



SO ORDERED,

Judge Neil P. Olack  
United States Bankruptcy Judge  
Date Signed: March 8, 2019

**The Order of the Court is set forth below. The docket reflects the date entered.**

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:**

**PHENIX TRANSPORTATION, INC.,**

**CASE NO. 18-04761-NPO**

**DEBTOR.**

**CHAPTER 11**

**IN RE:**

**PHENIX TRANSPORTATION WEST, INC.,**

**CASE NO. 18-04762-NPO**

**DEBTOR.**

**CHAPTER 11**

**AMENDED ORDER CONVERTING BANKRUPTCY CASES TO CHAPTER 7**

This matter came before the Court for hearing on March 8, 2019 (the “Show Cause Hearing”), on the Order to Show Cause (the “Show Cause Order”) requiring the debtors, Phenix Transportation, Inc. (“Phenix”) (P. Dkt. 152)<sup>1</sup> and Phenix Transportation West, Inc. (“Phenix West”) (P.W. Dkt. 192), to appear and show cause why the above-referenced bankruptcy cases (the “Bankruptcy Cases”) should not be converted to chapter 7. *See* 11 U.S.C. § 1112(b). Phenix and Phenix West are affiliated debtors and for simplicity are referred to only as Phenix. At the Show Cause Hearing, Craig M. Geno represented Phenix, Alan L. Smith represented

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<sup>1</sup> Docket entries in Case No. 18-04761-NPO are cited as “(P. Dkt. \_\_)”, and docket entries in Case No. 18-04762-NPO are cited as “(P.W. Dkt. \_\_)”.

Wells Fargo Equipment Finance, Inc. (“Wells Fargo”), Jim F. Spencer, Jr. represented People’s United Equipment Finance Corp. (“People’s United”), Erno Lindner represented Volvo Financial Services (“Volvo”), Steven N. Douglass represented Goodman Factors, and Ronald H. McAlpin represented David Asbach, Acting U.S. Trustee for region 5 (the “U.S. Trustee”). The Show Cause Order was not the only matter under consideration at the Show Cause Hearing. In another contested matter closely related to the Show Cause Order, there was testimony, documentary evidence, and oral argument regarding Wells Fargo’s Renewed Motion to Terminate the Automatic Stay and to Compel Abandonment of Property of the Estate or, in the Alternative, to Compel Adequate Protection (the “Renewed Motion”) (P. Dkt. 147; P.W. Dkt. 186) filed by Wells Fargo; the Joinder of Volvo Financial Services to Wells Fargo’s Renewed Motion to Terminate the Automatic Stay (P. Dkt. 156; P.W. Dkt. 198) filed by Volvo; and the Answer and Response to Wells Fargo’s Renewed Motion to Terminate the Automatic Stay and to Compel Abandonment of the Property of the Estate or, in the Alternative, to Compel Adequate Protection (P. Dkt. 160; P.W. Dkt. 202) filed by Phenix in the Bankruptcy Cases. The Court issued the Show Cause Order because of the seriousness of the allegations contained in the Renewed Motion. The day before the Show Cause Hearing, Phenix filed the Motion for the Appointment of a Chapter 11 Trustee (Expedited Hearing Requested) (the “Motion to Appoint Trustee”) (P. Dkt. 164; P.W. Dkt. 206), which the Court set for a status conference contemporaneously with the Show Cause Hearing.

At the Show Cause Hearing, the Court heard testimony from Rickey Wilkerson, Daphne Wilkerson, and Rebecca Locker. All three witnesses offered by Phenix testified that they supported the appointment of a chapter 11 trustee in the Bankruptcy Cases. During closing arguments, the lenders, Wells Fargo, People’s United, Volvo, and Goodman Factors, each

expressed their support for the conversion of the Bankruptcy Cases to chapter 7. The U.S. Trustee supported either conversion of the Bankruptcy Cases to chapter 7 or appointment of a chapter 11 trustee. Only Phenix opposed conversion of the Bankruptcy Cases to chapter 7. After considering these matters, the Court ruled from the bench that the Bankruptcy Cases should be converted from chapter 11 to chapter 7. This Order memorializes and supplements the Court's bench ruling.

### **Jurisdiction**

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Cases pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Notice of the Show Cause Order was proper under the circumstances.

### **Facts**

Phenix operates a trucking company in Forest, Mississippi. Daphne Wilkerson is the owner and president of Phenix. Her husband, Bennie Richard Wilkerson ("Rickey Wilkerson"), who is the vice-president, operates the business. Rebecca Locker works in the office of Phenix, and her duties include responsibility for obtaining and maintaining proper insurance coverage.

