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The Bankruptcy of Golfers' Warehouse, Inc.: A Lesson in How to Sell a Business in Chapter 11

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1. BACKGROUND INFORMATION

Golfers' Warehouse, Inc. ("Golfers' Warehouse") is a Hartford, Connecticut-based golf retailer, which operates a chain of retail golf stores in Connecticut, Massachusetts, and Rhode Island.[1] Self-described as "New England's largest golf supply warehouse for over 20 years,"[2] Golfers' Warehouse grew to have annual sales of approximately $28.4 million in 2008 on a seasonal business in which approximately 72% of its annual sales occurred between the months of March and August.[3]

However, in 2009, Golfers' Warehouse became unable to secure and purchase adequate inventory for its stores for a number of reasons, including a lack of trade credit, the general economic downturn, and a reduction in the advance rates provided for in

[1] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Statement Pursuant to Local Rule of Bankruptcy 1007-1(c) (Dkt. 4) (July 9, 2009).

[2] Golfers' Warehouse, About Us, http://www.golferswarehouse.com/ABUS.html (last accessed March 21, 2011).

[3] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Motion for Order (i) Approving Auction Procedures to be Employed in Connection with the Sale of Certain of the Debtor's Assets Pursuant to 11 U.S.C. §§ 105 and 363; (ii) Scheduling Date, Time and Place for Sale Hearing and Related Motions to Assume and Assign Executory Contracts Pursuant to 11 U.S.C. § 365; (iii) Approving Break Up Fee; (iv) Approving Form and Manner of Notice; and (v) Dispensing with Appraisal Requirements, (Dkt. 17), p. 2, (July 9, 2009) (hereinafter "Motion for Order Approving Auction Procedures").

Golfers' Warehouse's banking agreements.[4] While Golfers' Warehouse's normal inventory levels hovered around $6.5 million at any given time, its inventory fell to approximately $4.3 million in early July 2009, and it was expected to fall again to $3.5 million by the end of July 2009. At that rate, Golfers' Warehouse anticipated that it would not be able to sustain its operations past August 2009.

Golfers' Warehouse determined that the best course of action to protect its creditors[5] and to maximize their recovery was to orchestrate a sale of the business as a going concern.[6] Given the rapid rate at which inventory was declining and Golfers' Warehouse's inability to resupply, Golfers' Warehouse had to consummate the transaction before early August 2009 to be able to legitimately sell the business as a going concern. Therefore, Golfers' Warehouse began the process of marketing its business by contacting potential buyers, responding to all inquiries from those potential buyers, and allowing potential buyers to conduct due diligence on its operations.[7]

2. BANKRUPTCY FILING

On July 9, 2009, Golfers' Warehouse filed a voluntary petition for bankruptcy relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court

[4] *Motion for Order Approving Auction Procedures*, at 3.

[5] The main concern appears to have been the treatment of Wachovia, which held secured credit in the amount of $1,486,728.86 as of July 9, 2009, covered by a blanket lien on substantially all of Golfers' Warehouse's assets. *Motion for Order Approving Auction Procedures*, at 3, ¶ 5.

[6] *Motion for Order Approving Auction Procedures*, at 3.

[7] While Golfers' Warehouse makes this claim in various motions to the bankruptcy court, it never provides any factual information as to the identity of the potential buyers in this process, nor whether any of the potential buyers actually conducted any due diligence.

for the District of Connecticut.[8] Because Golfers' Warehouse maintained its principal place of business in Hartford, Connecticut, the venue for this bankruptcy filing, the District of Connecticut, was proper under 28 U.S.C. § 1408. Golfers' Warehouse's board of directors approved the filing.[9]

3. ASSETS AND LIABILITIES

As of May 31, 2009, approximately one month before Golfers' Warehouse filed its voluntary petition, its balance sheet indicated that it had assets of approximately $15,827,000 against liabilities of approximately $20,805,000.[10] Golfers' Warehouse's only secured creditor was Wachovia Bank, which was owed $1,486,728.86 as of July 9, 2009 from loans provided to Golfers' Warehouse in May 2005 and November 2007 and secured by blanket liens on substantially all of Golfers' Warehouse's assets.[11]

The balance of Golfers' Warehouse's liabilities, some $19.3 million, consisted of unsecured debt, much of which was trade debt attributable to various suppliers, such as Cleveland Golf/Srixon ($699,763.86), Callaway Golf ($615,013.15), and Nike USA, Inc. ($530,957.74).[12] However, Golfers' Warehouse's two largest unsecured debts were loans

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[8] In re Golfers' Warehouse, Inc., case no. 09-21911, D. Conn., Voluntary Petition, (Dkt. 1) (July 9, 2009).

[9] In re Golfers' Warehouse, Inc., case no. 09-21911, D. Conn., Resolutions of the Board of Directors of Golfers' Warehouse, Inc., (Dkt. 6) (July 9, 2009).

[10] Statement Pursuant to Local Rule of Bankruptcy 1007-1(c).

[11] In re Golfers' Warehouse, Inc., case no. 09-21911, D. Conn., Schedules ABDEF,(Dkt. 85), Schedule D, (July 23, 2009).

[12] In re Golfers' Warehouse, Inc., case no. 09-21911, D. Conn., List of Creditors Holding 20 Largest Unsecured Claims, (Dkt. 3) (July 9, 2009). This is a representative sample and is by no means exhaustive.

made by its two shareholders, Thomas M. DiVenere and Mark Blair, who were owed more than $7.3 million in unpaid principal alone.[13]

Among its assets at the time of the filing of the voluntary petition, Golfers' Warehouse held a membership interest in Nevada Bobs Holding LLC with a book value of $498,776.00, as well as a note from Nevada Bobs with a book value of $511,243.73.[14] Additionally, Golfers' Warehouse owned various leasehold improvements with book values of $3,305,412.15 and inventory with book values of $4,374,142.05.

4. FIRST DAY MOTIONS

A. Motion to Expedite Hearing and Limit Notice

With its first day motions, Golfers' Warehouse also filed an emergency *ex parte* motion seeking to expedite the hearing dates on its first day motions and to limit the parties to which service of its first day motions was required.[15] Golfers' Warehouse's

[13] Golfers' Warehouse was wholly owned by Golf Clubhouse, Inc., of which Mr. DiVenere and Mr. Blair are apparently shareholders. *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Corporate Ownership Statement, (Dkt. 5) (July 9, 2009). With the accrued interest on these loans, Mr. DiVenere actually held total unsecured claims of $8,593,454.02. Similarly, with interest, Mr. Blair held a total unsecured claim of $2,836,610.96, bringing their combined claims to over $11.43 million. *Schedules ABDEF, Schedule F.*

[14] *Schedules ABDEF, Schedule B.* The record is scant on the details of what Nevada Bobs Holding LLC is, and an Internet search proved equally fruitless. However, it appears to be a related entity to Golfers' Warehouse. Golfers' Warehouse's Statement of Financial Affairs indicates that, pre-petition, Golfers' Warehouse held an 85% equity interest in an entity known as Nevada Bobs Trademark LLC. *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Statement of Financial Affairs, (Dkt. 84) (July 23, 2009).

[15] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Emergency Ex Parte Motion to Limit Service and Shorten Notice of Hearing on Debtor's (a) Motion for Order Authorizing Debtor to Honor Pre-Petition Customer Programs; (b) Motion for Order Authorizing Debtor to Pay Pre-Petition Sales and Use Taxes; (c) Motion to Pay Pre-Petition Payroll and FICA, State, and Federal Withholding Taxes on Such Payroll; (d)

justification for expediting the hearing dates was to "avoid immediate and irreparable harm" that would come from having to wait the required amount of time for a hearing on its motions, given its precarious financial condition. Consequently, Golfers' Warehouse requested that the hearing date for all of these motions be moved forward to July 14, 2009, a mere five days after the filing of its voluntary petition. Golfers' Warehouse's justification for limiting the parties[16] to which service of its first day motions was required was that (1) Golfers' Warehouse had more than 140 creditors; (2) service to all 140 creditors would be burdensome; and (3) the few parties it proposed to serve were the most likely to have an interest in the matters contained in the first day motions. Whatever the merits of Golfers' Warehouse's arguments, and despite the fact that service upon only 140 creditors would not have been *that* burdensome, this motion was granted on July 10, 2009, the day after its filing.[17]

B. <u>Typical First Day Motions</u>

As part of its initial bankruptcy filing, Golfers' Warehouse filed a number of "first day motions" to settle various standard procedural and administrative matters. These first

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Motion to Continue Bank Accounts; (e) Motion for Preliminary and Final Order Authorizing Debtors in Possession to Obtain Credit and Granting Adequate Protection to Wachovia Bank, National Association and Authorizing the Use of Cash Collateral of Wachovia Bank, National Association; and (f) Motion for Order Approving Auction Procedures, (Dkt. 20) (July 9, 2009) (hereinafter "Emergency Ex Parte Motion to Limit Service and Shorten Notice of Hearing").

[16] The parties to whom service was limited were: (1) the United States Trustee; (2) the twenty largest unsecured creditors; (3) counsel to Wachovia Bank; (4) counsel to GWNE, Inc., the proposed buyer of Golfers' Warehouse; (5) the Internal Revenue Service; (6) the State of Connecticut; (7) the State of Massachusetts; (8) the State of Rhode Island; (9) any party that previously appeared and requested service.

[17] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Shortening Notice and Limiting Service, (Dkt. 21) (July 10, 2009).

day motions are typical in Chapter 11 cases, and are generally meant to override certain statutory prohibitions and to take advantage of certain powers given uniquely to a chapter 11 debtor-in-possession ("DIP").[18]

I. Motion to Appoint Debtor-In-Possession's Counsel

In Golfers' Warehouse's case, a number of first day motions were filed that were not the subject of any dispute and that were therefore summarily granted by the bankruptcy court. First, Golfers' Warehouse moved to retain the Hartford, Connecticut law firm of Rogin Nassau LLC ("Rogin Nassau") to serve as DIP's counsel in the bankruptcy proceedings.[19] Rogin Nassua's attorneys were retained at their normal hourly rates ($275-$485 for partners, $175-$225 for associates), and the firm was paid a retainer of $96,445.40[20] for its services to be rendered in connection with Golfers' Warehouse's Chapter 11 bankruptcy.[21]

II. Motion to Appoint Management Consultant

Next, Golfers' Warehouse moved to retain the Stoughton, Massachusetts management consulting firm of Altman and Company ("Altman") to act as a

[18] Jonathan P. Friedland et al., *Chapter 11-101, The Nuts and Bolts of Chapter 11 Practice: A Primer*, p. 18 (American Bankruptcy Institute 2007).

[19] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Debtor's Application to Employ Counsel, (Dkt. 8) (July 9, 2009).

[20] There is no information in the record indicating how this figure was generated.

[21] This motion was granted on August 7, 2009. *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Authorizing Employment of Counsel, (Dkt. 111) (August 7, 2009).

management consultant to the DIP in its bankruptcy proceedings.[22] Among the services to be performed by Altman were: (1) to give Golfers' Warehouse financial and management advice concerning the operations of a DIP; (2) to assist Golfers' Warehouse in the preparation of schedules, reports, and other financial documents required or desirable on behalf of the Debtor as DIP; (3) to assist Golfers' Warehouse in developing a plan of reorganization; (4) to assist Golfers' Warehouse in selling its assets; and (5) to assist Golfers' Warehouse in developing business plans, including an evaluation of continuing operations and asset sales. Altman was paid a retainer of $38,443.00,[23] which was held against amounts that would come due through the course of the bankruptcy proceedings.[24]

III. Other Typical First Day Motions

Golfers' Warehouse also filed other additional uncontested first day motions, including a motion to pay pre-petition payroll and the associated federal and state taxes on that payroll,[25] an application to continue using its pre-petition bank accounts with

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[22] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Debtor's Application to Employ Management Consultant, (Dkt. 9) (July 9, 2009).

[23] As with the retainer figure for Rogin Nassau, there is no information in the record indicated how this figure was generated.

[24] This motion was granted on August 6, 2009. *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Authorizing Employment of Management Consultant, (Dkt. 108) (August 6, 2009).

[25] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Motion to Pay Pre-Petition Payroll and FICA, State and Federal Withholding Taxes on Such Payroll, (Dkt. 11) (July 9, 2009). This motion was granted on July 14, 2009. *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Granting Debtor's Motion to Pay Pre-Petition Payroll and FICA, State and Federal Withholding Taxes on Such Payroll, (Dkt. 56) (July 14, 2009).

Wachovia and Bank of America,[26] and a motion to allow it to pay pre-petition sales and use taxes.[27]

C. Motion to Continue Honoring Pre-petition Customer Programs

Along with its other typical first day motions, Golfers' Warehouse also filed a motion asking the bankruptcy court to enter an order authorizing it to continue to honor its pre-petition customer programs.[28] Like many other retailers, Golfers' Warehouse managed a number of customer programs as part of its operations, such as gift certificates, a refund/return policy, a Customer Club loyalty program, and a program to allow customers to make deposits on purchases. Golfers' Warehouse argued to the bankruptcy court that continuing these programs was essential to maintaining customer loyalty and preserving the public's confidence in its business. As a result, Golfers' Warehouse requested permission to continue to operate these programs, with the

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[26] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Application to Continue Bank Accounts, (Dkt. 12) (July 9, 2009). This application was granted on July 14, 2009, with the condition that the bank accounts be thereafter marked and noted as "debtor in possession" accounts. *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Authorizing Use of Pre-Petition Bank Accounts, (Dkt. 57) (July 14, 2009). The Region 2 United States Trustee, which serves the judicial district of Connecticut, requires that all prepetition bank accounts controlled by the debtor must be closed immediately upon the filing of the bankruptcy petition, and new debtor in possession accounts must be opened to handle all post-petition activities. *Operating Guidelines and Reporting Requirements for Debtors in Possession and Trustees*, Office of the United States Trustee, Region 2, available at http://www.justice.gov/ust/r02/docs/chapter11/r2_operating_guidelines.pdf.

[27] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Debtor's Motion for an Order Authorizing Debtor to Pay Pre-Petition Sales and Use Taxes, (Dkt. 14) (July 9, 2009). This motion was granted on July 14, 2009. In re Golfers' Warehouse, Inc., case no. 09-21911, D. Conn., Order Authorizing Debtor to Pay Pre-Petition Sales and Use Taxes, (Dkt. 59) (July 14, 2009).

[28] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Motion for Order Authorizing Debtor to Honor Prepetition Customer Programs, (Dkt. 13) (July 9, 2009).

exception of its gift certificate program that had already been discontinued prior to bankruptcy.

Golfers' Warehouse noted in its motion that, because the customer programs were part of its ordinary course of business, it did not need bankruptcy court approval to continue them pursuant to § 363(c).[29] However, as a measure of overall safety, and recognizing that its customer deposit program may not have been deemed to be an ordinary course transaction, Golfers' Warehouse submitted that the court was allowed to authorize the continuance of this program under § 363(b). Further, Golfers' Warehouse noted that, should the court not authorize the continuance of the deposit program under § 363(b), those customers who had made pre-petition deposits would likely be entitled to priority claims under § 507(a)(7). Finally, Golfers' Warehouse observed that other bankruptcy courts had authorized DIPs to continue to operate their various customer programs. Without objection and after a hearing, the bankruptcy court granted this motion on July 14, 2009.[30]

D. <u>Motion to Borrow</u>

In addition to the above-mentioned first day motions, Golfers' Warehouse also filed a *Motion for Preliminary and Final Order Authorizing Debtors in Possession to Obtain Credit and Granting Adequate Protection to Wachovia Bank, National Association and Authorizing the Use of Cash Collateral of Wachovia Bank, National*

[29] *Motion to Honor Prepetition Customer Programs*, at 4.

[30] In re Golfers' Warehouse, Inc., case no. 09-21911, D. Conn., Order Authorizing Debtor to Honor Prepetition Customer Programs, (Dkt. 58) (July 14, 2009).

Association (the "Motion to Borrow").[31] This motion, which arguably became the most contested and important of Golfers' Warehouse's first day motions, purportedly sought to obtain financing from Wachovia Bank on behalf of Golfers' Warehouse in order to finance Golfers' Warehouse's continuing operations during the first portion of its bankruptcy proceedings.[32] However, as it soon became obvious, the real purpose of the Motion to Borrow was much different.

I. Pre-petition Matters Related to the Motion to Borrow

On May 14, 2004, Golfers' Warehouse and its parent company, Golf Clubhouse, Inc., entered into a loan and security agreement with Wachovia Bank under which Golfers' Warehouse became indebted to Wachovia for $1,108,949.39 in revolving loans.[33] On November 15, 2007, Golfers Warehouse and Golf Clubhouse, Inc. entered into another loan and security agreement with Wachovia Bank under which Golfers' Warehouse became indebted to Wachovia for an additional $377,779.47; however, this loan was for term loans as opposed to revolving loans. As security for these loans, Golfers' Warehouse granted Wachovia a blanket lien on all or substantially all of Golfers' Warehouse's pre-petition assets.[34] In addition, Thomas M. DiVenere, a shareholder of Golf Clubhouse, Inc. and an officer of Golfers' Warehouse, personally

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[31] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Motion for Preliminary and Final Order Authorizing Debtors in Possession to Obtain Credit and Granting Adequate Protection to Wachovia Bank, National Association and Authorizing the Use of Cash Collateral of Wachovia Bank, National Association, (Dkt. 10) (July 9, 2009) (hereinafter "Motion to Borrow").

[32] *Motion to Borrow*, at 5.

[33] *Motion to Borrow*, at 2.

[34] *Motion to Borrow*, at 3.

guaranteed all of the indebtedness and obligations under both of the pre-petition Wachovia loans up to $1.5 million.[35] These guaranties by the debtor's principal created a strong incentive on his part to see to it that Golfers' Warehouse was able to repay all of Wachovia's claims in its Chapter 11 liquidation. After all, if there were any deficiency, Wachovia would be looking to him in order to be made whole.

II. Golfers' Warehouse Requests Wachovia Bank to Provide Post-Petition Lending Facility

According to Golfers' Warehouse's Motion to Borrow, at some point in time leading up to the bankruptcy filing,[36] Golfers' Warehouse requested that Wachovia Bank establish a post-petition secured lending facility in favor of Golfers' Warehouse so that Golfers' Warehouse could obtain periodic revolving loans from Wachovia up to an amount of $1.5 million outstanding at any given time (the "DIP Financing Facility").[37] As security for this lending facility, Golfers' Warehouse granted Wachovia a security interest in all of its pre- and post-petition assets. Upon the satisfaction of certain necessary conditions, Wachovia indicated its willingness to provide the lending facility during the period beginning July 14, 2009 and ending July 28, 2009. Among the conditions to the DIP Financing Facility were the following: (1) execution and delivery of the necessary loan documents, which were to be approved by the bankruptcy court; (2) Golfers' Warehouse being authorized to pay off its pre-petition debt to Wachovia with the DIP Financing Facility proceeds in order to facilitate post-petition financing and to

[35] *Motion to Borrow*, at 5.

[36] This is presumed due to the fact that all of these facts are contained within a motion that was filed contemporaneously with the voluntary petition.

