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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
CHEMTURA CORPORATION, et al.,	:	Case No. 09-11233 (REG)
Debtors.	:	Jointly Administered

OBJECTION OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS TO DEBTORS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO ENTER INTO A PLAN SUPPORT AGREEMENT WITH THE CREDITORS' COMMITTEE AND CERTAIN HOLDERS OF THE DEBTORS' 2009 NOTES, 2016 NOTES AND 2026 DEBENTURES

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The Official Committee of Equity Security Holders (the "**Equity Committee**") appointed in the above-captioned jointly-administered chapter 11 cases (the "**Chapter 11 Cases**") of Chemtura Corporation ("**Chemtura**") and its affiliated debtors and debtors-in-possession (collectively with Chemtura, the "**Debtors**"), by and through its undersigned counsel, hereby objects (the "**Objection**") to the Debtors' Motion for Entry of an Order Authorizing the Debtors to Enter into a Plan Support Agreement with the Creditors' Committee and Certain Holders of the Debtors' 2009 Notes, 2016 Notes and 2026 Debentures (the "**Motion**"). In support of its Objection, the Equity Committee respectfully represents as follows.

PRELIMINARY STATEMENT

1. The plan filed by the Debtors now concedes that the Debtors are solvent estates with substantial equity value, and the creditors committee and the ad hoc committee have acknowledged that fact by supporting the Debtors' plan that pays its members a bonus with the Equity Committees' money.

2. At the same time the Debtors filed this proposed plan -- irrefutably establishing that the Chemtura equity holders are the fulcrum security in these chapter 11 cases and therefore have the most at stake in this reorganization process -- the Debtors are seeking authority to take $7 million from the equity holders' recoveries in order to pay an alleged substantial contribution claim that has not even been made and, even if it had been made, has no chance of being approved. This pretextual "settlement" is part of the proposed plan support agreement (the "**PSA**") that the Debtors seek to enter into with the Official Committee of Unsecured Creditors (the "**UCC**") and certain members (the "**Consenting Noteholders**") of an ad hoc committee (the "**Ad Hoc Committee**") of claimholders under the Debtors' 2009 Notes,

2016 Notes, and 2026 Notes.[1] The "settlement" is nothing more than a vote buying tactic, spent with currency that rightfully belongs to equity holders.

3. The PSA is an impermissible plan solicitation under Bankruptcy Code section 1125 because it has already obligated the UCC and the Consenting Noteholders to vote in favor of the joint plan of reorganization filed by the Debtors on June 17, 2010 (the "**Debtors' Plan**") prior to the approval of a disclosure statement. Under the present circumstances, where the Debtors' Plan provides for payment to unsecured creditors in full plus accrued interest, the PSA serves no purpose. The only thing the lockup accomplishes is to further marginalize equity's participation by improperly shutting it out of the plan process, while simultaneously decreasing equity recoveries by $7 million.

4. Specifically, the Debtors attempt to justify this improper lockup by linking it to a so-called "settlement" of the Ad Hoc Committee's purported claim for substantial contribution (the "**Substantial Contribution Settlement**"). This so-called settlement was manufactured by the noteholders and the Debtors in an improper effort to shoehorn themselves into the posture of the Texaco case, which is the only reported decision from this District that has authorized a post petition plan support agreement under any circumstances. However, neither Texaco nor the other unpublished orders and transcript rulings cited by the Debtors stand for the proposition that the Debtors' Substantial Contribution Settlement is a legitimate reason for entry into the PSA. The Substantial Contribution Settlement proffered by the Debtors does not remotely fit within the premise of *any* of these authorities and cannot justify the Debtors' entry into the PSA.

[1] As employed herein, "**2009 Notes**", "**2016 Notes**", and "**2026 Notes**" have the meanings ascribed to such terms in the joint plan of reorganization filed by the Debtors on June 17, 2010.

5. Furthermore, if approved, the Substantial Contribution Settlement would obligate the Debtors to pay up to $7 million for the Ad Hoc Committee's fees and expenses for a claim that has never been formally asserted. Nor can such a claim ever be credibly asserted because the Ad Hoc Committee's constituents are already being paid in full (including accrued interest and questionable "settlements") in exchange for their votes. The Ad Hoc Committee could never credibly contend that by diminishing equity recoveries, it has made a substantial contribution to the Chapter 11 cases. Consequently, there is no legitimate substantial contribution claim for the Ad Hoc Committee to make and there is no possible justification for paying a $7 million bogus settlement out of equity's pocket. In addition, even if there could be a substantial contribution, the nature of the Substantial Contribution Settlement makes any determination necessarily premature because it is impossible for the Court to determine the merits of such a settlement in the absence of a confirmed plan.

6. In any event, the Debtors have not met – and cannot meet - their burden for approval of the Substantial Contribution Settlement. They proffer no evidence on which the Court may determine, consistent with this Circuit's standards for approving settlements, whether the Substantial Contribution Settlement falls within the range of reasonableness. Rather, as set forth herein, the Substantial Contribution Settlement has no basis in law or fact, especially where as here the underlying "claim" has no likelihood of success on the merits.

7. As a result, the Motion must fail because (a) the PSA embodies an impermissible plan solicitation in violation of Bankruptcy Code section 1125, (b) the Substantial Contribution Settlement does not justify entry into the PSA under the Texaco decision, and (c) the Substantial Contribution Settlement itself cannot be approved because the Debtors have failed to establish the facts necessary to determine that the settlement falls within the range of

reasonableness.[2] This Court should not allow the Debtors to lock themselves in to a plan in the face of an alternative plan that injects $470 million of new cash in the Debtors, pays creditors in full, in cash, and provides the fulcrum security holders with value well beyond what they would otherwise receive under the Debtors' Plan.

Procedural Posture of the Case

8. The Debtors have now acknowledged what the Equity Committee has been asserting for months – that they are solvent entities and that existing shareholders represent the fulcrum security in these cases. Contrary to all prior statements of the Debtors proclaiming their insolvency, the Debtors recently entered into a sweetheart deal with their creditors that distributes substantial portions of the equity value by paying unsecured creditors in full, granting over $200 million in various manufactured settlement payments that do not withstand scrutiny, and providing leftover value to Chemtura's equity holders.

9. The Debtors and the other parties to the PSA did not enlist the Equity Committee's support in filing the Debtors' Plan, nor does the Equity Committee support the Debtors' Plan because, among other infirmities, it transfers to the Debtors' noteholders and other creditors value that rightfully belongs to equity security holders. Indeed, concurrent with the filing of this Objection, the Equity Committee is filing its Motion of the Official Committee of Equity Security Holders for an Order, Pursuant to Section 1121(d) of the Bankruptcy Code, Terminating the Exclusive Periods During Which Only the Debtors May File a Chapter 11 Plan and Solicit Acceptances Thereof (the "**Termination Motion**") to terminate the Debtors' exclusivity in order to file its competing plan that is fully funded with at least $470 million in

[2] Although the Debtors' Motion is murky regarding whether the Debtors seek relief pursuant to Bankruptcy Rule 9019, their proposed order submitted with the Motion purports to approve a settlement of the Ad Hoc Committee's fees: "the settlement of the dispute concerning payment of the fees and expenses of the Ad Hoc Committee of Bondholders under the Plan Support Agreement is hereby approved."

new equity commitments, raises $800 million in new debt, reinstates $500 million of 2016 Notes, and provides for pass-through of certain claims.

10. The Debtors' Plan reflects a so-called "global settlement" between the Debtors, the UCC, and the Ad Hoc Committee. Under this settlement, the Debtors' noteholder constituency will acquire control of the Debtors. Yet this so-called "global settlement" is at the expense of existing equity holders, whose recoveries are being used to fund the so-called global settlement and unfairly lines the pockets of the noteholders and creditors without any legal basis. In this regard, the Debtors' Plan includes, among other things:

(a) an unnecessarily low level of debt at emergence when all indicators reflect that the Debtors have a higher debt capacity – the low debt level serves to increase the amount of claims that must be equitized and results in greater dilution to existing equity holders;

(b) the unjustified provision of $50 million in "make-whole" claims to holders of the 2016 Notes when there is no legal basis for these claims and they can readily be avoided through reinstatement of the 2016 Notes;

(c) the unjustified provision of $20 million in "no-call" claims to holders of 2026 Notes;[3]

(d) up to $7 million payment for the fees and expenses of the Ad Hoc Committee through the Substantial Contribution Settlement that is prematurely before this Court and has no underlying merit or substance; and

(e) $50 million in contributions to the Debtors' pensions, notwithstanding that the Debtors intend to maintain these pensions and that there is no rational basis for the Pension Benefit Guaranty Corporation (the "**PBGC**") to terminate the pensions.

[3] The Equity Committee believes that these claims have no merit as the 2026 Notes are receiving a benefit from repayment and therefore have no damages. This eliminates the need for the $20 million payment.

The result is a truly incredible proposal that gratuitously pays creditors over $200 million in settlements, which is nearly three times the total amount of the aggregate $67 million of value allotted to equity and is, for this reason alone, unconfirmable.[4]

11. Inasmuch as the cost of the so-called global settlement reflected in the Debtors' Plan will be borne exclusively by Chemtura's equity holders, the decision to pursue such a settlement without enlisting the Equity Committee's support speaks volumes. Indeed, consistent with previous reports to the Court and as further set forth in the Termination Motion, the Equity Committee has an alternative plan at the ready that provides for new equity financing, a sustainable amount of leverage, satisfies existing claims in full, and creates value for existing equity holders well beyond what they otherwise would receive under the Debtors' Plan.

12. As the acknowledged fulcrum security holders, the equity holders have the most at stake in this reorganization process and therefore they need to be an active participant in plan negotiations. The PSA, however, eviscerates any meaningful participation by equity holders because the parties to the PSA will already be locked in to a depressed plan value and lucrative settlements and therefore would have no incentive to move from their entrenched positions, even if they were paid in full, in cash, under the Equity Committee's plan. In particular, the PSA contains no fiduciary outs for the Consenting Noteholders and only very limited fiduciary outs for the UCC, and needlessly obligates both these constituents to accept the Debtors' static and self-serving plan valuation, without even knowing the terms of a potential alternate plan.

[4] The Equity Committee recognizes that the propriety of the Plan and the settlements contained therein are matters to be addressed at confirmation and, thus, the Equity Committee does not fully address these matters in this Objection. For the avoidance of any doubt, the Equity Committee reserves all rights to object to the Plan on any applicable basis, whether or not discussed in this Objection.

ARGUMENT

A. The PSA Embodies an Impermissible Solicitation of Creditor Votes

13. The PSA violates Bankruptcy Code section 1125 because it is an impermissible solicitation of votes in support of the Debtors' Plan. Bankruptcy Code section 1125(b) provides that

> "[a]n acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information."

11 U.S.C. § 1125(b).

14. As Judge Walrath stated in invalidating a postpetition lock-up agreement in which creditors agreed to accept the debtor's plan prior to the approval of a disclosure statement:

> This is purely an 1126(e) issue where these votes were solicited contrary to the provisions of the code, because these were obtained before the approval of the disclosure statement under 1125.
>
> I think solicitation, while respectfully century glove says it cannot be read . . . – broadly, I think to find that obtaining a lock-up agreement in this form is not a solicitation of a vote, would mean eviscerating that from the Bankruptcy Code completely. Because if this is not soliciting a vote in favor of the debtor's plan, I don't know what is.
>
> And although it has conditions to actually signing the ballot, those conditions, in my opinion, are not – are not significant, and I think that rather than have creditors uncertain about whether or not they are bound by such agreements, given post petition action – activities, I think the better procedure is simply to state that post petition lock-up agreements have no role in a bankruptcy case.
>
> I do not – I disagree with counsel that it will inhibit negotiations for a consensual plan, but I think that the code does contemplate that all parties can continue to negotiate and receive full access to

> information under the Bankruptcy Code about the debtor and get to exercise their free will up until the moment they cast that ballot.

In re NII Holdings, Inc., No. 02-11505 (MFW), Hr'g Tr. at 60-12; 61-11, (Bankr. D. Del. Oct. 22, 2002) (Dkt. No. 394) (emphasis added) (transcript annexed hereto as **Exhibit A**).

15. Similarly, the court in In re Stations Holding Co. was troubled by the Debtors' entry into postpetition lock-up agreements and found them to be impermissible solicitations under even the narrowest view of "solicitation":

> This is a little bit more than negotiating on a plan. I think it's clear. I think Century Glove, respectfully, I don't know how I can ever interpret solicitation narrowly enough to not include this. A lockup agreement, certainly the ones signed in this case, constitute the solicitation of a vote on a plan and must be designated, I think, while I have discretion, I think it's clear that this process does not pass muster under 1125. I question whether it even passes muster under 1126, but I don't have to go there.
>
> I never want to see another lockup agreement like this cited to me as being appropriate. . . . I think the plain language of 11251 [sic], the term "solicitation" means asking for a vote. Requesting a vote. I don't think it even includes getting a vote. **Solicit a vote means ask for a vote. You ask for a vote. You got them to agree to vote** and I don't think it's appropriate without a disclosure statement.

In re Stations Holding Co., No. 02-10882 (MFW), Hr'g Tr. at 44-14; 46-7, (Bankr. D. Del. Sept. 25, 2002) (Dkt. No. 190, 196) (emphasis added) (transcript annexed hereto as **Exhibit B**).

16. The court in In re Greate Bay Hotel & Casino Inc., also scrutinized a postpetition lock-up agreement between a plan proponent and an official creditors committee and invalidated the agreement:

> Any agreement between High River and the Committee to the extent that it purports to irrevocably bind the Committee to support a High River Plan, is unenforceable against the Committee as a matter of law and is therefore void. The Committee is free to support any plan of reorganization that it deems, in its business judgment, to be in the best interests of its constituency, and is free to continue as a co-proponent of the High River Plan.

In re Greate Bay Hotel and Casino Inc., No. 98-10001 (JW), at 2 (Bankr. D.N.J. Mar. 10, 2000) (Dkt. No. 1271) (emphasis added) (annexed hereto as **Exhibit C**).

17. While parties in interest may attempt to achieve consensus in chapter 11 cases, the line between negotiation and solicitation must be respected. See In re Media Cent., Inc., 89 B.R. 685, 690 (Bankr. E. D. Tenn. 1988) ("Although negotiations with creditors and equity security holders is [sic] an integral part of a chapter 11 case, such negotiations cannot be accomplished through solicitation of votes on . . . plans having no court-approved disclosure statements."). A debtor's use of lock-up agreements to stifle the pursuit of alternative, value-maximizing transactions does not advance any chapter 11 policy or goal of the Bankruptcy Code. To the contrary, it is black letter law that a debtor's fiduciary duty is to maximize the value of the estate for distribution to all parties in interest. See Toibb v. Radloff, 501 U.S. 157, 163 (1991); Nw Airlines Corp. v. Ass'n of Flight Attendants-CWA (In re Nw Airlines Corp.), 349 B.R. 338, 369 (S.D.N.Y. 2006), aff'd, 483 F.3d 160 (2d Cir. 2007) (noting that debtor is a fiduciary obligated to maximize value of the estate and treat all parties fairly).

18. In this case, the Court has not approved the Debtors' recently filed Disclosure Statement. Despite that fact, the PSA provides for an immediate binding commitment by the Consenting Noteholders to affirmatively vote their debt, claims, and interests to accept the Debtors' Plan, and further provides that the solicitation period can be as little as five business days:

> [E]ach Consenting Noteholder agrees as follows:
>
> (i) So long as its vote has been solicited in a manner sufficient to comply with the requirements of sections 1125 and 1126 of the Bankruptcy Code, including its receipt of the Disclosure Statement following approval of such by the Bankruptcy Court under section 1125 of the Bankruptcy Code, each Consenting Holder agrees to (A) vote (or cause the voting of) its Debt, Claims, and Interests to accept the Plan, by delivering its duly executed and completed

> ballot accepting such Plan on a timely basis following the commencement of the Solicitation, and agrees that the period of such Solicitation may be as short as five (5) business days . . . .

See PSA at § 4(b)(i).

19. The Debtors wrongly contend that the PSA does not embody an impermissible solicitation because it requires a consenting vote "only if" such vote has been solicited in compliance with sections 1125 and 1126.[5] This is a manufactured "technicality" and does not change the fact that the votes have already been solicited – i.e. the Debtors have already asked for the votes. All that remains in the ministerial act of casting a ballot. None of the Debtors' arguments changes the fact that the Debtors have bought consenting votes with a $70 million payment on meritless claims and an immediate obligation to pay the Ad Hoc Committee fees for a task they never accomplished.[6] All of these payments are at the direct expense of the equity holders.

B. Texaco and Other Rulings Do Not Support Approval of the Settlement and PSA

20. The Debtors cite to no authority that authorizes them to enter into a settlement that reduces recoveries from shareholders in order to lock up noteholder votes on a plan.

21. Rather, the cases cited by the Debtors demonstrate that courts in this District and elsewhere will approve pre-plan settlements that incorporate the settling parties'

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[5] The Consenting Noteholders' agreement to reduce the solicitation period to as little as five business days evidences their pre-solicitation acceptance of the plan without requiring any significant time to review and digest the Disclosure Statement in order to cast an informed vote. Furthermore, the Debtors provide no justification to support the remarkable proposition that the Consenting Noteholders have the authority to reduce the Debtors' solicitation period as to all affected classes under the Plan.

[6] The Debtors do not address whether they are legally able to grant priority status to the Ad Hoc Committee's section 503(b) claim. See In re Nat'l Health & Safety Corp., No. 99-18339 (DWS), 2000 WL 968778, at *1 n.7 (Bankr. E.D. Pa. July 5, 2000) (in disapproving settlement of attorney's section 503(b) claim, the attorney "acknowledges that the Debtor cannot confer the priority claim status; rather only the Court can.").

agreement to support a proposed plan (a) only when such settlements do not adversely impact other constituents' treatment or recoveries under the proposed plan, and (b) only to the extent the plan includes the approved settlement. The PSA violates both of these conditions and precludes any approval by this Court.

22. Significantly, the stipulation and settlement in Trans World Airlines, Inc. v. Texaco Inc., (In re Texaco Inc.) 81 B.R. 813, 818-20 (Bankr. S.D.N.Y. 1988) established the rights of Texaco and Pennzoil, its judgment creditor, to apply for extensions of time to petition the Supreme Court for review of Pennzoil's state court judgment. The whole basis for the settlement was to give the parties adequate time to jointly propose and confirm a plan that would render the need for Supreme Court review moot. As part of the stipulation to defer the timing of the filing of the Supreme Court petition, the parties agreed to compromise Pennzoil's $11 billion judgment to an allowed $3 billion claim. See id. (stipulation set forth in appendix to decision). Importantly, the Texaco-Pennzoil stipulation only adversely impacted Pennzoil's recovery under the proposed plan. Pennzoil agreed to be a co-proponent of the plan, which provided for full recoveries to Texaco's unsecured creditors and its shareholders. Thus the approved settlement and ancillary plan support agreement did not adversely impact any other constituent – indeed, it enhanced other constituents' abilities to receive distributions. See In re Texaco Inc., 84 B.R. 893, 894, 898 (Bankr. S.D.N.Y. 1988) (observing that shareholders retained their interests under the Texaco plan and that the General Committee of Unsecured Creditors and Equity Committee supported confirmation of the plan). In contrast to the Texaco matter, here the Substantial Contribution Settlement confers no benefit on the equity holders. In fact, it serves to limit equity recoveries and therefore adversely impacts the fulcrum security holders in a significant way. Indeed, because the Ad Hoc Committee's constituents are entitled to a full recovery of their

claims, there is no quid pro quo as there was when Pennzoil reduced the amount of its allowed claim in the Texaco case in order to enable other constituents to receive distributions.

23. Similarly, this Court entered its order in the Lyondell case approving the Bank of New York settlement with the debtor pursuant to Rule 9019, together with Bank of New York's ancillary agreement to support a plan that embodied that settlement, only after this Court (a) excised the specific performance/damages provision of the settlement so that the settlement had no impact on pending disputes among other constituents, (b) satisfied itself that the settlement affected only the intercreditor dispute, and (c) did not otherwise prevent the Debtors from maximizing value for their stakeholders:

> But the notion that the estate is either going to be subjected to economic risk if I disapprove the 9019 between the estate and the senior secured, or that once more, people are going to be putting a gun to my head to tilt the scale on my evaluation of the 9019 that's coming up on trial next week is what really bothers me.
> * * * * *
> The issue, as I articulated at the beginning of oral argument, was never whether the underlying deal was a good one, but whether there were provisions in it that could, (a) impair the debtors' ability to maximize value if a Joe Smith were to come down the road to make a cash offer for the estate that was sufficiently attractive and which might require abandonment of the existing plan, or, (b) that would unfairly prejudice the creditors' committee in a matter of great importance to both sides that we are beginning – we are going to hear next week.
> If either of those were to transpire, either in an inability of the debtors to maximize value or something that would no longer permit the parties to have a fair fight next week, that would, of course, be a matter of material concern to me.
> * * * * *
> What we're trying to do here is to preserve the intercreditor agreement that was made between the different groups of secured lenders, which is a legitimate need and concern on the part of both sides, and which, as long as the debtors can maximize value and we're not adversely affecting the litigation with the creditors' committee, is now not only agreeable to me, but I fully understand, respect, and agree with.

In re Lyondell Chem. Co., No. 09-10023 (REG), Hr'g Tr. at 11, 37-38, Slip op. (Bankr. S.D.N.Y. Feb. 11, 2010) (emphasis added) (attached hereto as **Exhibit D**).

24. Contrary to the Debtors' assertion, the global settlement and attendant plan support agreement in the Owens Corning case demonstrates why the PSA should not be approved. That settlement was the culmination of an effort, after six years of protracted litigation and appeals, to settle

> "what . . . can fairly be called extraordinarily complex litigation, the equitable subordination actions, the estimation of asbestos personal injury claims, and the fraudulent transfer adversary that's pending in the District Court. . . . The parties have been engaged in years of discovery, weeks of trial, and months of appeals . . . . "

In re Owens Corning, No. 00-03837 (JFK), Hr'g Tr. at 9-10 (Bankr. D. Del. June 23, 2006) (Dkt. No. 18233) (attached hereto as **Exhibit E**). Consequently, the court viewed the settlement and plan support agreement as a settlement "of the legal disputes that have prevented confirmation to date." Id. at 14.[7] In sharp contrast to the marginal nature of the settlement proposed by the Debtors, the forgoing cases support the proposition that a debtor can enter into a settlement and plan support agreement only when the settlement is a fundamental component of the restructuring and does not adversely impact other constituents under the proposed plan.

25. None of these cases support their assertion that the settlement of any ancillary matter, such as the Ad Hoc Committee's amorphous substantial contribution claim, justifies locking in the Debtors and the estates' major constituents to a host of other controversial plan terms that have not yet been approved by the Court and that adversely affect other parties in

[7] The Heritage Organization case, cited by the Debtors, is also inapposite. In that case, the debtor entered into plan support agreements with parties who were co-proponents of the plan. Thus the court found that there was no impermissible solicitation because "[a] reading of § 1125(b) that requires a creditor intending to jointly propose a plan to draft a disclosure statement, get it approved, and then mail it to himself before agreeing to vote for it, under penalty of disenfranchisement, would be absurd." In re Heritage Org., L.L.C., 376 B.R. 793, 791 (Bankr. N.D. Tex. 2007).

interest. But this is precisely what the Debtors are trying to do. Specifically, the Debtors are trying to use the Substantial Contribution Settlement as a pretense for binding the Debtors (and others) to a PSA that includes provisions relating to numerous other plan terms (such as an agreed-upon low plan valuation for the Debtors and the payment of hundreds of millions to settle meritless claims) that are of vital importance to the equity holders and are not currently before the Court for approval.

C. The Debtors' Request for Approval of the Substantial Contribution Settlement is Premature

26. The Substantial Contribution Settlement should not even be entertained at this juncture. There is no confirmed plan and no demonstration that the Ad Hoc Committee could meet its heavy burden of demonstrating a tangible and direct benefit to the estate. Indeed, this Court has observed that substantial contribution awards cannot be made prior to the conclusion of the case before there is a result to use as a measuring stick against the party's alleged contribution:

> It is true that substantial contribution applications are heard only at the end of the case. Parties in interest, and the bankruptcy courts, need an understanding, with as much information as possible, of the extent of the benefits constituting the asserted substantial contribution. Considering them (and, presumably, making payment) at an earlier time (which this Court has never seen) would encourage parties to routinely make such applications to finance their private agendas, and, if granted, add significant administrative costs to already expensive chapter 11 cases without any real indication of their resulting benefit.

