

DEC 28 2006

MICHAEL N. MILBY, CLERK OF COURT

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TODAY'S DESTINY, INC.

CASE NO. 05-90080
CHAPTER 7

IN RE:

SHELTON CHIROPRACTIC CORPORATION
And TIMOTHY J. SHELTON and DR. MARC
KISSINGER, d/b/a KISSINGER CHIROPRACTIC
CLINIC and MARC D. KISSINGER, Individually
And KOTILA CHIROPRACTIC LIFE CENTER, P.C.
And GARY J. KOTILA and LA CRESCENT
CHIROPRACTIC, P.C. and ERIC J. KIESAU and
AARON M. PETERS, d/b/a ADVANCED CHIROPRACTIC
OF DUBOIS and JENNIFER M. PETERS, d/b/a ADVANCED
CHIROPRACTIC OF DUBOIS and ROBERT C. KENNY,
D.C., P.C. and ROBERT C. KENNY and NEUBER
CHIROPRACTIC CLINIC, S.C. and JAMES C. NEUBER
And JON K. BERGRIN, DC PA d/b/a FAMILY NECK &
BACK CENTER and JON K. BERGRIN and ANTHONY
RIELLO, JR., D.C., P.A. and ANTHONY J. RIELLO and
NORTHERN LIGHTS CHIROPRACTIC, LTD., t/a
PARKVIEW CHIROPRACTIC and WILLIAM A. KRIVA
And SUSAN COSGROVE, d/b/a COSGROVE SMITH
CHIROPRACTIC and SUSAN COSGROVE and FILBERTO
HERDOCIA d/b/a WESTON IMPLANT CENTER

Vs.

MICHAEL DAY, MAC DAY, MAX DAY (2), JARED
DAY, MEDICUS MARKETING, INC., IBD MARKETING,
INC., TEAMWORK INVESTMENTS, LLC, STRIAIGHTWAY
CHIROPRACTIC CDA, STERLING NATIONAL BANK
HPSC, INC., IRWIN BUSINESS FINANCE, BANKERS
HEALTHCARE, INC., GREATER BAY CAPITAL,
PATRIOT LEASING, STUDEBARKER-WORTHINGTON,
INC., EASTERN FUNDING, LLC, CFC INVESTMENTS,
INC., GE CAPITAL CORP., AMERICAN ENTERPRISE
LEASING, INC., FINANCIAL PACIFIC LEASING, LLC.,
BANKERS LEASING COMPANY, PIONEER CAPITAL
CORP., TIGER LEASING, LLC

MOTION TO INTERVENE

Shelton Chiropractic Corporation and Timothy J. Shelton, et al, (collectively “Interveners”) move to intervene as additional plaintiffs, and in support respectfully show:

1. The Chapter Seven Trustee commenced this case to set aside and recover assets and property of Today’s Destiny, Inc., (“Debtor”) which he alleges to have been fraudulently transferred through conduct of the present defendants in this case. Those defendants presented marketing agreements to Interveners which they had no intention of fully performing or honoring. This scheme was funded by inducing Interveners into executing “leases” of worthless equipment, which are actually disguised loans, and related guaranties. These “leases” were then flipped to partner finance companies for collection.

2. Interveners wish to assert claims against the present defendants for fraud and deceptive trade practices. Interveners also wish to assert claims against the lease finance companies as additional defendants for fraud, violations of the Texas Deceptive Trade Practices-Consumer Protection Act (the “DTPA”), usury, and declaratory judgment. These claims are to be asserted by Interveners together with the Chapter Seven Trustee. Interveners are seeking rescission and to recover, together with the Chapter Seven Trustee,

1. The purported leases are actually secured transactions because they cannot be terminated by the lessees and because the primary term of the leases exceeded the remaining economic life of the equipment as when the leases were entered into. Tex. Bus. & Com. Code Section 1.203(b), (b)(1) (Tex. UCC)(Vernon 200). Accordingly, the use of the terms “lease”, “lessor”, “lessee”, and “rentals” is for brevity, reference, and due to the caption on that document. Neither these terms nor the use thereof in this pleading or otherwise is intended to be or is an admission or acknowledgement that such transaction is a “true lease” or “finance lease” as opposed to a conditional sale or secured transaction.

sums paid under the leases and related guaranties, treble damages under the DTPA, attorney's fees, usury damages under the Texas Finance Code, and declaratory judgment and determination that they had not indebted to the lease finance companies.²

3. This Court has subject matter jurisdiction over Interveners' claims under the United States Bankruptcy Code because, as this Court has already determined, Interveners' claims are related to this Bankruptcy Case.³ Interveners are the largest group of creditors in the Bankruptcy Case, and most of Interveners have filed proof of claims. Dispositions of Interveners' causes of action will determine the extent of Interveners' claims against the Bankruptcy Estate. Elimination or reduction of liability and exposure to the lease finance companies will reduce those claims. Further, the nature of the transactions created by the Today's Destiny defendants leave the bankruptcy estate with a majority of creditors whose claims against the estate are still accruing.

4. Some of the lease company defendants also agreed to finance the Medicus, IBD and Straightway transactions despite the known problems with Today's Destiny. Conversely, recovery against the lease finance companies will increase the size of the estate and sums which would ultimately be distributed to creditors such as Interveners and other creditors. Further, this Court will likely need to determine ownership of these claims as between the Chapter Seven Trustee and Interveners under the Fifth Circuit in

2. The claims which Interveners are asserting are as alleged in the proposed Plaintiffs' ^{2nd} Amended Adversary Complaint, a true and correct copy of which is attached to this motion as Exhibit 1 and incorporated by reference.

3. 11 U.S.C. Section 157(c)(1).

In re Schimmelpenninck.⁴ In the event the Chapter Seven Trustee objects to Interveners' claims against the Estate on the basis of the lease finance companies' wrongful conduct, the causes of action against those companies will become a core proceeding.⁵

5. This case will enhance judicial economy through litigation of Interveners' almost identical claims in one case in one forum, as opposed to a multitude of collection cases in different states and the prospect of inconsistent adjudication of those cases.

6. The equipment leasing industry is hardly in a position to deny that this Court can determine Interveners claims. Ten years ago, FINOVA Capital Corporation, Colonial Leasing, Inc., and other finance leasing companies commenced and utilized an adversary case in connection with the Recomm scandal to remove class action cases filed against them and even their own collection cases into bankruptcy court. They eventually obtained confirmation of a confusing Fourth Amended Plan of Reorganization which modified and extended obligations of the lessees, even though many lessees had not appeared in either the adversary case or the bankruptcy case. The lessors subsequently filed another set of collection cases against lessees on the basis of that plan or reorganization, and some of those cases are still being litigated. Interveners are simply applying this precedent utilized by the lease-finance industry and applying it to the very similar circumstances found in the Today's Destiny case by joining into this adversary case.

4. 183 F.3d 347, 34 Bankr. Ct. Dec. 932, 42 Collier Bankr. Cas. 2d 904 (5th Cir. 1999). A copy of the *Schimmelpenninck* opinion is attached hereto as Exhibit 2.


5. 11 U.S.C. Section 157(b)(2)(B).

PRAYER

Intervenors respectfully request that:

1. They be granted permission to intervene into this adversary case as additional plaintiffs along with the Chapter Seven Trustee and to assert claims and causes of action against both the existing defendants and the "lease" financing companies;
2. They be granted other and further relief to which it may be entitled.

RESPECTFULLY SUBMITTED,



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