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### Simon Transportation Services, Inc.

Will Holloway

Eliot Kerner

J. Paul Singleton

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# **SIMON TRANSPORTATION SERVICES, INC.: A CHAPTER 11 ANALYSIS**



**Business Reorganizations and Workouts  
Spring 2010**

Will Holloway  
Eliot Kerner  
J. Paul Singleton

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## I. INTRODUCTION

Richard (“Dick”) Simon was fond of saying, “All I ever wanted was to be a truck driver.”<sup>1</sup> Born in Provo, Utah in 1937, Simon would eventually pursue his goal of being a truck driver and in time create the largest fleet of refrigerated trailers in the country.<sup>2</sup> As the old saying goes, however, “where there is risk, there is reward.” Despite early reward from Simon’s endeavors, the risk eventually proved too great. Dick Simon’s enterprise ultimately fell from its status as the largest fleet of refrigerated trailers in the United States to literally nothing. By the mid-2000s, Simon’s enterprise had dwindled to little more than a shell of a company with droves of penniless shareholders and unpaid creditors fighting for the scraps left behind. The following will detail both the rise and fall of Dick Simon’s enterprise, including a detailed analysis of its bankruptcy proceedings.

### *A. The Rise of Simon Transportation*

At the age of 18, Dick Simon traded in his car for a 2-ton tractor and a 32 foot trailer. At the age of 26, he began hauling refrigerated loads from Utah to California and back. Mr. Simon called this the “round robin” trip.<sup>3</sup> Picking up produce in Idaho, Mr. Simon would then add vegetables in Arizona and haul them to California. On the return trip, Mr. Simon would carry California produce back to Utah. As Mr. Simon stated, “In those days, I never slept. I was driving all the time.”<sup>4</sup>

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<sup>1</sup>27 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 403-406 (Tina Grant ed., 1999).

<sup>2</sup>27 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 403-406 (Tina Grant ed., 1999).

<sup>3</sup>27 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 403-406 (Tina Grant ed., 1999).

<sup>4</sup>27 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 403-406 (Tina Grant ed., 1999).

Eventually, the trips took their toll on Mr. Simon, and at the age of 35 he decided he could not make the trips anymore. However, Simon found himself “in a position where he could bring on more drivers and equipment.”<sup>5</sup> By the early 1980s, Simon Trucking Services (“Simon Trucking”) was operating 26 trucks. However, this decade would be one of tremendous growth for the company, and in 1988, after deals with Food King and other retailers, Simon Trucking would have 97 tractors and 225 trailers in its fleet.<sup>6</sup>

While the 1980s brought a period of growth for the company, they also brought more risk. In 1980, Congress passed The Motor Carrier Act of 1980.<sup>7</sup> Before the Act, interstate shipping was highly regulated and permits were issued based on specified routes.<sup>8</sup> This system created a business environment in which the lucky few were able to ship their goods along these routes and make a profit without any competition. The passage of The Motor Carrier Act brought with it more competition for these same routes while the demand for the shipments stayed the same. Deregulation swept across the market and allowed for more shipping competition to enter the market and change the business environment. Through this deregulation, freight rates would eventually be cut in half, and by 1987, 33 out of the 45 public shipping companies would go out of business.<sup>9</sup>

There was another, more subtle, result from the deregulation. In an attempt to cut costs, shipping companies began to cut back on maintenance and repairs of their trucks. This would eventually lead, at least in part, to the uproar which caused insurance rates to skyrocket and Simon to eventually file for bankruptcy.

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<sup>5</sup> 27 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 403-406 (Tina Grant ed., 1999).

<sup>6</sup> 27 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 403-406 (Tina Grant ed., 1999).

<sup>7</sup> Motor Carrier Regulatory Reform and Modernization Act, 49 U.S.C. §§ 10101-11908 (2010).

<sup>8</sup> 27 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 403-406 (Tina Grant ed., 1999).

<sup>9</sup> 27 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 403-406 (Tina Grant ed., 1999).

Nevertheless, the 1990s brought even more prosperity, with Simon Trucking increasing its revenue from \$31 million in 1990 to \$74 million in 1994.<sup>10</sup> Meanwhile, competitors such as Frozen Food Express Industries, Inc., with sales in 1996 of \$311.4 million, were pushing Simon Trucking to continue to try and expand its operations.<sup>11</sup> During this time then, Simon Trucking attempted to grow its operations and was forced to use its increased revenues to pay off the enormous amounts of interest it was accruing through increasing loan obligations.<sup>12</sup>

With the rise in competition and a debt to capital ratio that had increased upwards of 57%, Richard Simon began examining benefits of a public offering as a way to increase capital. With the immediate need to decrease leverage, on November 17, 1995, Richard Simon decided to go public, launching Simon Transportation Services Inc. (“Simon”). As Richard Simon would later state, “Going public was the best thing we ever did.”<sup>13</sup>

Using the \$19.7 million dollar influx brought about through the initial public offering, Simon bought over 650 state of the art tractors, increasing fuel efficiency and decreasing overall cost for the company.<sup>14</sup> With this new and robust fleet, Simon began attracting extremely large and well-established customers, such as Kellogg Company, M&M Mars, Tootsie Roll Industries Inc., and CPC International Inc.<sup>15</sup>

In July 1997, with business booming, Simon opened a new 130,000 square foot headquarters and maintenance facility in Salt Lake City. Attempting to maintain Simon as a

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<sup>10</sup> Gary Macklin, *Dick Simon Builds Nation's Largest Fleet of 53-Ft. Reefer Vans*, REFRIGERATED TRANSPORTER, (Nov. 1996).

<sup>11</sup> Gary Macklin, *Dick Simon Builds Nation's Largest Fleet of 53-Ft. Reefer Vans*, REFRIGERATED TRANSPORTER, (Nov. 1996).

<sup>12</sup> Gary Macklin, *Dick Simon Builds Nation's Largest Fleet of 53-Ft. Reefer Vans*, REFRIGERATED TRANSPORTER, (Nov. 1996).

<sup>13</sup> 27 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 403-406 (Tina Grant ed., 1999).

<sup>14</sup> 27 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 403-406 (Tina Grant ed., 1999).

<sup>15</sup> 27 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 403-406 (Tina Grant ed., 1999).

state of the art company, the corporation became the thirteenth company in the world to install global positioning systems in all of its vehicles. Known to company executives as the “War Room,” the central headquarters housed large computer screens which told the position and load of trucks, weather information, and alternative shipping routes.<sup>16</sup>

With the regulations out of the way, companies such as Simon were looking to show potential customers how their use of technology allowed them to offer lower costs for the suppliers. For Simon in the 1990s, the plan worked. Using the War Room along with other state of the art technology such as a radio frequency identification tag allowed Simon Transportation to minimize costs associated with fuel and vehicle maintenance.<sup>17</sup> As Bob Slaughter, Director of Management Information stated, “With our vehicle maintenance software, when this vehicle enters the yard, it says, ‘It needs this type of service, it needs an oil change, the tires need to be checked.’”<sup>18</sup> By showing off Simon’s state of the art technologies, it began picking up even more high-profile customers, including Nestle, Kraft Foods, Coors Brewing Company, Proctor & Gamble, The Kroger Company, and The Pillsbury Company.<sup>19</sup>

By the end of 1998, Simon Transportation had increased its revenue to roughly \$194 million and had a net worth of \$60 million.<sup>20</sup> As former Chief Financial Officer (“CFO”) Alban

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<sup>16</sup> 27 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 403-406 (Tina Grant ed., 1999).

<sup>17</sup> Linda Thompson, *Truckin’ Toward 2000: Firms Like England, Simon Use Up-to-Date Technology to Keep Ahead in Competitive Industry*, DESERT NEWS (May 25, 1997).

<sup>18</sup> *QUALCOMM and Dick Simon Featured on ABC’s “20/20,”* TRANSPORTATION TIMES, (Spring/Summer 1998).

<sup>19</sup> Linda Thompson, *Truckin’ Toward 2000: Firms Like England, Simon Use Up-to-Date Technology to Keep Ahead in Competitive Industry*, DESERT NEWS (May 25, 1997).

<sup>20</sup> Linda Thompson, *Truckin’ Toward 2000: Firms Like England, Simon Use Up-to-Date Technology to Keep Ahead in Competitive Industry*, DESERT NEWS (May 25, 1997).

Lang stated, “[Simon was] financially very strong, probably stronger than over 95% of the trucking companies across the country.”<sup>21</sup>

### *B. The Eventual Fall of a Trucking Giant*

Despite Simon’s rapid growth, by December of 2000, Simon was facing the highest driver turnover in its history – 175% in 2000.<sup>22</sup> According to a press release dated December 14, this turnover significantly increased recruiting costs and decreased truck utilization.<sup>23</sup> To correct this problem, Simon proposed a \$.02 per mile raise to its drivers effective November 1, 2000.<sup>24</sup> Unfortunately, the ultimate result of this pay raise was the opposite of what was expected by management. As of 2001, Simon’s turnover rate had *increased*, not decreased as planned, to 183%.<sup>25</sup>

In conjunction with rising wage expenses for drivers, Simon’s fuel costs also increased by nearly 40% between 1999 and 2000.<sup>26</sup> Although Simon had fuel price surcharge increase agreements with many of its customers, the size of this increase was too much to pass on to the consumer.<sup>27</sup> As a result, increases in revenues arising from these surcharge agreements were insufficient to cover the rising fuel costs.<sup>28</sup> Between 1999 and 2000, Simon incurred net losses of \$3.2 million and \$11.1 million, requiring the use of \$1.7 million and \$7.6 million of its cash

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<sup>21</sup> Linda Thompson, *Truckin’ Toward 2000: Firms Like England, Simon Use Up-to-Date Technology to Keep Ahead in Competitive Industry*, DESERT NEWS (May 25, 1997).

<sup>22</sup> Simon Transportation, Inc., Annual Report (Form 10-K), at 14 (Jan. 12, 2001).

\*NOTE: SEC filings have been saved as word documents. All page citations are in reference to their page location *as saved*, not as originally filed with the Securities and Exchange Commission.

<sup>23</sup> Simon Transportation, Inc., Press Release Dated December 14, 2000 (Jan. 02, 2001).

<sup>24</sup> Simon Transportation, Inc., Annual Report (Form 10-K), at 16-17 (Jan. 12, 2001).

<sup>25</sup> Simon Transportation, Inc., Annual Report (Form 10-K), at 9 (Jan 14, 2002).

<sup>26</sup> Simon Transportation, Inc., Annual Report (Form 10-K), at 17 (Jan. 12, 2001).

<sup>27</sup> Simon Transportation, Inc., Annual Report (Form 10-K), at 17 (Jan. 12, 2001).

<sup>28</sup> Simon Transportation, Inc., Quarterly Report (Form 10-Q), at 17 (Sept. 13, 2002) (noting a “19.6% decrease in the average price of fuel to \$1.11 per gallon in the 2002 quarter from \$1.38 per gallon in the 2001 quarter”).



reserves respectively. Notwithstanding these setbacks, Simon continued an aggressive expansion of its fleet by acquisition of several existing trucking companies.<sup>29</sup>

One of the more troubling aspects of Simon's business structure was that, by the early 2000s, "[t]he Company's top 5, 10, and 25 customers accounted for 24%, 39%, and 57% of revenue, respectively."<sup>30</sup> Yet, "[n]o single customer accounted for more than 10% of operating revenue" during the fiscal year.<sup>31</sup> Thus, Simon's top 5 customers each averaged roughly 5% of its entire revenue. By 2000, Simon was operating primarily on short-term loans, presumably due to cash-flow problems from receivable collection issues.<sup>32</sup> In fact, Simon had nearly half of all equity represented by debt.<sup>33</sup> Operating on the margin with sizable short-term loans made every penny from Simon's revenues extremely important. In the event one of Simon's top customers left, staying current with Simon's extensive short term debt posed a serious liquidity problem.

According to Simon's 10-K for fiscal 2000, the increasing operating debts and costs had caused Simon's net worth to dip to a point where it breached its secured credit agreement with its primary lender.<sup>34</sup> While this covenant was later waived, this was far from the end of Simon's problems. In 2001, Simon's losses finally reached a breaking point. The tragedy of September 11, 2001, both reduced consumer demand and "significantly increased the cost of Simon's auto and general liability insurance."<sup>35</sup> A reduction in demand for a business such as Simon's, one that was not sufficiently diversified, proved catastrophic. In that year, Simon's net losses

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<sup>29</sup>See e.g., Simon Transportation, Inc., Current Report (Form 8-K) (Jan 22, 2001) (detailing acquisition of Indiana Trucking Company pursuant to agreement reached in December of 2000).

<sup>30</sup> Simon Transportation, Inc., Annual Report (Form 10-Q), at 5 (Jan. 12, 2001).

<sup>31</sup> Simon Transportation, Inc., Annual Report (Form 10-Q), at 5 (Jan. 12, 2001).

<sup>32</sup> Simon Transportation, Inc., Annual Report (Form 10-Q), at 20-21 (Jan. 12, 2001).

<sup>33</sup> Simon Transportation, Inc., Annual Report (Form 10-Q), at 29-30 (Jan. 12, 2001).

<sup>34</sup> Simon Transportation, Inc., Annual Report (Form 10-K), at 43 (Jan. 12, 2001).

<sup>35</sup> Simon Transportation, Inc., Annual Report (Form 10-K), at 10 (Jan 14., 2002).

reached \$44.3 million, draining nearly \$20 million in cash reserves.<sup>36</sup> The company operated at an \$80.2 million deficit.<sup>37</sup> This poor financial picture triggered defaults on nearly all of the outstanding equipment leases.<sup>38</sup> These defaults then triggered other defaults on essentially all of the Simon's remaining secured debt which were primarily comprised of a line-of-credit secured by "accounts receivable, inventories of operating supplies, and office furniture and fixtures and the personal guarantee of [Simon's] majority stockholder."<sup>39</sup> In fact, the because of the financial condition of the company, it was unable to obtain a surety bond of the \$6 million required by its insurance carrier and thus was in real danger of losing its general liability insurance.<sup>40</sup> Because of regulatory laws, the loss of general liability insurance would force its entire fleet to halt operations immediately, leaving drivers and trucks stranded across the United States.<sup>41</sup> As of this time, Simon's losses were estimated at around \$100,000 per day. Even with a successful restructuring of debt outside of bankruptcy, Simon and its management knew that it would merely be postponing an inevitable liquidity crisis, as the company would eventually "not have adequate funds to run its business."<sup>42</sup> In light of this fact, Simon indicated the strong possibility of filing bankruptcy protection in several of its 2001 SEC filings.

In response to these mounting losses, and the very real possibility of being forced to halt all operations if it were to lose its general liability insurance, on February 25, 2002, Simon and

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<sup>36</sup> Simon Transportation, Inc., Annual Report (Form 10-K), at 43 (Jan 14, 2002).

<sup>37</sup> Simon Transportation, Inc., Annual Report (Form 10-K), at 43 (Jan 14, 2002).

<sup>38</sup> Simon Transportation, Inc., Annual Report (Form 10-K), at 43 (Jan 14, 2002). On December 2001, Dime Commercial Credit ("Dime"), one of the Company's lessors, filed suit against Simon due to Simon's defaults. Simon estimated the "exposure related to this obligation is \$1.5 to \$3 million." *Id.* at 27.

<sup>39</sup> Simon Transportation, Inc., Annual Report (Form 10-K), at 26 (Jan 14, 2002).

<sup>40</sup> Simon Transportation, Inc., Annual Report (Form 10-K), at 10 (Jan 14, 2002).

<sup>41</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Affidavit of Robert T. Goates in Support of Chapter 11 Petitions and First Day Motions, Doc. 6 at 4 (Bankr. D. Utah Feb. 25, 2002).

<sup>42</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Affidavit of Robert T. Goates in Support of Chapter 11 Petitions and First Day Motions, Doc. 6 at 4 (Bankr. D. Utah Feb. 25, 2002).

its wholly-owned subsidiary, Dick Simon, Inc. filed voluntary petitions for reorganization under Chapter 11 in the United States Bankruptcy Court for the District of Utah (“Court”).<sup>43</sup> According to Chief Executive Officer (“CEO”) Jack Isaacson, Simon’s “sources of liquidity dried up before [it] could turn around the operations in the face of challenging industry conditions and an economy in recession.”<sup>44</sup> With the company admittedly overleveraged, Simon “lacked the liquidity to continue operating outside of Chapter 11 protection.”<sup>45</sup> Simon’s 10-Q for the third quarter of 2002 further attributed the filing to a number of setbacks, such as “reduced shipping demand caused by the general national economic decline, a scarcity of qualified drivers, declining market values of used tractor and trailers, problems stemming from two acquisitions in 2001, periods of high fuel costs and increased driver and insurance costs.”<sup>46</sup> Isaacson indicated that Simon’s ultimate goal in bankruptcy was to reduce the size of its tractor and trailer fleet, transitioning into a “strong business that will support a leaner and more focused operation going forward.”<sup>47</sup>

Later, on March 26, 2002, Simon Terminal LLC, a wholly-owned subsidiary of Simon also filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court.<sup>48</sup> The reorganizations of Simon Transportation Services, Inc., Dick Simon, Inc. and Simon Terminal LLC were then approved for joint administration.<sup>49</sup>

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<sup>43</sup> Simon was represented by Weston L. Harris of the Salt Lake City law firm of Parsons, Kinghorn & Harris (f/k/a Parsons, Davies, Kinghorn & Peters). The presiding judge was the Honorable Glen E. Clark (Chief Judge) of the United States Bankruptcy Court.

<sup>44</sup> Simon Transportation, Inc., Press Release Dated February 25, 2002, at 1 (Mar. 4, 2002).

<sup>45</sup> Simon Transportation, Inc., Press Release Dated February 25, 2002, at 1 (Mar. 4, 2002).

<sup>46</sup> Simon Transportation, Inc., Quarterly Report (Form 10-Q), at 17 (Sept. 13, 2002).

<sup>47</sup> Simon Transportation, Inc., Press Release Dated February 25, 2002, at 1 (Mar. 4, 2002).

<sup>48</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Order Directing Joint Administration of Affiliated Cases, Doc. 5 at 1-2 (Bankr. D. Utah Feb. 25, 2002).

<sup>49</sup> Motion granted by minute entry, dated February 25, 2002.

## II. STABILIZE OPERATIONS

Generally speaking, Chapter 11 reorganization consists of either a rehabilitation of the debtor's operations or an orderly liquidation of its assets.<sup>50</sup> Regardless of the ultimate goal of the reorganization, the success of either goal hinges on the ability of the debtor to stabilize and maintain business operations. To facilitate this pressing need, upon the entry of an order for relief in a Chapter 11 case, the debtor becomes a "debtor-in-possession"<sup>51</sup> ("DIP") with the general authority of a bankruptcy trustee including the authority to operate the debtor's business.<sup>52</sup> The ability of a Chapter 11 debtor to retain current management in place represents perhaps the most valuable distinction between Chapter 11 and Chapter 7 with respect to the ability of a debtor to sustain continued operations and, thus, maximize either the changes for rehabilitation or the possible value for the assets of the estate.

### *A. Keeping Collectors at Bay – The Automatic Stay*

Aside from the ability to retain management of the debtor, one of the most important tools afforded by the bankruptcy code with respect to a debtor seeking to stabilize operations is found in section 362.<sup>53</sup> Generally, the Bankruptcy Code ("Code") creates an estate consisting of

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<sup>50</sup> See e.g., *In re Ocean Beach Properties*, 148 B.R. 494 (Bankr. E.D. Mich. 1992).

<sup>51</sup> 11 U.S.C. § 1101(1).

<sup>52</sup> See 11 U.S.C. §§ 1107(a), 363.

<sup>53</sup> 11 U.S.C. § 362(a). This section provides: "[A] petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of-(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; (4) any act to create, perfect, or enforce any lien against property of the estate; (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose

all property to which the debtor has an interest upon filing.<sup>54</sup> The “automatic stay,” found in section 362 of the Code, then operates to protect this property by halting all current and future claims against this estate.<sup>55</sup> In other words, creditors may no longer continue suits – or any other action for that matter – against the debtor to recover debts, nor may they later institute actions against the debtor to recover debts after the debtor has filed for Chapter 11 protection. In effect, this provision seals the debtor’s estate from all claims for the duration of the stay, allowing the debtor to shift its focus from defaulting obligations to the more important goal of future success.

Often, the automatic stay leaves many creditors without available recourse to recover defaults. The automatic stay, however, is not absolute and may be lifted upon, among other things, a showing of cause, including a lack of adequate protection.<sup>56</sup> The debtor has the burden of showing that cause does not exist to grant the motion.<sup>57</sup> In addition to a showing of cause, a creditor may be entitled to relief from the stay on the ground that the (1) debtor does not have equity in the property that is subject to the stay; and (2) the property is not necessary for an effective reorganization.<sup>58</sup> Unlike motions for relief for cause, creditors seeking relief under 362(d)(2) have the burden of proving that the debtor has no equity interest in the property in question.<sup>59</sup>

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before the commencement of the case under this title; (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title; (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.”

<sup>54</sup> 11 U.S.C. § 541(a).

<sup>55</sup> 11 U.S.C. § 362(a)(1).

<sup>56</sup> 11 U.S.C. § 362(d).

<sup>57</sup> 11 U.S.C. § 362(g).

<sup>58</sup> 11 U.S.C. § 362(d).

<sup>59</sup> 11 U.S.C. § 362(g)(1).

