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Death of a (Used Car) Salesman: An Examination of the Incredible Auto Sales, LLC Bankruptcy

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DEATH OF A (USED CAR) SALESMAN: AN EXAMINATION OF THE INCREDIBLE AUTO SALES, LLC BANKRUPTCY

Alicia Teubert & Melissa Carrasco
I. Introduction ..................................................................................................................... 7
II. Pre-Bankruptcy Portrait of Incredible Auto ................................................................. 8
   A. A Brief History ......................................................................................................... 8
       1. Formation and Ownership .................................................................................. 8
       2. Principal Place of Business & Other Real Property ......................................... 12
       3. All Roads Lead to Gutierrez: Incredible Auto’s Related Entities ....................... 14
   B. Franchise and Finance ......................................................................................... 17
       1. Franchise Agreement with KIA .......................................................................... 17
       2. Finance Agreement with Hyundai Motor Finance Company ............................ 19
          a. The Agreement ............................................................................................... 19
          b. How the System Was Supposed to Work ....................................................... 22
   III. Living on the Edge: The Short Walk to Bankruptcy ............................................... 25
      A. Internal Factors Leading to Bankruptcy .............................................................. 25
         1. Improving Cash Flow through Double Flooring, Re-flooring, and Title
            Fabrication ........................................................................................................ 25
            a. Double Flooring ............................................................................................ 25
            b. Re-flooring .................................................................................................... 27
            c. Title Fabrication ............................................................................................ 28
         2. Retaining Cash: Deal Jackets, “Ed Graham” Sales, and Unpaid Consumer Liens 29
            a. Deal Jackets ..................................................................................................... 30
            b. “Ed Graham” Sales .......................................................................................... 32
            c. Choice Not to Pay Consumer Liens ................................................................ 34
      B. External Factors for Bankruptcy ........................................................................... 37
         1. Finger Pointed at HMFC .................................................................................... 38
         2. Finger Pointed at Outside Conditions ................................................................ 39
      C. Most Likely Cause: Investigations, Indictments, and Subsequent Suits ............. 40
   IV. Destination: Chapter 11 ........................................................................................ 43
      A. Petition and Schedules ....................................................................................... 43
      B. Gone, but not Forgotten: Adversary Proceedings to Reclaim Vehicles .......... 48
         1. Manheim Services Corp. v. Incredible Auto Sales, LLC ................................ 48
            a. The Transaction .............................................................................................. 48
            b. The Stipulation ............................................................................................... 50
               i. What South Seattle Wanted: Vehicles, Insurance, & a TRO ...................... 50
               ii. What HMFC Wanted: Intervention & Priority ........................................ 53
               iii. What the Parties Got: Joint Stipulation ................................................ 54
            c. Preserving the Value of the Vehicles: The Liquidation Proposal ............... 55
            d. Three’s a Crowd: Negotiations after a Default Judgment ......................... 57
            e. Incredible Auto’s Final Move: Surcharge .................................................... 59
         2. Auto Auction Associates of Montana, Inc. v. Incredible Auto Sales, LLC ...... 61
            a. The Transaction and its Effect on Auto Auction .......................................... 61
b. The Proceedings ................................................................................................ 63
   i. Insurance, TRO, and Intervention .................................................................. 63
   ii. The Stipulation .............................................................................................. 64
   iii. Auto Auction Asserts its Rights .................................................................. 65
       I. Motion for Relief from the Automatic Stay .............................................. 66
       II. Application for Administrative Expenses ............................................. 68
       III. Motion for Default Judgment ................................................................ 70
   c. Incredible Auto’s Final Move: Surcharge ..................................................... 70
   d. The Remaining Dispute: Who has Priority in the Proceeds? ......................... 72
      i. HMFC’s Argument: Sale when Incredible Auto had Possession of the Cars 72
      ii. Auto Auction’s Argument: No Sale until Incredible Auto had the Titles .. 74
      iii. The Court’s Decision ............................................................................ 76
C. Those are My Cars: Motions for Relief from the Automatic Stay .................... 82
   1. Steve’s Auto Sales, Inc.: Unpaid Inventory .................................................. 82
      a. Background on Steve’s Auto ...................................................................... 82
      b. The Transaction with Incredible Auto ....................................................... 83
         i. Structure of the Transaction .................................................................... 85
         ii. What Went Wrong ................................................................................ 87
      c. Motion for Relief from the Automatic Stay ................................................. 88
         i. Motion & Objections ............................................................................. 88
         iii. Hearing No. 2: Who has the Superior Interest in the Proceeds? .......... 91
            I. Steve’s Auto’s Argument: Explicit Agreement Trumps Statutory Default 92
            II. HMFC’s Argument: No Explicit Agreement so Statutory Default Controls 94
            III. The Court Decides .......................................................................... 95
            iv. Don’t Take “No” for an Answer: HMFC’s Appeal ............................ 97
      a. The Transaction and What Went Wrong ................................................ 99
      b. Why the Parties Wanted Relief ................................................................ 103
      c. Motions for Relief from the Automatic Stay .......................................... 104
         i. The Initial Motion: First Interstate Bank ............................................... 104
         ii. Once Beaten, Twice Shy: The Remaining Motions for Relief ............. 106
         iii. Incredible Auto: An Attempt to Get Some Satisfaction .................... 108
   3. GE Commercial Distribution Finance Corp.: Boats and Boat Supplies ............ 111
      a. Floor Financing and Multiple Blanket Security Interests ......................... 112
      b. What Went Wrong .................................................................................. 113
      c. Motion for Relief and Objections ............................................................. 114
   4. United Car Care: Pre-Bankruptcy Lawsuit .................................................... 116
      a. Pre-Bankruptcy Relationship with Incredible Auto ................................. 116
      b. Motion for Relief and Objection ............................................................... 118
   5. Hyundai Motor Finance Company: Everything and the Kitchen Sink ............ 121
      a. Why HMFC Wanted Relief ...................................................................... 121
      b. Objections ............................................................................................... 122
      c. The Court’s Decision ............................................................................. 124
      d. Don’t Take “No” for an Answer: Incredible Auto’s Appeal ................... 127
D. It’s Only a Dollar: Incredible Auto’s Quest to Use Cash Collateral ................. 129

1. What Incredible Auto Wanted: The Initial Motion ........................................ 129
2. Objections to Incredible Auto’s Motion ........................................................... 131
   a. Steve’s Auto & the Auctions ................................................................. 131
   b. HMFC ..................................................................................................... 132
3. HMFC Takes the Offensive .............................................................................. 134
   a. Motion to Prohibit or Condition Use of Inventory or Cash Collateral .......... 134
   b. Incredible Auto’s Objection to HMFC’s Motion ........................................ 136
4. Hearings ......................................................................................................... 139
   a. Scheduled, Rescheduled, & a Stipulation ............................................... 139
   b. Hearing No. 1 (November 6 & 7, 2006): Valuation, Fraud, and Cash Collateral ................................................................. 140
      i. The Stipulation .................................................................................... 141
         I. HMFC’s Proposed Stipulation .......................................................... 142
         II. Incredible Auto’s First Proposed Stipulation ................................... 144
   c. Hearing No. 2 (November 14, 2006): Making Payroll .............................. 144
      i. Incredible Auto’s Protest: Emergency Motion .................................... 145
      ii. HMFC’s Objection & Attempt to be Reasonable ............................... 147
      iii. The Court’s Decision: Cash Collateral for Payroll ............................ 147
   d. In Between Hearings: Incredible Auto Continues the Fight ....................... 148
      i. Response to HMFC’s November 14, 2006 Motion ............................... 148
      ii. Motion to Extend Use of Cash Collateral Through February 2007 ....... 149
      iii. Motion from Unsecured Media Creditors ......................................... 151
   e. Hearing No. 3 (December 5, 2006): Fault and Finger Pointing .................. 151
      i. Incredible Auto’s Fourth Proposed Stipulation .................................... 152
      ii. The Court’s Decision: Use Cash Collateral through December 21, 2006 .. 154
   f. Hearing No. 4 (December 19, 2006): Use of Cash Collateral After December 21, 2006 ................................................................. 156
      i. HMFC’s Position: No Further Use of Cash Collateral ......................... 156
      ii. Gathering Evidence: Request for a Rule 2004 Examination ................. 159
      iii. The Hearing ...................................................................................... 160
      iv. Incredible Auto’s Response ............................................................... 160
      v. The Court’s Decision: Use Cash Collateral Until January 31, 2007 ....... 162
      i. Incredible Auto’s Motion .................................................................... 163
      ii. The Hearing ....................................................................................... 163
   h. Use of Cash Collateral Through Conversion .......................................... 164
E. Just Make up Your Mind: Executory Contracts & Unexpired Leases .............. 166

1. Executory Contracts: First Advantage Credco .............................................. 166
   a. Pre-Bankruptcy Relationship with Incredible Auto ................................. 166
   b. Credco’s Motion to Compel Assumption or Rejection ............................ 168
   c. The Hearing .......................................................................................... 169
2. Unexpired Leases: Equipment & Real Property .......................................... 171
   a. Equipment Leases: G.E. Capital, Dolphin Capital, & ADP Commercial ...... 171
b. Real Property Lease: King Ave. Properties .......................................................... 172
   i. The Landlord & its Pre-Bankruptcy Relationship with Incredible Auto ....... 172
   ii. Pre-Conversion Plan: Assume & Assign ...................................................... 173
   iii. The Problem: Who Gets the Fixtures? ..................................................... 174
   iv. Post-Conversion Plan: Reject ................................................................... 176

F. Adventures in the Free Market: Liquidation of Incredible Auto’s Assets ........ 178
1. Employment of Professionals: Jappy Dickson ................................................. 178
   a. Southwestern’s Services to Incredible Auto ................................................. 179
      i. Valuing Incredible Auto’s KIA Franchise .............................................. 179
      ii. Selling Incredible Auto’s Assets ............................................................ 181
   b. HMFC’s Objection ................................................................................... 182
2. Section 363 Sale of Assets to Rimrock .............................................................. 184
   a. Terms of the Sale ..................................................................................... 185
   b. Objections ................................................................................................ 187
      i. HMFC’s Objection: Too Vague & Affects HMFC’s Secured Position .... 187
      ii. KIA’s Objection: Does Not Provide for KIA’s Approval .................... 188
   c. The Court’s Decision ............................................................................. 190
   d. Status Reports and Other Reasons not to Annoy the Court ....................... 191

G. The Best Laid Plans of Mice & Men: Chapter 11 Plan & Disclosure Statements . 194
1. The Chapter 11 Plan .................................................................................... 194
2. The Disclosure Statement(s) .......................................................................... 196
   a. Statement No. 1—January 21, 2007 ............................................................ 196
      i. Voting .................................................................................................... 196
      ii. Benefits of the Plan ............................................................................ 198
      iii. Objections to the Disclosure Statement ............................................. 199
         I. Trustee’s Objection ........................................................................... 199
         II. Creditors’ Objections ................................................................. 201
      iv. The Court’s Decision: Amend the Disclosure Statement ................. 201
   b. Statement No. 2—March 19, 2007 .............................................................. 202
      i. The Court’s Decision: “Woefully Inadequate” ...................................... 203
      ii. Incredible Auto’s Excuse: Open Mouth; Insert Foot ......................... 204

H. Why Local Rules and Competency Matter: Attorney’s Fees ......................... 205
1. Mr. Needler’s Applications ........................................................................... 205
2. The Trustee’s Objection .............................................................................. 207
3. Mr. Needler’s “Final” Application .................................................................. 209
4. The Court’s Decision: Disgorge .................................................................. 210
5. If at First You Don’t Succeed: Mr. Needler’s Motion to Reconsider ............. 214
   a. Reasons to Reconsider ........................................................................... 214
   b. The Court’s Decision: No ....................................................................... 215
   c. Try, Try Again: Mr. Needler’s Appeal ..................................................... 216
6. Mr. Needler’s Supplemental Fee Application ................................................. 217
   a. Why Mr. Needler Should Receive His Fee ............................................. 218
   b. The Hearing ............................................................................................ 219
   c. The Court’s Final Answer: No ............................................................... 219

V. And Then, They Saw the Light: Conversion .................................................. 223
A. Motions to Convert .......................................................... 223
  1. Trustee ................................................................................. 223
  2. HMFC ................................................................................. 224
B. Incredible Auto’s Responses ............................................ 224
  1. Response to Trustee’s Motion ........................................ 224
  2. Response to HMFC’s Motion ........................................... 226
C. And So It Continued . . . and Continued ......................... 227
D. The Final Decision: Convert to Chapter 7 ..................... 230

VI. Killing me Softly: Post-Conversion Activity .................. 234
A. Who Wants the Leftovers? Property of the Estate ............ 234
  1. Assets ................................................................................. 234
  2. Abandonment .............................................................. 236
B. Trustee .................................................................................. 237
C. HMFC’s Competition: Administrative Expenses .......... 239
D. The End .................................................................................. 240

VII. Conclusion: Lessons Learned ....................................... 241
A. A Lesson for Creditors .................................................... 241
B. A Lesson for Bankruptcy Attorneys ............................... 243
C. A Lesson for Bankruptcy Courts ................................. 243
I. INTRODUCTION

At first glance, the Incredible Auto Sales, LLC (“Incredible Auto”) Chapter 11 bankruptcy appeared fairly standard. A once prospering business found itself in the red trying to keep its inventory stocked, pay its bills, and remain a going concern. On paper, the prospects of reorganization seemed promising. It had nearly $2 million worth of inventory.\(^1\) It had nearly $200,000 worth of machinery, fixtures, parts, and supplies.\(^2\) Plus, there was a market for its product because Incredible Auto was the only Kia Motors

\(^1\) *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Exhibit 1 to Debtor’s Emergency Motion for Use of Cash Collateral: Analysis of Assets Securing the Hyundai Motor Finance [sic] (Dkt. 17-3) at 2 (Oct. 26, 2006).

America (“KIA”) dealership in a 250-300 mile radius. However, the Incredible Auto on paper was not the same Incredible Auto that the creditors, the U.S. Trustee, and the court found under the microscope of the Chapter 11 proceedings.

II. PRE-BANKRUPTCY PORTRAIT OF INCREDIBLE AUTO

A. A BRIEF HISTORY

1. FORMATION AND OWNERSHIP

Mr. Tony Woolery organized Incredible Auto in Montana on April 28, 1995, as a member-managed limited liability company, and acquired the KIA franchise on July 1, 1997. Thereafter, Incredible Auto sold new and used KIA vehicles, sold vehicles that it obtained through trade-ins and auctions, and operated a repair shop on site. Incredible Auto was the only authorized KIA franchise located within 250-300 miles, so there was little KIA competition, especially for repairs. In September 2000, Mr. Rodolfo Nick Gutierrez purchased the franchised dealership and acted as the owner/operator. He paid

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3 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 23 (Apr. 3, 2009).

4 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Disclosure Statement (Dkt. 224) at 9 (Jan. 21, 2007).

5 See Business Entity Search - Mont. Sec. of State, https://app.mt.gov/cgi-bin/bes/besCertificate.cgi?action=detail&bessearch=C082747&trans_id=besa1007919442053ab00 (last visited Apr. 16, 2010). The Montana Secretary of State records show that it was involuntarily dissolved on December 4, 2007. See id.

6 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Kia Dealer Sales and Service Agreement (Dkt. 203-1) at 9 (Jan. 17, 2007).

7 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Motion to Use Cash Collateral (Dkt. 17) at 2 (Oct. 26, 2006).

8 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 23 (Apr. 3, 2009).

9 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Disclosure Statement (Dkt. 224) at 9 (Jan. 21, 2007).
both a base amount for the value for Incredible Auto and a small amount for “blue sky.”

Paying the assets’ value plus an amount for “blue sky” is the standard way of purchasing a dealership. The amount of the blue sky varies, but it is generally determined by looking at “[n]et profits, owner's compensation, and . . . three years worth of income.” At the time of the purchase, Incredible Auto was considered a small business boasting approximately thirty employees.

Mr. Gutierrez had considerable experience in the automotive industry. He had been the general manager of a Ford-Mercury store from 1984 until around 1992 when he moved out West. From that time until around 1999, he worked as an auto trainer for Universal Underwriters in Denver, Colorado. In this position, he worked with dealerships in the western United States to increase their profitability by assisting their finance departments, sales departments, parts and service departments, and secondary departments. He then went out on his own and purchased Incredible Auto.

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10 *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 9 (Apr. 3, 2009).* He claimed that the amount of blue sky he paid was not significant because the dealership had small sales volume: only forty to fifty cars per month. *See id.*

11 *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 33 (Apr. 3, 2009).*

12 *In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 42 (Apr. 3, 2009).*

13 *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Motion to Use Cash Collateral (Dkt. 17) at 2 (Oct. 26, 2006).*

14 *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 6-7 (Apr. 3, 2009).*

15 *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 7 (Apr. 3, 2009).*

16 *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 7-8 (Apr. 3, 2009).*
It appears that just after the purchase, Mr. Gutierrez, the acting president, owned 90% of Incredible Auto, Ms. Jody Stephens, the comptroller, owned five percent, and others owned the remaining five percent. In June 2006, Ken Cornelison purchased a ten percent ownership interest in Incredible Auto, reducing Mr. Gutierrez’s ownership interest to 80%. Mr. Cornelison paid $125,000 for his interest in Incredible Auto. That was the ownership picture of Incredible Auto as it entered bankruptcy on October 17, 2006.

During the bankruptcy proceeding, Incredible Auto underwent more ownership changes. For reasons that will become clearer later in this report, Mr. Gutierrez agreed to relinquish his governance power and salary at some point in November 2006.

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18 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 165 (Apr. 3, 2009); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedules and Statement of Affairs (Dkt. 54) at 46 (Nov. 12, 2006).


20 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 121 (Apr. 3, 2009). Although Incredible Auto was an LLC, all of the bankruptcy documents referred to “ownership interests” rather than “membership interests.” For purposes of continuity, this report will use the term “ownership interest” to mean “membership interest.”

21 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedules and Statement of Affairs (Dkt. 54) at 46 (Nov. 12, 2006).


23 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Reply to Hyundai Motor Finance’s Objection to the Debtor’s Continued Use of Cash Collateral (Dkt. 155) at 3 (Dec. 20, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 8 (Jan. 12, 2007).
Cornelison retained his ten percent interest in Incredible Auto,\textsuperscript{24} became the vice president,\textsuperscript{25} and took the “direct management” position of general manager.\textsuperscript{26} Mr. Gutierrez transferred two percent of his interest to his wife, Zsaneece Gutierrez, who then became an officer.\textsuperscript{27} According to Incredible Auto’s attorney, she was “regularly assigned duties” by Mr. Cornelison,\textsuperscript{28} but according to the court, “[f]or her monthly salary, Zsaneece agreed to sign checks if Cornelison was not available, and agreed to review bills and financials.”\textsuperscript{29} Although Mr. Gutierrez relinquished his salary of monthly $5,000, Mrs. Gutierrez began receiving the same amount as a salary when she became an officer.\textsuperscript{30} Thus, within a month and a half of filing bankruptcy, the ownership of Incredible Auto was as follows: Mr. Gutierrez owned 78\%, Mrs. Gutierrez owned two percent, Mr. Cornelison owned ten percent, Ms. Stephens owned five percent, and others owned five percent.

\textsuperscript{24} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Reply to Hyundai Motor Finance’s Objection to the Debtor’s Continued Use of Cash Collateral (Dkt. 155) at 3 (Dec. 20, 2006).

\textsuperscript{25} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 8 (Jan. 12, 2007).

\textsuperscript{26} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Reply to Hyundai Motor Finance’s Objection to the Debtor’s Continued Use of Cash Collateral (Dkt. 155) at 3 (Dec. 20, 2006).

\textsuperscript{27} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 8 (Jan. 12, 2007).

\textsuperscript{28} \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Reply to Hyundai Motor Finance’s Objection to the Debtor’s Continued Use of Cash Collateral (Dkt. 155) at 3 (Dec. 20, 2006).

\textsuperscript{29} \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 8 (Jan. 12, 2007).

\textsuperscript{30} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 8 (Jan. 12, 2007).
2. Principal Place of Business & Other Real Property

At all times prior to and during the bankruptcy, Incredible Auto’s principal business location was 1832 King Avenue West, Billings, Montana 59102.\(^{31}\) In 1996, Incredible Auto leased the property from Pierce Buildings on a five year lease with an option, at the discretion of Incredible Auto, to renew for four additional five-year terms.\(^{32}\) In 2002, Pierce Buildings assigned the lease to Ernie and Leanne Dutton, Livingston Marble and Granite, Inc., William and Evelyn Scalise, and Greg and Emily Strong ("Landlord").\(^{33}\) Incredible Auto identified the landlord as “King Ave. Properties” in its schedules.\(^{34}\) Under the lease, Incredible Auto was required to pay $12,458.33 in monthly rent during its second five-year term and $14,327.08 in monthly rent during its third five-year term.\(^{35}\) By the time it filed for bankruptcy, Incredible Auto was $42,981.00—approximately three months—behind.\(^{36}\) On this leased 1.8 acres of land, Incredible Auto

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\(^{32}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Exhibit A to Debtor’s Motion to Affirm Lease of Premises (Dkt. 145-1) at 6 (Dec. 16, 2006).

\(^{33}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Exhibit A to Debtor’s Motion to Affirm Lease of Premises (Dkt. 145-1) at 2 (Dec. 16, 2006).

\(^{34}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedules and Statement of Affairs (Dkt. 54) at 36 (Nov. 12, 2006). Although Incredible Auto referred to the landlord as “King Ave. Properties,” any time that the Landlord were involved in the Incredible Auto bankruptcy, their documents named them as individuals rather than as a corporate entity. See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation re: Lease and Motion for Approval (Dkt. 330) (Mar. 19, 2007).

\(^{35}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Exhibit A to Debtor’s Motion to Affirm Lease of Premises (Dkt. 145-1) at 7 (Dec. 16, 2006).

\(^{36}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedules and Statement of Affairs (Dkt. 54) at 28 (Nov. 12, 2006).
operated its new and used car dealership with a display lot and a 10,500 square foot building that housed its office and repair/body shop facilities.\(^{37}\)

Until two days before the bankruptcy commenced, Incredible Auto operated another used car lot approximately a mile down the road from Incredible Auto’s primary lot.\(^{38}\) The property consisted of a lot and a building, and the cars on the lot comprised both new and used inventory of Incredible Auto and cars “on consignment from Vince Wright, Kalispell Auto Liquidators.”\(^{39}\) The owner of the property at the time of the bankruptcy filing was never revealed, but Steve Marks, proprietor of Steve’s Auto Sales, was the former owner.\(^{40}\) Mr. Marks had leased the property to Tony Woolery prior to Mr. Gutierrez’s purchase of the dealership; Mr. Gutierrez assumed the lease in the transaction.\(^{41}\) During the course of the bankruptcy, the parties referred to this location as Incredible Auto’s second lot or the “New Beginnings” lot.\(^{42}\)

Mr. Cornelison claimed that, prior to the October 15, 2006 transfer, Incredible Auto had a “rental” of the “New Beginnings building.”\(^{43}\) Incredible Auto paid rent for

\(^{37}\) *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Motion to Use Cash Collateral (Dkt. 17) at 2 (Oct. 26, 2006).*

\(^{38}\) *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 69, 125 (Apr. 3, 2009).*

\(^{39}\) *In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 126 (Apr. 3, 2009).*

\(^{40}\) *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 15 (Dec. 13, 2006).*

\(^{41}\) *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 15 (Dec. 13, 2006).*

\(^{42}\) *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 68 (Apr. 3, 2009).*

\(^{43}\) *In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 124-25 (Apr. 3, 2009).* Whether the building was leased or rented was the
the use of this building to a company owned by Mr. Gutierrez called The Networks, d/b/a Auto Pro (“Auto Pro”).44 Two days before filing bankruptcy, Incredible Auto transferred the “rental of the building” to Graham-Staunton, Inc., d/b/a Incredible Chevrolet (“Incredible Chevrolet”).45 From that point on, the building was manned by Incredible Chevrolet employees, who sold the cars on the lot—even though the cars were still Incredible Auto’s new and used inventory and the consignment cars.46

3. All Roads Lead to Gutierrez: Incredible Auto’s Related Entities

As the bankruptcy continued, it became clear that many of the entities involved were related through Mr. Gutierrez. The court progressively became suspicious of the inter-relationships as it learned more facts.47 Mr. Gutierrez owned a company called Access Media.48 It was one of the advertising companies that Incredible Auto paid for advertising services.49 Mr. Gutierrez also owned a company called Auto Pro.50

subject of much oral sparring between Mr. Cornelison and the attorney for Hyundai Motor Finance Co. (“HMFC”) during HMFC’s cross examination of Mr. Cornelison. See id.


47 See e.g. In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 128 (Apr. 3, 2009) (“Well, Mr. Needler, I'm finding this whole arrangement a little cozy, Incredible Kia and Incredible Chevy. I'll be honest.”).


Incredible Auto paid Auto Pro rent for the use of the New Beginnings building.\textsuperscript{51} The court, however, did not take issue with those two relationships; it was more concerned with the interaction between Incredible Auto and Incredible Chevrolet.

At the time of filing, Mr. Gutierrez owned 80\% of Incredible Auto and 85\% of Incredible Chevrolet.\textsuperscript{52} Mr. Cornelison owned ten percent of Incredible Auto and ten percent of Incredible Chevrolet.\textsuperscript{53}

As mentioned above,\textsuperscript{54} just prior to filing bankruptcy, Incredible Auto transferred its “rental” of the New Beginnings building to Incredible Chevrolet.\textsuperscript{55} Additionally, the


\textsuperscript{53} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 121, 165 (Apr. 3, 2009). He purchased his interest in Incredible Chevrolet for $125,000 at the same time that he purchased his interest in Incredible Auto. See id at 121.

\textsuperscript{54} See supra pp. 13-14.
only people employed in the New Beginnings building owned by Incredible Chevrolet were former employees of Incredible Auto.\(^{56}\) Finally, Incredible Auto was wholesaling cars to Incredible Chevrolet through the New Beginnings property.\(^{57}\) When a customer visited the New Beginnings lot wishing to purchase a car that was owned by Incredible Auto, (1) an Incredible Chevrolet employee would call Incredible Auto, (2) Incredible Auto would sell the car to Incredible Chevrolet at wholesale, and (3) Incredible Chevrolet would sell the vehicle to the customer at retail, keeping the profit.\(^{58}\) The court made its displeasure with this arrangement clear enough that Incredible Auto agreed not to conduct any similar transactions.\(^{59}\)


\(^{59}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Reply to Hyundai Motor Finance’s Objection to the Debtor’s Continued Use of Cash Collateral (Dkt. 155) at 12 (Dec. 20, 2006).
B. FRANCHISE AND FINANCE

I. FRANCHISE AGREEMENT WITH KIA

As mentioned above, Incredible Auto executed a Kia Dealer Sales and Services Agreement (the “Franchise Agreement”) with KIA on July 1, 1997, while Tony Woolery was its owner, operator, and managing member. In December 2000, after Mr. Gutierrez acquired Incredible Auto, the Franchise Agreement was amended to remove Mr. Woolery and add Mr. Gutierrez.

Under the terms of the Franchise Agreement, KIA authorized Incredible Auto to “buy and resell . . . Kia Products . . . identify itself as an authorized Kia Dealer . . ., [and] use the Kia Marks . . . in the advertising, promotion, sale, and servicing of Kia Products . . . .” In return, Incredible Auto promised to “vigorously and aggressively sell and promote Kia Products, satisfactorily service Kia Products, . . . and establish and maintain [a] satisfactory Kia dealership . . .” by strictly complying with all of the terms and conditions of the Franchise Agreement.

See discussion supra pp. 17-19.

60 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Kia Dealer Sales and Service Agreement (Dkt. 203-1) at 4 (Jan. 17, 2007).

61 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Kia Dealer Sales and Service Agreement (Dkt. 203-1) at 2 (Jan. 17, 2007).

62 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Kia Dealer Sales and Service Agreement Amendment (Dkt. 203-1) at 5 (Jan. 17, 2007).

63 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Kia Dealer Sales and Service Agreement (Dkt. 203-1) at 5 (Jan. 17, 2007).

64 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Kia Dealer Sales and Service Agreement (Dkt. 203-1) at 5 (Jan. 17, 2007).

65 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Kia Dealer Sales and Service Agreement (Dkt. 203-1) at 5 (Jan. 17, 2007).

66 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Kia Dealer Sales and Service Agreement (Dkt. 203-1) at 5 (Jan. 17, 2007).
The terms and conditions of the Franchise Agreement were fairly standard. KIA would sell and deliver KIA products, such as vehicles, parts, and specialized equipment used to service KIA vehicles to Incredible Auto, and Incredible Auto would pay for the KIA products and then resell them or use them in serving KIA customers. However, two of the Franchise Agreement’s terms and conditions featured prominently in the Incredible Auto bankruptcy case.

First, was a provision requiring KIA’s prior written consent before Incredible Auto could transfer more than five percent of its ownership interest to any party other than the owner listed in the Franchise Agreement—Mr. Gutierrez. This provision became a headache for Incredible Auto when it attempted to sell nearly all of its assets, including its franchise, pursuant to section 363 of the Bankruptcy Code. Second, was a provision which allowed KIA to immediately terminate the Franchise Agreement if Incredible Auto “fail[ed] to conduct customary dealership operations for seven (7) consecutive business days” except for acts of God or other things beyond its control.

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67 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Kia Dealer Sales and Service Agreement (Dkt. 203-1) at 7-8, Exhibits A, D, E (Jan. 17, 2007).

68 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Kia Dealer Sales and Service Agreement (Dkt. 203-1) at 7-8 (Jan. 17, 2007).

69 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Kia Dealer Sales and Service Agreement (Dkt. 203-1) at 7 (Jan. 17, 2007).

70 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Kia Dealer Sales and Service Agreement (Dkt. 203-1) at 20-21 (Jan. 17, 2007). This provision became important during the bankruptcy case when KIA asserted this right after Incredible Auto attempted to sell its assets, including the KIA franchise, pursuant to section 363 of the Bankruptcy Code. See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Approve §363 Sale (Dkt. 176) (Jan. 7, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection of KIA Motors America, Inc. to Debtor’s Motion for Order Approving Contract for the Sale of Assets (Dkt. 203) at 3 (Jan. 17, 2007).

71 For further discussion of the section 363 sale and KIA’s response, see infra beginning on page 184.

72 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Kia Dealer Sales and Service Agreement (Dkt. 203-1) at 23-24 (Jan. 17, 2007).
This provision put Incredible Auto in a very difficult bargaining position when it attempted to secure approval for its use of cash collateral.\textsuperscript{73} Without using cash collateral, it could not continue its dealership operations and risked the loss of its franchise.\textsuperscript{74} Accordingly, although KIA did not actively inject itself into much of the Incredible Auto bankruptcy,\textsuperscript{75} its influence was felt in many of the negotiations and proceedings.\textsuperscript{76}

\textit{2. Finance Agreement with Hyundai Motor Finance Company}

\textit{a. The Agreement}

Hyundai Motor Finance Company (“HMFC”) was Incredible Auto’s primary financer and held an inventory loan agreement with Incredible Auto.\textsuperscript{77} Mr. Gutierrez signed the inventory loan and security agreement (“Agreement”) and the inventory loan and security agreement interest rate and charges addendum (“Addendum”) on July 27, 2005, as the managing member of Incredible Auto.\textsuperscript{78}

\textsuperscript{73} \textit{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Motion to Use Cash Collateral (Dkt. 17) at 7 (Oct. 26, 2006).}

\textsuperscript{74} \textit{See infra} p. 129 for a discussion of the cash collateral dispute within this case.

\textsuperscript{75} KIA’s attorney did not appear in the case until December 2006. \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Notice of Appearance and Request for Notice (Docket Entry 115) at 18 (Dec. 6, 2006). KIA’s first motion was not filed until January 2007, in response to Incredible Auto’s motion to approve the section 363 sale. \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection of KIA Motors America, Inc. to Debtor’s Motion for Order Approving Contract for the Sale of Assets (Dkt. 203) (Jan. 17, 2007).

\textsuperscript{76} \textit{See infra} p. 129 (discussing the cash collateral dispute); \textit{infra} p.184 (discussing the section 363 sale).

\textsuperscript{77} \textit{See United States v. Gutierrez, Case No. 09-00072, D. Mont., Indictment (Crim. Dkt. 1-1) (May 26, 2009).}

\textsuperscript{78} \textit{See In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 1: Inventory Loan and Security Agreement (Dkt. 100-1) at 4 (Nov. 30, 2006); \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 2: Hyundai Motor Finance Company Inventory Loan and Security Agreement Interest Rate and Charges Addendum (Dkt. 100-1) at 6 (Nov. 30, 2006).
The Agreement established that HMFC would advance payments to manufacturers, distributors, and other sellers for vehicles sold as inventory to Incredible Auto.\(^{79}\) It gave HMFC the power to vary the amount of money it would advance for vehicles based on the vehicle’s make, model, age, etc.\(^{80}\) It also gave HMFC the option to call-in the total amount of the advance if the value of vehicle, in HMFC’s discretion, dropped or the vehicle remained on Incredible Auto’s lot for 365 days.\(^{81}\) As further protection, the Agreement allowed HMFC to demand and retain possession of the title of each vehicle for which HMFC advanced funds until Incredible Auto sold the vehicle.\(^{82}\)

The Agreement allowed HMFC to terminate the Agreement or suspend advances upon Incredible Auto’s default, or in HMFC’s discretion upon notice given.\(^{83}\) Default under the Agreement included, but was not limited to the following: “A statement or representation made by [Incredible Auto] for the purpose of obtaining credit from [HMFC] is determined to be false; [t]he [c]ollateral becomes in danger of loss, misuse, seizure or confiscation; . . . or . . . [t]he occurrence of any event, or material adverse change in the financial condition or business operations of Dealer . . . .”\(^{84}\)

\(^{79}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 1: Inventory Loan and Security Agreement (Dkt. 100-1) at 1 (Nov. 30, 2006).

\(^{80}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 1: Inventory Loan and Security Agreement (Dkt. 100-1) at 1 (Nov. 30, 2006).

\(^{81}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 1: Inventory Loan and Security Agreement (Dkt. 100-1) at 1 (Nov. 30, 2006).

\(^{82}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 1: Inventory Loan and Security Agreement (Dkt. 100-1) at 2 (Nov. 30, 2006).

\(^{83}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 1: Inventory Loan and Security Agreement (Dkt. 100-1) at 2 (Nov. 30, 2006).

\(^{84}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 1: Inventory Loan and Security Agreement (Dkt. 100-1) at 3 (Nov. 30, 2006).
When Incredible Auto sold a vehicle for which HMFC had made an advance, Incredible Auto had to “remit faithfully and immediately,” the outstanding amount of the advance for that vehicle.\(^{85}\) Incredible Auto had to pay the amount “no later than the earlier of (i) the fifteenth calendar day after the sale or (ii) the second business day after funding of such \(v\)ehicle sale.”\(^{86}\) If it failed to pay in this time period, HMFC would consider the sale to be “out of trust.”\(^{87}\) The Agreement also provided that the date of the vehicle sale was the earliest of “(a) the date of delivery of the \(v\)ehicle to the customer, (b) the contract date, (c) the date the manufacturer’s certificate of origin or certificate of title \(w\)as assigned to [HMFC], or (d) the date [Incredible Auto] \(w\)as paid for the \(v\)ehicle.”\(^{88}\) In addition to Incredible Auto’s responsibility to repay the principal amount of the advance, it was required to pay interest in an amount equal to one percent for new, program, demonstrator, and service loaner vehicles, and 1.5% for used vehicles, with each having a different maturity date and term.\(^{89}\)

In order to secure both present and future advances, the Agreement provided HMFC security in the following property of Incredible Auto:

All inventory of new and used motor vehicles and other personal property; . . . All accounts or rights to payment of money; . . . All chattel paper, contract rights and general intangibles; . . . All office furniture, shop

\(^{85}\) *In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 1: Inventory Loan and Security Agreement (Dkt. 100-1) at 1 (Nov. 30, 2006).*

\(^{86}\) *In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 1: Inventory Loan and Security Agreement (Dkt. 100-1) at 1 (Nov. 30, 2006).*

\(^{87}\) *In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 122 (Apr. 3, 2009).*

\(^{88}\) *In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 1: Inventory Loan and Security Agreement (Dkt. 100-1) at 1 (Nov. 30, 2006).*

\(^{89}\) *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 1: Inventory Loan and Security Agreement (Dkt. 100-1) at 2 (Nov. 30, 2006).*
equipment, computer equipment and records, tools, lease improvements and fixtures, and other personal property; and [a]ll cash and non-cash proceeds of all of the foregoing . . . .

HMFC initially perfected its security interest by filing a Uniform Commercial Code Financing Statement on July 27, 2005, with the Montana Secretary of State. As Incredible Auto only operated in Montana and all the collateral was located in Montana, HMFC correctly filed the financing statements with the Montana Secretary of State. HMFC filed two additional financing statements, naming the same collateral, prior to the petition date: (1) one on August 25, 2005, listing a First Avenue address for Incredible Auto, and (2) one October 6, 2006, listing a new King Avenue address.

b. How the System Was Supposed to Work

When Incredible Auto acquired a new vehicle from KIA, KIA would “draft directly on [HMFC]” and deliver the vehicle to Incredible Auto. According to Dale Ueno, assistant manager in HMFC’s Commercial Finance Department, HMFC

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90 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 1: Inventory Loan and Security Agreement (Dkt. 100-1) at 2 (Nov. 30, 2006).

91 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 3: UCC Financing Statement (Dkt. 100-1) at 7-8 (Nov. 30, 2006).


93 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 4: UCC Financing Statement (Dkt. 100-1) at 9-10 (Nov. 30, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 5: UCC Financing Statement (Dkt. 100-1) at 11-12 (Nov. 30, 2006). The case never discussed the reason for the additional financing statements. One financing statement may have been for the New Beginnings lot, but there is no information regarding the rationale for the second financing statement.


“financed ‘80% of the purchase price for those vehicles purchased directly from sellers and 100% of the purchase price for those vehicles purchased through auto auctions.”

When Incredible Auto acquired a used vehicle from an auction, HMFC would either pay the auction directly or advance the funds to Incredible Auto to pay the costs.

 “[T]o obtain advances for particular vehicles, [Incredible Auto] was required to first purchase the vehicles and then fax to [HMFC] copies of the original certificates of title for the vehicles showing that the vehicles had been transferred to [Incredible Auto].” Incredible Auto would also fax the block ticket from the auction showing the purchase price. The block ticket, however, would not indicate whether the purchase price was paid by Incredible Auto. “Because you wouldn't get the title, . . . unless you had made the payment,” HMFC could, absent fraud, ensure that Incredible Auto had purchased the vehicle before they advanced funds for it.

When Incredible Auto sold a vehicle for which HMFC had advanced money, it generally would obtain payment directly from the consumer or from a retail lender which

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96 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 181) at 3 (Jan. 12, 2007).


98 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 181) at 3 (Jan. 12, 2007).


contracted with the consumer.\textsuperscript{102} Once Incredible Auto received the payment, it would make an electronic payment to HMFC for the advanced amount by the payment deadline set in the Agreement.\textsuperscript{103}

Generally, HMFC would conduct monthly audits of Incredible Auto’s inventory to make sure that Incredible Auto was complying with the Agreement.\textsuperscript{104} HMFC contracted with a company called Datascan to conduct the audits.\textsuperscript{105} Datascan would go to Incredible Auto and touch every vehicle for which HMFC had advanced money.\textsuperscript{106} If the vehicle was not present on the lot, Datascan had to determine the reason for its absence.\textsuperscript{107} If the vehicle had been sold, Datascan had to determine if Incredible Auto had been “funded”—received payment—by the customer or a retail lender.\textsuperscript{108} Datascan could determine this by reviewing the vehicle’s deal jacket. A deal jacket normally would contain the following information: (1) who purchased the vehicle and when, (2) a credit application, (3) a contract from the retail lender, if there was one, and (4) an

\textsuperscript{102} See generally In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 32 (Apr. 3, 2009).


application for title and title information.\textsuperscript{109} HMFC would use the date on the retail contract to judge whether Incredible Auto repaid HMFC within the terms of its Agreement.

\textbf{III. LIVING ON THE EDGE: THE SHORT WALK TO BANKRUPTCY}

\textbf{A. INTERNAL FACTORS LEADING TO BANKRUPTCY}

When Incredible Auto began feeling the financial crunch, it did everything it could to stay afloat. Specifically, it tried to (1) bring in as much cash as possible from HMFC, (2) retain as much cash as possible by delaying payments to HMFC and consumer lenders, and (3) creatively structure inventory purchases. Likely, much to Incredible Auto’s dismay, HMFC began visiting Incredible Auto more often than the monthly audit.\textsuperscript{110} It audited Incredible Auto on October 2nd, 6th-9th, 11th, 13th, 16th, 23rd, 30th, and on November 24th.\textsuperscript{111} The extent of Incredible Auto’s attempts to remain a going concern was uncovered during HMFC’s investigation.

\textit{1. IMPROVING CASH FLOW THROUGH DOUBLE FLOORING, RE-FLOORING, AND TITLE FABRICATION}

\textit{a. Double Flooring}

Around September 5, 2006, HMFC received a call from General Motors Acceptance Corporation (“GMAC”), Incredible Chevrolet’s floor financer, inquiring


\textsuperscript{110} \textit{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 60 (Apr. 3, 2009).}

\textsuperscript{111} \textit{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 37, 60, 109 (Apr. 3, 2009).}
about the possibility of double flooring.\textsuperscript{112} A vehicle is double floored if two floor
financers advance funds for the vehicle, consider it collateral, and have not been repaid
for the advance. GMAC sent HMFC a list of the vehicles that it floored so that HMFC
could compare lists.\textsuperscript{113} Mr. Ueno began investigating Incredible Auto on October 2,
2006, after HMFC received the tip.\textsuperscript{114}

Incredible Auto initially admitted to inadvertent double flooring due only to a
timing issue when vehicles were transferred from one floor plan to another over a holiday
weekend.\textsuperscript{115} However, HMFC’s investigation revealed that Incredible Auto had double
floored vehicles longer than claimed.\textsuperscript{116} HMFC found that nineteen vehicles had been
double floored with HMFC and GMAC, beginning as early as March 1, 2006, ranging in
length of time between one and 105 days, with an average of 30.1 days.\textsuperscript{117}

While Mr. Ueno was at Incredible Auto on October 2nd, he also conducted a
basic inventory audit.\textsuperscript{118} The “floor-plan audit [was completed] to determine the status of

\textsuperscript{112} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of

\textsuperscript{113} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of

\textsuperscript{114} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of
Proceedings Nov. 6, 2006 (Dkt. 427) at 120 (Apr. 3, 2009).

\textsuperscript{115} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of

\textsuperscript{116} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of

\textsuperscript{117} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 18:
GMAC Double Floored Vehicles – from GMAC Inventory Run 9/4/2006 (Dkt. 100-3) at 15 (Nov. 30,
2006).

\textsuperscript{118} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of
Proceedings Nov. 6, 2006 (Dkt. 427) at 120 (Apr. 3, 2009).
the vehicle inventory, what was on [ ] the lot and what was sold at the time.”

HMFC “touch[ed] every vehicle . . . look[ed] at the contracts, determine[ed] when it was sold to customers, and if it [wa]s funded.” At the time of the audit, “[HMFC] didn't see too much unusual as far as what [it] found. [HMFC was] unable to determine at the time what units had been funded. The dealer had indicated that they didn't keep those records.”

\[b.~\text{Re-flooring}\]

At some point between October 2nd and October 6th, HMFC received another tip, this time from a former Incredible Auto employee, who claimed Incredible Auto was re-flooring vehicles and getting advances for them. Basically, Incredible Auto had the vehicle as inventory at one point, and HMFC advanced funds for it. Incredible Auto then sold the vehicle and repaid HMFC but later re-sent title information to HMFC to obtain another advance even though the vehicle was not back on the lot. The former employee suggested that HMFC look into a few specific vehicles.

\[119~\text{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 120-21 (Apr. 3, 2009).}\]

\[120~\text{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 121 (Apr. 3, 2009).}\]

\[121~\text{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 122 (Apr. 3, 2009).}\]

\[122~\text{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 123 (Apr. 3, 2009).}\]

\[123~\text{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 28 (Apr. 3, 2009).}\]

\[124~\text{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 28 (Apr. 3, 2009).}\]

\[125~\text{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 28 (Apr. 3, 2009).}\]
This tip led to another on-site investigation of Incredible Auto that extended from October 6th through 9th 2006.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 123 (Apr. 3, 2009).} HMFC confirmed the information provided in the tip.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 29 (Apr. 3, 2009).} HMFC had floored a 2003 Acura on August 2, 2006.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 29 (Apr. 3, 2009).} Incredible Auto paid off the debt on August 10th, but then it reapplied for an advance on the vehicle on September 15th without having possession.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 29 (Apr. 3, 2009).} Although, Incredible Auto repaid the second advance on October 5th,\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 29 (Apr. 3, 2009).} it had held the cash for approximately twenty days without actually having the vehicle in inventory.

c. Title Fabrication

Though not until the November 2006 audit, HMFC also uncovered that Incredible Auto had been fabricating titles prior to filing for bankruptcy.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 181) at 3 (Jan. 12, 2006).} This fact is relevant because in order to obtain financing, Incredible Auto merely faxed the vehicle’s title to HMFC.\footnote{HMFC’s exhibit contained the dual-titles of seventeen vehicles. See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Exhibit 23-1 through 23-10 (Dkt. 100-4) (Nov. 30, 2006); In re} During the audit, HMFC uncovered that Incredible Auto had two title documents in the deal jackets of many vehicles.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 54 (Apr. 3, 2009).} One document was an original title,
and the other was a copy of the title. The signatures on the original titles were different from the signatures on the copies, which showed Incredible Auto as the purchaser.

Some of the photocopied titles even had signatures written in original ink. In his testimony, Mr. Ueno noted that because of the original ink signatures on the photocopies of the titles, he believed that Incredible Auto faxed fabricated titles to HMFC in order to receive financing for vehicles. Because of the fax transmission, HMFC would not be able to tell if the document was an original or a copy.

2. RETAINING CASH: DEAL JACKETS, "ED GRAHAM" SALES, AND UNPAID CONSUMER LIENS

While investigating the double flooring and falsification of documents, HMFC also determined that Incredible Auto was also out of trust to the tune of $366,880 at the time of filing bankruptcy. In other words, Incredible Auto sold $366,880 worth of

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139 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 21 (Apr. 3, 2009). Included is the amount that, on October 6th or 7th, Incredible Auto remitted to HMFC as payment for previous advances but which was returned for nonsufficient funds. Id. at 18. Additionally, because of Incredible Auto’s actions post-petition, the out-of-trust
vehicles without remitting payment back to HMFC. Incredible Auto had accumulated this out-of-trust balance through falsifying the deal jackets and making sales to “Ed Graham.” Also, Incredible Auto retained additional cash at the expense of their customers by accepting trade-in vehicles but failing to pay off the preexisting liens.

a. Deal Jackets

During HMFC’s October 2nd audit, HMFC found that some of the vehicles for which it had advanced funds were missing from the lot. However, it was unable to determine whether the vehicles had been purchased and thus funded by either a retail lender or a consumer. The deal jackets for these vehicles were either (1) missing entirely or (2) missing the retail contract designating when Incredible Auto was funded by the retail lender. When HMFC asked Mr. Gutierrez and Ms. Stephens what happened to the retail contracts, they responded that they shredded the contracts because the dates on the contracts did not match the dates that the funds arrived in Incredible Auto’s bank account. They stated that they would shred the funding documents and then orally tell the auditors when Incredible Auto was funded by the retail lenders.

total grew to $628,081 by the middle of January 2007. See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 2 (Jan. 12, 2007).


HMFC decided to contact the retail lenders to determine when Incredible Auto had been funded.\textsuperscript{145} It learned that many of the retail lenders had funded the contracts which Incredible Auto had asserted were unfunded.\textsuperscript{146}

During the October 6th through 9th audit, Mr. Gutierrez and Ms. Stephens presented HMFC with a set of documents: two separate sets of documents for four transactions.\textsuperscript{147} Ms. Stephens admitted that one jacket contained the original retail contract and the second one contained a fabricated retail contract.\textsuperscript{148}

<table>
<thead>
<tr>
<th>Vehicle</th>
<th>Real Contract Funding Date</th>
<th>Fabricated Contract Funding Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005 Kia Sportage\textsuperscript{149}</td>
<td>September 14, 2006</td>
<td>September 23, 2006</td>
</tr>
<tr>
<td>2005 Chevy Classic\textsuperscript{150}</td>
<td>September 9, 2006</td>
<td>September 23, 2006</td>
</tr>
<tr>
<td>2004 Chevy Impala\textsuperscript{151}</td>
<td>August 29, 2006</td>
<td>September 23, 2006</td>
</tr>
<tr>
<td>2005 Dodge Neon\textsuperscript{152}</td>
<td>August 29, 2006</td>
<td>September 22, 2006</td>
</tr>
</tbody>
</table>

According to Mr. Ueno, “Basically what was done was the contract was—a second contract was drafted just to give the appearance that it was within Hyundai’s repayment


period.” By doing this, Incredible Auto was able to appear as though it was repaying HMFC’s advances as required by the terms of the Agreement.

b. “Ed Graham” Sales

Some time before the October 30th audit, three vehicles that had been present during all of the other October audits had disappeared. When Datascan investigated what happened to the vehicles (a Grand Am, a Stratus, and one other vehicle), it determined that they had been sold to a Mr. Ed Graham on September 27, 2006. Though no sales information was available for the vehicles, Mr. Gutierrez stated that Mr. Graham regularly purchased vehicles and left them on the Incredible Auto lot for a period of time; thus it was not odd for HMFC to see the vehicles during its first seven audits but not find them during its October 30th audit.