[37] *Motion to Borrow*, at 4.

provide Wachovia with adequate protection of its interests; (3) Golf Clubhouse, Inc. guaranteeing repayment of the debt; and (4) Wachovia obtaining a superpriority lien on all of Golfers' Warehouse's pre- and post-petition assets.[38]

III. Bankruptcy Rules Pertaining to Debtors Obtaining Post-Petition Financing

In order for a bankrupt debtor to obtain post-petition financing, that debtor must comply with the provisions of the Bankruptcy Code. Under § 364 of the Bankruptcy Code, a DIP may obtain unsecured credit financing in the ordinary course of business without approval of the bankruptcy court and may obtain unsecured credit financing *outside* the ordinary course of business by obtaining approval of the bankruptcy judge.[39] In exchange for providing the DIP with unsecured credit, the Bankruptcy Code provides the creditor with a simple administrative priority claim.[40]

Given the obvious risks associated with extending unsecured credit to a DIP operating under Chapter 11 and knowing that greater protections are available under § 364, most lenders will refuse to extend credit to a bankrupt party on an unsecured basis.[41] In this case, when a debtor demonstrates that it is unable to obtain credit from lenders on an unsecured basis, bankruptcy courts are authorized under § 364(c)(1) of the Bankruptcy Code to allow creditors who extend financing to the DIP to have an administrative superpriority claim and either senior liens on unencumbered assets of the debtor or junior

[38] *Motion to Borrow*, at 5-6.

[39] 11 U.S.C. § 364(a).

[40] 11 U.S.C. § 503(b)(1)(A).

[41] George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19, 47-48 (2004).

liens on encumbered assets.[42] This superpriority claim and the additional liens provide the creditor with additional protection for its commitment to extend credit to the DIP. The creditor knows that it will be the first party, other than any senior secured creditor, to be paid upon the liquidation of the debtor's assets. In the case of Golfers' Warehouse, obtaining this § 364(c)(1) superpriority claim status, in addition to achieving post-petition secured status, was precisely what motivated Wachovia to extend the DIP Lending Facility to Golfers' Warehouse and was the basis for the Motion to Borrow.

IV. Golfers' Warehouse Requests Superpriority Status for Wachovia and Provides for Adequate Protection

In its Motion to Borrow, Golfers' Warehouse asserted that "despite diligent efforts," it was unable to obtain unsecured post-petition financing under the general administrative priority provisions of §§ 364(c)(1) and 503(b)(1).[43] Therefore, Golfers' Warehouse claimed that it was unable to obtain financing on any terms that were more favorable than those extended by Wachovia under the post-petition lending facility. Claiming that the approval of the lending facility would minimize disruption of its business operations and preserve the assets of the bankruptcy estate, Golfers' Warehouse argued that the terms of the lending facility were fair and reasonable and in the best interests of Golfers' Warehouse, its creditors, and the estate.[44]

Unfortunately, the record is devoid of any evidence substantiating these claims by Golfers's Warehouse. Golfers' Warehouse made these claims within its motion, but did

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[42] Kuney, *Hijacking Chapter 11*, at 48.

[43] *Motion to Borrow*, at 5.

[44] *Motion to Borrow*, at 7.

not cite any evidence in support of its bold assertions. While a hearing was held on this motion on July 14, 2009, the docket and record do not indicate whether any testimony was taken or other substantial proof was submitted to the court that would substantiate Golfers' Warehouse's claims.

V. Terms of the Post-Petition Lending Facility

Under the terms of the post-petition lending facility, Golfers' Warehouse was to repay any extended prime rate loans at an interest rate of the Prime Rate plus 3.00%, and any LIBOR loans at the LIBOR Rate plus 5.25%.[45] In addition, Golfers' Warehouse was to pay Wachovia a $50,000 "facility fee" in consideration of Wachovia entering into the DIP Lending Facility and extending credit thereunder, as well as a separate "commitment fee" (that would likely reach $25,000) apparently intended to partially compensate Wachovia for any unused credit that might exist under the revolving credit commitment.[46] Golfers' Warehouse attempted to justify these fees as necessary for adequate protection.[47]

Under the terms of the DIP Lending Facility, Golfers' Warehouse could only apply the loan proceeds to limited uses. Interestingly, one of the explicit acceptable uses of the loan proceeds was "to pay or cash collateralize the Pre-Petition Debt to the extent

[45] *Motion to Borrow*, Exhibit B, at 1.

[46] *Motion to Borrow*, Exhibit A, at 16.

[47] *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Objection to Motion for Preliminary and Final Order Authorizing Debtors in Possession to Obtain Credit and Granting Adequate Protection to Wachovia Bank, National Association and Authorizing the Use of Cash Collateral of Wachovia Bank, National Association, (Dkt. 42), p. 2, (July 13, 2009) (hereinafter "Objection to Motion to Borrow").

authorized by the Court."[48] In effect, the DIP Lending Facility allowed Golfers' Warehouse to use the credit Wachovia extended under the DIP Lending Facility to "repay" Wachovia for the outstanding pre-petition loans that were due and owing to Wachovia on Golfers' Warehouse's behalf. By doing so, the pre-petition loans would be satisfied, and Wachovia would have then re-characterized its loan from pre-petition secured claims to post-petition superpriority secured administrative claims under the terms of the DIP Lending Facility and the terms of the Court's order stemming from Golfers' Warehouse's Motion to Borrow. In addition to achieving superpriority status, Wachovia would also modify its security interest such that it covered not only Golfers' Warehouse's pre-petition assets but also its post-petition assets. The end effect of the Motion to Borrow and the DIP Lending Facility was what is commonly referred to as a "roll-up" – when post-petition financing is used to pay, in whole or in part, pre-petition secured debt.[49]

E. Trade Vendors Object to Motion to Borrow

Two of Golfers' Warehouse's unsecured creditors, Acushnet Company and Callaway Golf Company, (the "Trade Vendors"), caught on to the end result of Golfers' Warehouse's Motion to Borrow and filed an objection on July 13, 2009.[50] Claiming that the Motion to Borrow was nothing more than an attempt to recharacterize Golfers' Warehouse's pre-petition debt as a "desirable" post-petition superpriority administrative expense, the Trade Vendors asserted that Golfers' Warehouse could survive sufficiently

[48] *Motion to Borrow*, Exhibit A, at 13.

[49] *See* Kuney, *Hijacking Chapter 11*, *supra* note 41, at 63.

[50] *Objection to Motion to Borrow*. The Trade Vendors also filed a corrected objection, Dkt. 46, which simply corrected a typographical error in one of the signature lines.

on cash collateral alone and had no need for any post-petition credit. Further, the Trade Vendors argued that Wachovia had no need for adequate protection as there already existed a sufficient equity cushion due to the sale offer contained in Golfers' Warehouse's *Motion to Sell Assets Out of the Ordinary Course of Business Free and Clear of Security Interest*, which provided for the sale of all of Golfers' Warehouse's assets for $3.1 million and which had been filed and served on July 9, 2009 along with the other first day motions.[51] For these reasons, the Trade Vendors requested that the court deny the Motion to Borrow and require Golfers' Warehouse to survive solely on cash collateral as provided in § 363 of the Bankruptcy Code.

F. Bankruptcy Court Grants Motion to Borrow

On July 14, 2009, the bankruptcy court held an interim hearing on Golfers' Warehouse's Motion to Borrow. Despite the arguable correctness of the arguments contained within the Trade Vendors' objection, the Trade Vendors withdrew their objection at this hearing. No explanation is provided in the record regarding the reasoning behind this withdrawal. Following the interim hearing, the bankruptcy court granted the Motion to Borrow.[52]

Under the terms of the court's order granting Golfers' Warehouse's Motion to Borrow, the revolving loan facility was approved under the terms outlined above, and

[51] This motion will be discussed in detail later.

[52] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order After Interim Hearing (1) Authorizing Debtor-In-Possession to Obtain Financing, Grant Security Interests and Accord Priority Status Pursuant to 11 U.S.C. §§ 361, 364(c) and 364(d); (2) Authorizing the Use of Cash Collateral Pursuant to 11 U.S.C. §§ 361 and 363(c)(2); and (3) Modifying Automatic Stay; and (4) Giving Notice of Final Hearing Pursuant to Bankruptcy Rules 4001(a)(3), (b)(2) and (c)(2), (Dkt. 55) (July 14, 2009) (hereafter "*Order Granting Motion to Borrow*").

Wachovia was provided liens under the following conditions: (1) pursuant to § 364(c)(2), perfected first priority senior security interests in and liens upon all unencumbered collateral; (2) pursuant to § 364(c)(3), perfected junior security interests in all encumbered collateral; (3) pursuant to § 364(d), replacement priming liens providing Wachovia with post-petition priority over its pre-petition loans.[53] As discussed earlier, and objected to by the Trade Vendors, Wachovia was granted a superpriority claim pursuant to § 364(c)(1).

In addition, the court's interim order required that Golfers' Warehouse deposit all cash collateral into accounts designated by Wachovia; Golfers' Warehouse was prohibited from using those funds (other than for uses authorized under the loan facility agreements) until Wachovia had been paid in full for both its pre- and post-petition loans.[54] Further, Golfers' Warehouse was obligated to remit to Wachovia all proceeds from the sale of its pre-petition inventory.[55]

Also of note, the bankruptcy court approved a modification of the automatic stay provisions under § 362 of the Bankruptcy Code to allow Wachovia to take the appropriate steps to implement the provisions of the court's order and the loan facility agreement.[56]

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[53] *Order Granting Motion to Borrow*, at 9-10.

[54] *Order Granting Motion to Borrow*, *at* 12-13.

[55] *Order Granting Motion to Borrow*, at 5.

[56] *Order Granting Motion to Borrow*, at 28. Generally, a person is prohibited under § 362 from taking any actions against a bankrupt party without first obtaining the consent of the bankruptcy court.

On July 28, 2009, the bankruptcy court held a final hearing on Golfers' Warehouse's Motion to Borrow, upon the assertion that Golfers' Warehouse had a continued need for financing "of the type afforded by" the loan facility agreement.[57] As a result of this hearing, the court entered an order allowing the continuation of the loan facility agreement, under the same terms contained within the court's order after the interim hearing.

5. APPOINTMENT OF COMMITTEE OF UNSECURED CREDITORS

On July 16, 2009, after the interim DIP Loan hearing but prior to the final hearing on that motion, the United States Trustee appointed the following creditors of Golfers' Warehouse to serve on the Official Committee of Unsecured Creditors (the "Creditors Committee"): Mark Blair; Callaway Golf; Cleveland Golf/Srixon; Nike USA, Inc.; Taylormade/ADIDAS Golf; Mizuno USA, Inc.; and Acushnet Co.[58] On July 28, 2009, the Creditors Committee moved the court to approve the Dallas, Texas law firm of Kane Russell Coleman & Logan PC to serve as its principal counsel[59] with the Hartford,

[57] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order After Final Hearing (1) Authorizing Debtor-In-Possession to Obtain Financing, Grant Security Interests and Accord Priority Status Pursuant to 11 U.S.C. §§ 361, 364(c) and 364(d); (2) Authorizing the Use of Cash Collateral Pursuant to 11 U.S.C. §§ 361 and 363(c)(2); and (3) Modifying Automatic Stay, (Dkt. 96), p. 6-7, (July 29, 2009). Of course, as with most of the assertions contained in Golfers' Warehouse's motions, there is no direct evidence to support such a claim.

[58] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Appointment of Committee of Unsecured Creditors, (Dkt. 64) (July 16, 2009).

[59] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Application for Order Pursuant to 11 U.S.C. §§ 328, 330 and 1103(a) and Fed. Rule Bankr. P. 2014(a) Authorizing the Nunc Pro Tunc Employment of Kane Russell Coleman & Logan PC as Attorneys for the Official Committee of Unsecured Creditors, (Dkt. 93) (July 28, 2009).

Connecticut law firm of Filardi Law Offices LLC to serve as local counsel,[60] each representation being retroactive to July 16, 2009, the date upon which the Creditors Committee was formed. These motions were granted on August 6, 2009.[61]

6. THE SALE

Above all else, Golfers' Warehouse entered bankruptcy with one principal objective: to effectuate the sale of the business as a going concern. The move tracked a growing trend. Commentators have observed that "in recent years . . . Chapter 11 has become, at least in part, a vehicle for secured creditors that is more akin to a federal judicial foreclosure proceeding than a reorganization."[62] Courts have interpreted Chapter 11 so as to "shift a process originally focused on confirmation of a plan of reorganization into one making bankruptcy courts *the* forum of choice for sales of businesses, troubled or not."[63] Despite the fact that "Congress enacted Chapter 11 to allow, and indeed

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[60] In re Golfers' Warehouse, Inc., case no. 09-21911, D. Conn., Application of the Official Committee of Unsecured Creditors for an Order Authorizing the Nunc Pro Tunc Employment and Retention of Filardi Law Offices LLC as Local Counsel, (Dkt. 91) (July 28, 2009).

[61] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Authorizing the Employment and Retention of Filardi Law Offices LLC as Local Counsel to the Official Committee of Unsecured Creditors Nunc Pro Tunc, (Dkt. 109) (August 6, 2009); *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Authorizing the Application for Order Pursuant to 11 U.S.C. §§ 328, 330 and 1103(a) and Fed. Rule. Bankr. P. 2014(a) Authorizing the Nunc Pro Tunc Employment of Kane Russell Coleman & Logan as Attorneys for the Official Committee of Unsecured Creditors, (Dkt. 110) (August 6, 2009).

[62] Hon. J. Vincent Aug et al., *The Plan of Reorganization: A Thing of the Past?*, 13 J. BANKR. L. & PRAC. 4, Art. 1 (2004) (citing Elizabeth Warren & Jay L. Westbrook, *Secured Party in Possession*, 22 AM. BANKR. INST. J. 12 (2003)).

[63] George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 235 (2002). See also George W.

encourage, the rehabilitation rather than the piecemeal liquidation of financially distressed entities,"[64] businesses have used Chapter 11 "to expeditiously and effectively separate a business' past problems from its future prospects."[65]

With Wachovia's support, Golfers' Warehouse sought to capitalize on a major advantage of a § 363 sale. As Professor Kuney phrases it:

> By selling all or substantially all of the debtor's business or businesses preconfirmation under § 363, . . . parties may avoid the lengthy process of negotiating, proposing, confirming, and consummating a plan of reorganization—not to mention the potential for more pervasive scrutiny of transactions at multiple junctures by the court, creditors, the United States Trustee, and other parties in interest.[66]

When "the credit markets virtually froze in the last half of 2008, and financing became incredibly difficult to obtain,"[67] Golfers' Warehouse undoubtedly found the efficiency, speed, and flexibility of a § 363 sale—rather than the slow and tedious task of reorganization—especially appealing.

As the following sections indicate, Golfers' Warehouse entered bankruptcy in 2009 with a well-formed strategy.[68] It accomplished a sale, out of the ordinary course of

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Kuney, Selling a Business in Bankruptcy Court Without a Plan of Reorganization, 18 CEB Cal. Bus. L. Pract. 57, 57 (Summer 2003).

[64] Harley E. Riedel & Edward Peterson, *Practical Issues Surrounding Section 363 Sales*, 19 U. FLA. J.L. & PUB. POL'Y 75, 77 (2008).

[65] Robert G. Sable et al., *When the 363 Sale Is the Best Route*, 15 J. BANKR. L. & PRAC. 121, 122 (2006).

[66] Kuney, *Hijacking Chapter 11*, *supra* note 41, at 105.

[67] Daniel P. Winikka, *The Declining Use of Chapter 11 As a Reorganization Tool*, ASPATORE, 2009 WL 531545, at 1.

[68] See Sable et al., *supra* note 65, at 122, for a list of common prepetition planning questions and concerns.

business, free and clear of security interests, in less than a month.[69] The ensuing paragraphs lay out the mechanics of the sale, analyzing the sale in an attempt to draw out the methods and motivations at work.

A. Justifications and Motivations

On July 9, 2009, amidst a flurry of other motions, Golfers' Warehouse filed its *Motion to Sell Assets Out of the Ordinary Course of Business and Free and Clear of Security Interests* ("Motion to Sell").[70] From the very beginning, Golfers' Warehouse framed the sale as a necessity. The Motion to Sell stated that "in consultation with Wachovia" and "prior to the Petition Date, [Golfers' Warehouse] determined that the best course of action to maximize recovery to its creditors was to effectuate a sale of its business as a going concern."[71] Citing the "good business reason test" of *Committee of Equity Security Holders v. Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983),[72] Golfers' Warehouse offered a litany of reasons supporting the need to sell the company expeditiously. Without a doubt, it had engaged in substantial pre-petition preparation

[69] Golfers' Warehouse's motion to sell was filed on July 9, 2009. *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Motion to Sell Assets Out of the Ordinary Course of Business and Free and Clear of Security Interests, (Dkt. 15) (July 9, 2009) (hereinafter "Motion to Sell"). The court's order approving the sale was entered on August 5, 2009. *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Under 11 U.S.C. §§ 105, 363 and 365 Approving and Authorizing (A) The Sale of Substantially All Assets of the Debtor Free and Clear of All Liens, Claims, Interests and Encumbrances Pursuant to the Terms of the Asset Purchase Agreement With GWNE, Inc.,; (B) The Assumption and Assignment of Certain Unexpired Leases and Executory Contracts; and (C) Further Relief, (Dkt. 102)(August 5, 2009) (hereinafter "Order Approving Sale").

[70] *Motion to Sell*, at 1.

[71] *Motion to Sell*, at 3, ¶ 7.

[72] *See Motion to Sell*, at 5, ¶ 13.

and had diligently calculated its projected cash flow.[73] In paragraph 7 of the Motion to Sell, Golfers' Warehouse contended:

> The Debtor operates a seasonal business with approximately 72% of its annual sales occurring during the months of March through August. Due to a combination of (i) the lack of trade credit; (ii) deteriorating sales due to the general downturn in the economy and (iii) a reduction in the advance rates provided for in the Debtor's banking agreement, the Debtor was unable to purchase adequate inventory for its stores. The normal inventory level at this time of year is approximately $6.5 Million. The inventory level is now approximately $4.3 Million and is projected to be approximately $3.5 Million by the end of July. Some of the more popular items are not available for sale to the Debtor's customers. Accordingly, the Debtor will not be able to sustain continued operations past early August. Without a sale of the Debtor's business prior to early August, the Debtor will not be able to sell its business as a going concern.[74]

In another filing, Golfers' Warehouse identified a precise date, August 7, 2009, as the exact day on which its cash would run out.[75] Golfers' Warehouse submitted that a sale, if approved, would "generate substantial funds for the estate."[76]

The reasoning employed by Golfers' Warehouse is commonplace, but effective. As evidenced in the increasing use of § 363 sales, "bankruptcy judges place tremendous

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[73] For a list of considerations for prepetition planning, see Sable, supra note 65, at 122, 124.

[74] Motion to Sell, at 3, ¶ 7.

[75] Motion for Order Approving Auction Procedures, at 12, ¶ 28. ("[T]he Debtor needs to complete the sale of its businesses prior to August 7, 2009 when the Debtor anticipates that its will no longer have sufficient funds available to maintain its businesses as a going concern.").

[76] Motion to Sell at 5, ¶ 11. From the information provided in the docket, Golfers' Warehouse's assertion that a sale would "generate substantial funds for the estate" is unsubstantiated. However, testimony or some offer of proof may have been provided, as it appears that the practice in the Hartford division of the bankruptcy court for the District of Connecticut is to provide a transcript of declarations or testimony only upon request. See Transcript Ordering Procedures, available at http://www.ctb.uscourts.gov/Doc/transcript.pdf.

value on preserving the going concern value of the business."[77] Perceiving that "perhaps an asset is rapidly decreasing in value (the so-called "wasting asset") or an estate cannot afford the administrative expenses of a prolonged restructuring,"[78] judges find sound business reasons to approve sales and to preserve the value of businesses or corporations.[79] Golfers' Warehouse's Motion to Sell carefully played to such concerns. By filing in early July, approximately two months before the end of its "seasonal" swing, and by emphasizing its inventory shortages, Golfers' Warehouse characterized itself as a "wasting" entity in need of a speedy sale to generate funds for its creditor Wachovia. It entered bankruptcy with careful pre-petition calculations and detailed strategies to convince the court to approve a sale.

