



ORDERED in the Southern District of Florida on March 6, 2018.

2018年3月6日美國佛羅里達南區聯邦地區法院命令。

Raymond B. Ray, Judge 法官

United States Bankruptcy Court 美國破產法院

UNITED STATES BANKRUPTCY
COURT 美國破產法院
SOUTHERN DISTRICT OF FLORIDA
佛羅里達南區
FORT LAUDERDALE DIVISION
羅德岱堡地方法院
www.flsb.uscourts.gov

In re:
案由

Debtor 債務人: STEMTECH INTERNATIONAL, INC., STEMTECH 公司
Case No.案號: 17-11380-RBR Chapter 11 第 11 章

**ORDER GRANTING MOTION OF THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS (I) TO
CONVERT
THE DEBTOR'S CHAPTER 11 CASE TO A CASE UNDER
CHAPTER 7**

PURSUANT TO 11 U.S.C. §§ 1112(B)(1) AND 1112(B)(4)(A), (B) AND/OR (E)

授權無擔保債權人官方委員會 (I) 依 11 U.S.C. §§ 1112(B)(1) 及 1112(B)(4)(A), (B) 和/或 (E), 債務人第 11 章之案件轉為第 7 章之案件之命令

THIS MATTER came before the Court for an evidentiary hearing on January 11, 2018, February 7, 2018, and February 20, 2018, in Fort Lauderdale, Florida (collectively, the “Hearing”) upon the

(i) *Motion of the Official Committee of Unsecured Creditors (I) to Convert the Debtor's Chapter 11 Case to a Case Under Chapter 7 Pursuant to 11 U.S.C. §§ 1112(b)(1) and 1112(b)(4) (A), (B) and/or (E); or Alternatively, (II) to Appoint a Chapter 11 Trustee Pursuant to 11 U.S.C. §§ 1104(a)(1) and/or 1104(a)(2) (the "Motion to Convert")* [ECF Nos. 210 (redacted version without exhibits) and 233 (redacted version with exhibits)]; and (ii) *Debtor's Objection to the Motion of the Official Committee of Unsecured Creditors (I) to Convert the Debtor's Chapter 11 Case to a Case Under Chapter 7 Pursuant to 11 U.S.C. §§ 1112(b)(1) and 1112(b)(4) (A), (B) and/or (E); or Alternatively, (II) to Appoint a Chapter 11 Trustee Pursuant to 11 U.S.C. §§ 1104(a)(1) and/or 1104(a)(2) (the "Response," with the Motion to Convert, the "Pleadings")*. [ECF No. 232]. The Court, having reviewed the record before it in this chapter 11 case, including the Pleadings, the exhibits annexed to the Pleadings, having considered the testimonial and documentary evidence adduced at the Hearing, the argument of counsel, and being otherwise duly advised in the premises, finds as follows:

本案於 2011 年 1 月 11 日, 2018 年 2 月 7 日, 及 2018 年 2 月 7 日於佛羅里達羅德岱爾堡舉行之證據聽證會(以下通稱為「聽證會」)中審議:(i)無擔保債權人官方委員會之動議 (I) 依 11 U.S.C. §§1112 (b)(1) 及 §§1112 (b)(4)(A), (B) 和/或 (E), 將債務人第 11 章之案件轉為第 7 章之案件; 或者 (II) 依 11 U.S.C. §§1104 (a)(1) 和/或 §§1104 (a)(2) (「轉換動議」) [ECF 第 210 號(無公開之節錄版)和 233 (公開之節錄版)] 委任第 11 章之信託人; (ii) (I) 依 11 U.S.C. §§1112 (b)(1) 及 §§1112 (b)(4)(A), (B) 和/或 (E), 將債務人第 11 章之案件轉為第 7 章之案件; 或者 (II) 依 11 U.S.C. §§1104 (a)(1) 和/或 §§1104 (a)(2) 委任第 11 章之信託人(「回覆」, 其中包括轉換動議, 也就是「訴狀」) [ECF 第 232 號]。本院於審理本章第 11 章案件中之記錄, 包括訴狀, 附於訴狀中之證物, 考量於聽證會中提出之證詞文書證據, 律師辯護意見及其他適當之建議後, 發現如下:

- (i) Notice of the Hearing was sufficient, and no further notice was necessary;
- (ii) The Official Committee of Unsecured Creditors of Stemtech International, Inc. (the "Committee") met the burden of proof imposed on it under 11 U.S.C. § 1112(b)(1) for conversion of Stemtech International, Inc.'s (the "Debtor") chapter 11 case to a case under chapter 7 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, for "cause," including: (1) the Debtor's estate is substantially administratively insolvent and has been for several months (*i.e.*, the Debtor's Monthly Operating Reports for October, 2017, November, 2017, and December, 2017, reflect (a) cash on hand of \$269.05, \$80.28 and \$63.52, and (b) accrued and unpaid administrative expenses of \$460,477.74, \$499,119.30 and \$557,540.30, respectively, Committee Exs. 1(ix) (x) and 13); (2) the Debtor has not filed a disclosure statement or plan since the filing of its chapter 11 case on February 2, 2017 [ECF No. 1 (Voluntary Petition)], a fact as to which the Court can take judicial notice, *see United States v. Rey*, 811 F.2d 1453, 1457, n.5 (11 Cir. 1987); *In re Loe*, No. 07-12045-BKC-RBR, 2007 WL 997581, *1 (Bankr. S.D. Fla. Mar. 29, 2007) (Ray, J.) ("A bankruptcy judge may take judicial notice of the records on file before the court...."); (3) substantial and continuing loss to and diminution of the estate, 11 U.S.C. § 1112(b)(4)(A), *see* Committee Exs. 1(i)-(x),

2(i)-(xxxix), 3(i)-(xxxix), 12(i)-(iii), 13, 14(i)-(ii), 15(i)-(ii), 19, 20, 21, Debtor's Ex. A-C, G-H, M-N; (4) the absence of a reasonable likelihood of rehabilitation, *see id.*, *see also* Committee Exs. 16 and 17 (letters of intent for plan sponsors the Debtor did *not* go forward with, and testimony on the final day of the Hearing by the Debtor's CEO that he lacked knowledge of any firm deal with the most recent proposed plan sponsor, definitive documentation of such a deal or any earnest money having been put up with the Debtor or any agent of the Debtor and the absence of the representative of this plan sponsor to appear and testify in support of any transaction); (5) gross mismanagement of the estate, 11 U.S.C. §1112(b)(4)(B), *id.*; and (6) for the reasons explained in the Motion to Convert, all of which the Court adopts and incorporates herein by reference;

(iii) There are no "unusual circumstances" present here as contemplated by 11 U.S.C. §1112(b)(2); and

(iv) The Debtor has failed to meet its burden of proof to establish that there is a reasonable likelihood of confirming a chapter 11 plan within the timeframes established in 11 U.S.C. § 1121(e) and 1129(e), or if such sections do not apply, a reasonable period of time, or that grounds for conversion do not include an act or omission of the Debtor other than under 11 U.S.C. § 1112(b)(4)(A).

(i) 該聽證會之說明已充足，不必進行進一步之說明

(ii) Stemtech 公司的無擔保債權人官方委員會 (以下簡稱「委員會」) 負有 11 U.S.C. §§1112 (b)(1) 對其規定之舉證責任，將 Stemtech 公司 (簡稱為「債務人」) 第 11 章之案件轉為「美國破產法」11 U.S.C. §§ 101 以下之第 7 章案件。理由係：(1) 行政上債務人之財產無力償還債務，該狀況已持續數月 (見債務人於 2017 年 10 月，2017 年 11 月及 2017 年 12 月的月度經營報告)，具體狀況為：(a) 持有現金 269.05 美元，80.28 美元及 63.52 美元，以及 (b) 分別為 460,477.74 美元，499,119.30 美元及 557,540.30 美元之應計與未支付之行政費用，委員會證物 1(ix)1(x)

(iii) 13)1 ; (2) 債務人於 2017 年 2 月 2 日提交第 11 章之案件 [ECF 第 1 號 (自願呈請)] 以來，並未提交揭露聲明書或計畫，本院對此事實可採取司法認定，參見美國訴雷伊案，811 F.2d 1453, 1457, n.5 (第 11 巡迴法院，1987 年)；*re Loe*, No. 07-12045-BKC-RBR, 2007 WL 997581, *1 (Bankr. S.D. Fla. Mar. 29, 2007) (Ray, J.) (「破產法院法官可對該記錄進行司法說明，於法庭上審理.....