Phenix financed the purchase of numerous "18-wheeler" type semi-tractors, trailers, and other motor vehicles (collectively, the "Trucking Equipment") with a series of loans from Wells Fargo, People's United, Volvo, and other lenders. The loans were secured by the Trucking Equipment.

In November 2018, Phenix did not renew its property and casualty insurance coverage for its Trucking Equipment with its existing insurance carrier because of a significant increase in premiums and did not purchase replacement insurance coverage with a different carrier at that time. According to Rickey Wilkerson, the increase was the consequence of a motor-vehicle

accident involving a tractor-trailer that occurred years ago and resulted in a multi-million-dollar claim paid by its insurance carrier. For this same reason, Rickey Wilkerson claimed he was unable to find an affordable replacement insurance policy at that time. Workers' compensation coverage for its employees also ended in November 2018. As a consequence of no longer having insurance coverage in place, Phenix lost the U.S. Department of Transportation's authorization to operate its Trucking Equipment in interstate commerce.

Phenix filed bankruptcy on December 12, 2018, shortly after the U.S. District Court for the Southern District of Mississippi entered a Final Judgment of Replevin in favor of Wells Fargo. Evidentiary hearings were held in the Bankruptcy Cases on: (a) February 1 and 19, 2019, on Wells Fargo's Motion to Terminate the Automatic Stay and to Compel Abandonment of Property of the Estate or, in the Alternative, to Compel Adequate Protection (P. Dkt. 68; P.W. Dkt. 70); (b) February 12, 2019, on People's United Equipment Finance Corp.'s Motion to Lift the Stay of 11 U.S.C. § 362 or, in the Alternative, for Adequate Protection (P. Dkt. 56; P.W. Dkt. 68); and (c) February 19, 2019, on Volvo Financial Services' Motion for Relief from the Automatic Stay and Abandonment of Property (P. Dkt. 80; P.W. Dkt. 101), as well as the respective responses of Phenix to each of these motions. So far, the Court has entered two interim orders in the Bankruptcy Cases requiring Phenix, in summary, to obtain insurance coverage in accordance with the insurance coverage requirements found in the pre-petition contracts and other financing documents existing between Phenix and each of its secured creditors, to provide proof of such insurance to its secured creditors, and to comply with non-bankruptcy law by obtaining appropriate authorization from the U.S. Department of Transportation to operate in interstate commerce. (P. Dkt. 98, 126; P. W. Dkt. 124, 163).

At the hearing on February 1, 2019, that resulted in the Interim Order Regarding Wells Fargo's Motion to Terminate the Automatic Stay and to Compel Abandonment of Property of the Estate or, in the Alternative, to Compel Adequate Protection (P. Dkt. 98; P.W. Dkt. 124), the Court ruled from the bench that all trucking equipment must "remain parked and in place" unless and until Phenix filed with the Court documentation evidencing that Phenix had obtained all necessary approvals from the U.S. Department of Transportation to engage in interstate trucking operations (the "First Stay Put Order"). On February 4, 2019, however, an 18-wheeler semi-tractor was hauling a trailer loaded with 90 head of cattle when it was involved in a motor vehicle accident in Texas, resulting in the death of 10 head of cattle and damage to the trailer. At the time, Phenix did not have insurance coverage in place or authority from the U.S. Department of Transportation to operate its Trucking Equipment in interstate commerce. By continuing to operate its business after February 1, 2019, Phenix violated non-bankruptcy law, the financing agreement between Phenix and Wells Fargo, and the Court's First Stay Put Order.

At the hearing on February 12, 2019, that resulted in the Interim Order on People's United Equipment [*sic*] Finance Corp's Motion to Lift the Stay of 11 U.S.C. § 362 or, in the Alternative, for Adequate Protection (the "Second Interim Order") (P. Dkt. 126; P.W. Dkt. 163), Rickey Wilkerson testified that Phenix had purchased a "Commercial Business Auto Insurance Policy" from Prime Insurance Company, effective February 6, 2019, at a cost of \$250,000.00 and immediately thereafter Phenix had begun its operations again. He also testified, however, that Phenix had not yet obtained authorization from the U.S. Department of Transportation to operate in interstate commerce because of a misplaced identification number. In the Second Interim Order, the Court again ordered Phenix to "cease and desist from any and all operations of

its tractors and trailers until such time as the Department of Transportation has provided the appropriate authorization for such activities to commence” (the “Second Stay Put Order”).

