

University of Tennessee College of Law

Legal Scholarship Repository: A Service of the Joel A. Katz Law Library

Chapter 11 Bankruptcy Case Studies

Student Work

2012

Lambuth

Jennifer Crake

Zackarij Gradner

Scott McLeod

Follow this and additional works at: https://ir.law.utk.edu/utk_studlawbankruptcy



Part of the [Bankruptcy Law Commons](#)

Recommended Citation

Crake, Jennifer; Gradner, Zackarij; and McLeod, Scott, "Lambuth" (2012). *Chapter 11 Bankruptcy Case Studies*. 25.

https://ir.law.utk.edu/utk_studlawbankruptcy/25

This Article is brought to you for free and open access by the Student Work at Legal Scholarship Repository: A Service of the Joel A. Katz Law Library. It has been accepted for inclusion in Chapter 11 Bankruptcy Case Studies by an authorized administrator of Legal Scholarship Repository: A Service of the Joel A. Katz Law Library. For more information, please contact eliza.boles@utk.edu.

Jennifer Crake, Zackarij Gardner, Scott McLeod

Lambuth University

A private university affiliated with the Methodist Church

The University of Memphis: Lambuth Campus

*How a Private Methodist University
Became a Public State University Through Chapter 11*

TABLE OF CONTENTS

Introduction	1
Background	2
<i>a. Early History of Lambuth: 1843 through 1923</i>	2
<i>b. The Lambuth College Years, Expansion and Change: 1924 through 1991</i>	4
<i>c. Lambuth University Emerges, Declines: 1991 through 2008</i>	10
<i>d. Lambuth University in Free Fall, enters Chapter 11 Bankruptcy: 2008 to June 30, 2011</i>	14
Typical Bankruptcy Proceedings	25
<i>a. The Petition is Filed: June 30, 2011</i>	25
<i>b. The Petition Schedules: Lambuth’s Liabilities, Creditors, and Assets</i>	29
<i>c. First Day Notices and Claims</i>	35
<i>d. Emergency and Expedited Motions</i>	35
<i>e. Initial Debtor Interview, Case Management Conference, and Meeting of Creditors</i>	41
<i>f. Unsecured Creditors Committee</i>	42
<i>g. Relief from Automatic Stay</i>	45
<i>h. Administrative Expenses</i>	47
<i>i. DIP Financing</i>	48
The Lease	50
<i>a. Lease Terms</i>	54
<i>b. Objection by Radian</i>	55
<i>c. Background on the Bonds</i>	56
<i>d. Reasons for the Objection</i>	57
<i>e. Bank of New York Mellon’s Joinder to the Objection</i>	61
<i>f. Revise Lease Agreement</i>	61
<i>g. Motion to Lease is Granted</i>	63
The § 363 Sale	64
<i>a. Motion to Sell</i>	67
<i>b. Sale Terms</i>	67
<i>c. Lambuth’s Business Justifications for the §363 Sale</i>	69
<i>d. Assumption and Assignment</i>	74
<i>e. Waiver of the Temporary Stay</i>	76
<i>f. Ensuring that the §363 Sale was Free and Clear</i>	77
<i>g. Compromise and Settlement with Radian</i>	79
<i>h. Radian Files Response in Support</i>	81
<i>i. Unsecured Creditors Committee’s Objection to the Sale</i>	83
<i>j. Bank of New York Mellon Response</i>	84
<i>k. Order Granting Motion to Sell</i>	84
<i>l. Foreclosing Appeal</i>	88
Where Lambuth is Now (extensions, extensions, extensions)	89
<i>a. Trustee’s Motion to Dismiss the Case</i>	89
<i>b. Disclosure Statement and Summary of Plan</i>	91
<i>c. The University of Memphis: Lambuth Campus</i>	93
Conclusion	94

Introduction

On June 30, 2011, the small, private liberal arts college of Lambuth University (“Lambuth”) filed for Chapter 11 bankruptcy in an attempt to address their untenable financial position.¹ Lambuth's Board of Directors also took the painful step of suspending all academic operations at the storied school.² On the same day, the Board of Directors accepted the tentative purchase of the university by a local group of public and private entities³ for approximately \$7.9 million, which amounted to approximately \$2 million less than its total outstanding debts.⁴ During its bankruptcy proceedings, Lambuth University continued to operate as a debtor-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.⁵ The purchasing group’s plan was to acquire Lambuth University in an agreement by which it would satisfy the school’s debts, and the group would then transfer the campus to the state of Tennessee’s Board of Regents to continue operating the university as a part of the University of Memphis.⁶ To understand how this came to be, the motivations of those involved, and the significance of this event to the

¹ *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Voluntary Petition, (Dkt. 1), p.1, (June 30, 2011) (hereinafter “Voluntary Petition”). The school’s financial troubles began more than a decade ago, but as explained below, their financial difficulties began to accumulate at an accelerating rate in 2008.

² *In re Lambuth University*, Case No. 11-11942 Bankr. W.D. Tenn., Emergency Motion for an Order Authorizing Debtor to Enter into Lease of Premises to the State of Tennessee, Board of Regents, (Dkt. 87), p. 1, (July 29, 2011).

³ The local group (the “Jackson Group”) consisted, at various times, of the City of Jackson, Madison County Commission, the Jackson Energy Authority, and West Tennessee Healthcare. *Lambuth Votes to File Bankruptcy, Sell Itself for \$7.9M*, KNOXVILLE NEWS-SENTINEL, July 1, 2011, <http://www.knoxnews.com/news/2011/jul/01/lambuth-votes-file-bankruptcy-sell-79m/> (hereinafter “*Lambuth Votes*”).

⁴ *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Amended 20 Largest Unsecured Creditors, Summary of Schedules, Schedule A, Schedule B, Schedule D, Schedule E, Schedule F, Schedule G, Schedule H, Declaration Concerning Debtor's Schedules, Statement of Financial Affairs, Disclosure of Compensation of Attorney for Debtor, Equity Security Holders, Verification of Creditor Matrix, Statement of Corporate Ownership, (Dkt. 101), p. 3, (Aug. 3, 2011) (hereinafter “Schedules”). As of August 3, 2011, Lambuth University had approximately \$9.65 million in outstanding debt. *Id.*

⁵ *In re Lambuth University*, Case No. 11-11942 Bankr. W.D. Tenn., Emergency Motion for An Order Authorizing Payment of Prepetition Compensation, Employee Reimbursements, Withholding Taxes, and Contributions, Costs, and Expenses Incident to Certain Employee Benefit Plans, (Dkt. 11), at 1, (July 6, 2011).

⁶ *Id.*

people of Jackson and the state of Tennessee, the history of Lambuth and those involved in Lambuth's Chapter 11 bankruptcy is explored below in some depth.

Background

a. Early History of Lambuth: 1843 through 1923

Before its bankruptcy, Lambuth University was a small liberal arts college located in Jackson, Tennessee. A traditional seat of power in the Western Grand Division of Tennessee, the city of Jackson has a unique role as one of the three sites of the Tennessee Supreme Court.⁷ Originally named the Memphis Conference Female Institute (“MCFI”), Lambuth University was chartered by the Memphis Annual Conference of the United Methodist Church on December 2, 1843.⁸

Interestingly, the sectarian all-female school selected a former horse racing track frequented by the seventh President of the United States, Andrew Jackson, as the site of its campus.⁹ The campus consisted of a single four-story brick building that housed 17 boarding rooms, the president's office, parlors, kitchens, classrooms, and little else.¹⁰ The structure had two wings, and the west wing contained the music and art departments.¹¹ Although somewhat forward-looking for the era, MCFI was, and remained, quite conservative and traditional by modern standards.¹² As was often the case with many small institutions of higher learning of the period,

⁷ Due to its unique history and interstate rivalries amongst the Grand Divisions—East Tennessee, Middle Tennessee, and West Tennessee—the state of Tennessee set up a system by which the state supreme court rotates between the cities to prevent any regional bias. TENN. CONST. art. VI, § 2.

⁸ Robert M. Mathis, *Lambuth University*, THE TENNESSEE ENCYCLOPEDIA OF HISTORY AND CULTURE, (Feb. 21, 2011), <http://tennesseeencyclopedia.net/entry.php?rec=760> (hereinafter “Mathis”).

⁹ Notably, Jackson, Tennessee was originally named Alexandria. *Jackson*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/298758/Jackson>. It was renamed in 1822 in honor of then-General Andrew Jackson. *Id.*

¹⁰ PAM DENNIS AND SUSAN KUPISCH, LAMBUTH UNIVERSITY 10 (2004).

¹¹ *Id.*

¹² The school required the students to wear uniforms that changed color with the seasons. *Id.* at 11.

MCFI was owned and operated by a single family in its early days.¹³ The school's small five-acre plot encouraged faculty to interact with the students and allowed the students to become close to one another.¹⁴ This family ownership and operation coupled with the school's small size created a family-like connection between the students and faculty that would continue throughout the school's existence.¹⁵ While typical enrollment and faculty size for the first fifty years of MCFI's existence are unavailable, by the beginning of the twentieth century total enrollment and faculty combined was still under 100.¹⁶

In the early years, MCFI expanded its services to include education of local children including boys.¹⁷ In 1893, MCFI changed its name to the Memphis Conference Female Institute and Conservatory of Music and Arts for Girls and Young Ladies.¹⁸ The name change represented the school's focus on musical and artistic education at the school.¹⁹ Also towards that end, the school employed Professor Erwin Schneider and a series of other German professors to head its music department.²⁰

¹³ *Id.* at 7. The families that owned such institutions generally served in both administrative and faculty capacities. *Id.*

¹⁴ Lambuth College – Lantern Yearbook Class of 1969, E-YEARBOOK, at 220 (Feb. 21, 2012), *available with paid subscription at* http://www.e-yearbook.com/yearbooks/Lambuth_College_Lantern_Yearbook/1969/Page_220.html (hereinafter “Yearbook 1969”).

¹⁵ See Lambuth University, “Lambuth University to Cease Operations Effective June 30, 2011,” FACEBOOK, http://www.facebook.com/note.php?note_id=10150151855820738 (hereinafter the “Facebook Announcement”). Students and alumni expressed their sorrow and heartbreak on social media websites such as Facebook after Lambuth announced it was to cease operations on June 30, 2011. *Id.* One person went as far as to describe the shutdown of Lambuth as a “death in the family.” *Id.*; see also Kathy L. Gilbert, *Lambuth Students ‘torn apart’ by school closing*, UNITED METHODIST CHURCH, (Apr. 20, 2011, 6:00 PM), <http://www.umc.org/site/apps/nlnet/content3.aspx?c=1wL4KnN1LtH&b=5843827&ct=9358441¬oc=1>.

¹⁶ Dennis, *supra* note 10, at 12.

¹⁷ *Id.*

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 12.

²⁰ *Id.*

By the turn of the nineteenth century, the school had expanded beyond its curriculum of classical education and music to include an industrial department and a “Department of Elocution and Physical Culture.”²¹ The industrial department taught much needed career skills to women wishing to enter the Jackson workforce during World War I.²²

The goal of the early 1900s was to create a “Grade A” women's college. The Dean's during that time—Amos Blanche Jones,²³ Rev. Dr. S.A. Steele, Rev. H.G. Hawkins, and Rev. R.E. Naylor—expanded the school's course offerings; however, by 1919 it was determined that the school could not support further expansion and that an overhaul of the campus was necessary.²⁴ However, MCFI soon encountered financial difficulties that put the overhaul on hold.²⁵ To improve its financial stability, the decision was made to make the school coeducational, and on January 3, 1923 the MCFI charter was amended to reflect the change and to rename the school.²⁶ The school also moved to its present location on Lambuth Boulevard in Jackson, Tennessee. The new campus was located on a 22-acre plot.²⁷

b. The Lambuth College Years, Expansion and Change: 1924 through 1991

The school was renamed in honor of Walter Russell Lambuth and was officially reopened as Lambuth College on September 10, 1924.²⁸ This was a time of many firsts and changes at the

²¹ *Id.* at 14. The Department of Elocution and Physical Culture taught public speaking skills to the women. *Id.*

²² *Id.* The industrial education curriculum included courses in “typewriting, bookkeeping, and stenography.” *Id.*

²³ *Id.* at 7. Amos B. Jones also served as president of MCFI from 1878 to 1880.

²⁴ *Id.*

²⁵ Mathis, *supra* note 8.

²⁶ *Id.*

²⁷ See *Yearbook 1969*, *supra* note 14 at 220.

²⁸ Dennis, *supra* note 10 at 18-19. Walter R. Lambuth was born to missionary parents in Shanghai, China in 1854. *Id.* at 18. He graduated from Emory and Henry College and Vanderbilt University and was later ordained by the Tennessee Conference of the Methodist Church. *Id.* In 1910, he was elected a bishop of the Methodist Episcopal Church, South. *Id.* As bishop, he traveled the globe proselytizing and established Southern Methodism in the Belgian Congo, Belgium, Czechoslovakia, and other places. *Id.*

school. The new Administration Building was built at this time at a cost of \$130,000.²⁹ The building had three floors that contained classrooms, science labs, a kitchen, a dining room, a library, a chapel, dormitories, and more.³⁰ The college began offering courses in history, English, physical education, mathematics, foreign languages, and religion.³¹ The school also became involved in baseball, football, and other intercollegiate sports for the first time.³²

As student enrollment expanded, the students' extracurricular opportunities multiplied. Student clubs and organizations appeared for the first time and became very popular.³³ Soon it was clear that another addition to the campus was needed to house students. In 1929, a new dormitory—Epworth Hall—was completed to house the increasing number of male students at Lambuth College.³⁴ Epworth Hall would be renovated in 1953 and again in 1960, and it would be used by the school until 2001.³⁵

In 1948, construction on the new Lambuth College of Physical Education Building was completed.³⁶ It was located behind Epworth Hall and housed a gymnasium, administrative

²⁹ *Id.* at 19.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* The school's football team was a member of the Mississippi Valley Conference in 1927 and ended the season with a winning record of 5-2. *Id.* at 26.

³³ *Id.* at 24. Groups such as the Young Men's Christian Association (YMCA), the Young Women's Christian Association (YWCA), the fine arts club, glee club, and various fraternities and sororities added many students to their ranks. *Id.* at 24, 26-27.

³⁴ *Id.* at 28.

³⁵ *Id.*

³⁶ *Id.* at 52.

offices, locker rooms, a game room, and a kitchen.³⁷ The Lambuth Physical Education Building would be renovated and dedicated in 2000.³⁸

The year 1952 marked the beginning of a time of great expansion and growth for Lambuth. Dr. Luther L. Gobbel—a man described as one who did not “live[] in an ivory tower”³⁹—was elected President of Lambuth College and assumed his duties October 13, 1952.⁴⁰ Dr. Gobbel oversaw growth in student enrollment and campus size that was unsuccessfully imitated in the years leading up to filing for Chapter 11 bankruptcy.⁴¹

During Gobbel’s presidency student enrollment nearly doubled in size, the number of buildings on campus more than doubled, the campus doubled in acreage, staff increased by one-third, and the school gained accreditation from both the Southern Association of Colleges and Secondary Schools and the University Senate of the Methodist Church.⁴² Additional buildings included two new dormitories—Sprague Hall in 1953 and Spangler Hall in 1959.⁴³ The dorms were necessary to house a ballooning student population.

³⁷ *Id.*

³⁸ *Id.* The renovation and dedication of the building was part of university president W. Ellis Arnold III’s extensive overhaul of the Lambuth University campus and educational program. *Id.* at 8. Arnold’s aggressive expansion, along with the general economic downturn beginning in 2008, contributed to the later financial difficulties that led to Lambuth filing for Chapter 11 bankruptcy protection. See Scott Jaschik, *End of the Road for Lambuth U.*, INSIDE HIGHER ED. (Apr. 15, 2011, 3:00 AM) http://www.insidehighered.com/news/2011/04/15/lambuth_university_to_end_operations (hereinafter “*End of the Road*”).

³⁹ Lambuth College – Lantern Yearbook Class of 1980, at 16 (1980) available at <http://www.e-yearbook.com/sp/eybb?school=972&year=1980> with paid subscription (hereinafter “*Yearbook 1980*”).

⁴⁰ *Lambuth University*, EASTCHANCE, (2011), <http://www.eastchance.com/uni.asp?id=2477>.

⁴¹ In the late 1990s and early 2000s, the “Lambuth 2000” plan was adopted. Dennis, *supra* note 10, at 8. The goal of the plan was to renovate the Lambuth campus, increase faculty size, and expand course offerings to transform Lambuth into a modern educational institution. *Id.* at 114.

⁴² *Id.* at 54.

⁴³ *Id.* at 56.

In 1959, the entering class would reach its highest level in the history of Lambuth.⁴⁴ To accommodate a freshman class of over 600 students, Lambuth built a new dormitory and cafeteria, added parking lots for student vehicles, and hired additional faculty.⁴⁵ To be clear, Dr. Gobbel presided over a time of impressive and rapid growth that some at Lambuth termed “miraculous.”⁴⁶

To accomplish this “miraculous” growth, Dr. Gobbel relied on a combination of “hard work and team work,” which included adept organizational and planning skills on the part of Dr. Gobbel.⁴⁷ Dr. Gobbel expanded a fundraising program that was started just prior to his arrival in 1952. Between 1952 and 1953, the fundraising program was able to raise approximately \$300,000 and, as previously mentioned, that money was used to expand faculty and help construct Sprague Hall.⁴⁸

Moving into the 1960s, Lambuth was experiencing “extraordinary academic and fiscal growth,” and the Lambuth Board of Directors hired Dr. James S. Wilder to succeed Dr. Gobbel as president in July of 1962.⁴⁹ The Board hoped that Dr. Wilder would continue the recent growth. Wilder would preside over Lambuth until May of 1980.⁵⁰

Wilder instituted a program he called “The Great Challenge” in 1965.⁵¹ The program emphasized a commitment to academic growth and improvement of campus facilities.⁵² The goal of the program was to perpetuate the growth achieved under Dr. Gobbel’s presidency.

⁴⁴ *Id.* at 66.

⁴⁵ *Id.*

⁴⁶ *See Yearbook 1980, supra* note 39 at 12.

⁴⁷ *Id.* at 13.

⁴⁸ *Id.*

⁴⁹ Mathis, *supra* note 8.

⁵⁰ *Id.*

⁵¹ *Yearbook 1969, supra* note 14 at 220.

By 1969, the Great Challenge was in full swing and Lambuth was growing at a healthy rate. The campus plot increased to 50 acres.⁵³ Lambuth expanded course offerings and employed 54 full-time educators at a ratio of one educator for every fifteen students.⁵⁴ The campus also boasted 12 “modern, well-equipped buildings of Georgian Colonial architecture,” including a library named for Dr. Gobbel.⁵⁵ In sum, the assets held by the school were valued at over \$10,500,000, the annual operating budget had expanded to approximately \$2,000,000, and a total of 863 students were enrolled at Lambuth.⁵⁶

Along with expanded course offerings and a larger campus, Lambuth students encountered a variety of new services, amenities, and activities. In the fall of 1966, the new Student Union Building was completed. The Student Union Building included a new bookstore, student lounge, ballroom, and recreational room.⁵⁷ Activities included spring and winter formals,⁵⁸ school-wide picnics,⁵⁹ and an expanded repertoire of sports including cross country and baseball.⁶⁰

The late 1960s and 1970s brought increasing social change in addition to the expansion of facilities and course offerings. Increasing numbers of minority students began entering the

⁵² Dennis, *supra* note 10 at 67; *See also Yearbook 1969, supra* note 14 at 220.

⁵³ *Yearbook 1969, supra* note 14 at 220.

⁵⁴ *Id.*

⁵⁵ *Id.* The Luther L. Gobbel Library contained over 55,000 volumes of text at the end of the 1968-1969 academic year. *Id.* Construction of the Luther L. Gobbel Library completed in 1961 and was first used in the fall semester of that year. Dennis, *supra* note 10 at 75. It had four floors and housed books, periodicals, and reference collections with a capacity of 100,000 volumes. *Id.* The library also included audiovisual equipment, offices, and a variety of rooms accessible to students. *Id.* In 1968, the library was named an official depository of federal government documents. *Id.*

⁵⁶ *Yearbook 1969, supra* note 14 at 220.

⁵⁷ Dennis, *supra* note 10 at 76.

⁵⁸ *Id.* at 72. One such formal was the annual “Old South Ball” for which the students would dress in traditional antebellum southern attire. *Id.*

⁵⁹ *Id.* at 69.

⁶⁰ *Id.* at 74.

school. To illustrate, by 1972 the Black Student Union had become one of the largest student organizations⁶¹ and several African Americans were named to the school's "Who's Who" list (a type of honor roll) in 1975⁶²—just ten years prior there was not a single African American student named to the list.⁶³ Such organizations sponsored social events, talent shows, and sociopolitical events.⁶⁴

All of these things contributed to an inviting and lively atmosphere at Lambuth during the 1960s and 1970s. This atmosphere helped Lambuth to continue to attract students. Under the guidance of Dr. Harry Gilmer,⁶⁵ the school increased recruitment of international and non-traditional students⁶⁶ and brought back the football program—which had been on a nearly 40-year hiatus.⁶⁷ However, Lambuth's growth slowed in the 1980s, and this lull in growth would precede one of the most significant periods of change in what was at the time Lambuth's over 140-year history.

⁶¹ *Id.* at 85.

⁶² *Id.* at 73.

⁶³ *Id.* at 88.

⁶⁴ *Id.* at 85. Events included the entertainment events such as "Ebony Ball" and "Black Band Day" as well as political events centered around Rev. Dr. Martin Luther King Jr. *Id.* Students from all backgrounds also joined together in strikes during the 1972 school year to protest what they considered to be unfair policies. *Yearbook 1980, supra* note 39 at 16. Such policies included the continued use of "dorm mothers" (women who served as surrogate parents or authority figures to students living in Lambuth dorms). *See Id.* at 26.

⁶⁵ Gilmer would serve as president from 1980 until 1986. Dennis, *supra* note 10, at 90.

⁶⁶ Non-traditional students, in this context, includes students who have full-time jobs and attend school or have had a previous career and have returned to school. In the context of Lambuth, a very close-knit college community, commuters would also be included as "non-traditional" in 1980. The sudden rush of commuter students was such a new occurrence that in 1980, the yearbook included an article on the trials and tribulations of being a commuter student (some 300 students were commuters by that time). *Yearbook 1980, supra* note 39 at 26.

⁶⁷ Dennis, *supra* note 10, at 90, 95.

On June 2, 1987, Dr. Thomas F. Boyd was appointed president of Lambuth.⁶⁸ The new president helped Lambuth transition into a university,⁶⁹ modestly increased student enrollment, added new sports to the athletic program, and oversaw the building of a modern computer lab.⁷⁰ The familial atmosphere of the campus continued despite the growth of the school under his watch.⁷¹

c. Lambuth University Emerges, Declines: 1991 through 2008

As Lambuth College transitioned to Lambuth University in 1991, the school seemed to be thriving. The school was expanding both fiscally and educationally—a fact Lambuth hoped to emphasize and capitalize on by renaming itself “Lambuth University” in 1991. However, the growth Lambuth experienced from the 1950s to the 1970s had tapered off significantly. Although the school reached its highest ever enrollment level in 1995—1,227 students⁷²—its enrollment would only decline, sharply, from there. The “university” designation the school had thrust upon itself belied its true condition. The school never expanded beyond granting bachelor’s degrees at any point following the name change.

It appears that Lambuth was attempting to grow into a true university in 1995. That year, the school entered into a loan agreement with the Health, Educational and Housing Facility

⁶⁸ *Id.* at 102. Dr. Boyd was a local boy who had received his bachelor’s degree from Union University (a small, Evangelical Christian, liberal arts school also located in Jackson, TN) and his Ph.D. from the University of Tennessee. *Id.*

⁶⁹ Lambuth was renamed “university,” but it did not take on the traditional characteristics of a true university, that is, granting post-baccalaureate degrees—especially doctoral degrees. “University,” MERRIAM-WEBSTER, (2012), <http://www.merriam-webster.com/dictionary/university>.

⁷⁰ *Id.*

⁷¹ By the late 1980s and early 1990s, attending Lambuth had become a family affair for some students. Dennis, *supra* note 10 at 105. Some students had parents, grandparents, and even great-grandparents that attended Lambuth. *Id.*

⁷² See *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Lambuth Campus Feasibility Study Part I. (Dkt. 100-1), p. 8, (August 3, 2011) (hereinafter “Feasibility Study Part I”).

Board of the City of Jackson whereby the Health, Educational and Housing Facility Board would loan Lambuth the proceeds of bonds issued by it pursuant to an indenture of trust executed in favor of the Bank of New York Mellon Trust Company, N.A. (“BNY Mellon”).⁷³ Under the terms of the loan agreement, Lambuth would receive the proceeds of \$6,780,000 in “Series A” bonds and \$1,700,000 in taxable “Series B” bonds (collectively, the “Bonds”).⁷⁴ The Health, Educational, and Housing Facility Board then assigned its right to payment under the loan agreement to BNY Mellon as security for the repayment of the bonds,⁷⁵ the bondholders were given a security interest in Lambuth University’s personal property and a first priority deed of trust interest in several buildings on campus,⁷⁶ and Radian Asset Assurance, Inc., was retained to insure the university’s payment of the bonds.⁷⁷ The proceeds of these Bonds were to be used to fund the continued growth of Lambuth, but as time went on, Lambuth’s obligations on these Bonds became instrumental in causing Lambuth’s financial downward spiral and eventual Chapter 11 petition.⁷⁸

⁷³ *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Joinder of the Trustee to Radian Asset Assurance Inc.’s Objection to Debtor’s Emergency Motion For An Order Authorizing Debtor To Enter Into Lease Of Premises To The State, Board of Regents, (Dkt. 102) (Aug. 3, 2011) (hereinafter “Joinder of the Trustee to Radian’s Objection to Motion to Lease”).

