

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: CORLEY NISSAN, LLC,
Debtor.

No. 23-10975-j11

In re: DM & KC, LLC,
Debtor.

No. 23-10976-j11
(jointly administered)

MEMORANDUM OPINION AND ORDER
DENYING UST'S MOTION TO DISMISS OR CONVERT

The Court held a final evidentiary hearing on the United States Trustee's Motion to Dismiss or Convert ([Doc. 38](#)) on January 26, 2024, and took the matter under advisement. Parties and counsel appearing at the final hearing were noted on the record.

The United States Trustee ("UST") seeks dismissal or conversion of these jointly administered chapter 11 cases based on the "failure to maintain appropriate insurance that poses a risk to the estate or to the public." [11 U.S.C. § 1112\(b\)\(4\)\(C\)](#).¹ The jointly administered Debtors do not dispute that they do not currently have any property or liability insurance.

Based on the evidence now before the Court, the Court finds that "cause" exists to convert or dismiss these jointly administered bankruptcy cases due to the failure of DM & KC, LLC ("DM & KC") and Corley Nissan, LLC ("Corley Nissan") to maintain appropriate insurance that poses a risk to the estate or to the public. However, the Court finds that unusual circumstances establish that a) converting or dismissing these jointly administered cases is not in the best interests of creditors and the estate, b) there is a reasonable justification for the failure of

¹ All future statutory references are to Title 11 of the United States Code.

DM & KC and Corley Nissan to maintain appropriate insurance, c) there is a reasonable likelihood that a joint plan will be confirmed within a reasonable time, d) Corley Nissan's failure to maintain appropriate insurance on its personal property can be cured through abandonment of such property within a reasonable time fixed by this Court, and e) DM & KC's failure to maintain appropriate insurance will be cured by obtaining general liability insurance within a reasonable time fixed by this Court. *See* § 1112(b)(2).

PROCEDURAL BACKGROUND

Corley Nissan and DM & KC each filed a voluntary petition under chapter 11 of the Bankruptcy Code on October 31, 2023.² The Court ordered the joint administration of the Corley Nissan and DM & KC bankruptcy cases on January 3, 2024.³ The UST filed the Motion to Dismiss or Convert on January 4, 2024, seeking dismissal of both bankruptcy cases on the grounds that all estate assets are uninsured.⁴

The City of Gallup, a home rule New Mexico municipal corporation ("Gallup"), filed a Motion to Permit Post-Petition Perfection of Utilities Liens ("Utilities Motion") in the DM & KC case.⁵ The Utilities Motion requests the Court to allow Gallup to perfect a statutory utilities priming lien in the amount of \$48,425.88 against real property owned by DM & KC located at 1200 W. Jefferson Ave., Gallup, NM (the "1200 W. Jefferson Property") and 1000 W. Jefferson Ave., Gallup, NM (the "1000 W. Jefferson Property," together the "Jefferson Properties").⁶ The Utilities Motion recites that Corley Nissan, DM & KC, PrinsBank, Nusenda FCU ("Nusenda"),

² *See* Case No. 23-10975-j11 – [Doc. 1](#) and Case No. 23-10976-j11 – [Doc. 1](#).

³ *See* [Doc. 37](#).

⁴ *See* [Doc. 38](#).

⁵ *See* [Doc. 52](#).

⁶ *Id.*

and WBL SPO I, LLC a/k/a World Business Lenders, LLC (“WBL”), do not object to the relief requested in the Utilities Motion.⁷

Following the final hearing on the Motion to Dismiss or Convert, the Court fixed a deadline of February 2, 2024 for Corley Nissan and DM & KC to amend their respective schedules to make them as complete and accurate as possible.⁸ The Order confirmed that the Court took judicial notice of the dockets, the documents on the dockets, and the claims registers in Case Nos. 23-10975-j11 and 23-10976-j11 as requested by the UST at the final hearing on the Motion to Dismiss or Convert.⁹ Corley Nissan and DM & KC each filed amended schedules and an amended statement of financial affairs on February 2, 2024.¹⁰

FACTS¹¹

Corley Nissan

Corley Nissan is a limited liability company owned by members of the Corley family. Eddie Corley, Sr. owns 61% of the membership interests, and his daughter, Debora M. Money, owns 39% of the membership interests.¹²

Corley Nissan operated a Nissan automobile dealership located on the 1000 W. Jefferson Property it leased from DM & KC. Corley Nissan closed the dealership and ceased its business operations before filing for bankruptcy protection. It is no longer generating any income.

