UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 01-22939

TMP NATIONAL CARTAGE CORPORATION,
f/k/a Flower City Express,

Debtors. **DECISION & ORDER**

BACKGROUND

On July 31, 2001, TMP National Cartage Corporation (the "Debtor"), which operates a trucking company, filed a petition initiating a Chapter 11 case. On the Schedules and Statements required to be filed by Section 521 and Rule 1007, the Debtor: (1) indicated that it was the owner of a 2001 Freightliner Tractor and Raven Flatbed Trailer, together valued at $90,000.00, and subject to a security interest and lien in favor of Ford Motor Credit ("Ford Credit")[1]; (2) on its Schedule G of Executory Contracts and Unexpired Leases, indicated that it had a vehicle lease with Genesee Truck Rental and a Truck Rental Agreement covering six units with Penske Truck Leasing Co. ("Penske"); and (3) indicated that Jose Puente, the Debtor's President and twenty-five percent (25%) shareholder, was a co-debtor of the Debtor's obligations to Penske.

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[1] Ford Credit filed a proof of claim which attached copies of "Trac" Commercial Leases covering the tractor and trailer.

A Minute Report of a Section 341 Hearing conducted by the Office of the United States Trustee on August 28, 2001 indicated that the Debtor "needs to negotiate with Penske regarding post-petition lease assumption and payment terms."

On October 5, 2001, Penske filed a motion for relief from the automatic stay (the "Stay Relief Motion") which alleged that: (1) on April 16, 1999, the Debtor and Penske entered into a Vehicle Lease Service Agreement (the "Lease Agreement") that provided for the lease by the Debtor of six tractors and three trailers (collectively, the "Leased Vehicles"); (2) the Lease Agreement was not a financing agreement, so the Debtor had no equity in the Leased Vehicles; (3) through July 2001, the Debtor was more than $130,000.00 in arrears on its lease payments; (4) the Lease Agreement was terminated by Penske's pre-petition July 26, 2001 notice (the "Termination Notice"); (5) as of September 7, 2001, the Debtor was $11,166.06 in arrears on its post-petition lease payments; and (5) the automatic stay should be terminated so that Penske could obtain possession of the Leased Vehicles in accordance with its rights and remedies under the Lease Agreement.

On October 12, 2001, the Debtor interposed a Response to the Stay Relief Motion which: (1) reserved the Debtor's right to

bring further proceedings before the Court to determine whether the Lease Agreement constituted a true lease or a financing agreement; (2) disputed on several grounds the amounts that Penske had alleged were due under the Lease Agreement; and (3) disputed that, to the extent that the Lease Agreement was found to be a true lease, Penske had effectively terminated the lease pre-petition by the "Termination Notice."

On the return date of the Stay Relief Motion, the Court set the matter down for a hearing and advised the attorney for the Debtor that, if the Debtor wished to pursue its position that the Lease Agreement was a financing agreement rather than a true lease, it must file detailed papers with the Court prior to the hearing.

On October 29, 2001, the Debtor filed a memorandum (the "Debtor Memorandum") which set forth its position as to why the Lease Agreement was a financing agreement rather than a true lease. The Memorandum: (1) asserted that the governing law was New York State Case Law and Statutory Law, specifically Uniform Commercial Code Sections 1-201(37)[2], which defines a security

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[2] UCC Section 1-201(37) provides in part that:

"Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation... Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if

interest[3], and 2A-103(1)(j), which defines a lease[4]; (2) a

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the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and

(a) the original term of the lease is equal to or greater than the remaining economic life of the goods,

(b) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,

(c) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or

(d) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

A transaction does not create a security interest merely because it provides that:

(a) a present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into,

(b) the lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods,

(c) the lessee has an option to renew the lease or to become the owner of the goods,

(d) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed, or

(e) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

NY U.C.C. § 1-201(37) (2000).