⁷⁴ The Bonds issued were officially called the \$6,780,000 The Health, Educational and Housing Facility Board of the City of Jackson (Tennessee) Higher Education Facility Revenue Bonds, Series 1995 A (Lambuth University Project) and the \$1,700,000 The Health, Educational and Housing Facility Board of the City of Jackson (Tennessee) Higher Education Facility Taxable Revenue Bonds, Series 1995 B (Lambuth University Project). *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Joinder of the Trustee to Radian Asset Assurance Inc.’s Response to Debtor’s Expedited Motion For Order (A) Authorizing Sale Of Substantially All Estate Assets Free And Clear Of Liens, Claims, Rights, Encumbrances and Interests; (B) Authorizing Assumption And Assignment Of Executory Contracts; (C) Approval of Compromise and Settlement; and (D) Other Related Relief, (Dkt. 223), p.1-2, ¶1, (Oct. 11, 2011) (hereinafter “Joinder of Trustee to Radian’s Response to Motion to Sell”).

⁷⁵ *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Radian Asset Assurance Inc.’s Objection to Debtor’s Emergency Motion for an Order Authorizing Debtor to Enter into Lease of Premises to the State, Board of Regents, (Dkt. 100) (Aug. 3, 2011). (hereinafter “Radian’s Objection to Motion to Lease”).

⁷⁶ *In re Lambuth University*, Case No. 11-11942, Bankr. W.D. Tenn., Disclosure Statement and Summary of Plan, (Dkt. 484), p. 4, (Mar. 28, 2012) (hereinafter “Disclosure Statement and Summary of Plan”).

⁷⁷ *Radian’s Objection to Motion to Lease*, at 1.

⁷⁸ See *Radian’s Objection to Motion to Lease*, at 2. As of the Chapter 11 petition filing date, June 30, 2011, Lambuth still owed \$4,960,000 on the principal of the outstanding debt and another \$523,120 in associated fees. *Id.*

In 1996, the Lambuth Board of Directors elected W. Ellis Arnold III president of the university.⁷⁹ Arnold would attempt to correct the downward trajectory that began following the 1995 school year while also working towards the goal of growing the school into a true university. To achieve these goals, he instituted his “Lambuth Vision 2010” plan to encourage student enrollment by renovating existing structures on campus, increasing full-time faculty by 10%, increasing student service opportunities and extracurricular choices, and updating the school’s educational technology—all of which cost money provided by the 1995 bond debt.⁸⁰ However, his plan was missing several important components. First, the plan did not call for increasing undergraduate courses, and second, the plan did not address graduate or professional degree programs.

Despite his plan’s shortcomings, Arnold was effective at renaming and dedicating various structures. Building dedications were part of his long-term “Lambuth Vision 2010” plan.⁸¹ Arnold dedicated Lambuth’s “landmark building,” the Administration Building, as “Jones-Varnell Hall” in December of 1998.⁸² In 1999 he dedicated Oxley Square, a structure which contained four different buildings.⁸³

While all of the goals of the “Lambuth Vision 2010” plan are not clear, the aforementioned moves appear to have been aimed towards correcting the stagnation-turned-recession in student enrollment and growing the school into a proper university. Lambuth faced

⁷⁹ Dennis, *supra* note 10, at 114. Arnold came from Hendrix College—a small liberal arts college in Conway, Arkansas—where he was “vice president for Development and College Relations and General Counsel.” Dennis, *supra* note 10, at 114; *see also* HENDRIX COLLEGE, at <http://www.hendrix.edu/>.

⁸⁰ *See* Dennis, *supra* note 10, at 114; *Radian’s Objection to Motion to Lease*, at 2.

⁸¹ *See* Dennis, *supra* note 10, at 8.

⁸² *Id.*

⁸³ *Id.* The four buildings were named Whetson House, Henley House, Dawson House, and Loeb House in honor of various donors and significant faculty. *Id.* at 122. The four buildings together, Oxley Square, were named after Dr. Arthur Daniel Oxley. *Id.* Upperclassmen were selected on the basis of scholarship and leadership to live in these apartment-style living quarters. *Id.*

increasing pressure due to competition from other educational institutions including Union University, Jackson State Community College, Lane College, and Bethel University.⁸⁴

Union University and Jackson State Community College were Lambuth's largest competition.⁸⁵ Like Lambuth, Union University focused primarily on undergraduate degrees. However, unlike Lambuth, Union University was a true university. A university is traditionally defined as an educational institution having two divisions—an undergraduate division awarding bachelor's degrees and a postgraduate division which may confer master's degrees and doctorates.⁸⁶ Also like Lambuth, Union University experienced tremendous growth during the 1960s; however, this growth did not begin to wane in the 1980s nor did it reverse course in the 1990s.⁸⁷ In fact, as Lambuth began to falter, Union hit its stride. While 1996 marked the zenith of enrollment for Lambuth, Union continued to grow and attract students who could have been Lambuth enrollees.⁸⁸

Similarly, Jackson State Community College has continued to thrive while Lambuth has declined. Unlike Union and Lambuth, Jackson State is a traditional community college that focuses on two-year degrees and preparing students for four-year institutions.⁸⁹ Thus, while Union University specializes in undergraduate degrees and has some graduate degree programs,

⁸⁴ *Feasibility Study Part I*, at 10. Union University, Lane College, and Jackson State Community College are all located in Madison count near Jackson, TN. *Id.* Bethel University is located a bit north in Carrol County, TN.

⁸⁵ *Id.* table 4, at 9. Students that went to Lambuth most commonly chose Jackson State Community College and Union University as their second choices when rating schools they wanted to attend. *Id.*

⁸⁶ See "University," MERRIAM-WEBSTER, (2012), <http://www.merriam-webster.com/dictionary/university>.

⁸⁷ *History*, UNION UNIVERSITY, <http://www.uu.edu/about/history.cfm>. Between the 1960s and mid-1990s, Union University grew from less than 1,000 students enrolled to nearly 2,000. *Id.*

⁸⁸ *Id.* Union more than doubled in size between 1996 and 2010—growing from 1,972 in 1996 students to 4,050 in 2010. *Id.*

⁸⁹ See *Prospective Students*, JACKSON STATE COMMUNITY COLLEGE, (2012), <http://www.jscc.edu/prospective-students/>. Jackson State also had a program which allowed the University of Memphis to offer courses at its campus as part of a program that allowed students to take courses in Jackson for credit at the University of Memphis. *Feasibility Study Part I*, at 12.

Jackson State specializes in technical two-year degrees. In effect, Lambuth was squeezed out by the two schools—Union provided those students who wished to get 4-year and post-graduate degrees with a more desirable option than Lambuth, and Jackson State attracted those students looking for inexpensive two-year degrees programs geared towards providing practical career skills.⁹⁰

The combination of strong competition, declining enrollment, and mounting debt were moving Lambuth towards an increasingly untenable financial situation. The debt with which Lambuth saddled itself was manageable only if the school continued to grow, or, at the very least, maintained its enrollment levels. Neither of these events happened. Rather, the school entered a downward spiral that would be accelerated by the general global economic downturn that began in 2008.⁹¹

d. Lambuth University in Free Fall, enters Chapter 11 Bankruptcy: 2008 to June 30, 2011

By the start of the 2008-2009 academic year, Lambuth's enrollment had dropped to just over 650 students.⁹² It became clear to the Lambuth Board of Directors that Arnold's leadership left much to be desired, and the school went through a series of temporary presidents. In late 2008 the executive Board of Directors voted to recommend naming Dr. Jerry Israel interim president.⁹³ They hoped he would be able to guide the once highly-respected private university away from the approaching financial ruination while the school searched to fill the position long-

⁹⁰ In 2011, in-state tuition at Lambuth was \$19,500 per year. *Lambuth University*, COLLEGEVIEW, <http://www.collegeview.com/schools/lambuth-university/tuition> (last visited Mar. 3, 2012). The in-state tuition for Jackson State Community College was less than \$2,000 per semester. *Fees and Tuition*, JACKSON STATE COMMUNITY COLLEGE, <http://www.jscc.edu/fees-and-tuition/> (last visited March 14, 2012).

⁹¹ *Feasibility Study Part I*, at 4.

⁹² *Lambuth University*, MATCHCOLLEGE, <http://www.matchcollege.com/college/220589/Lambuth-University/TN> (last visited Mar. 3, 2012).

⁹³ *Id.*

term.⁹⁴ Israel was a senior consulting analyst for a “Work Out [sic] Presidents group” with a “proven track record in overcoming [financial] challenges.”⁹⁵ Along with hiring Dr. Israel, the Lambuth University Board of Directors also instituted a plan of action to address the institution’s perilous financial position. The first step in the plan was to raise additional funds from alumni and other supporters.⁹⁶ Despite these changes, the Lambuth administration maintained that there was no possibility that the school would close nor was there any threat to its operation as usual.⁹⁷ This was not entirely true.

In the summer of 2008, prior to hiring Dr. Israel, the school had cancelled scheduled raises for faculty, and three vice presidents suddenly resigned.⁹⁸ These events trumpeted the extent of the institution’s financial difficulties to the public for the first time. The cancelled raises signaled that, at the very least, there was *some* threat to the schools’ operation as usual. The media reported on the drastic steps Lambuth began taking to address its situation: the administration announced at a faculty meeting that scheduled raises due at the end of the 2007-2008 academic year were cancelled, Lambuth contributions to employee retirement funds were cut in half, and a program aimed at boosting senior faculty pay was put on hold.⁹⁹ Administrative officials attempted to soften the blow of this news by characterizing the move as a “typical” move that must be made in a “tight economy.”¹⁰⁰ However, coinciding with this

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* Among the supporters tapped for financial assistance was the United Methodist Board of Higher Education and Ministry. *Id.*

⁹⁷ *Id.*

⁹⁸ Scott Jaschik, *Disappearing Raises and Vice Presidents at Lambuth*, INSIDE HIGHER ED, (Aug. 18, 2008, 4:00 AM), <http://www.insidehighered.com/news/2008/08/18/lambuth> (hereinafter “*Disappearing Raises*”).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

move was the departure of three vice presidents and Lambuth's chief financial officer¹⁰¹ — seemingly *atypical* moves that indicated the true state of Lambuth. The school's acting president at the time, R. Fred Zuker, stated that the moves were “prudent” and that there was nothing to be worried about because the school expected to enroll 750 students in the 2008-2009 year.¹⁰² The school would enroll about 100 students, or 15%, less than that projection.¹⁰³ Zuker also opined on the long-term prospects of Lambuth and stated that enrollment would need to grow to “around 1,000” over the next four years.¹⁰⁴

At that time Lambuth was operating with an annual budget of around \$16 million, but according to media reports, the university was running seven-digit deficits.¹⁰⁵ Donors were helping to fill at least part of the budget shortfall,¹⁰⁶ but the mounting operating expenses and growing bond debt would begin to catch up with Lambuth. One professor told the educational news website Inside Higher Ed that he believed the problem was attracting students to the liberal arts program; students were more interested in programs that taught them “how to make money” instead of “learn[ing] how to think.”¹⁰⁷ However, other private liberal arts colleges, such as Union University, did not experience the same degree of troubles as Lambuth.

In the months following the announced cuts, things did not improve. In fact, things began to go from bad to worse at an ever-accelerating rate. New rumors began to surface that the school

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See *supra* note 92 and accompanying text.

¹⁰⁴ See *Disappearing Raises*, *supra* note 98.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

was now considering closing itself down completely.¹⁰⁸ Lambuth officials attempted to assuage fears that the school would close. One senior information officer stated that Lambuth was “still in the business of educating students, and . . . proceed[ing] with the spring term as usual” while interim president Dr. Israel stated that the school was attempting to raise an additional \$800,000 to cover budget shortfalls in the 2008-2009 year.¹⁰⁹ Israel stated that the school was “focused on budget, personnel, recruitment and retention” as well as considering recommendations from the school’s accreditor—the Southern Association of Colleges and Schools.¹¹⁰ The chairwoman of the Board of Directors, Mary Cay Koen, stated that the school did not suffer from excessive spending and that, instead, a “historic revenue issue” that was to blame.¹¹¹ However, Koen seems to have overlooked that the crisis, while certainly exacerbated by the declining revenue, was created, in large part, by the debt-fueled plan of expansion that began in 1995 with the issuance of bonds.¹¹² Dr. Israel and Lambuth were able to right the ship enough to finish out the 2008-2009 academic year; however, word again began to spread that Lambuth was in financial danger.

On June 10, 2009, Dr. Israel once again reiterated that the school was on track to turn itself around. He stated that students were not “abandoning” the school and that “things are holding together about as well as we can possibly expect.”¹¹³ However, he also announced yet

¹⁰⁸ Jackson Baker, *Facing Financial Peril, Lambuth University Looking for Way out of Crunch*, MEMPHIS FLYER, (Dec. 12, 2008), <http://www.memphisflyer.com/TheDailyBuzz/archives/2008/12/12/facing-financial-peril-lambuth-university-looking-for-way-out-of-crunch>.

¹⁰⁹ *Id.* The school was helped by the school’s historic benefactor, the United Methodist Church Memphis Conference. *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See notes 72-79 *supra* and accompanying text.

¹¹³ Cathy Farmer, *Israel Reports on Lambuth University*, THE MEMPHIS CONFERENCE OF THE METHODIST CHURCH, (June 10, 2009), <http://www.memphis-umc.net/news/detail/369>.

another new round of fundraising¹¹⁴—a move that hinted at the school’s desperate need for more funds. The direness of the situation would become apparent to students, faculty, and outsiders alike the following day.

On June 11, 2009, it became known that the state of Tennessee (the “State”) was looking into the possibility of acquiring the ailing Lambuth.¹¹⁵ This news was surprising to students and administration alike.¹¹⁶ Then-Governor Phil Bredesen amended his 2010 budget to include funds to determine the feasibility of acquiring Lambuth.¹¹⁷ Governor Bredesen and the State likely saw the writing on the wall when it began looking at purchasing Lambuth; around that time, it was reported that Lambuth was facing a more than \$7 million budget deficit for the 2009-2010 school¹¹⁸ year, and Lambuth was among 100 colleges and universities that failed the U.S. Department of Education’s test of financial responsibility.¹¹⁹ At the meeting where Gov. Bredesen launched Tennessee’s quest to turn the once-vibrant liberal arts college into a public university, the president of the University of Memphis, Shirley Raines, and other University of Memphis representatives were in attendance.¹²⁰ The presence of University of Memphis representatives at this meeting foreshadowed Lambuth’s eventual role within Tennessee’s

¹¹⁴ *Id.* Under the plan, Lambuth, through another group—the Foundation for Resource Enhancement (“FRE”)—would attempt to solicit an increasing amount of funding from elderly supporters in a plan that would ultimately pose “no expense to them.” *Id.* The program relied on elderly people donating excess insurability to the FRE, the FRE subsequently purchasing life insurance policies on donors, and then making an interest-only loan to financially ailing Lambuth after enough policies were amassed. *Id.*

¹¹⁵ Ryan Poe, *Lambuth Administrators Caught Unawares*, COMMERCIAL APPEAL, (June 11, 2009, 12:03 AM), <http://www.commercialappeal.com/news/2009/jun/11/lambuth-administration-caught-unawares/>.

¹¹⁶ *Id.*

¹¹⁷ *Id.* This was the first step towards Tennessee’s acquisition of Lambuth University.

¹¹⁸ *See Id.*

¹¹⁹ Goldie Blumenstyk, *Tennessee May Buy Ailing Ailing Private College*, THE CHRONICLE OF HIGHER LEARNING, (June 10, 2009), <http://chronicle.com/article/Tennessee-May-Buy-Ailing-Pr/47719/>.

¹²⁰ *See Poe supra* note 115.

educational network.¹²¹ However, for the time being, Raines would play her hand close to her chest, and she refused to comment on whether the University of Memphis would pursue opening a branch at Lambuth's Jackson, Tennessee location.¹²² State officials also attempted to temper expectations regarding whether the State would add Lambuth to its stable of college campuses.¹²³

In the months following the revelation that the State was looking into acquiring Lambuth, students and faculty were waiting for the other shoe to drop. In the meantime, Lambuth continued on with business as usual as best it could. In October of 2009, Lambuth found a full-time president in former Vice President of Maryville College, Dr. Bill Seymour.¹²⁴ The school hoped Dr. Seymour would provide stability during their time of troubles and guide Lambuth back towards financial solvency. Michael E. Keeney, the new chairman of the Board of Directors proclaimed that “[the board] believe[s] he is committed to the small-college, liberal arts education and possesses the leadership qualities that will enable him to provide stability to Lambuth for years to come.”¹²⁵ Unfortunately, stability would remain elusive for Lambuth over

¹²¹ See Clay Bailey, *University of Memphis classes at Lambuth to start in fall semester—Lease deal allows schools to merge*, THE COMMERCIAL APPEAL, (Aug. 5, 2011), <http://www.commercialappeal.com/news/2011/aug/05/university-memphis-gets-approval-lambuth-campus/> (stating that the University of Memphis would offer courses at the Lambuth campus in the fall of 2011) (hereinafter “Classes at Lambuth”); Associated Press, *Haslam raises U of M flag at former Lambuth U.*, KNOXNEWS, (Jan. 13, 2012), <http://www.knoxnews.com/news/2012/jan/13/haslam-raises-u-of-m-flag-at-former-lambuth-u/> (detailing the official University of Memphis flag-raising ceremony at the Lambuth Campus in January of 2012) (hereinafter “Haslam Raises”); *University of Memphis expands degree offerings at Lambuth campus*, MEMPHIS BUSINESS JOURNAL, (Nov. 9, 2011), <http://www.bizjournals.com/memphis/news/2011/11/09/university-of-memphis-expands-degree.html> (stating that the University of Memphis would expand degree options at the Lambuth Campus) (hereinafter “University of Memphis Expands”).

¹²² See Poe, *supra* note 115.

¹²³ *Id.* State House Finance Committee chairman Craig Fitzhugh, for example, cautioned against the state taking on any new campus in the midst of an economic downturn regardless of the specific issues any campus might have. *Id.*

¹²⁴ Nick Bona, *Maryville College VP named Lambuth University President*, VOLUNTEER TV, “Oct. 6, 2009”, <http://www.volunteertv.com/home/headlines/64654747.html>.

¹²⁵ *Id.*

the next three years. Lambuth was placed on probation by its accreditor in 2009 and it continued its march towards ever-increasing volatility.¹²⁶

In May of 2010, the other shoe seemed to drop when Lambuth announced that a shadowy group of investors had all but purchased the ailing university.¹²⁷ On May 23rd, Lambuth issued a statement saying as much, but Lambuth said that it would hold back the details from the public until all the terms of the agreement were settled.¹²⁸ President Seymour stated that they hoped to have everything ready by May 28, 2010 so that the school could deliver the terms and information about the purchasers to their accreditor, the Southern Association of Colleges and Schools' Commission on Colleges, for approval.¹²⁹ At the time of this purchase, projected enrollment for the 2010-2011 academic year was just 550—a 200-student decrease from the projection two years prior.¹³⁰ Actual enrollment, much like the enrollment two years prior, was substantially less than the poor projected enrollment: in the fall of 2010, just 456 students would enroll at Lambuth University.¹³¹ The undisclosed purchaser was facing a difficult situation, but Lambuth's accreditation was one of the features making it somewhat attractive.

May 28th came and went and no deal was struck. On May 29th, it was announced that no sale would occur and that Lambuth University's future was once again in flux.¹³² President

¹²⁶ *Financially Ailing Lambuth U. Agrees to Sale to Investors*, THE CHRONICLE OF HIGHER EDUCATION, (May 23, 2010), <http://chronicle.com/article/Financially-Ailing-Lambuth-/65664/>.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* Lambuth likely needed the approval of its accreditor so that the accreditation would be transferred to the buyers—without the accreditation transfer, the school would be worth substantially less to any interested parties. See Scott Jaschik, *Another College is Sold to a For-Profit*, INSIDE HIGHER ED, (May, 24, 2010), <http://www.insidehighered.com/news/2010/05/24/lambuth>.

¹³⁰ *Id.*

¹³¹ *Feasibility Study Part I*, at 7.

¹³² *Struggling Lambuth U. to Remain Nonprofit*, THE CHRONICLE OF HIGHER EDUCATION, (May 29, 2010, 12:49PM), <http://chronicle.com/blogs/ticker/struggling-lambuth-u-to-remain-nonprofit/24396>.

Seymour stated that it had decided not to go through with the sale because there were “advantages” to remaining in its non-profit form rather than selling to investors and turning for-profit.¹³³ Seymour also felt that Lambuth could accomplish its educational goals without selling completely to the investors. Instead, he floated the idea of a potential joint venture with the investors; however, it is unclear how such a joint venture would work in light of Lambuth’s non-profit status.¹³⁴ Given the school’s tenuous financial situation, there may be other explanations for the failure of the deal. For example, the investors may have gotten cold feet after looking at the school’s finances, or the investors may have received word that the school was in danger of losing its accreditation after its probationary period.¹³⁵ No matter the reason, the failure of this sale marked the beginning of the end of privately-owned Lambuth University and the creation of what the University of Memphis and the State would come to see as a significant opportunity.

In December of 2010, Lambuth’s probationary period came to an end, and the Southern Association of Colleges and Schools Commission on Colleges revoked Lambuth’s accreditation.¹³⁶ This is a substantial blow for any college, and, as would soon become apparent, a veritable deathblow to an independent Lambuth University. Lambuth appealed this decision, and it continued to hold accreditation while the appeal was under review.¹³⁷ However, without a guarantee that accreditation would be restored on a long-term basis, both students and potential buyers would be unlikely to consider Lambuth University a viable educational institution

¹³³ *Id.*

¹³⁴ *See Id.*

¹³⁵ *End of the Road*, *supra* note 38 (noting that Lambuth University had struggled with keeping its accreditation and faced the possibility of losing it pending the outcome of its probationary period).

¹³⁶ Eric Kelderman, *New Woe For Lambuth and Fisk Universities: Accreditation Problems*, THE CHRONICLE OF HIGHER EDUCATION, (Dec. 7, 2010), <http://chronicle.com/article/New-Woe-for-LambuthFisk/125644/>.

¹³⁷ *Id.*

because students would be unable to secure federal loans,¹³⁸ which would lead to decreased enrollment and strain the institution's already frail finances. The lack of accreditation probably limited Lambuth's likely suitors to institutions that already held accreditation or those who believed, rightly or wrongly, that there was a substantial likelihood of quickly obtaining accreditation.

In April of 2011, in light of the likely failure of its appeal, Lambuth University announced that it would be shutting its doors at the end of the Spring 2011 semester.¹³⁹ Students, alumni, faculty, and administrative officials all expressed great sadness upon hearing the news. For example, when Lambuth University posted its decision to its Facebook page, a plethora of students and alumni expressed their disappointment and sorrow.¹⁴⁰ Many students and alumni described the closing as "heartbreaking" and "sad," and one even described it as being akin to a "death in the family."¹⁴¹ Others worried what would become of their college records.¹⁴²

This bleak news was soon brightened by the news that Lambuth University could yet survive. President Seymour announced that Lambuth University might continue operating as part of another university and that three potential suitors, including the University of Memphis, were already speaking with Lambuth.¹⁴³ The Feasibility Study commissioned by then-Governor Bredeesen was continued under Governor Haslam. This Feasibility Study would be instrumental

¹³⁸ *Id.*

¹³⁹ *Facebook Announcement, supra* note 15.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Richard Morgan, *Board of Lambuth University in Jackson votes to cease operations June 30*, THE COMMERCIAL APPEAL, (April 14, 2011, 10:59 PM), <http://www.commercialappeal.com/news/2011/apr/14/lambuth-university-jackson-close-its-doors-june-30/>. The other suitors, much like the shadowy group of investors from the 2010 purchase talks, were never named.

in the State's decision to fund the transformation of Lambuth University to a campus of the University of Memphis.¹⁴⁴

In conjunction with the feasibility study, the University of Memphis performed an economic impact study to convince the state and the local authorities of Jackson that making the Lambuth campus part of the University of Memphis would allow the historic Jackson school to continue to exist and bring more money, jobs, and education to the area.¹⁴⁵ The economic impact study projected that if the Lambuth campus were to grow to 1,000 students, the Jackson area would see a \$28 million impact from student spending alone.¹⁴⁶ Apparently, this study and the preliminary reports regarding the feasibility study were enough for Governor Haslam to commit significant effort and funds to the task of acquiring the Lambuth campus and making it part of the University of Memphis.¹⁴⁷

Haslam described the potential acquisition of Lambuth as part of the University of Memphis as an “inexpensive way for the state to get a four-year campus” in Jackson.¹⁴⁸ Faced with criticism regarding the expenditure during a time of decreasing taxpayer revenue and decreasing support for the current state colleges and universities, Haslam said that this acquisition would cost the state \$11 million over four years but that the acquisition would provide economic and

¹⁴⁴ See generally *Feasibility Study Part I*. (detailing the financial status of Lambuth University and potential cost of taking it over and turning it into a University of Memphis campus).

¹⁴⁵ *Economic impact of a University of Memphis presence in Jackson*, MODERATELY MARVELOUS (May 3, 2011), <http://moderatelymarvelous.com/2011/05/03/economic-impact/>.

¹⁴⁶ *Id.*

¹⁴⁷ Richard Locker, *Haslam: University of Memphis acquisition of Lambuth 'inexpensive way' to add 4-year campus in Jackson*, THE COMMERCIAL APPEAL, (May 5, 2011, 4:11 PM), <http://www.commercialappeal.com/news/2011/may/05/tennessee-governor-says-u-m-acquisition-lambuth-in/?partner=RSS>.

