

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	)	
	)	Chapter 11
LUCKY BUCKS, LLC, <i>et al.</i>	)	
	)	Case No. 23-10758 (KBO)
	)	
Debtors. ¹	)	(Jointly Administered)
	)	
	)	Hearing Date: June 30, 2023
	)	Re: Dkt. No. 50
	)	

**HOLDINGS' OPPOSITION TO AD HOC GROUP OF HOLDINGS PIK
NOTEHOLDERS' MOTION TO CONVERT HOLDINGS'
CHAPTER 11 CASE TO A CHAPTER 7 CASE**

Lucky Bucks Holdings LLC ("Holdings"), as debtor and debtor in possession, respectfully submits this opposition (the "Opposition") to the Ad Hoc Group of Holdings PIK Noteholders' (the "Noteholders") *Motion to Convert Lucky Bucks Holdings LLC's Chapter 11 Case to a Chapter 7 Case* (D.I. 50) (the "Conversion Motion"). In support of the Opposition, Holdings relies on the *Declaration of Neal P. Goldman in Support of the Opposition* (the "Goldman Declaration"). For the reasons set forth below, the Court must deny the Conversion Motion.

PRELIMINARY STATEMENT

1. The Noteholders ask this Court to take the extraordinary step of converting this chapter 11 case to a chapter 7 case on the very first day.² They seek such drastic relief for two reasons: (i) they do not like their proposed treatment in Holdings' proposed chapter 11 plan; and

¹ The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal identification number, include: (i) Lucky Bucks, LLC ("Lucky Bucks") (4376); (ii) Lucky Bucks HoldCo, LLC ("HoldCo") and, together with Lucky Bucks, the "OpCo Debtors") (0081); and (iii) Lucky Bucks Holdings LLC (3221). Unless otherwise defined herein, capitalized terms have the same meaning provided in the *Declaration of James Boyden in Support of Debtors' Chapter 11 Petitions and First Day Relief* (D.I. 15) (the "Boyden Declaration").

² The Debtors each commenced a chapter 11 case by filing a voluntary petition for relief under chapter 11 on June 8, 2023 (the "Petition Date"). The Conversion Motion was filed hours before the first day hearing on June 12, 2023.

(ii) they have no interest in participating in good faith settlement negotiations about alternate treatment. But the Noteholders have not come close to meeting their substantial burden of demonstrating that conversion of this case at such an early juncture is warranted or appropriate.

2. Indeed, the Conversion Motion contains a fatal flaw: it requires the Court to pre-judge the merits of the pending Holdings Settlement Motion (D.I. 16). A hearing on the Holdings Settlement is necessary to substantiate the Noteholders' principal allegation that the Holdings Settlement—a settlement of *estate* claims,³ which was negotiated by Holdings' independent manager, Mr. Neal Goldman (the “Independent Manager”), in good faith—does not maximize value for Holdings' estate. Within a matter of weeks, the evidence at the Holdings Settlement Motion hearing will demonstrate that the Holdings Settlement offers substantial value for Holdings' estate and that such value would be lost in the event of a conversion to chapter 7. The Conversion Motion is thus premature and must be denied.

3. The implications of granting the Conversion Motion at this juncture should not be misunderstood: if the Noteholders succeed, no holding company with its own debt could *ever* file for chapter 11 in Delaware without risking immediate conversion to chapter 7 at the whim of its creditors. But it should not come to that. The Bankruptcy Code vests a debtor—not its creditors—with both (i) the power to choose which chapter of the Bankruptcy Code will maximize value for stakeholders and (ii) if it chooses chapter 11, a reasonable time (through exclusivity and the breathing spell of the automatic stay) to attempt to confirm a plan.

4. In seeking conversion, the Noteholders rely on the fact that they voted to reject Holdings' chapter 11 plan. But a creditor's vote to reject a proposed plan at the outset of a chapter

³ Despite the Noteholders' suggestion, Holdings is *not* seeking to effectuate any third-party releases, or compromise, settle, or impair the bulk of claims described in the Conversion Motion. To be clear, Holdings only seeks to compromise and settle *estate* causes of action, not any fraudulent inducement or other claims that may be directly held by creditors.

11 case cannot constitute cause to immediately convert the case to chapter 7. Forging consensus, or at least affording the debtor a reasonable opportunity to do so, is fundamental to chapter 11. The Bankruptcy Code affords a debtor the “unqualified opportunity to negotiate a settlement and propose [an acceptable] plan of reorganization without interference from creditors and other interests.” *In re Texaco, Inc.*, 81 B.R. 806, 809 (Bankr. S.D.N.Y. 1988) (citing H.R. Rep. No. 595, 95th cong., 2d Sess. 221-22, reprinted in 1978 U.S.C.C.A.N. 5787). Granting creditors the power to convert a debtor’s chapter 11 case on the first day simply because they do not support the debtor’s opening offer would undermine this bedrock principle and shift the balance of power in debtor/creditor negotiations.⁴ See *Century Glove v. First Am. Bank of New York*, 860 F.2d 94, 102 (3d Cir. 1988) (the Bankruptcy Code “allows a debtor the threat of limited delay to offset the creditors’ voting power of approval”); *In re AIG Financial Products Corp.*, 2023 WL 3360562, at *9-10 (Bankr. D. Del. May 10, 2023) (denying motion to dismiss filed one month after petition date because even though the movants did not support the proposed plan, the parties might “ultimately agree to some settlement . . . which will allow a plan to be confirmed”).

5. Holdings acknowledges that its time to remain in chapter 11 to pursue liquidation is not unlimited. In that regard, Holdings has taken every effort to expedite this case by (i) conducting a comprehensive Investigation (defined below) of Holdings’ Distribution Claims (defined below) in the months preceding the Petition Date, (ii) negotiating the Holdings Settlement, (iii) filing its chapter 11 plan on the first day of this case, and (iv) promptly seeking a hearing to consider the Holdings Settlement on the first available hearing date. Holdings’ efforts to accelerate its chapter 11 case and pursue settlement of its claims at the outset serve to minimize

⁴ This action could also have the effect of discouraging debtors from filing chapter 11 plans in the infancy stages of cases, for fear that rejection could lead to immediate conversion. As a matter of policy, the early advancement of restructuring plans should be encouraged by courts, and not frowned upon.

administrative expenses, promote judicial economy, and maximize value—key policy considerations that should militate against conversion, not for it.

6. In contrast, the Noteholders seek to delay the Court’s adjudication of the very narrow issue of whether to approve of the Holdings Settlement by demanding the Court first consider the Conversion Motion. But the Noteholders cannot satisfy their burden of demonstrating cause for conversion *before* the Court determines whether the Holdings Settlement—which by its terms, is unavailable outside of this chapter 11 case—is a reasonable, value-maximizing compromise of the Distribution Claims. Indeed, as part of the Rule 9019 process, the Noteholders will have a full opportunity within mere weeks to demonstrate that the Holdings Settlement is unreasonable. Preempting that process through an immediate conversion to chapter 7 would require the Court to determine that conversion is the superior option without affording Holdings and its Independent Manager, an estate fiduciary, a full and fair opportunity to present their case as to why the Holdings Settlement should be approved as reasonable.

7. The Noteholders cannot possibly demonstrate that conversion is in the best interests of Holdings’ estate before consideration of the Holdings Settlement Motion. If, as Holdings expects, the Court approves the Holdings Settlement, Holdings’ estate and its creditors will receive a substantial benefit of millions of dollars not available outside of chapter 11. Under those circumstances, conversion to chapter 7 would be entirely illogical. If the Court does not approve the Holdings Settlement, the Court can reassess the pendency of this chapter 11 case at that time. But in either case, this Court cannot know which bankruptcy process—chapter 11 or chapter 7—will maximize value for Holdings’ estate until *after* the Holdings Settlement Motion is considered.

8. The Holdings Settlement Motion demonstrates that the Holdings Settlement is the result of a good faith and arm’s-length process directed by a truly independent fiduciary. The

Independent Manager directed a comprehensive investigation (“Investigation”) of potential claims Holdings may possess related to the Holdings Distributions (defined below), including claims for both actual and constructive fraudulent transfer. That Investigation included a solvency analysis by a leading expert.

9. Following the Investigation, the Independent Manager determined, independently and free of outside influence, that potential claims related to those distributions have a substantially uncertain likelihood of success on their merits. The Independent Manager engaged in hard-fought, good faith negotiations with the recipients of the Holdings Distributions (the “Recipients”). The result was the Holdings Settlement, which provides for an aggregate payment of \$15,000,000 to the Holdings estate in exchange for a release of estate claims, including claims related to the Holdings Distributions (but not including third-party releases), upon entry of a final order granting the Holdings Settlement Motion. The Independent Manager then recommended, independently and without soliciting or considering the views of any Recipients, that the Holdings’ Board of Managers (the “Board”) approve the Holdings Settlement, which the Board unanimously did.

10. The Noteholders seek to avoid this Court’s consideration of the Independent Manager’s efforts—and void all the work done to date by an independent estate fiduciary—by immediately converting Holdings’ case to chapter 7. But a rushed decision to terminate Holdings’ chapter 11 case (and with it, the hard-fought Holdings Settlement) could have catastrophic consequences for all of Holdings’ stakeholders. If this case is converted to chapter 7, Holdings’ estate, through a chapter 7 trustee, would incur substantial costs to investigate and attempt to settle or litigate *the very same claims* that the Independent Manager already investigated and settled via the Holdings Settlement. A trustee and her new professionals would need to expend considerable time and resources familiarizing themselves with the facts and background related to the Debtors’

business, the Holdings Distributions and the complex transactions leading thereto, and be compensated for their efforts (including as a percentage of recovery). And there would be no guarantee that this duplicative work and expense would result in more value for stakeholders than already offered by the Holdings Settlement.

11. Given the comprehensive and independent process followed by the Independent Manager, there is a substantial probability that any settlement reached by a chapter 7 trustee would be on terms *less favorable* than the settlement negotiated by the Independent Manager. If the claims are not settled, the trustee may decide that litigation is not worth pursuing. If litigation is pursued, there is no guarantee it would be successful. In that case, the estate could recover *nothing*. Such an outcome would be contrary to the best interests of Holdings' estate and its creditors. It is thus premature to compel conversion of this case to chapter 7 before first determining what upside value is presently available to Holdings through the chapter 11 process.

12. In addition to these practical considerations, the Noteholders do not come close to carrying their burden of demonstrating "cause" to convert under section 1112(b)(1) of the Bankruptcy Code. The Noteholders identify two alleged "causes" for conversion, but prove neither.

13. *First*, the Noteholders argue that cause exists under section 1112(b)(4)(M), which provides that conversion is warranted when the debtor is unable to "effectuate substantial consummation of a *confirmed* plan" (emphasis added). But there is not yet a *confirmed* plan for Holdings to consummate; hence, section 1112(b)(4)(M) is inapplicable. If, by contrast, the Noteholders are attempting to demonstrate "cause" under 1112(b)(4)(M) because Holdings will *never* be able to effectuate a chapter 11 plan, that reading is inconsistent with the language of section 1112, which specifies that "cause" for conversion exists if the plan is not confirmed within

the time allotted under the Bankruptcy Code or court order.⁵ This is consistent with the basic premise that a chapter 11 debtor must be given a reasonable opportunity to achieve plan confirmation.

14. Even if a debtor's inability to effectuate a plan—whether before or after the termination of exclusivity—could satisfy sufficient “cause,” it is nonetheless premature to suggest that Holdings could never effectuate a plan. Bankruptcy is intended to be a collaborative process during which terms of proposed plans are negotiated and often change. The Noteholders' refusal to support the Debtors' proposed plan at this time does not mean that, at the confirmation hearing, Holdings will be unable to present a plan that has acceptance from an impaired creditor class.

15. Further, even if the Noteholders could establish “cause” under section 1112(b)(4)(M) (they cannot), the Conversion Motion should nonetheless be denied because “unusual circumstances” exist demonstrating that remaining in chapter 11—at least until the Holdings Settlement Motion is decided—is in the best interests of Holdings' creditors and the estate. Specifically, as discussed herein, the Noteholders seek drastic, first day relief that would deprive Holdings of the opportunity to maximize value for its only assets through approval of the Holdings Settlement, and that may very well leave the estate and its creditors worse off.

16. *Second*, the Noteholders argue in the alternative that cause for conversion exists under section 1112(b)(4)(A), which provides that conversion is warranted where there is (i) “continuing loss” to the estate *and* (ii) the “absence of a reasonable likelihood of rehabilitation.” The Noteholders must prove the existence of both (i) and (ii), but they have proved neither.

