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### In re Jazz Photo Corp.

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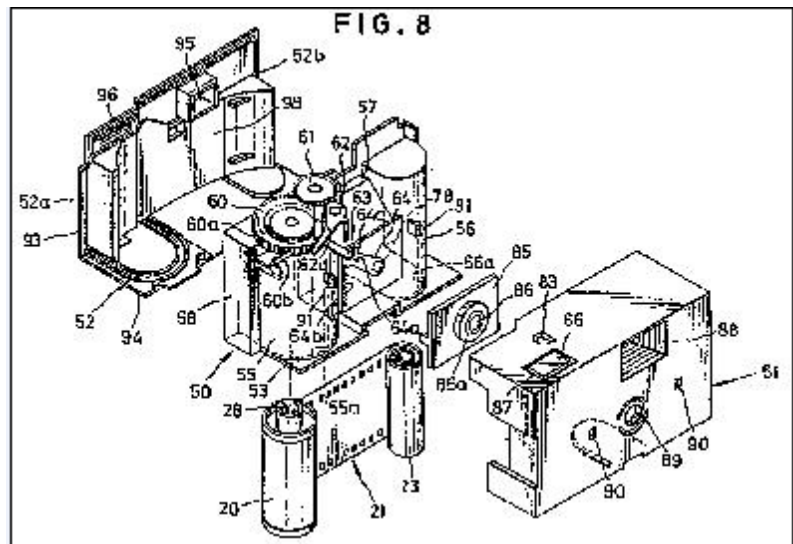
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**In re Jazz Photo Corp.**



Archie Carden  
&  
Cory Swainston

## I. Introduction

Jazz Photo Corp (“debtor” or “Jazz”) filed a petition for relief under Chapter 11 of Title 11 of the United States Code (“Bankruptcy Code”) on May 20, 2003 (“filing date”).<sup>1</sup> As of the filing of the petition, the Debtor employed approximately 28 people as well as 1 consultant, Jack Benun, and 20 independent sales representatives.<sup>2</sup> The debtor had assets valued at approximately \$6,931,292.00 on the filing date. The debtor had 3 subsidiaries, one each in Canada, Hong Kong, and the United Kingdom. 2001 and 2002 overall revenues were \$70.7 million and \$55.9 million respectively.

The petition was filed in order to protect the business as a going concern in the face of a large judgment owed to Fuji Photo Film Co. Limited (“Fuji”). The debtor and Fuji have been engaged in various legal actions going back to 1999. After a judgment was entered on Fuji's behalf in Federal District Court in New Jersey, Fuji became the debtor's largest creditor. The petition was filed to halt Fuji's efforts to “put the [d]ebtor out of business and force a liquidation of its assets for Fuji’s benefit”<sup>3</sup>

The debtor had three goals during the bankruptcy proceedings. Firstly, the debtor intended to continue the operation of its business. Secondly, the debtor intended to appeal the Fuji judgment. Finally, the debtor would pursue a judgment or settlement from Imation Corp (“Imation”) of a claim the debtor had against them.

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<sup>1</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *CHAPTER 11 VOLUNTARY PETITION*, Dkt. #1, (Bankr. D. N.J. May 20, 2003).

<sup>2</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S “VARIOUS FIRST DAY MOTIONS”*, Dkt. #10, (Bankr. D. N.J. May 20, 2003).

<sup>3</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S “VARIOUS FIRST DAY MOTIONS”*, Dkt. #10 at 11, (Bankr. D. N.J. May 20, 2003).

### **Debtor's Business Process**

Generally, the debtor bought cameras from its subsidiary in Hong Kong for resale in the United States.<sup>4</sup> The debtor bought both traditional, hard shell film and digital cameras as well as its controversial reloaded one use cameras.<sup>5</sup> These cameras were sold under the Jazz Photo name, the Bell & Howell name under a license, and under other private labels.<sup>6</sup> Most cameras were sold in stores such as Wal-Mart, Staples, Walgreens, and Office Depot.<sup>7</sup> The debtor's other subsidiaries, Jazz Canada and Jazz UK, distributed these cameras in Canada, the United Kingdom, and Europe. Subsidiaries were dealt with at arm's length.

### **Relationship with Benun**

The debtor was founded in 1995 by Jack Benun ("Benun").<sup>8</sup> Benun served as a director as well as CEO until 1997 when he considered taking the company public. Under the terms of a deal Benun made with the Securities and Exchange Commission ("SEC"), Benun was and is unable to serve as either an officer or a director of a publicly traded company. This deal took place after the SEC conducted an investigation into Benun's activities while serving in such capacities at Concord Camera Corp, another company founded by Benun.

While undergoing the process of becoming a public company Benun resigned his positions. Subsequently, the debtor and JCB Consultants, Inc. ("JCB") signed a consulting agreement. Benun is the principal employee, President, and primary shareholder of JCB. This agreement required Benun to be available and to provide services of various kinds to the debtor.

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<sup>4</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S "VARIOUS FIRST DAY MOTIONS"*, Dkt. #10 at 6, (Bankr. D. N.J. May 20, 2003).

<sup>5</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S "VARIOUS FIRST DAY MOTIONS"*, Dkt. #10 at 3, (Bankr. D. N.J. May 20, 2003).

<sup>6</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S "VARIOUS FIRST DAY MOTIONS"*, Dkt. #10 at 4, (Bankr. D. N.J. May 20, 2003).

<sup>7</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S "VARIOUS FIRST DAY MOTIONS"*, Dkt. #10 at 6, (Bankr. D. N.J. May 20, 2003).

<sup>8</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S "VARIOUS FIRST DAY MOTIONS"*, Dkt. #10 at 4, (Bankr. D. N.J. May 20, 2003).

These services include finding and acquiring products for sale by the debtor, arranging institutional financing, and recommending acquisitions, in addition to “developing the [d]ebtor's business generally.”<sup>9</sup>

Ultimately, the debtor decided not to complete the process of going public. However, several members of the Benun family are shareholders of the debtor. The JCB contract has also been very remonstrative to the Benun family. The contract provides for payment to JCB based upon the debtor's gross sales.<sup>10</sup> These payments operate at two rates, depending on how much the debtor has in gross sales. JCB is owed a \$15,000 weekly advance. JCB's non-fee compensation is limited to 8% of gross profits for the year. JCB may be paid for fees relating to certain duties it performs.

As of the first day of the case, the debtor considered its consulting agreement with JCB “one of its most valuable and important assets.”<sup>11</sup> The debtor's president cited Benun's relationships with various parties, including Rosenthal and Rosenthal (“Rosenthal”), their factorer, and other suppliers and creditors as the foundation for the value of this asset. He further cited the guarantees various members of the Benun family have extended to Rosenthal on behalf of the debtor. The president further stated “The [d]ebtor intends to perform all its obligations to JCB under the Consulting Agreement, pending a determination of whether to assume or reject same, to insure the [d]ebtor's smooth transition into Chapter 11 and the maintenance of the value of the [d]ebtor's franchise.”<sup>12</sup>

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<sup>9</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S "VARIOUS FIRST DAY MOTIONS"*, Dkt. #10 at 6, (Bankr. D. N.J. May 20, 2003).

<sup>10</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S "VARIOUS FIRST DAY MOTIONS"*, Dkt. #10 at 5, (Bankr. D. N.J. May 20, 2003).

<sup>11</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S "VARIOUS FIRST DAY MOTIONS"*, Dkt. #10 at 5, (Bankr. D. N.J. May 20, 2003).

<sup>12</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S "VARIOUS FIRST DAY MOTIONS"*, Dkt. #10 at 6, (Bankr. D. N.J. May 20, 2003).

## Relationship with Fuji

Fuji brought suit against the debtor and twenty-six other companies that imported refurbished single use cameras.<sup>13</sup> Fuji alleged that the debtor and the other companies infringed fifteen patents owned by Fuji by importing the cameras. This suit was brought before the United States International Trade Commission (“ITC”). On June 2, 1999 ITC concluded its investigation and issued a general exclusion order.<sup>14</sup> The order excluded single use cameras that violated a number of patents Fuji owns from entry into the United States “entry for consumption into the United States for the remaining terms of those patents, except under license of the patent owner or as provided by law.”<sup>15</sup>

The debtor appealed ITC's findings to the United States Court of Appeals for the Federal Circuit (“Court of Appeals”). The Court of Appeals affirmed ITC's holdings as they related to all but a specific class of cameras. The Court of Appeals reversed ITC's holding as they related to single use cameras first sold in the United States and refurbished within specific parameters.<sup>16</sup> The Court held that refurbishment of those cameras was permissible “repair” and not impermissible “reconstruction.” Both the debtor and Fuji filed petitions for certiorari, both were denied.<sup>17</sup>

Fuji then filed suit in United States District Court for New Jersey (“district court”) in order to determine and get a judgment for damages.<sup>18</sup> On March 18, 2003 the district court entered a final judgment for Fuji in the amount of \$29,765,280.60. The debtor appealed this case to the

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<sup>13</sup> *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d 1094, 1098 (Fed. Cir. 2001)

<sup>14</sup> *Certain Lens-Fitted Film Packages*, USITC Inv. No. 337-TA-406 (July 27, 2004), available at 1999 WL 377277

<sup>15</sup> *Certain Lens-Fitted Film Packages*, USITC Inv. No. 337-TA-406 (July 27, 2004), available at 1999 WL 377277 at 3

<sup>16</sup> *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d 1098-1099 (Fed. Cir. 2001)

<sup>17</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S "VARIOUS FIRST DAY MOTIONS"*, Dkt. #10 at 9, (Bankr. D. N.J. May 20, 2003).

<sup>18</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S "VARIOUS FIRST DAY MOTIONS"*, Dkt. #10 at 10, (Bankr. D. N.J. May 20, 2003).

Court of Appeals. The debtor's motion for stay pending appeal to this judgment was denied. Fuji attempted to restrain Rosenthal from turning any money over to the debtor. The debtor was convinced that Fuji's objective was the elimination of the debtor as a going concern. Fuji's actions and objective prompted the debtor to file for Chapter 11 in order to continue to operate while appealing the Fuji judgment.

### **Relationship with Imation**

The debtor sold and shipped approximately 4.5 million cameras loaded with film acquired from Imation in 1998. This shipment was returned to the debtor because the film was defective. The debtor alleged that this caused significant pecuniary damages and “impaired its reputation as a supplier of low-cost, quality Repaired Cameras.”<sup>19</sup> In response to the harm caused by Imation to the debtor's business, the debtor filed a lawsuit against Imation in 1999 in the district court. The debtor and its experts estimated damages at \$85 million without including any treble damages or prejudgment interest.<sup>20</sup> That amount of money could satisfy all of the debtor's creditors, Fuji included.

## **II. First Day Motions**

The debtor filed several other motions simultaneously with its petition (“first day motions”). The following motions were included:<sup>21</sup>

- Motion for an order authorizing the debtor to obtain a new factoring agreement with Rosenthal, the debtor's pre-petition financier.

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<sup>19</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S “VARIOUS FIRST DAY MOTIONS”*, Dkt. #10 at 6, (Bankr. D. N.J. May 20, 2003).

<sup>20</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *FIRST AMENDED DISCLOSURE STATEMENT PURSUANT TO SECTION 1125 OF THE BANKRUPTCY CODE FOR THE JOINT PLAN OF ORDERLY LIQUIDATION FILED ON BEHALF OF THE DEBTOR AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS*, Dkt. #941 at 12, (Bankr. D. N.J. April 12, 2005).

<sup>21</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S “VARIOUS FIRST DAY MOTIONS”*, Dkt. #10 at 2, (Bankr. D. N.J. May 20, 2003).

- Motion for an order authorizing the debtor to honor pre-petition salaries, commissions, and other employee obligations
- Motion for an order authorizing the debtor to maintain its bank account, cash management system, and business forms
- Motion for an order restraining utilities from disconnecting or altering service they provide to the debtor
- Motion for an order authorizing the debtor to honor certain pre-petition rebate obligations

The debtor's president filed an affidavit supporting these first day motions.<sup>22</sup> He gave four goals for the first day motions. The first goal was to “insure the [d]ebtor’s ability to operate in the ordinary course and to minimize disruption of its ability to continue to provide quality service and products to its clients.”<sup>23</sup> The other goals were to encourage employees, suppliers, and customers respectively. The debtor wanted to prevent employee attrition as well as preserving vendor and customer relationships and confidences.

On May 22, 2003 the court filed four orders granting most of the debtor's first day motions. The court allowed the four non-factoring motions outright. The post-petition financing motion was granted on a interim basis. The debtor was authorized to honor certain pre-petition obligations specifically the employee and rebate obligations. The utility companies were restrained from altering services or requiring a deposit. The quick turn around on these motions indicates that there is little here beyond a rubber stamping of some basic unopposed motions. The post-petition financing motion was more important and so the judge withheld final approval.