In re Adelphia Commc'ns Corp., 336 B.R. 610, 662 n.130 (Bankr. S.D.N.Y.) (emphasis added), aff'd, 342 B.R. 122 (S.D.N.Y. 2006); see also In re Sentinel Mgmt. Group, Inc., 404 B.R. 488, 497 (Bankr. N.D. Ill. 2009) ("[A]bstract, unrealized gains or theoretical revisions to a plan which have not resulted in an actual or demonstrable benefit to the debtor or its creditors do not amount to providing a substantial contribution.").

27. This last point is underscored by the fact that there are serious questions about the confirmability of the Debtors' Plan and the legality of many of the settlements contained therein. The Equity Committee believes that the Debtors' Plan as filed is unconfirmable and intends to vigorously oppose its confirmation. While the Equity Committee recognizes that the time for the Court to assess the Debtors' Plan's legality is at confirmation and intends to pursue its objections to the Debtors' Plan at that time, the Equity Committee also notes the following obvious flaws with respect to certain of the settlements contained therein:[8]

(a) Settlement with Respect to the Debtors' Reorganization Value: The Debtors' Plan incorporates an agreement by the Debtors, the UCC, and the Ad Hoc Committee with respect to the Debtors' reorganization value. Specifically, the parties have agreed to a reorganization value for the Debtors of $2.05 billion plus, except as otherwise agreed to by the Debtors, the UCC, and the Ad Hoc Committee, total cash available to satisfy allowed unsecured claims plus the amount of cash to be retained following the Effective Date. See Debtors' Plan at §§ 1.1.103, 7.1. The Equity Committee believes that this agreed-upon value – which will be used to equitize claims pursuant to the Debtors' Plan – understates the Debtors' true value. In this regard, the Equity Committee notes that the agreed-upon reorganization value is less than the value at which interested parties have previously indicated they are willing to invest in new equity. As a result, if the agreed-upon reorganization value is used, creditors under the Debtors' Plan will receive more than the allowed amount of their claims in violation of the Bankruptcy Code. Viewed in this light, the settlement with respect to the Debtors' reorganization value is one by which the UCC and the Ad Hoc Committee have agreed that their constituents will receive more than they are entitled to on account of their claims. Such a settlement does not provide any benefit to the estates and certainly does not support approval of the Substantial Contribution Settlement or the PSA.

[8] Again, the Equity Committee recognizes that the propriety of the Plan and the settlements contained therein are matters to be addressed at confirmation and, thus, the Equity Committee does not fully address these matters in this Objection. For the avoidance of any doubt, the Equity Committee reserves all rights to object to the Plan on any applicable basis, whether or not discussed in this Objection.

(b) Settlement with Respect to Funded Debt at Emergence: The Debtors' Plan incorporates an agreement by the Debtors, the UCC, and the Ad Hoc Committee with respect to the Debtors' funded debt at emergence. Specifically, the Debtors' Plan contemplates that the Debtors will have $750 million in funded debt at emergence. See Debtors' Plan at §§ 1.1.77, 5.9. The Equity Committee believes that the Debtors can support significantly more debt and that this agreed-upon debt level is unnecessarily low. As a result, the Debtors will be required to equitize more claims, resulting in noteholders and creditors receiving a greater share of stock in Chemtura at emergence and further unnecessary dilution of existing equity's ownership in Chemtura. Viewed in this light, the Ad Hoc Committee has agreed to a settlement that will provide noteholders with a greater stake in a less levered company at emergence to the detriment of Chemtura's existing equity security holders. Such a settlement does not provide any benefit to the estates and certainly does not support approval of the Substantial Contribution Settlement or the PSA.

(c) Settlement with Respect to Make-Whole and No-Call Claims: The Debtors' Plan incorporates the outlandish agreement by the Debtors, the UCC, and the Ad Hoc Committee regarding the treatment of claims under the Debtors' 2016 Notes and the 2026 Notes whereby, in addition to the full payment of their respective claims plus interest, (i) the holders of the 2016 Notes will be entitled to the additional allowance of $50 million on account of meritless make-whole claims and (ii) the holders of the 2026 Notes will be entitled to the additional allowance of $20 million on account of meritless no-call claims. The noteholders' make-whole and no-call claims are devoid of any merit and instead of recognizing that fact, the Debtors seek to make a pay-off to these claim holders for unmatured interest that is less than the current market rate than the Debtors will pay upon emergence. Indeed, the Debtors' own Disclosure Statement acknowledges many of the reasons why these claims should not be allowed in any amount, including because such claims are not supported by the terms of the 2016 Notes and the 2026 Notes. See Disclosure Statement at § IX.B.ii.(a)-(c). The Equity Committee will not here repeat all of these reasons. Nonetheless, it bears noting that there would not be any question of a make-whole claim or of a no-call claim (no matter how spurious) if the Debtors were to reinstate the 2016 Notes. Given the maturity dates and the low coupon

rates on the 2016 Notes and the 2026 Notes, it is in the Debtors' best interests to reinstate the 2016 Notes and eliminate the bonus payments to the 2026 Notes. Indeed, the debtor in Charter understood the value of using reinstatement as a means of maximizing value for all stakeholders and successfully litigated the issue on behalf of its constituents. Yet the Debtors have declined to do so here, and the beneficiaries of this decision are the holders of the 2016 Notes and the 2026 Notes who would much prefer the full payment of their claims now to the reinstatement of their below-market instruments. Viewed in this light, the Ad Hoc Committee has agreed to a settlement that provides for its preferred treatment of the 2016 Notes and the 2026 Notes (i.e., full repayment of these below market instruments now as opposed to repayment in accordance with their terms) plus the additional allowance of $70 in spurious make-whole and no-call amounts. Such a settlement, which deprives the Debtors of the benefit of existing below market debt and imposes an additional cost of $70 million of benefits on the estates, is detrimental to the Debtors' estates, and does not, in any way, support approval of the Substantial Contribution Settlement or the PSA.

(d) Settlement with Respect to the Debtors' Pension: The Debtors' Plan incorporates an agreement by the Debtors, the UCC, and the Ad Hoc Committee whereby the Debtors will make an unnecessary $50 million contribution to the Debtors' pensions notwithstanding that the Debtors have no intention to terminate such pensions. See Debtors' Plan at § 5.3. This settlement is ostensibly intended to assuage the alleged concerns of the PBGC, a member of the UCC, and to prevent the PBGC from instituting an involuntary termination of the pensions. The Equity Committee believes that this payment is unnecessary and will result only in there being less cash with which to pay claims, thereby further resulting in the unnecessary equitization of claims and unnecessary further erosion of existing equity's share of the reorganized Debtors. In this regard, there has been no showing that the PBGC would actually seek to terminate the Debtors' pensions in the face of a plan that pays creditors in full and will create a better capitalized company that will support pension plan obligations. Viewed in this light, the Ad Hoc Committee has agreed to a settlement that will result in noteholders having a greater share of the reorganized Debtors and in the unnecessary dilution of existing equity holders. Such a settlement does

> not support approval of the Substantial Contribution Settlement or the PSA.

D. The Debtors Cannot Satisfy the Iridium Standards

28. The Debtors' attempt to use the Substantial Contribution Settlement to justify approval of the PSA also fails because the Debtors have not – and cannot – satisfy this Circuit's standards for settlement approval pursuant to Rule 9019. According to the Debtors, the Substantial Contribution Settlement is warranted, because "the [Ad Hoc Committee] could argue that it has made a substantial contribution to these chapter 11 cases in light of its efforts to facilitate the settlement underlying the Plan, its agreement to the valuation underlying the Plan (notwithstanding its independent assessment that the Debtors' enterprise value is actually lower), its efforts to obtain the Consenting Noteholders' support for the Plan and negotiation of the global settlement of issues embodied in the Plan." Motion ¶ 14.

29. This argument fails for several reasons. As a preliminary matter, the Debtors do not have the authority to grant administrative status to the Ad Hoc Committee's section 503(b) claim:

> In any event, as the parties acknowledge, it is not within the Debtor's power to award priority claims. Thus, no litigation is being settled by this concession. There will still have to be a determination of Marks' entitlement to payment as a priority before other unsecured claims. I view this component of the settlement as a means to justify allocating estate assets to Marks in furtherance of reaching the negotiated payout number needed to do a deal with Marks.

In re Nat'l Health & Safety Corp., No. 99-18339 (DWS), 2000 WL 968778, at *4 (Bankr. E.D. Pa. July 5, 2000).

30. In addition, the proposed settlement can only be approved if it is shown to be in the "best interests of the estate." In re Adelphia Commc'ns Corp., 327 B.R. 143, 158 (Bankr. S.D.N.Y.), adhered to on reconsideration, 327 B.R. 175 (Bankr. S.D.N.Y.), aff'd, 337

B.R. 475 (S.D.N.Y. 2006); see also Nellis v. Shugrue, 165 B.R. 115, 121 (S.D.N.Y. 1994) ("The obligation of the bankruptcy court is to determine whether a settlement is in the best interest of an estate before approving it."). The best interests test may only be met when a settlement is found to be "fair and equitable." Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968).

31. In order to approve a settlement as fair and equitable, the court must be apprised of facts necessary to evaluate the settlement and arrive at an independent conclusion on the settlement's reasonableness. Adelphia, 327 B.R. at 159; Fed. R. Bankr. P. 7052 (initiation of contested matter triggers Rule 7052, which incorporates Fed. R. Civ. P. 52, requiring a court to make findings of fact and conclusions of law; accord, PW Enterprises, Inc. v. Kaler (In re Racing Servs., Inc.), 332 B.R. 581, 585 (8th Cir. B.A.P. 2005). See also Cook v. Waldron, No. H-05-3438, 2006 WL 1007489, at *4 (S.D. Tex. Apr. 18, 2006) (the court "must be informed of all the relevant facts and information in order to make an independent judgment as to whether the settlement is fair and reasonable under the circumstances."). In this regard, the Debtors do not apprise the Court of sufficient facts to enable the Court to evaluate the Substantial Contribution Settlement.

32. Courts in the Second Circuit utilize seven factors that may be relevant to determining whether a settlement should be approved: (a) the balance between the litigation's possibility of success and the settlement's future benefits; (b) the likelihood of complex and protracted litigation, with its attendant expense, inconvenience, and delay, including the difficulty in collecting on the judgment; (c) the paramount interest of the creditors, including each affected class's relative benefits and the degree to which creditors either do not object to or affirmatively support the proposed settlement; (d) whether other parties in interest support the

settlement; (e) the competency and experience of counsel supporting, and the experience and knowledge of the bankruptcy judge reviewing, the settlement; (f) the nature and breadth of releases to be obtained by officers and directors; and (g) the extent to which the settlement is the product of arm's length bargaining. See Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC), 478 F.3d 452, 462 (2d Cir. 2007); Adelphia, 327 B.R. at 159-60; Texaco, 84 B.R. at 902. Not all factors merit equal weight in determining the reasonableness of a settlement, and the court may place varying degrees of reliance upon each of the factors, depending upon their relevance to the proposed settlement terms. See, e.g., Adelphia, 327 B.R. at 160.

33. Given the current factual posture, the Debtors have not – and cannot – satisfy their burden of demonstrating that the Substantial Contribution Settlement passes muster under the relevant Iridium factors.

(i) Likelihood of Success/Benefits of Settlement

34. Bankruptcy Code section 503(b) sets a high bar for the allowance of claims for "substantial contribution," and the proponent of a section 503(b) application bears the burden of proving by a preponderance of the evidence that it has made a substantial contribution in the case. Id.; In re Dana Corp., 390 B.R. 100, 107-8 (Bankr. S.D.N.Y. 2008). The Bankruptcy Code's objective to promote meaningful creditor participation must be balanced against the contrasting policy that administrative expenses must be kept to a minimum. "As a result, bankruptcy courts narrowly construe the availability of the remedy afforded by [section] 503(b) . . . ." Sentinel, 404 B.R. at 493.

35. "Creditors face an especially difficult burden in passing the 'substantial contribution' test since they are presumed to act primarily in their own interests." In re U.S. Lines, Inc., 103 B.R. 427, 430 (Bankr. S.D.N.Y. 1989), aff'd, No. 90CIV. 3823, 1991 WL 67464

(S.D.N.Y. Apr. 22, 1991). As indicated above, the settlements that have been incorporated in the Debtors' Plan support this presumption. Moreover, given that certain members of the Ad Hoc Committee – and all the Consenting Noteholders – acquired a portion of their notes postpetition, any claim for substantial contribution on their part must be viewed with enhanced scrutiny because they are presumed to be operating in furtherance of their own self-interests.[9] See In re Best Prods. Co., 173 B.R. 862 (Bankr. S.D.N.Y. 1994) (declining to grant substantial contribution award to group that acquired claims postpetition and observing that the group "was a relative newcomer to the scene which purchased claims to make a profit. Unlike other creditors, it was not attempting to salvage as much as possible from a credit decision gone awry. . . . The point is that in cases such as this, the investor is looking out for itself, not for the estate as a whole.").

36. It is clear that "merely representing a client in an active role in a chapter 11 case is not sufficient to trigger section 503(b)(4)." In re Mirant Corp., 354 B.R. 113, 136 (Bankr. N.D. Tex. 2006), aff'd, 308 F. App'x 824 (5th Cir. 2009); see also In re Buckhead Am. Corp., 161 B.R. 11, 15 (Bankr. D. Del. 1993) (holding that the benefits of a substantial contribution claim must be tangible and direct; "[i]ncidental benefit to the estate or extensive participation in the case without more, are not sufficient bases for section 503(b) status"). Yet the Debtors have not provided any evidence of tangible benefits resulting from the Ad Hoc Committee's participation that would justify approval of the Substantial Contribution Settlement or the PSA. Extensive participation in a bankruptcy case that benefits only the class of creditors seeking section 503(b) allowance is insufficient.

[9] A comparison of the signatories to the PSA against the 2019 Statement filed by counsel to the Ad Hoc Committee indicates that every signatory to the PSA acquired some portion of its bond debt postpetition. See Verified Statement of Jones Day Regarding Representation of an Ad Hoc Committee of Bondholders Pursuant to Federal Rule of Bankruptcy Procedure 2019, filed on June 11, 2010 (Docket No. 2879).

37. Here, the Court need not look any further than the first Iridium factor to conclude that the purported Substantial Contribution Settlement cannot be approved. On the present record, the Court cannot infer any likelihood of success for a substantial contribution claim by the Ad Hoc Committee. Unsecured claims are being paid in full plus accrued interest under the Debtors' Plan. There is no credible assertion that securing payment in full from a solvent debtor substantially contributes to a case, particularly when the constituency alleging substantial contribution is enriching itself with settlement recoveries that are taken from equity's recoveries. In this regard, the 2016 noteholders are obtaining a $50 million windfall through the make-whole settlement (even though the Debtors can reinstate the 2016 notes) and the 2026 noteholders are obtaining a $20 million windfall through the no-call settlement. Because equity holds the fulcrum security, every dollar used to fund these settlements is a dollar stolen from equity recoveries. Incredibly, the Debtors' Plan seeks to reward a creditor group that obtained a windfall at the expense of the fulcrum constituents with a "substantial contribution" payment.

38. Furthermore, the Ad Hoc Committee has not even asserted that it has a claim for substantial contribution. Indeed, the Disclosure Statement acknowledges as much, noting that "[h]ad the [Ad Hoc Committee's] fees not been settled[,] … pursuant to section 503(b)(4) of the Bankruptcy Code, the [Ad Hoc Committee] may assert claims against the Estates for the third-party fees and expenses … in light of its substantial contribution to the case." See Disclosure Statement at Section IX. B.(iii) (emphasis added). In the absence of the assertion of such a claim, there is no basis for the Court to assess either the likelihood that such a claim would be successful or the benefits of a Substantial Contribution Settlement that would bind the Debtors to paying up to $7 million on account of the unasserted claim. Thus, approval of the Substantial Contribution Settlement is premature at best.

39. The Debtors' attempt to justify the Substantial Contribution Settlement by averring that the Ad Hoc Committee could argue that it has made a substantial contribution to the Chapter 11 Cases in light of its efforts to facilitate the settlements underlying the Debtors' Plan is unavailing. See Motion ¶ 14. Far from supporting approval of the Substantial Contribution Settlement, this argument merely serves to further underscore that this settlement may not be approved given the posture of the Chapter 11 Cases. The Court has not ruled on the Debtors' Plan or the settlements contained therein. Indeed, aside from the Debtors' agreement to pay the Ad Hoc Committee's fees, none of the elements of the global settlement contained in the Debtors' Plan is before the Court. Instead, the Court will rule on the Debtors' Plan and the settlements contained therein as part of the confirmation process. Accordingly, the Ad Hoc Committee's efforts to facilitate the Debtors' Plan and the settlements contained therein cannot now serve as a basis for inferring any benefit to the Substantial Contribution Settlement. Any attempt to justify the Substantial Contribution Settlements by reference to the settlements in the Debtors' Plan is, therefore, premature at best. See Nat'l Health & Safety, 2000 WL 968778 at *4 ("The parties attribute $30,000 of the settlement to their agreement that Marks be entitled to a section 503(b) priority claim for his substantial contribution to the case. Until the moment of this settlement Marks had not asserted such a claim and Debtor had not objected to same. While Marks has been an active participant in the case as described above and may ultimately have a basis for such a claim, it is entirely premature to evaluate such a claim at this juncture.") (footnote omitted).

40. Here, there is nothing to suggest that the Ad Hoc Committee could meet its burden and demonstrate a substantial contribution in these cases. Merely agreeing to a static plan valuation number and receiving full payment of claims is a far cry from making a

substantial contribution as required by governing case law. The Debtors' contention that the Ad Hoc Committee's contribution consisted of negotiating the as-yet-unapproved global settlement is specious at best. "The act of negotiating a point in a plan, does not provide a substantial contribution to the estate." In re Sentinel, 404 B.R. at 496. "[N]egotiating is an expected and routine activity in Chapter 11 cases, and absent some spectacular result, such as dramatically improving treatment of all creditors, expected and routine activities do not constitute substantial contribution[. . .]" In re Am. Plumbing & Mech., Inc., 327 B.R. 273, 291 (Bankr. W.D. Tex. 2005) (citation omitted).

41. Accordingly, the Debtors have not demonstrated – and cannot demonstrate – that a claim for substantial contribution by the Ad Hoc Committee has any prospect for success or that the Substantial Contribution Settlement provides any benefit to the estates. Absent such a showing, neither the Substantial Contribution Settlement nor the PSA may be approved.

(ii) Whether Other Parties in Interest Support the Settlement

42. The Equity Committee's opposition to the Substantial Contribution Settlement further undercuts its approval because, as the fulcrum security holders, the shareholders' interests must be viewed as paramount. In determining whether to approve a settlement, the court must determine that "no one has been set apart for unfair treatment." Cullen v. Riley (In re Master Mates & Pilots Pension Plan and IRAP Litigation), 957 F.2d 1020, 1031 (2d Cir. 1992). "Ignoring the effect of a proposed [settlement] upon the rights of third parties 'contravenes a basic notion of fairness.'" United States v. AWECO Inc. (In re AWECO Inc.), 725 F.2d 293, 298 (5th Cir. 1984).

43. In particular, courts will scrutinize settlements under the paramount interests of other parties who oppose the settlement when there is no significant dispute regarding the merits of the underlying "litigation" being settled:

> The settlement is unlike the compromises with which the Court is usually presented in a Rule 9019 motion. That is because there is no complex, protracted or expensive litigation between these parties. The only claim dispute, *i.e.*, the attorney's lien claim, is fairly routine and the outcome fairly obvious. Thus, the final . . . factor is dispositive here, *i.e.* the paramount interests of creditors.

Nat'l Health & Safety Corp., 2000 WL 968778, at *5. As a consequence, the National Health court denied a proposed settlement of an attorney's substantial contribution claim as a blatant attempt to buy the accepting vote of the attorney creditor in the absence of any benefit to the estate. Id. at 4. ("If the benchmark for approval of a settlement is whether the settlement is in the best interest of the estate, the Debtor has proferred no basis for me to find that this settlement achieves this standard. In the most simplistic terms, the settlement buys off the only creditor with sufficient information and resources to scrutinize the fairness of the Debtor's plan."); see also Cullen, 957 F.2d at 1026 ("[w]here the rights of one who is not a party to a settlement are at stake, the fairness of the settlement to the settling parties is not enough to earn the judicial stamp of approval); Medical Asset Mgmt., 249 B.R. 659, 665-6 (Bankr. W.D. Pa. 2000) (denying settlement upon objection of creditors who would receive less than 1% of settlement proceeds and would be precluded from pursuing certain litigation); Comm. of Unsecured Creditors of Interstate Cigar Co. v. Interstate Cigar Distribution Inc. (In re Interstate Cigar Co.), 240 B.R. 816, 825 (Bankr. E.D.N.Y. 1999) (disapproving settlement where there would be more harm to objecting party than there was a benefit to the estate and thus settlement was not within range of reasonableness).

44. These cases underscore that deference should be granted to the Equity Committee's opposition to the Substantial Contribution Settlement. The Equity Committee is the only constituent that has recoveries at stake in this process. For that reason alone, the Equity

Committee should be the only party in interest whose views are relevant to the Substantial Contribution Settlement.

(iii) Other Iridium Factors

45. None of the other Iridium factors supports approval of the Substantial Contribution Settlement. The paramount interests of creditors are not served by approval of a Substantial Contribution Settlement whose justification is solely predicated upon settlements that the Court has yet to consider. The interests of creditors are similarly not served by improper settlements or a PSA that binds the Debtors and major constituencies to a plan that fails to maximize value.

E. Section 363 is Inapplicable to the Substantial Contribution Settlement

46. Finally, the Debtors' contention that the Substantial Contribution Settlement may be considered to be a use of property of the estate and therefore may be approved if it is within the Debtors' sound business judgment is a strained reading of section 363(b) and an attempt to apply a more forgiving standard to the impermissible PSA. The sole case cited by the Debtors for this proposition, Northview Motors, Inc. v. Chrylser Motors Corp., 186 F.3d 346 (3d Cir. 1999) is inapposite. In the Northview case, the court of appeals analyzed the settlement at issue under section 363 because the Northview Trustee took control of litigation that was initially commenced by the debtor against Chrysler Motors and secured a settlement which the debtor and other parties in interest opposed. Id. at 348. The court observed that the Trustee's settlement implicated estate property because the debtor's claims against Chrysler constituted property of the estate. Id. at 350.

47. There can be no credible dispute that the reasoning of the Northview Motors court applying section 363 is not applicable to approval of the Substantial Contribution Settlement. Here there is no claim *initiated by the Debtors* that implicates property of the

Debtors' estate. Rather, the Debtors seek to settle a claim by the Ad Hoc Committee *that has not even been filed*. The Debtors do not identify any decision from this District that applies the debtor's business judgment to a settlement in lieu of the Iridium factors. Even if the business judgment standard applied, the Debtors have not demonstrated and cannot demonstrate that a $7 million gratuitous payment to professionals in the absence of a benefit to the Debtors' estate is a legitimate exercise of their business judgment.

CONCLUSION

Wherefore, the Equity Committee respectfully requests the Court deny the relief requested in the Motion and grant such other relief as is just and proper.

Dated: New York, New York
July 9, 2010

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

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Counsel for the Official Committee of Equity Security Holders

Exhibit A

In re NII Holdings, Inc., No. 02-11505 (MFW), Hr'g Tr. at 60-12; 61-11, (Bankr. D. Del. Oct. 22, 2002) (Dkt. No. 394)

United States Trustee filed a motion seeking to, *inter alia*, designate the votes of creditors who entered into a lock-up agreement post-petition (Dkt. No. 290). Objections were filed by the debtors (Dkt. No. 312) and an ad hoc committee of bondholders (Dkt. No. 316), and Nextel joined in the debtors' objection (Dkt. No. 315). The Court held a hearing on October 22, 2002 and designated the votes. An order was entered on October 25, 2002 (Dkt. No. 367).

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	Case No. 02-11505 (MFW)
NII HOLDINGS, INC. and NII HOLDINGS (DELAWARE), INC.	824 Market Street Wilmington, DE 19801
Debtors,	October 22, 2002 12:30 P.M.

TRANSCRIPT OF MOTIONS
BEFORE THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtors:	Richards, Layton & Finger, P.A. By: DANIEL DeFRANCESCHI, ESQ. PAUL N. HEATH, ESQ. REBECCA L. SCALIO, ESQ. One Rodney Square P.O. Box 551 Wilmington, DE 19899 Bingham, McCutcheon, LLP By: PATRICK J. TROSTLE, ESQ. WILLIAM F. GOVIER, ESQ.
For Nextel Communications, Inc.,:	Jones, Day, Reavis & Pogue By: PAUL E. HARNER, ESQ. JOHN W. EDWARDS, II, ESQ. 1900 Huntington Center 41 South High Street Columbus, OH 43215-6113 Morris, James, Hitchens & Williams, LLP By: BRETT D. FALLON, ESQ.