It appeared that the sales to Mr. Ed Graham were actually sales to Incredible Chevrolet because the Stratus later reappeared on the Incredible Auto lot. Mr. Ueno said that he “was told that the Stratus was a sale to Incredible Chevy, and the deal

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unwound, and it was back on the [Incredible Auto] lot.”\textsuperscript{158} HMFC never received payment on these “sales” to Mr. Ed Graham.\textsuperscript{159}

As mentioned above in section II(A)(3), Incredible Auto continued its transactions with Incredible Chevrolet even after the petition date.\textsuperscript{160} It also continued trying to retain as much HMFC money as possible post-petition.\textsuperscript{161} Incredible Auto not only wholesaled vehicles to Incredible Chevrolet post-petition, but it neglected to cash the checks it received from Incredible Chevrolet.\textsuperscript{162}

<table>
<thead>
<tr>
<th>Check Date</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>September 30, 2006</td>
<td>$18,000</td>
</tr>
<tr>
<td>October 19, 2006</td>
<td>$6,500</td>
</tr>
<tr>
<td>October 26, 2006</td>
<td>$15,129.33</td>
</tr>
<tr>
<td>October 31, 2006</td>
<td>$10,100</td>
</tr>
<tr>
<td>October 31, 2006</td>
<td>$12,198</td>
</tr>
</tbody>
</table>

This practice allowed Mr. Gutierrez’s second business, Incredible Chevrolet, to obtain inventory without paying for it, because Incredible Auto would not cash the checks. Plus, Incredible Auto could claim that they were not “funded” because the checks were not cashed, and therefore it did not have to repay HMFC for its advance.

\textsuperscript{158} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 63 (Apr. 3, 2009).

\textsuperscript{159} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 60-63 (Apr. 3, 2009).

\textsuperscript{160} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 11 (Jan. 12, 2007).

\textsuperscript{161} See generally In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) (Jan. 12, 2007).

\textsuperscript{162} See re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 11 (Jan. 12, 2007).

\textsuperscript{163} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 19: Datascan Audit Recap Report (Dkt. 100-3) at 16 (Nov. 30, 2006).
c. Choice Not to Pay Consumer Liens

Incredible Auto found another way to conserve its cash flow: accept customers’ vehicles as trade-ins for the purchase of new vehicles, resell the trade-ins to other customers, and then fail to repay trade-in customer’s outstanding consumer lien on the vehicles.\textsuperscript{164} During Mr. Ueno’s October 6th visit to Incredible Auto, he learned that there were unpaid liens on some of the vehicles acquired by Incredible Auto as trade-ins.\textsuperscript{165} Further investigation revealed that Incredible Auto failed to repay outstanding liens on as many as 35 vehicles that it acquired since April 2006.\textsuperscript{166} Some of these vehicles had been resold to other customers, and some were still on Incredible Auto’s lot by October 2006.\textsuperscript{167}

When Mr. Ueno asked Ms. Stephens about this, she said, “I’m not going to lie to you: We do have probably approximately $200,000 out there in lien payoffs that are floating out there.”\textsuperscript{168} She explained that the dealership was unable to repay the liens because of a “shortage of cash.”\textsuperscript{169} Mr. Gutierrez asserted that it was actually common


\textsuperscript{165} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 44 (Apr. 3, 2009).

\textsuperscript{166} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 48 (Apr. 3, 2009); \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 21: Unpaid Liens (Dkt. 100-3) at 24 (Nov. 30, 2006); \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Expedited Motion of Modify Stay, Alternative Motion for Appointment of Trustee and Notice (Dkt. 70) at 4 (Nov. 20, 2006).

\textsuperscript{167} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 48 (Apr. 3, 2009); \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 21: Unpaid Lien (Dkt. 100-3) at 24 (Nov. 30, 2006).

\textsuperscript{168} \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 44 (Apr. 3, 2009).

\textsuperscript{169} \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 44 (Apr. 3, 2009).
practice for a dealership to take a vehicle as a trade-in and then either make the customer’s monthly payments on the lien rather than paying off the car or have a seven day lag period in which Incredible Auto would repay the liens. Incredible Auto also hinted that it could not pay off the liens because HMFC had suspended its cash advances for new vehicle purchases in September. However, most of the vehicles identified had outstanding liens for much longer than seven days, and some of the vehicles were acquired as trade-ins months before HMFC suspended its new vehicle cash advances. Further discussion of the bankruptcy activity involving these consumer liens is found infra section IV(C)(2).

3. STEVE’S AUTO’S AND AUTO AUCTION’S TRANSACTIONS

Throughout September and early October 2006, with HMFC actively investigating its vehicle transactions and with its floor financing for new cars suspended, Incredible Auto had to find another way to maintain its vehicle inventory.


171 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 45 (Apr. 3, 2009). Mr. Ueno testified that some lag time was normal but no more than a couple of weeks. Id. at 48.


174 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 21: Unpaid Lien (Dkt. 100-3) at 24 (Nov. 30, 2006).

175 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 120 (Apr. 3, 2009).

However, it also needed cash to pay the debts that were continuing to mount. By this time, HMFC was still willing to finance used vehicle inventory on a case-by-case basis and would finance 100% of the purchase price of vehicles purchased through an auction. Accordingly, Mr. Gutierrez developed the following ten-part strategy to meet both of Incredible Auto’s needs. First, arrange to purchase vehicles wholesale from a friend who owns a car dealership. Second, structure the transaction as a purchase through an auction. Third, tender checks for the vehicles to the auction. Fourth, take possession of the vehicles. Fifth, convince the seller to obtain copies of the vehicle titles from the vehicles’ lienholders. Sixth, alter the copies so that they purport to give Incredible Auto title. Seventh, fax the copies to HMFC. Eight, obtain 100% of the

177 See for example the discussion of unpaid consumer liens beginning infra page 99.


179 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 181) at 3 (Jan. 12, 2007).

180 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 16-17, 59-61 (Dec. 13, 2006).

181 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 22-23 (Dec. 13, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 181) at 4 (Jan. 12, 2007).


183 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont. Deposition of Steve Marks (Dkt. 136) at 61-64 (Dec. 13, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 181) at 5 (Jan. 12, 2007).

184 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont. Deposition of Steve Marks (Dkt. 136) at 64-65 (Dec. 13, 2006); see also In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr.
purchase price from HMFC.¹⁸⁷ Ninth, ignore the phone calls when the checks are returned for insufficient funds.¹⁸⁸ Tenth, resell the vehicles as inventory.¹⁸⁹

Through this transaction, Incredible Auto managed to secure $41,705 in cash advances from HMFC¹⁹⁰ and fourteen vehicles for its inventory.¹⁹¹ The details of this transaction and its impact on Incredible Auto’s bankruptcy are discussed infra section VI(C)(1).

**B. EXTERNAL FACTORS FOR BANKRUPTCY**

Mr. Gutierrez attempted to blame everyone but himself for Incredible Auto’s financial situation. He blamed both HMFC and the national/local conditions for Incredible Auto’s problems.

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¹⁸⁸ See *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 181) at 3-4 (Jan. 12, 2007).

¹⁸⁹ Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (*In re Incredible Auto Sales, LLC*), Case No. 06-60855, Bankr. D. Mont., Complaint (Dkt. 7) (Oct. 18, 2006); *see In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont. Deposition of Steve Marks (Dkt. 136) at 66-67, 70 (Dec. 13, 2006).

¹⁹⁰ See *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 33, 53-54 (Dec. 13, 2006); *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 181) at 6 (Jan. 12, 2007).

¹⁹¹ See *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 20, 66 (Dec. 13, 2006).
I. FINGER POINTED AT HMFC

After learning of Incredible Auto’s double flooring, HMFC exercised its rights under the suspension/termination portion of the Agreement and suspended all advances for new car and used car inventory.\(^{192}\) It first suspended the advances for two ten-day periods during the month of September and never reinstated the new-car advances.\(^{193}\) HMFC restored the used car advances in late September or early October.\(^{194}\) According to Mr. Ueno, it was “advancing periodically on used cars”\(^{195}\) on a “case-by-case basis.”\(^{196}\) At the December 5, 2006 hearing, Incredible Auto’s attorney accused HMFC of “basically put[ing] [Incredible Auto] out of business at this time.”\(^{197}\)

Additionally, when Mr. Gutierrez testified at the November 5, 2006 hearing, he blamed the heightened presence of HMFC at the dealership for impairing sales and causing “staffing concerns.”\(^{198}\) He was not asked about and made no comment as the legitimacy of HMFC’s presence at Incredible Auto during the time period.


\(^{195}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 95 (Apr. 3, 2009).


\(^{198}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 79 (Apr. 3, 2009).
2. FINGER POINTED AT OUTSIDE CONDITIONS

In the court documents and newspapers, Mr. Gutierrez blamed four “outside” forces for Incredible Auto’s financial problems. First, he pointed to the local downturn of auto businesses in Billings\(^\text{199}\) and the national fuel crisis.\(^\text{200}\) Second, he stated that the bad press about the new vehicle market negatively affected Incredible Auto.\(^\text{201}\) Third, he claimed that he had lost personnel as a result of the declining business.\(^\text{202}\) Incredible Auto originally had 32 employees, but by the petition date, it only had 21 employees.\(^\text{203}\) Finally, and most forcefully, he blamed the large bridge construction and road expansion project that began in March and that had closed access to his facility.\(^\text{204}\) In his testimony, he stated that that the construction “require[ed] people to actually have to go around two blocks to get to us or cut across the Perkins parking lot, as we do, if they needed to get to us. So it makes it a little challenging for us at this point.”\(^\text{205}\) He claimed that “we had not expected the conditions of that road construction to impact us as much as it did.”\(^\text{206}\)

\(^{199}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Motion to Use Cash Collateral (Dkt. 17) at 2 (Oct. 26, 2006).

\(^{200}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Affidavit of Nick Gutierrez of Incredible Auto Sales LLC in Support of the Emergency Motion to Use Cash Collateral and Offer of Adequate Protection (Dkt. 17-6) at 2 (Oct. 26, 2006) [hereinafter Gutierrez Affidavit].

\(^{201}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Gutierrez Affidavit (Dkt. 17-6) at 2 (Oct. 26, 2006).

\(^{202}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 78 (Apr. 3, 2009).

\(^{203}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 51 (Apr. 3, 2009).

\(^{204}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 73 (Apr. 3, 2009).

\(^{205}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 73 (Apr. 3, 2009).

\(^{206}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 84 (Apr. 3, 2009).
The referenced road construction was a reconstruction of a bridge and addition of another lane.\textsuperscript{207} Other businesses were affected by the road construction and saw some drop-off in revenues,\textsuperscript{208} but those businesses said that “the inconveniences aren't as bad as expected . . . .”\textsuperscript{209} One restaurant manager said, “[S]ales losses have been minor and aren't necessarily related to the bridge work.”\textsuperscript{210} A hotel manager said, “We thought our business would come to a halt, but most of the week, we're booked.”\textsuperscript{211}

\textbf{C. MOST LIKELY CAUSE: INVESTIGATIONS, INDICTMENTS, AND SUBSEQUENT SUITS}

While the road and bridge construction may have been a contributing factor, the internal mismanagement of the business was the more likely cause of Incredible Auto’s bankruptcy. In fact, not only did Incredible Auto have to file for bankruptcy, its primary pre-bankruptcy managers—Mr. Gutierrez and Ms. Stephens—were investigated and indicted on criminal charges by the U.S. Attorney.


\textsuperscript{208} See Jan Falstad, \textit{Bridge Reconstruction Project Around King Avenue West Causing Some Headaches}, BILLINGS GAZETTE, Nov. 4, 2006, available at \url{http://www.billingsgazette.com/business/article_9bbf218a-199a-5133-b20e-845458af7dd3.html?mode=story}. One article refers to around fifteen business around the area of the road construction. \textit{See id.}


Ms. Stephens was indicted first and pled guilty to hiding knowledge of mail fraud. At her April 2009 plea hearing, she admitted that “she carried out orders from her supervisor and senior partner, took steps to hide crimes, lied to customers and didn't tell authorities what was happening until confronted by federal law enforcement.” The court ordered her to pay restitution “with $665,877 going to Little Horn State Bank and $174,934 to Hyundai Motor Finance Co.”

Likely using evidence gained from Ms. Stephens’s plea, a federal grand jury indicted Mr. Gutierrez on July 24, 2009, on three counts of wire fraud, three counts of mail fraud, bank fraud, and aggravated identity theft. The indictment alleged that (1) he told employees not to pay HMFC in accordance with the agreement; (2) he deceived HMFC and its auditors into believing that the payments were not late; (3) he directed employees to floor vehicles with HMFC that were already floored with another lender.

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215 See United States v. Gutierrez, Case No. 09-00072, D. Mont., Indictment (Crim. Dkt. 1-1) at 1-2 (May 26, 2009).

216 See United States v. Gutierrez, Case No. 09-00072, D. Mont., Indictment (Crim. Dkt. 1-1) at 3 (May 26, 2009).

217 See United States v. Gutierrez, Case No. 09-00072, D. Mont., Indictment (Crim. Dkt. 1-1) at 3 (May 26, 2009).

218 See United States v. Gutierrez, Case No. 09-00072, D. Mont., Indictment (Crim. Dkt. 1-1) at 3 (May 26, 2009).
and (4) he also did not pay off the existing car loans, as promised, on the cars that Incredible Auto received for trade in.\textsuperscript{219}

On February 19, 2010, Mr. Gutierrez changed his plea to guilty and on February 24, 2010, he filed a plea agreement pleading guilty to the count of bank fraud which involved Little Horn State Bank.\textsuperscript{220} Though the plea appears limited to actions perpetrated by Net-Works Ad Agency, Inc., a company owned by Mr. Gutierrez and his wife, against Little Horn State Bank,\textsuperscript{221} the actions that Mr. Gutierrez pled guilty to were the same actions/tactics that he and Incredible Auto perpetrated against HMFC prior to and during the Chapter 11 bankruptcy.\textsuperscript{222}

Additionally, on July 21, 2009, HMFC filed a civil complaint against Mr. Gutierrez claiming that he was a personal guarantee on the Agreement and that he personally owed HMFC $315,598.01 plus interest and attorneys fees and costs.\textsuperscript{223} HMFC made the claim based on breach of contract and personal guaranty.\textsuperscript{224} Mr. Gutierrez responded that (1) HMFC did not state a claim upon which relief could be

\textsuperscript{219} \textit{See} United States v. Gutierrez, Case No. 09-00072, D. Mont., Indictment (Crim. Dkt. 1-1) at 7 (May 26, 2009).

\textsuperscript{220} \textit{See} United States v. Gutierrez, Case No. 09-00072, D. Mont., Offer of Proof (Crim. Dkt. 27) at 4 (Feb. 25, 2010).

\textsuperscript{221} \textit{See} United States v. Gutierrez, Case No. 09-00072, D. Mont., Offer of Proof (Crim. Dkt. 27) at 4-5 (Feb. 25, 2010). This is true except the U.S. Attorney anticipated evidence would show that vehicles were double floored with Little Horn State Bank and HMFC. \textit{See id.} at 4.

\textsuperscript{222} \textit{See} United States v. Gutierrez, Case No. 09-00072, D. Mont., Indictment (Crim. Dkt. 1-1) (May 26, 2009).

\textsuperscript{223} \textit{See} Hyundai Motor Finance Company v. Gutierrez, Case No. CV-09-91-BLG-RFC-CSO, D. Mont., Complaint (Civ. Dkt. 1) at 5-6 (July 21, 2009). This amount includes $173,461.01 in principal and interest that remained unpaid after the sale of Incredible Auto’s assets and $142,137 for HMFC’s attorney’s expenses during the bankruptcy proceedings. \textit{See id.}

granted and (2) the amount claimed due “has been paid in full or substantially in full.”

Mr. Gutierrez continued his blame of HMFC in this subsequent proceeding by filing a counter claim alleging that HMFC

breach[ed] . . . the lending agreement by cutting off or delaying payment to Incredible Kia in September, 2006 in violation of the terms of the lending agreement, and by unlawfully interfering with Incredible Kia’s contractual, business and prospective business relations. HMFC occupied the Kia dealership, interfering with its sales activities in October, 2006. HMFC’s actions caused the loss of employees, customers and business. The amount of the loss in September was approximately $230,000.

IV. DESTINATION: CHAPTER 11

A. PETITION AND SCHEDULES

Incredible Auto filed its Chapter 11 petition on October 17, 2006, citing that it had 100-199 creditors, $1 million to $10 million in assets, and $1 million to $10 million in debts. It anticipated that funds would be available to pay the unsecured creditors.

Incredible Auto filed no first day motions and waited to file its emergency motion to use cash collateral until nine days after the petition date, due to the fact that its attorney was attending his wife’s high school reunion when Incredible Auto decided to file for bankruptcy.

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227 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Voluntary Petition (Dkt. 1) at 1 (Oct. 17, 2006).
228 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Voluntary Petition (Dkt. 1) at 1 (Oct. 17, 2006).
229 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of William L. Needler of the Law Firm William L. Needler and Associates, Attorney for the Debtor and Requests this Court to Modify, Amend, Vacate and Reconsider its Order of May 18, 2007 Denying Attorney Fees and
After the court granted Incredible Auto’s motion to extend the deadline to file schedules,\(^{230}\) Incredible Auto filed its schedules on November 12, 2006.\(^{231}\) It filed an amended version the next day apparently correcting a calculation error.\(^{232}\) Incredible Auto filed an additional amendment to Schedule F, the creditors holding unsecured nonpriority claims, on December 9, 2006, adding a five page list of customers whose original liens on their trade-ins remained unpaid.\(^{233}\)

The November 13th schedule listed $3,476,443.77 in the following personal property assets.\(^{234}\)

\(^{230}\) *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 45) at 1 (Nov. 6, 2006).*

\(^{231}\) *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedules and Statement of Affairs (Dkt. 54) at 1 (Nov. 12, 2006).*

\(^{232}\) *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Summary of Schedules (Dkt. 57) at 11 (Nov. 13, 2006).*

\(^{233}\) *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Amended to Schedules and Statement of Affairs (Dkt. 126) at 2 (Dec. 9, 2006).*

\(^{234}\) *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Summary of Schedules (Dkt. 57) at 1 (Nov. 13, 2006).*
### Incredible Auto Assets

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<tr>
<td>Accounts Receivable</td>
<td>$176,994.00</td>
</tr>
<tr>
<td>Kia Franchise</td>
<td>$800,000.00</td>
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<td>United Car Care Lawsuit</td>
<td>$502,400.00</td>
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<td>Parts and Supplies</td>
<td>$153,510.00</td>
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<td>Machinery &amp; Fixtures</td>
<td>42,352.00</td>
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<td>New Vehicles</td>
<td>$467,100.00</td>
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<td>Service Loaners</td>
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<tr>
<td>Used Vehicles</td>
<td>$1,251,940.00</td>
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<tr>
<td>Signage &amp; Leasehold Improvements</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>$3,476,443.77</strong></td>
</tr>
</tbody>
</table>

It also listed liabilities totaling $4,221,606.00. It claimed that it owed only $2,198,247.00 to two secured creditors: ADP Commercial Leasing (for a computer) and HMFC. Incredible Auto owed an unknown amount to four creditors holding unsecured priority claims: the Montana Department of Revenue, IM Agistics, Internal Revenue Service, and the State of Montana Department of Labor. It also owed $2,023,361.00 to 128 creditors holding unsecured nonpriority liens.

235 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Summary of Schedules (Dkt. 57) at 1-4 (Nov. 13, 2006).

236 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Summary of Schedules (Dkt. 57) at 1 (Nov. 13, 2006).

237 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedule and Statement of Affairs (Dkt. 54) at 14 (Nov. 12, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Summary of Schedules (Dkt. 57) at 1 (Nov. 13, 2006).

238 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedule and Statement of Affairs (Dkt. 54) at 16 (Nov. 12, 2006).

239 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedule and Statement of Affairs (Dkt. 54) at 17-35 (Nov. 12, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Summary of Schedules (Dkt. 57) at 1 (Nov. 13, 2006).
amendment, Incredible Auto provided a list of the names and addresses of customers
whose liens were unpaid, but it did not include the amount still owed on those liens.240

Incredible Auto listed three outstanding executory contracts: (1) King Ave.
Properties (the landlord), (2) Dolphin Capital Corporation (computer program lease), and
(3) ADP Commercial Leasing (computer system lease).241 It also noted that Mr.
Gutierrez was a co-debtor on the agreements with A&I Distributors, ADP Commercial
Leasing, and HMFC.242

Incredible Auto reported that, within ninety days of the petition date, it paid or
transferred an aggregate of $3,807,147.66 to thirty creditors.243 It also reported that,
within a year of the petition date, it paid an aggregate of $344,618 to insider creditors.244
Specifically, it paid $233,417 to Mr. Gutierrez, $60,000 to Ms. Stephens, and $51,201 to
Mr. Cornelison between June 1, 2006 and October 17, 2006.245

240 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Exhibit to Debtor’s First
Amendment to Schedules and Statement of Affairs (Dkt. 126-1) (Dec. 9, 2006). Thus, Incredible Auto
never provided a fully updated figure of the amount owed to the unsecured creditors holding nonpriority
interests.

241 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedule and Statement
of Affairs (Dkt. 54) at 36 (Nov. 12, 2006).

242 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedule and Statement
of Affairs (Dkt. 54) at 37 (Nov. 12, 2006).

243 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedule and Statement
of Affairs (Dkt. 54) at 40-41 (Nov. 12, 2006).

244 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedule and Statement
of Affairs (Dkt. 54) at 42 (Nov. 12, 2006).

245 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedule and Statement
of Affairs (Dkt. 54) at 42 (Nov. 12, 2006).
Incredible Auto made no attempt to avoid any of these pre-petition transfers pursuant to section 547 of the Bankruptcy Code.\footnote{Section 547 allows the trustee, or debtor in possession, see 11 U.S.C. § 1107 (2009), to “avoid any transfer of an interest of the debtor in property” that meets the criteria of a “preference.” 11 U.S.C. § 547 (2009).} Incredible Auto likely considered the transfers to the 30 non-insider creditors to be “transfer[s] . . . in payment of a debt incurred by the debtor in the ordinary course of business . . .” subject to the exception of section 547(c) of the Bankruptcy Code.\footnote{11 U.S.C. § 547(c) (2009).} These creditors included HMFC, advertising agencies, and consumer lenders all of which regularly provided financing and services to Incredible Auto in its ordinary course of business. The $320,362.00 worth of transfers to Incredible Chevrolet could have been questionable, but it likely did not consider them to be preferences as Incredible Auto forcefully argued that the transactions with Incredible Chevrolet were standard in the industry and in its ordinary course.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceeding Dec. 5, 2006 (Dkt. 428) at 137 (Apr. 3, 2009); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Reply to Hyundai Motor Finance’s Objection to the Debtor’s Continued Use of Cash Collateral (Dkt. 155) at 4 (Dec. 20, 2006).}

Of the pre-petition transfers to insiders, the $233,417 payment to Mr. Gutierrez seems somewhat excessive, considering the financial state of Incredible Auto in the year prior to the petition date. However, neither Incredible Auto nor the U.S. Trustee was willing to challenge this payment as a preference. They likely considered this payment to fall within the “ordinary course of business” exception of section 547(c)(2) as Mr. Gutierrez’s bona fide salary for his management of Incredible Auto. There are no facts available to determine whether this payment was more than his salary in prior years and would constitute something other than an ordinary course salary payment.
B. GONE, BUT NOT FORGOTTEN: ADVERSARY PROCEEDINGS TO RECLAIM VEHICLES

Hours after Incredible Auto filed its bankruptcy petition, it had a response from some of its creditors in the form of two adversary proceedings. Both adversary proceedings were reclamation actions pursuant to section 546 of the Bankruptcy Code.

I. MANHEIM SERVICES CORP. V. INCREDIBLE AUTO SALES, LLC

a. The Transaction

On September 13th and October 4th 2006, Incredible Auto purchased a total of ten vehicles from Manheim Services Corp. (“South Seattle”). South Seattle was a “dealers-only wholesale auto auction,” and Incredible Auto had a $500,000 credit limit with South Seattle with a 21-day float period. Accordingly, on October 4, 2006, South Seattle received checks from Incredible Auto to pay for the vehicles purchased on

249 See Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Complaint (Dkt. 7) (Oct. 18, 2006); Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Complaint (Dkt. 13) (Oct. 23, 2006).


251 The Plaintiff in this proceeding, Manheim Services Corporation was doing business under the name “South Seattle Auto Auction.” See Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Complaint (Dkt. 13) at 1 (Oct. 23, 2006). All of the court filings refer to the plaintiff as either “South Seattle” or “Auction.” See id. at 5; see also, Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Ex Parte Motion for Temporary Restraining Order & Order to Show Cause (Dkt. 2A) at 1 (Oct. 25, 2006). Throughout this paper, where the citation includes an “A” after the docket number, the citation is to the docket of the South Seattle Auto Auction Adversarial Proceeding.


253 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855 Adv. No. 06-00120, Bankr. D. Mont., Affidavit of Julie Picard (Dkt. 2-1A) at ¶ 3 (Oct. 25, 2006).

September 13, 2006. However, South Seattle’s bank soon returned the checks for insufficient funds. Incredible Auto then informed South Seattle that there were insufficient funds to pay any of the checks that it had tendered.

On October 17, 2006, before payment for the October 4th vehicles was due, Incredible Auto filed its bankruptcy petition and sent notice to South Seattle. That same day, South Seattle’s attorney sent a written reclamation demand for the ten vehicles to Incredible Auto and its attorney. In the letter, South Seattle demanded that Incredible Auto return the ten vehicles as well as any vehicles for which Incredible Auto had not yet paid South Seattle. Incredible Auto did not respond to South Seattle’s demand, and South Seattle initiated an adversary proceeding by filing a complaint on October 23, 2006.

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255 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855 Adv. No. 06-00120, Bankr. D. Mont., Affidavit of Julie Picard (Dkt. 2-1A) at ¶ 6 (Oct. 25, 2006).


261 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855 Adv. No. 06-00120, Bankr. D. Mont., Affidavit of Julie Picard (Dkt. 2-1A) at ¶ 10 (Oct. 25, 2006).

b. The Stipulation

i. What South Seattle Wanted: Vehicles, Insurance, & a TRO

In its complaint, South Seattle asked the court to order Incredible Auto (1) to surrender the ten vehicles, (2) to issue a temporary restraining order and preliminary injunction to keep Incredible Auto from “encumbering, selling, transferring, trading, or disposing of, in any manner,” the vehicles, and (3) to maintain insurance on the vehicles while the bankruptcy case was being administered. Two days later, South Seattle filed a formal motion for a temporary restraining order.

South Seattle was primarily concerned that Incredible Auto might sell the vehicles in the ordinary course of its business as a car dealership. Incredible Auto had possession of both the vehicles and their titles, and any purchaser would be unaware of South Seattle’s claim to the vehicles. Because vehicles are inherently mobile, the buyers could easily move them to any other location making it nearly impossible for South

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266 Manheim Services Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Ex Parte Motion for Temporary Restraining Order & Order to Show Cause (Dkt. 2A) at 1 (Oct. 25, 2006).

267 Manheim Services Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Ex Parte Motion for Temporary Restraining Order & Order to Show Cause (Dkt. 2A) at 2-3 (Oct. 25, 2006).

268 Manheim Services Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Ex Parte Motion for Temporary Restraining Order & Order to Show Cause (Dkt. 2A) at 4 (Oct. 25, 2006).
Seattle to exercise its reclamation rights.\textsuperscript{269} South Seattle later learned that its suspicions were accurate in that some of the vehicles had been sold to customers before South Seattle was able to secure a temporary restraining order.\textsuperscript{270}

Additionally, South Seattle was probably concerned that it might lose its interest in the vehicles under section 363(c)(1) and (f)(1) of the Bankruptcy Code. Section 363(c)(1) provides that the trustee, or debtor in possession,\textsuperscript{271} “may use property of the estate in the ordinary course of business without notice or a hearing.”\textsuperscript{272} Section 363(f)(1) allows the debtor in possession to sell property of the estate “free and clear of any interest in such property of an entity other than the estate . . . if applicable nonbankruptcy law permits sale of such property free and clear of such interest.”\textsuperscript{273}

Under Montana law, and that of most other states, a person who purchased one of the vehicles in the ordinary course of Incredible Auto’s business, would take the vehicle free of South Seattle’s interest in the vehicle.\textsuperscript{274} Accordingly, South Seattle argued that it had met all of the requirements of section 546(c)(1) of the Bankruptcy Code\textsuperscript{275} for reclaiming

\begin{footnotes}
\item[269] Manheim Services Corp. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., \textit{Ex Parte} Motion for Temporary Restraining Order & Order to Show Cause (Dkt. 2A) at 4 (Oct. 25, 2006).
\item[270] See Manheim Servs. Corp. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Settlement & Mutual Release Agreement (Dkt. 27-1A) at ¶ 2 (Feb. 16, 2007).
\item[275] Section 546(c)(1) allows a seller of goods to reclaim the goods from the bankruptcy debtor if (1) it sold the goods to the debtor in the ordinary course of the seller’s business; (2) the debtor received the goods while it was insolvent, 45 days before debtor commenced the case; and (3) seller made a written demand to reclaim the goods within twenty days after the commencement of the case. 11 U.S.C. § 546(c)(1) (2009).
\end{footnotes}
the vehicles and that a temporary restraining order was necessary to protect South Seattle’s ability to meaningfully exercise this right.\textsuperscript{276}

The next day, the court granted South Seattle a temporary restraining order prohibiting Incredible Auto from “encumbering, selling, transferring, trading, or disposing of in any manner” the vehicles that were the subject of South Seattle’s reclamation action.\textsuperscript{277} It also ordered Incredible Auto to maintain insurance on the vehicles.\textsuperscript{278} The temporary restraining order was initially effective for ten days\textsuperscript{279} but was continued until November 6, 2006, when the court scheduled a show cause hearing.\textsuperscript{280}

Because South Seattle satisfied the standard of section 546(c)(1)—the vehicles were sold to Incredible Auto in the ordinary course of South Seattle’s business; Incredible Auto received the vehicles while it was insolvent and within 45 days before the petition date; South Seattle demanded reclamation of the vehicles within twenty days post-petition—South Seattle was entitled to reclaim the vehicles. Had the court denied South Seattle’s motion, Incredible Auto easily could have continued to sell the vehicles

\textsuperscript{276}Manheim Services Corp. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., \textit{Ex Parte} Motion for Temporary Restraining Order & Order to Show Cause (Dkt. 2A) at 4 (Oct. 25, 2006).

\textsuperscript{277}Manheim Servs. Corp. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Temporary Restraining Order (Dkt. 4A) at ¶ 1 (Oct. 26, 2006).

\textsuperscript{278}Manheim Servs. Corp. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Temporary Restraining Order (Dkt. 4A) at ¶ 1 (Oct. 26, 2006).

\textsuperscript{279}Manheim Servs. Corp. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Temporary Restraining Order (Dkt. 4A) at ¶ 4 (Oct. 26, 2006).

\textsuperscript{280}Manheim Servs. Corp. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Order (Dkt. 10A) (Oct. 31, 2006).
thereby denying South Seattle its right of reclamation and relegating them solely to the status of an unsecured creditor with a pre-petition claim. Therefore, the court properly protected South Seattle’s right of reclamation by granting the temporary restraining order.

ii. What HMFC Wanted: Intervention & Priority

The same day that South Seattle moved for a temporary restraining order, HMFC moved to intervene as a defendant in the case and simultaneously filed an answer to South Seattle’s complaint. HMFC argued that it was entitled to intervene in the matter because it had an interest in the property that was the subject of the adversary proceeding and needed to protect its interest. HMFC had a perfected security interest in Incredible Auto’s inventory, and it argued that the vehicles that South Seattle sought to reclaim were part of Incredible Auto’s inventory. Therefore, HMFC denied that South Seattle was entitled either to reclaim the vehicles or to receive injunctive relief because either would harm HMFC’s security interest in the vehicles. HMFC also asked the court to determine that, if South Seattle did have a reclamation right to the


282 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Answer (Dkt. 3-1A) (Oct. 25, 2006).


286 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Answer (Dkt. 3-1A) at 3 (Oct. 25, 2006).
vehicles, such right would be subject to HMFC’s security interest. The court granted HMFC’s motion to intervene for good cause. Although the court did not explain what “good cause” it found to grant HMFC’s motion, HMFC, as Incredible Auto’s flooring lender, had a valid argument that it had a superior interest in the vehicles, if the vehicles were considered “inventory.”

iii. What the Parties Got: Joint Stipulation

While the parties were waiting for the court to rule on HMFC’s motion to intervene and to hold the show cause hearing, Incredible Auto was busy trying to avoid a hearing on the injunctive relief by negotiating a joint stipulation with South Seattle and HMFC, which was subsequently filed on November 6, 2006. The stipulation provided that Incredible Auto would (1) segregate the disputed vehicles from its regular inventory, (2) maintain insurance on the vehicles, (3) not do anything to encumber, sell, or transfer the vehicles, and (4) allow South Seattle and HMFC to inspect the vehicles during normal business hours and without advance notice.

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287 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Answer (Dkt. 3-1A) at 4 (Oct. 25, 2006).


290 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Stipulation re: South Seattle Auto Auction Right of Reclamation (Dkt. 11A) (Nov. 6, 2006).

291 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Stipulation re: South Seattle Auto Auction Right of Reclamation (Dkt. 11A) at ¶ 5 (Nov. 6, 2006).
Reaching the stipulation was beneficial for all of the parties involved. By agreeing to the stipulation, neither South Seattle nor HMFC relinquished their underlying claims—that South Seattle had the right to reclamation and that HMFC had a first priority security interest. Both South Seattle and HMFC preserved their interests in the vehicles until the court determined which had the superior interest because the stipulation required Incredible Auto to segregate the vehicles from its regular inventory and refrain from selling, encumbering, or transferring them. Also, the right to inspect enabled them to enforce the stipulation by verifying that the vehicles remained in a known location. Finally, South Seattle was assured that it would receive the payment it was owed, even if the vehicles were lost or stolen, by negotiating for the insurance requirement.

Incredible Auto also benefited from the stipulation because it both placated two of its creditors and secured more time in which it could focus on the other issues in the bankruptcy case. An incidental benefit was that the stipulation promoted a collegial relationship between South Seattle and HMFC leading to a subsequent agreement between the parties to settle the adversary proceeding without a trial.

c. Preserving the Value of the Vehicles: The Liquidation Proposal

After it approved the stipulation, the court set February 5, 2007, as the trial date for the adversary proceeding. In the interim, the court held a hearing in which it

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292 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Stipulation re: South Seattle Auto Auction Right of Reclamation (Dkt. 11A) at ¶¶ 1, 3 (Nov. 6, 2006).


294 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Minutes of Hearing Held-Stipulation Approved (Docket Entry) at 4 (Nov. 6, 2006).
ordered Incredible Auto, South Seattle, and Auto Auction of Montana ("Auto Auction"), which had initiated a separate adversary proceeding, to find a way to sell the vehicles while preserving South Seattle’s, Auto Auction’s, and HMFC’s respective interests in the vehicles. The court took this action because it was concerned that the vehicles would depreciate in value each day that they continued to sit on Incredible Auto’s lot, unable to be sold. Allowing the cars to depreciate would not facilitate the goal of preserving either the bankruptcy estate or the creditors’ interests. Accordingly, South Seattle proposed a plan to liquidate the vehicles (the “Liquidation Letter”).

In the Liquidation Letter, South Seattle proposed that the vehicles be auctioned by either Auto Auction or South Seattle and the proceeds be placed in an escrow account managed by South Seattle’s attorney until the adversary proceeding was resolved. The Liquidation Letter also suggested setting a minimum price for the vehicles and provided that South Seattle’s attorney would render to Incredible Auto and HMFC statements of the escrow account upon request.

295 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Order Setting the Trial Date (Dkt. 17A) (Dec. 6, 2006).

296 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 129-30 (Apr. 3, 2009).


298 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Exhibit A to Creditors' Expedited Joint Motion re: Liquidation of South Seattle Auto Auction’s Vehicles (Dkt. 103-1) (Dec. 1, 2006).

299 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Exhibit A to Creditors’ Expedited Joint Motion re: Liquidation of South Seattle Auto Auction’s Vehicles (Dkt. 103-1) (Dec. 1, 2006).

300 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Exhibit A to Creditors’ Expedited Joint Motion re: Liquidation of South Seattle Auto Auction’s Vehicles (Dkt. 103-1) (Dec. 1, 2006).
Incredible Auto did not response to the Liquidation Letter, and on December 1, 2006, South Seattle and HMFC collectively moved the court to order Incredible Auto to release the vehicles to South Seattle so that South Seattle could sell them. The court granted the creditors’ motion ordering that (1) the vehicles be moved to South Seattle’s premises by the end of business on December 15, 2006, (2) South Seattle auction the vehicles at no less than the minimum wholesale floor price for “cars in similar condition with similar mileage,” and (3) the proceeds of the sale be placed in an escrow account pending a final judgment in the adversary case. South Seattle did in fact auction the vehicles netting $54,400 in proceeds which were placed in an escrow account.

d. Three’s a Crowd: Negotiations after a Default Judgment

One month later, South Seattle moved for a default judgment against Incredible Auto contending that Incredible Auto had done nothing to respond to or defend against South Seattle’s complaint in the adversary proceeding. Because a default judgment is

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301 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Creditors’ Expedited Joint Motion re: Liquidation of South Seattle Auto Auction’s Vehicles (Dkt. 103) at ¶ 3 (Dec. 1, 2006).

302 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Creditors’ Expedited Joint Motion re: Liquidation of South Seattle Auto Auction’s Vehicles (Dkt. 103) at ¶ 6 (Dec. 1, 2006).


proper when “a party against whom a judgment for affirmative relief is sought has failed to plea or otherwise defend,” the court properly granted South Seattle a default judgment against Incredible Auto holding that “Incredible Auto has no right or interest to the ten vehicles or the proceeds thereof subject to [South Seattle’s] reclamation claim . . . .”

After the default judgment removed Incredible Auto from the negotiations, South Seattle and HMFC were able to reach a settlement agreement regarding the disposal of the proceeds. The creditors agreed to divide the proceeds equally with each receiving $27,200 plus half the accrued interest. In exchange, they both agreed to dismiss the adversary proceeding against each other, but neither waived its rights against Incredible Auto. On February 20, 2007, the court approved the settlement agreement without independent analysis, seeming to prefer cooperation rather than injecting itself into the


313 *See* *Manheim Servs. Corp. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC)*, Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Settlement & Mutual Release Agreement (Dkt. 27-1A) at ¶¶ 6-7 (Feb. 16, 2007).

South Seattle-HMFC issue. In the same order, the court closed the South Seattle adversary case.315

\textit{e. Incredible Auto’s Final Move: Surcharge}

However, Incredible Auto did not consider the matter entirely resolved. On February 22, 2007, it moved the court to order South Seattle to pay $4,967.09 pursuant to section 506(c) as “the reasonable, necessary costs and expenses of preserving” property of the estate.316 Incredible Auto argued that the vehicles were its inventory and were therefore subject to HMFC’s security interest.317 Therefore, it had a duty to “enhance” the value of the vehicles “so it could dispose of this property subject to HMFC’s superior claim.”318 Accordingly, Incredible Auto made repairs to the vehicles that it claimed were necessary to “enhance” the value of the vehicles.319 The vehicles with their “enhancements” were then returned to South Seattle pursuant to the court’s December 7, 2006 order,320 and South Seattle received the benefit of Incredible Auto’s work.321

315 Manheim Servs. Corp. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00120, Bankr. D. Mont., Order (Dkt. 28A) (Feb. 20, 2007).

316 \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion by Debtor Requesting This Court to Surcharge the Two Auto Auctions for the Debtor’s Expenses Paid on Auto Auction Vehicles (Dkt. 285) at 2 (Feb. 16, 2007).

317 \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion by Debtor Requesting This Court to Surcharge the Two Auto Auctions for the Debtor’s Expenses Paid on Auto Auction Vehicles (Dkt. 285) at 1-2 (Feb. 16, 2007).

318 \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion by Debtor Requesting This Court to Surcharge the Two Auto Auctions for the Debtor’s Expenses Paid on Auto Auction Vehicles (Dkt. 285) at 2 (Feb. 16, 2007).

319 \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion by Debtor Requesting This Court to Surcharge the Two Auto Auctions for the Debtor’s Expenses Paid on Auto Auction Vehicles (Dkt. 285-1) at Exhibit A (Feb. 16, 2007).

South Seattle objected to Incredible Auto’s motion arguing that the court had determined that Incredible Auto had no interest in the vehicles or in the proceeds\(^{322}\) and that Incredible Auto should have raised its claim before the court rendered its final judgment.\(^{323}\) The court agreed with South Seattle and denied Incredible Auto’s motion citing Incredible Auto’s “sitting on its rights through the respective adversary proceedings” and “fail[ure] to appear to properly prosecute its motion” for the surcharge.\(^{324}\)

Interestingly, the court noted that it was “inclined, at the hearing, to grant Debtor’s motion as it related to South Seattle Auto Auction,”\(^{325}\) but the court changed its mind because Incredible Auto failed to appear at the hearing.\(^{326}\) At this point in the case, the court was considerably irritated with Incredible Auto’s attorney for a variety of reasons, and this ruling was not surprising.

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\(^{321}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion by Debtor Requesting This Court to Surcharge the Two Auto Auctions for the Debtor’s Expenses Paid on Auto Auction Vehicles (Dkt. 285) at 2 (Feb. 16, 2007).

\(^{322}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to Debtor’s Motion for Surcharge (Dkt. 334) at ¶ 2 (Mar. 20, 2007).

\(^{323}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to Debtor’s Motion for Surcharge (Dkt. 334) at ¶ 4 (Mar. 20, 2007).

\(^{324}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 339) at 6 (Mar. 21, 2007).

\(^{325}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 339) at 6 (Mar. 21, 2007).

\(^{326}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 339) at 6 (Mar. 21, 2007).
2. **Auto Auction Associates of Montana, Inc. v. Incredible Auto Sales, LLC**

   a. *The Transaction and its Effect on Auto Auction*

Auto Auction was in a situation similar to South Seattle. From September 27, 2006, to October 11, 2006, Incredible Auto purchased a total of nineteen vehicles from Auto Auction using its line of credit with Auto Auction. Auto Auction delivered both the vehicles and their titles to Incredible Auto. The checks that Incredible Auto gave Auto Auction to pay for the vehicles were returned for insufficient funds, and Incredible Auto then informed Auto Auction that it did not have sufficient funds to cover any of the checks.

On October 17, 2006, at 8:30 a.m., the president of Auto Auction, Spencer Griffin, visited Incredible Auto and demanded that Incredible Auto return the nineteen vehicles pursuant to its state law right to reclaim. Mr. Gutierrez refused Auto

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327 Auto Auction Associates of Montana, Inc. was doing business as Auto Auction of Montana and Auto Auction of Billings. *Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC)*, Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Complaint (Dkt. 7) (Oct. 18, 2006).

328 *Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC)*, Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Complaint (Dkt. 7) at 3, 7-8 (Oct. 18, 2006).

329 *Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC)*, Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Final Pretrial Order (Dkt. 25B) ¶¶ 14-15 (Feb. 22, 2007). Throughout this paper, where the citation includes a “B” after the docket number, the citation is to the docket of the Auto Auction adversary proceeding.

330 *Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC)*, Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Complaint (Dkt. 7) at ¶ 10 (Oct. 18, 2006).

331 *Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC)*, Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Complaint (Dkt. 7) at ¶ 10 (Oct. 18, 2006).

332 *Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC)*, Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Affidavit of Spencer Griffin (Dkt. 2-1B) at ¶ 7 (Oct. 18, 2006); *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 68-69 (Dec. 13, 2006).

Auction’s demand but promised that he would bring a cashier’s check for the full balance to Auto Auction’s attorney’s office at 3:00 p.m. that afternoon.\textsuperscript{334} Mr. Griffin appeared at the attorney’s office, but Mr. Gutierrez did not.\textsuperscript{335} Instead, at 2:59 p.m., Incredible Auto’s attorney telephoned Auto Auction’s attorney informing Auto Auction that it had filed a Chapter 11 bankruptcy petition.\textsuperscript{336}

Auto Auction immediately drafted and delivered a written reclamation demand for eleven of the vehicles.\textsuperscript{337} The next day, Auto Auction delivered a second reclamation demand for the remaining eight vehicles that were inadvertently omitted from the first demand letter.\textsuperscript{338} The same day, Auto Auction initiated an adversary proceeding against Incredible Auto seeking (1) to reclaim the vehicles pursuant to section 546(c)(1) of the Bankruptcy Code, (2) to require Incredible Auto to insure the vehicles, and (3) to obtain a temporary restraining order to prevent Incredible Auto from “encumbering, selling, transferring, trading, or disposing of in any manner” the vehicles.\textsuperscript{339}

\textsuperscript{334} \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 68 (Dec. 13, 2006).

\textsuperscript{335} Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Affidavit of Spencer Griffin (Dkt. 2-1B) at ¶ 8 (Oct. 18, 2006).

\textsuperscript{336} \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 68 (Dec. 13, 2006).

\textsuperscript{337} Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Complaint (Dkt. 7) at ¶ 12 (Oct. 18, 2006).

\textsuperscript{338} Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Complaint (Dkt. 7) at ¶ 13 (Oct. 18, 2006).

\textsuperscript{339} Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Complaint (Dkt. 7) at ¶¶ 18, 20-21 (Oct. 18, 2006); Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Motion for Temporary Restraining Order (Dkt. 2B) at 4 (Oct. 18, 2006).
Auto Auction had much the same concerns as South Seattle. It was concerned that Incredible Auto might sell the vehicles in the ordinary course of its car sales business and effectively nullify Auto Auction’s reclamation rights.\(^{340}\) Auto Auction later learned that Incredible Auto did sell some of the vehicles to customers pre-petition.\(^{341}\) It was also concerned that the vehicles might be harmed through accident or loss while this case was pending leaving Auto Auction with little recourse for obtaining payment.\(^{342}\) Finally, Auto Auction was concerned because it had purchased the vehicles from third parties and had not yet paid all of the third parties for them.\(^{343}\) Its inability to pay the third parties was likely jeopardizing its own business relationships, and Auto Auction needed some assurance that it was going to receive either payment for the vehicles or the vehicles themselves.

\[b. \textbf{The Proceedings}\]

\[i. \textbf{Insurance, TRO, and Intervention}\]

The Auto Auction adversary case followed much the same timeline as the South Seattle adversary case. The court issued a temporary restraining order which enjoined Incredible Auto from doing anything to transfer or sell the vehicles and ordered

\(^{340}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC \((\text{In re Incredible Auto Sales, LLC})\), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Motion for Temporary Restraining Order (Dkt. 2B) at 2 (Oct. 18, 2006).

\(^{341}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC \((\text{In re Incredible Auto Sales, LLC})\), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Final Pretrial Order (Dkt. 25B) at \(\S\) 18 (Feb. 22, 2007).

\(^{342}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC \((\text{In re Incredible Auto Sales, LLC})\), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Final Pretrial Order (Dkt. 25B) at 3 (Feb. 22, 2007).

\(^{343}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC \((\text{In re Incredible Auto Sales, LLC})\), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Affidavit of Spencer Griffin (Dkt. 2-1B) at \(\S\) 11 (Oct. 18, 2006); \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 66-67 (Dec. 13, 2006).
Incredible Auto to maintain insurance on the vehicles\(^\text{344}\) even though Auto Auction had withdrawn its request for insurance.\(^\text{345}\) HMFC also moved to intervene as a defendant asserting that it had a properly perfected security interest in all of Incredible Auto’s inventory, including the vehicles that were the subject of Auto Auction’s reclamation claim.\(^\text{346}\) It also filed an answer to Auto Auction’s complaint arguing that, if Auto Auction was allowed to reclaim the vehicles, it would “impair HMFC’s security interest”\(^\text{347}\) which was superior to Auto Auction’s reclamation right.\(^\text{348}\) The court granted HMFC’s motion to intervene on November 3, 2006.\(^\text{349}\) This allowed HMFC to defend its asserted, and arguably valid, interest in the vehicles.

\(\text{ii. The Stipulation}\)

While the court was considering HMFC’s motion to intervene and before the hearing to determine Auto Auction’s request for injunctive relief, Auto Auction, HMFC,

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\(^{344}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Temporary Restraining Order (Dkt. 6B) at ¶ 1 (Oct. 20, 2006).

\(^{345}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Motion for Reconsideration (Dkt. 5B) at 5 n.2 (Oct. 20, 2006). The vehicles were covered by Auto Auction’s existing insurance policy as long as Auto Auction knew their location. \textit{Id.}

\(^{346}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Hyundai Motor Finance Co.’s Motion to Intervene as Defendant (Dkt. 8B) (Oct. 20, 2006).

\(^{347}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Answer of Hyundai Motor Finance Co. (Dkt. 8-1) at 3 (Oct. 20, 2006).

\(^{348}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Answer of Hyundai Motor Finance Co. (Dkt. 8-1) at 4 (Oct. 20, 2006).