17. The Noteholders argue that Holdings will suffer “continuing loss” if it remains in chapter 11 because it must pay bankruptcy-related administrative expenses (namely, legal fees)

⁵ See 11 U.S.C. § 1112(b)(4)(J) (cause exists if a debtor fails “to file a disclosure statement, or to file or confirm a plan *within the time fixed by this title or by order of the court*”) (emphasis added).

and, as a non-operational entity, does not earn revenue to cover those expenses. But it is inaccurate to suggest that Holdings has yet suffered a “loss”: any administrative expenses to be incurred by Holdings are incidental to the benefits of the Holdings Settlement and could constitute a “loss” *only if* the Holdings Settlement Motion is denied. If the Holdings Settlement Motion is granted, as Holdings expects, the settlement proceeds will dwarf any administrative expenses related thereto.

18. Moreover, administrative expenses charged to Holdings during the bankruptcy are not “loss[es]” as the term is used by section 1112(b)(4)(A). Holdings is not a languishing operating company continuing to accumulate operating losses while sitting in a protracted chapter 11 process. Holdings is, instead, a non-operational entity. Because it has no revenue, its balance sheet necessarily is diminished any time it has an expense of any type, but absent something more, this cannot reasonably represent a “loss” to the estate within the meaning of the statute. The Noteholders’ interpretation would lead to an absurd result: every non-operational company that files for chapter 11, including every holding company, would suffer a “loss” from the moment it files its petition and be subject to immediate conversion. Further, the notion that expenses incurred by a debtor just days after the Petition Date are “continuing” is specious.

19. It is also inaccurate to suggest that, merely because Holdings intends to liquidate under the plan, it has no prospect of “rehabilitation.” Chapter 11 permits plans of liquidation and, therefore, a finding that a debtor who seeks liquidation through chapter 11 cannot be “rehabilitat[ed]” would be inconsistent with the scope of chapter 11. Where a debtor is liquidating for the purpose of maximizing and distributing its assets to stakeholders, “rehabilitation” means the maximization of the value of that company’s estate—which Holdings is achieving through the Holdings Settlement Motion. Again, under the Noteholders’ interpretation of “rehabilitation” and

“continuing loss,” no holding company could ever seek to liquidate in chapter 11 without being immediately subject to mandatory conversion to chapter 7. The Bankruptcy Code does not restrict debtors in this way.

20. The Noteholders also wrongly assert that the Holdings’ bankruptcy filing does not serve a valid purpose. Both the Supreme Court and Third Circuit have recognized that liquidation is a valid and legitimate chapter 11 purpose where it maximizes the value of the estate.⁶ As discussed herein, the process that led to the Holdings Settlement—including the good faith investigation of claims and the Independent Manager’s hard-fought negotiations with the Recipients—was at arm’s-length. Holdings seeks to maximize value through liquidation of its primary asset (the estate causes of action) and yield proceeds not otherwise available outside of chapter 11. This is an entirely appropriate purpose to commence a chapter 11 case.

21. Moreover, it is appropriate and commonplace for a holding company to commence a chapter 11 case together with its family of reorganizing corporate entities. Courts have recognized that corporate families share an “identity of interest” that justifies the filing of individual affiliates where necessary to benefit the group.⁷ This is particularly relevant where, as here, displacement of the Board could undermine the corporate group’s ability to effectively reorganize, and the creditor extended credit recognizing that its obligor was part of a larger group.

⁶ See *Florida Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 37 n.2 (2008) (“Although the central purpose of Chapter 11 is to facilitate reorganizations rather than liquidations (covered generally by Chapter 7), Chapter 11 expressly contemplates liquidations.”); *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 120 n.4 (3d Cir. 2004) (“[L]iquidation plans, no less than reorganization plans, must serve a valid bankruptcy purpose. That is, they must either preserve some going concern value, e.g., by liquidating a company as a whole or in such a way as to preserve some of the company’s goodwill, *or by maximizing the value of the debtor’s estate.*”) (emphasis added).

⁷ See *In re Gen. Growth Properties, Inc.*, 409 B.R. 43, 63 (Bankr. S.D.N.Y. 2009) (“[A] judgment on an issue as sensitive and fact-specific as whether to file a Chapter 11 petition can be based in good faith on consideration of the interests of the group as well as the interests of the individual debtor.”); *In re Mirant Corp.*, 2005 WL 2148362, at *6 (Bankr. N.D. Tex. Jan. 26, 2005) (noting that “[a] failure to file for an entity that is a principal member of the [corporate] family could prove disastrous if relief in fact was necessary”).

22. Such concerns are also implicated by the potential appointment of a chapter 7 trustee. In the present case, Holdings serves as the manager of each of the OpCo Debtors. As such, the Board at Holdings effectively oversees the operations and affairs of the Debtors' business. Because the Debtors operate in a heavily regulated, competitive, and evolving industry, their business operations require regular oversight from the Board, which includes individuals with years of relevant experience in the industry. Common business challenges can be exacerbated when a business is in financial distress or amidst a reorganization. To the extent a chapter 7 trustee is appointed and supplants the members of the Board, the affairs of the Debtors' corporate group would be directed by a newly-appointed trustee who is not familiar with the Debtors' business or industry. This could have significant consequences for both the Debtors' business operations and their restructuring and should be an additional consideration for the Court in determining whether conversion is appropriate at this time.⁸

23. For these reasons and those below, the Conversion Motion should be denied and this case should proceed under chapter 11 without further delay.

RELEVANT BACKGROUND

24. The OpCo Debtors are among the largest Class B coin operated amusement machine ("COAM") operators based in the state of Georgia.⁹ *See* Boyden Decl. (D.I. 15) ¶ 1. Holdings is the non-operational parent of the OpCo Debtors. *Id.*

25. In mid-2022, the Georgia COAM industry experienced a significant downturn. *Id.* ¶¶ 5-9. Among other things, rising interest rates, an end to federal stimulus programs implemented

⁸ *See In re MatlinPatterson Glob. Opportunities Partners II L.P.*, 644 B.R. 418, 438 (Bankr. S.D.N.Y. 2022) (noting that "[c]hanging horses midstream [by appointing a chapter 7 trustee] . . . would be inefficient, costly, slow, and contrary to the estates' interests in timely and cost-effective resolution").

⁹ A full description of the Debtors' corporate history and operations, prepetition organizational and debt structure, and the events leading to these chapter 11 cases are set forth in the Boyden Declaration (D.I. 15). *Id.* ¶¶ 34-42 (corporate history and operations), ¶¶ 44-53 (prepetition structure), ¶¶ 54-61 (events leading to chapter 11 cases).

in response to the COVID-19 pandemic, and historic inflation began to negatively affect the discretionary income of COAM customers and the associated demand for COAM gaming. *Id.* ¶ 5. At the same time, the COAM industry also began experiencing increasingly strict regulatory enforcement. *Id.* ¶ 6. As a result of a confluence of macroeconomic challenges and increasingly strict regulatory enforcement in 2022, Lucky Bucks suffered a sharp decline in revenue. *Id.* ¶ 7.

26. The Debtors engaged restructuring advisors in the fall of 2022, who immediately began to identify steps to address the Debtors' near-term liquidity issues and, with the Debtors' input, construct a business plan and financial projections to develop transaction proposals and engage with creditors. *Id.* ¶ 10. The Debtors launched negotiations with their main creditor constituencies, including the Noteholders and the TL Ad Hoc Group. *Id.* ¶ 12.

27. In March 2023, Mr. Goldman was appointed as Holdings' Independent Manager and sole member of the Board's Restructuring Committee. Goldman Decl. ¶ 5. In his capacity as Independent Manager, Mr. Goldman alone directed and oversaw the Investigation into potential claims that Holdings may possess against certain individuals and entities who were Recipients of two pre-petition distributions from Holdings in 2021 and 2022 (together, the "Holdings Distributions"). *Id.* ¶ 6. Together with his advisors, and in his capacity as an independent fiduciary of Holdings, the Independent Manager evaluated potential claims assertable by Holdings related to the Distributions, including claims for both actual and constructive fraudulent transfer (collectively, the "Distribution Claims"). *Id.* ¶ 7.

28. In connection with that Investigation, the Independent Manager retained the services of Edward M. McDonough, a Senior Advisor with the firm Alvarez & Marsal ("A&M"), and was further advised by Milbank LLP. *Id.* After consulting with his advisors, the Independent Manager determined that the Distribution Claims had a substantially uncertain likelihood of

success. *Id.* The Independent Manager made that determination independently and free of outside influence. *Id.*

29. On this basis, the Independent Manager explored settlement negotiations with Holdings' creditors and the Recipients. *Id.* ¶ 9. After weeks of extremely hard-fought, and often contentious, negotiations with the Recipients, the Independent Manager and the Recipients agreed on the terms of the Holdings Settlement. *Id.* ¶ 10. In sum, the Holdings Settlement provides for an aggregate payment in the amount of \$15,000,000 to the Holdings estate, in exchange for a release of the estate's own claims, including claims related to the Holdings Distributions. *Id.* The Independent Manager did not receive any compensation on account of the Holdings Settlement or the restructuring of the OpCo Debtors. *Id.*

30. Notably, the Holdings Settlement only compromises and settles estate causes of action, and not any fraudulent inducement or other claims that may be directly held by creditors. Similarly, the Holdings Settlement does not seek to effectuate any non-consensual third-party releases.

31. On June 7, 2023, consistent with his fiduciary duties to Holdings, the Independent Manager recommended that the Board approve the Holdings Settlement. *Id.* ¶ 11. He made that recommendation independently and without soliciting or considering the views of any Recipients, including members of management or any other members of the Board. *Id.* In leading the Investigation, and ultimately reaching terms on the Holdings Settlement, the Independent Manager was not at any point coerced, influenced, or incentivized in any way by any Recipient, or any other party. The Board unanimously approved entry into the Holdings Settlement on June 7, 2023. *Id.* ¶ 12.

32. The Debtors commenced their chapter 11 cases on June 8, 2023. The Holdings Settlement Motion (D.I. 16) was filed that same day.¹⁰

33. Each of the Debtors remains in possession of its property and estate, pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. By order dated June 12, 2023, the Court granted the Debtors' motion seeking joint administration of their chapter 11 cases (D.I. 51).

ARGUMENT

A. Legal Standard

34. Section 1112 of the Bankruptcy Code provides that a bankruptcy court may convert a case from chapter 11 to chapter 7 upon a showing of "cause." 11 U.S.C. § 1112(b)(1).¹¹ The burden is on the movant to establish "cause" by a preponderance of the evidence. *Id.* § 1112(b); *In re 4 C Sols., Inc.*, 289 B.R. 354, 364 (Bankr. C.D. Ill. 2003). "Cause" must be assessed against the backdrop that conversion is a "drastic measure" and should not be granted prematurely. *In re Waterworks, Inc.*, 538 B.R. 445, 460 (Bankr. N.D. Ill. 2015) (quoting *In re Bovino*, 496 B.R. 492, 499 (Bankr. N.D. Ill. 2013)). Even if a movant establishes "cause," a court "is not obligated to convert the case—the decision remains within the court's discretion." *In re The 1031 Tax Grp., LLC*, 374 B.R. 78, 93 (Bankr. S.D.N.Y. 2007). Section 1112(b)(2) "explicitly provides for this discretion" where conversion "is not in the best interests of creditors and the estate." *Id.*

35. Courts are particularly reluctant to grant motions to convert where, as here, a chapter 11 case is in an "early or embryonic stage." *In re Lykes Bros. S.S. Co., Inc.*, 196 B.R. 586,

¹⁰ The Debtors' first day filings describe the commitment Holdings has received for the Holdings DIP Facility. Holdings has not filed a motion seeking approval of the Holdings DIP Facility to date, and remains engaged in the ongoing process of seeking Holdings DIP financing on more favorable terms.

¹¹ Section 1112(b)(4) provides a non-exhaustive list of factors constituting "cause," including the two factors upon which the Noteholders rely: (A) "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation," and (M) "inability to effectuate substantial consummation of a confirmed plan."

595 (Bankr. M.D. Fla. 1996); *see also In re 4 C Sols., Inc.*, 289 B.R. at 364 (“The earlier in the Chapter 11 case, the more reluctant courts are, absent some compelling justification, to abort the statutory confirmation process by ordering conversion or dismissal.”); *In re Rentclub, Inc.*, 141 B.R. 236-37 (Bankr. M.D. Fla. 1992) (holding that, even where the debtor’s prospects of reorganization are “not without doubt,” conversion of a chapter 11 case that is “still in its embryonic stage” is not warranted because the debtor deserves an opportunity to achieve reorganization). As this Court observed in *In re Simplexity, LLC*—another case in which the debtor was a non-operating entity whose primary assets were estate causes of action—courts should be skeptical of a motion to convert filed in the very early stages of a case. *See* Case No. 14-10569 (KG), June 4, 2014 Hr’g Tr., ECF No. 351, at 33:14-16 (Bankr. D. Del. 2014) (“The fact that the case was filed only two months ago is unusual. I don’t see motions to convert cases that are only two months old.”);¹² June 13, 2014 Order, ECF No. 353 (order denying motion to convert for reasons stated at June 4, 2014 hearing);¹³ Oct. 23, 2014 Order, ECF No. 543-1 (denying second motion to convert; noting that “[t]he Court previously denied a motion to convert these cases, finding unusual circumstances existed – in particular that the case was then only two months old”).¹⁴

36. The Noteholders base their showing of “cause” on sections 1112(b)(4)(M) and (b)(4)(A). Neither supports the drastic relief they seek.