[3] In a Post-Hearing submission, the Debtor asserted that the Lease Agreement contained a choice-of-law provision that established that Pennsylvania Law would be applied to interpret, construe and enforce the Lease Agreement. Penske has asserted in its Response to Debtor's Post-Hearing Submission that the choice between Pennsylvania Law and New York Law is of little consequence since both states apply the same version of the UCC and both jurisdictions' cases stress that other jurisdiction's decisions are entirely relevant. Further, Penske asserts that Pennsylvania and New York Law both apply an "economic realities" approach. Therefore, the Court in this Decision & Order has utilized

determination of whether an agreement is a true lease or a financing agreement is a finding of fact made after considering the totality of the circumstances, except in those specific circumstances set forth in UCC Section 1-201(37) where the Court must conclude as a matter of law that the transaction is a security interest or financing agreement; (3) Article 16 of the Lease Agreement provided: (a) an option for either party to terminate the Agreement before its expiration date; (b) an option for the Debtor to purchase the Leased Vehicles with Penske's consent if the Debtor exercised the early termination right; and (c) if it exercised the early termination right, an option for Penske to "put" the Leased Vehicles and require the Debtor to purchase the Leased Vehicles; (4) the Lease Agreement also provided for various rights and remedies in the event that the Debtor held over after the expiration of the Agreement, which continued the Agreement on a week-to-week basis and made

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the New York Statute for convenience purposes, and case law from both Pennsylvania and New York.

[4] UCC Section 2A-103(1)(j) provides that:

> (1)(j) "Lease" means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale of return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

NY U.C.C. § 2A-103(1)(j) (2000).

the provisions of Article 16 applicable during the holdover period; (5) the Lease Agreement passed all of the essential elements of ownership to the Debtor; (6) Penske's ability to terminate the Lease Agreement and "put" the Leased Vehicles to the Debtor made the Lease Agreement fall within the "purpose spirit [sic], if not the literal language, of that portion of UCC Section 1-201(37) that makes an agreement a security agreement as a matter of law"; (7) where a party is forced by an agreement to become the owner of the goods, or at the sole discretion of the lessor can be forced to become the owner of the goods for any reason whatsoever, the transaction is a sale; (8) if the Debtor should fall into the holdover period, it must purchase the Leased Vehicles so that the Agreement creates a security interest as a matter of law; (9) even though the Debtor could terminate the Lease Agreement prior to its expiration, it could only do that by becoming bound to purchase the Leased Vehicles; (10) even if the Lease Agreement is not a security interest as a matter of law, what the Court must determine is what the intent of the parties was in entering into the Lease Agreement, which could best be inferred from reviewing the various rights and duties created under the Lease Agreement; and (11) the provisions of the Lease Agreement when considered

together indicate that the transaction between the Debtor and Penske is a financing agreement for the following reasons: (a) the Debtor must insure the Leased Vehicles on Penske's behalf for both liability and loss; (b) the Debtor selected the Leased Vehicles and requested that Penske arrange to purchase them; (c) the Debtor was required to provide a guarantor of its obligations; (d) the Debtor is liable for any deficiency after a default and the liquidation of the Leased Vehicles; (e) for each Leased Vehicle the lease payments exceed the value of the Vehicle plus a rate of return; (f) if interest rates fall during the term of the Lease Agreement the purchase and refinance of each Leased Vehicle would be less expensive for the Debtor than performing under the Lease Agreement; and (g) the lease terms for the tractors and trailers are for approximately the useful life of the Vehicles.

On October 30, 2001, Penske filed a Trial Brief (the "Trial Brief") which alleged that: (1) Penske Truck Leasing Co., LP, was a truck leasing company that did not finance truck purchases; (2) Penske has more than twenty makes of vehicles available to its leasing customers, and it was at Penske's recommendation that the Debtor leased the particular Freightliner tractors and Trailmobile trailers covered by the

Lease Agreement; (3) Penske required a guarantor because of the Debtor's weak financial condition; (4) under the Lease Agreement, Penske provides service, maintenance and full road service for the Leased Vehicles, except for damage caused by the Debtor, replacement vehicles when appropriate and various fleet services, including fuel tax reporting; (5) the useful life for each of the Leased Vehicles substantially exceeds the respective lease term in the Lease Agreement; (6) the lease transaction entered into between Penske and the Debtor was "FASBE 13" certified by Penske's accountants, which is a certification that the transaction complies with the Internal Revenue Service regulations covering a lease rather than a financing agreement; (7) the Debtor has never shown the Leased Vehicles as an asset on its corporate books and records; (8) under the Lease Agreement the Debtor does not have an option to purchase at the termination of the Lease for a nominal amount; (9) it is not in Penske's best interests to exercise the right of termination provided to it by Article 16; and (10) all aspects of the Lease Agreement clearly reflect its character as a true lease.