\(^{349}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Order Granting Hyundai Motor Finance Co.’s Motion to Intervene (Dkt. 15B) (Nov. 3, 2006).
and Incredible Auto began negotiating a stipulation that they moved the court to approve on October 24, 2006.\(^{350}\) Under the terms of the stipulation, Incredible Auto agreed to (1) segregate the vehicles from its regular inventory, (2) insure the vehicles, and (3) allow Auto Auction and HMFC to inspect the vehicles during normal business hours without advanced notice.\(^{351}\) Neither Auto Auction nor HMFC relinquished their underlying claims: that Auto Auction had a right to reclaim the vehicles and that HMFC had a security interest superior to Auto Auction’s reclamation right.\(^{352}\) However, both creditors were able to lessen the likelihood of the vehicles being sold, transferred, or harmed through some act, intentional or otherwise, of Incredible Auto. Given Incredible Auto’s prior treatment of Auto Auction and HMFC, it was not unreasonable for them to be wary of Incredible Auto’s ability to safeguard the vehicles and refrain from selling them. The court approved the stipulation that same day.\(^{353}\)

### iii. Auto Auction Asserts its Rights

Unlike South Seattle, Auto Auction was not content to allow the bankruptcy case to proceed while its vehicles and the proceeds thereof remained in Incredible Auto’s possession. To accomplish its goal, Auto Auction took a three-pronged approach. It gave up the fight for eight of the vehicles because one of its vendors, whom Auto

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\(^{350}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Stipulation (Dkt. 12B) (Oct. 24, 2006).

\(^{351}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Stipulation (Dkt. 12B) at ¶ 5 (Oct. 24, 2006).

\(^{352}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Stipulation (Dkt. 12B) at ¶¶ 2-3 (Oct. 24, 2006).

\(^{353}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Order Vacating TRO Hearing, Approving Stipulation, and Discharging Injunction Bond (Dkt. 14B) (Oct. 24, 2006).
Auction had not paid, was granted relief from the automatic stay so that it could take possession of the vehicles from Incredible Auto.\textsuperscript{354} It moved for relief from the automatic stay so that it could take possession of the seven vehicles that remained in Incredible Auto’s possession.\textsuperscript{355} Finally, it sought administrative expense priority for the proceeds from the four vehicles that Incredible Auto had sold pre-petition.\textsuperscript{356}

I. Motion for Relief from the Automatic Stay

On December 7, 2006, Auto Auction and HMFC filed a joint motion for relief from the automatic stay.\textsuperscript{357} The creditors moved that the court order Incredible Auto to surrender seven of the vehicles so that Auto Auction could auction them for a minimum price set by both HMFC and Auto Auction and retain the proceeds in a trust account until the adversary case was resolved.\textsuperscript{358} The creditors reasoned that the sale was necessary to limit the vehicles’ depreciation and preserve as much value as possible.\textsuperscript{359} The court granted the creditors’ joint motion without any objection from Incredible Auto and ordered Incredible Auto to surrender the vehicles to Auto Auction by December 11,

\begin{footnotesize}
\begin{enumerate}
\item See infra p.82 (discussing the proceedings related to Steve’s Auto Sales, Inc.).
\item \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Expedited Joint Motion to Modify Automatic Stay (Dkt. 123) (Dec. 7, 2006).
\item \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Application for Administrative Expenses (Dkt. 200) (Jan. 16, 2007).
\item \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Expedited Joint Motion to Modify Automatic Stay (Dkt. 123) at 1 (Dec. 7, 2006).
\item \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Expedited Joint Motion to Modify Automatic Stay (Dkt. 123) at 1-3 (Dec. 7, 2006).
\item \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Expedited Joint Motion to Modify Automatic Stay (Dkt. 123) at 2 (Dec. 7, 2006).
\end{enumerate}
\end{footnotesize}
The court also ordered both Incredible Auto and HMFC to release any certificates of titles that either may have had in their possession so that Auto Auction could provide the titles to the auction purchasers, but it noted that the order did not affect either Auto Auction’s or HMFC’s rights in the adversary proceeding. Auto Auction proceeded with the sale and deposited the proceeds in a separate account pending resolution of the adversary proceeding.

Effectively, the parties were able to accomplish, by motion for relief from the automatic stay, what South Seattle had accomplished by stipulation. It appears that the parties proposed a stipulation to sell the vehicles, but it went unanswered by Incredible Auto. It is unclear why Auto Auction and HMFC pursued relief from the automatic stay rather than a stipulation. One possibility is that the sale of these vehicles was complicated by the fact that another creditor, Steve’s Auto Sales, had initially sold some of the vehicles to Auto Auction and was pursuing its own claim against Incredible Auto.

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360 In re Incredible Auto Sales, LLC, Case No. 06-06855-11, Bankr. D. Mont., Order Granting Expedited Joint Motion to Modify Stay (Dkt. 125) (Dec. 8, 2006).

361 In re Incredible Auto Sales, LLC, Case No. 06-06855-11, Bankr. D. Mont., Order Granting Expedited Joint Motion to Modify Stay (Dkt. 125) at 1 (Dec. 8, 2006).

362 In re Incredible Auto Sales, LLC, Case No. 06-06855-11, Bankr. D. Mont., Order Granting Expedited Joint Motion to Modify Stay (Dkt. 125) at 2 (Dec. 8, 2006).

363 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Final Pretrial Order (Dkt. 25B) at ¶ 26 (Feb. 22, 2007).

364 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Expedited Joint Motion to Modify Automatic Stay (Dkt. 123) at 3 (Dec. 7, 2006).
II. Application for Administrative Expenses

Additionally, Auto Auction filed an application for administrative expense priority pursuant to section 503(9) of the Bankruptcy Code. \(^{365}\) Auto Auction sought administrative expense priority for the value of four of the vehicles that it had sold to Incredible Auto within twenty days prior to the commencement of the case. \(^{366}\) Incredible Auto had re-sold those vehicles to its customers, but never paid Auto Auction for them. \(^{367}\) Unless Auto Auction could track down the vehicles’ owners and reclaim the vehicles, Auto Auction would have been left with an unsecured claim for the unpaid purchase price. By applying for administrative expense priority, Auto Auction was attempting to jump up the priority ladder from unsecured status to administrative expense status for the value of vehicles that it most likely could not obtain through reclamation.

Incredible Auto strongly objected to Auto Auction’s application for administrative expenses. \(^{368}\) It asserted that, because the vehicles were sold pre-petition, Auto Auction’s claim was an unsecured pre-petition claim \(^{369}\) and that the proceeds from

\(^{365}\) *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Application for Administrative Expenses (Dkt. 200) at 1 (Jan. 16, 2007).

\(^{366}\) *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Application for Administrative Expenses (Dkt. 200) at 1-2 (Jan. 16, 2007).

\(^{367}\) *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Application for Administrative Expenses (Dkt. 200) at 2 (Jan. 16, 2007).


the sales were subject to HMFC’s security interest not an administrative expense claim from Auto Auction.\textsuperscript{370}

On February 26, 2007, the court held a hearing on Auto Auction’s application.\textsuperscript{371} However, at the hearing, Incredible Auto withdrew its objection, and no other interested party raised an objection.\textsuperscript{372} HMFC did not object because its security interest was not threatened by Auto Auction’s application. Although HMFC’s security interest in the vehicles ended when they were sold in bona fide transactions to retail purchasers,\textsuperscript{373} it continued to have a security interest in the proceeds of the vehicles.\textsuperscript{374} Therefore, its priority status as a secured creditor was not harmed by Auto Auction’s administrative expense status as Auto Auction’s administrative expense would not be paid until HMFC’s secured claim was paid in full. The court approved Auto Auction’s application for administrative expenses and awarded $32,225 as an administrative expense to Auto Auction.\textsuperscript{375}

\textsuperscript{370} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance, & Objection to Auto Auction Associates’ Claim for Administrative Expenses (Dkt. 246) at ¶¶ 8-11 (Jan. 26, 2007).

\textsuperscript{371} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 294) (Feb. 28, 2007).

\textsuperscript{372} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 294) (Feb. 28, 2007).

\textsuperscript{373} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Trial Brief (Dkt. 26B) at 1 (Feb. 22, 2007); see also MONT. CODE ANN. § 30-9A-320 (2009).

\textsuperscript{374} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Inventory Loan and Security Agreement (Dkt. 100-1) at 2, 7-8 (Nov. 30, 2006).

\textsuperscript{375} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Trial Brief (Dkt. 26B) at 1 (Feb. 22, 2007).
III. Motion for Default Judgment

In January 2007, Auto Auction moved for a default judgment against Incredible Auto because Incredible Auto had “fail[ed] to plead or otherwise defend” against Auto Auction’s complaint.\textsuperscript{376} Auto Auction also requested that the court find that Auto Auction was entitled to the vehicles or the proceeds from the sale of the vehicles.\textsuperscript{377} The court not only granted Auto Auction a default judgment against Incredible Auto but also ordered Incredible Auto to surrender to Auto Auction any of the vehicles in its possession or the proceeds of the vehicles if any had been sold.\textsuperscript{378} The court further held that Incredible Auto had no interest in either the vehicles or the proceeds.\textsuperscript{379} Although this order removed Incredible Auto from the dispute over these vehicles, it did not resolve the dispute between HMFC and Auto Auction regarding their respective priorities in both the vehicles and their proceeds. This dispute is discussed in section IV(C)(2).

c. Incredible Auto’s Final Move: Surcharge

Incredible Auto was not finished. As described above, on February 22, 2007, it moved the court to order Auto Auction to pay $255.10 pursuant to section 506(c) as “the

\begin{itemize}
  \item \textsuperscript{376} Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re Incredible Auto Sales, LLC}), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Motion for Entry of Default of Incredible Auto Sales, LLC and Motion for Judgment by Default (Dkt. 18B) at 2 (Jan. 16, 2007).
  \item \textsuperscript{377} Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re Incredible Auto Sales, LLC}), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Motion for Entry of Default of Incredible Auto Sales, LLC and Motion for Judgment by Default (Dkt. 18B) at 2 (Jan. 16, 2007).
  \item \textsuperscript{378} Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re Incredible Auto Sales, LLC}), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Judgment by Default Against Incredible Auto Sales, LLC (Dkt. 20B) at 2 (Jan. 17, 2007).
  \item \textsuperscript{379} Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re Incredible Auto Sales, LLC}), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Judgment by Default Against Incredible Auto Sales, LLC (Dkt. 20B) at 2 (Jan. 17, 2007).
\end{itemize}
reasonable, necessary costs and expenses of preserving” property of the estate. The requested surcharge against Auto Auction was for repairs done to a Sorrento that was subsequently turned over to Auto Auction pursuant to the court’s January 16, 2007 order.

Auto Auction objected to Incredible Auto’s motion arguing that Incredible Auto had waived any surcharge claim when the court issued its default judgment finding that Incredible Auto had no interest in the vehicles or in the proceeds and that Incredible Auto’s motion was premature because the reclamation claim had not been decided. Auto Auction raised a good point considering that it had not regained possession of the Sorrento at that time. The court agreed with Auto Auction and denied Incredible Auto’s motion citing Incredible Auto’s “sitting on its rights through the respective adversary proceedings” and “fail[ure] to appear to properly prosecute its motion” for the surcharge.

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380 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion by Debtor Requesting This Court to Surcharge the Two Auto Auctions for the Debtor’s Expenses Paid on Auto Auction Vehicles (Dkt. 285) at 1-2 (Feb. 22, 2007).

381 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Auto Auction’s Objection to Debtor’s Motion for Surcharge (Dkt. 305) at 2 (Mar. 5, 2007).

382 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Auto Auction’s Objection to Debtor’s Motion for Surcharge (Dkt. 305) at 2 (Mar. 5, 2007).

383 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Auto Auction’s Objection to Debtor’s Motion for Surcharge (Dkt. 305) at 2 (Mar. 5, 2007).

384 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Motion for Entry of Default of Incredible Auto Sales, LLC and Motion for Judgment by Default (Dkt. 18B) at 2 (Jan. 16, 2007).

385 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Motion for Entry of Default of Incredible Auto Sales, LLC and Motion for Judgment by Default (Dkt. 18B) at 2 (Jan. 16, 2007).

386 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 339) at 6 (Mar. 21, 2007).
d. The Remaining Dispute: Who has Priority in the Proceeds?

i. HMFC’s Argument: Sale when Incredible Auto had Possession of the Cars

The default judgment discussed above did not settle the dispute between Auto Auction and HMFC, which centered around the proceeds of the remaining seven vehicles that were the subject of Auto Auction’s reclamation claim.\(^3\) Both parties claimed a superior interest in the proceeds of the vehicles,\(^4\) and the matter proceeded to trial on February 26, 2007.\(^5\) In its pre-trial brief, HMFC argued that its security interest in the vehicles was superior to Auto Auction’s reclamation claim under both the Bankruptcy Code and Montana law.\(^6\) Although it had advanced the funds for only six of the seven vehicles, it claimed an interest in all of the vehicles because it held a security interest in both “inventory” and “after acquired inventory” of Incredible Auto.\(^7\)

Under section 546(c) of the Bankruptcy Code, a seller’s reclamation rights are “subject to the prior rights of a holder of a security interest in such goods or the proceeds

\(^3\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Final Pretrial Order (Dkt. 25B) at 2-3 (Feb. 22, 2007).

\(^4\) See Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Auto Auction of Montana Trial Memorandum (Dkt. 27B) at 3 (Feb. 22, 2007); Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., HMFC’s Trial Brief (Dkt. 26B) at 4 (Feb. 22, 2007).

\(^5\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 1 (Mar. 26, 2007).

\(^6\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., HMFC’s Trial Brief (Dkt. 26B) at 4 (Feb. 22, 2007).

\(^7\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., HMFC’s Trial Brief (Dkt. 26B) at 10 (Feb. 22, 2007).
thereof.” HMFC argued that it held a prior security interest in the vehicles pursuant to its previously perfected security interest in Incredible Auto’s entire inventory.” The vehicles were “inventory” because Incredible Auto had possession of both the vehicles and the titles to all but one of the vehicles. Therefore, under section 546(c) of the Bankruptcy Code, HMFC argued that it had a superior interest in the vehicles and their proceeds.

Also, under Montana law, a seller’s reclamation rights are “subject to the rights of a buyer in ordinary course or other good faith purchaser.” A holder of a security interest is a “purchaser,” and one acts in “good faith” by acting honestly and “observ[ing] . . . reasonable commercial standards of fair dealing.” HMFC claimed that it qualified as a “good faith purchaser” because it had a security interest in the vehicles and was acting honestly. Therefore, under Montana law, HMFC argued that its interest was superior to Auto Auction’s.

393 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., HMFC’s Trial Brief (Dkt. 26B) at Exhibits 1-5 (Feb. 22, 2007).
394 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., HMFC’s Trial Brief (Dkt. 26B) at 6-7 (Feb. 22, 2007).
396 MONT. CODE ANN. § 30-1-201(2)(dd)-(ee) (2009).
397 MONT. CODE ANN. §30-1-201(2)(u) (2009).
398 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., HMFC’s Trial Brief (Dkt. 26B) at 5-6 (Feb. 22, 2007).
Naturally, Auto Auction had a contrary position. Auto Auction first attacked HMFC’s claim that it had a security interest in any of the vehicles arguing that Incredible Auto never acquired rights in the vehicles—a necessary prerequisite for HMFC’s security interest to attach. For one vehicle, Auto Auction never delivered title to Incredible Auto, and without delivery of the title or payment given by Incredible Auto, the sale of that vehicle was not completed. For the other vehicles, Auto Auction argued that the sales were not complete because the course of performance between Auto Auction and Incredible Auto—over 100 vehicle transactions—required Incredible Auto to pay for the vehicles in full before any sale was effective. In this case, Incredible Auto had not paid for the vehicles at all and had tendered checks to Auto Auction knowing that the checks would be returned for insufficient funds. The facts that Auto Auction was never paid, in contradiction of the parties’ course of performance,

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399 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Auto Auction of Montana Trial Memorandum (Dkt. 27B) at 2-3 (Feb. 22, 2007).


403 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Auto Auction Memorandum of Decision (Dkt. 30B) at 6 (Mar. 26, 2007).

404 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Auto Auction Memorandum of Decision (Dkt. 30B) at 4 (Mar. 26, 2007).

405 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Auto Auction Memorandum of Decision (Dkt. 30B) at 4 (Mar. 26, 2007).
and that Incredible Auto committed misconduct in purporting to pay Auto Auction were sufficient, according to Auto Auction, to prevent the completion of the sale and the attachment of HMFC’s security interest.\footnote{Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Auto Auction of Montana Trial Memorandum (Dkt. 27B) at 4-5 (Feb. 22, 2007).}

Auto Auction also challenged HMFC’s assertion that it was acting in “good faith,” which justified the court “reordering” the ordinary priority between a secured creditor and a seller asserting reclamation rights.\footnote{Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Auto Auction of Montana Trial Memorandum (Dkt. 27B) at 5 (Feb. 22, 2007).} Just prior to the transactions between Incredible Auto and Auto Auction, HMFC had “completely restructured how it dealt with [Incredible Auto] . . . due to [Incredible Auto’s] misconduct.”\footnote{Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Auto Auction of Montana Trial Memorandum (Dkt. 27B) at 6 (Feb. 22, 2007).} HMFC refused to advance any funds for new vehicles and would not advance funds to purchase any vehicles until after its own analyst made a decision regarding each proposed transaction.\footnote{Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Auto Auction of Montana Trial Memorandum (Dkt. 27B) at 6 (Feb. 22, 2007).} This was a remarkable change in the relationship between HMFC and Incredible Auto that was in response to Incredible Auto’s misconduct prior to the transaction involving the subject vehicles.\footnote{Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Auto Auction of Montana Trial Memorandum (Dkt. 27B) at 6 (Feb. 22, 2007).} Auto Auction argued that this indicated
HMFC’s lack of good faith because it was not in accordance with “reasonable commercial standards of fair dealing.”

iii. The Court’s Decision

The court held a hearing on February 26, 2007, and issued its final judgment one month later. The court held that Auto Auction was entitled to the proceeds from only one vehicle, and HMFC was entitled to the proceeds from the remaining six. To reach this decision, the court construed the language of section 546(c) of the Bankruptcy Code and of Montana Code Annotated section 30-9A-203.

The court first determined that, under the plain language of section 546(c), if HMFC had a security interest in the vehicles, then its interest was superior to Auto Auction’s reclamation rights. For HMFC’s security interest to attach to the vehicles, Incredible Auto would have to have “rights in the [vehicles] or the power to transfer

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411 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Auto Auction of Montana Trial Memorandum (Dkt. 27B) at 6 (Feb. 22, 2007).


413 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Order (Dkt. 31B) (Mar. 26, 2007).

414 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Order (Dkt. 31B) at 2 (Mar. 26, 2007); Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 14 (Mar. 26, 2007).

415 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Order (Dkt. 31B) at 2 (Mar. 26, 2007).

416 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 11 (Mar. 26, 2007).
rights in the [vehicles] to a secured party.” To determine if Incredible Auto had satisfied this requirement, the court examined Montana Code Annotated section 30-2-401 which delineates circumstances under which title to goods passes from the seller to the buyer. Specifically, this section provides that title to goods passes from the seller to the buyer when the seller delivers title to the goods to the buyer unless the parties “explicitly agreed” otherwise. Section 30-2-403 addresses the transfer of title even if the delivery was in exchange for a dishonored check.

A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase, the purchaser has such power even though . . . the delivery was in exchange for a check which was later dishonored.

Incredible Auto received titles to and tendered checks for all but one of the vehicles. One of the witnesses testified that Incredible Auto and Auto Auction had an express agreement that “Incredible Auto was free to sell the vehicles when the titles were

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417 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 11 (Mar. 26, 2007); see also MONT. CODE ANN. § 30-9A-203 (2009).

418 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 12 (Mar. 26, 2007).

419 MONT. CODE ANN. § 30-2-401 (2009). Under this section, title to good passes to the buyer (1) when the seller completes performance by delivering or shipping the goods, (2) whenever the seller delivers a “tangible document of title” unless the parties “explicitly agreed” otherwise, or (3) whenever the parties contracted that title would pass. MONT. CODE ANN. § 30-2-401 (2009).


422 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 14 (Mar. 26, 2007).
delivered.”423 The court had also concluded in a prior hearing on a matter involving Auto Auction and a different auto vendor that “the transaction was not complete as the title never passed and the tendering of a check never occurred even though possession passed.”424 Accordingly, the court held that Auto Auction was entitled to the proceeds from the single vehicle for which title had never been transferred and a check had never been tendered.425

The court then held that HMFC was entitled to the proceeds from the remaining six vehicles426 because (1) Incredible Auto took possession of those vehicles,427 (2) it tendered checks for the vehicles,428 and (3) because Auto Auction had delivered the vehicles’ titles to Incredible Auto.429 To reach this holding, the court relied upon various

423 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (*In re* Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 7 (Mar. 26, 2007).

424 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (*In re* Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 14 (Mar. 26, 2007).


426 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (*In re* Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 15 (Mar. 26, 2007).


provisions of Montana law.\(^{430}\) The court construed section 30-2-403(1)(b) to mean that Incredible Auto had the power to transfer a security interest in the vehicles to HMFC, who was a “good faith purchaser for value.”\(^{431}\) For HMFC’s security interest to attach, Incredible Auto only had to have the “power to transfer rights in the [vehicles] to [HMFC].”\(^{432}\) Incredible Auto had this power because it had possession of both the vehicles and their titles and had tendered checks in exchange.\(^{433}\) Therefore, the court found that HMFC’s security interest attached to the vehicles.\(^{434}\)

Additionally, the court was not persuaded by Auto Auction’s arguments that HMFC had not acted in good faith or that Incredible Auto’s misconduct prevented the sale of the vehicles from being completed.\(^{435}\) The court seemed to adopt a presumption that a secured floor lender was a good faith purchaser unless the challenger provided evidence of the secured creditor’s actual misconduct rather than a change in the creditor’s

\(^{430}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 15 (Mar. 26, 2007); see MONT. CODE ANN. § 30-1-201(2)(dd) (2009); MONT. CODE ANN. § 30-1-201(2)(ee) (2009); MONT. CODE ANN. § 30-2-403(1)(b) (2009); MONT. CODE ANN. § 30-9A-204 (2009).

\(^{431}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 15 (Mar. 26, 2007).


\(^{433}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 15 (Mar. 26, 2007).

\(^{434}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 15 (Mar. 26, 2007).

\(^{435}\) Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (\textit{In re} Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 16 (Mar. 26, 2007).
lending practices after learning of the debtor’s misconduct.\footnote{Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 16 (Mar. 26, 2007).} The court also dismissed allegations of Incredible Auto’s misconduct finding that Auto Auctions failed to prove that Incredible Auto knew that it had insufficient funds to cover the checks when it tendered the checks to Auto Auction.\footnote{Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 17 (Mar. 26, 2007).} Because Auto Auction’s reclamation right was subject to HMFC’s security interest,\footnote{11 U.S.C. § 546(c) (2009).} HMFC was entitled to the proceeds from the six vehicles in which it had a security interest,\footnote{Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 17 (Mar. 26, 2007).} and the Auto Auction adversary case was closed.

In one respect, the court’s decision in this matter seems supported by both the law and facts. Under Montana law, Incredible Auto had the power to transfer a security interest in six of the vehicles because it had possession of the vehicles and their titles. The fact that it obtained the vehicles and their titles by tendering bad checks did not affect its power to transfer an interest to HMFC, and HMFC properly obtained an interest in the vehicles which was superior to Auto Auction’s reclamation right.

However, Auto Auction’s second argument regarding HMFC’s lack of good faith in the transaction had more merit than the court acknowledged. For HMFC to be acting in “good faith,” it had to comply with “reasonable commercial standards of fair
To support its opinion, the court cited to a 1999, pre-BAPCPA case from the Southern District of New York which seemed to presume that a secured lender is a “good faith purchaser” unless a reclaiming seller is able to show that the secured lender engaged in its own misconduct.\footnote{Galey & Lord Inc. v. Arley Corp. (In re Arlco, Inc.), 239 B.R. 261, 271 (Bankr. S.D.N.Y. 1999); Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Memorandum of Decision (Dkt. 30B) at 16 (Mar. 26, 2007).} The court accepted and applied the rationale of this case rather than examining whether this presumption should apply in a transaction in which the debtor had clearly engaged in misconduct. Additionally, the court failed to analyze whether HMFC’s pre-petition decision to limit advances for Incredible Auto’s inventory purchases were the proximate cause of the bad checks that Incredible Auto tendered to Auto Auction.

Incredible Auto had the power to transfer a security interest in the vehicles to HMFC because it had possession of both the vehicles and their titles. Auto Auction gave Incredible Auto possession of both the vehicles and their titles because Incredible Auto tendered checks which it thought would be fully funded once HMFC advanced funds for the vehicles. HMFC chose not to advance funds for the vehicles because, by this time, it would only advance funds on a case-by-case basis after review. HMFC’s decision not to advance funds to pay for the vehicles was the main reason why Incredible Auto’s checks were returned for insufficient funds. Therefore, HMFC should not have been a “good faith purchaser” because it obtained its security interest knowing that Incredible Auto only had the power to transfer the interest by defrauding Auto Auction, or the court should have at least analyzed whether this was a possibility.

\footnote{MONT. CODE ANN. § 30-2-103(1)(b) (2009).}
C. THOSE ARE MY CARS: MOTIONS FOR RELIEF FROM THE AUTOMATIC STAY

1. STEVE’S AUTO SALES, INC.: UNPAID INVENTORY

a. Background on Steve’s Auto

Seven of the vehicles that were the subject of Auto Auction’s reclamation claim were “purchased” from Steve’s Auto Sales, Inc. ("Steve’s Auto"). Steve’s Auto was a wholesale and retail car dealer that had been in business for sixteen years. Steve’s Auto financed its inventory through a floor financing arrangement with two separate finance companies. The majority of vehicles that it sold to retail customers were purchased at auctions throughout the Midwestern United States, including Auto Auction. About 70% of its annual sales were from cars that it purchased either from car dealers or through auctions and then resold to other car dealers.

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442 Whether or not Auto Auction or Incredible Auto actually “purchased” the vehicles from Steve’s Auto was the subject of much dispute. See In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Steve’s Auto Sales’ Motion for Relief (Dkt. 76) at 2-3 (Nov. 22, 2006).

443 See Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Complaint (Dkt. 7) at Exhibit A-1 (Oct. 18, 2006); In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Motion for Relief from the Automatic Stay and Notice (Dkt. 67) at 2 (Nov. 17, 2006).

444 In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 4-5 (Dec. 13, 2006).

445 In re Incredible Auto Sales LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 9 (Dec. 13, 2006). The floor financiers were Automotive Finance Corporation ("AFC") and Dealers Services Corporation ("DSC") both of which were located in Billings, Montana in the Auto Auction offices. In re Incredible Auto, Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 9 (Dec. 13, 2006).

446 In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 5-6 (Dec. 13, 2006).

447 In re Incredible Auto Sales LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 8 (Dec. 13, 2006).
wholesale transactions were conducted through various auction companies, including Auto Auction.\textsuperscript{448}

For purchases through Auto Auction, a buyer would first pay Auto Auction the purchase price.\textsuperscript{449} Auto Auction would retain its fee and then send the balance to the vehicle’s seller.\textsuperscript{450} However, before Auto Auction would pay the seller, the seller was required to deliver the vehicle’s title to Auto Auction.\textsuperscript{451} Once it had both the buyer’s payment and the seller’s vehicle title, Auto Auction would send the payment to the seller and the title to the buyer, and the transaction would be complete.\textsuperscript{452}

\textit{b. The Transaction with Incredible Auto}

Steve’s Auto became involved with Incredible Auto through the personal relationship between the presidents of both companies: Steve Marks (Steve’s Auto) and Mr. Gutierrez (Incredible Auto).\textsuperscript{453} Mr. Marks and Mr. Gutierrez attended the same church and were social friends for several years.\textsuperscript{454} On several occasions, Steve’s Auto

\begin{footnotes}
\item \textsuperscript{448} In re Incredible Auto Sales LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 8, 10 (Dec. 13, 2006).
\item \textsuperscript{449} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 13 (Dec. 13, 2006).
\item \textsuperscript{450} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 13 (Dec. 13, 2006).
\item \textsuperscript{451} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 13 (Dec. 13, 2006).
\item \textsuperscript{452} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 14 (Dec. 13, 2006).
\item \textsuperscript{453} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 14-15 (Dec. 13, 2006).
\item \textsuperscript{454} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 15-16 (Dec. 13, 2006).
\end{footnotes}
had also sold vehicles to Incredible Auto on a wholesale basis. For some of these transactions, Incredible Auto had purchased the vehicles directly from Steve’s Auto; for others, Incredible Auto had purchased vehicles that Steve’s Auto was selling at an auction. Mr. Marks also owed the property on which Mr. Gutierrez had operated another car dealership, New Beginnings.

In late September 2006, Mr. Gutierrez approached Mr. Marks at church about the possibility of purchasing some vehicles from Steve’s Auto. The next day, the men met, and Mr. Gutierrez informed Mr. Marks that he needed to purchase some cars because he was “low on inventory.” Mr. Marks showed Mr. Gutierrez the vehicles that he had on his lot, and although Mr. Gutierrez picked out four vehicles to purchase, he informed Mr. Marks that he needed to purchase even more vehicles. Mr. Marks informed him that he had several other vehicles but that they were at various body shops.

455 In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 15 (Dec. 13, 2006).
456 In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 15 (Dec. 13, 2006).
457 In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 15 (Dec. 13, 2006).
458 In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 58 (Dec. 13, 2006).
459 In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 16 (Dec. 13, 2006). The conversation arose after Mr. Gutierrez and his wife offered their condolences to Mr. and Mrs. Marks whose four-month-old granddaughter had just died. In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 16 (Dec. 13, 2006).
460 In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 17 (Dec. 13, 2006).
461 In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 18 (Dec. 13, 2006).
462 In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 18 (Dec. 13, 2006).
being painted and prepared for an auction at Auto Auction.\textsuperscript{463} Mr. Gutierrez insisted that this was acceptable, so three days later, Mr. Marks took him to various body shops around the city so that Mr. Gutierrez could select the vehicles he wished to purchase—fourteen in all.\textsuperscript{464} Thirteen of the fourteen vehicles were subject to the security interests of Steve’s Auto’s floor financers who also held the original title work for each of the vehicles.\textsuperscript{465}

i. Structure of the Transaction

Mr. Gutierrez insisted that the vehicle purchase be conducted through Auto Auction “for comfort of not having any problems with titles and so on and so forth.”\textsuperscript{466} Mr. Marks analogized Auto Auction’s involvement to that of a real estate closing company.\textsuperscript{467} Auto Auction would never have physical possession of the vehicles but would handle the title work for the vehicles and the exchange of the purchase payment and titles.\textsuperscript{468} Although Mr. Marks thought this arrangement was “unusual,”\textsuperscript{469} he agreed to the transaction structure because Mr. Gutierrez believed it would provide him some

\textsuperscript{463} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 18 (Dec. 13, 2006).

\textsuperscript{464} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 19-20 (Dec. 13, 2006).

\textsuperscript{465} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 21 (Dec. 13, 2006).

\textsuperscript{466} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 22 (Dec. 13, 2006).

\textsuperscript{467} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 22 (Dec. 13, 2006).

\textsuperscript{468} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 22-23 (Dec. 13, 2006).

\textsuperscript{469} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 60 (Dec. 13, 2006). Mr. Marks testified that only three percent of the transactions in his business were structured in that manner. In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 60 (Dec. 13, 2006).
measure of protection if he later discovered discrepancies with the odometer reading or unknown vehicle damage.\textsuperscript{470}

Steve’s Auto delivered all but two of the fourteen vehicles to Incredible Auto,\textsuperscript{471} and Auto Auction prepared invoices for them.\textsuperscript{472} Incredible Auto then tendered checks to Auto Auction for six of the vehicles,\textsuperscript{473} and Steve’s Auto’s financers released the titles for those vehicles to Auto Auction.\textsuperscript{474} Auto Auction then paid Steve’s Auto for the six vehicles and released their titles to Incredible Auto.\textsuperscript{475} Although Incredible Auto had possession of twelve of the vehicles, it only had the titles for six of them.\textsuperscript{476} The Steve’s Auto finance companies did not release the titles for the remaining six vehicles because Incredible Auto never tendered payment for them.\textsuperscript{477}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{470} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 61 (Dec. 13, 2006). Auto Auction allowed a purchaser to return a vehicle within fourteen days if the purchaser determined that there was frame damage, flood damage, or an incorrect odometer reading on the vehicle. In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 77-78 (Dec. 13, 2006).
\item \textsuperscript{471} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 21 (Dec. 13, 2006). Two of the vehicles were still being repaired when the other vehicles were delivered. In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 34, 36 (Dec. 13, 2006).
\item \textsuperscript{472} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 22 (Dec. 13, 2006).
\item \textsuperscript{473} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 25-26 (Dec. 13, 2006).
\item \textsuperscript{474} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 25 (Dec. 13, 2006).
\item \textsuperscript{475} See In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 25 (Dec. 13, 2006).
\item \textsuperscript{476} See In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 25-27 (Dec. 13, 2006).
\item \textsuperscript{477} In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 26 (Dec. 13, 2006).
\end{itemize}
\end{footnotesize}
Before Steve’s Auto delivered the vehicles to Incredible Auto, Mr. Gutierrez asked Mr. Marks for photocopies of the titles so that he could determine if there was any flood damage history or mileage discrepancies on the vehicles.\(^{478}\) Even though Mr. Marks thought it was an “unusual” request,\(^{479}\) Mr. Marks contacted his floor finance companies which faxed copies of the vehicle titles to Mr. Gutierrez and Auto Auction.\(^{480}\)

**ii. What Went Wrong**

Three days before Incredible Auto filed for bankruptcy, Steve’s Auto took the eight remaining titles to Auto Auction so that Steve’s Auto could obtain payment for the vehicles.\(^{481}\) Auto Auction refused to pay Steve’s Auto because the checks that Incredible Auto had tendered as payment had been returned for insufficient funds.\(^{482}\) After Incredible Auto filed for bankruptcy, Mr. Gutierrez spoke to Mr. Marks at church and by telephone apologizing for not paying for the cars but insisting that there was no way that Steve’s Auto was going to get the vehicles back.\(^{483}\)

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\(^{478}\) *In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 61 (Dec. 13, 2006).*

\(^{479}\) *In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 62 (Dec. 13, 2006).*

\(^{480}\) *In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 62-63 (Dec. 13, 2006).* Mr. Gutierrez used the faxed copies of the vehicle titles to obtain financing from HMFC. *In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 64 (Dec. 13, 2006).* See *supra* p. 28 (discussing Incredible Auto’s title fabrication activities).

\(^{481}\) *In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 67-68 (Dec. 13, 2006).*

\(^{482}\) *In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 66 (Dec. 13, 2006); Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Complaint (Dkt. 7) at ¶ 10 (Oct. 18, 2006).*

\(^{483}\) *In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 69-73 (Dec. 13, 2006).*
Incredible Auto’s failure to pay for eight of the vehicles that Steve’s Auto delivered caused a great deal of hardship for Steve’s Auto because these vehicles were subject to liens held by Steve’s Auto’s floor financers.\(^{484}\) The financers would not release the original titles until the liens were paid off, and Steve’s Auto could not pay off the liens without payment from Incredible Auto.\(^{485}\) Because Steve’s Auto did not pay off the liens and no longer had possession of the vehicles, one of the financers, AFC, refused to do any more business with Steve’s Auto.\(^{486}\) The other financer, DSC, was willing to floor more vehicles, but Steve’s Auto had reached its flooring limit and therefore could purchase no additional vehicles.\(^{487}\) This left Steve’s Auto in the difficult position of needing to liquidate cars that it no longer possessed in order to secure additional financing to keep its business operational.\(^{488}\)

c. Motion for Relief from the Automatic Stay

i. Motion & Objections

On November 17, 2006, Steve’s Auto moved for relief from the automatic stay so that it could take possession of and sell seven of the vehicles that Incredible Auto had in

\(^{484}\) In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 43 (Dec. 13, 2006).

\(^{485}\) In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 43 (Dec. 13, 2006).

\(^{486}\) In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 43 (Dec. 13, 2006).

\(^{487}\) In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 43 (Dec. 13, 2006).

\(^{488}\) In re Incredible Auto Sales, LLC., Case No. 06-60855, Bankr. D. Mont., Deposition of Steve Marks (Dkt. 136) at 44 (Dec. 13, 2006).
its possession. HMFC promptly objected arguing that the vehicles were Incredible Auto’s inventory and therefore subject to its senior security interest. HMFC also argued that the vehicles were subject to the stipulation approved by the court in the Auto Auction adversary proceeding and could not be transferred to Steve’s Auto. Incredible Auto also objected arguing that Steve’s Auto’s motion should be determined as part of the Auto Auction adversary proceeding, that the vehicles were property of the estate, and that Steve’s Auto was not a secured creditor but an unsecured creditor with a pre-petition claim.

489 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion for Relief from Automatic Stay (Dkt. 67) (Nov. 17, 2006). Steve’s Auto did not move for relief from the automatic stay relating to the eighth vehicle until February 1, 2007. In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion for Relief from the Automatic Stay and Notice (Dkt. 258) (Feb. 1, 2007). Steve’s Auto claimed that this vehicle was “inadvertently omitted from the prior motion.” Id. at 3. These vehicles were also the subject of Auto Auction’s reclamation claim. Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Complaint (Dkt. 7) at Exhibit A (Oct. 18, 2006).

490 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Steve’s Auto Sales’ Motion for Relief (Dkt. 76) at 2 (Nov. 22, 2006).

491 Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Stipulation re: Auto Auction 546(c) Claim (Dkt. 7) at 2-3 (Oct. 124, 2006); Auto Auction Assoc. of Mont., Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Adv. No. 06-00119, Bankr. D. Mont., Order Vacating TRO Hearing, Approving Stipulation, and Discharging Injunction Bond (Dkt. 14) (Oct. 24, 2006).

492 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Steve’s Auto Sales’ Motion for Relief (Dkt. 76) at 2 (Nov. 22, 2006).

493 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance, and Objection to Motion for Relief from the Stay Filed by Steve’s Auto (Dkt. 89) at ¶¶ 2, 6, 7 (Nov. 27, 2006).

494 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance, and Objection to Motion for Relief from the Stay Filed by Steve’s Auto (Dkt. 89) at ¶ 4 (Nov. 27, 2006).

495 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance, and Objection to Motion for Relief from the Stay Filed by Steve’s Auto (Dkt. 89) at ¶ 5 (Nov. 27, 2006).
ii. Hearing No. 1: Who gets Possession of the Vehicles?

The court conducted a hearing on Steve’s Auto’s motion on December 5, 2006. At the hearing, Incredible Auto withdrew its objection to Steve’s Auto’s motion, and Steve’s Auto and HMFC reached an agreement regarding the vehicles. The parties agreed that Steve’s Auto could take possession of the vehicles and sell them but that it would hold the proceeds in a separate account until the court could determine which had a superior interest in the proceeds. Accordingly, on December 7, 2006, the court granted Steve’s Auto relief from the automatic stay and delayed determination of the parties’ interest in the proceeds until a hearing on December 12, 2006.

Steve’s Auto took possession of four of the vehicles pursuant to the court’s order. Two of the vehicles had never been delivered to Incredible Auto because they were being repaired at the time that Incredible Auto declared bankruptcy. It could not take possession of one of the vehicles because Incredible Auto had already sold it.

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496 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Minutes of Hearing Held (Docket Entry) at 18 (Dec. 5, 2006).

497 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont, Order on Steve’s Auto Sales, Inc.’s Motion for Relief from the Automatic Stay (Dkt. 117) at 1 (Dec. 7, 2006).

498 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont, Order on Steve’s Auto Sales, Inc.’s Motion for Relief from the Automatic Stay (Dkt. 117) at 1 (Dec. 7, 2006).

499 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont, Order on Steve’s Auto Sales, Inc.’s Motion for Relief from the Automatic Stay (Dkt. 117) at 2 (Dec. 7, 2006).

500 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont, Order on Steve’s Auto Sales, Inc.’s Motion for Relief from the Automatic Stay (Dkt. 117) at 2-3 (Dec. 7, 2006).

501 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont, Deposition of Steve Marks (Dkt. 136) at 34, 37-40 (Dec. 13, 2006).

502 In re Incredible Auto, Case No. 06-60855, Bankr. Mont, Deposition of Steve Marks (Dkt. 136) at 34, 36 (Dec. 13, 2006).

503 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont, Deposition of Steve Marks (Dkt. 136) at 33, 41 (Dec. 13, 2006). The eighth vehicle, referenced in footnote 489, had also been sold by
However, Incredible Auto had claimed it as part of its inventory in its bankruptcy filings.  

iii. Hearing No. 2: Who has the Superior Interest in the Proceeds?

On December 12, 2006, the court conducted a hearing to determine whether Steve’s Auto or HMFC had the superior interest in the proceeds from the vehicles. But at the hearing, Steve’s Auto and HMFC only agreed that the court should grant Steve’s Auto full relief from the automatic stay for the two vehicles that Steve’s Auto never delivered to Incredible Auto. Though not explained in the order, the parties most likely reached this agreement because HMFC had a very weak argument that the vehicles were part of Incredible Auto’s inventory as Incredible Auto never had possession of either the vehicles or their titles. The court ordered Steve’s Auto and HMFC to submit briefs detailing their respective positions regarding the proceeds of the remaining five vehicles and delayed its final decision until it had time to examine the parties’ briefs.

The sole disagreement between Steve’s Auto and HMFC was whether or not the September 2006 transaction between Steve’s Auto and Incredible Auto was a completed

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504 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Exhibit B to Debtor’s Emergency Motion for Use of Cash Collateral (Dkt. 17-2) at 2 (Oct. 26, 2006).

505 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 132) (Dec. 12, 2006).

506 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 132) at 1 (Dec. 12, 2006).

507 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 132) at 2 (Dec. 12, 2006).

508 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 132) at 2 (Dec. 12, 2006).
If the transaction was a completed sale, then the vehicles were part of Incredible Auto’s inventory subject to HMFC’s superior security interest. But, if the transaction was not a completed sale, then Steve’s Auto remained the owner of the vehicles and had the superior interest. Both parties agreed that Montana Code Annotated section 30-2-401 was the controlling statute, providing as follows:

Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes performance with reference to the delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place.

I. Steve’s Auto’s Argument: Explicit Agreement Trumps Statutory Default

Focusing on the “[u]nless otherwise explicitly agreed” language of the statute, Steve’s Auto argued that the transaction was not a completed sale until Incredible Auto paid for the vehicles and took possession of the vehicles’ titles. It argued that Incredible Auto and Steve’s Auto had an explicit agreement that the vehicles would be

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509 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Steve’s Auto Sales in Support of Motion for Relief from the Stay (Dkt. 150) at 1 (Dec. 19, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response Memorandum of HMFC in Opposition to Steve’s Auto Sales’ Motion for Relief from the Stay (Dkt. 164) at 2 (Dec. 26, 2006).

510 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response Memorandum of HMFC in Opposition to Steve’s Auto Sales’ Motion for Relief from the Stay (Dkt. 164) at 2 (Dec. 26, 2006).

511 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Steve’s Auto Sales in Support of Motion for Relief from the Stay (Dkt. 150) at 1 (Dec. 19, 2006).

512 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Steve’s Auto Sales in Support of Motion for Relief from the Stay (Dkt. 150) at 6 (Dec. 19, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response Memorandum of HMFC in Opposition to Steve’s Auto Sales’ Motion for Relief from the Stay (Dkt. 164) at 6 (Dec. 26, 2006).


514 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Steve’s Auto Sales in Support of Motion for Relief from the Stay (Dkt. 150) at 5 (Dec. 19, 2006).
sold through Auto Auction and that this “explicit agreement” included an “explicit agreement” to adopt the “custom and practice routinely followed by the Auto Auction.”

In the ordinary course of performance, a sale transaction facilitated by Auto Auction was complete only when (1) the buyer had tendered payment to Auto Auction, (2) the seller had delivered title to Auto Auction, and (3) there was a contemporaneous exchange of title and payment. Although Steve’s Auto delivered the vehicles to Incredible Auto, Incredible Auto did not tender payment for and Steve’s Auto did not deliver the titles to the vehicles. Therefore, according to Steve’s Auto, the sale transaction was never completed according to the “custom and practice routinely followed by the Auto Auction.”

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515 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Memorandum of Steve’s Auto Sales in Support of Motion for Relief from the Stay (Dkt. 150) at 6 (Dec. 19, 2006).

516 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Memorandum of Steve’s Auto Sales in Support of Motion for Relief from the Stay (Dkt. 150) at 6 (Dec. 19, 2006).

517 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Memorandum of Steve’s Auto Sales in Support of Motion for Relief from the Stay (Dkt. 150) at 6 (Dec. 19, 2006).

518 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Memorandum of Steve’s Auto Sales in Support of Motion for Relief from the Stay (Dkt. 150) at 6 (Dec. 19, 2006).

519 Incredible Auto did present checks to Auto Auction as payment for the vehicles, but the checks were subsequently dishonored. *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 181) at 6 (Jan. 12, 2007).

520 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Memorandum of Steve’s Auto Sales in Support of Motion for Relief from the Stay (Dkt. 150) at 6 (Dec. 19, 2006).

521 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Memorandum of Steve’s Auto Sales in Support of Motion for Relief from the Stay (Dkt. 150) at 6 (Dec. 19, 2006).
II. HMFC’s Argument: No Explicit Agreement so Statutory Default Controls

Conversely, HMFC focused on the remaining language of the statute to argue that the sale transaction was complete when Incredible Auto took physical possession of the vehicles rather than when it received the vehicle title certificates. HMFC argued that subsection 401(2) provides that “title to goods passes when the goods are delivered, regardless of reservation of title,” and that subsection 401(3) indicates that “[d]elivery of a certificate of title is relevant only where the goods are not physically delivered to the buyer.” HMFC also cited several cases from the 9th Circuit and other jurisdictions which determined that legal title to a vehicle transferred when the vehicle was physically delivered to the buyer, whether or not the title was transferred at the same time. Therefore, according to HMFC, the sale transaction was completed and legal title passed when Steve’s Auto delivered physical possession of the vehicles to Incredible Auto.

HMFC also refuted Steve’s Auto’s contention that there was an “explicit agreement” between Incredible Auto and Steve’s Auto that overrode the Montana UCC

523 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response Memorandum of HMFC in Opposition to Steve’s Auto Sales’ Motion for Relief from the Stay (Dkt. 164) at 6 (Dec. 26, 2006).
525 Mont. Code Ann. § 30-2-401(3) (2009) (“Unless otherwise explicitly agreed where delivery is to be made without moving the goods, (a) if the seller is to deliver a tangible document of title, title passes at the time when and the place where the seller delivers such documents.”); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response Memorandum of HMFC in Opposition to Steve’s Auto Sales’ Motion for Relief from the Stay (Dkt. 164) at 6 (Dec. 26, 2006).
526 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response Memorandum of HMFC in Opposition to Steve’s Auto Sales’ Motion for Relief from the Stay (Dkt. 164) at 7 (Dec. 26, 2006).
527 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response Memorandum of HMFC in Opposition to Steve’s Auto Sales’ Motion for Relief from the Stay (Dkt. 164) at 8 (Dec. 26, 2006).
provision.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response Memorandum of HMFC in Opposition to Steve’s Auto Sales’ Motion for Relief from the Stay (Dkt. 164) at 8-9 (Dec. 26, 2006).} HMFC first argued that any oral agreement violated the statute of frauds because the value of the vehicles was more than $500.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response Memorandum of HMFC in Opposition to Steve’s Auto Sales’ Motion for Relief from the Stay (Dkt. 164) at 8 (Dec. 26, 2006).} Then, HMFC argued that nothing about the transaction was in accordance with the ordinary course of performance between Incredible Auto and Steve’s Auto and therefore could not constitute an “explicit agreement” between the parties to adopt the ordinary practice of Auto Auction.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response Memorandum of HMFC in Opposition to Steve’s Auto Sales’ Motion for Relief from the Stay (Dkt. 164) at 9-10 (Dec. 26, 2006).} Accordingly, the “unless otherwise explicitly agreed” portion of the statute did not apply, and the sale transaction was completed when Incredible Auto took possession of the vehicles.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 182) at 1 (Jan. 12, 2007).}

III. The Court Decides

On January 12, 2007, the court granted Steve’s Auto’s motion for relief from the automatic stay allowing Steve’s Auto to keep the disputed proceeds from the sale of the four vehicles that Steve’s Auto repossessed and sold and the vehicle that Incredible Auto had sold.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 182) at 1 (Jan. 12, 2007). The court also made the order effective immediately rather than staying it for ten days as was customary under FED. R. BANKR. P. 4001(a)(3). In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 182) at 1 (Jan. 12, 2007). In mid-February, the court also granted Steve’s Auto relief from stay allowing him to recover the eighth vehicle referenced above. In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 269) at 1 (Feb. 16, 2007). As the vehicle had already been sold by Incredible Auto, In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D.} The court agreed with both parties that Montana Code Annotated section 30-
2-401 governed the transaction.\textsuperscript{533} However, section 30-1-205(5)\textsuperscript{534} required the court to consider Auto Auction’s “course of dealing” and the agreement to structure the transaction using Auto Auction in determining whether the sale was consummated when Incredible Auto took possession of the vehicles.\textsuperscript{535} Because both Incredible Auto and Steve’s Auto were very familiar with Auto Auction’s procedures for selling vehicles,\textsuperscript{536} the court found that their agreement to conduct the transaction using Auto Auction constituted an “explicit agreement” sufficient to override the Montana Uniform Commercial Code default rule.\textsuperscript{537} The “explicit agreement” was that they would adopt Auto Auction’s “established and recognized procedures” for passing legal title from Steve’s Auto to Incredible Auto.\textsuperscript{538} Therefore, Incredible Auto could not obtain legal title and the sale could not consummate until Incredible Auto paid Steve’s Auto (through Auto Auction) for the vehicles.\textsuperscript{539} Because Incredible Auto did not pay for the vehicles,

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\begin{itemize}
  \item \textsuperscript{533} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 181) at 2 (Feb. 1, 2007), surely the court meant to grant Steve’s Auto relief to obtain the vehicle’s proceeds.
  