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<sup>22</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S "VARIOUS FIRST DAY MOTIONS"*, Dkt. #10, (Bankr. D. N.J. May 20, 2003).

<sup>23</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *AFFIDAVIT OF ANTHONY COSSENTINO IN SUPPORT OF DEBTOR'S "VARIOUS FIRST DAY MOTIONS"*, Dkt. #10 at 2-3, (Bankr. D. N.J. May 20, 2003).



The debtor and Rosenthal had been in a factoring relationship since July 12, 1995.<sup>24</sup> The debtor paid Rosenthal a commission of 0.80% on any receivables purchased up to \$60 million. Rosenthal was paid a 0.70% commission for receivables over \$60 million. The debtor and Rosenthal had made separate arrangements for a few specific accounts.<sup>25</sup>

In addition to the factoring agreement, Rosenthal extended the debtor two lines of credit. The first line of credit allowed the debtor to borrow up to 85% of the value of “all qualifying receivables purchased by Rosenthal.” The other line of credit allowed for the debtor to borrow up to \$2 million or 50% of the value of its inventory, whichever is lower. These obligations were secured by the debtor's accounts receivable, general intangibles, inventory, and the proceeds from those items. Rosenthal further had a security interest in property owned by members of the Benun family who served as guarantors. As of the Filing Date, the debtor had outstanding obligations to Rosenthal of \$6,439,040.00. This obligation was secured by property valued at \$6,931,292.00.

As exhibit F to its application in support of the post-petition financing motion, the debtor included a thirteen week cash budget.<sup>26</sup> The budget's purpose is to show what the cash situation of the debtor will be absent an order from the court allowing Rosenthal to continue factoring and extending credit. This budget shows cash flowing into and out of debtor's hands in equal proportions for twelve of the thirteen weeks. The exception is the first week. In that week, the

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<sup>24</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *EXHIBIT F; MOTION RE: FOR AN ORDER: (A) AUTHORIZING HE DEBTOR TO FACTOR ACCOUNTS RECEIVABLE AND OBTAIN POST-PETITION FINANCING FROM ROSENTHAL & ROSENTHAL, INC.; (ii) SCHEDULING A FINAL HEARING DATE; AND (iii) GRANTING OTHER RELATED RELIEF;*, Dkt. #9-8 at 2, (Bankr. D. N.J. May 20, 2003).

<sup>25</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *VERIFIED APPLICATION IN SUPPORT OF THE DEBTOR'S MOTION FOR AN ORDER: (i) AUTHORIZING THE DEBTOR TO FACTOR ACCOUNTS RECEIVABLE AND OBTAIN POST-PETITION FINANCING FROM ROSENTHAL & ROSENTHAL, INC.; (ii) SCHEDULING A FINAL HEARING DATE; AND (iii) GRANTING OTHER RELATED RELIEF,* Dkt. #9 at 4, (Bankr. D. N.J. May 20, 2003).

<sup>26</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *EXHIBIT A; MOTION RE: FOR AN ORDER: (A) AUTHORIZING HE DEBTOR TO FACTOR ACCOUNTS RECEIVABLE AND OBTAIN POST-PETITION FINANCING FROM ROSENTHAL & ROSENTHAL, INC.; (ii) SCHEDULING A FINAL HEARING DATE; AND (iii) GRANTING OTHER RELATED RELIEF;*, Dkt. #9-3, (Bankr. D. N.J. May 20, 2003).

debtor will exhaust what cash reserves it has. For the remainder of this hypothetical budget, the debtor will be paying each week's debts with that week's income.

On May 22, 2003 the Bankruptcy Judge entered an interim order authorizing the debtor and Rosenthal to continue their factoring and credit agreements on modified terms.<sup>27</sup> One notable modified term is that the factoring commission was raised to 0.85% of receivables purchased. The bankruptcy court also granted Rosenthal “first and senior security interests and liens... in and on all existing and after acquired property of the [d]ebtor and the [d]ebtor's estate and the proceeds thereof.”<sup>28</sup>

As of the petition date Rosenthal had been assigned some receivables, but had not advanced the corresponding funds. The court ordered that those funds, when advanced, would be considered post-petition receivables and subject to the terms of the post-petition agreement.

The order authorizing post petition financing required Rosenthal to set aside up to two and one half percent of factored sales into a professional carve out account.<sup>29</sup> The amount placed into this account was not to exceed \$10,000 per week or \$250,000 total. Seventy percent of the account was dedicated to the debtor's professionals. The other thirty percent was to be paid to the committee's professionals. This money came out of Rosenthal's advances of seventy-seven and a half percent of the debtor's factored receivables.

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<sup>27</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *INTERIM ORDER: (A) AUTHORIZING THE DEBTOR TO FACTOR ACCOUNTS RECEIVABLE AND OBTAIN POST-PETITION FINANCING; (B) SCHEDULING A FINAL HEARING DATE; AND (C) GRANTING OTHER RELATED RELIEF*, Dkt. #19, (Bankr. D. N.J. May 22, 2003).

<sup>28</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *INTERIM ORDER: (A) AUTHORIZING THE DEBTOR TO FACTOR ACCOUNTS RECEIVABLE AND OBTAIN POST-PETITION FINANCING; (B) SCHEDULING A FINAL HEARING DATE; AND (C) GRANTING OTHER RELATED RELIEF*, Dkt. #19 at 7, (Bankr. D. N.J. May 22, 2003).

<sup>29</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *INTERIM ORDER: (A) AUTHORIZING THE DEBTOR TO FACTOR ACCOUNTS RECEIVABLE AND OBTAIN POST-PETITION FINANCING; (B) SCHEDULING A FINAL HEARING DATE; AND (C) GRANTING OTHER RELATED RELIEF*, Dkt. #19 at 11, (Bankr. D. N.J. May 22, 2003).

In paragraph seven, the court granted Rosenthal a super-priority claim “over any and all administrative expenses incurred and priority claims arising in this case or any subsequent case...”<sup>30</sup> This priority specifically excluded claims “specified in or ordered pursuant” to Sections 506(c) or 726(b) of the Bankruptcy Code. Further, the whole super-priority claim was subordinate to the claims of the U.S. Trustee's quarterly fees, Clerk of the Court fees, and Professional fees. The Professional fees were superior to Rosenthal's claim only to the extent that they were in the professional carve out account.

In paragraph ten, the court repeated the strength of Rosenthal's claim.

Except as to U.S. Trustee and Court fees, no costs or expenses of administration that have been or may be incurred in this proceeding, any conversion of this proceeding pursuant to Section 1112 of the Bankruptcy Code, or in any other proceeding related hereto, and no priority claims are, or will be, prior to or on a parity with the claims of Rosenthal against the Debtor arising out of the obligation created under the Post-Petition Agreement...except as set forth herein.<sup>31</sup>

Money collected on the accounts receivable that were factored pre-petition was to be applied to pre-petition obligations.<sup>32</sup> This was true whether Rosenthal or the debtor collected the money. Money collected from post-petition collateral is assigned to post-petition obligations.

### **III. Fuji's motion to appoint a chapter 11 trustee**

Here is the timeline of the Motion to appoint a Chapter 11 Trustee:<sup>33</sup>

1. On 6/24/03 Fuji filed its motion to appoint a Chapter 11 Trustee.

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<sup>30</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *INTERIM ORDER: (A) AUTHORIZING THE DEBTOR TO FACTOR ACCOUNTS RECEIVABLE AND OBTAIN POST-PETITION FINANCING; (B) SCHEDULING A FINAL HEARING DATE; AND (C) GRANTING OTHER RELATED RELIEF*, Dkt. #19 at 10, (Bankr. D. N.J. May 22, 2003).

<sup>31</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *INTERIM ORDER: (A) AUTHORIZING THE DEBTOR TO FACTOR ACCOUNTS RECEIVABLE AND OBTAIN POST-PETITION FINANCING; (B) SCHEDULING A FINAL HEARING DATE; AND (C) GRANTING OTHER RELATED RELIEF*, Dkt. #19 at 12, (Bankr. D. N.J. May 22, 2003).

<sup>32</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *INTERIM ORDER: (A) AUTHORIZING THE DEBTOR TO FACTOR ACCOUNTS RECEIVABLE AND OBTAIN POST-PETITION FINANCING; (B) SCHEDULING A FINAL HEARING DATE; AND (C) GRANTING OTHER RELATED RELIEF*, Dkt. #19 at 16, (Bankr. D. N.J. May 22, 2003).

<sup>33</sup> See generally, In re Jazz Photo Corp., Case no. 03-26565-MS, *DOCKET*, (Bankr. D. N.J. May 20, 2003 to March 1, 2010).

2. On 7/02/03 the Court scheduled a hearing for 7/16/03
3. On 7/16/03 the hearing was rescheduled for 7/30/03
4. On 7/25/03 the U.S. Trustee filed an objection to the Motion. The debtor filed a motion in opposition. Several other parties filed affidavits in opposition to the Motion.
5. On 7/28/03 the Official Committee of Unsecured Creditors filed a Letter in opposition.
6. On 7/30/03 A Hearing was held. See below for a description.
7. On 10/20/03 and 10/21/03 further hearings were held.
8. On 1/29/04. Fuji withdrew its motion.

On June 24, 2003 Fuji filed a motion to appoint a Chapter 11 trustee under section 1104(a) of the Bankruptcy Code. Fuji claimed that Benun and the officers of the debtor were operating the business in a self dealing manner. Fuji contended that debtor was operated for the sole benefit of Benun and the officers and that nothing would be left for the creditors. Specifically, Fuji claimed that Benun continued to “loot” the debtor “while his primary service seems to be establishing new business practices to insure that debtor's profits remain hidden from creditors.”<sup>34</sup>

Fuji's contentions can be broken down into several primary points. Firstly, Benun is the true operator of the debtor.<sup>35</sup> Secondly, Benun essentially makes money disappear.<sup>36</sup> The third

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<sup>34</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 5, (Bankr. D. N.J. June 24, 2003).

<sup>35</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 5, (Bankr. D. N.J. June 24, 2003).

<sup>36</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 11, (Bankr. D. N.J. June 24, 2003).

point of Fuji's is that Benun has numerous connections in Asia, Hong Kong specifically.<sup>37</sup> These connections allow him to adjust the debtor's supply chain and accounting model in order to transfer the debtor's wealth to Asia. Once the wealth is in Asia the Bankruptcy Court has no oversight over the money and Benun can ensure the money benefits him and not the creditors. Fuji alleges that Benun may already have found ways to siphon the debtor's money away from creditors using new companies set up in Asia for this purpose.

To support its point that Benun controls the debtor, Fuji cites several facts. Firstly, they note that almost all of the debtor's stock is owned by Benun's wife and children.<sup>38</sup> They further discuss Benun's excessive compensation and the characterization of all dealings with JCB, Benun's consulting company, as being with "Benun" by the debtor's accountants.<sup>39</sup> At the end of 2002, Debtor had "a cumulative gross profit of \$94,164,386, a cumulative net loss of \$4 million, and cumulative payments to JCB or Benun of \$10,809,725."<sup>40</sup>

Fuji also told a story that occurred at the May 22 hearings in the Bankruptcy Case.<sup>41</sup> Fuji's counsel asked if the salaries the debtor wanted to pay included Benun or any direct family members of Benun. Mr. Sirota consulted Mr. Cossentino and replied that they did not. The next day the debtor's counsel reversed and said that it turned out that Benun's brother, Mark Benun, was employed in the debtor's warehouse and was salaried at \$55,000. Fuji followed up with

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<sup>37</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 10, (Bankr. D. N.J. June 24, 2003).

<sup>38</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 13, (Bankr. D. N.J. June 24, 2003).

<sup>39</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 15, (Bankr. D. N.J. June 24, 2003).

<sup>40</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 16, (Bankr. D. N.J. June 24, 2003).

<sup>41</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 25, (Bankr. D. N.J. June 24, 2003).