⁷ *Id.*

⁸ See Order Resulting from Hearing Held January 26, 2024 and Fixing Deadline to Amend Schedules (“Order” - [Doc. 63](#)).

⁹ *Id.*

¹⁰ See Docs. 67, 68, 69, and 70. The parties stated on the record that they do not object to the Court admitting the amended schedules filed in each case in evidence. The Court admits those schedules in evidence.

¹¹ The Court’s findings of fact are set forth not only in the Facts section of this memorandum opinion, but also in the Discussion section, which contains additional findings of fact that are mixed questions of fact and law.

¹² See [Doc. 7](#).

Corley Nissan does not own any real property. The aggregate scheduled liquidation value of Corley Nissan’s assets (all personal property) is \$37,228.43, consisting of

Cash/cash equivalents (closed savings account)	\$5.27
Parts inventory	\$6,023.16
Office furniture, fixtures, and equipment	\$20,200
Service department equipment and lifts	\$11,000

(together, the “Personal Property”).¹³ Corley Nissan has abandoned vehicles valued at \$0.00 that customers dropped off at the dealership for servicing, but for which they did not have the money to pay for repairs, and which the customers never picked up.¹⁴ Corley Nissan also scheduled a possible breach of contract and tort claim with an unknown value. *Id.* Corley Nissan does not have any insurance coverage for the Personal Property. Nor does it carry any general liability insurance.

The total scheduled amount of Corley Nissan’s debt is \$8,702,228.25.¹⁵ Nine creditors have filed proofs of claim in the Corley Nissan case:¹⁶

Claim No.	Creditor	Nature of Claim	Amount
1	IRS	Priority Unsecured	\$1,297,713.31
2	Foursight Capital, LLC	Secured (Transcript of Judgment)	\$46,089.33
3	State Employees Credit Union	Unsecured	\$42,728.71
4	Sandia Laboratory Federal Credit Union	Unsecured	\$232,756.07
5	Martha Fernando	Unsecured	\$29,432.80
6	Mabel Larry	Unsecured	\$29,432.80
7	Nusenda Federal Credit Union	Unsecured	\$4694.32
8	Nusenda Federal Credit Union	Secured (Transcript of Judgment)	\$38,398.30
9	DOWC Administration Services, LLC	Secured	\$1,957,235.02

¹³ See [Doc. 67](#).

¹⁴ *Id.* The original schedules listed \$40,000 as the value of the abandoned vehicles. See [Doc. 20](#). The vehicles are scheduled at zero value to the estate in the amended schedules because they belong to customers. The vehicles are at a tow lot and are available for the customers to pick up.

¹⁵ See [Doc. 67](#).

¹⁶ See Corley Nissan’s Claims Register.

DOWC Administration Services, LLC (“DOWC”) obtained a prepetition judgment against Corley Nissan. Its secured claim is based on a claimed security interest in all of Corley Nissan’s assets, which would include the Personal Property.

Other creditors with relatively large scheduled claims include:¹⁷

¶ number in Schedules	Creditor	Nature of Claim	Amount
2.3, 2.4	NM Taxation and Revenue	Priority	\$300,000
3.3	Cloudfund LLC	Unsecured	\$754,230
3.5, 3.6	DM & KC LLC	Unsecured	\$212,708
3.13	Nissan North America	Unsecured	\$916,370.83
3.16	PrinsBank	Unsecured	\$1,200,000
3.17	Reynolds and Reynolds	Unsecured	\$928,872.04
3.19	SBA	Unsecured	\$150,000
3.23	World Business Lenders SPO I, LLC	Unsecured	\$1,750,000

No claims bar date has been set in the Corley Nissan case.

According to Corley Nissan’s schedules, DM & KC’s three principals personally guaranteed a substantial portion of Corley Nissan’s debt, including its obligations to DOWC, PrinsBank, and World Business Lenders SPO I, LLC.¹⁸

Several of Corley Nissan’s former customers have filed lawsuits against Corley Nissan asserting consumer fraud claims.¹⁹ The total amount of those claims is unknown. Some of the former customers have filed a motion for relief from stay to proceed with litigation against

¹⁷ See [Doc. 67](#).

¹⁸ See [Doc. 67](#) – Schedule H.

¹⁹ See Exhibit 2, p. 19.