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For Ad Hoc Committee:	Milbank, Tweed, Hadley & McCloy By: THOMAS R. KRELLER, ESQ.
Audio Operator:	Jennifer M. Patone

I N D E X

MOTIONS

THE COURT: Good morning.

MR. DeFRANCESCHI: Good morning, Your Honor.

THE COURT: Afternoon.

MR. DeFRANCESCHI: Correct. Good afternoon, Your Honor. Dan DeFranceschi from Richards, Layton & Finger on behalf of the debtors.

Your Honor, we have a very aggressive agenda today. The first item on that agenda is the motion of the United States Trustee seeking to designate votes pursuant to the lock-up agreements and directing that those votes not be counted.

Your Honor, by the motion, the U.S. Trustee actually also seeks to impose sanctions against the debtors with respect to those agreements, a fact that's of particular importance here, because I think as the hearing progresses Your Honor will see there was no improper conduct here but rather --

THE COURT: Well, should I hear from the U.S. Trustee whose motion it is?

MR. DeFRANCESCHI: Yes, Your Honor, I just wanted to introduce that and let Your Honor know that the ad hoc noteholder committee council will be her today as well, as will -- as is Motorola and NCI, the other parties to the lock-up agreements.

And with that, Your Honor, certainly Mr. McMahon should present his motion.

THE COURT: Thank you.

MR. McMAHON: Your Honor, good afternoon. Joseph McMahon for Donald Walton, the acting United States Trustee for Region 3.

I'm going to be dividing my presentation into two sections. The first section is what I call the characterization problem, which involves the question of whether the consents to the lock-up agreements are temporally characterized as pre-petition or post petition consents.

And then the second issue is whether or not there was a solicitation of an acceptance of a plan under Section 1125B.

THE COURT: Okay.

MR. McMAHON: I'll start with the first section and address that issue first. The debtors take the position in their objection to the U.S. Trustee's motion that to the extent that consents to the lock-up agreements, which are attached to Mr. Gilker's affidavit can be construed as acceptances. They were pre-petition acceptances.

Why is this argument important? Well, under Section 1125(b) of the Bankruptcy Code solicitation is prohibited during the post petition period prior to court approval of the disclosure statement.

THE COURT: Um-hum.

MR. McMAHON: And under Section 1126(b) and Rule 3018 there is no prohibition per se on pre-petition solicitation, and the plan proponent seeking to pre-pack a case as to

validate the pre-petition acceptances or rejections.

Based on the facts contained in the debtors and ad hoc committee's objections and the accompanying Gilker affidavit, the U.S. Trustee disagrees with the debtor's position as to the timing of the acceptances by Motorola and the noteholders.

The Gilker affidavit makes it clear that the debtors extended a post petition offer to Motorola and the noteholders to enter into the lock-up agreements. The noteholder and Motorola signatures were not delivered until May 29th, 2002, which was five days after the debtor's bankruptcy petitions were filed.

Moreover, the effectiveness of the lock-up agreements, if you look at the provision, Your Honor, they were cross conditional upon the noteholders and Motorola entering into the lock-up agreements on or before a certain date. They contain that provision.

The noteholder Motorola agreements are made effective as of May 29th. There were post petition communications between the parties related to changes made to the lock-up agreements. That's identified in Paragraph 14 of the debtor's objection and Paragraph 19 of the ad hoc committee objection.

Further, the lock-up agreements contain a prior negotiations provision which indicates that the lock-up agreement and the term sheet supersedes all prior negotiations

with respect to the subject matter of the lock-up.

Mr. Gilker, Paragraph 12 of his affidavit, states that it was, quote, "of paramount importance to the debtors," parens, "and to all the key creditors, including NCI, Motorola and the noteholders," end parens, "that all the key parties contractually agree to support this transaction," period, end quote.

Ironically the contractual agreement becomes much less important to the debtors after the U.S. Trustee files a motion to designate certain votes. There was no post petition solicitation, the debtors maintained, beginning at Page 18 of their objection, however, the facts indicate that there was a post petition solicitation.

Motorola's and the noteholders' contractual agreements were of paramount importance. Mr. Gilker's own words. To the extent that this Court disagrees with the U.S. Trustee's position and permits the debtors to advance their argument that the consents to the lock-up agreement should be validated as pre-petition acceptances, the U.S. Trustee believes that the debtors have not properly brought this issue before the Court.

In any pre-package case the debtor moves to approve the pre-petition disclosure and the votes cast pre-petition. In this case no such motion has been filed.

The U.S. Trustee was put on notice for the first time

this past week that the debtors were asserting a safe harbor defense under 11 U.S.C. Section 1126(b). Accordingly, the debtors' factual defense, to the extent that it has merits, warrants further examination.

Under 11 U.S. Section 1126(b) there's the threshold issue of whether the solicitation was in compliance with applicable non-bankrupt C regulation. And Your Honor's confirmation opinion in Zenith, this Court suggested that non-bankruptcy regulation for Section 1126(b)(1) purposes include securities regulation.

If there is no such non-bankruptcy regulation then under 11 U.S.C. Section 1126(b)(2) the voter must have been supplied with adequate information as defined in Section 1125(a) of the code. In In Re: The Southland Corp., that's a Northern District of Texas case that was cited in the Zenith opinion, the court ruled that a debtor seeking to approve pre-petition acceptances under Section 1126(b)(2) had to initially prove that there was no applicable non-bankruptcy regulation relevant to the disclosure before making the adequate information showing.

Regardless of the debtor's safe harbor defense, there is a basis as a matter of law for designating the votes of NCI and the noteholders today, accepting the debtor's arguments that the acceptances of NCI and the noteholders were pre-petition acceptances.

First, Federal Rule of Bankruptcy Procedure 3018(b) states that a holder of a claim or interest who has accepted or rejected a plan before the commencement of a case under the Code shall not be deemed to have accepted or rejected the plan if the Court finds, after notice and a hearing, that the plan was not transmitted to substantially all creditors and equity security holders of the same class, that an unreasonably short time was prescribed for such creditors and equity security holders to accept or reject the plan or that the solicitation was not in compliance with 11 U.S.C. Section 1126(b).

In other words, Your Honor, under Rule 3018(b) the debtors have the initial burden of demonstrating that substantially all creditors in Class 6 had a copy of the plan transmitted to them before attempting to pre-pack that class.

Under the facts contained in their own lock-up agreements, the Gilker First Day affidavit and the Bloom affidavit certifying the ballots, the debtors did not transmit a plan to substantially all creditors in Class 6 pre-petition. And that's with regard -- regardless of whether we measure the -- substantially all creditors by the number of holders of a dollar value of the holdings themselves.

If you take a look at the Bloom affidavit it contains information which indicates that at least 480 entities voted on the plan. NCI and the noteholders represent a tiny fraction of that total creditor class.

Further, if you do the analysis -- remember the $2.2 billion worth of bonds were lumped into Class 6.

THE COURT: Um-hum.

MR. McMAHON: And if you were to break out NCI's and the noteholders' holdings on a dollar value amount it's my estimate that approximately 800 million to a billion dollars of value is still there after we take them out. Therefore, under either test, Your Honor, we believe that the debtors can't pre-pack Class 6.

We further note that, Your Honor, if the Court adopts the U.S. Trustee's position and characterizes the debtor's efforts to obtain the Motorola lock-up agreements as an improper post petition solicitation and designates the Motorola votes on that basis, then the debtors are going to need Class 6 in order to confirm the plan under 11 U.S.C. Section 1129(a)(10).

THE COURT: Um-hum.

MR. McMAHON: There's only three impaired classes in the plan, 2, 3 and 6. If this Court designates 2 and 3 as improper post petition solicitation, then they're going to need 6. The post petition votes of Class 6, that is, in order to confirm their plan.

Let me move to the second issue, Your Honor, which is the solicitation under 11 U.S.C. Section 1125(b).

The debtors --

THE COURT: Before you do --

MR. McMAHON: -- sought to enter into lock-up.

THE COURT: Before you do, are you asserting that the NCI vote came in post petition, or are you acknowledging that that came in before the petition was filed?

MR. McMAHON: Your Honor, I am acknowledging that that came in before the petition was filed. I concede that.

THE COURT: All right. Thank you. All right.

I'm sorry to interrupt.

MR. McMAHON: No, thank you.

Moving to the second section of my argument, which is the solicitation under 11 U.S.C. Section 1125(b), the debtor sought to enter into lock-up agreements with NCI, certain noteholders and Motorola Credit Corporation. That's in Paragraph 4 of the Gilker designation affidavit.

And the debtors did, in fact, enter into lock-up agreements with those entities. They're attached as Exhibit C to that Gilker designation affidavit.

The lock-up agreements bind the signatory creditors to vote in favor of a plan of reorganization which is consistent with the provisions of the term sheet attached as Exhibit B to the Gilker designation affidavit.

Each of the lock-up agreements contain a provision entitled specific performance. That provision states that, quote, "It is understood and agreed by each of the parties

hereto that money damages would not be a sufficient remedy for any breach of this agreement by any party, and each non-breaching party shall be entitled to specific performance and injunctive or other equitable relief as a remedy of such breach," period, end quote.

The acting United States Trustee's position, Your Honor, here today is that the debtors, by seeking creditor consents to the lock-up agreements, were making a quote, "specific request for an official vote," period, end quote. That's the language from In Re: Snyder, the Utah case.

The lock-up agreements bind the signatory creditors to vote in favor of a plan. The agreement obligated the signatories to vote. Abstention was not an option. When each of the signatory creditors received ballots that were mailed to them with the solicitation package the debtors believed and maintain today the creditor had no option but to perform their obligations under the terms of the lock-up agreement.

Thus, in reality, the creditors had cast their votes at the time they signed the lock-up agreements. Had any creditor sought to do anything else, for example reject the plan, the debtors assert that they would have been able to come into this court and request an order that the rejecting ballot was in breach of the lock-up agreement and should not be counted as the creditors' vote. Rather, the official vote is the acceptance they agreed to when they signed the lock-up

agreement.

The debtors challenge the United States Trustee's position that there was a solicitation of an acceptance post petition and cite three cases in support of their position.

The first of the three cases is In Re: Pioneer Finance Corp. That's 246 Bankruptcy Reporter 626 out of the District of Nevada. The Pioneer Finance case involved the question of whether the pre-petition consents of bondholders obtained pursuant to an exchange offer and consent to solicitation constituted an acceptance of the plan under 11 U.S.C. Section 1126(b).

Thus, it is totally irrelevant to the question of what constituted an improper solicitation in violation of 1125(b).

Pioneer Finance is factually distinguishable from the instant case. First, in Footnote number 6 to the opinion, the Court specifically refused to determine whether the agreement, embodied in the consent form, constituted a contract or to consider the remedies, if any, that would be available if a consenting noteholder failed to vote in favor of a plan.

The existence of that footnote suggests that the consent form did not specifically identify any remedies that might be available if a consenting noteholder failed to vote in favor of the Pioneer Finance plan.

In this case we have an executed agreement where the

parties have identified specific performance and injunctive relief as available remedies in the event of a breach.

In other words, the lock-up agreements on their face suggest that the parties entered into a contract with the intent of making the agreement enforceable by injunction among other remedies in the event of non-performance.

The Pioneer case supports the U.S. Trustee's position. The plan proponent did the same thing the debtors are trying to do here today, which is changing their mind and belatedly trying to get approval of an offering as a pre-pack.

The Pioneer Court found that the pre-petition disclosure process was inadequate.

The second case cited by the debtors is In Re: Kellogg Square Partnership, 160 Bankruptcy Reporter 336. That's out of the District of Minnesota. What is interesting about Kellogg Square is that part of the opinion which appears immediately after the part cited by the debtors in Paragraph 23 of their objection to the Acting United States Trustee's motion, which addresses the signatory creditors' rights under the agreement in question. Quote, "The result and status of the agreement then is crucial. Had the final Court approved disclosure statement revealed information that materially bore on District Energy's interest and had the debtor previously failed to disclose that information to District Energy, District Energy would have a right under general non-bankruptcy

law to repudiate the agreement via recission, then to cast a rejecting ballot, period, end quote.

The Kellogg opinion indicates that the Court believed that some further action was necessary for the creditors' vote to count. That's not the case here.

In the instant case we have lock-up agreements which provide no such express out for non-disclosure to the signatory creditors. Again, nothing in the Kellogg Square opinion appears to suggest that the agreement that is the subject of that opinion contained a provision which entitled the debtor to injunctive relief.

Finally, the debtors cite the Third Circuit's ruling in Century Glove First American Bank. In Century Glove the Third Circuit held that, quote, "A party does not solicit acceptances when it presents a draft plan for the consideration of another creditor, but does not request that creditor's vote.

That's precisely the point, however, in this case, Your Honor. By seeking to lock up the signatory creditors' votes the debtors made a specific request for an official vote. There's nothing in the future about the lock-up agreement. The signatory creditors pledged their official vote at the time the lock-up agreements were entered into.

Your Honor, we submit that the relief granted in -- sought in the United States Trustee's motion, and we would cede the podium at this time to the debtor unless you have further

questions.

THE COURT: No, thank you.

MR. DeFRANCESCHI: Thank you, Your Honor. I think it was very carefully done that Mr. McMahon attempted to put the cart behind the horse here. The position of the debtors in this case is before you determine whether there was a solicitation, you have to make sure you satisfy the requirements of 1125 or 1126. And with respect to both provisions of the code, it must be an acceptance of rejection of a plan that would -- that was in fact solicited in order for those sections to apply.

The U.S. Trustee has offered no facts to support that there was any improper solicitation of an acceptance of plan here, save one fact. And that one fact is that the Motorola and the noteholder agreements, the two lock-up agreements that he was discussing, are dated as of May 29th.

The debtors submit that that fact alone, in light of the facts which I will present to Your Honor in a moment, lead to several conclusions that I think are inescapable here, but first and foremost that there was no acceptance of a plan that was solicited by the particular documents.

Your Honor, I -- the debtors filed --

THE COURT: Doesn't the lock-up agreement require that they vote for the plan?

MR. DeFRANCESCHI: Your Honor, what this lock-up

agreement provides for, and I think it's interesting that the Pioneer case was mentioned in the U.S.T.'s argument. What this plan provides for, and I think it's very important that we walk through the entirety of the lock-up agreements. It is improper in this situation to focus just on that one provision and ignore the rest of the agreement.

This agreement, if it is read in total, is entirely consistent with Century Glove, which the Court is well aware provided that the Third Circuit in construing this section of the Code, 1125, construed it in a manner to favor settlements, to favor creditor negotiations, found no principle difference between negotiations and solicitation of future acceptances. It's right there in the case.

The Pioneer decision is, although from another circuit, entirely consistent with that, and its telling, the language in that situation. And what was attempted to be done there -- it's telling how it supports us.

The language -- Pioneer --

THE COURT: Well, wait a minute. Let's go to the Third Circuit.

MR. DeFRANCESCHI: Yes.

THE COURT: Century Glove dealt with a creditor that sent a draft plan.

MR. DeFRANCESCHI: Yup.

THE COURT: It didn't say, "Sign on the dotted line

that you agree to support my plan."

MS. SCALA: Absolutely.

THE COURT: Let's start with the Bankruptcy Code.

MR. DeFRANCESCHI: Yes.

THE COURT: It says you cannot solicit an acceptance or rejection of a plan.

MR. DeFRANCESCHI: Yes.

THE COURT: If the lock-up agreement isn't a solicitation of an acceptance or a rejection of the plan, what is?

MR. DeFRANCESCHI: What is? A perfect example, Your Honor. If I were to take this document, which happens to be the plan and disclosure statement, hand it to Motorola, hand it to NCI, hand it to the noteholders, and say, "I want you to vote on this. This is the plan. This document here is the plan."

I get their vote. I haven't gotten an approved disclosure statement. I haven't done anything. I just -- this is the plan. Then I come to the Court and I say, "Your Honor, we had a --" you know, then I go through the regular process. I put in a motion to --

THE COURT: Um-hum.

MR. DeFRANCESCHI: -- prove solicitation procedures.

THE COURT: Um-hum.

MR. DeFRANCESCHI: I get the disclosure statement.

Same disclosure statement to prove this having adequate information we solicited.

And then I come in and say, "Your Honor, we didn't send ballots to these folks here. They had no way out of this. We just -- before anything was approved here we told them this is the plan that they're going to vote on, and we're holding them to that."

THE COURT: Well, isn't that what the lock-up agreement is?

MR. DeFRANCESCHI: Absolutely not, Your Honor. Absolutely not.

THE COURT: The lock-up agreement says, "We're going to hold you to it. In fact, we can get specific performance."

MR. DeFRANCESCHI: It says a lot more than that, Your Honor, a lot more that's very important here.

THE COURT: Well --

MR. DeFRANCESCHI: And I'm going to tell you what it says that's important.

THE COURT: Let's talk about whether it's solicitation. The other things may or may not be relevant.

MR. DeFRANCESCHI: Well, Your Honor --

THE COURT: But you solicited -- post petition they signed it. The fact that it says effective as of May 29th, didn't they sign it post petition?

MR. DeFRANCESCHI: Well, as a matter of fact, Your

Honor --

THE COURT: Motorola?

MR. DeFRANCESCHI: -- they actually signed the lock-up agreement, the noteholders signed it pre-petition. They just didn't have authority to release it.

THE COURT: Mr. Gilker doesn't say that.

MR. DeFRANCESCHI: Didn't have authority to release the signatures until the post petition -- we received it --

THE COURT: Well, Mr. Gilker's affidavit says there were modifications to the lock-up --

MR. DeFRANCESCHI: There were modifications.

THE COURT: -- agreement post petition.

MR. DeFRANCESCHI: Yes.

THE COURT: And that that --

MR. DeFRANCESCHI: What his affidavit says is there were ministerial, non-material changes to the lock-up agreement.

THE COURT: To make it conform to the NCI, which was signed --

MR. DeFRANCESCHI: To make it conform.

THE COURT: -- an hour before the petition.

MR. DeFRANCESCHI: Yes, it was, Your Honor. Yes, it was. What is also true here -- Your Honor asked a specific question, whether it was signed. There were signature pages. The facts of the case are very important.

It was a Friday afternoon --

THE COURT: Um-hum.

MR. DeFRANCESCHI: -- just prior to the Memorial Day holiday. Counsel for the noteholders had all the signature pages, had authority to release them, save one signature page. They couldn't get in touch with that particular noteholder to release it. And as a result of the intervening holiday weekend, basically what happened, Your Honor, is very simple. Two business days later when they came back to the office they gave them final authority to release the signature pages.

But I really do want Your Honor to understand our position, and perhaps Your Honor understands it very well that -- and disagrees with us that this was not an acceptance of a plan and that just because --

THE COURT: Well --

MR. DeFRANCESCHI: -- I'm sorry.

THE COURT: No, it was solicitation for an acceptance of the plan.

MR. DeFRANCESCHI: Your Honor, Century Glove specifically, specifically sanctions the procedure we did here. It says --

THE COURT: No, it does not.

MR. DeFRANCESCHI: Yes, it --

THE COURT: There was not a lock-up agreement --

MR. DeFRANCESCHI: Your Honor, respectfully --

THE COURT: -- sent with that plan, and it wasn't signed.

MR. DeFRANCESCHI: Your Honor --

THE COURT: The plan was sent.

MR. DeFRANCESCHI: Respectfully.

THE COURT: The Court said you can negotiate.

MR. DeFRANCESCHI: Respectfully.

THE COURT: But you got to stop.

MR. DeFRANCESCHI: It said more than you can negotiate. It says you can solicit future acceptances. Future acceptances of what? Of agreements to a plan, that was the context of this particular case.

It was 1125(b) --

THE COURT: It didn't say you can --

MR. DeFRANCESCHI: -- that was being considered.

THE COURT: -- sign. It did not say you can sign a lock-up agreement that binds you to vote in favor of the plan.

MR. DeFRANCESCHI: Your Honor --

THE COURT: That -- there's got to be a line.

MR. DeFRANCESCHI: Your Honor, there is a line. There is a way that this Court can harmonize the provisions of 1125(b) and --

THE COURT: Okay.

MR. DeFRANCESCHI: -- 1126 by analogy, because it's similar language, but --

THE COURT: Well --

MR. DeFRANCESCHI: -- focusing on 1125(b) for the moment. There's a way to harmonize that provision together with the Century Glove decision, which is really the only Third Circuit decision that addresses this general issue of solicitation under 1125 --

THE COURT: How?

MR. DeFRANCESCHI: Here's how you do it. First of all, if you -- if you see what the Third Circuit was looking at in that case, it is just a given in this practice, in the bankruptcy practice, that negotiations which would ultimately reach a consensual plan of reorganization is encouraged.

I don't think there would be any dispute, even from the United States Trustee's Office, that that's encouraged.

Number two, in that particular case, in the Century Glove case, the Court made very clear that it sees no principled distinction between creditor negotiations and soliciting future acceptances of a plan, no principle distinction. It's right there in black and white.

Now --

MR. DeFRANCESCHI: No, it talked about negotiating regarding a consensual plan. It didn't say, "soliciting future acceptances, i.e., sign a ballot."

MR. DeFRANCESCHI: It absolutely was giving this Court guidance when it said that that section of the code must

be read narrowly, because if you don't read it narrowly, what's going to happen? And I'm going to tell Your Honor how you could very easily read it narrowly and not to apply it in this case.

THE COURT: Well, how can it be read narrowly consistent with your enforcement of these lock-up agreements?

MR. DeFRANCESCHI: Well, first of all Your Honor, there is a major factual premise that is entirely erroneous here. We've assumed that we're seeking to enforce a lock-up agreement.

Where is there any evidence that these debtors have ever sought to enforce this lock-up agreement? There is none, and we are not seeking to enforce it.

Isn't that important? I think the answer to that question is absolutely yes.

THE COURT: No, it would be important in the 1126 context, but not in the 1125. 1125 prohibits solicitation of a vote. It does not prohibit enforcement of a post petition pre-disclosure statement vote.

MR. DeFRANCESCHI: Section --

THE COURT: It prohibits solicitation.

MR. DeFRANCESCHI: Section 1125(b) prohibits -- says that the acceptance or rejection of a plan may not be solicited.

THE COURT: Right.

MR. DeFRANCESCHI: That's what it says, unless you follow --

THE COURT: Right.

MR. DeFRANCESCHI: -- you know, 1125(a) and (c) and those requirements.

Number one, there should also be no dispute that we, in fact, followed and are relying on the solicitation procedures this Court approved consistent with general practice, that we received the votes, and it's those votes of the lock-up noteholders and MCI -- MCI and Motorola that we are counting here.

I think we can lay that to rest.

THE COURT: Right.

MR. DeFRANCESCHI: That happened. But to say that because there's a specific performance provision in this agreement coupled with the language in the prior paragraph of the agreement somehow makes that the official vote or makes that --

THE COURT: Well --

MR. DeFRANCESCHI: -- makes that the acceptance of the plan.

THE COURT: No, it doesn't. Does it constitute the solicitation of a vote that's prohibited by 1125? The U.S. Trustee is not saying this is the vote. It's saying this was a solicitation for a vote on the plan.

MR. DeFRANCESCHI: It doesn't say a vote, with all due respect, narrowly reading the express language --

THE COURT: Accepting or rejecting.

MR. DeFRANCESCHI: -- it says -- well, I --

THE COURT: How is that different?

MR. DeFRANCESCHI: Your Honor, I take exception to that, because the Third Circuit has stated very clearly we should read this section narrowly, and to say that the acceptance or rejection of a plan is the same as a vote, I think -- I think that misses the mark.

What I think it is saying here is this -- in this case we did not solicit the acceptance of a plan. What we said in this case is --

THE COURT: What did you solicit in the lock-up agreement then?

MR. DeFRANCESCHI: It's very -- we should go through -- to the terms of the lock-up agreement. I think it's instructive if we do that rather than dance around the issue as I know the United States Trustee would have us do. We've attached copies of the lock-up agreements to the affidavit.

THE COURT: I have it.

MR. DeFRANCESCHI: And I think that there are significant provisions in here that make very clear -- and I should add, Your Honor -- I know I'm stepping away from the podium, but I think it's picking it up.

I should add, Your Honor, and this is another predicate piece of information I think is very important here, these agreements were negotiated by parties who -- and I think this is very important -- very sophisticated business people, very sophisticated legal and financial advisers.