“That the President (since May 2001) of a company with only 28 employees did not know the brother of the founder, 'principal consultant', and in fact, controlling principal, of the debtor, was employed in the 'warehouse' is both incredible and suggests that the position is a no-show position.”<sup>42</sup>

Finally, Fuji notes a holding by the District Court in the patent infringement case.<sup>43</sup> The District Court had considered Benun's involvement with the debtor in order to determine if Benun should be jointly liable for the damages it found. In deciding that Benun was liable the District Court made the several findings of fact which Fuji summarized thusly

1. “Benun founded the debtor.
2. Benun had been the debtor's President, CEO, and sole director.
3. Benun's wife and children owned all of the debtor's stock.
4. Benun asked Fuji for a single use camera patent license, and when he was turned down, nevertheless cause Jazz to continue selling infringing single use cameras, with no exculpatory opinion of counsel.
5. Benun became a consultant merely to facilitate a public offering, but did not relinquish control over the debtor
6. Benun was paid over \$10 million, more than four times the debtor's retained earnings through 2001.”<sup>44</sup>

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<sup>42</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 25, (Bankr. D. N.J. June 24, 2003).

<sup>43</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 16-17, (Bankr. D. N.J. June 24, 2003).

<sup>44</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 16-17, (Bankr. D. N.J. June 24, 2003).

The District Court also stated that there was “a pattern of millions of dollars flowing from Jazz to Mr. Benun (representing a substantial portion of Jazz's operating income), then vanishing from Mr. Benun's ledger entirely.”<sup>45</sup> These facts and stories demonstrate Fuji's first two points, that Benun is in control and the Benun makes money disappear.

On the matter of Benun's connections with Asia, Fuji first repeated the details of Benun's involvement with Concord Camera, his previous company.<sup>46</sup> The SEC investigation that resulted in Benun's agreement not to serve as director or officer of any publicly traded company alleged that Benun used Hong Kong subsidiaries to embezzle \$150,000 from the company. He did so by ordering payments made to a Hong Kong employee. That employee then endorsed the check to a friend of Benun in Hong Kong. The money then made its way to Benun and his wife through a series of friends and wire transfers.

Fuji further cited statements that “most” Asian manufacturer had worked for Benun at one point and that Benun had a “great deal of influence” with the Asian market as evidence of Benun's Asian connections.<sup>47</sup> Before the petition was filed, the debtor changed its method of operation to begin dealing directly with suppliers and skipping Jazz Photo Hong Kong. The debtor did so “without explanation as to how Jazz Hong Kong is compensated for its services.”<sup>48</sup> Fuji noted that the budget submitted on the first day and the budget discussed one week later at

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<sup>45</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 18, (Bankr. D. N.J. June 24, 2003).

<sup>46</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 9-10, (Bankr. D. N.J. June 24, 2003).

<sup>47</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 26, (Bankr. D. N.J. June 24, 2003).

<sup>48</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 25, (Bankr. D. N.J. June 24, 2003).

the hearing had changed the amount paid to suppliers. Asian suppliers' payments were increased \$1.356 million while sales only rose \$288,000.<sup>49</sup>

Two of the debtor's largest creditors, behind Fuji, are Polytech and Everbest. Fuji alleges that these companies are affiliated with the debtor's Hong Kong arm. For this assertion, Fuji cites the failure of the debtor's president to confirm that Everbest is not an affiliate of Jazz Hong Kong.<sup>50</sup> Polytech's connection is based on Fuji's claim that Wong Titi Tai Tai, director of Polytech, and Kitty Wong, longtime employee of Jazz Hong Kong are the same person.<sup>51</sup> By tracing signatures and documents back, Fuji noted that both Wongs share an address and a Hong Kong Identity Card Number.

### **Debtor's response**

The debtor's brief in opposition to the motion took the position that “it is unnecessary to respond to every mischaracterization by Fuji.”<sup>52</sup> The brief opens by calling Fuji's motion an “exercise in creative writing.”<sup>53</sup> The debtor further claimed that Fuji threw “countless half-truths, innuendos, and outright falsehoods against the wall in the hope that something will stick.”<sup>54</sup>

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<sup>49</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 26, (Bankr. D. N.J. June 24, 2003).

<sup>50</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 26-27, (Bankr. D. N.J. June 24, 2003).

<sup>51</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR APPOINTMENT OF A CHAPTER 11 TRUSTEE PURSUANT TO SECTION 1104 OF THE BANKRUPTCY CODE*, Dkt. #90-1 at 28-30, (Bankr. D. N.J. June 24, 2003).

<sup>52</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *DEBTOR'S BRIEF IN OPPOSITION TO THE MOTION OF FUJI PHOTO FILM CO., LETD. FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE*, Dkt. #196 at 4, (Bankr. D. N.J. July 25, 2003).

<sup>53</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *DEBTOR'S BRIEF IN OPPOSITION TO THE MOTION OF FUJI PHOTO FILM CO., LETD. FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE*, Dkt. #196 at 2, (Bankr. D. N.J. July 25, 2003).

<sup>54</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *DEBTOR'S BRIEF IN OPPOSITION TO THE MOTION OF FUJI PHOTO FILM CO., LETD. FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE*, Dkt. #196 at 2, (Bankr. D. N.J. July 25, 2003).



The debtor asked the Court to notice the “long and acrimonious” relationship between Fuji and the debtor.<sup>55</sup> The brief stated that “Fuji has objected to nearly every application made by the debtor in this proceeding.”<sup>56</sup> This history between the debtor and Fuji caused Fuji to make accusations it cannot back up, according to debtor. In looking at what claims Fuji could prove, the debtor stated that “the largely inadmissible and frequently unintelligible documents . . . fall woefully short of the mark.”<sup>57</sup>

The debtor's brief in opposition noted that Benun is no longer a consultant and has moved back in-house.<sup>58</sup> In doing so he reduced his compensation from \$15,000 per week to \$12,500 per week. It also spends several pages attacking Fuji's attacks on Benun's personal finances.<sup>59</sup> Unfortunately, these pages were almost wholly redacted. A non-redacted statement points out Fuji's concession that “Mr. Benun has 'prepared and produced extensive financial disclosures.’”<sup>60</sup>

The brief's main point is that the “[d]ebtor's assets are not eroding.”<sup>61</sup> Pre-petition factored accounts receivable have been collected, thus eliminating many of Rosenthal's liens. Further, the debtor's accounts receivable and inventory values have increased without substantially increasing

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<sup>55</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *DEBTOR'S BRIEF IN OPPOSITION TO THE MOTION OF FUJI PHOTO FILM CO., LETD. FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE*, Dkt. #196 at 2, (Bankr. D. N.J. July 25, 2003).

<sup>56</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *DEBTOR'S BRIEF IN OPPOSITION TO THE MOTION OF FUJI PHOTO FILM CO., LETD. FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE*, Dkt. #196 at 10, (Bankr. D. N.J. July 25, 2003).

<sup>57</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *DEBTOR'S BRIEF IN OPPOSITION TO THE MOTION OF FUJI PHOTO FILM CO., LETD. FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE*, Dkt. #196 at 10, (Bankr. D. N.J. July 25, 2003).

<sup>58</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *DEBTOR'S BRIEF IN OPPOSITION TO THE MOTION OF FUJI PHOTO FILM CO., LETD. FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE*, Dkt. #196 at 4, (Bankr. D. N.J. July 25, 2003).

<sup>59</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *DEBTOR'S BRIEF IN OPPOSITION TO THE MOTION OF FUJI PHOTO FILM CO., LETD. FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE*, Dkt. #196 at 5-8, (Bankr. D. N.J. July 25, 2003).

<sup>60</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *DEBTOR'S BRIEF IN OPPOSITION TO THE MOTION OF FUJI PHOTO FILM CO., LETD. FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE*, Dkt. #196 at 8, (Bankr. D. N.J. July 25, 2003).

<sup>61</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *DEBTOR'S BRIEF IN OPPOSITION TO THE MOTION OF FUJI PHOTO FILM CO., LETD. FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE*, Dkt. #196 at 11, (Bankr. D. N.J. July 25, 2003).

its indebtedness. Finally, JCB, and Jazz Hong Kong agreed to subordinate their claim to the Imation lawsuit proceeds to the unsecured creditors of the debtor. They did so to alleviate concerns held by the U.S. Trustee and to “ensure that the proceeds of the Imation action will be available to the unsecured creditors of the debtor's estate.”<sup>62</sup> The brief concluded its statement of facts by saying “Accordingly, creditors are not prejudiced by the debtor's operations and are benefitted by the maintenance of the status quo and funding of, among other things, the Imation litigation and district court appeal.”<sup>63</sup>

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<sup>62</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *DEBTOR'S BRIEF IN OPPOSITION TO THE MOTION OF FUJI PHOTO FILM CO., LETD. FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE*, Dkt. #196 at 10, (Bankr. D. N.J. July 25, 2003).

<sup>63</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *DEBTOR'S BRIEF IN OPPOSITION TO THE MOTION OF FUJI PHOTO FILM CO., LETD. FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE*, Dkt. #196 at 12, (Bankr. D. N.J. July 25, 2003).

## The Hearings

At the July 30, 2003 hearing about the appointment of a trustee, the court decided to push back a decision. It did so for several reasons. Firstly, several parties felt that there had not been enough time for all the parties to analyze the information presented. Secondly, the U.S. Trustee, Ms. Jurow, said she was unclear about where the case stood and who should be appointed as a trustee. She indicated that appointing a chapter 7 trustee would not be a problem, but a Chapter 11 trustee needed to run the business and she was unsure of who to appoint at the time. Mr. O'Grady wanted to aim the hearing away from Benun's personal finances and connections with Asia. The Court agreed and decided to hear what Mr. Rosenthal had to proffer as to the “lack of transparency” in Asia.<sup>64</sup>

Mr. Rosenthal stated that Mr. Good, an investigator who went to Asia on behalf of Fuji, found a blurring of companies. Kitty Wong and others had set up companies in Hong Kong and China at the behest or with support from the debtor or Benun and these companies supplied the debtor. He further stated that these companies had replaced Jazz Hong Kong. The accounting for these companies was unsure enough that once the money went to Hong Kong, he did not know what happened to it. Mr. Rosenthal admitted that he did not have “a smoking gun.”<sup>65</sup> The Court acknowledged the lack of a smoking gun, called this “a creative writing exercise on everybody's part.”<sup>66</sup> The Court also stated that all Mr. Rosenthal had to offer was a “pattern of

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<sup>64</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *TRANSCRIPT OF MOTION FOR APPOINTMENT FOR CHAPTER 11 TRUSTEE BEFORE THE HONORABLE MORRIS STERN UNITED STATES BANKRUPTCY COURT JUDGE*, Dkt. #246 at 52, (Bankr. D. N.J. July 30, 2003).

<sup>65</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *TRANSCRIPT OF MOTION FOR APPOINTMENT FOR CHAPTER 11 TRUSTEE BEFORE THE HONORABLE MORRIS STERN UNITED STATES BANKRUPTCY COURT JUDGE*, Dkt. #246 at 59, (Bankr. D. N.J. July 30, 2003).

<sup>66</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *TRANSCRIPT OF MOTION FOR APPOINTMENT FOR CHAPTER 11 TRUSTEE BEFORE THE HONORABLE MORRIS STERN UNITED STATES BANKRUPTCY COURT JUDGE*, Dkt. #246 at 59, (Bankr. D. N.J. July 30, 2003).

conduct”<sup>67</sup> on Benun's part. Finally, Judge Stern concluded that Mr. Rosenthal could not show even “one dollar's worth of loss to the estate post-petition as a hard matter.” The Court concluded that there was insufficient reason to appoint a Chapter 11 trustee at that point.

On October 20, 2003 further hearings were held over two days. The minutes for the second hearing date are unavailable. The first hearing consisted of direct and cross examinations of various parties on both sides. Benun and Mr. Cossentino, the debtor’s current president, were to be examined the next day. At the beginning of the first day, Mr. Rosenthal stated that he did not need “to find a witness who watches Mr. Benun walk away with a bag of money.”<sup>68</sup> He went further, saying that he believed “the smoking gun” to be “the accumulated sum of evidence” in the case. Fuji then put on the witnesses it had available at the first hearing and the Debtor put on its witnesses. The available record does not reflect a holding by the court on the motion to appoint a trustee. The record is silent on the matter between October 20 and January 29, 2004. On January 29, Fuji withdrew its motion to have a trustee appointed.<sup>69</sup>

#### **IV. Debtor’s Motion for Sanctions Against Fuji**

On, October 3, 2003, Fuji filed its memorandum of evidence and law in support of its motion to appoint a chapter 11 trustee.<sup>70</sup> On October 16, 2003 Jazz sent Fuji a letter detailing Jazz’s intention to pursue sanctions against Fuji according to Federal Rule of Bankruptcy Procedure 9011, unless Fuji withdrew its motion to appoint a trustee. Fuji did not withdraw and continued to argue their motion. On January 15, 2004, Jazz wrote to Fuji again asking them to

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<sup>67</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *TRANSCRIPT OF MOTION FOR APPOINTMENT FOR CHAPTER 11 TRUSTEE BEFORE THE HONORABLE MORRIS STERN UNITED STATES BANKRUPTCY COURT JUDGE*, Dkt. #246 at 62, (Bankr. D. N.J. July 30, 2003).