Corley Nissan with any recovery to be paid from a \$50,000 surety bond that Corley Nissan was required to have in order to be a licensed auto dealer.²⁰

DM & KC

Like Corley Nissan, DM & KC is a limited liability company. Eddie Corley, Sr. owns 61% of the membership interests, and Kaul D. Corley, Sr. and Debora M. Money each own 19.5%.²¹

DM & KC owns the Jefferson Properties and real property located at 1030 N. Hwy 491, Gallup, New Mexico (together, the “Real Property”).²² The scheduled value of the Real Property is \$8.1 million, based on an appraisal.²³ According to an insurance quote from Covington Specialty Insurance Company, the value of the two buildings on the Jefferson Properties is over 85% of the value of the three buildings on the Real Property.²⁴ DM & KC has one tenant, First Quality Motors, who occupies one of the buildings situated on the Real Property, and pays DM & KC \$4,000 per month in rent. That is the only source of income for DM & KC. The other two buildings located on the Real Property are vacant.

On the petition date, DM & KC had cash or cash equivalents in the amount of \$4,005.07.²⁵ Scheduled accounts receivable of DM & KC are characterized as uncollectible.²⁶

The amended schedules filed in the DM & KC bankruptcy case list three secured creditors: 1) PrinsBank, holding a claim in the amount of \$1.2 million secured by a first mortgage lien against the Real Property; 2) WBL, holding a secured claim of \$1.75 million,

²⁰ See [Doc. 71](#).

²¹ See Exhibit 6.

²² The Real Property is comprised of three parcels, assigned separate addresses, land, and three buildings.

²³ See Exhibit 6 and [Doc. 69](#).

²⁴ See Exhibit C.

²⁵ See Exhibit 6.

²⁶ *Id.*

secured by a second mortgage lien against the Real Property, and 3) Gallup, holding a claim of \$44,425.88 secured by a statutory utilities lien against the Jefferson Properties.²⁷ The total amount of DM & KC's scheduled secured claims is \$2,994,425.80.²⁸

According to the Amended Schedules, there are no priority unsecured claims against DM & KC, and Eddie Corley, Sr. is the only nonpriority unsecured creditor with a scheduled claim (in the amount of \$93,636.00).²⁹ The Amended Schedules describe Eddie Corley, Sr.'s claim as capital contributions, not loans, and explain that the claim is disclosed in the Amended Schedules because those capital contributions were discussed at the §341(a) meeting of creditors.³⁰

The DM & KC claims register reflects a nonpriority unsecured claim by the Internal Revenue Service in the amount of \$500 for estimated taxes (Claim 1), a nonpriority unsecured indemnity claim by Nusenda FCU in the amount of \$4,694.32 (Claim 2), and a claim by Nusenda FCU in the amount of \$38,398.30 secured by a judgment lien (Claim 3).³¹ However, the stated basis for Nusenda FCU's \$4,694.32 claim is "Indemnification from Debtor in Case # D-1113-CV-2023-00064," which is a case in which Corley Nissan but not DM & KC is the defendant. Similarly, the stated basis for Nusenda FCU's \$38,398.30 claim is a default judgment against Corley Nissan in a lawsuit to which DM & KC was not a party. Nusenda FCU filed the same two claims against Corley Nissan.³² For purposes of this opinion, the Court finds that Nusenda FCU does not have any valid claim against DM & KC. No claims bar date has been set in the DM & KC bankruptcy case.

²⁷ See [Doc. 69](#).

²⁸ *Id.*

²⁹ See [Doc. 69](#).

³⁰ *Id.*

³¹ See DM & KC Claims Register – Case No. 23-109760j11. The Court's findings regarding the amount of debt are based on DM & KC's amended schedules and claims filed to date.

³² See Corley Nissan Case No. 23-10975-j11, Claims Nos. 7 and 8.

DM & KC has received an offer to buy the Real Property for \$4.2 million, which it regards as too low. Other parties have also expressed an interest in buying the Real Property. Remax has posted a listing for the sale of the Real Property with an asking price of \$6,500,000,³³ although Kaul Corley, Sr. testified that he thought the original listing price was \$7.25 or \$7.35 million and questioned whether the lower listing price was authorized.³⁴ Based on the amount of the secured claims against the Real Property in light of its appraised value, DM & KC has significant equity in the Real Property, possibly as much as \$3 million or \$4 million, even taking into account administrative claims against the DM & KC estate.³⁵

Counsel for Corley Nissan and DM & KC represented to the Court that if a chapter 11 plan is confirmed, the three principals of DM & KC have agreed to contribute the surplus, after paying DM & KC's creditors, to pay creditors of Corley Nissan.