(iv))；(3) 財產大量且持續地損失與減少，11 U.S.C. §1112(b)(4)(A)，見委員會證物 1(i)-(x), 2(i)-(xxxix), 3(i)-(xxxix), 12(i)-(iii), 13, 14(i)-(ii), 15(i)-(ii), 19, 20, 21, 債務人證物 A-C, G-H, M-N；(4) 欠缺合理之財務復原可能性，見註腳 另見委員會證物 16 及 17 (債務人無提出計畫發起人之意向書，且債務人之執行長於聽證會最後一日時，證實其不了解與近期提議之計畫發起人間之任何公司協議、以及與債務人或任何債務人之代理人進行此類交易或任何保證金交易、以及該計畫發起人之代表缺席與支援任何出庭之作證)；(5) 財產嚴重管理不佳，見 11 U.S.C. §1112(b)(4)(B) 註腳 (6) 基於轉換動議中解釋之理由，本院採用這些理由，並將其納入本文作為參考；

(v) 誠如 11 U.S.C. §1112 (b)(2) 之規定，本案無「反常情況」；且

(vi) 債務人未能履行其舉證責任，以確認於 11 U.S.C. §1121 (e) 及 1129 (e) 規定之時期內確定第 11 章之計畫之合理可能性，而若該類條款不適用，則合理之時期或轉換之理由，不包括債務人之行為或不作為，但不適用於 11 U.S.C. §1112 (b)(4)(A) 之規定。

Accordingly, the Court **ORDERS**

1. The Motion to Convert is **GRANTED**.²
2. The Office of the United States Trustee shall appoint a chapter 7 trustee

IMMEDIATELY upon entry of this Order on the Court's docket.

基此, 本院作出以下命令:

1. 授權本動議
2. 美國信託人辦公室應於本命令進入法院審理時, **立即**指定第 7 章之信託人。

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Submitted by:

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(Paul Steven Singerman, Esq. is directed to serve a copy of this order upon all interested parties and file a certificate of service within 3 days of entry of this order .)

(Paul Steven Singerman 律師受指示向所有利害關係人提供該命令之副本, 並於該命令生效後 3 日內提供服務證明).

¹ There is little doubt, if any, that the extent of the Estate's administrative insolvency would deepen once fees of professionals for the Debtor and the Committee for January, 2018 (and the first 20 days of February) were taken into account, but as of the final Hearing date the Debtor had not yet filed its Monthly Operating Report for January, 2018. The Estate's administrative insolvency is tied directly to the fact that the Debtor is a non-operating holding company with no employees which generates no income on its own (save funds it derives from a sublease a portion of its leased corporate offices), and the only funds available to the Debtor are those that its CEO, Ray Carter, Jr., elects to cause the non-Debtor's wholly-owned foreign subsidiaries to upstream to the Debtor. *See* Feb. 7, Trial Transcript at 52:21-52 through 54:1-8 ("Q. So it's pretty fair to say that you control the decisions about dividends from foreign subsidiaries to the debtor, right? A. During the bankruptcy, in particular, **I oversee all of that very closely, yes.** Q. And you make the decisions, right? A. **I'm the ultimate decision-maker, yes.**" *Id.* at 54:2-8) (Emphasis added). Mr. Carter's subsequent testimony on February 20, 2018,

that he was not the person who controlled the decision of whether and in what extent funds were upstreamed to the Debtor was impeached.

無疑地，若考量債務人與委員會於 2018 年 1 月（以及 2 月份前 20 天）的專業人員費用，但最終聽證時債務人尚未提交 2018 年 1 月的月度運營報告，則財產之行政破產程度將會加大。財產之行政破產與一事實直接相關，即債務人之非營運控股公司無員工以產生收益（其資金係將租賃之公司辦公室之一部分轉租而得），債務人唯一可動用之資金，係其執行長 Ray Carter Jr. 所選擇之非債務人全資海外子公司上線之債務人資金。請見 2 月 7 日審判記錄 52:21-52 至 54:1-8（「問：所以說您控制相關海外子公司向債務人分紅之決定權，這是正確的，對嗎？答：是的，特別是在破產期間，**我嚴密監控所有分紅。**問：您做出決定了，對嗎？答：**是的，我是最終決策者。**

54:2-8 註腳）（增加粗體強調）。Carter 先生隨後於 2018 年 2 月 20 日作證，稱其並非控制是否及應向債務人提供多少資金之決定之人。

² Because the Court is converting the Debtor's chapter 11 case to a case under chapter 7, the Court need not and does not address the alternative request of the Committee for the appointment of a chapter 11 trustee.

因本院正將債務人第 11 章之案件轉為第 7 章之案件，故本院不需亦不會處理委員會關於任命第 11 章信託人之替代要求。