

HERTZ GLOBAL HOLDINGS, INC.: COVID-19, STONKS, AND NOVEL DEBTOR-IN-POSSESSION FINANCING

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INTRODUCTION

On January 9, 2020, the World Health Organization (“WHO”) announced a mysterious coronavirus-related pneumonia in Wuhan, China. Shortly after, the first U.S. coronavirus case was confirmed in Washington state. By January 31, the WHO issued a global health emergency alert. By February 2, the U.S. restricted air travel from China, with travel from Europe being restricted a few weeks later. On March 19, 2020, California issued a statewide stay-at-home order, preventing travel except for essential jobs or needs; other states soon followed. Within the span of a few months, demand for international and national air travel plummeted. By April 14, 2020, TSA processed 87,534 passengers, down from 2,208,688 passengers a year ago.¹

This sharp decline in air travel was particularly felt by car rental company Hertz Global Holdings, Inc. (“Hertz”), whose business model was reliant on customers renting their vehicles at airports.² Hertz was especially vulnerable to this sharp drop in demand because they had spent the previous few years amassing debt to upgrade its business, primarily its vehicle fleet.³ This placed Hertz in a highly-leveraged position with a sudden interruption of cash flow that prevented them paying their debts. Hertz filed Chapter 11 on May 22, 2020 in the U.S. Bankruptcy Court for the District of Delaware, citing the indefinite nature of COVID-19.⁴ Hertz stated that until it could accurately predict when demand would recover, it felt it prudent not to burn through its cash reserves and instead restructure to continue operations.⁵

¹ Declaration of Jamere Jackson in Support of Debtors’ Petitions and Requests for First Day Relief, *In re Hertz Corp.*, No. 20-11218-MFW at 2 (Bankr. D. Del. Oct. 7, 2020).

² *Id.*

³ *Id.* at 12–28.

⁴ *Id.* at 36.

⁵ *Id.*

Immediately following its declaration, common shares of Hertz dropped to \$0.56, but rallied to over \$5 by June 8.⁶ Capitalizing off this stock surge, on June 12, 2020 Hertz, after filing an emergency motion the day prior, received permission from the court to sell up to \$1 billion in new shares of common stock.⁷ Hertz opted to sell \$500 million worth of new shares.⁸ Hertz cautioned investors that their equity would likely be wiped out in the restructuring, but this failed to cool investor enthusiasm.⁹ After the announcement, retail investors continued to purchase Hertz stock.¹⁰

On June 15, 2020, Hertz filed its prospectus on the \$500 million common stock issuance.¹¹ Shortly after, the SEC informed Hertz it had concerns about it selling stock during its bankruptcy proceedings. On June 17, Hertz announced it halted the sale pending SEC review.¹² On October 30, 2020, the NYSE delisted Hertz stock.¹³

On October 16, 2021, Hertz announced that it secured \$1.65 billion in debtor-in-possession financing to fund its reorganization and submitted a motion to the court for approval.¹⁴ The debtor-in-possession financing is set to mature on December 31, 2021, requiring Hertz to file

⁶ Debtor's Emergency Motion for Authorization to Enter into a Sales Agreement with Jefferies LLC and to Sell Shares of Common Stock of Debtor Hertz Global Holdings, Inc. Through at-the-Market Transactions, *In re Hertz Corp.*, No. 20-11218-MFW at 2.

⁷ Order Granting Debtors' Emergency Motion for Authority to Enter into a Sale Agreement with Jefferies LLC and to Sell Shares of Common Stock of Debtor Hertz Global Holdings, Inc. Through at-the-Market Transactions, *In re Hertz Corp.*, No. 20-11218-MFW.

⁸ Dan Runkevicius, *How Hertz Fooled Amateur Investors*, FORBES (July 1, 2020), <https://www.forbes.com/sites/danrunkevicius/2020/07/01/how-hertz-htz-fooled-amateur-investors/?sh=118fc270c1ac>.

⁹ Becky Yerak, *Hertz Sold \$29 Million in Stock Before SEC Stepped In*, WALL ST. J. (Aug. 10, 2020), <https://www.wsj.com/articles/hertz-sold-29-million-in-stock-before-sec-stepped-in-11597100128>.

¹⁰ *Id.*

¹¹ Hertz Glob. Holdings, Inc., Prospectus Supplement (Form 8-K) (June 15, 2020).

¹² Michael Wayland, *Hertz Halts Plan to Sell \$500 Million in Shares Pending SEC Review*, CNBC (June 17, 2020), <https://www.cnbc.com/2020/06/17/hertz-halts-plan-to-sell-500-million-in-shares-after-sec-review.html>.

¹³ Lou Carlozo, *Hertz Stock Too Bruised by Bankruptcy to Buy*, AOL (Nov. 6, 2020), <https://www.aol.com/news/hertz-stock-too-bruised-bankruptcy-131724868.html>.

¹⁴ Press Release, Hertz Glob. Holdings, Inc., Hertz Global Holdings Secures Commitments Of \$1.65 Billion In Debtor-In-Possession Financing (Oct. 16, 2020) (accessible at <https://ir.hertz.com/2020-10-16-Hertz-Global-Holdings-Secures-Commitments-Of-1-65-Billion-In-Debtor-In-Possession-Financing>).

its reorganization plan with the court prior to August 31, 2021.¹⁵ The court approved this motion on October 29, 2020.¹⁶

Hertz's attempted post-petition stock issuance shocked investors and bankruptcy practitioners as a novel method for raising capital to finance a reorganization without amassing new debt. This novel approach is explored below, discussing the circumstances giving rise to Hertz's collapse, its capital structure, the model of the proposed issuance, its regulatory basis, its benefit to the estate, and possible DIP packages. Finally, this piece discusses securities issued through typical registration versus allowable securities issuances in bankruptcy.

I. CHAPTER 11 BANKRUPTCY

A. WHAT IS CHAPTER 11 BANKRUPTCY?

Chapter 11 is often known as the reorganization chapter of bankruptcy.¹⁷ Unlike the other chapters of bankruptcy that exist primarily to discharge a debtor's debts, liquidate non-exempt assets, and provide a fresh start, Chapter 11 is designed for reorganization of a business to restore its viability, although liquidation under Chapter 11 is also possible.¹⁸ The debtor's business continues to operate, and creditors are stayed while a plan of reorganization is proposed. Affected creditors are allowed to vote on the plan, and if it satisfies the necessary legal requirements then the court may confirm the plan.¹⁹

In order to confirm the plan, the court must find, among other things, that: (1) the plan is feasible; (2) it is proposed in good faith; (3) the plan and the proponent of the plan are in compliance with the Bankruptcy Code; (4) that the plan is "in the best interests" of creditors, meaning that all creditors that do not vote for the plan receive at least as much under

¹⁵ Pat Holohan, *Court: Hertz Judge Approves USD 1.65Bn DIP to Fund Debtor Through 2021*, DEBTWIRE (Oct. 29, 2020), <https://www.debtwire.com/info/court-hertz-judge-approves-usd-165bn-dip-fund-debtor-through-2021>.