  \item \textsuperscript{534} Mont. Code Ann. § 30-1-205(5) (2009) provides:
  
  \texttt{[T]he express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade, must be construed wherever reasonable as consistent with each other. If such a construction is unreasonable: (a) express terms prevail over course of performance, course of dealing, and usage of trade; (b) course of performance prevails over course of dealing and usage of trade; and (c) course of dealing prevails over usage of trade.}
  
  \item \textsuperscript{535} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 181) at 8 (Jan. 12, 2007).
  
  \item \textsuperscript{536} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 181) at 10 (Jan. 12, 2007).
  
  \item \textsuperscript{537} See Mont. Code Ann. § 30-2-401(2) (2009).
  
  \item \textsuperscript{538} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 181) at 10 (Jan. 12, 2007).
\end{itemize}
it never obtained ownership of them, and HMFC’s security interest never attached to them.\textsuperscript{540}

Based on the facts of this transaction and section 30-1-205(5)’s\textsuperscript{541} requirement that the court consider the parties’ course of dealing, the court’s decision seemed legally sound and reasonable as a matter of business. Although Steve’s Auto may have relied too much on Mr. Gutierrez’s promise to pay for the vehicles, the court’s ruling enables businesses to continue to purchase goods without requiring a simultaneous exchange of funds for the goods. This provides a measure of flexibility so that businesses can structure transactions in a way that is beneficial to all.

\textbf{iv. Don’t Take “No” for an Answer: HMFC’s Appeal}

HMFC appealed the bankruptcy court’s decision to the Montana District Court.\textsuperscript{542} It argued that the bankruptcy court erred in holding that HMFC’s lien did not attach to the vehicles transferred from Steve’s Auto to Incredible Auto when it found an “explicit agreement” to override the statutory provisions regarding the time when legal title passes

\textsuperscript{539}In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 181) at 10 (Jan. 12, 2007).

\textsuperscript{540}In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 181) at 10-11 (Jan. 12, 2007).

\textsuperscript{541}MONT. CODE ANN. § 30-1-205(5) (2009) provides:

[T]he express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade, must be construed wherever reasonable as consistent with each other. If such a construction is unreasonable: (a) express terms prevail over course of performance, course of dealing, and usage of trade; (b) course of performance prevails over course of dealing and usage of trade; and (c) course of dealing prevails over usage of trade.

\textsuperscript{542}In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Notice of Appeal (Dkt. 233) at 1 (Jan. 22, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Transmittal Form (Dkt. 237) at 1-2 (Jan. 23, 2007).
from seller to buyer.\textsuperscript{543} Both HMFC and Steve’s Auto asserted essentially the same arguments on appeal as they had argued in the bankruptcy court;\textsuperscript{544} however, HMFC also hinted that Steve’s Auto was complicit in Incredible Auto’s scheme to fraudulently obtain floor plan advances for the vehicles.\textsuperscript{545}

The district court was not persuaded by HMFC’s argument\textsuperscript{546} and determined that an “explicit agreement” between two parties to a sale did not have to be in writing to create an exception to the statutory provisions regarding the time when legal title passes.\textsuperscript{547} The court determined that an “explicit agreement” could also be found in the course of performance between the seller and buyer.\textsuperscript{548} In this case, the course of performance involved structuring the sale using Auto Auction.\textsuperscript{549} Choosing this transaction structure was sufficient to constitute an “explicit agreement” to adopt Auto Auction’s standard sales policy: that legal title to the vehicles did not pass to Incredible Auto until it paid Steve’s Auto.\textsuperscript{550} Because Steve’s Auto was never paid, HMFC’s

\textsuperscript{543} Hyundai Motor Finance v. Incredible Auto Sales, LLC, No. CV-07-16- BLGRFC, D. Mont., Appellant’s Brief (Dkt. 4C) at 7-10 (Mar. 6, 2007). Throughout this paper, where the citation includes a “C” after the docket number, the citation is to the docket of the HMFC appeal.

\textsuperscript{544} See Hyundai Motor Finance v. Incredible Auto Sales, LLC, No. CV-07-16- BLG-RFC, D. Mont., Appellant’s Brief (Dkt. 4C) at 9-13, 16-17 (Mar. 6, 2007); Hyundai Motor Finance v. Incredible Auto Sales, LLC, No. 1.07-cv-00016-RFC, D. Mont., Appellee’s Response Brief (Dkt. 5C) at 7-8 (Apr. 5, 2007).

\textsuperscript{545} Hyundai Motor Finance v. Incredible Auto Sales, LLC, No. CV-07-16- BLG-RFC, D. Mont., Appellant’s Brief (Dkt. 4C) at 7 (Mar. 6, 2007).

\textsuperscript{546} See Hyundai Motor Finance v. Incredible Auto Sales, LLC, No. CV-07-16- BLG-RFC, D. Mont., Order (Dkt. 7C) at 8 (Sept. 25, 2007).

\textsuperscript{547} See Hyundai Motor Finance v. Incredible Auto Sales, LLC, No. CV-07-16- BLG-RFC, D. Mont., Order (Dkt. 7C) at 7 (Sept. 25, 2007).

\textsuperscript{548} See Hyundai Motor Finance v. Incredible Auto Sales, LLC, No. CV-07-16- BLG-RFC, D. Mont., Order (Dkt. 7C) at 8 (Sept. 25, 2007).

\textsuperscript{549} See Hyundai Motor Finance v. Incredible Auto Sales, LLC, No. CV-07-16- BLG-RFC, D. Mont., Order (Dkt. 7C) at 8 (Sept. 25, 2007).
security interest never attached to the vehicles, and the bankruptcy court’s order was affirmed. For the same reasons discussed above, the district court’s decision to affirm the bankruptcy court seemed grounded in both law and fact.

2. CONSUMER CREDITORS: UNPAID LIENS ON TRADE-IN VEHICLES

In addition to Steve’s Auto, there was another group of interested parties who moved for relief from the automatic stay because they were never paid for vehicles that Incredible Auto had in its possession at the time the bankruptcy case commenced. These motions were brought by seven of Incredible Auto’s customers, or by their respective secured creditors, so that they could seize vehicles that the customers had delivered to Incredible Auto as a “trade-in” for the purchase of a different vehicle.

a. The Transaction and What Went Wrong

Each of the motions alleged similar facts. Some time prior to the commencement of the case, a consumer entered into a retail installment contract and security agreement

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550 See Hyundai Motor Finance v. Incredible Auto Sales, LLC, No. CV-07-16- BLG-RFC, D. Mont., Order (Dkt. 7C) at 8 (Sept. 25, 2007).

551 See Hyundai Motor Finance v. Incredible Auto Sales, LLC, No. CV-07-16- BLG-RFC, D. Mont., Order (Dkt. 7C) at 8 (Sept. 25, 2007).

552 See Hyundai Motor Finance v. Incredible Auto Sales, LLC, No. CV-07-16- BLG-RFC, D. Mont., Order (Dkt. 7C) at 8 (Sept. 25, 2007).

553 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Andres] (Dkt. 160) at 2, 4 (Dec. 22, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 1] (Dkt. 36) at 2-3 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 2] (Dkt. 37) at 2-3 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 3] (Dkt. 275) at 2-3 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Motion to Modify Stay [Nuvell 1] (Dkt. 276) at 2-3 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Nuvell 2] (Dkt. 290) at 2-3 (Feb. 23, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [Toyota] (Dkt. 266) at 3 (Feb. 14, 2007). Incredible Auto actually identified 29 customers whose liens on trade-in vehicles were unpaid on the commencement date of the bankruptcy case. In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Amendment to Schedules and Statement of Affairs (Dkt. 126) at 1-2, 5-8 (Dec. 9, 2006). However, only the parties discussed in this section moved for relief from the automatic stay. See Motions to Modify Stay cited supra.
with a lender who financed his or her purchase of a vehicle ("Lender"). Pursuant to
the security agreement, the consumer granted the Lender a security interest in the
vehicle, which the Lender properly perfected by filing with the state Department of
Motor Vehicles. In the month before the bankruptcy case commenced, the
consumer entered into a retail installment sale contract with Incredible Auto to purchase a
different vehicle. As part of the sale, the consumer delivered the first vehicle to

554 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Andres] (Dkt. 160) at 2 (Dec. 22, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 1] (Dkt. 36) at 2 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 2] (Dkt. 37) at 2 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 3] (Dkt. 275) at 2 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 4] (Dkt. 276) at 2 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 5] (Dkt. 278) at 2 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 6] (Dkt. 279) at 2 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [Yamaha] (Dkt. 266) at 2 (Feb. 14, 2007).

555 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Andres] (Dkt. 160) at 2 (Dec. 22, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 1] (Dkt. 36) at 2 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 2] (Dkt. 37) at 2 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 3] (Dkt. 275) at 2 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 4] (Dkt. 276) at 2 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 5] (Dkt. 278) at 2 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 6] (Dkt. 279) at 2 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [Yamaha] (Dkt. 266) at 2 (Feb. 14, 2007).

556 The exception to this statement is the matter of Diane and Kenneth J. Gates who traded in their first vehicle and purchased a second vehicle from Incredible Auto in July, 2006. In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Andres] (Dkt. 160) at 2 (Dec. 22, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 1] (Dkt. 36) at 2 (Nov. 2, 2006).

557 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Andres] (Dkt. 160) at 2 (Dec. 22, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 1] (Dkt. 36) at 2 (Nov. 2, 2006); In re Incredible Auto Sales, LLC,
Incredible Auto as a “trade-in” whose value was to be applied to the purchase price of the second vehicle. Incredible Auto agreed to pay the consumer’s Lender the outstanding loan balance on the first vehicle and obtain title to it, but Incredible Auto made no payments to the Lender. One of the consumers continued to make payments on the outstanding loan balance on the first vehicle so that he would not default on the loan.

559 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 2] (Dkt. 37) at 2 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 1] (Dkt. 36) at 2 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 2] (Dkt. 37) at 2 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 3] (Dkt. 275) at 2 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Nuvell 1] (Dkt. 276) at 2 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [Toyota] (Dkt. 266) at 3 (Feb. 14, 2007).

560 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Andres] (Dkt. 160) at 2 (Dec. 22, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 1] (Dkt. 36) at 2 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 2] (Dkt. 37) at 2 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 3] (Dkt. 275) at 2 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Nuvell 1] (Dkt. 276) at 2 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Nuvell 2] (Dkt. 290) at 2 (Feb. 23, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [Toyota] (Dkt. 266) at 3 (Feb. 14, 2007).

561 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Andres] (Dkt. 160) at 3 (Dec. 22, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 1] (Dkt. 36) at 2 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 2] (Dkt. 37) at 2 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 3] (Dkt. 275) at 2 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Nuvell 1] (Dkt. 276) at 2 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Nuvell 2] (Dkt. 290) at 2 (Feb. 23, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [Toyota] (Dkt. 266) at 3 (Feb. 14, 2007).
contract. The rest of the consumers stopped making payments on the first loan balance and defaulted on their loan contracts.

One Lender had a slightly different twist to its motion for relief. Like the other Lenders, WFS Financial, Inc. ("WFS") had a perfected security interest in a vehicle that was traded to Incredible Auto so that the consumer/borrower could purchase a different vehicle. However, unlike the other Lenders, Incredible Auto tendered a check to WFS to pay the outstanding balance on the loan secured by the vehicle, but the check was returned for insufficient funds. WFS sought relief from the automatic stay so that it could turn the bad check over to the police, pursue a state law criminal action for issuing a bad check, and collect the debt it was owed.

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562 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Andres] (Dkt. 160) at 3 (Dec. 22, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 1] (Dkt. 36) at 2-3 (Nov. 2, 2006) (The consumers continued to make payments from July 2006 to November 2006 and then defaulted.).

563 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 1] (Dkt. 36) at 3 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 2] (Dkt. 37) at 3 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 3] (Dkt. 275) at 2 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Motion to Modify Stay [Nuvell 1] (Dkt. 276) at 3 (Feb. 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Nuvell 2] (Dkt. 290) at 3 (Feb. 23, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [Toyota] (Dkt. 266) at 3 (Feb. 14, 2007).

564 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [WSF] (Dkt. 188) at 2 (Jan. 13, 2007).

565 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [WSF] (Dkt. 188) at 1-2 (Jan. 13, 2007).

566 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [WSF] (Dkt. 188) at 3 (Jan. 13, 2007).

567 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [WSF] (Dkt. 188) at 3-4 (Jan. 13, 2007).
b. Why the Parties Wanted Relief

Because of the automatic stay, none of the Lenders were able to foreclose and liquidate the vehicles that secured the defaulted liens.\textsuperscript{568} The Lenders were likely motivated by two other concerns. First, because Incredible Auto had possession of the vehicles, it had the power to sell them in the ordinary course of its business free and clear of the Lenders’ security interests.\textsuperscript{569} This would effectively leave the Lenders with no recourse for repayment of the loan other than to pursue the consumers for breach of contract or hope to obtain payments as unsecured creditors in the Chapter 11. Second, the Lenders were likely concerned that the vehicles might be damaged, lost, or stolen while the automatic stay was in place, thereby reducing their value as collateral if the Lenders ever did recover the vehicles.\textsuperscript{570}

The consumers were also affected by the automatic stay. Because Incredible Auto failed to pay the outstanding balances on their first vehicle liens, they were in the unenviable position of being liable for multiple loans.\textsuperscript{571} Accordingly, they had to choose

\textsuperscript{568} See 11 U.S.C. § 362(a)(3) (2009) (“Except as provided in subsection (b) of this section, a petition filed under section 301 . . . of this title . . . operates as a stay, applicable to all entities, of . . . any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate . . . .”).


\textsuperscript{570} See, e.g., In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Motion to Modify Stay [Nuvell 1] (Dkt. 276) at 3 (Feb. 20, 2007) (“Nuvell cannot verify whether the Vehicle is properly insured naming Nuvell as loss payee.”).

\textsuperscript{571} See, e.g., In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Motion to Modify Stay [Nuvell 1] (Dkt. 276) at 2 (Feb. 20, 2007).
between making the payments on a loan for a vehicle they no longer could use or sell or defaulting on the loan and watching their credit ratings deteriorate.\textsuperscript{572}

\subsection*{c. Motions for Relief from the Automatic Stay}

\subsubsection{i. The Initial Motion: First Interstate Bank}

To gain relief from this predicament, two consumers\textsuperscript{573} and four Lenders\textsuperscript{574} each filed motions for relief from the automatic stay.\textsuperscript{575} First Interstate Bank ("FIB") was the first of the Lenders to file for relief, filing motions with respect to two different vehicles.\textsuperscript{576} HMFC objected to FIB’s motions for relief.\textsuperscript{577} HMFC admitted that both FIB

\begin{footnotesize}
\textsuperscript{572} See, e.g., \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Andres] (Dkt. 160) at 3 (Dec. 22, 2006) ("[L]ifting the stay allows Andres to sell the vehicle and pay the credit union’s debt and thereby preserve Andres’ credit rating.").

\textsuperscript{573} Two consumers, Marty and Wendy Andres continued to make payments on the first vehicle loan after Incredible Auto took possession of the vehicle because they did not want to default. \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Andres] (Dkt. 160) at 1 (Dec. 22, 2006).

\textsuperscript{574} The Lenders were First Interstate Bank, the creditor of Scott Lawley, \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 1] (Dkt. 36) at 2 (Nov. 2, 2006), Colleen & Dean Sheehan, \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 2] (Dkt. 37) at 2 (Nov. 2, 2006), and Leroy A. Landrie, \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 3] (Dkt. 275) at 2 (Feb. 20, 2007); Nuvell Credit Company, LLC, the creditor of Diane & Kenneth J. Gates, \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Motion to Modify Stay [Nuvell 1] (Dkt. 276) at 2 (Feb. 20, 2007), and Kevin J. & Tamara A. Parnell, \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [Nuvell 2] (Dkt. 290) at 2 (Feb. 23, 2007); Toyota Motor Credit Corporation, the creditor of Kit Veit, \textit{In re} Incredible Auto Sales LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [Toyota] (Dkt. 266) at 3 (Feb. 14, 2007); and WSF Financial, Inc, the creditor of Kelly Spah, \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [WSF] (Dkt. 188) at 1 (Jan. 13, 2007).

\textsuperscript{575} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [Andres] (Dkt. 160) at 1 (Dec. 22, 2006); \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 1] (Dkt. 36) at 1 (Nov. 2, 2006); \textit{In re} Incredible Auto Sales LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 2] (Dkt. 37) at 1 (Nov. 2, 2006); \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 3] (Dkt. 275) at 1 (Feb. 20, 2007); \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Motion to Modify Stay [Nuvell 1] (Dkt. 276) at 1 (Feb. 20, 2007); \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [Toyota] (Dkt. 266) at 3 (Feb. 14, 2007).
\end{footnotesize}
and HMFC had security interests in the vehicles,\textsuperscript{578} but it argued that HMFC’s interest was superior to FIB’s because it had a “first and prior security interest” in all of Incredible Auto’s inventory.\textsuperscript{579} The vehicles became part of Incredible Auto’s inventory when Incredible Auto took possession of them;\textsuperscript{580} therefore, HMFC had a superior security interest in the vehicles.\textsuperscript{581} However, HMFC’s objection also included an alternative request that it be granted any excess sale proceeds as a junior secured creditor if the court determined that FIB had the superior interest and granted FIB’s motion for relief.\textsuperscript{582}

\textsuperscript{576} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 1] (Dkt. 36) at 1 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 2] (Dkt. 37) at 1 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 3] (Dkt. 275) at 1 (Feb. 20, 2007). FIB filed its first two motions for relief on November 2, 2006. In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 1] (Dkt. 36) at 1 (Nov. 2, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 2] (Dkt. 37) at 1 (Nov. 2, 2006). It filed its third motion for relief on February 20, 2007. In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [FIB 3] (Dkt. 275) at 2 (Feb. 20, 2007).

\textsuperscript{577} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Motion to Modify Stay Docket #36 [FIB 1] (Dkt. 58) (Nov. 13, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Motion to Modify Stay Docket #37 [FIB 2] (Dkt. 59) (Nov. 13, 2006).

\textsuperscript{578} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Motion to Modify Stay Docket #36 [FIB 1] (Dkt. 58) at ¶ 4 (Nov. 13, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Motion to Modify Stay Docket #37 [FIB 2] (Dkt. 59) at ¶ 4 (Nov. 13, 2006).

\textsuperscript{579} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Motion to Modify Stay Docket #36 [FIB 1] (Dkt. 58) at ¶ 2 (Nov. 13, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Motion to Modify Stay Docket #37 [FIB 2] (Dkt. 59) at ¶ 2 (Nov. 13, 2006).

\textsuperscript{580} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Motion to Modify Stay Docket #36 [FIB 1] (Dkt. 58) at ¶ 1 (Nov. 13, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Motion to Modify Stay Docket #37 [FIB 2] (Dkt. 59) at ¶ 1 (Nov. 13, 2006).

\textsuperscript{581} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Motion to Modify Stay Docket #36 [FIB 1] (Dkt. 58) at ¶ 2 (Nov. 13, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Motion to Modify Stay Docket #37 [FIB 2] (Dkt. 59) at ¶ 2 (Nov. 13, 2006).
After a preliminary hearing, the court granted both of FIB’s motions for relief.\textsuperscript{583}

The order allowed both FIB and HMFC “to pursue their nonbankruptcy remedies against” the vehicles that were the subject of FIB’s motions.\textsuperscript{584} The court made the orders effective immediately and not subject to the traditional ten-day stay.\textsuperscript{585} This order gave FIB the right to (1) repossess the vehicles, (2) liquidate them, (3) use the proceeds to satisfy the outstanding loan balances, and (4) then pay any excess proceeds to HMFC.\textsuperscript{586}

\textit{ii. Once Beaten, Twice Shy: The Remaining Motions for Relief}

After losing its objections to FIB’s first two motions for relief, HMFC did not object to FIB’s third motion for relief or any of the other Lenders’ motions for relief. Incredible Auto did not object or request a hearing for any of the Lenders’ or the consumers’ motions for relief.\textsuperscript{587} Accordingly, the court granted each of the Lenders’

\textsuperscript{582}In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Motion to Modify Stay Docket #36 [FIB 1] (Dkt. 58) at ¶ 6 (Nov. 13, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Motion to Modify Stay Docket #37 [FIB 2] (Dkt. 59) at ¶ 6 (Nov. 13, 2006).

\textsuperscript{583}In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Modifying Stay [FIB 1] (Dkt. 73) (Nov. 22, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Modifying Stay [FIB 2] (Dkt. 74) (Nov. 22, 2006).

\textsuperscript{584}In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Modifying Stay [FIB 1] (Dkt. 73) (Nov. 22, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Modifying Stay [FIB 2] (Dkt. 74) (Nov. 22, 2006).

\textsuperscript{585}In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Modifying Stay [FIB 1] (Dkt. 73) (Nov. 22, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Modifying Stay [FIB 2] (Dkt. 74) (Nov. 22, 2006).

\textsuperscript{586}In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Modifying Stay [FIB 1] (Dkt. 73) (Nov. 22, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Modifying Stay [FIB 2] (Dkt. 74) (Nov. 22, 2006).

\textsuperscript{587}In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Granting Motion for Relief from Automatic Stay [Andres] (Dkt. 173) (Jan. 5, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Modifying Stay [FIB 1] (Dkt. 73) (Nov. 22, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Modifying Stay [FIB 2] (Dkt. 74) (Nov. 22, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order [FIB 3] (Dkt. 307) (Mar. 6, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order [Nuvell 1]
and consumers’ motions for relief giving each party, except for WFS, the right to foreclose and liquidate its collateral. The order pertaining to WFS granted WFS the right to “proceed against Incredible Auto Sales in a criminal action in the issuance of a bad check” but said nothing about WFS obtaining the vehicle that still secured its lien.

The court’s orders pertaining to the consumer liens appear to be the most practical solution to what could have been a thorny problem. The court could have done more to analyze HMFC’s claim of a superior security interest, as HMFC seemed to have a legitimate claim that the cars were inventory because Incredible Auto had possession of them. However, the court likely did not want to appear to approve of the method by which Incredible Auto acquired the vehicles. Perhaps it was also growing wary of Incredible Auto’s business practices as evidenced by the fact that the court made each of its orders effective immediately rather than applying the customary ten day stay under Bankruptcy Rule 4001(a)(3). By making the orders immediately effective, the court eliminated Incredible Auto’s opportunity to sell the vehicles before the Lenders were able to enforce the orders and seize the vehicle. Regardless of the court’s motivation, after FIB’s two initial motions for relief, there were no objections to any of the other motions for relief, and therefore, granting the motions was more of a matter of course.

(Dkt. 308) (Mar. 6, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order [Nuvell 2] (Dkt. 318) (Mar. 12, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order [Toyota] (Dkt. 302) (Mar. 5, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order [WSF] (Dkt. 249) (Jan. 29, 2007).

588 See Orders cited supra note 587.

589 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order [WSF] (Dkt. 249) (Jan. 29, 2007).

iii. Incredible Auto: An Attempt to Get Some Satisfaction

Although they had relief from the automatic stay, some of the Lenders still had trouble repossessing their collateral. On March 4, 2007, Incredible Auto moved for permission to transfer some of the vehicles that were the subject of the Lenders’ motions for relief to the Lenders. However, it wanted the transfer to constitute a “full satisfaction and release” of any debt owed to the Lender by Incredible Auto or the consumers. Incredible Auto wanted this release before it transferred the vehicles because the value of the vehicles was less than the amount of the lien that each vehicle secured. Therefore, Incredible Auto most likely wanted the release because it did not want itself or the consumers to be liable for the deficiency.

Some of the creditors were not pleased with this proposal. Nuvell filed an objection arguing that the court’s grant of relief from the automatic stay entitled Nuvell “to use self help repossession or any other legally permitted method” to seize the vehicle

591 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion for Leave to Transfer Vehicles (Dkt. 301) at 3 ¶ 8 (Mar. 4, 2007). Incredible Auto proposed returning the vehicles in exchange for a release from the following lenders: First Interstate Bank, for the Leroy Landrie lien, Nuvell, for the Kevin Parnell lien, WFS, for the Michael Geiser lien, Toyota Motor Credit, for the Kit Veit lien, and four other Lenders who did not file any motions for relief from the automatic stay. In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion for Leave to Transfer Vehicles (Dkt. 301-1) at Exhibit A (Mar. 4, 2007).

592 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion for Leave to Transfer Vehicles (Dkt. 301) at 3 ¶ 8 (Mar. 4, 2007). Incredible Auto proposed returning the vehicles in exchange for a release from the following lenders: First Interstate Bank, for the Leroy Landrie lien, Nuvell, for the Kevin Parnell lien, WFS, for the Michael Geiser lien, Toyota Motor Credit, for the Kit Veit lien, and four other Lenders who did not file any motions for relief from the automatic stay. In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion for Leave to Transfer Vehicles (Dkt. 301-1) at Exhibit A (Mar. 4, 2007).

593 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion for Leave to Transfer Vehicles (Dkt. 301) at 2 ¶ 6 (Mar. 4, 2007).

if Debtor did not “voluntarily surrender” it to Nuvell. Therefore, it had the right to seize the vehicle and then file a proof of claim for the deficiency. Nuvell asserted that Incredible Auto did not have the legal right to retain the vehicle in order to secure a release of liability for (1) itself—for failing to pay Nuvell’s lien on the vehicle—or (2) for the consumers—for breach of contract.

WFS also objected to Incredible Auto’s motion but on entirely different grounds. WFS contended that Incredible Auto’s exhibits to its motion incorrectly stated the details of the debt owed to WFS. In its motion and exhibits, Incredible Auto claimed that WFS was owed $3,152.63 for debt incurred by Michael Geiser. WFS contended that it was actually owed $15,524.71 for debt incurred by Kelly Spah that was not satisfied when Incredible Auto attempted to pay off the debt by tendering a check covered by insufficient funds. However, unlike Nuvell, WFS did not object to the

595 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection of Nuvell Credit Company LLC to Debtor’s Motion for Leave to Transfer Vehicles (Dkt. 324) at ¶ 5 (Mar. 15, 2007).

596 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection of Nuvell Credit Company LLC to Debtor’s Motion for Leave to Transfer Vehicles (Dkt. 324) at ¶ 5 (Mar. 15, 2007).

597 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection of Nuvell Credit Company LLC to Debtor’s Motion for Leave to Transfer Vehicles (Dkt. 324) at ¶ ¶ 3-4 (Mar. 15, 2007).

598 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection of WFS to Debtor’s Motion for Leave to Transfer Vehicles Held in the Debtor’s Inventory to Certain Financial Institutions in Full Settlement and Release of All Debt and Claims Against the Debtor and the Consumer Buyers (Dkt. 325) (Mar. 15, 2007) [hereinafter WFS Objection].

599 *In re* Incredible Auto Sales, LLC, Case No. 06-60855 Bankr. D. Mont., WFS Objection (Dkt. 325) at 2 (Mar. 15, 2007).

600 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion for Leave to Transfer Vehicles (Dkt. 301-1) at Exhibit A (Mar. 4, 2007).

601 *In re* Incredible Auto Sales, LLC, Case No. 06-60855 Bankr. D. Mont., WFS Objection (Dkt. 325) at 2 (Mar. 15, 2007).
Alicia Teubert & Melissa Carrasco
Incredible Auto Sales, LLC

substance of the motion—that Incredible Auto wanted release from liability for itself and the consumer.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion for Leave to Transfer Vehicles (Dkt. 301) at 3 ¶ 8 (Mar. 4, 2007).}

A hearing on Incredible Auto’s motion was set for April 24, 2007,\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection of Nuvell Credit Company, LLC to Debtor’s Motion for Leave to Transfer Vehicles (Dkt. 324) at 1 (Mar. 15, 2007).} but Nuvell was not content to wait for the court’s decision.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion for Turnover of Vehicle Location (Dkt. 350) at 1 (Apr. 5, 2007).} On April 3, 2007, Nuvell withdrew its objection to Incredible Auto’s motion\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Withdrawal of Nuvell’s Objection to Debtor’s Motion for Leave to Transfer Vehicles (Dkt. 349) (Apr. 3, 2007).} opting instead to move the court to require Incredible Auto to immediately inform Nuvell about the location of one of the vehicles in which it had a security interest.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion for Turnover of Vehicle Location (Dkt. 350) at 2 (Apr. 5, 2007).} Nuvell had been trying to locate the vehicle since the court granted its motion for relief on March 6, 2007, but had been unsuccessful.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion for Turnover of Vehicle Location (Dkt. 350) at 1 (Apr. 5, 2007).} On April 20, 2007, the court granted Nuvell’s motion giving Incredible Auto ten days to

\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion for Turnover of Vehicle Location (Dkt. 350) at 3, 6 (Apr. 5, 2007). Additionally, the State of Montana was unable to issue a title in the Brockies’ name because Incredible Auto did not provide it with the title. In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion for Turnover of Vehicle Information (Dkt. 351) at ¶ 3 (Apr. 5, 2007). Accordingly, National Auto requested that the court order Incredible Auto to turn over the vehicle title within ten days, provide information about how National Auto could obtain the title, or explain why the title could not be delivered. In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion for Turnover of Vehicle Information (Dkt. 351) at ¶ 6(b) (Apr. 5, 2007). The court granted National Auto’s motion on April 20, 2007, after the case was converted to a Chapter 7. See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Granting Motion for Turnover (Dkt. 363) (Apr. 20, 2007).}

\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion for Turnover of Vehicle Location (Dkt. 350) at 1 (Apr. 5, 2007).}

\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion for Turnover of Vehicle Location (Dkt. 350) at 2 (Apr. 5, 2007).}
inform Nuvell either of the location of the vehicle or of the name of the subsequent purchaser of the vehicle.\textsuperscript{608}

On April 24, 2007, the court held a hearing on Incredible Auto’s motion and other matters.\textsuperscript{609} It denied Incredible Auto’s motion because the case had recently been converted to a Chapter 7 case.\textsuperscript{610} The court had already granted the Lenders’ relief from the automatic stay, so the Lenders had the right seize the vehicles, sell them, and retain enough proceeds to satisfy their liens. Incredible Auto no longer had the right to hold the vehicles as a bargaining chip for better treatment from the Lenders. In either Chapter 11 or Chapter 7 bankruptcy, the Lenders would have had an unsecured claim for the difference between the value of the vehicles and the value of their liens. Therefore, Incredible Auto’s attempt to obtain “full satisfaction” of the amount owed to the Lenders was merely an attempt to circumvent bankruptcy law. Although this would have been acceptable if the Lenders had agreed, the Lenders were not required to do so, and the court was correct to not force them to do so.

3. GE COMMERCIAL DISTRIBUTION FINANCE CORP.: Boats and Boat Supplies

In spite of its name, Incredible Auto did not limit its scope to selling new and used vehicles. Incredible Auto was also a wholesale vendor of Tracker Marine boats and

\textsuperscript{608} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Granting Motion for Turnover (Dkt. 362) (Apr. 20, 2007).

\textsuperscript{609} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 368) (Apr. 26, 2007).

\textsuperscript{610} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 368) (Apr. 26, 2007).
Incredible Auto financed its Tracker Marine inventory through a wholesale financing agreement with GE Commercial Distribution Finance Corp (“GE Commercial”) executed on October 30, 2003.613

a. Floor Financing and Multiple Blanket Security Interests

Under the wholesale financing agreement, GE Commercial agreed to advance funds to Incredible Auto to purchase the Tracker Marine inventory.614 Incredible Auto was required to repay the advance immediately upon selling or transferring a piece of inventory.615 Failure to send payment to GE Commercial upon selling or transferring inventory was a default under the wholesale financing agreement.616 In return, Incredible Auto granted GE Commercial a blanket security interest in all of Incredible Auto’s inventory, equipment, fixtures, accounts, proceeds, etc.617 GE Commercial properly perfected its security interest by filing on November 12, 2003.618


612 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [GE Commercial] (Dkt. 112) at 2, Exhibit A (Dec. 5, 2006).

613 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [GE Commercial] (Dkt. 112) at 2 (Dec. 5, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [GE Commercial] Exhibit A (Dkt. 112) at 9 (Dec. 5, 2006).

614 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [GE Commercial] Exhibit A (Dkt. 112) at 1 (Dec. 5, 2006).

615 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [GE Commercial] Exhibit A (Dkt. 112) at 2 ¶ 7 (Dec. 5, 2006).

616 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [GE Commercial] Exhibit A (Dkt. 112) at 4 ¶ 12 (Dec. 5, 2006).

617 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [GE Commercial] Exhibit A (Dkt. 112) at 1 (Dec. 5, 2006).
In July 2005, HMFC became Incredible Auto’s primary financer for its automotive inventory with a blanket security interest in all of Incredible Auto’s inventory, equipment, fixtures, accounts, proceeds, etc. Because both lenders had blanket security interests, HMFC and GE Commercial executed an “Intercreditor Agreement” to determine which lender had the superior security interest in Incredible Auto’s property. Pursuant to the Intercreditor Agreement, HMFC agreed to subordinate its interest in any inventory that was directly financed by GE Commercial or the proceeds of that inventory. HMFC would have the superior interest in the remainder of Incredible Auto’s property.

b. What Went Wrong

Prior to the petition date, Incredible Auto sold $7,657.64 worth of Tracker Marine inventory but failed to send payment to GE Commercial. Incredible Auto was already


619 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Inventory Loan and Security Agreement (Dkt. 100-1) at 4 (Nov. 29, 2006).

620 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Inventory Loan and Security Agreement (Dkt. 100-1) at 2 (Nov. 29, 2006).


623 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [GE Commercial] Exhibit C, Intercreditor Agreement (Dkt. 112) at 1 (Dec. 5, 2006).

624 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [GE Commercial] (Dkt. 112) at 3 (Dec. 5, 2006). Incredible Auto also did not make the interest
behind in its payments to GE Commercial with an outstanding balance totaling $39,041.28.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [GE Commercial] (Dkt. 112) at 4 (Dec. 5, 2006).} By the petition date, Incredible Auto had five Tracker Marine boats and four boat engines in its inventory with a fair market value of $29,931.44.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [GE Commercial] (Dkt. 112) at 1 (Dec. 5, 2006).} On December 5, 2006, GE Commercial moved for relief from the automatic stay so that it could foreclose on the Tracker Marine inventory and liquidate it to satisfy Incredible Auto’s indebtedness.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay and Notice [GE Commercial] (Dkt. 112) at 3 (Dec. 5, 2006).}

c. Motion for Relief and Objections

Incredible Auto filed a limited objection to GE Commercial’s motion.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response, Limited Resistance and Objection to G.E. Commercial Finance Corporation (Dkt. 144) (Dec. 15, 2006).} Incredible Auto was willing to allow GE Commercial to foreclose on and liquidate the boats and motors as long as GE Commercial “[w]aive[d] any and all claims against [Incredible Auto] and pick[ed] up merchandise at a pre-arranged time.”\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response, Limited Resistance and Objection to G.E. Commercial Finance Corporation (Dkt. 144 ) at ¶ 4 (Dec. 15, 2006).} GE Commercial was amenable to Incredible Auto’s proposal,\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation to Compromise and Settle Motion to Modify Stay and Related Objection Filed by Incredible Auto Sales, LLC (Dkt. 208) (Jan. 18, 2007).} and the parties executed a
stipulation that GE Commercial would have relief from the automatic stay.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation to Compromise and Settle Motion to Modify Stay and Related Objection Filed by Incredible Auto Sales, LLC (Dkt. 208) at ¶ 4 (Jan. 18, 2007).} Incredible Auto agreed to voluntarily surrender the boats and motors and to provide GE Commercial with full access to “inspect[,] examin[e], and recover[ ] . . . the Collateral.”\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation to Compromise and Settle Motion to Modify Stay and Related Objection Filed by Incredible Auto Sales, LLC (Dkt. 208) at ¶ 3 (Jan. 18, 2007).} GE Commercial agreed to give Incredible Auto credit for the $39,041.28 balance that it was owed pre-bankruptcy,\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation to Compromise and Settle Motion to Modify Stay and Related Objection Filed by Incredible Auto Sales, LLC (Dkt. 208) at ¶ 5 (Jan. 18, 2007).} and to file an unsecured claim for the remaining $8,884.87 that it was owed when Incredible Auto sold inventory and failed to forward the payments to GE Commercial.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation to Compromise and Settle Motion to Modify Stay and Related Objection Filed by Incredible Auto Sales, LLC (Dkt. 208) at ¶ 6 (Jan. 18, 2007).} The court approved the parties’ stipulation on January 19, 2007,\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Approving Stipulation Between Debtor and GE Commercial Distribution (Dkt. 217) (Jan. 19, 2007).} and modified the automatic stay so that GE Commercial could seize and liquidate the boats and motors.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Approving Stipulation Between Debtor and GE Commercial Distribution (Dkt. 217) at 1-2 (Jan. 19, 2007).} As the parties had reached a mutually satisfactory arrangement, there was probably no need for the court to force the parties to reach a different result.
4. United Car Care: Pre-Bankruptcy Lawsuit

a. Pre-Bankruptcy Relationship with Incredible Auto

United Car Care ("UCC") was an unsecured creditor which sought relief from the automatic stay so that it could continue to prosecute its pre-bankruptcy lawsuit against Incredible Auto, Incredible Chevrolet, and Mr. Gutierrez. UCC was “in the business of issuing various repair and service protection plans to vehicle purchasers” (“Vehicle Service Contracts”) through contractual relationships with auto dealerships. Beginning in 2001, Incredible Auto and UCC executed a series of contracts in which Incredible Auto agreed to sell UCC’s Vehicle Service Contracts to its customers. On December 17, 2004, and December 22, 2004, the parties executed two additional agreements in which Incredible Auto agreed to sell 400 Vehicle Service Contracts from February 1, 2005, to January 31, 2006. In exchange, UCC agreed to lend Incredible Auto $144,000 plus interest compounded monthly, and advance $56,000 of anticipated profit sharing. If Incredible Auto did not sell 400 Vehicle Service Contracts by

637 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC] (Dkt. 245) at 1 (Jan. 26, 2007).

638 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit 1 (Dkt. 245) at 6 (Jan. 26, 2007).

639 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit 1 (Dkt. 245) at 9 (Jan. 26, 2007).

640 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit 1 (Dkt. 245) at 9 (Jan. 26, 2007); see also In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit A (Dkt. 245) at 15 (Jan. 26, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit B (Dkt. 245) at 18 (Jan. 26, 2007).

641 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit 1 (Dkt. 245) at 9 (Jan. 26, 2007).

642 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit 1 (Dkt. 245) at 10 (Jan. 26, 2007). UCC agreed that, if Incredible Auto met its obligation to sell 400 Vehicle Service Contracts, Incredible Auto would receive a portion of the profit from those contracts.
January 21, 2006, it had to pay the $144,000 plus accrued interest on February 28, 2006.\textsuperscript{643} The $56,000 advance was to be “deemed an advance on underwriting profit sharing for the year 2005 and beyond.”\textsuperscript{644} Mr. Gutierrez personally guaranteed the entire $200,000 debt.\textsuperscript{645}

UCC tendered the $200,000 in loans and advances to Incredible Auto pursuant to the agreement.\textsuperscript{646} However, by January 31, 2006, Incredible Auto had sold only fourteen Vehicle Service Contracts,\textsuperscript{647} and on February 20, 2006, UCC sent notice that the balance of the loans ($213,809.45) was due in full on February 28, 2006.\textsuperscript{648} Incredible Auto did not repay any part of the loan by February 28, 2006,\textsuperscript{649} and continued to refuse to refund the money.\textsuperscript{650}

\textsuperscript{643} \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit A (Dkt. 245) at 16 (Jan. 26, 2007).}

\textsuperscript{644} \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit 1 (Dkt. 245) at 11 (Jan. 26, 2007).}

\textsuperscript{645} \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit 1 (Dkt. 245) at 11 (Jan. 26, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit 1 (Dkt. 245) at 11 (Jan. 26, 2007).}

\textsuperscript{646} \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit C (Dkt. 245) at 19 (Jan. 26, 2007).}

\textsuperscript{647} \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit C (Dkt. 245) 19-20 (Jan. 26, 2007).}

\textsuperscript{648} \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit C (Dkt. 245) 19-20 (Jan. 26, 2007).}

\textsuperscript{649} \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit 1 (Dkt. 245) at 11 (Jan. 26, 2007).}

\textsuperscript{650} \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit 1 Dkt. 245) at 12 (Jan. 26, 2007).}
Interestingly, on May 23, 2005, Incredible Auto and Incredible Chevrolet sued UCC for $628,000.\(^{651}\) On June 22, 2006, UCC filed its amended answer, counterclaims, and a third party claim against Mr. Gutierrez.\(^{652}\) UCC asserted a breach of contract counterclaim against Incredible Auto and Incredible Chevrolet for their failure to repay the outstanding principal and interest due under the agreement by February 28, 2006.\(^{653}\) It also asserted a breach of personal guaranty claim against Mr. Gutierrez who had personally guaranteed the loan from the UCC.\(^{654}\)

\textit{b. Motion for Relief and Objection}

Before the lawsuit could be decided, Incredible Auto commenced the bankruptcy case.\(^{655}\) UCC moved for relief from the automatic stay so that it could continue to prosecute its claims against Incredible Auto, Incredible Chevrolet, and Mr. Gutierrez.\(^{656}\) UCC argued that relief was warranted under section 362(d) of the Bankruptcy Code because Incredible Auto had identified the anticipated proceeds from the lawsuit as part

\(^{651}\) \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC] (Dkt. 245) at 2 (Jan. 26, 2007). The authors were unable to obtain Incredible Auto’s complaint for this lawsuit. The date that the lawsuit was filed was obtained from UCC’s motion for relief from the automatic stay. \textit{Id.} The authors find it highly unusual that Incredible Auto would file a lawsuit in May 2005, receive no answer from UCC until a year later, and not have pursued a default judgment against UCC—especially considering the fact that Incredible Auto was in need of cash at the time. \textit{Id.} However, as the authors have been unable to obtain Incredible Auto’s filings in this matter, the answer to this question is unavailable.

\(^{652}\) \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit 1 (Dkt. 245) (Jan. 26, 2007).

\(^{653}\) \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit 1 (Dkt. 245) at 12-13 (Jan. 26, 2007).

\(^{654}\) \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC], Exhibit 1 (Dkt. 245) at 13 (Jan. 26, 2007).

\(^{655}\) \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Voluntary Petition (Dkt. 1) (Oct. 17, 2006).

\(^{656}\) \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC] (Dkt. 245) at 1 (Jan. 26, 2007).
of its “assets” listed on its schedules\(^{657}\) and its disclosure statement.\(^{658}\) UCC promised that, if the court granted its motion, it would prosecute its claims against all three counter-defendants, and if it prevailed, it would not seek to collect anything from Incredible Auto without the court’s permission.\(^{659}\) However, UCC asserted that it had the right to collect its claim from Incredible Chevrolet and Mr. Gutierrez as neither were protected by the automatic stay.\(^{660}\)

Incredible Auto filed a limited objection to UCC’s motion.\(^{661}\) It did not object to UCC’s request to pursue the litigation because it believed that it would prevail in its original claim against UCC.\(^{662}\) In fact, Incredible Auto needed to prevail in its claim against UCC because it had listed the lawsuit proceeds as an asset providing adequate protection of HMFC’s security interest and preventing HMFC from obtaining relief from the automatic stay.\(^{663}\) Therefore, Incredible Auto asserted that “[i]t [was] in the best interest of the Debtor, this Estate, and all Creditors herein that this State Court case go

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\(^{657}\) See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Schedules and Statement of Affairs (Dkt. 54) at Schedule B (Nov. 12, 2006).

\(^{658}\) \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Debtor’s Disclosure Statement (Dkt. 224) at 8 (Jan. 21, 2007).

\(^{659}\) \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC] (Dkt. 245) at 3 (Jan. 26, 2007).

\(^{660}\) \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Motion to Modify Stay [UCC] (Dkt. 245) at 3 (Jan. 26, 2007).

\(^{661}\) \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Debtor’s Limited Response, Resistance and Objection to Motion for Relief from the Stay Filed by United Car Care (Dkt. 260) at 2 (Feb. 5, 2007).

\(^{662}\) \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Debtor’s Limited Response, Resistance and Objection to Motion for Relief from the Stay Filed by United Car Care (Dkt. 260) at 2 (Feb. 5, 2007).

\(^{663}\) \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance, and Objection to the Motion of Hyundai Motor Finance for Relief from Stay and for the Appointment of a Trustee (Dkt. 90-1) at Exhibit 1 (Nov. 27, 2006).
ahead.664 Incredible Auto simply moved the court to allow it enough time to find an
attorney to prosecute the lawsuit665 and to stay any judgment that UCC may obtain on its
counterclaims.666

At the February 28, 2007 hearing on the matter, Incredible Auto withdrew its
objection667 after eliciting an agreement from UCC that UCC’s relief would be stayed for
ten days.668 Accordingly, the court granted UCC’s motion for relief authorizing it to
“prosecute and liquidate its State Court claim against the Debtor, Incredible Chevrolet,
and Guarantor R. Nick Gutierrez . . . .”669 but stayed relief until March 8, 2007.670

However, after the case was converted to Chapter 7, and before either of the
parties could pursue the lawsuit, the Chapter 7 Trustee abandoned Incredible Auto’s
interest in its claim against UCC.671 Because there is no record of UCC continuing to
pursue its counterclaim against Incredible Auto, it appears that UCC either abandoned its

664 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Limited Response,
Resistance and Objection to Motion for Relief from the Stay Filed by United Car Care (Dkt. 260) at 2 (Feb.
5, 2007).

665 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Limited Response,
Resistance and Objection to Motion for Relief from the Stay Filed by United Car Care (Dkt. 260) at 2 (Feb.
5, 2007).

666 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Limited Response,
Resistance and Objection to Motion for Relief from the Stay Filed by United Car Care (Dkt. 260) at 3 (Feb.
5, 2007).

667 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order [UCC] (Dkt. 293) at 1
(Feb. 28, 2007).

668 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order [UCC] (Dkt. 293) at 1
(Feb. 28, 2007).

669 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order [UCC] (Dkt. 293) at 1-2
(Feb. 28, 2007).

670 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order [UCC] (Dkt. 293) at 2
(Feb. 28, 2007).

671 In re Incredible Auto Sales, LLC Case No. 06-60855, Bankr. D. Mont., Notice of Trustee’s Intent to
Abandon Property (Dkt. 425) at 2 (Apr. 23, 2008).
counterclaim or had its claim discharged in the Chapter 7 case. Further discussion of this lawsuit’s treatment post-conversion is found in section VI(A)(2).

5. **HYUNDAI MOTOR FINANCE COMPANY: EVERYTHING AND THE KITCHEN SINK**

Unlike the other entities that filed motions for relief from the automatic stay, HMFC’s motion for relief had much broader implications for the entire bankruptcy case. Because HMFC was Incredible Auto’s floor financer, it held a security interest in all of Incredible Auto’s inventory, equipment, fixtures, accounts, and general intangibles. Therefore, by requesting relief from the automatic stay so that it could foreclose and liquidate its collateral, HMFC was essentially moving to liquidate the majority of Incredible Auto’s assets making it nearly impossible for Incredible Auto to continue as a going concern.

   a. Why HMFC Wanted Relief

   HMFC’s motion was likely motivated by its increasing distrust of Incredible Auto. Its motion alleged that Incredible Auto had (1) breached its Agreement by failing to remit the proceeds of its vehicle inventory to HMFC, (2) engaged in a series of transactions with Incredible Chevrolet for the purpose of defrauding HMFC, (3)...

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672 See supra p. 19.

673 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Expedited Motion to Modify Stay, Alternative Motion for Appointment of Trustee (Dkt. 70) at ¶ 2(c) (Nov. 20, 2006).

674 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Expedited Motion to Modify Stay, Alternative Motion for Appointment of Trustee (Dkt. 70) at ¶ 5 (Nov. 20, 2006).

675 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Expedited Motion to Modify Stay, Alternative Motion for Appointment of Trustee (Dkt. 70) at ¶ 4(a) (Nov. 20, 2006); *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Inventory Loan and Security Agreement (Dkt. 70-1) at 1 (Nov. 17, 2006).