¹⁴⁸ *Id.*

educational benefits to both the state and Jackson that would outweigh the initial costs.¹⁴⁹ Under the plan, Tennessee would spend the \$11 million in the following manner: \$5 million would be disbursed in 2011-12, \$3 million in 2012-13, \$2 million in 2013-14, and \$1 million in 2014-15.¹⁵⁰ He also addressed the concern that the State would now be expected to provide bailouts to other private colleges and universities in the future by saying that Lambuth University was a special case and that the opportunity to cheaply add a state university in Jackson—the largest city in the state without a state college or university—was the deciding factor.¹⁵¹ Any potential deal with the State was also contingent on whether a local Jackson purchasing group would be able to first pay off Lambuth’s sizeable debt and bring its buildings up to code.¹⁵² The local entities that would potentially be able to address Lambuth’s debts included the City of Jackson, Tennessee, Madison County, Tennessee, the Industrial Development Board of the City of Jackson, the Jackson Energy Authority, and West Tennessee Healthcare (the “Jackson Group”).¹⁵³ The Jackson Group likely wanted to see Lambuth survive due to a combination of its economic and educational impact on the area and its strong historic ties to the area.¹⁵⁴

To facilitate the transfer and address its debt, Lambuth University’s Board of Directors took the first steps towards making a State takeover possible at a meeting on June 30, 2011. At this

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Debtor’s Expedited Motion For Order (A) Authorizing Sale of Substantially All estate assets free and Clear of Liens, Claims, Rights, Encumbrances and interests ; (B) Authorizing Assumption And Assignment Of Executory Contracts; (C) Approval of Compromise and Settlement; and (D) Other Related Relief, (Dkt. 185), p.2, ¶ 6, (Sept. 20, 2011). (hereinafter “Motion to Sell”).

¹⁵⁴ See *supra* parts a and b for a discussion of the history that Lambuth University, in its various forms, has shared with the Madison County and Jackson area. For example, Lambuth has a nearly 170-year history tied to Jackson—a city that has traditionally been one of the three capitals of Tennessee, is a seat of the Tennessee Supreme Court under the Tennessee Constitution, and is named in honor of Tennessee legend, President Andrew Jackson. See *supra* note 9 and part a.

meeting, the Board of Directors voted unanimously to file for Chapter 11 bankruptcy protection and to sell the campus to the Jackson Group for \$7.9 million.¹⁵⁵ However, no actual agreement of sale was consummated at the meeting, so the sale would have to be completed during the course of Lambuth's bankruptcy proceedings.¹⁵⁶ The agreement would need to satisfy the school's outstanding debt of over \$10 million¹⁵⁷ (over half that amount was attributable to the massive bond debt that began to accumulate in 1995).¹⁵⁸ Once an agreement with the Jackson Group was reached, the Jackson Group would then turn the campus over to the State and its Board of Regents system, which would then turn the campus into a satellite campus of the University of Memphis.¹⁵⁹ Then, the \$11 million in financing would begin to be distributed to the University of Memphis.¹⁶⁰

As previously discussed, this \$11 million would be distributed in a decreasing fashion; that is, less money would be distributed to the University of Memphis to operate the Lambuth campus each year from 2011 until 2015.¹⁶¹ This descending funding plan assumes increased enrollment and revenue, and eventually, if things go as planned, there would be no "extra" state funding allocated to Lambuth University.¹⁶² As Jackson Mayor Jerry Gist stated, all involved

¹⁵⁵ *Lambuth Votes*, *supra* note 3. Another motivating factor that pushed Lambuth University to declare Chapter 11 bankruptcy was the fact that the Jackson Energy Authority was about to shut off the utilities (electricity, water, etc.) to the campus. To prevent this, Lambuth filed to take advantage of the automatic stay proceeding. *Disclosure Statement and Summary of Plan*, at 6.

¹⁵⁶ *Lambuth Votes*, *supra* note 3.

¹⁵⁷ *Id.*

¹⁵⁸ Motion to Sell, at 3, ¶10.

¹⁵⁹ *Lambuth Votes*, *supra* note 3.

¹⁶⁰ *Id.*

¹⁶¹ See *supra* note 150 and accompanying text.

¹⁶² See *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Lambuth Campus Feasibility Study Part II. (Dkt. 100-2), p. 22, (August 3, 2011) (hereinafter "Feasibility Study Part II"). The school would seek to balance their budget so that their liabilities do not *exceed* their income. *Id.* at 20-22.

“hop[ed] . . . this [could] be an expeditious process” that would benefit everyone.¹⁶³ By the end of June 2011, it was clear that Lambuth University and the other parties involved had, at the least, a general plan that entailed (a) the sale of Lambuth University when it filed for Chapter 11 protection and (b) its continued operation as a satellite of the University of Memphis.

Typical Bankruptcy Proceedings

a. The Petition is Filed: June 30, 2011

After exhausting all other possibilities,¹⁶⁴ Lambuth filed a Voluntary Petition (“Petition”) for Chapter 11 bankruptcy protection on June 30, 2011, in the Western District of Tennessee, Eastern Division.¹⁶⁵ Lambuth is located in Madison County, Tennessee,¹⁶⁶ and its principal place of business¹⁶⁷ lies within the Western District of Tennessee, Eastern Division,¹⁶⁸ so its choice of jurisdiction was proper.¹⁶⁹ Lambuth retained Steven N. Douglass (“Douglass”),¹⁷⁰ of

¹⁶³ *Lambuth Votes*, *supra* note 3.

¹⁶⁴ It is important to keep in mind a number of factors at work behind the scenes (and that the Court is aware of) in Lambuth’s bankruptcy proceedings: (1) Lambuth is entering bankruptcy as a ‘good debtor’ with a very feasible, positive plan/outcome from bankruptcy, (2) a major player with great sway in Lambuth’s plan is the State of Tennessee, and (3) Lambuth is not looking for bankruptcy to solve its financial woes but is using it merely as a tool for its ultimate rebirth as The University of Memphis: Lambuth Campus.

¹⁶⁵ *Voluntary Petition*, at 1.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 2.

¹⁶⁸ The Western District is divided into two divisions. Its Eastern Division includes Madison County, Tennessee. 28 U.S.C.A. § 123 (West 2008).

¹⁶⁹ As of the date of this document, no parties to the case have objected to Lambuth’s choice of jurisdiction.

¹⁷⁰ Douglass is seemingly well-versed in the area of bankruptcy law, having concentrated his practice in the areas of bankruptcy law and commercial litigation since the 1980’s. He has also served on the Bankruptcy Section of the Memphis Bar Association and as assistant counsel to the Committee on the Judiciary of the United States House of Representatives. Interestingly, Douglass clerked for the Honorable Judge David S. Kennedy, Chief United States Bankruptcy Judge for the Western District of Tennessee (Judge Boswell is assigned to Lambuth’s case). *Steven N. Douglass, Attorney*, HARRIS SHELTON HANOVER WALSH, <http://www.harrishelton.com/pages/attorneydetail.aspx?AttorneyID=9> (last visited March 27, 2012).

Harris Shelton Hanover Walsh, PLLC,¹⁷¹ a Memphis, Tennessee, law firm, as its attorney.¹⁷²

Michael E. Keeney, the Chairman of Lambuth's Board of Directors,¹⁷³ signed the Petition for Lambuth as Chairman of the Board of Directors.¹⁷⁴

Lambuth filed as a tax-exempt corporation with 200-999 estimated creditors, \$1,000,001-\$10,000,000 estimated assets, and \$10,000,001- \$50,000,000 estimated liabilities.¹⁷⁵ The Petition also states that Lambuth's debts are primarily business debts¹⁷⁶ and that Lambuth estimates that *no* funds will be available to pay any unsecured creditors through its bankruptcy proceedings.¹⁷⁷ The Petition includes a schedule listing the creditors who hold Lambuth's twenty largest unsecured claims¹⁷⁸ and an attachment listing another 130 unsecured creditors.¹⁷⁹

The day after Lambuth filed its Petition, the Court filed a Notice of ... Deficient Filing¹⁸⁰ listing fourteen statutorily required Schedules¹⁸¹ missing from the Petition and a fourteen day

¹⁷¹ This firm worked with Lambuth before its bankruptcy filing to help work out debt issues and is familiar with its business. *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Application for Employment of Harris Shelton Hanover Walsh, PLLC, as Counsel for Debtor, (Dkt. 76) p. 2, (July 25, 2011) (This document states that attorney fees will be \$300.00 per hour or Partners, \$175.00 per hour for Associates, and \$75.00 per hour for Paralegals.). The Court granted Lambuth permission to employ the firm as their bankruptcy counsel. *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Order on Application for Employment of Harris Shelton Hanover Walsh, PLLC, as Counsel for Debtor, (Dkt. 79), p. 1, (July 26, 2011).

¹⁷² *Voluntary Petition*, at 3.

¹⁷³ Michael E. Keeney is a managing partner at Thomason Hendrix Harvey Johnson & Mitchell, PLLC, and is a 1988 graduate of Lambuth University.

¹⁷⁴ *Voluntary Petition*, at 3.

¹⁷⁵ *Id.* at 1.

¹⁷⁶ *Id.* The Voluntary Petition requires the petitioner to 'check-the-box' to define the nature of its debts. The petitioner must choose either consumer debts (primarily for individuals filing due to personal/household debts) or business debts (the obvious choice for Lambuth).

¹⁷⁷ *Id.* Among the myriad of 'check-the-box' requirements, the Voluntary Petition also requires the petitioner to estimate (really predict) if it will be able to pay any unsecured creditors out of its bankruptcy resources.

¹⁷⁸ *Id.* at 4-5. This form includes a chart listing the unsecured creditor's name, address, and the amount of the claim.

¹⁷⁹ *Id.* at 6-25. This list appears to have been typed on a personal computer and includes only the name and address of the creditor (some addresses are missing). No claim amount is listed and the list does not designate the creditors as unsecured. However, subsequent case documents confirm the status of the creditors as unsecured.

¹⁸⁰ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Notice of Required Filing Fee and/or Deficient Filing, (Dkt. 2), p. 1, (July 1, 2011).

deadline¹⁸² to file the schedules with the Court. Like the Petition and many other bankruptcy documents, the missing Schedules are fill-in-the-blank and check-the-box forms readily available online.¹⁸³ Even so, the “Notice of ... Deficient Filing” is a common occurrence in bankruptcy proceedings due to the breadth of detailed information required in the Schedules.¹⁸⁴

Four days *after* the deadline to file the missing Schedules, Douglass filed a Motion to Extend Time to File Schedules [sic], requesting another twenty days to complete the Schedules.¹⁸⁵ He stated that Lambuth was making substantial progress in completing the Schedules, but also that management personnel had been unable to make final revisions to the them due to obligations in “winding down the university and negotiating with certain interested parties regarding the sale of the assets[.]”¹⁸⁶ The Court issued a Notice of Hearing on the matter the same day¹⁸⁷ and scheduled the Hearing for nine days later. The Hearing was postponed another 12 days¹⁸⁸ and the Court granted Douglass’ Motion to Extend Time—without a hearing and without

¹⁸¹ The debtor’s filing requirements are listed in 11 U.S.C. § 521(a).

¹⁸² The fourteen day deadline is not found in the Title 11 of the United State Code, but in a “local order of the Court.” *In re Lambuth University*, Notice of Required Filing Fee and/or Deficient Filing at 1 (July 1, 2011).

¹⁸³ United States Bankruptcy Courts, Western District of Tennessee, Bankruptcy Forms, <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx> (last visited March 21, 2012).

¹⁸⁴ Although the Petition itself is fairly quick and easy to complete, the amount of time and research needed to complete Schedules required to be filed with the Petition can be extensive, especially for complex business entities like Lambuth. *See generally* Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 Am. Bankr. Inst. L. Rev. 349 (2008) (detailed discussion of the new Schedules requirements due to B.A.P.C.B.A.).

¹⁸⁵ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Motion to Extend Time to File Schedules, Statement of Financial Affairs and Lists Pursuant to Federal Rules of Bankruptcy Procedure 1007(c), (Dkt. 60), p. 2, (July 19, 2011).

¹⁸⁶ *Id.* at 2. Indeed, Lambuth had been in talks for some time with the State of Tennessee/University of Memphis concerning the sale of its assets. The sale eventually came to fruition and is a major part of Lambuth’s case; it is discussed in detail in a later section of this document. *Lambuth Votes*, *supra* note 3.

¹⁸⁷ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Notice of Hearing, (Dkt. 61) (July 19, 2011).

¹⁸⁸ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Notice of Continuance, (no Dkt. entry) (July 27, 2011).

objection.¹⁸⁹ Because there was no formal hearing, the Court required the Order Granting the Motion to Extend Time to File Schedules to be prepared by Steven Douglass by August 24, 2011. However, the Order was not filed until September 7, 2011, over a month *after* Douglass filed the missing Schedules.¹⁹⁰ Ultimately, the missing Schedules, which concerned Lambuth’s real and personal property, secured and unsecured creditors, general financial affairs, co-debtors, contracts and leases, security holders and attorney fees were filed *before* the extended deadline by Douglass in a 107-page document.¹⁹¹

Petition Schedules: Timeline Summary of Events¹⁹²

Date	Event
July 15, 2011	Deadline: File Missing Schedules
July 19, 2011	Filed: Motion to Extend Time to File Schedules
July 19, 2011	Scheduled: Hearing date, July 27
July 27, 2011	Rescheduled: new Hearing date, August 10
August 3, 2011	Filed: Petition Schedules (107 page document)
August 10, 2011	Granted: Motion to Extend Time to File Schedules Ordered: Douglass to prepare the Order Granting Motion to Extend Time
August 26, 2011	Notice: Douglass’ Order Past Due
September 7, 2011	Filed: Order Granting Motion to Extend Time

b. The Petition Schedules: Lambuth’s Assets, Liabilities, and Creditors

On August 3, 2011, Lambuth filed its Petition Schedules¹⁹³ (the “Schedules”) with updated information from that on its Petition. Lambuth’s check-the-box information was generally

¹⁸⁹ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Minutes – Notice of Continuance, (no Dkt.entry) (August 10, 2011).

¹⁹⁰ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Order Granting Motion to Extend Time to File Schedules, Statement of Financial Affairs and Lists Pursuant to Federal Rule of Bankruptcy Procedure 1007(c), (Dkt. 166) (September 7, 2011).

¹⁹¹ *Schedules*, at 1. The sheer length of this document helps illustrate the all-too-common need for filing extensions and the clerk’s frequent use of the “Notice of . . . Deficient Filing” document.

¹⁹² See *Supra* note 164. The timing of these events does not follow a logical order and it seems that Douglass is dropping the ball, so to speak, by missing Court-ordered deadlines. However, these small mishaps are tolerated by the Court most likely because of the larger goal of Lambuth’s case: successfully completing the complex sale and lease transaction with the Jackson Group and the University of Memphis/State of Tennessee.

consistent between the two forms: the Schedules lists 386 creditors, assets valued at \$6,258,897.00, and liabilities¹⁹⁴ valued at \$9,656,941.56.¹⁹⁵ Its creditor and asset values fell within the check-the-box items on page one of Lambuth's Petition¹⁹⁶ in which Lambuth estimated it has between 200-999 creditors and \$1,000,001-\$10,000,000 in assets, but Lambuth's liabilities value falls just short of its estimated \$10,000,001- \$50,000,000 in liabilities at only \$9.6 million.

Lambuth's liabilities consisted of both secured and unsecured claims arising from business debt accumulated from operating its campus. Although it only has two secured creditors, Downtown Jackson Lions Club ("Lions Club")¹⁹⁷ and BNY Mellon,¹⁹⁸ versus 384 unsecured creditors,¹⁹⁹ the amounts of its secured and unsecured debt are roughly the same at close to \$5 million each.²⁰⁰ Lambuth ultimately settled both of its secured debts²⁰¹ prior to filing its Disclosure Statement and Summary of Plan on March 28, 2012.²⁰²

¹⁹³ *Schedules*, at 1.

¹⁹⁴ *Schedules*, at 3.

¹⁹⁵ *Schedules*, at 1-3.

¹⁹⁶ *Voluntary Petition*, at 1.

¹⁹⁷ *Schedules*, at 10. The Lions Club supports many youth development and sports organizations around th Jackson, Tennessee, area. See Downtown Jackson's Lion Club, <http://www.jacksonlionsclub.org/> (last visited April 17, 2012).

¹⁹⁸ *Schedules*, at 10. The Bank of New York Mellon Trust Company is a global investment management and investment services company . . . with over \$26 trillion in assets under custody or administration. See BNY Mellon <http://www.bnymellon.com/about/index.html> (last visited April 23, 2012).

¹⁹⁹ *Schedules*, at 1.

²⁰⁰ *Schedules*, at 3.

²⁰¹ *Schedules*, at 1. Downtown Jackson Lions Club is also listed on the Schedules as having a non-priority unsecured claim of \$42,118.16. Under the Disclosure Statement and Summary of Plan filed March 28, 2012, this claim will get a pro rata portion of whatever funds, if any, are remaining after having paid the priority unsecured debts. *Disclosure Statement and Summary of Plan*, at 9.

²⁰² *Disclosure Statement and Summary of Plan*, at 9. Lambuth's two secured claims are discussed in detail in "The Lease" and "The § 363 Sale" sections of this document.

As for its unsecured claims, Lambuth's non-priority unsecured debt of \$3,601,784.15 far exceeds its priority unsecured debt of only \$958,910.54.²⁰³ All of Lambuth's priority unsecured claims are reported on the Schedules as wages, salaries, commissions, and related federal, state, and local taxes and penalties²⁰⁴ as required under 11 U.S.C § 507(a).²⁰⁵ All of Lambuth's non-priority unsecured debt arises out of operating costs incurred while running the university.²⁰⁶

The major inconsistency between Lambuth's Petition and Schedules is the Schedule listing Lambuth's twenty largest unsecured claims. This Schedule differs from the Petition by five creditors (it was also updated from to show more current claims amounts).²⁰⁷ The five creditors that left this list did so due to other unsecured creditors having larger claims. However, four of the new unsecured creditors listed on the Schedules should have been initially included on the Petition due to the amount of their claims.²⁰⁸ Curiously, these claims are left off of the Petition. These claims are \$100,000 from Dr. Mary Cay Koen, \$52,000 from the General Board of Higher Education of the Methodist Church,²⁰⁹ \$50,000 from Jeff Campbell, and \$42,759.95

²⁰³ *Schedules*, at 3.

²⁰⁴ *Schedules*, at 11. On its Schedules, Lambuth checked only the boxes related to 'wages, salaries and commissions' under 11 U.S.C § 507(a)(4) and 'taxes ... owed to governmental units' under 11 U.S.C. § 507(a).

²⁰⁵ 11 U.S.C § 507(a) provides, in relevant parts that: the following claims have priority . . . wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual . . . an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date.

²⁰⁶ *Schedules*, at 39-90. Lambuth's Schedules show non-priority unsecured claims ranging from month-to-month subscription services (like email servers) to one-time purchases (like personalty items) for the purpose of maintaining the university's day-to-day operations.

²⁰⁷ *Schedules*, at 1-2.

²⁰⁸ It is unclear why these claims were missing from the Petition. Perhaps they were unperfected endowments whose true form (debt v. donation) only became known after the filing of the Petition. Dr. George W. Kuney, Lindsay Young Distinguished Professor of Law and Director of the Clayton Center for Entrepreneurial Law, The University of Tennessee College of Law, Remarks during the Reorganizations and Workouts class period (April 20, 2012).

²⁰⁹ *Supra* note 8. Lambuth had operated for decades as a private university affiliated with the Methodist Church.

from Joey Stoner.²¹⁰ Joey Stoner's claim is the only one given priority status;²¹¹ it is a priority claim under 11 U.S.C. § 507(a)(4) (like the bulk of Lambuth's priority unsecured claims) because it was used to fund Lambuth's employee payroll expenses in late 2009.²¹² The fifth new claim listed on the Schedules is from the K Revocable Living Trust,²¹³ and it is the largest of all the unsecured claims at \$1,313,000.00²¹⁴

One of the most notable of the twenty largest unsecured claims (which is on both the Petition and the Schedule) is the claim for \$541,270.00 from the Jackson Energy Authority.²¹⁵ This claim is cited in Lambuth's Disclosure Statement and Summary of Plan as one of the main contributing factors leading to Lambuth's decision to file for bankruptcy protection.²¹⁶ In fact, the Jackson Energy Authority had already threatened to turn off Lambuth's utility services due to the amount of unpaid debt.²¹⁷

The Schedules list no codebtors²¹⁸ but list forty executory contracts and unexpired leases²¹⁹ and two lawsuits to which it is a party.²²⁰ One of the final Schedules also discloses Douglass' attorney compensation.²²¹ The Schedule does not list an agreed total amount of compensation for legal services, but the Court had already approved Douglass' \$300 hourly rate (his standard

²¹⁰ *Schedules*, at 1-2.

²¹¹ *Id.* Joey Stoner is Lambuth's Vice President for Business Affairs; he held this position at the time of his loan to the university.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Schedules*, at 1-2.

²¹⁵ *Id.* This is Lambuth's second largest unsecured claim.

²¹⁶ *Disclosure Statement and Summary of Plan*, at 6.

²¹⁷ *Id.*

²¹⁸ *Schedules*, at 94.

²¹⁹ *Schedules*, at 91-93. All of these are rejected later in the Final Disclosure and Summary of Plan. *In re Lambuth University*, Final Disclosure and Summary of Plan at 10.

²²⁰ *Infra* note 408.

²²¹ *Schedules*, at 104.

hourly rate²²²) and Lambuth’s choice of debtor’s counsel in a previous Order.²²³ It does disclose that Douglass has not received any compensation prior to filing the Schedules²²⁴ and that he agrees to accept whatever future legal fees the court allows.²²⁵ Douglass will have to file Interim Applications for Allowance of Compensation and Reimbursement of Expenses to Attorneys for Debtors with the Court to collect any fees.²²⁶ Douglass’ filings must be made in accordance with 11 U.S.C. § 330,²²⁷ Compensation for Officers, showing “reasonable compensation for actual, necessary services rendered,”²²⁸ and the notice and filing requirements in 11 U.S.C. § 331, Interim Compensation.²²⁹

Schedules: Summary of Liabilities

Claim Category	Number of Creditors	Value
Unsecured Priority Claims ²³⁰	130	\$958,910.41
Unsecured Non-priority Claims ²³¹	254	\$3,601,784.15
Secured Claims ²³²	2	\$5,096,247.00
Total:	386	\$9,658,941.56

²²² *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Application for Employment of Harris Shelton Hanover Walsh, PLLC, as Counsel for Debtor, (Dkt. 76) (July 25, 2011). Douglass initially filed this Application on July 14, 2011 (Dkt. 36) but it was incomplete due to missing party signatures and by failing to include the names of the specific attorneys and paralegals assigned to Lambuth’s case.

²²³ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Order on Application for Employment of Harris Shelton Hanover Walsh, PLLC, as Counsel for Debtor, (Dkt. 79) (July 26, 2011).

²²⁴ *Schedules*, at 104.

²²⁵ *Id.*

²²⁶ To date, Douglass has filed one Interim Application for \$42,929.38. *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Interim Application for Allowance of Compensation and Reimbursement of Expenses to Attorneys for Debtors, (Dkt. 382) (November 23, 2011). The Interim Application was granted without opposition. *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Order Granting Application for Interim Compensation, (Dkt. 431) (Dec. 28, 2011).

²²⁷ 11 U.S.C. § 330.

²²⁸ *Id.*

²²⁹ 11 U.S.C § 331.

²³⁰ *Schedules*, at 12-38.

²³¹ *Schedules*, at 39-90.

²³² *Schedules*, at 10. Downtown Jackson Lions Club secured claim for \$136,247.00 and BNY Mellon’s secured claim for \$4,960,000.

Lambuth's list of assets on the Schedules, both real and personal property,²³³ is much shorter than its lists of liabilities. Not surprisingly, Lambuth's real property consists of its campus of 51 acres, including buildings and facilities.²³⁴ The total value of this real property is listed at \$4,386,247.00, less than the secured claim of \$5,096,247.00 against it.²³⁵ Lambuth's personal property consists of \$600.00 in petty cash,²³⁶ \$5,240.00 in a checking account,²³⁷ \$886,512.00 in accounts receivable (all student accounts and collections),²³⁸ \$450,000.00 in office and machinery equipment and supplies,²³⁹ and \$530,298.00 in a restricted endowment checking account and trust funds.²⁴⁰ Lambuth reports all of its income is derived from its business operations and claims no income from other sources.²⁴¹

Schedules: Summary of Assets

Description	Value	Claim
Real Property ²⁴²	\$136,247.00	\$136,247.00
Real Property ²⁴³	\$4,250,000.00	\$4,960,000.00
Petty Cash ²⁴⁴	\$600.00	
Checking Account ²⁴⁵	\$5,240.00	
Accounts Receivable ²⁴⁶	\$185,666.00	
Accounts Receivable Collections ²⁴⁷	\$700,846.00	

²³³ Schedules, at 3.

²³⁴ Schedules, at 5.

²³⁵ Id.

²³⁶ Schedules, at 6.

²³⁷ Id.

²³⁸ Schedules, at 7.

²³⁹ Schedules, at 8.

²⁴⁰ Id. at 9.

²⁴¹ Id. at 96.

²⁴² Id. at 5. This real property is the baseball fields secured by the Lions Club secured claim of \$136,247.00.

²⁴³ Id. at 5. This real property is the 51 acre campus secured by BNY Mellon's secured claim of \$4,960,000.00.

²⁴⁴ Id. at 6.

²⁴⁵ Id.

²⁴⁶ Id. at 7.

²⁴⁷ Id.

Personal Property ²⁴⁸	\$450,000.00	
7 Restricted Endowments ²⁴⁹	\$530,298.00	
Total:	\$1,872,650.00	\$5,096,247.00

c. First Day Notices and Claims

During the initial month of the bankruptcy proceedings, Lambuth’s creditors were notified of the bankruptcy proceedings,²⁵⁰ and many creditors came forward to file Proof of Claims with the Court (subsequently, the Clerk for the Bankruptcy Court filed almost as many Notices of Deficient Claim²⁵¹). Around this time, the Court also set the Case Management Conference,²⁵² the Meeting of Creditors,²⁵³ and the Initial Debtor Interview.²⁵⁴ These first few weeks proceeded, for the most part, like any conventional Chapter 11 case, with the exception of a few very important emergency and expedited motions discussed below.

d. Emergency and Expedited Motions

In the first week after filing its Petition, Lambuth filed its first motion, an Emergency Motion requesting that the Court give it “authorization to pay prepetition compensation,

²⁴⁸ *Id.* at 8.