DM & KC has no property insurance coverage on the Real Property, nor does it carry general liability insurance. Insurance coverage lapsed sometime in August of 2023. The insurance policies were not renewed because DM & KC did not have the financial ability to pay the premiums. Counsel for PrinsBank represented to the Court that PrinsBank has obtained forced place insurance on the Real Property to protect its interest in the Real Property. WBL, which also holds a mortgage against the Real Property, did not appear at the hearing on the Motion to Dismiss or Convert. The Court infers that WBL is a sophisticated commercial lender based on the size of its claim and its name (WBL SPO I, LLC a/k/a World Business Lenders, LLC).

³³ See Exhibit 7.

³⁴ The Court has not approved DM & KC's retention of a real estate broker. Apparently, the Real Property was listed for sale with a broker prepetition.

³⁵ $\$8,100,000 - (\$1,750,000 + \$1,200,000 + \$44,425.88) = \$2,994,425.88 = \$5,205,574.12$. At closing, the UST agreed that there is at least \$1.2 million in equity in the Real Property.

The vacant buildings located on the Real Property are secured with key-entry-only deadbolt locks. There are no doorknobs on any of the entry points. There are no security cameras on the Real Property. Kaul Corley, Sr. checks on the Real Property daily. There has been a problem with transients and trespassers on the Real Property. No one has physically broken into the buildings located on the Real Property, although there was one instance of a rock being thrown through a window. The window has since been repaired. Police and sheriffs have been quick to respond to reports of trespassers or disturbances on the Real Property. Employees of the one remaining tenant are allowed to park their vehicles close to the other buildings.

DM & KC's Efforts to Obtain Insurance

DM & KC has contacted several insurance brokers beginning in late November 2023 in an effort to obtain insurance coverage on the Real Property, including Bubony Insurance Agency, who contacted several insurance companies in an effort to obtain insurance quotes, and Brightline Dealer Advisors.³⁶ DM & KC started receiving insurance quotes in January of 2024. DM & KC have now received the following insurance quotes:

Insurance Company	Coverage	Quoted Premium
Kinsale Insurance Company ³⁷	Insured value of the structures on the Real Property = \$5,767,000	Total Premium = \$65,768.42 (including fees and taxes) Monthly Payment Amount = \$5,596.91
Covington Specialty Insurance Company ³⁸	Insured value of the structures on the Real Property = \$6,800,000	Total Premium = \$54,874.85 (including policy fee and tax) General Liability Coverage = \$2,852.00 (included in the Total Premium) Optional Terrorism Coverage = \$2,101.00 plus additional taxes in the amount of \$63.09

³⁶ See Exhibits A and C.

³⁷ See Exhibit B. Exhibit B was admitted for the limited purpose of demonstrating DM & KC's efforts to obtain insurance and not for the truth of the matters asserted therein.

³⁸ See Exhibit C.

Although Kaul Corley, Sr. did not request a financing option when seeking insurance quotes, he acknowledged that the insurance quote from Kinsale Insurance Company included a financing option.³⁹ He has not otherwise sought financing on behalf of DM & KC to pay for insurance premiums. Mr. Corley does not believe the insured value of the structures on the Real Property on either of the insurance quotes is sufficient. He is continuing efforts to secure insurance coverage quotes from other companies. Obtaining insurance is made more difficult because two of the three buildings on the Real Property are unoccupied.⁴⁰

DM & KC does not generate sufficient income from the monthly rental payments to cover the insurance premiums for both liability and property insurance. Kaul Corley, Sr. has not yet discussed with Eddie Corley, Sr. the possibility that Eddie Corley, Sr. pay the insurance premium personally, to be paid back from the proceeds of the sale of the Real Property.

Chapter 11 Prospects

No proposed chapter 11 plan has been filed in either bankruptcy case. Counsel for the Debtors represented that no plan has been filed because of the pending Motion to Dismiss or Convert. If the Court denies the Motion to Dismiss or Convert, Corley Nissan and DM & KC are committed to filing a joint liquidating plan that proposes to sell the Real Property with the assistance of a real estate broker and contribute the excess proceeds from the sale to Corley Nissan, after paying the secured creditors of DM & KC and its administrative expenses.