For the most part, very little happened with respect to the automatic stay in Simon's case that would be considered out of the ordinary. Because, at the time of filing, Simon had defaulted on nearly all its outstanding lease and credit obligations, it is not surprising that many creditors sought relief from the stay in order to quickly recover on Simon's defaulted obligations. The majority of these motions sought relief to recover leased property to which Simon was in default. Simon often agreed to these motions or posed no objection after determining the leased property was not required for continuing operations, or that retention of the property would pose no economic benefit to the estate.<sup>60</sup> In fact, Simon likely welcomed many of these motions, as it had previously determined that in order to successfully liquidate the company, a reduction of 40% of its tractor and trailer fleet was necessary.<sup>61</sup>

For example, soon after Simon's petition, Banc of America (BOA) filed a motion for relief from stay as a successor in interest to a lease agreement entered into between Simon and NationsBanc.<sup>62</sup> According to BOA, as of the petition date, Simon was five months behind on its lease obligation in an amount of over \$300 thousand dollars.<sup>63</sup> In their motion, they sought to compel Simon to assume or reject the lease or, in the alternative, for relief from stay in order to mitigate its damages.<sup>64</sup> Ultimately, Simon did not object to granting relief from stay in order to

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<sup>60</sup> See e.g., *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion to Assume or Reject an unexpired lease of personal property, Motion for Relief From Stay – No Payment Made Filed by Banc of America Leasing & Capital, LLC, Doc. 179 at 2 (Bankr. D. Utah Mar. 20, 2002).

<sup>61</sup> Simon Transportation, Inc., Press Release Dated February 25, 2002, at 1 (Mar. 4, 2002).

<sup>62</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion to Assume or Reject an unexpired lease of personal property, Motion for Relief From Stay – No Payment Made Filed by Banc of America Leasing & Capital, LLC, Doc. 50 (Bankr. D. Utah Mar. 1, 2002).

<sup>63</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion to Assume or Reject an unexpired lease of personal property, Motion for Relief From Stay – No Payment Made Filed by Banc of America Leasing & Capital, LLC, Doc. 50 at 3-4 (Bankr. D. Utah Mar. 1, 2002).

<sup>64</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion to Assume or Reject an unexpired lease of personal property, Motion for Relief From Stay – No Payment Made Filed by Banc of America Leasing & Capital, LLC, Doc. 50 at 4 (Bankr. D. Utah Mar. 1, 2002).

retain possession of the leased vehicles. In fact, Simon expressly conceded it had no equity interest in the leased vehicles and retention of the vehicles would be of no benefit to the estate.<sup>65</sup> Without objection to relief from stay, the court then granted BOA's motion, requiring the rejection of the lease and lifting the stay to permit BOA to regain possession of the leased property.<sup>66</sup> Similarly, Dime Commercial Corporation sought relief from the stay to recover over 100 trucks and 75 trailers it had leased to Simon.<sup>67</sup> In its response, Simon conceded that it had no equity interest in the vehicles as lessee and it no longer needed the vehicles.<sup>68</sup> Accordingly, the Court granted Dime's motion to obtain possession of the property.<sup>69</sup> Finally, Eastman Kodak Company sought relief from stay in order to set-off mutual debts owed by the parties.<sup>70</sup> While the record is devoid of Kodak's proof, the Court found that Simon, in fact, "ha[d] no equity in the property which [was] the subject of [Kodak's] Motion."<sup>71</sup> Because no objection was filed in order to satisfy Simon's burden of proof with respect to the remaining issues, the Court granted

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<sup>65</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion to Assume or Reject an unexpired lease of personal property, Motion for Relief From Stay – No Payment Made Filed by Banc of America Leasing & Capital, LLC, Doc. 179 at 2 (Bankr. D. Utah Mar. 20, 2002).

<sup>66</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Granting Motion to Assume/Reject, Granting Motion for Relief From Stay, Doc. 210 (Bankr. D. Utah Mar. 26, 2002).

<sup>67</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Relief from Stay, Doc. 112 (Bankr. D. Utah Mar. 13, 2002).

<sup>68</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors Limited Objection to Motion for Relief from Stay, Doc. 239 at 2 (Bankr. D. Utah Mar. 13, 2002).

<sup>69</sup> Motion granted by minute entry, dated April 4, 2002.

<sup>70</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Granting Eastman Kodak Company's Motion for Relief From the Automatic Stay to Permit Set-Off of Pre-Petition Mutual Debts, Doc. 488 at 2 (Bankr. D. Utah May 15, 2002).

<sup>71</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Granting Eastman Kodak Company's Motion for Relief From the Automatic Stay to Permit Set-Off of Pre-Petition Mutual Debts, Doc. 488 at 2 (Bankr. D. Utah May 15, 2002).

Kodak's motion for relief.<sup>72</sup> Similar relief was granted to numerous other creditors after no objections were made to their relief from stay or upon agreed order.<sup>73</sup>

In addition to creditors seeking to recover leased property following Simon's defaults, a significant number of Simon's creditors were comprised of parties injured as a result of pre-petition vehicle accidents. Those creditors also sought relief from the stay, not to recover property, but primarily to continue existing litigation outside the bankruptcy forum. These motions were often predicated on the ground that the personal injury or wrongful death claims could not be tried in the bankruptcy court because they were not "core matters."<sup>74</sup>

While the automatic stay generally works to consolidate all claims against the estate in a single forum, personal injury and wrongful death claims generally cannot be litigated on their merits in the bankruptcy court. They must either be heard by the district court, or decided in a court of concurrent jurisdiction where the injury arose.<sup>75</sup> Of course, to continue a proceeding in a state court, relief from the automatic stay must be granted.<sup>76</sup> Cause for these motions was often asserted on the ground that their claim was entitled to a trial by jury, something unavailable in

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<sup>72</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Granting Eastman Kodak Company's Motion for Relief From the Automatic Stay to Permit Set-Off of Pre-Petition Mutual Debts, Doc. 488 at 2 (Bankr. D. Utah May 15, 2002).

<sup>73</sup> See e.g., *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Granting Motion To Assume/Reject IBJ Whitehall Business Credit Corp. Lease, Doc. 444 (Bankr. D. Utah May 2, 2002); *In re Simon Transportation Services, Inc.*, No. 02-22906, Stipulated Order Approving Stipulation Between Debtors and General Electric Capital Corp for an Order Approving Rejection of Leases and Granting Related Relief from the Automatic Stay, Doc. 426 (Bankr. D. Utah Apr. 29, 2002) (upon agreed order); *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Granting Stipulation Re: Motion to Compel Debtor to accept or reject lease of personal property, Doc. 393 (Bankr. D. Utah Apr. 19, 2003) (upon agreed order); *In re Simon Transportation Services, Inc.*, No. 02-22906, Order for Relief From the Automatic Stay, Doc. 390 (Bankr. D. Utah Apr. 19, 2002) (granted relief from stay with respect to setoff of certificate of deposit after no objections were filed).

<sup>74</sup> See e.g., *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Relief from Stay, Doc. 645 (Bankr. D. Utah July 22, 2002); *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Relief from Stay, Doc. 649 (Bankr. D. Utah July 22, 2002).

<sup>75</sup> See 28 U.S.C. § 157(b)(5).

<sup>76</sup> See 11 U.S.C. § 362.



the bankruptcy forum. Moreover, many of these creditors further argued that such relief would not damage the estate because recovery would be limited solely to insurance proceeds.<sup>77</sup>

As previously mentioned, in determining the merits of such a motion, it is the debtor who has the burden of proving that cause does not exist to grant the motion.<sup>78</sup> Here, the debtors rarely filed a response to these motions for relief. In fact, in situations where a response was actually filed, Simon's response often only an effort to clarify that it would not object so long as the motion stipulated that any recovery would be limited to insurance proceeds from policies held by Simon and not from other property of the estate.<sup>79</sup> Because of the limitation on a bankruptcy court's jurisdiction and the lack of objection by Simon, relief sought with respect to claims for personal injury and wrongful death were uniformly granted on the stipulation that recovery would be limited to insurance proceeds.<sup>80</sup>

However, the Court made clear that limiting recovery to insurance proceeds was not a guaranteed method for obtaining relief from stay for actions outside the personal injury or wrongful death setting. Specifically, the Court denied an employee's motion for relief to

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<sup>77</sup>See e.g., *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Relief From Stay, Doc. 721 (Bankr. D. Utah Sept. 5, 2002).

<sup>78</sup> 11 U.S.C. § 362(g).

<sup>79</sup> See e.g., *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtor's Response to Motion for Relief From Stay Filed by Daniel Sheeks, Doc. 677 (Bankr. D. Utah Aug. 6, 2002) (noting that "Debtors have consistently taken the position in these cases that if parties would waive all claims against the Debtors' respective estates and look to insurance proceeds only, that Debtors would stipulate to relief from the automatic stay"); *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for Relief from Stay, Doc. 993 (Bankr. D. Utah April 10, 2003) (noting similar stipulation by Committee following liquidation plan where Committee obtained rights as DIP); *In re Simon Transportation Services, Inc.*, No. 02-22906, Response to Motion for Relief From Stay, Doc. 954 (Bankr. D. Utah Mar. 10, 2003) (same).

<sup>80</sup> See e.g., *In re Simon Transportation Services, Inc.*, No. 02-22906, Stipulated Order for Relief From the Automatic Stay as to Glen Putnam, Doc. 542 (Bankr. D. Utah Jun. 11, 2002); *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Lifting Automatic Stay, Doc. 531 (Bankr. D. Utah Jun. 4, 2002); *In re Simon Transportation Services, Inc.*, No. 02-22906, Order for Relief From the Automatic Stay as to James Owens Sr., Anthony Collins & C.R. England, Inc. to pursue and prosecute claims against the Deb asserted and pending in the State Court Action, Doc. 770 (Bankr. D. Utah Oct. 16, 2002); *In re Simon Transportation Services, Inc.*, No. 02-22906, Stipulated Order for Relief From the Automatic Stay, Doc. 757 (Bankr. D. Utah Oct. 1, 2002).

continue an employment discrimination lawsuit against Simon.<sup>81</sup> In her motion, Ms. Tammy Homer sought relief from stay in order to file a claim for employment discrimination against Simon in district court.<sup>82</sup> Prior to the petition date, Ms. Homer had received notice of her right to sue in federal court from the Equal Employment Opportunity Commission on January 29, 2002.<sup>83</sup> She argued that, because federal law requires her file suit in federal court within 90 days of receiving her notice of a right to sue, she would be irreparably harmed by the automatic stay.<sup>84</sup> In addition, her motion specifically limited any recovery to insurance proceeds rather than to Simon's estate.<sup>85</sup> Simon, however, objected.<sup>86</sup> Simon correctly noted that 11 U.S.C. § 108 expressly tolled the statute of limitations on Ms. Homer's claim and, therefore, she would not be irreparably damaged as a result of the stay.<sup>87</sup> Moreover, Simon pointed out that Ms. Homer's limitation of her recovery to insurance proceeds would provide no benefit to her or the estate, as Simon had no insurance that would cover her termination action.<sup>88</sup> For these reasons, Simon requested she simply file a proof of claim with the Court like any other general unsecured

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<sup>81</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Order Denying Motion For Relief From Stay, Doc. 464 (Bankr. D. Utah May 5, 2002).

<sup>82</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Relief From Stay, Doc. 303 at 1 (Bankr. D. Utah Apr. 2, 2002).

<sup>83</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Relief From Stay, Doc. 303 at 2 (Bankr. D. Utah Apr. 2, 2002).

<sup>84</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Relief From Stay, Doc. 303 at 2 (Bankr. D. Utah Apr. 2, 2002).

<sup>85</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Relief From Stay, Doc. 303 at 2 (Bankr. D. Utah Apr. 2, 2002).

<sup>86</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Debtor's Response/Objection to Motion of Tammy J. Homer for RFS, Doc. 383 (Bankr. D. Utah Apr. 17, 2002).

<sup>87</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Debtor's Response/Objection to Motion of Tammy J. Homer for RFS, Doc. 383 at 3 (Bankr. D. Utah Apr. 17, 2002).

<sup>88</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Debtor's Response/Objection to Motion of Tammy J. Homer for RFS, Doc. 383 at 2 (Bankr. D. Utah Apr. 17, 2002).

creditor.<sup>89</sup> Following a hearing of the parties on April 25, the Court – without comment – denied Ms. Homer’s motion for relief from stay.<sup>90</sup>

### *B. Elevating the Priority Status of Certain Creditors*

Not all provisions of the Code make the goal of stabilizing operations easy. A fundamental goal of the Code is to provide for the equitable distribution of a debtor’s assets to its creditors and shareholders. In this regard, the Code requires payments to creditors to be made in a specified order. Specifically, section 507 prescribes a general priority in which prepetition claims against the debtor must be paid upon confirmation of a plan.<sup>91</sup> Plan confirmation, however, is a long and arduous process that can, in many cases, take years to complete. This delay leaves many creditors without recovery for an extended period of time, if ever.

In order to maintain stable operations, however, many immediate ongoing payments to creditors are necessary. Often, these payments are made based upon pre-petition debts, such as payments of wages to employees, amounts due to vendors and suppliers, and other obligations owed on account of credit extended to the debtor prior to filing. As Murphy’s Law dictates, the payments necessary to maintain a continuous business, such as payments to employees and vendors, typically fall last in the line of repayment priority.<sup>92</sup> This means that a debtor’s pressing need to pay vendors, suppliers, and employees would fall squarely in violation of section 507’s priority scheme, a dichotomy that could place a debtor in a precarious position.

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<sup>89</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtor's Response/Objection to Motion of Tammy J. Homer for RFS, Doc. 383 at 4 (Bankr. D. Utah Apr. 17, 2002).

<sup>90</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Denying Motion For Relief From Stay, Doc. 464 (Bankr. D. Utah May 5, 2002).

<sup>91</sup> Generally, the priority is outlined from first to last as follows: secured claims, spousal support obligations, costs of administration, certain high-priority claims, and general unsecured obligations.

<sup>92</sup> In addition, and more importantly, section 547 prohibits payments or other prepetition transfers made to a creditor that increase the creditor's recovery ahead of recovery by other, similarly situated creditors.<sup>92</sup>

While the Code does not expressly authorize payments to prepetition creditors prior to confirmation of a plan of reorganization, without the ability to make good on these prepetition claims, employees would likely resign, vendors would likely cease doing business with the debtor, and creditors would refuse to extend the debtor any additional credit. Within a very short amount of time, the debtor would likely find itself unable to continue business operations. Ultimately, this would destroy any possibility of a successful reorganization. Thus, business realities often dictate that certain creditors be afforded special treatment at the outset of the Chapter 11 case.

For this reason, a body of case law has developed permitting payments of prepetition claims prior to confirmation of a plan.<sup>93</sup> For example, section 105 generally permits the court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”<sup>94</sup> This provision, combined with a bankruptcy court’s inherent equity powers, has been held to permit a debtor to satisfy many prepetition claims prior to the confirmation of a Chapter 11 plan.<sup>95</sup> Therefore, a debtor’s petition is commonly accompanied by first day motions seeking authorization to make payments in violation of the Code’s priority structure, such as those to honor pre-petition wage and employee benefit obligations and maintain existing bank accounts. Once these orders are in place, a debtor can maintain payroll, honor employee benefits, and reassure vendors that outstanding invoices will be paid.

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<sup>93</sup> See e.g., *In re Chateaugay Corp.*, 80 B.R. 279 (S.D. N.Y. 1987); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174 (Bankr. S.D. N.Y. 1989); *In re Gulf Air, Inc.*, 112 B.R. 152, 20 (Bankr. W.D. La. 1989); *In re Structurlite Plastics Corp.*, 91 B.R. 813 (Bankr. S.D. Ohio 1988). But see *In re Revco D.S., Inc.*, 91 B.R. 777, 780 (Bankr. N.D. Ohio 1988) (holding that section 1129 precludes the payment of prepetition claims prior to confirmation of a plan of reorganization).

<sup>94</sup> 11 U.S.C. § 105.

<sup>95</sup> See e.g., *In re Chateaugay Corp.*, 80 B.R. 279 (S.D. N.Y. 1987); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174 (Bankr. S.D. N.Y. 1989); *In re Gulf Air, Inc.*, 112 B.R. 152, 20 (Bankr. W.D. La. 1989); *In re Structurlite Plastics Corp.*, 91 B.R. 813 (Bankr. S.D. Ohio 1988).

In Simon's filing, its needs were no different. As discussed in more detail below, among Simon's first-day motions were requests to pay critical vendors,<sup>96</sup> to pay prepetition wages and other employee benefits,<sup>97</sup> and to continue use of existing bank accounts.<sup>98</sup> In order to prevent an immediate halt of operations, Simon's most important motions included those in support of its employees, customers, and other stakeholders.

One critical class of prepetition creditors was Simon's employees. Because Simon employed over 2,600 employees at the time of filing, maintaining the ability to pay wages and other benefits was critical to stabilizing and maintaining operations.<sup>99</sup> Many of these employees likely lived paycheck to paycheck and could not remain employed by Simon if they were forced to wait for the confirmation of the plan to obtain wages owed prior to Simon's filing. In addition, these claims would receive only a third or fourth priority status, making full payment extremely unlikely in the average bankruptcy. As such, one of its first motions was a request to pay "prepetition wages, salaries, reimbursable employee expenses and medical and other employee benefits."<sup>100</sup> In support of this motion, Simon's CFO, Robert Goates, noted that approval of this motion was vital to ensuring "the willingness of existing employees to continue

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<sup>96</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion to Pay Critical Vendors to Extent Such Vendors Agree to Extend Post-petition Unsecured Credit, Doc. 12 (Bankr. D. Utah Feb. 25, 2002).

<sup>97</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion Authorizing Payment of Pretetition Wages, Salaries, Reimbursable Employee Expenses and Medical and Other Employee Benefits, Doc. 10 (Bankr. D. Utah Feb. 25, 2002).

<sup>98</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion Authorizing Maintenance of Existing Cash Management System, Maintenance of Bank Accounts and Continued Use of Business Forms, Doc. 14 (Bankr. D. Utah Feb. 25, 2002). Simon also filed a motion to employ counsel, Scott J. Goldstein, pursuant to 11 U.S.C. § 327(a), (b). *In re Simon Transportation Services, Inc.*, No. 02-22906, Application to Employ Scott J. Goldstein, Doc. 7 (Bankr. D. Utah Feb. 25, 2002).

<sup>99</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion Authorizing Payment of Pretetition Wages, Salaries, Reimbursable Employee Expenses and Medical and Other Employee Benefits, Doc. 10 (Bankr. D. Utah Feb. 25, 2002).

<sup>100</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion Authorizing Payment of Pretetition Wages, Salaries, Reimbursable Employee Expenses and Medical and Other Employee Benefits, Doc. 10 (Bankr. D. Utah Feb. 25, 2002).

to work for Simon.”<sup>101</sup> Further, the continued existence of this workforce was “indispensable to maximizing the going concern value of Simon’s operations.”<sup>102</sup>

In addition, Simon filed a motion to pay the prepetition claims of its critical vendors, a much needed concession if Simon expected to remain operational.<sup>103</sup> Simon’s list of critical vendors included those that operated to ensure payments to drivers while on route, independent contractor drivers, and fuel vendors.<sup>104</sup> According to Mr. Goates, the inability to make payments to these vendors “would have a catastrophic effect on [Simon’s] operations.”<sup>105</sup> In particular, the inability to make these payments would result in the inability of drivers to obtain fuel and needed supplies. Without these needs fulfilled, “drivers would leave their tractors, and the tractors, trailers, and shipper’s freight would be stranded nationwide.”<sup>106</sup> Thus, these payments were necessary to ensure the uninterrupted post-petition operation of Simon’s business.<sup>107</sup>

Similar to a debtor’s explicit payment of pre-petition claims, permitting the incidental payment of pre-petition claims through a debtor’s bank account, due to actions such as the delay in bank processing, would also run afoul of section 507’s priority scheme. However, it would be very burdensome for a debtor such as Simon, with a large amount of depository accounts, to be forced to close these accounts just to turn around and reopen new ones. Therefore, Simon also

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<sup>101</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Affidavit of Robert T. Goates in Support of Chapter 11 Petitions and First Day Motions, Doc. 6 at 10 (Bankr. D. Utah Feb. 25, 2002).

<sup>102</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Affidavit of Robert T. Goates in Support of Chapter 11 Petitions and First Day Motions, Doc. 6 at 9 (Bankr. D. Utah Feb. 25, 2002).

<sup>103</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion to Pay Critical Vendors to Extent Such Vendors Agree to Extend Post-petition Unsecured Credit, Doc. 12 (Bankr. D. Utah Feb. 25, 2002).

<sup>104</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion to Pay Critical Vendors to Extent Such Vendors Agree to Extend Post-petition Unsecured Credit, Doc. 12 at 10 (Bankr. D. Utah Feb. 25, 2002).

<sup>105</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Affidavit of Robert T. Goates in Support of Chapter 11 Petitions and First Day Motions, Doc. 6 at 10 (Bankr. D. Utah Feb. 25, 2002).

<sup>106</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Affidavit of Robert T. Goates in Support of Chapter 11 Petitions and First Day Motions, Doc. 6 at 10 (Bankr. D. Utah Feb. 25, 2002).

<sup>107</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Affidavit of Robert T. Goates in Support of Chapter 11 Petitions and First Day Motions, Doc. 6 at 11 (Bankr. D. Utah Feb. 25, 2002).

filed a motion to authorize the maintenance of existing cash management system, maintenance of bank accounts and continued use of business forms.<sup>108</sup> Mr. Goates maintained that the inability to retain these accounts would effectively freeze operations while “establishing and implementing new post-petition cash systems, controls, and procedures.”<sup>109</sup> By obtaining relief from the obligation to open new bank accounts, Simon was able to save the trouble of shifting its entire cash management and accounts collection systems at a time when uninterrupted cash flow is especially critical.