On October 31, 2001, the Court conducted a hearing (the "Hearing") on the Stay Relief Motion at which it heard the testimony of Mark Swartout ("Swartout"), the local branch

manager for Penske, and Martin Puente ("Puente"), the Debtor's vice-president. At the conclusion of the hearing, the Court advised the parties that its preliminary ruling was that the Lease Agreement was a true lease not a financing agreement.

The Debtor's Post-Hearing submission, filed on November 9, 2001, asserted that: (1) by the terms of the Lease Agreement, the applicable law was Pennsylvania Law not New York Law; (2) Pennsylvania Law looked at the economic realities of the agreement and the transaction, rather than the intent approach utilized by New York Courts, citing *In re Kim*, 232 B.R. 324 (Bankr. E.D.Pa. 1999); (3) Article 16 of the Lease Agreement provided that on any in service anniversary date Penske, at its sole discretion, could force the Debtor to purchase the Leased Vehicles or buy its way out of the Agreement; (4) during a holdover period, Penske must enforce the provisions of Article 16; (5) the Debtor believed that the economic essence of Article 16 was that Penske, if it had a desire to do so, could exercise its "put" and avoid taking a loss if the resale value of a Leased Vehicle felled precipitously during the term of the Lease Agreement; (6) Article 16 applied in the event of a holdover; (7) Article 16 was designed to insure that Penske recovered its out-of-pocket costs for the Leased Vehicles plus a profit,

thereby shifting to the Debtor the economic risk of owning the vehicle in a fluctuating resale market; (8) forcing a lessee to insure the residual value of an item through a "put" is the equivalent of a sale for a fixed mark up, and, therefore, under the Lease Agreement the Debtor was and is bound to become the owner of the Leased Vehicles; (9) in order to determine whether the Debtor is paying the value of the Leased Vehicles plus a return over the lease term, the mileage charges, or at least the profit portion of those charges, must be added to the regular lease payments; (10) Penske took economic advantage of the Debtors; and (11) the Termination Notice was not effective to terminate the Lease Agreement prior to the filing of the Debtor's petition.

On November 9, 2001, Penske filed an additional Trial Brief which reiterated its prior positions, and reminded the Court that Swartout had testified that in his eighteen years with Penske: (1) he had never known Penske to exercise the Article 16 right of early termination and requirement that a lessee purchase a leased vehicle; and (2) he knew of only three occasions where a lessee had exercised its right to terminate and purchase a leased vehicles prior to the expiration of the lease agreement.

DISCUSSION

I. OVERVIEW

If you wish to start out in the trucking business and you want to own your vehicle(s), you go to a truck dealership, buy a new or used truck(s) and, if you do not pay cash, finance your purchase through a local financial institution, a division of the manufacturer or an entity that specializes in financing trucks and trailers. If you cannot afford to purchase outright, would be unable to obtain the necessary financing, or do not have the time, ability or staff to repair and maintain your vehicles and file all of the required reports and tax returns, you can go to a truck leasing company, such as Penske or Ryder, lease the vehicle(s) and also obtain maintenance, repair, road service and related services.

Although you may be able to purchase your leased vehicle(s) during or at the expiration of the lease term, generally such a purchase is economically less favorable than if you initially purchased the vehicle(s) outright or with financing.

Although truck leasing companies make money from lease payments and mileage charges (if the lease also provides for maintenance, repair and road services), they also can make money from the resale of the leased vehicles. The lease terms are

generally designed to insure that the vehicles come off lease at the optimum resale time, often when there are still some manufacturer's warranties available, and truck leasing companies are generally able to resell the vehicles coming off lease at the high end of the resale value range. This is in part because the leasing companies insured that the vehicles were meticulously maintained and repaired during the lease term and detailed maintenance and repair logs to demonstrate this are available to the purchaser.

