

Holland & Knight

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October 1, 2012

Mitchel B. Kahn
Nelson Comis Kahn & Sepulveda, LLP
300 E. Esplanade Drive, Suite 1170
Oxnard, California 93036

Re: Scope of Issues

Dear Mr. Kahn,

Scope of Work: Holland & Knight LLP (H&K) was retained to provide bankruptcy and regulatory services in support of Ventura County Transportation Commission's (VCTC) efforts to recover the value of diesel particulate traps, which were paid for from public funds, and that were installed on buses operated by a private carrier, CUSA CC, LLC (Contractor) contracted by VCTC to provide intercity bus services. After filing its Chapter 11 case in Wilmington, Delaware, Contractor discontinued the bus service that it had been contracted by VCTC to provide; and then failed to both uninstall and return the publicly funded traps, or to reimburse VCTC for the value of the traps, in compliance with federal or state laws or regulations relating to public property. VCTC has withheld payment of the remaining Contractor invoices in light of the Contractor's failure to return the traps or pay for their value.

Initial Issues: Initially, in coordination with VCTC's General Counsel, H&K was asked to review the proof of claim filed by VCTC for the value of the traps and to assess the effect of the passage of the applicable claims deadline on the claim. In the course of the initial discussion with VCTC's General Counsel, H&K learned that VCTC had not received any notice of a rejection of the Extension Agreement under which the Contractor was to continue to provide bus service for the month of July 2012. H&K has determined that the general bar dates to filing proofs of claim which had expired prior to the filing of VCTC's claim would not act as a bar to VCTC's claim for the value of the traps, but that based on the, as yet unconfirmed, view that VCTC's claims are an administrative expense priority, a proof of claim, which is typically used to assert pre-petition claims, would not be the best mechanism for asserting VCTC's claim.

Next Step: Complete the analysis as to whether the Contractor's breach of the Existing Agreement results in an administrative priority claim. The estimated legal fees to do so are approximately \$4,000.00 - 5,000.00.

Rejection Motion: In the course of researching the proof of claim deadline issue, H&K learned that a motion had been filed to reject the VCTC agreements. Because of the Contractor's failure to reject the VCTC agreements prior to their expiration and the possibility that Contractor's apparent breach of the Extension Agreement could amount to an administrative priority claim, H&K recommended that an objection be filed to the rejection motion even though the objection

deadline had passed before H&K learned of the rejection motion. The reason for this recommendation is that a claim resulting from the rejection of a contract is deemed to have arisen on the day preceding the filing of the bankruptcy case, resulting in a general unsecured claim which has a much lower priority in the bankruptcy claim priorities than an administrative expense claim. As a result of the filing of an objection to the rejection motion on behalf of VCTC, the Contractor withdrew the VCTC agreements from the rejection motion, thereby allowing VCTC to preserve its arguments that its damages resulting from the Contractor's breach of the Extension Agreement should be accorded administrative expense priority.

Motion to Compel Payment: On Monday, September 24th, local Delaware counsel learned that the Contractor had filed a motion to compel VCTC to pay the two outstanding invoices totaling approximately \$204,000.00 and to find VCTC in contempt for willful violation of the bankruptcy automatic stay. A response to the motion was to be filed by September 28th and a hearing was scheduled for October 5th. On Tuesday, September 25th, H&K and local DE counsel were able to obtain an adjournment of the hearing to November 1st and an extension of time to file an objection to the motion. On that same day, H&K went over in detail VCTC's defenses to the claimed liability for the outstanding invoices with Contractor's counsel, including asserting the doctrine of recoupment based on VCTC's breach of contract claim against the Contractor in the approximate amount of \$372,000.00 and informally asserting that VCTC's claim is entitled to administrative priority. Counsel for the Contractor asserted that the Contractor owned the traps pursuant to the terms of the Amended and Restated Agreement, but that the Contractor was interested in trying to reach a consensual resolution of VCTC's and the Contractor's claims. H&K requested that counsel provide to H&K the language which counsel believed established the Contractor's ownership of the traps while at the same time providing to counsel the language from the Amended and Restated Agreement which established the Contractor's obligation to uninstall and return the traps or to purchase them from VCTC. On Thursday, September 27th, H&K sent an e-mail to counsel to follow-up regarding the promised language, which in H&K's view does not exist.