Kaul Corley, Sr. is confident that DM & KC will be able to sell the Real Property for a good price if given adequate time to sell. The Real Property is a particularly attractive location in Gallup, New Mexico because it is situated on a main corridor leading into Gallup from the

³⁹ See Exhibit B.

⁴⁰ See Exhibit A.

surrounding communities. Mr. Corley believes it would be best to sell the three lots comprising the Real Property together, but DM & KC is willing to sell the lots separately if necessary.

Debtors' counsel represented to the Court that Debtors will be able to file a joint chapter 11 plan by the end of February 2024, and that he is willing to commit to that as a hard deadline. As of the date of the final hearing on the Motion to Dismiss or Convert, there was no written agreement signed by the principals of DM & KC committing to contribute proceeds from the sale of the Real Property to the Corley Nissan estate.

DISCUSSION

The UST requests that the Court dismiss or convert the jointly administered cases of Corley Nissan and DM & KC for “cause” based on the Debtors’ failure to maintain appropriate insurance that poses a risk to the estates and to the public. Corley Nissan and DM & KC oppose dismissal or conversion, pointing out that “cause” under § 1112(b)(4)(C) exists only if there is a failure to maintain “appropriate” insurance. Corley Nissan and DM & KC do not dispute that neither Debtor has any insurance of any kind. They argue that § 1112(b)(4)(C) does not require insurance that a debtor cannot afford, and that, in these cases, “appropriate” insurance is no insurance. Nevertheless, Corley Nissan and DM & KC have committed to purchase liability insurance for DM & KC.

Section 1112(b) governs involuntary dismissal or conversion of chapter 11 cases. Section 1112(b)(1) provides, in relevant part:

[O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or examiner is in the best interests of creditors and the estate.

§ 1112(b)(1). The statutory directive of § 1112(b)(1) is that the court “shall” convert or dismiss if “cause” is shown unless the Court appoints a trustee or examiner. *See In re Picacho Hills Util. Co.*, [518 B.R. 75, 81](#) (Bankr. D.N.M. 2014) (“Once cause is established under § 1112(b), the Court must dismiss or convert the case, or appoint a Chapter 11 trustee . . .”).

However, § 1112(b)(2) contains an “unusual circumstances” exception to the statutory directive of § 1112(b)(1). Section 1112(b)(2) provides:

(2) The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that—

(A) there is a reasonable likelihood that a plan will be confirmed within . . . a reasonable period of time; and

(B) the grounds for converting or dismissing the case include an act or omission of the debtor . . .

- (i) for which there exists a reasonable justification for the act or omission; and
- (ii) that will be cured within a reasonable period of time fixed by the court.

§ 1112(b)(2).

A. Whether “cause” exists.

The UST as the party requesting dismissal or conversion bears the burden of demonstrating “cause.” *In re Whetten*, [473 B.R. 380, 382](#) (Bankr. D. Colo. 2012) (“The movant bears the burden of establishing cause by a preponderance of the evidence.”). “[F]ailure to maintain appropriate insurance that poses a risk to the estate or to the public” is one of the enumerated grounds for “cause” defined in § 1112(b). § 1112(b)(4)(C).⁴¹ Because both Debtors have no property or liability insurance, the UST asserts that cause exists to dismiss or convert the

⁴¹ The itemized list in § 1112(b)(4) constituting “cause” for conversion or dismissal “is illustrative, not exhaustive.” *Whetten*, [473 B.R. at 382](#). *See also Picacho Hills*, [518 B.R. at 80](#) (“The list [of 16 grounds that constitute ‘cause’ for conversion or dismissal] is not exhaustive.”).

Corley Nissan and DM & KC cases, contending that the failure to maintain any insurance poses a risk to the estates and to the public.

Debtors rely on *In re KC's Pub, LLC*, [428 B.R. 612](#) (Bankr. M.D. Pa. 2010) for the proposition that the Court should consider a debtor's ability to pay in determining whether the debtor has "appropriate" insurance. The *KC's Pub* court held:

I find that among the relevant factors a bankruptcy judge should consider to determine whether a debtor-in-possession is maintaining "appropriate insurance" are: (1) applicable requirements under other federal or state laws; (2) the debtor's size and the complexity of the case; (3) the debtor's financial wherewithal to purchase insurance; (4) the existence of or lack of pre- or post-petition uninsured claims against the debtor; (5) any steps taken by the debtor to reduce the risk of claims; and, (6) the best interests of creditors.