¹⁶ Order (I) Authorizing the Debtors to Obtain Debtor-in-Possession Financing and Granting Liens and Superpriority Administrative Claims and (II) Granting Related Relief, *In re Hertz Corp.*, No. 20-11218-MFW.

¹⁷ MICHAEL L. BERNSTEIN & GEORGE W. KUNEY, *BANKRUPTCY IN PRACTICE* 144 (Charles J. Tabb, 5th ed. 2015).

¹⁸ *Id.* at 143.

¹⁹ See UNITED STATES COURTS, *Chapter 11 – Bankruptcy Basics*, (available at <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> (last visited Feb. 24, 2021)).

the plan as they would in a Chapter 7 liquidation.²⁰ In order to satisfy the feasibility requirement (and the good faith requirement), the court must find that confirmation of the plan is not likely to be followed by liquidation (unless the plan is a liquidating plan) or the need for further financial reorganization.²¹

B. WHAT IS A DEBTOR-IN-POSSESSION?

Unique to Chapter 11 is that, typically, no trustee is appointed and the debtor remains in possession of the business as a debtor-in-possession (a “DIP”).²² The debtor retains possession and control of its assets until its plan of reorganization is confirmed (or a trustee is appointed).²³ A DIP is a fiduciary to the Chapter 11 estate and its beneficiaries: the shareholders, creditors, and other parties in interest. A DIP has a duty to protect and preserve the assets of the estate and prosecute the bankruptcy case in a swift manner.²⁴ Of chief importance, the DIP does not operate the business as it did prepetition; instead, the DIP becomes a fiduciary of the estate, subject to the court’s orders and the requirement that the DIP exercise its powers to benefit its creditors (through maximization of the debtor’s value).²⁵ The DIP must also keep the court informed about its reorganization.²⁶

Here, after filing its petition, Hertz retained possession of—among many things—its fleet of cars on which its secured creditors had liens.²⁷ Hertz needed its fleet to continue its operations, establishing Hertz as a debtor-in-possession.²⁸ This DIP status precluded the court from appointing a trustee but instead relied on Debtor to facilitate its reorganization.

²⁰ *Id.*

²¹ *Id.*

²² 11 U.S.C. § 1101; *see also* BERNSTEIN & KUNEY, *supra* note 17, at 144.

²³ UNITED STATES COURTS, *supra* note 19.

²⁴ BANKRUPTCY DESK GUIDE § 5:110 (West 2010); *accord* 11 U.S.C. §§ 1106–1107 (establishing the DIP’s duties including accounting for property, examining and objecting to claims, and filing informational reports as required); *see also* Hansen, Jones & Leta, P.C. v. Segal, 220 B.R. 434 (D. Utah 1998).

²⁵ BANKRUPTCY DESK GUIDE, *supra* note 24, at § 9:281.

²⁶ *Id.* *See also* *In re* Walters, 136 B.R. 256 (Bankr. C.D. Cal. 1992); *In re* Modern Off. Supply, Inc., 28 B.R. 943 (Bankr. W.D. Okla. 1983).

²⁷ Declaration of Jamere Jackson, *In re* Hertz Corp., (No. 20-11218-MFW) at 33.

²⁸ *Debtor in Possession: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/debtor-in-possession> (last visited Feb. 21, 2021).

C. TYPICAL DIP FINANCING

Given that the debtor is in bankruptcy, it often requires additional post-petition financing to support its operational and liquidity needs through reorganization.²⁹ These needs may include payroll, purchasing inventory, paying rent, or paying debt, among other expenses.³⁰ Often debtors will not survive the reorganization without this post-petition financing. Additionally, due to the debtor's precarious financial position, post-petition financiers often have to be induced to lend to the debtor.

Debtors must seek approval from the court for post-petition financing. Due to the often immediate need for post-petition financing, such motions are typically filed early in the case, often on the first day after filing the petition, and are heard by the court on short notice.³¹ This short notice often prompts many bankruptcy courts to issue interim approval for such financing subject to subsequent final approval so that other parties in interest have time to consider the terms of the proposed financing and may object to its terms or its approval, if appropriate.³²

“[11 U.S.C.] § 364 governs post-petition financing and provides an escalating series of statutory inducements... [for] post-petition lenders that is tied to an escalating series of procedural and evidentiary hurdles for the debtor.”³³ 11 U.S.C. § 364 is essentially divided into three parts:

1. [11 U.S.C. §§] 364(a) and (b) authorize the debtor to incur unsecured debt that is entitled to treatment as an expense of administration under § 11 U.S.C. 503(b)(1). Code § 364(a) covers ordinary-

²⁹ Jay M. Goffman & Grenville R. Day, *First Day Motions and Orders in Large Chapter 11 Cases: (Critical Vendor, Dip Financing and Cash Management Issues)*, 12 J. BANKR. L. & PRAC. 59, 72 (2003).

³⁰ *Id.*

³¹ William L. Medford & Bruce H. White, *Obtaining Approval of Post-Petition Financing: Is Shopping the Financing A Code Requirement?*, AM. BANKR. INST. J. 20 (2010).

³² See, e.g., Order Granting Debtors' Emergency Motion for Authority to Enter into A Sale Agreement with Jefferies LLC and to Sell Shares of Common Stock of Debtor Hertz Global Holdings, Inc. Through At-The-Market Transactions, *In re Hertz Corp.*, No. 20-11218-MFW (granting Debtors' motion filed the day before); Debtors' Emergency Motion for Authority to Enter into A Sale Agreement with Jefferies LLC and to Sell Shares of Common Stock of Debtor Hertz Global Holdings, Inc. Through At-The-Market Transactions, *In re Hertz Corp.*, No. 20-11218-MFW.

³³ WILLIAM L. NORTON III, 5 NORTON BANKRUPTCY LAW & PRACTICE § 94:21 (3d ed., Westlaw 2021).

course-of-business-transactions and does not require court approval[,] [while] Code § 364(b) covers other than ordinary-course-of-business transactions and does require a court order after notice and a hearing.

2. [11 U.S.C.] § 364(c) authorizes the debtor to obtain credit or incur debt that has status as a superpriority expense of administration and/or is secured by a lien on unencumbered property or a junior lien on encumbered property. . . . [This] debt . . . requires a court order entered after notice and a hearing.