¹² A copy of the *Simplexity* June 4, 2014 hearing transcript is attached hereto as **Exhibit A**.

¹³ A copy of the *Simplexity* order denying first motion to convert is attached hereto as **Exhibit B**.

¹⁴ A copy of the *Simplexity* order denying second motion to convert is attached hereto as **Exhibit C**.

B. There is No Cause to Convert Under Section 1112(b)(4)(M)

37. The Noteholders argue that conversion is warranted because Holdings is unable “to effectuate substantial consummation of a **confirmed** plan.” 11 U.S.C. § 1112(b)(4)(M) (emphasis added); (Conversion Motion ¶¶ 31-36). But their reliance on section 1112(b)(4)(M) is misplaced. Holdings’ plan of reorganization has not yet been confirmed, and therefore Holdings cannot possibly have failed to substantially consummate it. *See* 7 COLLIER ON BANKRUPTCY ¶ 1112.04 (16th Ed. 2023) (explaining that cause to convert under section 1112(b)(4)(M) exists “[i]f a plan **has been confirmed**, but cannot be substantially consummated within a reasonable amount of time” and that the concept of “substantial consummation” relates to a plan that has already been put in place) (emphasis added); *Smith v. John Peter Lee, Ltd. (In re Smith)*, 1998 WL 133445, at *3 (9th Cir. Mar. 20, 1998) (affirming bankruptcy court’s grant of motion to convert pursuant to section 1112(b)(4)(M) where debtor failed, **after confirmation**, to substantially consummate plan).

38. Even if one were to look past the text of section 1112(b)(4)(M) (and the Noteholders’ argument) and instead consider whether a debtor’s alleged pre-confirmation inability to effectuate a plan could satisfy sufficient “cause” to convert, it is not possible to conclude **now**, mere days after the Petition Date, that Holdings will never confirm a plan. Chapter 11 bankruptcy is intended to be a collaborative process during which terms of proposed plans are negotiated and often change. And for that reason, courts routinely recognize that debtors must be given a reasonable time to confirm a plan before being subject to conversion to chapter 7 or dismissal. *See, e.g., AIG Financial Products Corp.*, 2023 WL 3360562, at *9-10 (denying motion filed one month after petition date because even though the movants did not support the proposed plan, Judge Walrath found that the parties might **“ultimately agree to some settlement . . . which will allow a plan to be confirmed”**) (emphasis added); *In re Gabriel Techs. Corp.*, 2013 WL 2318581, at *3 (Bankr. N.D. Cal. May 28, 2013) (denying motion filed three months after petition date and

noting that, while the “[p]lan, or some variation of it, may or may not be confirmable . . . that is for another day” and that the movant could re-file its motion if a plan is not confirmed within the time fixed by the court); *In re: Gen. Growth Props., Inc.*, 409 B.R. at 65 (denying motion as premature, despite movants’ arguments that they were the debtors’ only creditors and would never vote to approve a plan, because “[t]here is no requirement in the Bankruptcy Code that a debtor must prove that a plan is confirmable in order to file a petition” and noting that “parties often find it in their best interests to [ultimately] agree on the terms of a plan, despite their litigating posture”) (collecting cases).¹⁵

39. This approach is supported by the language of section 1112(b)(4), which specifies that cause exists where the debtor has failed “to file a disclosure statement, or to file or confirm a plan *within the time fixed by this title or by order of the court.*” 11 U.S.C. § 1112(b)(4)(J) (emphasis added); *see also In re Gabriel Techs. Corp.*, 2013 WL 2318581, at *3 (observing that, if the debtors fail to “obtain confirmation within the timetable to be set, [movant] will have its wish [to achieve conversion to chapter 7], albeit under § 1112(b)(4)(J)”).

40. Here, the Noteholders’ current refusal to support Holdings’ proposed plan does not mean that, at the confirmation hearing, Holdings will be unable to propose a plan that has acceptance from an impaired creditor class. Holdings should be afforded a reasonable opportunity to drive consensus.

41. Further, adopting the Noteholders’ position could have far-reaching, negative consequences: a grant of conversion here would mean that any time the majority of creditors vote against a proposed plan at the outset of a chapter 11 case, the debtor may be subject to immediate

¹⁵ *See also In re: Elite Auto Dealer, Inc.*, 2020 WL 6598256, at *2, *5-6 (D. Nev. July 8, 2020) (denying motion filed two weeks after petition date because the debtor had not unreasonably delayed the chapter 11 proceeding and was “still within the 120-day plan exclusivity period”).

conversion. Congress never intended to give creditors such power, as this would undermine a debtor's negotiating leverage during its exclusivity period and complicate efforts to reach consensus. In voluntary cases, debtors—not their creditors—have the choice of which section of the Bankruptcy Code to pursue. *See* 11 U.S.C. § 301(a) (specifying manner in which voluntary case is commenced); *see also In re Banks*, 545 B.R. 241, 243 (Bankr. N.D. Ill. 2016) (“Debtors may choose which bankruptcy chapter to file for when they are eligible [to file under more than one chapter].”). Accordingly, the Court should not countenance the Noteholders’ attempt to strip Holdings of all control of its case at the very outset before it is afforded a reasonable opportunity to drive consensus.

42. The cases cited by the Noteholders are not to the contrary. They involve circumstances in which the debtor had (i) already been languishing in bankruptcy when conversion was sought or (ii) otherwise failed to meaningfully progress toward achieving confirmation. (*See* Conversion Motion ¶ 31) (citing *In re Babayoff*, 445 B.R. 64, 76 (Bankr. E.D.N.Y. 2011) (case had a “long history”—already spanning two years—that demonstrated *pro se* debtor’s failure to make meaningful progress towards confirmation, including debtor’s repeated filing of proposed plans that were “incomplete draft[s]”); *Loop Corp. v. U.S. Trustee*, 379 F.3d 511, 515 (8th Cir. 2004) (noting that, even though case was pending for five months, and despite an initial finding of “cause” for conversion, the bankruptcy court continued the conversion hearing for another month “to give the debtors and creditors one last chance to negotiate a confirmable plan”); *In re Larmer Estates, Inc.*, 6 B.R. 933, 935, 937 (Bankr. E.D. N.Y. 1980) (granting motion to convert where case was pending for seven months and there had been “absolutely no movement toward the confirmation of a plan”); *In re DCNC North Carolina I, LLC*, 407 B.R. 651, 665, 668, 671 (Bankr. E. D. Pa. 2009) (granting motion to dismiss where debtors’ reorganization relied, in part, on remote

chance of success in litigation that would take “years” to resolve)). In this instance, Holdings has already filed its plan and the Holdings Settlement Motion and is expeditiously seeking to have the Court consider both in the near term. Holdings is not languishing or using time as a tactic. As a result, no cause exists to convert under section 1112(b)(4)(M).

C. There is No Cause to Convert Under Section 1112(b)(4)(A)

43. The Noteholders’ alternative “cause” theory also fails. They seek to convert this case on the basis that there is a “continuing loss” of the Holdings’ estate and the “absence of a reasonable likelihood of rehabilitation.” § 1112(b)(4)(A) (emphasis added);¹⁶ (Conversion Motion ¶ 38). The statute is conjunctive. The Noteholders must prove both (i) that there is a “continuing loss” to the estate and (ii) the absence of a reasonable likelihood of rehabilitation. They have proved neither.

1. Holdings Has Not Suffered a “Continuing Loss”

44. The Noteholders argue that Holdings will *necessarily* suffer a “continuing loss” if it remains in chapter 11 because it must pay bankruptcy-related administrative expenses (namely, legal fees)¹⁷ and, as a non-operational entity, does not earn revenue to cover those expenses. (Conversion Motion ¶ 38). Not true.

45. Holdings’ expenses could constitute a “loss” *only if* the Holdings Settlement Motion is denied. Holdings’ professional fees are necessary, and incidental, to obtaining approval

¹⁶ Section 1112(b)(4)(A) provides in full that cause to convert a case includes “substantial or continuing loss or diminution of the estate and the absence of a reasonable likelihood of rehabilitation.” The Noteholders argue only that Holdings has experienced a “continuing loss,” not that it has suffered a “substantial” loss or “diminution” of its estate. (Conversion Motion ¶ 38).

¹⁷ Notably, the Court has already granted the Noteholders’ request for language in each first day order confirming that none of those orders authorized Holdings to incur any liabilities. Accordingly, the Noteholders’ “continuing loss” argument is limited to the accrual (not payment) of professional fees. As discussed herein, these professional fees are necessary to realize the benefits of the Holdings Settlement—a settlement that (pursuant to its own terms) will not be available outside of chapter 11.

of the value-maximizing Holdings Settlement. If the Holdings Settlement Motion is granted, the Holdings estate will receive a substantial gain of millions of dollars that will dwarf those expenses. In that scenario, there is no “loss.” *See, e.g., In re TMT Procurement Corp., et al.*, 534 B.R. 912, 920 (Bankr. S.D. Tex. 2015) (debtor’s incurrence of professional fees in furtherance of litigation did not constitute a “loss” where the litigation could bring substantial assets into the estate and it was expected that debtors would “expend professional fees in search of future recoveries”); *In re MatlinPatterson Glob. Opportunities Partners II L.P.*, 644 B.R. at 437-38, 439 (declining to convert under section 1112(b)(4)(A) and noting that it was “conceivable . . . that a debtor’s successful effort to secure an insurer commitment to pay creditors could constitute an increase in estate value that could overcome” any loss).¹⁸ Accordingly, a determination of whether Holdings will suffer any “loss” must necessarily await the Court’s decision on the Holdings Settlement Motion and cannot be addressed at this time.

46. Moreover, Holdings is not incurring actual operating losses. Courts have recognized that where a debtor has no operations or tangible assets, the mere accrual of professional fees cannot be deemed “continuing losses” to the estate. *In re Gabriel Techs. Corp.*, 2013 WL 2318581, at *2-3 (“[T]he accrual of liabilities are not the same as the incurring of actual out-of-pocket losses, such as the dissipation of assets that diminishes the estate. Leaving the Debtors in possession of the chapter 11 estate is not risking some ever-diminishing pool of assets.”); *In re TMT Procurement Corp.*, 534 B.R. at 920 (“In a case where the debtor has few, if

¹⁸ At the first day hearing, the Noteholders also suggested that support for their Conversion Motion could be found in *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011). But *Jameson* is readily distinguishable. There, the court found that the debtor acted in bad faith in filing for bankruptcy on the eve of the foreclosure of its assets. *Id.* at 300-301. In addition, the movant/creditor was able to prove that the chapter 11 process (which contemplated a sale process) would not create value for the estate. *Id.* at 303. Here, in contrast, Holdings has acted in good faith in seeking approval of the Holdings Settlement, which resulted from an independent, arm’s-length process and, if approved, will maximize value and bring millions of dollars into Holdings’ estate for the benefit of its creditors.

any, tangible assets remaining, the mere accrual of professional fees must be distinguished from actual out-of-pocket losses.”); *In re Simplexity LLC*, June 4, 2014 Hr’g Tr., ECF No. 351, at 34:2-5 (“I think it’s also significant that, at the moment, we have a[] nonoperating debtor. So there is – there are not significant operating expenses that are further diminishing the assets of the debtor.”). The opposite approach would lead to absurd results—namely, any non-operational company would be immediately considered to suffer from a “continuing loss” the moment it files for chapter 11.

47. Furthermore, even if Holdings had experienced some “loss” at this stage, it would be nonsensical to suggest it has been “continuing” when the bankruptcy case just began and is scheduled to last less than two months. *See In re Gabriel Techs. Corp.*, 2013 WL 2318581, at *3 (“[T]he court must consider how long a situation must persist to be said to be continuing for purposes of § 1112(b)(4)(A).”); *In re Simplexity LLC*, June 4, 2014 Hr’g Tr., ECF No. 351, at 33:14-16 (denying motion to convert filed two months after the petition date).

48. The Noteholders fail to cite a single case with analogous facts—*i.e.*, where a debtor’s administrative expenses were limited to professional fees and the debtor had secured a source of recovery that would entirely cover the cost of those expenses. (*See* Conversion Motion ¶ 38) (citing *In re Great Am. Pyramid Joint Venture*, 144 B.R. 780 (Bankr. W.D Tenn. 1992) (debtor had no guaranteed source of funding to cover the costs of administering the case); *FRGR Managing Member LLC*, 419 B.R. 576 (Bankr. S.D.N.Y. 2009) (same); *In re Tracey Serv. Co.*, 17 B.R. 405 (Bankr. E.D. Pa. 1982) (same); *In re W.J. Rewolt Co.*, 22 B.R. 459 (Bankr. E.D. Mich. 1982) (same); *see also see also Loop Corp.*, 379 F.3d at 516 (debtor had certain cash assets in the estate, but had not secured other funding to offset administrative costs, and this “negative cash flow” resulted in diminution of estate)). And again, the Noteholders rely on cases involving

circumstances in which conversion occurred well after the chapter 11 case's "embryonic" stage. (See Conversion Motion ¶ 38) (citing *Loop Corp.*, 379 F.3d at 513-14 (conversion motion filed five months after petition date and granted one month later because court wanted to give parties additional time to put forth a confirmable plan); *In re Great Am. Pyramid Joint Venture*, 144 B.R. 780 (case converted thirteen months after petition date); *FRGR Managing Member LLC*, 419 B.R. at 578 (conversion motion filed seven months after petition date); *In re Tracey Serv. Co.*, 17 B.R. at 406-07 (conversion granted five months after chapter 11 case began and no plan or disclosure statement had been filed by debtor)).