What that means, of necessity, Your Honor, is that when they draft an agreement like this they mean what they're saying. It's not a situation where we just put these wink and a not provisions in this agreement. This is a situation where the parties, sophisticated parties at arm's length with the life of this company on the line, negotiated an agreement.

So, what does the agreement say? We provide provisions of the agreement, we outline them in our -- in our papers.

We outline them in our papers, and I think among the provisions you need to consider -- and if the Court will indulge me, I do -- this is very important and I do want to rely on my outline for the hearing. I usually don't do that, but it's very important. I want to make the points.

First, Your Honor, the agreement to vote all of the claims in favor of the plan, which is in Paragraph 3, were expressly conditions on, again, the terms of the plan and the restructuring documents.

By the way, Your Honor, so the Court's aware, these are the restructuring documents.

THE COURT: Um-hum.

MR. DeFRANCESCHI: These were not done. These are the restructuring documents. Keep that in mind as I continue.

Expressly conditioned on the terms of the plan and the restructuring documents being consistent with and no less favorable to the lock-up party than the terms set forth in the term sheet and the terms and conditions of the plan in all respects not specifically addressed by the term sheet are acceptable to each lock-up party in its sole and exclusive discretion.

When the parties drafted that they meant what the said, in their sole and exclusive discretion. There's no evidence nor could there be, 'cause it's not the case, that the term sheet comprised all the terms in this plan that we're seeking confirmation of today. Out number one.

Number two, Your Honor. The lock-up agreements expressly provided that nothing in the lock-up agreements, and this is in Paragraph 5 or Section 5, shall require the debtors, my client, to breach its fiduciary duties as a Chapter 11 debtor in possession and exercise -- and any exercise of such fiduciary duties by the debtor shall not be deemed to constitute a breach of the terms of this agreement.

By its own terms -- this is important, Your Honor -- and the agreement of these parties the debtors did not have to prepare, finalize, propose, solicit, seek confirmation of or

even go effective on a plan if to do so would violate my client's fiduciary duties.

Certainly this is consistent with our duties as a Chapter 11 debtor in possession.

It bears mentioning on this point, Your Honor, that the debtors considered numerous other financial restructuring possibilities. We've outlined them before for the Court, and they're in our affidavits, but suffice it to say we determined in the exercise of those duties that this plan that we're seeking confirmation of is the best plan for these estates.

Moreover, Your Honor, the creditors committee represented by legal counsel and financial advisers spent considerable time and effort trying to come up with another plan. They couldn't do that, either, Your Honor.

This is the plan.

Next point, Your Honor. The agreement expressly stated that the lock-up parties could, quote, "terminate the obligations under the agreement and rescind any vote on the plan which vote shall be null and void and have no further force and effect upon the occurrence of certain events, including --" and I'll get into those in a minute, Your Honor, but the very fact that it said, "if the agreement isn't followed they can rescind any vote on the plan, it'll be null and void," suggests that there was no vote on this plan at the time the agreement was entered into.

That's -- how can they get out of the agreement? Okay.

If the restructuring documents, Your Honor -- that's these documents right here, several hundred pages of sophisticated contractual and legal documents. If they are inconsistent with the term sheet, unless those documents are consented to, something in the future that yet has to happen, lock-up parties can terminate.

If the debtors breach the agreement, lock-up parties can terminate.

If other parties to the lock-up -- other lock-up agreements breach their agreements or have not entered into lock-up agreements, can terminate.

Significantly -- and I don't think this issue has come up before this Court to my knowledge, the provision also allowed for termination -- this is 8H -- if there was any material adverse change with respect to the debtor, its assets, its liabilities or operations, the Chapter 11 proceedings or the ability of the debtor to confirm the plan on a consensual basis.

For the United States Trustee's Office to suggest that that isn't a huge potential out for these parties -- if, for example, the disclosure statement wasn't to their liking, if the plan wasn't to their liking, if the debtor's business changed to some significant degree such that the mac (phonetic)

clause came into effect, I don't know what is. But there's more.

THE COURT: Well, it doesn't say if it's not to their liking.

MR. DeFRANCESCHI: Well, Your Honor, with --

THE COURT: If it's consistent with the term sheet --

MR. DeFRANCESCHI: They're -- I've already given you --

THE COURT: -- they're bound.

MR. DeFRANCESCHI: -- I've already given you the provision. It says that they have sole and exclusive discretion with respect to any provision of the plan that -- and that's in Paragraph --

THE COURT: I see. I see it.

MR. DeFRANCESCHI: Yeah, okay.

Each of these provisions demonstrate that the lock-u parties had not definitively accepted a plan. Rather there was an agreement to vote in favor of a plan in the future, subject to these substantial conditions.

But there is more in the agreement that compels this reading, Your Honor. The lock-ups provide, quote, "The agreement is not and shall not be deemed to be a solicitation for consents to a plan. The acceptances of the lock-up party --" I paraphrased -- will not be solicited until such parties have received a disclosure statement and related ballot as

approved by the Bankruptcy Court. It's Paragraph 7.

The United States Trustee, Your Honor, would ask the Court to ignore the provision arguing that the U.S. Trustee knows better what the parties actually agreed to, suggesting that this is somehow a sort of wink and a nod provision.

THE COURT: Well, you can't call something --

MR. DeFRANCESCHI: Your Honor, this --

THE COURT: -- black if it's white.

MR. DeFRANCESCHI: We're not doing that, Your Honor. There is a reason for this provision.

THE COURT: Okay.

MR. DeFRANCESCHI: There is a very significant reason why the sophisticated parties to this agreement wanted that in there.

THE COURT: Other than to avoid Section 1125.

MR. DeFRANCESCHI: Well, Your Honor, phrasing it that way suggests that there was something untoward here, and I suggest there's not.

But here's the reason. That provision is in there to protect against the very thing, the very thing that the debtors tried to do with the bondholders in the Pioneer case. Remember, in the Pioneer case there was a pre-petition exchange offer, and as part of the exchange offer there was a box where they could check off that said if the exchange doesn't have unanimous consent, then you're -- pre-petition, if there wasn't

unanimous consent, then you will consent to vote in favor of a plan on substantially similar terms of the exchange offer, a copy of which was provided.

The debtors tried to use that pre-petition consent --

THE COURT: Um-hum.

MR. DeFRANCESCHI: -- from some seventy-some odd percent of the bondholders post petition as a vote on a plan to satisfy the various confirmation requirements. The Court said no. No.

What the parties in this case did was, is they precluded the debtors from trying to do that. And in fact the debtors have not done that. We have not -- we have not taken the lock-up agreements and said to Your Honor, "This agreement right here? This is the vote." And the parties contractually protected themselves with that provision. It's not a wink and a nod provision. It's an important provision. It's there for a reason.

Your Honor, on this point we think that in light of the facts of this case, which may or may not be the same. The United States Trustee makes suggestions that in some of these cases there may or may not have been a specific performance provision. There may or may not have been these other provisions, the mac clause, the clause -- the provision that the parties bargained for that said if the plan is different from the expressed terms of the term sheet they have their

absolute and exclusive discretion to get out of the deal. Under the facts of this case --

THE COURT: Now, you're going too far in your absolute discretion to get out of the deal. It's only if --

MR. DeFRANCESCHI: As I said, if the plan has provisions beyond what's in the terms sheet, which it most certainly does, then the language -- I'll read it for Your Honor again.

It says they have absolute and exclusive discretion.

THE COURT: No, it says if they're inconsistent.

MR. DeFRANCESCHI: Exactly. Well --

THE COURT: Not beyond. I mea, the fact that there's --

MR. DeFRANCESCHI: -- presumably --

THE COURT: The fact that the plan contains a definitional section which is not contained in the term sheet, I would submit, you would not concede means that the parties to the lock-up agreement are not bound to vote in favor of the plan.

MR. DeFRANCESCHI: Your Honor, we're not here to decide that issue, because no one has suggested one way or the other on that.

The provision says what it says.

THE COURT: Um-hum.

MR. DeFRANCESCHI: The argument here, remember, is

that we -- that there was an acceptance of plan that was solicited by these documents.

THE COURT: Yes.

MR. DeFRANCESCHI: That's what the code requires in order for that section to apply.

THE COURT: Um-hum.

MR. DeFRANCESCHI: There -- these provisions make very clear, and Your Honor, we must look at the entire agreement. These provisions make very clear that there was not an acceptance of a plan that was solicited. There couldn't have been.

There couldn't have been. There were too many outs in this agreement, and these -- again, Your Honor, I have to emphasize.

MR. KRELLER: Your Honor, Thomas Kreller of Millbank, Tweed, Hadley and McCoy (phonetic) on behalf of the Ad Hoc Bondholder group. I apologize for interrupting Mr. DeFranceschi, and I'll cede the podium back to him.

Just on this point, Your Honor, I would like to advise you that from the bondholder perspective, and we are the counsel who represented the bondholder group in negotiating the plan support agreement, in negotiating the term sheet that underlied that plan support agreement and in negotiating ultimately these restructuring documents and the plan itself, the bondholder group believed in fact that by virtue of the

lock-up agreement and the various provisions that gave us discretion, we believed and we asserted throughout that we had very broad discretion to terminate our obligations under the plan support agreement.

We believe that we agreed to proceed towards an attempt to consummation of the -- to consummate the transaction that was outlined in the term sheet, but it was always subject to our discretion and our approval of all of the various restructuring documents.

Your Honor, I can also tell you that on a number of occasions over the course of the case, and in the context of negotiating some of the restructuring documents, some of the terms of the plan and some issues that came up during the course of the approval of the disclosure statement and the solicitation of votes, we advised the company that we believed we had the right to terminate the plan support agreements because of things that had happened or because of drafts of documents that were circulated, and that if those issues weren't cleared up in a way satisfactory to us that in fact we would very seriously consider terminating the plan support agreements.

Your Honor, I -- just one example. We insisted with the company that there be additional disclosure when the company filed its 10Q. We insisted that that go out to creditors as part of the voting process, and the company

concurred with that, and we did so. But had that not happened, I guarantee you that the bondholders would have seriously considered terminating the support agreement.

And I can tell you, trust me, that if the bondholders didn't want to vote for this -- yes for this plan, they wouldn't have voted because they thought they could be compelled to under the support agreement. And we would be here having a very different discussion about whether this agreement is enforceable or not.

That's not the discussion for today. We -- no one's attempting to enforce the agreement. In fact, the agreement's probably lapsed by its terms several weeks ago. And so, Your Honor, just on that particular point, just so you know the bondholders' perspective, and presumably the bondholders who signed support agreements are the purported victims of this improper solicitation. I think our opinion is relevant. We did not believe that we were obligated to vote on any particular plan until this plan came out, under the underlying restructuring documents were done to our satisfaction.

And at the time our votes were cast, that's what our votes were cast on, not based on a term sheet or not based on the existence of the plan support agreement, Your Honor.

And I'll -- would like some time to address some of our other issues later, but I did want to weigh in on that particular point.

MR. DeFRANCESCHI: Your Honor, apologize for getting a little too animated here, but this is a very important issue.

THE COURT: Um-hum.

MR. DeFRANCESCHI: Very important issue, and I think, putting aside whether I personally, as a member of the Delaware bar, agree with the policy decision made by the United States Trustee, it's irrelevant.

What is relevant here though is the facts and circumstances presented to Your Honor today. And based on those facts and circumstances and the direction from the Third Circuit to narrowly read this section, because we want to encourage negotiations, and the fact that the only document that was attached to the lock-up agreement was the term sheet which admittedly was a pre-petition agreement. There's no dispute on that. It was done May 21st. Compels a decision that there was no acceptance -- or obviously rejection -- but no acceptance of a plan that was solicited here.

Your Honor, I could -- I could continue with the rest of my arguments, but I do think that on this point I don't know if Mr. Kreller or the other parties want to weigh in on it. I do think that this is the threshold issue. I think it's the significant issue. I think it's -- I think here, under the facts of this case, it is -- it is the critical issue, it is the turning issue.

And I don't know how Your Honor wishes me to proceed.

THE COURT: All right, let me hear from any other party.

MR. HARNER: Good afternoon, Your Honor, Paul Harner of Jones, Day, Reavis and Pogue in Chicago on behalf of Nextel Communications.

We field a joinder in the debtor's objection, and obviously we join in the arguments that Mr. DeFranceschi's made this afternoon, but it strikes me that there's a very important distinction here that has not yet been drawn, and that is that Section 1125(b) speaks to the improper post petition solicitation of acceptances of a plan.

Your Honor, I believe, focused on that issue immediately by asking a question during Mr. McMahon's argument, and that was, do you now concede that my client, Nextel Communications, Inc., in fact signed its lock-up agreement prior to the petition date, and he agreed that we had signed the agreement at that time, concededly only an hour before, but during the pre-petition period.

I think what that also suggests is that we would not even be having this discussion if these agreements had all been signed, say an hour before the petition date, or a minute before the petitions were filed in this court, much less a day or a week or a month.

What that suggests is that the important distinction here is whether or not the solicitation is this document

itself. If there was a solicitation here, and there may very well have been, it was a solicitation to agree, as the parties ultimately did in these documents, as a contractual matter to support a plan under certain circumstances. And Mr. DeFranceschi's reviewed for you at great length what the exceptions to those circumstances were, what the parties outs were, and as Mr. Kreller just pointed out, these agreements have now expired by their terms, pursuant to a temporal termination clause.

But what's relevant about all of this is that if there was a solicitation, it was only for that contractual agreement, and that solicitation by definition must have occurred during the pre-petition period, whether these agreements were signed or as is more technically correct, the signatures were released from escrow a day, a business day or two business days subsequent to the filing of the petition.

There was months of negotiations that occurred prior to the petition date, active, good faith, arm's length, extensive, sometimes vigorous and contentious negotiations between highly sophisticated parties that led to this agreement.

This agreement to support a certain plan under certain contractual circumstances subject to certain outs had been reached before the petition was filed here. And the fact that the signatures were executed or released from escrow

subsequent to the petition date is irrelevant. What Section 1125(b) speaks to is the improper post petition solicitation of acceptances of a plan.

This document, these documents, these lock-up agreements, are not themselves the solicitation activity that's at issue here. The solicitation activity were those discussions that occurred beforehand. Now, that leads me --

THE COURT: Well, but you can't say the first time I talked to you about the plan was the solicitation but the last time I did, and you actually signed something that bound you to the plan was not a solicitation.

MR. HARNER: I don't disagree, Your Honor, and it requires a case by case determination, but that leads to a suggestion Nextel would posit with respect to how in a principled way the Court can resolve this, exercising its own discretion to examine these cases on an individual case-specific basis.

THE COURT: Um-hum.

MR. HARNER: We're on very dangerous ground here, and I'm not going to presume to question the U.S. Trustee's policy judgment with respect to these matters, either, but it's become abundantly clear that the United States Trustee has generally become hostile to lock-up agreements.

THE COURT: Post petition lock-up agreements.

MR. HARNER: Post petition lock-up agreements, that's

correct --

THE COURT: Uh-huh.

MR. HARNER: -- and that obviously was an issue in this case early on, when we talked about the proper composition of the unsecured creditors committee.

But the fact of the matter is that these agreements are a very, very common practice, and they save people a lot of time and a lot of money, and the bankruptcy process that we've all gotten used to -- by the way, Mr. McMahon kept talking about pre-package cases. This isn't a pre-packaged plan of reorganization. It was never intended to be.

What the parties were always trying to achieve here was a pre-negotiated plan of reorganization.

THE COURT: Um-hum.

MR. HARNER: What they tried to do is what prudent business people try to do in exactly these circumstances, which is stay out of bankruptcy court as long as possible so that both the system and the parties' resources are not burdened until they can reach an agreement, if that's possible. That's exactly what happened here.

If we adopt the U.S. Trustee's approach we're going to discourage that kind of approach in future cases. And it seems to me the way to reconcile that or avoid that result --

THE COURT: How are we going to -- how are we going to discourage that? We're going to say pre-petition you can do

what you want.

MR. HARNER: Well, that --

THE COURT: But post petition you do have to follow the rules.

MR. HARNER: And it strikes me that it's not at all inconsistent with the rules if a signature gets released afterwards, but the agreement's made -- and more importantly, and this is the point I was making earlier, Your Honor, the solicitation, to the extent that you characterize any of these activities as solicitation, is done pre-petition.

So, here's the principled way to reconcile the problem. The Court, on a case by case basis, in this or any other similar or dissimilar case, can make a determination whether on the facts -- and you have those facts before you by affidavit and otherwise -- there were, in fact, solicitation activities occurring post petition or whether or not, as Mr. Gilker's affidavit points out, what was going on here was post petition ministerial activities.

THE COURT: Um-hum.

MR. HARNER: The solicitation activities here you absolutely, in our view, have the discretion to find occurred, to the extent that any did, in the pre petition period here. If there's ever a case for the Court to exercise that discretion and not designate votes based on this highly technical reading of what occurred here, this is the one. We

urge you to exercise that discretion and to adopt a rule that allows you to make that determination on a case by cases basis of when solicitation activities occurred for selection -- Section 1125(b) purposes in this case.

Thank you, Your Honor.

THE COURT: Thank you.

MR. KRELLER: Your Honor, Thomas Kreller again on behalf of the Ad Hoc Bondholder group. I'll be brief. I'll reiterate Mr. Harner's statements regarding the timing of the execution of the lock-up agreements, Your Honor.

The term sheet was in place well before the filing of the bankruptcy case. The lock-up agreements were substantially final, and in fact signed by NCI prior to the filing of the case.

What occurred in the post petition period were minor revisions to the plan support agreement to conform the forms of agreement to reflect the fact that we had three parties with very different interests who were attempting to move forward on a consensual basis, I think a very productive effort on their part.

There were no activities with respect to the solicitation of the terms of the term sheet, which is the only thing at this point that could be viewed as the plan, since the plan didn't exist at the time of the lock-up agreements.

The term sheet simply did not move during the time

period that -- to the extent anyone's concerned about a time period.

There are a couple of other basic points, basic facts. I -- what the U.S. Trustee appears to be concerned about is the ability of a debtor to compel a creditor to accept a plan over that creditor's subsequent objection.

I missed --

THE COURT: No, not necessarily, and we're missing the insidious effect of having signed a lock-up agreement, whether the creditor felt compelled to vote in favor of the plan to avoid litigation over whether or not, you know, this out would be applicable or not.

I mean, I don't think I have to decide this issue. Only in the event that your clients feel you were misled or want to get out of the lock-up agreement.

MR. KRELLER: I'm not suggesting that you do, Your Honor. Number one, I am missing any insidious effect of anything here, quite frankly. But I -- what I -- what this goes to, Your Honor, is the policy behind what's being asserted here, and there -- you can't make the -- if a debtor was able to enforce a lock- up agreement pursuant to a specific performance clause, it would be you, Your Honor, who would have to enforce that lock-up and order specific performance.

THE COURT: Um-hum.

MR. KRELLER: Under what circumstances would you

compel specific performance of a lock-up agreement if you found that lock-up agreement, which you would have to in order to find specific performance, if you found that lock-up agreement was tantamount to an improper solicitation?

If the creditor was bound to vote for the plan under the terms of the lock-up --

THE COURT: Um-hum.

MR. KRELLER: -- and you were put in a position of being asked to enforce that lock-up -- if there was an improper solicitation you simply wouldn't order specific performance on that lock-up agreement, would you?

THE COURT: Course not. But I don't know, again, what the effect of the lock-up agreement is where your clients have not asked me to let them out of it.

The fact that it was signed had some effect.

MR. KRELLER: Your Honor, the fact that it --

THE COURT: Or it would not have been signed or the debtor would not have asked you to sign it.

MR. KRELLER: The effect of signing the lock-up agreement was that we knew, NCI knew, Motorola knew, and the debtor knew that we were all proceeding forward --

THE COURT: Um-hum.

MR. KRELLER: -- in lockstep manner on a consensual basis. That was the effect of the signing. We've been through this, and I won't belabor it, we had plenty of discretion. Did

we have absolute discretion to terminate these agreements? I don't say we had absolute discretion. We had plenty of discretion. In a situation where we had plenty of discretion, what does specific performance mean? How vulnerable are we to a specific performance argument? I don't think very.

And again, Your Honor, to get back to it, if the fear is the creditors are somehow disadvantaged here or taken advantage of by a debtor, whether through threats of litigation and a creditor believing it was going to somehow avoid litigation and the associated costs, whatever the fear is, you wouldn't find yourself in a situation where you were ordering specific performance under a lock-up agreement like this, unless you were prepared to order specific performance and then turn around and designate the vote and have the whole thing be moot.

THE COURT: Well, that may, in fact, be exactly what the result is.

MR. KRELLER: Well, Your Honor --

THE COURT: The -- 1125 doesn't deal with whether or not, you know, a contract between you and the debtor to vote in favor of a plan is enforceable or not.

MR. KRELLER: I agree, Your Honor.

THE COURT: The may -- you may be subject to other damages by the debtor for your failure to comply with the agreement.

MR. KRELLER: That's -- that may well be, Your Honor. And I agree, but if the fear behind this is somehow the compulsion of creditors through a solicitation on less than adequate information, which is certainly not the case here, and I'm sure Mr. DeFranceschi will take you through that, and I'm happy to as well. That simply is not the case and could almost never be the case, quite frankly, under these circumstances, Your Honor.

And I guess the last point, Your Honor, that I would raise is the -- even if you conclude that there was an improper solicitation, and even if you conclude that somehow my clients were bound to this agreement and voted for the plan as a result of signing this lock-up agreement, which I don't concede, and I wouldn't believe would be the appropriate ruling, the question then turns to what is the appropriate remedy?

There's been no wrongdoing here, Your Honor. There's been the intervention of a holiday weekend at the very tail end of what was a very difficult and hard-fought process. And a decision by a debtor that it, as a business matter, wanted to have a long holiday weekend in Latin America to approach people and deal with vendor issues and other matters critical to the business, and that the filing of the case, knowing that things had progressed to term sheet stage, and in fact to lock-up agreement stage, gave them the comfort that they could make that filing, do what they needed to do on the business side and

collect signatures later.

There's no wrongdoing here, Your Honor. There's no evidence of that, nor do I know that there's any suggestion, quite frankly, and nothing in the record would support that.

And the question then turns to remedy. And designation, Your Honor, is a rather dramatic remedy here. An appropriate remedy in the face of such a ruling might be to allow creditors who were locked up to the agreements the opportunity to change their votes, if they so decided to do.

We -- had we thought that was appropriate, my clients would have already done so. And I can tell you that my clients do not wish to change their votes, and at no point in this process had any intention of changing their votes once cast and once these documents were done.

And so, Your Honor, I think -- even if we get to the point where you've concluded on these other issues and you're looking to the designation as a remedy, I would suggest that that remedy is inappropriate here, particularly under these facts and circumstances, and that, you know, to the extent there is a remedy needed, it would be to reach out to the creditors who were parties to these support agreements, and I believe you probably have at least their counsel and perhaps representatives of all of them here and available to you at some level, or we could make that happen.

To the extent you would like to implement that

remedy, that would seem to me to be much more appropriate than designation as a result of some of these other issues that we've raised.

THE COURT: Well, the debtor has asserted that designation makes no difference, confirmation.

MR. KRELLER: Your Honor, I believe the debtor has submitted, and the ad hoc group would concur, that if you were to designate the votes, the requisite acceptances by far would still have come in under Class 6.

And if by meaning it has no effect on confirmation, you mean the plan is still confirmable and should be confirmed, I would agree with that. Whether it has no effect, Your Honor, I -- as professionals who deal in these kinds of cases every day, Your Honor, these lock-up agreements are very important to the process and --

THE COURT: Yeah, but not post petition.

MR. KRELLER: Your Honor, the activities that -- Your Honor, we -- I guess we -- I won't go down that path, because we don't need to debate how one gets to a consensual plan without talking to people about what it is they propose to do.

THE COURT: There's nothing wrong with the talking, and Century Glove said that, but there's a big difference between talking and signing a contract such a lock-up agreement.

MR. KRELLER: Well, Your Honor, I would just -- I

would submit then that the signing of a lock-up with a specific performance clause which seems to be creating some problems, a specific performance clause of questionable enforceability, I think, is well within the bounds. But nonetheless, Your Honor, you have my points. And I'll rest.

THE COURT: I do.

MR. DeFRANCESCHI: Your Honor, I too might concede that in certain situations, in lock-up agreements, unlike the one before Your Honor, there may be something wrong with that. I will -- I would not concede that there was anything improper here with this lock-up agreement.

Your Honor had raised a couple questions about whether designation matters here or not. And I believe we would have the evidence to show that Class 6 would carry even without these votes, and it would be an overwhelming support for the plan.