²⁴⁹ *Id.* at 9.

²⁵⁰ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Certificate of Notice, (Dkt. 13), p. 3-7, (July 7, 2011) (listing all of the parties, including creditors, receiving notice).

²⁵¹ *See In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Notification[s] of Deficient Claim, (Docs. 31, 33, 38, 41, 42, 44, 62, 63, 72, 77, 78, 90, etc) (beginning July 13, 2011). Many of these claims were deficient for simple mistakes such as leaving a line item blank or for failing to check-the-box.

²⁵² *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Order and Notice of Case Management Conference, (Dkt. 7) (July 5, 2011) (hereinafter “Order and Notice of Case Management Conference”).

²⁵³ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Notice of Commencement of Case Under Chapter 11 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates, (Dkt. 9) (July 6, 2011) (hereinafter “Notice of Commencement”).

²⁵⁴ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., As required by 28 U.S.C. Section 586(a), the United States Trustee provides notice that the Initial Debtor Interview will be held on Wednesday, July 13, 2011 at 10:00 AM (Madalyn Scott Greenwood by Peggy Rodgers), (No Dkt.) (July 7, 2011).

employee reimbursements and withholding taxes, to reduce the notice period for objecting to the Motion, and to set an expedited hearing in the event objections are filed.”²⁵⁵ Lambuth stated that it was “continuing to operate its business and manage its properties as Debtor-in-possession”²⁵⁶ and needed this skeleton crew of “essential”²⁵⁷ employees for the “continued operation of the Debtor’s business”²⁵⁸ so that it can maintain its main asset, the campus, throughout the bankruptcy proceedings.²⁵⁹

All of the prepetition wages and related expenses requested in the Emergency Motion are awarded priority status under 11 U.S.C. § 507(a)(4),²⁶⁰ but the monetary relief is limited to \$11,725 per employee. Lambuth’s Emergency Motion requested only \$4,156.04 per employee²⁶¹ and only those employee expenses allowed under § 507.²⁶² Notice of a hearing²⁶³ on the matter was given, but since no objections were filed, no hearing was required.²⁶⁴ The

²⁵⁵ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Emergency Motion for an Order Authorizing Payment of Prepetition Compensation, Employee Reimbursement, Withholding Taxes, and Contributions, Costs, and Expenses to Certain Employee Benefit Plans, (Dkt. 11) (July 6, 2011) (hereinafter “Emergency Motion”).

²⁵⁶ *Id.* at 1.

²⁵⁷ *Id.* at 5.

²⁵⁸ *Id.*

²⁵⁹ Also during this time, Lambuth is negotiating the lease with the State of Tennessee so the University of Memphis can take over operations. Keeping the lights on, so to speak, and everything in working order will aid a smoother transition.

²⁶⁰ 11 U.S.C. § 507(a)(4).

²⁶¹ *Emergency Motion*, at 4-5.

²⁶² 11 U.S.C. §§ 507(a)(4)-(5),(8).

²⁶³ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Notice of Hearing with Related Information RE Form, Manner and Serving of Notice, (Dkt. 12) (July 7, 2011).

²⁶⁴ *Id.* at 1. The Notice of Hearing stated that a hearing would be held only if objections were filed by July 8, 2011.

Court granted the Motion just four days later,²⁶⁵ recognizing that the relief requested is “in the manifest best interest of the Debtor, the estate and creditors and interested parties.”²⁶⁶

Just five days after filing the Emergency Motion (and the same day the Court granted the Emergency Motion), Lambuth filed an *Expedited* Motion for an Order Authorizing Payment of Prepetition Compensation, Employee Reimbursement, Withholding Taxes, and Contributions, Costs, and Expenses to Certain Employee Benefit Plans²⁶⁷ for thirty additional employees. This Expedited Motion read almost verbatim to the previous Emergency Motion.²⁶⁸ A Notice of Hearing²⁶⁹ immediately followed, no objections were filed, and the Court granted the Expedited Motion.²⁷⁰

Lambuth’s next motion was filed that same week: an Amended Expedited Motion Pursuant to U.S.C. §§ 105(a), 366(a) and 507 (I) to Determine Adequacy of Assurance of Payment for Future Service from Utilities and (II) to Establish Procedures for Determining Requests for Additional Assurance.²⁷¹ The crux of this Motion is 11 U.S.C. §366(a), which states:

“a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under

²⁶⁵ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Order Granting Emergency Motion for an Order Authorizing Payment of Prepetition Compensation, Employee Reimbursement, Withholding Taxes, and Contributions, Costs, and Expenses to Certain Employee Benefit Plans, (Dkt. 23) (July 11, 2011).

²⁶⁶ *Id.* at 2.

²⁶⁷ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Expedited Motion for an Order Authorizing Payment of Prepetition Compensation, Employee Reimbursement, Withholding Taxes, and Contributions, Costs, and Expenses to Certain Employee Benefit Plans, (Dkt. 22) (July 11, 2011).

²⁶⁸ Lambuth stated the same reasons for needing to pay these thirty employees in the Expedited Motion as it did for the initial nine employees in the Emergency Motion.

²⁶⁹ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Notice of Hearing with Related Information RE Form, Manner and Serving of Notice, (Dkt. 24) (July 11, 2011).

²⁷⁰ There is no docket containing the Order granting this motion because Douglass has yet to file it. There is a docket entry on August 26, 2011, stating that the order is to be submitted by Douglass. From this docket entry, it reasons that the Court authorized the Expedited Motion, but it is not in the official case docket yet.

²⁷¹ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Amended Expedited Motion Pursuant to 11 U.S.C. §§ 105(a), 366(a), and 507 (I) to Determine Adequacy of Assurance of Payment for Future Services from Utilities and (II) to Establish Procedures for Determining Requests for Additional Assurance, (Dkt. 27) (July 12, 2011).

this title or that a debt owed by the debtor before the order for relief was not paid when due.”

As was previously mentioned, Lambuth’s second largest unsecured creditor is the Jackson Energy Authority, to which it owes \$541,270.00²⁷² for prepetition utility services. Jackson Energy Authority had warned Lambuth that its utilities would start being turned off on June 30, 2011, but it was stopped from doing this pursuant to 11 U.S.C. §366(a) because Lambuth filed its bankruptcy petition that same day. The Expedited Motion sought to heal the relationship between debtor and creditor and establish guidelines for their future dealings (so Lambuth could keep its utilities on and so the Jackson Energy Authority could receive payment for its services).

Specifically, Lambuth sought relief in the form of:

“Deeming the following as adequate assurance of payment for future services within the meaning of 11 U.S.C. § 366, subject only to the additional procedures described herein (the “Proposed Adequate Assurance”):

The Utility Companies’ retention of unused pre-petition security deposits, if any and, payment of post-petition amounts owed to each Utility Company on a timely basis as an administrative expense.”

As with the Emergency and Expedited Motion for employee expenses, Lambuth filed this Expedited Motion for utility expenses so that it could continue maintaining its main asset, its campus. However, the Jackson Energy Authority objected to thw Expedited Motion²⁷³ for the following three reasons:

1. prepetition security deposits do not constitute adequate assurance;²⁷⁴

²⁷² *Schedules*, at 1.

²⁷³ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Objection by Jackson Energy Authority to Amended Expedited Motion Pursuant to 11 U.S.C. §§ 105(a), 366(a), and 507 (I) to Determine Adequacy of Assurance of Payment for Future Services from Utilities and (II) to Establish Procedures for Determining Requests for Additional Assurance, (Dkt. 30) (July 13, 2011).

²⁷⁴ *Id.* at 1. Lambuth’s prepetition debt at over \$500,000 must have far exceeded any prepetition security deposits Jackson Energy Authority had on hand (there is nothing in the record establishing the amount of a security deposit, if one existed at all).

2. granting post-petition amounts as an administrative expense does not constitute adequate assurance;²⁷⁵ and
3. the proposed procedures for Jackson Energy Authority to request “additional” adequate assurance other than administrative priority are unreasonable.²⁷⁶

In less than a month, however, Lambuth and Jackson Energy Authority came to an agreement and filed an Agreed Order on August 8, 2011²⁷⁷ resolving the adequacy of assurance issues. The Agreed Order provides that:

1. Lambuth shall deposit \$60,000.00 with Jackson Energy Authority unless the University of Memphis assumes its utilities no later than August 6, 2011;²⁷⁸
2. post-petition utilities shall be given administrative expense priority;²⁷⁹
3. all post-petition utilities shall be paid in a timely manner as an administrative expense, without further order of the Court;²⁸⁰ and
4. if Lambuth fails to pay for utility services when due, and fails to cure nonpayment within ten days of written notice, Jackson Energy Authority shall be authorized to terminate utility services and apply the security deposit to the balance owed for post-petition utilities without further order of the Court.²⁸¹

The \$60,000.00 security deposit never came due because the University of Memphis assumed Lambuth’s utilities on August 5, 2011,²⁸² two days *before* the Agreed Order stating the August 6, 2011, security deposit deadline was filed.²⁸³

²⁷⁵ *Id.* Jackson Energy Authority’s basic argument here is that Lambuth did not pay prepetition debts in a timely manner so it is likely that it won’t pay post-petition debts in a timely manner.

²⁷⁶ *Id.* at 2.

²⁷⁷ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Agreed Order Resolving Objection by Jackson Energy Authority to Amended Expedited Motion Pursuant to 11 U.S.C. §§ 105(a), 366(a), and 507 (I) to Determine Adequacy of Assurance of Payment for Future Services from Utilities and (II) to Establish Procedures for Determining Requests for Additional Assurance, (Dkt. 118) (August 8, 2011).

²⁷⁸ *Id.* Lambuth’s average monthly utility services are stated on Exhibit A to its Expedited Motion at \$64,525.00 so the \$60,000.00 security deposit would nearly cover one month’s service costs.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Per the Lease Agreement approved by the Court on August 5, 2011, the University of Memphis assumed Lambuth’s utilities so the security deposit was not required. *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Notice of Filing Final Lease Agreement Emergency Motion for an Order Authorizing Debtor to Enter into Lease of Premises to the State, Board of Regents, (Dkt. 111), p.3, (August 5, 2011) (hereinafter “Revised Proposed Lease”); *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Order Granting Emergency

Timeline: Adequacy of Assurance of Payment Expedited Motion and Agreed Order

Date	Event
July 12, 2011	Lambuth Files: Amended Expedited Motion . . . to Determine Adequacy of Assurance of Payment for Future Services from Utilities and . . . Establish Procedures for Determining Requests for Additional Assurance ²⁸⁴
July 12, 2011	Clerk Files: Notice of Hearing with Related Information RE Form, Manner and Serving of Notice ²⁸⁵
July 13, 2011	Jackson Energy Authority Files: Objection . . . to Amended Expedited Motion . . . to Determine Adequacy of Assurance of Payment for Future Services from Utilities and . . . Establish Procedures for Determining Requests for Additional Assurance ²⁸⁶
August 5, 2011	Court Grants: <i>Order Granting Emergency Motion for an Order Authorizing Debtor to Enter into Lease of Premises to the State of Tennessee, Board of Regents (University of Memphis assumes Lambuth’s Utilities)</i> ²⁸⁷
August 6, 2011	Agreed Order Deadline: \$60,000 deposit due to Jackson Energy Authority ²⁸⁸
August 8, 2011	Jackson Energy Authority Files: Agreed Order Resolving Objection by . . . to Amended Expedited Motion . . . to Determine Adequacy of Assurance of Payment for Future Services from Utilities and . . . Establish Procedures for Determining Requests for Additional Assurance ²⁸⁹

Motion For an Order Authorizing Debtor to Enter Into Lease of Premises to the State, Board of Regents, (Dkt. 112), p.1, (Aug. 5, 2011) (hereinafter “Order Granting Motion to Lease”).

²⁸³ *Supra* note 192. Once again, the backward timing of some events seems curious, but all parties, including the Court, ignore these minor issues because of the larger goal in mind: successfully transitioning Lambuth from a private university to a public one as a satellite campus of the University of Memphis.

²⁸⁴ This docket entry is an Amended Motion because Lambuth filed the motion three times on July 12, 2011; the first two filings were rejected by the Clerk due to incomplete filings (names and addresses of parties to be served were missing). *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Expedited Motion Pursuant to 11 U.S.C. §§ 105(a), 366(a), and 507 (I) to Determine Adequacy of Assurance of Payment for Future Service from Utilities and (II) to Establish Procedures for Determining Requests for Additional Assurance, (Dkt. 25) (July 12, 2011); *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Amended Motion Expedited Motion Pursuant to 11 U.S.C. §§ 105(a), 366(a), and 507 (I) to Determine Adequacy of Assurance of Payment for Future Service from Utilities and (II) to Establish Procedures for Determining Requests for Additional Assurance, (Dkt. 26) (July 12, 2011).

²⁸⁵ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Notice of Hearing with Related Information RE Form, Manner and Serving of Notice, (Dkt. 28) (July 12, 2011).

²⁸⁶ *Supra* note 273.

²⁸⁷ *Order Granting Motion to Lease*, at 1.

²⁸⁸ *Supra* note 277.

²⁸⁹ *Id.*

e. Initial Debtor Interview, Case Management Conference, and Meeting of Creditors

While Lambuth was working to resolve important issues related to its Emergency and Expedited Motions, the Trustee and the Court were taking care of statutorily mandated requirements. As required by 28 U.S.C. Section 586(a),²⁹⁰ the Trustee set the Initial Debtor Interview for July 13, 2011.²⁹¹ However, no other docket entries were recorded to verify that the Interview actually happened.

We can be sure, though, that the Case Management Conference did occur. Just days after Lambuth filed its Petition, the Court filed an Order and Notice of Case Management Conference²⁹² in accordance with 11 U.S.C. § 105(d).²⁹³ The Conference was initially set for July 20, 2011,²⁹⁴ but was rescheduled for and occurred on July 13, 2011.²⁹⁵

The Court's Notice states that the "purpose of the Case Management Conference is to . . . establish and implement a sound and effective case management program . . . to expedite the administration of this Chapter 11 case, to discourage unnecessary litigation, and to . . . facilitate

²⁹⁰ 28 U.S.C. § 586 Reads in part that "each United States trustee, within the region for which such United States trustee is appointed, shall . . . (7) in each of such small business cases . . . (A) conduct an initial debtor interview as soon as practicable after the date of the order for relief but before the first meeting scheduled under section 341(a) of title 11. 11 U.S.C. § 341(a) provides in part that . . . within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a Meeting of Creditors.

²⁹¹ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., As required by 28 U.S.C. Section 586(a), the United States Trustee provides notice that the Initial Debtor Interview will be held on Wednesday, July 13, 2011 at 10:00 AM (Madalyn Scott Greenwood by Peggy Rodgers), (Dkt. 21 removed) (July 11, 2011).

²⁹² *Order and Notice of Case Management Conference*, at 7.

²⁹³ 11 U.S.C. § 105(d), Power of Court, provides in part that . . . the court . . . shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case.

²⁹⁴ *Id.*

²⁹⁵ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Amended Order and Notice of Case Management Conference, (Dkt. 10) (July 6, 2011) (hereinafter "Amended Order and Notice of Case Management Conference"); *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Case Management Order, (Dkt. 32) (July 13, 2011).

the early resolution of disputes.”²⁹⁶ To that end, the Court lists certain objectives²⁹⁷ of the Conference, including:

1. setting a date by which the Debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;²⁹⁸
2. set a date for the Debtor to file an estimate of anticipated administrative expenses;²⁹⁹ and
3. any other matters deemed relevant and appropriate.³⁰⁰

The Conference met these objectives, and more, producing an Order that obligated Lambuth to, among other things:

1. file a disclosure statement and plan (or summary of plan);³⁰¹
2. file an estimate of anticipated administrative expenses within thirty days after the entry of this order;³⁰² and
3. timely file all monthly operating reports and timely pay all United States trustee quarterly fees pursuant to 28 U.S.C. § 1930(a)(6).³⁰³

Pursuant to 11 U.S.C. § 341,³⁰⁴ the Trustee set and gave notice of the Meeting of the Creditors for August 10, 2011.³⁰⁵ The Meeting Notice provided a Proof of Claim for creditors to file with the Clerk³⁰⁶ and set claim deadlines for creditors as follows:

²⁹⁶ *Amended Order and Notice of Case Management Conference*, at 1.

²⁹⁷ *Supra* note 293. These specific objectives are permitted under 11 U.S.C. § 105(d) which enumerates the powers of the Court.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 2.

³⁰⁰ *Id.*

³⁰¹ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Case Management Order, (Dkt. 32), p.1, (July 13, 2011) (hereinafter “Case Management Order”). No deadline was set for this filing but Lambuth filed a Disclosure Statement and Summary of Plan on March 28, 2012. *See Disclosure Statement and Summary of Plan*, at 1.

³⁰² *Case Management Order*, at 1. This term sets the deadline of August 13, 2011, for Lambuth to file estimated administrative expenses. However, to date, there is still no such entry in the docket.

³⁰³ *Id.*

³⁰⁴ *Supra* note 290.

³⁰⁵ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Setting of Meeting of Creditors, (Dkt. 8) (July 6, 2011); *Notice of Commencement*, at 1.

1. Proof of Claims due by November 8, 2011;³⁰⁷ and
2. Government Proof of Claims due by December 27, 2011.³⁰⁸

The Meeting occurred as initially scheduled (one of the few that did)³⁰⁹ with no objections.

f. Unsecured Creditors Committee

The Unsecured Creditors Committee proceeded with a bit more complexity.³¹⁰ The Trustee appointed six members from five different unsecured creditors to the Committee;³¹¹ all five are on the Schedule listing the “Creditors Holding 20 Largest Unsecured Claims.”³¹² The Committee’s first task was to employ an attorney for its representation throughout Lambuth’s

³⁰⁶ *Supra* note 251. These Proof of Claim forms are the source of the numerous Notice of Deficient Claim(s) that flooded the docket during the first weeks of Lambuth’s bankruptcy proceedings.

³⁰⁷ *Notice of Commencement*, at 9.

³⁰⁸ *Id.* See also *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Ex Parte Motion of the United States Securities and Exchange Commission for an Extension of the Government Bar Date to File Proof of Claim, (Dkt. 417) (December 21, 2011); *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Order Granting Ex Parte Motion of the United States Securities and Exchange Commission for an Extension of the Government Bar Date to File Proof of Claim, (Dkt. 423) (December 22, 2011). This appears to be merely a placeholder for the Securities and Exchange Commission, and not tied to a specific act(s) by Lambuth (The Commission’s Motion states that the “staff of the Commission currently is investigating potential claims that it may have against the Debtor, *if any.*”) (Emphasis added.).

³⁰⁹ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., The United States Trustee reports that the Meeting of Creditors required under 11 U.S.C. Section 341 has been held and conducted as scheduled, (Madalyn Scott Greenwood by Peggy Rodgers), (Dkt. 120 removed) (August 11, 2011).

³¹⁰ It took three tries to get the Committee correctly listed. The first filing listed the wrong Chairperson and the second filing listed the wrong addresses. *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., (Dkt. 104) Appointment and Notice of Appointment of Official Unsecured Creditors Committee (August 3, 2011); *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., First Amended Appointment and Notice of Appointment of Official Unsecured Creditors Committee, (Dkt. 122) (August 12, 2011) (hereinafter “First Amended Appointment”).

³¹¹ *First Amended Appointment*, at 1.

³¹² *Schedules*, at 1-2. The members are from Hobson’s, Inc.; Johnsey’s Sporting Goods (Chairman, Fred Johnsey, Jr.); Rainer, Kizer, Reviere, Bell PLC; Skeeter Kell Sporting Goods; and Sodexo, Inc. and Affiliates (largest claimholder on the Committee).

bankruptcy proceedings. This part went smoothly and its Application³¹³ to approve Stephen L. Hughes³¹⁴ (“Hughes”) as attorney for the Committee was granted without opposition.³¹⁵

The Committee’s next task was to hire an appraiser to “appraise, testify, give deposition, or do consulting work after the appraisal report is completed on behalf of the Unsecured Creditors Committee . . . and [t]o perform all other appraisal and related valuation related services for the Committee.”³¹⁶ This is where the Committee met resistance. Jackson Energy Authority filed an Objection to the Committee’s Amended Application³¹⁷ to employ an appraiser, stating that the Application “does not specify the scope of work to be performed by the appraiser or set any limit on total amount of fees which the appraiser may incur at the expense of all unsecured creditors.”³¹⁸ The Amended Application was ultimately approved³¹⁹ following a hearing on

³¹³ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Application to Approve Employment of Attorney for Unsecured Creditors Committee, (Dkt. 123) (Aug. 15, 2011).

³¹⁴ *Id.* at 2. Hughes’ compensation is stated at \$235.00 per hour plus expenses, subject to the approval of the Court upon the filing of the appropriate Motion. Hughes specializes in representing creditors in bankruptcy cases. See Stephen L. Hughes, LEGAL INFORMATION INSTITUTE, <http://lawyers.law.cornell.edu/lawyer/stephen-l-hughes-981620> (last visited April 17, 2012).

³¹⁵ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Order Authorizing Employment of Attorney for Unsecured Creditors Committee, (Dkt. 186) (Sept. 21, 2011)

³¹⁶ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Expedited Application to Approve Employment of Appraiser for Unsecured Creditors Committee, (Dkt. 213) (Oct. 6, 2011); *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Amended Application to Approve Employment of Appraiser for Unsecured Creditors Committee Nunc pro Tunc to October 6, 2011, (Dkt. 216) (Oct. 6, 2011) (hereinafter “Amended Application to Approve Employment of Appraiser”). The Committee requested Walter Allen, a licensed appraiser in the State of Tennessee, at a \$325.00 hourly rate for initial appraisal services and a \$350.00 hourly rate for further consulting work as needed.

³¹⁷ Amended Application to Approve Employment of Appraiser, at 1.

³¹⁸ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Objection by the City of Jackson and Jackson Energy Authority to Amended Application to Approve Employment of Appraiser for Unsecured Creditors Committee Nunc pro Tunc to October 6, 2011, (Dkt. 251) (Oct. 18, 2011).

³¹⁹ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Order Granting Amended Application to Approve Employment of Appraiser For Unsecured Creditors Committee Nunc Pro Tunc to October 6, 2011, (Dkt. 385) (Nov. 29, 2011).

October 19, 2011.³²⁰ All of this trouble was for appraiser fees totaling just \$493.75.³²¹ These fees were approved as administrative expenses³²² to be paid in full.³²³

Throughout the bankruptcy proceedings, the Committee has continued to function dutifully, adding prepetition unsecured creditors³²⁴ when needed and objecting during the sale and lease proceedings when it felt the unsecured creditors would be prejudiced as a whole.³²⁵

g. Relief from Automatic Stay

The first party to request relief from the automatic stay as provided in 11 U.S.C § 362(a)³²⁶ was Gary Grisham, Successor Trustee to the Lyndell B. Harris Testamentary Trust.³²⁷ This

³²⁰ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Minutes - Objection to Generic Application filed by Creditor The Unsecured Creditors Committee to Employ Appraiser. Filed by Creditors City of Jackson, TN, Jackson Energy Authority Hearing scheduled 10/19/2011 at 09:30 AM at Room 342, Jackson, TN. (Seiler, Vincent) Settled. (Oct. 19, 2011).

³²¹ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Application for Administrative Expenses and Motion to Approve Fees of J. Walter Allen, MAI, MRICS, Appraiser, (Dkt. 390) (Dec. 7, 2011). The appraiser would not be needed any further because of the sale and lease being finalized with The Jackson Group and The State of Tennessee/University of Memphis respectively.

³²² The Court approved the expenses pursuant to 11 U.S.C. § 503(b) reading in part that “the actual, necessary costs and expenses of preserving the estate including . . . wages, salaries, and commissions for services rendered after the commencement of the case” shall be allowed as administrative expenses.

³²³ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Order Granting Motion to Approve Fees of Walter J. Allen, MAI, MRICS, Appraiser and to Allow Same as an Administrative Expense, (Dkt. 456) (Feb. 6, 2012) (hereinafter “Order Granting Motion to Approve Fees of Walter J. Allen”).

³²⁴ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Motion Filed by the Unsecured Creditors Committee to Add Prepetition Creditor Pursuant to United States Bankruptcy Rule 1009, (Dkt. 481) (Mar. 23, 2012). The creditor is Kelly & Kelly, P.C., representing the Estate of Marjorie Ann Swift, and an unsecured claim of \$640.00.

³²⁵ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Objection to Motion to Assume Lease or Executory Contract filed by Debtor Lambuth University, Motion For Compromise And Settlement, Generic Motion, Motion to Sell Property Free and Clear of Liens, (Dkt. 212) (October 6, 2011). The Committee even subpoenaed a real estate appraiser, Jack Wade of Wade Associates, for documents relating to any appraisals done on Lambuth’s real property assets in the previous 36 months. *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Subpoena Duces Tecum Issued To Jack Wade Filed by Stephen L. Hughes on behalf of Creditor The Unsecured Creditors Committee, (Dkt. 222) (Oct. 10, 2011). Nothing came of this because the sale and lease were approved at the price and terms negotiated between Lambuth and The Jackson Group and the State of Tennessee/University of Memphis. The Unsecured Creditors Committee in this case is functioning as just a figurehead with no real power even though the touted goal of bankruptcy is to protect the unsecured creditors as best as possible. The Committee really had no chance because the sale and lease have been the main priority of the bankruptcy proceedings from the beginning.