B. Setting Up the Sale

I. Statutory Bases

As previously noted, Golfers' Warehouse's Motion to Sell stated that the decision to sell the company was made "in consultation with Wachovia."[80] Although, as of the petition date, Golfers' Warehouse owed Wachovia $1,486,728.86 secured by liens on substantially all of its assets, it is unsurprising that Wachovia consented to the § 363 sale.

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[77] Elizabeth B. Rose, Comment, *Chocolate, Flowers, and § 363(b): The Opportunity for Sweetheart Deals Without Chapter 11 Protections*, 23 EMORY BANKR. DEV. J. 249, 271 (2006).

[78] Douglas E. Deutsch & Michael G. Distefano, *The Mechanics of a § 363 Sale*, 30 AM. BANKR. INST. J. 48, 48 (2011).

[79] *But see* Rakhee V. Patel & Vickie L. Driver*, Toto, I've a Feeling We're Not in Kansas Anymore: Bankruptcy Sales Outside the Ordinary Course of Business*, 57 Fed. Law. 56, 60 (2010) (noting that "the debtor's own dilatory conduct in the case" is often overlooked).

[80] *Motion to Sell*, at 2.

A sale offered Wachovia a benefit typical of a § 363 proceeding: a chance to "realiz[e] on [its] interest[] more quickly by avoiding a lengthy confirmation process and controlling the process so as to avoid further risk."[81]

As Golfers' Warehouse's only secured creditor, Wachovia's consent squarely placed the sale within § 363(f)(2),[82] allowing Golfers' Warehouse to sell its assets "free and clear of any interest in such property of an entity other than the estate."[83] Moreover, as additional justification, Golfers' Warehouse sought support under § 363(f)(5).[84] Paragraph 18 of the motion to sell reads: "Moreover, by conducting a sale[] of the Assets free and clear of any liens or other interests[,] any party claiming a security interest[] would receive money satisfaction of such interest to the extent that it could be compelled to receive in a legal or equitable proceeding."[85]

These two Bankruptcy Code provisions permitted Golfers' Warehouse to ask for a sale "free and clear of any security interests with any liens attaching to sale proceeds."[86]

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[81] Kuney, *Hijacking Chapter 11*, *supra* note 41, at 109.

[82] 11 U.S.C. § 363(f)(2) reads: "The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if— . . . such entity consents."

[83] *See* 11 U.S.C. § 363(f)(2). As Professor Kuney notes: "Bankruptcy courts, however, have chosen not to follow the plain meaning of §363(f), but instead to interpret that subsection's words "any interest" to mean "any claim or interest" so as to give the debtor or trustee the same power to sell prior to plan confirmation as that under a confirmed plan, and to strip off liens, claims and other interests in the process." Kuney, *Misinterpreting Bankruptcy Code Section 363(f)*, *supra* note 63, at 236.

[84] *See* 11 U.S.C. § 363(f)(5).

[85] *Motion to Sell*, at 7, ¶ 18.

[86] *Motion to Sell*, at 7, ¶ 18.

Thus, Golfers' Warehouse petitioned the court to approve the sale of "substantially all" of its assets. It proposed a sale as a "package" deal, purporting the sale to be in the "best interest of [itself], its estate and its creditors."[87]

II. Sale Terms

Having concluded that a sale was in its best interest, on July 9, 2009, Golfers' Warehouse entered into an Asset Purchase Agreement with GWNE, Inc., a subsidiary of Worldwide Golf.[88] Golfers' Warehouse's Motion to Sell set out the terms of the agreement in their most basic form. Under the Asset Purchase Agreement, the corporation would be sold for the following amount and according to the following terms:

> a cash price of 80% of the cost of the Debtor's inventory less $500,000 (in consideration of certain assumed liabilities under the Sale Agreement, including without limitation, the Buyer's assumption of all customer gift cards, coupon programs and deposit liability). The Debtor places a value on the total cash consideration at $3,100,000 as of the Petition Date. The Assets include all of the Debtor's inventory, furniture, fixtures, equipment, and a 2001 Isuzu box truck.[89]

However, in order to ensure that a sale brought the highest value for the estate, the Motion to Sell announced that Golfers' Warehouse would also employ another typical § 363 sale technique: the auction. The purpose of the auction process, described in

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[87] *Motion to Sell*, at 7, ¶s 16,18. This statement also is unsupported by anything in the record. See note 76, *supra*, for one possible explanation.

[88] *Motion to Sell*, at 3, ¶ 8.

[89] *Motion to Sell*, at 4, ¶ 8.

subsection b of this part, would be to "solicit higher and better bids for the Assets on terms substantially similar to those contained in the Sale Agreement."[90]

a. The Asset Purchase Agreement

Purchasers often benefit from § 363 sales because they "are able to acquire entire businesses unencumbered by unsecured debts, successor liability, or property interests."[91] The buyer of a business through § 363 is able "to obtain clean assets and to avoid the inevitable battle between competing classes of creditors that often occurs when Plans of Reorganization not involving asset sales are filed."[92]

In this case, the Asset Purchase Agreement between GWNE, Inc. and Golfers' Warehouse specified that for a "cash payment of $3,100,000, subject to adjustment . . . plus (b) the total amount of the Assumed Liabilities,"[93] GWNE would acquire substantially all of Golfers' Warehouse's assets. The assets purchased in the sale would include: assumed leases and contracts,[94] personal property, intangible property (including

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[90] *Motion to Sell*, at 4, ¶ 9.

[91] Kuney, *Hijacking Chapter 11*, supra note 41, at 109.

[92] Turney Stevens, *Section 363 Offers Big Advantages*, NASHVILLE MED. NEWS, at 1 (2004).

[93] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Asset Purchase Agreement, (Dkt. 15-2), p. 13, § 3.1.1, (July 9, 2009) (hereinafter "Asset Purchase Agreement"). Pursuant to § 3.1.2, the purchase price may be adjusted based upon the estimated value of Golfers' Warehouse's inventory as of the date of sale. Id. at 14. The $3,100,000 purchase price also included a $500,000 reduction from the actual value of the company to account for Assumed liabilities such as gift cards, coupon programs, and deposit liabilities. *Id*.

[94] Though Schedule 2.1.1 listing Assumed Leases is not available from PACER, § 2.4 of the Asset Purchase Agreement reveals two leases were rejected: the Burlington, Massachusetts lease and the Braintree, Massachusetts lease. The leases assumed under the Asset Purchase Agreement would then be: the Hartford, Connecticut lease, the

the right to use the name Golfers' Warehouse and all associated websites, databases, email addresses, etc.), inventory, governmental permits, and books and records.[95] The following assets, among others, were excluded from the sale: excluded leases, tax refunds or credits applicable to the period of time prior to closing, and accounts receivable dating prior to closing.[96] Furthermore, the Asset Purchase Agreement specified that as of the date of closing, GWNE would offer employment to Golfers' Warehouse employees at its discretion. Golfers' Warehouse would be solely responsible for wages, commission, benefits, bonus arrangements, and workers' compensation claims arising out of employment before the closing date.[97]

In addition to these "clean" assets by way of a "free and clear" § 363 sale, the Asset Purchase Agreement also provided the buyer, GWNE, with a release from most liability. As Sable et al. note: "Outside of bankruptcy, there are greater risks under the 'mere continuity doctrine,' 'substantial continuity doctrine,' 'successor liability doctrine,' 'de facto merger doctrine,' and the Bulk Sale Act that purchasers of substantially all of an insolvent business's assets will inherit some or all of the business's liabilities."[98] However, in bankruptcy proceedings, "the general rule is that, without an express

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Cranston, Rhode Island lease, and the Natick and Danvers, Massachusetts leases. *Asset Purchase Agreement*, at 12, § 2.4.

[95] *Asset Purchase Agreement*, at 10-11, § 2.1.1-2.1.6.

[96] *Asset Purchase Agreement*, at 11. Accounts receivable are also covered in § 2.5. *Id.* at 13.

[97] *Asset Purchase Agreement*, at 32, § 9.

[98] Sable et al., *supra* note 65, at 123.

agreement, a purchaser of assets for fair consideration does not assume the seller's liabilities, even when the purchaser buys substantially all of the assets of the seller."[99]

The Asset Purchase Agreement went to great lengths to make GWNE's release from most liabilities clear. Section 3.2 stated: "Buyer [GWNE] shall, effective as of the Closing Date, assume . . . *only* those liabilities and obligations of Seller specifically described and quantified on Schedule 3.2."[100] Similarly, as further insurance, section 3.3 explicitly laid out seventeen liabilities that GWNE *did not* assume. Most pertinent were: cure costs relating to any excluded contract, liabilities arising out of Golfers' Warehouse's business conduct prior to closing, administrative and professional fees relating to the Chapter 11 proceedings, liabilities arising from employment contracts and conduct prior to closing, and taxes applicable to the period prior to closing.[101] Combined with the provisions of § 363(m)[102] and Golfers' Warehouse's request for a waiver of the automatic ten-day stay under Bankruptcy Rule 6004(h),[103] the Asset Purchase Agreement

[99] Kuney, *Selling a Business*, *supra* note 63, at 63.

[100] *Asset Purchase Agreement*, at 15, § 3.2 (emphasis added).

[101] *Asset Purchase Agreement*, at 15-17. The list of excluded liabilities purports not to limit the generality of the foregoing section 3.2. *Id.*

[102] 11 U.S.C. § 363(m) reads: "The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal."

[103] *Motion to Sell*, at 7, ¶ 17. At the time of filing, Federal Rule of Bankruptcy Procedure 6004(h) stated: "An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise." In December of 2009, Rule 6004(h) was amended to provide 14 days after entry of the order, including weekends and holidays, unless the last days is a

virtually assured the parties that the "sale transaction [would] close shortly after court approval, and any appeal [would] be rendered moot."[104] The Asset Purchase Agreement all but eliminated GWNE's liability, creating an essentially non-appealable sale on its preferred liability terms.

Finally, and importantly, the Asset Purchase Agreement stated: "A Third Party interested in acquiring the Purchased Assets may submit to Seller an Acquisition Proposal in accordance with the provisions of the Sale Procedures Order."[105] Although the terms of the sale procedure are discussed in the following section, the Asset Purchase Agreement in essence provided that if a third party presented a qualified offer exceeding the proposed purchase price of $3,100,000 by at least $225,000, then an overbid hearing and auction would occur at which bidding would proceed in $100,000 increments.[106] GWNE would maintain a right of first refusal, and, if it lost at auction, would be compensated $125,000 (a "break up fee") for its diligence in investigating and pursuing the sale.[107]

b. Auction Procedures

As referenced in the Motion to Sell and the Asset Purchase Agreement, on July 9, Golfers' Warehouse also filed its *Motion for Order (i) Approving Auction Procedures to*

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weekend or a holiday, in which case the period rolls over to the next business day. *See* Bankruptcy Rule 9006(a)(1).

[104] Kuney, *Selling a Business*, *supra* note 63, at 58.

[105] *Asset Purchase Agreement*, at 29, § 7.

[106] *Asset Purchase Agreement*, at 29-30, § 7.

[107] *Asset Purchase Agreement*, at 29-30, § 7. The propriety of a "break up fee" will be discussed more thoroughly in part b, section i.

be Employed in Connection with the Sale of Certain of the Debtor's Assets Pursuant to 11 U.S.C. §§ 105 and 363; (ii) Scheduling Date, Time and Place for Sale Hearing and Related Motions to Assume and Assign Executory Contracts Pursuant to 11 U.S.C. § 365; (iii) Approving Break Up Fee; (iv) Approving Form and Manner of Notice; and (v) Dispensing with Appraisal Requirements (hereinafter "Proposed Auction Procedures").[108] Although the Bankruptcy Code is silent on the proper auction process,[109] the Proposed Auction Procedures followed the typical path.

i. A "Stalking Horse" Buyer and "Break Up" Fee

In § 363 sales, debtors often rely upon "an initial, prospective purchaser, the 'stalking horse,' to submit an offer from which competitive bidding may commence."[110] As in this case, the debtor and stalking horse buyer negotiate an asset purchase agreement that is included as part of the debtor's bankruptcy filing. Because the stalking horse buyer invests a significant amount of time and resources investigating the debtor and

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[108] *Motion for Order Approving Auction Procedures*. On July 27, with the support of the Official Committee of Unsecured Creditors, Golfers' Warehouse filed a motion proposing several strictly technical corrections to the auction procedures. *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Ex Parte Motion to Make Technical Corrections to Auction Procedures (Dkt. 89) (July 27, 2009). Two days later, the court summarily issued an order approving the changes. *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Approving Technical Corrections to Auction Procedures (Dkt. 95) (July 29, 2009).

[109] Sable et al., *supra* note 65, at 121 ("There is nothing in the Bankruptcy Code requiring bidding (there is no mention of higher and better offers), stalking horses, or sale procedures orders.") Some commentators have called for the Bankruptcy Code to be "amended to include an explicit process for a sale or sales of substantially all the assets of a business free and clear of all claims and interests." George W. Kuney, *Let's Make It Official: Adding an Explicit Preplan Sale Process As An Alternative Exit From Bankruptcy*, 40 HOUS. L. REV. 1265, 1268 (2004).

[110] Sable et al., *supra* note 65, at 127.

negotiating an agreement, the parties often negotiate a "break up" fee to compensate the stalking horse for its effort. "The seller's acceptance of a later bid" most often triggers payment of this break up fee.[111]

In the case at hand, Golfers' Warehouse entered the Asset Purchase Agreement[112] with GWNE as a stalking horse buyer and negotiated a $125,000 break-up fee, citing the fact that GWNE "ha[d] expended significant time and money conducting its due diligence and ha[d] incurred substantial expenses relating to the negotiation of the Sale Agreement."[113] The fee, if necessary, would be paid upon the completion of the sale to another party or upon Golfers' Warehouse's default on the terms of the Sale Agreement.[114] Noting that several similar—and higher—fees had been "approved by bankruptcy courts to buyers as compensation for the time, effort and money expended by buyers, and because the buyer has in fact enhanced the bidding process by acting as a stalking horse for higher or better offers," Golfers' Warehouse cited a plethora of case law to support the proffered fee.[115] The motion concluded that the proposed $125,000 fee was consistent with case law and would "encourage the solicitation of higher and

[111] Sable et al., *supra* note 65, at 127.

[112] *See supra* section II, part a.

[113] *Motion for Order Approving Auction Procedures*, at 5, ¶ 12.

[114] *Motion for Order Approving Auction Procedures*, at 5, ¶ 12.

[115] *Motion for Order Approving Auction Procedures*, at 5, ¶ 13. For a discussion of the varying tests used to judge the reasonableness of break up fees, see Sable et al., *supra* note 65, at 128.

better offers by having brought a buyer ready, willing and able to consummate this transaction."[116]

ii. The Auction

Despite its arrangement with GWNE, Golfers' Warehouse proposed the solicitation of competing bids at auction in order to maximize the value of the sale to the estate. Pursuant to the notice requirements of Bankruptcy Rules 6004(a)[117] and 2002(c)(1),[118] Golfers' Warehouse stated its intention to inform all known creditors and interested parties of the terms and conditions of the sale, as well as the timeframe allotted for objections. In its Emergency Ex Parte Motion to Limit Service and Shorten Notice—also filed on July 9—Golfers' Warehouse proposed shortening notice to "to overnight notice by overnight courier, express mail, email or facsimile" so that a hearing on the Auction Procedures could take place on July 14.[119] It suggested limiting service to:

> (a) the United States Trustee; (b) the Debtor's twenty largest unsecured creditors (c) counsel to Wachovia Bank, National Association, the Debtor's secured lender; (d) counsel to GWNE, Inc., the proposed buyer

[116] *Motion for Order Approving Auction Procedures*, at 7, ¶ 17.

[117] Bankruptcy Rule 6004(a) reads: "Notice of a proposed use, sale, or lease of property, other than cash collateral, not in the ordinary course of business shall be given pursuant to Rule 2002(a)(2), (c)(1), (i), and (k) and, if applicable, in accordance with § 363(b)(2) of the Code."

[118] Bankruptcy Rule 2002(c)(1) states: "Subject to Rule 6004, the notice of a proposed use, sale, or lease of property required by subdivision (a)(2) of this rule shall include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections. The notice of a proposed use, sale, or lease of property, including real estate, is sufficient if it generally describes the property. The notice of a proposed sale or lease of personally identifiable information under § 363(b)(1) of the Code shall state whether the sale is consistent with any policy prohibiting the transfer of the information."

[119] *Emergency Ex Parte Motion to Limit Service and Shorten Notice of Hearing*, at 6.

> of the Debtor; (e) the Internal Revenue Service, Special Procedures Office; (f) the State of Connecticut; (g) the State of Massachusetts; (h) the State of Rhode Island; and (i) any party that has appeared and requested notice.[120]

Although Golfers' Warehouse's explanation that "the above listed entities are those most likely to have any interest in the matters"[121] seems to have been a tacit acknowledgment that most, if not all, unsecured creditors would not profit from the sale, notice of the sale was also published in the *Hartford Courant* and the *Boston Globe*.[122]

Under the Auction Procedures, any party that wished to take part in the auction was required to submit a "qualified bid" by August 4, 2009 at 9:00 a.m.[123] A qualified bid had to include a signed asset purchase agreement and redlined copy noting changes from the proffered Purchaser's Agreement (including contracts and leases assigned), consideration at least $225,000 more than the proffered $3,100,000 price for terms

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[120] *Emergency Ex Parte Motion to Limit Service and Shorten Notice of Hearing*, at ¶ 14.

[121] *Emergency Ex Parte Motion to Limit Service and Shorten Notice of Hearing*, at ¶ 15.

[122] *Motion for Order Approving Auction Procedures*, at 10, ¶ 26.