But beyond that, Classes 2 and 3 had one party in each class which was Motorola entities. And the anomaly here, Your Honor, is that they full support the treatment that they're getting under the plan and actually voted in favor of the plan. If you were to designate and determine that their votes don't count and then come to the conclusion that those two classes have rejected, I would submit that we certainly have the case for a consensual cram-down on those two classes.

THE COURT: Um-hum.

MR. DeFRANCESCHI: I mean, they're here and they consent to the treatment, so, in some respect it doesn't matter, but in another respect, Your Honor, it really matter, because -- and I don't want to go on forever on this point, but the parties that are here today, and word will certainly spread, need to have guidance as to what they can do in connection with agreements.

You want to -- if you want to -- this is a lock-up agreement, but it's sort of -- to say that it's a lock-up agreement does not -- does not mean there's anything wrong with that. I mean, we could have called this the NII agreement. And the fact of the matter is we need to be bound by what it says, because the parties specifically negotiated protections in it to allow them the ability to vote in the future in favor of the plan or not vote in favor of the plan or get out of this agreement if a whole series of complex actions didn't occur.

I'm sorry, Your Honor -- okay. I don't know if Your Honor wants me to go forward with -- I really didn't get into the 1125(b) issue, because it was my view that that solicitation issue doesn't get raised until we make a determination if this document was the acceptance -- was the post petition acceptance of a plan, because the section requires a finding that that is the case, and that's what my arguments have gone to so far. Others have sort of argued additional points.

But if we were to go to whether there was a post petition solicitation of this agreement, assuming it is an acceptance of plan, which as I said we disagree with, we would echo the thoughts that Mr. Harner raised, that there was no post petition solicitation of this document.

The solicitation, to the extent there was, which was a solicitation seeking future acceptances of a plan, occurred pre-petition. That's what the evidence actually says, save one fact, the fact that some of these agreements were dated the 29th of May.

But other than that, there is no fact that supports a finding that there was a post petition solicitation, putting aside again whether there was an acceptance of a plan that was solicited and --

THE COURT: Well --

MR. DeFRANCESCHI: -- we spent a long time on that issue, Your Honor.

THE COURT: -- even Mr. Gilker acknowledges that there were discussions post petition and there were changes, and must I not conclude that somebody asked them to sign it?

MR. DeFRANCESCHI: Well, as we said, there --

THE COURT: It was already signed. Somebody asked them to release the signatures.

MR. DeFRANCESCHI: Yeah, I think that the types of changes, Your Honor, they were referred to as ministerial

changes, and the point was argued that they weren't changes that said, you know, "You're going to vote for this plan." They were -- for example, NCI did the first lock-up agreement, and we needed to conform the lock-up agreements to rep -- to reference that, for example, the Motorola entities had three separate lock-up agreements. They needed to be conformed to provide for those three separate entities.

They're all slightly different in who they refer to. The noteholder lock-up agreement provides provisions in it for the ad hock committee and the backstopping noteholders. Those types of changes certainly -- certainly don't give rise to the level of a solicitation of an acceptance of a plan. What those are, those are just basically what we would call conforming changes so that the lock-up agreements -- and again, I just -- the agreements were consistent.

THE COURT: Well, the ministerial changes may have been -- the changes may have been ministerial, but --

MR. DeFRANCESCHI: And since the changes were ministerial, and all that counsel was waiting for was final authority to release the signatures --

THE COURT: Can't you see --

MR. DeFRANCESCHI: I'm sorry.

THE COURT: Can't you see the danger in that? We all work out a pre-petition deal. The petition's filed, and I don't ask you to hand me the signature page until the minute

after bankruptcy. Then I've just avoided any scrutiny of the lock-up agreement, because I didn't solicit it post petition. So, therefore, it comes in, and you're bound by it, but I don't have to go through really complying with the disclosure statement or any of the 1125 issues.

MR. DeFRANCESCHI: Your Honor, a couple points on that. I mean, I see where you're going, I think, but it sort of has as a premise that if there was some need to scrutinize these agreements under this section of the code, which I -- my position, based on the language, the express language of the document, it's not an acceptance of a plan.

THE COURT: Well, I disagree with you on that point.

MR. DeFRANCESCHI: Your Honor --

THE COURT: The solicitation of an acceptance.

MR. DeFRANCESCHI: Your Honor has ruled on it. That -- but the point though in terms of whether there's any need to scrutinize it, certainly Your Honor can always scrutinize this if someone raises the issue, party in interest raises the issue, but it's where should that scrutiny be focused? Should it be focused on a narrow interpretation of the section that says that there must be a solicita -- that the acceptance or rejection of a plan was solicited post petition?

And obviously the answer to that is yes. And then Your Honor -- what Your Honor has to do is look at these facts and say, because there were ministerial edits made and because

the signature pages weren't released, it was a post petition solicitation, despite the fact that there's no evidence that we asked them to do anything other than make those ministerial changes post petition.

THE COURT: And deliver the signatures.

MR. DeFRANCESCHI: I don't know that there was really any evidence to that effect, either. I mean, the signatures were forthcoming once the ministerial changes were made. But the other -- so the next step, Your Honor is --

THE COURT: Well, if you didn't think --

MR. DeFRANCESCHI: -- even if --

THE COURT: -- if you didn't think you were going to get the signatures, you wouldn't even have told them what the changes were.

MR. DeFRANCESCHI: We knew the signatures were coming. That was the point.

THE COURT: Right.

MR. DeFRANCESCHI: They had agreed to do that prior to filing the case. We knew the signatures were coming. But what's the next step? Is the next case when there are no ministerial changes at all, and the agreement --

THE COURT: Right.

MR. DeFRANCESCHI: -- the agreement got caught up in the mail? Now, all of a sudden that somehow is a solicitation?

THE COURT: Um-hum.

MR. DeFRANCESCHI: I know that case isn't before the Court, but that is going down the very slippery slope that --

THE COURT: That's what I'm saying.

MR. DeFRANCESCHI: That's going down a very slippery slope that the Third Circuit said we shouldn't go down, the way I read Century Glove. And you know, there's another important point that I think needs to be brought out here. Because in this case -- this case takes on added significance, because in this case at the end of the day if Your Honor decides to exercise her discretion to designate these entities and not count the votes, we'll still have a sufficient number and amount and claim. There won't be an appeal here.

THE COURT: Um-hum.

MR. DeFRANCESCHI: And so the state of flux is parties still don't really know what to do in this situation, 'cause --

THE COURT: Don't use lock-ups post petition.

MR. DeFRANCESCHI: Well, again --

THE COURT: It's as simple as that.

MR. DeFRANCESCHI: Again --

THE COURT: And if you want a lock-up agreement to be effective, you make darn sure you get the signature before you file the petition.

MR. DeFRANCESCHI: With all due respect, Your Honor, I -- I don't know that that really answers the question,

because I think that what that is doing is sort of imposing some sort of a -- perhaps it's a policy argument.

THE COURT: There is a policy in the bankruptcy code, and that is contained in 1125.

MR. DeFRANCESCHI: Absolutely.

THE COURT: You don't vote until there's disclosure in accordance with the code and the Court has approved that disclosure.

MR. DeFRANCESCHI: Right.

THE COURT: The Court is not involved in pre-petition negotiations towards a plan.

MR. DeFRANCESCHI: That's right.

THE COURT: So, I have no jurisdiction over pre-petition lock-up agreements unless you're seeking to have them designated a vote.

MR. DeFRANCESCHI: Which we're not.

THE COURT: So -- but I do have --

MR. DeFRANCESCHI: But --

THE COURT: -- jurisdiction over post petition activities.

MR. DeFRANCESCHI: I think I understand where Your Honor's coming out on this, and --

THE COURT: Well, let me make it clear then.

MR. DeFRANCESCHI: Yeah.

THE COURT: There is no room for a post petition

disclosure statement.

MR. DeFRANCESCHI: I'm sorry, Your Honor, a post petition --

THE COURT: Excuse me, post petition lock-up agreement, thank you. And I think I must designate the votes of these entities who had executed a post -- executed a lock-up agreement which became effective post petition on delivery to the debtors.

I think the 1126 isn't even -- other than 1126(e) by which I designate it, the whole concept -- the debtor's not seeking to present these as pre-petition votes that I have to determine whether they must be counted or not. This is purely an 1126(e) issue where these votes were solicited contrary to the provisions of the code, because these were obtained before the approval of the disclosure statement under 1125.

I think solicitation, while respectfully Century Glove says it cannot be read --

MR. DeFRANCESCHI: Broadly.

THE COURT: -- broadly, I think to find that obtaining a lock-up agreement in this form is not a solicitation of a vote, would mean eviscerating that from the bankruptcy code completely. Because if this is not soliciting a vote is favor of the debtor's plan, I don't know what is.

And although it has conditions to actually signing the ballot, those conditions, in my opinion, are not -- are not

significant, and I think that rather than have creditors uncertain about whether or not they are bound by such agreements, given post petition action -- activities, I think the better procedure is simply to state that post petition lock-up agreements have no role in a bankruptcy case.

I do not -- I disagree with counsel that it will inhibit negotiations for a consensual plan, but I think that the code does contemplate that all parties can continue to negotiate and receive full access to information under the bankruptcy code about the debtor and get to exercise their free will up until the moment they cast that ballot. And I think this would inhibit that.

MR. DeFRANCESCHI: Your Honor, as a clarification, did Your Honor also rule that with respect to the fact that the debtors are not seeking to count the pre-petition vote of NCI, that essentially following up on what Your Honor said, that removes it from the Court's consideration?

THE COURT: Well, I am only designating the Motorola and the signing noteholders or bondholders, which was, I think, Exhibit C to the Gilker -- Exhibit D to the Gilker affidavit.

MR. DeFRANCESCHI: There were a total of four agreements. I know which ones you mean, Your Honor.

THE COURT: Yeah, Nextel, which signed its lock-up agreement and delivered it pre-petition. That lock-up agreement in and of itself does not cause me to designate their

vote.

MR. DeFRANCESCHI: So, in terms of a bright line ruling to take from this, if I could, Your Honor, post petition lock-up agreements that are similar to this one are -- and who knows what other types, are just prohibited under 1125(b).

THE COURT: Correct.

MR. DeFRANCESCHI: And with respect to this type of agreement pre-petition, before you file the petition, as long as you're not seeking to rely on that to vote as a vote --

THE COURT: As the vote. That's a different standard, and you're not -- so I need not --

THE COURT: You're not ruling on that.

THE COURT: -- deal with that standard.

MR. DeFRANCESCHI: Right.

MR. DENNY: Your Honor, Robert Denny from Morris Nichols on behalf of the ad hock bondholders, whose votes have now, I guess, just been designated.

The question we have -- ane Mr. Kreller raises on remedy, your concern is that somehow we were coerced into voting by designating. You're saying that we don't have any voter voice on the vote at all?

We just want to understand the implication, 'cause designating means that our vote --

THE COURT: Not for today.

MR. DeFRANCESCHI: Your Honor, to that point I did

not under -- I do not understand Your Honor to be passing on any other contractual agreement contained in the lock-up agreement or any obligations that any of the parties may have to follow through with the term sheets or any of the other provisions. It's just specifically as to the vote; is that correct?

THE COURT: I'm only exercising 1126(e) and designating the votes as not being counted.

MR. DeFRANCESCHI: So that with respect to meeting the two-thirds and one -- more than one-half voting requirements with the class, these do not count.

THE COURT: These do not count.

MR. DeFRANCESCHI: Yes.

MR. DENNY: And on the never you're talking about this specific vote on this plan. In other words, if there was something to happen three months from now --

THE COURT: I don't know what will happen, 'cause I'm not making any ruling.

MR. DeFRANCESCHI: With that, Your Honor, I suppose the only issue left is what I believe in all the time I've been practicing -- I don't know that anyone has ever sought sanctions against me for activities like this. This motion was filed as a motion for sanctions by the United States Trustee. I do not -- and he specifically mentions that money damages may be appropriate here. I just do not see that they've made any

case for that here.

THE COURT: Well, let me hear from the U.S. Trustee on that.

MR. DeFRANCESCHI: I think it's inappropriate.

MR. McMAHON: Your Honor, good afternoon, Joseph McMahon for Donald Walton, the Acting United States Trustee. Your Honor, while the case certainly provides a basis for the assessment of sanctions, if the Court deems it appropriate in its discretion, as the record stands at this point we can't attribute any malicious intent to any of the entities with respect to the solicitation process here, that there was some untoward or wrong purpose that was trying to be achieved by them.

With respect to that section of the motion, Your Honor, we certainly leave it to the Court's discretion based upon the factual record.

THE COURT: Well, I don't find any basis to award sanctions, so I'll deny that relief.

MR. DeFRANCESCHI: Your Honor, I assume Mr. McMahon will submit a form of offer which we would like to see before it's submitted to Your Honor.

THE COURT: All right.

MR. DeFRANCESCHI: The next matter on the agenda is the motion to essentially equitably subordinate NCI, and that is filed by Cordillera, I believe, and we have counsel for

Cordillera and for NCI here to present that.

I know Your Honor as a 2 o'clock.

THE COURT: Um-hum.

MR. DeFRANCESCHI: I don't -- we have what I'll call, perhaps, the main even yet to come. I understand the 2 o'clock hearing may not be a lengthy hearing. I don't know if Your Honor -- how you want to proceed.

THE COURT: Well, maybe this might be a good time to break and have you come back immediately after 2:20, 2:30.

MR. DeFRANCESCHI: 2:30?

THE COURT: 2:30? All right, we'll recess until 2:30.

MR. DeFRANCESCHI: Thank you, Your Honor.

THE COURT: Thank you.

(Recess)

THE COURT: Back again.

MR. DeFRANCESCHI: Your Honor, Dan DeFranceschi. One clarifying point, not so much on the ruling, but on something that was brought up at the prior piece of this hearing, and it'll help us in preparing for confirmation. Due to the designation, if the Court were -- the Court's designating the Motorola votes which are in Classes 2 and 3, they're secured claims, they were the only parties in -- that was the only party in those classes, and I had suggested that they would consensual -- they would agree consensually to be crammed down.

And they are here, and they would sit -- they would stand up and say we want this treatment, we want to be crammed down, but Your Honor has not counted our vote for purposes of voting on the plan.

So, we're in a conundrum whether Your Honor would be in a position to rule on whether you would, you know, approve a consensual cramdown such as this, or whether we'll need to put on an indubitable equivalent case under 11 -- under 1129(b)(a) -- I don't know the subsection. There's too many letters and numbers in there for the secured claim.

THE COURT: Well, I'm sure you can put on that indubitable equivalent --

MR. DeFRANCESCHI: Since --

THE COURT: Since there's no objection from that class.

MR. DeFRANCESCHI: Very well, Your Honor, I appreciate that.

THE COURT: Cordillera.

MR. KRELLER: Good afternoon, Your Honor, my name is Glen Kreller. I represent Cordillera Communications who's filed a motion before the Court seeking to subordinate the claim of Nextel Communications or NCI as it's sometimes referred to here.

As a preliminary, Your Honor, I have the originals of four depositions, which I would tender to the Court since they

have been -- pieces of them have been designated and we will refer to other pieces at cross designation. I got the designation as I arrived today, so I haven't filed a cross designation.

THE COURT: All right, you may -- thank you.

MR. KRELLER: Your Honor, the subject comes up under 510(c) of the code.

THE COURT: Um-hum.

MR. KRELLER: The issues of equitable subordination generally I think require the finding of inequitable conduct or unfair advantage, injury to the creditor or -- and, I should say, that the subordination would not be inconsistent with the bankruptcy code.

That's the Paper Kraft (phonetic) case, and that's pretty much the guiding light on this matter, I think.

I believe we have to look factually at what exists here today. We know that Nextel is the language I choose to us, if I may, because I distinguish between Nextel and NII in my mind. I can't quite bring myself to say NCI and NII. I stumble.

THE COURT: Um-hum.

MR. KRELLER: We know that they're an insider. They're a 99 percent shareholder of the debtor, and that most times, until shortly before the term sheet was agreed to in the spring, they had at least four of the seven directors of the

debtor company as their designees.

The -- if you add to the fact that Motorola is also an insider in this case and they control or at least influence significantly Nextel, because they have a 14 percent shareholding position and designate the ability to designate up to two directors. That becomes important when considering what the plan is a little later, and I put that out as a piece of the entire puzzle here.

In reference to the 10K that was filed by NII, 12/31 of 1901 -- or 1921 -- strike that 2001. I'll get the century right in a moment. NII had never cash flowed a sufficient amount to pay its operating expenses. In its entirely history it did not do that.

In fact, Mr. Lindal (phonetic) in his deposition said to this date neither has the parent company, Nextel, cash flowed to that degree.

The significance of that is that it required NII to always seek the capital market for funds with which to operate, and in doing so they got to be a very over leveraged company. That's I guess why they're here today. They have something like $2.7 billion in debt --

THE COURT: Um-hum.

MR. KRELLER: -- and I regret to say that my client is a small part of that. We've been referred to in the papers as a disgruntled creditor.

THE COURT: Um-hum.

MR. KRELLER: We only have a $28 million debt, Your Honor. And I suppose that's small in comparison.

The interesting structure that developed in this case was the fact that in August, July and August, of 2001 Nextel determined two things. Nextel determined that they had just finished putting in $500 million of capital infusion into NII. They did so in March and in July of 2001. And they determined that NII did not have any recourse to capital markets other than through Nextel. That was their only source of capital.

They had a commitment which they publicly announced to make an additional $250,000 infusion by means of a secured loan, but there was some difficulty apparently with the security for that loan, and they did not make that third tranche of $250 million to NII.

Instead, at the beginning of August, they commenced discussions internally at Nextel for the restructuring --

THE COURT: Well, excuse me. Am I going to hear testimony, or are these facts all conceded?

MR. KRELLER: I believe the facts are not disputed about which I'm addressing the Court, and I would be pleased to put on testimony.

THE COURT: Because I have -- because I haven't read the depositions. Are these facts disputed?

MR. EDWARDS: Many of the facts that I've heard so

far, Your Honor, are disputed.

MR. KRELLER: In that event, Your Honor --

THE COURT: All right.

MR. KRELLER: -- I'll refer the Court to deposition testimony. The witnesses that I would normally present are not present. We've deposed several. I don't know -- what when this is -- I didn't do all the depositions myself, but I can refer the Court to the deposition testimony, and I will do so.

The reference to non-profitability is found at Lindal's deposition at Page 29. Also the reference to the parent company's failure to be profitable during that same period of time.

THE COURT: What was that page reference?

MR. KRELLER: Page 29, Your Honor.

The next subject where I begin to talk about the determinations by Nextel of the need to restructure the debt is found in Exhibit 10 to the Lindal deposition, and the references are throughout the deposition, but Exhibit 10 is identified as a memorandum to Mr. Lindal from Mr. Britton (phonetic), who as then the treasurer of Nextel, inviting the parties, who consisted of Mr. Donahue, the president of Nextel, two other directors of Nextel and Mr. Lindal to a meeting to discuss the restructuring of NII debt.

That exhibit is attached as Exhibit 10 to the deposition.

In the reference to the $500,000 of infusion and the $250,000 secured loan is found in the Shindler deposition at Page 47 to 52.

The Britton memo to which I've referred, that is Exhibit 10 to the Lindal deposition, is significant because it begins the discussion of restructure at that time. This is not involving the debtor. This is involving the parent company, and there is an appendage to that memorandum which emphasizes the need for extreme confidentiality of that discussion.

Mr. Shindler and Mr. Lindal both testified -- Mr. Lindal at Pages 18 to 20 of his deposition -- that the loan was finally not made, and during the fall of 2001 discussions began between Nextel and NII about restructure.

Prior to that time, however, Mr. Shindler reported at Pages 53 to 55 and Mr. Lindal at Pages 12 to 16, that Nextel acquired two positions of bonds or notes in the -- in swap transactions, swapping for those notes Nextel common stock, which they issued and subsequently registered.

That became publicly announced in August -- on August 27th in a 10K which was filed -- or an 8K which was filed with the Securities and Exchange Commission.

The stock value was about 30 percent of the face of the bonds, $857 million worth of bonds and the stock at about 30 percent of that, necessitating the taking by Nextel of a $469 million extraordinary gain as reference in their 10Q filed

for the period ended September 30, 2001.

At this point I think it's important to compare the emphasis in Mr. Britton's memo of August 3, which is Exhibit 10, and what occurred in the acquisition of those bonds. Mr. Britton emphasized that they could take the bonds and they could improve the cash flow position of the subsidiary because the debt service would not be required.

What happened was that Nextel did not do that. They chose to keep the bonds as an active position requiring NII to continue to be liable for those bonds. It's perfectly legitimate transaction, and I don't have any question that ordinary accounting did improve the balance sheet of the consolidated companies by reducing that amount of debt, but it did not improve the position of NII.

Nextel did take the gain, and they reported it in their 10Q. And Mr. Lindal referred to that in his deposition at Pages 118 to 119 to that effect.

During the fall Mr. Lindal was then placed upon a committee of people from Nextel to negotiate the restructure of NII, and that resulted in the tendering to NII of a term sheet in December, December 17th of 2001, and that is an exhibit to the -- it's Exhibit -- I'm going to have to give the Court a reference in a moment. I've lost my note as to that exhibit number, but it's an exhibit in the Lindal deposition, and it is a term sheet which proposed the parent company to engage in a

restructure of the debt by issuing 100 percent of the common stock of NII to all of the unsecured creditors and with Nextel putting in $250 million of new capital for preferred shares which would be convertible into 50 percent of the stock if it were converted.

So, to place it in a little bit different picture, we had a $250 million, 50 percent interest in the creditors, and a $250 million interest in the new stockholder position. That was the proposal that Nextel made.

It is that proposal that started the discussions which ultimately led to the term sheet, which forms the basis of the plan in this case, in which 140 million equals 80 percent of the company, and 20 percent is reserved for the unsecured creditor class. But that's not quite right, because the unsecured creditor class doesn't exist as a class in this case.

There are four classes of unsecured debt in this case. There are two Motorola classes, there is a bondholder class, and there is the also-rans of which Cordillera is one of two. The other one is NCI. Those are the breakdowns of the classes.

Now, I'm not going to get into the classification argument at this point in time.

THE COURT: All right.

MR. KRELLER: This is the subordination argument.

But the point of the whole argument is simply this. That the harm to the creditors is that we have lost 50 percent of the company, if that was the value, and certainly Nextel had reason to know that that was the value. They were the insiders. WE have lost that value. We now have 20 percent of a company, of which 80 percent is valued at $140 million, according to the plan.

That's the damage that's done to these creditors. They have not been included in the discussions, the negotiations or any other part nor have they been able to post plan to negotiate, because there was a lock-up agreement that prohibited anybody from changing the plan. And that was the discussion with which we faced when we tried to negotiate.

If you're looking for harm, that's the harm. The conduct is what happened was that Nextel bought themselves with their stock at no cash outlay and no benefit to the debtor, no infusion of cash to the debtor, they bought themselves an $857 million place at the table. That's 30 percent of the bonds -- 37 percent of the bonds, and they became a dominant negotiating party in that class.

We think that violates the fiduciary duty that Nextel had to NII, because as Mr. Shindler states in his deposition in that pages that I've cited, he had no notice and no knowledge the company, NII, did not know Nextel was acquiring those bonds until they were acquired. And if I read the cases correctly,

Your Honor, that alone in this circuit is sufficient to subordinate a claim.

That's what the case says, and I think, Your Honor, when there's no notice by the fiduciary that that is sufficient, they've got to follow their fiduciary trail, and they've got to deal with the debtor as a fiduciary. They're parents. The Nextel designated directors are the ones mentioned in Mr. Britton's memo that are confidential negotiators and planners for the restructure.

They started that process two months before NII was brought into the process. They bought the bonds, they formed their committee, they started doing their negotiation. That's the way the scenario reads when you -- pardon me, when you reexamine the depositions that are before the Court that I've referred to.

I would add one more factor. In Mr. Juliss's (phonetic) deposition, which is before the Court, he refers at Pages 33 to 47 to Exhibit 4, which is a letter that he wrote, which precipitated the discussions with the noteholders and got the noteholders into the case. He was a noteholder, but he laid out the damage, he laid out the whole history, and it's frankly without that road map that Cordillera probably would not be here today, because we would not have had notice or knowledge of any of these events. They just happened. They happened so slick, they happened so carefully, but they

Exhibit B

In re Stations Holding Co., No. 02-10882 (MFW), Hr'g Tr. at 44-14; 46-7, (Bankr. D. Del. Sept. 25, 2002) (Dkt. No. 190, 196)

United States Trustee filed a motion seeking to, *inter alia*, designate the votes of signatories to a lock-up agreement who entered into that lock-up agreement post-petition (Dkt. No. 149). Objections were filed by the debtor (Dkt. No. 158), creditors committee (Dkt. No. 167) and Gray Television, a plan sponsor whose subsidiary would merge into the debtor as part of the plan, objected (Dkt. No. 165). The Court held a hearing on September 25, 2002 and designated the votes. An order was entered on September 30, 2002 (Dkt. No. 177).