At the hearing on February 19, 2019, Rickey Wilkerson testified that Phenix had authorization from the U.S. Department of Transportation to operate in interstate commerce but still had not obtained workers compensation coverage for its employees. For a third time, the Court ordered Phenix to discontinue its trucking operations (the “Third Stay Put Order”). Evidence at that same hearing demonstrated that a semi-tractor owned by Phenix was totaled in a motor vehicle accident in Alabama on January 3, 2019, when there was no insurance coverage in place and Phenix did not have authorization from the U.S. Department of Transportation to operate. Phenix never informed its secured lender, Volvo, of the accident, and the semi-tractor has not yet been repaired or replaced.

Counsel for Phenix filed the Motion to Appoint Trustee on March 7, 2019. The allegations in the Motion to Appoint Trustee include: (1) that Rickey Wilkerson has “either delayed, ignored or violated Court directives and at least one Court order by operating trucks without having insurance on them”; (2) that Rickey Wilkerson “is making questionable business decisions for and on behalf of [Phenix], not just with respect to the operation of trucks, but in other areas we well”; (3) that many of the employees of Phenix “have lost confidence in [Rickey] Wilkerson’s ability to operate the companies and make sound, justifiable business decisions”; (4) that an independent third party needs to examine certain transfers involving Phenix and insiders; and (5) that “creditors . . . have lost faith in [Rickey] Wilkerson’s managerial ability.” (P. Dkt. 164; P.W. Dkt. 206).

## **Discussion**

Section 1112(b) allows a bankruptcy court to convert or dismiss a chapter 11 case to chapter 7 “for cause,” when it is in the best interest of the creditors and the estate. 11 U.S.C. § 1112(b).<sup>2</sup> Examples of “cause” set forth in the statute include “gross mismanagement of the estate” and “failure to maintain appropriate insurance that poses a risk to the estate or to the public.” 11 U.S.C. § 1112(b)(4)(B),(C). When determining whether to dismiss or convert a case under § 1112, a court is required to apply a burden-shifting analysis. Under that analysis, once “cause” is shown to exist, the burden shifts to the debtor to establish the exceptions in § 1112(b)(2). If “cause” is shown and the debtor fails to meet its burden of proving the statutory exceptions under § 1112(b)(2), dismissal or conversion is mandatory unless the court determines the appointment of a chapter 11 trustee or an examiner is in the best interests of creditors and the estate.

### **A. Gross Mismanagement**

A debtor-in-possession is vested with significant powers under the Code. 11 U.S.C. § 1107(a). Those powers come with concomitant responsibilities. A debtor-in-possession owes creditors the same fiduciary duty as a trustee. Phenix, however, has failed to provide all of its secured lenders with proof of insurance showing their status as “Loss Payees” or even to inform its lenders of the location of their collateral. Moreover, Phenix failed to obtain workers’ compensation insurance coverage until March 7, 2019. Additionally, a motor-vehicle accident occurred on February 4, 2019, which shows that Phenix operated its Trucking Equipment without authorization from the U.S. Department of Transportation in violation of the Court’s bench ruling prohibiting it from doing so. Under cross-examination at the hearings and, in

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<sup>2</sup> Hereinafter, all code sections refer to the Bankruptcy Code, located at title 11 of the U.S. Code.

particular, at the hearing held on February 19, 2019, Rickey Wilkerson has been less than cooperative in answering questions about Phenix's business operations.

Also, Phenix has leased its trucks to family-owned companies without prior Court authorization and has transferred assets to, or borrowed assets from, family-owned companies, without prior Court authorization. In short, Phenix is not conducting its post-petition business operations in compliance with the Bankruptcy Code, applicable non-bankruptcy law, or its agreements with its secured lenders. The Court finds that this is evidence of Rickey Wilkerson's gross mismanagement. Accordingly, the Court finds that cause exists to convert the Bankruptcy Cases due to gross mismanagement of the estate.

**B. Failure to Maintain Insurance**

While Phenix may now have all insurance in place, it has operated its Trucking Equipment post-petition without proper insurance, and "loss payee" certificates still have not been provided to all secured lenders. The U.S. Trustee informed the Court that he does not have all proper insurance documents despite repeated requests. Without insurance, Phenix is unable to mitigate the inherent risks to the estate and the public arising from its proposed operation of its trucking business. It is well established that the operation of trucks in interstate highways presents risks of known dangers to the public. Based on the failure of Phenix to maintain proper insurance while conducting its business post-petition and to provide proper documentation of insurance to the U.S. Trustee and its secured lenders once it obtained such insurance, the Court finds that there exists sufficient cause for the dismissal or conversion of the Bankruptcy Cases under § 112(b)(4)(C).