[123] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Motion for Order (i) Approving Auction Procedures to be Employed in Connection with the Sale of Certain of the Debtor's Assets Pursuant to 11 U.S.C. §§ 105 and 363; (ii) Scheduling Date, Time and Place for Sale Hearing and Related Motions to Assume and Assign Executory Contracts Pursuant to 11 U.S.C. § 365; (iii) Approving Break Up Fee; (iv) Approving Form and Manner of Notice; and (v) Dispensing with Appraisal Requirements, Exhibit B, (Dkt. 17-2), p. 3, (July 9, 2009) (hereinafter "Auction Procedures"). However, the court's order approving the Auction Procedures set an initial bid deadline of August 3 at 12:00 noon. *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order (i) Approving Auction Procedures to be Employed in Connection with the Sale of Certain of the Debtor's Assets Pursuant to 11 U.S.C. §§ 105 and 363; (ii) Scheduling Date, Time and Place for Sale Hearing and Related Motions to Assume and Assign Executory Contracts Pursuant to 11 U.S.C. § 365; (iii) Approving Break Up Fee and Expense Reimbursement Fee; (iv) Approving Form and Manner of Notice; and (v) Dispensing with Appraisal Requirements, Exhibit B,(Dkt. 60-2), p. 2, ¶ 5, (July 15, 2009) (hereinafter "Order Approving Auction Procedures").

substantially the same as the arrangement with GWNE, and the assumption of all assumed liabilities defined in the Purchaser's Agreement.[124] Qualified bidders could not be dependent on financing to support the bid and were required to submit financial statements and proof of viability, as well as a $400,000 deposit to be held in trust as insurance against withdrawal of the bid or default under the terms of the sale.[125]

If a third party offered a qualified bid, then an auction would be held on August 4, 2009, at 10:00 a.m. at the offices of Golfers' Warehouse's counsel.[126] Golfers' Warehouse would then select the "best bid"[127] to open the auction. The Auction Procedures specifically stated that the following factors would be considered in selecting the opening and best bid:

> (A) the amount and nature of the consideration; (B) the ability of the Qualified Bidder to close the proposed transaction; (C) the proposed closing date and the likelihood, extent and impact of any potential delays in closing; (D) any purchase price adjustments; (E) the impact of the contemplated transaction on any actual or potential litigation; (F) the net economic effect of any changes from the Purchaser's Agreement, if any, contemplated by any Competing Agreement, (H) the net after-tax consideration to be received by the Debtor's estates, and (I) the effect of the Break-Up Fee.[128]

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[124] *Auction Procedures*, at 2-3.

[125] *Auction Procedures*, at 4-6.

[126] *Auction Procedures*, at 7.

[127] See Stevens, *supra* note 92, at 1, for a discussion of what constitutes the "best bid" at auction. Generally, it is that bid which results in the greatest return for creditors. *Id*.

[128] *Auction Procedures*, at 7.

Bidding would then proceed in, at minimum, $100,000 increments from the opening bid.[129] Because, as it contended, Golfers' Warehouse had "already negotiated a sale of the Assets to [GWNE] on reasonable and fair terms," it asked that the court waive the local bar rule, LBR 6004-1's, appraisal requirement.[130]

Upon completion of the auction, Golfers' Warehouse proposed that a sale hearing be held on August 5. Though the August 5 date fell one day short of the twenty-day notice requirement of Bankruptcy Rule 2002(a)(2),[131] Golfers' Warehouse appealed to Bankruptcy Code § 102[132] and Bankruptcy Rule 9006(c)(1),[133] petitioning the court to shorten notice of the hearing and to permit a nineteen-day period of notice. A hearing on August 5 would allow Golfers' Warehouse to complete the sale of the business by August 7, the date upon which it calculated that its cash flow would run dry.[134]

III. Assigning Contracts and Leases

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[129] *Auction Procedures*, at 8.

[130] *Auction Procedures*, at 12, ¶ 29. Connecticut LBR 6004-1 can be found at http://www.ctb.uscourts.gov/local_rules.htm - LBR 6004-1.

[131] Bankruptcy Rule 2002(a)(2) has since been amended to require twenty-one days of notice.

[132] In relevant part, 11 U.S.C. § 102 reads: In this title - (1) "after notice and a hearing", or a similar phrase - (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but (B) authorizes an act without an actual hearing if such notice is given properly and if - (i) such a hearing is not requested timely by a party in interest; or (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act . . . .

[133] Bankruptcy Rule 9006(c)(1) states that, with certain exceptions, "when an act is required or allowed to be done at or within a specified time . . . the court for cause shown may in its discretion with or without motion or notice order the period reduced."

[134] Motion for Order Approving Auction Procedures, at 11, ¶ 12.

Along with the other July 9 motions, Golfers' Warehouse also filed a *Motion to Assume and Assign Executory Contracts and Unexpired Leases* ("Motion to Assume").[135] Golfers' Warehouse offered the justification that, "[by] assigning the Contracts and Leases to the Buyer, the Debtor will generate substantial funds for its estates, especially in light of the overall transaction, which involves the sale of the Debtor's business as a going concern."[136] The Motion to Assume provided that, pursuant to § 365(a),[137] Golfers' Warehouse would assume six leases (listed in Exhibit A to the motion). The leases were commercial leases for Golfers' Warehouse's store and warehouse locations in Connecticut, Massachusetts, and Rhode Island.[138] Golfers' Warehouse would assign these leases to either: (a) GWNE under the Asset Purchase Agreement; or (b) the winner at auction under the Auction Procedures[139] under § 365(f).[140] Golfers' Warehouse

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[135] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Motion to Assume and Assign Executory Contracts and Unexpired Leases, (Dkt. 16) (July 9, 2009).

[136] *Motion to Assume and Assign Executory Contracts and Unexpired Leases*, at 6, ¶ 13.

[137] In relevant part, 11 U.S.C. § 365(a) reads: "[T]he trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."

[138] *Motion to Assume and Assign Executory Contracts and Unexpired Leases*, at 2, ¶ 2-3.

[139] *Motion to Assume and Assign Executory Contracts and Unexpired Leases*, at 5, ¶ 11.

[140] In relevant part, 11 U.S.C. § 365(f) reads:

> "[N]otwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.
>
> (2) The trustee may assign an executory contract or unexpired lease of the debtor only if—
> (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

expressly reserved the right "to amend Exhibit A by deleting certain Contracts and Leases based upon the outcome of the auction and the agreement of the Buyer or successful bidder at auction to assume all of the Contracts and Leases."[141] Thus, Golfers' Warehouse ensured its (or its ultimate acquirer's) ability to "leverage more favorable terms with those third parties who wish[ed] to avoid having their [leases] rejected."[142]

Although Golfers' Warehouse claimed that it would continue to fulfill its obligations under the leases until the completion of the sale and that it "d[id] not believe that any amounts [were] necessary to cure any defaults under §§ 365(b)(1)(A) and (b)(2)" and was not aware of any encumbrances or defaults on the leases,[143] it proposed the service of a "Cure Amount Notice" upon the counterparties to all leases.[144] Each Cure Amount Notice would include Golfers' Warehouse's "calculation of the cure amounts that [it] believe[d] must be paid to cure all defaults."[145] Pursuant to the proposed Notice, counterparties would be informed that they must file objections to the cure amounts set on "the date that is four (4) Business Days prior to, and excluding, the date of the Sale

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> (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

[141] *Motion to Assume and Assign Executory Contracts and Unexpired Leases*, at 5, ¶ 11.

[142] Sable et al., *supra* note 65, at 139.

[143] *Motion to Assume and Assign Executory Contracts and Unexpired Leases*, at 5, ¶ 11.

[144] *Motion to Assume and Assign Executory Contracts and Unexpired Leases*, at 5, ¶ 12.

[145] *Motion to Assume and Assign Executory Contracts and Unexpired Leases*, at 5, ¶ 12.

Hearing."[146] Unless the counterparties to the leases properly objected, they would be forever barred from objecting to the Cure Amount and from asserting claims against Golfers' Warehouse or the eventual purchaser for any additional amount.[147] Thus, Golfers' Warehouse's Motion to Assume, by ensuring Golfers' Warehouse's ability "to easily assign favorable unexpired leases and executory contracts to the buyer," set the stage for it to "maintain one of the signature benefits of the chapter 11 process without having to satisfy all of chapter 11's reorganization requirements."[148]

IV. Foreclosing Appeal

Tucked away in the penultimate paragraph of Golfers' Warehouse's Motion to Sell was the common[149] request that "the ten (10)[150] day stay set forth in Rule 600[4](h) of the Federal Rules of Bankruptcy Procedure be waived."[151] Golfers' Warehouse reasoned that the request was justified by the need "to effectuate a quick sale of the

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[146] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Motion to Assume and Assign Executory Contracts and Unexpired Leases, Exhibit B (Dkt. 16-2), p. 2, ¶ 4 (July 9, 2009).

[147] *Motion to Assume and Assign Executory Contracts and Unexpired Leases*, at 6, ¶ 13.

[148] Deutsch & Distefano, *supra* note 78, at 48.

[149] *See* Friedland et al., *The Nuts and Bolts of Chapter 11 Practice*, *supra* note 18, at 223 ("Courts may, and often do, waive the 10-day [now 14-day] stay in their sale approval order.").

[150] See *supra*, note 103 and accompanying text (noting that Rule 6004(h) has been amended to provide a fourteen-day stay).

[151] *Motion to Sell*, at 7, ¶ 17. Although the motion itself states rule "6006(h)," it should read "6004(h)." Rule 6004(h) reads: "An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise."

Assets in order to preserve the value of selling the Assets as a going concern."[152] The Motion to Sell and accompanying order also included provisions to the effect that negotiations with GWNE were conducted "as an arms-length transaction" and "in good faith."[153] Under § 363(m),[154] if the court took these recitations at face value and granted a waiver of the stay, effectively, the "sale transaction [would] close shortly after court approval, and any appeal [would] be rendered moot."[155]

C. Finalizing the Sale

On July 15, 2009, the bankruptcy court entered its *Order (i) Approving Auction Procedures to be Employed in Connection with the Sale of Certain of the Debtor's Assets Pursuant to 11 U.S.C. §§ 105 and 363; (ii) Scheduling Date, Time and Place for Sale Hearing and Related Motions to Assume and Assign Executory Contracts Pursuant to 11 U.S.C. § 365; (iii) Approving Break Up Fee and Expense Reimbursement Fee; (iv) Approving Form and Manner of Notice; and (v) Dispensing with Appraisal Requirements* ("Order Approving Auction Procedures").[156] The Order Approving Auction Procedures granted Golfers' Warehouse's sale motions in all respects and provided that, pursuant to

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[152] *Motion to Sell*, at 7, ¶ 17. Again this assertion was unsubstantiated by the record. However, see *supra,* note 76 and accompanying text, for one possible explanation.

[153] *Motion to Sell*, at 7, ¶ 17; at 5, ¶ 12.

[154] 11 U.S.C. § 363(m) reads: "The reversal or modification on appeal of an authorization under [§ 363(b) or (c)] of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal."

[155] Kuney, *Selling a Business*, *supra* note 63, at 58.

[156] *Order Approving Auction Procedures*.

Bankruptcy Rules 6004(g)[157] and 6006(d), the ten-day stay was waived, rendering the order enforceable immediately.[158] The court issued a Notice of Hearing, setting a hearing for the sale of Golfers' Warehouse for August 5 at 10:00 a.m.[159]

No qualified bid was received before the August 3 deadline specified in the Order Approving Auction Procedures.[160] Thus, the sale process proceeded pursuant to Golfers' Warehouse's Asset Purchase Agreement with GWNE. Separated by the court's order approving the sale, Golfers' Warehouse also filed two final motions in this concluding stage.

I. Rejecting Undesirable Leases

On August 4, in its *Motion to Reject Unexpired Leases* ("Motion to Reject"), Golfers' Warehouse took one final step "to eliminate unwanted leaseholds."[161] Utilizing § 365(a) to "cherry pick" only favorable leases, Golfers' Warehouse moved to reject the leases of the two locations specified in the Asset Purchase Agreement.[162] Golfers' Warehouse offered the following explanation to demonstrate that, in its "business judgment," rejecting the leases was in its best interest:

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[157] Now Rule 6004(h).

[158] *Order Approving Auction Procedures*, at 9-10, ¶ 15.

[159] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Notice of Hearing, (Dkt. 61) (July 15, 2009).

[160] *Order Approving Auction Procedures*, p. 2, ¶ 5.

[161] Sable et al., *supra* note 65, at 140.

[162] *See supra* note 67 for the text of § 365(a).

> The Debtor does not believe that the Surplus Leases have any value to the Debtor's estate. No party expressed an interest in them during the sale process. The Burlington Location is in a shopping center with numerous vacancies, including the anchor spaces. The Braintree Location is a warehouse in an industrial park with vacancies. The rentals set forth in the Surplus Leases are either at or above current market rentals.[163]

Therefore, because the Asset Purchase Agreement specified that GWNE would remove all inventory from the rejected lease locations and that Golfers' Warehouse would then remove its fixtures,[164] Golfers' Warehouse petitioned the court to grant the Motion to Reject "upon the earlier of (i) August 31, 2009 or (ii) the date that the Debtor gives the applicable Landlord possession of the applicable Premises."[165] On August 5, the court set a hearing on the matter for August 20.[166] On August 21, the court entered its Order Granting Debtor's Motion to Reject Unexpired Leases.[167]

II. The Court Order and Consummation

On August 5, 2009, the bankruptcy court issued its *Order Under 11 U.S.C. §§ 105, 363 and 365 Approving and Authorizing (A) The Sale of Substantially All Assets of the Debtor Free and Clear of All Liens, Claims, Interests and Encumbrances Pursuant to the Terms of the Asset Purchase Agreement with GWNE, Inc.; (B) The Assumption and Assignment of Certain Unexpired Leases and Executory Contracts; and (C) And Further*

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[163] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Motion to Reject Unexpired Leases, (Dkt. 100), p. 3-4, ¶ 7, (August 4, 2009).

[164] *Motion to Reject Unexpired Leases*, at 3, ¶ 6.

[165] *Motion to Reject Unexpired Leases*, at 4, ¶ 10.

[166] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Notice of Hearing, (Dkt. 101), (August 5, 2009).

[167] *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Granting Debtor's Motion to Reject Unexpired Leases, (Dkt. 123) (August 21, 2009).

Relief ("Order Approving Sale"), which approved the sale of Golfers' Warehouse to GWNE, Inc.[168] The order specified that the sale would be governed by the Asset Purchase Agreement and that "every provision, term, and condition thereof be, and therefore is, authorized and approved in its entirety."[169] Because, as the judge had handwritten on the order, the "10-day stay of Fed. R. Bankr. P. 6004(h) is not applicable,"[170] the order was effective immediately. By the terms of the Order Approving Sale, Golfers' Warehouse could send two to four employees to conduct business in the main Hartford office until September 30.[171] With the court's final order in hand, on August 7, the sale to GWNE, Inc. was consummated.[172]

III. The Transition to GW Liquidation

Having sold the rights to the use of the name "Golfers' Warehouse" to GWNE, Golfers' Warehouse moved on August 10 to amend the caption of the case to reflect the completed sale.[173] It also filed an application to amend its Certificate of Incorporation with the State of Connecticut.[174] Golfers' Warehouse thus requested to be referred to as

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[168] *See generallyOrder Approving Sale.*

[169] *Order Approving Sale*, at 25, ¶ X.

[170] *Order Approving Sale*, at 26, ¶ Z.

[171] *Order Approving Sale*, at 27, ¶ BB.

[172] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Application to Amend Caption, (Dkt. 117), p. 2, ¶ 5, (August 5, 2009).

[173] *See Application to Amend Caption*, at 2, ¶ 6.

[174] *Application to Amend Caption*, at 2, ¶ 7.

"GW Liquidation, Inc. f/k/a Golfers' Warehouse, Inc."[175] After notice of the name change,[176] as well as an amended motion to change the caption,[177] the court granted the motion on August 21.[178] The sale was complete. Golfers' Warehouse had transitioned to GW Liquidation.

7. THE PLAN

A. Pre-Confirmation

A bankruptcy plan lays out in detail how and in what amounts a debtor intends to distribute its assets to its various credit and equity holders. Consequently, the plan plays a powerful role in Chapter 11's purpose to maximize the payout to creditors by maximizing the value of the debtor's estate.[179] Because the plan ultimately affects how much a creditor receives, the plan must pass the scrutiny of both the creditors and the court. Because of this scrutiny, the proponent of the plan should do everything in its power to win the favor of the voting unsecured creditors.

In the case of Golfers' Warehouse, Golfers' Warehouse itself proposed the only plan, a plan which the bankruptcy court eventually confirmed in November 2010.

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[175] *Id.*

[176] *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Notice of Name Change, (Dkt. 118) (August 5, 2009).

[177] *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Application to Amend Caption, (Dkt. 119) (August 5, 2009). The amended application and the original application are identical with the exception of the signing attorneys. Attorney Barry S. Feigenbaum signed the first application, while attorney Matthew T. Wax-Krell signed the amended application. Both attorneys were employed by Rogin Nassau, the firm representing Golfers' Warehouse.

[178] *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order to Amend Caption, (Dkt. 124) (August 21, 2009).

[179] *See* Friedland et al., *The Nuts and Bolts of Chapter 11 Practice, supra* note 18, at 5.

However, even before Golfers' Warehouse filed its first plan on August 30, 2010, the Creditors Committee sought to subordinate certain insider unsecured claims and to avoid insider pre-petition payments to further maximize the debtor's estate and, quite possibly, to win the favor of other voting creditors.

I. Insider Avoidance, Subordination, and Settlement Before the Plan

a. Examination of Insiders

Before a party can avoid a payment or subordinate a claim, it needs sufficient evidence to prove that it can avoid or subordinate the payment or claim, which usually requires document collection and individual testimony. The party requests permission from the court to examine the debtor, and any party may examine any financial issue affecting the debtor's estate and consummation of the plan.[180] A "party in interest" includes the debtor, the creditors' committee, a creditor, an equity holder, or an equity holders' committee.[181] However, the party must show that sufficient merit exists to conduct the examination.[182]

Resolving questions regarding a debtor's financial status helps solidify the plan in anticipation of its filing by securing the favor of creditors. If a creditor sees that the DIP has done everything possible to increase the payout beforehand, it will be more likely to approve the plan than if the DIP had not affirmatively sought to maximize the value of

[180] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Ex-Parte Motion Pursuant to Federal Rule of Bankruptcy Procedure 2004 for the Examination of the Debtor and Production of Documents, (Dkt. 131) (September 21, 2009) (hereinafter "Motion for Examination of the Debtor and Production of Documents"). *See also* Fed. R. Bankr. P. 2004(a).

[181] 11 U.S.C. § 1121(c).

[182] Fed. R. Bankr. P. 2004.

the estate. Furthermore, by resolving avoidance issues before the court confirms a plan, the DIP ensures that the plan's details appear more certain and less subject to variation or disruption than if lingering disputed issues remained.

In the case of Golfers' Warehouse, the Creditors Committee took steps from September 2009 through September 2010 to see if it could subordinate certain claims and avoid certain pre-petition payments. In September and October 2009, the Creditors Committee filed for permission to examine certain insiders, pre-petition payments, and unsecured creditor claims.[183] The Creditors Committee requested information regarding several individuals: Scott St. Germain (Golfers' Warehouse's Vice President of Finance), Matt DiVenere (Golfers' Warehouse's former Secretary), Mark Dube (Golfers' Warehouse's President), Robert Jamin (officer), Thomas DiVenere (Golfers' Warehouse's CEO, Chairman of the Board and majority shareholder of the parent corporation, Golf Clubhouse, Inc.), Marc Blair (Golfers' Warehouse director and minority shareholder of Golf Clubhouse, Inc.), and Blair's relatives (Jean A. Blair, Gregory M. Blair, Michael S. Blair).[184]

In 2008, a year before the petition was filed, Golfers' Warehouse paid $174,423.09 to Dube, $339,036.68 to Thomas, and $122,307.60 to St. Germain.[185] In addition to these pre-petition payments, all the individuals—with the exception of Matt

[183] *See Motion for Examination of the Debtor and Production of Documents*; *see also In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Ex-Parte Motion Pursuant to Federal Rule of Bankruptcy Procedure 2004 for the Examination of Thomas DiVenere and Production of Documents, (Dkt. 142) (October 23, 2009).

[184] *Motion for Examination of the Debtor and Production of Documents*, Exhibit A.

[185] *Statement of Financial Affairs*, at 2.