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	. Case No. 02-10882 (MFW) . Motion No. (if provided)
STATIONS HOLDING COMPANY, INC.,	. 824 Market Street . Wilmington, Delaware 19801
Debtor.	. September 25, 2002 . 1:13 p.m.

TRANSCRIPT OF OMNIBUS HEARING
BEFORE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor:	Kirkland & Ellis By: JAMES SPRAYREGEN, ESQ. GEOFFREY RICHARDS, ESQ. 200 East Randolph Drive Chicago, II 60601 Pachulski, Stang, Ziehl, Young & Jones By: LAURA DAVIS JONES, ESQ. 919 North Market Street 16th Floor, PO Box 8705 Wilmington, DE 19899
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THE COURT: Good afternoon.

MR. SPRAYREGEN: Good afternoon, Judge Walrath. James Sprayregan of Kirkland & Ellis and Geoff Richards also of Kirkland & Ellis on behalf of the debtors.

MR. RICHARDS: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. SPRAYREGEN: Your Honor, we're here for several matters this afternoon. Obviously chief amongst them is the hearing on the confirmation of the debtor's plan which is listed as item one on the agenda. It's obviously difficult to consider item one without considering the potential impact of item two which is the U.S. Trustee's motion to designate votes of those parties who are bound by lockup agreements.

THE COURT: Right.

MR. SPRAYREGEN: If the Court recalls, when we were here for the disclosure statement hearing there was an objection to the approval of the disclosure statement on the same basis in essence that's articulated in the designation motion that the disclosure statement should not be approved. That objection was resolved by reserving all of the U.S. Trustee's rights to object in essence as now articulated in the designation motion and describing in the disclosure statement the U.S. Trustee's objection on the basis therefore and the fact that the debtor and others disputed that characterization.

We at the time, Your Honor, said we thought it would

be best to proceed to confirmation, get the votes in and see where all the facts are and put them before the Court and at that point in time to consider the issues in that context.

Your Honor, we think that was a highly relevant decision because we still are before you today with respect to this confirmation hearing in an interesting factual posture based upon the votes that came in and the votes that were submitted in the ballot report that was submitted to the Court attached to the declaration of Paula Galbraith, the tabulation agent.

What happened, Your Honor, as a factual matter, is there were three classes voting; the bondholder class, the senior preferred and the junior preferred. The common was deemed to reject because they were receiving nothing under the plan.

As articulated in the ballot report, Your Honor, there were parties not subject to lockup agreements in both the bondholder class and the senior preferred class that voted yes on the plan. Your Honor, what is set forth in the ballot report as a result of that is if you take the issue of the lockup agreements and you assume the lockups are valid, those three voting classes voted to accept the plan. If you assume that the U.S. Trustee's motion is granted, the designation motion, and the locked-up parties' votes on the plan of reorganization are designated and thus not counted for purposes

of confirmation, the factual situation we would have is the bondholder class has accepted, the senior preferred class has accepted and the junior preferred class has rejected. There was one rejecting vote at the junior preferred class. We would then obviously be in a cram-down mode with respect to the junior preferred class.

I go through all of that at the threshold of this hearing, Your Honor, because our suggestion, subject to how the Court desires to proceed and obviously subject to Mr. Perch's position on behalf of the U.S. Trustee's Office, is that due to this factual situation the issue of the validity of the lockups with respect to this particular case is not ripe and doesn't need to be determined in order to address confirmation of the plan because --

THE COURT: So you're not asking me to consider those who voted pursuant to the lockup?

MR. SPRAYREGEN: What we're saying is you don't need to consider those for purposes of confirmation. That is assuming arguendo you were to grant the designation motion, then if you just count the votes in that guise, we have sufficient votes to confirm the plan. We don't think that you need to determine that motion or need to determine the lockup issue --

THE COURT: Well, I need to determine who voted to determine whether or not the plan should be confirmed. So I

don't think it's not ripe or moot --

MR. SPRAYREGEN: With --

THE COURT: -- and I think you have to decide whether you want to proceed with the second motion.

MR. SPRAYREGEN: Your Honor, what we're raising, and we'll proceed any way the Court desires, is if we proceed on the designation motion and the Court grants the designation motion, we would then ask to continue to proceed with the confirmation hearing --

THE COURT: Well, I understand.

MR. SPRAYREGEN: -- and all I'm suggesting is in terms of efficiency and resources and in terms of not reaching issues that actually candidly are important issues in many other cases that don't need to be determined in this particular case to address confirmation, that there is a method by which to not address the issue and address the confirmation. We're happy to proceed however the Court desires, but we're also not asking to burden the Court with decisions that aren't actually relevant to the issue of whether the plan ought to be confirmed.

So that was where we were coming from on that. But as we said at the disclosure statement hearing and as I went through in part at that point in time --

THE COURT: Well, let me cut to the chase. I think I have to decide the motion and I'm prepared to decide the

motion. So let me hear from the United States Trustee.

MR. PERCH: Thank you, Your Honor. May it please the Court, Frank Perch for the United States Trustee.

Your Honor, before I begin my argument on this matter, I would like to introduce to the Court the person sitting to my left at counsel table who is Margaret Harrison, who is a new staff attorney who has joined our office as of this week.

THE COURT: All right, thank you. Welcome.

MR. PERCH: Thank you very much, Your Honor.

Your Honor, this is the U.S. Trustee's motion to designate the parties who executed certain post-petition lockup agreements and therefore to direct that those votes not be counted with respect to confirmation of the plan of reorganization. And, of course, as Mr. Sprayregen indicated, the issue would then have to be determined whether the plan could be confirmed notwithstanding not counting those parties' votes.

Your Honor, in this case I think it is now factually beyond dispute what occurred. I don't think the facts are in dispute here. I think that there is no dispute. That what occurred is that the debtor in part at the behest of the proposed purchaser, Gray Communications, obtained the signature of very large percentages of the bondholder and senior preferred shareholder and junior preferred shareholder

constituencies, classes four, five and six, all three of the voting classes under the plan. Obtained signatures of a large percentage of these parties after the filing of the petition but prior to the dissemination of any disclosure statement to certain lockup agreements. And the plan supplement that was filed on approximately August 6th by the debtors contains what I believe are all of the lockup agreements. There are four agreements, if I recall correctly, and some of them were signed by multiple parties. In relevant part they are all the same. And the key features of the lockup agreements for purposes of this issue, Your Honor, were outlined in the United States Trustee's motion and the most important feature and the one I'm going to spend the most time on is the injunctive relief and specific performance features, and that is the provision of the lockup agreement that states that the various covenants that the signatories have entered into with respect to this agreement are enforceable by specific performance. And, in fact, the signatories are stipulating to that. They're stipulating that money damages would not be a sufficient remedy for any breach of this agreement and each non-breaching party shall be entitled to the sole and exclusive remedy of specific performance and injunctive or other equitable relief.

So one of the things that the parties have stipulated that the debtor may obtain injunctive relief on, they may obtain injunctive relief on the covenant of each signatory that

it shall timely vote its claim to accept the plan and shall not elect on its ballot to preserve any claims that may be affected by the releases provided for under the plan. Each of the signatories has agreed -- first of all, they've agreed to vote. They're not permitted to abstain. They've agreed -- they have committed to vote in favor of the plan. They have committed not to preserve any rights against third parties where there may be a ballot election as there was here whether or not to enter into certain releases. And all of those provisions may be specifically enforced.

The language of the agreement would suggest that the signatories have waived any objection to the specific enforcement, the injunctive enforcement of those provisions.

As a result, Your Honor, we believe that the lockup agreement is a vote. The opponents, the debtor and the Official Committee of Unsecured Creditors, the opponents have cited to the governing 3rd Circuit case on solicitation which is Century Glove and they've also cited to the case that's referred to in Century Glove which is the older case of Snyder. And the language in the Snyder case I think that's used that the debtor clearly relies on is the statement that solicitation should be viewed narrowly in order to foster negotiation among creditors and should be deemed to refer only to requests for an official vote.

And as a result, Your Honor, the question presented

by this motion and the question that's before Your Honor is whether the disclaimer in these documents that says this is not an official vote is enough to make it not an official vote when you look at what the real effect of the agreement is. And the Court certainly has power to do that and I just want to spend a moment to make that clear because the debtor in its opposition papers spends a lot of time on saying this agreement was heavily negotiated and it was carefully written to be contingent on compliance with the Bankruptcy Code and contingent on compliance with 1125(b) and so on.

I've been in this courtroom many times when the issue has been placed before the Court in various contexts. Their document is not necessarily what it says it is, that saying it does not make it so. You may say the document is a lease, nonetheless the Court may find that it's a financing agreement. So they may say this document is not a vote, nonetheless the Court may find that it's a vote.

As a result of having obtained the stipulation to the injunctive specific performance agreement, what the debtor has done is the debtor has rendered the rest of the process a sham and a mere formality. Because what the debtor is saying is that I present to you a ballot. I present to you a disclosure statement. And that ballot says -- it has two boxes, it says accept, it says reject. What happens if one of these creditors who signs this agreement took that ballot and checked reject

and sent that ballot back to the voting agent? The debtor's position is that they have the power under the agreement to come here, to come to the Court and say, Your Honor, take that ballot, rip it up, shred it, throw it in the trash. That is not their vote. What is their vote? Their vote is an acceptance. Why is their vote an acceptance? Because of this thing that they signed back here before the disclosure statement was even drafted and so therefore the debtor's position is that the vote has already occurred and that, in fact, if the creditor takes any action that is inconsistent with the vote, the acceptance having already occurred back then, the debtor can come to court and render that subsequent act of the creditor a nullity. So that, in fact, when the optical process of voting is occurring, there is not voting. There is no choice. This isn't a real vote. This isn't a real choice. Voting involves choice. At least maybe outside of the Soviet Union, which is gone.

THE COURT: You'll need to find another analogy.

(Laughter)

MR. PERCH: I suppose so.

The purpose of a disclosure statement -- let me state it this way, Your Honor. The purpose of a disclosure statement is to provide creditors with information to utilize in making a choice. But what's occurred here is that a disclosure statement has been disseminated but the choice has already been

foreclosed. And it's our position, Your Honor, that the injunctive provision of the agreement makes it a vote.

There actually is, Your Honor, a fairly small body of case law about this it turns out, and I think you may have noticed that both the U.S. Trustee's motion and the debtor's and the Committee's responses really argue about the impact of the same three or four cases. I think the case that the respondents rely on most heavily is the case out of the District of Minnesota, the Bankruptcy Court of the District of Minnesota called Kellogg Square in which the debtor entered into a rather complicated settlement with the Utility that involved the rejection of the Utility's contract thereby creating an unsecured claim that the Utility would vote, a rather large unsecured claim, that the Utility would be entitled to vote and an element of the settlement with the Utility was therefore that the Utility would agree to vote that unsecured claim in favor of the plan. And the debtor and the Committee -- and I think also argue, that Kellogg Square should be read by Your Honor as standing for the proposition that basically the Court there has endorsed the concept of a lockup agreement and has endorsed the concept that the vote can be fixed prior to the dissemination of the disclosure statement.

If the Kellogg Square case bears some careful examination, there's nothing in the Kellogg Square opinion that in any way indicates that the agreement entered into with

respect to the Utility's claim in that case contained an injunctive relief specific performance stipulation on behalf of that creditor.

The terms of the agreement are described in several paragraphs on Page 338 of the Court's opinion and with respect to the plan all the agreement as recited in the opinion says that District Energy, which was the name of the creditor, will cast a ballot in favor of debtor's plan.

The Court then states after reciting the five elements of the agreement that all the parties to that, the relevant parties to that case agreed that those provisions accurately set forth the understanding and agreement that the debtor negotiated with District Energy, that was apparently subsequently reduced to writing.

So in the absence of anything further, I think we have to take the Court's description as being a description of what the agreement is and it doesn't contain this injunctive specifically enforced provision. In fact, it seems like the Court really didn't view the agreement as containing a provision under which the debtor could force a vote if the creditor didn't take some action.

Turning forward to Pages 339 and 340 of the opinion, the Court says that District Energy's agreement to accept the debtor's plan made post-petition but before approval of a disclosure statement remained executory until District Energy

actually filed its accepting ballot with the clerk of this court.

In other words, for whatever reason, clearly what the Court in the Kellogg case understood was happening was a circumstance where the creditor had entered into a contractual commitment but that further action by the creditor was required in order to make the creditor's vote count. That's just simply not true here and I don't think the Court can make that finding here. The Court has to look at this agreement and see that here the debtor has the ability to make the vote count in the absence of action by the creditor or even notwithstanding contrary action by the creditor.

The responses, I should say, also refer to the Texaco case and the Texaco case is a situation that I think is factually distinguishable on additional grounds, including grounds that were specifically set forth by the Court in its opinion. The Court noted in its opinion, notwithstanding the fact that the respondent's attempt to downplay this I think the Court found it to be significant in its opinion that the Court felt the agreement there could not be determined to be a solicitation because it did not, in fact, obligate the party to vote. They could abstain. Once again, a situation where further action by the creditor was found by the Court to be required in order to have a vote occur, which is simply not true here.

Also, in the Texaco case, ultimately what happened was the creditor and the debtor were joint proponents of the plan and I think the Court just has to factually distinguish that situation from this one because the concept of a co-proponent of a plan objecting to their own plan or voting to reject their own plan is a little bit Alice in Wonderland. I suppose one could ultimately say I changed my mind and I don't like the plan that I've proposed, but this is not a circumstance where we're talking about whether a co-proponent would, absent some other actions, support its own plan.

So those two cases really which are the principal cases that are relied on here are both legally and factually distinguishable. They involve complicated settlements. Really both of them are factually distinguishable because they involve complicated settlements, including settlements of claims that were unliquidated as to liability. But the most important feature is that in both of those cases the Court found that further action by the creditor was required in order for there to be a vote. Here what we have is a situation where the debtor drafted an agreement very carefully, using its own words, that was intended to foreclose the possibility that any further action by the creditor was either necessary or would be sufficient in order to provide for a vote to be counted that would be different from the vote that the debtor sought to lock in at the time that the agreement was signed.

I really think, Your Honor, the only other argument, if one can call it that, that the debtor places before Your Honor in support of the agreements is they are something that customarily happens and there are some exhibits attached to the debtor's response to the motion that are somewhat similiar looking agreements from the Goss Graphic case, the United Artists case and I believe one other case, Global Ocean.

Your Honor, if one looks at all those agreements, you can see those were all pre-petitioned lockup agreements. They're agreements that specifically recite. They are things that were signed pre-petition with respect to a case to be commenced in the future.

The issue of a pre-petition lockup agreement is a different issue that's not before the Court today. A pre-petition -- a pre-petition vote, if there is such a thing, implements Section 1126(b), not 1125(b), Section 1126(b) dealing with how you present a pre-packaged plan or present pre-packaged votes at least from certain creditors or certain classes.

THE COURT: And isn't it fundamentally different? 1125 does not apply to solicitation of votes before a bankruptcy case is filed.

MR. PERCH: Absolutely. Absolutely. But --

THE COURT: It can't.

MR. PERCH: -- but the issue -- the issue may exist

in such a case. The issue could theoretically come up in such a case that if any attempt were made to enforce the lockup agreements without seeking approval of the lockup, voting process under 1126(b), but we don't need to talk about that today because that's not this case. This is an 1125 case. This is a post-petition act of the debtor and of the creditors in question.

Your Honor, certainly regardless of whether Your Honor ultimately determines that the plan could be confirmed if -- even if the votes are designated. Certainly it's important for a number of purposes on the record of this confirmation hearing to be clear as to what the votes are and I think Mr. Sprayregen's argument to the Court seem to want to straddle the fence of saying that -- asking the Court to confirm the plan but not really wanting to take the position as to whether the votes are counted or not. There are a number of reasons why we need to know for the future whether the votes are counted or not. I'll just pick one which is that in the event that there were to be any further need to seek a modification of the plan under Section 1127, Section 1127(d) provides that votes that were counted for the previous plan are votes that count for the modification unless those creditors change them. So there's just one example, we only need one, of why we need to know exactly which votes are counted for this plan. Why this record has to be very clear and for that reason, Your Honor, I think

the motion does need to be considered and for the reasons that I have set forth, I think that the Court needs to find that what occurred here was determination of these creditors' official votes. No way around it, determination of these creditors' official votes. I think you might hear from the debtor or from the Committee that well, it was contingent upon filing a plan that was consistent with the term sheet. Once again, Your Honor doesn't need to engage in hypothetical inquiries. Your Honor doesn't need to decide whether the creditor may have been bound under the agreement or should have been bound under the agreement if some different plan had been filed. We only need to decide whether the votes count with respect to the plan that is before Your Honor today.

It is somewhat interesting in that there is one objection filed that suggests that the plan at least in one measure does not comply with the term sheet. That being the objection of the Bank of New York. I'm not rising in support of the Bank of New York's position because the Bank of New York has a position about sort of automatic payment of indenture trustee fees that disagrees with objections that we've made in other cases. But without belaboring the Court any further, Your Honor, what may happen -- what may happen if some other plan had been filed, if the debtor had done something else, is totally irrelevant. Let's just assume for purposes of this argument that outside of whatever Your Honor may ultimately

decide with respect to Bony's objection, that the plan is at least within the number of the term sheet. It's hard to say in compliance because the whole point is the term sheet is the three-page outline, does not comply with any of the disclosure requirements as was explained in our motion. But let's assume it does, the point is that with respect to that plan, to the plan -- with respect to the plan that the parties are seeking confirmation of today, certainly it's my understanding that the debtor's position is that that plan conforms to the term sheet. It's my understanding that the debtor's position is that as a result the creditors are bound to vote and therefore I think the Court has to just work with that and not get distracted by any hypothetical issues about what other plan might exist. The point is that the debtor believes that it has precluded -- the debtor believes that these agreements can be used to preclude anything other than acceptance by these creditors and for the reasons set forth in our motion and in this argument, Your Honor, we believe that that violates 1125 as a result of which these parties need to be designated and their votes not counted. And that I think really sets forth the U.S. Trustee's position, unless the Court has any questions.

THE COURT: No, thank you.

MR. PERCH: Thank you.

MR. SPRAYREGEN: Your Honor, we, on behalf of the debtor, actually endorse the U.S. Trustee's suggestion that we

focus on the precise facts of this case in this situation. And it seems to us that what that means it's focusing on a piece of paper that was signed up between and among the debtors and various creditors who became locked-up parties.

The U.S. Trustee focuses extensively on this injunctive relief point. Your Honor, we would submit that that is a red herring. And, in fact, the point is used as a method by which to distinguish the situation of the creditor in the Kellogg case that I'll go through in a minute. But the injunctive relief section is just a -- is a remedy, it has nothing to do with whether there is a contractual obligation at the front end. And in the Kellogg case whether there was or wasn't an agreed-upon provision for specific performance, there was a contractual obligation subject to whatever it was subject to in that case. And had that obligation been breached by the creditor, the debtor would have had whatever rights it would have had and in this case was the rights if the lockup was enforceable would be injunctive relief in that case because it's not specified, at least in the written opinion, would have been a creature of state contract law. May have been specific performance. May have been injunctive relief. May have been monetary damages. Who knows what it could have been?

But I start with that because I'm attempting to illustrate that that's not the issue. The issue --

THE COURT: Well, let's talk about the issue which is

1125 --

MR. SPRAYREGEN: Yes.

THE COURT: -- (b).

MR. SPRAYREGEN: I was just turning to that.

Your Honor, 1125(b) --

THE COURT: By asking the creditors to sign the lockup, is there any definition of solicit that that does not fall within?

MR. SPRAYREGEN: Yes, Your Honor.

THE COURT: What?

MR. SPRAYREGEN: Your Honor, in the lockup agreements themselves, we have enshrined several provisions that go to exactly that point. This is not something that the debtor and the creditors didn't think about at the time these lockup agreements were entered into. The debtor, the creditors the Creditors Committee, had every desire and continues to have every desire and belief actually, to comply with all of the provisions of the Bankruptcy Code, including the solicitation provisions. So what does the lockup agreement say? It says the lockup agreement isn't going to be enforceable if it provides for any different treatment, and if in the plan of reorganization there's any different treatment than is set forth in the term sheet. That's one point.

The second point. The enforceability of the lockups, that is the obligation under the lockup agreements to do

anything.

THE COURT: Isn't the lockup -- the request to sign the lockup is a request for the commitment to vote for the plan? You will vote in favor of the plan.

MR. SPRAYREGEN: Only if certain things happen.

THE COURT: Well, if certain things -- let's ignore that because the question is whether this is a solicitation of a vote on the plan.

MR. SPRAYREGEN: Exactly, Your Honor. And our point is that can't be ignored when you say let's ignore that. There's an incredibly important and relevant and applicable condition subsequent to any obligation. What is that? The enforceability of a lockup is subject to the provisions of Section 1125 and 1126 of the Bankruptcy Code. It is also specifically stated that these are not a solicitation under the Code.

THE COURT: Well, either it is or isn't, you know, is for me to determine, not for you to say whether it is or it isn't.

MR. SPRAYREGEN: Your Honor, we understand that, but it is important, Your Honor, and the previous sentence is critically important, that's the operative language of the lockup agreement. And what is says is there's zero obligation. No obligation whatsoever to vote on this plan or to vote yes on this plan unless and until this Court approves a disclosure

statement.

THE COURT: Yes.

MR. SPRAYREGEN: And once a disclosure statement is approved, Your Honor, from that moment in time on under 1125(b), we're permitted to solicit the vote.

So you have in essence --

THE COURT: You solicited the vote before. You got their commitment to vote for a plan, not inconsistent with the plan summary, a three-page document, conditioned only on a disclosure statement being approved. You didn't say hey, if the disclosure statement reveals information that causes you to want to change your vote, you can change your vote. It doesn't say that.

MR. SPRAYREGEN: Your Honor, that's actually a critical and important point.

THE COURT: Yes.

MR. SPRAYREGEN: The point is if there was information in the disclosure statement that the creditors were uncomfortable with, there was no prohibition on objecting to the disclosure statement. And unless and until the disclosure statement is approved, there's not obligation to vote.

THE COURT: Objecting to a fact is different from objecting to a plan that requires my vote or nothing in here says that if the disclosure statement reveals that I'm not aware of because you only gave me a three-page summary, I can

change my vote.

MR. SPRAYREGEN: Yes --

THE COURT: It allows you to object to the disclosure statement.

MR. SPRAYREGEN: With respect, Your Honor, I --

THE COURT: And objections to the disclosure statement are non-substantive.

MR. SPRAYREGEN: With respect, Your Honor, I very much disagree.

THE COURT: Where?

MR. SPRAYREGEN: This is a --

THE COURT: Where does it say that?

MR. SPRAYREGEN: Let me get to that. This is actually -- this factual situation is highly relevant. The reason this is a three-page term sheet is because this is a very simple point. We are paying the creditors, the bondholders, in full.

THE COURT: But you're talking about preferred shareholders and you're not paying them in full.

MR. SPRAYREGEN: We're not paying them in full, that's correct. But it says right in the term sheet what they get under the plan.

THE COURT: Yes.

MR. SPRAYREGEN: And --

THE COURT: And let's posit the disclosure statement

revealed that the company is worth ten times what Gray is paying for the debtor.

MR. SPRAYREGEN: Yes.

THE COURT: Do you think the preferred shareholders could change their votes?

MR. SPRAYREGEN: Do I think -- I don't think the disclosure statement could get approved. That would be inconsistent --

THE COURT: Wait a minute. The disclosure statement, the only possible objection to a disclosure statement is it lacks adequate information or the information is factually inaccurate. You can't object to it on substantive grounds that it differs from what I was told previously.

MR. SPRAYREGEN: No, that's not my point. My point is then they wouldn't be getting that which they bargained for under the term sheet --

THE COURT: Oh, yes, would. I could see that your plan would say, hey, you know, we bargained to give them $60 million. That's all they're getting but gosh, the true valuation of the company reveals it's worth 300 million.

MR. SPRAYREGEN: Okay. If that's --

THE COURT: They could object to the disclosure statement. I'd overrule that objection.

MR. SPRAYREGEN: Hold on, Your Honor. Because we're now into the equity level.

THE COURT: Yes.