[428 B.R. at 617](#).

While inability to pay might be relevant to the type of insurance coverage that constitutes "appropriate insurance," it is not a sufficient reason to avoid a finding of cause under § 1112(b)(4)(C) where a failure to maintain any insurance poses a material risk to the estate or the public.⁴²

Debtors further contend that the "appropriate insurance" requirement of § 1112(b)(4)(C) only requires insurance to avoid a finding of cause where the failure to maintain insurance poses a *material* risk to creditor recoveries in the case or to the public. The Court agrees. As the court explained in *In re Honx, Inc.*:

The failure-to-insure provision of § 1112 addresses the situation where a debtor's failure to maintain proper insurance exposes the estate to liabilities which threaten creditors' recoveries, the stability of the bankrupt entity, or the public generally.

No. 22-90035, 2022 WL 17984313, at *3 (Bankr. S.D. Tex. Dec. 28, 2022).⁴³

⁴² See *In re M.A.R. Designs & Constr., Inc.*, [653 B.R. 843, 861–62](#) (Bankr. S.D. Tex. 2023) ("An inability to pay is not an excuse to not maintain insurance sufficient to avoid conversion or dismissal under § 1112(b)(4)(C).").

⁴³ Accord *M.A.R. Designs*, [653 B.R. at 861](#).

1. *Cause with respect to DM & KC*

The Court finds cause to dismiss or convert the DM & KC case because the failure to maintain any liability insurance poses a material risk to the public. There are three buildings on DM & KC's Real Property, two of which are vacant. The land on which the buildings are situated is accessible by the general public. There has been a problem with transients and trespassers on the Real Property. DM & KC needs to maintain liability insurance to protect against injury to a member of the public who enters the property.

On the other hand, the Court does not find cause to dismiss or convert the DM & KC case because of the failure to maintain any property insurance. Failure to maintain property insurance does not pose a material risk to recoveries by DM & KC's creditors. There are three DM & KC creditors with liens against the Real Property. In the order of priority of their liens, those creditors are:

Creditor	Approximate Claim Amount	Lien Priority
Gallup	\$44,425.88	First ⁴⁴
PrinsBank	\$1.2 million	Second
WBL SPO I, LLC a/k/a World Business Lenders, LLC	\$1.75 million	Third

At the hearing on the Motion to Dismiss or Convert, counsel for PrinsBank confirmed that PrinsBank has forced place insurance insuring its interest in the Real Property. WBL failed to appear at the hearing. The Court expects WBL, a sophisticated commercial lender, will likewise maintain forced placed insurance insuring its interest in the Real Property. The cost of the insurance can be added to the amount of its claim. The interest of Gallup in the Jefferson

⁴⁴ Gallup will be in first position once its Utilities Motion is granted.

Properties is adequately protected by its security cushion, even if disaster, such as a fire, were to strike the Jefferson Properties. The only other creditor of DM & KC is the IRS, which holds a claim in the amount of \$500. The IRS's claim is so de minimus in comparison to the value of the Real Property that the Court will disregard it for purposes of applying § 1112(b)(4)(C).

2. Cause with respect to Corley Nissan

Corley Nissan has no business operations and few assets other than some personal property. Its failure to maintain liability insurance does not pose a risk to creditors or the public and therefore does not constitute cause to dismiss or convert.

Corley Nissan has Personal Property with a scheduled value of approximately \$40,000. DOWC, which claims a first priority secured interest in the property, is undersecured. Damage to the Personal Property poses a material risk to DOWC. Corley Nissan's failure to maintain property insurance on the Personal Property therefore constitutes cause.⁴⁵

B. Whether the Court should deny the motion to convert or dismiss under the unusual circumstances exception.

Having determined that "cause" exists under § 1112(b)(1) to dismiss or convert the Corley Nissan and DM & KC bankruptcy cases, the Court will examine whether the unusual circumstances exception set forth in § 1112(b)(2) applies. Corley Nissan and DM & KC have the burden of proof to show that the unusual circumstances exception applies.⁴⁶

⁴⁵ If Corley Nissan had abandoned the Personal Property prior to the hearing on the Motion to Dismiss or Convert, the Court would not have found cause to convert or dismiss the Corley Nissan case. The Court cannot, consistent with § 1112(b), find that "cause" does not exist, conditioned upon Corley Nissan abandoning the Personal Property within a time fixed by the Court. To do so would render superfluous the element under the "unusual circumstances" exception that requires the debtor to cure the problem within a reasonable time. *See* § 1112(b)(2)(B)(ii).