<sup>68</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *TRANSCRIPT OF HEARING HELD ON 10/21/2003*, Dkt. #348 at 5, (Bankr. D. N.J. October 21, 2003).

<sup>69</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *WITHDRAWAL OF DOCUMENT*, Dkt. #411, (Bankr. D. N.J. January 29, 2004).

<sup>70</sup> *In re Jazz Photo Corp.*, 312 B.R. 524, 530 (Bankr. D.N.J. 2004).

withdraw their motion under threat of sanctions.<sup>71</sup> On January 27, 2004, after Fuji learned that Judge Stern would not grant a two-month adjournment of the motion until April, Fuji withdrew its motion to appoint a chapter 11 trustee.<sup>72</sup>

On February 3, 2004, Jazz filed a motion for sanctions pursuant to Federal Rule of Bankruptcy Procedure 9011 and 28 U.S.C. section 1927.<sup>73</sup> Rule 9011 provides that a signed document submitted to the court is: a) not presented for an improper purpose; b) is supported by existing law or a nonfrivolous argument to extend or modify existing law; c) the allegations are supported by evidence, and; d) any denials of facts are supported by evidence.<sup>74</sup> If a signed submission fails these tests, a signing attorney, law firm, and the party may be subject to sanctions.<sup>75</sup> At least 21 days prior to filing the motion for sanctions, the motion must be served upon the offending party in order to give them a chance to withdraw their allegedly volatile motion.<sup>76</sup> Rule 9011 mirrors similar language and purpose as that seen in Federal Rule of Civil Procedure 11.<sup>77</sup>

28 U.S.C. section 1927 provides that “[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.”<sup>78</sup> This statute is strictly construed by courts.<sup>79</sup>

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<sup>71</sup> *In re Jazz Photo Corp.*, 312 B.R. 524, 530 (Bankr. D.N.J. 2004).

<sup>72</sup> *In re Jazz Photo Corp.*, 312 B.R. 524, 530 (Bankr. D.N.J. 2004).

<sup>73</sup> *In re Jazz Photo Corp.*, Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF DEBTOR'S MOTION FOR AN ORDER IMPOSING SANCTIONS AGAINST FUJI PHOTO FILM CO., LTD. AND ITS COUNSEL PURSUANT TO (i) FED. R. BANKR. P. 9011(b)(1), (2) AND (3), AND (ii) 28 U.S.C. § 1927*, Dkt. #409, (Bankr. D. N.J. Feb. 3, 2004).

<sup>74</sup> Fed. R. Bankr. P. 9011(a)-(b).

<sup>75</sup> Fed. R. Bankr. P. 9011(c).

<sup>76</sup> Fed. R. Bankr. P. 9011(c)(1).

<sup>77</sup> *Landon v. Hunt*, 977 F.2d 829, 833 (3d Cir. Pa. 1992).

<sup>78</sup> 28 USCS § 1927 (2008).

<sup>79</sup> *Overnite Transp. Co. v. Chi. Indus. Tire Co.*, 697 F.2d 789, 795 (7th Cir. 1983).

Jazz's motion for sanctions alleged 15 sanctionable statements in Fuji's motion to appoint a chapter 11 trustee.<sup>80</sup> They characterized Fuji's discovery process as a "witch hunt"<sup>81</sup> and argued that the entire purpose of Fuji's motion was to increase the burden of defense against a competitor.<sup>82</sup>

On March 8, 2003, Jack Benun moved to be joined to Jazz's motion for sanctions.<sup>83</sup> On March 24, 2004, Fuji filed their opposition to the motion.<sup>84</sup> Judge Stern first heard the matter on April 27, 2004, but continued the matter until May 17, 2004 to allow for more evidentiary submissions from Fuji.

On August 3, 2004, a little over a year after Fuji filed their initial motion to appoint a chapter 11 trustee, Judge Stern entered his order denying Jazz's motion for sanctions and filed a formal opinion on the matter.<sup>85</sup>

Judge Stern's analysis hinged on several procedural issues of rule 9011: whether Jazz's letters to Fuji fulfilled the requirement for 21 day advance notice by service of the motion to

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<sup>80</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF DEBTOR'S MOTION FOR AN ORDER IMPOSING SANCTIONS AGAINST FUJI PHOTO FILM CO., LTD. AND ITS COUNSEL PURSUANT TO (i) FED. R. BANKR. P. 9011(b)(1), (2) AND (3), AND (ii) 28 U.S.C. § 1927*, Dkt. #409, at 11-13 (Bankr. D. N.J. Feb. 3, 2004).

<sup>81</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF DEBTOR'S MOTION FOR AN ORDER IMPOSING SANCTIONS AGAINST FUJI PHOTO FILM CO., LTD. AND ITS COUNSEL PURSUANT TO (i) FED. R. BANKR. P. 9011(b)(1), (2) AND (3), AND (ii) 28 U.S.C. § 1927*, Dkt. #409, at 24 (Bankr. D. N.J. Feb. 3, 2004).

<sup>82</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF DEBTOR'S MOTION FOR AN ORDER IMPOSING SANCTIONS AGAINST FUJI PHOTO FILM CO., LTD. AND ITS COUNSEL PURSUANT TO (i) FED. R. BANKR. P. 9011(b)(1), (2) AND (3), AND (ii) 28 U.S.C. § 1927*, Dkt. #409, at 25 (Bankr. D. N.J. Feb. 3, 2004).

<sup>83</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *JOINDER OF JACK C. BENUN AND REQUEST FOR ADDITIONAL SANCTIONS IN CONNECTION WITH DEBTOR'S MOTION FOR AN ORDER IMPOSING SANCTIONS AGAINST FUJI PHOTO FILM CO., LTD. PURSUANT TO BANKRUPTCY RULE 9011 AND 28 U.S.C. § 1927*, Dkt. #446, (Bankr. D. N.J. Mar. 8, 2004).

<sup>84</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *OPPOSITION TO DEBTOR'S MOTION FOR AN ORDER IMPOSING SANCTIONS AGAINST FUJI PHOTO FILM CO., LTD. AND ITS COUNSEL PURSUANT TO (i) FED. R. BANKR. P. 9011(b)(1), (2) AND (3), AND (ii) 28 U.S.C. § 1927 AND JOINDER OF JACK C. BENUN*, Dkt. #460, (Bankr. D. N.J. Mar. 24, 2004).

<sup>85</sup> In re Jazz Photo Corp., 312 B.R. 524 (Bankr. D.N.J. 2004).

adverse parties; whether the motion was moot if made after Fuji's withdrawal of the offending motion, and; whether Jack Benun could be joined in the motion for sanctions against Fuji.<sup>86</sup>

Judge Stern found that while there is a circuit split on whether the requirement that notice by service of the motion is to be applied strictly, the District of New Jersey supports a strict reading, and that notice by a letter was not sufficient notice to satisfy the statute.<sup>87</sup> While, he was less supportive of the idea that a motion for sanctions filed after the offending motion has been withdrawn was automatically moot, he did note that the timing of the filing here was at least problematic for Jazz's case.<sup>88</sup> He disposed of the motion to join Benun, stating that the statute requires a party to file a motion for sanctions, which Benun did not.<sup>89</sup>

Rather than disposing of the motions on these technical issues, however, Judge Stern went into a detailed examination of Jazz's complaints in the body of the opinion, and an even more detailed analysis in the attached appendix.<sup>90</sup> While advising the attorneys for Fuji that they had been overzealous in the language of their motion to appoint an examiner, there was not a complete lack of factual basis for the motion, such that chapter 11 sanctions were a necessary corrective.<sup>91</sup> He officially rebuked Fuji's attorneys for asserting that Benun assisted Polytech in filing a "patently fraudulent" claim in the bankruptcy.<sup>92</sup> However, his analysis of whether any set of actions by Fuji was sanctionable was necessarily tempered by the context of the case, that Jazz and Fuji had been armed combatants in litigation for five years at this point.

[T]hough Marquis of Queensbury rules now apply via Rule 9011, brass-knuckle battlers should not expect a court to ignore the realities of context when fiduciary status is at issue. Though this court has indicated that history, generalities and circumstantial evidence would not, as of January 2004, necessarily suffice as

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<sup>86</sup> *In re Jazz Photo Corp.*, 312 B.R. 524, 532 (Bankr. D.N.J. 2004).

<sup>87</sup> *In re Jazz Photo Corp.*, 312 B.R. 524, 533 (Bankr. D.N.J. 2004).

<sup>88</sup> *In re Jazz Photo Corp.*, 312 B.R. 524, 534 (Bankr. D.N.J. 2004).

<sup>89</sup> *In re Jazz Photo Corp.*, 312 B.R. 524, 534 (Bankr. D.N.J. 2004).

<sup>90</sup> *See In re Jazz Photo Corp.*, 312 B.R. 524, 542-555 (Bankr. D.N.J. 2004).

<sup>91</sup> *In re Jazz Photo Corp.*, 312 B.R. 524, 535 (Bankr. D.N.J. 2004).

<sup>92</sup> *In re Jazz Photo Corp.*, 312 B.R. 524, 551 (Bankr. D.N.J. 2004).

proof that a trustee should be appointed for Jazz, the *entirety* of the Fuji allegations is by no means frivolous. And, given recent developments with the ITC, the future of debtor-in-possession status for Jazz and its management is uncertain. (emphasis in original)<sup>93</sup>

### V. Fuji's Motion to Convert to Chapter 7

By August 2004, the bankruptcy had reached a tipping point. Partially because their level of involvement in the bankruptcy and surrounding litigation gave them better information, and partially because it fit with their greater strategy to bring about Jazz Photo's end, Fuji moved for an involuntary conversion of Jazz Photo's bankruptcy from a Chapter 11 to a Chapter 7 bankruptcy under 11 U.S.C. section 1112(b).<sup>94</sup> Fuji's chief reasons were an improper diminution in the value of the estate, Jazz's worsening administrative insolvency, and Jazz's use of the protections of Chapter 11 to continually infringe on Fuji's patents.

Early in the bankruptcy, Judge Stern had approved three motions for relief from the automatic stay: one for the appeals by both sides in *Jazz v. Fuji*,<sup>95</sup> one for Jazz to pursue the Imation litigations,<sup>96</sup> and a motion by Fuji to allow the International Trade Commission ("ITC") to determine whether Jazz had violated the cease and desist order in set out by the ITC in the initial administrative action ("ITC-2").<sup>97</sup> Six days prior to filing this motion, the ITC had accepted the determinations of the Administrative Law Judge ("ALJ") in ITC-2 and found that

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<sup>93</sup> *In re Jazz Photo Corp.*, 312 B.R. 524, 539 (Bankr. D.N.J. 2004).

<sup>94</sup> *In re Jazz Photo Corp.*, Case no. 03-26565-MS, Motion *TO CONVERT CASE TO CHAPTER 7*, Dkt. #602, (Bankr. D. N.J. Aug. 2, 2004).

<sup>95</sup> *In re Jazz Photo Corp.*, Case no. 03-26565-MS, Consent Order re: *GRANTING THE DEBTOR AND FUJI PHOTO FILM CO., LTD RELIEF FROM THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. 362(D)*, Dkt. #70, (Bankr. D. N.J. June 12, 2003).

<sup>96</sup> *In re Jazz Photo Corp.*, Case No. 03-26565-MS, Consent Order re: *GRANTING THE DEBTOR, JAZZ PHOTO (HONG KONG)LTD., IMATION CORP. AND IMATION S.P.A RELIEF FROM THE AUTOMATIC STAY*, Dkt. #191, (Bankr. D. N.J. July 16, 2003).

<sup>97</sup> *In re Jazz Photo Corp.*, Case no. 03-26565-MS, Order *DETERMINING (I) THAT THE AUTOMATIC STAY PROVISION OF THE BANKRUPTCY CODE DOES NOT PREVENT THE INTERNATIONAL TRADE COMMISSION FROM CONTINUING ITS ENFORCEMENT PROCEEDING AND (II) MODIFYING THE AUTOMATIC STAY TO PERMIT THE INTERNATIONAL TRADE COMMISSION TO CONTINUE ITS ENFORCEMENT PROCEEDING*, Dkt. #194, (Bankr. D. N.J. July 30, 2003).



Jazz had continued to violate Fuji's patents post-petition.<sup>98</sup> This decision was adopted as the posture of the ITC when they refused to review the administrative judge's decision on infringement, but left open the question of the amount of civil penalties to assess against Jazz.<sup>99</sup> While the ALJ's decision supported a \$13 million fine assessed by the ITC against Jazz and Benun for violation of a prior cease and desist order, it did not declare any amount of compensable damages owed to Fuji.