According to CEO Jon Isaacson, “[t]hese first day orders [were to] enable [Simon] to continue operating and take care of [its] customers and remaining employees as [it] commence[s] what [it] expect[s] will be an orderly and intensive strategic restructuring process.”<sup>110</sup> Apparently, the Court recognized the immediate need to make these prepetition payments. Without discussion, all of Simon’s first day motions were granted by minute entry on the afternoon of filing.<sup>111</sup>

### *C. Maintaining Sufficient Liquidity to Meet Operational Needs*

Stabilizing operations can be a delicate undertaking when cash flow is suffering. To make matters worse, section 363 of the Code places significant restrictions on the debtor’s use of a certain portion of its most liquid assets. While section 363(c)(1) allows a DIP to “use, sell or lease property of the estate in the ordinary course of business without notice or a hearing, unless

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<sup>108</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion Authorizing Maintenance of Existing Cash Management System, Maintenance of Bank Accounts and Continued Use of Business Forms, Doc. 14 (Bankr. D. Utah Feb. 25, 2002).

<sup>109</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Affidavit of Robert T. Goates in Support of Chapter 11 Petitions and First Day Motions, Doc. 6 at 12 (Bankr. D. Utah Feb. 25, 2002).

<sup>110</sup> Simon Transportation, Inc., Press Release Dated February 26, 2002, at 1 (Mar. 4, 2002).

<sup>111</sup> Order granted by minute entry, dated March 25, 2002.

the court orders otherwise,”<sup>112</sup> considerable limitations are placed on the debtor’s use of “cash collateral.”<sup>113</sup> Cash collateral generally includes all cash, securities, or other cash equivalents that are secured by a creditor.<sup>114</sup> Specifically, section 363 precludes the use of cash collateral unless the party with an interest in the collateral consents or the court permits such use after notice and hearing.

While the Code is silent to the requirements of what is to be considered prior to authorizing use of cash collateral, Code section 363(e) provides that at any time, on request of an entity that has an interest in property proposed to be, or actually is being, used, sold, or leased by the trustee or DIP, the court, with or without a hearing, shall prohibit or condition the use, sale, or lease as is necessary to provide adequate protection of that interest.<sup>115</sup> Under section 361, adequate protection may be provided to the extent of any decrease in value of the secured creditor’s interest in such property (i.e., a loss in value below the amount of the secured claim) by cash payments, providing the secured creditor an additional or replacement lien, or other relief which constitutes the indubitable equivalent of the impairment of the secured creditors interest in the property.<sup>116</sup>

Because of the obstacles imposed by the Code on the use of cash collateral, first day motions to use cash collateral are common.<sup>117</sup> In Simon’s case, “substantially all of the Debtors’ existing cash and anticipated future cash . . . constitute[d] cash collateral” as of the date of the

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<sup>112</sup> See 11 U.S.C. § 363(c)(1).

<sup>113</sup> See 11 U.S.C. § 363(b).

<sup>114</sup> See 11 U.S.C. § 363(a).

<sup>115</sup> 11 U.S.C. § 363(e).

<sup>116</sup> 11 U.S.C. §§ 361(1)-(3).

<sup>117</sup> JONATHAN FRIEDLAND ET. AL., CHAPTER 11-101: THE NUTS AND BOLTS OF CHAPTER 11 PRACTICE 166 (2007).



petition.<sup>118</sup> Without permission to use cash collateral, Simon would have essentially no capital with which to use to pay creditors necessary to continue operations and increase stability. It must be noted, however, that the ability to use cash collateral is of little benefit if the debtor is without cash to use, as is often the case of a Chapter 11 debtor. In the long-term, obtaining liquidity may be accomplished through streamlining operations, cutting expenses, or accelerating the collection of outstanding receivables to generate necessary cash flow. For most debtors, however, these methods of obtaining liquid capital are not practical. Typically, debtors are in such dire positions that more immediate forms of liquidity are required. Thus, quickly obtaining sufficient liquid capital to meet operational needs is often one of the debtor's main priorities at the outset of Chapter 11 proceedings.

As a general matter, troubled companies have significant difficulty obtaining financing even in the absence of the scarlet letter that is bankruptcy. To alleviate some of this difficulty for debtors in bankruptcy, the Code provides various “carrots” that may be used to overcome various risk barriers that lead lenders to avoid dealing with financially distraught borrowers. Most notably, section 364 provides various levels of priority for a post-petition lender, including (1) administrative priority for certain financings incurred outside of the ordinary course of business if approved by the court;<sup>119</sup> (2) super-administrative priority for post-petition financing incurred in the ordinary course of business;<sup>120</sup> and (3) super-super-priority – or the grant of superior

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<sup>118</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Interim and Final Orders (I) Authorizing Debtors to Incur Postpetition Secured Indebtedness, (II) Granting Security Interests and Priority Pursuant to 11 U.S.C. Section 364, (III) Modifying Automatic Stay and (IV) Setting Final Hearing, Doc. 20 at 38 (Bankr. D. Utah Feb. 26, 2002).

<sup>119</sup> 11 U.S.C. § 364(b).

<sup>120</sup> 11 U.S.C. § 364(a).

security interests – to a lender if the debtor is unable to obtain other favorable unsecured credit.<sup>121</sup>

Accordingly, a motion requesting to obtain post-petition financing, as well as requesting authorization to use of cash collateral, was filed within twenty-four hours of Simon’s petition.<sup>122</sup> In addition to the use of its existing cash collateral, Simon sought to incur \$2 million in post-petition financing from Jerry Moyes, and any additional amounts he may loan in his sole discretion.<sup>123</sup> According to the motion, Mr. Moyes was to receive a first priority security interest in all of Simon’s pre- and post-petition unencumbered property and a junior security interest in all property already encumbered as of the petition date.<sup>124</sup>

Presumably, Simon anticipated that conferring 364 priority on Mr. Moyes would raise red flags due to his controlling interest in Simon<sup>125</sup> as well as his position as Chairman of the Board.<sup>126</sup> In support of its request to grant section 364(c) priority status on Mr. Moyes, Simon

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<sup>121</sup> 11 U.S.C. §§ 364(c), (d).

<sup>122</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion For Interim and Final Orders (I) Authorizing Debtors to Incur Postpetition Secured Indebtedness (II) Granting Security Interests and Priority Pursuant to 11 U.S.C. Section 364, (III) Modifying Automatic Stay and (IV) Setting Final Hearing, Doc. 20 (Bankr. D. Utah Feb. 26, 2002).

<sup>123</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion For Interim and Final Orders (I) Authorizing Debtors to Incur Postpetition Secured Indebtedness (II) Granting Security Interests and Priority Pursuant to 11 U.S.C. Section 364, (III) Modifying Automatic Stay and (IV) Setting Final Hearing, Doc. 20 (Bankr. D. Utah Feb. 26, 2002).

<sup>124</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion For Interim and Final Orders (I) Authorizing Debtors to Incur Postpetition Secured Indebtedness (II) Granting Security Interests and Priority Pursuant to 11 U.S.C. Section 364, (III) Modifying Automatic Stay and (IV) Setting Final Hearing, Doc. 20 at 6-7 (Bankr. D. Utah Feb. 26, 2002).

<sup>125</sup> Simon Transportation, Inc., Press Release Dated December 14, 2000, at 1 (Jan. 02, 2001).

<sup>126</sup> Simon Transportation, Inc., Annual Report (Form 10-K), at 27 (Jan. 12, 2001). This is because a DIP operates its business as a fiduciary for both equity interests and creditors. *See Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985); *Wolf v. Weinstein*, 372 U.S. 633, 649-52 (1963); *In re Anchorage Nautical Tours, Inc.*, 145 B.R. 637 (Bankr. 9th Cir. 1992); *In re Curry & Sorensen, Inc.*, 57 B.R. 824, 838 (Bankr. 9th Cir. 1986); *In re Cochise College Park, Inc.*, 703 F.2d 1339 (9th Cir. 1983); *Tenn-Fla Partners v. First Union National Bank*, 229 B.R. 720, 734 (W.D. Tenn. 1999), *aff’d*, 226 F.3d 746 (6th Cir. 2000). The U.S. Supreme Court in *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985), has expressly held that “bankruptcy causes fundamental changes in the nature of the corporate relationships. . . . [O]ne of the painful facts of bankruptcy is that the interests of shareholders become subordinated to the interests of creditors.” 471 U.S. at 355.

indicated that it engaged in a significant pre-petition inquiry in order to gauge the availability of post-petition financing and was unable to obtain more favorable financing from non-insider sources.<sup>127</sup> Moreover, Simon made a special point to note that the agreement reflected “arms-length negotiations and the sound exercise of business judgment.”<sup>128</sup>

The motions to use cash collateral and incur DIP financing were approved on February 26, 2002.<sup>129</sup> At that time, the Court gave interim approval for a \$2 million secured debtor-in-possession financing facility for payment of permitted pre-petition claims, working capital needs, letters of credit and other general corporate purposes.<sup>130</sup> Following the Court’s order, post-petition financing was later extended from \$2 million to \$5 million in order to obtain third-party financing for insurance purposes.<sup>131</sup>

### III. SALE OF ASSETS

Traditionally, Chapter 11 of the U.S. Bankruptcy Code has been used to facilitate management’s rehabilitation of a troubled company. Having stabilized operations, the next step

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<sup>127</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion For Interim and Final Orders (I) Authorizing Debtors to Incur Postpetition Secured Indebtedness (II) Granting Security Interests and Priority Pursuant to 11 U.S.C. Section 364, (III) Modifying Automatic Stay and (IV) Setting Final Hearing, Doc. 20 at 39 (Bankr. D. Utah Feb. 26, 2002).

<sup>128</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion For Interim and Final Orders (I) Authorizing Debtors to Incur Postpetition Secured Indebtedness (II) Granting Security Interests and Priority Pursuant to 11 U.S.C. Section 364, (III) Modifying Automatic Stay and (IV) Setting Final Hearing, Doc. 20 at 8 (Bankr. D. Utah Feb. 26, 2002).

<sup>129</sup> Order by minute entry, dated February 26, 2002.

<sup>130</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion For Interim and Final Orders (I) Authorizing Debtors to Incur Postpetition Secured Indebtedness (II) Granting Security Interests and Priority Pursuant to 11 U.S.C. Section 364, (III) Modifying Automatic Stay and (IV) Setting Final Hearing, Doc. 20 (Bankr. D. Utah Feb. 26, 2002).

<sup>131</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Approving Increase in Debtor-In-Possession Credit Facility and Authorizing Funding of Letter of Credit solely for providing \$3 million in security to RLI Insurance Company, Doc. 81 at 1 (Bankr. D. Utah Mar. 8, 2002). On March 8, 2002, the Court approved the entire \$5 million DIP Credit Facility to supplement the Company's operations during the reorganization process.

of a debtor is to streamline business operations by optimizing workforce capacity, restructuring equipment and asset facilities, and examining ways to cut expenses and otherwise improve profitability in order to ensure a successful reorganization.<sup>132</sup> However, as discussed above, by the time Simon filed for bankruptcy protection, the company's financial picture was bleak. In fact, it was beyond bleak. Simon was in nothing short of dire straits. Recognizing this precarious financial position and the unlikelihood of a successful reorganization, Simon's next step in its bankruptcy process was dramatically different.

On March 11, 2002, Simon filed a motion with the Court for bid and auction procedures for a sale of substantially all of its assets and operations.<sup>133</sup> Simon indicated that its intent was to sell the business as a going concern where the buyer would retain many of Simon's employees and profitable accounts.<sup>134</sup> The motion anticipated the assumption and assignment of various profitable leases that were to be included as part of the sale.<sup>135</sup> Simon cited a liquidity crunch and lack of sufficient post-petition DIP financing for a long-term reorganization as the reason for its decision to seek liquidation.<sup>136</sup> According to Simon, at roughly \$100,000 in operating losses

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<sup>132</sup> JONATHAN FRIEDLAND ET. AL., CHAPTER 11-101: THE NUTS AND BOLTS OF CHAPTER 11 PRACTICE 23 (2007).

<sup>133</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Approval of Sale Substantially All of the Debtors' Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc 106 (Bankr. D. Utah Mar. 11, 2002).

<sup>134</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Approval of Sale Substantially All of the Debtors' Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc 106 at 2 (Bankr. D. Utah Mar. 11, 2002).

<sup>135</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Approval of Sale Substantially All of the Debtors' Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc 106 at 4 (Bankr. D. Utah Mar. 11, 2002). Many of Simon's lease agreements had guaranteed residual clauses, meaning that Simon would be responsible to pay any deficiency in its leased tractors' value upon expiration of the respective leases. Simon estimated the value of its leased tractors was significantly below such residual values and would constitute a liability to which the successful bidder would negotiate prior to assumption. *Id.* at 2-3.

<sup>136</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Approval of Sale Substantially All of the Debtors' Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc 106 (Bankr. D. Utah Mar. 11, 2002); *see also* Simon Transportation, Inc., Press Release Dated February 25, 2002, at 1 (Mar. 4, 2002).

per day and its relatively small amount of post-petition financing, it did not expect to be able to remain in business for more than 60 days.<sup>137</sup>

In a nutshell, Simon's motion sought to liquidate Simon Transportation through a Chapter 11 proceeding. At this point, one may be asking "isn't the purpose of Chapter 11 to avoid liquidation?" Such is a fair question. For starters, Chapter 11 is entitled "Reorganization." Moreover, the United States Supreme Court has expressly held that the "fundamental purpose" of Chapter 11 is "to prevent a debtor from going into liquidation."<sup>138</sup> For many debtors, however, the prospect of reorganization is neither feasible nor realistic. Often, the need to liquidate results from a lack of liquidity and increased administrative costs associated with a bankruptcy filing. In many ways, liquidating a business is simpler and quicker than attempting to make the necessary operational changes and to restructure the many obligations that modern companies have on their balance sheets. Fortunately for these debtors, when Congress enacted the Bankruptcy Act of 1978,<sup>139</sup> a provision expressly permitting liquidating plans in Chapter 11 was included as a part of the statute.<sup>140</sup>

Today, it is well settled that Chapter 11 may be used to facilitate the orderly liquidation of assets.<sup>141</sup> In fact, prior requirements of good faith in filing have now been eliminated from the Code. Thus, debtors may now file under Chapter 11 with the preconceived purpose of

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<sup>137</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Approval of Sale Substantially All of the Debtors' Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc 106 at 2 (Bankr. D. Utah Mar. 11, 2002).

<sup>138</sup> *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1983).

<sup>139</sup> Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2682 (1978)

<sup>140</sup> *See* 11 U.S.C. § 1123(b)(4).

<sup>141</sup> Prior to 1978, many courts had trouble in deciding whether substantial liquidations of property should be allowed within the context of a reorganization proceeding. 56 AM. BANKR. L. J. 29; *See, generally*, Cary, *Liquidation of Corporations in Bankruptcy Reorganization*, 60 HARV. L. REV. 173 (1946). For some time, however, courts had shown a clear movement to permit liquidations to be effectuated in reorganization proceedings. 56 AM. BANKR. L. J. 29; *See, generally*, Cary, *Liquidation of Corporations in Bankruptcy Reorganization*, 60 HARV. L. REV. 173 (1946).

liquidating all the debtor's assets.<sup>142</sup> From the debtor's perspective, however, liquidating through a confirmed plan has many drawbacks. Most notably, confirmation of a plan is nothing short of a laborious task, which requires successful navigation through many difficult statutory hurdles. For example, a confirmed plan requires, among other things, an approved disclosure statement,<sup>143</sup> compliance with applicable law,<sup>144</sup> feasibility,<sup>145</sup> and good faith.<sup>146</sup> However, just because a plan meets these requirements does not mean it will be confirmed. The plan must also be approved by various classes of creditors and, if not all approve, meet stringent requirements for approval over the objection of dissenters.<sup>147</sup> For this reason, confirmed plans are more the exception than the rule, as studies suggest that confirmation occurs in only about 17% of Chapter 11 cases.<sup>148</sup> In fact, of those cases in which plans were confirmed, the average plan took 656 days before approval.<sup>149</sup> Because of these significant obstacles and delays, many debtors – like Simon – seek to liquidate in a less strenuous manner.

Section 363(b) of the Code provides an alternative, and less burdensome method, for a debtor to liquidate.<sup>150</sup> The powers conferred under this section of the Code are not only extraordinary in scope, but also exclusive to bankruptcy law. Generally, section 363(b) allows a debtor to sell property of the estate free and clear of liens, encumbrances, and/or adverse

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<sup>142</sup> See John C. Anderson & Peter G. Wright, *Liquidating Plans of Reorganization*, 56 AM. BANKR. L. J. 29 (1982).

<sup>143</sup> 11 U.S.C. § 1125.

<sup>144</sup> 11 U.S.C. § 1129.

<sup>145</sup> 11 U.S.C. § 1129(a)(11).

<sup>146</sup> 11 U.S.C. § 1129(a)(3).

<sup>147</sup> 11 U.S.C. §§ 1129(a)(7)-(8).

<sup>148</sup> Samuel Bufford, *Chapter 11 Case Management And Delay Reduction: An Empirical Study*, 4 AM. BANKR. INST. L. REV. 85, 88 (1996).

<sup>149</sup> Samuel Bufford, *Chapter 11 Case Management And Delay Reduction: An Empirical Study*, 4 AM. BANKR. INST. L. REV. 85, 88 (1996).

<sup>150</sup> 11 U.S.C. § 363.

interests.<sup>151</sup> In contrast to the arduous steps necessary to confirm a liquidation plan, liquidating under section 363(b) merely requires court approval after notice and hearing.<sup>152</sup> While the Code is silent as to the factors weighed during that hearing, courts have adopted a “test similar to the business judgment rule, thus giving a great deal of deference to the [debtor’s] decision.”<sup>153</sup>

Ultimately, this “process allows the court to evaluate the best interests of the debtor’s estate and the parties in interest and typically results in competitive bidding in an attempt to yield the maximum value for the estate and its creditors.”<sup>154</sup> Moreover, while Chapter 7 is generally viewed as a streamlined process for liquidating a business under the supervision of an appointed trustee, business debtors often seek the same result by way of Chapter 11. From the debtor’s perspective, management will often be inclined to choose chapter 11 because the Code mandates a trustee in every chapter 7 case.<sup>155</sup> In contrast, Chapter 11 allows the debtor and its management to remain “in possession,” with the powers and obligations of a trustee.<sup>156</sup> For these reasons, debtors are increasingly filing for bankruptcy protection in Chapter 11 with no intention of reorganizing in the traditional sense. Today, 363 sales have “grown to be a widely utilized and accepted practice.”<sup>157</sup>

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<sup>151</sup> 11 U.S.C. § 363(f).

<sup>152</sup> 11 U.S.C. § 363(c)

<sup>153</sup> Chad P. Pugatch, et. al., *The Lost Art Of Chapter 11 Reorganization*, 19 U. FLA. J.L. & PUB. POL’Y 39, 58 (2008); see also *In re W.A. Mallory Co.*, 214 B.R. 834, 836 (Bankr. E.D. Va. 1997).

<sup>154</sup> Chad P. Pugatch, et. al., *The Lost Art Of Chapter 11 Reorganization*, 19 U. FLA. J.L. & PUB. POL’Y 39, 56 (2008).

<sup>155</sup> 81 AM. BANKR. L. J. 65; 11 U.S.C. §§ 701-702. See also, *In re Hagerstown Fiber Ltd. P’ship*, 226 B.R. 353, 359 (Bankr. S.D.N.Y. 1998).

<sup>156</sup> 81 AM. BANKR. L. J. 65; 11 U.S.C. § 1107.

<sup>157</sup> Chad P. Pugatch, et. al., *The Lost Art Of Chapter 11 Reorganization*, 19 U. FLA. J.L. & PUB. POL’Y 39, 60 (2008).

While some evidence points otherwise,<sup>158</sup> Simon appeared to enter Chapter 11 with the goal of liquidation. In particular, Simon’s filings in the Court indicated its intent to complete the reorganization through a 363 sale long before it learned of an inability to obtain long-term post-petition financing.<sup>159</sup> In fact, even before engaging the services of Morgan Keegan and Company, an investment banking company, to assist in soliciting bids for the sale of the its operations and assets,<sup>160</sup> Simon had already made clear an “intent to complete the reorganization through a sale of assets on an expedited basis” one day earlier.<sup>161</sup>

Despite the marketing efforts by its investment banker, however, Simon had received only one bid by the time it filed its motion to sell its assets.<sup>162</sup> That bid was for \$2 million and was filed by a company named Central Refrigerated Services, Inc. (“Central”), a wholly-owned subsidiary of Central Freight Lines, Inc. In its motion, Simon requested approval of the sale to Central if no higher bids were received under its proposed auction procedures.<sup>163</sup> In addition, Simon’s original auction procedures specified that any acceptable bid must exceed that of Central’s by nearly \$1 million dollars, an amount that reflected a \$250,000 expense

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<sup>158</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Disclosure Statement Filed by Simon Transportation Services Inc., Doc. 818 at 4 (Bankr. D. Utah Nov. 7, 2002) (implying the decision to liquidate came after the filing of Simon’s bankruptcy petition).

<sup>159</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Chapter 11 Voluntary Petition, Doc. 1 (Bankr. D. Utah Feb. 25, 2002).