⁴⁶ *Whetten*, 473 B.R. at 382 ("Thus, once cause is demonstrated, the burden shifts to the opposing party to prove 'unusual circumstances.'").

The Bankruptcy Code does not define “unusual circumstances,” yet the plain meaning of the phrase suggests, as many courts have held, that the circumstances must be uncommon to chapter 11 cases generally.⁴⁷ Circumstances that do not qualify as “unusual circumstances” for purposes of § 1112(b) include, for example, disputes regarding the validity, priority, and amount of a creditor’s claim, difficulty making plan payments due inherent financial pressures, and adversarial differences.⁴⁸

The circumstances present in the Corley Nissan and DM & KC jointly administered cases are unusual. Corley Nissan and DM & KC have common ownership. DM & KC has three secured creditors holding aggregate claims of approximately \$3 million and only one unsecured creditor holding an estimated claim of \$500. DM & KC’s assets consist of the Real Property with improvements that DM & KC values at \$8.1 million based on an appraisal. Corley Nissan, on the other hand, has total assets valued at \$37,228.43 (all of which are fully encumbered), and total scheduled debt held by numerous creditors in the amount of \$8,702,228.25. This scenario alone does not constitute “unusual circumstances.” What makes the circumstances unusual is that the individuals that own DM & KC have agreed to contribute, pursuant to a confirmed chapter 11 joint liquidating plan, the substantial surplus in the DM & KC estate (after paying its creditors) to the Corley Nissan estate to pay its creditors. Absent such a plan, DM & KC would have no obligation to pay creditors of Corley Nissan. In addition, there is a high risk of the loss or substantial diminution of that surplus if the cases are dismissed or converted.

⁴⁷ See, e.g., *In re Baroni*, [36 F.4th 958, 968](#) (9th Cir. 2022), *cert. denied sub nom. Baroni v. Seror*, [143 S. Ct. 424, 214 L. Ed. 2d 234](#) (2022); *M.A.R. Designs*, [653 B.R. at 870](#); *In re California Palms Addiction Recovery Campus, Inc.*, No. 22-40065, 2022 WL 2116643, at *16 (Bankr. N.D. Ohio June 10, 2022); *In re Fall*, [405 B.R. 863, 870](#) (Bankr. N.D. Ohio 2009), *aff’d sub nom. Fall v. Farmers & Merchants State Bank*, No. 3:08CV3012, 2009 WL 974538 (N.D. Ohio Apr. 9, 2009); *In re Orbit Petroleum, Inc.*, [395 B.R. 145, 148](#) (Bankr. D.N.M. 2008).

⁴⁸ *Baroni*, [36 F.4th at 968](#).

If the DM & KC case were converted to chapter 7, it is likely the Chapter 7 trustee would abandon the Real Property and declare a “no asset” estate because there is only one unsecured creditor in the case holding a claim of only \$500. The Real Property then likely would be sold at a foreclosure sale at a depressed price. If the Corley Nissan case were converted to chapter 7, it is likely the Chapter 7 trustee in that case would abandon the approximately \$40,000 of fully encumbered and uninsured personal property in the estate and declare the estate a “no asset” estate. The claims in the Corley Nissan case of almost \$9 million would be unpaid, except for a relatively small recovery by the first lien holder on the abandoned personal property and any recovery on Corley Nissan’s \$50,000 surety bond.⁴⁹ If the Corley Nissan and DM & KC bankruptcy cases were both dismissed, the claims in the Corley Nissan case would be almost entirely unpaid. On the other hand, if DM & KC and Corley Nissan confirm a joint liquidating chapter 11 plan, creditors of Corley Nissan may receive a dividend of \$3 million or more. These circumstances, in the Court’s experience, are unusual.

Having found unusual circumstances, the Court will address the other requirements of § 1112(b)(2).

C. There is a reasonable likelihood that a plan will be confirmed within a reasonable period of time.

Neither Corley Nissan nor DM & KC has filed a chapter 11 plan. Counsel for the Debtors represented that they intend to file a joint liquidating plan, and will commit to file the plan by February 29, 2024, if the Court denies the Motion to Dismiss or Convert. Counsel has represented that the proposed plan will provide adequate time for DM & KC to market and sell

⁴⁹ If the Corley Nissan and DM & KC bankruptcy cases were converted or dismissed, it is possible that one or more creditors holding personal guarantees of Corley Nissan debt executed by the owners of DM & KC could be paid from the proceeds of a sale of the Real Property following a foreclosure sale. However, a foreclosure sale likely would yield a much lower price for the Real Property than a sale under a chapter 11 plan.

the Real Property with the assistance of a real estate broker to maximize value for creditors, and will provide that the surplus sale proceeds will be paid to Corley Nissan's creditors.