The ITC-2 decision was the death knell for Jazz Photo's continued operations. From the inception of the bankruptcy proceedings, Jazz had based its hopes for reorganization on two prongs: a successful lawsuit against Imation resulting in a cash windfall and a successful appeal on the district court's decision in *Jazz v. Fuji*. While the ITC-2 decision did not affect the prospects of either the lawsuit or the appeal, it added millions of dollars of additional liability in civil fines and potential administrative costs to Fuji as well as tying up more funds in future administrative costs for Jazz's planned appeal on ITC-2.

Fuji, bolstered by the favorable administrative action, moved for conversion to Chapter 7 and filed contemporaneous motions 1) to allow an estimated administrative expense for post-petition infringement of their patent and 2) for relief from the automatic stay to file an injunctive action in the District Court.

### **Fuji's Motion for Conversion to Chapter 7**

Section 1112(b)(1) allows a party in interest to the bankruptcy to move for an involuntary conversion to Chapter 7 if the moving party can establish good cause. Former section 1112(b) provides a non-exhaustive list of conditions that can show cause. Fuji's motion focused on three

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<sup>98</sup> *Certain Lens-Fitted Film Packages*, USITC Inv. No. 337-TA-406 (Apr. 6, 2004).

<sup>99</sup> *Certain Lens-Fitted Film Packages*, USITC Inv. No. 337-TA-406 (July 27, 2004), available at 2004 ITC LEXIS 545.

statutory causes: 1) “Substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation,”<sup>100</sup> 2) Inability of the debtor to effectuate a plan;<sup>101</sup> and 3) “unreasonable delay by the debtor that is prejudicial to creditors.”<sup>102</sup>

The requirements of former Section 1112(b)(1) are conjoined.<sup>103</sup> This means that Fuji needed to show that there has been continuing loss or diminution and they must show that there is no reasonable likelihood of rehabilitation. While Jazz’s loss during the bankruptcy had been extensive,<sup>104</sup> from the outset of the bankruptcy, Jazz had based its hopes for recovery on the prospective award in the Imation litigation or a successful appeal in *Jazz v. Fuji*. Until there was some finality in either of those two matters, the likelihood of rehabilitation would be impossible to judge.

The same problem applies when examining Jazz’s ability to effectuate a plan. The fact that the entire bankruptcy was contingent on a favorable outcome in one of two pending court actions militated against a holding that the debtor was unable to effectuate a plan or that the delay was unreasonable.

### **Fuji’s Motion for Allowance of Administrative Claim**

With the motion to convert to Chapter 7, Fuji contemporaneously moved to have the bankruptcy court estimate Fuji’s claimed infringement damages<sup>105</sup> as an administrative claim, which would give them greater priority than they currently enjoyed. Administrative fees are given priority only second to payment of marital obligations in the bankruptcy code.<sup>106</sup> Items

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<sup>100</sup> Former 11 USC § 1112(b)(1) (2004), (amended Apr. 20, 2005).

<sup>101</sup> Former 11 USC § 1112(b)(2) (2004), (amended Apr. 20, 2005).

<sup>102</sup> Former 11 USC § 1112(b)(3) (2004), (amended Apr. 20, 2005).

<sup>103</sup> *In re Lizeric Realty Corp.*, 188 B.R. 499, 503 (Bankr. S.D.N.Y. 1995).

<sup>104</sup> *In re Jazz Photo Corp.*, Case no. 03-26565-MS, Motion *TO CONVERT CASE TO CHAPTER 7*, Dkt. #602 at 16, (Bankr. D. N.J. Aug. 2, 2004).

<sup>105</sup> *In re Jazz Photo Corp.*, Case no. 03-26565-MS, Motion for *ALLOWANCE OF ADMINISTRATIVE CLAIM*, Dkt. #603, (Bankr. D. N.J. Aug. 2, 2004).

<sup>106</sup> 11 USC § 507(a)(1)-(2) (2008)

considered to be administrative fees include “actual, necessary costs and expenses of preserving the estate.”<sup>107</sup> The Supreme Court has held that this language is expansive enough to include claims against the estate that arise out of post-petition negligence, even if payment of the claims does not benefit the estate.<sup>108</sup> The Third Circuit Court of Appeals has held that administrative priority does not extend to fines or other civil and criminal penalties assessed by the government.<sup>109</sup>

In Jazz’s case, these two rules would mean that the fine assessed by the ALJ in ITC-2 would not be given administrative priority. However, Fuji’s claim for infringing sales would arise out of Jazz’s operation of their business post-petition, and thus could potentially be given administrative priority under section 507(a)(2). Fuji’s claims also arose out of business conduct more central to Jazz’s operation than the claims in *Reading*. In *Reading*, the plaintiff brought a negligence claim for burning down a neighboring building. There was no business connection between the negligent receiver and the neighbor. The Supreme Court weighed this disconnect from the debtor’s business operations heavily, but ultimately decided that the lack of centrality to the debtor’s operations wasn’t sufficient to merit lower priority. For Jazz, the sale of infringing cameras was and had been central to the business model. Damages arising out of these sales would be much more in line with a plain reading of the statute than the damages at issue in *Reading*, making it more likely that Fuji’s claim could be given administrative priority.

However, there is a question largely unaddressed in Fuji’s motion for administrative costs, and one the court did not consider later, whether Fuji would need to show negligence in order to invoke the *Reading* expansion of administrative costs.

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<sup>107</sup> 11 USC § 503(b)(1)(A) (2008)

<sup>108</sup> *Reading Co. v. Brown*, 391 U.S. 471, 484 (1968).

<sup>109</sup> *Pa. Dep’t of Env’tl. Res. v. Tri-State Clinical Labs., Inc.*, 178 F.3d 685, 698 (3d Cir. 1999).

Patent infringement is a strict liability tort, although the scienter nature of the infringement can be used in calculating damages.<sup>110</sup> In Fuji's initial lawsuit against Jazz, the jury did not find willful infringement with regard to the refurbished cameras.<sup>111</sup> However, in a potential action initiated by Fuji, a finder of fact would have to weigh the prior court decision, the years of litigation, and the company's resulting troubles in coming to a conclusion on whether the post-petition infringement was willful. All told, even though an action for infringement requires a lesser scienter than negligence, the facts of Jazz's post-petition infringement should support a conclusion that, at a minimum, negligence was involved. This combined with the infringement's central relation to Jazz's operations should be enough to bring Fuji's claim within the *Reading* expansion of administrative priority.

But this begs the question, how much in damages? Fuji had not commenced an action, let alone obtained a judgment that would allow them to liquidate their claim. ITC-2 was an administrative action to determine if Jazz had violated a cease and desist order and did not reference Jazz's potential liability to Fuji. Fuji would normally have to make a separate claim for damages from post-petition infringement, try the claim and obtain a judgment before they could make an administrative claim on the estate under *Reading*.

The bankruptcy code provides a method in Section 503(c) for the estimation of unliquidated and contingent claims.<sup>112</sup> It is not clear from the code whether this section applies to administrative claims or only to pre-petition claims. The preceding subsections<sup>113</sup> concern only pre-petition claims, and there is no clear agreement among the bankruptcy courts whether

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<sup>110</sup> *In re Seagate Tech., LLC*, 497 F.3d 1360, 1368 (Fed. Cir. 2007).

<sup>111</sup> *Fuji Photo Film Co. v. Jazz Photo Corp.*, 249 F. Supp. 2d 434, 456 (D.N.J. 2003). The jury found willful infringement only in the cameras that Jazz had manufactured.

<sup>112</sup> 11 USC § 502(c).

<sup>113</sup> 11 USC § 502(a)-(b)

Section 502(c) can apply to post-petition claims.<sup>114</sup> The decisions that have shoehorned Section 503 claims into Section 502(c) have encountered problems later in preserving due process rights of the Section 503 claimants.<sup>115</sup> In any case, Fuji could likely grease the skids by waiving their right to pursue later due process appeals in the event of an unfavorable estimation.

Fuji did attempt to provide an estimate of their eventual administrative expense in excess of \$6 million. They arrived at that number by extrapolating the percentage of infringing cameras as part of the total number of cameras in the ITC ruling, then applying that percentage to the total number of cameras imported by Jazz. They then apply the \$.56 per camera damages amount from the *Jazz v. Fuji* litigation. However, Fuji's likely purpose was not to actually have the motion granted, but to prepare the ground for the motion to convert to Chapter 7. Whether or not Fuji's motion for allowance of an administrative expense was granted, the underlying claim was valid and it would just be a matter of time before the claim would become an administrative expense.<sup>116</sup>

### **Fuji's Motion for Relief From the Automatic Stay**

Very early in the bankruptcy, Fuji moved for and was granted relief from the automatic stay to allow the ITC to pursue its action against Jazz.<sup>117</sup> The ITC-2 action was instigated at Fuji's request to ensure that Jazz was not violating the cease and desist order in ITC-1. The

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<sup>114</sup> See *In re Atcall, Inc.*, 284 B.R. 791, 799 (Bankr. E.D. Va. 2002) (No comparable provision [to Section 502(c)] for estimation of administrative claims which must be "actual, necessary" costs.) *But see In re MacDonald*, 128 B.R. 161, 167 (Bankr. W.D. Tex. 1991) (Estimation of post-petition claims similar to Section 502(c) is permissible under general bankruptcy powers).

<sup>115</sup> See generally *In re MacDonald*, 128 B.R. 161, 167 (Bankr. W.D. Tex. 1991) (Estimation of administrative fees becomes problematic as it encounter the competing concerns of preserving a claimant's due process rights and Section 1129(a)(9)(A) requirement of full payment for administrative claims for plan approval.)

<sup>116</sup> See *In re Jazz Photo Corp.*, Case no. 03-26565-MS, *LIQUIDATING TRUSTEE'S EIGHTEENTH QUARTERLY STATUS REPORT FOR THE PERIOD THROUGH DECEMBER 31, 2009, PURSUANT TO FIRST AMENDED JOINT PLAN OF ORDERLY LIQUIDATION*, Dkt. #1324, (Bankr. D. N.J. Mar. 4, 2010).

<sup>117</sup> *In re Jazz Photo Corp.*, Case no. 03-26565-MS, Order *DETERMINING (I) THAT THE AUTOMATIC STAY PROVISION OF THE BANKRUPTCY CODE DOES NOT PREVENT THE INTERNATIONAL TRADE COMMISSION FROM CONTINUING ITS ENFORCEMENT PROCEEDING AND (II) MODIFYING THE AUTOMATIC STAY TO PERMIT THE INTERNATIONAL TRADE COMMISSION TO CONTINUE ITS ENFORCEMENT PROCEEDING*, Dkt. #194, (Bankr. D. N.J. July 30, 2003).

motion was made as an alternative to Fuji seeking injunctive relief in the district court. When the ITC adopted the ALJ's findings in ITC-2, Fuji moved for relief from the automatic stay to pursue injunctive relief in the district court. Fuji wanted to prevent Jazz from selling infringing cameras, but the injunction also served Fuji's larger purpose of imposing greater transaction costs on Jazz's operations, thus making a reorganization infeasible.

The automatic stay in 11 U.S.C. Section 362(a)(1) prevents any party from commencing or continuing a judicial, administrative, or other proceeding that could have commenced before the beginning of the bankruptcy. 11 U.S.C. Section 362(d)(1) allows a party in interest to move for relief from the automatic stay. If the Bankruptcy Judge finds adequate cause, they may grant the motion. 28 U.S.C. Section 959(a) provides that a debtor in possession may be sued for any of the activities of the business carried on while in bankruptcy. However, such an action would be granted under the equity powers of the court, giving wide deference to the judge in determining whether to permit the action.<sup>118</sup> Fuji argued in their motion that under this section of the United States Code, there was sufficient cause to remove the automatic stay for an injunctive action.

Both Fuji, in its motion, and Jazz, in its objection, relied heavily on the same case.<sup>119</sup> *In re Television* was a copyright infringement claim that arose post-petition. The creditor moved for relief from the automatic stay to pursue an injunction against further copyright infringement. The debtor in possession, citing 28 U.S.C. Section 959(a), requested that the bankruptcy court use its equitable powers to prevent the injunctive suit because it would have a deleterious effect on the reorganization. The debtor had recently filed its plan for reorganization, and contended that the addition of a lawsuit and the administrative costs that would result jeopardized the

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<sup>118</sup> 28 U.S.C. § 959(a) (2008).