49. Because the Noteholders cannot show the existence of a "continuing loss" of Holdings' estate, cause for conversion does not exist pursuant to section 1112(b)(4)(A) and the Court need not consider the "rehabilitation" aspect of section 1112(b)(4)(A). See *In re Gabriel Techs. Corp.*, 2013 WL 2318581, at *3.

2. There is a Reasonable Likelihood of Rehabilitation

50. Even assuming, *arguendo*, that the Noteholders can establish a "continuing loss" (which is not possible before the Holdings Settlement Motion is decided), they would also need to prove the "absence of a reasonable likelihood of rehabilitation." § 1112(b)(4)(A). The Noteholders argue that, because Holdings has no operations and the proposed plan calls for it to be liquidated, it cannot be "rehabilitat[ed]." But this position mistakes the purpose behind section 1112(b)(4)(A)'s "rehabilitation" requirement and the provision's application to non-operating debtors.

51. The purpose of section 1112(b)(4)(A) is to "prevent [t]he debtor in possession from gambling on the enterprise at the creditors' expense when there is no hope of rehabilitation." *In re Lizeric Realty Corp.*, 188 B.R. 499, 503 (Bankr. S.D.N.Y. 1995) (citing pre-amendment version of statute). Although this purpose may be implicated where an operating entity is languishing in

bankruptcy and burning through estate resources without any hope of re-emergence, it is an entirely different matter where, as here, a non-operating debtor files with the intent to accomplish a chapter 11 liquidation. In the latter scenario, courts have recognized that a debtor need not have plans to reorganize as a going concern to avoid conversion to chapter 7. *See In re AIG Financial Products Corp.*, 2023 WL 3360562, at *9 n.80 (noting that “reorganization . . . is not the only appropriate use of Chapter 11 since the Code clearly contemplates liquidating plans.”) (quoting *In re PPI Enterprises (U.S.), Inc.*, 324 F.3d 197, 211 (3d Cir. 2003)); *In re R & S St. Rose Lenders, LLC*, 2016 WL 3536533, at *6 n.11 (Bankr. D. Nev. 2016) (denying conversion motion and declining to hold that “rehabilitation” excludes liquidating plans even where chapter 11 proceeding was pending for five years without a confirmed plan).¹⁹

52. Rather, “rehabilitation” in liquidation cases is synonymous with the maximization of the value of the estate. *See In re Honx, Inc.*, 2022 WL 17984313, at *3 (Bankr. S.D. Tex. Dec. 28, 2022) (explaining that “rehabilitation” in the liquidation context is “better read as encompassing a debtor’s intention to use the bankruptcy process to prevent a complete and total loss of value” and holding that the debtor “met [the rehabilitation] standard by pointing out that, in bankruptcy, it is able to secure funding from its parent with which it may be able to pay [creditors]”).

53. Here, Holdings has undertaken extensive efforts to maximize value for the Holdings estate: the Independent Manager conducted a thorough investigation into the Distribution Claims and participated in arm’s-length negotiations with the Recipients to secure a substantial settlement payment for Holdings in exchange for the release of estate causes of action

¹⁹ *See also In re The 1031 Tax Group, LLC*, 374 B.R. at 93 (denying motion to appoint trustee or convert where Debtors were operating businesses in “wind-down mode” because debtors were working diligently to file a confirmable plan of liquidation).

that the Independent Manager deemed substantially uncertain to succeed if litigated.²⁰ Through the Rule 9019 process, Holdings seeks to maximize value of its only assets—the Distribution Claims—by gaining approval of the Holdings Settlement and bringing millions of dollars into the estate for the benefit of all stakeholders, including creditors.

54. The Noteholders’ interpretation of “rehabilitation” is too narrow and inconsistent with the availability of liquidation under chapter 11. *See In re Honx, Inc.*, 2022 WL 17984313, at *3 (“There is no ongoing business requirement in the Code.”) (citing *Toibb v. Radloff*, 501 U.S. 157, 161 (1991)); *In re Deer Park, Inc.*, 136 B.R. 815, 818 (B.A.P. 9th Cir. 1992), *aff’d*, 10 F.3d 1478 (9th Cir. 1993) (“Although the word ‘reorganization’ might commonly bring to mind ongoing operations, Congress explicitly placed language providing for liquidation within Chapter 11, which is titled ‘Reorganization.’”). If the Noteholders’ position were accepted—*i.e.*, that Holdings cannot be “rehabilitated” because it seeks to liquidate in chapter 11—then no liquidating holding company could ever file for chapter 11 relief in Delaware without risking immediate conversion to chapter 7. *See In re Honx, Inc.*, 2022 WL 17984313, at *3 (“By the [movant’s] logic, any chapter 11 process that purports to create a plan of liquidation rather than reorganization, for example, would be dismissed for cause. Yet, sometimes, a plan of liquidation is better for all parties . . . than allowing the provisions of chapter 7 . . . to dictate the liquidation process.”). The Court should not allow such a result.

²⁰ The Noteholders claim they were “induced” to purchase the Holdings PIK Notes based on allegedly misleading representations about Holdings’ business, specifically with respect to location contracts. (Conversion Motion ¶¶ 7, 9-10). Even if true, the Noteholders’ allegations would, at most, give rise to potential *direct claims* (*i.e.*, claims belonging to the creditors, not Holdings), such as fraudulent inducement, that ***are not being released under the Holdings Settlement***. And in any event, the Noteholders admit that they are only speculating. (*See* Conversion Motion ¶ 13 (“***If these facts are borne out*** . . . [the Holdings Distributions were] actual fraudulent conveyance[s].”) (emphasis added)).

55. The Noteholders' authorities are not persuasive. *In re BH S&B Holdings, LLC*, 439 B.R. 342 (Bankr. S.D.N.Y. 2010) involved an operating company that had been languishing in bankruptcy for over a year without proposing a plan of liquidation or reorganization—a starkly different scenario from Holdings' chapter 11 case, which is only weeks old and which includes a proposed plan. In the other case cited by the Noteholders, *In re 15375 Memorial Corp.*, 386 B.R. 548 (Bankr. D. Del. 2008), the bankruptcy court denied the conversion motion.²¹

D. Unusual Circumstances Exist Such That Conversion to Chapter 7 Is Not in the Best Interests of Holdings' Creditors and the Estate

56. Even if the Noteholders were able to establish “cause” for conversion to chapter 7 under section 1112(b)(4)(M), “unusual circumstances” establish that conversion is not appropriate. 11 U.S.C. § 1112(b)(2). Section 1112(b)(2) gives courts discretion to deny conversion where unusual circumstances establish that conversion is not in the best interests of creditors and the estate, and the party opposing conversion demonstrates that (i) there is a reasonable likelihood that a plan will be confirmed within a reasonable time and (ii) the grounds for conversion include an act or omission “for which there exists a reasonable justification” and “that will be cured within a reasonable period of time.” *Id.* Courts have substantial discretion to determine whether there are unusual circumstances that weigh against conversion. *See In re The 1031 Tax Group, LLC*, 374 B.R. at 93 (“The statute explicitly provides for this discretion where a court is able to identify unusual circumstances.”). While the Bankruptcy Code does not define “unusual circumstances,” the definition “contemplates conditions that are not common in most chapter 11 cases.” *In re Dovetail, Inc.*, 2008 WL 5644889, at *3 (Bankr. N.D. Ill. Dec. 31, 2008).

²¹ On appeal, the District Court reversed and granted conversion on the grounds that the bankruptcy filing was not made in good faith. 400 B.R. 420, 429 (D. Del. 2009).

57. The circumstances here are unusual. To begin, the Noteholders have taken the radical step of filing the Conversion Motion just three days after Holdings filed for chapter 11 relief (and mere hours before the first-day hearing). As Delaware courts have held, a creditor's request to convert a chapter 11 case to a chapter 7 case in the infancy of the chapter 11 process is an "unusual circumstance" in and of itself. *In re Simplicity LLC*, June 4, 2014 Hr'g Tr., ECF No. 351, at 33:14-16 ("The fact that the case was filed only two months ago is unusual. I don't see motions to convert cases that are only two months old."); June 13, 2014 Order, ECF No. 353 (order denying motion to convert); Oct. 23, 2014 Order, ECF No. 543-1 (denying second motion to convert; noting that "[t]he Court previously denied a motion to convert these cases, finding unusual circumstances existed – in particular that the case was then only two months old.").

58. The Noteholders' self-serving and aggressive tactics make the circumstances even more unusual. Not only does the Conversion Motion seek to seize control of Holdings' bankruptcy process and deprive Holdings of the opportunity to realize the significant and immediate gain that the Holdings Settlement would yield for the Holdings estate for the benefit of creditors, but it also asks the Court to take extraordinary measures in displacing management similar to what the court described in *In re MatlinPatterson Glob. Opportunities Partners II L.P.*, 644 B.R. at 438 (noting that "[c]hanging horses midstream [by appointing a chapter 7 trustee] . . . would be inefficient, costly, slow, and contrary to the estates' interests in timely and cost-effective resolution").

59. Similar circumstances exist here. Indeed, conversion of the case before the Court can consider the merits of the Holdings Settlement Motion would compromise substantial value that is only available to Holdings' estate in this chapter 11 case. Moreover, courts recognize that liquidation through chapter 11, as opposed to chapter 7, is often in the best interests of all stakeholders. *See In re Deer Park, Inc.*, 136 B.R. at 818 ("[A] debtor's continuing participation

in a planned, orderly liquidation may in fact be necessary to bring about the maximum recovery for the creditors, as opposed to the amount realized from a forced sale.”); *In re Honx, Inc.*, 2022 WL 17984313, at *3 (“[S]ometimes, a plan of liquidation is better for all parties than . . . allowing the provisions of chapter 7 or a race to the courthouse to dictate the liquidation process.”). Among other things, a chapter 7 liquidation requires a trustee to use considerable time and resources to familiarize herself with the facts and circumstances of a case, whereas liquidation under a chapter 11 allows knowledgeable management and their professionals who are already familiar with the case to administer the liquidation process. As the Ninth Circuit has observed:

A liquidation under Chapter 11 allows the debtor in possession, one who is presumably more familiar with the assets of the debtor’s organization and its respective values, the ability to plan for an orderly divestiture of the assets over time as opposed to a Chapter 7 trustee, who is generally less familiar with the debtor’s assets. A Chapter 11 plan, even though a liquidating plan, must still conform to the same statutory requirements of any other Chapter 11 reorganization. A liquidating plan is desirable when the debtor in possession can bring about a greater recovery for the creditors than would a straight liquidation under Chapter 7.

In re Deer Park, Inc., 136 B.R. at 818; *see also In re All Am. of Ashburn, Inc.*, 40 B.R. 104, 108-10 (Bankr. N.D. Ga. 1984) (case should not be converted because administrative expenses would be greater under chapter 7 due to duplication of legal work).

60. In addition to “unusual circumstances” militating against conversion, there is a reasonable likelihood that Holdings will be able to confirm a plan within a reasonable time, which satisfies the requirements of section 1112(b)(2)(A)-(B). It is entirely “reasonable” to expect that the Holdings Settlement—which resulted from a good faith, arm’s-length process directed by an independent fiduciary—will be approved, which will facilitate Holdings’ efforts to build consensus for a confirmable chapter 11 plan.

61. The Noteholders have cited no authority in support of their position that a chapter 7 trustee is warranted in a situation such as this, where an independent fiduciary has already investigated potential claims held by the debtor and determined that those claims have a substantially uncertain likelihood of success and yet negotiated a \$15,000,000 settlement. (*See* Conversion Motion ¶ 41) (citing *In re Team Systems Int'l*, 640 B.R. 296, 312, 320-21 (Bankr. D. Del. 2022) (appointing chapter 7 trustee where allegations of debtor's wrongdoing, including the fabrication of evidence and serious litigation misconduct in the bankruptcy case, had substantial and well-documented evidentiary support)).

E. Holdings' Bankruptcy Case Serves a Legitimate Bankruptcy Purpose

62. Finally, the Noteholders claim that Holdings' bankruptcy filing fails to serve a valid reorganizational purpose because it anticipates a plan of liquidation (as opposed to reorganization) and was allegedly filed "solely to approve an insider deal reached with themselves." (Conversion Motion ¶ 21). For the reasons set forth in the Goldman Declaration and discussed above, the Court should reject the Noteholders' suggestion that the Holdings Settlement is anything other than the culmination of a good-faith and arm's-length process conducted by an independent fiduciary.