Trust had provided an endowment for Lambuth since 1972.³²⁸ Per the terms of the Trust, should Lambuth “become supported by the state or federal government,”³²⁹ the Trust capital and interest will be distributed to the American Cancer Society;³³⁰ Grisham’s Motion requested relief under 11 U.S.C § 362(d) relating to this term.³³¹ Grisham wanted to bring the Trust property through Madison County, Tennessee, Probate Court to determine the proper termination of the Trust. After notice of a hearing and no subsequent objections, the Court granted Grisham’s Motion.³³²

The next parties to request a relief from stay³³³ were Kasi Jean Bryant, William Todd Bryant, and Kerri Cummings Bryant.³³⁴ The Bryants are plaintiffs in a negligence case filed against Lambuth and seek relief from the automatic stay so their case and a related declaratory judgment action can proceed to conclusion.³³⁵ After notice and a hearing with no objection, the

³²⁶ 11 U.S.C § 362(a).

³²⁷ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Motion for Relief from Automatic Stay by Gary Grisham, Successor Trustee at 1, (Dkt. 140) (August 23, 2011).

³²⁸ *Id.*

³²⁹ *Id.* at 2.

³³⁰ *Id.* These two obligations are noteworthy because Lambuth later fails to comply with both of them giving the Trustee specific reasons to warrant a motion to dismiss the case. *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., United States Trustee’s Motion to Dismiss the Case: Expedited Hearing Requested, (Dkt. 479) (March 22, 2011) (This Motion is discussed in detail in the final section of this document: “Where Lambuth is Now”).

³³¹ This section of the Code provides that, after notice and a hearing, the Court shall grant relief from stay against property in 11 U.S.C. § 362(a) so long as the debtor has no equity in the property and it is not necessary for an effective reorganization.

³³² *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Order Granting Motion for Relief from Automatic Stay by Gary Grisham, Successor Trustee, (Dkt. 191) (Sept. 22, 2011).

³³³ Radian Asset Assurance, Inc. and the Bank of New York Mellon Trust Company, N.A. (one of Lambuth’s two secured creditors) actually filed before the Bryants, however, their filing was not a Motion for Relief from Automatic Stay but an Agreed Order for Relief Granting Relief from Automatic Stay. This Agreed Order was part of the negotiated sale of Lambuth’s assets and is discussed in detail in a later section of this document. *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Agreed Order Granting Relief from Automatic Stay to Radian Asset Assurance, Inc. and the Bank of New York Mellon Trust Company, (Dkt. 408) (Dec. 13, 2011).

³³⁴ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Motion for Relief from Automatic Stay, (Dkt. 408) (Jan. 5, 2012).

³³⁵ *Id.* at 2. The Bryants are seeking relief under 11 U.S.C. § 362(d)(1) but their motion states they are not seeking property of the Lambuth’s bankruptcy estate. However, should the Bryants prevail on their claims, a judgment in their favor is bound to negatively affect the property value of Lambuth’s bankruptcy estate.

Bryants Motion for Relief was granted.³³⁶ However, after notice of the Order granting the Bryants relief from stay, Lambuth filed a Motion to Set Aside Order Granting Relief from Automatic Stay.³³⁷

Lambuth's Motion stated that it "did not object to the relief based upon a mistake in the relief requested."³³⁸ Lambuth thought the Bryants were only seeking insurance funds, not property of the bankruptcy estate.³³⁹ To support its claim that the Order granting relief will prejudice its bankruptcy estate, Lambuth stated that it was unsure at this time whether insurance funds will fully indemnify it and that its bankruptcy estate will bear the litigation costs, which will become administrative expenses, which will ultimately prejudice its other creditors.³⁴⁰ Lambuth objected to the Order granting relief because it was not limited to insurance funds, but Lambuth stated that it would not object to the Order should it be amended to limit the Bryants relief to only insurance funds.³⁴¹ Lambuth requested a hearing before the Court on the matter.³⁴²

The Bryants filed a Response opposing Lambuth's request to set aside the order.³⁴³ As of the date of this paper, the matter is unresolved, but a hearing on the matter is scheduled for May 2, 2012.³⁴⁴

³³⁶ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Motion for Relief from Automatic Stay, (Dkt. 457) (Feb. 7, 2012).

³³⁷ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Motion to Set Aside Order Granting Motion for Relief from Automatic Stay, (Dkt. 463) (Feb. 21, 2012).

³³⁸ *Id.* at 3.

³³⁹ *Supra* note 223 and accompanying text.

³⁴⁰ *Supra* note 226.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Response in Opposition to Motion to Set Aside Order Granting Motion for Relief from Automatic Stay, (Dkt. 478) (Mar. 13, 2012).

³⁴⁴ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Notice of Continuance Update Hearing Deadlines, (no Dkt. No.) (Apr. 18, 2012).

*h. Administrative Expenses*³⁴⁵

There is also a claim for administrative expenses (re)scheduled for a hearing on May 2, 2012³⁴⁶ concerning the City of Jackson's claim for trash collection services totaling \$1,110.16.³⁴⁷ Some of this claim is fees and penalties³⁴⁸ but Lambuth objects to the whole amount,³⁴⁹ stating that the City of Jackson:

1. did not provide services to the estate that were actual or necessary to preserve the estate pursuant to 11 U.S.C. 503(b)(1);³⁵⁰ and
2. is only entitled, at best, to one month's services if in fact they were provided.³⁵¹

Jackson Energy Authority was more fortunate. Its motion³⁵² for administrative expense priority and the full amount of post-petition utility services totaling \$47,652.45³⁵³ was granted without opposition.³⁵⁴

The Tennessee Department of Labor and Workforce also filed a Request for Payment of Administrative Expense³⁵⁵ for employment taxes and unemployment fees totaling \$20,272.86.³⁵⁶

³⁴⁵ *Supra* note 323. The Unsecured Creditors Committee's Motion to approve its appraiser fees as administrative expenses was granted on February 6, 2012. *See Order Granting Motion to Approve Fees of Walter J. Allen*, at 1.

³⁴⁶ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Notice of Continuance Update Hearing Deadlines, (no Dkt. No.) (Apr. 18, 2012).

³⁴⁷ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., City of Jackson, Tennessee, Motion for Administrative Expense Claim, (Dkt. 430) (Dec. 27, 2011). The City of Jackson is filing under 11 U.S.C. § 503(b)(1) which provides administrative priority to claims arising from the "actual, necessary costs and expenses of preserving the estate for commissions for services rendered after the commencement of the case."

³⁴⁸ *Id.* at (Dkt. 430-1) Exhibit 1.

³⁴⁹ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Objection to City of Jackson, Tennessee, Motion for Administrative Expense Claim, (Dkt. 455) (Jan. 7, 2012).

³⁵⁰ *Supra* note 323 at 1.

³⁵¹ *Id.* Lambuth is denying the City of Jackson has provided any post-petition trash collection services.

³⁵² *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Jackson Energy Authority Motion for Administrative Expense Claim, (Dkt. 368) (Nov. 8, 2011). *Supra* note 277. Jackson Energy Authority is also filing under 11 U.S.C. § 503(b)(1) and the prior Agreed Order (Dkt. 118) granting post-petition utility services administrative expense priority.

³⁵³ *Id.*

³⁵⁴ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Order Granting Jackson Energy Authority Motion for Administrative Expense Claim, (Dkt. 429) (Dec. 27, 2011). The Order states that the "expense claim shall be paid as soon as possible from the Debtor's bankruptcy estate."

However, the Department of Labor failed to file a motion requesting that their claim be approved as an administrative expense pursuant to 11 U.S.C. § 501.³⁵⁷ Although it was the first to file a motion regarding administrative expenses, it is now the furthest behind, still having failed to file the missing motion to date.³⁵⁸

i. DIP Financing

There is one notable omission from Lambuth's bankruptcy proceedings: debtor-in-possession³⁵⁹ (DIP) financing.³⁶⁰ Although Lambuth continued to operate its campus (albeit at a much reduced activity level³⁶¹) as a DIP, its lease of its entire campus made it unnecessary to utilize this significant bankruptcy device. According to Lambuth's Schedules, it had only \$5,840.00 in available cash,³⁶² so DIP financing would seem very necessary. However, Lambuth did not need its own cash reserves for very long because the University of Memphis began operating the campus as a sort of "DIP financier" when it began leasing the entire campus (discussed in detail in the next section) just a little more than a month after its Petition was filed.³⁶³

³⁵⁵ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Request for Payment of Administrative Expense, (Dkt. 152) (Aug. 31, 2011).

³⁵⁶ *Id.* It filed pursuant to 11 U.S.C. § 501.

³⁵⁷ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Notice of Required Filing Fee and/or Deficient Filing, (Dkt. 159) (Sept. 2, 2011).

³⁵⁸ *Id.* The Clerk has filed multiple Notices regarding the missing motion (*See* Dkt. 159, 422, 424).

³⁵⁹ *See generally* 11 U.S.C. § 1107. A debtor that continues to operate its business as a fiduciary to the bankruptcy estate.

³⁶⁰ *See generally* 11 U.S.C. § 364. New debt acquired by the DIP during the bankruptcy process to facilitate the DIP's continued operation of its business throughout the bankruptcy process.

³⁶¹ *Supra* notes 256-59 and accompanying text.

³⁶² *Schedules*, at 1-2.

³⁶³ *Order Granting Motion to Lease*, at 1.

The Lease

On July 29, 2011, only four days after Lambuth filed its application to employ Stephen Douglass as its attorney, Lambuth filed an emergency motion requesting that the court authorize it to lease its campus to the State, specifically the State's Board of Regents³⁶⁴ ("Motion to Lease") pursuant to § 363(b).³⁶⁵ Lambuth needed court approval to lease its campus because this lease was clearly outside the ordinary course of Lambuth's business.³⁶⁶ The motion was filed as an emergency motion because it needed to be addressed on an expedited basis due to the fact that Lambuth wanted to lease the campus to the Board of Regents as soon as possible so that the University of Memphis, a Board of Regents member institution operating under its supervision, could immediately take possession of the campus, pay all of the campus's operating expenses, for which Lambuth had no funds and no financing, and make all the preparations necessary to hold fall semester classes on the campus as a Jackson branch of the University of Memphis.³⁶⁷

Earlier on the same day the Motion to Lease was filed, the Tennessee Board of Regents unanimously approved a "working plan" outlining how the Board of Regents would at first lease, and then own, the Lambuth campus and operate the campus as part of the University of

³⁶⁴ The Tennessee Board of Regents was created by the Tennessee legislature in 1972 as the governing body of the State University and Community College System of Tennessee. The Tennessee Board of Regents system consists of 46 institutions of higher learning with a combined annual enrollment of over 200,000 students, making it the nation's sixth largest system of public higher education. The University of Tennessee System is a separate system with its own Board of Trustees. The Board of Regents and the UT Board of Trustees are coordinated by the Tennessee Higher Education Commission. Who We Are, TENNESSEE BOARD OF REGENTS, <http://www.tbr.edu/about/default.aspx?id=804> (last visited April 16, 2012).

³⁶⁵ *Motion to Lease*, at 1.

³⁶⁶ 11 U.S.C. § 363(b); Jonathan P. Friedland et al., *Chapter 11-101, The Nuts and Bolts of Chapter 11 Practice: A Primer*, p. 20 (American Bankruptcy Institute 2007).

³⁶⁷ *Motion to Lease*, at 2, ¶ 5. The University of Memphis wanted to begin holding fall semester classes on the Lambuth campus starting August 2011. *Id.*

Memphis.³⁶⁸ Under the Board of Regents' working plan, the Board would, as quickly as possible so as to not delay the start of classes, enter into a lease agreement with Lambuth whereby the University of Memphis would, for nominal consideration (\$1.00), lease Lambuth's campus and operate the campus as a Jackson satellite campus of the University of Memphis until Lambuth could sell its assets to a local purchasing group.³⁶⁹ Because State officials had decided that State money could not be used to purchase the private university or pay off its debts, the State could not purchase Lambuth directly. As has already been mentioned, for the State to take over the campus, a deal would have to be arranged in which a third party purchasing group would purchase the campus (so that Lambuth could pay off its debts with the proceeds) and then give the campus to the Board of Regents, which would continue to operate the campus through the University of Memphis as a satellite campus.³⁷⁰ The working plan also called for the University of Memphis to accept \$5,000,000 from the State legislature to fund the operation of the campus during the 2011-2012 academic year.³⁷¹ This funding was granted by state law in Public Chapter No. 47, but the funding was contingent on certain requirements being met, most notably that all outstanding debt of Lambuth had to be resolved or paid off from non-state sources before the University of Memphis could receive the funding.³⁷² This requirement only increased the need for a quick sale of Lambuth's assets to a purchaser so that Lambuth's debts

³⁶⁸ Tennessee Board of Regents Minutes, July 29, 2012, at 3-4 (hereinafter "Tennessee Board of Regents Minutes"). The working plan was greatly influenced by the Tennessee Higher Education Commission's Lambuth Campus Feasibility Study which endorsed the acquisition of Lambuth's assets by the State. *Feasibility Study Part I*, at 4.

³⁶⁹ Tennessee Board of Regents Minutes, July 29, 2011, at 3; *Lambuth Votes*, *supra* note 3.

³⁷⁰ See *Lambuth Votes*, *supra* note 3; See *Feasibility Study Part II*, at 20, 25.

³⁷¹ Tennessee Board of Regents Minutes, July 29, 2011, at 3.

³⁷² See *Feasibility Study Part II*, at 20, 25. The other requirements that had to be met before the University of Memphis could receive the \$5,000,000 appropriation were that an operating budget had to be established by the University of Memphis for the Jackson satellite campus, the funds could not be put towards capital expenses, and the facilities received must be in good serviceable order and free and clear of all liens. *Id.*

could be paid off, allowing the University of Memphis to receive funding for the operation of the campus.

Under the working plan, the University of Memphis would operate the campus as a full-service campus and provide student housing, food service, and classes to at least 250 students.³⁷³ The Board of Regents' approval of the working plan on July 29, 2011³⁷⁴ and the Tennessee Higher Education Commission's recommendation that the State acquire the Lambuth Campus in its Lambuth Campus Feasibility Study on July 28, 2011³⁷⁵ served as a "green light" for Lambuth to sell its assets to the local purchasing group, subject to the approval of the bankruptcy court. Expecting a sale of its assets to be eventually approved by the bankruptcy court, the Lambuth Board of Directors had already voted on June 30, 2011 to accept a tentative proposal from a local purchasing group to purchase the campus for \$7.9 million.³⁷⁶ However, to consummate the proposed deal between Lambuth, the local purchasing group, and the State, Lambuth needed to follow the working plan precisely and immediately lease its campus to the State so that the University of Memphis could begin shouldering the campus's operating and maintenance expenses.

With these considerations in mind, Lambuth explained to the court that the proposed lease of its campus to the State for its immediate use should be approved because the lease was the critical first step of a larger plan to sell substantially all of its assets to a local ownership group which would then transfer them to the State once Lambuth's debts were paid.³⁷⁷ In order to

³⁷³ Tennessee Board of Regents Minutes, July 29, 2011, at 3.

³⁷⁴ Tennessee Board of Regents Minutes, July 29, 2011, at 4.

³⁷⁵ *Feasibility Study Part I*, at 4, ¶ 3.

³⁷⁶ *See Lambuth Votes*, *supra* note 3.

³⁷⁷ *Motion to Lease*, at 2, ¶¶ 4-5. Lambuth directly stated that it was not seeking authority to sell its assets in this motion. *Id.* at 3, ¶ 11.

persuade the court to approve a proposed lease outside the ordinary course of business under §363(b), courts require that the debtor demonstrate that there is a “sound business reason” or “business justification” for approving the lease.³⁷⁸ Lambuth highlighted the lease’s importance to a larger plan that would ultimately maximize value for the estate as the business justification for why the court should approve of the lease.³⁷⁹

Lambuth also offered two other business justifications for the proposed Lease not based on the lease’s importance to the eventual sale. First, Lambuth argued that the proposed lease should be approved because it was essential to preserving the value of Lambuth’s assets, especially its most important asset—its campus real estate—for its creditors.³⁸⁰ Lambuth asserted that its 50 acre campus and 28 buildings³⁸¹ would begin to degrade and lose value if they were to sit empty for a substantial period of time.³⁸² Lambuth stated that since it had ceased all operations as of the filing date³⁸³ and had no ability to conduct any operations on campus or pay operating expenses due to its financial position,³⁸⁴ diminution of the campus was inevitable without an immediate lease or sale to an entity like the State that could pay to operate and maintain the campus.³⁸⁵ Accordingly, Lambuth claimed that the proposed lease “[was] crucial to the

³⁷⁸ Hon. J. Vincent Aug et al., *The Plan of Reorganization: A Thing of the Past?*, 13 J. BANKR. L. & PRAC. 4, Art. 1 (2004). The business justification test was established in *In re Lionel Corp.*, 722 F.2d 1063. (2d Cir. 1983) and adopted in the Sixth Circuit by *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986). See Elizabeth B. Rose, Comment, *Chocolate, Flowers, and § 363(b): The Opportunity for Sweetheart Deals Without Chapter 11 Protections*, 23 EMORY BANKR. DEV. J. 249, 271 (2006).

³⁷⁹ *Motion to Lease*, at 2, ¶ 5. A sale or lease of the debtor’s assets that will maximize value for the state is an often accepted as a business justification for the sale or lease under § 363. See *Rose, supra* note 378, at 269.

³⁸⁰ *Motion to Lease*, at 2, ¶ 5.

³⁸¹ *Motion to Lease*, at 3, ¶ 9. Among the campus buildings are a library, dormitories, a planetarium and a performing arts center. *Id.*

³⁸² *Motion to Lease*, at 2, ¶ 5.

³⁸³ *Motion to Lease*, at 1, ¶ 3.

³⁸⁴ *Voluntary Petition*, at 1 (showing Lambuth’s total assets and liabilities).

³⁸⁵ *Motion to Lease*, at 3, ¶ 10.

preservation and maximization of [its] assets.”³⁸⁶ This argument takes advantage of the tendency of bankruptcy judges to approve § 363 sales and leases where they believe “time is of the essence” because a business’s assets are quickly declining in value and where the sale or lease will help preserve the value of the business simply by allowing the business to continue to operate.³⁸⁷

Second, Lambuth asserted that the societal benefits and job retention effects of having the campus in use justified the proposed lease. This argument has been successful in persuading judges to approve § 363 sales and leases in other cases.³⁸⁸ If unused during the bankruptcy period, Lambuth suggested that its impressive campus would be a wasted resource in an area in need of an accredited four-year university.³⁸⁹ Lambuth emphasized how leasing the campus immediately so that classes could resume would have a positive effect on the whole community: “The Lease will allow the necessary time to complete the sale of the assets and provide the community the stability and benefits of a higher institution of learning.”³⁹⁰ Lambuth also emphasized that keeping the campus operating via the proposed lease would allow the former Lambuth University employees, educators, and maintenance personnel to keep their jobs as they would likely be retained in their present capacities by the University of Memphis, not an insignificant point in light of Madison County’s high unemployment rate.³⁹¹

a. Lease Terms

³⁸⁶ *Motion to Lease*, at 3, ¶ 10.

³⁸⁷ Rose, *supra* note 378, at 270-71; Hon William T. Bodoh et al., The Parameters of the Non-Plan Liquidating Chapter Eleven: Refining the Lionel Standard, 9 BANKR. DEV. J. 1, 8-12 (1992).

³⁸⁸ Rose, *supra* note 378, at 271; Bodoh et al., *supra* note 387, at 10-11.

³⁸⁹ *Feasibility Study Part 1*, at 9-13.

³⁹⁰ *Motion to Lease*, at 2, ¶ 5.

³⁹¹ *Motion to Lease*, at 3, ¶ 12; *Feasibility Study Part 1*, at 10.

The proposed lease document was very short at just over one and one-half pages in length, unlike a standard commercial lease of even one building, which can easily be between 30 and 100 pages long, with exhibits.³⁹² The lease was for a term of one year, but the term could be terminated at any time by the State upon 30 days notice.³⁹³ Interestingly, the term could be extended for 30 day increments indefinitely because the lease did not prohibit the University of Memphis from holding over at the end of the term.³⁹⁴ Also noteworthy was the amount of rent Lambuth charged: the lease gave the State the right of possession to all of Lambuth's titled real estate in return for consideration of one dollar and payment for all operating expenses, including utilities, required by the premises during the term of the lease.³⁹⁵ In addition, the lease provided that the State was responsible for all repair and maintenance of the premises during the lease term,³⁹⁶ but Lambuth retained responsibility for all property taxes during the lease term.³⁹⁷

b. Objection by Radian

Radian Asset Assurance, Inc. ("Radian") filed an objection to Lambuth's Motion to Lease one day before Lambuth and the local Purchaser executed the Purchase and Sale Agreement (the "Agreement").³⁹⁸ As a contingent creditor, Radian had an interest in the bankruptcy proceeding because Radian insured payment to bondholders of principal and interest on the 1995 Series A and Series B Bonds issued by the City of Jackson (the "Issuer") for the benefit of Lambuth

³⁹² *Motion to Lease*, at 6-7.

³⁹³ *Motion to Lease*, at 6, §§ 3-4.

³⁹⁴ *Motion to Lease*, at 7, § 17.

³⁹⁵ *Motion to Lease*, at 6, 7, §§ 4, 15.

³⁹⁶ *Motion to Lease*, at 7, § 12.

³⁹⁷ *Motion to Lease*, at 8, § 20.

³⁹⁸ *Radian's Objection to Motion to Lease*, at 1.

University.³⁹⁹ The tax-exempt bonds were issued pursuant to an Indenture of Trust (the “Indenture”) between the Issuer and the predecessor in trust to BNY Mellon as trustee.⁴⁰⁰ The Issuer lent the proceeds from the sale of the tax-exempt Bonds to Lambuth pursuant to a Loan and Security Agreement (the “Loan Agreement”), signed September 1, 1995, between Lambuth and the Issuer, and the Issuer assigned its rights in the Loan Agreement to BNY Mellon as security for the repayment of the Bonds.⁴⁰¹ In addition to the loss of its accreditation⁴⁰² and its inability to continue funding its operating expenses due to dwindling cash reserves,⁴⁰³ Lambuth’s inability to service its bond debt was the impetus behind its bankruptcy filing.

c. Background on the Bonds

Under the Loan Agreement, Lambuth was required to make payments to BNY Mellon in amounts sufficient to pay the principal of and interest on the Bonds (such payments, together with other required payments under the Loan Agreement, the “Loan Payments”).⁴⁰⁴ Lambuth’s obligation to make the Loan Payments due on the Bonds was secured by a senior lien on five of Lambuth’s campus buildings, certain personal property, and a negative pledge on all of

³⁹⁹ *Joinder of Trustee to Radian’s Response to Motion to Sell*, at 1-2, ¶1; *see also supra* note 74 and accompanying text.

⁴⁰⁰ *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Radian Asset Assurance Inc.’s Response to Debtor’s Expedited Motion For Order (A) Authorizing Sale Of Substantially All Estate Assets Free And Clear Of Liens, Claims, Rights, Encumbrances and Interests; (B) Authorizing Assumption And Assignment Of Executory Contracts; (C) Approval of Compromise and Settlement; and (D) Other Related Relief, (Dkt. 221), p.3, ¶11, (Oct. 11, 2011) (hereinafter “Radian’s Response to Motion to Sell”).

⁴⁰¹ *Radian’s Response to Motion to Sell*, at 2, ¶ 5.

⁴⁰² Tennessee Board of Regents Minutes, July 29, 2011, at 2.

⁴⁰³ *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Debtor’s Report Of Operations For Filing Period July 2011, (Dkt. 173), p.3, (Sept. 13, 2011). One of the reasons why Radian filed its Chapter 11 petition at the end of June 2009 was to stay Jackson Energy Authority from terminating Debtor’s utilities due to lack of payment. *See Radian’s Objection to Motion to Lease*, at.8, ¶ 30.

⁴⁰⁴ *Radian’s Response to Motion to Sell*, at 2, ¶ 6.

Lambuth's assets as provided in a Deed of Trust signed on September 1, 1995.⁴⁰⁵ At the time Lambuth filed its Chapter 11 petition, the unpaid principal on the Bonds was approximately \$4,960,000.00.⁴⁰⁶ Furthermore, Lambuth had not made any payments of principal or interest due on the bonds since March 2009.⁴⁰⁷ Overall, Lambuth owed approximately \$5.4 million in principal, interest, attorneys' fees, Trustee's fees, and other expenses due under the Indenture, the Loan Agreement, and the Deed of Trust (collectively, the "Bond Documents") and was clearly in default under the Bond Documents.⁴⁰⁸

d. Reasons for the Objection

Under the Bond Documents, Radian was "authorized to control all rights and remedies thereunder and to direct the Bond Trustee to take such actions as are necessary and appropriate in addressing repayment, collateral, [and] default issues."⁴⁰⁹ Exercising this power, Radian objected to Lambuth's proposed lease in order to protect itself, BNY Mellon, and the bondholders (collectively, the "Bond Estate"). Under the Bond Documents, in the event that Lambuth did not meet its payment obligations on the Bonds, then Radian, as the insurer, would be obligated to make payments of principal or interest on the Bonds to compensate for Lambuth's failure, and Radian's right to receive compensatory payments from Lambuth would

⁴⁰⁵ *Radian's Response to Motion to Sell*, at 2, ¶ 7.

⁴⁰⁶ *Radian's Response to Motion to Sell*, at 2, ¶ 9.

⁴⁰⁷ *Radian's Response to Motion to Sell*, at 2, ¶ 9.

⁴⁰⁸ *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Order Granting Debtor's Expedited Motion For Order (A) Authorizing Sale Of Substantially All Estate Assets Free And Clear Of Liens, Claims, Rights, Encumbrances and Interests; (B) Authorizing Assumption And Assignment Of Executory Contracts; (C) Approval of Compromise and Settlement; and (D) Other Related Relief, (Dkt. 367), p.4, ¶ 8, (Nov. 8, 2011) (hereinafter "Order Granting Motion to Sell").