The joint liquidating plan will be fairly straightforward. Counsel for the Debtors has substantial experience representing chapter 11 debtors and has more than a sufficient level of expertise to prepare such a plan and take it to a confirmation hearing. Because it will be a liquidating plan under which the members of DM & KC will contribute any estate distributions on account of their equity interests to the creditors of Corley Nissan, the absolute priority rule will not be an obstacle to confirmation. *See* § 1129(b)(2)(A) and (B).

The UST argues that creditors of Corley Nissan who have claims against DM & KC's members under personal guaranties of Corley Nissan's debt might object to the contribution of the surplus in the DM & KC estate if part of the surplus is paid to creditors of Corley Nissan who do not have such personal guaranties. The joint plan can deal with that issue by separately classifying claims, if appropriate. The Court will fix a deadline of February 29, 2024, for the Debtors to file a joint chapter 11 plan.

Based on the foregoing, the Court finds and concludes that there is a reasonable likelihood that a plan will be confirmed within a reasonable period of time.

D. *There exists a reasonable justification for the failure to maintain insurance.*

Corley Nissan does not have liability insurance because it does not need it. Corley Nissan does not have property insurance because it has not been able to afford it. Those reasons for lack of insurance constitute reasonable justifications for Corley Nissan's failure to maintain insurance.

DM & KC does not have property and liability insurance because has not been able to afford it. That constitutes a reasonable justification for DM & KC's failure to maintain insurance.⁵⁰

E. The failure to maintain insurance will be cured within a reasonable period of time fixed by the Court.

Corley Nissan can cure its failure to maintain insurance on its Personal Property by abandoning all tangible property of the estate and making such property available for the creditor holding a first priority security interest in the property to pick it up. The UST agreed that abandoning the Personal Property solves the problem of Corley Nissan's failure to insure it. The Personal Property is fully encumbered and does not provide a benefit to the estate. The Court will fix a deadline that is ten days from entry of this memorandum opinion and order for Corley Nissan to file a motion to abandon the Personal Property to ensure it is abandoned within a reasonable period of time.

DM & KC has rental income of \$4,000 per month, from which it appears that DM & KC can afford to pay an insurance premium for liability insurance. The insurance quote from Covington Specialty Insurance Company includes a Commercial General Liability premium of \$2,852.00.⁵¹ The Court will fix a deadline that is thirty days from entry of this memorandum opinion and order for DM & KC to acquire liability insurance. Because DM & KC has rental income that appears sufficient for DM & KC to purchase liability insurance timely, the Court finds and concludes that DM & KC's failure to maintain liability insurance will be cured within a reasonable period of time fixed by the Court.

Based on the foregoing, the Court will deny the Motion to Dismiss or Convert.

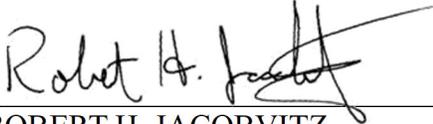
⁵⁰ The Court has decided that DM & KC is not required to maintain property insurance to avoid conversion or dismissal. This does not mean that it is prudent not to carry the insurance.

⁵¹ See Exhibit C.

WHEREFORE, IT IS HEREBY ORDERED, that the Motion to Dismiss or Convert is DENIED, conditioned on the following:

- A. No later than February 29, 2024, Corley Nissan and DM & KC must file a joint liquidating plan that provides for the sale of the Real Property with excess proceeds to be contributed to the estate of Corley Nissan to pay creditors of Corley Nissan.
- B. No later than February 22, 2024, Corley Nissan must file a motion to abandon all tangible property of its estate, including the Personal Property.
- C. No later than March 13, 2024, DM & KC must obtain liability insurance and file of record a notice confirming that it has obtained appropriate liability insurance.

ORDERED FURTHER, that the failure of Corley Nissan or DM & KC to comply with the deadlines without leave of Court will result in dismissal or conversion. In that event, the Court will decide whether dismissal or conversion is appropriate.


ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: February 12, 2024

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and all other counsel of record.