3. [11 U.S.C.] § 364(d)(1) authorizes the debtor to obtain credit or incur debt that is secured by an equal or senior lien on property that is already subject to a lien[,] [often known] as a *superpriority* lien. This debt also requires a court order entered after notice and a hearing[,] [but such] liens cannot be given without providing adequate protection to existing lienholders.³⁴

“[F]inancing under 11 U.S.C. 364(b) and (c) . . . is rare because lenders are generally reluctant to lend to a debtor in bankruptcy without

³⁴ *Id.* at § 94:22 (emphasis added) (citing *In re First South Sav. Ass'n*, 820 F.2d 700 (5th Cir. 1987)); 11 U.S.C. 503(b)(1)(A) (2012) (“[T]here shall be allowed administrative expenses . . . including . . . the actual, necessary costs and expenses of preserving the estate . . .”). Norton states as follows:

One case even goes so far as to hold that the requirement of adequate protection is an absolute prerequisite to approval of a priming lien, so that even if the existing lienholder does not object to the motion or request adequate protection, the court has no authority to grant the priming lien without making an express finding of or provision for adequate protection of the interest of the existing lienholder.

NORTON, *supra* note 33, at § 94:22, n.3 (citing *In re T.M. Sweeney & Sons LTL Servs., Inc.*, 131 B.R. 984 (Bankr. N.D. Ill. 1991)).

collateral and/or a superior lien position.”³⁵ As such, most post-petition lenders favor § 364(d).³⁶ § 364(d)’s *superpriority* lien subordinates otherwise first-priority security interests, thus § 364(d) conditions its approval on whether the “trustee is unable to obtain such credit otherwise” and requires that the subordinated lien receive “adequate protection.”³⁷

Congress did not expand on how the “unable to obtain such credit otherwise” requirement may be satisfied, but courts have generally required a debtor to “shop” a proposed post-petition financing arrangement.³⁸ “[A] debtor must show that it made a ‘reasonable effort’ to obtain post-petition financing from other potential lenders on less onerous terms and that such financing was unavailable.”³⁹ This “‘case-by-case’ standard allows courts to account for the different characteristics of a given case,” such as whether time is of the essence or how thoroughly a debtor has solicited financing.⁴⁰ For example, in *In re Beker Industries Corp.*, the debtors testified that it approached thirty-five to forty lenders prepetition and approximately twenty lenders post-petition to seek financing.⁴¹ The only other financing available was prepetition banks who negotiated for priming liens under § 364(d).⁴² Given this, the court found

³⁵ Medford & White, *supra* note 31, at 20.

³⁶ *See id.* (citing *In re AMF Bowling Worldwide Inc.*, 278 B.R. 96, 100 (Bankr. E.D. Va. 2002)).

³⁷ *Id.* (citing 11 U.S.C. § 364(d)(1)(A)); *See also In re Plabell Rubber Products, Inc.*, 137 B.R. 897, 899 (Bankr. N.D. Ohio 1992). “[M]ost courts hold that the existence of an equity cushion provides adequate protection.” NORTON, *supra* note 33, at § 94:31 (citing *In re Snowshoe Co., Inc.*, 789 F.2d 1085 (4th Cir. 1986)); *In re Timber Prods., Inc.*, 125 B.R. 433, 434 (Bankr. W.D. Pa. 1990) (establishing six factors to determine in assessing whether the equity cushion may provide adequate protection in a Code § 364(d) motion: (1) does the accrual of interest erode the equity cushion; (2) is the property increasing or decreasing in value; (3) has the debtor shown an inability to obtain refinancing since the filing; (4) has the debtor offered any other method of adequate protection; (5) do current economic conditions suggest a realistic prospect for successful reorganization or rehabilitation under Chapter 11; (6) has the debtor’s conduct of the litigation been more than a deliberate delaying tactic).

³⁸ Medford & White, *supra* note 31, at 20 (citing *In re Phase-I Molecular Toxicology Inc.*, 285 B.R. 494, 495–96 (Bankr. D.N.M. 2002)).

³⁹ *Id.* at 66 (quoting *Suntrust Bank v. Den-Mark Constr. Inc. (In re Den Mark Constr. Inc.)*, 406 B.R. 683, 692 (E.D.N.C. 2009) (internal citations omitted) (citing *Snowshoe*, 789 F.2d at 1088)).

⁴⁰ *Id.* (citing *Snowshoe*, 789 F.2d at 1088).

⁴¹ *Id.* (citing *In re Beker Indus. Corp.*, 58 B.R. 725, 729 (Bank. S.D.N.Y. 1986)).

⁴² *Id.* at 727–29.

that there was no other alternative financing and approved the financing granting priming liens under § 364(d).⁴³

II. HERTZ GLOBAL HOLDINGS, INC.'S BANKRUPTCY

A. EVENTS PRECEDING BANKRUPTCY

(i) COVID-19's Effects on Hertz

In a declaration to the United States Bankruptcy Court for the District of Delaware filed shortly after Debtor filed its petition, Hertz Executive Vice President and Chief Financial Officer, Mr. Jamere Jackson, laid out the circumstances that led to Hertz's restructuring.⁴⁴ Chiefly, Mr. Jackson attributed Hertz's insolvency to the sudden and drastic drop in air travel.⁴⁵ Per TSA data, on March 1, 2020, around 2.1 million travelers passed through airport security.⁴⁶ On April 1, 2020, that number dropped to 124,021, a 94% decrease.⁴⁷ Air travelers accounted for a majority of Hertz's rental revenue, which was suddenly cut off by the lack of travelers.⁴⁸ Additionally, its revenue was affected in its off-airport locations due to state-imposed lockdowns, travel restrictions, and general consumer reluctance to travel.⁴⁹ By March 21, Hertz's total daily reservations at U.S. off-airport locations dropped 70% from the same time the year before.⁵⁰ By April, one month after the pandemic started, Hertz's global revenue dropped 73% from the same time the year before.⁵¹ This, coupled with COVID-19 chilling the demand for used vehicles (due to economic insecurity and less commuting),⁵² accelerated Hertz's fleet

⁴³ *Id.* at 728–29, 743; *see also* Medford & White, *supra* note 31, at 20, 66.

⁴⁴ Declaration of Jamere Jackson, *In re* Hertz Corp., (No. 20-11218-MFW) at 1–3.

⁴⁵ *Id.* at 2.

⁴⁶ *TSA Checkpoint Travel Numbers (Current Year Versus Prior Year(s)/ Same Weekday)*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/coronavirus/passenger-throughput> (last updated Sept. 7, 2021, 9:00 AM).