DiVenere and St. Germain—filed unsecured claims against Golfers' Warehouse.[186] Thomas filed unsecured claims totaling $8,910,708.53;[187] Dube filed a claim of $95,128.77; Marc Blair and family filed a claim worth $2,984,660.58; and Robert Jamin filed a $95,128.77 claim as well.[188]

In addition to the foregoing examinations, the Creditors Committee was also interested in examining the claims surrounding a pre-petition Golfers' Warehouse lawsuit,[189] as well as Golfers' Warehouse's transactions with Nevada Bob's, another golf store.[190]

Sometime before and within two years of the petition date, Nevada Bob's Trademarks LLC was a subsidiary of Golfers' Warehouse. Golfers' Warehouse had owned an 85% interest in the company; however, in an effort to reduce its liabilities of $1.1 million owed to various third parties, Golfers' Warehouse negotiated a deal with Nevada Bob's to reduce its equity stake in the LLC from 85% to 21.7%, forgiving

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[186] *See* Chart 4.

[187] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Motion to Approve Settlement Agreement with Thomas DiVenere, (Dkt. 174), p. 2 (February 24, 2010).

[188] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Motion to Approve Settlement Agreement with Mark L. Blair, Individually and as Agent for Jean A. Blair, Gregory M. Blair, Michael S. Blair, Mark S. Dube and Robert S. Jamin, (Dkt. 214), p. 2 (August 19, 2010) (hereinafter "Motion to Approve Settlement Agreement with Mark L. Blair").

[189] Golfers' Warehouse was involved in a breach of lease lawsuit, *Sobol Family Partnership v. Golfers' Warehouse, Inc.*, which settled out of court and left Golfers' Warehouse owing $258,819.36 as of the petition date. *Statement of Financial Affairs*, at 3.

[190] *Motion for Examination of the Debtor and Production of Documents*, Exhibit A, at 8-9.

Nevada Bob's' debt to Golfers' Warehouse of $498,776 in exchange for Nevada Bob's' assumption of $1.1 million in promissory notes plus interest.[191] Through this strategy, Golfers' Warehouse owed no debts to those third parties, and Nevada Bob's owed $506,427 to Golfers' Warehouse in the form of a loan, which was re-classified as a note.[192]

On October 16 and 27, 2009, the court allowed the Creditors Committee to examine the insiders, pre-petition claims, and unsecured creditors it had requested.[193] In the months following, the Committee examined these documents and individuals to see if it was cost effective to (1) avoid the pre-petition payments to Thomas, Dube, and St. Germain, and to (2) subordinate the Thomas DiVenere, Dube, Jamin, and Blair unsecured claims. This two-front "war" lasted from October 2009 to September 2010, culminating in a settlement agreement.

b. Avoiding Insider Pre-petition Payments

Under the Bankruptcy Code, a DIP may avoid a payment made to a creditor for an antecedent debt if the payment was made while the debtor was insolvent, paid within one year before the debtor filed the bankruptcy petition (if the creditor was an insider), and

[191] *Id*. at 4.

[192] *Schedules ABDEF*, Schedule B.

[193] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Authorizing Rule 2004 Examination of Scott St. Germain, (Dkt. 135) (September 23, 2009); *see also In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Authorizing Rule 2004 Examination of Matt DiVenere, (Dkt. 140) (October 16, 2009); *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Authorizing Rule 2004 Examination of Thomas DiVenere, (Dkt. 145) (October 27, 2009).

the payment gives the creditor more than it would receive under Chapter 7.[194] However, the DIP cannot avoid a payment if the debtor made the payment in the ordinary course of business or the recipient gave additional consideration.[195] Alternatively, the DIP may avoid a payment if it was fraudulently transferred. Specifically, if the debtor transferred the payment intending to hinder the creditor, was insolvent during the transfer,[196] or transferred payments to insiders but not in the ordinary course of business, then the DIP may avoid such a transfer.[197]

On May 31, 2009, two months before filing a petition, Golfers' Warehouse's liabilities exceeded its total assets by $4,978,000 ($20,805,000 liabilities - $15,827,000 assets).[198] However, even though Golfers' Warehouse paid insiders throughout the year preceding petition, it is unclear that it was insolvent during that entire period. Yet, Golfers' Warehouse was most likely insolvent during that period, for several reasons. First, around 1999, when parent corporation Golf Clubhouse, Inc. first acquired Golfers' Warehouse, the parent purchased Golfers' Warehouse using leverage from promissory notes guaranteed by CEO Thomas DiVenere in the amount of $3 million.[199] Second, all the while, Golfers' Warehouse accumulated debt from DiVenere's consulting group

[194] 11 U.S.C. § 547(b).

[195] 11 U.S.C. § 547(c).

[196] A corporation is insolvent if its debts exceed its total assets. 11 U.S.C. § 101(32)(A).

[197] 11 U.S.C. § 548(a)(1).

[198] *Statement Pursuant to Local Rule of Bankruptcy 1007-1(c)*.

[199] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Claim No. 65, at 4.

amounting to $8.5 million by 2005.[200] Third, from 2004 to 2008, Golfers' Warehouse breached a lease agreement in Connecticut (the basis of the *Sobol* case), for Golfers' Warehouse's Waterbury store.[201] Lastly, Golfers' Warehouse had already witnessed declining sales from 2007 onward.[202]

In its examinations from September 2009 through February 2010, the Creditors Committee likely concluded that it did not have a good case to avoid the pre-petition payments made to Dube, Thomas DiVenere, and St. Germain. The pre-petition payments were payroll payments, and the defendants could have easily argued that they were made in the ordinary course of business. Additionally, with respect to the Nevada Bob's inter-company loans, if the Creditors Committee were to have avoided these loans, it would have brought Nevada Bob's in as another creditor, possibly secured, and would have also reversed the negotiated release of the $1.1 million in debt Golfers' Warehouse owed to various third parties, bringing that debt into the case as well.

Furthermore, if the unsecured pre-petition litigation claim from the *Sobol* case had been subordinated, Golfers' Warehouse would have faced a high standard because *Sobol* was resolved a year before Golfers' Warehouse filed its bankruptcy petition. Allowing the Creditors Committee to subvert due process by subordinating that claim would have faced stiff opposition. This likely explains why the Creditors Committee decided not to pursue these payments and claims and why these issues were absent from the settlement.

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[200] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Claim No. 79, at 3.

[201] *Statement of Financial Affairs*, at 3. *See also* http://civilinquiry.jud.ct.gov/CaseDetail/PublicCaseDetail.aspx?DocketNo=UWYCV044014883S.

[202] *Statement of Financial Affairs*, at 1.

c. Subordinating Insider Unsecured Claims

The Creditors Committee did pursue, however, the subordination of the unsecured insider claims of Thomas DiVenere, Dube, Jamin, and Blair. To subordinate a claim, the insider must have acted in a way that unfairly affected the other creditors. Similarly to subordination, the Creditors Committee could also nullify a claim by "recharacterization," where substance takes precedence over form.[203]

In the case of Golfers' Warehouse, the Creditors Committee argued that the insider claims were really equity claims, and, therefore, that the court could subordinate them to the equity class, which ultimately would devalue the claims to zero under the anticipated plan proposed by Golfers' Warehouse.[204] The Creditors Committee also argued that if it could not subordinate these claims, it could otherwise avoid them through Chapter 5 litigation, an argument that all of the claimants objected to.[205] Recharacterizing the claims as equity interests would have relieved the estate of around $10 million in claims ($8 million from Thomas and $2.8 million from the Blairs).[206] Neither the settlement agreements nor the orders approving them further detail the court's

[203] For example, if a creditor loaned money to a corporation, but that corporation was wholly owned by that creditor, that loan might not really be a loan but in fact a capital interest in the corporation. Consequently, the court would look to factors that would reveal whether the parties intended for the loan to function as a loan and whether the parties were related.

[204] Under the plan, only two classes existed. Class 1 consisted of all unsecured creditors while Class 2 consisted of all equity holders. Class 1 received any available cash while Class 2 received nothing. *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., First Amended Liquidating Plan of Reorganization, (Dkt. 232), p. 9 (October 7, 2010).

[205] *Motion to Approve Settlement Agreement with Thomas DiVenere*; *see also Motion to Approve Settlement Agreement with Mark L. Blair*.

[206] *See* Chart 4.

reasoning.

One possible explanation as to why the Creditors Committee went after these claims was that these claims, which originated as "loans" to Golfers' Warehouse, were really capital infusions, in which the contributor would in substance receive equity in the form of stock. Before Golfers' Warehouse became the wholly owned subsidiary of Golf Clubhouse, Inc.,[207] Golf Clubhouse, Inc. did not exist. In fact, in 1999, Thomas created it to transfer the majority ownership of Golfers' Warehouse to him under the guise of a corporate entity.[208] Prior to Golf Clubhouse, Inc., Thomas DiVenere and Matt DiVenere were principals of DiVenere Group, a consulting firm.[209] Perhaps Thomas DiVenere enjoyed golf so much and saw enough potential in the golf supply business that he decided to acquire Golfers' Warehouse through a merger. So, he created the entity shell of Golf Clubhouse, Inc., leveraging a promise for future growth in the company (through his consulting firm's expertise) in exchange for the current Golfers' Warehouse shareholders' stock.

In essence, with the help of Marc Blair (another shareholder of Golf Clubhouse, Inc.), Thomas DiVenere bought, through Golf Clubhouse, all of the shares in Golfers' Warehouse via promissory notes. The former Golfers' Warehouse shareholders would receive those notes instead of cash for their shares, and Thomas would have the majority

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[207] *Statement of Financial Affairs*, at 8.

[208] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Claim No. 80, at 3.

[209] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Claim No. 79, Exh. A, at 1.

stake in Golf Clubhouse. The Blairs, Dube, and Jamin's claims were all notes[210] that were part of a group of $3 million in notes[211] owed by Golfers' Warehouse. The Blairs, Dube, and Jamin could have been former shareholders in Golfers' Warehouse before Thomas DiVenere's entity acquired it. In fact, all of these notes first existed in May 1999, around the same time that Thomas DiVenere started making loans and performing consulting services for Golfers' Warehouse. Thus, it seems that these $8 million in claims represent Thomas DiVenere's extension of several loans to Golfers' Warehouse from 1999 to 2005, probably in efforts to expand and to save an ultimately failing business venture.[212]

d. Insider Settlement Agreements

With respect to the insider settlement agreement, because neither side wanted to concede to the other side's arguments, settlement was the only option. The Creditors Committee settled with Thomas DiVenere in March 2010 and settled with the others (the Blairs, Jamin, and Dube) on September 16, 2010, a month after Golfers' Warehouse filed its first plan and a month before it filed its amended plan.[213] To prove that those claims were really equity would have involved complex, protracted litigation, as the issue largely depended on subtle facts about constructive ownership in a corporation doing

[210] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Claim No. 64, Exh. A, at 1; No. 65, Exh. A, at 1; No. 66, Exh. A, at 1.

[211] *Claim No. 65*, at 4.

[212] *Claim No. 79*, at 3.

[213] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Approving Settlement Agreement, (Dkt. 182) (March 18, 2010); *see also In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Approving Settlement Agreement, (Dkt. 227) (September 16, 2010).

business with closely related entities that were possibly not sufficiently unrelated to render any transfers as having occurred at "arm's length."

The March settlement agreement with Thomas DiVenere is nearly identical to the September settlement agreement with the other insiders except for a few differences. The March agreement relinquished both of Thomas' unsecured claims, Nos. 79 and 80, while, in the September agreement, the parties agreed to reduce but not eliminate Claims No. 64, 65, and 66 of Blair, Jamin, and Dube. The settlements also released Golfers' Warehouse from any claims of those creditors and released the creditors from any claims the debtor had or would have against them. Lastly, the settlements confirmed that Thomas DiVenere, Dube, Blair, and Jamin all approved the reorganization plan, subject only to approval of the Creditors Committee.[214]

The court approved both settlements, and Golfers' Warehouse reduced its previous unsecured claims total by $10 million, reducing its total unsecured debt from roughly $18 million to $8 million.[215]

II. Filing of the Plan

While any "party in interest" may file a plan, only the debtor may file one during the "exclusivity period," a period of time dating from the petition date until 120 days after the court files the order for relief."[216] After this period, any party may file a plan.[217]

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[214] *Motion to Approve Settlement Agreement with Thomas DiVenere*, Exhibit A; *see also Motion to Approve Settlement Agreement with Mark L. Blair*.

[215] *See* Chart 2 and 4.

[216] 11 U.S.C. § 1121(b). *See also* Friedland et al., *The Nuts and Bolts of Chapter 11 Practice, supra* note 18, at 271.

[217] 11 U.S.C. § 1121(c).

In the case of Golfers' Warehouse, no party filed a plan except for Golfers' Warehouse itself. Dovetailing the insider settlements, Golfers' Warehouse drafted an initial plan and filed it on August 30, 2010. Two months later, on October 7, 2010, Golfers' Warehouse amended the plan, probably to take into account the settlement issues that were not completely resolved until September 16, 2010.[218]

III. Amendments to the Disclosure Statement and Plan

The amendments to the initial Golfers' Warehouse plan served mainly to reapportion the power between the debtor and creditors after and in response to the settlements, as well as to win approval from the voting creditors.[219] Once the plan went into effect, the Creditors Committee would have dissolved, and the creditors would no longer have had a governing body to look after their interests.[220] Without any assurances that the plan would treat those creditors fairly, the plan might not have won voter approval.

a. Disclosure Statement Amendments

Before any party can vote on or object to a plan, the court must first approve a disclosure statement.[221] Disclosure statements present the plan in a format more accessible to non-lawyers. In bankruptcy cases, impaired creditors need to know whether to vote for or against the plan. If creditors do not understand the plan, then they will not

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[218] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Approving Settlement Agreement, (Dkt. 182) (March 18, 2010); *see also In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Approving Settlement Agreement, (Dkt. 227) (September 16, 2010).

[219] *See generally* 11 U.S.C. § 1129.

[220] *First Amended Liquidating Plan of Reorganization*, at 21, § 8.11.

[221] 11 U.S.C. § 1125.

vote effectively in their best interests. Voting on a plan without complete and accurate information could constitute a deprivation of property without due process of law, a violation of 14th Amendment rights.[222] Nevertheless, the disclosure statement minimizes that danger by informing the voter of the plan's most essential parts.[223]

Under the Bankruptcy Code, a disclosure statement must contain "adequate information" so as to give the holder of a claim sufficient information to make an informed judgment on how to vote.[224] The proponent of a plan may not solicit votes unless the court approves the statement and must also wait until after creditors receive notice of, copies of, and a hearing on, the plan and statement.[225]

Golfers' Warehouse filed its first disclosure statement along with the plan on August 30, 2010.[226] A month later, Golfers' Warehouse filed an amended statement and plan on October 7, 2010.[227] The court approved the statement the same day, finding that the statement satisfied the "adequate information" standard of § 1125.[228] However, it is

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[222] U.S. Const. amend. XIV, § 1.

[223] *See* Friedland et al., *The Nuts and Bolts of Chapter 11 Practice, supra* note 18, at 208.

[224] 11 U.S.C. § 1125(b) & (a)(1).

[225] 11 U.S.C. § 1125(b).

[226] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, (Dkt. 219) (August 30, 2010).

[227] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., First Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code,(Dkt. 233) (October 7, 2010) (hereinafter "First Amended Disclosure Statement").

[228] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Approving First Amended Disclosure Statement and Fixing Date for Filing Acceptance or Rejection of First Amended Plan, Objections Thereto, and Confirmation Hearing, Combined with

unclear how the court held a hearing on the disclosure statement on the same day of the filing without notice to other parties. This tactic certainly helped Golfers' Warehouse avoid any objections to the statement, but at the risk of due process objections. The possible oversight likely did not matter since the Creditors Committee helped secure the necessary votes to approve the plan.[229]

Because the voting creditor might look primarily to the disclosure statement and not to the plan, amendments unique to the statement provide a window into the tactics Golfers' Warehouse used to win creditor approval. Golfers' Warehouse made two amendments to the disclosure statement, both of which seem to reflect how Golfers' Warehouse tried to sell the plan to voters by clarifying certain facts that otherwise would need no clarification in the plan itself.

In the first example, the original disclosure statement stated that the plan provides $827,000 in cash to pay creditors. The amendment added that this amount is an "initial distribution" representing 9.9% of the total value of those claims. Perhaps this percentage gives the voter a quick reference to how little of its claim it should expect to receive. While the "9.9%" statement alone might not have helped Golfers' Warehouse's cause, stating that the payment represents only a fraction of what is to come, it does induce the voter to read on to the next paragraph. In the next paragraph, the plan states that creditors may have more cash if Golfers' Warehouse successfully avoids certain preferential payments in the amount of $790,000. That additional influx of cash would

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Notice Thereto, (Dkt. 234) (October 7, 2010) (hereinafter "Order Approving First Amended Disclosure Statement").

[229] *See infra*, part 7, section B.

provide a slight increase in the 9.9%.[230]

In the other example, the amended statement clarifies what a Plan Administrator expects to be paid. Rogin Nassau served as author of the plan, the Plan Administrator, and also as Golfers' Warehouse's counsel. The voter or judge would be less likely to endorse a plan if he thinks the debtor paid the Plan Administrator in excess of what is reasonable; money paid to the Administrator translates into less money for the creditors. To allay fears of what an Administrator would receive, the disclosure statement disclosed the typical hourly rates the firm charged, which the original statement left out.[231] This clarification corresponds to an amendment to the plan that limited the compensation paid to the Plan Examiner's counsel to $10,000.[232]

b. Amendments to Increase Creditor Protection

In other examples, the amendments served to protect the creditors and to increase compliance with the Code. Both goals helped win the favor of both the voters and the court. For example, under the Bankruptcy Code, the court cannot confirm a plan unless the debtor has paid all fees owed to the court, or unless the plan describes how the debtor will pay them.[233] An amendment to the plan provided that Golfers' Warehouse would pay quarterly fees to the United States trustee until the final decree date.[234]

As another amendment, Golfers' Warehouse attempted to assuage the fears of the

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[230] *First Amended Disclosure Statement*, at 10.

[231] *First Amended Disclosure Statement*, at 17.

[232] *First Amended Liquidating Plan of Reorganization*, at 18.

[233] 11 U.S.C. § 1129(a)(12).

[234] *First Amended Liquidating Plan of Reorganization*, at 15, § 5.13.

creditors by clarifying the Plan Administrator's duties and liabilities. Because Rogin Nassau served as Golfers' Warehouse's counsel, the plan drafter, and the Plan Administrator, the creditors probably needed assurances that the Administrator would protect their interests. One such amendment required that the Plan Administrator report his activity and expenses separately from Rogin Nassau's other attorneys. Separating the accounts allowed for more accurate estimates of administrative costs and expenses and an easier method to judge the reasonableness of the costs.[235]

In yet another amendment, the plan required the Plan Administrator to obtain a fidelity bond equal to 110% of the total cash under the plan. Should the Administrator commit fraud, the estate could collect on the bond to insure payment to the estate and, consequently, the creditors.[236] However, sometime prior to February 23, 2011, the Administrator was unable to secure the bond because a surety required placing a lien on all the assets of the estate.[237] A lien would have subordinated all of the assets to a surety, which would have ruined creditors' chances of receiving maximum payout. Because the Administrator was unable to secure a bond, he was not able to distribute the $1.2 million in cash to the Class 1 creditors by the deadline of December 31, 2010.[238]

On February 23, 2011, Golfers' Warehouse and the Creditors Committee agreed to modify the plan to remove the fidelity bond requirement, replacing it with the

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[235] *First Amended Liquidating Plan of Reorganization*, at 11, § 5.2.