<sup>160</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Application to Employ as Financial Advisor Involving Debtors or The Sale of All or Certain of Debtors' Assets - Morgan Keegan & Company, Doc. 26 (Bankr. D. Utah Feb. 26, 2002).

<sup>161</sup> Simon Transportation, Inc., Press Release Dated February 25, 2002, at 1 (Mar. 4, 2002).

<sup>162</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Approval of Sale Substantially All of the Debtors' Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc 106 at 3 (Bankr. D. Utah Mar. 11, 2002).

<sup>163</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for an Order approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets; (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc 107 at 8-9 (Bankr. D. Utah Mar. 11, 2002).



reimbursement, a \$500,000 bid fee, and a \$100,000 bid protection fee.<sup>164</sup> Simon's motion also reserved the sole and exclusive right to select the winning bidder of the sale of assets, even if the bid Simon selected as the winning bid did not constitute the highest bid.<sup>165</sup>

While early courts held that 363 sales of substantially all of a debtor's assets should only be permitted in emergencies,<sup>166</sup> the majority of courts now require only a "good business reason" for such a sale.<sup>167</sup> This test was formulated in the Second Circuit case, *In re Lionel Corp.*<sup>168</sup> In analyzing the tension between a 363 sale of assets and the general Chapter 11 scheme, the court noted that "every sale under section 363(b) does not automatically short-circuit or side-step Chapter 11; nor are these two statutory provisions to be read as mutually exclusive."<sup>169</sup> The Second Circuit noted that the determination of a good business reason requires analysis of the following factors:

. . . the proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-a-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the asset is increasing or decreasing in value.<sup>170</sup>

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<sup>164</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for an Order approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets; (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc 107 at 9 (Bankr. D. Utah Mar. 11, 2002).

<sup>165</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for an Order approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets; (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc 107 at 12 (Bankr. D. Utah Mar. 11, 2002).

<sup>166</sup> *In re White Motor Credit Corp.*, 14 B.R. 584 (Bankr. N.D. Ohio 1981).

<sup>167</sup> See e.g., *In re Quality Stores, Inc.*, 272 B.R. 643 (Bankr. W.D. Mich. 2002).

<sup>168</sup> *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983).

<sup>169</sup> *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983).

<sup>170</sup> *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983).

Nevertheless, because of the potential to circumvent the requirements of Chapter 11's disclosure and consent requirements, courts often look skeptically on proposed 363 sales, looking for compelling reasons that might justify the sale.<sup>171</sup> This is particularly true in the case of sales to insiders.<sup>172</sup> Not surprisingly then, the fact that Central was controlled, formed, and operated by Jerry Moyes appeared to be the most contentious point of Simon's proposed sale.<sup>173</sup> In fact, Mr. Moyes was not only an insider – the principal controlling shareholder of Simon as well as Chairman of its Board<sup>174</sup> – he had also previously obtained a priority in any proceeds from the sale as a result of his status as the DIP lender.<sup>175</sup>

For this reason, numerous objections were filed with the court in response to Simon's motion for sale.<sup>176</sup> Soon after filing its March 11 motion, the United States Trustee ("Trustee") moved to reject the sale and its proposed structure.<sup>177</sup> In its objection, the Trustee argued that the sale may call the DIP's fiduciary duties into question.<sup>178</sup> The Trustee first noted that Central was

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<sup>171</sup> *In re Au Natural Restaurant, Inc.*, 63 B.R. 575 (Bankr. S.D. N.Y. 1986).

<sup>172</sup> See e.g., *In re Coastal Industries, Inc.*, 63 B.R. 361, 15 COLLIER BANKR. CAS. 2D (MB) 435 (Bankr. N.D. Ohio 1986); *In re Crutcher Resources Corp.*, 72 B.R. 628 (Bankr. N.D. Tex. 1987); *Westship, Inc. v. Trident Shipworks, Inc.*, 247 B.R. 856, 866 (M.D. Fla. 2000); *In re Channel One Communications, Inc.*, 117 B.R. 493, 496 (Bankr. E.D. Mo. 1990).

<sup>173</sup> See *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Approval of Sale Substantially All of the Debtors' Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc 106 at 3 (Mar. 11, 2002).

<sup>174</sup> See *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Approval of Sale Substantially All of the Debtors' Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc 106 at 3 (Bankr. D. Utah Mar. 11, 2002); Simon Transportation, Inc., Annual Report (Form 10-K), at 27 (Jan. 12, 2001).

<sup>175</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion For Interim and Final Orders (I) Authorizing Debtors to Incur Postpetition Secured Indebtedness (II) Granting Security Interests and Priority Pursuant to 11 U.S.C. Section 364, (III) Modifying Automatic Stay and (IV) Setting Final Hearing, Doc. 20 at 6-7 (Bankr. D. Utah Feb. 26, 2002).

<sup>176</sup> See Docs 160, 161, 162, 163, 168.

<sup>177</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for an Order Approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets; (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc. 160 (Bankr. D. Utah Mar. 19, 2002).

<sup>178</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for an Order Approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets; (2) the Form of Bidding, Auction and Sale

a corporation created solely for the purpose of purchasing Simon.<sup>179</sup> According to the Trustee, Mr. Moyes status as DIP lender would give him a super-priority in the proceeds of any sale. Thus, the Trustee argued that a significant portion of consideration of a 363 sale would go right back to the Moyes family through Central.<sup>180</sup> Simon’s largest creditor, CitiCapital, a company holding a first priority secured claim in “almost all of [Simon’s] personal property” agreed. CitiCapital argued that Simon’s proposed sale to Central was merely an attempt by Mr. Moyes to “improperly elevate his claim to the assets being sold ahead of CitiCapital’s first lien on such assets.”<sup>181</sup> Based on these facts, the Trustee alleged that it was “difficult to conceive” how the agreement could be made at arms’ length and in good faith.<sup>182</sup>

While neither the Trustee nor CitiCapital fully explained the basis of their fear that Mr. Moyes was essentially ousting CitiCapital’s status as first-priority status as a secured creditor, the reason for their concern is not difficult to discern. Generally, the sale of collateral subject to a security interest does not affect the holder’s rights in that security interest.<sup>183</sup> In particular,

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Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc. 160 at 4 (Bankr. D. Utah Mar. 19, 2002).

<sup>179</sup> See also *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for an Order Approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets: (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc. 160 at 2-3 (Bankr. D. Utah Mar. 19, 2002); Central Freight Lines, Inc., *Prospectus*, at 64 (Dec. 11, 2003), available at <http://sec.gov/Archives/edgar/data/1085636/000095013703006297/c72067b4e424b4.htm>.

<sup>180</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for an Order Approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets: (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc. 160 at 3 (Bankr. D. Utah Mar. 19, 2002).

<sup>181</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Debtors’ Motion for Approval of Sale of Substantially all of the Debtors’ Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc. 332 at 3 (Bankr. D. Utah Apr. 8, 2002).

<sup>182</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for an Order Approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets: (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc. 160 at 4 (Bankr. D. Utah Mar. 19, 2002).

<sup>183</sup> See U.C.C. § 3-315.

Section 9-315 of the Uniform Commercial Code – which has now been adopted in all 50 states and the District of Columbia<sup>184</sup> – provides that “a security interest . . . continues in collateral notwithstanding sale . . . .”<sup>185</sup> This protection is merely a continuation of the notion under Article 9 that once a security interest has attached, it is effective against all parties. Section 363 of the Bankruptcy Code significantly changes this general rule. In effect, a debtor is given authority under section 363(f) to sell encumbered property “free and clear” of such interests.<sup>186</sup>

However, the ability to sell free and clear of encumbrances certainly did not elevate Mr. Moyes’s priority status ahead of CitiCapital. Nor did 363(f) impair CitiCapital’s security interest *per se*. Under non-bankruptcy law as well as the terms of the proposed sale, CitiCapital’s security interest would extend to the proceeds of the sale.<sup>187</sup> Thus, CitiCapital would still be entitled to priority to the extent of its first-priority security interests prior to the sale. It is important to note that despite these protections, the sale could still conceivably impair the interests of CitiCapital. Because the sale was to an insider, a very real possibility existed that the sale would not amount to an arms-length transaction. Accordingly, if the cash consideration received under the sale amounted to less than the true value of property disposed under the sale, CitiCapital would be left merely holding a secured claim to an insignificant pool of proceeds, with a general unsecured claim to the extent of the deficiency.<sup>188</sup> Then, by structuring this sale in the proposed manner, Moyes could essentially absolve much of CitiCapital’s interest in the

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<sup>184</sup> RICHARD F. DUNCAN, ET. AL., LAW & PRACTICE OF SECURED TRANSACTIONS: WORKING WITH ARTICLE 9 § 1.01[4] (2009).

<sup>185</sup> See U.C.C. § 3-315(a)(1).

<sup>186</sup> 11 U.S.C. § 363(f).

<sup>187</sup> See U.C.C. § 3-315(a)(2); *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for an Order Approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets; (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc. 160 at 7 (Bankr. D. Utah Mar. 19, 2002) (providing that all security interests would attach to proceeds).

<sup>188</sup> 11 U.S.C. § 506 (amount of secured claim is limited to the value of the collateral).

property for a price much lower than the true amount of the claim. With a significant portion of the sale consideration expected to be in the form of the assumption of various liabilities that Simon owed to the Moyes family,<sup>189</sup> the probability of this scenario materializing was far from remote.

Further, both the Trustee and the Unsecured Creditors Committee (“Committee”) found difficulty in the fact that the terms of the proposed sale would absolve all claims against Jerry Moyes or his affiliates.<sup>190</sup> In fact, according to the Committee, selling all claims and causes of action of the bankruptcy estate against the buyer or its affiliates could absolve the Committee of an estimated \$10-\$12 million in lien avoidance and preference claims against the Moyes family.<sup>191</sup> While not cited by either party in their objection, in *In re Braniff Airways, Inc.*, the Fifth Circuit denied a proposed sale containing similarly broad releases of liability. In reaching its decision, the court noted that the sale expressly “provided for the release of claims by all parties against [the debtor], its secured creditors and its officers and directors.”<sup>192</sup> According to the Fifth Circuit, such a release “[o]n its face . . . is not authorized by § 363(b)”<sup>193</sup>

Other objections to Simon’s proposed sale and bidding procedures centered on the lack of objective criteria for establishing the winning bidder which left the decision solely within the

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<sup>189</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for an Order Approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets; (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc. 161 at 4 (Bankr. D. Utah Mar. 19, 2002).

<sup>190</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for an Order Approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets; (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc. 160 at 3 (Bankr. D. Utah Mar. 19, 2002). The Committee was represented by Peter W. Billings, Gary E. Jubber, and Douglas J. Payne of the Salt Lake City law firm of Fabian & Clendenin.

<sup>191</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion of the Debtors’ for Approval of Sale of Substantially all of the Debtors’ Assets and to approve Assumption and Assignment of Leases and Executory Contracts, Doc. 331 at 4 (Bankr. D. Utah Apr. 8, 2002).

<sup>192</sup> *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983).

<sup>193</sup> *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983).

discretion of Simon,<sup>194</sup> the fact that bid protections were not warranted to compensate for due diligence expenses where a stalking horse bid is “an insider with unlimited access and knowledge of the Debtor’s financial affairs,”<sup>195</sup> the fact that the purchase price included the assumption of debts owed to the Moyes family who are also insiders of Central,<sup>196</sup> the fact that the motion failed to provide adequate assurance to lenders with secured claims against the assets to be sold,<sup>197</sup> that the motion provided for the sale of leased assets which are not owned by Simon,<sup>198</sup> and, finally, that the sale of Simon’s headquarters needed to be conditioned upon the payment of certain regulatory duties owed to the city of which the headquarters were located.<sup>199</sup>

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<sup>194</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for an Order Approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets: (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc. 161 at 2-3 (Bankr. D. Utah Mar. 19, 2002); *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for an Order Approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets: (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc. 162 at 3 (Bankr. D. Utah Mar. 19, 2002).

<sup>195</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for an Order Approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets: (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc. 161 at 4 (Bankr. D. Utah Mar. 19, 2002).

<sup>196</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for an Order Approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets: (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc. 161 at 4 (Bankr. D. Utah Mar. 19, 2002).

<sup>197</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for an Order Approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets: (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc. 163 at 2 (Bankr. D. Utah Mar. 19, 2002); *In re Simon Transportation Services, Inc.*, No. 02-22906, Limited Opposition to Motion for Approval of Sale Substantially All of the Debtors’ Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc. 168 at 4-6 (Bankr. D. Utah Mar. 19, 2002).

<sup>198</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Limited Opposition to Motion for Approval of Sale Substantially All of the Debtors’ Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc. 168 at 3 (Bankr. D. Utah Mar. 19, 2002); *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for Approval of Sale Substantially All of the Debtors’ Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc. 236 at 2 (Bankr. D. Utah Mar. 26, 2002).

<sup>199</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Response to Motion for Approval of Sale Substantially All of the Debtors’ Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc. 243 (Bankr. D. Utah Mar. 27, 2002).

The Committee also objected on the grounds that the sale would leave nothing to be distributed to unsecured creditors.<sup>200</sup> In response, Mr. Moyes, through Central, negotiated a settlement where Central increased its offer so that proceeds might lead to some distribution to unsecured creditors.<sup>201</sup> The Committee then withdrew its objection to the proposed sale procedures.<sup>202</sup> Despite the remaining objections, the Court approved the bid and auction procedures on March 21, 2002.<sup>203</sup> In its order, however, the Court reduced Central's bid fee from \$500,000 to \$50,000 and required Central to file a formal Asset Purchase Agreement with the Court in order to serve as stalking horse bidder.<sup>204</sup>

On March 25, 2002, in accordance with the Court's order, Central filed an unsigned Asset Purchase Agreement to be approved by the Court in the event that Central became the winning bidder at auction.<sup>205</sup> Because the motion for sale also included a provision permitting the buyer to assume or reject unexpired leases after closing of the sale,<sup>206</sup> lessors objected to Central's Asset Purchase Agreement on the grounds that it did not list any executory contracts to

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<sup>200</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Disclosure Statement Filed by Simon Transportation Services Inc., Doc. 818 at 4 (Bankr. D. Utah Nov. 7, 2002).

<sup>201</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Disclosure Statement Filed by Simon Transportation Services Inc., Doc. 818 at 4 (Bankr. D. Utah Nov. 7, 2002).

<sup>202</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Disclosure Statement Filed by Simon Transportation Services Inc., Doc. 818 at 4 (Bankr. D. Utah Nov. 7, 2002).

<sup>203</sup> Order by minute entry, dated March 21, 2002.

<sup>204</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Re: Motion for an Order Approving: (1) Bidding and Auction Procedures and Sale Date or Sale of Assets; (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc. 206 at 3 (Bankr. D. Utah Mar. 25, 2002).

<sup>205</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Notice of Filing Asset Purchase Agreement Relating to the Stalking Horse Bid, Doc. 228 (Bankr. D. Utah Mar. 25, 2002).

<sup>206</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for an Order approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets; (2) the Form of Bidding, Auction and Sale Notice; and (3) The Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc 107 at 23 (Bankr. D. Utah Mar. 11, 2002).

be assumed or assigned following the sale.<sup>207</sup> An amended version of the Asset Purchase Agreement proposed that the buyer would not be responsible to cure any defaults of the assumed or assigned contracts.<sup>208</sup> Needless-to-say, various lessors also objected to this provision on the ground that it was in direct violation with section 365(b)(1) of the Code, which requires debtors to cure defaults prior to assumption or rejection of executory contracts and unexpired leases.<sup>209</sup>

These objections finally pushed Mr. Moyes over the edge. On the morning of April 8, 2002, Mr. Moyes filed a motion to “address the factual inaccuracies and mischaracterizations” outlined in the various objections.<sup>210</sup> Mr. Moyes claimed that allegations characterizing the proposed sale as a “breach of fiduciary duty and loyalty” or “self-dealing” were nothing short of “libelous.”<sup>211</sup> Further, in a move that would have impressed even the producers of Jerry Springer, Mr. Moyes even dared one objector to “replace [him] as DIP lender, and prepetition lender, and assume the risk that [he had] assumed.”<sup>212</sup> He went on to state that only if the objector took him up on the offer, as well as offered a bid for Simon no lower than that submitted by Moyes, would “his request . . . be entitled to a modicum of respect.”<sup>213</sup>

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<sup>207</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for Approval of Sale Substantially All of the Debtors’ Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc. 328 (Bankr. D. Utah Apr. 5, 2002).

<sup>208</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Support Document Re: Supplement to Central Freight Lines, Notice of Filing Asset Purchase Agreement Relating to the Stalking Horse Bid, Doc. 319-2 at 11 (Bankr. D. Utah April 4, 2002).

<sup>209</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Motion for Approval of Sale Substantially All of the Debtors’ Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc. 328 at 5 (Bankr. D. Utah Apr. 5, 2002).

<sup>210</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Preliminary Reply to Motion for Appointment of Examiner and Objection to Proposed Sale, Doc. 339 at 2 (Bankr. D. Utah Apr. 8, 2002).

<sup>211</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Preliminary Reply to Motion for Appointment of Examiner and Objection to Proposed Sale, Doc. 339 at 5 (Bankr. D. Utah Apr. 8, 2002).

<sup>212</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Preliminary Reply to Motion for Appointment of Examiner and Objection to Proposed Sale, Doc. 339 at 7 (Bankr. D. Utah Apr. 8, 2002).

<sup>213</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Preliminary Reply to Motion for Appointment of Examiner and Objection to Proposed Sale, Doc. 339 at 7 (Bankr. D. Utah Apr. 8, 2002).



Nevertheless, it appears that such a challenge was nothing more than a facetious attempt to get a rise out of the objector since replacing Mr. Moyes as DIP lender would have been impossible given the sale of Simon's assets was "scheduled to commence" that afternoon.<sup>214</sup>

On April 8, 2002, less than twelve hours after Mr. Moyes's proverbial claws came out, and before this fight could escalate to a good ole' fashioned backyard brawl, the operations and assets of Simon were sold. The Court, without comment regarding the numerous objections raised in response to the proposed sale, approved the transaction subject to final negotiation of the asset purchase agreement to Central. In connection with the sale, Central ultimately paid approximately \$51 million in total consideration for the acquired assets and operations.<sup>215</sup> The actual cash consideration paid, however, was relatively small, representing a true doomsday scenario with respect to the value of CitiCapital's secured claims. Specifically, over 95% of the purchase price was financed through the assumption of approximately \$49 million of the Simon's liabilities, including liabilities owed to the Moyes family.<sup>216</sup> The remaining consideration was in the form of approximately \$2.5 million in cash.<sup>217</sup> The sale was closed on April 22, 2002.<sup>218</sup>

#### **IV. EXECUTORY CONTRACTS AND THE FREIGHTLINER BUYBACK AGREEMENTS**

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<sup>214</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Preliminary Reply to Motion for Appointment of Examiner and Objection to Proposed Sale, Doc. 339 at 2 (Bankr. D. Utah Apr. 8, 2002).

<sup>215</sup> Simon Transportation, Inc., Quarterly Report (Form 10-Q), at 13 (Sept. 13, 2002).

<sup>216</sup> Simon Transportation, Inc., Quarterly Report (Form 10-Q), at 14 (Sept. 13, 2002). Central also agreed to pay Simon 50% of receivables collected in excess of \$20 million as well as 25% of insurance premiums and deposit refunds in excess of \$4 million. *Id.* at 14.

<sup>217</sup> Simon Transportation, Inc., Quarterly Report (Form 10-Q), at 14 (Sept. 13, 2002).

<sup>218</sup> Simon Transportation, Inc., Quarterly Report (Form 10-Q), at 13 (Sept. 13, 2002).

Although the Court ultimately approved Simon’s Sale Motion, a party to some of the assumed and assigned executory contracts lurked. A discussion of the battle between Freightliner, Simon, and Central follows.

The most recognized definition of an executory contract is the so-called Countryman definition. It defines an executory contract as:

[A] contract under which the obligation of both the bankrupt and the other party to the contract is so far clearly underperformed that failure of either to complete performance would constitute a material breach excusing the performance of the other.<sup>219</sup>

Stated another way, an executory contract is a contract where “if either side stopped performing the contract it would be an actual breach of contract.”<sup>220</sup>

Section 365 of the Code allows the trustee, or in this case the DIP, to “assume or reject any executory contract or unexpired lease.”<sup>221</sup> After a Chapter 11 proceeding has been initiated, in most instances the DIP must ask the administering court for permission before the DIP takes any action. The debtor’s motion to assume and assign creditors’ executory contracts are often read with bated breath as the creditors determine whether their rights were or were not affected. The Chapter 11 debtor usually has until plan confirmation to decide whether to (1) reject the contract, (2) assume and perform under the contract, or (3) assume and assign the contract to a third party who will perform under the contract.<sup>222</sup>

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<sup>219</sup> Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 469 (1973).

<sup>220</sup> Bob Eisenbach, *Executory Contracts – What Are They and Why Do They Matter?*, In the (Red): The Bankruptcy Blog (July 18, 2006), <http://bankruptcy.cooley.com/2006/07/articles/business-bankruptcy-issues/executory-contracts-what-are-they-and-why-do-they-matter-in-bankruptcy/>.

<sup>221</sup> 11 U.S.C. § 365(a).

<sup>222</sup> David P. Freeman & Luis C. Marini, *Executory Contracts Under Bankruptcy Code Section 365*, 3-4 (Oct. 20, 2005), available at: <http://abiworld.net/newsletter/realestate/vol4num2/RealEstate.pdf>.