<sup>119</sup> *In re Television Studio School of New York*, 77 B.R. 411, 412 (Bankr. S.D.N.Y. 1987).

viability of the plan. The bankruptcy judge agreed with the debtor and stopped the injunctive suit.

Fuji tried to distinguish *In re Television* on the grounds that Jazz had not moved far enough along in its reorganization, and that the injunctive suit would not hurt a reorganization that was simply not going to happen.<sup>120</sup> Jazz cited the case for the holding, noting that Fuji's injunctive motion as presented would have the effect of requiring 60 day advance notice to Fuji of any sales of refurbished cameras, effectively preventing Jazz from selling their inventory and forcing them out of business, thus providing a major harm to the reorganization.<sup>121</sup>

Jazz responded to the three motions on September 10, 2004<sup>122</sup>. They were joined in opposing the conversion to a Chapter 7 by the unanimous unsecured creditor's committee,<sup>123</sup> and the US Trustee.<sup>124</sup> Fuji responded to the various objections by reiterating and refining its original motion.<sup>125</sup> Fuji clarified that while the ITC had not unreservedly accepted the ALJ's

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<sup>120</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, Motion for *RELIEF FROM STAY RE: FUJI PHOTO FILM CO., LTD'S MOTION FOR A DETERMINATION THAT THE AUTOMATIC STAY IS NOT APPLICABLE AND TO LIFT THE INJUNCTION AGAINST PROCEEDING OR, ALTERNATIVELY, FOR RELIEF FROM THE AUTOMATIC STAY*, Dkt. #604 at 18-21, (Bankr. D. N.J. Aug. 2, 2004).

<sup>121</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *DEBTOR'S: (A) OPPOSITION TO THE MOTION OF FUJI PHOTO FILM CO., LTD. FOR A DETERMINATION THAT THE AUTOMATIC STAY IS NOT APPLICABLE AND TO LIFT THE INJUNCTION AGAINST PROCEEDING OR, ALTERNATIVELY, FOR RELIEF FROM THE AUTOMATIC STAY TO COMMENCE AN INJUNCTION ACTION IN THE DISTRICT COURT, AND (B) APPLICATION IN SUPPORT OF CROSSMOTION, TO THE EXTENT NECESSARY, TO EXPAND THE RETENTION OF BUDD, LARNER, ROSENBAUM, GREENBERG & SADE, P.C. AS SPECIAL LITIGATION COUNSEL*, Dkt. #653 at 19-20, (Bankr. D. N.J. Sept. 15, 2004).

<sup>122</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *DEBTOR'S OPPOSITION TO THE MOTION OF FUJI PHOTO FILM CO., LTD. PURSUANT TO 11 U.S.C. § 1112(b) FOR ORDER CONVERTING THE DEBTOR'S CHAPTER 11 CASE TO A CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE*, Dkt. #649, (Bankr. D. N.J. Sept. 10, 2004).

<sup>123</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *LETTER FROM UNSECURED CREDITOR'S COMMITTEE TO JUDGE MORRIS STERN UNANIMOUSLY OPPOSING FUJI'S MOTION TO CONVERT TO CHAPTER 7*, Dkt. #653, (Bankr. D. N.J. Sept. 15, 2004).

<sup>124</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *LETTER FROM US TRUSTEE TO JUDGE MORRIS STERN OPPOSING FUJI'S MOTION TO CONVERT TO CHAPTER 7*, Dkt. #657, (Bankr. D. N.J. Sept. 17, 2004).

<sup>125</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *REPLY OF FUJI PHOTO FILM CO., LTD. IN FURTHER SUPPORT OF ITS MOTION FOR ORDER CONVERTING THE DEBTOR'S CHAPTER 11 CASE TO A CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE*, Dkt. #662, (Bankr. D. N.J. Sept. 20, 2004).

determinations as to civil penalties, it had accepted the ALJ's finding of post-petition infringement.<sup>126</sup>

On September 22, 2004, the motion was heard and continued by the bankruptcy court. In that hearing, Judge Morris Stern was most concerned with the very speculative nature of Jazz's potential for emerging successfully from a chapter 11, that it would require both a favorable damages holding on appeal in *Jazz v. Fuji* and a successful outcome in the Imation lawsuit.<sup>127</sup> "If the decision that comes out [of the appeal] is that [*Jazz v. Fuji*] is affirmed, one word, boom. Then your question of me is going to be, well, what about a zillion dollar potential from Imation."<sup>128</sup>

Jazz defended in the hearing on the grounds that conversion would be immediately damaging to the unsecured creditors in several ways. Wal-Mart, who was still receiving delivery of Jazz Photo cameras, would immediately assert a large administrative claim. Fuji's award in ITC-2 would also result in an administrative claim because the infringing actions by Jazz took place post-petition. Furthermore, conversion would greatly reduce the chance of successful litigation in Imation by dispersing key Jazz Photo employees to the wind.<sup>129</sup> Jazz agreed with Judge Stern that their chance to emerge successfully from a chapter 11 was quickly vanishing, but argued that until that chance had disappeared, either with an adverse decision from the appeal on *Jazz v. Fuji* or the pending Imation litigation, conversion would be premature.

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<sup>126</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *REPLY OF FUJI PHOTO FILM CO., LTD. IN FURTHER SUPPORT OF ITS MOTION FOR ORDER CONVERTING THE DEBTOR'S CHAPTER 11 CASE TO A CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE*, Dkt. #662, (Bankr. D. N.J. Sept. 20, 2004).

<sup>127</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *TRANSCRIPT OF HEARING HELD ON 9/22/2004*, Dkt. #686, (Bankr. D. N.J. Sept. 22, 2004).

<sup>128</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *TRANSCRIPT OF HEARING HELD ON 9/22/2004*, Dkt. #686 at 57-58, (Bankr. D. N.J. Sept. 22, 2004).

<sup>129</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *TRANSCRIPT OF HEARING HELD ON 9/22/2004*, Dkt. #686 at 59, (Bankr. D. N.J. Sept. 22, 2004).



In the end, Judge Stern agreed provisionally with Jazz. He continued Fuji's motions until November and asked for amended briefs on any issues that might arise between September and November. It was not the victory either side had hoped. Jazz knew they were still marching to the guillotine; Fuji had not convinced the judge to drop the blade.

Prior to the November hearing, Jazz's position continued to deteriorate. As a result of the ITC's adverse ruling, the United States Customs Department began seizing imported cameras. Jazz already had trouble purchasing domestic non-infringing camera shells, and the heightened enforcement by customs effectively cut off Jazz's supply line. By December, 2004, Jazz had no cameras available to sell.<sup>130</sup>

Along with the lack of inventory, the adverse ITC-2 ruling resulted in \$13 million dollars in civil penalties. Together with the growing administrative claim from Fuji for post-petition infringement, this meant that Jazz had incurred at least another \$19 million in debt due to legal consequences of its post-petition business operations.

Despite the growing problems, there were some signs of hope for recovery. A date for the Imation case had finally been set for January 2005, leading to increased settlement pressure on Imation. In early November, 2004, the Court of International Trade ("CIT") held that most of the cameras imported by Jazz Photo that had been stopped in customs had been permissibly repaired.<sup>131</sup> Furthermore, the cameras that were excluded from the holding could be released by customs on sufficient proof that they were processed in a way that would not infringe on Fuji's

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<sup>130</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *SECOND OMNIBUS SUPPLEMENTAL RESPONSE IN SUPPORT OF FUJI PHOTO FILM CO., LTD.'S (A) MOTION FOR ORDER CONVERTING THE DEBTOR'S CHAPTER 11 CASE TO A CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE; (B) MOTION FOR A DETERMINATION THAT THE AUTOMATIC STAY IS NOT APPLICABLE AND TO LIFT THE INJUNCTION AGAINST PROCEEDING OR, ALTERNATIVELY, FOR RELIEF FROM THE AUTOMATIC STAY; AND (C) MOTION FOR ALLOWANCE OF ADMINISTRATIVE CLAIM*, Dkt. #762, (Bankr. D. N.J. Jan. 24, 2005).

<sup>131</sup> *Jazz Photo Corp. v. United States*, 28 C.I.T. 1954, 1977 (2004).

patents.<sup>132</sup> This put a dent into one of Fuji's arguments for conversion to chapter 7, that Jazz had been unable to obtain cameras in a way that was not infringing.<sup>133</sup>

In January, 2005, the trial phase of the Imation lawsuit began. A few weeks into the trial, Judge Linares encouraged Jazz and Imation to reach settlement outside the court. Because the Imation litigation was Jazz's largest asset, the potential for settlement quickly revealed fault lines between the parties in bankruptcy.<sup>134</sup> Jazz wanted an all-or-nothing award at trial, since a settlement would probably not give them sufficient capital to emerge from chapter 11. The US Trustee and two members of the Unsecured Creditors Committee were concerned that the all-or-nothing approach would result in nothing for the unsecured creditors. As a result, the US Trustee filed a motion for the court to appoint an examiner solely for the purpose of determining whether a settlement was in the best interests of the estate.<sup>135</sup>

In light of the CIT decision and the proximity of the Imation court date, the rehearing on Fuji's motion to convert to a chapter 7 was continued to January, 2005, and then again to February of the same year. At the time of the hearing, Imation settlement talks were nearly complete, and Imation had made a firm settlement offer to Jazz of \$25 million.<sup>136</sup> The proposed settlement also included a \$1 million carve out from Fuji's claims in favor of the unsecured

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<sup>132</sup> *Jazz Photo Corp. v. United States*, 28 C.I.T. 1954, 1977 (2004).

<sup>133</sup> See e.g. In re Jazz Photo Corp., Case no. 03-26565-MS, Motion *TO CONVERT CASE TO CHAPTER 7*, Dkt. #602 at 16, (Bankr. D. N.J. Aug. 2, 2004)., In re Jazz Photo Corp., Case no. 03-26565-MS, *DEBTOR'S SUPPLEMENTAL SUBMISSION PURSUANT TO ORDER CONTINUING MOTIONS OF FUJI PHOTO FILM CO., LTD. SEEKING: (A) CONVERSION OF THE DEBTOR'S CHAPTER 11 PROCEEDING; (B) ESTIMATION OF ADMINISTRATIVE CLAIM; AND (C) RELIEF FROM THE AUTOMATIC STAY, TO THE EXTENT APPLICABLE, TO PROCEED BEFORE THE UNITED STATES DISTRICT COURT*, Dkt. #720, (Bankr. D. N.J. Nov. 12, 2004).

<sup>134</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *TRANSCRIPT OF HEARING 2/9/2004*, Dkt. #841 at 4, (Bankr. D. N.J. Feb. 2, 2004). In the hearing on the US Trustee's motion to appoint an examiner, the attorney for the unsecured creditor's committee revealed that the committee was split two to one in favor of accepting the settlement.

<sup>135</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *MEMORANDUM OF LAW IN SUPPORT OF UNITED STATES TRUSTEE'S FOR AN ORDER DIRECTING THE APPOINTMENT OF AN EXAMINER*, Dkt. #774, (Bankr. D. N.J. Feb. 4, 2005).

<sup>136</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *TRANSCRIPT OF HEARING 2/9/2004*, Dkt. #841 at 57, (Bankr. D. N.J. Feb. 2, 2004).

creditors. The carveout was conditioned upon Jazz agreeing to cease business operations and file a plan of liquidation. Even though Jazz had not accepted the offer, Imation was potentially required to make a Form 8-K filing<sup>137</sup> declaring the amount of the proposed settlement.

One of the conditions for mistrial established by Judge Linares in the Imation case was public disclosure of settlement information. Because Form 8-K filings are publicly accessible, Jazz was worried that the 8-K filing would lead to a mistrial. Jazz desperately wanted to avoid a mistrial in the Imation case<sup>138</sup> and stated that they would seek a preliminary injunction to prevent the Form 8-K filing. One of the earliest motions in the February bankruptcy hearing was made by Jazz to seal the transcript of the hearing to prevent just such a public disclosure and mistrial.

In the hearing, the possibility of appointing a chapter 11 trustee was raised for the first time, but the court eventually settled on appointing an examiner limited to evaluating the settlement offer.<sup>139</sup> The examiner would have to come to a decision within a week. The court also clarified some terms in the settlement agreement, most consequentially, that if the settlement were accepted by the examiner, Jazz would have to cease sales of cameras and begin to wind-down its business by March 1, 2004.<sup>140</sup> The blade was now suspended high above Jazz, waiting only for the signal to drop.

#### **IV. Dissolution and Wrapup**

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<sup>137</sup> See Securities Exchange Act of 1934, 15 USC § 78m (2008). (Reporting corporations are required to file documents, including Form 8-K, to “keep reasonably current” the information on file with the SEC.)