⁴⁷ *Id.*

⁴⁸ Declaration of Jamere Jackson, *In re* Hertz Corp., (No. 20-11218-MFW) at 29.

⁴⁹ *Id.* at 30–31

⁵⁰ *Id.* at 31.

⁵¹ *Id.*

⁵² Matt Degen, *Car Buying During Coronavirus: Tips, Advice and Deals*, KELLEY BLUE BOOK (May 20, 2020, 9:00 AM), <https://www.kbb.com/car-news/coronavirus-covid-19-car-buying-advice-deals>; *see* Declaration of Jamere Jackson, *In re* Hertz Corp., (No. 20-11218-MFW) at 32.

depreciation calculus beyond its book depreciation.⁵³ Hertz was forced to spend approximately \$75 million to remain compliant with the funding ratios required by the notes securing its vehicles.⁵⁴ This resulted in a liquidity crunch.

Hertz responded as best it could to the sharp contraction in demand, by furloughing (and later laying off) employees and cancelling future vehicle orders.⁵⁵ Hertz was unable to offload its vehicle fleet due to the depressed demand for used vehicles.⁵⁶ Hertz attempted to negotiate with creditors, eventually reaching some forbearance⁵⁷ and waiver agreements,⁵⁸ but it was not enough to weather the COVID-storm, and Hertz opted to file Chapter 11 on May 22, 2020, the day the waiver agreements expired, when it could not make a \$400 million payment to its lenders.⁵⁹

(ii) Hertz's Prepetition Capital Structure

Hertz had about 142,294,110 shares of common stock issued and outstanding on the Petition Date⁶⁰. At the close of trading on the Petition Date, the share price was \$2.84.⁶¹ Hertz entered Chapter 11 with approximately \$19 billion in total debt, \$14.7 billion of which relates to vehicle financing activities. Hertz believed this debt was now unsustainable due to its drop in revenue.⁶²

Below is a chart summarizing Hertz's significant third-party financial debt obligation as of the Petition Date:⁶³

⁵³ Declaration of Jamere Jackson, *In re* Hertz Corp., (No. 20-11218-MFW) at 32.

⁵⁴ *Id.*

⁵⁵ *Id.* at 33–34.

⁵⁶ *Id.* at 33.

⁵⁷ *Id.* at 35.

⁵⁸ *Id.*

⁵⁹ *Id.* at 5, 36.

⁶⁰ *Id.* at 28.

⁶¹ *Id.*

⁶² *Id.* at 4.

⁶³ *Id.* at 13.

Facility	Principal Amount
<i>Non-Vehicle Debt</i>	
Senior Notes	\$2,700 million
Senior Term Loan	\$656 million
Senior RCF	\$615 million
Senior Second Priority Secured Notes	\$350 million
Promissory Notes	\$27 million
<i>Vehicle Debt</i>	
HVF II U.S. ABS Program	\$10,893 million
Donlen U.S. ABS Program	\$1,592 million
U.S. Vehicle RCF	\$93 million
European Vehicle Notes (estimated in USD)	\$794 million
European ABS Program (estimated in USD)	\$650 million
Hertz Canadian Securitization (estimated in USD)	\$251 million
Donlen Canada Securitization (estimated in USD)	\$27 million
Australian Securitization (estimated in USD)	\$149 million
New Zealand RCF (estimated in USD)	\$46 million
U.K. Financing Facility (estimated in USD)	\$229 million

The majority of funding for Hertz's rental and leasing fleet was raised through various asset-backed securities programs (ABS Program)—the general arrangement is as follows:

1. The Company owns a non-Debtor affiliate entity, the Issuer, whose purpose is to raise funds by selling notes secured by the vehicles.
2. The Issuer then loans the proceeds of the ABS Note to a second Company-owned special purpose entity, the Vehicle Owner, creating an intercompany obligation from the Vehicle Owner to the Issuer. The Vehicle owner then uses the proceeds to purchase vehicles.
3. The Vehicle Owner leases the vehicles (either to the Hertz's rental car business or to its fleet leasing business) in exchange for payments that the Vehicle Owner uses to repay the Issuer on the intercompany

obligation; the Issuer then pays the principal and interest to the holders of the ABS Notes.⁶⁴

This transaction was more or less duplicated through each of Hertz's markets, in both their rental and leasing industries.

B. HERTZ POST-PETITION

(i) Goals of Hertz Bankruptcy

Debtor sought to continue their operations in Chapter 11 with as little disruption as possible. Hertz filed a slew of motions in concurrence with its petition asking the court to—broadly—allow it to continue its operations through the process.⁶⁵ Debtor also sought to maintain the confidence and support of its key stakeholders, such as vendors, customers, employees, franchisees, and other key constituencies. Hertz argued that, without these motions, irreparable harm would befall its estate and creditors and damage the confidence of the stakeholders.⁶⁶

(ii) Irrational Retail Trading of Hertz's Stock

On May 26, 2020, the first day of trading after Debtor filed its Chapter 11 petition, Hertz common stock closed at a price of \$0.56 per share⁶⁷ and traded as low as \$0.40 per share.⁶⁸

That same day the New York Stock Exchange (NYSE) began delisting procedures for Debtor's common stock due to its filing for bankruptcy.⁶⁹ On June 12, 2020, Hertz requested a review of the NYSE

⁶⁴ *Id.* at 20.

⁶⁵ *Id.* at 37.

⁶⁶ *Id.* at 39.

⁶⁷ *Hertz Global Holdings Inc Stock Price (Quote)*, STOCK INVEST, <https://stockinvest.us/stock-price/HTZGQ?page=7> (last visited Sept. 8, 2021).

⁶⁸ Debtors' Emergency Motion for Authority to Enter into a Sale Agreement, *In re Hertz Corp.*, (No. 20-11218, Doc. 387) at 9.