Next Step: It is our recommendation that we continue efforts to try to resolve these matters through negotiation. There is a significant issue for VCTC under paragraph 5 of the Extension Agreement with respect to the Contractor's failure to return the traps. Numbered paragraph 5 provides that the Contractor is not required to return the traps for so long as VCTC has not paid all outstanding invoices. This point has not yet been raised by the Contractor, and when it does, we have a response which is that the Contractor was required to uninstall and return the traps, and only the obligation to return the traps is affected by any failure of VCTC to pay an invoice. By failing to uninstall the traps prior to selling the buses, the Contractor has rendered its performance impossible even if VCTC paid the invoices. The question is whether VCTC would be amenable to a settlement which would result in VCTC not making any payment to the Contractor in exchange for a reduced (administrative?) claim in the Chapter 11 case, or even a walk-away by both parties. Any settlement would also have to take into account VCTC's claims under the performance bond. A preliminary estimate of fees to pursue such negotiations is \$5,000.00 - 7,500.00.

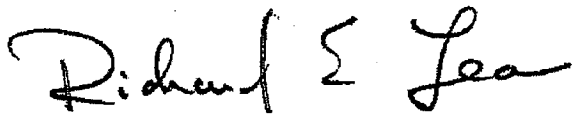
Sale Order/TMS Obligations: With the Bankruptcy Court Order approving the sale of the Contractor's assets to TMS free and clear of all encumbrances and claims and with the Bankruptcy Court's determination that notice of the sale was provided to all parties in interest, the question is whether VCTC can assert a legal action against TMS with respect to recovery of the traps or their value. While TMS would likely argue that any attempt by VCTC to recover the traps or their value from TMS violates the bankruptcy sale order's injunction against any party asserting an encumbrance or contract rights against TMS and the purchased assets, we believe there remains a credible legal claim that VCTC could assert and pursue. Initially, because the Contractor could only sell under the sale order what ownership rights it had, the Contractor could not sell the traps it did not own. Further, in its September 5, 2012 decision, the Surface Transportation Board referenced in footnote 3 a decision of June 29, 2012 providing interim approval, which required TMS to honor valid leases and other contracts associated with the assets being acquired (49 USC 14303 (i)). This reference would appear to include the Extension Agreement. To the extent that TMS has an independent obligation under the Federal transportation statute, it is H&K's view that the Bankruptcy Court did not have jurisdiction to relieve TMS of those obligations.

Next Step: It is our recommendation that VCTC determine what legal or regulatory obligations TMS may now carry with regard to the return of the traps or payment of their value. An essential part of this determination will depend on discussions with the legal and regulatory staff of the Department of Transportation/Federal Transit Administration. Once a determination is made, we can then open a line of discussion with TMS setting forth their obligations under the statute. We can expect that TMS would likely claim that VCTC is enjoined from pursuing claims against TMS pursuant to the injunctive provisions contained in the bankruptcy sale order. However, such a communication could lead to productive discussions and an acceptable resolution. We estimate that the cost of this work could range between \$12,000 - 16,000.00.

Breach of Contract Claim: In addition to seeking the recovery of the traps or payment from TMS and pursuing its claims under the performance bond, VCTC could also assert an administrative expense claim in the Chapter 11 case, once it is determined that VCTC has the basis for such a claim, for the Contractor's breach of the Extension Agreement. In this option, VCTC would argue that it has a recognizable claim to the value of the traps under the Extension Agreement, which imposes an affirmative obligation on the contractor to remove and return the equipment immediately upon termination of the Extension Agreement; or pay for the equipment. While the Contractor would argue that VCTC is obligated to pay the balance of the unpaid invoices, we would note that the Extension Agreement terminated by its own terms on July 31, 2012, triggering the Contractor's obligation to immediately uninstall and return the traps or to pay their underappreciated value. The mechanism for asserting an administrative claim in this Chapter 11 case is a "Request for Payment". Typically, these are not heard until later in a Chapter 11 case in the context of the plan confirmation process. There is the possibility that the bankruptcy court would entertain this Request outside of the confirmation process, but we would need to consult with local counsel in this regard. The Contractor would oppose this relief, resulting in the need for an evidentiary hearing, or a trial, if you will. The cost of this alternative would be the most expensive and, including the legal fees of both H&K and local DE counsel would likely be in the range of \$40,000.00 - 50,000.00.