<sup>138</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *TRANSCRIPT OF HEARING 2/14/2004*, Dkt. #810 at 5-6, (Bankr. D. N.J. Feb. 14, 2004).

<sup>139</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *TRANSCRIPT OF HEARING 2/14/2004*, Dkt. #810 at 56, (Bankr. D. N.J. Feb. 14, 2004).

<sup>140</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *TRANSCRIPT OF HEARING 2/14/2004*, Dkt. #810 at 90-93, (Bankr. D. N.J. Feb. 14, 2004). The prohibition on sales excluded certain sales in liquidation and certain non-infringing sales outside the country, but required all such sales not to be in the ordinary course of business.

On February 10, 2005, pursuant to the order of the bankruptcy court, the US Trustee provided notice for the appointment of Edwin Ordway of Capstone Advisory Group, LLC as examiner.<sup>141</sup> Capstone is a firm that specializes in providing multidisciplinary professional advice to corporations involved in acquisitions, restructurings, and reorganizations, among other things.<sup>142</sup> Ordway's appointment was approved by the court on February 14. Mr. Ordway approved the settlement agreement in a written report issued February 15, and on February 18, 2005, Judge Stern ordered the approval of the settlement offer between Imation and Jazz Photo.<sup>143</sup> Per the settlement agreement, Jazz would cease operations on March 1, and submit a plan for liquidation.

On March 21, 2005, after 22 months of bankruptcy litigation, Jazz submitted its chapter 11 plan for orderly liquidation.<sup>144</sup> The plan called for the appointment of a liquidating trustee to oversee the winding up of Jazz's business.<sup>145</sup> The liquidating trustee would establish a liquidating trust, transfer all of Jazz's assets into the trust, and oversee all remaining matters of the business, including overseeing Jazz's remaining appeals in the ITC-2 case.<sup>146</sup>

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<sup>141</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *NOTICE OF APPOINTMENT OF EXAMINER*, Dkt. #790, (Bankr. D. N.J. Feb. 11, 2005).

<sup>142</sup> *Capstone Advisory Group, LLC Company Website*, (Accessed April 23, 2008) <<http://www.capstoneadvisorygroup.com/restructuring-and-transaction-advisory>>

<sup>143</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *ORDER APPROVING SETTLEMENT OF PENDING UNITED STATES DISTRICT COURT LITIGATION AGAINST IMATION CORP. AND IMATION S.P.A.*, Dkt. #803, (Bankr. D. N.J. Feb. 18, 2005).

<sup>144</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *JOINT PLAN OF ORDERLY LIQUIDATION*, Dkt. #871, (Bankr. D. N.J. Mar. 21, 2005).

<sup>145</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *JOINT PLAN OF ORDERLY LIQUIDATION*, Dkt. #871 at 23, (Bankr. D. N.J. Mar. 21, 2005).

<sup>146</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *JOINT PLAN OF ORDERLY LIQUIDATION*, Dkt. #871 at 19, (Bankr. D. N.J. Mar. 21, 2005).

Under the plan, The claims would be classified according to the following table:

<b>Category</b>	<b>Statute<sup>147</sup> or Other Definition</b>	<b>Accept the Plan?</b>	<b>Satisfaction of Claim</b>
<b>Secured Claim</b>	Section 506	Yes. Unimpaired claim.	Full
<b>Administrative Claim</b>	Section 503(b)(1)(A)	No vote under the plan	Full. If claim is disputed, carveout of claim amount is retained in escrow
<b>Priority Non-Tax Claim</b>	Section 507(a)	Yes. Unimpaired claim.	Full
<b>General Unsecured Claim</b>	Anything not fitting in one of the other categories	May vote to accept or reject	Pro Rata
<b>Affiliate Claim</b>	Claims by affiliates: Jazz Photo Hong Kong and JCB Consultants, Inc.	No. Impaired claim.	None
<b>Penalty Claim</b>	Non-Compensatory penalty claims	No. Impaired claim.	None
<b>Equity Interest</b>	Interests in stock, warrants, and other equity instruments	No. Impaired claim.	None

<sup>147</sup>

All chart statutory sections are to the bankruptcy code in Chapter 11 of Title 11 unless stated otherwise.

While the plan was waiting for approval from creditors, Jazz was negotiating the sale of substantially all of their assets to Ribí, Inc.<sup>148</sup> Ribí was owned by Jack Benun's wife, Mona, and their four daughters with Jack Benun serving as an officer.<sup>149</sup> On April 5, 2005, Jazz filed a motion to sell substantially all of Jazz's assets to Ribí in a 11 USC Section 363(f) transaction for \$887,750, which would give the Benuns the opportunity to snatch a minor victory from the jaws of defeat. Ribí and the Benuns would be able to use the Jazz trademark, and, assuming they could put together the manufacturing and sales apparatus needed, continue to act as a competitor to Fuji.

Section 363(f) allows a debtor to sell assets free and clear of competing interests in the property.<sup>150</sup> This potentially amounted to a first sale within the United States, clearing Fuji's claims for patent infringement by operation of the Bankruptcy court, a position that would only be resolved after much litigation.<sup>151</sup>

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<sup>148</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *APPLICATION OF THE DEBTOR IN SUPPORT OF MOTION FOR ORDER: (1) AUTHORIZING AND APPROVING SALE OF SUBSTANTIALLY ALL OF ITS ASSETS TO RIBI TECH PRODUCT, LLC, OR A PARTY MAKING A HIGHER OR BETTER OFFER, FREE AND CLEAR OF LIENS, ENCUMBRANCES AND SECURITY INTERESTS THEREON PURSUANT TO 11 U.S.C. § 363 AND FED. R. BANKR. P. 6004, (2) AUTHORIZING AND APPROVING SOLICITATION AND COMPETITIVE BIDDING PROCEDURES RELATED THERETO; (3) SCHEDULING AUCTION SALE AND HEARING DATE TO CONFIRM SALE; (3) APPROVING THE FORM, MANNER AND SUFFICIENCY OF NOTICE OF AUCTION AND SALE HEARING; AND (4) GRANTING OTHER RELATED RELIEF*, Dkt. #922 at 7, (Bankr. D. N.J. Apr. 5, 2005).

<sup>149</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *APPLICATION OF THE DEBTOR IN SUPPORT OF MOTION FOR ORDER: (1) AUTHORIZING AND APPROVING SALE OF SUBSTANTIALLY ALL OF ITS ASSETS TO RIBI TECH PRODUCT, LLC, OR A PARTY MAKING A HIGHER OR BETTER OFFER, FREE AND CLEAR OF LIENS, ENCUMBRANCES AND SECURITY INTERESTS THEREON PURSUANT TO 11 U.S.C. § 363 AND FED. R. BANKR. P. 6004, (2) AUTHORIZING AND APPROVING SOLICITATION AND COMPETITIVE BIDDING PROCEDURES RELATED THERETO; (3) SCHEDULING AUCTION SALE AND HEARING DATE TO CONFIRM SALE; (3) APPROVING THE FORM, MANNER AND SUFFICIENCY OF NOTICE OF AUCTION AND SALE HEARING; AND (4) GRANTING OTHER RELATED RELIEF*, Dkt. #922 at 7, (Bankr. D. N.J. Apr. 5, 2005).

<sup>150</sup> 11 U.S.C. § 363(f) (2008).

<sup>151</sup> See Matthew W. Siegal and Kristopher M. Hansen, "Free and Clear" Bankruptcy Sales Do Not Extinguish Claims of Patent Infringement, 2 Bloomberg Law Reports 1-3 (September 2, 2008), available at <<http://www.stroock.com/SiteFiles/Pub638.pdf>>.

Needless to say, Fuji was not happy with this proposed insider sale of the business. Within two weeks, Fuji filed an indignant objection to the proposed sale to Ribi.<sup>152</sup> “Enough is enough,” Fuji began, characterizing the offer as an “outrage” and “mere subterfuge” designed to enable Jazz to shuck its liabilities and continue to infringe on Fuji’s patents.

Undoubtedly, Fuji was correct in these assertions. Ribi Tech. was structured to avoid attempts by Fuji to strike at its structure. If the sale occurred, even with a judgment lien against Jack Benun for the infringement damages, Fuji would be unable to get at the Ribi stock held by his wife and daughters.

Fuji needed to obstruct the sale to Ribi in whatever way they could manage. Beyond the ethical objections and umbrage that began their formal objection, they made a controversial claim near the close that they should be allowed to credit bid against Ribi.<sup>153</sup> The bankruptcy code allows for a secured creditor to credit bid in a section 363 sale, but nowhere in the code is it permitted to bid an administrative or unsecured claim in a 363 sale.<sup>154</sup>

That said, Fuji was not without options at this point. The bankruptcy began as a way to avoid paying Jazz’s judgment debt of \$30 million to Fuji. Had Fuji obtained a judgment lien prior to the filing of bankruptcy, they would be secured creditors. The only thing operating to stop Fuji from becoming a secured creditor by attaching all of Jazz’s property was the automatic

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<sup>152</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *OBJECTION OF FUJI PHOTO FILM CO., LTD. TO THE DEBTOR’S MOTION FOR AN ORDER: (1) AUTHORIZING AND APPROVING SOLICITATION AND COMPETITIVE BIDDING PROCEDURES FOR THE DEBTOR TO SELL SUBSTANTIALLY ALL OF ITS ASSETS; (2) SCHEDULING AUCTION AND HEARING DATE TO CONFIRM SALE; (3) APPROVING OF FORM, MANNER AND SUFFICIENCY OF NOTICE OF AUCTION AND SALE HEARING; AND (4) GRANTING OTHER RELATED RELIEF*, Dkt. #965, (Bankr. D. N.J. Apr. 15, 2005).

<sup>153</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *OBJECTION OF FUJI PHOTO FILM CO., LTD. TO THE DEBTOR’S MOTION FOR AN ORDER: (1) AUTHORIZING AND APPROVING SOLICITATION AND COMPETITIVE BIDDING PROCEDURES FOR THE DEBTOR TO SELL SUBSTANTIALLY ALL OF ITS ASSETS; (2) SCHEDULING AUCTION AND HEARING DATE TO CONFIRM SALE; (3) APPROVING OF FORM, MANNER AND SUFFICIENCY OF NOTICE OF AUCTION AND SALE HEARING; AND (4) GRANTING OTHER RELATED RELIEF*, Dkt. #965, (Bankr. D. N.J. Apr. 15, 2005).

<sup>154</sup> 11 U.S.C. § 363(k) (2008).

stay.<sup>155</sup> Fuji may have been able to successfully petition the judge for relief from the automatic stay.

11 U.S.C. Section 362(d) allows a petitioner to petition for relief from the automatic stay for cause.<sup>156</sup> While section 362(d)(1) lists a “lack of adequate protection of an interest in property” as cause, it is provided merely as an example, and does not constitute the entire breadth of “cause,” which can include debtor misconduct<sup>157</sup> and bad faith.<sup>158</sup> The test for adequate cause is basically an *ad hoc* factual determination by the bankruptcy court.<sup>159</sup>

Fuji may have had a hard time convincing Judge Morris of the factual cause for relief. Fuji already had a sizeable administrative claim, for which they would be paid out of Jazz’s assets in liquidation. Adding a \$30 million secured claim would preclude every other creditor from any possible recovery, and was not reflective of Fuji’s relative interest at the time of the filing of bankruptcy. Even permitting a portion of that \$30 million claim to gain secured priority for the purpose of credit bidding would not add any value to the Jazz estate, it would simply preclude the estate from gaining whatever cash infusion an actual auction would bring in.

Meanwhile, Jazz had not evidenced bad faith as it has been used to determine cause. The bad faith determination is usually made in reference to the purpose of filing the bankruptcy, and has often come up in the context of debtors attempting to hide assets from imminent foreclosure by creating a new entity, transferring assets to that entity, and then having the new entity petition for bankruptcy.<sup>160</sup> Jazz’s bankruptcy was a result of an adverse judgment by Fuji and not an attempt to protect certain assets by hiding them in a shell.

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<sup>155</sup> 11 U.S.C. § 362(a)(1) (2008).

<sup>156</sup> 11 U.S.C. 362(d)(1) (2008).

<sup>157</sup> *Farmers & Merchants Bank & Trust v. Trail West, Inc.*, 28 B.R. 389, 394 (D.S.D. 1983).

<sup>158</sup> *See, e.g. Duggan v. Highland-First Ave. Corp.*, 25 B.R. 955, 961 (Bankr. C.D. Cal. 1982).

<sup>159</sup> *Layne v. Omni/Co.*, 17 B.R. 140 (Bankr. S.D. Ohio 1981).