MR. SPRAYREGEN: We're paying the banks in full under this plan.

THE COURT: Yes.

MR. SPRAYREGEN: We're paying the bonds in full. Under your factual scenario, the senior preferred creditors just would have received more. That's exactly the point. That's why it's so simple. If --

THE COURT: No. The senior preferred shareholders would not if they're getting what Gray is paying for the debtor, not what the valuation of the debtor is.

MR. SPRAYREGEN: Your Honor, again, we would submit that is the fair market valuation.

THE COURT: Well, I know you're submitting that. I'm positing an objection to a disclosure statement which reveals facts different from what they were told at the time they agreed to vote in favor of the plan. It would not relieve them of their obligation to vote for this plan.

MR. SPRAYREGEN: Your Honor, the terms of the plan provide that the senior preferred receive everything that doesn't go to the people above them until they're paid in full under their preferred stock certificate.

THE COURT: No. It says they get the consideration paid by Gray. It doesn't say that they get the fair market value of the company.

MR. SPRAYREGEN: I have to admit, Your Honor, I'm not quite following that in the sense of unless we posit that the market did not operate here what -- and again, we're prepared to at the right time present our evidence and confirmation. But the evidence will be that through a process this was and produced the fair market value. So --

THE COURT: I'm talking about the terms of the lockup and at the time that they signed the lockup.

MR. SPRAYREGEN: Um-um-hum.

THE COURT: And what rights they had. The fact that it was conditioned on the debtor filing a disclosure statement is irrelevant because it does not say that they have the right to change their vote if the disclosure statement I approve causes them to want to change their vote.

MR. SPRAYREGEN: But, Your Honor, obviously --

THE COURT: Isn't that the point of the disclosure statement?

MR. SPRAYREGEN: That's exactly the point of the disclosure statement, Your Honor, and what we're submitting and it may be that we disagree, obviously your view is more important than mine, but what we're saying is they were not obligated unless and until their rights -- excuse me, their obligations in essence spun into existence after the time that this Court approved the disclosure statement.

THE COURT: An approval of a disclosure statement is

nothing more than approving a document that contains adequate information. Your lockup agreement did not say that after reviewing that they had the right to change their mind. So how does it comply with 1125 which says nobody has to vote on a plan until they get adequate information.

MR. SPRAYREGEN: We agree with that. Your Honor, what you're positing is that they were obligated to vote prior to the time that the Court approved the disclosure statement.

THE COURT: No. Prior to them getting, considering and having the right then to decide how to vote after they get the adequate disclosure.

MR. SPRAYREGEN: And, Your Honor, what we are saying, and again, it appears the Court disagrees, but what we're saying is their obligation to vote did not exist, did not come into being.

THE COURT: Until I approved the disclosure statement, but not that contained information substantially similar to the information they had already gotten.

MR. SPRAYREGEN: But, Your Honor, this is where --

THE COURT: And isn't that -- even a pre-bankruptcy lockup agreement has that protection.

MR. SHIFF: Adam Shiff. Your Honor, if I may interrupt. I think there's a point though that there's a step in here that's still missing. The point is the Court did approve a disclosure statement. Ballots then went out to

everyone who's entitled to vote and each one of those people had an independent decision to make at that point. They could vote or not vote. They may have believed this agreement was binding on them. They may have agreed it was not binding on them. But they all made a decision to vote. If we had a situation here, which we don't have, where someone got that document and said, you know what, I don't like this plan anymore. I want to vote against. And then someone came in and said oh, no, you can't, you're bound -- you're bound to vote on this and then you'd have this issue to decide --

THE COURT: No, I have the issue to decide whether these votes should be counted, i.e., whether I think they're bound by it whether or not they think they are or not. Whether they, because of the language in here saying they only have --

MR. SHIFF: But the only real relevant facts here are people all received a disclosure statement. That's a fact. There was a disclosure statement approved by you. Those people then all voted in favor. So the only thing you really have before you is the fact that every single creditor and all shareholders, with the exception of one, received documents and not only that, those documents specifically said there are people out there who believe these things are unenforceable. The U.S. Trustee's statements were included in there. People had a road map where they could turn and said we don't have to vote --

THE COURT: And it also said 98 percent have already voted in favor of a plan under lockup agreements.

MR. SHIFF: It's really -- but everyone was free to do that. Your Honor, someone referred to Global Ocean before, it's a similar situation. We had lockups with 98 percent of the people.

THE COURT: And they were all signed pre-petition. That is a completely --

MR. SHIFF: They were but --

THE COURT: -- different situation.

MR. SHIFF: -- that didn't stop -- that didn't stop this person who thought it was inappropriate from coming in here and complaining about it and getting that plan thrown out.

THE COURT: Because 1126(b) has a different standard. You're not even complying with that standard.

MR. SHIFF: I'm not discussing the ultimate standard as to what they should have given us or not given us when we signed the agreement. I'm focusing on the action that happened here. The action that happened was people file -- submitted ballots in accordance with the balloting procedure following receipt of the disclosure statement. People had the -- people had independent counsel they could have consulted whether it's binding on me or not. Now, it may have been people were saying oh, we received 100 cents on the dollar, we're so happy we're not going to think about it. But the fact

is all those people received ballots following the disclosure statement. They openly submitted the ballot and there's no evidence, there's no evidence that's been offered, that, you know, votes certainly weren't coerced in any way. Simply, like in any case, people got ballots, they voted yes or no. And if someone came in here and said -- voted no and they tried to challenge it, we'd have an interesting issue.

At the disclosure statement hearing I posited that these agreements may not be enforceable -- who signed them because there are certain, you know, subjects and caveats there. But the point is I don't think that's germane to what we're here before. That would be interesting if we were on issue with enforcing this lockup agreement. If one of the parties --

THE COURT: You are enforcing the lockup agreement. You want the votes to count and they were votes --

MR. SHIFF: No, I am not --

THE COURT: -- obtained pursuant to a lockup agreement submitted and signed before any disclosure statement approved by this Court was given to them.

MR. SHIFF: Respectfully, Your Honor, I don't think anyone is seeking to enforce the lockup agreement. I think the only thing people are seeking to enforce is to have the votes that were timely submitted count. That's what --

THE COURT: I can't ignore that those parties signed

a document before they got the disclosure statement that bound them to vote in favor of the plan.

MR. SHIFF: Well, I'm not sure if -- we don't know if they're necessarily bound because we're not here in an issue of contract interpretation about that. It may or may not have because it may be that these agreements are on their face they're just invalid, they're just no good.

THE COURT: Yes.

MR. SHIFF: In which case nobody is bound. But the point is everyone got ballots. Everyone had a disclosure statement. Everyone voted yes. And nobody has objected to the plan.

THE COURT: Well, the U.S. Trustee has objected to counting these votes and I have to consider whether these votes were solicited in accordance with Section 1125.

MR. SHIFF: I understand that, Your Honor. And I think we need to focus on in making that determination it's not necessarily a long line of history that led up to this that may or may not have triggered some contingent obligations, but the fact that -- because the only thing people did is they agreed that if we get all this stuff we'll vote. They weren't --

THE COURT: No, they agreed if we --

MR. SHIFF: -- there weren't -- attached, hold them in escrow --

THE COURT: No. They stated if we get all the stuff

we'll vote yes and we'll agree to the releases.

MR. SHIFF: And that may or may not have been a binding agreement.

THE COURT: Well, if it's not binding, why did you send it out?

MR. SHIFF: Why did people send it out?

THE COURT: Yes. Why did Gray insist on it if it's not binding?

MR. SHIFF: We can ask -- we certainly -- we can certainly ask Gray, they're here.

THE COURT: Yes.

MR. SHIFF: Because there was -- there was -- Gray had issues with respect -- and I'm speaking secondhand, with respect to their financing which made them comfortable knowing that, you know, they could start their road shows knowing hey, there are people out there who generally support this plan. But whatever people's intentions were, whatever they were thinking I don't think is relevant to the real inquiry here which is simply that ballots were timely voted in favor of a plan. There were not ballots that were voted early. There's no evidence there were any votes that were coerced. There's no evidence there are any --

THE COURT: Well, there's evidence --

MR. SHIFF: -- votes filed because of the lockup agreement.

THE COURT: Well, do you want me to ignore that the lockup agreements even went out before the disclosure statement? Is that what you're asking me to do? Nobody is saying that it's valid or invalid. Nobody is seeking to enforce it or to get out of it so therefore ignore it?

MR. SHIFF: Respectfully, Your Honor, I don't think it's relevant for counting these ballots --

THE COURT: Yes, it is.

MR. SHIFF: -- that have been cast.

THE COURT: I disagree. Of course it's relevant.

MR. SPRAYREGEN: Your Honor, if I might address a couple of other points. And I understand the Court's position, but again if we look at the terms of the lockup agreement, the hypothetical that the Court posited which obviously is not necessarily the only possible hypothetical, but what if the fair market value was a lot more than the -- what the terms of the plan provided? Well, Your Honor, the lockup agreements actually specifically contemplated that and provided the locked-up parties with the exact out that the Court is raising here. And I don't know if the Court has the lockup agreement --

THE COURT: I have it.

MR. SPRAYREGEN: If you look at Section 2, Sub 3, there's a provision -- because this isn't a 363 --

THE COURT: Where's Sub 3 of Section 2?

MR. SPRAYREGEN: Oh, you may not be in the preferred stockholder. There's two different forms of lockup.

MR. RICHARDS: Your Honor, that's attached as an exhibit to the plan supplement which has been filed which is identified as item 1A on the agenda.

THE COURT: Well, which lockup agreement did you attach to your response?

MR. RICHARDS: We attached the lockup agreement for the senior notes as an example of the form of the lockup agreement.

THE COURT: Where is the preferred shareholders?

MR. RICHARDS: It's behind 1A. I believe it's Exhibit C. Tab B, actually, Your Honor. My apology.

THE COURT: I'm looking at Exhibit C as junior preferred stock. Again, there's no Section 2, 3.

MR. SPRAYREGEN: I have the senior preferred stock. Hold on. We will find an extra copy for the Court

THE COURT: Exhibit B.

MR. SPRAYREGEN: I'm sorry?

MR. RICHARDS: Your Honor, if I may approach?

THE COURT: No, I have it. Exhibit B. If another proposal is received?

MR. SPRAYREGEN: Yes, Your Honor. This was --

THE COURT: And approved by the Court? Okay.

MR. SPRAYREGEN: Yeah. It says -- yes.

Notwithstanding this Subsection 2, all of these things happen, it does provide for Gray to get a break-up fee, again subject to the approval of the Court. But it specifically contemplates the possibility that notwithstanding the Gray transaction that something better could come along. And if it did, this lockup agreement covered and protected the senior preferred holders for exactly the type of harm and risk that the Court is positing. So for example --

THE COURT: No. What I'm positing is you don't get somebody else in and Gray gets the company for the price it's paying the company is worth six times what it's paying for it.

MR. SPRAYREGEN: And, Your Honor, what I'm saying is this Section 3 --

THE COURT: How does that help?

MR. SPRAYREGEN: It specifically addresses it. There's a transaction --

THE COURT: There has to be another proposal.

MR. SPRAYREGEN: Exactly. There's a transaction in the market, Your Honor, publicly announced for Gray to buy these assets for this amount of money. Spread of record this company had sophisticated advisors and as a company, again, we can present the evidence at the appropriate time, that this was what the market produced and not only that, after all of that, that notwithstanding taking the Gray proposal in order to protect against the fact that it's possible something better

comes along, the lockup agreement specifically contemplated that in that scenario the senior preferred holders, and if there was an up value, it could flow all the way down the junior preferred holders and if lightening should strike, it could go down to the common, that value and the order of absolute priority would flow down to that. This in no way prevented a better deal than --

THE COURT: Well, I'm not sure that that says it. What 3 says is if another deal comes along that the debtor accepts that's better --

MR. SPRAYREGEN: Um-um-hum.

THE COURT: -- the senior preferred shareholders agree to pay Gray a break-up fee of $15 million.

MR. SPRAYREGEN: Yes.

THE COURT: He doesn't say you're no longer bound to vote in favor of the original plan.

MR. SPRAYREGEN: Yes, Your Honor, but that's the point.

THE COURT: Where does it say that? That they don't have to vote in favor of the debtor's original plan to sell to Gray.

MR. SPRAYREGEN: Your Honor, that's the point, is the original plan is not only to sell to Gray, it's to sell to Gray or a better offer that comes along pursuant to this Subsection 3. It's the functional equivalent of a 363 auction process

contained within a plan process. And the senior preferred holders are highly sophisticated people. They have no reason to give away their value. They protected exactly the points you're raising and they didn't want to be --

THE COURT: They protected by paying a break-up fee. Okay.

MR. SPRAYREGEN: Exactly. They -- what Gray said is I want to know that people are onboard with this deal. Well, the senior preferred holders say okay, I'll be on board with the deal unless a better one comes along. Gray says okay, I can live with that as long as if that happens I get some compensation. Your typical O'Brien factors.

THE COURT: Where in the plan does it talk about another potential deal?

MR. SPRAYREGEN: But, Your Honor, again, the facts are important. And again, we can put on the evidence --

THE COURT: Where in the plan does it specifically say that can happen?

MR. SPRAYREGEN: I don't believe it does say that anymore because, this is important, Your Honor, the facts are important. We can put on the evidence, by the time we got to that point in time, nothing better did come along. We're not required to wait even until this hearing. I don't think if somebody stepped up today and said I possibly could offer more money whether you have lockups or not or whether all the votes

were in, there comes a point in time where the process needs to end. And so the senior preferred holders protected themselves and were protected by the debtor or protected by the terms of the lockup agreement that something better could come along.

So, Your Honor, the idea that the plan could only be the Gray deal per the lockup agreement is not correct. It could be whatever was the best deal that came along. That's exactly what was supposed to both as an economic matter and as a legal matter be protected against.

And, Your Honor, I would -- again, I think it's important to look at the case law, sparse as it may be, in this area. Mr. Perch, I'll give him credit, struggled mightily to distinguish the Kellogg case. I would submit that is not a distinguishable case. In that case the only difference that's cited is the injunction provision, but in that case the Court held that that was not a solicitation even though that was even a stronger contractual agreement because it didn't have the outs that our document had, a stronger contractual agreement to vote for a plan because it didn't purport to exempt the debtor from the statutory obligations, 1125, which is explicitly provided for in our lockup agreement, and the Court there states that what 1125(b) protects creditors, hypothetical reasonable investors, is by mandating a minimum quantum of disclosure, not a maximum, and that's what this disclosure statement is protecting and that's exactly what was protected

for in this lockup agreement.

THE COURT: It was not protected in this lockup agreement because getting the information was not what allowed the creditors to vote. The purpose of a disclosure statement to give adequate information sufficient to permit a creditor or shareholder to vote on a plan. And you're providing that you agree to vote yes subject to the Court approving a disclosure statement, period, does not satisfy that purpose.

MR. SPRAYREGEN: But, Your Honor, I don't want to take up the Court's time --

THE COURT: Well again, the disclosure statement could have said anything.

MR. SPRAYREGEN: Well --

THE COURT: Could have completely been different completely from the three-page plan summary they had. Completely different from other information provided to these creditors at the time they committed to vote in favor of this plan.

MR. SPRAYREGEN: Well, Your Honor, then with respect we disagree with that characterization and I would suggest very strongly that this Section 2, Sub 3 provision addresses exactly your point. If there was different information and this thing was more valuable, that's what Sub 3 of Section 2 is exactly intended to flush out and is their contractual protection that the debtor needs to continue to act in good faith with input

from its advisors in dealing with anything that may be in essence a higher and better offer. That's exactly what it covered for. And --

THE COURT: Well, would the merger agreement allow the debtor to file a plan in support of any other proposal?

MR. SPRAYREGEN: Your Honor, the merger agreement is ineffective until this Court confirms the plan and yes, it did permit us because of this Section 2.

THE COURT: Where?

MR. SPRAYREGEN: Well, we can get the document out but Gray's counsel is standing here, maybe he can address it better than me.

MR. FOREMAN: Your Honor, I don't have the agreement with me to point to the provision. But if I could be heard on other points.

Michael Foreman; Proskauer Rose for Gray Television.

Two points I wanted to make that I don't think have been made, Judge, and perhaps they may start -- they may shed some different light on this.

I think it's important to note that in these agreements there's a real benefit that every signatory to the agreement is getting. They're getting the commitment of the debtor to expeditiously file and proceed to confirmation with a plan that gives them a certain value. And what this plan did in a very real sense was get the major constituencies in this

case to agree on what their economic recovery was going to be. Very similar to a settlement as if they were going to be settling out recoveries that they're going to be getting on claims. The exact remedy they have in this agreement if the either the disclosure statement contains information that was contrary to the information upon which they entered into this agreement and as a due diligence provision --

THE COURT: Where is that?

MR. FOREMAN: I'm looking at the preferred -- Section 16, there's a section independent -- some decision-making which where the signatory notes that they have done their own due diligence --

THE COURT: That's different from a disclosure statement.

MR. FOREMAN: I understand that, Your Honor, but there is a remedy if, in fact, they want to get to get out of this --

THE COURT: Where?

MR. FOREMAN: And the remedy is that this agreement in Section 10-6, subject to the provisions of Sections 1125 and 1126 of the Bankruptcy Code, this agreement is a legally valid and binding obligation enforceable in accordance with its terms. If a party to this signatory who got the benefit of the debtor with Gray moving very quickly to get a plan done which gives the note-holders par plus interest which gives

significant value to the senior preferred and it gives value to the junior preferred, and the debtor abided by its obligation under this agreement by moving forward expeditiously to achieve confirmation of this plan. But if they believed that there was a basis -- that there was a faulty basis upon which they entered this agreement, they would have come into court here and said, Judge, this agreement isn't binding on me, they violated 1125 and 1126. They didn't provide adequate information. They improperly got out vote. And they would have come in and as Mr. Shiff said you would have had a very interesting issue and I think it's very clear how Your Honor would have decided. But there is a remedy here to get out of this lockup. But perhaps Mr. --

THE COURT: It's conceded that the debtor has violated 1125 because no disclosure statement was given to them before they signed the lockup agreement.

MR. FOREMAN: Your Honor, I would submit and Mr. Sprayregan has also, I would submit, Your Honor, that what happened with this merger agreement was a negotiation of the consideration Gray was to pay for this debtor for the stock of the operating companies. That was a negotiated process. What happened with respect to these agreements is that then the note-holders were brought into the fold as were the senior preferred and the junior preferred to say this is the price we got, are you onboard with this price? Because if you're not

onboard with this price, Gray is not going to start getting its financing on the efforts and the debtor isn't going to go forward with the confirmation process. So before we start down that path, are you onboard? And what you have in these agreements are the note-holders saying yes, we're onboard. And the senior preferred is saying yes, we're not getting our full liquidation preference, but we're onboard. And you have the -- and you have the, by a large majority of the junior preferred shareholders saying I recognize I'm not getting anywhere near my liquidation preference, but I also recognize this is a great deal. I'm signing onto it also and I want you to move forward as quickly as you can to get this done. That's what these lockups are.

THE COURT: They're a little bit more, respectfully. This is a little bit more than negotiating on a plan. I think it's clear. I think Century Glove, respectfully, I don't know how I can ever interpret solicit narrowly enough to not include this. A lockup agreement, certainly the ones signed in this case, constitute the solicitation of a vote on a plan and must be designated, I think, while I have discretion, I think it's clear that this process does not pass muster under 1125. I question whether it even passes muster under 1126, but I don't have to go there. And I do note that all of the precedents cited by the debtor again convinces me why I don't refer to precedent other than a written opinion by another Court because

it was clear to me that every single lockup agreement noted or cash by the debtor to their response is a lockup agreement that was obtained pre-petition. That's a completely different situation. The Bankruptcy Code protects those by requiring that a disclosure statement be sent and that they have the right to change their votes essentially if the disclosure statement is different, contains information different from what the information they got was.

MR. FOREMAN: Well --

THE COURT: In this case the lockup agreements do not so provide.

MR. SPRAYREGEN: Your Honor, I understand your position although you did skip over the -- and I don't want to reargue, but you did skip over the last point I was going to make which you noted that in 1126(e) it's a discretionary section, it's not a mandatory section, and you noted that while it's not mandatory you think it's necessary to designate in this particular case.

THE COURT: I think it is. I think for this reason. I never want to see another lockup agreement like this cited to me as being appropriate and it would be easy to listen to the debtor saying well, in this case it doesn't make any difference because they're getting 100 percent and, of course, they'd vote in favor of the plan. The next time I see it they'll be getting ten percent and the disclosure statement will contain

material disclosures that were not made at the time the vote was solicited. I think the plain language of 11251, the term "solicitation" means asking for a vote. Requesting a vote. I don't think it even includes getting a vote. Solicit a vote means ask for a vote. You ask for a vote. You got them to agree to vote and I don't think it's appropriate without a disclosure statement.

MR. SPRAYREGEN: Your Honor, we obviously understand your position. The only point I was going to make with respect to the discretionary nature of it, and I don't want to belabor it because the Court appears to have a position already, but this is a situation where the parties completely believed that notwithstanding the Court's ruling, that they were complying with all of the provisions of the Bankruptcy Code, including Section 1125, and at least they thought carefully drafted the document, apparently not carefully enough to address the Court's concerns, but carefully drafted the documents and not just the document, not form over substance, but the deal that they thought they reached, we're not talking subjective as opposed to the Court's interpretation of that, but thought that what they had entered into was completely in compliance with the Bankruptcy Code.

THE COURT: Well, and it turned out not to be.

MR. SPRAYREGEN: Exactly. And what my point on that, Your Honor, is in that type of a situation that doesn't mandate

designation.

THE COURT: No. But the discretion is mine and I don't think it's appropriate to approve votes cast by somebody bound by the lockup agreements at issue here.

MR. SPRAYREGEN: Your Honor, with that I think we've done --

THE COURT: Go back to confirmation.

MR. SPRAYREGEN: -- as we started out, I would go back to a confirmation then and as I noted without those votes, there are non -- parties that were never bound by any lockup agreement who voted yes in favor of the plan and we are prepared to proceed with confirmation with respect to demonstrating that the debtor, again notwithstanding the ruling on the motion, satisfies all confirmation standards. And I would note that Mr. Perch's motion was a motion that certainly the designation of votes the U.S. Trustee has not objected to the confirmation of a plan of reorganization.

So with that, Your Honor, if it pleases the Court, I'd ask Mr. Richards to proceed forward with the confirmation standards.

THE COURT: Okay. Thank you.

Do we want to take a short break? I have a two o'clock that will be very short.

MR. SPRAYREGEN: If it pleases the Court.

THE COURT: All right. Let's take a short break and

come back to confirmation.

(RECESS)

THE COURT: Confirmation.

MR. RICHARDS: Your Honor, good afternoon again.

THE COURT: Good afternoon.

MR. SPRAYREGEN: Excuse me. Your Honor, James Sprayregen for the debtor.

We -- during the break we actually used the time profitably. The one objection that we do have to confirmation we did resolve. I'm not sure how the Court wants to proceed. I can articulate that resolution and then Mr. Richards could get into the standards.

THE COURT: All right, that's fine.

MR. SPRAYREGEN: Okay. The indenture trustee for the bonds had objected. I'm not sure if the Court had seen the objection. There was a timeliness issue with respect to it, but we think we've resolved it by the final -- by the following construct.

The indenture trustee has some amount of fees right now, but we've agreed to put as part of the closing $150,000 in escrow to cover potential indenture trustee fees and they'll be subject to any objection being filed on the earlier of 30 days from a confirmation date, assuming if the Court was to confirm today, or the effective date. That is if the effective date is less 30 days from the confirmation date. The objection to the

indenture trustee fees would have to come in before that.

THE COURT: The earlier of the effective date or 30 days from the confirmation order?

MR. SPRAYREGEN: Yes. So the indenture trustee was asking for some certainty as to the position of the indenture trustee fees and most of what their billing has already been done, obviously there's some cleanup work which is part of the reason for the escrow in a greater than the estimated amount of their fees.

One other piece of it, Your Honor, the plan does have a current provision that says there will be an estimate for administrative expenses, in essence mostly professional fees, indenture trustee fees, to be put in a different escrow account at 125 percent of the estimated amount. To the extent there was a shortfall on the 150,000, the 25 percent excess or whatever that turns out to be based on whatever this Court's final allowances are and final numbers, would also be available to cover the indenture trustee fees to the extent the Court allowed them and they were permitted under the indenture and they were more than $150,000.

Other than that, the parties would all reserve their rights as to what the standard is and the potential allowance of these fees.

THE COURT: All right.

MR. SPRAYREGEN: I wanted to make sure that I

articulated that correctly.