Even though in any given geographical area truck leasing companies may be competitive in their pricing, given the needs of prospective truck lessees, truck lease agreements are economically favorable to the truck lessors. Nevertheless, no matter how economically favorable a true truck lease may be to the leasing company, it does not make it a financing agreement.

II. SUMMARY OF DECISION

Based upon a review and analysis of the Lease Agreement and the testimony of the witnesses and evidence produced at the Hearing, I find that the Lease Agreement is a true lease and not a financing agreement or security interest as described in NY UCC 1-201(37), and the Debtor has failed to meet its burden to demonstrate otherwise.

The Lease Agreement is not a financing agreement or a security interest as a matter of law because, even if the Debtor had no right to terminate the Lease Agreement prior to the expiration of the stated lease term, which it does have under Article 16: (1) the lease term for each Vehicle is not equal to or greater than the economic life of the Leased Vehicle; (2) there is no requirement at the termination of the original lease term that the Debtor renew the Lease Agreement for the then-remaining economic life of the Leased Vehicles; (3) the Debtor has no option to renew the Agreement; (4) although the Agreement sets forth certain rights and remedies in the event of a holdover by the Debtor, such a holdover by the Debtor would not be the equivalent of an option to renew for no additional consideration or nominal consideration; and (5) the Debtor does not have an option to become the owner of the goods for no additional consideration or nominal additional consideration at the end of the lease term.

Furthermore, the Court's: (1) assessment of the economic realities of the Lease Agreement; and (2) determination of the intention of the parties from a review and analysis of the provisions of the Lease Agreement, the testimony and evidence produced at the Hearing and all other facts and circumstances,

employing a totality of the circumstances test, results in the only conclusion possible; the Lease Agreement is a true lease.

The correspondence and notices produced by Penske, including the Termination Notice, are not sufficient for the Court to find that the Lease Agreement was effectively terminated prior to the filing of the Debtor's petition.

III. ARTICLE 16 OF THE LEASE AGREEMENT

A. The Provision

> **TERMINATION PRIVILEGES**. Either party may upon sixty (60) days, prior written notice to the other, terminate this VLSA as to one (1) or more of the Vehicles on the annual anniversary of their respective in service dates.
> Upon termination by either party, CUSTOMER shall, at PENSKE TRUCK LEASING's option, purchase the Vehicle as to which the notice has been given other than substitute, interim, or additional vehicle(s). Alternatively, in lieu of purchasing the Vehicle, CUSTOMER may elect to pay PENSKE TRUCK LEASING the difference, if any, between the purchase price as calculated in this Article and the Fair Market Value (defined as the highest appraisal of market value wholesale) received by PENSKE TRUCK LEASING from two (2) or more independent vehicle dealers of each such vehicle as of the date of termination (the "alternative payment").
> The purchase price of the Vehicle shall be the original agreed value of the Vehicle set forth in Schedule "A" less the monthly depreciation credit of the Vehicle set forth in Schedule "A" multiplied by the number of months elapsed from the in service date of the Vehicle to the termination date, provided, however, that the purchase price is to be paid by the CUSTOMER for the Vehicle shall not be less than fifteen percent (15%) of its original agreed value set forth in Schedule "A."

> CUSTOMER shall simultaneously pay all outstanding lease charges through and including the date of purchase of the Vehicle (or date the alternative payment is made by CUSTOMER), together with applicable sales or use taxes and that portion of all license and registration fees, applicable personal property taxes, and prepaid expenses paid by PENSKE TRUCK LEASING with respect to the Vehicle, pro-rated to the date of termination. Upon receipt thereof, PENSKE TRUCK LEASING shall cause the conveyance to CUSTOMER of title to the Vehicle to be purchased, as-is, where-is. CUSTOMER shall have no right to exercise any option to terminate, or to effect the termination of, this VLSA under this Article while CUSTOMER shall be in default under the VLSA. No cancellation or other termination of this VLSA by either party shall in any way release CUSTOMER of liability for the payment of any sum(s) due or to become due PENSKE TRUCK LEASING under this VLSA or any damages which it shall have sustained by reason of CUSTOMER's breach thereof.