676 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Expedited Motion to Modify Stay, Alternative Motion for Appointment of Trustee (Dkt. 70) at ¶ 4(b) (Nov. 20, 2006).
defrauded its customers by failing to pay the liens on their trade-in vehicles,\(^{(4)}\) double-floored some of the inventory,\(^{(5)}\) attempted to purchase inventory using bad checks,\(^{(6)}\) and (5) altered vehicle documents in order to erroneously obtain advances from HMFC.\(^{(7)}\) HMFC’s distrust was further evidenced by its alternative motion: to appoint a trustee to manage Incredible Auto.\(^{(8)}\)

\textit{b. Objections}

HMFC’s motion provoked a number of objections from both Incredible Auto and its other creditors. Auto Auction was the first to object.\(^{(9)}\) However, its only concern was that HMFC be prohibited from seizing either the vehicles or their proceeds in which Auto Auction had asserted an interest.\(^{(10)}\) Steve’s Auto objected on similar grounds: that it claimed an interest in a number of vehicles in Incredible Auto’s possession and HMFC

\begin{footnotesize}
\begin{itemize}
\item \(^{(4)}\) \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Expedited Motion to Modify Stay, Alternative Motion for Appointment of Trustee (Dkt. 70) at ¶ 4(c) (Nov. 20, 2006).
\item \(^{(5)}\) \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Expedited Motion to Modify Stay, Alternative Motion for Appointment of Trustee (Dkt. 70) at ¶ 4(d) (Nov. 20, 2006).
\item \(^{(6)}\) \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Expedited Motion to Modify Stay, Alternative Motion for Appointment of Trustee (Dkt. 70) at ¶ 4(e) (Nov. 20, 2006).
\item \(^{(7)}\) \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Expedited Motion to Modify Stay, Alternative Motion for Appointment of Trustee (Dkt. 70) at ¶ 4(f) (Nov. 20, 2006).
\item \(^{(8)}\) \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Expedited Motion to Modify Stay, Alternative Motion for Appointment of Trustee (Dkt. 70) at ¶¶ 6-7 (Nov. 20, 2006).
\item \(^{(9)}\) \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Limited Objection to Hyundai Motion to Modify Stay [Auto Auction] (Dkt. 86) (Nov. 27, 2006).
\item \(^{(10)}\) \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Limited Objection to Hyundai Motion to Modify Stay [Auto Auction] (Dkt. 86) at 2 (Nov. 27, 2006).
\end{itemize}
\end{footnotesize}
should be prohibited from seizing the vehicles or any of their proceeds.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Limited Objection to Hyundai Motion to Modify Stay [Auto Auction] (Dkt. 86) at 2 (Nov. 27, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to Motion to Modify Stay [Steve’s Auto] (Dkt. 88) at 2 (Nov. 27, 2006).} Neither Auto Auction nor Steve’s Auto objected to HMFC’s motion to appoint a trustee.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to Motion to Modify Stay [Steve’s Auto] (Dkt. 88) at 2 (Nov. 27, 2006).}

Incredible Auto objected both to HMFC’s motion for relief and its alternative motion to appoint a trustee.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to Motion to Modify Stay [Steve’s Auto] (Dkt. 88) at 2 (Nov. 27, 2006).} It argued that such relief was unwarranted because it was already unable to use the proceeds from the inventory due to the court’s restrictive cash collateral rulings.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to Motion to Modify Stay [Steve’s Auto] (Dkt. 88) at 2 (Nov. 27, 2006).} But, it asserted that it had strictly complied with the court’s requirements for cash collateral and reporting.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to Motion to Modify Stay [Steve’s Auto] (Dkt. 88) at 2 (Nov. 27, 2006).} It denied HMFC’s allegations of fraudulent dealings,\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to Motion to Modify Stay [Steve’s Auto] (Dkt. 88) at 2 (Nov. 27, 2006).} blamed failure to pay for the consumers’ trade-ins on the court’s restrictive cash collateral rulings,\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to Motion to Modify Stay [Steve’s Auto] (Dkt. 88) at 2 (Nov. 27, 2006).} and asserted that the double flooring was the result of
poor timing. Therefore, it argued that HMFC’s interest was adequately protected by a 60% equity cushion. Therefore, it asked the court to deny HMFC’s motions and remove the restrictions on the use of the cash collateral.

c. The Court’s Decision

On December 5, 2006, the court conducted a hearing on HMFC’s motions and the subsequent objections in which it heard witness testimony on the matters. On January 12, 2007, the court entered its order and issued a memorandum decision holding that HMFC’s motion for relief from the automatic stay was granted for good cause. The court found good cause because of the evidence that Incredible Auto had engaged in numerous transactions and activities, both pre- and post-petition, with the purpose or effect of defrauding HMFC and other creditors. The court also found good cause because HMFC did not have a 60% equity cushion as Incredible Auto claimed.

691 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance, and Objection to the Motion of Hyundai Motor Finance for Relief from Stay and for the Appointment of a Trustee (Dkt. 90) at ¶ 15 (Nov. 27, 2006).

692 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance, and Objection to the Motion of Hyundai Motor Finance for Relief from Stay and for the Appointment of a Trustee (Dkt. 90) at ¶¶ 17-18 (Nov. 27, 2006).

693 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance, and Objection to the Motion of Hyundai Motor Finance for Relief from Stay and for the Appointment of a Trustee (Dkt. 90) at 6 (Nov. 27, 2006).

694 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) (Jan. 12, 2007).


696 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 14 (Jan. 12, 2007).

697 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 7-13 (Jan. 12, 2007); see also p. 20 (discussing Incredible Auto’s business practices).

698 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 13 (Jan. 12, 2007).
Incredible Auto claimed that HMFC had a 60% equity cushion because it was over-secured by over $1.3 million. If Incredible Auto had valued HMFC’s claim at approximately $2.1 million, then in calculating the equity cushion, Incredible Auto included $502,400 in potential proceeds from the pending litigation with UCC and had estimated the value of the KIA franchise at $800,000. The court found that HMFC’s claim was actually worth $2.275 million, that the lawsuit had no value because it was in its early stages, and that the value of the KIA franchise was $180,000 based on the blue sky value and a single offer to purchase. These recalculations reduced HMFC’s equity cushion to $78,667.95 which was less than four percent of its claim. Therefore, the court found that HMFC was not adequately protected by its equity cushion “particularly given all the fraudulent acts that have transpired in Debtor’s organization over the past few months.”

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699 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 13 (Jan. 12, 2007).

700 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 12 (Jan. 12, 2007).


702 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 13 (Jan. 12, 2007).

703 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 13 (Jan. 12, 2007).

704 In re Incredible Auto Sales LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 12 (Jan. 12, 2007).

705 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 13 (Jan. 12, 2007).

706 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 13 (Jan. 12, 2007).
The court determined that Auto Auction’s and Steve’s Auto’s objections were partially moot because of its prior orders granting the parties relief pertaining to several of the vehicles that were the subject of the dispute between them and HMFC.  

However, twelve vehicles were still the subject of Auto Auction’s and South Seattle’s pending reclamation actions. The court held that the disposition of those vehicles should be determined in the pending adversary proceedings and excluded those vehicles from its order granting HMFC relief. Finally, the court held that HMFC’s motion to appoint a trustee was moot given its grant of automatic stay relief.

The court’s decision to grant HMFC relief from the automatic stay seems to be a straightforward application of section 362(d)(1) of the Bankruptcy Code—granting relief “for cause, including lack of adequate protection . . . .” Incredible Auto could not provide proof that its assets were valuable enough to secure the over $2.2 million claim that HMFC was owed. It could not offer replacement liens because HMFC already had a blanket security lien on everything that Incredible Auto owned or would own in the future. Any cash that Incredible Auto had was cash collateral already subject to HMFC’s

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707 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 13 (Jan. 12, 2007).

708 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 4-5 (Jan. 12, 2007); *See* pp.56-76 (discussing the dispute between HMFC and Auto Auction), pp. 76-94 (discussing the dispute between HMFC and Steve’s Auto).

709 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 4, 14 (Jan. 12, 2007).

710 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 14 (Jan. 12, 2007).

711 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 14 (Jan. 12, 2007).

blanket lien. In sum, Incredible Auto had nothing to offer HMFC to ensure that it would or even could repay the more than $2.2 million HMFC was owed.

Although the court’s order effectively gave HMFC the power to halt any chance Incredible Auto had of reorganizing, section 362(d)(1) does require the court to consider what impact relief from the automatic stay may have on a debtor’s chance of reorganizing. It only requires the court to consider whether the creditor is adequately protected.

Additionally, even if a creditor obtains such relief, the creditor is not required to exercise this right and may, as HMFC did, choose to let the case proceed for a time. In this case, HMFC waited until after most of Incredible Auto’s assets were sold in a section 363 sale so that it could receive the proceeds from the sale as payment of its claim. This was probably the most efficient decision for HMFC because, it would have had to find a buyer on its own for any of the collateral that it seized after receiving relief from the automatic stay. By waiting until after the sale, HMFC benefitted by allowing Incredible Auto to do the work of finding a buyer and negotiating a fair price.

d. Don’t Take “No” for an Answer: Incredible Auto’s Appeal

Incredible Auto appealed\(^{713}\) the court’s order on the grounds that (1) some of the court’s findings of fact were false or incorrect,\(^ {714}\) (2) the court disregarded facts of the case pertaining to the value of the equity cushion,\(^ {715}\) (3) it did not consider the impact of its order for relief on the value of the KIA franchise because allowing HMFC to liquidate

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\(^{713}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Notice of Debtor/Appellant’s Appeal to U.S. District Court Pursuant to 28 USC Section 158(C)(1) (Dkt. 228) (Jan. 22, 2007).

\(^{714}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Notice of Debtor/Appellant’s Appeal to U.S. District Court Pursuant to 28 USC Section 158(C)(1) (Dkt. 228) at 1 (Jan. 22, 2007).

\(^{715}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Notice of Debtor/Appellant’s Appeal to U.S. District Court Pursuant to 28 USC Section 158(C)(1) (Dkt. 228) at 2 (Jan. 22, 2007).
its collateral could cause Incredible Auto to lose its franchise,\(^{716}\) and (4) it incorrectly cited Incredible Auto’s improper pre-petition behavior to justify the order for relief.\(^{717}\)

However, before the court heard the appeal, Incredible Auto and HMFC moved the court to approve a stipulation that the appeal would be dismissed with prejudice.\(^{718}\) The motion contained no reason for the stipulation\(^{719}\) and was not accompanied by any brief, memorandum, or other document to explain the parties’ rationale.\(^{720}\) By this time, the section 363 sale of the majority of Incredible Auto’s assets, including the KIA franchise, was pending and very likely to close.\(^{721}\) It is possible that both HMFC and Incredible Auto thought it was in their best interests to allow the sale to proceed and not pursue the extra expense of the appeal. As discussed above, any proceeds from the sale would be subject to HMFC’s security interest, and the sale would provide the same result as if HMFC had exercised its grant of relief from the automatic stay. Regardless of the reason, the court approved the stipulation and ordered Incredible Auto’s appeal dismissed with prejudice.\(^{722}\)

\(^{716}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Debtor/Appellant’s Designation of Record and Statement of Issues on Appeal (Dkt. 256) at ¶ 2 (Feb. 1, 2007).

\(^{717}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Debtor/Appellant’s Designation of Record and Statement of Issues on Appeal (Dkt. 256) at ¶ 5 (Feb. 1, 2007).

\(^{718}\) Incredible Auto Sales v. Hyundai Motor Finance (*In re Incredible Auto Sales, LLC*), No. CV-07-13-BLG-RFC, D. Mont, Stipulation (Dkt. 6D) (Mar. 6, 2007). Throughout this paper, where the citation includes a “D” after the docket number, the citation is to the docket of the Incredible Auto appeal of HMFC’s relief from the automatic stay.

\(^{719}\) Incredible Auto Sales v. Hyundai Motor Finance (*In re Incredible Auto Sales, LLC*), No. CV-07-13-BLG-RFC, D. Mont, Stipulation (Dkt. 6D) (Mar. 6, 2007).

\(^{720}\) Incredible Auto Sales v. Hyundai Motor Finance (*In re Incredible Auto Sales, LLC*), No. CV-07-13-BLG-RFC, D. Mont, Stipulation (Dkt. 6D) (Mar. 6, 2007).

\(^{721}\) See section pp. 178-188.

D. It’s Only a Dollar: Incredible Auto’s Quest to Use Cash Collateral

Instead, Incredible Auto and its floor financer HMFC, which had a security interest in nearly all of Incredible Auto’s assets, engaged in a highly contested dispute regarding Incredible Auto’s use of cash collateral.

1. What Incredible Auto Wanted: The Initial Motion

Incredible Auto filed its emergency motion for use of cash collateral on October 26, 2006—nine days post-petition. It requested the right to use the cash collateral and for leave to grant HMFC further adequate protection. To support its position that HMFC was adequately protected under section 361 of the Bankruptcy Code, Incredible Auto claimed that HMFC was $616,620.42 over secured; more specifically, the value of Debtor’s assets which secured HMFC’s $2,163,000 debt totaled $2,779,620.42.

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723 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Hyundai Exhibit 1: Inventory Loan and Security Agreement (Dkt. 100-1) at 2 (Nov. 30, 2006).

724 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Motion to Use Cash Collateral (Dkt. 17) at 1 (Oct. 26, 2006).

725 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Motion to Use Cash Collateral (Dkt. 17) at 2 (Oct. 26, 2006).

726 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Motion to Use Cash Collateral (Dkt. 17) at 3 (Oct. 26, 2006).
<table>
<thead>
<tr>
<th>Collateral</th>
<th>Value</th>
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<td>New Car Inventory</td>
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<td>Used Car Inventory</td>
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<tr>
<td>Parts and Supplies</td>
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<td>Machinery and Fixtures</td>
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<td>Signage and Leasehold Improvements</td>
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</tr>
<tr>
<td><strong>Total:</strong></td>
<td><strong>$2,779,620.42</strong></td>
</tr>
</tbody>
</table>

In addition to arguing that HMFC was over-secured, Incredible Auto offered four additional “belts and suspenders” forms of adequate protection. First, Incredible Auto offered to pledge the value of its KIA franchise to HMFC, an amount it estimated to be $800,000. Second, it pointed to the “modest” $242,498 profit that it anticipated collecting over the next twelve months as additional protection. Third, it offered to

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728 This amount equals the total value of the vehicles ($1,490,691.00) minus the amount of existing liens on those vehicles which needed to be paid off ($65,125.00). See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Exhibit 1 to Debtor’s Emergency Motion for Use of Cash Collateral: Analysis of Assets Securing the Hyundai Motor Finance (Dkt. 17-3) at 2 (Oct. 26, 2006).

729 See supra pp. 116-121 (discussing the Gutierrez, Incredible Auto Sales, LLC v. United Car Care lawsuit).

730 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Motion to Use Cash Collateral (Dkt. 17) at 4 (Oct. 26, 2006).

make monthly payments of $15,469 starting within sixty days of an order. Finally, it asserted that continuing and replacement liens on the Trust Accounts would serve as further protection.

Incredible Auto needed to use cash collateral. It claimed that it “can not operate, sell vehicles, service the public, repair vehicles and continue its pre petition franchised business, nor can it protect the value of its KIA Motors Franchise without an Order granting Use of Collateral effective immediately.” It further claimed that if Incredible Auto could not run its business as usual, KIA had the right to cancel the franchise.

2. Objections to Incredible Auto’s Motion
   a. Steve’s Auto & the Auctions

As expected, HMFC was a vocal objector to Incredible Auto’s motion, but it was not the only one. South Seattle, Auto Auction, and Steve’s Auto all filed objections. South Seattle requested that, if the court granted Incredible Auto’s motion, it exclude the vehicles that were subject to its adversary hearing because the sale of any of the vehicles

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732 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Motion to Use Cash Collateral (Dkt. 17) at 5 (Oct. 17, 2006). This amount equaled seven percent of the value of the new and used vehicle inventory, the parts inventory and the factory receivables. See id.

733 Incredible Auto established the following trust accounts in a local bank: Trust Account A: Proceeds of New Vehicles; Trust Account B: Proceeds of Used Vehicles; Trust Account C: Proceeds of Service Sales in the Service Department; Trust Account D: For Proceeds from All Receivables both pre-petition and post-petition; Trust Account E: Tax deposits. See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Motion to Use Cash Collateral (Dkt. 17) at 6 (Oct. 26, 2006).

734 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Motion to Use Cash Collateral (Dkt. 17) at 4 (Oct. 26, 2006).

735 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Motion to Use Cash Collateral (Dkt. 17) at 4 (Oct. 26, 2006) (capitalization in the original).

736 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Motion to Use Cash Collateral (Dkt. 17) at 7 (Oct. 26, 2006).
at issue would interfere with its rights under that proceeding. Auto Auction made a very similar claim. It claimed that the vehicles at issue in its adversary proceedings should be segregated per the stipulation in the adversary proceeding agreed to between Incredible Auto, HMFC, and Auto Auction. Steve’s Auto objected to make its claim known. It claimed that an issue existed as to whether Auto Auction or Steve’s Auto was the true seller, under section 546(c)(1) of the Bankruptcy Code, of the vehicles in question in the Auto Auction adversary proceeding. So, Steve’s Auto mirrored Auto Auction’s objection and requested that nothing should happen to the vehicles in question prior to the outcome of the adversary proceeding.

b. HMFC

In HMFC’s objection, it strongly denied that it was over-secured and stated that the protection offered by Incredible Auto was not adequate. First, it restated the facts and allegations that it made in its motion to prohibit or condition the use of inventory or cash collateral. Then, it attacked the claims and the offer of additional adequate

737 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to Debtor’s Emergency Motion to Use Cash Collateral Pursuant to 11 USC Section 363 of the Bankruptcy Code (Dkt. 19) at 3 (Oct. 27, 2006).

738 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to Cash Collateral Motions (Dkt. 22) at 1-2 (Oct. 27, 2006).

739 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to Debtor’s Emergency Motion for Use of Cash Collateral (Dkt. 30) at 2 (Oct. 31, 2006).

740 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to Debtor’s Emergency Motion for Use of Cash Collateral (Dkt. 30) at 3 (Oct. 31, 2006).

741 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response to Debtor’s Emergency Motion to Use Cash Collateral (Dkt. 25) at 3 (Oct. 30, 2006).

742 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response to Debtor’s Emergency Motion to Use Cash Collateral (Dkt. 25) at 1 (Oct. 30, 2006); see also infra p. 134.
protection that Incredible Auto made in its emergency motion to use cash collateral.\textsuperscript{743} HMFC began by claiming that Incredible Auto owed it $2,243,608.81 plus $31,767.01 in interest as of the commencement of the bankruptcy, which was $112,375.82 more than the amount claimed due by Incredible Auto.\textsuperscript{744} It stated that in the last audit conducted by HMFC (October 23, 2006), it found Incredible Auto’s inventory to be worth only $1,800,661.81, and that amount did not factor in the estimated four cars that Incredible Auto sold post-petition and the exiting liens on the vehicles that had yet to be paid by Incredible Auto.\textsuperscript{745} HMFC stated that it already had a security interest in the KIA franchise that Incredible Auto said it was willing to pledge, but it strongly denied that the franchise was worth $800,000.\textsuperscript{746} Similarly, it claimed that the prospective “$502,400.00 lawsuit receivable”\textsuperscript{747} had no value especially because Incredible Auto was subject to a counterclaim in the case.\textsuperscript{748} HMFC claimed that the offer of additional monthly payments was inadequate because the seven percent interest rate was arbitrary; it did not match the market rate or the contract rate.\textsuperscript{749} Finally, HMFC objected to the procedure

\textsuperscript{743} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response to Debtor’s Emergency Motion to Use Cash Collateral (Dkt. 25) at 1-3 (Oct. 30, 2006).

\textsuperscript{744} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response to Debtor’s Emergency Motion to Use Cash Collateral (Dkt. 25) at 1 (Oct. 30, 2006).

\textsuperscript{745} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response to Debtor’s Emergency Motion to Use Cash Collateral (Dkt. 25) at 2 (Oct. 30, 2006).

\textsuperscript{746} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response to Debtor’s Emergency Motion to Use Cash Collateral (Dkt. 25) at 2 (Oct. 30, 2006).

\textsuperscript{747} See supra Chart 1 p. 130.

\textsuperscript{748} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response to Debtor’s Emergency Motion to Use Cash Collateral (Dkt. 25) at 2 (Oct. 30, 2006).

\textsuperscript{749} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response to Debtor’s Emergency Motion to Use Cash Collateral (Dkt. 25) at 3 (Oct. 30, 2006).
outlined by Incredible Auto to safeguard the funds in trust accounts due to the following reasons: (1) the procedure did not allow HMFC to monitor the accounts; (2) it did not allow HMFC to inspect inventory and records; and (3) it did not describe how HMFC would receive the proceeds.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Response to Debtor’s Emergency Motion to Use Cash Collateral (Dkt. 25) at 2-3 (Oct. 30, 2006).}

3. **HMFC Takes the Offensive**

   a. **Motion to Prohibit or Condition Use of Inventory or Cash Collateral**

   As mentioned in the introduction, based on a tip, HMFC conducted intensive audits of Incredible Auto’s records in September and October 2006 which revealed multiple fabrications and frauds.\footnote{For further discussion of Incredible Auto’s business practices, see supra beginning on page 25.} So, on the same day that Incredible Auto filed its emergency cash collateral motion, HMFC filed an emergency motion to prohibit or condition the use, sale, or lease of inventory or cash collateral.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Emergency Motion to Prohibit or Condition Use, Sale or Lease of Inventory and/or Cash Collateral and Notice Thereof (Dkt. 18) (Oct. 26, 2006).} As many judges are at least initially sympathetic to a debtor’s request to keep its business afloat, HMFC likely wanted to make sure the court knew of Incredible Auto’s track record.

   HMFC began its motion discussing the security arrangement between the two entities and then turned to problems that it had faced.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Emergency Motion to Prohibit or Condition Use, Sale or Lease of Inventory and/or Cash Collateral and Notice Thereof (Dkt. 18) (Oct. 26, 2006).} HMFC claimed the following: (1) that as of October 23, 2006, Incredible Auto had denied it access to its business premises in contravention of the security agreement,\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Emergency Motion to Prohibit or Condition Use, Sale or Lease of Inventory and/or Cash Collateral and Notice Thereof (Dkt. 18) (Oct. 26, 2006).} (2) that HMFC had advanced
$2,243,608.81\textsuperscript{755} as of October 23, 2006, and that an inspection showed Incredible Auto had inventory valued at only $1,800,661.81,\textsuperscript{756} (3) that Incredible Auto had not remitted the $442,947.00 in proceeds,\textsuperscript{757} (4) that Incredible Auto was around $367,000 out of trust on the date of filing,\textsuperscript{758} and (5) that vehicles worth $76,067.00 had been sold post-bankruptcy with the proceeds placed in an account untouchable by HMFC.\textsuperscript{759} It also alleged that Incredible Auto had double-floored vehicles, taken trade-ins and not paid off the original loan, and had paid for vehicles with bad checks.\textsuperscript{760}

After listing those claims and allegations, HMFC asked the court to order that (1) Incredible Auto allow HMFC to inspect its records, (2) all proceeds be held in debtor in possession (“DIP”) accounts to which HMFC would have access, (3) HMFC be

\textsuperscript{754} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Emergency Motion to Prohibit or Condition Use, Sale or Lease of Inventory and/or Cash Collateral and Notice Thereof (Dkt. 18) at 2 (Oct. 26, 2006).

\textsuperscript{755} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Emergency Motion to Prohibit or Condition Use, Sale or Lease of Inventory and/or Cash Collateral and Notice Thereof (Dkt. 18) at 2 (Oct. 26, 2006). Debtor’s stated amount of $2,163,000 would have been correct except prior to filing bankruptcy, a few of Incredible Auto’s checks were returned to HMFC as non-sufficient funds; HMFC recalculated the debt owed. See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 18 (Apr. 3, 2009).

\textsuperscript{756} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Emergency Motion to Prohibit or Condition Use, Sale or Lease of Inventory and/or Cash Collateral and Notice Thereof (Dkt. 18) at 2 (Oct. 26, 2006).

\textsuperscript{757} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Emergency Motion to Prohibit or Condition Use, Sale or Lease of Inventory and/or Cash Collateral and Notice Thereof (Dkt. 18) at 2 (Oct. 26, 2006).

\textsuperscript{758} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Emergency Motion to Prohibit or Condition Use, Sale or Lease of Inventory and/or Cash Collateral and Notice Thereof (Dkt. 18) at 3 (Oct. 26, 2006).

\textsuperscript{759} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Emergency Motion to Prohibit or Condition Use, Sale or Lease of Inventory and/or Cash Collateral and Notice Thereof (Dkt. 18) at 2 (Oct. 26, 2006).

\textsuperscript{760} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Emergency Motion to Prohibit or Condition Use, Sale or Lease of Inventory and/or Cash Collateral and Notice Thereof (Dkt. 18) at 2-3 (Oct. 26, 2006).
reimbursed or receive a replacement lien for the amount advanced on a vehicle when such vehicle was sold, (4) the titles be delivered to HMFC for safekeeping, (5) Incredible Auto only use cash collateral as submitted in the budget, and (6) Incredible Auto’s employees fully cooperate with HMFC.\textsuperscript{761}

\textit{b. Incredible Auto’s Objection to HMFC’s Motion}

Incredible Auto filed an objection to HMFC’s motion to prohibit or condition the use of inventory or cash collateral.\textsuperscript{762} This document set a heated tone\textsuperscript{763} and began the long debate over Incredible Auto’s use of cash collateral.

Incredible Auto again asserted that it should be entitled to use cash collateral because HMFC was over-secured and, using slightly different numbers than in its emergency motion, calculated that HMFC had a 60.7\% equity cushion.\textsuperscript{764}

\textsuperscript{761} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Emergency Motion to Prohibit or Condition Use, Sale or Lease of Inventory and/or Cash Collateral and Notice Thereof (Dkt. 18) at 3-4 (Oct. 26, 2006).

\textsuperscript{762} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance and Objection to Hyundai Motor Finance Company’s Motion to Prohibit Use of Collateral (Dkt. 42) (Nov. 5, 2006).

\textsuperscript{763} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance and Objection to Hyundai Motor Finance Company’s Motion to Prohibit Use of Collateral (Dkt. 42) at 3-4 (Nov. 5, 2006) (Incredible Auto referred to HMFC’s attitude as being “hard hearted,” and not only denied HMFC’s allegations, but called them “totally false.”).

\textsuperscript{764} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Debtor’s Exhibit 1: Analysis of Assets Under Liens to Hyundai Motor Finance Securing Claim of $2,163,000 on Filing (Dkt. 43-3) (Nov. 5, 2006).
In an effort to show the court that it was doing everything possible to please HMFC, Incredible Auto further claimed that it set up the requested trust accounts,
segregated all of its deposits, and complied with the access to information requests made by HMFC.\textsuperscript{768} Responding to HMFC’s distrust of Mr. Gutierrez, it additionally made Mr. Cornelison (vice president) and Mrs. Gutierrez (member and Mr. Gutierrez’s wife) required signatories on various accounts.\textsuperscript{769} Additionally, Incredible Auto restated that it was willing to make periodic payments to HMFC and again, insisted that the franchise was worth $800,000.\textsuperscript{770} It cautioned, however, that the $800,000 figure could only be realized if the dealership maintained regular operations.\textsuperscript{771} Incredible Auto had retained a broker pre-petition who was actively soliciting bids for the dealership.\textsuperscript{772}

Like any business in Chapter 11, Incredible Auto needed to use its cash collateral to function. In this objection, Incredible Auto stressed its desperate need to use cash collateral and cited the following reasons: (1) the need to pay expenses necessary to continue Incredible Auto’s operations and (2) the need to pay $35,000 in past payroll

\textsuperscript{768} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance and Objection to Hyundai Motor Finance Company’s Motion to Prohibit Use of Collateral (Dkt. 42) at 2 (Nov. 5, 2006).

\textsuperscript{769} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance and Objection to Hyundai Motor Finance Company’s Motion to Prohibit Use of Collateral (Dkt. 42) at 5 (Nov. 5, 2006).

\textsuperscript{770} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance and Objection to Hyundai Motor Finance Company’s Motion to Prohibit Use of Collateral (Dkt. 42) at 3-4 (Nov. 5, 2006).

\textsuperscript{771} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance and Objection to Hyundai Motor Finance Company’s Motion to Prohibit Use of Collateral (Dkt. 42) at 4 (Nov. 5, 2006).

\textsuperscript{772} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance and Objection to Hyundai Motor Finance Company’s Motion to Prohibit Use of Collateral (Dkt. 42) at 4 (Nov. 5, 2006).
expenses to the twenty necessary employees. It submitted a budget with its motion and requested that the court approve the use of cash collateral.

4. Hearings
   a. Scheduled, Rescheduled, & a Stipulation

A hearing on the cash collateral issue was originally scheduled for November 1, 2006, but Incredible Auto’s attorney had to appear at an emergency motion for cash collateral hearing in Albuquerque, New Mexico for another case. On November 1, 2006, the judge adjudicated as fair a stipulation between HMFC and Incredible Auto that (1) reset the hearing to November 5, 2006, (2) directed Incredible Auto to put all the sale proceeds into a trust account, and (3) mandated that Incredible Auto give HMFC access to its inventory and records. As the case was in its infancy, it made sense for the court to approve an arrangement in which each party bargained for something it wanted. Incredible Auto wanted more time, and HMFC wanted access. Both achieved this by agreement.

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773 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance and Objection to Hyundai Motor Finance Company’s Motion to Prohibit Use of Collateral (Dkt. 42) at 2-3 (Nov. 5, 2006).

774 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Incredible Kia Monthly Profit Loss (Dkt. 43-4) at 1 (Nov. 5, 2006).

775 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 4 n.11 (May 18, 2007).

776 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation to Continue Nov. 1, 2006 Hearings and Joint Motions for Other Relief (Dkt. 29) (Oct. 31, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 32) (Nov. 1, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Order Approving Stipulation (Dkt. 34) (Nov. 1, 2006).

Both Mr. Gutierrez and Mr. Ueno, assistant manager in HMFC’s credit department, testified at the hearing. Mr. Gutierrez, led by his attorney, discussed his business and how he determined Incredible Auto’s value. The attorneys for HMFC, Auto Auction, South Seattle, and Steve’s Auto stringently cross examined Mr. Gutierrez regarding the valuation and the allegations of fraud. Mr. Ueno discussed Incredible Auto’s practices that HMFC considered fraudulent and in contravention of the security agreement. By the conclusion of the hearing, the parties agreed, and the judge ordered, that Incredible Auto could use the cash collateral but only to (1) pay the $35,000 payroll debt and (2) pay $6,000 for insurance obligations. During the hearing, the parties reached an agreement as to the use of the cash collateral for a 45 day period. The court also ordered the parties to enter a written stipulation by November 13, 2006, fully resolving the cash collateral issue. Until that time, the parties would operate under the

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777 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 130 (Apr. 3, 2009).


780 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006 (Dkt. 427) at 119-29 (Apr. 3, 2009).

781 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Allowing Limited Use of Cash Collateral (Dkt. 51) at 2 (Nov. 8, 2006).

782 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Allowing Limited Use of Cash Collateral (Dkt. 51) at 2 (Nov. 8, 2006).

783 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Allowing Limited Use of Cash Collateral (Dkt. 51) at 2 (Nov. 8, 2006).
terms of the November 1, 2006 order,\textsuperscript{784} which required all proceeds to be placed in trust and gave HMFC access to Incredible Auto’s inventory and records.\textsuperscript{785}

The fact that the court ordered the parties to reach a stipulation rather than reaching its own conclusion regarding the use of cash collateral would probably not be unusual in most Chapter 11 cases. If a debtor and its creditors could reach a satisfactory agreement, the court could be more restrained as both parties could be expected to protect their own interests in negotiating a stipulation. However, in light of the accusations of fraud revealed at the hearing, the court should have probably done more than require (1) that the proceeds be placed in trust and (2) that HMFC be given access to Incredible Auto’s inventory and records while the parties were trying to reach a stipulation.

i. The Stipulation

It would not be an exaggeration to say that an atmosphere of distrust existed between HMFC and Incredible Auto. The problem only intensified when they attempted to negotiate a stipulation. HMFC was more than happy operating under the November 1, 2006 order because its primary concerns were access and safeguarding proceeds.\textsuperscript{786} Thus, it likely had little incentive to compromise. Incredible Auto, on the other hand, desperately needed the use of the cash collateral but had its own points of contention. By the court’s deadline, November 13, 2006, HMFC and Incredible Auto were unable to

\textsuperscript{784} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Order Approving Stipulation (Dkt. 34) (Nov. 11, 2006).

\textsuperscript{785} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Allowing Limited Use of Cash Collateral (Dkt. 51) at 2 (Nov. 8, 2006).

\textsuperscript{786} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., [HMFC Proposed] Order Allowing Use of Cash Collateral (Dkt. 60-1) at 3 (Nov. 13, 2006) (The “post-petition sale of Inventory . . . and/or use of the proceeds of such Inventory will diminish the value of the Inventory and proceeds and, therefore, diminish the value of HMFC’s security interest in the property of the Debtor’s estate during the pendency of this case.”).
Alicia Teubert & Melissa Carrasco
Incredible Auto Sales, LLC

As they each submitted a proposed stipulation for the court’s review.

I. HMFC’s Proposed Stipulation

HMFC’s motion for entry of an order allowing use of cash collateral accused Incredible Auto of not negotiating in good faith by “fail[ing] to include even the most basic agreed upon terms, such as HMFC’s replacement lien in Debtor’s proposed new motor vehicle inventory or even a budget for use of cash collateral. . . Debtor has failed or refused to respond in any meaningful way.”

HMFC submitted to the court a proposed order, which it claimed incorporated the procedures for (1) “tracking replacement inventory” and (2) using the cash collateral from Incredible Auto’s proposals.

Although HMFC’s stipulation allowed Incredible Auto to use the cash collateral in the ordinary course of business to buy and sell new and used vehicles, pay operating expenses, and pay existing liens in accordance with a budget, it also contained nine specific requirements. First, Incredible Auto had to put all proceeds into trust accounts and then transfer them into the debtor-in-possession (“DIP”) account in accordance with specific procedures. Second, HMFC would continue to have a security interest in pre-

787 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Motion for Entry of Order Allowing Use of Cash Collateral (Dkt. 60) at 3 (Nov. 13, 2006).

788 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Motion for Entry of Order Allowing Use of Cash Collateral (Dkt. 60) at 3 (Nov. 13, 2006).

789 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., [HMFC Proposed] Order Allowing Use of Cash Collateral (Dkt. 60-1) at 4 (Nov. 13, 2006).

bankruptcy collateral during the pendency of the case.\textsuperscript{791} Third, Incredible Auto had to pay $99,000 to HMFC from very specific sources.\textsuperscript{792} Fourth, Incredible Auto had to provide HMFC with proof of insurance.\textsuperscript{793} Fifth, Incredible Auto had to allow inspections without notice, provide a daily electronic copy of all records, submit a copy of all financial reports and statements of HMFC, give HMFC notice of all offers to purchase Incredible Auto or its assets, give HMFC the right to inspect accounting records upon reasonable notice, and immediately provide information on the unpaid liens on the trade-ins.\textsuperscript{794} Sixth, Mr. Gutierrez was prohibited from participating in management and Mr. Cornelison and Mrs. Gutierrez were the only authorized signatories.\textsuperscript{795} Seventh, all titles and MSOs had to be given to Incredible Auto’s attorney.\textsuperscript{796} Eighth, the vehicles subject to the adversary proceedings had to be segregated.\textsuperscript{797} Finally, the stipulation would terminate on December 21, 2006, unless extended by the parties.\textsuperscript{798}

\textsuperscript{791} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., [HMFC Proposed] Order Allowing Use of Cash Collateral (Dkt. 60-1) at 4-5 (Nov. 13, 2006).

\textsuperscript{792} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., [HMFC Proposed] Order Allowing Use of Cash Collateral (Dkt. 60-1) at 5 (Nov. 13, 2006).

\textsuperscript{793} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., [HMFC Proposed] Order Allowing Use of Cash Collateral (Dkt. 60-1) at 5 (Nov. 13, 2006).

\textsuperscript{794} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., [HMFC Proposed] Order Allowing Use of Cash Collateral (Dkt. 60-1) at 5-6 (Nov. 13, 2006).

\textsuperscript{795} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., [HMFC Proposed] Order Allowing Use of Cash Collateral (Dkt. 60-1) at 6-7 (Nov. 13, 2006).

\textsuperscript{796} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., [HMFC Proposed] Order Allowing Use of Cash Collateral (Dkt. 60-1) at 7 (Nov. 13, 2006).

\textsuperscript{797} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., [HMFC Proposed] Order Allowing Use of Cash Collateral (Dkt. 60-1) at 8 (Nov. 13, 2006).

\textsuperscript{798} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., [HMFC Proposed] Order Allowing Use of Cash Collateral (Dkt. 60-1) at 4, 7 (Nov. 13, 2006).
II. Incredible Auto’s First Proposed Stipulation

Like HMFC, on November 13, 2006, Incredible Auto filed a proposed stipulation ("First Proposed Stipulation") and order.\textsuperscript{799} Unlike the HMFC version, it did not contain harsh allegations about the negotiation process.\textsuperscript{800} It contained some provisions that appeared very similar to the HMFC draft order.\textsuperscript{801} For example, it designated the same termination date and discussed the existing trust accounts.\textsuperscript{802} It also included a budget for the expenses as HMFC requested,\textsuperscript{803} but it did have distinct differences. While it was clear at that point in the proceeding that HMFC’s primary concern was access, Incredible Auto’s First Proposed Stipulation only gave HMFC ability to request daily copies of the cash deposits and bank statements, reasonable access to the floor and deal jackets, and a monthly expense report. Incredible Auto did not want HMFC constantly interfering, but HMFC wanted Incredible Auto under a microscope.

c. Hearing No. 2 (November 14, 2006): Making Payroll

The court was not thrilled with the impasse regarding cash collateral, but it was likely that Incredible Auto’s history gave it pause. Instead of just approving Incredible


Auto’s proposed order, it demanded that a signed stipulation be filed immediately or the issue would be set for another hearing. 804

i. Incredible Auto’s Protest: Emergency Motion

After the court demanded that a stipulation be signed, Incredible Auto filed an emergency motion to enter an order approving a revised cash collateral stipulation ("Second Proposed Stipulation") on November 17, 2006. 805 Incredible Auto’s motion urged the court to approve the Second Proposed Stipulation that it attached to the motion, or in the alternative, to enter an order allowing Incredible Auto to make its payroll of $40,000. 806 Incredible Auto stated that after the hearing on November 7, 2006, it drafted a stipulation and order and gave it to all the parties. It claimed that HMFC sent a different draft on November 10, 2006, that “was such a radical departure from anything agreed to in the hearing that Incredible’s Bankruptcy Attorney had to drop everything and at extra cost to this estate return to Billings, Montana for the hearing date of November 14, 2006.” 807 On the court’s order, Incredible Auto’s attorney ordered a transcript of the hearing and drafted a revised stipulation which “was also rejected by Hyundai by adding

804 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Minutes of Hearing Held (Docket Entry) at 11 (Nov. 14, 2006).

805 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Emergency Motion to Enter Order Approving Cash Collateral Stipulation (Dkt. 66) (Nov. 17, 2006).

806 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Emergency Motion to Enter Order Approving Cash Collateral Stipulation (Dkt. 66) at 4 (Nov. 17, 2006).

807 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Emergency Motion to Enter Order Approving Cash Collateral Stipulation (Dkt. 66) at 2 (Nov. 17, 2006).
other and new extraneous provisions harming the basic Debtor operation of the Cash Collateral to Hyundai’s benefit.”

Many of the provisions in Incredible Auto’s Second Proposed Stipulation were substantively the same as the provisions in its First Proposed Stipulation, with a few major revisions. It defined “profit” and identified the trust account into which factory receivables would go. Incredible Auto also basically copied and pasted, at least substantively, the HMFC’s sections on “Post-Petition Security Interest,” “Transfer of Title,” and “Information; Inspections.” These were substantial concessions that Incredible Auto provided HMFC.

808 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debito’s Emergency Motion to Enter Order Approving Cash Collateral Stipulation (Dkt. 66) at 3 (Nov. 17, 2006).


ii. HMFC’s Objection & Attempt to be Reasonable

Even with these changes, HMFC filed an objection to Incredible Auto’s emergency motion to enter order approving its Second Proposed Stipulation.\(^\text{813}\) While at first, such an objection may seem unreasonable, HMFC denied the allegations that it has been uncooperative and insisted that it would not compromise and stipulate to a document showing “an incorrect amount of the debt owed to HMFC.”\(^\text{814}\) It is reasonable for a secured creditor to refuse to stipulate to the wrong debt.

As a show of good faith, HMFC stated that it did not object to Incredible Auto using the cash collateral to make payroll as long as “Debtor submits a budget for such payments within five (5) days.”\(^\text{815}\) HMFC stated that the use of last year’s budget for determining payroll was not sufficient because Incredible Auto “now operates on a skeletal staff, compared to previous years.”\(^\text{816}\)

iii. The Court’s Decision: Cash Collateral for Payroll

Because HMFC did not object to using the cash collateral for payroll, on November 20, 2006, the court ordered that Incredible Auto could use the cash collateral only to make “the payroll that was due to Debtor’s current employees as of Friday,

\(^{813}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Emergency Motion to Enter Order Approving Cash Collateral Stipulation (Dkt. 68) (Nov. 17, 2006).

\(^{814}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Emergency Motion to Enter Order Approving Cash Collateral Stipulation (Dkt. 68) at 2 (Nov. 17, 2006). Note that even in the Second Proposed Stipulation drafted by Incredible Auto, it claimed the debt owed to HMFC equaled $2,163,000. In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation as to the Use of Collateral Under 11 U.S.C. Section 363 and Adequate Protection Under 11 U.S.C. Section 361 of the Bankruptcy Code (Revised 11/15/06) (Dkt. 66-1) at 4 (Nov. 17, 2006).

\(^{815}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Emergency Motion to Enter Order Approving Cash Collateral Stipulation (Dkt. 68) at 1 (Nov. 17, 2006).

\(^{816}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Emergency Motion to Enter Order Approving Cash Collateral Stipulation (Dkt. 68) at 2 (Nov. 17, 2006).
November 17, 2006, provided, however, that Debtor must submit a budget for such payments to the Court and all parties in interest within five (5) days of the date of this Order. Following the court’s order, Incredible Auto filed a payroll report exactly five days after the order. This payroll showed an amount due of $34,483.86, which was less than the $40,000 amount originally requested by Incredible Auto.

\[817\] In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 71) at 3 (Nov. 207, 2006) (emphasis in original).

\[818\] See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Payroll Report for Nov. 17, 2006 (Dkt. 82) at 1 (Nov. 25, 2006).

\[819\] See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Payroll Report for Nov. 17, 2006 (Dkt. 82) at 4 (Nov. 25, 2006). Note that this amount includes a $5,000 payment to Mr. Cornelison (owner/manager), $473.59 in sales commissions to Krista Davis who supposedly worked at Incredible Chevrolet at the time, and $1,614.33 to the office manager, Ms. Stephens, who had already been implicated in the fraud that HMFC alleged. See id. at 3-4.

\[820\] See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance and Objection to Motion of HMFC as the Debtor’s Use of Cash Collateral and Other Relief (Dkt. 78) (Nov. 23, 2006).
Incredible Auto argued that, in regards to that allegation, “Nothing could be further from the truth”\(^{821}\) and that “[t]he bad faith of Hyundai should be evident to this Court.”\(^{822}\) It claimed that because all parties, except HMFC, had signed onto its stipulation and that hours of negotiation had occurred without result, “Hyundai is guilty of false charges, bad faith and intentional efforts to ‘weasel out’ of legitimate findings and consents by this Court.”\(^{823}\) Incredible Auto requested that the court order HMFC to reimburse it for expenses, pay damages for “these continuing intentional falsehoods,” and pay penalties under 9011.\(^{824}\) It wanted these issues discussed at the next cash collateral hearing, which would occur on December 5, 2006.\(^{825}\)

**ii. Motion to Extend Use of Cash Collateral Through February 2007**

Two days before the hearing, Incredible Auto filed another motion pleading its case to use cash collateral and requesting that its use be extended through February

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\(^{821}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance and Objection to Motion of HMFC as the Debtor’s Use of Cash Collateral and Other Relief (Dkt. 78) at 3 (Nov. 23, 2006) (emphasis original).

\(^{822}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance and Objection to Motion of HMFC as the Debtor’s Use of Cash Collateral and Other Relief (Dkt. 78) at 3 (Nov. 23, 2006) (emphasis original).

\(^{823}\) See *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance and Objection to Motion of HMFC as the Debtor’s Use of Cash Collateral and Other Relief (Dkt. 78) at 3 (Nov. 23, 2006). For context, note that HMFC’s main objection was still that Incredible Auto continued to understate the amount of debt that HMFC was owed. *See In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Emergency Motion to Enter Order Approving Cash Collateral Stipulation (Dkt. 68) at 1 (Nov. 17, 2006).

\(^{824}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance and Objection to Motion of HMFC as the Debtor’s Use of Cash Collateral and Other Relief (Dkt. 78) at 4 (Nov. 23, 2006). Incredible Auto’s counsel did call HMFC’s attorney and request that the charges of bad faith be withdrawn under the safe harbor provisions of 9011. *See In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Sworn Declaration of Attorney in Support of Debtor’s Response, Resistance and Objection and Request for Sanctions (Dkt. 78-1) at 2 (Nov. 23, 2006).

\(^{825}\) See *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Notice of Hearing Set for 12/5/2006 (Docket Entry 84) at 14 (Nov. 27, 2006).
While it attached a proposed cash collateral stipulation to the motion (“Third Proposed Stipulation”), the document recited the exact provisions under Incredible Auto’s Second Proposed Stipulation. In its motion, Incredible Auto noted that HMFC claimed its debt was $100,000 higher than listed by Incredible Auto, and it suggested that HMFC was free to submit a proof of claim with the higher amount. It restated that HMFC had an equity cushion of over 60% and the “cushion is more than adequate to protection [sic] to Use Cash Collateral.” Incredible Auto claimed that HMFC agreed in the November 6th and 7th hearing to the use of cash collateral but had since refused to sign a stipulation. It stated “[t]hese actions tie the hands of the Debtor and its

826 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Additional Motion to be Extended to Request that the Stipulation as to Use of Cash Collateral Previously Filed with the Court be Approved and Cash Usage Include Budgeted Expenditures Through Feb. 28, 2006 [sic] (Dkt. 106) (Dec. 3, 2006).


828 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Additional Motion to be Extended to Request that the Stipulation as to Use of Cash Collateral Previously Filed with the Court be Approved and Cash Usage Include Budgeted Expenditures Through Feb. 28, 2006 [sic] (Dkt. 106) at 2 (Dec. 3, 2006).

829 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Additional Motion to be Extended to Request that the Stipulation as to Use of Cash Collateral Previously Filed with the Court be Approved and Cash Usage Include Budgeted Expenditures Through Feb. 28, 2006 [sic] (Dkt. 106) at 3 (Dec. 3, 2006).

830 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Additional Motion to be Extended to Request that the Stipulation as to Use of Cash Collateral Previously Filed with the Court be Approved and Cash Usage Include Budgeted Expenditures Through Feb. 28, 2006 [sic] (Dkt. 106) at 3-4 (Dec. 3, 2006).
employees unfairly and can lead to such losses that the sale of the franchise could be made impossible.\textsuperscript{831}

iii. Motion from Unsecured Media Creditors

A group of unsecured media creditors, through which Incredible Auto advertised, submitted a motion the day before the hearing supporting Incredible Auto’s motions to use cash collateral.\textsuperscript{832} The group’s motion recited some of the basic facts and then urged the court to approve the stipulation because not doing so would result in Incredible Auto’s liquidation—a result which would “irreparably harm” the group of unsecured creditors.\textsuperscript{833} If Incredible Auto was liquidated, it was highly unlikely that the unsecured creditors would obtain any payment from the estate.

\begin{quote}
\textit{e. Hearing No. 3 (December 5, 2006): Fault and Finger Pointing}
\end{quote}

HMFC’s tactic at the hearing was to ensure that the court knew of every single fraudulent or underhanded action taken by Incredible Auto. Mr. Ueno was the first witness, and he described in excruciating detail everything that he and the audit team uncovered in the seven audits that HMFC conducted during the month of October.\textsuperscript{834}

\textsuperscript{831} \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Additional Motion to be Extended to Request that the Stipulation as to Use of Cash Collateral Previously Filed with the Court be Approved and Cash Usage Include Budgeted Expenditures Through Feb. 28, 2006 [sic] (Dkt. 106) at 4 (Dec. 3, 2006).

\textsuperscript{832} \textit{See In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Media Creditors’ Motion to Approve Debtor’s Request to Approve Cash Collateral Stipulation (Dkt. 108) (Dec. 4, 2006).

\textsuperscript{833} \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Media Creditors’ Motion to Approve Debtor’s Request to Approve Cash Collateral Stipulation (Dkt. 108) at 2 (Dec. 4, 2006).

Incredible Auto attempted to show that its demise into bankruptcy was HMFC’s fault, but the overwhelming message from the hearing was the extent of Incredible Auto’s inappropriate actions. Mr. Cornelison, Incredible Auto’s acting manager, testified attempting to show all the problems were resolved, but he ended up revealing the Incredible Auto-Incredible Chevrolet wholesaling arrangement which prompted the judge to say, “it appears to me this -- this deal on the wholesale to retail is very troubling to me because I see the profit going out the door from [Incredible Auto] and going over to [Incredible] Chevy.” After hearing testimony, the court decided to (1) review the hearing’s transcript and issue an order as to the use of cash collateral through December 21, 2006, and (2) schedule a hearing for December 19, 2006, to hear arguments on Incredible Auto’s motion to extend the use of cash collateral through February 2007. It appears that, after a month of allowing the parties to fight over the cash collateral, the court finally realized that they were never going to agree, and it had to step in to resolve the matter.

i. Incredible Auto’s Fourth Proposed Stipulation

Even though, the court said that it would review the record and draft an order, Incredible Auto submitted another motion to approve the stipulation after the hearing and

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836 In other words, Mr. Gutierrez was the problem and he is no longer involved in management.