⁶⁹ Laura Layden, *Troubled Hertz Delisted by New York Stock Exchange as It Fights for Survival*, NEWS-PRESS (Oct. 30, 2020), <https://www.news-press.com/story/money/companies/2020/10/30/hertzs-stock-no-longer-trade-nyse/6083143002>.

decision.⁷⁰ The NYSE also considered delisting HTZ stock for falling below \$1.⁷¹ At this time, there were 400 million authorized shares of Hertz common stock, and 246,777,008 unissued shares.⁷²

Despite these issues, over the next two weeks Hertz's stock price rose significantly, closing at a price of \$5.53 on June 8, a 900% increase.⁷³ In their first day motions, Hertz claimed the bankruptcy was triggered only when \$135 million came due unexpectedly, prompting some investors to speculate that Hertz was solvent but facing cash flow problems.⁷⁴ Other investors were less bullish, speculating that Hertz was actually balance sheet insolvent, making its prospects for viability low.⁷⁵

Regardless of whether Hertz was balance sheet insolvent or simply facing cash flow problems, its stock rally was unusual. In general, bankruptcy law requires the distribution of assets based on priority (though distribution is seldom this straightforward).⁷⁶ Secured creditors are paid first, then unsecured, and equity holders (e.g., stockholders) have last claim on the company's assets and receive nothing if secured and unsecured creditors are not fully repaid.⁷⁷

This unusual stock rally was largely driven by retail investors through social media, particularly apps like Reddit and Robinhood.⁷⁸ Robinhood provides retail investors easy access to financial markets, with no trading fees or sales minimums. Nearly 43,000 Robinhood accounts owned shares of Hertz prior to its bankruptcy, but that number jumped to 171,000 by June 2020.⁷⁹ This type of highly speculative investing, where large masses of small retail investors organize themselves through social

⁷⁰ *Id.* (explaining that on October 30, 2020, NYSE officially delisted HTZ stock after a review committee found the stock was no longer suitable for listing in light of the company filing for bankruptcy protection).

⁷¹ M. Corey Goldman, *Hertz Will Sell Up to \$1 Billion in Shares to Fund Bankruptcy*, THE STREET (June 12, 2020), <https://www.thestreet.com/investing/hertz-htz-stock-sale-bankruptcy>.

⁷² Declaration of Jamere Jackson, *In re Hertz Corp.*, (No. 20-11218-MFW) at 28.

⁷³ *Id.*

⁷⁴ *Id.* at 4.

⁷⁵ Anthony J. Casey & Joshua C. Macey, *The Hertz Maneuver (and the Limits of Bankruptcy Law)*, U. CHI. L. REV. ONLINE (Oct. 7, 2020), <https://lawreviewblog.uchicago.edu/2020/10/07/casey-macey-hertz>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* See Jessica Dinapoli et al., *Once a 'Stonk,' Hertz Reveals Dilemma Companies Face in Reddit Frenzy*, YAHOO! FINANCE (Feb. 8, 2021), <https://finance.yahoo.com/news/once-stonk-hertz-reveals-dilemma-114759242.html>; see also *Saturday Night Live* (NBC television broadcast Jan. 30, 2021) ("First of all it's pronounced the STONK market . . . !").

⁷⁹ Casey & Macey, *supra* note 75, at *6.

media (e.g., Reddit.com), to invest via apps like Robinhood, became known as “stonks.”⁸⁰

With this surge in its “stonk” price, Hertz sought to capture this value increase in its stock. For the benefit of its estate and to finance the reorganization, Hertz petitioned the court for permission to issue and sell shares of authorized but unissued shares of its common stock.

(iii) Specifics of the Agreement for Hertz’ Stock Issuance

On June 11, 2020, Hertz asked the court for permission to sell up to the 246 million shares of authorized but unissued shares of its common stock for up to \$1 billion.⁸¹ Hertz sought permission to enter into a sale agreement with Jeffries LLC acting as Hertz’s sales agent. Jeffries LLC would handle the specifics of the stock sale while Hertz would set the minimum price for which the new stock could be sold.

In exchange for selling the stock, Jefferies LLC would receive a commission of up to 3% of the gross proceeds.⁸² The remainder, after paying any fees or taxes, would pass to Hertz.⁸³ Additionally, Hertz agreed to indemnify and hold harmless Jefferies LLC for any claims arising from the Securities Act of 1933, the Securities Exchange Act of 1934, or other law or regulation in connection with their sale of Hertz’ stock.⁸⁴ Hertz filed a prospectus supplement relating to the issuance on June 15, 2020, that supplemented a shelf registration statement (Form S-3) issued on June 10, 2019.⁸⁵ In this supplement, Hertz was very explicit to potential investors that their equity will almost certainly become worthless.⁸⁶ Hertz

⁸⁰ Dinapoli, *supra* note 78. This type of investing would later rally Gamestop’s (GME) stock price despite the company’s bleak outlook.

⁸¹ Motion to Sell Shares of Common Stock of Debtor Hertz Global Holdings, Inc, *In re* Hertz Corp., No. 20-11218-MFW, Doc. 387 (June 11, 2020).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Hertz Glob. Holdings, Inc., Prospectus Supplement, Registration Statement No. 333-231878 (June 15, 2020).

⁸⁶ Thomas Franck, *Hertz Says it Expects Stockholders to Lose All the Money in Filing for Selling More Stock*, CNBC (June 15, 2020), <https://www.cnbc.com/2020/06/15/hertz-says-it-expects-stockholders-to-lose-all-their-money-in-filing-for-selling-more-stock.html>. This prediction was later validated when the Debtor filed its Chapter 11 reorganization plan and disclosure statement on March 2, 2021. Under the plan, shareholders receive no recovery, and the shares will be cancelled upon the plan’s effective date. Unsecured noteholders will receive either 70% cash recovery, or, for qualified institutional investors, new equity via rights offer. Disclosure Statement for Joint Chapter 11 Plan of

cautioned investors that any return on investment would only come after it paid, in full, its debtholders, and that was not likely unless an astounding change in COVID-19 spurred significant turnaround in global travel trends.⁸⁷

(iv) Benefit to the Hertz's Estate

The benefit of the stock issuance to the estate is obvious. It raises capital to fund the reorganization and pay back creditors without accruing additional debt or wiping out existing equity holders, as is typical in reorganizations. Going into bankruptcy, Hertz was \$19 billion in debt, which accounted for around 90% of its capital.⁸⁸ Most of this debt was for leases secured by its vehicle fleet. Though Chapter 11 offered Hertz temporary respite from its creditors, it needed cash. Hertz had few options to raise enough capital to fund its reorganization and satisfy creditors, and Hertz (at the time) was either unwilling or unable to borrow more.

By issuing stock to new investors, Hertz could fund its reorganization without taking on new debt at disadvantageous terms. Instead, the stockholder took the risk of purchasing potentially worthless equity, while Hertz would get the cash in hand to fund its operations, finance its reorganization, or pay its debt. In its Motion to Enter Sale Agreement, Hertz stated the sale “would allow Hertz to raise capital on terms superior to any debtor-in-possession financing.”⁸⁹ Moreover, “The stock issuance would not impose restrictive covenants on the Debtor and would be junior to claims of Debtor’s creditors.”⁹⁰ Stated differently, the stock issuance would not require Hertz to comply with the harsh conditions that typically accompany DIP financing. Further, “the issuance of shares would impose no payment or repayment obligations on the

Reorganization of the Hertz Corporation and its Debtor Affiliates, *In re Hertz Corp.*, No. 20-11218-MFW; see also WYCO Researcher, *Hertz Just Filed Their Ch.11 Reorganization Plan Which Will Wipe Out Shareholders*, SEEKING ALPHA (Mar. 2, 2021), <https://seekingalpha.com/article/4410692-hertz-just-filed-ch-11-reorganization-plan-which-will-wipe-out-shareholders>.