⁴⁰⁹ *Radian's Objection to Motion to Lease*, at 3, ¶ 11.

be subrogated to the rights of the bondholders.⁴¹⁰ This was troubling to Radian because at the time of Lambuth's Motion to Lease, Lambuth had failed to make any of the monthly payments due on the Bonds in over two years and owed principal payments on the Bonds totaling \$4,960,000 as a result of this failure.⁴¹¹ Also contributing to Radian's concern was Lambuth's request that the court authorize it to lease its 50 acre campus and buildings, which were not only the collateral securing Lambuth's obligation to make payments under the Bonds⁴¹² but also Lambuth's most valuable assets, for nominal consideration. In light of these considerations, it was not surprising that Radian objected to Lambuth's proposed lease and requested a hearing to protect itself.⁴¹³

Radian objected to the proposed lease on several grounds. First, Radian claimed that Lambuth had failed to meet the business justification standard for approving §363 asset leases because it could not demonstrate a sound business reason justifying the lease or that entering into the lease was in the best interests of the estate and its creditors.⁴¹⁴ In support of its assertion, Radian first argued that entering into the proposed lease could not be a valid exercise of business judgment because leasing the campus presented an opportunity for income for the debtor, yet Lambuth was only charging the State rent of one dollar per year.⁴¹⁵ Radian asserted that the rent provision did not serve to preserve the going concern value of Lambuth or to further any of the

⁴¹⁰ *Radian's Objection to Motion to Lease*, at 1, ¶ 3.

⁴¹¹ *Radian's Objection to Motion to Lease*, at 2, ¶ 9-10.

⁴¹² *Radian's Objection to Motion to Lease*, at 2, ¶ 7.

⁴¹³ *Radian's Objection to Motion to Lease*, at 3, ¶ 11.

⁴¹⁴ *Radian's Objection to Motion to Lease*, at 5, ¶ 19. The "best interest" test has been used occasionally instead of the more-often used business justification test for approval of sales and leases outside the ordinary course of business under § 363(b). *See* Rose, *supra* note 378, at 269.

⁴¹⁵ *Radian's Objection to Motion to Lease*, at 5, ¶ 19.

other often-cited business justifications for a lease, such as saving money for the estate or preventing further decline of the value of the debtor's assets.⁴¹⁶

Second, Radian pointed out the fact that the University of Memphis would only receive the \$5,000,000 appropriation from the Tennessee legislature to support its operations on the Lambuth campus once “all outstanding debt of Lambuth University has been paid off from non-state sources.”⁴¹⁷ To Radian, repayment of the bond debt did not seem likely to imminently occur because Lambuth's only proposal for repaying its Bond debt and its other creditors was through a sale of substantially all of its assets, yet Lambuth had not, to date, received a firm offer for its assets and had been unable to resolve various points of contention between itself and the leading potential purchaser.⁴¹⁸ Because Lambuth currently had no way to pay off its outstanding debt other than by a sale of its assets⁴¹⁹ that did not seem imminent, if the proposed lease was authorized, the University of Memphis would legally possess the campus, yet not be eligible to receive the funding necessary to care for or operate the property.⁴²⁰ This situation could cause the campus to become neglected and preclude other more productive uses of the property. Furthermore, although no other potential bidders expressed interest in purchasing the campus, the lease to the State acted as a lock-up agreement deterring potential purchasers since the State would possess the campus for at least one year in return for nominal consideration. Recognizing that the proposed lease could potentially cause these problems, Radian argued that it was not appropriate for the court to authorize the proposed lease under the current circumstances.

⁴¹⁶ See Bodoh et al., *supra* note 387, at 7-14 (listing various categories of business justification accepted by bankruptcy courts).

⁴¹⁷ *Radian's Objection to Motion to Lease*, at 4-5, ¶ 18; *Feasibility Study Part II*, p.20.

⁴¹⁸ *Radian's Objection to Motion to Lease*, at 3-4, ¶¶14-15.

⁴¹⁹ In its Motion to Sell, Lambuth stated that it “ha[d] no other means to satisfy” its debt due under the Bonds except by a “sale of all or substantially all of its assets.” *Motion to Sell*, p.4, ¶ 12.

⁴²⁰ *Radian's Objection to Motion to Lease*, at 4-5, ¶18.

Radian also objected to the proposed lease on the grounds that the collateral for the Bonds, the five campus buildings, would not be adequately protected due to several provisions in the proposed lease. Under § 363(e), a party having an interest in property that the debtor proposes to lease is entitled to adequate protection of its interest.⁴²¹ This provision is meant to insure that a secured creditor like Radian “receive[s] in value essentially what he bargained for.”⁴²² When necessary, a court can condition the debtor’s authorization to use the collateral on the provision of adequate protection for the secured creditor.⁴²³ Radian explained that it had an interest in the property to be leased because the property served as collateral for the Bonds it insured and that, as a result, it was entitled to seek adequate protection of its collateral.⁴²⁴

The first and most significant aspect of the lease that caused Radian to seek adequate protection was the lack of an insurance provision in the lease.⁴²⁵ In light of Lambuth’s limited funds, the lack of a provision requiring the lessee to insure the property effectively meant that the property would not be insured. Radian also objected to the fact that the State could terminate the lease or surrender the campus without liability in the case of damage or total destruction of the campus by fire or other casualty.⁴²⁶ Radian surely recognized that failing to have its collateral adequately insured could expose the Bond Estate to great loss. Radian also objected to the clause in the proposed lease allowing the State to hold over after the one-year term lapsed.⁴²⁷

Radian asserted that this could allow the University of Memphis to use the campus free of charge

⁴²¹ 11 U.S.C. § 363(e).

⁴²² See *La Jolla Mortgage Fund v. Rancho El Cajon Associates*, 18 B.R. 283, 286 (Bankr. S.D. Cal.1982).

⁴²³ Friedland et al., *supra* note 366, at 33. The adequate protection entitlement “is constitutionally mandated to protect the creditor’s property interest (the security interest) from being taken without ‘just compensation’ under the 5th Amendment.” ROBERT M. LLOYD & GEORGE W. KUNEY, *SECURED TRANSACTIONS*, 405 (2008).

⁴²⁴ *Radian’s Objection to Motion to Lease*, at 5, ¶20.

⁴²⁵ *Radian’s Objection to Motion to Lease*, at 7, ¶26.

⁴²⁶ *Motion to Lease*, at 7, §§10, 14.

⁴²⁷ *Motion to Lease*, at 7, §17.

indefinitely if a purchase agreement between Lambuth and the local buyers ultimately could not be consummated.⁴²⁸

Radian also expressed concern about the contract provision giving the State the right to sublet the campus.⁴²⁹ If the State were to sublet the campus to a third party, Radian argued that its collateral could be occupied and mistreated by third parties “further removed from oversight by this Court.”⁴³⁰ In addition, Radian objected that the lease did not require the State to restore the campus at the end of the lease to the condition the campus was in when the lease began.⁴³¹ Radian asserted that the absence of such a provision subjected its collateral to the risk of uncompensated alterations.⁴³² Furthermore, Radian expressed concern that the wording of the proposed lease might allow the State to pay only the operating and maintenance expenses of the campus buildings it chose to operate rather than the operating and maintenance expenses for the entire campus.⁴³³ Finally, Radian also expressed its unease that the lease contained no provision relating to security for the extensive 51 acre campus.⁴³⁴

e. Bank of New York Mellon’s Joinder to the Objection

BNY Mellon joined Radian’s objection the day it was filed and also asked the court to deny Lambuth’s Motion to Lease.⁴³⁵ As explained above, BNY Mellon was an interested party

⁴²⁸ *Radian’s Objection to Motion to Lease*, at 5-6, ¶ 21.

⁴²⁹ *Motion to Lease*, at 6, §7.

⁴³⁰ *Radian’s Objection to Motion to Lease*, at 8, ¶ 31.

⁴³¹ *Radian’s Objection to Motion to Lease*, at 7, ¶ 27.

⁴³² *Radian’s Objection to Motion to Lease*, at 7, ¶ 27.

⁴³³ *Radian’s Objection to Motion to Lease*, at 8, ¶¶ 29-30. The University of Memphis indicated that it would not be utilizing all of Lambuth’s 50 acre, 19 building campus immediately. *See Feasibility Study Part I*, at 18 (“as enrollment expands and [the University of Memphis] begins to utilize more of the space on the Lambuth campus”).

⁴³⁴ *Radian’s Objection to Motion to Lease*, at 8, ¶ 32.

⁴³⁵ *Joinder of the Trustee to Radian’s Objection to Motion to Lease*, at 1.

because it was the trustee for the Bonds and because Lambuth was required to make principal and interest payments on the Bonds to it under the Loan Agreement.⁴³⁶ BNY Mellon echoed Radian’s concerns by asserting that no sound business purpose justified the sale and that its security interest in the campus buildings was not adequately protected under the proposed lease⁴³⁷

f. Revised Lease Agreement

Two days after Radian and BNY Mellon filed their objections, Lambuth and the State modified the terms of their proposed lease in response to the objections.⁴³⁸ The revised proposed lease stated that the State could sublet the premises only with the approval of the bankruptcy court.⁴³⁹ Like the old lease, the revised lease required the State to return the premises “in as good order and condition as when received,” but the revised lease removed the adjoining phrase “damage by earthquake, fire, public calamity, the elements, acts of God, or circumstances over which the State has no control or for which Lessor is responsible pursuant to this lease, excepted,” thus shifting liability for repairing any damages to the premises caused by weather or natural disaster to the State. This is not an insignificant detail in West Tennessee, which is often subject to tornados and other violent weather.⁴⁴⁰ Notably, the original hold over provision was also removed from the revised lease.⁴⁴¹ A use provision was added to the lease restricting the State’s use of the premises to “a University of Memphis campus” and requiring the State to

⁴³⁶ *Joinder of the Trustee to Radian’s Objection to Motion to Lease*, at 2, ¶ 2.

⁴³⁷ *Joinder of the Trustee to Radian’s Objection to Motion to Lease*, at 6, ¶ 3.

⁴³⁸ *Revised Proposed Lease*, at 1.

⁴³⁹ *Revised Proposed Lease*, p.4, § 7.

⁴⁴⁰ *Revised Proposed Lease*, p.4, § 10.

⁴⁴¹ *Revised Proposed Lease*, p.4, § 10.

“offer classes during the lease term.”⁴⁴² This added provision should have allayed fears the Bond Estate may have had about the State squatting on the campus without using it in the event a sale agreement could not be reached. Finally, a provision was added stating that the State would insure the campus during the lease period through the State’s Risk Management Program.⁴⁴³ These changes to the proposed lease should have mooted Radian and BNY Mellon’s concerns about the lack of an insurance provision and the lack of requirement that the State hold classes on the campus as well as their concerns about the State’s ability to hold over indefinitely, to sublet the campus, and to avoid repairing damage to the campus caused by a fire or a natural disaster. However, their concerns regarding the nominal consideration charged in rent, the University of Memphis’s eligibility to receive funding, the State’s ability to make alterations to the campus, the State’s ability to avoid paying operating and maintenance expenses on the campus buildings it chooses not to operate, and the lack of security procedures for the campus remained unremedied after the lease revisions.

g. Motion to Lease is Granted

After granting Lambuth’s motion to reduce the 20 day period for the notice of and hearing on its emergency Motion to Lease for good cause pursuant to Fed. R. Bankr. P. 2002(a)(2) and 9006 and holding a hearing on the motion, the court granted the Motion to Lease.⁴⁴⁴ As requested by Lambuth, the court also waived the 14 day stay on the effectiveness of its order

⁴⁴² *Revised Proposed Lease*, p.5, § 21. The provision provided: “The State shall use the premises as a University of Memphis campus and offer classes during the lease term.” *Id.*

⁴⁴³ *Revised Proposed Lease*, p.5, § 22. The provision provided: “The State’s risk of loss to the premises during the lease period shall be provided for through the State’s Risk Management Program.” *Id.*

⁴⁴⁴ *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Order Granting Motion To Shorten Time for hearing on Motion for an Order Authorizing Debtor to Enter into Lease Of Premises to the State, Board of Regents, (Dkt. 97) (Aug. 1, 2011); *Order Granting Motion to Lease*, at 1.

pursuant to Fed. R. Bankr. P. 60004(h) so that the lease could close immediately.⁴⁴⁵ In its two page order, the court found that the proposed lease was in the best interest of Lambuth, its creditors, interested parties, and the estate and that Lambuth demonstrated sufficient business reasons and judgment in entering into the Lease.⁴⁴⁶ Interestingly, although the court waived the 14 day stay of effectiveness, the court did not make an explicit finding of good faith in connection with the lease such that an appeal of the lease order after the consummation of the lease would have been moot under § 363(m),⁴⁴⁷ most likely because Lambuth never requested a “good faith” finding in its Motion to Lease. Failing to request a “good faith” finding is odd and out of keeping with standard practice nationwide.

However, as allowed by § 363(e), the court imposed three conditions on the proposed lease to insure that the Bond Estate’s interest in the campus was adequately protected.⁴⁴⁸ The court’s approval of the Lease was subject to the following three conditions, two of which were already contained in the revised proposed lease: (1.) The campus had to be insured by the State’s risk management program upon the execution of the Lease; (2.) BNY Mellon, as trustee, and Lambuth had to be loss payees on any such type of insurance or risk coverage; and (3.) The property could not be sublet by the State without the court’s approval.⁴⁴⁹

The § 363 Sale

⁴⁴⁵ *Order Granting Motion to Lease*, at 2, ¶ 7.

⁴⁴⁶ *Order Granting Motion to Lease*, at 1, ¶ 5.

⁴⁴⁷ Pursuant to § 363(m), an appeal of a lease order will likely be rendered moot if the lease has been consummated, if the requisite findings of good faith were made and no stay of the order is granted prior to the closing of the lease. Friedland et al., *supra* note 366 at 223; George W. Kuney, *Selling a Business in Bankruptcy Court Without a Plan of Reorganization*, 18 CEB Cal. Bus. L. Pract. 57, 58 (Summer 2003).

⁴⁴⁸ *Order Granting Motion to Lease*, at 3, ¶ 6. Under 11 U.S.C. § 363(e), upon a request from a secured creditor who has an interest in the property to be sold or leased, the court can “condition the debtor’s right to use or sell or lease collateral upon provision of adequate protection to the secured creditor.” Friedland et al., *supra* note 366, at 33.

⁴⁴⁹ *Order Granting Motion to Lease*, at 2, ¶ 6.

In light of the events and negotiations that occurred before Lambuth filed its Chapter 11 petition,⁴⁵⁰ Lambuth entered bankruptcy with a plan to quickly sell its campus free and clear of all liens and encumbrances to a pre-arranged local white knight purchasing group who would then benevolently give the campus to the State so that the 168-year-old institution could continue having a valuable educational and economic impact on the Jackson area, albeit under a different name. With a sale of all of its assets free and clear of all liens as its goal, it is natural that Lambuth would choose to sell itself in bankruptcy through a pre-confirmation § 363(b) sale, a technique that has become very popular.⁴⁵¹ In fact, a Chapter 11 debtor like Lambuth whose goal is to sell its assets free and clear “will generally proceed straight to a preplan sale before (if ever) engaging in the costly and time consuming process of proposing, confirming, and consummating a plan of reorganization.”⁴⁵² The preplan § 363 sale is attractive to both debtor’s and purchasers because it is a “speedy, effective way to sell [assets] free and clear of liabilities, known or unknown, that would otherwise follow the assets . . . into the hands of the purchaser.”⁴⁵³ It is an “efficient alternative to the costly and lengthy plan confirmation process,”⁴⁵⁴ and unlike the a plan confirmation process, “the non plan § 363 sale procedures

⁴⁵⁰ See *supra* notes 150-155 and accompanying text; see also *Answers to FAQs about Lambuth University*, THE MEMPHIS CONFERENCE OF THE UNITED METHODIST CHURCH (Apr., 21, 2012), <http://memphissite.brickriver.com/news/detail/933> (stating Lambuth’s goal of selling itself to another university so that Lambuth’s debts would be paid off and so that the university would continue to exist and provide benefits to Jackson and Madison County); Tom Humphrey, *Lambuth Now Official Part of University of Memphis*, KNOXVILLE NEWS SENTINEL, Dec. 21, 2011, <http://blogs.knoxnews.com/humphrey/2011/12/lambuth-now-official-part-of-u.html> (stating that the purchase agreement for the Lambuth campus had “been in the works for more than a year.”)

⁴⁵¹ See George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 Am. Bankr. L.J. 235, 235 (2002) (finding that a shifting interpretation of Chapter 11 has resulted in bankruptcy courts becoming *the* forum of choice for sales of businesses, troubled or not); see also Aug. *supra* note 378 (finding that in 2002, 84% of all debtors entered bankruptcy with a deal in hand or utilized the bankruptcy court to sell the assets of the business).

⁴⁵² Friedland et al., *supra* note 366, at 223.

⁴⁵³ Kuney, *Selling a Business*, *supra* note 447, at 58.

⁴⁵⁴ George W. Kuney, *Let's Make It Official: Adding an Explicit Pre-Plan Sale Process as an Alternative Exit from Chapter 11*, 40 HOUSTON L. Rev. 1265, 1270 (2004).

require little in the way of notice, disclosure, or an opportunity for objectors or alternate bidders to actually be heard.”⁴⁵⁵

Utilizing a preplan §363 sale in Chapter 11 was the most efficient way Lambuth could have sold itself free and clear of all liens and encumbrances, a prerequisite for completing its pre-negotiated deal with the State.⁴⁵⁶ Like any buyer in a § 363 sale, the State found the § 363 sale to be very attractive because it would allow the State to achieve its primary objective of obtaining good title to the campus free and clear of any liens, claims, or interests.⁴⁵⁷ Such a sale was also attractive because it would allow cash-strapped Lambuth to avoid having to go through the time and expense of convincing creditors to approve a plan.⁴⁵⁸ Because Lambuth had lost its accreditation and had virtually no hope of pulling itself out of debt due to its severe financial problems,⁴⁵⁹ the speed of a § 363 sale⁴⁶⁰ allowed Lambuth to maximize the value of its campus and allowed the State to quickly take over the campus and continue Lambuth’s tradition of offering accredited higher education in an area of the state clearly in need of it.⁴⁶¹ In that sense, the § 363 sale of Lambuth was similar to a sale of a business to a competitor who then reopens the business under his own name.

⁴⁵⁵ Kuney, *Selling a Business*, *supra* note 447, at 58.

⁴⁵⁶ Both the Tennessee Board of Regents’ Working Plan and the Tennessee legislature’s \$5,000,000 appropriation to the University of Memphis to fund operations on the Lambuth campus were contingent on the State being able to obtain the Lambuth campus from the local purchaser free and clear of any liens and encumbrances. See Tennessee Board of Regents Minutes, July 29, 2011, at 3 and Feasibility Study Part II, at 1; Bill Dries, Jackson City Council Moves to Buy Lambuth Campus, MEMPHIS DAILY NEWS, August 3, 2011, available at <http://www.memphisdailynews.com/editorial/Article.aspx?id=60746>.

⁴⁵⁷ See *BAP Casts Shadow Over 363(f) “Free and Clear” Sale Orders—Especially for Lender’s Credit Bid under 363(k)*, Cooley, Godward & Kronish, Absolute Priority, Fall 2008, at 6, http://www.cooley.com/files/AbsolutePriority_200810.pdf.

⁴⁵⁸ Friedland et al., *supra* note 366, at 224.

⁴⁵⁹ *Motion to Sell*, at p.2, ¶ 6.

⁴⁶⁰ A major advantage of a § 363 sales is that they “can be accomplished very quickly, generally taking between two to three months to complete.” Douglas E. Deutsch & Michael G. Distefano, *The Mechanics of a § 363 Sale*, 30 AM. BANKR. INST. J. 48, 48 (2011).

⁴⁶¹ *Feasibility Study Part I*, at 9-10.

a. Motion to Sell

On August 4, 2011, almost seven weeks before Lambuth’s Motion to Sell was filed, Lambuth entered into a Purchase and Sale Agreement (the “Sale Agreement”) with the City of Jackson, Madison County, and the Industrial Development Board of the City of Jackson (collectively the “Purchaser”) in which the Purchaser agreed to purchase substantially all of the Lambuth’s assets and then convey those assets to the State.⁴⁶² The Sale Agreement stated that the sale of Lambuth’s assets was contingent on the bankruptcy court’s approval.⁴⁶³ On September 20, 2011, Lambuth filed a motion requesting that the court, after a notice and hearing, approve of the debtor’s “sale of substantially all estate assets free and clear of all liens, claims, rights, encumbrances, and interests”⁴⁶⁴ pursuant to § 363(b)(1) and Fed. R. Bank. P. 6004 of the Federal Rules of Bankruptcy, which permit sales of the debtor’s property outside of the ordinary course of business by private sale.⁴⁶⁵

b. Sale Terms

Under the terms of the eleven page Sale Agreement, the Purchaser agreed to pay as consideration for Lambuth’s assets \$7,900,000—\$7,400,000 million for Lambuth’s Real Estate

⁴⁶² *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Purchase and Sale Agreement. (Dkt. 182-1), P. 9-10, (Sept. 20, 2011) (hereinafter “Purchase and Sale Agreement”); *see also* Dries, *supra* note 456 (describing the general terms of the sale and how much money each member of the local purchasing group would contribute).

⁴⁶³ *Purchase and Sale Agreement*, at 3, § 3.7.

⁴⁶⁴ *Motion to Sell*, at 1.

⁴⁶⁵ 11 U.S.C. 363(b)(1) provides, in relevant part: “The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate”; Fed. R. Bank. P. 6004(f)(1) reads: “All sales not in the ordinary course of business may be by private sale or by public auction.”

and \$500,000 for the personalty located on the Real Estate.⁴⁶⁶ The Agreement provided that in exchange for the purchase price, Lambuth would deliver to the Purchaser a general warranty deed, a bill of sale transferring all personalty, and all other documents, writings, and instruments requested by the Purchaser.⁴⁶⁷ Certain assets, among others, were excluded from the purchase: Lambuth's bank deposits, donations or gifts receivable or in process, stocks, bonds, notes, any marketable securities, investment accounts, trust accounts, and business records.⁴⁶⁸ The Agreement provided that the closing of the sale would occur no later than 20 days following the date on which the last of the following events occurred: (1.) the entering of an order by the court approving the proposed sale terms; (2.) approval of the Sale Agreement by the governing bodies of the City of Jackson, Madison County, and the Industrial Development Board of Jackson, the three groups comprising the Purchaser; (3.) approval of the seller's title insurance, inspection of the property, and submission of notification by the State that it is ready to "take title of all [Lambuth's] [p]roperty for use as a University of Memphis educational facility"; and (4.) approval by the Tennessee Attorney General of the transfer of Lambuth's assets pursuant to the terms of the Sale Agreement.⁴⁶⁹ If any of these events did not occur by January 31, 2012, Lambuth and the Purchaser would have had no further obligations to each other.⁴⁷⁰

Interestingly, there was no "break-up" fee or expense reimbursement provision to compensate the Purchaser for any out-of pocket expenses incurred in connection with the

⁴⁶⁶ *Purchase and Sale Agreement*, at 2, §§ 2.1-2.2.

⁴⁶⁷ *Purchase and Sale Agreement*, at 4, § 5.1.

⁴⁶⁸ *Purchase and Sale Agreement*, at 11, Schedule 1.2.

⁴⁶⁹ *Purchase and Sale Agreement*, at 4-5, § 6.1.

⁴⁷⁰ *Purchase and Sale Agreement*, at 5, § 6.

proposed sale in the event that another party ultimately purchased the assets.⁴⁷¹ The absence of such a provision was likely due to the fact that no other purchaser was interested in putting up millions of dollars to buy and then give away Lambuth’s assets as well as the parties’ desire to keep the transaction simple and efficient. The Agreement contained neither a “window shop” clause allowing Lambuth to receive unsolicited bids nor a “no shop clause” prohibiting Lambuth from soliciting other bids or negotiating with other bidders.⁴⁷² Understandably, the agreement imposed virtually all the closing costs on the Purchaser.⁴⁷³ All property taxes, utility charges, and lease rents (if any) were to be prorated as of the closing date of the sale.⁴⁷⁴ In addition, the Agreement stated that all leases and contracts pertaining to the campus would be assigned to the Purchaser at the closing of the sale.⁴⁷⁵ Notably, the Agreement did not impose on the Purchaser any requirement that it offer employment to current Lambuth employees, even though Lambuth had implied that the State would make such an offer in its Motion to Lease.⁴⁷⁶ The agreement also did not provide the Purchaser with a release preventing it from inheriting liability from Lambuth, although generally, a purchaser of substantially all of the seller’s assets for fair consideration does not assume the seller’s liabilities, absent an agreement to do so.⁴⁷⁷

c. Lambuth’s Business Justification for the § 363 Sale

⁴⁷¹ See Aug et al., *supra* note 378. Such expenses may include attorney’s fees, accounting fees, bank commitment fees, and other associated costs, such as appraisals, as well as compensation for time and lost opportunity costs. *Id.*

⁴⁷² See Aug et al., *supra* note 378. “No shop” clauses are generally not approved by bankruptcy courts because they restrict the maximum benefit to be gained from a sale of assets. *Id.*

⁴⁷³ *Purchase and Sale Agreement*, at 5, § 6.3.

⁴⁷⁴ *Purchase and Sale Agreement*, at 5, § 6.4.

⁴⁷⁵ *Purchase and Sale Agreement*, at 2, § 3.3.

⁴⁷⁶ *Motion to Lease*, at 3, ¶ 12.

⁴⁷⁷ Kuney, *Selling a Business*, *supra* note 447, at 63.