[236] *First Amended Liquidating Plan of Reorganization*, at 15.

[237] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Motion to Modify Plan After Confirmation but Prior to Substantial Consummation, (Dkt. 321) (February 23, 2011).

[238] *First Amended Liquidating Plan of Reorganization*, at 11, § 5.3.

condition that Rogin Nassau would "provide its assurance of the faithful and honest [conduct] *sic* of the Plan Administrator."[239] Since the Administrator was ready to make the distributions save for the bond problem, Golfers' Warehouse and the Creditors Committee further amended the initial distribution deadline to 30 days after the court confirmed the modification, moving the deadline to April 2, 2011.[240]

Golfers' Warehouse and the Creditors Committee could have both foreseen the surety lien issue when they first drafted that fidelity bond amendment. Yet, Golfers' Warehouse drafted it in anyway. Golfers' Warehouse wanted to limit notice of the bond removal, excluding notice to the unsecured creditors who were not members of the Creditors Committee.[241] While the tactic quickened confirmation, it also served to buy Golfers' Warehouse more time to sort out miscellaneous objections to unsecured claims before distributing the cash out to the creditors. Golfers' Warehouse resolved the last objection on February 3, 2011, while the motion to modify the bond provision took place on February 23. Perhaps to the unsecured creditor, the bond problem looked like an honest oversight of due diligence, but to Golfers' Warehouse, having the bond provision in the plan gave non-committee creditors reason to vote for the plan, only to later find out that they would not be paid on time nor with the protections originally planned.

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[239] *Motion to Modify Plan After Confirmation but Prior to Substantial Consummation.*

[240] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Granting Motion to Modify Plan After Confirmation but Prior to Substantial Consummation, (Dkt. 338) (March 3, 2011); *see also In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Ex-Parte Motion to Expedite Hearing and Limit Notice on the Motion to Modify Plan After Confirmation but Prior to Substantial Consummation, (Dkt. 322), p. 2 (February 23, 2011) (hereinafter "Ex-Parte Motion to Expedite Hearing and Limit Notice on the Motion to Modify Plan").

[241] *Ex-Parte Motion to Expedite Hearing and Limit Notice on the Motion to Modify Plan*.

One last amendment to the plan required that the Plan Administrator continue filing reports from the time the plan went into effect until the final decree. Under the Bankruptcy Code, a DIP must file regular financial reports to allow the court and United States trustee to monitor the debtor's activity and to account for any taxes that may arise.[242] Golfers' Warehouse had been filing "Monthly Operating Reports" since its petition date in July 2009, but the Code does not indicate that the execution of a plan relinquishes the debtor's duties.[243] Such an amendment reinforces that the debtor acknowledges its duties owed and cannot claim the plan as having relinquished them by default. This amendment further protects creditors by keeping Golfers' Warehouse's activities transparent after the Creditors Committee dissolves.

B. Confirmation: Approval of Creditors and Court

Before the debtor can execute a plan, the plan must win the approval of a sufficient number of creditors and the court.[244] Not all creditors matter, however. To some "unimpaired" creditors, the plan would not materially affect their rights in the debtor's estate.[245] Consequently, the Code presumes that unimpaired creditor classes accept a plan without actually voting.[246]

Holders who are not entitled to any property under the plan represent another non-voting class. However, in contrast to unimpaired creditors, the Code presumes that these

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[242] 9 AM. JUR. 2D BANKRUPTCY § 358; *see also* 11 U.S.C. §§ 704(a)(8) and 1106(a)(1).

[243] 11 U.S.C. § 704(a)(8).

[244] *See generally* 11 U.S.C. § 1129.

[245] 11 U.S.C. §§ 1124, 1129(a)(8).

[246] 11 U.S.C. § 1126(f).

holders have not accepted the plan.[247] If they were entitled to property, their class could affirmatively reject or accept the plan by majority vote.[248]

Among the creditors that do matter in confirming a plan (those that are impaired but are to receive something under the plan), at least one impaired class must accept the plan.[249] A creditor class accepts a plan if its accepting creditors (1) hold two-thirds of the class's total value, (2) represent the majority of the total allowed claims in that class, and (3) do not claim with bad faith under 1126(e).[250]

Golfers' Warehouse's plan consisted of two classes of claims: "Class 1" and "Class 2." Class 1 consisted of all impaired claims that were not "Class 2" or "Article II" claims (503(b) administrative claims, or 507 priority claims). All unsecured creditors resided in Class 1. Class 2 contained all equity holders. However, Class 2 would receive nothing under the plan and was deemed to have rejected the plan under 1126(g). Because Class 2 "voted," Class 1 stood alone to vote on the plan.[251] No secured creditors class existed as Wachovia had been paid off from the proceeds of the sale of substantially all of the debtor's assets under § 363.[252]

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[247] 11 U.S.C. § 1126(g).

[248] 11 U.S.C. § 1126(d).

[249] 11 U.S.C. § 1129(a)(10).

[250] 11 U.S.C. § 1126(c).

[251] *First Amended Liquidating Plan of Reorganization*, at 7-9.

[252] *See* Appendix, Chart 2 under "Secured Debt."

Although no vote tabulation appears on the docket, Class 1 must have approved the plan because the court confirmed it on November 29, 2010.[253] Even still, Golfers' Warehouse probably had a relatively easy time securing approval from two-thirds of the Class 1 members for two primary reasons. First, both Golfers' Warehouse and the Creditors Committee worked together to negotiate the plan, as it was in the interest of both parties to have the court confirm it. Second, since the Creditors Committee included the largest unsecured creditors, convincing the Creditors Committee to vote in favor of the plan secured two-thirds of the value of Class 1. Of the approximately $8.38 million of Class 1 claims,[254] the Creditors Committee members' claims consisted of $5.05 million of all of Class 1.[255] That proportion counts for nearly 61% of Class 1 claims; a mere 6% more, and Class 1 would have satisfied the two-thirds requirement.

I. Voting

Once the court approves the disclosure statement, the court sets deadlines, such as voting deadlines, objection deadlines, and confirmation hearing deadlines. The court also sets a deadline for when the proponent of the plan needs to give, to all voters, notice of the plan, its disclosure statement, and information about the voting and hearing dates. The voter may accept or reject the plan. He may also submit any objections to the plan. The court addresses those objections at the confirmation hearing.

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[253] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Confirming Plan of Reorganization, (Dkt. 285) (November 29, 2010).

[254] *First Amended Disclosure Statement*, Exhibit B.

[255] *See* Appendix, Chart 5.

On or before October 15, 2010, Golfers' Warehouse sent out copies of the disclosure order, statement, plan, and voting ballots to all holders entitled to vote.[256] All voters should have returned their ballots and objections by November 16, 2010. No creditor or holder objected to the plan or statement.

II. Confirmation Requirements

Before the court confirms the plan, the plan must satisfy a number of requirements, most of which are outlined under § 1129 of the Code.

a. One Plan and Good Faith

The court may confirm only one plan.[257] The court only confirmed the Golfers' Warehouse plan. No other plan existed.

The plan must also have been proposed in good faith.[258] Nothing in the record suggests Golfers' Warehouse did not act in good faith. A court may find a lack of good faith if the proponent of the plan fraudulently induced the court to confirm the plan.[259] Golfers' Warehouse indicated that the plan was the only one that maximized all creditors' claims.[260] Furthermore, Golfers' Warehouse believed that Chapter 11 and not Chapter 7 was the proper path to take because the § 363 sale to GWNE saved 120 jobs.[261] It would

[256] *Order Approving First Amended Disclosure Statement*.

[257] 11 U.S.C. § 1129(c).

[258] 11 U.S.C. § 1129(a)(3).

[259] 11 U.S.C. § 1144.

[260] *First Amended Disclosure Statement*, at 33-35.

[261] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Application for Payment of Final Compensation to Debtor's Counsel, Rogin Nassau LLC, in the Amount of

be unlikely for Golfers' Warehouse to then sabotage the trust of all parties by committing fraud with a disingenuous plan. Golfers' Warehouse even assigned a Plan Examiner from the dissolved Creditors Committee to monitor the Plan Administrator's actions when executing the plan.

b. Claims

The plan separated claims into three broad categories: Article II, Class 1, and Class 2 claims. Article II claims consisted of § 503(b) administrative claims and other § 507 priority claims. Class 1 claims consisted of all undisputed, unsecured creditor claims. Class 2 consisted of all shareholder interests. Article II claims were to be paid first. Any remaining cash was to go to Class 1 claims pro rata. Class 2 would receive nothing under the plan.[262]

The plan must pay § 503(b) administrative claims in cash equal to the claim on the effective date.[263] Administrative claims consist of necessary costs to preserve the debtor's estate.[264] They also include compensation for bankruptcy officers and payment of court fees, as well as any expenses associated with running a creditors' committee, including professional services used by those committees, such as counsel.[265] The plan must pay all employee wages, employee benefits, and unsecured claims of individuals via

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$30,391.00 and Reimbursement of Expenses in the Amount of $5,543.97, (Dkt. 261), p. 2 (November 11, 2010).

[262] *First Amended Liquidating Plan of Reorganization*, at 7-8.

[263] 11 U.S.C. § 1129(a)(9)(A).

[264] 11 U.S.C. §§ 503(b)(1)(B)-(C).

[265] 11 U.S.C. § 503(b)(4).

a deferred cash payment equal to each claim.[266] Holders of tax and penalty claims would receive regular installment payments equal to the value of the claim, over a maximum of five years, and the plan should treat them as fairly as they would the unsecured claim holders.[267]

Golfers' Warehouse's plan was to pay Article II claims in full, without interest, and in cash. Golfers' Warehouse's § 503(b) claims included post-petition fees to the four professional firms involved in the case: Rogin Nassau (Golfers' Warehouse's counsel), Kane Russell Coleman & Logan (Creditors' counsel), the Filardi Law Firm (Creditors' counsel), and Altman and Company (Golfers' Warehouse's consulting firm).[268] The § 503(b) claims presumably also included fees to the court, the United States trustee, the Plan Administrator, the Plan Examiner, and taxes owed to CT, MA, and RI, and all other costs necessary to administer the case.

While the Code provides that the debtor may pay certain § 507 priority claims as deferred cash payments,[269] because Golfers' Warehouse listed § 507 priority claims as Article II claims, Golfers' Warehouse's plan treated them more favorably than the Code required, by paying those claims not on a deferred basis, but when due, in full, and in cash. Of the § 507 priority claims, Golfers' Warehouse had to pay its employees their wages and honor customer gift cards, consumer deposits, and store credits.[270]

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[266] 11 U.S.C. §§ 507(a)(4), (5), (7), 1129(a)(9)(B).

[267] 11 U.S.C. §§ 507(a)(8); 1129(a)(9)(C).

[268] *First Amended Disclosure Statement*, at 9.

[269] 11 U.S.C. § 1129(a)(9)(B).

[270] *Schedules ABDEF*, Schedule E.

Under the plan, the unsecured Class 1 holders received deferred payments. As long as $200,000 would remain in Golfers' Warehouse's accounts reserved for Class 1, the Administrator could distribute Class 1 amounts pro rata until the account was empty. The plan would have renewed distributions once more cash became available for Class 1.[271]

Furthermore, under the Bankruptcy Code, the plan must specify the treatment of impaired classes.[272] Golfers' Warehouse's plan had two impaired classes: Class 1 and Class 2. Total Class 1 claims were about $8,292,361.[273] In addition to paying out Class 1 claims in cash in pro rata portions, the plan indicated that the first distribution would come no later than 30 days after the plan confirmation, December 29, 2010.[274] So, the first distribution to Class 1 had to have been no later than December 29, 2010. However, because of the bond problem, the distribution did not have to occur until April 2 the following year. No holder in Class 2 would receive anything under the plan.

Each impaired class member must accept the plan, or, if not, the non-accepting member must alternatively receive an amount not less than it would receive had the case gone through Chapter 7.[275] The plan indicates it satisfied this requirement because the plan not only gives each Class 1 member an amount not less than Chapter 7 but also gives an amount greater than Chapter 7 required. First, a holder would generally receive

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[271] *First Amended Liquidating Plan of Reorganization*, at 8.

[272] 11 U.S.C. § 1123(a)(3).

[273] *First Amended Disclosure Statement*, Exhibit B.

[274] *First Amended Liquidating Plan of Reorganization*, at 8.

[275] 11 U.S.C. §§ 1129(a)(8), 1129(a)(7)(A).

lesser amounts in Chapter 7 than in Chapter 11 because the Chapter 7 Trustee would not have access to the amount of information that a committee could access under Chapter 11.[276] Under Chapter 7, creditors appoint one person to represent the trustee of the case. While a creditors' committee can exist, the Chapter 7 case provides significantly less involvement of the parties' counsel,[277] and thus, the Trustee has less of an incentive to work in the best interest of the creditor, or might work less efficiently, and consequently decrease the amount that ultimately reaches the creditors. Secondly, the plan argued that no other alternative plan would produce any better result for the creditors than its own because Golfers' Warehouse created the plan specifically to maximize the creditors' interests.[278] Although Class 2 was impaired, it would not have received an amount less than it would have under Chapter 7 because, under Chapter 7, it would have received presumably nothing; equity holders are the last class in the pecking order after unsecured creditors.

Additionally, a plan must "not discriminate unfairly" and must be "fair and equitable" to impaired classes who have not accepted the plan in order to cram down upon those classes.[279] Under the "fair and equitable" test, each holder in either an unsecured claim class or equity interest class must receive property with a value equal to the amount of its claim. If one holder does not receive property of equal value, the class might still qualify as fair and equitable if any subordinate claim will receive nothing

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[276] *First Amended Disclosure Statement*, at 34.

[277] 11 U.S.C. §§ 702, 705.

[278] *First Amended Disclosure Statement*, at 35.

[279] 11 U.S.C. § 1129(b).

under the plan.[280] Golfers' Warehouse's plan had two impaired classes: Class 1 and Class 2. Class 2 was subordinate to Class 1. Class 2 was to receive nothing under the plan and represented all the equity holders. Therefore, Class 1 passed the fair and equitable test. However, Class 2 was also impaired. Since Class 2 was an equity class that was not to receive anything under the plan, its value to be received was zero, and since all Class 2 members would have received nothing, the plan's treatment of Class 2 qualifies as "fair and equitable."

Another plan requirement under the Bankruptcy Code is that all payments made in connection with the plan and case must have been subject to approval by the court as "reasonable."[281] Of the documented payments in Golfers' Warehouse's cases, namely the administrative claims, each was approved or would be approved by the bankruptcy court as part of the fee application process, and such payments faced no objection by the court or the United States trustee.

Before the court can confirm a plan, the debtor must have paid all fees owed to the court or the plan must describe how those fees will be paid.[282] Golfers' Warehouse's plan did not indicate that the fees would be paid all at once. Instead, Golfers' Warehouse planned to pay quarterly fees to the United States trustee until the final decree date.[283]

c. Officers Under The Plan

[280] 11 U.S.C. § 1129(b)(1)-(2).

[281] 11 U.S.C. § 1129(a)(4).

[282] 11 U.S.C. § 1129(a)(12); 28 U.S.C. § 1930.

[283] *First Amended Liquidating Plan of Reorganization*, at 15, § 5.13.

The plan must also disclose any officer serving under the plan. The plan may allow the debtor or its hired representative to adjust or settle the debtor's claims. The method of selecting an officer under the plan must be "consistent with the interests of creditors, equity holders, [and] public policy."[284] Golfers' Warehouse's plan called for two posts. A Plan Administrator would execute the plan and a Plan Examiner would serve as consultant to the Administrator. Golfers' Warehouse appointed Barry Feigenbaum of Rogin Nassau (Golfers' Warehouse's counsel) as the Plan Administrator.[285]

The Creditors Committee would have dissolved when the plan went into effect. The facts do not indicate when the plan went into effect, but the plan stated that it must be administered no later than 30 days after the court filed the order confirming the plan.[286] Therefore, the plan probably went into effect around December 29, 2010, since the court filed the order on November 29, 2010.[287] The Plan Administrator was supposed to file a notice of the effective date, but the docket reveals no such notice.

Because the committee dissolved, the only remaining power existed in the Plan Administrator, who happened to be Golfers' Warehouse's counsel. To provide some balance to the execution of the plan and to make sure that the Administrator worked in the best interests of the creditors, the Examiner served as an ally to the creditors while Feigenbaum executed the plan. The plan specified that the Creditors Committee would

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[284] 11 U.S.C. § 1129(a)(5); 1123(b)(3); 1123(a)(7).

[285] *First Amended Liquidating Plan of Reorganization*, at 6, § 1.30.

[286] *First Amended Liquidating Plan of Reorganization*, at 5, § 1.21.

[287] *Order Confirming Plan of Reorganization*.

appoint an examiner prior to the confirmation hearing on November 18, 2010.[288] No record confirmed when the appointment took place, but a notice filed on December 9, 2010 confirmed that Feigenbaum appointed Charles Filardi.[289] Filardi had served as the Creditors Committee's local counsel, as well as counsel for two members prior to the Creditors Committee's formation.

While the Examiner had no real authority, he would serve as a "sounding board" to the Administrator and would discuss post-confirmation issues.[290] The Administrator would also consult with the Examiner involving any post-confirmation settlements of claims under Chapter 5. As long as the Examiner worked for the Creditors Committee, the Examiner held considerable power to influence the voting of the largest Class 1 members despite him having no actual authority.

Typically, after the bankruptcy court confirms a plan, the United States Trustee and the court reduce their supervisory roles in the case.[291] In addition, allowing the debtor itself to administer the remainder of the case without a scrutinizing creditors' committee would suggest that the debtor could work against the interests of the creditors. Perhaps such a change in power explains why Golfers' Warehouse and the creditors negotiated to have plan officers shepherd the case's remaining affairs.

While Chapter 7 conversion would bestow administrative powers to a third party trustee, the requirements to convert the case to Chapter 7 at such a late stage probably

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[288] *First Amended Liquidating Plan of Reorganization*, at 6-7, § 1.31.

[289] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Notice of Appointment of Plan Examiner, (Dkt. 292) (December 9, 2010).

[290] *First Amended Liquidating Plan of Reorganization*, at 6-7, § 1.31.

[291] *See* Friedland et al., *The Nuts and Bolts of Chapter 11 Practice, supra* note 18, at 333.

proved counter-productive. A party in interest can request a conversion, but must gain court approval to convert.[292] Even though the court exercises discretion on the matter, the court cannot convert a case if it "specifically identifies" evidence that conversion would (1) not further the "best" interests of both the creditors and the estate, (2) that a plan will likely be confirmed within a reasonable time, and (3) that the court has no cause to convert.[293] Such causes include various types of negligent behavior, such as the debtor's failing to attend hearings, failing to file on time, or failing to comply with court orders.[294]

Any party in interest against Golfers' Warehouse would have had no incentive to disrupt the investigations that, if fruitful, could have led to more payouts to creditors. First, Golfers' Warehouse filed its first plan in August 2010, and in the months preceding, it dealt with Creditors Committee examinations and settlements. During those examinations, Golfers' Warehouse could have revealed estimates to the Creditors Committee regarding how many cents on the dollar each creditor might receive. Since all of the unsecured creditors belonged in one class, each creditor had a piece of the pie. Second, Golfers' Warehouse did not act negligently in its duties, and it filed a plan when it had a firmer idea of the total amount of claims, following a settlement reduction of nearly $10 million in claims from insiders. Lastly, the Creditors Committee represented a large number of unsecured creditors. If this case were administered under Chapter 7, the single Chapter 7 trustee would have significantly less resources and political sway

[292] 11 U.S.C. § 1112(b)(1).