⁸⁷ Franck, *supra* note 86.

⁸⁸ Amiyatosh Purnanandam, *Was Hertz's Bankruptcy and Layoffs Necessary: The Role Securitization Played*, FORBES (June 10, 2020), <https://www.forbes.com/sites/amiyatoshpurnanandam/2020/06/10/was-hertz-bankruptcy-and-layoffs-necessary-the-role--securitization-played>.

⁸⁹ Motion to Enter Sale Agreement, *In re Hertz Corp.*, (No. 20-11218-MFW) at 2.

⁹⁰ *Id.* at 9; see also Casey & Macey, *supra* note 75, at *7.

Debtors.”⁹¹ With this, Hertz told the court that the stock issuance was “an exercise of the Debtors’ sound business judgment.”⁹²

(v) Regulatory Authority Basis for Stock Issuance

Though there is nothing peculiar about a debtor issuing stock, Hertz was the first major company to attempt to issue stock *during* the pendency of its bankruptcy.⁹³ 11 U.S.C. § 363(b)(1) authorizes courts, after notice and hearing, to permit a debtor to “use, sell, or lease, other than in the ordinary course of business, property of the estate.” Courts are split on whether a debtor has a property interest in unissued stock, and thus whether a debtor could issue that stock without complying with § 363 of the Bankruptcy Code (i.e., without permission from the court). § 541(a)(1) of the Bankruptcy Code defines the debtor’s property broadly as “all legal or equitable interests.”

In its motion to enter the sale, Hertz discussed *Intramerican Oil & Minerals, Inc. v. Mid-America Petroleum, Inc. (In re Mid-America Petroleum, Inc.)*,⁹⁴ where the court held that “authorized but unissued stock cannot be considered an asset of a corporation,” and “cannot be owned by the corporation.”⁹⁵ The court concluded the debtor could issue shares of authorized stock without complying with the requirements of § 363 of the bankruptcy code because unissued stock was not property of the estate and thus not subject to the Bankruptcy Code.⁹⁶

Hertz also referenced *In re CPT Corp.*,⁹⁷ where the Court held that the “trustee (or [] debtor-in-possession) can issue authorized but unissued shares of a corporate debtor’s stock because [the] shares are not assets of the corporation and hence not property of the estate.”⁹⁸ In *Decker v. Advantage Fund, Ltd.*,⁹⁹ the court stated that “unissued stock is not an

⁹¹ Motion to Enter Sale Agreement, *In re Hertz Corp.*, (No. 20-11218-MFW) at 9. Though Hertz would still have to pay fees related to the issuance, it would have no obligation to repay stockholders if their equity were wiped out in the reorganization.

⁹² Casey & Macey, *supra* note 75, at *7.

⁹³ *Id.* at *2.

⁹⁴ 71 B.R. 140 (Bankr. N.D. Tex. 1987).

⁹⁵ *Id.* at 141.

⁹⁶ *Id.*

⁹⁷ No. 4-90-5759, 1992 WL 237359, at *1 (Bankr. D. Minn. Sept. 21, 1992).

⁹⁸ *Id.* at *4.

⁹⁹ 362 F.3d 593 (9th Cir. 2004).

interest of the debtor corporation in property; it is merely equity in the corporation itself.”¹⁰⁰

Other bankruptcy courts have reached different conclusions as to the classification of stock. In *Global Crossing Estate Representative v. Winnick*,¹⁰¹ the district court found that the corporation at issue had a property interest in its unissued stock, due to its “power to transfer stock to third parties in exchange for value. . . .”¹⁰² This holding was narrowed due to the unique circumstances of the case.¹⁰³ The court explained that counsel cannot on the one hand say the debtor was completely insolvent when the stock was transferred but also argue that the stock had value to the creditors.¹⁰⁴ The court took the debtor at their word that the stock was worthless but acknowledged “that under certain circumstances the stock of an insolvent [operation] may have value based on its estimated future [probability]. . . .”¹⁰⁵

However, these cases only introduce the debate within the caselaw as to whether unissued stock qualifies as part of the bankruptcy estate. Hertz could produce “no cases in which a debtor in bankruptcy had [actually] raised funds by selling unissued shares to the public.”¹⁰⁶ In fact, “commentors speculated [] this was likely the first time a large Chapter 11 debtor had tried . . .” such an arrangement.¹⁰⁷ A former SEC chief accountant stated, “I can’t recall an incident where a company has made a stock filing this early after filing for bankruptcy.”¹⁰⁸ “. . . Attorney Thomas J. Salerno, who represented [the] owners of the Phoenix Coyotes hockey team when the NHL property was sold in bankruptcy,” stated “[h]ow can you sell stock and then take the position later that you can’t pay all your creditors?”¹⁰⁹ Additionally, Gamco Investors, Inc. and its affiliates (who held nearly 3% of Hertz common stock) filed an objection to Hertz’s motion, stating that Hertz “advance[s] the [] theory that proceeds from the sales of unissued shares is a cost-effective, efficient and creative

¹⁰⁰ *Id.* at 596 (citing *In re Curry and Sorensen, Inc.*, 57 B.R. 824, 829 (B.A.P. 9th Cir. 1986)).

¹⁰¹ 2006 WL 2212776, at *1 (S.D.N.Y. Aug. 3, 2006).

¹⁰² *Id.* at *8.

¹⁰³ *See Id.* at *9.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (citing *In re Bridge Info. Sys., Inc.*, 311 B.R. 781, 791 (Bankr. E.D. Mo. 2004)).

¹⁰⁶ Casey & Macey, *supra* note 75, at 2.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (citing Jeff Sommer, *Hertz: And Now for Something Completely Worthless*, N.Y. TIMES (June 17, 2020)).

¹⁰⁹ *Id.* (citing David Welch, *Hertz Killing Share Sale Ends Unusual Bid to Fund Bankruptcy*, BLOOMBERG (June 18, 2020)).

substitute for debtor-in-possession ('DIP') financing and base it on the premise that Hertz's 'shares have significant value.'"¹¹⁰ Despite this, on June 12, 2020, Judge Mary Walfrath granted approval for Hertz to sell up to \$1 billion in stock.¹¹¹

(vi) Stock Issuance Called Off

The court's approval kicked off a firestorm of controversy from experts and pundits who largely predicted all Hertz's investors would have their equity "wiped out."¹¹² Despite this controversy, less than a week after the court approved the sale, "Hertz announced that it [would] suspend the stock issuance in response to SEC comments."¹¹³ Though SEC comments are not fatal to an issuance *per se*, and Hertz could have engaged in discussions with the SEC to resolve the comments, it opted to discontinue the issuance in light of the agency's scrutiny.