63. It is indisputable that Holdings' chapter 11 case was filed for a legitimate purpose. Many courts have explained that liquidation serves a valid chapter 11 purpose where it "maximiz[es] the value of the estate"—specifically, where it "preserv[es] some value in bankruptcy that would otherwise be lost" outside of the bankruptcy." *AIG Financial Products Corp.*, 2023 WL 3360562, at *8-9 (holding that "because the [d]ebtor is hopelessly insolvent and has a valid reorganizational purpose . . . the Debtor's bankruptcy filing satisfies the implicit good faith requirement of section 1112(b)"); *see also In re Integrated Telecom Express, Inc.*, 384 F.3d at 120 n.4 ("[L]iquidation plans, no less than reorganization plans, must serve a valid bankruptcy purpose. That is, they must either preserve some going concern value, *e.g.*, by liquidating a

company as a whole or in such a way as to preserve some of the company’s goodwill, *or by maximizing the value of the debtor’s estate.*”) (emphasis added).

64. Here, Holdings commenced this chapter 11 case for the legitimate purpose of maximizing the value of its estate. Through the Holdings Settlement Motion, Holdings seeks to maximize the value of the Distribution Claims by gaining approval of the Holdings Settlement and bringing millions of dollars into the estate for the benefit of all stakeholders, including creditors. As noted above, the Holdings Settlement reflects the culmination of a thorough investigation into the Distribution Claims and arm’s-length negotiations to secure \$15,000,000 for Holdings in exchange for the release of estate causes of action that the Independent Manager deemed substantially uncertain to succeed if litigated. The Holdings Settlement thus maximizes value for the Holdings estate. Moreover, the benefits of the Holdings Settlement would not be available outside of chapter 11.

65. The one case the Noteholders cite to support its improper bankruptcy purpose argument is irrelevant; it held that the debtor’s bankruptcy petition served no legitimate purpose *because the debtor was “highly solvent”* at the time it filed for chapter 11, “with access to cash to meet comfortably its liabilities as they came due for the foreseeable future.” *In re LTL Mgmt., LLC*, 64 F.4th 84, 108 (3d Cir. 2023) (emphasis added).

66. Moreover, it is entirely appropriate and commonplace for a holding company to commence a chapter 11 case together with its family of reorganizing corporate entities. Indeed, courts have repeatedly recognized that “the nature of [the] corporate family create[s] an ‘identity of interest’” that makes it entirely reasonable and necessary to “consider[] . . . the interests of the group as well as the interests of the individual debtor” in determining whether to file a chapter 11 petition—a decision that is inherently “sensitive and fact-specific.” *In re Gen. Growth Properties*,

Inc., 409 B.R. at 62-63 (quoting *In re U.I.P. Engineered Prod. Corp.*, 831 F.2d 54, 56 (4th Cir. 1987) (holding that it was “clearly sound business practice” for parent company to “seek Chapter 11 protection for its wholly-owned subsidiaries when those subsidiaries were crucial to its own reorganization plan”)). Indeed, failure to consider and act upon the group’s interests when making such a critical decision could lead to “disastrous” consequences in some cases. *In re Mirant Corp.*, 2005 WL 2148362, at *6 (holding that decision to place “key and integrated member of the [debtors’] corporate family” in chapter 11 was done in good faith and noting that “[a] failure to file for an entity that is a principal member of the [corporate] family could prove disastrous if relief in fact was necessary”). This is particularly relevant where, as here, conversion to chapter 7 could undermine the corporate group’s ability to effectively reorganize, and the creditor extended credit recognizing that its obligor was part of a larger group. *See In re Gen. Growth Properties, Inc.*, 409 B.R. at 61 (emphasizing that the creditor movants “do not contend that they were unaware that they were extending credit to a company that was part of a much larger group, and that there were benefits as well as possible detriments from this structure”); *In re Mirant Corp.*, 2005 WL 2148362, at *6 (observing that where “the need for rehabilitation of the corporate family enterprise is obvious, it is clearly a valid use of chapter 11 to address that need”).

67. In the event Holdings had not commenced a chapter 11 case, the consequences for its corporate group could have been severe. As Holdings serves as the manager of each of the OpCo Debtors, the Board at Holdings effectively oversees the affairs of the Debtors’ business operations. The Debtors operate in a heavily regulated, competitive, and evolving industry. Their business operations require constant oversight from the Board, which includes individuals who have years of experience with the Debtors’ business and industry. Of course, the business challenges confronting any board become more acute when the underlying business is in distress.

This was particularly relevant for the Debtors, given the challenges confronting the Georgia COAM industry. Without the protections afforded by the automatic stay, creditors could have exercised remedies against Holdings that could have significantly undermined both the Debtors' business operations and their restructuring efforts. Courts have recognized the legitimate need to take action to protect the corporate group in such circumstances.

68. Notably, the same concerns attendant to an exercise of remedies by creditors would be implicated by the appointment of a chapter 7 trustee for Holdings. To the extent a chapter 7 trustee is appointed and supplants the members of the Board, the affairs of the Debtors' corporate group would be directed by a newly-appointed trustee who is not familiar with the Debtors' business or industry. This could have significant consequences for both the Debtors' business operations and their restructuring, including for the reasons noted by the Court in *In re MatlinPatterson Glob. Opportunities Partners II L.P.*:

The motion asks to eject from the case knowledgeable debtor-in-possession management and highly skilled counsel who have invested enormous resources in developing their knowledge and strategy for navigating Debtors' challenging situation. Converting the case—and no movant seeks dismissal—would put in place a Chapter 7 trustee who, no matter how skilled, would need to learn the case, evaluate and retain professionals, and determine how best to manage the demands of Debtors' sophisticated and litigious creditors. It would surely take months for a Chapter 7 trustee and his or her professionals to get up to speed and even begin to be able to litigate or negotiate disputes that the incumbent Debtor team has mastered and is seeking to resolve. Changing horses midstream in this manner would be inefficient, costly, slow, and contrary to the estates' interests in timely and cost-effective resolution.

644 B.R. at 438.

69. Although Holdings does not believe the Noteholders can satisfy their burden of establishing cause for the conversion of this case to chapter 7 at this time, Holdings believes it prudent to note to the Court the potential implications of the displacement of the Board. For this

reason, along with the other reasons set forth above, the Court should not convert Holdings' case to chapter 7 at this time.²²

CONCLUSION

70. For all the foregoing reasons, the Conversion Motion should be denied.

[Remainder of page intentionally left blank]

²² In a single sentence, the Noteholders request, in the alternative, that the Court appoint a chapter 11 trustee. (Conversion Motion ¶ 41). The Court should deny this request. For the reasons discussed herein, the Noteholders cannot carry their high burden of showing that appointment of a chapter 11 trustee is warranted or in the interest of Holdings' stakeholders.

Dated: June 22, 2023
Wilmington, Delaware

/s/ Russell C. Silberglied

Russell C. Silberglied (No. 3462)
David T. Queroli (No. 6318)
Matthew P. Milana (No. 6681)
Richards, Layton & Finger, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Telephone: 1 (302) 651-7700
Fax: 1 (302) 651-7701
Email: silberglied@rlf.com
queroli@rlf.com
milana@rlf.com

- and -

Dennis F. Dunne (admitted *pro hac vice*)
Tyson Lomazow (admitted *pro hac vice*)
MILBANK LLP
55 Hudson Yards
New York, New York 10001
Telephone: 1 (212) 530-5000
Fax: 1 (212) 530-5219
Email: DDunne@Milbank.com
TLomazow@Milbank.com

Andrew M. Leblanc (admitted *pro hac vice*)
Samir L. Vora (admitted *pro hac vice*)
MILBANK LLP
1850 K Street, N.W.
Suite 1100
Washington, DC 20006
Telephone: 1 (202) 835-7500
Fax: 1 (202) 263-7586
Email: ALeblanc@Milbank.com
SVora@Milbank.com

*Proposed Co-Counsel to the
Debtors and Debtors in Possession*

Exhibit A

***Simplexity* Transcript**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: Chapter 11
SIMPLEXITY, LLC, et al, Case No. 14-10569 (KG)
Debtors. Courtroom No. 3
824 Market Street
Wilmington, Delaware 19801
Wednesday, June 4, 2014
.

TRANSCRIPT OF MOTION OF FIFTH THIRD BANK TO CONVERT CASES TO
CASES UNDER CHAPTER 7
BEFORE THE HONORABLE KEVIN GROSS
CHIEF UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors: Robert S. Brady, Esq.
Kenneth J. Enos, Esq.
YOUNG, CONAWAY, STARGATT
& TAYLOR, LLP
Rodney Square
1000 North King Street
Wilmington, Delaware 19801

(Appearances Continued)

Audio Operator: Electronically Recorded
by Ginger Mace, ECRO
Transcription Company: Reliable
1007 N. Orange Street
Wilmington, Delaware 19801
(302) 654-8080
Email: gmatthews@reliable-co.com

Proceedings recorded by electronic sound recording, transcript
produced by transcription service.

1 APPEARANCES: (Continued)

2 For the Official Committee
3 of Unsecured Creditors: Christopher A. Ward, Esq.
4 POLSINELLI, PC
222 Delaware Avenue, Suite 1101
5 Wilmington, Delaware 19801

6 Michael P. Richman, Esq.
7 HUNTON & WILLIAMS, LLP
200 Park Avenue
8 New York, New York 10166

9 For Fifth Third Bank: Paul N. Heath, Esq.
10 RICHARDS, LAYTON & FINGER, PA
920 North King Street
11 Wilmington, Delaware 19801

12 Randall L. Klein, Esq.
Kenneth Ulrich, Esq.
13 GOLDBERG KOHN, LTD
55 East Monroe Street, Suite 3300
14 Chicago, Illinois 60603

15 For Adeptio Funding, LLC: Michael W. Yurkewicz, Esq.
16 KLEHR, HARRISON, HARVEY
& BRANZBURG, LLP
17 919 Market Street
Wilmington, Delaware 19801

18 Michael H. Torkin, Esq.
SULLIVAN & CROMWELL, LLP
19 125 Broad Street
New York, New York 10041

20 For Wal-Mart Stores, Inc.: Jeremy W. Ryan, Esq.
POTTER, ANDERSON & CORROON, LLP
1313 North Market Street
Wilmington, Delaware 19801

21

22 (Appearances Continued)

23

24

25

1 APPEARANCES VIA TELEPHONE:

2 For Fifth Third Bank: Prisca Kim, Esq.
GOLDBERG KOHN, LTD

3 For Adeptio Funding, LLC: Mark Schneiderman, Esq.
4 SULLIVAN & CROMWELL, LLP

5 For Sprint Solutions, Inc.: David Swan, Esq.
MCGUIREWOODS

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

Page

ARGUMENT

COURT DECISION

1 (Proceedings commence at 3:03 p.m.)

2 THE COURT: Good afternoon, everyone. Please be
3 seated. It's good to see you, and I know that we're here on a
4 matter that probably has some people exercised, so -- with an
5 "E," not an "O."

6 MR. BRADY: Good afternoon, Your Honor.

7 THE COURT: Good afternoon.

8 MR. BRADY: Robert Brady on behalf of Simplexity, LLC,
9 et al. We've learned to expect the unexpected in the
10 Simplexity case.

11 THE COURT: Oh, yes.

12 MR. BRADY: But Your Honor, as set forth on the
13 agenda, everything has had an order entered, so we're really
14 down just to Fifth Third's motion to convert.

15 THE COURT: Yes.

16 MR. BRADY: I will yield to Mr. Klein.

17 THE COURT: All right. Well, thank you, Mr. Brady.

18 Good afternoon, Mr. Klein.

19 MR. KLEIN: Good afternoon, Your Honor. Randy Klein
20 on behalf of Fifth Third Bank.

21 This morning, Your Honor, we filed a reply brief.

22 THE COURT: I saw that, yes; I did see it. Read it,
23 even.

24 (Laughter.)

25 THE COURT: I didn't just see it; I even read it, so

1 ...

2 MR. KLEIN: Thank you, Your Honor. I will adjust my
3 comments accordingly.

4 This motion is a straightforward motion to convert an
5 administratively insolvent estate that is getting increasingly
6 more insolvent. For today, there's really only four points to
7 consider:

8 Is there a continuing loss or diminution? We say
9 there is. We believe it's been admitted to.

10 Have the debtors ceased operating? That's
11 indisputable.

12 Are there unusual circumstances in this case to
13 justify keeping the cases in Chapter 11, as being in the best
14 interest of creditors and the estates? We believe no.

15 And is it reasonably likely that a plan will be
16 confirmed in this case within a reasonable period of time?
17 Again, no.