<sup>160</sup> *Duggan v. Highland-First Ave. Corp.*, 25 B.R. 955, 961 (Bankr. C.D. Cal. 1982).



Despite Fuji's objections, on April 22, the court authorized a competitive bidding process. No bids other than the initial bid by Ribí Tech. were put forward. Fuji's lack of a competitive bid, even a cash bid, begs the question, "Whither the objection?" Why would Fuji, a subsidiary of a multi-billion dollar conglomerate, not bid a fraction of the potential cost of future patent litigation against Ribí to acquire the assets and put Jazz out of business for good?

The answer is that Fuji intended to litigate against Benun and Ribí. On April 18, 2005, Fuji filed a complaint naming Benun, Ribí, and Polytech Enterprises as co-defendants.<sup>161</sup> The complaint alleged that Ribí and Benun intended to acquire infringing cameras with the intent to resell those cameras.<sup>162</sup> The relief Fuji requested was both damages, including treble damages for willful infringement, and injunctive relief against a sale of potentially infringing cameras.<sup>163</sup>

But why sue at all? Fuji had expended millions of dollars in legal fees to this point. This single transaction, the sale of Jazz's assets to Ribí, was the logical endpoint of seven years of intense litigation in multiple venues, several trips to the appellate courts, a protracted bankruptcy proceeding in which Fuji pursued every avenue available to force a competitor out of business, and, finally, when they had the opportunity to destroy any chance of recovery by Jazz Photo and Jack Benun, Fuji instead decided to pursue a costly litigation process instead of buying Jazz's assets for a cheaper price.

As a result, on May 16, 2005, the court ordered the sale of substantially all of the debtor's assets to Ribí Tech for the agreed price of \$887,750.<sup>164</sup> With the judgment from Imation and the

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<sup>161</sup> Fuji Photo Film Co. v. Benun, *COMPLAINT WITH DEMAND FOR JURY TRIAL*, Case no. 05cv1863 (KSH)(PS), Dkt. #1 at 1, (D. N.J. Apr. 18, 2005).

<sup>162</sup> Fuji Photo Film Co. v. Benun, *COMPLAINT WITH DEMAND FOR JURY TRIAL*, Case no. 05cv1863 (KSH)(PS), Dkt. #1 at 21, (D. N.J. Apr. 18, 2005).

<sup>163</sup> Fuji Photo Film Co. v. Benun, *COMPLAINT WITH DEMAND FOR JURY TRIAL*, Case no. 05cv1863 (KSH)(PS), Dkt. #1 at 24-25, (D. N.J. Apr. 18, 2005).

<sup>164</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *JAZZ PHOTO CORP LIQUIDATION TRUST SUMMARY OF ACTIVITY MARCH 1, 2005 TO JULY 31, 2005*, Dkt. #1162, (Bankr. D. N.J. Sept. 26, 2005).

remaining assets in the business, Jazz had just over \$26 million to satisfy its obligations in liquidation.

On May 13, 2005, the court approved the amended plan for orderly liquidation and approved the employment of Brian T. Moore as the liquidating Trustee.<sup>165</sup> Mr. Moore worked with Capstone Advisory Group, LLC and served as liquidating trustee until his death on July 24, 2007.<sup>166</sup> Upon Mr. Moore's death, Edwin Ordway from Capstone Advisory Group, LLC was appointed to replace him. Edwin Ordway had previously served as the examiner for the case and had determined that the settlement offer by Imation was in the best interest of the debtor.<sup>167</sup>

The liquidating trustee made several important contributions to the estate. He pursued 12 separate cases of preferential payments, securing just over \$200,000 for the estate.<sup>168</sup> The liquidating trustee also oversaw the distribution of Jazz's assets to its creditors according to the chapter 11 plan, according to the chart below.

The liquidating trustee served to keep the case open while the surrounding litigation came to an end. Polytech, one of Jazz's chief suppliers of reloadable cameras was also sued by Fuji for patent infringement. Polytech asserted an administrative claim against the estate, and the funds of that claim were held in escrow by the liquidating trustee while the litigation was

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<sup>165</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, Order *CONFIRMING FIRST AMENDED JOINT PLAN OF ORDERLY LIQUIDATION*, Dkt. #1036 at 5, (Bankr. D. N.J. May 13, 2005).

<sup>166</sup> Paid Notice: Deaths, *Moore, Brian Thomas Sr.*, N.Y. Times, July 26, 2007, at B7, available at <http://query.nytimes.com/gst/fullpage.html?res=980CE2DE133AF935A15754C0A9619C8B63>.

<sup>167</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, Order *APPROVING SETTLEMENT OF PENDING US DISTRICT COURT LITIGATION AGAINST IMATION CORP. AND IMATION S.P.A.*, Dkt. #803 (Bankr. D. N.J. Feb 18, 2005).

<sup>168</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *LIQUIDATING TRUSTEE'S EIGHTEENTH QUARTERLY STATUS REPORT FOR THE PERIOD THROUGH DECEMBER 31, 2009, PURSUANT TO FIRST AMENDED JOINT PLAN OF ORDERLY LIQUIDATION*, Dkt. #1324 at 3, (Bankr. D. N.J. Mar. 4, 2010).

pending.<sup>169</sup> The trustee also maintained Jazz's books until it could be agreed that Fuji would take possession of the books.<sup>170</sup>

The case is still open as of March 1, 2010.<sup>171</sup> Several of the surrounding patent infringement claims have only recently closed or are still pending.<sup>172</sup>

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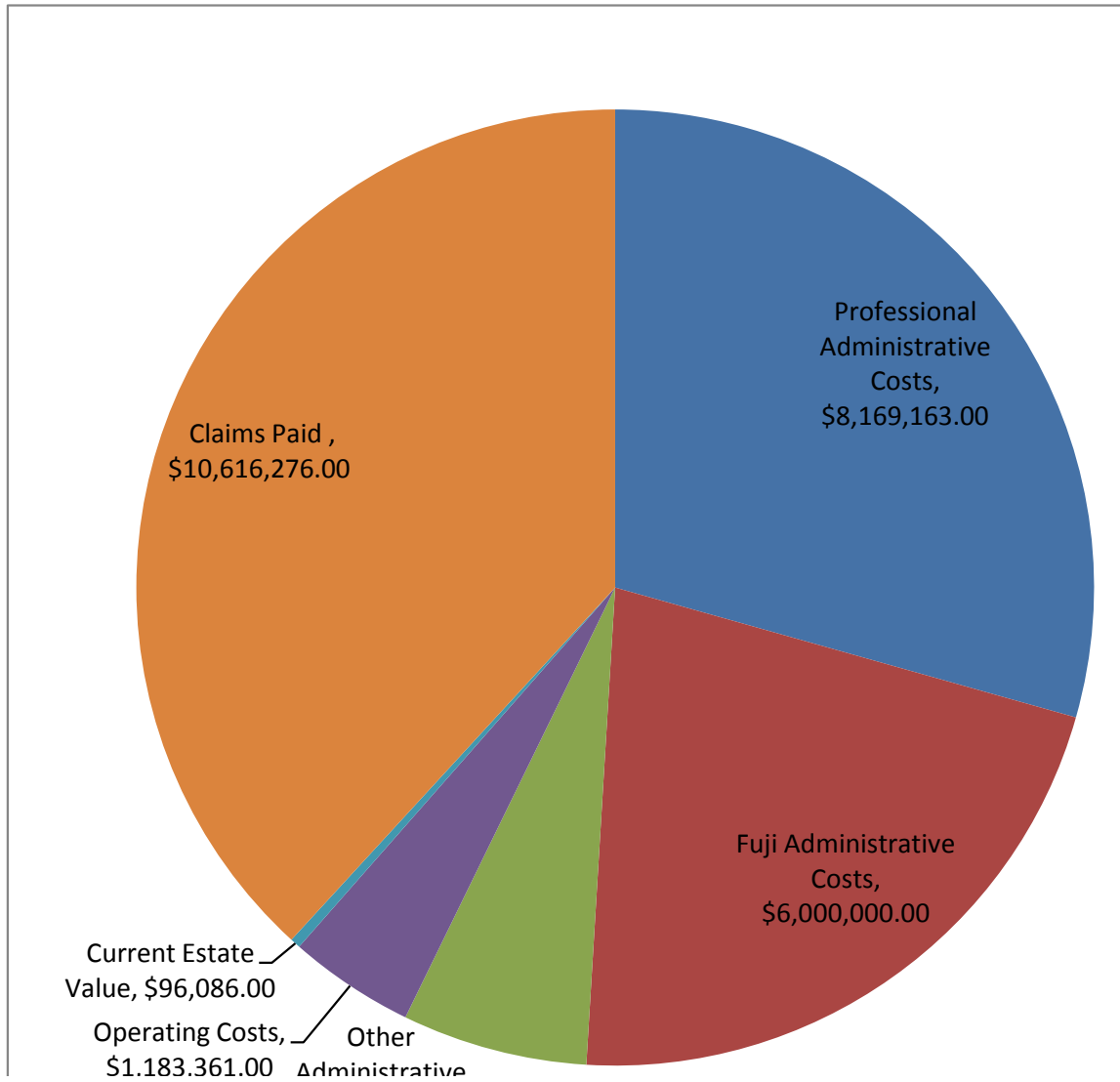
<sup>169</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *LETTER OF MARCH 23, 2009 FROM MARK J. POLITAN TO JUDGE MORRIS STERN*, Dkt #1308, (Bankr. D. N.J. March 23, 2009).

<sup>170</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *ORDER (i) AUTHORIZING THE TRUSTEE TO TRANSFER THE DEBTOR'S BOOKS AND RECORDS TO FUJIFILM CORPORATION AND (ii) DENYING THE TRUSTEE'S MOTION TO ABANDON AND DESTROY THE DEBTOR'S BOOKS AND RECORDS*, Dkt. #1314, (Bankr. D. N.J. May 21, 2009).

<sup>171</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *LIQUIDATING TRUSTEE'S EIGHTEENTH QUARTERLY STATUS REPORT FOR THE PERIOD THROUGH DECEMBER 31, 2009, PURSUANT TO FIRST AMENDED JOINT PLAN OF ORDERLY LIQUIDATION*, Dkt. #1324 at 6-11, (Bankr. D. N.J. Mar. 4, 2010).

<sup>172</sup> See, e.g. *Fuji Photo Film Co. v. Benun*, 463 F.3d 1252 (Fed. Cir. 2006). *Fuji Photo Film Co. v. Benun, FINAL ORDER AND JUDGMENT*, Case no. 05cv1863 (KSH)(PS), Dkt. #430, (D.N.J. July 24, 2009).

**Disbursement of the Estate**  
**\$27,760,591**  
**March 1, 2006 - December 31, 2009<sup>173</sup>**



<sup>173</sup> In re Jazz Photo Corp., Case no. 03-26565-MS, *LIQUIDATING TRUSTEE'S EIGHTEENTH QUARTERLY STATUS REPORT FOR THE PERIOD THROUGH DECEMBER 31, 2009, PURSUANT TO FIRST AMENDED JOINT PLAN OF ORDERLY LIQUIDATION*, Dkt. #1324 at 6-11, (Bankr. D. N.J. Mar. 4, 2010).

## Professional Compensation<sup>174</sup>

<b>Firm Name</b>	<b>Service Performed</b>	<b>Compensation Pre-Liquidation</b>	<b>Compensation Post-Liquidation</b>	<b>Total</b>
Cole, Schotz, Meisel, Forman, & Leonard P.A.	Bankruptcy Counsel	\$885,092	\$792,359	\$1,677,451
Budd Lerner, P.C.	Litigation Counsel	\$2,680,646	\$4,215,630	\$6,896,276
Ravin Greenberg	Unsecured Creditor Committee Counsel	\$380,200	\$396,184	\$776,384
Capstone Advisory Group, LLC	Liquidating Trustee & Examiner	n/a	\$209,195	\$209,195
Neville Petersen	Special Litigation Counsel	n/a	\$540,385	\$540,385
Eisner LLC	Accountant	\$48,875	\$25,000	\$73,875

<sup>174</sup> Pre-Liquidation compensation is compensation paid from the date of filing up to March, 1 2005. Post liquidation compensation is compensation paid from March 1, 2005 through December 31, 2009. All information is taken from monthly fee applications and summary provided in In re Jazz Photo Corp., Case no. 03-26565-MS, *LIQUIDATING TRUSTEE'S EIGHTEENTH QUARTERLY STATUS REPORT FOR THE PERIOD THROUGH DECEMBER 31, 2009, PURSUANT TO FIRST AMENDED JOINT PLAN OF ORDERLY LIQUIDATION*, Dkt. #1324, (Bankr. D. N.J. Mar. 4, 2010).