Despite the discontinuance, on October 29, 2020, Hertz received approval from the court for \$1.65 billion in DIP financing to fund the company through 2021.¹¹⁴ Up to \$1B can be used for new fleet financing, giving Hertz the future ability to replenish their vehicle fleet, while \$800 million can be used for working capacity and general corporate expenses.¹¹⁵ The financing requires Hertz to file a Chapter 11 plan for

¹¹⁰ Limited Objection and Reservation of Rights of Gamco Investors at ¶ 2, *In re Hertz Corp.*, (No. 20-11218-MFW), Doc. 406 (June 12, 2020).

¹¹¹ Order Granting Debtors' Emergency Motion, *In re Hertz Corp.*, (No. 20-11218-MFW).

¹¹² Claudia Assis, *Bankrupt Hertz Gets Approval to Sell Up to \$1 Billion in Stock – But Experts Expect Equity to be Wiped Out*, MARKETWATCH (June 13, 2020), https://www.marketwatch.com/story/hertz-seeks-bankruptcy-court-approval-to-offer-1-billion-in-stock-but-experts-expect-equity-to-be-wiped-out-2020-06-12?mod=article_inline.

¹¹³ Casey & Macey, *supra* note 75, at 8; *see also* Claudia Assis, *Hertz Pulls Share Offering, Says SEC Planned to Review It*, MARKETWATCH (June 17, 2020), <https://www.marketwatch.com/story/hertz-pulls-share-offering-says-sec-planned-to-review-it-2020-06-17>.

¹¹⁴ Order (I) Authorizing the Debtors to Obtain Debtor-in-Possession Financing and Granting Liens and Superpriority Administrative Claims and (II) Granting Related Relief, *In re Hertz Corp.*, (No. 20-11218-MFW); *see also* Pat Holohan, *Court: Hertz Judge Approves USD 1.65bn DIP to Fund Debtor Through 2021*, DEBTWIRE (Oct. 29, 2020), <https://www.debtwire.com/info/court-hertz-judge-approves-usd-165bn-dip-fund-debtor-through-2021>.

¹¹⁵ Laura Layden, *Hertz Secures New Financing to Steer it Out of Bankruptcy*, NEWS-PRESS (Oct. 16, 2020), <https://www.news-press.com/story/money/companies/2020/10/16/hertz-has-secured-1-65-billion-new-financing-fights-its-way-out-bankruptcy/3676571001>.

reorganization by August 31, 2021, through the company hopes to exit reorganization well before then.¹¹⁶

3. TYPICAL STOCK ISSUANCE V. BANKRUPTCY STOCK EXEMPTION

Though Hertz raised eyebrows by seeking and gaining approval to issue stock as a DIP before its reorganization plan was confirmed, most Chapter 11 practitioners know that stock can be issued as part of a reorganization plan.¹¹⁷ An issuance of shares pre-plan is not subject to the bankruptcy code's protections in §§ 1125 and 1145, which contain a registration exemption for securities that are issued as part of a Chapter 11 plan of reorganization.

This exclusion is evidenced in *In Securities and Exchange Commission v. Granco Products, Inc.*¹¹⁸ There, the SEC enjoined an attempt to issue shares to the public without registration where the proceeds were to be used to secure notes issued to unsecured creditors under the plan of reorganization. Additionally, in a letter to Northeast Utilities, the SEC expressly noted that the securities being issued to fund a plan of reorganization must be registered unless they could qualify for a non-Code based exemption from registration.¹¹⁹

However, if included in a DIP's reorganization plan, reorganization can serve as an alternative to the typical registration of securities offerings. The next section briefly explores the typical registration of securities offerings before discussing how Chapter 11 can serve as an exemption from federal and state securities law registration requirements.

A. Typical Channels of Securities Offerings

The basic commandment of securities offerings is: "thou shalt not offer or sell securities without registration, absent an exemption."¹²⁰ Per Regulation S-K under the Securities Act of 1933 (the "Securities Act"), the issuance of every security must comply with state and federal securities

¹¹⁶ *Id.*

¹¹⁷ George W. Kunej, *Going Public Via Chapter 11: 11 U.S.C. Sections 1125(E) and 1145*, 23 CAL. BANKR. J. 3, 3 (1996).

¹¹⁸ SEC v. Granco Products, Inc., 236 F. Supp. 968 (S.D.N.Y. 1964).

¹¹⁹ Northeast Util., SEC Staff No-Action Letter (Feb. 11, 1991).

¹²⁰ Professor Joan MacLeod Heminway, Lecture on Corporate Finance at the University of Tennessee College of Law (Nov. 2020).

law.¹²¹ These laws require that the issuing company take steps to provide prospective investors full disclosure about the company, its financial health, and the risk of the investment, through a registration statement filed with the SEC.

Section 4(a)(2) of the Securities Act exempts from registration transactions by an issuer not involving a public offering, known as a private placement.¹²² To qualify for this exemption, the purchasers of the securities must:

- either have enough knowledge and experience in finance and business matters to qualify as “sophisticated investors” (i.e., able to evaluate the risks and merits of the investment), or be able to bear the investment’s economic risk
- have access to the type of information normally provided in a prospectus for a registered security offering, and
- agree not to resell or distribute the securities to the public.¹²³

In the instant case, Hertz did not qualify for such an exemption—because they were issuing stock to the general public—and were forced to issue a registration statement with their offering.¹²⁴ This registration statement garnered scrutiny from the SEC.¹²⁵ Often when the SEC expresses such concerns, the issuing company does not go forward until the comments are resolved.¹²⁶ Here, following the SEC’s expression of

¹²¹ 17 C.F.R. § 229.10 (2021).

¹²² 17 C.F.R. § 230.506 (2021).

¹²³ *Id.* See also *Private Placements – Rule 506(b)*, SEC. EXCH. COMM’N (Mar. 12, 2020), sec.gov/smallbusiness/exemptofferings/rule506b.

¹²⁴ Hertz Glob. Holdings, Inc. Current Report (Form 8-K) (June 15, 2020).

¹²⁵ Maggie Fitzgerald, *The SEC Told Bankruptcy Hertz it Has Issues With its Plan to Sell Stock, Chairman Jay Clayton Says*, CNBC (June 17, 2020), <https://www.cnbc.com/2020/06/17/the-sec-told-bankrupt-hertz-it-has-issues-with-its-plan-to-sell-stock-chairman-jay-clayton-says.html>.