In determining whether to approve a debtor's decision to assume or reject an executory contract courts apply the business judgment rule.<sup>223</sup> According to the business judgment rule, a court "will not interfere with the debtor's decision if it was based on a good faith, reasonable business judgment that appears beneficial to the estate."<sup>224</sup>

In support of its Sale Motion, Simon claimed it "lack[ed] any equity in its tractors and trailers for which [it] [had] guaranteed payment of residual values, and for which they were in arrears up to five months prior to the Petition Date."<sup>225</sup> Simon further pleaded that "because of the lack of equity and the potential for millions of dollars arising from the rejection or abandonment of leased or purchased tractors and trailers" permitting assumption and assignment would be in the best interests of the estate.<sup>226</sup>

In its April 22 Order, the Court approved Simon's plan to sell its assets for two reasons. First, the Court found that Simon demonstrated "good, sufficient, and sound business purpose and justification."<sup>227</sup> Second, the Court found that Simon demonstrated "compelling circumstances for the sale of the Acquired Assets and other transactions contemplated [by] section 365."<sup>228</sup> Even though Mr. Moyes was the controlling shareholder of both Simon and

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<sup>223</sup> David P. Freeman & Luis C. Marini, *Executory Contracts Under Bankruptcy Code Section 365*, 4 (Oct. 20, 2005), available at: <http://abiworld.net/newsletter/realestate/vol4num2/RealEstate.pdf>.

<sup>224</sup> David P. Freeman & Luis C. Marini, *Executory Contracts Under Bankruptcy Code Section 365*, 4 (Oct. 20, 2005), available at: <http://abiworld.net/newsletter/realestate/vol4num2/RealEstate.pdf>.

<sup>225</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Approval of Sale Substantially All of the Debtors' Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc 106 at 5 (Bankr. D. Utah Mar. 11, 2002).

<sup>226</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Approval of Sale Substantially All of the Debtors' Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc 106 at 5-6 (Bankr. D. Utah Mar. 11, 2002).

<sup>227</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Pursuant to Sections 105(a), 363, 365, and 1146 of the Bankruptcy Code: (A) Authorizing the Sale of Substantially All of the Debtors' Assets to Central Refrigerated Service, Inc. Free and Clear of Liens, Claims, Interests and Encumbrances; (B) Approving the Asset Purchase Agreement; and (C) Granting Related Relief, Doc 407 at 8 (Bankr. D. Utah Apr. 22, 2002).

<sup>228</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Pursuant to Sections 105(a), 363, 365, and 1146 of the Bankruptcy Code: (A) Authorizing the Sale of Substantially All of the Debtors' Assets to Central Refrigerated

Central, and the Buyback Agreements would be an integral part of continuing operation, the Court agreed that Simon's decision was made on a good faith, reasonable business judgment.

*A. Freightliner's Response:*

Freightliner filed a notice of appeal on May 2, 2002.<sup>229</sup> The appeal challenged the Court's April 22 Order pursuant to sections 105(A), 363, 365, and 1146 of the Code.<sup>230</sup> In granting the April 22 Order, the Court allowed Simon's sale of substantially all of its assets and approved of the proposed Asset Purchase Agreement.<sup>231</sup> At the heart of Freightliner's appeal were two provisions of the April 22 Order. First, Freightliner objected to the Court's finding that Freightliner's failure to object to Simon's asset sale permitted the sale. Second, Freightliner objected to the Court's stated reasons for approving Simon's asset sale. Freightliner, in their May 2 Memorandum of Points and Authorities, objected to the sale of their Buyback Agreements with Simon.<sup>232</sup> Underlying Freightliner's objection was their argument that these

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Service, Inc. Free and Clear of Liens, Claims, Interests and Encumbrances; (B) Approving the Asset Purchase Agreement; and (C) Granting Related Relief, Doc 407 at 8 (Bankr. D. Utah Apr. 22, 2002).

<sup>229</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Notice of Appeal Under 28 U.S.C. § 158(A) or (B) from the April 22, 2002 Order Pursuant to Sections 105(A), 363, 365, and 1146 of the Bankruptcy Code: (A) Authorizing the Sale of Substantially All of the Debtors' Assets to central Refrigerated Service, Inc. Free and Clear of Liens, Interests and Encumbrances; (B) Approving the Asset Purchase Agreement; and (C) Granting Related Relief, Doc. 449 (Bankr. D. Utah May 3, 2002).

<sup>230</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Notice of Appeal Under 28 U.S.C. § 158(A) or (B) from the April 22, 2002 Order Pursuant to Sections 105(A), 363, 365, and 1146 of the Bankruptcy Code: (A) Authorizing the Sale of Substantially All of the Debtors' Assets to central Refrigerated Service, Inc. Free and Clear of Liens, Interests and Encumbrances; (B) Approving the Asset Purchase Agreement; and (C) Granting Related Relief, Doc. 449 (Bankr. D. Utah May 3, 2002).

<sup>231</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Notice of Appeal Under 28 U.S.C. § 158(A) or (B) from the April 22, 2002 Order Pursuant to Sections 105(A), 363, 365, and 1146 of the Bankruptcy Code: (A) Authorizing the Sale of Substantially All of the Debtors' Assets to central Refrigerated Service, Inc. Free and Clear of Liens, Interests and Encumbrances; (B) Approving the Asset Purchase Agreement; and (C) Granting Related Relief, Doc. 449 (Bankr. D. Utah May 3, 2002).

<sup>232</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 454 at 2 (Bankr. D. Utah May 2, 2002).

Buyback Agreements were not executory contracts, and therefore could neither be assumed nor assigned.<sup>233</sup>

If a creditor wishes to protect its contracted rights, following a debtor's motion to assume and assign executory contracts, then the affected creditor must proverbially "scream or die."<sup>234</sup> One commentator summarizes the procedural anxiety that accompanies the "scream or die" process in this way:

If you want to object (1) to the assignment of your executory contract, license, or lease at all, (2) to its assignment to the particular buyer proposed, or (3) even to the amount proposed to be paid to cure defaults, you have to file a written objection by the deadline listed in the notice. If you don't, the debtor will ask the bankruptcy court for an order approving the transfer of your contract, license, or lease, and that may well involve no cure payment at all. Because bankruptcy cases move quickly by necessity, "screaming" after the deadline will generally be too late.<sup>235</sup>

The court found, in the April 22 Order, that "[p]roper, timely, adequate, and sufficient notice of the proposed assumption and assignment of the Buyback Agreements . . . [had] been provided to Freightliner."<sup>236</sup> The court concluded that Freightliner's failure to object meant that they "have consented to the assumption and assignment of the Buyback Agreements pursuant to

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<sup>233</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 454 at 2 (Bankr. D. Utah May 2, 2002).

<sup>234</sup> Bob Eisenbach, *Bankruptcy Asset Sales: What Parties with Contracts Should Watch For*, In the (Red): The Bankruptcy Blog (Nov. 6, 2006) <http://bankruptcy.cooley.com/2006/11/articles/business-bankruptcy-issues/bankruptcy-asset-sales-what-parties-with-contracts-should-watch-for/>.

<sup>235</sup> Bob Eisenbach, *Bankruptcy Asset Sales: What Parties with Contracts Should Watch For*, In the (Red): The Bankruptcy Blog (Nov. 6, 2006) <http://bankruptcy.cooley.com/2006/11/articles/business-bankruptcy-issues/bankruptcy-asset-sales-what-parties-with-contracts-should-watch-for/>.

<sup>236</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Pursuant to Sections 105(a), 363, 365, and 1146 of the Bankruptcy Code: (A) Authorizing the Sale of Substantially All of the Debtors' Assets to Central Refrigerated Service, Inc. Free and Clear of Liens, Claims, Interests and Encumbrances; (B) Approving the Asset Purchase Agreement; and (C) Granting Related Relief, Doc 407 at 6 (Bankr. D. Utah Apr. 22, 2002).

Section 365.”<sup>237</sup> Assuming that the Buyback Agreements were assumable executory contracts, the Court found Simon’s notice of assumption and assignment of their executory contracts sufficient. Freightliner’s failure to scream resulted in the assumption and assignment of the Buyback Agreements.

This, however, was an inaccurate representation of the events leading up to the Sale Motion; or so said Freightliner.<sup>238</sup> Freightliner claimed that despite the service of the motion on 6,500 parties in interest, nothing was ever delivered to Freightliner.<sup>239</sup> In addition to the lack of service, Freightliner further contended that the April 22 Order granted relief where none had been requested.<sup>240</sup> Specifically, Freightliner argued that the April 22 Order “relieved Freightliner of virtually all of the rights they had bargained for” in their contracts (the Buyback Agreements) with Simon.<sup>241</sup>

The issue here was whether the Buyback Agreements were, in fact, executory contracts that could be assumed and assigned. The Buyback Agreements were “prepetition conditional

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<sup>237</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Pursuant to Sections 105(a), 363, 365, and 1146 of the Bankruptcy Code: (A) Authorizing the Sale of Substantially All of the Debtors’ Assets to Central Refrigerated Service, Inc. Free and Clear of Liens, Claims, Interests and Encumbrances; (B) Approving the Asset Purchase Agreement; and (C) Granting Related Relief, Doc 407 at 6 (Bankr. D. Utah Apr. 22, 2002).

<sup>238</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion for Approval of Sale Substantially All of the Debtors’ Assets and to Approve Assumption and Assignment of Leases and Executory Contracts, Doc 106 (Bankr. D. Utah Mar. 11, 2002).

<sup>239</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Memorandum of Points and Authorities Supporting Freightliner’s Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 454 at 3 (Bankr. D. Utah May 2, 2002).

<sup>240</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Memorandum of Points and Authorities Supporting Freightliner’s Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 454 at 3 (Bankr. D. Utah May 2, 2002).

<sup>241</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Memorandum of Points and Authorities Supporting Freightliner’s Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 454 at 3 (Bankr. D. Utah May 2, 2002).

commitments with . . . Dick Simon[, and referred to] Freightliner’s selective program of making conditional offers to repurchase used freight trucks upon qualifying new truck purchases.”<sup>242</sup>

Freightliner further objected to the April 22 Order on procedural grounds, arguing that notice was not “proper, adequate, timely and sufficient.”<sup>243</sup> Citing *In re Automationsolutions International, LLC*, Freightliner argued that “principles of fairness require that when relief is being sought against [a] party [that] party must be told in unambiguous terms that its specific rights are to be adjudicated.”<sup>244</sup> The relief sought by Freightliner was for the Court to unwind the provision of the April 22 Order granting Simon the authority to assume and assign the Buyback Agreements.

The due process clause of the Fifth Amendment of the United States Constitution prohibits courts from acting with finality absent notice that is “reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action.”<sup>245</sup> Bankruptcy Rule 2002 addresses the notice requirements, both process and form. Under Rule 2002(a)(2), notice must be given to “the debtor, the trustee, all creditors and indenture trustees [by mail] at least 21 days . . . [before] a proposed use, sale, or lease of property of the estate other than in the ordinary course of business.”<sup>246</sup> Unless the court orders otherwise, notice must be given by

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<sup>242</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Memorandum of Points and Authorities Supporting Freightliner’s Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 454 at 2 (Bankr. D. Utah May 2, 2002).

<sup>243</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Pursuant to Sections 105(a), 363, 365, and 1146 of the Bankruptcy Code: (A) Authorizing the Sale of Substantially All of the Debtors’ Assets to Central Refrigerated Service, Inc. Free and Clear of Liens, Claims, Interests and Encumbrances; (B) Approving the Asset Purchase Agreement; and (C) Granting Related Relief, Doc 407 (Bankr. D. Utah Apr. 22, 2002).

<sup>244</sup> 274 B.R. 527, 529 (Bankr. N.D. Cal. 2002).

<sup>245</sup> COMMERCIAL BANKRUPTCY LITIGATION § 2:18 (citing *U.S. v. Security Indus. Bank*, 459 U.S. 70, 75 (1982), which held that the “federal bankruptcy power is subject to the Fifth Amendment).

<sup>246</sup> FED. R. BANKR. P. 2002(a).

mail.<sup>247</sup> When notice is mailed pursuant to Rule 2002 it must be addressed to the address provided by the “creditor, indenture trustee, or equity security holder” in the party’s last filed request.”<sup>248</sup>

When a creditor is a corporate entity, the Rule clarifies that a designated mailing address may be derived one of three ways. Under Rule 2002(g)(1)(a), “a proof of claim filed by a creditor . . . that designates a mailing address constitutes a filed request to mail notices to that address.”<sup>249</sup> Under Rule 2002(g)(2), “[e]xcept as provided in § 342(f) of the Code, if a creditor . . . has not filed a request designating a mailing address under Rule 2002(g)(1) . . ., the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later.”<sup>250</sup> Finally, Rule 2002(g)(4) governs circumstances in which the parties have agreed on a designated mailing address. Under Rule 2002(g)(4), “the notice provider shall give the notice to the entity in the manner agreed to and at the address or addresses the entity supplies to the notice provider.”<sup>251</sup> Interestingly, however, Rule 2002(g)(4) also notes that “failure to use the supplied address does not invalidate any notice that is otherwise effective under applicable law.”<sup>252</sup> The Rules governing proper service of notice are nuanced, but as the saying goes, “the devil is in the details.” To be sure, much of Freightliner’s objection to the April 22 Order arose from alleged improper service of notice.

Freightliner launched its attack on the April 22 Order by filing a Memorandum of Points and Authorities on May 2, 2002. In a March 22 Order, the Court directed Simon to provide

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<sup>247</sup> COMMERCIAL BANKRUPTCY LITIGATION § 2:18.

<sup>248</sup> FED. R. BANKR. P. 2002(g)(1).

<sup>249</sup> FED. R. BANKR. P. 2002(g)(1)(a).

<sup>250</sup> FED. R. BANKR. P. 2002(g)(2).

<sup>251</sup> FED. R. BANKR. P. 2002(g)(4).

<sup>252</sup> FED. R. BANKR. P. 2002(g)(4).



notice of its Sale Motion to “all known creditors and parties in interest, including . . . all parties to executory contracts and leases.”<sup>253</sup> In response to the Court’s order, Simon served notice on roughly 6,500 parties in interest, but not Freightliner.<sup>254</sup> The certificate of service, argued Freightliner, indicated that notice of Sale Motion was “directed to any responsible person or registered agent, as required by law, but rather by ordinary mail sent to the Freightliner Companies at their ‘general delivery’ address.”<sup>255</sup> Addressing notice to Freightliner’s general delivery address, it was alleged, meant that notice was delivered in “the manner *least* likely to actually inform Freightliner of the relief sought against it.”<sup>256</sup> As discussed above, mailing notice to Freightliner’s general delivery address would be adequate only if the general delivery address was Freightliner’s designated delivery address,<sup>257</sup> the address on the list of creditor’s or schedule of liabilities,<sup>258</sup> or the agreed upon address between Simon and Freightliner.<sup>259</sup>

#### *B. Simon’s Response:*

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<sup>253</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Memorandum of Points and Authorities Supporting Freightliner’s Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 454 at 6 (Bankr. D. Utah May 2, 2002) (quoting the Order Approving Stipulation to Extend Deadline for Unsecured Creditors’ Committee to Object to Motion of the Debtors’ for an Order Approving: (1) Bidding and Auction Procedures and Sale Date for Sale of Assets; (2) the Form of Bidding, Auction and Sale Notice; and (3) the Scheduling of an Expedited Hearing on Motion for Sale Procedures, Notice, and Sales Hearing, Doc. 191 (Bankr. D. Utah Mar. 22, 2002)).

<sup>254</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Memorandum of Points and Authorities Supporting Freightliner’s Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 454 at 3 (Bankr. D. Utah May 2, 2002).

<sup>255</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Memorandum of Points and Authorities Supporting Freightliner’s Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 454 at 4 (Bankr. D. Utah May 2, 2002).

<sup>256</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Memorandum of Points and Authorities Supporting Freightliner’s Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 454 at 3 (Bankr. D. Utah May 2, 2002) (emphasis in original).

<sup>257</sup> FED. R. BANKR. P. RULE 2002(g)(1)(a).

<sup>258</sup> FED. R. BANKR. P. RULE 2002(2).

<sup>259</sup> FED. R. BANKR. P. RULE 2002(4).

Simon filed its Preliminary Response on July 19, 2002. In it, Simon rebutted two of Freightliner's challenges while consenting to Freightliner's proposed relief that it be excluded from the effects of the April 22 Order.<sup>260</sup> Simon's Preliminary Response clarified the bifurcated nature of Freightliner's objection to the Court's orders.<sup>261</sup> The Preliminary Response challenged three of Freightliner's requests for relief. Freightliner argued that (1) notice of the Joint Motion of Debtors and Central Refrigerated Services, Inc. to Assume and Assign Certain Contracts Under 11 U.S.C. § 365 (Vendor Contracts); Notice of Hearing and Opportunity to Object (Vendor Contracts) ("Contracts Motion") was inadequate; (2) the Freightliner commitments in the Contracts Motion are not executory contracts and cannot be assumed and assigned; and (3) the order regarding the Motion for Approval of Sale of Substantially All of the Debtors' Assets and to Approve Assumption and Assignment of Leases and Executory Contracts ("Sale Motion") granted extraordinary relief and relief beyond that requested by the Debtors.<sup>262</sup>

Despite its acknowledgment that Freightliner did not have standing to reverse the Sale Motion, Simon did not oppose Freightliner's request that it be excluded from the effects of the April 22 Order as it related to the issues regarding assumption and assignment.<sup>263</sup> With the

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<sup>260</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 4-5 (Bankr. D. Utah July 19, 2002).

<sup>261</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 3 (Bankr. D. Utah July 19, 2002).

<sup>262</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 3 (Bankr. D. Utah July 19, 2002).

<sup>263</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders

issues arising out of the Sale Order disposed of at the outset, Simon next addressed Freightliner's challenges on notice and whether the Buyback Agreements were in fact executory contracts. To do this, Simon suggested the Court "exclude Freightliner from the Sale Order[,] . . . rely on the Contracts Order[, and] . . . determin[e] whether the Contracts Motion and Contract Order validly notified Freightliner of its rights."<sup>264</sup> The remaining issues will be discussed in turn.

Simon alleged that it "did not intend to give anything less than proper notice" and that proper notice was, in fact, given.<sup>265</sup> Indeed, Simon argued that notice of the Contracts Motion was mailed to Freightliner's headquarters (the general delivery address) and that notice of the Sale Motion was mailed to "39 Freightliner entities, including an entity that is a party to at least three of the Freightliner" Buyback Agreements.<sup>266</sup>

The Sale Motion sought to assume and assign the executory contracts after the sale was concluded.<sup>267</sup> Simon motioned for, and was granted, an expedited schedule for the assumption

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Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 3-4 (Bankr. D. Utah July 19, 2002).

<sup>264</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 4 (Bankr. D. Utah July 19, 2002).

<sup>265</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 4 (Bankr. D. Utah July 19, 2002).

<sup>266</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 4 (Bankr. D. Utah July 19, 2002).

<sup>267</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 5 (Bankr. D. Utah July 19, 2002).

and assignment in an attempt to streamline the bankruptcy proceeding.<sup>268</sup> Simon contended that the Sale Motion clearly included the equipment purchase agreements.<sup>269</sup> Indeed, the Asset Purchase Agreement filed on March 25, 2002, identified the Buyback Agreements as among the assets to be purchased.<sup>270</sup> Simon argued that the Buyback Agreements were mentioned in two other documents. First, Central's April 24, 2002 Asset Purchase Agreement stated that it was assuming all of Simon's "right, title, and interest of every kind, nature, or description and all contracts and agreements to which [Simon] were parties."<sup>271</sup> Second, the Buyback Agreements, "although not by name, were also referred to in the Confidential Memorandum sent by . . . Morgan Keegan to other . . . bidders."<sup>272</sup> Notice of the Sale Motion, Simon alleged, was sent to

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<sup>268</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 5 (Bankr. D. Utah July 19, 2002).

<sup>269</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 5 (Bankr. D. Utah July 19, 2002).

<sup>270</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 5 (Bankr. D. Utah July 19, 2002).

<sup>271</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 5 (Bankr. D. Utah July 19, 2002).

<sup>272</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 5 (Bankr. D. Utah July 19, 2002).

39 Freightliner entities, as well as Mercedes-Benz Credit Corporation, who, along with Freightliner, is a wholly owned subsidiary of Daimler-Chrysler.<sup>273</sup>

In its Memorandum of Points and Authorities, Freightliner also urged the Court to void the effects of the Contracts Motion with respect to Freightliner's obligations, because notice of this motion was also inadequate. Freightliner argued that the Contracts Motion "was not addressed to a Freightliner officer or other executive and did not specify in large type the contracts to be assumed and assigned."<sup>274</sup> Simon succinctly dispensed with Freightliner's arguments. Although the Contracts Motion was not addressed to "any particular executive, . . . it was appropriately delivered to a manager who handles bankruptcy matters for Freightliner."<sup>275</sup> The importance of the Buyback Agreements to Freightliner, along with the fact that Freightliner assigned management personnel to handle the Agreements, suggested Freightliner, and its recipient, should have known what was at stake when they received the Contracts Motion.<sup>276</sup> Citing *In re*

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<sup>273</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 5 (Bankr. D. Utah July 19, 2002).

<sup>274</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 8 (Bankr. D. Utah July 19, 2002).

<sup>275</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 8 (Bankr. D. Utah July 19, 2002).

<sup>276</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 9 (Bankr. D. Utah July 19, 2002).