In its Motion to Sell, Lambuth requested that the court authorize it to “consummate and carry out” the sale of its campus according to the terms contained in the Sale Agreement.⁴⁷⁸ As with its proposed lease, Lambuth’s proposed sale was outside the ordinary course of business and thus needed the authorization of the court.⁴⁷⁹ Lambuth asked that the court “approv[e] the sale of [its A]ssets free and clear of all liens, claims, and encumbrances.”⁴⁸⁰ To provide the Purchaser with the good faith purchaser protections of § 363(m) such that any potential appeals of the sale would be moot⁴⁸¹ and to reduce the risk associated with successor liability in a sale,⁴⁸² Lambuth also requested that the court make a finding in its order that the “Purchaser is a good faith purchaser of [Lambuth’s] assets,” that the “terms of the sale are fair and reasonable[] and the Purchaser is paying reasonably equivalent value for the [a]ssets,” and that the “settlement with Radian [is] fair and equitable and in the manifest best interest of the estate.”⁴⁸³

In justifying its proposed private sale, Lambuth turned to the predictable refrain of the sound business purpose test, “the dominant standard for assessing asset sales outside the ordinary course of business pursuant to § 363(b).”⁴⁸⁴ As with leases, under § 363(b), a bankruptcy court can authorize a sale of substantially all of a debtor's assets when a sound business purpose justifies such an action.⁴⁸⁵ When finding that an articulated business reason justifies a sale,

⁴⁷⁸ *Motion to Sell*, at 13, ¶ 1.

⁴⁷⁹ 11 U.S.C. § 362(a); Friedland et al., *supra* note 366, at 20.

⁴⁸⁰ *Motion to Sell*, at 14, ¶ 4.

⁴⁸¹ Aug et al., *supra* note 378; Friedland et al., *supra* note 366, at 222, 223.

⁴⁸² Robert G. Sable et al., *When the 363 Sale Is the Best Route*, 15 J. BANKR. L. & PRAC. 121, 137 (2006).

⁴⁸³ *Motion to Sell*, at 14, ¶ 5-7.

⁴⁸⁴ Rose, *supra* note 378, at 268. 11 U.S.C. 363(b) does not state what standard a court should apply when deciding whether the court should approve a particular proposed sale.

⁴⁸⁵ As explained at *supra* note 15, this rule was established by *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) and *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986).

bankruptcy courts are given “wide latitude in approving even a private sale of all or substantially all of the estate assets not in the ordinary course of business under § 363(b).”⁴⁸⁶

Lambuth made many general statements about itself, but offered few details, in support of its assertion that a sound business purposed existed for the sale:

[A] prompt asset sale is necessary based upon consideration of many factors, including its rapidly accumulating losses, very modest and dwindling cash reserves, defaults under its secured debt, accumulation of unpaid trade debt, its cessation of academic affairs due to the loss of accreditation, and its inability to obtain new equity or debt financing.⁴⁸⁷

By pointing out its low cash reserves, its loss of accreditation, and the severe financial problems it had been having for decades, Lambuth characterized itself as a hopeless wasting asset that would continue to lose value, resulting in material adverse harm to creditors, if left unused. In light of these facts and the reality that it would not be able to retire the secured debt owed on its Bonds by any means other than an asset sale,⁴⁸⁸ Lambuth argued that, in its business judgment, a prompt asset sale to a financially capable buyer “represent[ed] the best manner in which to preserve the going concern and maximize value to creditors.”⁴⁸⁹ Furthermore, Lambuth asserted that the costs of additional litigation, estate administration, and the normal plan process would only drain more funds from the estate.⁴⁹⁰ Lambuth was wise to make the argument that an immediate sale would avoid administrative costs and prevent further decline in value of a wasting asset (the “time is of the essence” justification) because courts often find these reasons

⁴⁸⁶ *In re Ancor Exploration Company*, 30 B.R. 802, 808 (Bankr. N.D. Okla.1983)

⁴⁸⁷ *Motion to Sell*, at 9, ¶ 38.

⁴⁸⁸ *Motion to Sell*, at 4, ¶ 12.

⁴⁸⁹ *Motion to Sell*, at 9, ¶ 38.

⁴⁹⁰ *Motion to Sell*, at 4, ¶ 12.

to be sufficient business justifications.⁴⁹¹ Lambuth also asserted that its proposed sale was justified by a sound business purpose because creditors would benefit more from a sale of Lambuth's campus as a going concern rather than from a piecemeal sale of its assets.⁴⁹² This argument has also been used effectively in bankruptcy courts as sales that preserve and capture the going concern value of the business for the benefit of the estate are generally found to be sound business justifications.⁴⁹³ The business justifications for the sale offered by Lambuth are indeed sound business reasons for a sale:

By selling the assets of a business as a unit, rather than in a piecemeal liquidation, going concern value can be captured for the benefit of the estate. Further, by reducing the assets of the estate to cash . . . or some other similar form of fungible valuable consideration, the tasks and costs of postsale management and administration of a debtor and its estate can be dramatically reduced.⁴⁹⁴

Finally, Lambuth also asserted the social benefits justification that judges are often resonates with judges⁴⁹⁵ when it declared that the local educational and economic advantages of having the Lambuth campus operating as an accredited, four-year state university rather than wasting away as unoccupied buildings served as a sound business reason for the sale.⁴⁹⁶

In addition to the sound business reasons for the sale, Lambuth also offered two other justifications for the sale: the sale was the result of good faith negotiations, and the purchase

⁴⁹¹ See Deutsch & Distefano, *supra* note 460, at 48; Rose *supra* note 378, at 269-71; Bodoh et al., *supra* note 387, at 7-9.

⁴⁹² Motion to Sell, at 8, ¶ 35.

⁴⁹³ Kuney, Let's Make It Official, *supra* note 454, at 1270; Rose, *supra* note 378, at 271; Bodoh et al., *supra* note 387, at 10-11.

⁴⁹⁴ Kuney, Let's Make It Official, *supra* note 454, at 1270-71.

⁴⁹⁵ Rose, *supra* note 378, at 271; Bodoh et al., *supra* note 387, at 10.

⁴⁹⁶ See *Answers to FAQs about Lambuth University*, *supra* note 450; Humphrey, *supra* note 450.

price was fair and reasonable.⁴⁹⁷ These two factors are considered by courts when deciding whether to approve of a sale of substantially all the assets, and their presence supports a finding that the sale should be allowed.⁴⁹⁸ Lambuth asserted that the offer from the Purchaser was the result of extensive, arms-length negotiations made in good faith over the course of many weeks.⁴⁹⁹ Moreover, Lambuth claimed that was the contemplated offer was “highest and best offer” for the assets to date⁵⁰⁰ and that the consideration it was receiving was “fair and reasonable.”⁵⁰¹ Because Lambuth was asking the court to find that its private sale, rather than public auction,⁵⁰² contained a fair price and was the product of good-faith negotiations, Lambuth emphasized its allegedly extensive marketing efforts in order to assure the court that it had been aggressively seeking to sell itself to the highest bidder. Lambuth informed the court it had “market[ed] the sale of substantially all of its assets” for “several months” and had communicated with “at least 5” potential purchasers interested in purchasing the university as a going concern; however, Lambuth did not disclose the identity of the five potential purchasers.⁵⁰³ Although it is difficult to know the extent to which Lambuth marketed itself, the

⁴⁹⁷ *Motion to Sell*, at 8-9, ¶ 36.

⁴⁹⁸ See *In re Abbotts Dairies, Inc.*, 788 F.2d 143, 146, 149-50 (3rd Cir. 1986); Aug et al., *supra* note 378.

⁴⁹⁹ *Motion to Sell*, at 4, ¶ 16.

⁵⁰⁰ *Motion to Sell*, at 4, ¶ 11. This claim is consistent with news coverage of Lambuth’s efforts to sell itself to a local purchaser, as an earlier offer to buy the campus would have brought in only \$5.9 million. See *Group offers \$5.9 million for Lambuth Campus*, Victoria (Tex.) Advocate, May 19, 2011, available at <http://m.victoriaadvocate.com/news/2011/may/19/bc-tn-lambuth-closing/>.

⁵⁰¹ *Motion to Sell*, at 9, ¶ 39. Whether this consideration was fair and reasonable is up for debate in light of the fact that less than two years prior to the Motion to Sell, the Lambuth campus had been appraised for \$38.9 million. See *Radian’s Objection to Motion to Lease*, at 4, ¶ 17.

⁵⁰² Bankruptcy courts prefer public auctions to private sales because “public auctions provide better protection against subsequent claims that the debtor failed to maximize value for the benefit of its creditors.” SheppardMullin, Bankruptcy and Restructuring Blog, *One’s Crisis is Another’s Opportunity: Section 363 Sales* (March 31, 2010), <http://www.bankruptcylawblog.com/assets-sales-and-acquisitions-ones-crisis-is-anothers-opportunity-section-363-sales.html>.

⁵⁰³ *Motion to Sell*, at 3, 4, ¶ 7, ¶ 13.

Tennessee Board of Regents indicated its belief as early as July 2011 that the Purchaser would ultimately be the party to purchase Lambuth out of bankruptcy.⁵⁰⁴

Finally, to address any concern the court might have had regarding adequate protection of the Bond Estate's interest, Lambuth stated that the Bond Estate was receiving adequate protection of its interest because the terms of the settlement agreement between Lambuth and Radian (the "Settlement Agreement") provided that "a lien in favor of the Bond Trustee shall attach to the proceeds of the sale and shall be paid at closing."⁵⁰⁵ As mentioned above, under § 363(e), if a party having an interest in the property to be sold so requests, the court can impose certain conditions on the proposed sale to protect that party's interest.⁵⁰⁶ In this case, as part of their agreement, Lambuth and the party with an interest, Radian, proactively imposed a condition on the proposed free and clear sale to ensure that it would not compromise the security position of the Bond Estate. Lambuth and Radian agreed that a lien would attach to the proceeds of the sale and would be paid to BNY Mellon, for the benefit of the Bond Estate, at the closing of the sale from the funds received from the Purchaser.⁵⁰⁷ This arrangement obligated Lambuth to pay off the agreed-upon debt owed on the Bonds using the proceeds from the sale of its assets, and it utilized a lien in favor of BNY Mellon on the sale proceeds to ensure that Radian had adequate protection and assurance that it would be paid. This technique of having a creditor's interests

⁵⁰⁴ Tennessee Board of Regents Minutes, July 29, 2011, at 2.

⁵⁰⁵ *Motion to Sell*, at 11, ¶ 45.

⁵⁰⁶ 11 U.S.C. 363(e); *See, e.g.*, *La Jolla Mortgage Fund v. Rancho El Cajon Associates*, 18 B.R. 283, 286 (Bankr. S.D. Cal. 1982).

⁵⁰⁷ *Motion to Sell*, at 11, ¶ 45. Under the terms of their settlement, Lambuth and Radian agreed that New York Mellon, on behalf of the bondholders, "would be allowed a secured claim of \$5,000,000.00 to be paid at the closing of the sale of [Lambuth's] [a]ssets." *Id.* at 12, ¶51.

attach to the proceeds of the § 363 sale is the most commonly used method of giving adequate protection in connection with a sale free and clear.⁵⁰⁸

d. Assumption and Assignment

In its Motion to Sell, Lambuth also sought approval to “assume and assign” Lambuth’s unexpired leases and executory contracts pertaining to the campus to the Purchaser as provided in the Sale Agreement.⁵⁰⁹ Lambuth needed to assume and assign these contracts to the Purchaser, who would then assign them to the State, in order for the State to properly take control of the campus. Under § 365(a), a debtor can easily assign favorable unexpired leases and executory contracts to the buyer of its assets.⁵¹⁰ As when deciding whether to authorize a sale of assets under §363, bankruptcy courts use the deferential business judgment standard when determining whether to approve a debtor’s request to assume and assign executory contracts and unexpired leases.⁵¹¹ As a condition precedent to assuming an executory contract so that it can be assigned, bankruptcy courts require that all defaults first be cured pursuant to § 365(b).⁵¹² Lambuth stated that it was not in default under any contract it was seeking to assign, and thus cure procedures were not necessary.⁵¹³

Without explaining how it would benefit the bankruptcy estate, Lambuth asserted that, in its sound business judgment, the assumption and assignment of its unexpired leases and executory contracts was “in the best interests of [itself] and bankruptcy estate” and would “provide benefit

⁵⁰⁸ S.Rep No. 989, 95th Cong., 2d Sess. 56 (1978).

⁵⁰⁹ *Motion to Sell*, at 13-14, ¶ 2.

⁵¹⁰ Deutsch & Distefano, *supra* note 460, at 48.

⁵¹¹ Group of Investors v. Milwaukee R. Co., 318 U.S. 523, 550 (1943).

⁵¹² Aug et al., *supra* note 378.

⁵¹³ *Motion to Sell*, at 7, ¶ 29

to the Debtor’s bankruptcy estate.”⁵¹⁴ Lambuth also asserted that “a sound business reason exists for assumption and assignment of certain unexpired leases and executory contracts to Purchaser in connection with the [s]ale” without providing any evidence of this claim.⁵¹⁵ In a similarly unsubstantiated and conclusory assertion, Lambuth stated that the assumption and assignment of the unexpired leases and executory contracts were within its “sound business judgment.”⁵¹⁶ Because a court must approve a debtor’s decision to assume or reject any executory contract or unexpired lease pursuant to section 365(a) if such a decision is a valid exercise of the debtor’s business judgment, Lambuth argued that the court was required to approve Lambuth’s decision.⁵¹⁷ Lambuth also requested that the court declare that the unexpired leases and executory contracts were “valid and binding and in full force and effect” and that Lambuth was “relieved from any further liability under the contract pursuant to Section 363(k).”⁵¹⁸

e. Waiver of the Temporary Stay

Finally, Lambuth asked the court to waive the 14 day temporary stay imposed by Fed. R. Bankr. P. 6004(h) and 6006(d) on orders authorizing the sale of a debtor’s assets and assumption and assignment of an executory contracts.⁵¹⁹ Lambuth claimed that the court should waive the temporary stay because it was in the best interests of Lambuth’s creditors and the estate that “the

⁵¹⁴ *Motion to Sell*, at 6, ¶ 24.

⁵¹⁵ *Motion to Sell*, at 7 ¶ 25.

⁵¹⁶ *Motion to Sell*, at 7, ¶ 28.

⁵¹⁷ *Motion to Sell* at 5-6, ¶ 22-23.

⁵¹⁸ *Motion to Sell*, at 7, ¶30. In relevant part, 11 U.S.C 365(k) provides: “Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.”

⁵¹⁹ Rule 6004(h) provides: “An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.”

sale be consummated as quickly as possible without any stay pending appeal in light of Debtor's financial condition and substantial reduction in ongoing operational costs after the sale closes."⁵²⁰ The temporary stay "permits parties a small window of time to challenge a sale through a motion for rehearing or reconsideration, appeal, or otherwise before a sale becomes final."⁵²¹ This is significant because once a sale becomes final and a court finds the purchaser to be a good faith purchaser, any subsequent appeals of the sale are mooted under § 363(m).⁵²² Here, waiver of the temporary stay would allow the sale of the campus to close immediately, and if the court were to find in its order that the Purchaser was a good faith purchaser as Lambuth requested, § 363(m) would be applicable causing any appeal of the sale to be rendered moot.⁵²³ Debtors and purchasers regularly seek a finding, as Lambuth did here, that the purchaser is a good faith purchaser because of the resulting appeal protection provided by § 363(m),⁵²⁴ and courts consistently waive the 14 day stay in their sale approval order.⁵²⁵

f. Ensuring that the § 363 Sale was Free and Clear

As explained earlier, the overarching deal between Lambuth, the Purchaser, and the State required that the State receive the campus from the Purchaser free and clear of all liens and encumbrances.⁵²⁶ Accordingly, Lambuth asked the court to allow it to utilize § 363(f) to sell its

⁵²⁰ *Motion to Sell*, at 13, ¶ 55.

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

⁵²² Aug et al., *supra* note 378,

⁵²³ Kuney, *Selling a Business*, *supra* note 447, at 58.

⁵²⁴ See Cooley, Godward & Kronish, *supra* note 457, at 7.

⁵²⁵ Friedland et al., *supra* note 366, at 223.

⁵²⁶ See *supra* notes 370-372 and accompanying text.

campus free and clear of all liens and encumbrances, with a lien in favor of BNY Mellon attaching to the proceeds of the sale.⁵²⁷ The State certainly realized that a § 363 sale in bankruptcy provided the easiest and most efficient way for the State, through the intermediary Purchaser, “to acquire [the] entire business[] unencumbered by unsecured debts, successor liability, or property interests.”⁵²⁸ In fact, a sale free and clear of liens under §363(f) does not require a hearing if there is no objection and the pleadings offer evidence supporting the sale.⁵²⁹ In relevant part, § 363(f)(1)-(5) provides that “the trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate,” if one of five conditions are met.⁵³⁰ One such enumerated condition is if the owner of the interest consents to the sale.⁵³¹ The reasoning behind this provision is that there is “no reason to bar a consensual transaction that will benefit the estate.”⁵³²

The only lien on the Lambuth campus that needed to be removed through the § 363 sale so that the State could take the campus from the Purchaser free and clear was the lien on five campus buildings securing Lambuth’s obligation to make payments on the Bonds.⁵³³ As a result of the powers given to it under the Bond Documents, Radian was the “holder” of the lien on the five campus buildings securing the Bonds. After extensive negotiations, Radian and Lambuth

⁵²⁷ *Motion to Sell*, at 14, ¶4.

⁵²⁸ See George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19, 109 (2004).

⁵²⁹ Kuney, *Selling a Business*, *supra* note 447, at 58.

⁵³⁰ 11 U.S.C 363(f); Section 363(f) was drafted in the disjunctive and, therefore, only one of the above five provisions must be met to sell property free and clear of interests. See Aug et al., *supra* note 378.

⁵³¹ 11 U.S.C 363(f)(2).

⁵³² Kuney, *Misinterpreting*, *supra* note 451, at 235.

⁵³³ See *Schedules*, at 10. As mentioned above, the Downtown Jackson Lions Club was formerly a secured creditor holding a lien on Lambuth’s “buildings and facilities.” *Id.* However, this lien was extinguished by an agreement between Lambuth and the Downtown Jackson Lions Club which was approved by the court in *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Order Granting Debtor’s Motion to Surrender Collateral In Full Satisfaction of Debt, (Dkt. 394), p. 10, (Dec. 8, 2011).

were able to reach the Settlement Agreement in which Radian consented to the sale. As a result of Lambuth's securing Radian's consent, the sale met the second condition of § 363(f) such that Lambuth could sell its campus "free and clear" of Radian's security interest.⁵³⁴ Moreover, because Radian held the only lien on the campus, Lambuth was in a position to sell its campus free of all liens. The second condition of § 363(f) was the only basis Lambuth offered as to why the sale should be free and clear of all liens and encumbrances; it is not clear if any of the other conditions allowing the sale free and clear could have been met.

g. Compromise and Settlement with Radian

In its Motion to Sell, Lambuth also asked the court to approve its proposed Settlement Agreement with Radian pursuant to Fed. R. Bankr. P. 9019.⁵³⁵ The sale of Lambuth's campus to the Purchaser free and clear under § 363(f)(2) would have been impossible without the consent and support of Radian, Lambuth's largest creditor and its only secured creditor as a result of its right to act on behalf of the Bond Estate.⁵³⁶ Radian and Lambuth were locked in arms-length negotiations for an "extended period" before the parties came to terms on the amount Lambuth had to pay to satisfy its debt owed on the Bonds, \$5,000,000, and the undisclosed minimum sale price Lambuth could accept for the sale of substantially all of its assets.⁵³⁷ Although Lambuth owed approximately \$5.4 million on the Bonds,⁵³⁸ Lambuth claimed that the Bond Estate had an

⁵³⁴ 11 U.S.C 363(f).

⁵³⁵ *Motion to Sell*, at 5, ¶ 20.

⁵³⁶ *See supra* note 409 and accompanying text.

⁵³⁷ *Motion to Sell*, at 11. ¶ 50.

⁵³⁸ *Order Granting Motion to Sell*, p.4, ¶ 8.

equity cushion giving them adequate protection⁵³⁹ due to the fact that Lambuth’s assets had “sufficient value to satisfy the current outstanding balance owed on the Bonds, administrative claims, [and] unsecured priority claims[] and [provide] a dividend to unsecured creditors.”⁵⁴⁰

This assertion was accurate as the Agreement signed by Lambuth and the Purchaser provided for a purchase price of \$7,900,000—\$7,400,000 million of which was for Lambuth’s real estate.⁵⁴¹

Although Radian would not receive any of the \$5,000,000 to be paid by Lambuth in satisfaction of its debt due on the Bonds under the terms of the Settlement Agreement because it was merely the insurer for the bonds, the lien in favor of BNY Mellon securing the \$5,000,000 was designed to give further assurance to Radian that Lambuth would pay the Bond debt. In the Settlement Agreement, Radian agreed that it would refrain from asserting any other claims against Lambuth on behalf of the Bond Estate, other than an unsecured claim of up to \$300,000, representing the “[i]nterest, attorneys’ fees, trustee’s fees, and other amounts” owed by Lambuth under the Bond Documents.”⁵⁴² In addition, Radian agreed to cease all litigation related to the bankruptcy proceeding and to not “assert the right of the Bond Trustee to credit bid pursuant to its rights under 11 U.S.C. Section 363(k).”⁵⁴³ The most important aspect of the Settlement Agreement was that Radian agreed to give its consent to the proposed sale of Lambuth’s assets

⁵³⁹ As Friedland et al. explain, “if the secured lender has an “equity cushion”—the value of the hard collateral substantially exceeds the amount of the secured debt—the lender is very likely to be deemed to have adequate protection. Friedland et al., *supra* note 366, at 32. Radian likely had an equity cushion based on the appraised value of the campus. See *Radian’s Objection to Motion to Lease*, at 4, ¶ 17.

⁵⁴⁰ *Motion to Sell*, at 3, ¶ 7.

⁵⁴¹ See *Purchase and Sale Agreement*, at 2, §§ 2.1-2.2. The \$500,000 sale price for all the personalty contained in the buildings as well as Lambuth’s vehicles and equipment seems to be a very low price. The transaction may have been structured in this way to give the Purchaser a very high basis in the land in relation to the overall sale price.

⁵⁴² *Motion to Sell*, at 12, ¶ 51; *Joinder of the Trustee to Radian’s Response to Motion to Sell*, at 3, ¶ 5.

⁵⁴³ *Motion to Sell*, at 12, ¶ 52. If a secured creditor’s collateral is to be sold, 11 U.S.C. 363(k) gives the creditor the right to credit bid at the sale: “At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.”

allowing a sale free and clear under § 363(f)(2).⁵⁴⁴ However, Radian reserved the right under the Settlement Agreement to declare the Settlement Agreement null and void if an order, effective upon entry and neither stayed nor appealed, approving Lambuth's proposed sale was not entered by October 25, 2011 or if the \$5,000,000 secured claim on the sale proceeds was not received by December 28, 2011.⁵⁴⁵

h. Radian Files Response in Support

On October 11, 2011, Radian filed a Response to Lambuth's Motion to Sell in which it asked the court to approve the Settlement Agreement and gave its consent to the proposed sale.⁵⁴⁶ Radian reiterated in its Response that its willingness to accept the Settlement Agreement was conditioned on the order approving the proposed sale being entered (and not stayed or appealed) and the payment being received by the specified dates.⁵⁴⁷ Radian encouraged the court to accept the parties' Settlement Agreement and approve the proposed sale on the grounds that by limiting its recovery to the \$5,000,000 secured claim and capping its unsecured claims at \$300,000, Lambuth was preserving more of the estate's assets for the unsecured creditors.⁵⁴⁸ Because the terms of expedited pre-plan § 363 sales—like the one proposed by Lambuth—often benefit secured creditors at the expense of smaller, unsecured creditors,⁵⁴⁹ the court likely

⁵⁴⁴ *Radian's Response to Motion to Sell*, at 3, ¶ 14.

⁵⁴⁵ *Motion to Sell*, at 12, ¶ 52.

⁵⁴⁶ *Radian's Response to Motion to Sell*, at 3, ¶¶ 14, 19.

⁵⁴⁷ *Radian's Response to Motion to Sell*, at 3, ¶ 18.

⁵⁴⁸ *Radian's Response to Motion to Sell*, at 4, ¶ 15.

⁵⁴⁹ *See* Kuney, *Misinterpreting*, *supra* note 451, at 282-83.

responded positively to this assertion because the proposed arrangement would make the secured party more or less whole yet also serve to further two primary aims of the bankruptcy process in that it would benefit the estate and protect unsecured creditors.⁵⁵⁰

Although Radian, on behalf of the Bond Estate, was not going to receive all of the “\$5.4 million in principal, interest, and other expenses”⁵⁵¹ that Lambuth owed on the Bonds by settling for the \$5,000,000 secured claim and the \$300,000 unsecured claim, this settlement was still very beneficial for Radian. Radian was receiving a little more (\$40,000) than the unpaid principal on the Bonds (\$4,960,000) and was allowed to pursue an unsecured claim for 300,000, roughly equal to the \$400,000 in interest and other fees owed by Lambuth on the Bonds.⁵⁵² Even though Radian knew that it would probably not recover the unsecured claim in full and that it would never recover the remaining \$100,000 it was owed in interest and other fees, Radian likely determined that receiving \$5,000,000 million by December 29, 2011, was an attractive offer in light of the reality that the \$5,000,000 would allow the Bonds to be retired and would end Radian’s duty to cover Lambuth’s missed bond payments. Lambuth had not made payments on the Bonds in over two years and the State-endorsed § 363 sale presented an opportunity for it to “realiz[e] on [its] interest[] more quickly by avoiding a lengthy confirmation process and controlling the process so as to avoid further risk.”⁵⁵³ With each passing month that Lambuth continued to miss bond payments, Radian was being forced to step into Lambuth’s shoes and make the payments. Thus, the § 363 sale was attractive to it because the principal amount of the bonds, including the missed payments it had previously made, would be paid off immediately

⁵⁵⁰ See Sable, *supra* note 482, at 140.

⁵⁵¹ *Order Granting Motion to Sell*, at 4, ¶ 8.

⁵⁵² *Joinder of the Trustee to Radian’s Response to Motion to Sell*, at 3, ¶ 5.