18 So why isn't this case, like other 363 sale cases,
19 Ritz Camera, for example, that -- where the debtors
20 consensually convert the case to Chapter 7? We believe the
21 answer here is because the debtors are controlled by their
22 board, who does not want a Chapter 7 Trustee investigating
23 them. They'll lose their attorney/client privilege.

24 And they know that, typically, D&O insurance has an
25 insured-versus-insured exclusion that won't apply, unless an

Argument

7

1 estate representative is appointed, so -- or that will apply,
2 unless an estate representative is appointed. So they don't
3 want to have a trustee.

4 And the committee's pleading is just an attempt to
5 distract from the merits of the conversion, so they can control
6 yet unfiled allegations of equitable subordination or some
7 other claim that they think will yield a greater recovery to a
8 subset of creditors than a recovery that would be shared
9 ratably from D&O proceeds and preference litigation.

10 I want to make it clear, Your Honor, that we didn't
11 file this motion as some sort of strategic attempt to cut off
12 the investigation period. We filed the motion after the Wal-
13 Mart sale had been consummated, and in enough time to be on for
14 today, on 21 days notice. So that was the timing for the
15 motion.

16 Fifth Third has not delayed any investigation, either.
17 They produced 150,000 documents -- pages of documents, seven
18 custodians, in a thirty-day period. My colleague Mr. Ulrich is
19 here today if Your Honor has any concerns at all about the
20 production and any allegations of delay on the part of Fifth
21 Third.

22 Fifth Third will also work with any Chapter 7 Trustee
23 to come up with a reasonable time frame for the trustee to
24 discuss with the committee counsel whatever they think they've
25 discovered. We invite that. We would also invite scrutiny

1 that the debtors have not brought and cannot bring with respect
2 to the actions of their client.

3 So there's no reason, from our perspective, to keep
4 these cases in Chapter 11, with two sets of professionals,
5 neither of whom are pursuing any D&O investigation, when one
6 objective trustee can carry out the obligations of the estate.

7 The committee called our argument about harm
8 "specious," on the basis that nobody's ox is being gored. It's
9 simply untrue. Fifth Third has a DIP claim that isn't paid,
10 and it holds the largest unsecured claims. We believe there
11 are preference actions and other causes of action that will --
12 once we get through the DIP payment, will be shared ratably by
13 unsecured creditors.

14 Fifth Third also holds Adeptio's claim by a
15 subordination agreement. So, by our calculation, roughly 70
16 percent of all distributions are going to come back to Fifth
17 Third and will be diluted, we're paying for 70 percent of the
18 professional fees that are being incurred in this Chapter 11
19 case. So there is harm, and everybody is being harmed in that
20 respect, by the continued incurrence of professional fees. And
21 that will happen, it's true, in every liquidating 11.

22 But the creditors' committee doesn't really care about
23 that because, to them, this litigation, or at least to the
24 other creditors, it's free. The professional fees will be
25 incurred, they'll get paid out of avoidance action proceeds.

1 And they would much rather go for the home run, and try and
2 subordinate Fifth Third's claim. We understand that. But
3 that's not what, necessarily, a Chapter 7 Trustee is going to
4 do, and how they're going to look at it, for the benefit of the
5 estate, preserving all of the estate.

6 So, with continuing losses and diminution and no
7 operating business, we're at the point, under 1112, that
8 mandates conversion. And it shifts: Will the debtors and the
9 committee demonstrate to this Court that there are unusual
10 circumstances that would justify a determination that it's in
11 the best interest of creditors and the estate to stay in
12 Chapter 11? We don't think there's any unusual circumstances
13 here. The creditors' committee is bringing litigation against
14 the senior secured lender. That happens a lot.

15 So then the issue is -- I think the final issue is:
16 Is there the reasonable likelihood of a confirmed plan within a
17 reasonable period of time?

18 THE COURT: Tell me what you think is a reasonable
19 period of time, because we're only about two months into the
20 case.

21 MR. KLEIN: Well, I think the -- I would say this.

22 THE COURT: Certainly well within the preference --
23 the exclusivity period.

24 MR. KLEIN: We are within about another month of the
25 exclusivity period --

1 THE COURT: Right.

2 MR. KLEIN: -- we're three months in. So my view is,
3 if their plan is predicated on litigation, which the committee
4 says that it is, in order to pay the administrative claims like
5 Fifth Third's unpaid DIP loan, to get a plan confirmed, they
6 have to litigate to get there. Fifth Third is not going to lay
7 down. They're going to litigate and defend themselves --

8 THE COURT: Sure.

9 MR. KLEIN: -- aggressively. So that's going to take
10 a much longer time than any -- whether it's a month, two, or
11 three months, it will take substantially longer than that. It
12 can take years, based on the kinds of allegations that they're
13 making. No commercial bank is going to accept the kind of
14 allegations that are being made here, that somehow justifies
15 equitable subordination.

16 So, and our view, even if there were unusual
17 circumstances to get to that last prong about a reasonable
18 likelihood of a confirmed plan within a reasonable period of
19 time, that being the fourth of the four issues, it will take a
20 long time before any litigation was resolved.

21 THE COURT: Now do you think that the committee is
22 controlled by the board?

23 MR. KLEIN: No, Your Honor.

24 THE COURT: Okay. And it's the committee that, right
25 now, is investigating, and will presumably be the party that

1 brings any action or takes any action against Fifth Third Bank.

2 MR. KLEIN: Other standing issues that they would --

3 THE COURT: Sure.

4 MR. KLEIN: -- that would have to be addressed.

5 THE COURT: True.

6 MR. KLEIN: So we don't know what kind of -- what kind

7 of counts they think that they can bring. But presumably,

8 either they or the debtor would be the plaintiff, if they file

9 an adversary complaint. But all of that requires more money,

10 disclosure statement, plan, confirmation hearing. And there

11 are no funds to pay for any of that.

12 So these cases were fast-tracked as sales to try and

13 preserve some jobs and maximize the remaining value, and that's

14 done. So if -- whatever reason there had been, if there ever

15 was any reason for these cases to be in Chapter 11, it's over.

16 There's no more reason to stay in Chapter 11, when you're down

17 to what we're down to here, pure litigation, investigation,

18 board claims, lender claims, preference claims. That's what

19 Chapter 7 is for. Thank you, Your Honor.

20 THE COURT: Thank you, Mr. Klein.

21 Mr. Brady.

22 MR. BRADY: Good afternoon again, Your Honor.

23 THE COURT: Good afternoon.

24 MR. BRADY: Robert Brady on behalf of Simplexity.

25 Your Honor, as set forth in our papers, I think there

1 are still very serious questions of whether Fifth Third has met
2 its heavy burden of cause to require conversion of these cases.
3 Obviously, I think it's admitted that the estate does have
4 causes of action, and it is investigating those and can pursue
5 those, to the extent appropriate, but --

6 THE COURT: And in fact, the investigation period is
7 still --

8 MR. BRADY: Is --

9 THE COURT: -- eight days off --

10 MR. BRADY: Precisely, Your Honor.

11 THE COURT: -- the end period.

12 MR. BRADY: But even Fifth Third concedes that this
13 drastic result they're asking for so early in the case,
14 conversion, is not required if there are unusual circumstances
15 --

16 THE COURT: Yes.

17 MR. BRADY: -- and a reasonable likelihood of a plan
18 being confirmed in a reasonable period of time.

19 I'm, frankly, surprised that there's any debate that
20 this case is unusual. Fifth Third even says so in Paragraph 8
21 of its reply. They say this case is different, and they go on
22 to provide its reasons that the case deviates from what they
23 call the "typical protocol" in a Section 363 sale case.

24 Your Honor, I can tell you some things that are very
25 unusual about this case. One is the layering of the DIP. Your

1 Honor heard a lot about that in our various DIP hearings.

2 Fifth Third mentioned several times in their motion
3 and their response as a basis for cause that the DIP is in
4 default and remains unpaid. Well, Your Honor, we saw that one
5 coming. It's really the ultimate in gamesmanship to bury the
6 DIP behind \$15 million of prepetition debt, and then complain
7 that the DIP hasn't been repaid.

8 That's why the debtors negotiated a provision that
9 doesn't allow Fifth Third to exercise any remedies while the
10 challenge period is open or if a challenge is outstanding;
11 again, a very unusual provision of a DIP.

12 THE COURT: Uh-huh.

13 MR. BRADY: You may argue -- we didn't raise it -- but
14 this violates the DIP order, in the sense that this is, in
15 effect, an exercise of remedies. But the only reason -- to be
16 clear, Your Honor, the only reason the DIP hasn't been repaid
17 is because Fifth Third put it behind \$15 million of its
18 prepetition debt.

19 This case is unusual because Fifth Third wouldn't
20 properly fund the case; and, instead of funding -- reaching an
21 agreement on a proper funding of the budget, left the parties
22 to relief under Section 506(c). So you can expect that you'll
23 see a 506(c) action in this case.

24 Fifth Third indicated here that they're bearing the
25 brunt of the continuing cost of the Chapter 11 cases. They

1 didn't tell you they were paying them. They say they were
2 accruing, but they didn't say they're paying them because
3 they're not. They are paying only what they are required to
4 under the budget, and nothing else.

5 THE COURT: And you don't have an operating company at
6 this point, so there are not operating expenses.

7 MR. BRADY: Correct, Your Honor. The committee, the
8 debtors, we're working to evaluate assets of the estate, in an
9 effort to maximize the value of those assets, all with the hope
10 that -- for some resolution to this case, or a result in the
11 case where counsel can be paid.

12 This case is also unusual because Fifth Third insisted
13 on a challenge period in the DIP. Now challenge periods are
14 fairly standard. But that's when the debtor is stipulating to
15 all of the facts of the allowed nature of the claim.

16 THE COURT: Right.

17 MR. BRADY: There's no stipulation to this DIP.

18 THE COURT: That's right.

19 MR. BRADY: So no one has stipulated that Fifth
20 Third's claim was money good [sic], yet, they still insisted on
21 a challenge period.

22 You may recall the Adeptio DIP that we had first
23 presented to the Court --

24 THE COURT: Right.

25 MR. BRADY: -- had no stipulations and had no

1 challenge period. So they insist on a challenge period, and
2 then ask to convert the case on the eve of that challenge
3 period.

4 I think it's telling, Your Honor, that the only
5 creditor that is here today seeking conversion is the one
6 creditor that is the potential -- a potential target of a
7 lawsuit. Now the debtors and the committee do not believe that
8 conversion is in the best interest of the creditors of the
9 estate.

10 Fifth Third goes to some length in their papers to
11 wonder why the focus seems to only be on Fifth Third, and a
12 potential cause of action against Fifth Third. Well, it's --
13 the answer is simple. We are required to focus on potential
14 causes of action of Fifth Third because of the challenge
15 deadline. There is no other cause of action with an imminent
16 deadline. And so efforts to review those potential estate
17 causes of action can wait, while we address the one that we're
18 required to address at Fifth Third's insistence.

19 I think, really, Fifth Third's reply makes it crystal-
20 clear why they want the case converted. They want to control
21 who investigates Fifth Third. They don't like what they're
22 hearing out of the committee and the debtors. So they want
23 someone new -- after the parties have done virtually all of the
24 work in preparing to make a decision before the investigation
25 period, they want to change who investigates them. I think

1 it's clear, conversion is not in the best interest of the
2 creditors; it's in the best interest of Fifth Third as a
3 potential defendant.

4 Now Fifth Third says there is no likelihood of a plan
5 in this case, none, zero. Well, and that's interesting because
6 Fifth Third references in their papers that they made a good
7 faith settlement proposal. And while I won't go into the
8 substance of the settlement proposal, I can tell you, Your
9 Honor, it contemplated a plan.

10 So I think it's disingenuous to indicate that there is
11 zero likelihood of a plan in this case when the good faith
12 settlement proposal that they put forth did contemplate a plan.
13 Obviously, Fifth Third doesn't address whether their claim
14 would be feasible if efforts to equitably subordinate their
15 claim are successful. But I can tell Your Honor I think a plan
16 would be feasible in that circumstance.

17 So, while Fifth Third doesn't think much of potential
18 causes of action against it, Fifth Third does concede that the
19 debtors have, and I quote:

20 "-- valuable claims, including multi-million dollar
21 preferences and potential claims against their former
22 CEO and competitor, against whom Simplexity recently
23 obtained a TRO relating to a breach of contract."

24 So Fifth Third admits there are valuable claims out
25 there. And that is what the debtors and the committee are

1 looking at. They're addressing the claim they have to look at
2 now, potential claim, because of the challenge period, and
3 collecting information on the others. So there are clearly
4 scenarios where a plan is possible, or even likely. And that's
5 really why conversion has to be denied at this time. It's
6 simply too early to know how this case is going to unfold.

7 Fifth Third wants a trustee, Your Honor, because
8 they'll have no time and no money, really, to investigate. The
9 work has been done, largely. And again, we think Fifth Third
10 doesn't like what they're hearing and wants to change the party
11 that's investigating them.