*National Gypsum Co.*, Simon argued that “[t]echnical arguments regarding notice cannot be sustained when the movant possesses ‘actual knowledge of a significant refined degree.’”<sup>277</sup>

Simon alleged that prior to filing for bankruptcy it had entered into five executory contracts with Freightliner.<sup>278</sup> The itemized executory contracts were: (1) Conditional Commitment to Repurchase # 2000-00366 dated on or about May 3, 2001; (2) Conditional Commitment to Repurchase # 2001-00013 dated on or about May 3, 2001; (3) Conditional Commitment to Repurchase #2001-0014 dated on or about May 3, 2001; (4) Agreement between Dick Simon and Freightliner dated on or about January 25, 2000; and (5) Used Conditional Trade Agreement dated on or about February 14, 2001.<sup>279</sup> The agreements at issue were contracts placing “obligations on Freightliner to purchase tractors from Dick Simon at prices that may exceed the prevailing market price.”<sup>280</sup> These agreements were “enter[ed] into with customers to repurchase vehicles after a certain period of time.”<sup>281</sup>

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<sup>277</sup> 208 F.3d 498, 513 (5th Cir. 2000).

<sup>278</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors’ Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner’s Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 2 (Bankr. D. Utah July 19, 2002).

<sup>279</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors’ Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner’s Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 2 (Bankr. D. Utah July 19, 2002).

<sup>280</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors’ Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner’s Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 9 (Bankr. D. Utah July 19, 2002).

<sup>281</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors’ Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner’s Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at Exhibit 8 Deposition of W. Wells Talmadge 26 (Bankr. D. Utah July 19, 2002).

In response to Freightliner's allegation that the Buyback Agreements were not executory contracts, Simon countered that Freightliner's argument was entirely conclusory.<sup>282</sup> In support of its argument, Simon argued that Freightliner neither "allege[d] any monetary or non-monetary defaults on the contracts" nor made "any allegation of fact that Central cannot provide adequate assurance of future performance."<sup>283</sup>

*C. Order Denying Without Prejudice Debtors' Supplemental Motion:*

The Court, in an Order dated December 3, 2002, denied Simon's Supplemental Motion to Assume and Assign without prejudice.<sup>284</sup> In the December 3 Order, the Court made two critical findings of fact and conclusions of law.

The Freightliner commitments at issue were the Buyback Agreements where "Freightliner [was] required to purchase at a set price certain trucks that it had previously sold to [Simon] provide that Simon satisfied certain conditions."<sup>285</sup> The corollary of Freightliner's commitment was that Simon was required to "(a) obtain and deliver title to the used truck for trade-back to Freightliner; (b) maintain and present the used truck to Freightliner in a condition

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<sup>282</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 9 (Bankr. D. Utah July 19, 2002).

<sup>283</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Debtors' Preliminary Response to Memorandum of Points and Authorities Supporting Freightliner's Motion for (I) Reconsideration of April 22, 2002 Orders Authorizing Sale, etc. and Approving Assumption and Assignment of Executory Vendor Contracts, etc., and (II) Exclusion of the Freightliner Companies from the Effects of those Orders, Doc. 642 at 9 (Bankr. D. Utah July 19, 2002).

<sup>284</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Denying Without Prejudice Debtors' Supplemental Motion to Assume and Assign (1) Agreement Between Dick Simon and Freightliner, (2) Agreement for Conditional Commitment to Repurchase #2000-00366, (3) Agreement for Conditional Commitment to Repurchase #2001-00013, and (4) Agreement for Conditional Commitment to Repurchase #2001-00014 Pursuant to 11 U.S.C. § 365 and Authorization of Auction, Doc. 852 (Bankr. D. Utah Dec. 3, 2002).

<sup>285</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Denying Without Prejudice Debtors' Supplemental Motion to Assume and Assign (1) Agreement Between Dick Simon and Freightliner, (2) Agreement for Conditional Commitment to Repurchase #2000-00366, (3) Agreement for Conditional Commitment to Repurchase #2001-00013, and (4) Agreement for Conditional Commitment to Repurchase #2001-00014 Pursuant to 11 U.S.C. § 365 and Authorization of Auction, Doc. 852 at 2 (Bankr. D. Utah Dec. 3, 2002).

that meets certain specified requirements; and (c) purchase 1.2 new trucks . . . for each truck traded-in.”<sup>286</sup> Citing the Countryman definition, the Court found that both parties “have obligations under the [Buyback Agreements] that are so unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other,” making the Buyback Agreements executory contracts worth as much as \$7.7 million.<sup>287</sup>

The Court then addressed the sale of substantially all of Simon’s assets, specifically whether the parties, Simon and Central, included the Buyback Agreements as part of the sale. “A review of the documents surrounding the Sale,” the Court stated, “verifie[d] that the [Buyback Agreements] were not marketed as part of the Sale.”<sup>288</sup> In its findings of fact and conclusions of law, the Court cited to five instances that supported its determination that the Buyback Agreements were not part of the sale. Four of the five instances were examples of the parties’ failure to disclose material facts including: (1) Simon’s failure to disclose the existence of the Buyback Agreements in its schedule and statement of affairs; (2) Simon’s failure to advertise the terms and estimated value of the Buyback Agreements while it marketed its assets for sale; (3) Central’s failure to disclose the existence of the Buyback Agreements in the Asset Purchase Agreement it filed with the Court; and (4) both parties’ failure to provide adequate and

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<sup>286</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Denying Without Prejudice Debtors’ Supplemental Motion to Assume and Assign (1) Agreement Between Dick Simon and Freightliner, (2) Agreement for Conditional Commitment to Repurchase #2000-00366, (3) Agreement for Conditional Commitment to Repurchase #2001-00013, and (4) Agreement for Conditional Commitment to Repurchase #2001-00014 Pursuant to 11 U.S.C. § 365 and Authorization of Auction, Doc. 852 at 2-3 (Bankr. D. Utah Dec. 3, 2002).

<sup>287</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Denying Without Prejudice Debtors’ Supplemental Motion to Assume and Assign (1) Agreement Between Dick Simon and Freightliner, (2) Agreement for Conditional Commitment to Repurchase #2000-00366, (3) Agreement for Conditional Commitment to Repurchase #2001-00013, and (4) Agreement for Conditional Commitment to Repurchase #2001-00014 Pursuant to 11 U.S.C. § 365 and Authorization of Auction, Doc. 852 at 3 (Bankr. D. Utah Dec. 3, 2002).

<sup>288</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Denying Without Prejudice Debtors’ Supplemental Motion to Assume and Assign (1) Agreement Between Dick Simon and Freightliner, (2) Agreement for Conditional Commitment to Repurchase #2000-00366, (3) Agreement for Conditional Commitment to Repurchase #2001-00013, and (4) Agreement for Conditional Commitment to Repurchase #2001-00014 Pursuant to 11 U.S.C. § 365 and Authorization of Auction, Doc. 852 at 3 (Bankr. D. Utah Dec. 3, 2002).



proper notice to Freightliner.<sup>289</sup> With respect to the fifth instance, the Court noted that in a confidential memorandum between Simon and Morgan Keegan the Buyback Agreements were hardly mentioned, and when they are the Buyback Agreements were characterized as liabilities rather than assets.<sup>290</sup>

The Court concluded that the Buyback Agreements were not “marketed, sold or assigned as part of the Sale.”<sup>291</sup> In additional support of its determination, the Court noted that the sale was conducted on shortened notice to an insider, that the day after the sale the parties filed a joint motion seeking authority to assume and assign the Buyback Agreements, and that the inclusion of the Buyback Agreements did not affect the final sale price.<sup>292</sup>

Finding that there was “no consideration paid for the Buyback Agreements,” Simon did not “exercise [its] business judgment,” and that assuming and assigning the Buyback Agreements was “not in the best interests of the Estate” the Court denied Simon’s motion

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<sup>289</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Denying Without Prejudice Debtors’ Supplemental Motion to Assume and Assign (1) Agreement Between Dick Simon and Freightliner, (2) Agreement for Conditional Commitment to Repurchase #2000-00366, (3) Agreement for Conditional Commitment to Repurchase #2001-00013, and (4) Agreement for Conditional Commitment to Repurchase #2001-00014 Pursuant to 11 U.S.C. § 365 and Authorization of Auction, Doc. 852 at 4-5 (Bankr. D. Utah Dec. 3, 2002).

<sup>290</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Denying Without Prejudice Debtors’ Supplemental Motion to Assume and Assign (1) Agreement Between Dick Simon and Freightliner, (2) Agreement for Conditional Commitment to Repurchase #2000-00366, (3) Agreement for Conditional Commitment to Repurchase #2001-00013, and (4) Agreement for Conditional Commitment to Repurchase #2001-00014 Pursuant to 11 U.S.C. § 365 and Authorization of Auction, Doc. 852 at 4 (Bankr. D. Utah Dec. 3, 2002).

<sup>291</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Denying Without Prejudice Debtors’ Supplemental Motion to Assume and Assign (1) Agreement Between Dick Simon and Freightliner, (2) Agreement for Conditional Commitment to Repurchase #2000-00366, (3) Agreement for Conditional Commitment to Repurchase #2001-00013, and (4) Agreement for Conditional Commitment to Repurchase #2001-00014 Pursuant to 11 U.S.C. § 365 and Authorization of Auction, Doc. 852 at 5 (Bankr. D. Utah Dec. 3, 2002).

<sup>292</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Denying Without Prejudice Debtors’ Supplemental Motion to Assume and Assign (1) Agreement Between Dick Simon and Freightliner, (2) Agreement for Conditional Commitment to Repurchase #2000-00366, (3) Agreement for Conditional Commitment to Repurchase #2001-00013, and (4) Agreement for Conditional Commitment to Repurchase #2001-00014 Pursuant to 11 U.S.C. § 365 and Authorization of Auction, Doc. 852 at 5 (Bankr. D. Utah Dec. 3, 2002).

without prejudice. The Court also held that the Buyback Agreements were to be auctioned by the Committee with the Buyback Agreements assumed and assigned by the winning bidder.<sup>293</sup>

Central filed a Motion to Reconsider that was subsequently denied by the Court on April 29, 2003. Shortly thereafter, on June 24, Central filed a Notice of Appeal on Order Denying Motion to Reconsider.<sup>294</sup> Specifically, Central sought to appeal the Court's factual findings, that Central paid nothing for the Buyback Agreements, and that the Buyback Agreements were not included in the sale of assets to Central.<sup>295</sup>

#### *D. Appeal:*

Freightliner filed its Statement of Issues to be Presented and Designation of Record on Appeal on May 20, 2003. In it, Freightliner stated that the sole issue was “[w]hether the Freightliner Conditional Commitment to Repurchase Agreements [a.k.a. Buyback Agreements] are executory contracts under 11 U.S.C. § 365, and, therefore, subject to assumption and assignment.”<sup>296</sup>

Two and a half weeks later, Central filed its Statement of Issues to be Presented on Appeal and Designation of Record on Appeal.<sup>297</sup> Central sought to present three issues on appeal: (1) whether the evidence supported a finding that it paid nothing for the Buyback

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<sup>293</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Denying Without Prejudice Debtors' Supplemental Motion to Assume and Assign (1) Agreement Between Dick Simon and Freightliner, (2) Agreement for Conditional Commitment to Repurchase #2000-00366, (3) Agreement for Conditional Commitment to Repurchase #2001-00013, and (4) Agreement for Conditional Commitment to Repurchase #2001-00014 Pursuant to 11 U.S.C. § 365 and Authorization of Auction, Doc. 852 at 6 (Bankr. D. Utah Dec. 3, 2002).

<sup>294</sup> *In re Simon Transportation Services, Inc.*, 2:03-cv-00563-BSJ, Notice of Appeal on Order Denying Motion to Reconsider, Doc. 1 at 1 (C.D. Utah June 24, 2003).

<sup>295</sup> *In re Simon Transportation Services, Inc.*, 2:03-cv-00563-BSJ, Notice of Appeal on Order Denying Motion to Reconsider, Doc. 1 at 1-2 (C.D. Utah June 24, 2003).

<sup>296</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Statement of Issues to be Presented and Designation of Record on Appeal, Doc. 1050 at 2 (Bankr. D. Utah May 20, 2003).

<sup>297</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Statement of Issues to be Presented and Designation of Record on Appeal, Doc. 1050 at 1 (Bankr. D. Utah May 20, 2003).

Agreements; (2) whether the record supported a finding as to the Buyback Agreements' estimated values, and if so, whether the failure to disclose the estimated values had a material effect on potential bidders; and (3) whether the record supported a finding that the assignments of the Buyback Agreements were in the best interests of Simon's estate.<sup>298</sup>

On February 20, 2004, the District Court filed its Order Affirming Bankruptcy Court's April 25, 2003 Order Denying Motion to Reconsider.<sup>299</sup> Since they previously sold the Buyback Agreements at auction to Freightliner, the issue as to whether they were in fact executory contracts was mooted.<sup>300</sup> The only remaining issues before the District Court were whether the notice was adequate and proper and whether the Buyback Agreements were properly disclosed.<sup>301</sup> The District Court ultimately affirmed the Bankruptcy Court's Order on two grounds.

First, the District Court held that the notice was improper pursuant to Federal Rule of Bankruptcy Procedure 6006(c).<sup>302</sup> According to Rule 6006(c), notice of a motion to assume and assign an executory contract "shall be given to the other part to the contract."<sup>303</sup> The absence of notice proved fatal for Central as the District Court went on to hold that "[a]bsent notice, the April 22, 2002 order approving the sale of the [Buyback Agreements] was overly broad because it failed to take into consideration what the bankruptcy court did not know, namely that no notice

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<sup>298</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Statement of Issues to be Presented and Designation of Record on Appeal, Doc. 1050 at 2 (Bankr. D. Utah May 20, 2003).

<sup>299</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Order Affirming Bankruptcy Court's April 25, 2003 Order Denying Motion to Reconsider, Doc. 40 at 1 (C.D. Utah Feb. 20, 2004).

<sup>300</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Order Affirming Bankruptcy Court's April 25, 2003 Order Denying Motion to Reconsider, Doc. 40 at 5 (C.D. Utah Feb. 20, 2004).

<sup>301</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Order Affirming Bankruptcy Court's April 25, 2003 Order Denying Motion to Reconsider, Doc. 40 at 4 (C.D. Utah Feb. 20, 2004).

<sup>302</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Order Affirming Bankruptcy Court's April 25, 2003 Order Denying Motion to Reconsider, Doc. 40 at 4 (C.D. Utah Feb. 20, 2004).

<sup>303</sup> FED. R. BANKR. P. 6006(c).

was given.”<sup>304</sup> The Buyback Agreements, the District Court concluded, were not a part of the sale.<sup>305</sup>

The District Court next addressed the “inadequate disclosure of the [Buyback Agreements] prior to the purported sale on April 8, 2002.”<sup>306</sup> At issue was whether Simon properly disclosed the Buyback Agreements on its schedules of assets.<sup>307</sup> Here, the District Court held Simon and Central to a higher standard than the business judgment rule noting that in “[a] sale of substantially all of the debtors’ assets, on shortened notice, to an insider places upon the debtor heightened scrutiny to insure that there has been adequate disclosure under the circumstances.”<sup>308</sup> The District Court held that Simon not only failed to meet the higher threshold of heightened scrutiny, but also failed to meet even the lower threshold of the business judgment rule.<sup>309</sup>

Central filed a notice of appeal on March 22, 2004. In it, Central sought to appeal both the District Court’s Order Affirming Bankruptcy Court’s April 25, 2003 Order Denying Motion to Reconsider and Bankruptcy Court’s Order Denying Motion to Reconsider, entered on April

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<sup>304</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Order Affirming Bankruptcy Court’s April 25, 2003 Order Denying Motion to Reconsider, Doc. 40 at 4 (C.D. Utah Feb. 20, 2004).

<sup>305</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Order Affirming Bankruptcy Court’s April 25, 2003 Order Denying Motion to Reconsider, Doc. 40 at 4 (C.D. Utah Feb. 20, 2004).

<sup>306</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Order Affirming Bankruptcy Court’s April 25, 2003 Order Denying Motion to Reconsider, Doc. 40 at 4 (C.D. Utah Feb. 20, 2004).

<sup>307</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Order Affirming Bankruptcy Court’s April 25, 2003 Order Denying Motion to Reconsider, Doc. 40 at 4 (C.D. Utah Feb. 20, 2004).

<sup>308</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Order Affirming Bankruptcy Court’s April 25, 2003 Order Denying Motion to Reconsider, Doc. 40 at 4 (C.D. Utah Feb. 20, 2004).

<sup>309</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Order Affirming Bankruptcy Court’s April 25, 2003 Order Denying Motion to Reconsider, Doc. 40 at 4 (C.D. Utah Feb. 20, 2004).

25, 2003.<sup>310</sup> Freightliner also filed a notice of appeal on April 5, 2004 praying for similar relief.<sup>311</sup>

The Court of Appeals, on June 2, 2005, held that the appeal was moot and subsequently dismissed the appeal.<sup>312</sup> When determining whether an appeal is moot the Court of Appeals must determine “whether a court can issue an effective remedy in [the] case.”<sup>313</sup> The Bankruptcy Code significantly limits courts’ ability to review asset sales.<sup>314</sup> Specifically, section 363(m) states that

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.<sup>315</sup>

To be sure, the Court of Appeals noted that it “had never set aside an asset sale when a stay had not been obtained.”<sup>316</sup> Congress’s rationale for the language in section 363(m) was to protect good-faith purchasers “from having their purchases reversed,” so they are “more willing to bid for these assets.”<sup>317</sup> When good-faith purchasers are more willing to bid on these assets,

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<sup>310</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Notice of Appeal for the United States Court of Appeals for the Tenth Circuit (Central), Doc. 41 at 1 (C.D. Utah Mar. 22, 2004).

<sup>311</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Notice of Appeal for the United States Court of Appeals for the Tenth Circuit (Freightliner), Doc. 45 at 1 (C.D. Utah Apr. 5, 2004).

<sup>312</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Tenth Circuit Court of Appeal Order and Judgment, Doc. 51 at 2 (10th Cir. July 26, 2005).

<sup>313</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Tenth Circuit Court of Appeal Order and Judgment, Doc. 51 at 4 (10th Cir. July 26, 2005) (citing *In re Osborn*, 24 F.3d 1199, 1203 (10th Cir. 1994)).

<sup>314</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Tenth Circuit Court of Appeal Order and Judgment, Doc. 51 at 4 (10th Cir. July 26, 2005).

<sup>315</sup> 11 U.S.C. § 363(m).

<sup>316</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Tenth Circuit Court of Appeal Order and Judgment, Doc. 51 at 5 (10th Cir. July 26, 2005) (citing *In re BCD Corp.*, 119 F.3d 852, 856 (10th Cir. 1997)).

<sup>317</sup> *In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Tenth Circuit Court of Appeal Order and Judgment, Doc. 51 at 5 (10th Cir. July 26, 2005).

the assets' values increase and "maximize[] the value of the bankruptcy estate."<sup>318</sup> Central, however, failed to stay the Bankruptcy Court's Order authorizing the auction of the Buyback Agreements, thereby mooting the appeal.

## V. LIQUIDATION PLAN

After Simon's assets were substantially liquidated, the debtors publicly announced through a press release and the filing of a Form 8-K with the Securities and Exchange Commission that it would be filing a liquidating plan with the Court.<sup>319</sup> On November 7, 2002, Simon filed its Disclosure Statement for Joint Liquidation and its proposed plan for the same.<sup>320</sup> In addition, on January 10, 2003, Simon – along with the Committee – filed a Joint Plan of Liquidation.<sup>321</sup> Objections were subsequently raised<sup>322</sup> by the U.S. Trustee's Office,<sup>322</sup> the Internal Revenue Service (IRS),<sup>323</sup> the Missouri Department of Revenue,<sup>324</sup> Granger Hunter Improvements District (Granger Hunter),<sup>325</sup> Thermo King Svc, Inc. (Thermo King),<sup>326</sup> and Dime

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<sup>318</sup>*In re Simon Transportation Services, Inc.*, No. 2:03-cv-00562-BSJ, Tenth Circuit Court of Appeal Order and Judgment, Doc. 51 at 5 (10th Cir. July 26, 2005).

<sup>319</sup> Simon Transportation, Inc., Press Release Dated June 7, 2002 (Jun. 7, 2002).

<sup>320</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Disclosure Statement Filed by Simon Transportation Services Inc., Doc. 818 (Bankr. D. Utah Nov. 7, 2002); *In re Simon Transportation Services, Inc.*, No. 02-22906, Chapter 11 Plan of Reorganization, Doc. 819 (Bankr. D. Utah Nov. 7, 2002).

<sup>321</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Joint Plan of Liquidation dated December 27, 2002, Doc. 889 (Bankr. D. Utah Jan. 10, 2003).

<sup>322</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Disclosure Statement, Doc. 853 (Bankr. D. Utah Dec. 04, 2002).

<sup>323</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Joint Plan of Liquidation, Doc. 939 (Bankr. D. Utah Feb. 20, 2003).

<sup>324</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Confirmation of Plan, Doc. 912 (Bankr. D. Utah Feb. 7, 2003).

<sup>325</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Limited Objection to Confirmation of Joint Plan of Liquidation dated December 27, 2002, Doc. 936 (Bankr. D. Utah Feb. 20, 2003).

Commercial Corporation (Dime Commercial).<sup>327</sup> These objections attacked, among other things, the adequacy of the Disclosure Statement as well as the plan's its treatment of certain classes of claims.