⁵⁵³ Kuney, *Hijacking*, *supra* note 528, at 109.

with the \$5,000,000 proceeds and Radian would be able to free itself of its insurance obligation more quickly than if a bankruptcy plan of reorganization were submitted and confirmed. Radian likely thought that its minimal loss under the Settlement Agreement was worth sustaining in order to close the proposed sale and terminate its insurance responsibility to the bondholders. Furthermore, if Radian had foreclosed on the five campus buildings, which served as its collateral, the potential sale to the Purchaser and the State would have likely fallen apart, and the foreclosure sale may not have yielded an amount equal to the \$5,000,000 offered by Lambuth. Finally, by agreeing to the Settlement Agreement and consenting to the pre-plan § 363 sale, Radian and Lambuth were able to “avoid the lengthy process of negotiating, proposing, confirming, and consummating a plan of reorganization” as well as “the potential for more pervasive scrutiny of transactions at multiple junctures by the court, creditors, the United States Trustee, and other parties in interest.”⁵⁵⁴

i. Unsecured Creditors Committee’s Objection to the Sale

On October 6, 2011 before Radian or BNY Mellon responded to the Motion to Sell, the Committee objected to the proposed sale.⁵⁵⁵ In its short, conclusory objection, the Committee requested that the court deny Lambuth’s Motion to Sell on four grounds: (1.) the value of the property exceeded the proposed sale price; (2.) the proposed sale price did not adequately protect the interest that the unsecured creditors had in the property; (3.) the proposed sale did not satisfy the requirements of § 363; and (4.) the proposed sale and settlement with Radian was not in the

⁵⁵⁴ Kuney, *Hijacking*, *supra* note 528, at 105.

⁵⁵⁵ *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Objection to Debtor’s Motion for Order (A) Authorizing Sale Of Substantially All Estate Assets Free And Clear Of Liens, Claims, Rights, Encumbrances and Interests; (B) Authorizing Assumption And Assignment Of Executory Contracts; (C) Approval of Compromise and Settlement; and (D) Other Related Relief, (Dkt. 212) (Oct. 6, 2011) (hereinafter “Objection to Motion to Sell”).

best interest of the estate or the unsecured creditors.⁵⁵⁶ The Committee's objection offered no evidence to support these claims and curtly asked that the Court not authorize Lambuth's proposed sale or Settlement Agreement. The Committee may have had a valid argument that the proposed sale price was too low because Lambuth's campus had been valued at \$38.3 million by a certified real estate appraiser in December 2009, yet under the proposed sale, the Purchaser would purchase the campus for \$7.9 million, roughly 20% of its appraised value.⁵⁵⁷

j. Bank of New York Mellon Response

As trustee for the Bonds, BNY Mellon was intimately involved in the negotiations and Settlement Agreement between Lambuth and Radian. In fact, under the Settlement Agreement, Lambuth would pay \$5,000,000 of the sale proceeds to BNY Mellon, who would then be responsible for distributing the funds to the bondholders.⁵⁵⁸ BNY Mellon expressed approval of the proposed Settlement Agreement and joined Radian in supporting the Motion to Sell by filing a Joinder to Radian's Response to Motion to Sell ("Joinder").⁵⁵⁹

In its Joinder, BNY Mellon asked the court to overrule the Committee's objection and approve both Lambuth's proposed sale and the proposed Settlement Agreement.⁵⁶⁰ Without explaining its reasoning or offering any evidence to support its assertions, BNY Mellon praised Lambuth's plan to pay \$5,000,000 of the sale proceeds to BNY Mellon upon the closing of the

⁵⁵⁶ *Objection to Motion to Sell*, pp.1-2, ¶¶ 1-5.

⁵⁵⁷ See *Radian's Objection to Motion to Lease*, at 4, ¶ 17. Real estate prices in Jackson, TN fell approximately 2% from the end of 2009 through 2011, but this decline would not explain the fact that the Lambuth campus sold for only 20% of its 2009 appraisal value. See *Jackson Real Estate Market (TN)*, FORECASTCHART.COM (March 29, 2012), <http://www.forecast-chart.com/estate-real-jackson-tn.html>.

⁵⁵⁸ *Motion to Sell*, at 12, ¶ 51.

⁵⁵⁹ *Joinder of the Trustee to Radian's Response to Motion to Sell*, at 5, ¶ 1.

⁵⁶⁰ *Joinder of the Trustee to Radian's Response to Motion to Sell*, at 4, ¶ 8.

sale for the benefit of the bondholders as a “a sound exercise of the Debtor’s business judgment . . . supported by the facts and legal authority set forth in the Motion . . . in best interest of the Debtor, its bankruptcy estate, creditors and other parties in interest.”⁵⁶¹ BNY Mellon also approved of the provision limiting the Bond Estate’s unsecured claim to \$300,000.⁵⁶²

k. Order Granting Motion to Sell

On November 8, 2011, a little over four months after Lambuth filed for Chapter 11 protection, the bankruptcy court entered its order granting Lambuth’s Motion to Sell (the “Sale Order”).⁵⁶³ Although the Sale Order was not issued until November 8, 2011, two weeks after the deadline specified in the Settlement Agreement, Radian did not exercise its right to declare the Settlement Agreement null and void.⁵⁶⁴ The Sale Order authorized the sale of Lambuth’s assets according to the terms of the Sale Agreement as requested in the Motion to Sell,⁵⁶⁵ thereby approving the assumption and assignment of executory contracts relating to the campus provision. The court stated that the sale of the assets would be free and clear of all liens, claims, rights, encumbrances, and interests other than existing utility easements, and the secured claim in favor of BNY Mellon would attach to the proceeds of the sale as set forth in the Motion to Sell and the Sale Agreement.⁵⁶⁶ The court also found the Settlement Agreement between Lambuth and Radian to be “in the manifest best interest of the estate” and approved it pursuant to Fed R.

⁵⁶¹ *Joinder of the Trustee to Radian’s Response to Motion to Sell*, at 4, ¶ 8.

⁵⁶² *Joinder of the Trustee to Radian’s Response to Motion to Sell*, at 3, ¶ 6.

⁵⁶³ *Order Granting Motion to Sell*, at 4, ¶ 11.

⁵⁶⁴ *See Motion to Sell*, at 12, ¶ 52.

⁵⁶⁵ *Order Granting Motion to Sell*, at 4, ¶ 11-12.

⁵⁶⁶ *Order Granting Motion to Sell*, at 4, ¶ 11.

Bank. P. 9019.⁵⁶⁷ However, the court made two changes to the Settlement Agreement in its Sale Order. First, the court slightly lowered the amount BNY Mellon would be paid from the proceeds of the sale of the assets from \$5,000,000 to \$4,900,000.⁵⁶⁸ In addition, the court prohibited Radian from pursuing an unsecured claim of up to \$300,000 against the estate as provided in the Settlement Agreement; the court stated that the \$4.9 million would “full[y] satisf[y] of all claims against the estate by Radian and the Bond Trustee and . . . and all claims of the estate against Radian and/or the Bond Trustee.”⁵⁶⁹ As a result of the Sale Order, Lambuth achieved its goal of consummating a free and clear § 363 sale of substantially all of its assets: “The sale shall result in the outstanding debt of [Lambuth] being paid through the sale proceeds and the property thereafter being free and clear of all liens, claims and encumbrances.”⁵⁷⁰

The Sale Order also contained many findings of fact requested by Lambuth to make the sale more difficult to appeal and to reduce the risk of the Purchaser’s successor liability,⁵⁷¹ including that “[a] sound business purpose exists for such sale, and good cause exists to approve the settlement with Radian.”⁵⁷² Most importantly, the court found that “the Purchaser, the State, and Debtor have engaged in good faith, arms-length negotiations, and there is no collusion among the parties.”⁵⁷³ Lambuth, the Purchaser, and Radian, were certainly satisfied with this finding because it meant that any appeal of the validity of the sale would be rendered moot under §

⁵⁶⁷ *Order Granting Motion to Sell*, at 4, ¶12. Fed. R. Bank. P. 9019 states: “On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.”

⁵⁶⁸ *Order Granting Motion to Sell*, at 4-5, ¶ 12.

⁵⁶⁹ *Order Granting Motion to Sell*, at 4-5, ¶ 12.

⁵⁷⁰ *Order Granting Motion to Sell*, p.4, ¶ 11.

⁵⁷¹ See *supra* note 482 and accompanying text.

⁵⁷² *Order Granting Motion to Sell*, at 4, ¶ 9.

⁵⁷³ *Order Granting Motion to Sell*, at 3, ¶ 7.

363(m) once the sale closed, assuming no stay of the order was granted prior to the closing.⁵⁷⁴ In addition, the court found that Lambuth was attempting to maximize value for all interested parties by quickly completing a sale of its assets in a way that was acceptable to both the court and Radian.⁵⁷⁵ The court stressed that Lambuth “had no other means to satisfy” the secured debt due on the Bonds other than by selling its assets.⁵⁷⁶ The court also noted that Lambuth’s sale was motivated by its desire to “avoid deterioration in asset values, avoid continued, protracted litigation, and retire secured debt due under the Bonds.”⁵⁷⁷ Under the Supremacy Clause of the United States Constitution, these findings are entitled to full faith and credit in all other state and federal courts and thus “provide a solid line of defense . . . from later assaults by [a plaintiff], no matter how otherwise well-grounded in fact and law those attacks may be.”⁵⁷⁸

Despite the court’s waiver of the temporary stay of Fed. R. Bankr. P. 6004(h) causing the Sale Order to become effective immediately as requested by Lambuth, the parties were not able to close the sale of Lambuth’s assets immediately.⁵⁷⁹ As explained by the Tennessee Attorney General (the “Attorney General”) in its Notice to the Court filed three weeks before the court authorized the sale, the Tennessee Nonprofit Corporation Act⁵⁸⁰ gives the Attorney General “broad authority to act in the public interest in Tennessee nonprofit corporation mergers, sales of assets and dissolutions.”⁵⁸¹ As part of its statutory framework, Tenn. Code Ann. § 48-51-

⁵⁷⁴ See Aug et al., *supra* note 378; Cooley, Godward & Kronish, *supra* note 457, at 7.

⁵⁷⁵ *Order Granting Motion to Sell*, at 4, ¶ 9.

⁵⁷⁶ *Order Granting Motion to Sell*, at 4, ¶ 9.

⁵⁷⁷ *Order Granting Motion to Sell*, at 4, ¶ 9.

⁵⁷⁸ Lloyd & Kuney, *supra* note 423, at 375.

⁵⁷⁹ *Order Granting Motion to Sell*, at 5, ¶ 15.

⁵⁸⁰ Tenn. Code Ann. § 48-51-101 et seq.

⁵⁸¹ *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Notice to the Court of Status of Compliance with the Tennessee Non Profit Corporation Act by the Public Interest Division of the Office of the Tennessee Attorney General, (Dkt. 250), p. 1, ¶ 1 (Oct. 18, 2011) (hereinafter “Notice to the Court”).

701(c)(1) and (2) require Lambuth, as a Tennessee non-profit corporation, to produce relevant data, documents, detailed statements, and other information regarding the proposed transaction to the Attorney General in a timely fashion so that the Attorney General can determine whether to object to the sale of Lambuth.⁵⁸² The court noted that this requirement is bolstered by 11 U.S.C. 1129(a)(16)⁵⁸³ and 11 U.S.C. 541(f)⁵⁸⁴ which require that any transfer of property by a non-profit debtor comply with the normal rules that would apply to a non-bankruptcy transfer of property by a non-profit debtor.⁵⁸⁵ Because Lambuth would have to comply with the Tennessee Nonprofit Corporation Act outside of bankruptcy, these statutes mandate that Lambuth comply with the Act while in bankruptcy court. Because Lambuth had not filed the required documentation and information with the Attorney General, the Attorney General informed the court in its Notice to the Court that it was presently “unable to form an opinion as to whether the transaction is in the public interest.”⁵⁸⁶ Accordingly, the court stated in its Sale Order that notice from the Attorney General that it has no objection to the sale of Lambuth’s assets was a condition precedent to the sale closing.⁵⁸⁷ On December 12, 2011, the Attorney General filed a

⁵⁸² *Notice to the Court*, at 2, ¶ 5.

⁵⁸³ 11 U.S.C. 1129(a)(16) provides that “all transfers of property of the plan shall be made in accordance with applicable provisions of non-bankruptcy law that govern the transfer of property by a corporation or trust that is not moneyed, business, or commercial corporation or trust.”

⁵⁸⁴ 11 U.S.C. 541(f) provides that “notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.”

⁵⁸⁵ *Notice to the Court*, at 2, ¶¶ 7-8.

⁵⁸⁶ *Notice to the Court*, at 2, ¶6.

⁵⁸⁷ *Order Granting Motion to Sell*, at 5, ¶ 16.

one-page notice with the court stating it had no objection to the sale.⁵⁸⁸ As a result of this notice, Lambuth and the Purchaser were authorized to officially close the sale.⁵⁸⁹

1. Foreclosing Appeal

Granting the request contained in Lambuth's Motion to Sell, the court waived the temporary stay of Fed. R. Bankr. P. 6004(h) making the sale order effective immediately and allowing Lambuth and the Purchaser to close the sale as soon as they received the requisite notice from the Attorney General.⁵⁹⁰ As a result of the court's finding that Lambuth, the Purchaser, and the State had all acted in good faith and the court's waiving of the temporary stay, if Lambuth and the Purchaser had closed the sale immediately as they intended,⁵⁹¹ any appeal challenging the validity of the sale would have been instantly moot under § 363(m).⁵⁹² Once Lambuth and the Purchaser finally closed the sale on December 21, 2011, any subsequent appeal of the Sale Order was rendered moot by §363(m), and the validity of the sale could not be challenged because the court had made the requisite good faith findings and no stay of the Sale Order had been granted prior to the closing.⁵⁹³

⁵⁸⁸ *In re Lambuth University*, case no. 11-11942, Bankr. W.D. Tenn., Notice of No Objection to Sale, (Dkt. 401) (Dec., 12 2011).

⁵⁸⁹ *Order Granting Motion to Sell*, at 5, ¶ 16.

⁵⁹⁰ *Order Granting Motion to Sell*, at 5, ¶ 15.

⁵⁹¹ Although Lambuth and the Purchaser intended to close the sale of the campus quickly, the sale officially closed when the Purchaser registered the deed to the property on December 21, 2011, over 6 weeks after the sale was authorized by the court. *See* Humphrey, *supra* note 450.

⁵⁹² *See* Friedland et al., *supra* note 366, at 223. To make this point explicit, the bankruptcy court affirmed in its Sale Order that "the Purchaser and the State are entitled to the protections of 11 U.S.C. Section 363(m)." *Order granting Motion to Sell*, at 5, ¶ 13.

⁵⁹³ *See* Humphrey, *supra* note 450.

Where Lambuth is Now

a. Trustee's Motion to Dismiss the Case

Even though Lambuth is in a great position with the approved Lease and Sale, it still must abide by the bankruptcy court's rules and statutes. Lambuth has failed to do this in three instances. The three requirements Lambuth failed to meet were stated in the Case Management Order⁵⁹⁴ and could cost Lambuth its case.⁵⁹⁵ Lambuth was required to:

1. timely file all monthly operating reports;⁵⁹⁶
2. timely pay all United States trustee quarterly fees;⁵⁹⁷ and
3. file a plan or summary of plan.⁵⁹⁸

Subsequently, the U.S. Trustee filed a Motion to Dismiss the Case⁵⁹⁹ pursuant to 11 U.S.C. § 1112(b) citing Lambuth's failures as specific examples of "cause" for dismissal.⁶⁰⁰

Lambuth moved quickly to cure the third failure by filing a Disclosure Statement and Summary of Plan just six days after the Trustee's Motion was filed.⁶⁰¹ It then filed an Objection to the Trustee's Motion to Dismiss stating that it had cured the defect of failing to file a plan⁶⁰²

⁵⁹⁴ *Case Management Order*, at 1-2.

⁵⁹⁵ Realistically, it does not appear that Lambuth's chapter 11 case will be dismissed because of the major advancements made with the Sale and Lease; this Motion seems to be a 'slap on the wrist' to get Lambuth focused back on the bankruptcy side of its case (versus the Sale and Lease).

⁵⁹⁶ *Case Management Order*, at 2.

⁵⁹⁷ *Case Management Order*, at 2.

⁵⁹⁸ *Case Management Order*, at 1.

⁵⁹⁹ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., United States Trustee's Motion to Dismiss the Case; Expedited Hearing Requested, (Dkt. 479) (March 22, 2012).

⁶⁰⁰ These "causes" are enumerated in 11 U.S.C. § 1112(b)(4)(e) failure to comply with an order of the court (filing monthly operating reports per the Case Management Order); § 1112(b)(4)(k) failure to pay any fees or charges required (failure to pay Trustee fees; Lambuth owes approximately \$6,500 according to the Trustee's Motion); and § 1112(b)(4)(j) failure to file . . . a plan.

⁶⁰¹ *Disclosure Statement and Summary of Plan*, at 1.

⁶⁰² *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Objection to United States Trustee's Motion to Dismiss; Expedited Hearing Requested, (Dkt. 489) (April 9, 2012).

and that it “will have filed the monthly operating reports as required.”⁶⁰³ Within three weeks of the Trustee’s Motion, Lambuth filed three missing Monthly Operating Reports⁶⁰⁴ and paid the Trustee the full balance due.⁶⁰⁵ To date, the hearing on the Trustee’s Motion and Lambuth’s Objection to the Motion is (re)scheduled for May 2, 2012.⁶⁰⁶

b. Disclosure Statement and Summary of Plan

The Disclosure Statement and Summary of Plan (the “Plan”) filed on March 28, 2012,⁶⁰⁷ is also scheduled for a hearing on May 2, 2012.⁶⁰⁸ It is a “pot plan,” meaning that the Lambuth estate will draw funds out of a “pot” to pay unsecured creditors a pro-rata share of whatever is left after administrative fees, secured creditors’ claims, and other priority creditors’ claims are

⁶⁰³ *Id.*

⁶⁰⁴ See *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Report Of Operations For Filing Period December 2011, (Dkt. 492) (April 12, 2012); *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Report Of Operations For Filing Period January 2012, (Dkt. 493) (April 12, 2012); *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Report of Operations For Filing Period February 2012, (Dkt. 494) (April 12, 2012).

⁶⁰⁵ See *Supra* note 601. The Monthly Operating Reports state that the Trustee payments were made. Lambuth filed the last missing Monthly Operating Report for September, 2011, on April 18, 2012. *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Report of Operations For Filing Period September 2011, (Dkt. 497) (April 18, 2012).

⁶⁰⁶ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., (no Dkt. No.) Notice Of Continuance Update Hearing Deadlines (RE: related document Objection to (related document: Motion to Dismiss Case filed by U.S. Trustee U.S. Trustee). Filed by Debtor Lambuth University (Douglass, Steven)) Hearing scheduled 05/02/2012 at 09:30 AM at Room 342, Jackson, Tennessee (April 18, 2012).

⁶⁰⁷ *Disclosure Statement and Summary of Plan*, at 1.

⁶⁰⁸ *In re Lambuth University*, No. 11-11942-ghb, Bankr. W.D. Tenn., Order And Notice Of Hearing On Disclosure Statement Combined with Related Orders and Notice of the Entry Thereof, (Dkt. 486) (March 30, 2012). The Plan was the first docket entry to be scheduled for a hearing on May 2, 2012; this may be the main reason other docket entries were rescheduled for May 2, 2012. See *Supra* notes 344, 346, and 606.

paid.⁶⁰⁹ There are no special concessions in the Plan, and it does not stray from the statutory priority ladder⁶¹⁰ or statutorily allowed maximum-amount for each category of claim.⁶¹¹

The Plan proposes that priority unsecured claims⁶¹² receive 100% of their allowed priority claims not to exceed \$11,750.00, and any claim amount over this will be treated as a non-priority unsecured claim.⁶¹³ Then, unsecured non-priority claims⁶¹⁴ will receive a *pro rata* share of all funds remaining after payment of any unclassified claims and priority unsecured claims.⁶¹⁵ Allowed administrative expenses shall be paid in full with cash.⁶¹⁶ The Plan states that the claims of Lions Club and BNY Mellon have been extinguished and Lambuth has approximately \$3,000,000 to distribute to the remaining claims.⁶¹⁷ The Plan also includes a “Liquidation Analysis,” which estimates that it would have only \$1,000,000 to distribute to the remaining claims if the assets of the Debtor were sold pursuant to a Chapter 7 liquidation, as an alternative to the payments as proposed under the Plan.⁶¹⁸ With only \$3,000,000 to distribute, it appears that Lambuth’s pre-petition unsecured non-priority creditors will receive no money towards their claims.

⁶⁰⁹ See Peter Orville, *Important Dates in Chapter 13 Cases*, BANKRUPTCY LAW NETWORK, <http://www.bankruptcylawnetwork.com/important-dates-in-chapter-13-cases-%E2%80%93-part-6/> (last visited April 25 2012).

⁶¹⁰ See 11 U.S.C. § 507, Priorities. *Supra* note 607 at 9.

⁶¹¹ *Id.*

⁶¹² *Schedules*, at 12-38. These are all claims arising from employee compensation and related expenses and are accorded priority under 11 U.S.C § 507(a).

⁶¹³ *Disclosure Statement and Summary of Plan*, at 9.

⁶¹⁴ *Schedules*, at 39-90. These are all claims arising from operating Lambuth’s campus (excluding employee compensation and related expenses).

⁶¹⁵ *Id.*

⁶¹⁶ *Disclosure Statement and Summary of Plan*, at 7. Administrative claims are estimated at \$100,000.00. *Id.* at 5.

⁶¹⁷ This amount is the remainder from the \$7.9M sale to The Jackson Group after paying off BNY Mellon’s principal claim of \$4.9M.

⁶¹⁸ *Disclosure Statement and Summary of Plan*, at 11.

The Plan: Summary of Liabilities

Description	Claim
Administrative Expense Claims ⁶¹⁹	\$100,000.00 (estimated)
Pre-Petition Secured Claims ⁶²⁰	\$5,096,247.00 (extinguished)
Pre-Petition Unsecured Priority Claims ⁶²¹	\$835,510.00 + 7.65%
Pre-Petition Unsecured Non-Priority Claims ⁶²²	\$5,100,000.00
Executory Contracts and Unexpired Leases ⁶²³	Rejected
Total Claims Not Extinguished:	\$6.1 million (approximately)

If the Plan is confirmed and Lambuth’s Chapter 11 case is completed, the reorganized debtor will be a Tennessee single entity corporation that (1) will be dissolved, or (2) will have its assets and operations managed by the United Methodist Foundation for the Memphis and Tennessee Conferences.⁶²⁴ The Court will determine what path the post-§363 sale Lambuth takes.⁶²⁵

c. The University of Memphis: Lambuth Campus

Mayor Gist’s wish for an expeditious and beneficial process⁶²⁶ seemed to have come true in the months following Lambuth’s June 30, 2011 Chapter 11 filing. Although, the Tennessee Higher Education Commission’s Lambuth Campus Feasibility Study praised the proposed acquisition of Lambuth as a “unique opportunity to quickly ramp up a campus in an area of Tennessee without a public university presence,”⁶²⁷ the Commission also recommended that the

⁶¹⁹ *Disclosure Statement and Summary of Plan*, at 5.

⁶²⁰ *Id.*

⁶²¹ *Id.*

⁶²² *Id.*

⁶²³ *Disclosure Statement and Summary of Plan*, at 10.

⁶²⁴ *Id.*

⁶²⁵ *Id.*

⁶²⁶ *See supra* note 163 and accompanying text.

⁶²⁷ *Feasibility Study Part II*, at 22.

State address building maintenance needs and shortfalls relating to Americans with Disabilities Act (“ADA”) compliance.⁶²⁸ The study also warned about the potential for incongruence between the projected increase in enrollment and the revenue needed to operate the campus.⁶²⁹ The maintenance needs, ADA compliance issues, and uncertain economic future did not deter the University of Memphis and the State from pushing forward and offering classes at the Lambuth campus during the 2011-2012 academic year. In fact, more than 400 students enrolled in classes at the University of Memphis—Lambuth Campus in the fall of 2011.⁶³⁰ The lease and eventual sale making it possible for the Lambuth campus to continue operations as part of the University of Memphis also allowed the University of Memphis to offer new educational opportunities to the Jackson area.⁶³¹ New degree programs included Bachelor of Arts degrees in English, Communication and Psychology; a Bachelor of Business Administration in Accounting or Management; a Bachelor of Professional Studies in Entertainment Music Industries; a Bachelor of Science in Biology/Pre-Med; and a Bachelor of Science in Nursing for Transfer Students.⁶³² The campus also began offering six graduate degree programs.⁶³³

Conclusion

In becoming a satellite campus of the University of Memphis, the Lambuth campus has finally been able to achieve the status of a true university.⁶³⁴ This development is significant,

⁶²⁸ *Feasibility Study Part II*, at 22-23.

⁶²⁹ *Feasibility Study Part II*, at 22-23

⁶³⁰ *Haslam Raises*, *supra* note 121.

⁶³¹ *University of Memphis Expands*, *supra* note 121.

⁶³² *University of Memphis Expands*, *supra* note

⁶³³ *University of Memphis Expands*, *supra* note

⁶³⁴ *See supra* note 69.

because Lambuth failed to achieve university status during its previous 168 years as a private entity, and the desire to become a true university was the driving factor behind many of the decisions that led to the school's financial struggles and eventual Chapter 11 bankruptcy. This improvement in status, along with the stability of state-funding during the next five years,⁶³⁵ bodes well for the future of the Lambuth campus. The school is already forging ahead in its new role—on May 3, 2012, the Lambuth Campus will see its first-ever University of Memphis baccalaureate graduating class.⁶³⁶ As it stands now, the University of Memphis—Lambuth Campus will continue educating and otherwise benefitting the people of Tennessee—especially the city of Jackson and Madison county—for years to come.

⁶³⁵ See *supra* notes 149-50 and accompanying text.

⁶³⁶ *Events and Activities*, THE UNIVERSITY OF MEMPHIS LAMBUTH CAMPUS, (Apr. 20, 2012), <http://www.memphis.edu/lambuth/life.php>.