¹²⁶ *Id.*

concern, Hertz opted not to attempt to resolve the comments or proceed with the issuance.

B. Chapter 11 Stock Issuance Exemption

11 U.S.C. § 1145(a)(1) exempts the offer or sale of securities under a plan of reorganization from the Securities Act registration requirements,¹²⁷ and from any state or local law requiring registration of securities.¹²⁸ This exemption is limited to the debtor's securities that—under the plan of reorganization—can be exchanged for: (1) a claim against the debtor, (2) an interest in the debtor, or (3) an administrative expense claim in the debtor's case.¹²⁹ The securities at issue must be exchanged wholly or principally for that claim, interest, or administrative expense.¹³⁰ Such an issuance qualifies as a “public offering” under securities law.¹³¹

In *Amarex*,¹³² § 1145(a)'s exemption was also held to include transactions involving issuances of stock of non-debtor entities that were not a prepetition affiliate or successor of the debtor.¹³³ The court held that § 1145(a) applied to a reorganization where the debtor was merged into a wholly-owned subsidiary (unrelated to the debtor prepetition), where the debtor's creditors would receive shares of the wholly-owned subsidiary.¹³⁴ The court overruled a creditor's objections that § 1145 was inapplicable because the subsidiary was not a successor to or prepetition affiliate of the debtor.¹³⁵ The court held that § 1145(a) applied to a reorganization where the debtor was merged into a wholly-owned subsidiary (unrelated to the debtor prepetition), where the debtor's creditors would receive shares of the wholly-owned subsidiary.¹³⁶ The SEC endorsed this logic through several “no-action” letters.¹³⁷

¹²⁷ Except by an underwriting, as defined in 11 U.S.C. § 1145(b). WILLIAM L. NORTON III, 6 BANKRUPTCY LAW & PRACTICE § 115:3 (3d ed., Westlaw 2021).

¹²⁸ As well as exemption from licensing of an issuer or underwriter, or broker, or dealer of such securities. NORTON, *supra* note 127, at § 115:3.

¹²⁹ NORTON, *supra* note 127, at § 115:3.

¹³⁰ *Id.* (quoting § 11 U.S.C. § 1145(a)(1)(B)).

¹³¹ *See* Kuney, *supra* note 117, at 7 (rephrasing 11 U.S.C. § 1145(c)).

¹³² *In re Amarex*, 53 B.R. 12 (Bankr. W.D. Okla. 1985).

¹³³ *Id.* at 14; *see also* Kuney, *supra* note 117, at 7.

¹³⁴ *Amarex*, 53 B.R. at 14.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*; *see also* Kuney, *supra* note 117, at 7 (The letters indicated that an issuer of securities “will qualify as ‘successor’ to the debtor under § 1145(a)(1) if [] ‘the issuer acquires and

§ 1145(a)'s exemption also applies to securities that are resold by the recipient.¹³⁸ Though the text of § 1145(a) only mentions the *initial issuance* of securities, § 4(1) of the Securities Act and § 1145(b)(1) provide recipients (including persons other than the issuer, underwriting, or dealer) the ability to trade the shares.¹³⁹ § 1145(a)(2)¹⁴⁰ also exempts the offer or sale of securities through the exercise of a warrant option, subscription right, or conversion privilege when that warrant, option, subscription right, or conversion privilege is issued under a plan of reorganization.¹⁴¹

Registration exemptions notwithstanding, any entity considering issuing securities via § 1145(a) could invite liability based upon allegations of fraud in connection with the issuance.¹⁴² In response to this liability, Congress enacted 11 U.S.C. § 1125(e) which provides the debtor, other plan proponents, and their agents with qualified immunity related to the solicitation of a plan or the issuance of securities under a plan.¹⁴³

CONCLUSION

Hertz was the victim of two novel events: COVID-19 and—seemingly—irrational trading fueled by speculative retail investors on social media and mobile trading apps.¹⁴⁴ Hertz was the first major company to fold as a direct result of COVID-19. The worldwide lockdowns spurred by the pandemic were most instantly felt by the travel industry and while airlines are routinely bailed out, Hertz was not so lucky. But for this pandemic, Hertz likely would have remained a healthy company. Chapter 11 serves an organization like Hertz well as it allows it a brief respite from its creditors, a moment to reorganize, and an opportunity to emerge, post-petition, as a viable entity.

Hertz was also the first major company to experience a novel trend in investing: grassroots retail traders with huge appetites for risk at very

operates the business of the debtor, regardless of the form of acquisition or operation chosen by the issuer.”).

¹³⁸ Kuney, *supra* note 117, at 8.

¹³⁹ *Id.* at 8–9.

¹⁴⁰ 11 U.S.C. § 1145(a)(2).

¹⁴¹ NORTON, *supra* note 127, at § 115:4.

¹⁴² Kuney, *supra* note 117, at 12.

¹⁴³ *Id.*

¹⁴⁴ Also known as “stonks.” See Palmer Haasch, *The ‘Stonks’ Meme is Surging in the Internet Economy Amid the GameStop Stock Sage. Here’s How it Rose to Notoriety*, INSIDER (Jan. 29, 2021), <https://www.insider.com/stonks-meme-origin-stocks-dogecoin-gamestop-hold-line-memes-game-2021-1> (discussing the rise of the word “stonk” as a meme for stocks).

small investments. This “stonk”¹⁴⁵ investing befuddled analysts who traditionally view the price of a stock as a reflection of a company’s value, but also allowed Hertz the opportunity to creatively finance its reorganization. Hertz’s brief flirtation with an in-bankruptcy-stock-issuance raised an interesting question of whether such issuances could serve as a viable form of DIP financing for reorganization,¹⁴⁶ particularly considering the taxing cost of traditional post-petition debt. This flirtation was quickly ended by SEC regulators reluctant to sanction issuance of a potentially worthless stock.

For the time being it seems that Chapter 11 securities offerings are limited to a debtor’s plan of reorganization. Though not as fluid as an in-bankruptcy-stock-issuance, this exemption allows a debtor to sidestep the traditional registration of securities offerings and can be a viable way for debtors to raise capital— in exchange for equity—following a plan of reorganization. Given that bankruptcy courts generally do not regard unissued stock as part of the estate and the increase in highly speculative retail trading, it is possible that a debtor will issue stock for DIP financing. This possibility—for now though—seems to be opposed by the SEC.

¹⁴⁵ *Id.*

¹⁴⁶ See generally Casey & Macey, *supra* note 75.