Under section 1125 of the Code, a debtor must provide voting parties with a disclosure statement and plan summary prior to voting on plan confirmation. To satisfy the section 1125 requirements, the disclosure statement must provide "adequate information" sufficient to "enable . . . a hypothetical investor of the relevant class to make an informed judgment about the plan."<sup>328</sup> According to the Trustee, Simon's disclosure statement was deficient because it did not include a description of Simon's current assets, a description of the Simon's post-filing operations, a schedule of claims against the estate, an estimate of what the creditors would receive if the liquidation was pursued under Chapter 7, and an estimate of administrative expense claims.<sup>329</sup>

The IRS also objected on the ground that the disclosure statement did not correctly provide for payment of tax claims.<sup>330</sup> Specifically, the original disclosure statement provided for the payment of tax claims exclusive of penalties and interest.<sup>331</sup> Under section 1129(a)(9)(A), however, priority tax claims are entitled to interest. Further, the IRS objected to the adequacy of

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<sup>326</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Limited Objection to Confirmation of Plan, Doc. 934 (Bankr. D. Utah Feb. 19, 2003).

<sup>327</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Limited Objection to Confirmation of Joint Plan of Liquidation dated December 27, 2002, Doc. 937 (Bankr. D. Utah Feb. 20, 2003).

<sup>328</sup> 11 U.S.C. §§ 1125 (a)-(b).

<sup>329</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Disclosure Statement, Doc. 853 at 2 (Bankr. D. Utah Dec. 04, 2002).

<sup>330</sup> See *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Debtors' Disclosure Statement for Joint Plan Liquidation, Doc. 862 at 2 (Bankr. D. Utah Dec. 9, 2002). Prior to submitting Simon's disclosure statement to the Court, the IRS had filed proofs of administrative, priority unsecured, and general unsecured claims. See Objection to Debtors Disclosure Statement for Joint Plan Liquidation, Doc. 862, at 2 (Bankr. D. Utah Dec. 9, 2002).

<sup>331</sup> See *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Debtors' Disclosure Statement for Joint Plan Liquidation, Doc. 862 at 2 (Bankr. D. Utah Dec. 9, 2002).

the disclosure statement with respect to its exclusion of several claims, such as claims by taxing authorities for penalties arising from noncompliance.<sup>332</sup>

In response to these objections, Simon and the Committee filed a second disclosure statement on January 10, 2003.<sup>333</sup> The amended statement neither attempted to better characterize the nature and amount of outstanding claims, nor did it attempt to estimate the results of a liquidation plan to a Chapter 7 liquidation. Rather, the amended statement simply made note that a Chapter 11 liquidation would be preferable to Chapter 7 due to the benefits of having the Committee liquidate rather than a Chapter 7 trustee, who is admittedly less familiar with Simon's operations, accountants, and attorneys than would be the Committee.<sup>334</sup> Apparently, this half-hearted attempt to address the Trustee's objections was sufficient for the Court, who approved the amended disclosure statement on January 22, 2003.<sup>335</sup>

Following the Court's acceptance of a debtor's disclosure statement, section 1128 requires a hearing prior to confirming a prospective Chapter 11 plan. Generally, a plan may be confirmed so long as it meets the requirements of section 1129. This section, among other things, imposes requirements regarding the treatment of various classes of claims – such as holders of administrative, secured, priority, and general unsecured claims – before a plan may be confirmed. It is within these requirements that most objections were directed. Simon's plan proposed, among other things, that the Committee serve as representative of the consolidated

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<sup>332</sup> See *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Debtors' Disclosure Statement for Joint Plan Liquidation, Doc. 862 at 2 (Bankr. D. Utah Dec. 9, 2002).

<sup>333</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Disclosure Statement for Joint Plan of Liquidation, Doc. 888 (Bankr. D. Utah Jan. 10, 2003).

<sup>334</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Disclosure Statement for Joint Plan of Liquidation, Doc. 888 at 7 (Bankr. D. Utah Jan. 10, 2003).

<sup>335</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Approving Adequacy of Disclosure Statement and Setting Hearing on Confirmation, Doc. 897 (Bankr. D. Utah Jan. 22, 2003).



estate pursuant to 11 U.S.C. § 1123(b)(3)(B).<sup>336</sup> The Committee was to be vested with all property of the estate and would have full power of a trustee to sell or otherwise dispose of such property.<sup>337</sup> With respect to its resolution of outstanding claims, administrative were to be paid in full and priority claims were entitled to the same, following full satisfaction of administrative claims.<sup>338</sup> Any remaining distributions, if any, were to go to general unsecured creditors on a *pro rata* basis.<sup>339</sup> The deadline for filing administrative expense claims was set at no more than thirty days following the court's confirmation of the plan.<sup>340</sup>

Plans ordinarily classify the treatment of various claim holders, such as secured creditors, unsecured creditors entitled to priority, general unsecured creditors, and equity security holders. Interestingly, while Simon's plan outlined the treatment of both administrative and priority claims, the amended plan did not even attempt to outline the rights of secured claimholders.<sup>341</sup> With respect to remaining unsecured creditors, Simon's plan proposed the creation of two distinct classes of non-administrative, unsecured, and non-priority claims.<sup>342</sup> The first class, Class 1, constituted an impaired class of claims comprised of all remaining pre-petition unsecured claims. Class 1 claims were entitled to receive a pro rata share of the consolidated

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<sup>336</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Confirming Amended Joint Plan of Liquidation, Doc. 955 at 3 (Bankr. D. Utah Mar. 3, 2003).

<sup>337</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Confirming Amended Joint Plan of Liquidation, Doc. 955 at 4 (Bankr. D. Utah Mar. 3, 2003).

<sup>338</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Joint Plan of Liquidation, Doc. 889 at 4-5 (Bankr. D. Utah Jan. 10, 2003).

<sup>339</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Joint Plan of Liquidation, Doc. 889 at 4-5 (Bankr. D. Utah Jan. 10, 2003).

<sup>340</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Joint Plan of Liquidation, Doc. 889 at 4 (Bankr. D. Utah Jan. 10, 2003).

<sup>341</sup> *See In re Simon Transportation Services, Inc.*, No. 02-22906, Joint Plan of Liquidation dated December 27, 2002, Doc. 889 (Bankr. D. Utah Jan. 10, 2003).

<sup>342</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Joint Plan of Liquidation dated December 27, 2002, Doc. 889 at 6-7 (Bankr. D. Utah Jan. 10, 2003).

estate following full satisfaction of administrative expense and priority claims.<sup>343</sup> The second class of claims, Class 2, also constituted an impaired class of claims. However, Class 2 claims consisted of those claims arising from the holder's equity interest in the consolidated estate.<sup>344</sup> The plan proposed to cancel the interests of these holders of the Company's common stock.<sup>345</sup> With respect to outstanding executory contracts, the plan provided that executory contracts not assumed or assigned as of the effective date of the plan were to be rejected.<sup>346</sup> The plan further provided that any claims arising from the rejection of these contracts, which would constitute a breach of the contract under Section 365 of the Bankruptcy Code<sup>347</sup> and any claim arising from such breach would be relegated to Class 2 unsecured status.<sup>348</sup>

The Missouri Department of Revenue, like the IRS objections to the disclosure statement, raised objections in response to plan's treatment of priority tax claims.<sup>349</sup> Accordingly, Simon and the Committee filed two joint motions to modify the plan of liquidation in order to address concerns raised by the objections of the Missouri Department of Revenue as well as the IRS.<sup>350</sup>

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<sup>343</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Joint Plan of Liquidation dated December 27, 2002, Doc. 889 at 6 (Bankr. D. Utah Jan. 10, 2003).

<sup>344</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Joint Plan of Liquidation dated December 27, 2002, Doc. 889 at 6 (Bankr. D. Utah Jan. 10, 2003).

<sup>345</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Confirming Amended Joint Plan of Liquidation, Doc. 955 at 5 (Bankr. D. Utah Mar. 3, 2003).

<sup>346</sup> See *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Denying Without Prejudice Debtors' Supplemental Motion to Assume and Assign (1) Agreement between Dick Simon and Freightliner, (2) Agreement for Conditional Commitment to Repurchase #2000-00366, (3) Agreement for Conditional Commitment to Repurchase #2001-00013, and (4) Agreement for Conditional Commitment to Repurchase #2001-00014 Pursuant to 11 U.S.C. § 365 and Authorization of Auction (related document(s) 641 ), Doc. 852 (Bankr. D. Utah Dec. 03, 2002) (requiring assignment by auction of certain Buyback Agreements not marketed in Simon's 363 sale).

<sup>347</sup> 11 U.S.C. § 365(g)(2).

<sup>348</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Joint Plan of Liquidation dated December 27, 2002, Doc. 889 at 7 (Bankr. D. Utah Jan. 10, 2003).

<sup>349</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Confirmation of Plan, Doc. 912 at 1-3 (Bankr. D. Utah Feb. 7, 2003).

<sup>350</sup> See *In re Simon Transportation Services, Inc.*, No. 02-22906, Joint Motion to Modify Joint Plan of Liquidation, Doc. 948 (Bankr. D. Utah Feb. 27, 2003); *In re Simon Transportation Services, Inc.*, No. 02-22906, Amended Joint

These amendments permitted the IRS to file administrative expense claims for unfiled tax returns within 30 days of due date.<sup>351</sup> The amendments also modified the objection date for “Priority Tax Claims,” expressly entitled tax claims to interest, and relegated penalty claims to Class 1 unsecured status.<sup>352</sup> Following the amendments, the Missouri Department of Revenue withdrew its objections to the plan.<sup>353</sup>

Another objection came from Grainger Hunter, a creditor who held secured, priority, and general unsecured claims.<sup>354</sup> Generally, under section 1129(a)(9), in order to be confirmed, holders of priority and secured claims are entitled to payments constituting the total value of the creditor’s allowed claim.<sup>355</sup> Because the plan did “not specify the treatment of [its] secured claims or its priority claim,” nor did the plan provide a deadline for objections to priority claims, Grainger objected to the plan’s adequacy.<sup>356</sup> Similarly, Dime Commercial, a creditor holding administrative claims, as well as a potential secured claim, against Simon, objected on the ground that the plan did not even attempt to classify secured claims, much less specify their treatment under the plan.<sup>357</sup>

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Chapter 11 Plan of Liquidation, Doc. 949 (Bankr. D. Utah Feb. 27, 2003); *In re Simon Transportation Services, Inc.*, No. 02-22906, Second Amended Chapter 11 Joint Plan of Liquidation, Doc. 952 (Bankr. D. Utah Feb. 28, 2002).

<sup>351</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Second Amended Chapter 11 Joint Plan of Liquidation, Doc. 952 at 2 (Bankr. D. Utah Feb. 28, 2002).

<sup>352</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Second Amended Chapter 11 Joint Plan of Liquidation, Doc. 952 at 3 (Bankr. D. Utah Feb. 28, 2002).

<sup>353</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Withdrawal of Document, Doc. 947 (Bankr. D. Utah Feb. 27, 2003).

<sup>354</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Limited Objection to Confirmation of Joint Plan of Liquidation dated December 12, 2002, Doc. 936 at 2 (Bankr. D. Utah Feb. 20, 2003).

<sup>355</sup> See 11 U.S.C. §§ 1129(a)(9), (b)(2).

<sup>356</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Limited Objection to Confirmation of Joint Plan of Liquidation dated December 27, 2002, Doc. 936 at 1-2 (Bankr. D. Utah Feb. 20, 2003).

<sup>357</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Limited Objection to Confirmation of Joint Plan of Liquidation dated December 27, 2002, Doc. 937 at 2 (Bankr. D. Utah Feb. 20, 2003).

A modified plan was later filed with the court. The modified plan, however, still did not attempt to classify secured claims or provide for a general treatment of secured and priority claims.<sup>358</sup> But, the amended plan did expressly state that Grainger Hunter would be entitled to payment of its secured claims immediately on the effective date of the plan.<sup>359</sup> In addition, the amended plan provided that Dime Commercial would be allowed an administrative claim for two tractors leased under the agreement, if those trucks – which were missing at the time – could not be found. If found, the plan provided that any claims arising from the rejection would be entitled to Class 1 claim status, with Dime Commercial treated as a secured lien holder for purposes of any insurance proceeds.<sup>360</sup>

In addition to the 1129 requirements dealing with the treatment of particular classes of claims, a plan will only be confirmed if all classes of claims approve the plan by vote.<sup>361</sup> Holders of unimpaired, but not those of impaired, claims are deemed to accept the plan under section 1126(f). In Simon's case, both Class 1 and Class 2 creditors held impaired claims. Ballots indicated, however, that only Class 1 creditors approved the plan.<sup>362</sup> With only one class of claims approving the plan, it could not fully meet the requirements of 11 U.S.C. § 1123(a)(8). Nevertheless, subsection (b)(1) provides a safe harbor permitting confirmation of a plan in the

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<sup>358</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Amended Joint Chapter 11 Plan of Liquidation, Doc. 949 (Bankr. D. Utah Feb. 27, 2003); *In re Simon Transportation Services, Inc.*, No. 02-22906, Second Amended Chapter 11 Joint Plan of Liquidation, Doc. 952 (Bankr. D. Utah Feb. 28, 2002).

<sup>359</sup> See *In re Simon Transportation Services, Inc.*, No. 02-22906, Second Amended Chapter 11 Joint Plan of Liquidation dated December 27, 2002, Doc. 952 at 7 (Bankr. D. Utah Mar. 5, 2003).

<sup>360</sup> See *In re Simon Transportation Services, Inc.*, No. 02-22906, Second Amended Chapter 11 Joint Plan of Liquidation dated December 27, 2002, Doc. 952 at 13 (Bankr. D. Utah Mar. 5, 2003).

<sup>361</sup> 11 U.S.C. §§ 1129(a)(7)-(8).

<sup>362</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Confirming Amended Joint Plan of Liquidation, Doc. 955 at 3 (Bankr. D. Utah Mar. 3, 2003). Class 1 creditors were the holders of the allowed unsecured claims, the only class of claims entitled to vote on the matter. *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Confirming Amended Joint Plan of Liquidation, Doc. 955 3 (Bankr. D. Utah Mar. 3, 2003).

event that not all impaired classes of claims have approved.<sup>363</sup> Section 1129(b)(1) permits debtors to “cramdown” a plan over a dissenting class of creditors. In order to invoke this safe harbor, “the plan [must] not discriminate unfairly, and [must be] fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.”<sup>364</sup>

Under the terms of the original joint plan, a maintenance agreement entered into between Thermo King and Simon would be rejected.<sup>365</sup> In addition to various post-petition administrative expense claims arising under this lease, Thermo King held pre-petition unsecured claims against Simon in the amount of \$1,333,000.<sup>366</sup> The plan provided that these unsecured claims would constitute Class 2 claims upon confirmation of the plan.<sup>367</sup> These creditors were not expected to receive any distribution under the liquidation plan.<sup>368</sup> In fact, by June 6, 2002 the Company had already sent notification to major broker-dealers requesting that they cease trading in the Company's common stock.<sup>369</sup> In other words, the plan as written sought to cut an entire group of creditors out of the pro rata distribution of the estate. Accordingly, by relegating Thermo King's pre-petition claims to Class 2 status, the plan would preclude Thermo King from the possibility of any recovery on its claims.

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<sup>363</sup> 11 U.S.C. § 1123(b).

<sup>364</sup> 11 U.S.C. § 1123(b).

<sup>365</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Joint Plan of Liquidation dated December 27, 2002, Doc. 889 at 7 (Bankr. D. Utah Jan. 10, 2003).

<sup>366</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Limited Objection to Confirmation of Plan, Doc. 934 at 2 (Bankr. D. Utah Feb. 19, 2003).

<sup>367</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Joint Plan of Liquidation dated December 27, 2002, Doc. 889 at 7 (Bankr. D. Utah Jan. 10, 2003).

<sup>368</sup> Simon Transportation, Inc., Press Release Dated June 7, 2002 (Jun. 7, 2002).

<sup>369</sup> Simon Transportation, Inc., Press Release Dated June 7, 2002, at 1-2 (Jun. 7, 2002).

For this reason, Thermo King filed an objection on the ground that the plan would “discriminate unfairly” between impaired classes of claims.<sup>370</sup> In its objection, however, Thermo King noted that Simon had previously indicated in private conversations with Thermo King that the proposed plan had mistakenly classified claims arising from rejection of executory contracts as Class 2 unsecured claims rather than Class 1.<sup>371</sup> In response, Simon’s amended plan corrected its earlier mistake and thus classified claims arising from the rejection of executory contracts as Class 1 allowed unsecured claims.<sup>372</sup> Following this amendment, Thermo King withdrew its original objection.<sup>373</sup>

After hearing but without significant comment, the court held that any remaining impairment of Class 2 claims would not pose an obstacle to confirmation, as the amended plan did not detrimentally affect the rights of any party in interest.<sup>374</sup> Following this finding, the court then quickly worked through the remaining confirmation requirements. While neither the plan nor disclosure statement estimated the administrative claims of the estate,<sup>375</sup> the court ultimately held that all other conditions for confirmation were met.<sup>376</sup> Specifically, the court held that the

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<sup>370</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Limited Objection to Confirmation of Plan, Doc. 934 at 3 (Bankr. D. Utah Feb. 19, 2003); *see also* 11 U.S.C. § 1129(b)(1).

<sup>371</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Limited Objection to Confirmation of Plan, Doc. 934 at 3 (Bankr. D. Utah Feb. 19, 2003).

<sup>372</sup>*See In re Simon Transportation Services, Inc.*, No. 02-22906, Second Amended Chapter 11 Joint Plan of Liquidation dated December 27, 2002, Doc. 952 at 7 (Bankr. D. Utah Mar. 5, 2003).

<sup>373</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Withdrawal of Document, Doc. 945 (Bankr. D. Utah Feb. 26, 2003).

<sup>374</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Order Confirming Amended Joint Plan of Liquidation, Doc. 955 at 6 (Bankr. D. Utah Mar. 3, 2003). Specifically, the Court noted and that the modifications in Simon and the Committee’s second amendments to the plan would not materially or detrimentally affect the rights any parties in interest or objectors to the plan.

<sup>375</sup> With certain limited exceptions, the Chapter 11 debtor must pay all administrative expenses in full to remain in control of its business and attempt to liquidate through the Chapter 11 process. *See* 11 U.S.C. § 1129(a)(9). Section 1129(a)(9) requires the debtor to pay in full the “administrative expenses” incurred both in operating the business post-petition (e.g., vendor invoices) and in funding the costs to administer the case (e.g., professionals fees).

<sup>376</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Order Confirming Amended Joint Plan of Liquidation, Doc. 955 at 5 (Bankr. D. Utah Mar. 3, 2003).

plan would be sufficient to pay administrative claims, the holders of claims would receive at least as much as they would under Chapter 7, the plan was feasible and not likely to be followed by a subsequent liquidation, and it had proposed in good faith.<sup>377</sup> The court noted that the plan as amended would not materially or detrimentally affect the rights any parties in interest or objectors to the plan.<sup>378</sup> Thus, on March 13, 2003, the bankruptcy court entered an order confirming Simon's Second Amended Joint Plan of Liquidation.<sup>379</sup>

## VI. POST-PLAN ACTIVITY

Following the sale of substantially all of Simon's assets, Simon ceased its business operations in preparation of filing a plan of liquidation with the Court.<sup>380</sup> At that time, Simon had approximately \$3 million in cash on deposit.<sup>381</sup> Additionally, Simon anticipated obtaining additional funds through the pursuit of preferential payment claims against certain of its vendors.<sup>382</sup> As of the first quarter of 2002, however, no estimate had been made of the potential amount of those claims.<sup>383</sup>

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<sup>377</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Confirming Amended Joint Plan of Liquidation, Doc. 955 at 6 (Bankr. D. Utah Mar. 3, 2003).

<sup>378</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Confirming Amended Joint Plan of Liquidation, Doc. 955 at 4 (Bankr. D. Utah Mar. 3, 2003).

<sup>379</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Order Confirming Amended Joint Plan of Liquidation, Doc. 955 at 6 (Bankr. D. Utah Mar. 3, 2003).

<sup>380</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Disclosure Statement Filed by Simon Transportation Services Inc., Doc. 818 (Bankr. D. Utah Nov. 7, 2002).

<sup>381</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Disclosure Statement Filed by Simon Transportation Services Inc., Doc. 818 at 6 (Bankr. D. Utah Nov. 7, 2002).

<sup>382</sup> Simon Transportation, Inc., Quarterly Report (Form 10-Q), at 16 (Sept. 13, 2002).

<sup>383</sup> Simon Transportation, Inc., Quarterly Report (Form 10-Q), at 16 (Sept. 13, 2002).

A bankruptcy does not end on the confirmation of a plan, however, as a significant amount of activity continues after a plan is confirmed. The effects of a confirmed plan are set out in section 1141. Most significantly, a plan “discharges the debtor from its pre-confirmation debt and substitutes the obligations set forth in the plan” for the debtor's prior indebtedness.<sup>384</sup> Put another way, the plan creates “a new and binding contract, sanctioned by the Court, between a debtor and his preconfirmation creditors.”<sup>385</sup>

The bankruptcy estate consists of all of the debtor’s property interests at the time of the filing. The estate and its contents often become the subject of much of bankruptcy litigation, since the estate is often the source of payments made to the creditors. Therefore, for creditors the importance of maximizing the size of the estate cannot be overstated. One hurdle, with which creditors are often confronted, is when a debtor transfers assets prepetition in anticipation of bankruptcy. To counter this, bankruptcy law created a powerful framework granting creditors the power to unwind certain prepetition transfers. These avoidance powers are codified in chapter 5 of the Code.<sup>386</sup> The avoidance provisions of the Code, which are also referred to as “clawback” provisions, grant the trustee the power to undo transactions that occurred shortly before the bankruptcy filing. For the purposes of this essay, the discussion of the avoidance actions will be limited to the most common forms of avoidance for fraudulent transfers and preferential transfers.