[293] 11 U.S.C. § 1112(b)(2).

[294] 11 U.S.C. § 1112(b)(4)(A)-(P).

than the Creditors Committee. That impairment would have delayed the case from moving forward, and would have been detrimental to the interests of both the debtor and creditors.

d. Plan Confirmed

On November 18, 2010, two days after the Class 1 creditors turned in their ballots, the court held a hearing concerning the confirmation of the amended plan. The court confirmed the plan and filed the order eleven days later on November 29.[295]

C. Post-Confirmation

After the court confirmed the amended plan on November 29, 2010, activity slowed. The court gave Golfers' Warehouse until May 31, 2011 to file a final report and an application of final decree, which would close the case.[296] In December 2010, Golfers' Warehouse paid out administrative claims to the four professional firms involved. Since October 2010, Golfers' Warehouse has filed eight different objections to various unsecured claims.[297] From October 2010 to February 2011, Golfers' Warehouse successfully sustained all remaining objections it brought that were not resolved prior to the confirmation of the plan.

I. Debtor Objections

Aside from settling out pre-petition payments and insider claims, Golfers' Warehouse increased cash to Class 1 creditors by objecting to miscellaneous claims that no longer accurately reflected the current amount due. Under the Amended Plan, only

[295] *Order Confirming Plan of Reorganization*.

[296] *Order Confirming Plan of Reorganization*.

[297] *See* Appendix, Chart 3.

the Debtor or Plan Administrator may bring objections to claims that were not previously allowed by a court order. The Debtor had to file any such objections no later than thirty days after the plan went into effect.[298] While Golfers' Warehouse need not have brought objections to untimely proofs of claims, it did so with objections against claims 82, 84, 85, and 86. Successfully disallowing those claims, Golfers' Warehouse reduced Class 1 claims by $86,513.58.[299]

II. Plan Compensation To Professionals

Out of the $1.2 million in available cash from the § 363 sale, $1.16 million was available to Class 1 creditors. Approximately $290,000 was devoted to administering the plan and administrative claims. Throughout December 2010, the court approved motions to pay the administrative claims of the various law firms and professionals involved in carrying out the case.[300] While the plan estimated $190,000 would go towards paying professional fees, the court authorized $226,573.74, which included the final fee applications for the two firms representing the Creditors Committee: Kane Russell Coleman & Logan, and Filardi Law Offices.[301] The final fee application for Golfers' Warehouse's counsel has yet to appear. Since the case is still ongoing, that application will probably not appear until or near the final decree (deadline: May 31, 2011).

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[298] *First Amended Liquidating Plan of Reorganization*, at 10, § 4.4.

[299] *See* Appendix, Chart 3.

[300] *See* Appendix, Chart 6.

[301] *Id*.

8. APPENDIX

Chart 1: Payout

Total Consideration of 363 sale	**$3,600,000**[302]	**=$3,100,000**[303] Cash Consideration	**+$500,000**[304] Assumed Liabilities
363 Adjusted Sales Price	**$2,735,754**[305] According to Amended Disclosure Statement		
"Sale of Assets" (MORs)	**$2,297,973.58**[306]		
363 "Gross Sale Price"	**$1,884,261.60**[307]		
Total Wachovia Secured Debt	**$1,486,728.86**	**=$377,779.47**[308] Pre-petition Term Loan	**+$1,108,949.39**[309] Pre-petition Revolver Loan
Payment in satisfaction of Debt to Wachovia	**($787,942.95)**[310] According to Amended Disclosure Statement	**($614,816.52)**[311] According to a Compensation Application	
Available Cash	**$1,269,445.08**[312]		
503(b) payments	**($226,573.74)**[313]		
Available Cash to Class 1 Creditors	**=$1,042,871.34**	**$1,200,113.36**[314] Estimated Available Cash to Class 1 Creditors (Amd. Plan).	**$8,375,012.13**[315] Estimated Class 1 Claims (Amd. Plan).

[302] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Motion to Sell Assets Out of the Ordinary Course of Business and Free and Clear of Security Interests, (Dkt. 15), Exh. B, p. 14 (July 9, 2009).

[303] *Id*. at 4.

[304] *Id*. at Exh. B, p. 14.

[305] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., First Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, (Dkt. 233), p. 8 (October 7, 2010).

[306] *See* Chart 2.

[307] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Application for Payment of Final Compensation to Debtor's Counsel, Rogin Nassau LLC, in the Amount of $30,391.00 and Reimbursement of Expenses in the Amount of $5,543.97, (Dkt. 261), p. 2 (November 11, 2010).

[308] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order after Final Hearing (1) Authorizing Debtor-in-Possession to Obtain Financing, Grant Security Interests and Accord Priority Status Pursuant to 11 U.S.C. §§ 361, 364(c), and 364(d); (2) Authorizing the Use of Cash Collateral Pursuant to 11 U.S.C. §§ 361 and 363(c)(2), and (3) Modifying Automatic Stay, (Dkt. 96), p. 2 (July 29, 2009).

[309] *Id.* at 2.

[310] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., First Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, (Dkt. 233), p. 12 (October 7, 2010).

[311] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Application for Payment of Final Compensation to Debtor's Counsel, Rogin Nassau LLC, in the Amount of $30,391.00 and Reimbursement of Expenses in the Amount of $5,543.97, (Dkt. 261), p. 2 (November 11, 2010).

[312] *Id*. at 2.

[313] *See* Chart 6.

[314] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., First Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, (Dkt. 233), Exh. B (October 7, 2010).

[315] *Id*.

Chart 2: Debts and Loans

Date	Event	Unsecured Debt	Priority Debt	Secured Debt	Loan Payment	Loan Received	"Sale of Assets"
07/09/09	Petition	$17,098,481.31[316]	$428,836.23[317]	$1,486,728.86[318]	$0	$0	$0
07/31/09	MOR July 09	$17,400,863.97[319]	$80,174.09[320]	$377,779.01[321]	$1,392,970.18[322]	$690,616.74[323]	$0
08/31/09	MOR Aug 09	$17,394,646.80[324]	$0[325]	$0[326]	$901,596.21[327]	$87,834.09[328]	$2,277,668.58[329]
09/30/09	MOR Sep 09	$17,394,646.80	$0	$0	$0	$0	$20,305[330]
10/31/09	MOR Oct 09	$17,394,536.01	$0	$0	$0	$0	$0
11/30/09	MOR Nov 09	$18,192,721.96	$0	$0	$0	$0	$0
12/31/09	MOR Dec 09	$18,192,721.96	$0	$0	$0	$0	$0
01/31/10	MOR Jan 10	$18,192,721.96	$0	$0	$0	$0	$0
02/31/10	MOR Feb 10	$9,434,190.45[331]	$0	$0	$0	$0	$0
03/31/10	MOR Mar 10	$9,434,190.45	$0	$0	$0	$0	$0
04/30/10	MOR Apr 10	$9,434,190.45	$0	$0	$0	$0	$0
05/31/10	MOR May 10	$9,434,190.45	$0	$0	$0	$0	$0
06/30/10	MOR Jun 10	$9,434,190.45	$0	$0	$0	$0	$0
07/31/10	MOR Jul 10	$9,434,190.45	$0	$0	$0	$0	$0
08/31/10	MOR Aug 10	$9,434,190.45	$0	$0	$0	$0	$0
09/30/10	MOR Sep 10	$9,434,190.45	$0	$0	$0	$0	$0
10/31/10	MOR Oct 10	$9,434,190.45	$0	$0	$0	$0	$0
11/30/10	MOR Nov 10	$9,434,190.45	$0	$0	$0	$0	$0
12/31/10	MOR Dec 10	$9,434,190.45	$0	$0	$0	$0	$0
01/31/11	MOR Jan 11	$9,434,190.45	$0	$0	$0	$0	$0
02/28/11	MOR Feb 11	$9,434,190.45	$0	$0	$0	$0	$0

[316] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Corporate Monthly Operating Report, (Dkt. 137), p. 7 (October 5, 2009).

[317] *Id.*

[318] Wachovia Pre-petition Revolver Loan plus the Pre-Petition Term Loan: $1,108,949.39 + $377,779.47. *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order after Final Hearing (1) Authorizing Debtor-in-Possession to Obtain Financing, Grant Security Interests and Accord Priority Status Pursuant to 11 U.S.C. §§ 361, 364(c), and 364(d); (2) Authorizing the Use of Cash Collateral Pursuant to 11 U.S.C. §§ 361 and 363(c)(2), and (3) Modifying Automatic Stay, (Dkt. 96), p. 2 (July 29, 2009).

[319] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Corporate Monthly Operating Report, (Dkt. 137), p. 7 (October 5, 2009).

[320] *Id.*

[321] *Id.*

[322] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Corporate Monthly Operating Report, (Dkt. 137), p. 2 (October 5, 2009).

[323] *Id.*

[324] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Corporate Monthly Operating Report, (Dkt. 138), p. 10 (October 6, 2009).

[325] *Id.*

[326] *Id.*

[327] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Corporate Monthly Operating Report, (Dkt. 138), p. 2 (October 6, 2009).

[328] *Id.*

[329] *Id.*

[330] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Corporate Monthly Operating Report, (Dkt. 147), p. 2 (November 4, 2009).

[331] Settlement of Thomas DiVenere's Claims.

Chart 3: Debtor Objections

Claim #	Before Objection	After Objection	Date of Objection	Date of Order
#06[332]	$15,838.79	$8,000	10/12/10	11/19/10
#22[333]	$6,606.15	$0	10/12/10	11/19/10
#24[334]	$2,500	$0	10/12/10	11/18/10
#41[335]	$49,413.46	$26,000	10/12/10	12/9/10
#82[336]	$30,771.63	$0	10/15/10	12/9/10
#86[337]	$1,817.09	$0	10/15/10	12/2/10
#84[338]	$3,266.46	$0	12/21/10	2/3/11
#85[339]	$10,300	$0	12/21/10	2/3/11
Total:	$120,513.58	$34,000		
Difference	$86,513.58			
Amount Estimated by Plan[340]	$86,651			

[332] New England Guide filed unsecured claim for consignment goods delivered to Debtor. However, Debtor said goods were returned. Court reduced the claim, possibly in satisfaction of a breach of contract. *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Debtor's Objection to Claim Number 6 Filed by New England Golf Guide, (Dkt. 237) (October 12, 2010); *see also In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Sustaining Debtor's Objection to Claim Number 6 Filed by New England Golf Guide, (Dkt. 281) (November 19, 2010).

[333] The City of Cranston filed this claim probably for taxes. Debtor claimed this amount was already paid. Court sustained. Claim disallowed. *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Debtor's Objection to Claim Number 22 Filed by the City of Cranston, (Dkt. 238) (October 12, 2010); *see also In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Sustaining Debtor's Objection to Claim Number 22 Filed by the City of Cranston, (Dkt. 282) (November 19, 2010).

[334] RI Division of Tax filed this claim. Debtor stated this amount was not due. RI responded saying this was a franchise tax still owed because Debtor failed to dissolve business with the Secretary of State. At the plan confirmation hearing, the Court ruled it a moot issue. *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Debtor's Objection to Claim Number 24 Filed by Rhode Island Division of Taxation, (Dkt. 239) (October 12, 2010).

[335] MA Department of Revenue filed an unsecured priority claim. Then amended it to consist of a $46,800 secured claim, $5,800 unsecured priority claim, and a general unsecured claim of $319. Debtor argued that those amounts were already paid by it or the parent corporation. MA fired back saying if Debtor did not pay tax, MA has right to place lien. For two tax years it did file, for two other years the lien notice was questionable. MA argued that the 363 sale agreement said MA had right to attach lien on the cash proceeds and that at the time the Debtor had sufficient funds to pay out. The Court heard the matter and reduced all claims to one $26,000 unsecured claim. *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Sustaining Debtor's Objection to Claim Number 41 (as Amended) Filed by the Massachusetts Department of Revenue, (Dkt. 290) (December 9, 2010).

[336] Greg Norman Collection filed unsecured claim. Debtor said amount was already paid and the proof of claim was filed late. Court sustained objection and disallowed the claim. *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Debtor's Objection to Claim Number 82 Filed by Greg Norman Collection, Div. of Tharanco, (Dkt. 248) (October 15, 2010); *see also In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Sustaining Debtor's Objection to Claim Number 82 Filed by Greg Norman Collection, Div. of Tharanco, (Dkt. 291) (December 9, 2010).

[337] Pitney Bowes filed $1,800 unsecured claim. Debtor argued it was filed late and amount due was actually $188. Court disallowed claim. *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Debtor's Objection to Claim Number 86 Filed by Pitney Bowes, Inc.,(Dkt. 249) (October 15, 2010); *see also In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Sustaining Debtor's Objection to Claim Number 86 Filed by Pitney Bowes, Inc., (Dkt. 288) (December 2, 2010).

[338] Team Effort filed unsecured claim. Debtor argued filed late. Also argued that the invoice sent was directed to "Golfers' Warehouse" which does not refer to the Debtor (GW Liquidation does). Court sustained and claim disallowed. *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Debtor's Objection to Claim Number 84 Filed by Team Effort, (Dkt. 312) (December 21, 2010); *see also In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Sustaining Debtor's Objection to Claim Number 84 Filed by Team Effort,(Dkt. 317) (February 3, 2011).

[339] WHDH-TV filed an unsecured claim. Debtor argues claim was filed late and it was a duplicate of Claim No. 40. Court disallowed claim. *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Debtor's Objection to Claim Number 85 Filed by WHDH-TV,(Dkt. 313) (December 21, 2010); *see also In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Sustaining Debtor's Objection to Claim Number 85 Filed by WHDH-TV, (Dkt. 318) (February 3, 2011).

[340] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., First Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, (Dkt. 233), p. 11 (October 7, 2010).

Chart 4: Settlements

Insider	Claims	Pre-Petition Payments[341]	Total Debtor Cost Before Settlement	Settlement Results	Total Debtor Cost After Settlement	Date of Settlement
Thomas DiVenere	Claim No. 79: $8,535,548.53 Claim No. 80: $375,160.00	$339,036.68	$9,249,745.21	Creditors Committee failed to avoid pre-petition payment, but expunged both claims.	$339,036.68	Filed: 2/24/10. Approved: 3/18/10.
Scott St. Germain	$0	$122,307.60	$122,307.60	No Dispute	$122,307.60	N/A.
Mark S. Dube	Claim No. 64: $95,128.77[342]	$174,423.09 +$10,071.80[343]	$279,623.66	Reduce Claim to $61,381.19	$245,876.08	Filed: 8/19/10. Approved: 9/16/10.
Marc Blair and Family	Claim No. 66: $2,983.660.58		$2,983.660.58	Reduce Claim to $1,927,237.62	$1,927,237.62	Filed: 8/19/10. Approved: 9/16/10.
Robert Jamin	Claim No. 65: $95,128.77[344]		$95,128.77	Reduce Claim to $61,381.19	$61,381.19	Filed: 8/19/10. Approved: 9/16/10.
Totals			**$12,730,465.82**		**$2,695,839.17**	
Amount Recovered by Creditors Committee					**$10,034,626.65**	

[341] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Statement of Financial Affairs, (Dkt. 84), p. 2 (July 23, 2009).

[342] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Motion to Approve Settlement Agreement with Mark L. Blair, Individually and as Agent for Jean A. Blair, Gregory M. Blair, Michael S. Blair, Mark S. Dube and Robert S. Jamin, (Dkt. 214), p. 2 (August 19, 2010).

[343] *Id.* at Exh. A, p. 2.

[344] *Id.* at 2.

Chart 5: Members of the Creditors Committee

Official Committee of Unsecured Creditors[345]	Claim Amount[346]
Acushnet Co[347]	$323,058.10[348]
Marc Blair[349]	$1,927237.62[350]
Callaway Golf	$743,262.39
Cleveland Golf/SRIXON	$695,647.45
Mizuno USA Inc.	$337,880.66
Nike USA, Inc.	$562,689.33
Taylormade/Adidas Golf	$459,505.44
Total Committee Member Claims	**$5,049,280.99**
Total Class 1 Claims	**$8,375,012.13[351]**
Percentage of Class 1 Claims that are Committee claims	**60.29%**

[345] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Application of the Official Committee of Unsecured Creditors for an Order Authorizing the Nunc Pro Tunc Employment and Retention of Filardi Law Offices LLC as Local Counsel, (Dkt. 91), p. 2 (July 28, 2009).

[346] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Schedules ABDEF, (Dkt. 85), Schedule F, (July 23, 2009).

[347] Owner of the Footjoy and Titleist golf brands.

[348] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Claim No. 60.

[349] Officer and Director of Golfers' Warehouse and minority shareholder of parent corporation Golf Clubhouse, Inc. *See In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Motion to Approve Settlement Agreement with Mark L. Blair, Individually and as Agent for Jean A. Blair, Gregory M. Blair, Michael S. Blair, Mark S. Dube and Robert S. Jamin, (Dkt. 214), p. 2 (August 19, 2010).

[350] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Motion to Approve Settlement Agreement with Mark L. Blair, Individually and as Agent for Jean A. Blair, Gregory M. Blair, Michael S. Blair, Mark S. Dube and Robert S. Jamin, (Dkt. 214), Exh. A, p. 5 (August 19, 2010).

[351] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., First Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, (Dkt. 233), Exh. B (October 7, 2010).

Chart 6: Article II 503(b) Payments to Professionals

Firm	Fees	Expenses	Totals
Rogin Nassau LLC (Golfers' Warehouse)	$30,391.00	$5,622.52	$36,013.52[352]
Filardi Law Offices LLC (Creditors Committee)	$36,531.00	$586.79	$37,117.79[353]
Altman & Co. (Golfers' Warehouse consultant)	$15,365.00	$340.25	$15,705.25[354]
KRCL (Kane Russell Coleman & Logan)	$132,409.60	$5,327.58	$137,737.18[355]
Total Paid to Firms			**$226,573.74**
Total Estimated by Plan			**$190,000**[356]

[352] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Granting Final Application of Debtor's Counsel, Rogin Nassau LLC, for Interim Compensation and Reimbursement of Expenses, (Dkt. 304), (December 16, 2010).

[353] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Authorizing Second Application of Filardi Law Offices LLC for Approval of Attorney's Fees and Expenses Incurred as Local Counsel for the Official Committee of Unsecured Creditors, (Dkt. 305), (December 16, 2010); *see also In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Authorizing Final Application of Filardi Law Offices LLC for Approval Of Attorney's Fees And Expenses Incurred As Counsel for the Official Committee of Unsecured Creditors, (Dkt. 346), (March 31, 2011).

[354] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Granting Third and Final Application of Debtor's Management Consultant, Altman and Company LLC, for Compensation and Reimbursement of Expenses, (Dkt. 303), (December 16, 2010).

[355] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Authorizing Second Interim Application of Kane Russell Coleman & Logan PC for Approval of Attorney's Fees and Expenses Incurred as Counsel for the Official Committee of Unsecured Creditors, (Dkt. 306), (December 16, 2010); *see also In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., Order Authorizing Final Application of Kane Russell Coleman & Logan PC for Approval Of Attorney's Fees And Expenses Incurred As Counsel for the Official Committee of Unsecured Creditors, (Dkt. 345), (March 31, 2011).

