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In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Savannah Division

In the matter of: )  
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W. G. SHUCKERS, INC. ) Chapter 11 Case  
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 ) Number 97-40432  
Debtor )

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Debtor's case was filed on February 13, 1997. On September 15, 1997, the Georgia Department of Revenue, acting on behalf of the State of Georgia, moved to dismiss the case for reasons set forth in the Motion. On September 17, 1997, the United States Trustee filed a Motion to Convert the case to a case under Chapter 7 and the matter came on for a hearing on September 26, 1997. At that time the facts revealed the following.

The Debtor corporation operates a restaurant on River Street in Savannah, Georgia, which has been in business over 15 years and has been a fixture on the Savannah riverfront enjoying a high profile and an excellent reputation. For a multitude of reasons the cash flow in the business during 1996 forced the Debtor to seek Chapter 11 protection on February 13, 1997. On March 18, 1997, a Motion for Relief from Stay was filed by the Trustees of the Callen Trust, landlords of the Debtor's place of business, seeking a determination that the leasehold on the premises had expired pre-petition. By Order entered

April 21, 1997, I ruled in favor of the Movant and granted Movant relief from the automatic stay to pursue its rights to seek a dispossessory warrant against the Debtor corporation under state law. That Order is currently on appeal to the United States District Court for the Southern District of Georgia.

During the same period of time, the State of Georgia, which was owed substantial monies for unpaid sales and use taxes and which had padlocked the Debtor's place of business pre-petition, filed a Consent Order which was entered on March 21, 1997, and provided generally the following: (1) that the Debtor would establish a separate bank account to deposit Georgia sales and use taxes; (2) that the Debtor would make weekly deposits into that account for all sales and use taxes collected during the previous week; (3) that the Debtor would provide copies of the weekly deposit slips to the Georgia Department of Revenue; (4) that the Debtor would not withdraw funds from the account for any use other than remitting Georgia sales and use taxes due the Department; and (5) that the Debtor would file all Georgia sales and use tax returns and pay all taxes due after the filing of the petition.

Evidence revealed at the September 26 hearing that the Debtor has again, post-petition, suffered cash flow shortages causing it to from time-to-time fall behind in its post-petition obligations. In particular the evidence revealed that during the July/August time frame the United States Trustee received notice from the Debtor's bank that several checks drawn on the debtor-in-possession account had been returned for insufficient funds. Debtor's principal, Wade Beam, testified that all checks which had been dishonored have

now been made good by the Debtor with the exception of a portion of the check to the Trustees of the Callen Trust for August rent and with the further exception that a check payable to the Georgia Department of Revenue for March sales and use taxes is outstanding and there are insufficient funds to cover that check at this time.

On a positive note Mr. Beam testified that the July and August downturn in business has been reversed and that September and the remainder of the fall season in Savannah is expected to be good. He bases his projections on advanced bookings for private parties at the restaurant and on information received from major hotels in the area which report to him that their advance reservations for this period of time are much better than last year. Anticipating an upturn in business he projects a potential annual profit of the business of nearly \$100,000.00 for the next 12 months. However, since the case was filed in February he testified that the net profit in the business has amounted to only \$15,000.00 and that money has been plowed back into the business to make necessary repairs on the restaurant and meet other needs of the business. Indeed the reports filed with the United States Trustee reveal that there has been a cumulative loss during the period of time the business has operated under Chapter 11 of approximately \$17,000.00.

Mr. Beam was unable to explain this apparent discrepancy in his testimony and the records filed monthly with the United States Trustee. Mr. Beam further admits that the terms of the Consent Order concerning sales and use taxes have not been complied with. He admits that weekly deposits have not been made every week since the date of entry of that

Order. He admits that no deposit slips have been forwarded to the State on a weekly basis to show the amount of the deposit. He admits that monies deposited in the special tax account that were to be used only for the purpose of paying Georgia sales and use taxes have in fact been withdrawn and used for other purposes. The State's counsel asserted that the sales and use tax returns for July and August had not been received by the Department, but Mr. Beam testified under oath that they were mailed, that they were mailed timely, and that checks for the full amount of taxes due for those two months were enclosed with the return. However, he admits that at the present time there are insufficient funds in his account to cover the amount of each of the checks which he believed to be in the range of \$6,000.00 each. Finally, Mr. Beam concedes that if this Court's Order granting stay relief to the Callen Trust is not reversed or if affirmed, he is unable to work out some agreement which is not yet in place with the Movant, the business cannot continue to operate. He believes that the possibility of finding investors to come in and invest working capital in the business to assist it in becoming viable exists, but there is no agreement in place and the Debtor's critical need for such an infusion of capital has been obvious since the date of filing of this case and indeed for at least several months prior to the filing of this case.

11 U.S.C. Section 1112(b) provides in relevant part as follows:

(b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee . . . and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of

creditors and the estate, for cause, including--

- (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
- (2) inability to effectuate a plan;
- (3) unreasonable delay by the debtor that is prejudicial to creditors;

Upon consideration of all the evidence in this case I have determined that the Motion to Convert should be granted. The Debtor is not unique in facing cash flow difficulties. Virtually every Chapter 11 debtor that comes before this Court is similarly situated. The Debtor is not unique in having optimistic projections about its future chances for success nor in having an optimistic view of the ability to obtain additional capital with which to formulate a plan. Nor is it unprecedented that creditors facing a debtor in distress will agree to afford the debtor more time than this case has been pending in order to sort out its financial affairs in an effort to successfully reorganize.

In this case, however, the State has not agreed to waive the provisions of this Court's Order which was entered into with the consent of the Debtor on March 21. The Debtor has admitted that it has violated the terms of that Order in several material respects. It is unquestionable that a Chapter 11 debtor-in-possession has fiduciary obligations and serves in many respects in the same capacity as a trustee serving in a case. *See* 11 U.S.C. § 1107. Given the unambiguous terms of the Consent Order and given the fiduciary obligations of the debtor-in-possession, both of which have been violated, I conclude that

cause exists for conversion of this case.

IT IS THEREFORE ORDERED that this case be converted to a case under Chapter 7 of the Bankruptcy Code and that a Trustee be appointed.

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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_\_ day of September, 1997.