In effect, fraudulent transfer law grants the creditor (typically the DIP or the trustee) the power to “avoid a transaction between the debtor and a third party if the transaction is, on

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<sup>384</sup> David A. Lander and David A. Warfield, *A Review and Analysis of Selected Post-Confirmation Activities in Chapter 11 Reorganizations*, 62 AM. BANKR. L. J. 203, 204 (1988).

<sup>385</sup> *In re Ernst*, 45 B.R. 700, 702 (Bankr. D. Minn.1985).

<sup>386</sup> 11 U.S.C. §§ 501-562.



appropriate standards, adverse to the creditor.”<sup>387</sup> The creditor’s avoidance power in bankruptcy law appears in section 548.<sup>388</sup> Section 548, however, has a caveat: the DIP must prove that the debtor’s transfer was made with fraudulent intent. The power to avoid transfers made with “actual fraud,” under section 548(a)(1)(A), permits avoidance when a transfer is “made with the actual intent to ‘hinder, delay, or defraud’ a creditor.”<sup>389</sup> The power to avoid transfers made with “constructive fraud,” under section 548(a)(1)(B), allows the DIP to “avoid a transfer made for ‘less than a reasonably equivalent value.’”<sup>390</sup> In the present case, the Committee sought to avoid a prepetition transfer between Simon and Richard Simon, Jr. on the grounds that the transfer was fraudulent.<sup>391</sup> At issue was a prepetition non-compete agreement entered into between Simon and Mr. Simon, Jr. under which Simon agreed to pay Mr. Simon, Jr. approximately \$3,000 per week totaling \$154,503.28.<sup>392</sup> During the course of litigation, the parties discovered that Simon was likely solvent at the time the transfers were made. Ultimately, the Committee and Mr. Simon, Jr. settled.<sup>393</sup> Mr. Simon, Jr. agreed to “waive, release and forever discharge . . . the Committee from any and all claims, liabilities, and causes of action of any kind” and the associated case was dismissed.<sup>394</sup>

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<sup>387</sup> JONATHAN P. FRIEDLAND, ET. AL., CHAPTER 11-101: THE NUTS AND BOLTS OF CHAPTER 11 PRACTICE 93 (2007).

<sup>388</sup> 11 U.S.C. § 548. Avoidance actions may also arise under non-bankruptcy law. Under section 544(b), the DIP or Trustee may avoid a transfer that is “voidable by a creditor at state law.” 11 U.S.C. § 544(b).

<sup>389</sup> 11 U.S.C. § 548(a)(1)(A).

<sup>390</sup> 11 U.S.C. § 548(a)(1)(B).

<sup>391</sup> *In re Simon Transportation Services, Inc.*, No. 04-02405, Complaint to Avoid Fraudulent Transfers, Doc. 1 at 3 (Bankr. D. Utah Feb. 24, 2004).

<sup>392</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Seventh Motion to Approve Settlement Agreements, Doc. 1524 at 46 (Bankr. D. Utah Aug. 7, 2007).

<sup>393</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Seventh Motion to Approve Settlement Agreements, Doc. 1524 at 46 (Bankr. D. Utah Aug. 7, 2007).

<sup>394</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Seventh Motion to Approve Settlement Agreements, Doc. 1524 at 46 (Bankr. D. Utah Aug. 7, 2007).

The power to avoid preferences, under section 547, comes from the “first principle of bankruptcy . . . that similarly situated creditors share *pro rata*.”<sup>395</sup> Although the debtor in making a preferential transfer is paying a debt to a creditor, an otherwise unobjectionable deed, the effect of debtor’s preference defies the basic tenet of *pro rata* distribution.<sup>396</sup> A prima facie case, under section 547(b), to avoid a preferential transfer has five elements if the transfer was (1) made to a creditor; (2) for an antecedent debt; (3) made while the debtor was insolvent; (4) and within 90 days before bankruptcy (or 1 year if the recipient is an insider); (5) if the creditor gets more than it would get in a liquidation.<sup>397</sup> As of this writing, 143 preferential claims were settled resulting in a net \$1,509,092.24 being returned to the estate.<sup>398</sup>

The Committee has objected to a number of claims filed by claimants attempting to collect taxes against Simon. The claims are generally objected to on the grounds that the taxes

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<sup>395</sup> JONATHAN P. FRIEDLAND, ET. AL., CHAPTER 11-101: THE NUTS AND BOLTS OF CHAPTER 11 PRACTICE 94 (2007).

<sup>396</sup> JONATHAN P. FRIEDLAND, ET. AL., CHAPTER 11-101: THE NUTS AND BOLTS OF CHAPTER 11 PRACTICE 94 (2007).

<sup>397</sup> 11 U.S.C. § 547(b).

<sup>398</sup> *In re Simon Transportation Services, Inc.*, No. 02-2906, Chapter 11 Quarterly Financial Report for the Quarter January 1, 2004 to March 31, 2004, Doc. 1440 at 3 (Bankr. D. Utah May 6, 2004); *In re Simon Transportation Services, Inc.*, No. 02-2906, Chapter 11 Quarterly Financial Report for the Quarter April 1, 2004 to June 30, 2004, Doc. 1453 at 3 (Bankr. D. Utah July 26, 2004); *In re Simon Transportation Services, Inc.*, No. 02-2906, Chapter 11 Quarterly Financial Report for the Quarter July 1, 2004 to September 30, 2004, Doc. 1459 at 3 (Bankr. D. Utah Oct. 15, 2004); *In re Simon Transportation Services, Inc.*, No. 02-2906, Chapter 11 Quarterly Financial Report for Quarter the October 1, 2004 to December 31, 2004, Doc. 1471 at 3 (Bankr. D. Utah Jan. 11, 2005); *In re Simon Transportation Services, Inc.*, No. 02-2906, Chapter 11 Quarterly Financial Report for the Quarter January 1, 2005 to March 31, 2005, Doc. 1481 at 3 (Bankr. D. Utah Apr. 15, 2005); *In re Simon Transportation Services, Inc.*, No. 02-2906, Chapter 11 Quarterly Financial Report for the Quarter April 1, 2005 to June 30, 2005, Doc. 1489 at 3 (Bankr. D. Utah July 8, 2005); *In re Simon Transportation Services, Inc.*, No. 02-2906, Chapter 11 Quarterly Financial Report for the Quarter July 1, 2005 to September 30, 2005, Doc. 1504 at 3 (Bankr. D. Utah Oct. 17, 2005); *In re Simon Transportation Services, Inc.*, No. 02-2906, Chapter 11 Quarterly Financial Report for the Quarter October 1, 2005 to December 31, 2005, Doc. 1513 at 3 (Bankr. D. Utah Jan. 12, 2006); *In re Simon Transportation Services, Inc.*, No. 02-2906, Chapter 11 Quarterly Financial Report for the Quarter January 1, 2006 to March 31, 2006, Doc. 1515 at 3 (Bankr. D. Utah Apr. 3, 2006); *In re Simon Transportation Services, Inc.*, No. 02-2906, Chapter 11 Quarterly Financial Report for the Quarter April 1, 2006 to June 30, 2006, Doc. 1516 at 3 (Bankr. D. Utah July 12, 2006); *In re Simon Transportation Services, Inc.*, No. 02-2906, Chapter 11 Quarterly Financial Report for the Quarter October 1, 2007 to December 31, 2007, Doc. 1536 at 3 (Bankr. D. Utah Jan. 14, 2008).

have already been paid and therefore the claims should be disallowed.<sup>399</sup> Another common objection to the priority claim made by the tax collectors is that a portion of the asserted claim is a penalty and should be reclassified as a general unsecured claim.<sup>400</sup> In the end, the Court determined in a hearing that all of these objections made by the Committee should be granted and dismissed the claims made.<sup>401</sup>

Another category of claims objected to was made on behalf of another individual. One such case was where the U.S. Equal Opportunity Commission made a claim on behalf of an employee of Simon who allegedly suffered lost wages and sexual harassment.<sup>402</sup> The objection made by the Committee was that this claim was duplicative of the one made by the individual. The Court also granted this objection and dismissed the claim as duplicative.<sup>403</sup>

The Committee also entered into stipulated agreements with a number of claimants. Dime Commercial Corporation filed a claim for \$352,599.16 for leased equipment still in possession of Simon Transportation. As the Committee stated, “given the risks and expense of litigation, the Committee and Dime” to settle the claim for \$40,000.<sup>404</sup>

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<sup>399</sup> *In re Simon Transportation Services, Inc.*, No. 02-2906, Unsecured Creditors Committee Objections to Proof of Claims, Doc. 1116 (Bankr. D. Utah May 6, 2004); *In re Simon Transportation Services, Inc.*, No. 02-2906, Unsecured Creditors Committee Objections to Proof of Claims, Doc. 1117 (Bankr. D. Utah May 6, 2004)

<sup>400</sup> *In re Simon Transportation Services, Inc.*, No. 02-2906, Unsecured Creditors Committee Objections to Proof of Claims, Doc. 1126 (Bankr. D. Utah May 6, 2004).

<sup>401</sup> *In re Simon Transportation Services, Inc.*, No. 02-2906, Order Approving Stipulations and Allowing Administrative Expenses, Doc. 1151 (Bankr. D. Utah May 6, 2004).

<sup>402</sup> *In re Simon Transportation Services, Inc.*, No. 02-2906, Unsecured Creditors Committee Objections to Proof of Claims, Doc. 1124 (Bankr. D. Utah May 6, 2004); *In re Simon Transportation Services, Inc.*, No. 02-2906, Unsecured Creditors Committee Objections to Proof of Claims, Doc. 1125 (Bankr. D. Utah May 6, 2004).

<sup>403</sup> *In re Simon Transportation Services, Inc.*, No. 02-2906, Unsecured Creditors Committee Objections to Proof of Claims, Doc. 1124 (Bankr. D. Utah May 6, 2004); *In re Simon Transportation Services, Inc.*, No. 02-2906, Unsecured Creditors Committee Objections to Proof of Claims, Doc. 1125 (Bankr. D. Utah May 6, 2004).

<sup>404</sup> *In re Simon Transportation Services, Inc.*, No. 02-2906, Dime Corp. Motion for Allowance of Administrative Expense, Doc. 1000 (Bankr. D. Utah May 6, 2004).

Another such claimant was Thermo King SVC, Inc. Thermo King originally agreed to provide the company with post-petition fleet maintenance and repair services. Thermo King claimed \$378,609.93 for work it had conducted for Simon. The Committee objected, stating that the claim is unable to satisfy its burden of post-petition benefit to the debtors.<sup>405</sup> In the end, the entities agreed to stipulate that Thermo King was entitled to \$87,500.00.<sup>406</sup>

In addition to directly increasing the asset value of the estate, the bankruptcy estate's value can be maximized by a corresponding reduction of estate liabilities. In this way, following confirmation of the plan, the Committee sought to disallow many of the outstanding claims against the estate. It is at this point that the current activity of the bankruptcy centers.

Following confirmation of the plan, many administrative claims were filed arising out of various lease agreements.<sup>407</sup> These claims were almost uniformly objected to on the grounds that such leases were not true leases and, thus, these claimants could not satisfy the requirement that the claim arose out of transactions with the debtor in possession.<sup>408</sup> As the Committee correctly noted, however, that such claims would be entitled to administrative priority only to the extent of

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<sup>405</sup> *In re Simon Transportation Services, Inc.*, No. 02-2906, Order Approving Stipulation for Administrative Expenses of Thermo King, Doc. 1529 (Bankr. D. Utah May 6, 2004).

<sup>406</sup> *In re Simon Transportation Services, Inc.*, No. 02-2906, Order Approving Stipulation for Administrative Expenses of Thermo King, Doc. 1529 (Bankr. D. Utah May 6, 2004).

<sup>407</sup> *See e.g., In re Simon Transportation Services, Inc.*, No. 02-22906, First and Final Application for Compensation as an Administrative Expense for Morgan Keegan and Co as Financial Advisor for the Sale of Substantially all of Debtors Assets, Doc. 996 (Bankr. D. Utah Feb. 25, 2002); *In re Simon Transportation Services, Inc.*, No. 02-22906, Application for Administrative Expenses Filed by Wells Fargo Equipment Finance, Inc., Doc. 992 (Bankr. D. Utah Feb. 25, 2002); *In re Simon Transportation Services, Inc.*, No. 02-22906, First and Final Application for Compensation as an Administrative Expense for Morgan Keegan and Co as Financial Advisor for the Sale of Substantially all of Debtors Assets, Doc. 996 (Bankr. D. Utah Feb. 25, 2002); *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion to Allow Administrative Priority Claim and Related Relief Filed by Fleet Capital Corporation, Doc. 978 (Bankr. D. Utah Feb. 25, 2002).

<sup>408</sup> *See e.g., In re Simon Transportation Services, Inc.*, No. 02-22906, Unsecured Creditors Committee Motion to Approve Settlement Agreement with First Union for Allowance of Administrative Expense Priority Claim Pursuant to 11 U.S.C. 503(b)(1)(A), Doc. 1460 at 2 (Bankr. D. Utah Feb. 25, 2002); *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Application for Allowance of Administrative Expenses Claim, Doc. 1033 (Bankr. D. Utah Feb. 25, 2002).

the debtor's actual post-petition use of such equipment, if any.<sup>409</sup> In many cases, the Committee successfully negotiated with these claimants to revise their claim to an amount substantially below their original claim.<sup>410</sup>

One of the most successful negotiations of the Committee arose from an administrative claim filed by KeyCorp Leasing, Ltd ("Key"). Key filed for an administrative claim arising out of a lease agreement entered into between Key and Simon.<sup>411</sup> Key argued that it was entitled to an administrative expense claim of up to \$654,040.96, the amount that should have been paid under the lease between the time of filing and the time of confirmation.<sup>412</sup> In response, the Committee first argued that the leases were not true leases, rather a secured financing arrangement that would not entitle Key to any administrative expense claim.<sup>413</sup> Moreover, the Committee argued that an administrative expense claim must arise from a transaction with a debtor-in-possession and benefit the estate in the operation of its business.<sup>414</sup> Key could not,

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<sup>409</sup> See e.g., *In re Simon Transportation Services, Inc.*, No. 02-22906, Stipulation and Motion to Approve Stipulation for Allowance of Administrative Priority Expense Claim, Doc. 1073 (Bankr. D. Utah Feb. 25, 2002); *In re Simon Transportation Services, Inc.*, No. 02-22906, Unsecured Creditors Committee Motion to Approve Settlement Agreement with First Union for Allowance of Administrative Expense Priority Claim Pursuant to 11 U.S.C. § 503(b)(1)(A), Doc. 1460 at 2 (Bankr. D. Utah Feb. 25, 2002); *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Application for Allowance of Administrative Expenses Claim, Doc. 1033 (Bankr. D. Utah Feb. 25, 2002).

<sup>410</sup> See e.g., *In re Simon Transportation Services, Inc.*, No. 02-22906, Unsecured Creditors Committee Motion to Approve Settlement Agreement with First Union for Allowance of Administrative Expense Priority Claim Pursuant to 11 U.S.C. § 503(b)(1)(A), Doc. 1460 at 2 (Bankr. D. Utah Feb. 25, 2002) (settling \$25,000 claim for \$5,000); *In re Simon Transportation Services, Inc.*, No. 02-22906, Motion to Approve Stipulation for Allowance of Administrative Priority Expense Claim Filed by Unsecured Creditors Committee, Doc. 1055 (Bankr. D. Utah Feb. 25, 2002) (settling \$21,929 claim for \$10,000); *In re Simon Transportation Services, Inc.*, No. 02-22906, Stipulation and Motion to Approve Allowance of Administrative Priority Expense Claim for Key Equipment, Doc. 1082 (Bankr. D. Utah Feb. 25, 2002) (settling \$645,040 claim for \$80,000).

<sup>411</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Application for Allowance of Administrative Expenses Claim, Doc. 984 (Bankr. D. Utah Feb. 25, 2002).

<sup>412</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Application for Allowance of Administrative Expenses claim, Doc. 984 at 3 (Bankr. D. Utah Feb. 25, 2002). Key also offered several additional amounts of claims).

<sup>413</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Application for Allowance of Administrative Expenses Claim, Doc. 1033 at 7 (Bankr. D. Utah Feb. 25, 2002).

<sup>414</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Application for Allowance of Administrative Expenses Claim, Doc. 1033 at 11 (Bankr. D. Utah Feb. 25, 2002).

according to the Committee, “point to [any] explicit post-petition transaction between the Debtors and Key.”<sup>415</sup> These objections ultimately proved at least colorable to Key, who ultimately settled their claim against Simon for \$80,000.00, an amount constituting only 12% of its original claim.<sup>416</sup>

Very few attorneys or other professionals for that matter, work for free. Bankruptcy is no different. Section 330(a)(1) of the Code authorizes the payment of reasonable compensation for services rendered as well as necessary costs. Because it is not uncommon for bankruptcies to span periods of years, section 331 generally authorizes interim payments every 120 days. For the most part, only Simon and the Committee’s attorneys have been authorized interim payment for their fees. For example, Parsons, Davies, Kinghorn & Peters (“Parsons”), who held a retainer for its services in the amount of \$91,262.50,<sup>417</sup> made application for interim fees in an amount of \$116,749.52.<sup>418</sup> These amounts were subsequently approved, directing any amounts due and owing in excess of the retainer to be paid in full.<sup>419</sup> They were recently awarded an additional \$62,698.45 by the Court.<sup>420</sup> In addition, on January 2, 2003, the Court – by oral motion – granted interim fees in the amount of \$50,000 to be paid to Fabian & Clendenin,

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<sup>415</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Objection to Application for Allowance of Administrative Expenses Claim, Doc. 1033 at 12 (Bankr. D. Utah Feb. 25, 2002).

<sup>416</sup>*See In re Simon Transportation Services, Inc.*, No. 02-22906, Stipulation and Motion to Approve Allowance of Administrative Priority Expense Claim for Key Equipment, Doc. 1082 at 3 (Bankr. D. Utah Feb. 25, 2002).

<sup>417</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Second Application for Compensation for Parsons, Davies, Kinghorn & Peters, Doc. 792 at 4 (Bankr. D. Utah Feb. 25, 2002).

<sup>418</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Order Approving First & Second App of Parsons Davies Kinghorn & Peters for Allowance of Interim Comp & Reimbursement of Expenses for Services as Co-counsel for Debtors, Doc. 846 at 2 (Bankr. D. Utah Feb. 25, 2002).

<sup>419</sup>*In re Simon Transportation Services, Inc.*, No. 02-22906, Order Approving First & Second App of Parsons Davies Kinghorn & Peters for Allowance of Interim Comp & Reimbursement of Expenses for Services as Co-counsel for Debtors, Doc. 846 at 2 (Bankr. D. Utah Feb. 25, 2002).

<sup>420</sup> Order granted by minute entry, dated May 5, 2004.

counsel of record of the Committee.<sup>421</sup> An additional payment of \$38,518.26 was authorized on May 5, 2004. In addition, the Court also recently approved for Spencer, Fane, Britt & Brown, LLP, co-counsel of Simon, in the amount of \$24,325.82.<sup>422</sup>

To date, however, various administrative expense claims from professionals remain unpaid. In particular, Morgan Keegan & Company filed a claim for compensation from services rendered in the amount of \$112,800.72.<sup>423</sup> Prior to performance of services, however, the company obtained a retainer in the amount of \$100,000, bringing the actual claim against the estate down to \$12,800.72.<sup>424</sup> Nevertheless, the Court has yet to hear Morgan Keegan & Company's motion.<sup>425</sup>

## VII. CONCLUSION

As of today, this bankruptcy proceeding is nearing completion. Thus far, there have been 1,073 claims filed, totaling \$268,436,238.00.<sup>426</sup> When a debtor's Chapter 11 plan is approved, the debtor's business is said to be in the process of reorganization, hence the title of this chapter. In *In re Simon Transportation Services, Inc.*, however, the title of Chapter 11 may be a bit of a

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<sup>421</sup> Order granted by minute entry, dated June 2, 2003. The \$50,000 was awarded with respect to total fees requested in the amount of \$84,518.26. *In re Simon Transportation Services, Inc.*, No. 02-22906, Application for Compensation for Peter W. Billings Jr., Doc. 1005 at 1 (Bankr. D. Utah Feb. 25, 2002). In addition, the Court granted fees in the amount of \$13,352.44 to Logan & Co., the balloting agent employed for purposes of plan confirmation by the same minute entry.

<sup>422</sup> Order granted by minute entry, dated May 5, 2004.

<sup>423</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, First and Final Application for Compensation as an Administrative Expense for Morgan Keegan and Co as Financial Advisor for the Sale of Substantially all of Debtors Assets, Doc. 996 at 5 (Bankr. D. Utah Feb. 25, 2002).

<sup>424</sup> *In re Simon Transportation Services, Inc.*, No. 02-22906, First and Final Application for Compensation as an Administrative Expense for Morgan Keegan and Co as Financial Advisor for the Sale of Substantially all of Debtors Assets, Doc. 996 at 5 (Bankr. D. Utah Feb. 25, 2002).

<sup>425</sup> See Minute entry dated April 28, 2004 (noting that the fee application for Morgan Keegan & Company).

<sup>426</sup> *In re Simon Transportation Services, Inc.*, No. 02-2906, Claims Register Summary.

misnomer. Although the initial goal of reorganization is the debtor's continued operation, this case offers strong evidence that liquidation, in some cases, may be a more sensible avenue for the insolvent company.