B. <u>Holdover Period</u>

It is important for the truck leasing companies to be able to sell vehicles coming off lease as soon as possible in order to maximize their return on a resale. As Swartout confirmed at the Hearing, the lease termination times are determined in large part to insure that they coincide with the optimum resale time. Often this is because there may still be manufacturer's warranties available.

Therefore, the Lease Agreement provides that "[u]pon expiration or termination of the Vehicle's lease, CUSTOMER shall (with the exception of a Vehicle purchased, pursuant to Article

16 hereof, prior to the expiration of its lease term) return the Vehicle to the PENSKE TRUCK LEASING service location shown on the Schedule "A" in the same condition and appearance as when received, ordinary wear and tear excepted."

However, as correctly pointed out by the Debtor, the Lease Agreement also provides that, "[a]ny holding over after the expiration of the Vehicle's lease term shall be on a week-to-week basis and subject to all the terms of the VLSA, except that either party may terminate at any time during the period of holding over upon one (1) week's prior written notice to the other, provided all the other termination requirements set forth in Article 16 are satisfied."

The Debtor makes much of the fact that during any holdover period the Debtor could or would be required to purchase the vehicle pursuant to the provisions of Article 16, thereby making the Lease Agreement a financing agreement or security interest as a matter of law under NY UCC 1-201(37). However, holding over is not something that is required of the Debtor under the Lease Agreement, nor is it expected. Therefore, the Debtor could always avoid the holdover provisions by simply complying with the provisions of the Lease Agreement, not holding over and

returning the Leased Vehicles at the termination of the lease.

Penske can never require a holdover, and the most likely reasons for a holdover are that: (1) a lessee has determined to purchase a leased vehicle and it needs more time to get together the purchase price or finalize financing; or (2) the lessee is entering into a new lease with Penske and the new leased vehicles have not arrived in time, in which case Penske would be working closely with the lessee to put the new lease into effect.

In view of what the Debtor believes are the unclear provisions of Article 16 as they apply during a holdover period, if a lessee did not want to purchase a leased vehicle, it would insure that it did not holdover or it would holdover only with a written waiver of the applicability of Article 16.

The Lease Agreement cannot be interpreted as always requiring the lessee to purchase the leased vehicles just because it may be required to do so under some circumstances if the lessee holds over, since the election to holdover is not expected and is exclusively at the option of and under the complete control of the lessee. Penske cannot unilaterally put the lessee, or in this case the Debtor, into a holdover period.

C. The Right of Penske Under Article 16 to Terminate the Lease Agreement Early and Require a Purchase or Buy-Out

Certainly the Debtor does not and could not complain that Article 16 affords it the right, in its sole discretion and for whatever business reasons it may have, to terminate the Lease Agreement before its expiration and buy its way out of the Lease for a computable amount, or, with Penske's consent, purchase the Leased Vehicles.

The Debtor has asserted that the lease expiration date under the Lease Agreement is also an "annual anniversary" date on which the Debtor could purchase a leased vehicle or, more significantly, Penske could exercise its "put" and force a purchase if the required sixty-day notice had been given.

I agree with the interpretation of Penske, as testified to by Swartout, that there are no such options for either party under the Lease Agreement after the annual anniversary date for the year preceding the lease expiration date, although, as discussed above, the lessee might voluntarily holdover in an attempt to argue that it can then purchase the leased vehicle.

I believe the proper interpretation of Article 16 is that, in circumstances other than during a holdover, where a purchase at the option of Penske may or may not apply, Article 16 affords

either party the option on one of the anniversary dates prior to the lease expiration date to terminate the Agreement.

Should the lessee exercise the option to terminate early on an annual anniversary date prior to the lease expiration date, it can either: (1) pay the alternative buy-out amount provided for; or (2) request of Penske that it be able to purchase a vehicle or vehicles for the applicable purchase price set forth in Article 16, and, if Penske consents, purchase the vehicle. If Penske does not consent, the lessee can always pay the buy-out amount.