**C. Defenses under § 1112(b)(2)**

Once “cause” is found to exist, dismissal or conversion is mandatory, unless there exist “unusual circumstances” and the conditions set forth in § 1112(b)(2) are present. None exist here. The Code does not define “unusual circumstances,” but the phrase “contemplates conditions that are not common in most chapter 11 cases.” *In re Triumph Christian Ctr., Inc.*, 493 B.R. 479, 496 (Bankr. S.D. Tex. 2013). Phenix has failed to satisfy the first prong of the § 1112(b)(2) defense in that it has failed to prove and identify “unusual circumstances” that show that the Code’s purposes would be better served by maintaining the Bankruptcy Cases in chapter 11. This case involves no “conditions that are not common in most chapter 11 cases.” *In re Aurora Memory Care, LLC*, 589 B.R. 631, 642 (Bankr. N.D. Ill. 2018).

Even if the Court were to find unusual circumstances, Phenix still must prove that: (1) there is a reasonable likelihood that a plan will be confirmed within a reasonable time, (2) that “cause” for dismissal or conversion is something other than a continuing loss or diminution of the estate coupled with a lack of reasonable likelihood of rehabilitation; (3) there is reasonable justification or excuse for a debtor’s act or omission; and (4) the act or omission will be cured within a reasonable period of time. 11 U.S.C. § 1112(b)(2). The Court finds that Phenix has failed to provide any reasonable justification or excuse for its actions and omissions.

Rickey Wilkerson’s excuse for operating Phenix without insurance coverage and without authorization from the U.S. Department of Transportation has been the cost of the premium. His search for a bargain, however, does not justify in any manner the risk to Phenix, the cargo hauled by Phenix, Phenix’s drivers, its secured creditors, and the public at large. His refusal to acknowledge that risk renders him untrustworthy to serve in the role of a fiduciary for a debtor in possession. In the Motion to Appoint Trustee, counsel for Phenix asserts that Rickey Wilkerson

“is making questionable business decisions for and on behalf of [Phenix], not just with respect to the operation of trucks, but in other areas as well.” The Court agrees. Additionally, the Court is convinced that Rickey Wilkerson will continue “making questionable business decisions” notwithstanding the counsel and advise of his experienced and knowledgeable bankruptcy attorney. His removal from the business is unlikely to result in any real change in management, given Daphne Wilkerson’s five-year absence from the business.

**D. Conversion, Dismissal, or Appointment of a Chapter 11 Trustee**

Creditors are best served by a road map that lead to the largest number of them being paid the largest amount of money in the shortest amount of time. *In re Rey*, No. 04 B 35040, 2006 WL 2457435, at \*9 (Bankr. N.D. Ill. Aug. 21, 2006). Because the estate has assets available for a chapter 7 trustee to liquidate and administer, the Court finds that conversion rather than dismissal is in the best interest of creditors and the estate. The Court finds that the appointment of a trustee in each of the Bankruptcy Cases, as urged by Phenix, would not address the concerns of the Court about Rickey Wilkerson’s post-petition conduct as quickly as is necessary to address the public safety issue. Moreover, Rickey Wilkerson’s testimony at prior hearings related to the Motion for Authority to Sell Equipment Outside the Ordinary Course of Business Free and Clear of Liens, Claims and Interests (P. Dkt. 86; P.W. Dkt. 112) indicates that potential buyers would prefer that the Trucking Equipment be parked in a secure place in Forest, Mississippi, and not operated by a chapter 11 trustee.

No monthly operating reports have been filed in the Bankruptcy Cases. But based on the evidence presented at the Show Cause Hearing, Phenix has been operating its business post-petition using cash collateral without Court approval, leasing its Trucking Equipment without

Court approval, and obtaining loans from insiders without Court approval. Phenix did not demonstrate a viable business for a chapter 11 trustee to operate.

### **Conclusion**

The Court issued the First Stay Put Order, the Second Stay Put Order, and the Third Stay Put Order in an attempt to force compliance, stabilize the business, and provide an opportunity to reorganize. Rickey Wilkerson, as the operator of the business, is simply unable or unwilling to discharge his fiduciary duties in the Bankruptcy Cases. Under § 1112(b)(2), cause exists to convert the Bankruptcy Cases to chapter 7. As a result, the Motion to Appoint Trustee is now moot and should be denied.

IT IS, THEREFORE, ORDERED that the Bankruptcy Cases are hereby converted to chapter 7.

IT IS FURTHER ORDERED that the Motion to Appoint Trustee is denied as moot.

##END OF ORDER##