838 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Minutes of Hearing Held (Docket Entry) at 18 (Dec. 5, 2006).
before the court entered its order. The motion requested that the court approve the revised stipulation that was attached (“Fourth Proposed Stipulation”). This newly drafted stipulation had mostly minor, non-substantive changes from Incredible Auto’s Third Proposed Stipulation; it made specific references to exhibits admitted in the hearing and updated some of the dates. One drastic difference existed: Incredible Auto listed HMFC’s debt as $2,163,000 on its Third Proposed Stipulation but listed it as $2,275,375.82 on this Fourth Proposed Stipulation. This change resolved HMFC’s major objection to all of Incredible Auto’s proposed stipulations by accurately identifying the amount that HMFC was owed.

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839 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Approve Stipulation and Agreement as to Cash Collateral (Dkt. 119) (Dec. 7, 2006).

840 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Approve Stipulation and Agreement as to Cash Collateral (Dkt. 119) at 2 (Dec. 7, 2006).


844 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Emergency Motion to Enter Order Approving Cash Collateral Stipulation (Dkt. 68) at 2 (Nov. 17, 2006).
ii. The Court’s Decision: Use Cash Collateral through December 21, 2006

Although Incredible Auto filed the Fourth Proposed Stipulation, the court drafted its own order regarding the cash collateral. Many provisions in the court’s order followed Incredible Auto’s Fourth Proposed Stipulation with small differences for grammar, spelling, and style. However, some substantive differences existed. The court added a section noting that a hearing would occur on December 19th regarding Incredible Auto’s motion to extend the use of cash collateral through February. As South Seattle, Auto Auction, and Steve’s Auto continuously made their presence known in the proceedings, the court specified that HMFC’s continued security interest did not prejudice any of the reclamation claims. Following the position of HMFC, it chose to adopt $2,275,375.82 as the amount owed to HMFC. Foreseeing future problems, it added a section stating that, if the parties disagreed over what constituted “reasonable notice,” then the parties would contact the court. It specified exactly how the “recap of


actual monthly expenses” would be prepared and given to the interested parties. It gave credence to HMFC’s concerns, when it explicitly required that Incredible Auto give HMFC and all the auction entities information about the outstanding liens. Most notably, the court took a different approach to both the auto auction cars and to Mr. Gutierrez’s influence as compared to Incredible Auto’s Fourth Proposed Stipulation. First, instead of keeping the cars segregated, the court ordered that the cars be returned to the respective auto auctions. Second, likely in response to the list of allegations uncovered at the hearing, the court stated that Mr. Gutierrez could not participate in the management and did not adopt Incredible Auto’s exception allowing him to assess, accept, or reject offers to purchase Incredible Auto. Additionally, contrary to Incredible Auto’s Fourth Proposed Stipulation, the court explicitly forbade Mr. Gutierrez from receiving any salary and benefits beginning the day he transferred his interest to his wife.


The court’s order properly balanced the interests of both Incredible Auto and its creditors, especially HMFC. It allowed Incredible Auto enough freedom to use the cash collateral that it could remain a going concern until the pending section 363 sale was culminated. However, it protected HMFC’s interest by providing it access to Incredible Auto’s inventory and internal records, separating Mr. Gutierrez even further from the management of the company, and acknowledging the true value of HMFC’s claim against Incredible Auto’s assets. It seemed clear that the court was disturbed by Incredible Auto’s pre- and post-petition business practices and was taking appropriate action to help prevent Incredible Auto’s management from continuing to siphon money out of the business.

f. Hearing No. 4 (December 19, 2006): Use of Cash Collateral After December 21, 2006

i. HMFC’s Position: No Further Use of Cash Collateral

As mentioned above, prior to the December 5, 2006 hearing, Incredible Auto filed a motion to extend the use of cash collateral through February. After the court entered its order regarding cash collateral use through December 21, 2006, HMFC filed its objection to Incredible Auto’s request to extend the use through February. HMFC objected to Incredible Auto’s motion on the grounds that Incredible Auto could not provide HMFC adequate protection. Over a span of fourteen pages, HMFC argued

856 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Additional Motion to be Extended to Request that the Stipulation as to Use of Cash Collateral Previously Filed with the Court be Approved and Cash Usage Include Budgeted Expenditures Through Feb. 28, 2006 [sic] (Dkt. 106) (Dec. 3, 2006).

857 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Motion for Continued Use of Cash Collateral (dkt.106) (Dkt. 137) at 15 (Dec. 13, 2006).

858 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Motion for Continued Use of Cash Collateral (dkt.106) (Dkt. 137) at 1 (Dec. 13, 2006).
that it was not adequately protected because: (1) HMFC had not received the proceeds from roughly $700,000 worth of sales both pre- and post-petition;\(^{859}\) (2) Incredible Auto’s motion was based on an incorrect assumption that HMFC was over-secured;\(^{860}\) and (3) many of Incredible Auto’s actions had impaired HMFC’s security.\(^{861}\)

The actions HMFC pointed to were as follows: (1) Incredible Auto had engaged in insider transactions between itself and Incredible Chevrolet totaling $62,718.83;\(^{862}\) (2) the stated value of the “intangible part” of the franchise, $800,000, was grossly overstated;\(^{863}\) (3) the value of the lawsuit proceeds, $502,400 was grossly overstated, as it did not account for the counter-claim or attorney’s fees;\(^{864}\) (4) Incredible Auto did not pay off the existing liens on trade-in vehicles and had understated the amount still due (the $65,125 figure was actually $242,699.58);\(^{865}\) (5) Incredible Auto misused inventory by letting family members use the vehicles;\(^{866}\) (6) some parties, like First Interstate Bank,
Valley Federal Credit,\textsuperscript{867} and Steve’s Auto had repossessed the vehicles, thus making Incredible Auto’s inventory inaccurate;\textsuperscript{868} (7) the vehicles subject to the auto auctions claims were listed as inventory;\textsuperscript{869} (8) Incredible Auto received financing for vehicles it never even owned by falsifying titles;\textsuperscript{870} (9) Incredible Auto’s projected profit statement understated the wholesale value of its vehicles so that the profit margin appeared greater than it was;\textsuperscript{871} (10) Mrs. Gutierrez’s monthly $5,000 salary was unearned and a simple substitution for the $5,000 amount that Mr. Gutierrez used to receive;\textsuperscript{872} (11) Incredible Auto deliberately included in its inventory vehicles that it had sold to Incredible Chevrolet pre-petition;\textsuperscript{873} (12) after about a month or two, Incredible Auto claimed that the values of certain vehicles dropped between $7,000 and $9,000;\textsuperscript{874} (13) HMFC could not perform its audits fully because Incredible Auto’s records were inadequate;\textsuperscript{875}

\textsuperscript{867} Valley Federal Credit had repossessed a vehicle without seeking stay relief. \textit{See In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Motion for Continued Use of Cash Collateral (dkt.106) (Dkt. 137) at 7-8 (Dec. 13, 2006).

\textsuperscript{868} \textit{See In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Motion for Continued Use of Cash Collateral (dkt.106) (Dkt. 137) at 7-8 (Dec. 13, 2006).

\textsuperscript{869} \textit{See In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Motion for Continued Use of Cash Collateral (dkt.106) (Dkt. 137) at 9 (Dec. 13, 2006).

\textsuperscript{870} \textit{See In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Motion for Continued Use of Cash Collateral (dkt.106) (Dkt. 137) at 9-10 (Dec. 13, 2006).

\textsuperscript{871} \textit{See In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Motion for Continued Use of Cash Collateral (dkt.106) (Dkt. 137) at 10-11 (Dec. 13, 2006).

\textsuperscript{872} \textit{See In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Motion for Continued Use of Cash Collateral (dkt.106) (Dkt. 137) at 11 (Dec. 13, 2006).

\textsuperscript{873} \textit{See In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Motion for Continued Use of Cash Collateral (dkt.106) (Dkt. 137) at 11-12 (Dec. 13, 2006).

\textsuperscript{874} \textit{See In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Motion for Continued Use of Cash Collateral (dkt.106) (Dkt. 137) at 12-13 (Dec. 13, 2006).

\textsuperscript{875} \textit{See In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Motion for Continued Use of Cash Collateral (dkt.106) (Dkt. 137) at 13 (Dec. 13, 2006).
Incredible Auto had not complied with the trust procedures; and (15) Incredible Auto had not complied with the terms of the cash collateral order.

**ii. Gathering Evidence: Request for a Rule 2004 Examination**

On the same day that HMFC filed the above objection, HMFC filed a motion for a Rule 2004 examination. Although it had a substantial understanding of what Incredible Auto was doing, HMFC sought to obtain more detailed information about Incredible Auto from Mr. Gutierrez. Although the examination was scheduled after the December 19th hearing, HMFC probably wanted to be able to use the information in future objections to cash collateral motions. However, even though the court ordered the examination, HMFC obtained no information because Mr. Gutierrez “asserted his 5th Amendment rights and refused to answer any substantive questions concerning the matter.” Undeterred, on December 20, 2006, HMFC filed a motion for a Rule 2004 examination of Ms. Stephens, office manager, Lalonna Seymore, the title clerk, and

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876 *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Motion for Continued Use of Cash Collateral (dkt.106) (Dkt. 137) at 13 (Dec. 13, 2006).*

877 *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Motion for Continued Use of Cash Collateral (dkt.106) (Dkt. 137) at 13 (Dec. 13, 2006).*

878 *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion for Rule 2004 Examination and Notice (Dkt. 133) (Dec. 13, 2006).*

879 *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Motion for Rule 2004 Examination (Dkt. 135) (Dec. 13, 2006).*

880 *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 138) (Dec. 14, 2006).*

881 *In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion for Rule 2004 Examination (Dkt. 154) at 2 (Dec. 20, 2006).*
Krista Davis, the “former employee” accused of forging documents.\textsuperscript{882} The court granted the motion the next day.\textsuperscript{883}

iii. The Hearing

The day before Mr. Gutierrez’s uninformative examination, the court held a hearing on Incredible Auto’s motion to extend the use of the cash collateral through February.\textsuperscript{884} Mr. Cornelison testified correcting some of the information presented at the December 5th hearing and updating the court as to Incredible Auto’s finances.\textsuperscript{885} At the time, the court decided to take Incredible Auto’s motion under advisement.\textsuperscript{886}

iv. Incredible Auto’s Response

Before the court issued its order, Incredible Auto filed a reply to HMFC’s objection.\textsuperscript{887} Incredible Auto stated that most of the allegations in HMFC’s objection “are false and all relate to pre petition period and do not involve present management.”\textsuperscript{888} It charged that any “lack of profitability of this Debtor to date can be traced to the ‘bad

\textsuperscript{882} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion for Rule 2004 Examination (Dkt. 154) at 1 (Dec. 20, 2006).

\textsuperscript{883} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order for Rule 2004 Examination (Dkt. 156) at 1 (Dec. 21, 2006).

\textsuperscript{884} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Minutes of Hearing Held (Docket Entry) at 24 (Dec. 19, 2006).

\textsuperscript{885} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Allowing Use of Cash Collateral Through Jan. 31, 2007 (Dkt. 159) (Dec. 27, 2006). Specifically, Mr. Cornelison testified that Mr. Gutierrez did not transfer all of his interest to his wife; he transferred only two percent of his interest. \textit{Id}.

\textsuperscript{886} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Minutes of Hearing Held (Docket Entry) at 24 (Dec. 19, 2006).

\textsuperscript{887} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Reply to Hyundai Motor Finance’s Objection to the Debtor’s Continued Use of Cash Collateral (Dkt. 155) (Dec. 20, 2006).

\textsuperscript{888} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Reply to Hyundai Motor Finance’s Objection to the Debtor’s Continued Use of Cash Collateral (Dkt. 155) at 2 (Dec. 20, 2006).
faith’ of Hyundai and actions by Hyundai” and that “[t]he damage done to the Debtor’s D.I.P. operations by Hyundai by these continued resistances has been intentional on its part.” It claimed that HMFC was still over-secured by $1,216,716.01. It called HMFC’s allegations about the wholesale-sales to Incredible Chevrolet a “grab at straws.” It referred to HMFC’s claim that the franchise was not worth $800,000 as “bogus.” It claimed that Incredible Auto had given a list of unpaid liens to HMFC and the other creditors and noted that “[t]he sinister hand s [sic] of Hyundai certainly played a big part in this [having unpaid liens].” It denied any phantom flooring and that the titles were falsified. It denied all but one of HMFC’s remaining allegations, and it

889 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Reply to Hyundai Motor Finance’s Objection to the Debtor’s Continued Use of Cash Collateral (Dkt. 155) at 2 (Dec. 20, 2006).

890 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Reply to Hyundai Motor Finance’s Objection to the Debtor’s Continued Use of Cash Collateral (Dkt. 155) at 2 (Dec. 20, 2006).


892 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Reply to Hyundai Motor Finance’s Objection to the Debtor’s Continued Use of Cash Collateral (Dkt. 155) at 2 (Dec. 20, 2006). Note, however, that it was this type of transaction that the judge was concerned about. See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Dec. 5, 2006 (Dkt. 428) at 129 (Apr. 13, 2009).

893 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Reply to Hyundai Motor Finance’s Objection to the Debtor’s Continued Use of Cash Collateral (Dkt. 155) at 6 (Dec. 20, 2006).

894 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Reply to Hyundai Motor Finance’s Objection to the Debtor’s Continued Use of Cash Collateral (Dkt. 155) at 8 (Dec. 20, 2006).

requested that its use of cash collateral be extended through February because “[t]he
Debtor will sell the Franchise, but can’t do so without continuing Use of Cash Collateral.”

v. The Court’s Decision: Use Cash Collateral Until January 31, 2007

Two days after the hearing and one day after Incredible Auto filed its reply, “the Court [found] the decision on Debtor’s motion to extend the cash collateral agreement to be a close one. The Court [ ] extend[ed] the cash collateral agreement until January 31, 2007, and further require[ed] Debtor to file a motion to extend such cash collateral agreement into February 2007.” This order contained the same provisions as its December 8th order allowing the use of cash collateral through December 21st, except that (1) the dates changed, (2) the provision regarding Incredible Auto’s payment of $99,000 to HMFC was eliminated, and (3) the provision regarding the auto action cars was removed.

The fact that the court extended Incredible Auto’s use of cash collateral for one month rather than the two it requested indicates that it was still concerned about the company’s management and wanted to keep it on a very short leash. At this point, it likely realized that the section 363 sale was imminent or highly likely and wanted to preserve as much of Incredible Auto’s going concern value as possible. Therefore, it

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896 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Reply to Hyundai Motor Finance’s Objection to the Debtor’s Continued Use of Cash Collateral (Dkt. 155) at 13 (Dec. 20, 2006) (capitalization in original).

897 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Allowing Use of Cash Collateral Through Jan. 31, 2007 (Dkt. 159) at 3 (Dec. 21, 2006).

properly kept Incredible Auto’s use of cash collateral limited and under its strict oversight.


i. Incredible Auto’s Motion

As instructed, Incredible Auto filed a motion to continue its use of cash collateral through February. \(^{899}\) Incredible Auto stated that (1) it had already filed a budget for February and March prior to the motion, (2) “[had] radically cut its staff and operating costs based on its Liquidation Plan and its pending sale and liquidation of assets,” and (3) “Normal Debtor operations [were] a necessity to keep the Kia Franchise intact and to preserve the value of the Dealership assets.” \(^{900}\) It requested to use the cash collateral at least through the month of February. \(^{901}\)

ii. The Hearing

At the hearing on January 23, 2007, the parties agreed to allow Incredible Auto to use the cash collateral in accordance with the budget it submitted with its motion. \(^{902}\) The court’s order contained nearly the same provisions as its prior order allowing use of cash collateral through January 2007, except that this order also allowed Incredible Auto to

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\(^{899}\) See *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Debtor’s Emergency Motion for an Order Continuing the Debtor’s Use of Cash Collateral (Dkt. 232) (Jan. 22, 2007).

\(^{900}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Debtor’s Emergency Motion for an Order Continuing the Debtor’s Use of Cash Collateral (Dkt. 232) at 2 (Jan. 22, 2007).

\(^{901}\) See *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Debtor’s Emergency Motion for an Order Continuing the Debtor’s Use of Cash Collateral (Dkt. 232) at 2 (Jan. 22, 2007).

\(^{902}\) See *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 241) at 3 (Jan. 24, 2007).
transfer money into its DIP account to cover expenses listed on its revised February budget and to pay its rent to its landlord.903

**h. Use of Cash Collateral Through Conversion**

By the end of February, the court had approved the sale of Incredible Auto to Rimrock Chrysler, Inc. (“Rimrock”).904 But, Incredible Auto needed funds to continue operations until the consummation of the sale. The sale could have been several weeks away because the sale was contingent upon KIA’s approval, and KIA would likely move to continue the next hearing until March 20, 2007.905 Incredible Auto stated that HMFC would consent and asked the court to allow it to use the cash collateral until either March 15, 2007, or March 20, 2007.906 It filed a budget for expenses through both March 15th and 20th and submitted the budget within four days of the motion.907

With no opposition filed, the court granted Incredible Auto the right to use the cash collateral as budgeted through March 20, 2007.908 The terms of use were substantively identical to the provisions under February’s cash collateral order.909

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903 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 241) at 4-9 (Jan. 25, 2007).

904 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Extend Limited Cash Collateral Usage (Dkt. 270) at 1 (Feb. 16, 2007).

905 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Extend Limited Cash Collateral Usage (Dkt. 270) at 2 (Feb. 16, 2007).

906 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Extend Limited Cash Collateral Usage (Dkt. 270) at 2 (Feb. 16, 2007).

907 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Revised Budget (Dkt. 277) (Feb. 20, 2007).


909 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Allowing Use of Cash Collateral Through Mar. 20, 1007 (Dkt. 303) at 1-6 (Mar. 5, 2007).
The cash collateral issue did not surface again because most of Incredible Auto’s assets, including the KIA franchise, were sold on March 26, 2007, and the case was converted to a Chapter 7 on April 10, 2007.

The cash collateral hearings consumed a considerable amount of the court’s, Incredible Auto’s, and the creditors’ time and resources. The dispute regarding Incredible Auto’s use of cash collateral spanned nearly the entire course of the Chapter 11 case. It was not an issue that was decided in a single hearing but required multiple hearings, at least one a month. However, under the facts of the case, this issue probably could not have been resolved any differently.

The court essentially was faced with three options. It could have granted Incredible Auto’s initial emergency motion allowing it carte blanche access to and use of the cash collateral. It could have granted HMFC’s motion and prohibited Incredible Auto from using the cash collateral at all. Or, it could have proceeded as it did attempting to accommodate the needs and interests of both Incredible Auto and HMFC.

If the court had chosen the first option, Incredible Auto’s management would have likely continued to engage in questionable and outright fraudulent business practices thereby irreparably injuring the estate. If the court had chosen the second option, the Chapter 11 case would have had to convert to a Chapter 7 case in November because Incredible Auto would have been unable to remain a going concern at all. Had the case been converted in November, it is likely that HMFC would have received less from the sale of Incredible Auto’s assets in a liquidation sale than it later received in the section

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910 See infra page 184 and following for a discussion of the section 363 sale.

911 See infra page 223 and following for a discussion of the conversion to Chapter 7.
363 sale to Rimrock. Plus, there would probably have been more administrative expenses connected with the liquidation sale.

By choosing the third option, the court walked a fine, but necessary, line between keeping Incredible Auto running and protecting HMFC’s interest. It also provided some of the other creditors, such as South Seattle, Auto Auction, and Steve’s Auto another forum in which to assert their interests so that their claims to the vehicles and their proceeds were not subsumed by HMFC’s much larger claim to the collateral. In the beginning, while Incredible Auto and HMFC were engaged in their most heated dispute, the court actively protected the interests of some of the minor third parties by allowing the use of cash collateral to pay employees’ salaries and maintain insurance on the vehicles. In sum, the court probably made the best of a difficult and complicated situation giving Incredible Auto a chance under Chapter 11 without completely sacrificing HMFC’s interest.

E. JUST MAKE UP YOUR MIND: EXECUTORY CONTRACTS & UNEXPIRED LEASES

1. EXECUTORY CONTRACTS: FIRST ADVANTAGE CREDCO

   a. Pre-Bankruptcy Relationship with Incredible Auto

In April 2005, Incredible Auto contracted with First-Advantage-Credco (“Credco”).\(^ {912} \) Credco was a credit reporting company\(^ {913} \) that provided consumer credit reports about Incredible Auto’s customers and potential customers.\(^ {914} \) By the time

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\(^ {912} \) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 3 (Jan. 2, 2007).

\(^ {913} \) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 2 (Jan. 2, 2007).
Incredible Auto filed for bankruptcy, it owed Credco $9,041.62, and the contract was in default. However, Incredible Auto continued to order Credco’s credit reports post-petition, and Credco continued to perform because it believed the automatic stay prevented it from terminating the contract or collecting the amount it was owed both pre- and post-petition.

In its bankruptcy schedules, Incredible Auto classified the Credco contract, not as an executory contract, but only as an unsecured nonpriority claim implying that either it or Credco no longer had material, unperformed duties on the petition date. It also valued Credco’s unsecured claim at $6,319.00 rather than the $9,041.62 that Credco believed it was owed pre-petition.

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914 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 3 (Jan. 2, 2007).

915 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 4 (Jan. 2, 2007).

916 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 4 (Jan. 2, 2007).

917 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 4 (Jan. 2, 2007).

918 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 4 (Jan. 2, 2007).

919 See *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedules and Statement of Affairs (Dkt. 54) at Schedule G (Nov. 12, 2006).

920 See *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedules and Statement of Affairs (Dkt. 54) at Schedule F (Nov. 12, 2006).

921 See *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedules and Statement of Affairs (Dkt. 54) at Schedule F (Nov. 12, 2006).
b. Credco’s Motion to Compel Assumption or Rejection

Credco was not pleased to have had its contract with Incredible Auto classified as an unsecured nonpriority claim—especially because Incredible Auto was continuing to use Credco’s services post-petition.\(^{923}\) Therefore, it moved the court to require Incredible Auto “to assume or reject [the contract] immediately . . . as an executory contract.”\(^{924}\) It also moved, in the alternative, that the court (1) terminate the automatic stay so that Credco could terminate the contract,\(^{925}\) (2) prohibit Incredible Auto from exercising its rights under the contract,\(^{926}\) or (3) condition its use of Credco’s services on Incredible Auto’s providing adequate assurance of payment of both the pre-petition and the post-petition fees owed to Credco.\(^{927}\)

Credo argued that it was “prejudiced by [Incredible Auto’s] delay in deciding whether to assume or reject the [contract]” because it continued to lose money each time Incredible Auto used its services post-petition without any payment or adequate

\(^{922}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 4 (Jan. 2, 2007).

\(^{923}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 2, 5-6 (Jan. 2, 2007).

\(^{924}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 1-2 (Jan. 2, 2007).

\(^{925}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 1-2 (Jan. 2, 2007).

\(^{926}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 1-2 (Jan. 2, 2007).

\(^{927}\) In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 1-2 (Jan. 2, 2007).
assurance of payment.\textsuperscript{928} Therefore, it wanted the court to order Incredible Auto to decide whether to assume or reject the contract immediately.\textsuperscript{929} If Incredible Auto assumed the contract, Credco wanted Incredible Auto to cure all of the unpaid pre-and post-petition fees, to pay for its attorney’s fees, and to provide adequate assurance of future performance.\textsuperscript{930} Credco also wanted the court to declare that the fees for Credco’s post-petition performance were a “necessary and reasonable administrative expense for [Incredible Auto’s] continuing use of Credco’s services.”\textsuperscript{931}

c. The Hearing
On January 23, 2007, the court held a hearing on Credco’s motion.\textsuperscript{932} At the hearing, the court decided to allow Incredible Auto to reject the contract\textsuperscript{933} with Credco.\textsuperscript{934} Incredible Auto did not object to Credco’s motion\textsuperscript{935} but insisted that it “had

\textsuperscript{928}\textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 5 (Jan. 2, 2007).

\textsuperscript{929}\textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 5 (Jan. 2, 2007).

\textsuperscript{930}\textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 6 (Jan. 2, 2007).

\textsuperscript{931}\textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of First Advantage-Credco to Compel Debtor-in-Possession to Assume or Reject Executory Contract (Dkt. 168) at 6 (Jan. 2, 2007).

\textsuperscript{932}\textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Minutes of Hearing Held (Docket Entry) at 37 (Jan. 23, 2007).

\textsuperscript{933} The minutes of the hearing state that the “court . . . allow[ed] Debtor to reject lease with First Advantage Credco.” \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Minutes of Hearing Held (Docket Entry) at 37 (Jan. 23, 2007). Because we do not have the transcript of this hearing, there is no way to know why the court characterized this agreement as a lease rather than a contract.

\textsuperscript{934}\textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Minutes of Hearing Held (Docket Entry) at 37 (Jan. 23, 2007).
not used . . . Credco’s services since [Incredible Auto’s] bankruptcy petition was filed.” It also asserted that the contract was neither beneficial nor necessary to Incredible Auto’s bankruptcy case. Therefore, the court granted Credco’s motion and allowed Incredible Auto to reject the contract. It further authorized Credco to “immediately terminate any service it may provide to [Incredible], . . . and file an administrative claim for any damages it believes it incurred between [the date of the petition and the date of the hearing]. In its amended disclosure statement, Incredible Auto had no estimate of administrative expense claims and did not identify Credco as the potential holder of an administrative expense claim. Thus, it is presumed that Credco did not file proof of an administrative expense for damages incurred during the specified period of time but settled for an unsecured claim for the unpaid pre-petition fees.

Interestingly, the court never analyzed, and Incredible Auto never disputed, whether or not the Credco contract was actually an executory contract. Credco did not file a full copy of its contract with its motion, but it appears from the excerpt attached that

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935 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 241) at 2 (Jan. 24, 2007).
936 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 241) at 2 (Jan. 24, 2007).
937 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 241) at 2 (Jan. 24, 2007).
938 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 241) at 2 (Jan. 24, 2007).
939 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 241) at 2 (Jan. 24, 2007).
940 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Amended Disclosure Statement (Dkt. 329) at 7 (Mar. 19, 2007).
941 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedules and Statement of Affairs (Dkt. 54) at Schedule F (Nov. 12, 2006).
Credco provided credit reports upon request of Incredible Auto but had no continuing obligation to provide credit reports except as requested by Incredible Auto. It is unclear whether the contract required Credco to perform for a period of time or whether Credco merely had to perform on a request-by-request basis. Also, it appears that Incredible Auto was obligated to pay Credco only for the credit reports it ordered and had no further obligation to Credco. If these assumptions are correct, then the Credco contract would not have been an executory contract because, by the petition date, there would not have been unperformed material obligations on both sides.

If the Credco contract was not an executory contract, then Credco should not have been allowed to move for Incredible Auto to assume or reject the contract. However, the result might have been the same as Credco would have been entitled to an administrative expense for the services it provided post-petition pursuant to section 503(b)(1)(A) of the Bankruptcy Code. Therefore, Credco’s motion may have simply been more of a comfort order so that Credco could rest assured that it could stop providing services to Incredible Auto without violating the automatic stay.

2. Unexpired Leases: Equipment & Real Property

a. Equipment Leases: G.E. Capital, Dolphin Capital, & ADP Commercial

Incredible Auto listed three unexpired leases on its initial schedules. However, its Chapter 11 plan addressed the treatment of four leases in the bankruptcy case. The lessors identified in the plan were as follows: G.E. Capital, with a lease for a copy

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942 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedules and Statement of Affairs (Dkt. 54) at Schedule G (Nov. 12, 2006). The lessors were Dolphin Capital Corp., ADP Commercial Leasing, and the Landlord of the King Avenue real property. See id.

943 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 6-7 (Jan. 18, 2007).
machine,\textsuperscript{944} Dolphin Capital, with a lease for computer equipment,\textsuperscript{945} ADP Commercial Leasing, with a lease of a computer system,\textsuperscript{946} and King Ave. Properties, with a lease of the real property on which Incredible Auto was located.\textsuperscript{947} Under the Chapter 11 plan, G.E. Capital’s and Dolphin Capital’s leases were rejected, and they were classified as unsecured creditors.\textsuperscript{948} Incredible Auto assumed\textsuperscript{949} the lease with ADP Commercial Leasing allowing Incredible Auto to continue to use the computer system until the case was closed.\textsuperscript{950} None of the equipment lessors filed any motions or other documents in the bankruptcy case. However, the treatment of the King Ave. Properties lease was more complex.

\textit{b. Real Property Lease: King Ave. Properties}

\textit{i. The Landlord & its Pre-Bankruptcy Relationship with Incredible Auto}

On March 15, 1996, Pierce Buildings entered into a real property lease agreement with Incredible Auto.\textsuperscript{951} In February 2002, Pierce Buildings assigned its interest in the

\textsuperscript{944} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 6 (Jan. 18, 2007).
\textsuperscript{945} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 7 (Jan. 18, 2007).
\textsuperscript{946} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 7 (Jan. 18, 2007).
\textsuperscript{947} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 6 (Jan. 18, 2007).
\textsuperscript{948} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 6-7 (Jan. 18, 2007).
\textsuperscript{949} The Chapter 11 Plan says that the lease “shall be affirmed” rather than assumed, but this did not seem to matter in the case. In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 7 (Jan. 18, 2007).
\textsuperscript{950} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 7 (Jan. 18, 2007).
lease to Mr. and Mrs. Ernie Dutton, Livingston Marble & Granite, Inc., Mr. and Mrs. Scalise, and Mr. and Mrs. Strong (collectively, the “Landlord”). In June 2003, when Mr. Gutierrez owned Incredible Auto, Incredible Auto exercised its option to renew the lease. When the bankruptcy case commenced, the lease was to expire on March 15, 2011, but Incredible Auto had options to extend it until March 15, 2016. However, Incredible Auto owed $42,981.00 in unpaid pre-petition rent.

ii. Pre-Conversion Plan: Assume & Assign

On December 16, 2006, Incredible Auto moved to assume the lease pursuant to section 365 of the Bankruptcy Code. Incredible Auto was planning to sell the KIA

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951 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Lease Agreement (Dkt. 145-1) at 1 (Dec. 16, 2006). At the time, Pierce Buildings was a general partnership that was leasing the real property from Lyndon and JoAnn Coburn with the option to purchase. *Id.* at 1. Also at the time, Incredible Auto was owned and operated by Tom Woolery not Mr. Gutierrez. *See id.* at 2.; *see also In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Disclosure Statement (Dkt. 329) at 10 (Mar. 19, 2007).

952 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Lease Agreement, Assignment of Lease (Dkt. 145-1) at 1 (Dec. 16, 2006). Ernie Dutton was the majority individual owner with 40% interest in the Lease. *Id.* at 1. Livingstone Marble & Granite, Inc. also owned 40% interest. *Id.* at 1. The Scalises and the Strongs owned 10% interest respectively. *Id.* at 1.


954 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Lease Agreement, Exercise of Option to Extend Lease (Dkt. 145-1) at 1 (Dec. 16, 2006); *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Lease Agreement (Dkt. 145-1) at 3 (Dec. 16, 2006).

955 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Affirm Lease of Premises (Dkt. 145) at ¶ 4 (Dec. 16, 2006).

956 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Lease Agreement (Dkt.145-1) at 3 (Dec. 16, 2006); *see also In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings Nov. 6, 2006, Testimony of Nick Gutierrez (Dkt. 427) at 25 (Apr. 3, 2009).

957 *See In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Schedules and Statement of Affairs (Dkt. 54) at Schedule F (Nov. 12, 2006); *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Affirm Lease of Premises (Dkt. 145) at ¶ 2 (Dec. 16, 2006).

958 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Affirm Lease of Premises (Dkt. 145) (Dec. 16, 2006).
franchise\textsuperscript{959} and wanted to assume the lease so that it could assign it to the future buyer of the KIA franchise.\textsuperscript{960} Incredible Auto had also secured the Landlord’s support for its motion to assume.\textsuperscript{961} No party objected to the motion,\textsuperscript{962} and the court granted it on January 4, 2007.\textsuperscript{963}

iii. The Problem: Who Gets the Fixtures?

As the sale of the KIA franchise progressed,\textsuperscript{964} Incredible Auto, the Landlord, and HMFC began to disagree about the disposition of the fixtures installed on the property.\textsuperscript{965} Eight days after giving Incredible Auto permission to assume the lease, the court had granted HMFC relief from the automatic stay so that HMFC could foreclose on its

\textsuperscript{959} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Affirm Lease of Premises (Dkt. 145) at ¶ 5 (Dec. 16, 2006).

\textsuperscript{960} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Affirm Lease of Premises (Dkt. 145) at ¶¶ 6-7 (Dec. 16, 2006).

\textsuperscript{961} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Affirm Lease of Premises (Dkt. 145) at ¶ 5 (Dec. 16, 2006).

\textsuperscript{962} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 171) (Jan. 4, 2007).

\textsuperscript{963} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 171) (Jan. 4, 2007). In spite of the fact that Incredible Auto had assumed the lease, it still classified the unpaid pre-petition rent as an unsecured claim rather than an administrative expense in its initial disclosure statement. \textit{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Disclosure Statement (Dkt. 224) at 6 (Jan. 21, 2007).} The Landlord vigorously objected to this characterization, \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to Disclosure Statement (Dkt. 279) (Feb. 20, 2007),} and Incredible Auto amended its disclosure statement to recharacterize the Landlord’s claim for unpaid pre-petition rent as an administrative expense. \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Amended Disclosure Statement (Dkt. 329) at 8 (Mar. 19, 2007).} The Landlord began receiving post-petition rent payments in February 2007, pursuant to the court’s January 24, 2007 order. \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation re: Lease and Motion for Approval (Dkt. 330) at 2 (Mar. 19, 2007).}

\textsuperscript{964} The sale of the KIA franchise is discussed \textit{infra} beginning on page 184.

\textsuperscript{965} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation re: Lease and Motion for Approval (Dkt. 330) at 2 (Mar. 19, 2007).
collateral, including Incredible Auto’s equipment and fixtures. To facilitate this order, Incredible Auto scheduled an auction on April 15, 2007, to sell all of the furniture, fixtures, and equipment that were on the property subject to the lease. The dispute involved which fixtures were “removable fixtures,” which the Landlord was entitled to keep as part of the property, or “trade fixtures,” which Incredible Auto was entitled to remove and sell to satisfy its debt to HMFC.

On March 19, 2007, Incredible Auto, HMFC, and the Landlord reached an agreement and moved the court to approve a stipulation regarding the fixtures. The parties designated a long list of items, deemed them “removable fixtures,” and agreed that the Landlord would pay Incredible Auto $15,000 for them. Incredible Auto and HMFC agreed that they would provide the Landlord with whatever documentation was necessary for the Landlord to have clear title to each of the “removable fixtures,” releasing HMFC’s lien on them. Incredible Auto was able to remove and auction the

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966 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation re: Lease and Motion for Approval (Dkt. 330) at 2 (Mar. 19, 2007); see also In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 14 (Mar. 19, 2007).

967 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation re: Lease and Motion for Approval (Dkt. 330) at 2 (Mar. 19, 2007).

968 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation re: Lease and Motion for Approval (Dkt. 330) at 2 (Mar. 19, 2007).

969 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation re: Lease and Motion for Approval (Dkt. 330) at 1 (Mar. 19, 2007).

970 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation re: Lease and Motion for Approval (Dkt. 330) at 3 (Mar. 19, 2007).

971 A “removable fixture” was an item of personal property, affixed to the real property, that became property of the Landlord once the Lessee vacated the property. In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation re: Lease and Motion for Approval (Dkt. 330) at 3 (Mar. 19, 2007).

972 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation re: Lease and Motion for Approval (Dkt. 330) at 3 (Mar. 19, 2007).
other fixtures at issue. Finally, Incredible Auto agreed to completely clean up, repair any damage to, and remove all sold property from the property by April 15, 2007. The court approved the stipulation on March 20, 2007.

iv. Post-Conversion Plan: Reject

However, the status of the lease was not settled. Less than a month after the court approved the stipulation, the court granted the U.S. Trustee’s motion to convert the case to a Chapter 7 case. The day after Incredible Auto’s auction, Incredible Auto, the Landlord, and the Chapter 7 Trustee (“Ch. 7 Trustee”) moved the court to approve a new stipulation. By this date, the KIA franchise had been sold, and the sale did not include the buyer’s assumption of the lease. Also, Incredible Auto was no longer using

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973 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation re: Lease and Motion for Approval (Dkt. 330) at 3 (Mar. 19, 2007).

974 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation re: Lease and Motion for Approval (Dkt. 330) at 4 (Mar. 19, 2007). The parties also agreed that Incredible Auto would pay the Landlord $10,000 in rent through April 15, 2007, and that HMFC would facilitate this by releasing cash collateral. Id. at 2.

975 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Approving Stipulation Between Debtor, Hyundai, and Lessors (Dkt. 336) at 1 (Mar. 20, 2007). On March 20, 2007, the Landlord had filed a so called “scream or die” motion to approve the Stipulation without notice or a hearing. Id. at 1. The court determined that the Stipulation was “filed for good cause” and was “in the best interests of the Debtor and the Bankruptcy Estate.” Id. at 1. Therefore, notice and hearing was not necessary and the Stipulation was approved. Id. at 1. The order did provide that “any party in interest [had] the right to object, request a hearing, and schedule a hearing to reconsider the issuance of the [o]rder” by March 30, 2007. Id. at 2.

976 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Granting Motion Convert Case to Chapter 7 (Dkt. 354) (Apr. 10, 2007). Matters relating to the conversion to Chapter 7 are discussed infra beginning on page 223.

977 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation for Rejection of Lease and Motion for Approval (Dkt. 360) (Apr.16, 2007).

978 The §363 sale of the Kia Franchise and Incredible Auto’s other assets are discussed infra beginning on page 184.

979 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Asset Purchase Agreement (Dkt. 176-1) at 3 (Jan. 7, 2007.)
the property for any purpose. Accordingly, the parties stipulated (1) that the Ch. 7 Trustee would reject the lease thereby terminating all of Incredible Auto’s interest under the lease and (2) that the Landlord would be allowed an administrative expense claim for the lease and any related damages. The court approved the rejection stipulation on May 1, 2007, and terminated the lease. Because the parties who had an interest in the lease or the leased property reached agreements regarding its disposition, the court really had little to do other than approve stipulations. Considering the nature of the cash collateral dispute, the court likely had other things to do than inject itself into an amicable lease negotiation.

Pursuant to section 503(b)(1) and (b)(7) of the Bankruptcy Code, the Landlord applied for administrative expense for the unpaid post-petition rent incurred prior to the rejection of the lease ($42,636.48) and for “monetary obligations for [the] rejected lease ($103,327.08).” The court awarded the Landlord $145,963.76 as an

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980 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation for Rejection of Lease and Motion for Approval (Dkt. 360) at 2 (Apr. 16, 2007).
981 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation for Rejection of Lease and Motion for Approval (Dkt. 360) (Apr. 16, 2007).
982 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation for Rejection of Lease and Motion for Approval (Dkt. 360) (Apr. 16, 2007).
983 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Approving Stipulation for Rejection of Lease (Dkt. 372) (May 1, 2007).
985 When a nonresidential real property lease is assumed and then rejected, section 503(b)(7) provides an administrative expense for two years worth of rent from the date the lease is rejected or the Lessee turns the premises over to the Landlord. 11 U.S.C. § 503(b)(7) (2009).
986 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Application for Administrative Expense (Dkt. 407) at 1-2 (Aug. 23, 2007). The Landlord had already filed a proof of claim for the asserted Administrative Expenses. Id. at 2.
administrative expense on September 7, 2007. This decision appeared to be a straightforward application of section 503 as it pertained to expenses incurred under the Lease.

F. ADVENTURES IN THE FREE MARKET: LIQUIDATION OF INCREDIBLE AUTO’S ASSETS

I. EMPLOYMENT OF PROFESSIONALS: JAPPY DICKSON

Early in the case, Incredible Auto needed to value its KIA franchise for two purposes. First, it needed to use cash collateral to sustain its business operations throughout the reorganization, and Incredible Auto offered the value of the KIA franchise as evidence that HMFC was adequately protected by a substantial equity cushion. Second, once reorganization became unrealistic, it needed to liquidate its assets, including the KIA franchise.

Accordingly, Incredible Auto contacted Jappy Dickson, the general manager and owner of Southwestern Brokerage Company (“Southwestern”) based in Arlington, Texas, to value the KIA franchise. Southwestern specialized in the purchase and

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987 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 415) (Sept. 7, 2007).

988 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Motion to Use Cash Collateral (Dkt. 17) (Oct. 26, 2006).

989 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s First Motion to Use Cash Collateral (Dkt. 17) at ¶¶13-14 (Oct. 26, 2006). For further discussion of the cash collateral issues involved in this case, see supra beginning on page 129.

990 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 7 (Jan. 18, 2007).

991 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Jappy Dickson Resume, (Dkt. 110-3) (Dec. 4, 2006). Mr. Dickson was the 100% shareholder of Southwest Brokerage Co. In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Affidavit of Jappy Dickson in Support of Application [sic] Employ Broker (Dkt. 110-2) at ¶ 1 (Dec. 4, 2006).

992 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Exhibit 7, Letter from Jappy Dickson (Dkt. 43-7) (Nov. 5, 2006).
sale of automobile franchises, their assets, and real property. Mr. Dickson had over twelve years of experience as an automobile franchise broker and 42 years experience in the retail and wholesale automobile business. Incredible Auto learned of Mr. Dickson’s services through its attorney, William L. Needler, who had represented Mr. Dickson’s prior corporation in its Chapter 11 bankruptcy.

a. Southwestern’s Services to Incredible Auto

   i. Valuing Incredible Auto’s KIA Franchise

To value an automobile franchise, a broker would ordinarily value the assets, like cash, inventory, equipment, parts, accounts receivable, etc., then add a “blue sky value.” The blue sky value was an estimate of the profit that the franchise was likely to produce based on a number of factors such as the franchise’s goodwill, its location, the demand for its particular brand in the market, and the strength of competitors. At the time, the National Automobile Dealers Association calculated blue sky value based on a

993 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Exhibit 7, Letter from Jappy Dickson (Dkt. 43-7) (Nov. 5, 2006).

994 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Exhibit 7, Letter from Jappy Dickson (Dkt. 43-7) (Nov. 5, 2006).

995 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Affidavit of Jappy Dickson in Support of Application [sic] Employ Broker (Dkt. 110-2) at ¶¶ 4, 6 (Dec. 4, 2006). Mr. Needler seems to have been in the habit of recommending Mr. Dickson’s services to his bankruptcy clients. At the time that Mr. Dickson was under contract to sell the Incredible Auto dealership, he had another brokerage contract to sell the assets of New Mexico automobile dealership which was also in bankruptcy. Id. at ¶ 6. Mr. Needler was representing the New Mexico dealership in its bankruptcy proceedings. Id. at ¶ 6.


formula which accounted for net profits, owner compensation benefits and interest payments, and dealer reserve for the three most recent years.\footnote{998}{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Exhibit 7, NADA Recommendation to Value Auto Franchise Blue Sky Value (Dkt. 43-7) (Nov. 5, 2006).}

Mr. Dickson assigned a blue sky value of $800,000 for the Incredible Auto KIA franchise.\footnote{999}{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Exhibit 7, Letter from Jappy Dickson (Dkt. 43-7) (Nov. 5, 2006).} He reached the valuation based on the strength of the KIA product line,\footnote{1000}{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Exhibit 7, Letter from Jappy Dickson (Dkt. 43-7) (Nov. 5, 2006).} the market for KIA vehicles in Incredible Auto’s location,\footnote{1001}{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Exhibit 7, Letter from Jappy Dickson (Dkt. 43-7) (Nov. 5, 2006).} the KIA warranty,\footnote{1002}{Id.} and the lack of proximity of other KIA dealers.\footnote{1003}{Id.} Mr. Dickson had visited Incredible Auto “at least two times” and had also examined its assets.\footnote{1004}{Id.} Incredible Auto valued its other assets at over $2.7 million.\footnote{1005}{Id.}
ii. Selling Incredible Auto’s Assets

After it became apparent that Incredible Auto’s assets would have to be liquidated, \(^{1006}\) Incredible Auto listed the auto dealership with Southwestern for sale at $800,000 \(^{1007}\) and applied for the court’s approval of the Southwestern brokerage contract pursuant to section 327(a) of the Bankruptcy Code. \(^{1008}\) The initial contract contained a number of irregularities. It was dated March 21, 2006, five months before Incredible Auto filed for bankruptcy and over eight months before Incredible Auto applied for the court to approve Southwestern’s employment. \(^{1009}\) It contained an agreement by Incredible Auto to sell the dealership for “$25,000 for the Blue Sky/Good Will plus book value for the remainder of the assets . . . ,” \(^{1010}\) but the application to employ Southwestern stated that Incredible Auto was listed for $800,000. \(^{1011}\) It provided that Southwestern would receive a finder’s fee of $100,000 at the closing of the sale regardless of whether it

\(^{1006}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 5-6 (Jan. 18, 2007).

\(^{1007}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Debtor’s Application to Employ Southwest Brokerage Company (Broker) of Arlington, Texas (Dkt. 110) at ¶ 4 (Dec. 4, 2006).

\(^{1008}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Debtor’s Application to Employ Southwest Brokerage Company (Broker) of Arlington, Texas (Dkt. 110) at ¶ 4 (Dec. 4, 2006). Section 327(a) provides that the debtor in possession, “with the court’s approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee’s duties under this title.” 11 U.S.C. § 327(a) (2009). Interestingly, Incredible Auto filed its application at 10:00 p.m. the night before it had an important hearing regarding the use of cash collateral. *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Hearing December 5, 2006, Testimony of Ken Cornelison (Dkt. 428) at 132 (Apr. 3, 2009).

\(^{1009}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Debtor’s Application to Employ Southwest Brokerage Company (Broker) of Arlington, Texas (Dkt. 110) at ¶ 1, Exhibit 1 (Dec. 4, 2006).

\(^{1010}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Debtor’s Application to Employ Southwest Brokerage Company (Broker) of Arlington, Texas (Dkt. 110) at ¶ 1, Exhibit 1 (Dec. 4, 2006).

\(^{1011}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Debtor’s Application to Employ Southwest Brokerage Company (Broker) of Arlington, Texas (Dkt. 110) at ¶ 4 (Dec. 4, 2006).
actually found the buyer,"\textsuperscript{1012} but the application to employ Southwestern stated that Southwestern would receive a $25,000 commission “on those assets actually sold."\textsuperscript{1013} The contract also provided that Southwestern would receive ten percent of its fee up front, which according to the contract date, would have been paid pre-petition.\textsuperscript{1014}

\textit{b. HMFC’s Objection}

HMFC objected to Incredible Auto’s application to employ Southwestern asserting that it was “so unreasonably ambiguous and confusing that HMFC cannot reasonably determine the terms of the agreement."\textsuperscript{1015} HMFC’s objection noted the discrepancies described in the preceding paragraph\textsuperscript{1016} and asked that the court clarify that the minimum sale price for Incredible Auto was not $25,000 and that the broker’s fee was $25,000 reduced by any amount that Incredible Auto had paid pre-petition.\textsuperscript{1017} HMFC clarified that it was not opposed to Incredible Auto’s using Southwestern’s services, but that it needed the terms to be very clear.\textsuperscript{1018}

\textsuperscript{1012} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Brokerage Contract (Dkt. 110-1) at ¶¶ 4, 8 (Dec. 4, 2006).

\textsuperscript{1013} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Application to Employ Southwest Brokerage Company (Broker) of Arlington, Texas (Dkt. 110) at ¶ 8 (Dec. 4, 2006).

\textsuperscript{1014} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Brokerage Contract (Dkt. 110-1) at ¶ 5 (Dec. 4, 2006).

\textsuperscript{1015} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Application to Employ Professional (Dkt. 140) at 1 (Dec. 14, 2006).

\textsuperscript{1016} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Application to Employ Professional (Dkt. 140) at 2 (Dec. 14, 2006).

\textsuperscript{1017} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Application to Employ Professional (Dkt. 140) at 2 (Dec. 14, 2006).

\textsuperscript{1018} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Objection to Debtor’s Application to Employ Professional (Dkt. 140) at 3 (Dec. 14, 2006).
Incredible Auto acceded to HMFC’s demand, filing an amended application to employ Southwestern.\(^{1019}\) The amended application clarified that the original contract was a pre-petition contract that was superseded by a new brokerage contract.\(^{1020}\) Under the terms of the new contract, Incredible Auto was listed for sale at $800,000,\(^{1021}\) and Southwestern was to receive a flat fee of $25,000 upon the closing of a successful sale.\(^{1022}\) The application also noted that an offer to purchase Incredible Auto was already pending before the court.\(^{1023}\) With no objection from HMFC, the U.S. Trustee, or any other interested party, the court granted the application to employ Southwestern.\(^{1024}\) However, the court conditioned its approval on the success of a pending sale.\(^{1025}\)
Southwestern would only receive its $25,000 fee if the sale closed; if there was no sale, then Southwestern could not obtain its fee from property of the estate. Accordingly, the court crafted a solution that benefited both Incredible Auto and its creditors. All of the parties involved wanted the sale to progress, but it would not benefit either Incredible Auto or its creditors if facilitating the sale consumed too much of the estate’s assets. By forcing Southwestern and Incredible Auto to clarify the terms of the contract and by capping Southwestern’s fee, the court rightfully provided Incredible Auto with the resources it needed to sell its assets while preserving as much of the estate as possible.