[356] *In re Golfers' Warehouse, Inc.*, case no. 09-21911, D. Conn., First Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, (Dkt. 233), p. (October 7, 2010).

The Bankruptcy of Golfers' Warehouse, Inc.

Presentation by
Briton Collins
Will Smith
David Choi

GOLFERS' WHO?

- Hartford, Connecticut based golf supply chain operating stores in Connecticut, Massachusetts, and Rhode Island.

- 2008 annual sales of approx. $28.4 million.

THE DOWNFALL

- In 2009, GW became unable to obtain new inventory due to a lack of trade credit, the general economic downturn, and a reduction in the advance rates on its banking agreements.
- Inventory levels fell from $6.5 to $ 3.5 million.
- At the rate it was falling, GW would be unable to sustain operations past August 2009.

WHAT TO DO?

- GW determined it needed to sell its business as a going concern in order to protect its creditors, the main concern being the treatment of Wachovia, its only secured creditor.
- However, needed to stave off creditors in the process.
- July 9, 2009: GW filed for Ch. 11 in the U.S. Bankruptcy Court for the District of Conn.

THE SKINNY

- Assets: approx. $15.8 million
- Liabilities: approx. $20.8 million
- Secured Creditor: Wachovia = approx. $1.5 million

FIRST DAY MOTIONS

- Motion to Expedite Hearing and Limit Notice
  - 140 creditors
  - Notice to all was “burdensome”
  - Only certain parties would really care
  - GRANTED!

FIRST DAY MOTIONS

- ALL of the typical first day motions: appoint counsel, pay taxes, pay payroll, etc.
- Motion to Continue Honoring Prepetition Customer Loyalty Programs
  - Gift Certificates, refunds/returns, loyalty points.
  - Necessary for continued customer loyalty and confidence.
  - Claimed it was ordinary course under § 363(c), but it sought approval under § 363(b) just in case.

MOTION TO BORROW

- GW had approx. $1.5 million in pre-petition secured debt to Wachovia under two separate loans.
- GW claimed it could not obtain any unsecured debt on more favorable terms, and needed to enter into a DIP lending facility with Wachovia under § 364 in order to support GW's continued operations through bankruptcy.

MOTION TO BORROW

- Wachovia gets superpriority status and lien on both pre- and post-petition assets.

- Wachovia gets up to $75,000 in various “fees”, all of which seem pretty bogus.

MOTION TO BORROW

- What was this loan for?
  - GW claimed it was to fund post-petition operations.
- HOWEVER, one of the explicit uses in the loan agreement was that the post-petition loan funds could be used to pay or cash collateralize GW's pre-petition debt to Wachovia.
- We have a "roll up."
  - Take a pre-petition debt and make it a post-petition administrative superpriority with all the trimmings.

“OBJECTION, YOUR HONOR!”

- Two unsecured creditors objected, calling GW out on the roll up.
  - Plenty of money was coming from the impending sale.
    - $3.1 million, to be exact.

- Don’t know why, but the objection was withdrawn at the hearing.

MOTION GRANTED

- Motion to Borrow was granted.

- Official Committee of Unsecured Creditors formed.
  - Seven unsecured creditors – mostly pre-petition trade suppliers.

THE SALE

- Motion to Sell – July 9, 2009
- Sale Order – August 5, 2009

- In consultation with Wachovia
- As a going concern, free and clear, out of the ordinary course of business

JUSTIFICATIONS

- The Debtor operates a seasonal business with approximately 72% of its annual sales occurring during the months of March through August. Due to a combination of (i) **the lack of trade credit**; (ii) **deteriorating sales due to the general downturn in the economy** and (iii) **a reduction in the advance rates provided for in the Debtor's banking agreement**, the Debtor was unable to purchase adequate inventory for its stores. The normal inventory level at this time of year is approximately $6.5 Million. The inventory level is now approximately $4.3 Million and is projected to be approximately $3.5 Million by the end of July. Some of the more popular items are not available for sale to the Debtor's customers. Accordingly, the Debtor will not be able to sustain continued operations past early August. **Without a sale of the Debtor's business prior to early August, the Debtor will not be able to sell its business as a going concern.**
- **Identified August 7 as the day upon which its cash would run out**

STATUTORY BASES

- 11 U.S.C. § 363(f): The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if:
  - (2) such entity consents
  - (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest

ASSET PURCHASE AGREEMENT

- July 9, 2009 with GWNE, Inc.
- “A cash price of 80% of the cost of the Debtor’s inventory less $500,000 (in consideration of certain assumed liabilities under the Sale Agreement, including without limitation, the Buyer’s assumption of all customer gift cards, coupon programs and deposit liability). The Debtor places a value on the total cash consideration at $3,100.000 as of the Petition Date. The Assets include all of the Debtor’s inventory, furniture, fixtures, equipment, and a 2001 Isuzu box truck.”

ASSET PURCHASE AGREEMENT

- Assumed leases and contracts, personal property, intangible property (including the right to use the name Golfers' Warehouse and all associated websites, databases, email addresses, etc.), inventory, governmental permits, and books and records.
- Essentially released GWNE, Inc. from all liability
- Waiver of the automatic ten-day (now 14-day) stay under Bankruptcy Rule 6004(h)

ASSET PURCHASE AGREEMENT

- If a third party presented a qualified offer exceeding the proposed purchase price of $3,100,000 by at least $225,000, then an overbid hearing and auction would occur at which bidding would proceed in $100,000 increments.
- GWNE would maintain a right of first refusal, and, if it lost at auction, would be compensated $125,000 (a “break up fee”) for its diligence in investigating and pursuing the sale.

AUCTION PROCEDURES

- Motion for Order Approving Auction Procedures filed on July 9, 2009
- Qualified bids had to be submitted by August 3, 2009 at noon
  - At least $225,000 more than GWNE, Inc. for substantially the same terms ($100,000 increment + $125,000 break up fee)
- If bid received, auction on August 4 at 10:00 a.m.

FINALIZING THE SALE

- No bidders, sale commenced pursuant to Asset Purchase Agreement with GWNE, Inc.
- On August 4, Golfers' Warehouse moved to reject two leases at undesirable locations (*see* § 365(a))
- On August 5, 2009, court issued order approving sale
- August 21, case caption changed to refer to Golfers' Warehouse as "GW Liquidation, Inc. f/k/a Golfers' Warehouse

THE PLAN

- Clarifies who gets what and how
- Filing
  - 1121(b) – debtor only
  - 1121(c) – anyone else after
- Goal: Maximize estate, maximize payout
  - Win Voters and Win the Court
- Two versions:
  - August 2010 Plan
  - October 2010 Amended Plan

TIMELINE

- **Pre-Confirmation**
  - Resolving Insider Activities
  - Amendments
- **Confirmation: by Creditors and Court**
  - Voting
  - Details of the Plan
- **Post Confirmation**
  - Debtor Objections

TIMELINE

- July 2009: Petition
- Aug 2009: 363 Sale
- Sep 2009 to Sep 2010: Pre-Confirmation
- Oct 2010 to Nov 2010: Vote & Confirmation
- Dec 2010 to May 2011: Post Confirmation

PRE-CONFIRMATION
Sept 2009 - Sept 2010

- Examination of Insiders
- Issues
  - Pre-petition payroll payments
  - Relationship with Nevada Bob's
  - Pre-petition litigation settlement – *Sobol* case
  - Insider Unsecured Claim subordination
- Results of Examination
- Actions Taken
- Settlement
- Effects

EXAMINATION
Who and What

- financial issue affecting debtor's estate and consummation of plan
  - BRCP 2004(a)
- Who
  - Scott St. Germain (GW Vice President of Finance)
  - Matt DiVenere (GW former Secretary)
  - Mark Dube (GW President)
  - Marc Blair (GW Director & min. shr Golf Clubhouse)
  - Blair's relatives - Jean A. Blair, Gregory M. Blair, Michael S. Blair
  - Robert Jamin (officer)
  - Thomas DiVenere (CEO, Chrmn Board, maj shr Golf Clubhouse)
- What
  - Pre-petition payroll payments to Germain,
  - Relationship with Nevada Bob's
  - Pre-petition litigation settlement – *Sobol* case
  - **Insider Unsecured Claim subordination**

PRE-PETITION PAYMENTS

- **When**: July 2008-July 2009
- **What**: payroll
  - $174,423.09 to Dube
  - $339,036.68 to Thomas
  - $122,307.60 to St. Germain.
- **LAW**:
  - 547(a)-(c) cannot avoid if paid in “ordinary course of business

NEVADA BOB'S

- Nevada Bob's Trademarks LLC - GW Subsidiary
  - **GOAL**
    - to reduce GW $1.1 million owed to various third parties
  - **DEAL**
    - GW
      - Reduce equity from 85% to 21.7%
      - forgive Nevada Bob's of $498,776 debt
    - NB
      - Assume $1.1 million promissory notes plus interest
  - **RESULT**
    - GW owed no debts to 3rd parties
    - NB owed $506,427 to GW in loans

SOBOL SETTLEMENT

- *Sobol Family Partnership v. GW*
  - CoA: Breach of Lease
  - settled out of court – 2004-2008
  - Settlement amount = unsecured claim
  - Amount: $258,819.36

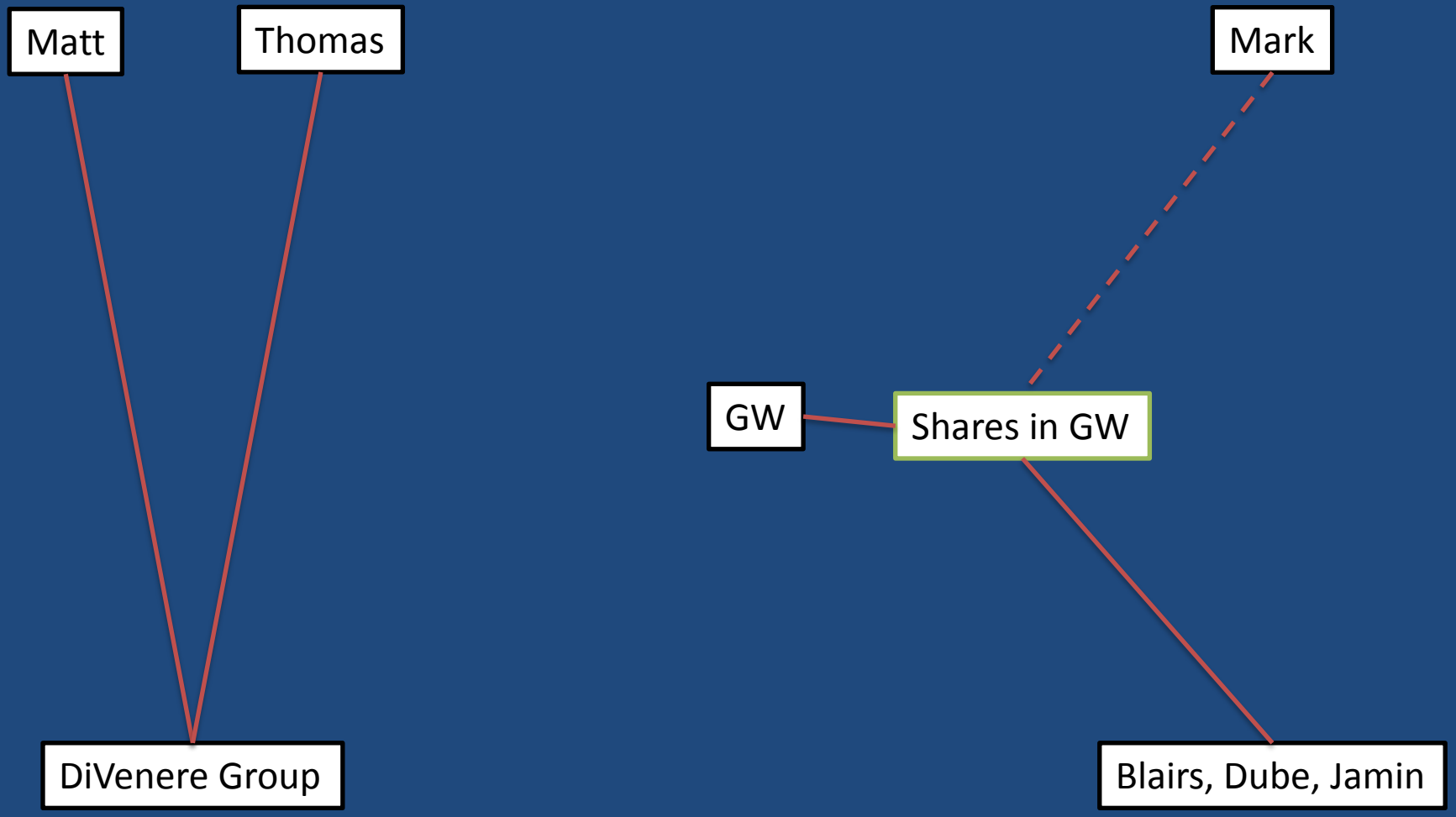
RESULTS OF EXAMINATION

- Why these were not pursued:
  - Pre-petition payroll payments to Germain,
    - did not have a good case to avoid pre-petition payments because were payroll payments
  - Relationship with Nevada Bob's
  - Pre-petition litigation settlement – *Sobol* case
- If avoid inter-company loans
  - Nevada Bob's in as another creditor (possibly secured)
  - reverse release of $1.1 million GW owed to various third parties
- Subordinating unsecured litigation claim of *Sobol*
  - resolved a year before petition
  - due process issue and comity

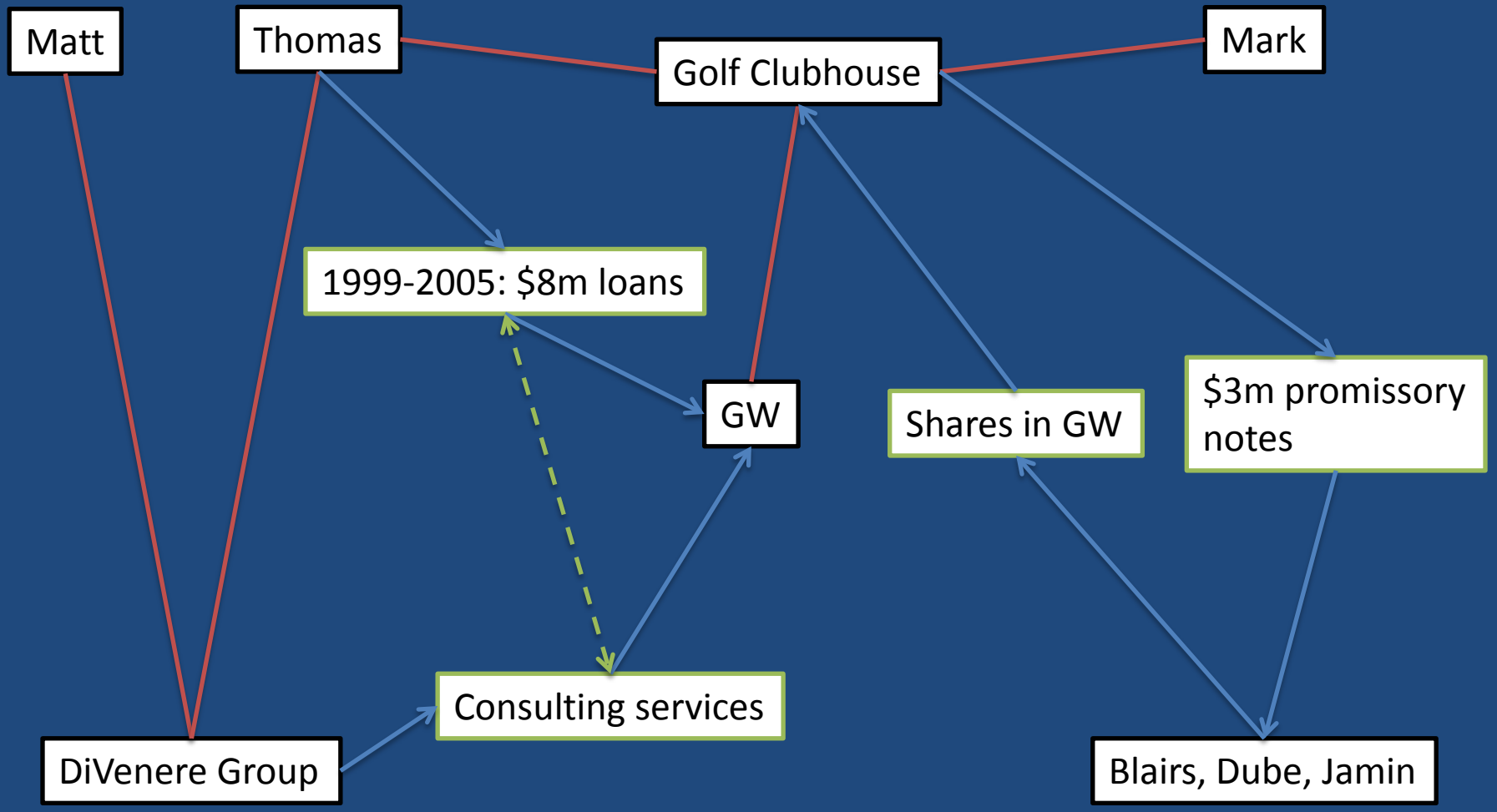
UNSECURED CLAIMS

- Thomas 2 claims: $8,910,708.53
- Dube: $95,128.77
- Blair and family: $2,984,660.58
- Jamin: $95,128.77
- GOAL: reduce to equity claim (zero payout)
- Outcome: reduced

POSSIBLE MERGER
Before (pre-1999)



POSSIBLE MERGER
After



UNSECURED CLAIMS

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- Blair and family: $2,984,660.58
- Jamin: $95,128.77
- GOAL: reduce to equity claim (zero payout)
- Outcome: reduced unsecured claims
  - from $18m to 8 m. (September 2010).

PLAN BEFORE AMENDMENTS

- Unchanged
  - Article II claims -
    - 503(b) admin claims - $200k approx.
    - 507 priority claims
  - Class 1 – Unsecured creditors
    - $8m total
    - Receive all cash remaining
  - Class 2 – Equity holders
    - Receive nothing
  - No Secured Creditors

PLAN BEFORE AMENDMENTS

- Unchanged
  - Plan Administrator
    - GW's Counsel
  - Plan Examiner
    - Committee's Counsel

AMENDMENTS

- Amended (probably as result of negotiations)
  - Increased Creditor Protection
    - Fidelity bond requirement
      - Replaced with promise to perform duties faithfully
    - Monthly Operating Reports post confirmation
    - Plan Admin fees/expenses tracked separately
    - Limit Plan Examiner fees to $10k
  - Reduced litigation liability to debtor
  - Compliance
    - File regular status reports to UST – 704(a)(8); 1106(a)(1)

VOTE: APPROVAL OF CREDITORS

- Need only class 1 to accept the plan
- §1126(c): Class 1 accepts if accepting creditors:
  - hold 2/3rds total value of class
  - Represent majority of total claims in class
  - No bad faith claims
- Creditors' Committee: 60% of total value of Class 1 creditors

VOTING & CONFIRMATION

- Nov 16, 2010 deadline
- Nov 18 hearing and confirmed
- Nov 29 filed order confirming

DEBTOR OBJECTIONS

- Time Period: Oct 2010-Feb 2011
- Total value of claims disputed
  - $120k
- Result:
  - $86k objections sustained
  - Reduced total value to $34k