12 I think it's really too late for a do-over. They
13 asked for this investigation period, they agreed not to
14 exercise remedies until this investigation period was over and
15 a challenge was decided. And to seek conversion now is, in
16 effect, exercising remedies on the fact that their DIP is not
17 paid.

18 THE COURT: Thank you, Mr. Brady.

19 Mr. Richman, good afternoon.

20 MR. RICHMAN: Good afternoon, Your Honor. Michael
21 Richman, Hunton & Williams, for the Official Committee of
22 Unsecured Creditors. And I apologize, my voice is a little
23 scratchy; I'm just recovering from a cold.

24 THE COURT: All right. I'll listen more carefully.

25 MR. RICHMAN: Thank you, Your Honor.

1 I want to pick up with the point that Mr. Brady just
2 made. When the case began, and the DIP was negotiated and
3 approved, everybody here knew that this is how the case was
4 going to go. We had Wal-Mart, we were going to have a 363
5 sale, maybe there was going to be competitive bidding. There
6 was going to be a closing. There was going to be an
7 investigation under the challenge period. Hundreds of
8 thousands of dollars were going to be spent, mostly by
9 committee professionals, because we were tasked with having to
10 investigate the claims against the bank.

11 The bank -- as Mr. Brady pointed out, the bank is the
12 only target in the challenge period. So when the reply that we
13 got four and a half hours before this hearing says that
14 conspicuously absent from our objection is reference to claims
15 against Adeptio or Dizinos (phonetic) or others, but there's
16 nothing conspicuous about that. It's not relevant at all.

17 THE COURT: Uh-huh.

18 MR. RICHMAN: The point is everybody knew this is how
19 it was going to go. Nothing has changed. There are no new
20 facts. So, when Mr. Klein stands here and says our filing the
21 motion for conversion before we completed the production of
22 documents and even began the production -- they filed this the
23 day before they made their data dump on is -- having
24 conveniently failed to make any rolling production at all, so
25 that we could have been doing anything in the 30 days that

1 elapsed from the time of our discovery request, prevented us
2 from doing anything.

3 So Mr. Klein stands here and says, oh, this wasn't a
4 strategic decision, we waited until Wal-Mart closed and that's
5 what dictated the timing. Really? You couldn't have timed the
6 motion and hearing for after the challenge period, which
7 expires at the end of next week, unless Your Honor extends it,
8 which we may have to ask Your Honor to do. Because, as we
9 indicated in our objection, the privilege logs by which they
10 withheld some 700 documents from us are hugely deficient, and
11 we're in discussion with them now about fixing that. And if it
12 doesn't get fixed, and if we have to look at too much in too
13 short a time because we got jammed, we may be back here next
14 week to ask for more time.

15 So it's just not credible to stand here and say this
16 wasn't a strategic decision. This had to have been planned
17 from the outset. And in a way, it's a reneging of the
18 agreements made under the DIP motion and order because you
19 don't set up a challenge period and task the professionals with
20 incurring hundreds of thousands of fees that you know you're
21 not going to fund, and put them exposed.

22 Look how many professionals are in this court today,
23 Your Honor, that aren't getting paid. All right? All here
24 because of this motion. We didn't have to be here today. We
25 could have completed the investigation. Instead, this is an

1 attempt to cut us off and to try to get somebody else to come
2 in.

3 Now I wasn't -- I'm not going to repeat what Mr. Brady
4 said, and I wasn't exactly sure how I was going to present this
5 today. But --

6 THE COURT: I can see you getting more fired up as you
7 go.

8 MR. RICHMAN: I am very fired up by the reply, Your
9 Honor --

10 THE COURT: Yeah.

11 MR. RICHMAN: -- because I take the words that lawyers
12 write very seriously, and there are some things that I am
13 sensitive to.

14 I served as co-chair of the ABI's National Ethics Task
15 Force, so I'm a little sensitive to accusations that --
16 preemptively, that I have violated Rule 11, or that Young
17 Conaway or Polsinelli have violated Rule 11. I want to read
18 this to Your Honor because this got my attention right away.
19 And if that's what Mr. Klein was trying to do, he succeeded.

20 In Paragraph 3 of his reply, he says, when he's
21 arguing why a Chapter 7 Trustee should come in, and how they'll
22 be so cooperative and give them a reasonable period of time to
23 investigate, they're going to subject the trustee to a limited
24 challenge period. That's so gracious of them. But in the next
25 sentence, they say, so the trustee can consider the committee's

1 purported claims to take any appropriate action, quote:

2 "That will provide the best assurance that any claims
3 made against Fifth Third will have at least some basis
4 in fact and law."

5 Your Honor, you don't write words like that unless you
6 are trying to send the message that you believe that the
7 professionals for the committee and for the debtors are going
8 to violate Rule 11 and their ethical responsibilities in
9 bringing claims.

10 And by the way, no claims have been brought, nor have
11 they been identified. So what we have in the reply and in Mr.
12 Klein's argument is what psychologists would call "projection:"
13 a display of the concerns they have, the worries they have
14 that they are going to be on the receiving end of claims that
15 no one has articulated.

16 Okay. That's not all. Paragraph 8, Page 5 of the
17 reply. I quote:

18 "Instead of resolving the cases, the debtors and the
19 committee have opted to engage in a vendetta against
20 Fifth Third that only increases administrative
21 expenses for no good reason. That is why Fifth Third
22 wants an independent trustee."

23 What have we done? We have -- we're investigating, as
24 the DIP order required. We have -- there is nothing -- you
25 know, I remember Mr. Klein, at the first couple of hearings,

1 arguing passionately that the Court shouldn't consider lawyer
2 arguments, and we shouldn't speak of the actions before the
3 case was filed, about which no one should speak, because we
4 didn't have evidence.

5 Where is there evidence of a vendetta? We haven't
6 done anything but serve the normal discovery requests that we
7 were expected to serve, to do the job that we were given a
8 compressed time frame to do. There's no conduct, there's
9 nothing -- we haven't come to court for a motion, we haven't
10 asked for a conference. We're dealing with it all. There's
11 nothing to support that.

12 This is a code word, to try to -- well, I think one of
13 the things that's going on is they probably decided, you know,
14 we really don't have a strong case for conversion, but we can
15 get all the lawyers to continue to drive up their unpaid fees,
16 and aggravate everybody, and have Richman stand at the podium
17 and be so angry that the Court will conclude that the committee
18 is biased, and therefore, you need a trustee. Because now
19 Richman and Brady, they're so pissed off at the bank, that they
20 can't honestly investigate and bring an unbiased investigation.
21 Maybe that's what they're thinking.

22 They say on Page 3, in Paragraph 5 of their argument,
23 in the reply that was filed four and a half hours before the
24 hearing today, that:

25 "In the context of a debtor who has ceased business

1 operations and liquidated virtually all of its assets,
2 any negative cash flow, including resulting only from
3 administrative expenses, effectively comes straight
4 from the pockets of the creditors."

5 This was the key point that we made in our objection.
6 How dare you stand here and purport to speak about the concerns
7 of creditors when all you are really doing is protecting your
8 own hide?

9 You know, Fifth Third Bank didn't even consult with
10 us. We didn't get a call from Mr. Klein saying, hey, we're
11 thinking about filing a motion to convert, what do you think.
12 All right? Admittedly, it would have been a long shot for us
13 to agree. But if you're speaking for creditors, that we are
14 the statutory official representative of, and in a -- and as we
15 say, in a liquidating 11, when all of the assets have been
16 sold, the creditors' committee should be given great deference,
17 in terms of how its constituency, the creditors, exclusive of
18 the bank, feel about how the case should be going, don't
19 pretend that you're speaking for the interests of all
20 creditors.

21 THE COURT: And if you're concerned about costs.

22 MR. RICHMAN: Right. And if you're concerned about
23 costs. We're concerned about costs.

24 You heard Mr. Klein also argue, which, again, is
25 something that I have to assume he just made up because there's

1 certainly no basis for it in any evidence or in anything that's
2 happened in the case, that we are incentivized to engage in
3 scorched-earth tactics. I think that what he said in the
4 argument is the litigation is free. I don't know what he means
5 by "free." I don't think my law firm thinks that the accrued
6 hourly rates are free. Okay? But that we would then for
7 rather go for a home run than subordinate their claim. He's
8 just making it up.

9 He says in Paragraph 13 of the reply:

10 "The committee and its professionals, who are now owed
11 hundreds of thousands of dollars, junior in priority
12 to Fifth Third" --

13 Maybe -- are -- I added "maybe." I'm going back to
14 quote now:

15 "-- are incentivized to pursue a scorched-earth
16 litigation strategy to repay their own fees, and to
17 try to get a meaningful recovery for unsecured
18 creditors, who obviously" -- "who, otherwise, are
19 substantially diluted by recoveries" --

20 He's -- there's no basis for this, there's absolutely
21 none. We have done nothing but what they required us to do in
22 the challenge period. And we haven't even brought claims. And
23 yet, we're having the message be sent to the Court that the
24 claims that we would bring are not going to be well founded in
25 law or fact, and that we're doing it because we're biased, that

1 we have a vendetta, that we have incentives to not play fair,
2 follow the rules, because we want to recover our fees, and
3 therefore, Judge, please turn this over to a trustee because
4 that's going to be so much better for creditors.

5 But how is it going to be better for creditors? All
6 of the administrative expenses that have been accrued in this
7 case will still come ahead of creditor recoveries in a Chapter
8 7. And then all the Chapter 7 administrative expenses are
9 going to come ahead. And the Chapter 7 Trustee is going to
10 have to start from scratch and redo everything that we did.

11 I will tell you, given the -- how many documents did
12 Mr. Klein say they produced to us, 150,000; 150,000 pages? And
13 there may be more. But they're just going to take -- the
14 trustee is just going to take our interpretation of that,
15 without reviewing it from scratch? And we're going to have to
16 go deeper in the hole, in order to get a trustee up to speed?
17 And then the trustee might hire us, or somebody else?

18 That -- as we said in our objection, the fact that
19 there are administrative expenses that are necessarily being
20 incurred in order to prosecute litigation is a neutral fact for
21 conversion. Creditors aren't going -- you can't assume --
22 there's no evidence, no basis to say that creditors, including
23 Fifth Third, are going to be any better off if these cases are
24 pursued by a trustee than they are in the 11, if it stays in
25 11.

1 So the reply, to my way of thinking -- and I have a
2 pretty thick skin, and I've been involved in a lot of cases
3 over my career -- was one of the more outrageous that I've ever
4 seen, particularly from lawyers who have pleaded that we not
5 speak of things without having evidence for them.

6 We've been investigating and doing our best. My
7 emotions in reacting to this are not going to affect how my
8 client or we view the voracity or the legitimacy of any claims,
9 or the cost benefit basis that would be made. We are not
10 infected by any conflicts. We don't represent any parties in
11 the case that we can't vigorously pursue, and I think that
12 that's understood with Young Conaway, and it's part of the
13 discussion.

14 And by the way, the bank was aware of those conflicts,
15 again, at the beginning of the case, and didn't seem to be
16 concerned about it then, when it set this process in motion.

17 THE COURT: So I shouldn't read anything, at this
18 point in time, into the argument that you can also be pursuing,
19 but haven't been pursuing, D&O claims and preference claims and
20 so on.

21 MR. RICHMAN: Right. And we fully intend to pursue
22 all of that. But we weren't going to dilute the brief period
23 of time that we had to learn if there were claims against the
24 bank by being diverted into -- we haven't exonerated anybody.
25 We haven't concluded that there aren't claims against the D's

1 and O's, or against the equity sponsor; there may well be. And
2 we intend to investigate that at the appropriate time. But we
3 weren't going to -- we're not getting paid for the time that
4 we're involved in investigating now. We weren't going to
5 expand the investigation when we weren't required to.

6 Our hope is that we can wrap this into a liquidating
7 Chapter 11 plan, and with financing that is potentially
8 obtainable on some of the causes of actions as to which there
9 are no liens, be able to get some seed money and funding to
10 carry this forward in a liquidating trust, as to which the
11 creditors on the creditors' committee would remain in control.
12 And there is absolutely no showing that that can't be done.

13 And I appreciate that the bank is saying, well, so
14 far, you haven't brought your equitable subordination claim,
15 and you haven't tried to designate our vote. And look, you
16 know, that's going to come. But there's no -- it's neutral
17 right now. We may not be able to assume that they can be
18 subordinated, but they can't assume that they're going to have
19 voting power to defeat a plan. It's just too soon.