2. SECTION 363 SALE OF ASSETS TO RIMROCK

The offer to purchase Incredible Auto referenced in Incredible Auto’s amended application and the court’s subsequent order was an offer from Rimrock. Rimrock was a car dealership located across the street from Incredible Auto. Rimrock’s initial offer was $400,000 for Incredible Auto’s parts, equipment, signage, and the “blue sky”

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1026 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 295) at 2 (Feb. 28, 2007).

1027 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 295) at 2 (Feb. 28, 2007).

1028 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Asset Purchase Agreement (Dkt. 176-1) at 1 (Jan. 7, 2007).

value of the franchise.\textsuperscript{1030} Incredible Auto made a counter offer of $575,000,\textsuperscript{1031} and on December 29, 2006, the parties executed an asset purchase agreement (“Purchase Agreement”)\textsuperscript{1032} with the following terms.

\textit{a. Terms of the Sale}

Rimrock would purchase the KIA franchise for a “blue sky” value of $375,000.\textsuperscript{1033} It would also pay up to $50,000 for Incredible Auto’s inventory of vehicle parts valued at Incredible Auto’s actual cost,\textsuperscript{1034} $20,000 for the specialized tools and equipment used to service KIA vehicles,\textsuperscript{1035} $20,000 for the KIA signage and advertising materials,\textsuperscript{1036} and some unspecified amount for Incredible Auto’s used vehicle inventory whose value was to be designated by Rimrock and either accepted or rejected by Incredible Auto.\textsuperscript{1037} Finally, Rimrock agreed to assume Incredible Auto’s $12,000 liability under a promissory note payable to A & I Distributors (“A&I”),\textsuperscript{1038} to release

\begin{footnotesize}
\begin{enumerate}
\item \textit{In re} Incredible Auto, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings December 5, 2006, Testimony of Ken Cornelison (Dkt. 428) at 132-34 (Apr. 3, 2009).
\item \textit{In re} Incredible Auto, LLC, Case No. 06-60855, Bankr. D. Mont., Partial Transcript of Proceedings December 5, 2006, Testimony of Ken Cornelison (Dkt. 428) at 133 (Apr. 3, 2009).
\item \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Asset Purchase Agreement (Dkt. 176-1) at 1, 7 (Jan. 7, 2007).
\item \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Asset Purchase Agreement (Dkt. 176-1) at 2 (Jan. 7, 2007).
\item \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Asset Purchase Agreement (Dkt. 176-1) at 2 (Jan. 7, 2007).
\item \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Asset Purchase Agreement (Dkt. 176-1) at 2 (Jan. 7, 2007).
\item \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Asset Purchase Agreement (Dkt. 176-1) at 2 (Jan. 7, 2007). If Incredible Auto rejected Rimrock’s valuation of a particular vehicle, Incredible Auto had the right to keep the vehicle and sell it if it wished. \textit{Id.} at 2.
\end{enumerate}
\end{footnotesize}
Incredible Auto from any claim A&I might bring against Incredible Auto, and to pay the commission owed to Southwestern. The parties’ obligations under the contract were contingent upon the court’s approval and upon any subsequent, upset bids by third parties. However, if the court approved the contract, and a third party made a higher offer that Incredible Auto accepted, Rimrock was entitled to a $10,000 break-off fee.

Incredible Auto duly filed a motion to approve the contract with Rimrock pursuant to section 363 of the Bankruptcy Code. It also attached a copy of the Purchase Agreement and a notice that it wished to send to all of the auto dealers in Montana and all interested parties, hoping to solicit higher bids.

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1038 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Asset Purchase Agreement (Dkt. 176-1) at 2 (Jan. 7, 2007). A & I Distributors supplied oil to Incredible Auto. See *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Schedules and Statement of Affairs (Dkt. 54) at Schedule F (Nov. 12, 2006.)


1046 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Notice to All Creditors, Interested Parties and Other Bidders of the Sale of Assets (Dkt. 176-3) at 2 (Jan. 7, 2007). Incredible Auto subsequently placed an advertisement in Crains Automotive News, a national publication widely read by
b. Objections

i. HMFC’s Objection: Too Vague & Affects HMFC’s Secured Position

HMFC objected to Incredible Auto’s motion asserting that the Purchase Agreement’s standard for valuation of the used vehicle inventory was “vague” and would infringe upon HMFC’s security interest in those vehicles.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 353) at 2-3 (Apr. 10, 2007).} HMFC was walking a rather tight rope in this matter because it needed the assets sold in order to have any hope of being paid the debt it was owed.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Limited Objection to Debtor’s Motion to Sell Assets (Dkt. 201) at 2 (Jan. 16, 2007).} By this time, the court had granted HMFC relief from the automatic stay so it was entitled to seize the used vehicle inventory and Incredible Auto’s other assets and sell them to satisfy its debt.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Limited Objection to Debtor’s Motion to Sell Assets (Dkt. 201) at 2 (Jan. 16, 2007); see also In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 185) at 14 (Jan. 12, 2007).} HMFC certainly did not want Incredible Auto to be able to sell the used vehicles to Rimrock without having some say in their valuation.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Limited Objection to Debtor’s Motion to Sell Assets (Dkt. 201) at 2 (Jan. 16, 2007).} Therefore, while HMFC “urged” the court to “approve the proposed sale as quickly as possible,” it asked that the used vehicles be excluded from the sale or that it be allowed to approve the terms of their sale.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Limited Objection to Debtor’s Motion to Sell Assets (Dkt. 201) at 2 (Jan. 16, 2007).}
The next day, HMFC amended its objection adding two additional reasons why the court should not approve the Purchase Agreement.\textsuperscript{1052} First, HMFC objected to the provision requiring Rimrock to assume the $12,000 promissory note in favor of A&I.\textsuperscript{1053} It claimed that assumption of A&I’s note would elevate A&I, an unsecured creditor, up the priority ladder above the claims of HMFC or other secured creditors.\textsuperscript{1054} This would violate the basic priority structure of the Bankruptcy Code. Second, HMFC objected to the provision that Rimrock would pay Southwestern’s brokerage commission even though the court had not approved the employment of Southwestern or any broker.\textsuperscript{1055} HMFC reasoned that, if the buyer had to pay the broker’s commission, then the buyer would want to pay a lower purchase price for Incredible Auto’s assets.\textsuperscript{1056} This would reduce the funds available to pay Incredible Auto’s indebtedness to HMFC.\textsuperscript{1057}

\textbf{ii. KIA’s Objection: Does Not Provide for KIA’s Approval}

KIA also objected to Incredible Auto’s motion.\textsuperscript{1058} KIA was the franchisor which allowed Incredible Auto to own and operate its KIA dealership pursuant to the Kia Dealer

\textsuperscript{1052} \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Amended Limited Objection to Debtor’s Motion to Sell Assets (Dkt. 204) (Jan. 17, 2007).}

\textsuperscript{1053} \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Amended Limited Objection to Debtor’s Motion to Sell Assets (Dkt. 204) at 2 (Jan. 17, 2007).}

\textsuperscript{1054} \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Amended Limited Objection to Debtor’s Motion to Sell Assets (Dkt. 204) at 2 (Jan. 17, 2007).}

\textsuperscript{1055} \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Amended Limited Objection to Debtor’s Motion to Sell Assets (Dkt. 204) at 3 (Jan. 17, 2007).}

\textsuperscript{1056} \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Amended Limited Objection to Debtor’s Motion to Sell Assets (Dkt. 204) at 3 (Jan. 17, 2007).}

\textsuperscript{1057} \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Amended Limited Objection to Debtor’s Motion to Sell Assets (Dkt. 204) at 3 (Jan. 17, 2007).}

\textsuperscript{1058} \textit{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection of Kia Motors America, Inc. to Debtor’s Motion for Order Approving Contract for the Sale of Assets (Dkt. 203) (Jan. 17, 2007) [hereinafter KIA Objection].}
Sales and Services Agreement (“Franchise Agreement”) executed July 1, 1997. KIA objected to the part of the Purchase Agreement which purported to sell the “Kia Motor America franchise and all associated goodwill.” KIA asserted that, under the Franchise Agreement, Incredible Auto could not transfer its franchise without KIA’s consent. Also, Montana law prohibited the transfer of a car dealership or franchise without the manufacturer’s or franchisor’s prior consent. Furthermore, KIA argued that the Franchise Agreement was a personal services contract, as stated in the Franchise Agreement, and therefore could not be assumed by or assigned to any party other than Incredible Auto. Finally, KIA argued that Incredible Auto failed to provide KIA the “adequate assurance of future performance” by Rimrock required by section 365(f)(2)(B) of the Bankruptcy Code before a debtor could assume and assign an executory contract. Therefore, KIA asked the court to deny Incredible Auto’s motion or at least set a hearing when it could be heard on the matter.

1059 *In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., KIA Objection (Dkt. 203) at ¶ 1 (Jan. 17, 2007).*

1060 *In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., KIA Objection (Dkt. 203) at ¶ 3 (Jan. 17, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Asset Purchase Agreement (Dkt. 176-1) at 1 (Jan. 7, 2007).*

1061 *See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., KIA Objection (Dkt. 203) at 2 (Jan. 17, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., KIA Dealer Sales and Service Agreement (Dkt. 203-1) at 19 (Jan. 17, 2007).*


1063 *In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., KIA Dealer Sales and Service Agreement (Dkt. 203-1) at 19 (Jan. 17, 2007).*

1064 *In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., KIA Objection (Dkt. 203) at 4 (Jan. 17, 2007).*

c. The Court’s Decision

On January 23, 2007, the court held a hearing on Incredible Auto’s motion. The court granted Incredible Auto’s motion to approve the Purchase Agreement with certain exceptions. First, KIA had to approve Rimrock to be a dealer of KIA products and services. KIA had until February 26, 2007, to approve Rimrock and if it did not do so, the court would hold another hearing. The court also orally ordered KIA to submit a status report if KIA believed it would not be able to make a decision about Rimrock by February 26th. Second, Southwestern’s brokerage fee from the proceeds of the sale had to be segregated in a trust account until the court made a separate determination about how much it should get.

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1072 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Conditionally Permitting Sale of Assets under 11 U.S.C. § 363 (Dkt. 243) at 3 (Jan. 24, 2007). The court provided a veiled warning to both Rimrock and Incredible Auto that KIA could move for a postponement of the hearing if Rimrock failed to turn over sufficient information required by KIA to make its decision. Id. at 3.

1073 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., KIA Motors America, Inc.’s Status Report Concerning Franchise Agreement and Motion to Continue Hearing (Dkt. 286) at 2 (Feb. 22, 2007).
paid. Third, the asset sale would not include Incredible Auto’s used vehicle inventory, but its new vehicle inventory would be included. However, any proceeds from the new vehicle inventory would be distributed directly to HMFC. Finally, all of the parties stipulated, and the court approved, that three months of post-petition rent would be paid to the Landlord from the sale proceeds.

\[\text{\textit{d. Status Reports and Other Reasons not to Annoy the Court}}\]

On February 22, 2007, KIA filed a status report detailing its progress on the decision whether or not to accept Rimrock as a KIA dealer. The report said that Rimrock had provided some documents to KIA, that KIA was waiting for other documents, and that KIA would not be able to make a decision by February 26th and would like to have a hearing on March 20th.

\[\text{\textsuperscript{1074} \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Conditionally Permitting Sale of Assets under 11 U.S.C. § 363 (Dkt. 243) at 3 (Jan. 24, 2007).}\]

\[\text{\textsuperscript{1075} \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Conditionally Permitting Sale of Assets under 11 U.S.C. § 363 (Dkt. 243) at 3-4 (Jan. 24, 2007).}\]


\[\text{\textsuperscript{1078} \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Conditionally Permitting Sale of Assets under 11 U.S.C. § 363 (Dkt. 243) at 4 (Jan. 24, 2007).}\]

\[\text{\textsuperscript{1079} \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., KIA Motors America, Inc.’s Status Report Concerning Franchise Agreement and Motion to Continue Hearing (Dkt. 286) at 2 (Feb. 22, 2007).}\]

\[\text{\textsuperscript{1080} \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., KIA Motors America, Inc.’s Status Report Concerning Franchise Agreement and Motion to Continue Hearing (Dkt. 286) at 2-3 (Feb. 22, 2007).}\]
By March 4, 2007, KIA had not approved Rimrock to assume Incredible Auto’s franchise, but Incredible Auto was moving forward with the liquidation of its inventory to satisfy its debt to HMFC.  

It executed a consignment agreement with Rimrock authorizing Rimrock to sell some of its vehicles and then send the proceeds to HMFC.  

Incredible Auto was also selling some of its vehicles and depositing the proceeds in a trust account to be held on HMFC’s behalf.  

By March 16, 2007, KIA filed a second report stating that it had “preliminarily approved Rimrock as the assignee of the Dealer Agreement” contingent upon its receipt of closing documents from Rimrock and Incredible Auto.  

KIA announced that the parties were trying to close the assignment by March 19, 2007.  

However, the court may have been growing impatient with KIA, and on March 21, 2007, when the asset sale still had not closed, the court ordered KIA’s attorney to “provide the Court with daily status reports concerning the status of the sale between

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1083 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Status Report on Dealership Operations and Sale of Assets (Dkt. 300) at 1 (Mar. 4, 2007). Additionally, Incredible Auto restructured its management. Id. at 2. Mr. Gutierrez was no longer General Manager, and Mr. Cornelison, who had replaced Mr. Gutierrez, was terminated. Id. at 2. Mr. Gutierrez’s wife became General Manager. Id. at 2.

1084 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., KIA Report to the Court Regarding Debtor’s Motion to Sell Dealership (Dkt. 327) at 2 (Mar. 16, 2007).

1085 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., KIA Report to the Court Regarding Debtor’s Motion to Sell Dealership (Dkt. 327) at 2 (Mar. 16, 2007).

1086 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., KIA Report to the Court Regarding Debtor’s Motion to Sell Dealership (Dkt. 327) at 2 (Mar. 16, 2007).
Debtor and Rimrock Chrysler... Once KIA had to file daily status reports, the asset sale moved forward at a speedier pace. Five days later, on March 26th, KIA filed notice that the sale to Rimrock had closed with the exception of the assignment of the KIA franchise. Four days after that, on March 30th, KIA filed notice that the franchise assignment had been approved, and the sale was complete.

Although it took three months for the section 363 sale to consummate, in retrospect, there was probably little else that the court could have done to make the process more expedient. It properly required Incredible Auto to clarify the Purchase Agreement so that both it and HMFC could realize its ramifications on the remainder of the bankruptcy proceedings. Under the explicit terms of the Franchise Agreement, KIA had the right to approve or reject any assignee of the Franchise Agreement, and the court properly enforced those terms. However, when it became apparent that KIA was not making its decision very quickly and that the delay was reducing the value of the assets, the court took decisive action by requiring KIA to file daily reports. Assuming that KIA’s attorneys were receiving a substantial fee for every report they drafted, this helped to motivate KIA to make a decision in a timely manner thereby facilitating the section 363 sale.


G. THE BEST LAID PLANS OF MICE & MEN: CHAPTER 11 PLAN & DISCLOSURE STATEMENTS

1. THE CHAPTER 11 PLAN

Incredible Auto filed its Chapter 11 Plan (“Plan”) on January 18, 2007, just meeting the deadline promised by Incredible Auto’s attorney and adopted by the court. The Plan began with some definitions and then moved on to classify the claims and interests. It used the following categories: (1) Administrative claims, (2) Priority claims, (3) Class C, the HMFC interest, (4) Class D, the copier lease from General Electric, (5) Class E, the King Ave. Properties landlord claim, (6) Class F, the Promax Computer Software lease from Dolphin Capital Corporation, (7) Class G, the computer system lease from ADP Commercial Leasing (8) Class H, unsecured creditors, and (9) Class I, the equity interest of Incredible Auto.

The Plan then claimed that classes C through I were “unimpaired” and that “[t]his is a liquidation Plan and there are no impaired claims since all creditors will receive their claims pursuant to a Title 11 Code liquidation sale.” However, this overly broad statement was clearly inaccurate because a claim is impaired unless it falls within one of

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1091 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 1 (Jan. 18, 2007).

1092 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Allowing Use of Cash Collateral Through Jan. 31, 2007 (Dkt. 159) at 3 (Jan. 18, 2007).

1093 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 2-4 (Jan. 18, 2007).

1094 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 4-5 (Jan. 18, 2007).

1095 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 5-6 (Jan. 18, 2007).
the exceptions of section 1124 of the Bankruptcy Code.\textsuperscript{1096} A plan that simply pays creditors the value of their claims does not keep the creditors from being “impaired” under section 1124. Rather a creditor generally is impaired if the plan changes any of the creditor’s “legal, equitable, or contractual rights.”\textsuperscript{1097} In this case, not only did the plan alter all of the creditors’ rights,\textsuperscript{1098} it was clear by this time that Incredible Auto did not have enough assets to pay their claims in full.

Regarding the administrative and priority claims, the Plan stated that the administrative claims, except for section 506(c) allowed claims, would be paid only after Class C, HMFC, was paid in full.\textsuperscript{1099} Regarding the secured claims, the Plan stated: (1) Class C, HMFC’s claim, would be paid from the liquidation sale, (2) Class D and F’s leases were rejected and their claims for unpaid rent would be paid as administrative expenses under section 503 of the Bankruptcy Code, (3) Class E’s landlord claim would be paid as an unsecured claim under Class H, except for the post-petition rent, which would be an administrative claim, (4) class G’s computer system lease would be affirmed and paid as agreed, and (5) the general unsecured claims would be paid pro rata after


\textsuperscript{1098} For example, HMFC, as a secured creditor, had the right to foreclose and seize the collateral. However, under the Plan, it was forced to accept cash instead. Similarly, the lessors, under their respective lease agreements, had the right to receive payment for the term of the lease, but under the Plan, all but one of the leases were rejected thereby giving the lessors merely an unsecured claim for the unpaid rent.

\textsuperscript{1099} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 6 (Jan. 18, 2007).
HMFC’s and any administrative expenses were paid.\textsuperscript{100} Until any sale selling the assets free and clear from HMFC claims, Incredible Auto intended on operating normally.\textsuperscript{101}

2. \textit{The Disclosure Statement(s)}

On the same day that Incredible Auto filed its Plan, it also filed a motion to extend the deadline for filing the disclosure statement by two days.\textsuperscript{102} In explanation, Incredible Auto’s attorney stated that he was a sole practitioner and had a very similar deadline in two other cases.\textsuperscript{103} The court pointed out that it was Incredible Auto’s attorney who said that the disclosure statement would be filed by the deadline, but it granted the two day extension.\textsuperscript{104}

\begin{itemize}
\item[a.] \textit{Statement No. 1—January 21, 2007}

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\item[i.] \textbf{Voting}

In the disclosure statement’s introduction, Incredible Auto stated that “[s]ince Creditors and Interested Parties under this Plan will receive more than they would in a Chapter 7 [and] since no Panel Trustee has been installed with the resultant increased fees and costs, this Plan does not provide for a vote.”\textsuperscript{105} This statement suggests that Incredible Auto’s attorney could have been confusing the standard for voting on the Plan
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\begin{flushleft}
\textsuperscript{100} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 6-7 (Jan. 18, 2007).
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\textsuperscript{101} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 7 (Jan 18, 2007).
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\textsuperscript{102} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Extend for Two Days the Deadline to File Liquidating Disclosure Statement (Dkt. 216) at 1 (Jan. 18, 2007).
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\textsuperscript{103} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Extend for Two Days the Deadline to File Liquidating Disclosure Statement (Dkt. 216) at 2 (Oct. 17, 2006).
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\textsuperscript{104} See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 218) (Jan. 19, 2007).
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\textsuperscript{105} In \textit{re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Debtor’s Disclosure Statement (Dkt. 224) at 2 (Jan. 21, 2006).
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under section 1126 of the Bankruptcy Code with the standard for confirming the Plan under section 1129 of the Bankruptcy Code. Section 1129(a)(7) provides that a plan may be confirmed over the objection of an impaired class if the class will receive more than they would receive in a Chapter 7 liquidation. However, this section does not address whether a class of creditors may be excluded from voting to approve the plan. Under section 1126(f), a class of creditors is entitled to vote on the plan unless it is presumed to have accepted the plan because it is unimpaired. Although the Incredible Auto Plan claimed that all of its creditors were unimpaired, this statement was clearly erroneous and was corrected in its amended disclosure statements.

Although the introduction stated that the Plan did not provide for a vote, the approval of the Plan section requested that “all Creditors and all interested parties . . . vote in favor of his Plan” after it described why the Plan was fair and equitable under section 1129. This disjointed position on voting could be explained by the likelihood

1110 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 5-6 (Jan. 18, 2007).
1111 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Amended Disclosure Statement (Dkt. 329) at 11 (Mar. 19, 2007).
1112 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Disclosure Statement (Dkt. 224) at 11 (Jan. 21, 2007).
1113 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Disclosure Statement (Dkt. 224) at 10-11 (Jan. 21, 2007).
that Incredible Auto’s attorney cobbled the disclosure statement together from other
disclosure statements that he had used for past clients.1114

ii. Benefits of the Plan

The disclosure statement (1) provided a summary of the Plan’s terms, (2) included
a summary of the section 363 sale’s status,1115 and (3) touted two benefits. First, it
claimed that a Chapter 11 liquidation would be less costly than a Chapter 7 liquidation: in
“a forced liquidation situation, with a Chapter 7 Trustee, the Debtors [sic] believe no
assets would be available to apply to any unsecured or prepetition claims. Because of
this, confirmation of this Plan is for the best interests of all creditors [ ] and does not
require the normal voting margins.”1116 Second, it claimed that it was in a better position
than a Chapter 7 Trustee to operate the business: “[t]here is no way a Chapter 7 Trustee
can run a normal Dealer operation without danger of manufacturers [sic] actions to
revoke the Franchise.”1117

As part of the disclosure statement, Incredible Auto included multiple exhibits
which (1) listed the new car inventory as of December 13, 2006,1118 (2) listed the used car

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1114 This is evident from the number of typos, misstatements, and inaccuracies relating to Incredible Auto’s affairs—facts that the attorney should have known—contained within the disclosure statement.

1115 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Disclosure Statement (Dkt. 224) at 3-4 (Jan. 21, 2007). Note that this document referred to the Plan as a liquidating plan, but the title of the Plan document was Plan of Reorganization. Compare id. at 3 with In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Plan of Reorganization (Dkt. 215) at 1 (Jan. 18, 2007).

1116 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Disclosure Statement (Dkt. 224) at 9 (Jan. 21, 2007).

1117 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Disclosure Statement (Dkt. 224) at 8 (Jan. 21, 2007).

inventory,\textsuperscript{1119} (3) showed Incredible Auto’s analysis of the assets, as of January 17, 2007, securing HMFC’s claim,\textsuperscript{1120} (4) presented Incredible Auto’s February income and expenses,\textsuperscript{1121} and (5) gave Incredible Auto’s analysis of its cash collateral and debtor-in-possession accounts.\textsuperscript{1122}

iii. Objections to the Disclosure Statement

Incredible Auto’s disclosure statement faced objection from a group of creditors including the Landlord, Auto Auction, and HMFC, and also from the U.S. Trustee (“Trustee”).

I. Trustee’s Objection

A month after the initial disclosure statement was filed, the Trustee objected on four grounds.\textsuperscript{1123} First, the Trustee’s main objection was that the disclosure statement was outdated, and thus not adequate under section 1125 of the Bankruptcy Code\textsuperscript{1124} because (1) the court approved the sale which included realized sale proceeds for some assets in an amount $547,000 less than the amount listed in the disclosure,\textsuperscript{1125} and (2) the

\begin{itemize}
\item \textsuperscript{1119} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Disclosure Exhibit 2: Debtor’s List – Used Vehicles on Hand – List B (1/17/07) (Dkt. 224-2) (Jan 21, 2007).
\item \textsuperscript{1120} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Disclosure Exhibit 3: Debtor’s Analysis of Assets Securing Hyundai Motor Finance (Dkt. 224-3) (Jan. 21, 2007).
\item \textsuperscript{1121} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Disclosure Exhibit 4: Debtor’s Proforma Projection of Income and Expenses (Budget) for Month of Feb. 2007 and Compared with Approved Budget for Jan. 2007 (Dkt. 224-4) (Jan 21, 2007).
\item \textsuperscript{1122} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Disclosure Exhibit 6: Debtor’s Analysis of D.I.P. and Cash Collateral Accounts as of Jan. 17, 2007 (Dkt. 224-5) (Jan. 21, 2007).
\item \textsuperscript{1123} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., United States Trustee’s Objection to Disclosure Statement (Dkt. 282) (Feb. 21, 2007).
\item \textsuperscript{1124} 11 U.S.C. § 1125 (2009).
\item \textsuperscript{1125} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., United States Trustee’s Objection to Disclosure Statement (Dkt. 282) at 1 (Feb. 21, 2007).
\end{itemize}
disclosure statement included around one million dollars worth of “auction vehicles” now excluded from the sale.\textsuperscript{1126} Second, the Trustee said that the claims other than HMFC’s claims were not adequately described because Incredible Auto did not include an amount and it did not estimate the administrative expense amounts.\textsuperscript{1127} Third, the Trustee noted that the disclosure statement contained “erroneous and contradictory statements about the voting requirements and confirmation standards under chapter 11 of the Bankruptcy Code.”\textsuperscript{1128} Though Incredible Auto asserted that no claim was impaired, the Trustee stated, “All of the claims are impaired under 11 U.S.C. § 1124. The fact that the Debtor proposes a liquidating plan does not alter the fact that in order for ‘cramdown’ to occur under 11 U.S.C. § 1129(b), at least one impaired class of claims must accept the plan.”\textsuperscript{1129} Finally, the Trustee commented on Incredible Auto’s exhibits as being incomplete and outdated:\textsuperscript{1130} “creditors must have accurate, and current information about the Debtor’s finances and future prospects in the event the sale does not close as anticipated or is delayed.”\textsuperscript{1131}

\textsuperscript{1126}See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., United States Trustee’s Objection to Disclosure Statement (Dkt. 282) at 2 (Feb. 21, 2007).

\textsuperscript{1127}See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., United States Trustee’s Objection to Disclosure Statement (Dkt. 282) at 2 (Feb. 21, 2007).

\textsuperscript{1128}In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., United States Trustee’s Objection to Disclosure Statement (Dkt. 282) at 2 (Feb. 21, 2007).

\textsuperscript{1129}In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., United States Trustee’s Objection to Disclosure Statement (Dkt. 282) at 2-3 (Feb. 21, 2007).

\textsuperscript{1130}See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., United States Trustee’s Objection to Disclosure Statement (Dkt. 282) at 3 (Feb. 21, 2007).

\textsuperscript{1131}In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., United States Trustee’s Objection to Disclosure Statement (Dkt. 282) at 3 (Feb. 21, 2007).
II. Creditors’ Objections

In a form that could also be classified as a thinly disguised objection to the Plan, the Landlord objected to the adequacy of the disclosure statement because the “Disclosure Statement and Plan inaccurately classify and treat the prepetition portion of Creditors’ claim as a general unsecured claim under Class H. Debtor has assumed the Lease which requires that it treat all obligations under the Lease, including payment of prepetition rent, as new administrative obligations in the bankruptcy.”

Both HMFC and Auto Auction joined the Trustee’s objection, but Auto Auction’s objection was broader. It also joined other creditors’ objections and made some objections of its own. It said the disclosure statement did not address possible preference claims; it overvalued the litigation claim; it did not describe the possible administrative claims; and the exhibits listed as inventory some of the vehicles subject to Auto Auction’s reclamation claim.

iv. The Court’s Decision: Amend the Disclosure Statement

After reviewing the four objections and listening to the comments made at the February 26, 2007, hearing, the court gave Incredible Auto fifteen days to submit an

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1132 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to Disclosure Statement (Dkt. 279) at 2 (Feb. 20, 2007).

1133 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to Disclosure Statement (Dkt. 284) at 1 (Feb. 21, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Auto Auction of Montana Objection to Disclosure Statement (Dkt. 283) (Feb. 21, 2007).

1134 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Auto Auction of Montana Objection to Disclosure Statement (Dkt. 283) (Feb. 21, 2007).

1135 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Auto Auction of Montana Objection to Disclosure Statement (Dkt. 283) at 1-2 (Feb. 21, 2007).
amended disclosure statement.\(^\text{1136}\) As discussed above, the initial disclosure statement was too vague and contained too many inaccurate and contradictory statements of both law and fact to provide the adequate information required under section 1125 of the Bankruptcy Code. Thus, the court properly required Incredible Auto to amend the disclosure statement.

\textit{b. Statement No. 2—March 19, 2007}

Obeying the court’s direction, Incredible Auto filed an amended disclosure statement responding to some of the objections.\(^\text{1137}\) Most of the provisions in the amended disclosure statement mirrored the provisions in the initial disclosure statement, with a few marked differences.\(^\text{1138}\) First, Incredible Auto eliminated its assertion that the Plan did not require a vote by the creditors.\(^\text{1139}\) Second, it added some of the information that the Trustee and the other creditors claimed was missing. More specifically, it included the following: (1) a statement that HMFC was granted relief from the automatic stay,\(^\text{1140}\) (2) updated and detailed information regarding the process and proceeds from the sale to Rimrock, including the broker fee,\(^\text{1141}\) (3) a non-exhaustive list of the possible

\(^\text{1136}\) See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Minutes of Hearing Held (Docket Entry) at 44 (Feb. 26, 2007).

\(^\text{1137}\) See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Debtor’s Amended Disclosure Statement (Dkt. 329) (Mar. 19, 2007).


\(^\text{1140}\) See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Debtor’s Amended Disclosure Statement (Dkt. 329) at 3 (Mar. 19, 2007).

\(^\text{1141}\) See \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Debtor’s Amended Disclosure Statement (Dkt. 329) at 3-6, 9, 21-22 (Mar. 19, 2007).
administrative “claims,” and (4) a change that the class G claim would be rejected, and (5) a note that an application to employ an attorney in the UCC litigation was pending.

### i. The Court’s Decision: “Woefully Inadequate”

Even these changes were not enough for the court. After a hearing on March 20, 2007, the court denied approval of Incredible Auto’s amended disclosure statement. The court agreed with the Trustee that the amended disclosure was an improvement, but continued on to state that even the amendment was “woefully inadequate.” The court stated,

Thus, pursuant to 11 U.S.C. § 1125(a)(1), Debtor has failed to provide ‘information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan.’

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1142 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Amended Disclosure Statement (Dkt. 329) at 6-7 (Mar. 19, 2007). The disclosure statement consistently referred to administrative expenses as administrative “claims.” Id.

1143 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Amended Disclosure Statement (Dkt. 329) at 8 (Mar. 19, 2007).

1144 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Amended Disclosure Statement (Dkt. 329) at 10 (Mar. 19, 2007).

1145 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 339) at 7 (Mar. 21, 2007).

1146 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 339) at 4 (Mar. 21, 2007).

1147 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 339) at 5-6 (Mar. 21, 2007).
Primarily, the court noted that the Plan failed to include any of the nineteen common-law factors that would have helped the creditors and the court determine whether the Plan could succeed.\textsuperscript{1148}

The court exaggerated a little when it stated that the amended disclosure statement failed to include \textit{any} of the nineteen factors used by bankruptcy courts to determine the adequacy of a disclosure statement. The amended disclosure statement provided a short history of Incredible Auto, described Incredible Auto’s assets and their value, discussed the creditors and their claims, discussed the pending litigation, and described some of the potential administrative expenses.\textsuperscript{1149} However, by this point in the case, the court was likely exasperated with both Incredible Auto and its attorney, so its decision to completely reject the amended disclosure statement is not surprising.

\textbf{ii. Incredible Auto’s Excuse: Open Mouth; Insert Foot}

Incredible Auto’s attorney explained the reason behind the inadequacy in the Plan and disclosure statements at the April 24, 2007 hearing. Incredible Auto’s attorney said,

\begin{quote}
I frankly believe that all this discussion about the plan and disclosure is ridiculous in this case. There was no way that this Debtor could operate after the sale. This was a Chapter 7. This was going to a Chapter 7. You know it, I know and the UST knows it. So the information in the disclosure statement and all the time amending the plan may not have been up to the UST’s standards, but it really was not a necessary step here. Now, if the Court wants to dock me for some time on the disclosure and plan, that’s fine, I’ll abide by that, Judge. But, the point is that this was a Chapter 7.\textsuperscript{1150}
\end{quote}

\textsuperscript{1148} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 339) at 5 (Mar. 21, 2007).

\textsuperscript{1149} See \textit{generally} \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Amended Disclosure Statement (Dkt. 329) at 1-10 (Mar. 19, 2007).

\textsuperscript{1150} \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 6 (May 18, 2007).
Though he likely thought he was defending his lack-luster drafting with this statement, he probably did not realize that the comment would return to haunt him.\textsuperscript{1151}

\textbf{H. WHY LOCAL RULES AND COMPETENCY MATTER: ATTORNEY’S FEES}

\textit{1. MR. NEEDLER’S APPLICATIONS}

On October 19, 2006, the court granted Incredible Auto’s motion to employ Attorney William Needler and granted him permission to appear Pro Hac Vice.\textsuperscript{1152} Even prior to that date, Mr. Needler filed a statement of attorney fees pursuant to section 329 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2016(b).\textsuperscript{1153} The agreement entered into between Incredible Auto and Mr. Needler included a $25,000 retainer and $1,039 filing fee.\textsuperscript{1154} His hourly fee equaled $275.00, his associate’s hourly fee equaled $185.00, and his paralegal hourly fee equaled $80.00.\textsuperscript{1155} Though the documents included a more detailed list of services, Mr. Needler generally agreed to provide Incredible Auto “[r]epresentation in all other matters arising in, related to, and/or

\textsuperscript{1151} See the discussion \textit{infra} of Mr. Needler’s unsuccessful attempt to gain approval of his attorney’s fees.

\textsuperscript{1152} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Granting Application to Employ William L. Needler (Docket Entry) at 3 (Oct. 19, 2006); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Granting Motion to Appear Pro Hac Vice (Docket Entry) at 3 (Oct. 19, 2006).

\textsuperscript{1153} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Statement of Attorney Fees Pursuant to 11 USC Section 329 and Bankruptcy Rule 2016(B) (Dkt. 4) (Oct. 17, 2006).

\textsuperscript{1154} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Statement of Attorney Fees Pursuant to 11 USC Section 329 and Bankruptcy Rule 2016(B) (Dkt. 4) at 1 (Oct. 17, 2006). On the filing date, Mr. Needler had received $16,039 for the retainer and filing fee from third party, non-creditor sources. See id.

\textsuperscript{1155} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Statement of Attorney Fees Pursuant to 11 USC Section 329 and Bankruptcy Rule 2016(B) (Dkt. 4) at 3 (Oct. 17, 2006). It is not clear why the associate’s fee was listed as Mr. Needler identified himself as a sole practitioner at another time in the case. See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Extend for Two Days the Deadline to File Liquidating Disclosure Statement (Dkt. 216) at 2 (Oct. 17, 2006).
in connection with this Chapter 11 proceeding, whether before the Bankruptcy Court and/or any Court of the United States having jurisdiction.”

On January 14, 2007, Mr. Needler filed an amended statement of attorney’s fees. He informed the court that the remaining $10,000 of the retainer amount was paid by Mrs. Gutierrez. He represented that she was not a pre-petition creditor and that the funds came “from her independent funds and not those of this estate.” The rest of his amended statement contained the same provisions that appeared in his first statement.

On March 8, 2007, Mr. Needler filed his first application for fees for the period of September 15, 2006, through February 18, 2007. He requested $74,917.71, which equaled his total time and fees ($100,956.71) less the collected retainer ($26,039.00). To support this request he stated that he worked 289.7 hours, traveled 84.6 hours (half the

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1156 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Statement of Attorney Fees Pursuant to 11 USC Section 329 and Bankruptcy Rule 2016(B) (Dkt. 4) at 2-3 (Oct. 17, 2006).

1157 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Second Amended Statement of Attorney Fees Pursuant to 11 USC Section 329 and Bankruptcy Rule 2016(B) (Dkt. 190) (Jan. 14, 2007).

1158 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Second Amended Statement of Attorney Fees Pursuant to 11 USC Section 329 and Bankruptcy Rule 2016(B) (Dkt. 190) at 2 (Jan. 17, 2007).

1159 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Second Amended Statement of Attorney Fees Pursuant to 11 USC Section 329 and Bankruptcy Rule 2016(B) (Dkt. 190) at 2 (Jan. 17, 2007).

1160 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., First Application of William L. Needler and Associates, Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 313) at 3 (Mar. 8, 2007).

1161 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., First Application of William L. Needler and Associates, Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 313) at 2 (Mar. 8, 2007).
cost) and expended fees totaling $10,481.71.\textsuperscript{1162} He included a computer print-out detailing all of the duties that he performed for Incredible Auto.\textsuperscript{1163}

\subsection*{2. The Trustee’s Objection}

The Trustee, not shy of what it thought of Incredible Auto’s attorney, filed an objection to Mr. Needler’s application for fees.\textsuperscript{1164} Its objection began by stating “this is a difficult fee application to evaluate.”\textsuperscript{1165} It suggested that the court had done more to manage this case than Incredible Auto’s attorney, resulting from the attorney’s lack of effort to comply with local rules.\textsuperscript{1166} It provided numerous examples of errors on Mr. Needler’s part. The two notices Mr. Needler filed for the “emergency” motion to approve the sale of assets were so confusing that the court simply set the motion for a hearing on its own.\textsuperscript{1167} He made requests that could only be made by the Trustee.\textsuperscript{1168} He

\begin{itemize}
\item \textsuperscript{1162} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., First Application of William L. Needler and Associates, Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 313) at 5 (Mar. 8, 2007).
\item \textsuperscript{1163} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., First Application of William L. Needler and Associates, Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 313) at 16-66 (Mar. 8, 2007).
\item \textsuperscript{1164} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to First Application of William L. Needler and Associates Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 326) (Mar. 16, 2007).
\item \textsuperscript{1165} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to First Application of William L. Needler and Associates Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 326) at 1 (Mar. 16, 2007).
\item \textsuperscript{1166} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to First Application of William L. Needler and Associates Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 326) at 1 (Mar. 16, 2007).
\item \textsuperscript{1167} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to First Application of William L. Needler and Associates Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 326) at 1-2 (Mar. 16, 2007).
\item \textsuperscript{1168} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to First Application of William L. Needler and Associates Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 326) at 3 (Mar. 16, 2007). He requested to reset the 341 meeting and local
filed an unnecessary second application to employ himself even after the court approved his first application.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to First Application of William L. Needler and Associates Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 326) at 3 (Mar. 16, 2007).} He delayed re-filing the broker’s employment application nearly forfeiting the broker’s fee.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to First Application of William L. Needler and Associates Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 326) at 3 (Mar. 16, 2007).} He delayed in filing an application to employ co-counsel but continued to work with the attorney.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to First Application of William L. Needler and Associates Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 326) at 3 (Mar. 16, 2007).} After he eventually filed this attorney’s application, the application was disallowed, and the attorney could not apply for administrative expenses for his unpaid fees.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to First Application of William L. Needler and Associates Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 326) at 3 (Mar. 16, 2007).} The Plan Mr. Needler drafted claimed that the claims were unimpaired when, under the Bankruptcy Code, all the claims were impaired.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to First Application of William L. Needler and Associates Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 326) at 3 (Mar. 16, 2007).} Additionally, the disclosure statement he drafted was “generally poorly drafted and wholly inadequate.”\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to First Application of William L. Needler and Associates Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 326) at 4 (Mar. 16, 2007).}

The Trustee asked for a reduction in the amount of fees by one-third or one-half because Mr. Needler’s rate exceeded the local billing rate and his service was below the

rules reserves that to the Trustee under Mont. LBR 2003-4. See id.; In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 12 (May 18, 2007).
quality expected of most Montana attorneys.\textsuperscript{1175} The Trustee commented: his “pleadings appear to have been hastily thrown together and poorly researched,”\textsuperscript{1176} and he demonstrated an unacceptable lack of understanding of the legal requirements of Chapter 11 of the Bankruptcy Code.”\textsuperscript{1177}

\textbf{3. \textit{M}R. \textit{N}EEDLER’S “\textit{F}INAL” \textit{A}PPPLICATION}

After the court took his initial request under advisement,\textsuperscript{1178} Mr. Needler filed his “final” application for fees covering the term of February 28, 2007, through April 10, 2007.\textsuperscript{1179} He requested $14,236.14, which covered the 45.5 hours that he worked, the 9 hours that he traveled, and the $486.14 he spent on fees.\textsuperscript{1180} He also reminded the court

\textsuperscript{1175} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to First Application of William L. Needler and Associates Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 326) at 4 (Mar. 16, 2007).

\textsuperscript{1176} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to First Application of William L. Needler and Associates Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 326) at 4 (Mar. 16, 2007).

\textsuperscript{1177} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Objection to First Application of William L. Needler and Associates Attorneys for Debtor, for Interim Fee Allowance and Reimbursement of Costs (Dkt. 326) at 4 (Mar. 16, 2007).

\textsuperscript{1178} \textit{See In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Minutes of Hearing Held (Docket Entry) at 55-56 (Apr. 24, 2007).

\textsuperscript{1179} \textit{See In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Final Application of William L. Needler and Associates, Attorneys for Debtor, for Fee Allowance and Reimbursement of Costs (Dkt. 377) (May 14, 2007). Note that Incredible Auto filed two final applications for fees which were identical.

\textsuperscript{1180} \textit{See In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Final Application of William L. Needler and Associates, Attorneys for Debtor, for Fee Allowance and Reimbursement of Costs (Dkt. 377) at 3-4 (May 14, 2007).
that he was still seeking the $74,917.71\textsuperscript{1181} under the first application for fees, which brought the total amount requested during the pendency of the trial to $89,153.85.\textsuperscript{1182}

4. The Court’s Decision: Disgorge

Within four days of Mr. Needler’s final application and without a hearing, the court issued an order granting in part, and denying in part his request.\textsuperscript{1183} The court awarded him “the sum of $18,040.00 and costs of $4,610.69, for a total of $22,650.69 . . .”\textsuperscript{1184} But, because he had to first apply the retainer, the court ordered “that attorney William L. Needler shall, within ten (10) days of the date of this Order, disgorge the sum of $3,388.31 and remit such sum to the Chapter 7 Trustee, Joseph V. Womack.”\textsuperscript{1185}

The court entered a 25 page memorandum of the decision.\textsuperscript{1186} After a discussion of the facts and a full quote of the Trustee’s written objection, the court quoted what Mr. Needler said at the hearing regarding his unacceptable plan and disclosure statements,

\begin{quote}
This was going to a Chapter 7. So the plan didn’t measure up but it wasn’t going to confirmation, there was no way. . . . Your honor didn’t . . . [sic] that’s silly to require a plan and disclosure statement for a 363 sale. So all the objections on the sufficiency of the disclosure statement and the
\end{quote}

\begin{footnotes}
\footnotetext[1181]{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Final Application of William L. Needler and Associates, Attorneys for Debtor, for Fee Allowance and Reimbursement of Costs (Dkt. 377) at 4 (May 14, 2007).}
\footnotetext[1182]{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Final Application of William L. Needler and Associates, Attorneys for Debtor, for Fee Allowance and Reimbursement of Costs (Dkt. 377) at 8 (May 14, 2007).}
\footnotetext[1183]{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 379) (May 18, 2006).}
\footnotetext[1184]{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 379) at 1 (May 18, 2007).}
\footnotetext[1185]{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 379) at 1-2 (May 18, 2007).}
\footnotetext[1186]{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) (May 18, 2007).}
\end{footnotes}
contents of the plan, it was an effort that was going nowhere because this was a Chapter 7.\textsuperscript{1187}

The court then recounted the law saying that even though the Trustee offered its opinion, the court must make its own determination regarding attorney fees.\textsuperscript{1188} So, the court discussed the progression of the case, pointing out Mr. Needler’s organizational, procedural, and general shortcomings as it progressed through the case review.\textsuperscript{1189} The court began by questioning all of Mr. Needler’s emergency claims because (1) he began meeting with Incredible Auto a month before the petition date and (2) he filed the emergency cash collateral motion nine days after the petition date.\textsuperscript{1190} “If the use of cash collateral was so critical, one would think that Needler would have included such motion as one of his first day motions.”\textsuperscript{1191} The court pointed out that at one cash collateral hearing, Mr. Needler was “[a]pparently oblivious” that HMFC had filed a proposed stipulation the day before.\textsuperscript{1192} It highlighted that, although one of Mr. Needler’s responses was titled as an objection to HMFC’s proposed stipulation, “[i]nterestingly, Debtor’s November 23, 2006, objection addresses not one substantive issue with respect

\textsuperscript{1187} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 6 (May 18, 2007).

\textsuperscript{1188} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 7 (May 18, 2007) (citing In re Busy Beaver Bldg. Centers, Inc., 19 F.3d 833 (3rd Cir. 1994); In re Wildman, 72 B.R. 700 (Bankr. N.D. Ill. 1987)).

\textsuperscript{1189} See generally In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) (May 18, 2007).

\textsuperscript{1190} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 9-10 (May 18, 2007).

\textsuperscript{1191} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 10 (May 18, 2007).

\textsuperscript{1192} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 14 (May 18, 2007).
to HMFC’s second Cash Collateral Motion.” 1193 The court’s opinion of Mr. Needler’s actions was clear:

The time spent not only by this Court, but by all the parties, on the issue of cash collateral was enormous. Needler then had the audacity to appear at the April 24, 2007, hearing and assert that ‘[t]his was a Chapter 7... You know it, I know and the UST knows it.’ . . . [T]he Court takes exception with Needler’s vociferous pontification before this Court on April 24, 2007, that this Court knew that this was a Chapter 7 case dressed up like a Chapter 11. 1194

In addition to the problems surrounding cash collateral, the court also noted that Mr. Needler delayed in making the employment filings for Mr. Rice, his co-counsel, (by two months) and broker Jappy Dickson (took a month and a half to amend the application and three months from the start of the case). 1195 The court also noted numerous examples of Mr. Needler violating local court rules. 1196

It concluded that the Incredible Auto “case went from bad to worse following the bankruptcy petition date and it is now clearly evident to this Court that the services rendered by Needler, other than preparation of Debtor’s petition and schedules, and efforts to sell Debtor’s assets, were not reasonably likely to benefit Debtor’s bankruptcy

1193 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 15-16 (May 18, 2007).

1194 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 19-20 (May 18, 2007).

1195 *See* In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 18 (May 18, 2007).

1196 *See* In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) (May 18, 2007). He moved to continue the creditor’s meeting, which can only be done by the U.S. Trustee. *Id.* at 12. The court said that Mr. Needler “needs to review the Court’s local rules concerning filing exhibits and other documents prior to hearings and needs to further generally review this Court’s local rules for other procedures that may affect the administration of this case.” *Id.* at 18.
estate.”1197 Because “[t]his was going to a Chapter 7,”1198 according to Mr. Needler, the court stated that the time he spent on the cash collateral issue, the plan of reorganization and disclosure statements, and objections to the conversion motions was “for naught.”1199 “Needler’s actions did nothing but allow Debtor’s shareholders additional time to siphon monies out of Debtor, to the detriment of Debtor’s creditors, and also allowed Needler to present this Court with an exorbitant request for fees and costs.”1200 The court calculated Mr. Needler’s productive time to be 53.4 hours ($18,040.00)1201 and allowable costs to be $4,610.691202 for a total of $22,650.69. Because the allowable fees and costs were less than the amount of the retainer collected by Mr. Needler, the court ordered that he disgorge the difference ($3,388.31) to the Chapter 7 Trustee.1203

The authors agree with the court’s assessment of Mr. Needler’s performance throughout this case. Nearly every document that Mr. Needler filed contained typos and mischaracterizations of either the law or facts. In some documents, his assertions and statements indicate that he did not even understand basic principles of Chapter 11

1197 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 20-21 (May 18, 2007).

1198 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 6 (May 18, 2007).

1199 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 21 (May 18, 2007).

1200 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 22 (May 18, 2007).

1201 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 23 (May 18, 2007).

1202 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 24 (May 18, 2007).

1203 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 378) at 24 (May 18, 2007).
bankruptcy. Additionally, it seemed as if Mr. Needler himself contributed to the case lasting as long as it did and becoming as contentious as it was. Though the court’s memorandum was well reasoned and supported by the facts of the case, it appeared clear that the court was frustrated with Mr. Needler’s continued disrespect for the local rules and the court. Perhaps the court shared the same frustration as the authors.

5. IF AT FIRST YOU DON’T SUCCEED: MR. NEEDLER’S MOTION TO RECONSIDER

a. Reasons to Reconsider

Obviously displeased, Mr. Needler filed a motion to reconsider, seeking relief from the disgorgement order and approval of the first and final applications for fees. He rehashed some of the filings of Incredible Auto, using its original figures as to value and debt. He explained his pre-petition relationship with Incredible Auto and blamed it for the timing of the filing. He stated that the first emergency cash collateral motion was filed nine days post-petition because he was on vacation at his wife’s class reunion. He claimed that he did his job by “protect[ing] this estate, keep[ing] the Franchise in tact [sic], [and] get[ting] the Franchise sold so that moneys would be

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1204 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion of William L. Needler of the Law Firm William L. Needler and Associates, Attorney for the Debtor and Requests this Court to Modify, Amend, Vacate and Reconsider its Order of May 18, 2007 Denying Attorney Fees and Expenses for Debtor’s Attorney and to Set a Rehearing and Trial (Dkt. 383) (May 29, 2007) [hereinafter Needler’s Motion to Reconsider].