On the other hand, should Penske exercise the option to terminate early on an annual anniversary date, I do not believe that it can require the lessee to purchase the Leased Vehicles. Penske must always accept the alternative buy-out amount from the lessee.

Therefore, other than during a holdover period where the parties' rights are unclear, but which can only be caused by the Debtor, I disagree with the Debtor's interpretation that Penske has a "put," and, therefore, the Agreement should be interpreted as a conditional sale at Penske's sole discretion.

Even if Article 16 affords Penske the right to terminate the Lease Agreement early and require a purchase, although it may be

a somewhat unusual provision in a truck lease, it is: (1) a provision that by itself does not make the Agreement a financing agreement or a security interest as a matter of law under NY UCC Section 1-201(37); and (2) only one factor for the Court to consider in its totality of the circumstances analysis of the economic realities.[5] Furthermore, I accept Swartout's testimony as credible that Penske rarely, if ever, exercises its option to terminate one of its lease agreements before the lease expiration date. Certainly, if Penske routinely exercised that option, it would not be competitive in the truck leasing business for long. Therefore, I can only conclude that Article 16 is included in the Lease Agreement to provide for some very rare and exceptional circumstance or set of circumstances. Furthermore, there is no evidence in the record that Penske has ever terminated a lease agreement before its lease expiration date and attempted to require the lessee to purchase a leased vehicle.

IV. ECONOMIC REALITIES AND THE INTENTION OF THE PARTIES

A. Economic Realities

[5] If a prospective lessee is shopping around for a truck lease and visits with Penske and one of its competitors, one of the things that the competitor would likely bring to the prospective lessee's attention is Article 16 of the Penske lease agreement.

Since, as discussed in the Summary of Decision, the Lease Agreement is not a financing agreement or security interest as a matter of law, the Court must look at the economic realities of the transaction. *In re Kim,* 232 B.R. 324, 329-330 (Bankr. E.D.Pa. 1999) (citing *In re Murray*, 191 B.R. 309, 314 (Bankr. E.D.Pa. 1996).

We know from the Decision of the United States Bankruptcy Court for the Northern District of New York in *In re Owen*, 221 B.R. 56 (Bankr. N.D.N.Y. 1998) ("*Owen*")[6] that: (1) in this case, the Debtor has the burden of proof to demonstrate that the transaction is other than what the Lease Agreement purports it to be, which is a true lease; and (2) the principle factors that many courts focus on in assessing the economic realities of whether a transaction represents a conditional sale or a true lease is whether: (a) a purchase option price at the end of the lease term is nominal; (b) the lessee is required to make aggregate rental payments having a present value equaling or exceeding the fair market value of the leased equipment at the inception of the lease; and (c) the lease term covers the total useful life of the leased equipment.

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[6] The Debtor has acknowledged that the decisions of courts other than Pennsylvania Courts in interpreting the provisions of the UCC can be helpful.

When the *Owen* factors are considered in connection with the provisions of the Lease Agreement, it is clear that the first and third factors are inapplicable. As discussed above, the Debtor has no purchase option at the expiration of the lease term, but even if it does under some of the Debtor's theories and interpretations, any ability to purchase the Leased Vehicles would never be for nominal consideration. In addition, I accept the testimony of Swartout at the Hearing that the useful life of each of the Leased Vehicles exceeds the applicable lease term set forth in the Lease Agreement.

As to the second factor in the *Owen* case, in its Post-Hearing submission, the Debtor provides an analysis to support its assertion that the consideration received by Penske under the Lease Agreement is substantially more than Penske's acquisition cost for each Leased Vehicle, so that the second *Owen* factor is present.

First, the UCC specifically provides that a transaction does not create a security interest merely because it provides that the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or greater than the fair market value of the goods at the time the lease is entered into.

Therefore, even if the Debtor's analysis is correct, that in itself would not require the Court to find that the transaction is a financing agreement.