20 THE COURT: Sure.

21 MR. RICHMAN: This motion shouldn't have been brought
22 now. This is strategic.

23 So Your Honor, I otherwise stand with Mr. Brady on the
24 legal arguments, which are also in our objection; I won't brief
25 them. We ask that the motion be denied in its entirety, and

1 that we get back to our investigation and see where that goes.
2 Thank you for indulging my emotions today, Your Honor.
3 THE COURT: Thank you. Thank you, Mr. Richman.
4 Anyone else? Yes.
5 MR. TORKIN: Yes. Good afternoon.
6 THE COURT: I have a taker. Good afternoon.
7 MR. TORKIN: Good afternoon, Your Honor. Michael
8 Torkin --
9 THE COURT: Good to see you, Mr. Torkin.
10 MR. TORKIN: -- from Sullivan & Cromwell, on behalf of
11 Adeptio Funding --
12 THE COURT: Yes.
13 MR. TORKIN: -- and various entities. We'll be very
14 brief.
15 We, obviously, support the committee and the debtor.
16 And importantly, we wanted to remain above the fray, and didn't
17 feel the need to inundate the Court with additional pleadings.
18 But I just felt a need, given the reply, to at least make some
19 comments on the spurious allegations asserted in the reply that
20 somehow the debtors failed to cause the sale of Simplexity as a
21 going concern in a manner that would protect a job to maximize
22 value.
23 I think it's very important to remember the beginning
24 of these cases, where Adeptio organized these cases to be sold
25 in an efficient manner --

1 THE COURT: Yes.

2 MR. TORKIN: -- to organize the sale to Wal-Mart, to
3 put forward financing without stipulations, without
4 investigation periods, without events of default that people
5 could come and sue potentially D's and O's or certain --
6 whatever allegations that you would traditionally find in
7 financing, because we feel comfortable that we have done the
8 right thing leading up to these cases. We have done the right
9 thing, in terms of the sale process that was negotiated with
10 the bank back in September, in the forbearance period.

11 And at this juncture, we also agree and stand by the
12 debtors and the committee, that this motion should be denied
13 today. Thank you very much.

14 THE COURT: All right. Thank you, Mr. Torkin.

15 Mr. Klein.

16 MR. KLEIN: Thank you, Your Honor. Randy Klein on
17 behalf of Fifth Third Bank. I will be brief in responding to
18 some of the argument Your Honor has just heard.

19 With respect to Mr. Brady's argument about the
20 financing order and what was agreed to, the order says that we
21 would not exercise remedies against collateral. It goes on to
22 say:

23 "Provided, however, the foregoing shall not restrict
24 or impair any rights of the DIP agent," et cetera,
25 "arising under 364(c) and/or 507(b) of the Bankruptcy

1 Code."

2 In other words, our right of payment. So we aren't
3 exercising rights against collateral by filing our motion to
4 convert.

5 And getting back to the merits of the motion to
6 convert. So the committee counsel and we see this very
7 differently. We would have filed a motion to convert
8 regardless of the ongoing investigation. We didn't believe
9 these cases should have been filed. We didn't believe in the
10 Chapter 11, we didn't believe in the sale process. We funded a
11 defensive DIP because we were threatened with a priming loan,
12 and we are where we are now.

13 There is nothing that will be cut off substantively by
14 converting the cases to Chapter 7. So the issues are: Should
15 these cases -- must these cases be converted based on the
16 undisputed facts of diminution and lack of rehabilitation?
17 There's no -- the burden has shifted, it's not about rhetoric.
18 They've admitted the continuing diminution and lack of
19 rehabilitation. We're down to what are they showing about
20 unusual nature of the case, best interest, and a reasonable
21 period of time.

22 I will say this about Mr. Richman's impassioned
23 argument. We were not casting aspersions against the
24 committee's counsel. We simply believe in the neutrality of a
25 Chapter 7 Trustee. They have a client. Their client are the

1 unsecured creditors, who would benefit from equitable
2 subordination. They may not get much of a dividend otherwise,
3 I get it.

4 That's why they're bringing or threatening to bring --
5 and their pleading is replete, quite to the contrary, referring
6 to Fifth Third's motion as disingenuous, specious, ridiculous.
7 We didn't use words like that, which mean misleading and the
8 like. We simply stated what we believed to be a basis to
9 convert these cases, that a liquidating 11 that does not have
10 the support of the senior secured creditor should not exist.
11 So that's our basis.

12 We think the statute is mandatory. We don't think
13 that they've met the shifted burden here of keeping these cases
14 in Chapter 11.

15 And with respect to the time that's left on the
16 challenge period, Your Honor knows we extended it, based on --
17 voluntarily, based on the massive discovery requests that we
18 got. And so that's why that tail is hanging out there. We're
19 here today because this is the day this month that we have an
20 omnibus hearing. If we had waited another month, they would
21 have been another month deeper into their claims, and they
22 would have had an even more significant argument about their
23 knowledge bank.

24 So we did what we did, in order to cut off the burn,
25 and try and get these cases into Chapter 7, while the trustee

1 still has an opportunity to evaluate whether claims should be
2 brought. So there would be no prejudice to the unsecured
3 creditors, other than Fifth Third. But there is prejudice to
4 Fifth Third by continuing in Chapter 11. Thank you, Your
5 Honor.

6 THE COURT: All right. Thank you, Mr. Klein.

7 Well, look. I read the papers, and you're absolutely
8 right, of course, that the statute is mandatory, unless the
9 Court finds specifically that there are unusual circumstances.
10 And I don't want to add any fuel to the fire that's in the
11 courtroom already.

12 You know, look, Fifth Third did not want the case
13 filed in the first place. And I understand that. And there's
14 been -- Fifth Third has been hostile to the case right from the
15 start, and that hostility continues.

16 And it's evident from the filing of this motion, which
17 I have to say I thought was very untimely, with an additional
18 amount of time remaining on an investigation, an investigation
19 which has already cost significant -- a significant amount of
20 money. And when we talk about control of the case, it's Fifth
21 Third that is seeking to control the case, every bit as much as
22 it accuses others of seeking to control the case.

23 So I think that there are very significant, unusual
24 circumstances, at the moment. And that's not to say that it
25 won't change. But at the moment, we -- there are just a number

1 of them.

2 For example, the fact -- the very fact that Fifth
3 Third insisted upon an investigation period, which has not yet
4 expired, and which is ongoing. I think that's an unusual
5 circumstance that we don't see.

6 I know that Fifth Third talked about how, usually,
7 these cases convert on a consensual basis. Well, there's a
8 reason for that, because usually the lender is working with the
9 debtor, and it is a -- it's not the target of litigation.

10 Here, that's another significant and, I think, unusual
11 circumstance, that the lender is the subject of potential
12 litigation, and that that cause of action certainly appears, at
13 this moment, to be potentially valuable. That's unusual.

14 The fact that the case was filed only two months ago
15 is unusual. I don't see motions to convert cases that are only
16 two months old, and that -- and where there has been a sale so
17 recently, and where the lender has imposed some very serious
18 restrictions on the ability of the committee to investigate.
19 Fifth Third Bank speaks loudly about the cost, and how it's
20 going to cooperate with a trustee. It could be cooperating
21 right now with the committee, and it would cost far less
22 inconvenience and far less disruption, if it did so. But it's
23 chosen not to do that. And yet, it wants the Court to, in
24 effect, lean toward its position on the basis of that argument.
25 And that's just not -- that just doesn't really sell me on

1 conversion.

2 I think it's also significant that, at the moment, we
3 have an nonoperating debtor. So there is -- there are not
4 significant operating expenses that are further diminishing the
5 assets of the debtor.

6 And I did say in another case, in the Skoe Group case
7 (phonetic), where there was an effort to convert a case,
8 convert the case while there was potential, significant, and
9 valuable litigation pending, that that was a basis for not
10 converting. And I'm going to say that again.

11 But I will say this. This is clearly a case that the
12 Court has got to maintain strong control, strong controls,
13 because it could easily get out of hand with the spending and
14 the expense.

15 This strikes me as the kind of case that might even be
16 appropriate, frankly, for a very independent counsel to be
17 prosecuting, if facts are developed, on a contingency basis, as
18 opposed to, you know, an hourly rate basis, because of the
19 potential, I think, impact upon creditors. So that's just a
20 thought in the back of my mind.

21 But as of today, June the 5th, with an investigation
22 period still open, and the other reasons that I've stated, I'm
23 going to deny the motion to convert. And we will -- we'll see
24 what happens, and we'll see what happens with any effort to --
25 I'm not going to rule in advance, obviously, on a request to

1 extend the challenge period. But I would hope that Fifth Third
2 Bank would be -- if such a request is made, and there is
3 opposition to it, I would hope that Fifth Third Bank would come
4 in and be able to cite chapter and verse as to how it has
5 cooperated during these next eight days. And I think that's
6 the ruling -- that's the Court's ruling for today.

7 I would hope that the parties' emotions don't get in
8 the way of, I think, some productive discussion here. But --
9 and that -- so motion denied, is my ruling for today. All
10 right.

11 MR. KLEIN: Thank you, Your Honor.

12 THE COURT: Thank you all.

13 MR. BRADY: Thank you, Your Honor.

14 THE COURT: With that, we'll stand in recess.

15 (Proceedings conclude at 3:45 p.m.)

16 *****

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of my knowledge and ability.



June 5, 2014

Coleen Rand, AAERT Cert. No. 341
Certified Court Transcriptionist
For Reliable

Exhibit B

***Simplexity* Order on First Motion to Convert**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

-----X
In re: : Chapter 11
: :
SIMPLEXITY, LLC, *et al.*,¹ : Case No. 14-10569 (KG)
: :
Debtors. : Jointly Administered
: :
: Ref. Docket No. 281, 325, 327, 334 & 352
: :
-----X

**ORDER DENYING MOTION OF FIFTH THIRD BANK TO
CONVERT CASES TO CASES UNDER CHAPTER 7**

Upon consideration of *Motion of Fifth Third Bank to Convert Cases to Cases Under Chapter 7* [Docket No. 281] (the “Motion to Convert”); and upon consideration of the *Debtors’ Objection to Motion of Fifth Third Bank to Convert Cases to Cases Under Chapter 7* [Docket No. 325] and the *Objection of the Official Committee of Unsecured Creditors to Motion of Fifth Third Bank to Convert Cases to Cases Under Chapter 7* [Docket No. 327]; and a hearing having been held on the Motion to Convert on June 4, 2014; and for the reasons set forth on the record at the hearing held on June 4, 2014; it is hereby,

ORDERED that the Motion to Convert is denied; and it is further

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: Simplexity, LLC (9770); Simplexity Services, LLC (2823) (together with Simplexity, LLC, the “Simplexity Debtors”); and Adeptio INPC Holdings, LLC (4699) (“Adeptio”). The Simplexity Debtors’ mailing address is 10790 Parkridge Blvd., Suite 200, Reston, VA 20191. Adeptio’s mailing address is Cira Centre, 2929 Arch Street, Suite 1800, Philadelphia, PA 19104.

ORDERED that this Court shall retain jurisdiction over all matters arising from or related to the interpretation or implementation of this Order.

Dated: June 13, 2014
Wilmington, Delaware


Kevin Gross
Chief United States Bankruptcy Judge

Exhibit C

***Simplexity* Order on Second Motion to Convert**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	) Chapter 11
	)
Simplexity, LLC, <i>et al.</i> ,	) Case No. 14-10569(KG)
	)
Debtor.	) Re Dkt. Nos. 443 and 473

MEMORANDUM ORDER

First Third Bank (“FTB”) has moved pursuant to § 1112(b) of the Bankruptcy Code to convert these Chapter 11 cases to cases under Chapter 7 of the Bankruptcy Code. The Debtors do not oppose the motion but the Committee of Unsecured Creditors (the “Committee”) has objected. The Committee, in fact, has filed a motion for standing to bring an adversary proceeding against FTB and in its proposed Complaint levels serious charges of wrongdoing against the movant, FTB.

Section (b)(1) of the Bankruptcy Code is very clear. Upon showing of cause, the Court shall - not may, shall – convert or dismiss a case brought under Chapter 11 unless, pursuant to § 1112(b)(2) the Court finds and specifically identifies unusual circumstances that make conversion or dismissal contrary to the best interests of the creditors and debtor’s estate. But, as § 1112(b)(2)(A) further provides, there must be a reasonable likelihood that a plan will be confirmed within a reasonable period of time. The Court previously denied a motion to convert these cases, finding unusual circumstances existed – in particular that the case was then only two months old. FTB correctly points out that the Court neglected to make a finding of the reasonable likelihood of a plan being confirmed but at that early stage the Court still expected the parties to find a path to a plan process.

The case no longer has a short life. However, the Debtors and the Committee, especially the Debtors, have expressed cautious optimism that a negotiated resolution remains possible and, in that event, a confirmable liquidating plan would result. The Court therefore concludes that in the very short term, there exists a reasonable likelihood of a plan being confirmed and the unusual circumstance is on-going discussions which would lead to a confirmable plan. In contrast, a pause in converting the case will do very little, if any, harm to FTB.

Accordingly, the Court will deny the motion at this time. If, however, the parties do not reach resolution by December 1, 2014, FTB shall submit a certification of counsel to that effect accompanied by an Order converting the cases which the Court will enter.

Further, under the circumstances, the Court will defer ruling on the Committee's motion for standing to commence an adversary proceeding against FTB.

Dated: October 23, 2014



KEVIN GROSS, U.S.B.J.