice between converting the chapter 11 case to a case under chapter 7, or outright dismissal, "whichever is in the best interests of creditors and the estate." The Code does not define the phrase "best interest of creditors and the estate." 7 *Collier on Bankruptcy* ¶ 1112.04[6]. "Presumably, the parties will be the best judge of their own best interest, and if all the parties agree on one course of action, the court should accommodate their desire." Id. (citations omitted).

In the case at bar, the Debtor, the UST and U.S. Capital agree that dismissal is the best course of action. Here, the Debtor does not contest U.S. Capital's assertion that the Debtor did not maintain insurance on the Property. The Debtor has conceded that U.S. Capital will not consent to a plan to sell the Property and that without consent it will be "difficult if not impossible, to confirm a plan." It is questionable whether the Debtor was even properly placed into bankruptcy by an authorized petitioner. Fines and interest apparently continue to accrue for multiple zoning violations. Given all of this, there is continuing loss to the estate, an absence of a reasonable likelihood of rehabilitation, failure to maintain insurance, an apparent unwillingness/inability to even attempt to file a disclosure statement or to file and attempt to confirm a plan in a timely fashion, not to mention an admitted prospective inability to effectuate substantial consummation of a confirmed plan, if one could be confirmed. There is no equity for creditors, as confirmed by the trustee's abandonment in the related case. Applying the standards discussed above, Debtor's case should be dismissed.

VI. CONCLUSION

For these reasons, the United States Trustee respectfully asks this court to construe "and" as it appears in 11 U.S.C. § 1112(b)(4) in the disjunctive. Moreover, "cause," has been

demonstrated and the case should be dismissed.

Dated: January 13, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on the 13th day of January 2006, that a copy of the United States Trustee's Response to Issues Presented Under the Court's Order on Revisions to 11 U.S.C. § 1112(b) was served by deposit in the United States Mail, postage prepaid to the following parties:

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