Second, I do not accept the Debtor's analysis, in that: (1) the Debtor's analysis, based upon one of the 1999 Freightliners, compares what the Debtor believes is the consideration paid to Penske against Penske's acquisition cost for the Vehicle instead of the fair market value required by the UCC[7]; (2) the Debtor's analysis wrongfully adds into the consideration received by Penske what it believes are mileage charges in excess of the amount necessary for Penske to perform the required repairs and maintenance, however, this is simply profit for an additional service, maintenance and repair work which the Debtor contracted for; (3) the Debtor's analysis wrongfully adds into the consideration received by Penske what it believes is the present value of the buy-out provision in Article 16, since it asserts that Penske has the option to force the buy-out at its sole discretion; and (4) the fair market value of the 1999 Freightliners at the time of the execution of the Lease

[7] Many times acquisition cost and fair market value will be identical. However, in this case Swartout testified that because of its superior buying power Penske acquired the Leased Vehicles for substantially less than their fair market value, in the case of new vehicles, fifteen percent (15%) less than list price.

Agreement was more than the $77,256.00[8] present value determined by the Debtor using a $1,600.00 monthly payment for sixty (60) months at a nine percent (9%) discount.

Even though the Lease Agreement contains a number of other provisions which NY UCC Section 1-201(37) specifically enumerates, but states cannot by their existence result in a finding that the transaction is a security interest, such as risk of loss and duty to insure, when all of these provisions are considered together they do not result in a conclusion that the Lease Agreement is a financing agreement rather than a true lease. Even though some of the provisions pass one or more risks or responsibilities to the Debtor that may otherwise be considered to be an incidence of ownership, they do not result in the conclusion that the Lease Agreement is a financing agreement.

An analysis under the economic realities test of Pennsylvania Law can only result in the conclusion that the Lease Agreement is a true lease. Clearly, Penske has drafted an agreement that, based upon its superior bargaining power, in

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[8] Swartout testified that Penske's acquisition cost was fifteen percent (15%) less than the agreed price for Leased Vehicles ($84,301.00 x .85 = $71,655.85). If the Debtor could obtain the Vehicle for one-half of the Penske discount, the fair market value would be $78,821.00 ($84,301.00 x .935 = $78,821.00).

almost every way is economically to its benefit. The Debtors careful analysis of many of the economic aspects of the Lease Agreement only demonstrates that the Agreement, as expected, is heavily weighted in favor of Penske.

B. Intention of the Parties

Even though under Pennsylvania and New York Law the Court must employ an economic realities test and not an intention of the parties test, the Debtor has never asserted that: (1) when it entered into the Lease Agreement it intended then, or at any time during or at the expiration of the lease term, to become the owner of the Leased Vehicles; (2) it believed that the Lease Agreement, when fully performed, would make it the owner of the Leased Vehicles; or (3) it believed that the Lease Agreement was an economically viable means of purchasing the Leased Vehicles.

Furthermore, I do not believe that the Lease Agreement, when taken as a whole, evidences an intent on the part of Penske, the Debtor, or both parties that the transaction was other than a true lease.

V. TERMINATION

Penske's default letters to the Debtor, including the Termination Notice, when read together, do not meet the termination requirements in the Lease Agreement which require

five days written notice to the Debtor of termination. In this case, the Termination Notice, dated July 26, 2001, was not given a full five days before the Debtor's July 31, 2001 petition, and in the actions of the parties after an earlier default letter, it is not clear that Penske did not waive any attempted prior termination.

CONCLUSION

The Lease Agreement is not a financing agreement or security interest in accordance with NY UCC Section 1-201(37) or its Pennsylvania counterpart. It is a true lease.

The automatic stay provided for by Section 362 is hereby terminated, unless by the close of business on December 14, 2001, the Debtor has: (1) paid to Penske all post-petition amounts due on the Lease Agreement through November 30, 2001, including lease payments, late charges and mileage charges; and (2) filed a motion to assume the Lease Agreement, which shall be returnable on the Court's December 19, 2001 Motion Calendar at 9:30 a.m. This Decision & Order shall constitute an Order Shortening Time for any motion to assume the Lease Agreement.

IT IS SO ORDERED.

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HON. JOHN C. NINFO, II
CHIEF U.S. BANKRUPTCY JUDGE

Dated: December 7, 2001