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U.S. BANKRUPTCY COURT

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WISCONSIN

In re: Case Number:

HOME OIL, INC. EF7-85-01132 INV.

Debtor.

OPINION AND ORDER

The debtor, by Peter F. Herrell, has moved the court to abstain from hearing this involuntary petition. The petitioners appear by David R. Carlson. An evidentiary hearing on this matter was held on Janury 10, 1985, and the issue has been submitted for determination by briefs. The sole issue is whether the fact that the debtor has substantially no assets available for distribution constitutes grounds for dismissal pursuant to 11 U.S.C. § 305(a). The court finds that the mere existence of this fact alone is insufficient to warrant dismissal.

The debtor argues that to the extent that there might be any equity in the assets, the equity would be more than exhausted in the administration of the estate and the payment of back taxes; therefore, the only purpose of this proceeding, if any, is to harass the debtor.

§ 305 of the Bankruptcy Code, in pertinent part, provides:

> § 305. Abstention
> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if--

> (1) The interests of creditors and the debtor would be better served by such dismissal or suspension;

11 U.S.C. § 305. The language of this section indicates that a determination as to the best interests of creditors and debtor must be made on a case-by-case basis. This is fundamentally a discretionary decision on the part of the court, and great care must be used in the exercise of this discretion. Matter of Luftee, Inc., 6 B.R. 539, 548 (Bankr. E.D. N.Y. 1980). The Congress has emphasized the discretionary nature of this section of the Code by providing that such determinations are not reviewable on appeal or otherwise. 11 U.S.C. § 305(c).

There is a general rule that courts should exercise jurisdiction when properly involved. In re Rai Marketing Services, Inc., 20 B.R. 943, 945 (Bankr. D. Kan. 1982). And since section 305 is not appealable, courts should be hesitant to abstain and should do so only in extraordinary circumstances. Id. "Congress has indicated that it intended section 305(a) dismissals to be the exception rather than a rule." Matter of Luftee, Inc., 6 B.R. 539, 548 (Bankr. E.D. N.Y. 1980). Unless there are factors that distinguish a case from the norm, it should not be dismissed. Id.

The court agrees with the debtor to the extent that the fact that there are no assets available for unsecured creditors is a factor to be taken into consideration when making a section 305 determination. However, this is not, of itself, sufficient to warrant dismissal. Unless the debtor can show alternative

arrangements pending, harm to the interests of other creditors, or other relevant circumstances, the court cannot dismiss an otherwise sufficient petition.

It is also worth noting in this case that the future of the debtor corporation would be quite dim, at best, if the court were to have cause to dismiss. The economic plight of the debtor is apparent. To the extent that there might be any unsecured assets at this time, there surely will not be in the near future. It is the court's opinion that it would be in the best interests of all concerned to have a trustee take possession of the assets and to liquidate them as efficiently as possible. It may be the trustee's decision to abandon substantial portions of the estate, but a trustee is in a better position to make this determination on an individual item basis than the court is at this early time.

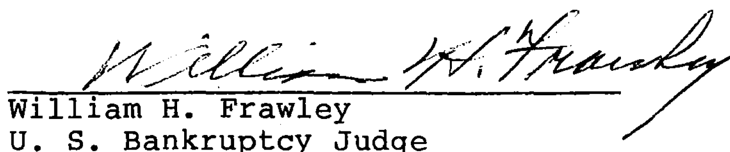
This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT the motion of the debtor for abstention is hereby denied.

Dated: February 4, 1986.

BY THE COURT:



William H. Frawley
U. S. Bankruptcy Judge

cc: Attorney David R. Carlson
Attorney Peter F. Herrell