Mitchel B. Kahn
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Sincerely,

Handwritten signature of Richard E. Lear in cursive script.Handwritten signature of Dan Maldonado in cursive script.

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Richard E. Lear

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Practices

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Restructuring and
Creditors' Rights
Litigation and
Dispute Resolution

Education

Washington and Lee
University School of
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University of New
Hampshire, B.A.,
magna cum laude

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District of Columbia
Virginia
New Hampshire
Maryland

Court Admissions

U.S. Court of
Appeals for the
Fourth Circuit
U.S. District Court
for the Eastern
District of Virginia
U.S. District Court
for the Western
District of Virginia
U.S. District Court

Richard E. Lear practices primarily in the litigation area emphasizing insolvency, Chapter 11, and creditors' rights and bankruptcy issues. For 25 years, Mr. Lear has served as counsel for institutional lenders, franchisors, leasing companies, and landlords in connection with individual and business Chapter 11 cases and in workouts. He has also counseled clients regarding the effect of bankruptcy and insolvency on proposed bond refundings, conventional loan refinancings and other transactions. He also has substantial experience advising clients with respect to transactional insolvency issues, such as bankruptcy-remote structures, substantive consolidation, true sales, preference and fraudulent transfer analysis and with drafting and reviewing reasoned legal opinions on bankruptcy issues, including in connection with the securitization of financial assets.

Mr. Lear has lectured on several occasions on bankruptcy issues at various seminars sponsored by local, regional, and state bar associations.

Mr. Lear's reported decisions include:

Robbins v. Chase Manhattan Bank, N. A. (In re Robbins), 1994 WL 149597 (W. D. Va. 1994)

Robbins v. Chase Manhattan Bank, N.A. (In re Robbins), 1993 WL 310632 (W.D. Va. 1993)

Consolidated Rail Corporation v. Dicello (In re Delaware & Hudson Railway Co.), 121 B. R. 406 (Sp. Ct. R. R. A. 1990)

In re Fay Assocs. L. P., 225 B.R. 1 (Bankr. D. D. C. 1998)

for the Eastern
District of Michigan
U.S. District Court
for the District of
Maryland
U.S. Bankruptcy
Court for the District
of Columbia
All State Courts in
Virginia
All State Courts in
New Hampshire
U.S. District Court
for the District of
Columbia
U.S. Bankruptcy
Court for the District
of Maryland
U.S. Bankruptcy
Court for the
Western District of
Virginia

In re 1560 Wilson Blvd. L. P., 206 B. R. 819 (Bankr. E.D. Va. 1996)

In re 1550 Wilson Blvd. L. P., 206 B. R. 812 (Bankr. E.D. Va. 1996)

Since 2009, Mr. Lear has been an adjunct faculty member at Georgetown University School of Continuing Studies where he teaches a course in real estate bankruptcy in Georgetown's Master of Professional Studies in Real Estate Program.

Over the past 20 years, Mr. Lear has authored numerous articles and seminar outlines addressing bankruptcy issues. He also founded in 1998 and is the editor of, and a regular contributor to, the Holland & Knight national *Bankruptcy and Creditors' Rights* newsletter.

Mr. Lear served as law clerk to The Honorable Martin V. B. Bostetter, Jr., Chief Judge, United States Bankruptcy Court for the Eastern District of Virginia from 1983-85.

Honors & Awards

The Best Lawyers in America guide, Bankruptcy and Creditor-Debtor Rights Law/Insolvency and Reorganization, 2001-2012

Top Washington Lawyer Nominee, *Washington Business Journal*, Bankruptcy, 2004

Top Washington Lawyer Finalist, *Washington Business Journal*, Bankruptcy, 2006

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Memberships

American Bankruptcy Institute

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Virginia Bar Association

Northern Virginia Bankruptcy Bar Association, Director, 2005-2006, Secretary, 2006-2007, Treasurer, 2007-2010, President-Elect, 2009-2010

District of Columbia Bar Association

Local Bankruptcy Rules Standing Committee of the Eastern District of Virginia, 2006-2007

U.S. Bankruptcy Court for the Eastern District of Virginia, Member, Alexandria Division, Bar Liason Committee, 2005-2009

Alexandria Division of the Eastern District of Virginia, Bankruptcy Mediation Panel

Alexandria Division of the Eastern District of Virginia, Bar Liaison Committee

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