1205 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Needler’s Motion to Reconsider (Dkt. 383) at 3-4 (May 29, 2007).

1206 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Needler’s Motion to Reconsider (Dkt. 383) at 5 (May 29, 2007).

1207 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Needler’s Motion to Reconsider (Dkt. 383) at 5 (May 29, 2007).
available for creditors and the estate.” He blatantly blamed HMFC and (less blatantly) the court for the delays regarding cash collateral and the continuing lack of Incredible Auto’s profitability. He defended his procedural and drafting choices by saying “[t]his Court may not like it” but courts in Chicago, South Carolina, and Texas have all approved. He declared that he and Incredible Auto should be commended for getting this sale to go through. Finally, he claimed that the court’s fee determination was “unconscionable and also manifestly unfair.”

b. The Court’s Decision: No

The court, however, denied Mr. Needler’s motion to reconsider. It ruled that an amendment was “not warranted under Rule 59” because Mr. Needler did not meet the requirements under Federal Rules of Bankruptcy Procedure 9023 or 9024 in that he made “not a single reference to any error of fact or law in his Motion and the Court concludes that no such errors were made . . . [and] Mr. Needler’s motion sets forth no

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1208 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Needler’s Motion to Reconsider (Dkt. 383) at 6 (May 29, 2007).

1209 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Needler’s Motion to Reconsider (Dkt. 383) at 8 (May 29, 2007).

1210 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Needler’s Motion to Reconsider (Dkt. 383) at 10 (May 29, 2007).

1211 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Needler’s Motion to Reconsider (Dkt. 383) at 12 (May 29, 2007).

1212 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Needler’s Motion to Reconsider (Dkt. 383) at 13 (May 29, 2007).


1214 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 385) at 5 (May 30, 2007).
newly discovered evidence.” The court also found no grounds for a new hearing under Rule 60 because “Needler does not appear to be seeking relief from the Court’s May 18, 2007, Memorandum of Decision and Order based upon mistake, inadvertence, surprise or excusable neglect.”

c. Try, Try Again: Mr. Needler’s Appeal

On June 11, 2007, Mr. Needler appealed the court’s ruling to the Bankruptcy Appellate Panel, but on June 26, 2007, the Trustee elected to have the appeal heard by the Montana District Court. One of the main issues raised by Mr. Needler was that he was not given a hearing before the bankruptcy court entered its order. At the district court level, the Trustee conceded that a hearing should have occurred, so the district court remanded it back to the bankruptcy court to hold a hearing on Mr. Needler’s final request for fees.

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1215 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 385) at 5 (May 30, 2007).

1216 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 385) at 5 (May 30, 2007).

1217 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Notice of Referral of Appeal for Bankruptcy Appellate Panel (Docket Entry) at 59 (June 11, 2007).

1218 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Notice of Election to Have Appeal Heard by the District Court (Docket Entry) at 60 (June 26, 2007).

1219 See Incredible Auto Sales, LLC v. U.S. Trustee (In re Incredible Auto Sales), Ch. 11 Case No. 06-60855, Dist. Ct. No. CV-07-98-BLG-RFC, D. Mont., Order for Remand (Dkt. 402E) at 2 (July 27, 2007). Throughout this paper, where the citation includes an “E” after the docket number, the citation is to the docket of the William L. Needler fees appeal.

6. Mr. Needler’s Supplemental Fee Application

As directed, the bankruptcy court set a hearing on the fees and costs matter for August 30, 2007. Before the hearing date, Mr. Needler filed a supplemental fee request for the fees incurred between April 16, 2007, and June 21, 2007. The specific request was for $15,812.50 in billable time and $255.00 in fees for a total of $16,067.50. Mr. Needler filed a 25 page memorandum in support of all three of his fee requests.

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1221 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Setting Hearing on William Needler’s Final Application and any Objections Thereto (Docket Entry) at 60 (July 31, 2007).

1222 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., First Supplement to Allowance of Two Applications for Fees and Expenses for Debtor’s Attorney on Remand from the U.S. District Court (Dkt. 408) (Aug. 25, 2007).


1224 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum on Remand from the U.S. District Court in Support of the First Interim Application for Allowance of Fees and Expenses for William L. Needler the Debtor’s Attorney (Hereinafter, the Applicant) Together with Those Fees and Costs Requested in the Final and Supplemental Requests (Dkt. 413) (Aug. 28, 2007) [hereinafter Memo in Support on Remand].

1225 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memo in Support on Remand (Dkt. 413) at 3-4 (Aug. 28, 2007).
a. Why Mr. Needler Should Receive His Fee

In the motion, he recounted the facts of the case like he did in his motion to reconsider and blamed HMFC for the delay and problems encountered in the case.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memo in Support on Remand (Dkt. 413) at 4-6 (Aug. 28, 2007).} A few claims, however, were different. This time, Mr. Needler listed the correct amount of the HMFC debt.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memo in Support on Remand (Dkt. 413) at 4 (Aug. 28, 2007).} He described the time and finalization of the sale to Rimrock.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memo in Support on Remand (Dkt. 413) at 7-8 (Aug. 28, 2007).} In the motion, he then argued, “Evidence In This Case \textbf{Does Not Support} This Court’s Flawed Findings And Charges That The Chapter 11 Was Unsuccessful And That This Was A ‘Rudderless Ship.’”\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memo in Support on Remand (Dkt. 413) at 10 (Aug. 28, 2007).} Keeping with the same attitude he had during the pendency of the case, he said, “This Applicant, a former World War II, Third Mate in the Merchant Marine knows all about a ‘rudderless ship’ – this Chapter 11 was NOT such ‘a ship,’” and that “[t]his Court has been quick to criticize the Applicant for certain procedural events in this Case. It forgets that there were Emergencies in this Case, which were caused proximately by Hyundai and this Court’s failures to act.”\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memo in Support on Remand (Dkt. 413) at 18 (Aug. 28, 2007).} He claimed
that this was a successful Chapter 11 case for a car dealership and that he should be entitled to his fee.\footnote{1232}{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memo in Support on Remand (Dkt. 413) at 24-25 (Aug. 28, 2007).}

\textit{b. The Hearing}

The court held a hearing on August 30, 2007, about Mr. Needler’s final request and supplemental request for fees.\footnote{1233}{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 421) at 1 (Oct. 30, 2007).} Although the hearing was intended to address the final and supplemental fee requests, during the hearing, it was clear that Mr. Needler was making his claim for all his fees, citing to the fact that the final request incorporated his initial request.\footnote{1234}{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 421) at 3 (Oct. 30, 2007).} He spent most of the hearing discussing his credentials and past cases.\footnote{1235}{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 421) at 12 (Oct. 30, 2007).}

\textit{c. The Court’s Final Answer: No}

On October 30, 2007, the court entered its final order on the issue.\footnote{1236}{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 422) (Oct. 30, 2007).} Under its order, nothing changed with regard to Mr. Needler’s initial interim request and final request.\footnote{1237}{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 422) at 1 (Oct. 30, 2007).} He was entitled only to $18,040 in fees and $4,610.69 in costs (totaling $22,650.69), thus requiring him to disgorge $3,388.31 of his initial retainer.\footnote{1238}{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 422) at 1 (Oct. 30, 2007).}
regards to Mr. Needler’s supplemental request, the court denied the request for $2,200.00 of the fees and $255.00 as being premature\textsuperscript{1239} because “Judge Cebull has not entered a decision on Needler’s appeal.”\textsuperscript{1240} It also denied the request for the balance of the fees for the same reason it denied the initial interim and final fee request.\textsuperscript{1241}

In the court’s memorandum of decision, it again pointed to Mr. Needler’s failings as the justification for its decision.\textsuperscript{1242} In addition to its original reasons for reducing Mr. Needler’s fees, it clarified that it was not penalizing Mr. Needler for Incredible Auto’s pre-petition behavior but was lowering his fees as justified by his post-petition incompetence.\textsuperscript{1243} It reiterated that the only person to blame for not filing employment applications for Mr. Rice and Mr. Dickson was Mr. Needler.\textsuperscript{1244} The court rejected Mr. “Needler’s explanation for the cash collateral fiasco . . . that he had used the same method of valuation of collateral for 20 years. The Court presumes that Needler’s thinking on this issue was that since he had used his method for 20 years, HMFC should accept Needler’s valuation techniques without question.”\textsuperscript{1245}

\textsuperscript{1239} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 422) at 2 (Oct. 30, 2007).

\textsuperscript{1240} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 421) at 15 (Oct. 30, 2007).

\textsuperscript{1241} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 422) at 1-2 (Oct. 30, 2007).

\textsuperscript{1242} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 421) at 15 (Oct. 30, 2007).

\textsuperscript{1243} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 421) at 4 (Oct. 30, 2007).

\textsuperscript{1244} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 421) at 4 (Oct. 30, 2007).

\textsuperscript{1245} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 421) at 5 (Oct. 30, 2007).
those techniques to be in error because the court found a four percent equity cushion compared to Mr. Needler’s 60%. The court again pointed out that Mr. Needler could have filed a plan of liquidation, but instead “Needler’s election to file such disgraceful pleadings is a direct reflection upon Needler and illustrates Needler’s sloppy approach in this case, which sloppy practices this Court does not condone.” The court pointed to two basic premises which led to its decision:

First, the caliber of professional services provided by Needler to this Debtor was significantly deficient. . . . Second, the actions taken by Needler, even though he later professed to clearly foreseeing the outcome of this case, were inconsistent with the facts that developed during the pendency of this Chapter 11 case.

Next, it discussed the problems applicable to all the fee applications. The court said that its main evaluative tool was “whether the fees and costs requested by Needler are commensurate with the benefit conferred upon the bankruptcy estate.” The court found that very little of Mr. Needler’s actions benefited the bankruptcy estate especially because “Needler admits that he knew this case was going nowhere from its inception.” “In this Court’s opinion, Needler’s bombastic approach in this case did nothing but buy time for Nick Gutierrez and perhaps Cornelison to siphon the last bits of

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1246 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 421) at 5 (Oct. 30, 2007).

1247 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 421) at 7 (Oct. 30, 2007).

1248 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 421) at 8 (Oct. 30, 2007).

1249 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 421) at 13 (Oct. 30, 2007).

1250 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 421) at 15 (Oct. 30, 2007).
money out of the Debtor.”

In fact, the court decided to do a search of Mr. Needler’s former cases and found that just as he had been in the past, “Needler was in this case contentious, admitted no wrong, and has attempted to blame the auto auctions, HMFC, the UST and even this Court for the outcome of the case—even when Needler knew this case should have been filed under Chapter 7.”

In light of the court’s extensive documentation of Mr. Needler’s mishandling of the Incredible Auto bankruptcy, the court’s firm stance limiting Mr. Needler’s fees seems well-justified. As mentioned by the court, this is not new behavior for Mr. Needler. Even back in 1985, the Seventh Circuit Court of Appeals affirmed the lower court’s order requiring Mr. Needler to pay the costs of opposing counsel. The court said,

Lawyers sometimes file first and think later. . . . A court may order an attorney who “multiplies the proceedings . . . unreasonably and vexatiously” to bear the adversary’s cost and attorneys’ fees personally, 28 U.S.C. § 1927. William L. Needler & Associates, Ltd., filed unjustified pleadings in this bankruptcy suit. When its adversaries demonstrated that the pleadings were without substance, Needler’s firm revised them slightly and filed them twice more.

Over twenty years later, Mr. Needler continued to use the same tactics throughout the Incredible Auto bankruptcy case wasting the time and resources of all the parties involved in the case. Although the result seemed harsh, Mr. Needler received less than one-fourth of the fees for which he applied, another attorney may think twice before mismanaging another case before this court.

\[1251\] In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 421) at 15 (Oct. 30, 2007).

\[1252\] In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 421) at 15 (Oct. 30, 2007).

\[1253\] In re TCI Limited, 769 F.2d 441, 442 (7th Cir. 1985).

\[1254\] Upon hearing of Mr. Needler’s conduct, an unbiased layperson commented, “The monkey never learns.”
V. AND THEN, THEY SAW THE LIGHT: CONVERSION

A. MOTIONS TO CONVERT

1. TRUSTEE

On December 28, 2006, the Trustee filed a motion to convert the case to a Chapter 7.1255 As grounds, the Trustee pointed to the fact that Incredible Auto had not filed a plan or disclosure statement.1256 It also determined that Incredible Auto’s financial position was worsening.1257 Whereas in an initial report to the Trustee, Incredible Auto estimated a loss of $533 per month going forward, the Trustee found that Incredible Auto lost $58,974.00 in November alone.1258 The Trustee concluded that conversion was warranted under section 1112(b)(4)(A) of the Bankruptcy Code because “[t]he large and increasing losses continuing to be generated by the Debtor, and the increase in the Debtor’s postpetition liabilities are evidence of a substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation . . . .”1259

1255 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Convert, and Notice (Dkt. 167) (Dec. 28, 2006).

1256 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Convert, and Notice (Dkt. 167) at 1 (Dec. 28, 2006).

1257 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Convert, and Notice (Dkt. 167) at 1 (Dec. 28, 2006).

1258 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Convert, and Notice (Dkt. 167) at 2 (Dec. 28, 2006).

1259 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Motion to Convert, and Notice (Dkt. 167) at 2 (Dec. 28, 2006).
2. HMFC

Within six days, HMFC joined the Trustee’s motion and asked the court to convert the case to Chapter 7.\(^{1260}\) While the Trustee relied more on the financial purposes for conversion, HMFC focused more on the personnel and governance issues of Incredible Auto. It believed that Mr. Gutierrez had participated in the business with regard to its sale in contravention of the court’s order.\(^{1261}\) It reminded the court that two individuals implicated in the fraud and falsification of documents were still on staff, and a former employee, who Mr. Gutierrez testified had falsified documents, worked at Incredible Auto’s sister corporation (Incredible Chevrolet).\(^{1262}\) Finally, it told the court that the four individuals discussed in its motion refused to testify at their 2004 examinations by pleading the protection of the 5th Amendment, thus keeping HMFC from getting information about Incredible Auto.\(^{1263}\)

B. INCREDIBLE AUTO’S RESPONSES

1. RESPONSE TO TRUSTEE’S MOTION

Incredible Auto filed a response and objection,\(^{1264}\) but the court struck its motion because it failed to follow local rules and “notice the matter for hearing.”\(^{1265}\) The court

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\(^{1260}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Joinder in U.S. Trustee’s Motion to Covert Case and Notice (Dkt. 170) (Jan. 4, 2007).

\(^{1261}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Joinder in U.S. Trustee’s Motion to Covert Case and Notice (Dkt. 170) at 2 (Jan. 4, 2007).

\(^{1262}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Joinder in U.S. Trustee’s Motion to Covert Case and Notice (Dkt. 170) at 2 (Jan. 4, 2007).

\(^{1263}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., HMFC’s Joinder in U.S. Trustee’s Motion to Covert Case and Notice (Dkt. 170) at 1 (Jan. 4, 2007).

\(^{1264}\) See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance and Objection to US Trustee’s Motion to Convert the Chapter 11 to a Chapter 7 (Dkt. 177) (Jan. 7, 2007).
stated that it had “previously admonished Debtor’s counsel for his failure to follow this Court’s Local Rules. Despite such admonition, counsel filed a response to the UST’s Motion to Convert . . . [and] failed to notice the matter for hearing.”

So, Incredible Auto filed an amended response and objection which met the conditions required by the court. The first amended response and objection was followed by two other amendments, but other than a change to the caption and the title of the motions, no substantive difference existed between the three amendments. In fact, each contained the same typos.

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1265 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 179) at 2 (Jan. 10, 2007).

1266 *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 179) at 2 (Jan. 10, 2007).

1267 See *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Debtor’s Response, Resistance and Objection to US Trustee’s Motion to Convert the Chapter 11 to a Chapter 7 Set for Hearing Date Jan. 23, 2007 at 10:00 A.M. Billings, Montana (Dkt. 180) (Jan. 11, 2007).

1268 See *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Debtor’s Response, Resistance and Objection to US Trustee’s Motion to Convert the Chapter 11 to a Chapter 7 Set for Hearing Date Jan. 23, 2007 at 10:00 A.M. Billings, Montana (Dkt. 180) (Jan. 11, 2007); *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Second Amended Debtor’s Response, Resistance and Objection to US Trustee’s Motion to Convert the Chapter 11 to a Chapter 7 (Dkt. 196) (Jan. 16, 2007); *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Third Amended Debtor’s Response, Resistance and Objection to US Trustee’s Motion to Convert the Chapter 11 to a Chapter 7 (Dkt. 197) (Jan. 16, 2007).

1269 See *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Debtor’s Response, Resistance and Objection to US Trustee’s Motion to Convert the Chapter 11 to a Chapter 7 Set for Hearing Date Jan. 23, 2007 at 10:00 A.M. Billings, Montana (Dkt. 180) (Jan. 11, 2007); *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Second Amended Debtor’s Response, Resistance and Objection to US Trustee’s Motion to Convert the Chapter 11 to a Chapter 7 (Dkt. 196) (Jan. 16, 2007); *In re* Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Third Amended Debtor’s Response, Resistance and Objection to US Trustee’s Motion to Convert the Chapter 11 to a Chapter 7 (Dkt. 197) (Jan. 16, 2007).
In response to the Trustee’s claim that a plan and disclosures had not been filed, Incredible Auto pointed out that the court gave it a deadline of January 18, 2007. It attempted to establish that the current management of Incredible Auto was ethically and efficiently running the company, and it denied that any “cause” for conversion existed under section 1112(b)(4) of the Bankruptcy Code. It did not, however, attempt to rebut the Trustee’s determination that Incredible Auto had substantial and growing losses.

2. RESPONSE TO HMFC’S MOTION

Incredible Auto also filed a response and objection to HMFC’s joinder motion. It more or less resubmitted the objection that it filed in response to the Trustee’s motion, but it added a few more facts. Because the objection to the Trustee’s motion contained more management information, the document was more responsive to HMFC’s

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1270 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Third Amended Debtor’s Response, Resistance and Objection to US Trustee’s Motion to Convert the Chapter 11 to a Chapter 7 (Dkt. 197) at 3 (Jan. 16, 2007).

1271 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Third Amended Debtor’s Response, Resistance and Objection to US Trustee’s Motion to Convert the Chapter 11 to a Chapter 7 (Dkt. 197) (Jan. 16, 2007).

1272 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Third Amended Debtor’s Response, Resistance and Objection to US Trustee’s Motion to Convert the Chapter 11 to a Chapter 7 (Dkt. 197) at 2-3 (Jan. 16, 2007).

1273 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Third Amended Debtor’s Response, Resistance and Objection to US Trustee’s Motion to Convert the Chapter 11 to a Chapter 7 (Dkt. 197) (Jan. 16, 2007).

1274 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response, Resistance and Objection to HMFC’s Motion for Joinder in the U.S. Trustee’s Motion to Convert the Chapter 11 to a Chapter 7 Set for Hearing Date Jan. 23, 2007 at 10:00 A.M. Billings, Montana (Dkt. 202) (Jan. 16, 2007) [hereinafter Debtor’s Response to HMFC’s Joinder Motion].

1275 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response to HMFC’s Joinder Motion (Dkt. 202) (Jan. 16, 2007).
Alicia Teubert & Melissa Carrasco  
Incredible Auto Sales, LLC

claims than it was the Trustee’s. In the response and objection to HMFC, Incredible Auto added the following facts: (1) that the wholesale sales arrangement between Incredible Auto and Incredible Chevrolet were industry standard,\textsuperscript{1276} (2) that Mr. Cornelison fired Ms. Stephens and Lalonna Seymour,\textsuperscript{1277} (3) that establishing a panel of trustees “unfamiliar and unknowlegeable with the automotive business, would not be in the best interests of this Debtor, this estate and its creditors,”\textsuperscript{1278} (4) that none of the “cause” elements under section 1112(b)(4) of the Bankruptcy Code apply to Incredible Auto post-petition,\textsuperscript{1279} and (5) that HMFC did not comply with the notice requirement under section 1112(b) of the Bankruptcy Code.\textsuperscript{1280}

**C. AND SO IT CONTINUED . . . AND CONTINUED**

After Incredible Auto filed the preceding responses, nothing happened for a while. As noticed in the motions, the parties were to discuss the issue at the January hearing, but the Trustee, HMFC, and court agreed that both the Trustee’s motion and HMFC’s joinder motion should be continued until February 26, 2007.\textsuperscript{1281} At the hearing in February, Incredible Auto and the Trustee agreed, so the court continued the issue until

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\textsuperscript{1276} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response to HMFC’s Joinder Motion (Dkt. 202) at 3 (Jan. 16, 2007).

\textsuperscript{1277} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response to HMFC’s Joinder Motion (Dkt. 202) at 3 (Jan. 16, 2007).

\textsuperscript{1278} \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response to HMFC’s Joinder Motion (Dkt. 202) at 4 (Jan. 16, 2007).

\textsuperscript{1279} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response to HMFC’s Joinder Motion (Dkt. 202) at 6 (Jan. 16, 2007).

\textsuperscript{1280} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Response to HMFC’s Joinder Motion (Dkt. 202) at 6 (Jan. 16, 2007).

\textsuperscript{1281} See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 241) at 2 (Jan. 24, 2007); \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 353) at 4-5 (Oct. 17, 2006).
March 20, 2007.\textsuperscript{1282} It appears that the parties agreed to continue hoping the section 363 sale would close soon.

Ten days before the hearing in March, Incredible Auto filed a motion to continue the Trustee’s motion until April and to allow Incredible Auto’s attorney to appear at the March hearing via telephone.\textsuperscript{1283} It made the request because Incredible Auto’s attorney had to file his opening brief in another case on March 19th and the Appendix on March 15th.\textsuperscript{1284} It claimed that it called the Trustee, and the Trustee consented.\textsuperscript{1285}

The Trustee originally did consent, but it later filed an objection to Incredible Auto’s motion to continue.\textsuperscript{1286} Later in the day on which the Trustee consented, Incredible Auto’s attorney informed the Trustee that someone removed business records from Incredible Auto’s place of business.\textsuperscript{1287} The Trustee attempted, but was unable to reach Incredible Auto’s attorney to inform him that the Trustee could no longer consent

\textsuperscript{1282}See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Minutes of Hearing Held (Docket Entry) at 44 (Feb. 26, 2007); \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 353) at 4 (Apr. 10, 2007).

\textsuperscript{1283}See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Continue U.S. Trustee Motion to Convert the Case Set for Mar. 20, 2007 to Next Billings, Montana Court Setting and Other Relief (Dkt. 316) at 1 (Mar. 10, 2007).

\textsuperscript{1284}See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Continue U.S. Trustee Motion to Convert the Case Set for Mar. 20, 2007 to Next Billings, Montana Court Setting and Other Relief (Dkt. 316) at 2-3 (Mar. 10, 2007).

\textsuperscript{1285}See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Debtor’s Motion to Continue U.S. Trustee Motion to Convert the Case Set for Mar. 20, 2007 to Next Billings, Montana Court Setting and Other Relief (Dkt. 316) at 3 (Mar. 10, 2007).

\textsuperscript{1286}See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., United States Trustee’s Objection to Debtor’s Motion to Continue Hearing on Motion to Convert (Dkt. 320) (Mar. 12, 2007).

\textsuperscript{1287}See \textit{In re} Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., United States Trustee’s Objection to Debtor’s Motion to Continue Hearing on Motion to Convert (Dkt. 320) at 1 (Mar. 12, 2007).
“in light of [the] very serious development . . . .”1288 The Trustee asked the court to hear the motion to convert as early as possible because “[t]he disappearance of business records is a further indication that there are ongoing losses to, and diminution of this bankruptcy estate and that grounds for conversion exist under 11 U.S.C. § 1112(b)(4)(A).”1289

In a very short opinion, the court noted that Incredible Auto’s motion requested a continuance, quoted from the Trustee’s objection, and denied Incredible Auto’s motion to continue.1290 The court likely recognized that the parties at least needed to discuss conversion at that time.

Accordingly, the March 20, 2007 hearing occurred, but the attorney for Incredible Auto was absent.1291 The Trustee agreed to continue the hearing on the issue for a short period of time “recogniz[ing] that conversion of this case to Chapter 7 may derail the pending sale of Debtor’s Kia franchise to Rimrock Chrysler, Inc.”1292 In its order, the court reluctantly agreed to continue the motion to convert saying,

This case cries for conversion. The prior Orders entered by this Court delineate many of the fraudulent activities that occurred in Debtor’s operation pre-petition. The recent disappearance of business records appears to this Court to be nothing more than a continuance of Debtor’s pre-petition activities. A trustee or some similar person needs to be...

1288 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., United States Trustee’s Objection to Debtor’s Motion to Continue Hearing on Motion to Convert (Dkt. 320) at 1 (Mar. 12, 2007).

1289 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., United States Trustee’s Objection to Debtor’s Motion to Continue Hearing on Motion to Convert (Dkt. 320) at 1-2 (Mar. 12, 2007).

1290 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 321) (Mar. 12, 2007).

1291 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 339) at 1 (Mar. 21, 2007).

1292 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 339) at 2 (Mar. 21, 2007). By this time, KIA had set March 21, 2007, as the closing date for the section 363 sale. Id. at 3.
brought into this case to preserve the few assets that appear to remain and to protect the interests of the creditors.\footnote{1293}

**D. THE FINAL DECISION: CONVERT TO CHAPTER 7**

On April 10, 2007, the court granted the Trustee’s motion to covert and the case was converted to a Chapter 7.\footnote{1294} The court concluded that

\begin{quote}
[t]he sale of Debtor’s primary assets to Rimrock, the [three week] lack of activity by Debtor and the undisputed fact that Debtor’s business records were removed from Debtor’s business premises, leaves this Court with the firm conviction that it is now time to convert this case to Chapter 7 of the Bankruptcy Code and put the Debtor in its final resting place.\footnote{1295}
\end{quote}

The Trustee established “cause” for the conversion under section 1112(b)(4)(B) of the Bankruptcy Code “on the basis of the gross mismanagement of Debtor’s business operations.”\footnote{1296} The court stated that Incredible Auto was grossly mismanaged both pre- and post-petition\footnote{1297} and listed seven examples: First, Gutierrez never completely transferred his interest to his wife, who was receiving Mr. Gutierrez’s former $5,000 salary for signing checks and reviewing the finances.\footnote{1298} Second, evidence showed that Incredible Auto employees falsified documents and that many of those employees

\footnotesize{\textsuperscript{1293} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 339) at 3 (Mar. 21, 2007).}

\footnotesize{\textsuperscript{1294} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 354) (Apr. 10, 2007).}

\footnotesize{\textsuperscript{1295} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 353) at 6-7 (Apr. 10, 2007).}

\footnotesize{\textsuperscript{1296} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 353) at 9 (Apr. 10, 2007).}

\footnotesize{\textsuperscript{1297} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 353) at 12 (Apr. 10, 2007).}

\footnotesize{\textsuperscript{1298} See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 353) at 9 (Apr. 10, 2007).}
remained on the payroll both pre- and post-petition. Third, Incredible Auto deliberately double-floored vehicles and misrepresented the practice to the court. Fourth, it purposefully chose not to pay off the existing liens on the trade-in vehicles. Fifth, it falsified sales documents to give it more time before it had to repay HMFC. Sixth, the replacement general manager did not investigate the fraudulent activities. Finally, Incredible Auto was wholesaling vehicles to Incredible Chevrolet post-petition, allowing Incredible Chevrolet instead of Incredible Auto to benefit from the retail markup.

As the court found cause, it then evaluated whether the other sections of the Bankruptcy Code either required or prohibited it from converting the case to Chapter 7. “Section 1112(b)(1) directs that the court must convert or dismiss the case if the movant establishes cause unless the court determines that unusual circumstances exist and the court enumerates the circumstances.” Because Incredible Auto’s attorney did
not appear at the March 20, 2007 hearing, the court stated that it could not determine or enumerate any unusual circumstances. So, the court had to convert the case unless another provision prohibited conversion.

In stated that, “when sections 1104(a)(3) and 1112(b) are read together, it seems clear that the court must appoint a chapter 11 trustee rather than convert or dismiss the case if section 1104(a)(3) applies.” And section 1104(a)(3) applies when appointing a chapter 11 trustee “would be in the best interests of creditors and the estate.” The court concluded that conversion, rather than appointing a Chapter 11 trustee was more beneficial to the creditors. It noted that converting the case and appointing a Chapter 7 trustee would allow for a faster liquidation and that conversion “would also better serve the creditors in this case, where the Debtor no longer has an ongoing business to preserve, in that the creditors would not be burdened with the higher fees associated with the administration of a Chapter 11 case.” Thus, the court concluded that the exception preventing conversion did not apply.

The court also determined that the final exception did not apply. A court cannot convert if: (1) “there is a reasonable likelihood that a plan will be confirmed within

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1307 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 353) at 12 (Apr. 10, 2007).
1308 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 353) at 8 (Apr. 10, 2007) (citing 7 COLLIER ON BANKRUPTCY ¶ 1112.04[3] (15th ed. rev.)).
1309 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 353) at 8 (Apr. 10, 2007) (citing 7 COLLIER ON BANKRUPTCY ¶ 1112.04[3] (15th ed. rev.)).
1310 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 353) at 12 (Apr. 10, 2007).
1311 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 353) at 12 -13 (Apr. 10, 2007).
[specific] time frames;”\textsuperscript{1312} (2) the grounds for conversion “include an act or omission by the debtor other than substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;”\textsuperscript{1313} and (3) “there exists a reasonable justification for the act or omission, and the act or omission will be cured within a reasonable time fixed by the court.”\textsuperscript{1314} The court was rather blunt about Incredible Auto’s inability to meet this exception when it said, “Approval of Debtor’s disclosure statement was previously denied on the grounds that it was “woefully inadequate” and it appears, based upon Debtor’s pathetic efforts in the past, highly unlikely that Debtor will be able to formulate a confirmable Chapter 11 plan at any time.”\textsuperscript{1315}

The court’s interpretation of the Bankruptcy Code appears correct. Likely not wanting to risk any appeal, it cited not only to the Bankruptcy Code, but also to a secondary source specifically focused on bankruptcy law. In fact, the court was very methodical in applying the facts to the law. The only criticism that the authors can posit is that, perhaps, the court should have considered the Trustee’s and HMFC’s motion to convert earlier in the case. Had it done so, it probably would have reached the same conclusion and saved the estate, the creditors, and the court a lot of time.

\textsuperscript{1312} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 353) at 8 (Apr. 10, 2007) (citing 7 COLLIER ON BANKRUPTCY ¶ 1112.04[3] (15th ed. rev.)).

\textsuperscript{1313} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 353) at 8 (Apr. 10, 2007).

\textsuperscript{1314} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 353) at 8 (Apr. 10, 2007).

\textsuperscript{1315} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision (Dkt. 353) at 13 (Oct. 17, 2006).
VI. KILLING ME SOFTLY: POST-CONVERSION ACTIVITY

A. WHO WANTS THE LEFTOVERS? PROPERTY OF THE ESTATE

Although the KIA franchise and much of its inventory and equipment had been sold in the section 363 sale, at the time of conversion, the Incredible Auto estate still owned nearly $386,000 worth of assets, and HMFC was still its largest creditor.

I. ASSETS

On the conversion date, Incredible Auto owned nearly $386,000 worth of assets. Most of these assets were used vehicles that were not included in the section 363 sale to Rimrock, but Incredible Auto had other assets such as the proceeds of a bank account, a pre-petition refund from the Montana State Worker’s Compensation fund, unsold KIA parts, the dealership’s equipment and furniture, and the

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1316 See the discussion of the section 363 sale beginning supra page 184.
1317 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Status Report of Recap of Payoff Details by the Debtor as to Hyundai’s Secured Claim (Dkt. 395) at Exhibit A (June 20, 2007).
1318 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Status Report of Recap of Payoff Details by the Debtor as to Hyundai’s Secured Claim (Dkt. 395) (June 20, 2007).
1319 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Status Report of Recap of Payoff Details by the Debtor as to Hyundai’s Secured Claim (Dkt. 395) at Exhibit A (June 20, 2007).
1320 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Status Report of Recap of Payoff Details by the Debtor as to Hyundai’s Secured Claim (Dkt. 395) at Exhibit A (June 20, 2007); see also In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Conditionally Permitting Sale of Assets under 11 U.S.C. § 363 (Dkt. 243) (Jan. 24, 2007).
1321 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Status Report of Recap of Payoff Details by the Debtor as to Hyundai’s Secured Claim (Dkt. 395) at Exhibit A (June 20, 2007).
1322 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Status Report of Recap of Payoff Details by the Debtor as to Hyundai’s Secured Claim (Dkt. 395) at Exhibit A (June 20, 2007).
1323 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Status Report of Recap of Payoff Details by the Debtor as to Hyundai’s Secured Claim (Dkt. 395) at Exhibit A (June 20, 2007).
1324 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Status Report of Recap of Payoff Details by the Debtor as to Hyundai’s Secured Claim (Dkt. 395) at Exhibit A (June 20, 2007).
excess proceeds from the sale of the South Seattle vehicles.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Status Report of Recap of Payoff Details by the Debtor as to Hyundai’s Secured Claim (Dkt. 395) at Exhibit A (June 20, 2007); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Settlement and Mutual Release Agreement (Dkt. 27-1) at 1 (Feb. 16, 2007).} Later, after Incredible Auto’s attorney was ordered to disgorge $3,388.31 in attorney’s fees,\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 422) (Oct. 30, 2007).} those fees were added to the bankruptcy estate.\footnote{See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Notice of Trustee’s Intent to Abandon Property (Dkt. 425) at 1 (Apr. 23, 2008).} Additionally, there were “other potential assets” totaling $419,909.13.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Status Report of Recap of Payoff Details by the Debtor as to Hyundai’s Secured Claim (Dkt. 395) at Exhibit A (June 20, 2007).} These “other potential assets” were the potential proceeds from the UCC lawsuit,\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Status Report of Recap of Payoff Details by the Debtor as to Hyundai’s Secured Claim (Dkt. 395) at Exhibit A (June 20, 2007).} outstanding dealer reserves,\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Status Report of Recap of Payoff Details by the Debtor as to Hyundai’s Secured Claim (Dkt. 395) at Exhibit A (June 20, 2007).} and miscellaneous receivables.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Status Report of Recap of Payoff Details by the Debtor as to Hyundai’s Secured Claim (Dkt. 395) at Exhibit A (June 20, 2007).}

HMFC was still Incredible Auto’s largest creditor and was owed over $2.2 million.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Status Report of Recap of Payoff Details by the Debtor as to Hyundai’s Secured Claim (Dkt. 395) (June 20, 2007).} As a secured creditor,\footnote{See supra page 19.} HMFC was entitled to receive the value of its claim.\footnote{11. U.S.C. § 506 (2009).} Accordingly, Incredible Auto began liquidating its assets and using them to pay HMFC’s secured claim.\footnote{In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Status Report of Recap of Payoff Details by the Debtor as to Hyundai’s Secured Claim (Dkt. 395) (June 20, 2007).}
2. **ABANDONMENT**

Two of these assets did not remain in the bankruptcy estate. In April 2008, the Trustee gave notice that it intended to abandon the $3,388.31 in disgorged fees from Incredible Auto’s attorney and Incredible Auto’s interest in its claim against UCC.\(^{1336}\)

The Trustee abandoned the disgorged attorney’s fees because it found that the estate did not have any interest in them and that, even if the estate did have an interest in the money, it was “not economically viable to administer these funds as the only asset of the estate.”\(^{1337}\) Therefore, the property was “burdensome or of inconsequential value and benefit to the estate.”\(^ {1338}\)

Mrs. Gutierrez had paid Mr. Needler, $10,000 of his retainer.\(^ {1339}\) After Mr. Needler was ordered to disgorge a portion of those fees,\(^ {1340}\) Mrs. Gutierrez demanded that the estate return those fees.\(^ {1341}\)

Also prior to the commencement of the Chapter 11 case, Incredible Auto had filed a lawsuit against UCC.\(^ {1342}\) Incredible Auto had even treated its potential proceeds from

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\(^{1336}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Notice of Trustee’s Intent to Abandon Property (Dkt. 425) at 1-2 (Apr. 23, 2008).

\(^{1337}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Notice of Trustee’s Intent to Abandon Property (Dkt. 425) at 1-2 (Apr. 23, 2008).


\(^{1339}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Notice of Trustee’s Intent to Abandon Property (Dkt. 425) at 1-2 (Apr. 23, 2008); *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Statement of Attorney Fees Pursuant to 11 USC Section 329 and Bankruptcy Rule 2016(B) (Dkt. 4) at 1 (Oct. 17, 2007); *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Second Amended Statement of Attorney Fees Pursuant to 11 USC Section 329 and Bankruptcy Rule 2016(B) (Dkt. 190) at 2 (Jan. 17, 2007).

\(^{1340}\) *See In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 422) (Oct. 30, 2007).

\(^{1341}\) *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Notice of Trustee’s Intent to Abandon Property (Dkt. 425) at 1-2 (Apr. 23, 2008).
the lawsuit, assuming it prevailed, as an asset of the estate.1343 After the case was converted, the Trustee contacted four different attorneys seeking one who would pursue the claim “on a contingency fee basis because the estate [did] not have the funds to pay an attorney on an hourly basis.”1344 However, the Trustee was “unable to find an attorney, who after reviewing the file, believe[ed] that the claim [was] worth pursuing”1345 and was forced to abandon the estate’s interest in the claim. The court approved the abandonment of both the fees and the lawsuit just ten days later.1346

B. TRUSTEE

The court appointed Joseph V. Womack as trustee for the Incredible Auto estate (“Ch. 7 Trustee”).1347 As Ch. 7 Trustee, Mr. Womack was authorized to appoint an attorney to represent the estate in legal transactions.1348 Accordingly, he then applied to appoint himself as attorney for the Incredible Auto estate1349 anticipating legal


1343 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Amended Summary of Schedules (Dkt. 57) at 1 (Nov. 13, 2006).

1344 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Notice of Trustee’s Intent to Abandon Property (Dkt. 425) at 2 (Apr. 23, 2008).

1345 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Notice of Trustee’s Intent to Abandon Property (Dkt. 425) at 2 (Apr. 23, 2008).

1346 In re Incredible Auto, LLC, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 426) at 1 (May 13, 2008).

1347 See In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Trustee’s Initial Report (Docket Entry 382) at 55 (May 29, 2007) (currently unavailable); In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Trustee’s Application to Serve as Attorney (Dkt. 386) at 1 (May 31, 2007).


1349 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Trustee’s Application to Serve as Attorney (Dkt. 386) at 1 (May 31, 2007).
transactions such as handling “claims regarding the property, liquidating the estate’s interest assets, and other legal work for the estate.”

As a “professional person,” Mr. Womack would be paid from the assets of the estate. Mr. Womack sought to be paid on an hourly basis for all work other than that involving an adversary claim and on a contingency basis for adversary claims. The court approved Mr. Womack’s application the same day that it was filed, finding that Mr. Womack was a disinterested professional and that he “represent[ed] no interest substantially adverse to the estate.” It may appear at first that Mr. Womack would have to be an interested party to the bankruptcy case as both the trustee for the estate and as an attorney who would be paid for services rendered to the estate. However, it seems that this arrangement was acceptable in Montana and provided an efficient method of winding up the Incredible Auto estate.

1350 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Trustee’s Application to Serve as Attorney (Dkt. 386) at 2 (May 31, 2007).


1353 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Trustee’s Application to Serve as Attorney (Dkt. 386) at 1-2 (May 31, 2007). Mr. Womack charged an hourly fee of $200. Id.

1354 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Trustee’s Application to Serve as Attorney (Dkt. 386) at 1-2 (May 31, 2007).

1355 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Trustee’s Application to Serve as Attorney (Dkt. 386) at 1-2 (May 31, 2007).

1356 *In re Incredible Auto Sales, LLC*, Case No. 06-60855, Bankr. D. Mont., Trustee’s Order (Dkt. 387) at 1-2 (May 31, 2007).
C. HMFC’S COMPETITION: ADMINISTRATIVE EXPENSES

In January 2007, while the case was still a Chapter 11, Auto Auction had applied for an administrative expense pursuant to section 503(b)(9) of the Bankruptcy Code\textsuperscript{1357} for the vehicles that it sold to Incredible Auto in the ordinary course of its business twenty days before the commencement of the case.\textsuperscript{1358} The court granted Auto Auction’s application in February 2007.\textsuperscript{1359} Post-conversion, Auto Auction applied for an administrative expense under section 503(b)(9) of the Bankruptcy Code for the value of seven additional vehicles that it sold to Incredible Auto during the twenty day prepetition window.\textsuperscript{1360} These vehicles were re-sold to satisfy Incredible Auto’s debt to HMFC after Auto Auction lost its adversary proceeding.\textsuperscript{1361}

The Ch. 7 Trustee objected to Auto Auction’s claim having Tier I\textsuperscript{1362} administrative expense priority.\textsuperscript{1363} However, he indicated that he would not object if

\textsuperscript{1357} 11 U.S.C. § 503(b)(9).

\textsuperscript{1358} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Application for Administrative Expenses (Dkt. 200) (Jan. 16, 2007). See supra page 68 for further discussion.

\textsuperscript{1359} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Granting Application for Administrative Expenses (Dkt. 294) (Feb. 28, 2007).

\textsuperscript{1360} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Granting Application for Administrative Expenses (Dkt. 294) at 2-3 (Feb. 28, 2007); see also Auto Auction Assoc, of Montana, Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 31) at 1-2 (Mar. 26, 2007).

\textsuperscript{1361} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Granting Application for Administrative Expenses (Dkt. 294) at 2-3 (Feb. 28, 2007); see also Auto Auction Assoc, of Montana, Inc. v. Incredible Auto Sales, LLC (In re Incredible Auto Sales, LLC), Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 31) at 1-2 (Mar. 26, 2007).

\textsuperscript{1362} 11 U.S.C. § 507(a)(1) (2009). Under the priority scheme of section 507 of the Bankruptcy Code, the Chapter 7 trustee and certain domestic support obligations are entitled to payment before any other administrative expense. Id. These are known as Tier I administrative expenses.

\textsuperscript{1363} In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Trustee’s Objection to Auto Auction’s Second Application for Administrative Expenses (Dkt. 406) at 1 (Aug. 21, 2007).
Auto Auction’s claim was granted Tier II status. Auto Auction did not dispute the Ch. 7 Trustee’s objection and executed a stipulation accepting Tier II administrative expense status.

Auto Auction had a valid claim for an administrative expense under section 503(b)(9) of the Bankruptcy Code. Because its claim arose under section 503 of the Bankruptcy Code, it had no viable claim to higher status on the priority ladder than as a Tier II administrative expense. As the holder of a Tier II administrative expense, Auto Auction’s claim automatically would be subordinate to any Tier I administrative expense and would go unpaid if the estate did not have enough assets to pay both the Tier I and the Tier II administrative expenses. Therefore, Auto Auction had to be content with Tier II status because it had no choice.

D. THE END

On October 22, 2008, eighteen months after the case was converted from Chapter 11 to Chapter 7 and almost exactly two years after the petition date, the court issued its

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1364 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Trustee’s Objection to Auto Auction’s Second Application for Administrative Expenses (Dkt. 406) at 1-2 (Aug. 21, 2007). Under section 507(a)(2) of the Bankruptcy Code, after the Tier I administrative expenses are paid, “administrative expenses allowed under section 503(b) . . .” are entitled to payment. 11 U.S.C. § 507(a)(2) (2009). Because they are subordinate to the Tier I administrative expenses, these are known as Tier II administrative expenses.

1365 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Stipulation for Approval of Second Application for Administrative Expenses (Dkt. 417) at 1-2 (Sept. 10, 2007). The court approved the stipulation the next day. In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Order Approving Stipulation By & Between Auto Auction and Trustee (Docket Entry 418) at 59-60 (Sept. 10, 2007).

1366 Section 503(b)(9) allows an administrative expense for “the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor’s business.” 11 U.S.C. § 503(b)(9) (2009).

1367 See 11 U.S.C. § 507 (2009) (detailing the priority in which administrative expenses and claims are to be paid in a bankruptcy case).
final decree. A week earlier, the Trustee had determined that “there [were] no assets in the estate to administer for the benefit of creditors of the estate” and had filed his final report. Accordingly, the court ordered that the case was closed.

VII. CONCLUSION: LESSONS LEARNED

The Incredible Auto bankruptcy may have appeared simple on the petition date, but the fraud by Incredible Auto’s owners and the lack of professionalism of Incredible Auto’s attorney complicated the case. In the end, the case was converted to a Chapter 7, Incredible Auto’s main creditor was left unsatisfied, and two of Incredible Auto’s owners pled guilty to criminal charges arising from their management of Incredible Auto. Upon reflection, three broad lessons can be learned from this case: a lesson for creditors, a lesson for bankruptcy attorneys, and a lesson for bankruptcy courts.

A. A LESSON FOR CREDITORS

For the creditors, the Incredible Auto bankruptcy illustrates the fact that there is no such thing as being fully secured. HMFC had a blanket security interest in all of Incredible Auto’s tangible and intangible assets, their proceeds, future inventory, and even its KIA franchise. HMFC had procedures in place to protect its security interest. It properly perfected its interest; it conducted monthly audits of Incredible Auto’s inventory; it had access to Incredible Auto’s books of record. In short, HMFC had everything it thought it needed to protect itself from a default by Incredible Auto. With a

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1368 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Final Decree (Docket Entry) at 61 (Oct. 22, 2008).

1369 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., 341 Meeting Held & Trustee’s Report of No Distribution (Docket Entry) at 61 (Oct. 16, 2008).

1370 In re Incredible Auto Sales, LLC, Case No. 06-60855, Bankr. D. Mont., Final Decree (Docket Entry) at 61 (Oct. 22, 2008).
different debtor, this may have been enough protection. But, with a debtor intent on defrauding it, these protections were worthless.

These authors can conceive of one different practice that, if implemented by HMFC, may have prevented the fraud. HMFC could have required Incredible Auto to submit the original titles of acquired vehicles before it would advance funds for the vehicles. By doing this, Incredible Auto would have been unable\textsuperscript{1371} to submit altered or copied titles to obtain funds from HMFC. This likely would have prevented Incredible Auto’s double flooring, re-flooring, and fabrication of titles because HMFC would have had possession of the original titles.

This practice, if implemented, would not be without cost. Requiring Incredible Auto to send the original titles means that Incredible Auto would have to spend its own money to purchase a vehicle, send the original title of the vehicle to HMFC, wait for the title to arrive at HMFC, and then wait for HMFC to release the funds for the vehicle. HMFC would have to store and manage a massive quantity of titles and then locate and release the titles for individual vehicles at a moment’s notice whenever a consumer purchased a particular vehicle. On a small scale, it might be practical for Incredible Auto to wait for the funds for one car; it might be practical for HMFC to store a few titles. But, Incredible Auto, or any other car dealership, would probably never have enough cash in reserve to purchase an inventory of vehicles and wait for reimbursement. Similarly, HMFC or any other floor financer would probably find that the overhead costs of maintaining the titles of thousands of vehicles would be impractical. Therefore, as the

\textsuperscript{1371}\ The authors recognize that those intent on committing fraud will generally find a way to do so regardless of the safeguards designed to prevent it.
costs of the suggested practice make it untenable, these authors conclude that there is no such thing as being fully secured.

**B. A LESSON FOR BANKRUPTCY ATTORNEYS**

After observing Mr. Needler’s conduct and the consequences that followed, it should be clear to bankruptcy attorneys that following the court’s local rules and practicing in a professional manner could highly affect both the outcome of the case and the court’s willingness to award attorney’s fees. The court used Mr. Needler’s rash comments to support its order to convert the case from Chapter 11 to Chapter 7. It cited his failure to follow local rules, his poorly drafted filings, and his unmeasured outbursts as reason to reduce his fees from over $100,000 to under $25,000. Even if a respect for the law and the legal profession does not inspire an attorney to behave with the utmost professionalism, a healthy fear of losing attorney’s fees ought to provide sufficient motivation.

**C. A LESSON FOR BANKRUPTCY COURTS**

Although a goal of Chapter 11 is rehabilitating a struggling business, not all Chapter 11 debtors can be saved or even ought to be saved. The deferential approach that a court could adopt at the onset of an ordinary Chapter 11 case may not be appropriate for all Chapter 11 debtors. The court cannot always afford to remain deferential, especially when it is presented with documented allegations early in the case that the debtor has been defrauding its creditors, customers, and vendors.

The Montana Bankruptcy Court had evidence of Incredible Auto’s fraudulent activities nine days after the petition date, but following a deferential approach, it allowed the case to continue for six months wasting the court’s, the creditors’, and the estate’s
time and money. For example, its insistence that HMFC and Incredible Auto reach a
stipulation on the use of cash collateral seemed naïve in light of the underlying mistrust
between the two. As a result, the cash collateral dispute lasted for two-thirds of the
Chapter 11 case.

This case “crie[d] for conversion”\textsuperscript{1372} long before the court ordered it. In
retrospect, the court probably should not have taken the deferential approach. Instead, it
should have recognized that the relationship between Incredible Auto and HMFC was
such that the case was going to consume the estate’s assets if it was allowed to continue
for long. The court should have “put [Incredible Auto] in its final resting place”\textsuperscript{1373} long
before New Year’s. Other bankruptcy courts could learn to be more proactive when
faced with a related situation.

\textsuperscript{1372} \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Order (Dkt. 339) at 3 (Mar. 21,
2007).

\textsuperscript{1373} \textit{In re Incredible Auto Sales, LLC}, Case No. 06-60855, Bankr. D. Mont., Memorandum of Decision
(Dkt. 353) at 7 (Apr. 10, 2007).