MR. SIEGEL: Okay. Just a couple of points just so Your Honor understands.

The Trustee's fees and expenses now are significantly less than $150,000. In fact, they are -- and don't hold me to this, they're somewhere between 70 and $80,000. The major concern the Trustee has right now going forward is protection on the cost of defending itself in any litigation involving objections to its claims. It's the Trustee's view that under the indenture it would be entitled to the reasonable costs and expenses of defending itself from any objection to claim.

I would note that obviously the Trustee reserves the right to the extent that it views the fees and expenses incurred in the estate as unreasonable in the prosecution of an objection to claim, it reserves the right to object to those as well. I don't think that's here or there. But the Trustee's only concern is to have certainty on this issue. To have a number agreed upon and to be protected in the event that there is a litigation brought with respect to its own fees and expenses and costs.

That's really what this settlement ultimately is about. Hopefully we can resolve this prior to the effective date or prior to any objection date. But in the event we can't, the Trustee wants to make sure that it's protected with respect to its costs.

THE COURT: All right.

MR. SPRAYREGEN: That was an important point, Your Honor. We obviously hope that we're not objecting and we can ultimately resolve --

MR. PERCH: Your Honor, Frank Perch for the U.S. Trustee.

The only observation I'll make about this, in trying to follow all of what's being provided for here is that is that the U.S. Trustee would reserve his rights with respect to whether indenture trustee fees can be paid other than pursuant to the standards established under Section 503(b)(3), (b)(4) or (b)(5). It sounded like all rights to object are being preserved in the time frame that Mr. Sprayregen described, so I think that that's not a problem if I understood that correctly.

THE COURT: All right.

MR. SIEGEL: Your Honor, I would only note that to the extent to which the U.S. Trustee has concerns, and I know another argument started this way today that didn't necessarily go how people would hope, but I think it's somewhat of a moot issue. When you're dealing with a solvent estate, whether the Trustee's entitlement to fees comes from some administrative theory or just from its general unsecured claim is somewhat beside the point because I don't think anybody is suggesting that there's a claim.

THE COURT: Well, I'm not here to hear any claim

objection or --

MR. SIEGEL: I understand that and just consider this then another gratuitous comment on the record.

THE COURT: Thank you.

(Laughter)

THE COURT: Responding to prior --

MR. SIEGEL: Yes, exactly.

MR. RICHARDS: Again, Your Honor, Geoffrey Richards for the debtors -- for the debtor.

We'd like to proceed now on confirmation and briefly, Your Honor, I point out some background. First is that on August 16th the debtor sent out or filed rather its Affidavit of Mailing. In the Affidavit of Mailing we identified that all parties identified in the disclosure statement order entitled to receive solicitation packages did so. That included the disclosure statement order of ballots to the extent the parties were voting on the plan and also the plan and the disclosure statement and the exhibits to the disclosure statement as well as the plan. And this is also disclosed in the balloting affidavit in Paragraph A.

Your Honor, we filed a brief in support of plan confirmation. We filed that on the 20th. The brief in support sets forth the 1129 standards and, Your Honor, we explained in that brief that even if the parties to the lockup agreements have their votes designated by this Court, that we can still

confirm the plan under Section 1129.

Briefly, Your Honor, as we set forth in the brief, there are four impaired classes; Class 4, 5, 6 and 7. Excluding the votes covered by the lockup agreements we still have consenting -- rather parties that have voted to accept the plan in Classes 4 and Classes 5. Class 7 is the common equity interest and Class 7 is not receiving or retaining anything on account of it's interest in the debtor and is deemed to reject, therefore they did not vote. The only other class is Class 6, that is the junior preferred stockholders. There was one ballot that was received that is not covered by a lockup agreement and that vote-holder voted -- or stockholder, rather, voted to reject the plan. So Class 6 is a not accepting class, but again we believe under 1129 we can very simply satisfy the standard. Because again, junior to Class 6 no one is receiving or retaining anything on account of their interest and we have two impaired non-insider classes senior to Class 6 who have accepted a plan, specifically Class 4 and Class 5. And in neither Class 4 or Class 5 are those creditors or stockholders receiving more than 100 percent of their allowed claim or their allowed interest.

Furthermore, Your Honor, we submitted a balloting affidavit. That was also submitted on the 20th. And the balloting affidavit also explains the votes that were received even excluding the votes covered by the lockup agreements that

we have. The only other people who voted in Class 4 and Class 5 voted to accept the plan.

In addition, Your Honor, we submitted on the 20th of the month affidavits from James Yager. He is the president and chief operating officer of the debtor and we also submitted an affidavit from Mary Flodin. Mary Flodin is the chief financial officer of the debtor and both of those affidavits go to support the satisfaction of the 1129 standards. Both of those individuals, Your Honor, are in court today and available to testify if the Court deems that necessary or appropriate.

Briefly, Your Honor, we believe the pleadings that we filed in the case and the affidavits that we have submitted satisfy the 1129 standards. We're willing to proceed however the Court would like us to if the Court feels that a proffer or testimony is necessary. But again, we believe on the facts in this case and the pleadings we've submitted that we satisfy the 1129 standards.

THE COURT: All right. Does anybody else wish to be heard on the confirmation?

MR. PERCH: Your Honor, Frank Perch for the U.S. Trustee.

The U.S. Trustee did not file a separate objection to confirmation. The Court does certainly have the ability to determine under Section 1129 that confirmation would be appropriate with respect to the plan as submitted with the

votes that were not designated as a result of the Court's prior ruling. Obviously Your Honor has an independent duty to determine that the plan has been proposed in good faith and in compliance with the law and otherwise that all of the requirements of Section 1129 have been met, notwithstanding the irregularities of the voting process.

THE COURT: You're not going to give me a hint as to which way you think I should decide on that point?

MR. PERCH: Well, Your Honor, the difficulty -- let me -- let me state the difficulty the U.S. Trustee has in this situation which is that this is -- this is a deal that renders obviously very significant compensation to these various classes of creditors and equity holders. The difficulty that we have is that the Court is being put in the situation of being asked to determine effectively that the voting process of the, I guess, three or four ballots that were submitted that were not governed by the lockup agreements were not somehow tainted by the fact that they were submitted in the process where everybody else, where they were told that everybody else was already locked in. I am not -- I am not going to be standing here and saying -- I don't have a witness in the back of the courtroom. I don't have any of these -- any of these voters here to explain why they voted. I don't know that the debtor does either. So I'm not -- what I want to be very clear about, Your Honor, is I'm not going to go out on a limb and

then suggest that I have a factual basis to make and -- I'm not here prepared to make a factually-based objection to what it was that motivated any of the accepting voters to vote to accept the plan. I don't have -- I don't have them. I don't have their affidavits. I don't have a witness to present any factual evidence on.

Basically what I'm saying, Your Honor, is is it is what it is. It's a somewhat -- what it is is a somewhat unusual situation where the Court would be confirming a plan based on a very small number of votes that were cast under the circumstances that they were cast with the debtor asserting that all the other votes were locked up. There was evidently at least one party who decided that notwithstanding whatever --

THE COURT: Everyone else thought.

MR. PERCH: Whatever everybody else thought that he would vote to reject. But as I said, Your Honor, it is what it is and I rise only to note that that is what the Court is confronted with and that's what we're all confronted with here. I don't think either of us have the evidence here as to the other parties that voted.

THE COURT: All right, thank you. Anybody else?

MR. RICHARDS: Your Honor, I would simply say in response to the U.S. Trustee's position, I think what's important here is what's absent which is, you know, that everything -- let me say that differently, Your Honor. And

that is that there is -- the votes that have been received that are not covered by the lockups, there's no question as to the validity or the effectiveness of those votes. That Your Honor has decided on the 1126(e) issue that certain votes should be designated and, Your Honor, we respectfully accept the Court's decision on that point. But even casting aside those votes, Your Honor, the other parties who voted have voted to accept the plan and under the standards set forth in 1129 and 1126, we still satisfy those standards. We're happy to go through the different components of 1129, Your Honor, and demonstrate good faith, and the other components as we've said we've submitted affidavits from Mr. Yager and Ms. Flodin and those individuals are in the courtroom available and ready to testify if necessary. But I think what's important, Your Honor, is what's absent and that is that there is no challenges to good faith or any of the issues or compliance as the Code says complies with applicable law. Well, we believe the plan does currently comply with applicable law and the provisions of the Code. And so we believe that under 1129 we still continue to satisfy those standards even if the votes that have been covered by the lockups agreements are designated by this Court.

THE COURT: All right. Well, let me say this. I think that it's clear that there is no evidence here that the plan itself is not proposed in good faith. The fact that I have concluded that the locked-up votes were solicited in

violation of Section 1125 does not mean that the plan itself cannot be confirmed. I agree that the remedy provided by 1125 and 1126 is sufficient under the facts of this case that is simply designating those votes as not being counted. Rather than go any further and find that the entire process has been tainted or that the plan solicitation and efforts towards confirmation of a plan were not done in good faith or in compliance with the -- otherwise in compliance with the Bankruptcy Code.

I think that counsel just tried to be a little too clever in this case. I don't know why. I don't think it was necessary. But I'm satisfied with the designation of the votes that the plan can be confirmed and that there won't be any improper use of this case as a precedent in other cases where, in fact, the improper solicitation might have tainted other voters or otherwise tainted the entire process. But I don't find it in this case. And I do believe the plan otherwise complies with Section 1129 and can be confirmed.

MR. RICHARDS: Thank you, Your Honor.

One minor matter that I would ask is that the affidavits be accepted into evidence as well as all documents of record.

THE COURT: Yes. I didn't say that. Since there was no objection to the declarations, I don't think it's necessary that there be any proffer. I'll accept the declarations in

support of confirmation.

MR. RICHARDS: Thank you, Your Honor.

As a result of some of the events of today, we don't have a form of order that we have circulated to the parties. What we'd like to do, Your Honor, is prepare a confirmation order that's obviously different from the one that we had submitted to Your Honor on Monday, circulate it to the U.S. Trustee and Gray and the Committee and to the other parties who are in the courtroom here today to get an agreed order that we will submit to chambers under cover letter from counsel.

THE COURT: All right.

MR. PERCH: Your Honor, just as a housekeeping point. Would Your Honor also like a form of order on the designation issue?

THE COURT: Yes.

MR. PERCH: I will likewise circulate the order amongst the parties.

THE COURT: All right.

MR. RICHARDS: One other thing, Your Honor, and I apologize. I know it's getting a little late this afternoon. Wondering if -- how late Your Honor is going to be here today. Maybe we can ask the parties to convene back with us at our co-counsel's office so that we might be able to formulate that order this afternoon and still submit it to Your Honor.

THE COURT: I have a 3:00 and a 4:00 so I'm here till

they're done.

MR. RICHARDS: We will work as expeditiously as we can with the parties to prepare that form of order.

THE COURT: All right. The 4:00 might be extended -- excuse me, the 4:00 won't be extended, but the 3:00 may be. So I'm here at least till 5:00 I think.

MR. RICHARDS: Very well.

THE COURT: All right. We'll stand adjourned then.

COUNSEL: Thank you, Your Honor.

* * * * *

CERTIFICATION

I, Patricia A. Kontura, certify that the foregoing is a correct transcript to the best of my ability from the electronic sound recording of the proceedings in the above-entitled matter.

Patricia A. Kontura

J&J COURT TRANSCRIBERS, INC.

Date: October 2, 2002

Exhibit C

In re Greate Bay Hotel and Casino Inc., No. 98-10001 (JW), at 2 (Bankr. D.N.J. Mar. 10, 2000) (Dkt. No. 1271)

Entity seeking to propose a competing plan filed a motion to, *inter alia*, set aside a lock-up agreement (Dkt. Nos. 1205 and 1206) between creditors committee and a third party plan proponent. Responses were filed by the creditors committee (Dkt. No. 1215) and the debtors (Dkt. No. 1250). The Court held a hearing on February 16, 2000 and entered an order holding that the lock-up agreement was unenforceable (Dkt. No. 1271). Only the motion and memorandum of law filed at docket entries 1205 and 1206 and the order filed at docket entry 1271 are available electronically.

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PD-9779

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In re: GREATE BAY HOTEL AND CASINO, INC., a New Jersey Corporation, GB HOLDINGS, INC., a Delaware Corporation, and GB PROPERTY FUNDING CORP., a Delaware Corporation, Debtors.	Case No. 98-10001 (JW) (Jointly Administered) Chapter 11 Hearing Date: February 16, 2000, at 10:00 a.m.

ORDER RESOLVING MOTION BY PARK PLACE AND MERRILL LYNCH ASSET MANAGEMENT TO SET ASIDE LOCK-UP AGREEMENT, DISQUALIFYING COUNSEL FOR CREDITORS' COMMITTEE AND FOR OTHER RELIEF

Upon the joint motion (the "Motion") of Park Place Entertainment Corporation and Merrill Lynch Asset Management, in the chapter 11 cases of Greate Bay Hotel and Casino, Inc., GB Holdings, Inc. and GB Property Funding Corp., as debtors and debtors-in-possession (the "Debtors"), to set aside the agreement by and among Cyprus LLC and Larch LLC, each together a direct or indirect wholly owned limited liability company owned by Carl C. Icahn (collectively referred to as "High River"), and the Official Committee of Unsecured Creditors of the Debtors

(the "Committee"); (ii) to disqualify Cooper Perskie April Neidelman Wagenheim & Levenson ("Cooper Perskie") as counsel for the Committee; and (iii) prohibiting the Committee from acting as a co-proponent of a High River plan of reorganization (the "High River Plan"), making any recommendation as to a plan of reorganization and/or taking any other action in support of a plan; and upon the record of the proceedings before the Court on February 16, 2000; and for good cause shown,

IT IS on this 10 day of March, 2000,

ORDERED that:

1. Any agreement between High River and the Committee to the extent that it purports to irrevocably bind the Committee to support a High River Plan, is unenforceable against the Committee as a matter of law and is therefore void. The Committee is free to support any plan of reorganization that it deems, in its business judgment, to be in the best interests of its constituency, and is free to continue as a co-proponent of the High River Plan.

2. The Court denies the Motion to the extent that it sought to disqualify Cooper Perskie as counsel to the Committee for the reasons set forth by the Court at the hearing.

3. The Court denies the Motion to the extent it concludes that there was improper solicitation of votes for the reasons set forth by the Court at the hearing.

4. Cooper Perskie shall not render any advice or legal assistance to the Committee or the Official Committee of Unsecured Creditors for Claridge at Park Place, Inc. ("CPPI") in this case or in the CPPI case, which is pending before this Court as Case No. 99-17399 (JW) (the "CPPI Case"), with respect to any motion, legal issue or other matter that relates to the Brighton Park Improvements Agreement dated November 5, 1987, between GBHC and CPPI. The

Committee in this case and the Official Committee of Unsecured Creditors in the CPPI Case shall retain special counsel for any such matter.

5. The Clerk of the Bankruptcy Court is hereby instructed to file a copy of this Order in the CPPI Case.

JUDITH H. WIZMUR
UNITED STATES BANKRUPTCY JUDGE

Exhibit D

In re Lyondell Chem. Co., No. 09-10023 (REG), Hr'g Tr. at 11, 37-38, Slip op. (Bankr. S.D.N.Y. Feb. 11, 2010)

Debtor filed a motion to approve a settlement with Bank of New York Mellon (Dkt. No. 3719), and Bank of New York Mellon filed a statement (Dkt. No. 3720). The creditors committee objected to the motion (Dkt. No. 3769). The Court held a hearing on February 11, 2010. The motion was granted, as modified, and an order was entered on February 17, 2010 (Dkt. No. 3820).

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	. Chapter 11
LYONDELL CHEMICAL COMPANY, et al, Debtors.	. Case No. 09-10023 (REG)
	. New York, New York
	. Thursday, February 11, 2010
	. 1:59 p.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors:	Andrew Troop, Esq. Matthew Goldstein, Esq. CADWALADER, WICKERSHAM & TAFT, LLP One World Financial Center New York, NY 10281
For the Official Committee of Unsecured Creditors:	John C. Elstad, Esq. BROWN RUDNICK One Financial Center Boston, Massachusetts 02111

(Appearances continued)

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APPEARANCES: (Continued)

For Leverage Source:	Daniel H. Golden, Esq. AKIN, GUMP, STRAUSS, HAUER & FELD One Bryant Park New York, New York 10036
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For Aurelius Capital Management, LP:	Thomas Moers Mayer, Esq. KRAMER, LEVIN, NAFTALIS & FRANKEL, LLP 1177 Avenue of the Americas New York, New York 10036
Also appearing:	Samuel A. Khalil, Esq. MILBANK, TWEED, HADLEY & MC CLOY, LLP One Chase Manhattan Plaza New York, New York 10005

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(Proceedings commence at 1:59 p.m.)

THE COURT: Have seats, everybody.

I know you all, so I don't need appearances.

Mr. Troop, if you're here to announce a consensual resolution with the creditors' committee on this motion, I'll hear it. If you don't, I have preliminary remarks.

MR. TROOP: Your Honor, we do not have a consensual resolution with the committee on the one limited objection that they've raised with respect to the resolution.

THE COURT: A huge limited objection. Then sit down.

Folks, you can make your presentations as you see fit, but I have very major difficulties as to why the creditors' committee's objections on this motion weren't accommodated or why this motion wasn't otherwise consensually resolved. The merits of the economic terms of the settlement were obvious. The needs and concerns of the Bank of New York are very great.

But while the Bank of New York has serious and seemingly very legitimate concerns, its being paid in cash to address them would be detrimental to all concerned. So the economics of this settlement are as close to a no-brainer as I've ever seen.

But, Mr. Troop, or whoever else is going to justify an inability to address the creditors' committee's concerns, I have very considerable difficulty seeing how the debtors can forfeit their rights to a fiduciary out, and to provide for the

absence of an out if I disapprove the 9019 that's coming down the road. And the provision of 5.9 that calls for specific performance and even damages just strikes me as extraordinary.

Is the estate going to be setting itself up for an arguably post-petition claim if I disapprove the settlement? Is somebody trying to put a thumb on the scales?

So, Mr. Troop, when it's your turn, help me understand why the debtors or maybe the banks were unwilling to just work out something to address these concerns. Come on up now, please.

MR. TROOP: Your Honor, may I have one minute?

THE COURT: Yes.

(Pause in proceedings.)

MR. TROOP: Thank you, Your Honor.

Your Honor, let me get right to the heart of it, and the heart of it is as follows:

The issues that you have identified are not issues which were not the subject of substantial and meaningful negotiations in connection with putting this settlement together. The debtors exercising their judgment in connection with the settlement had to balance the following factors in determining whether or not committing to try to continue to put together a plan that preserves the relative relationship between BNY, the noteholders here, and the senior secured lenders through May 20th was worth the, to use your words, Your

Honor, the no-brainer of the economics that go along with the settlement.

The debtors became comfortable that the economics supported and support approval and provide -- in going forward with this settlement for the following combination of reasons:

The first, Your Honor, is that there are modifications to the plan that can be made, notwithstanding the commitment with regard to the relative rights that are not insignificant. There's a ninety-million-dollar move that can be made which keeps this deal together, one.

Two; significantly, while May 20th may seem a long way away, if Your Honor were to not approve the 9019, or not approve the ECA, the parties may not be back at square zero, but the negotiations and the efforts to put together a reorganization plan for these debtors would take some time. The debtors concluded that, on balance, being committed to try to maintain the economics of this deal, the no-brainer economics of this deal for this estate, which would have to benefit any other plan that the debtors might have to consider if the lender litigation 9019 settlement isn't approved, and I want to talk about it that way, Your Honor, because I'm not going to talk about -- sorry, Your Honor -- new stuff, new boundaries. I'm not going to talk about it other than to say the "if" of it, because that's what we're considering, seemed to the debtors the way to achieve the compromise and preserve

its economics to be applied during the course of any subsequent negotiations or efforts to put together a plan.

It means, Your Honor, that in connection with these creditors, and I'm pointing to these creditors, Mr. Siegel's creditors and Mr. Mayer represents one of the larger holders, to keep that together, to have our option, not theirs, effectively, to compel this to move forward seemed the balance to make, given the economics of the settlement.

THE COURT: Is the Bank of New York and the major creditor in its constituency the problem, or is this a problem of the banks putting terms on the debtor and on me to put one's fingers on the scale of the motions that are coming up coming down the road?

MR. TROOP: I can say that from the debtors' perspective, Your Honor, that is not what we felt at all in the context of the process, that this was not intended to be, and was not intended to tip -- to use your words, to put a thumb on the scale with regard to the matters that are coming up.

Now, yes, Your Honor, it is true that as a result of this settlement the debtors will eliminate objections, potential objections to the 9019 from other constituents. But, Your Honor, we see that as part of our responsibility in trying to build a consensus to get out of Chapter 11. It's to manage that process, it's this deal that is to manage that consensus building.

And as I said, Your Honor, from the debtors' perspective, yes, we clearly acknowledge and recognize the point that you're making, that -- and that the committee made, that we've committed to do this through May 20th. But on balance with the parties around the table, with the consideration being given up by the senior creditors, not only with respect to, Your Honor, value that resides in the debtors, but worldwide, in relationship to claimants that have claims here against certain debtors in order to build consensus, it was very hard for the debtors to say, no deal. And --

THE COURT: Forgive me, Mr. Troop. What debtor in a case on my watch or on the watch of any other bankruptcy judge in the country could ever responsibly abandon its fiduciary duties and not retain a fiduciary out?

MR. TROOP: But, Your Honor, I always have my fiduciary out, don't I?

THE COURT: Well, if that's so, then why didn't you and Mr. Elstad or Mr. Elstad's colleagues agree that of course the order can provide that the debtor has a fiduciary out?

MR. TROOP: Is there any reason that we can't provide that? Perhaps I missed -- maybe I missed the import, Your Honor, and I apologize.

(Pause in proceedings.)

MS. SIEGEL: If -- Your Honor, if you want, I can go to the podium or I can do it from here.

THE COURT: I'm certainly going to give you a chance to be heard whenever you wanted, Mr. Siegel. I didn't understand that you were the problem. But if you want to be heard, whenever you want to be heard, if Mr. Troop wants to yield to you now, that's all right with me.

MS. SIEGEL: I just want to make one point of clarification, and perhaps it's not a clarification that needs to be made. But I want to talk about what, at least in our view, this settlement provides for the debtor to commit to do and what it doesn't provide the debtor to commit to do. And I focus on Section 1.2 of the settlement agreement, which is the definition of a modified plan.

What this says is that a modified plan is a plan that provides for the treatment that is provided for under the settlement, which is defined in relationship to the senior secured holders with the adjustments that are in the settlement, and that as long as we fit within the definition of a modified plan, this agreement is not breached.

The way that we read this is that the debtor could develop a plan with an entirely different presumption, whatever its fiduciary duties drive it to, around this relationship between the treatment of the Arco and the Equistar holders and the senior holders without violating this agreement. We do not think that this has any effect on the debtors' overall fiduciary duty to the estate or its constituents simply because

what this settlement essentially does is it determines an intercreditor issue with respect to collateral and how that collateral will be shared.

That's really the only point that I wanted to make, Your Honor. We don't think that we are impeding on the debtors' ability to come up with a plan that would be a better plan, whatever that means, so long as the relationship between the recoveries of the senior secured holders and the Arco and the Equistar holders struck. That's our view.

THE COURT: Mr. Siegel, that isn't what's bothering me. The deal between you and the senior secured, so long as it meets your constituency's needs and concerns, isn't bothering me.

What's bothering me is that if Joe Smith comes off the street, don't put it in terms of Reliance, if Joe Smith comes off the street and bids $25 billion for this debtor in cash, the debtor must retain a fiduciary out to say that it's going to throw the plan into the trash and that it's going to take the better offer. And by the same token, while I would understand and agree in a heartbeat that you and Mr. Mayer could walk from the deal, if I disapprove the settlement with the senior lenders that the creditors' committee is so concerned about, the notion that the estate could then be subjected to a suit for specific performance and especially damages is one that's very troublesome to me. And that seems

to be what 5.9 of the agreement says.

Now, I don't mind giving you a full reservation of rights to raise all of your concerns, which, as I previously indicated, I think are very material concerns, if they can't deliver to you what's been promised. But the notion that the estate is either going to be subjected to economic risk if I disapprove the 9019 between the estate and the senior secured, or that once more, people are going to be putting a gun to my head to tilt the scale on my evaluation of the 9019 that's coming up on trial next week is what really bothers me.

Mr. Mayer, I'll hear from you, just as I'll hear from Mr. Siegel.

MR. MAYER: Thank you, Your Honor.

A couple of points. First, with respect to the hypothetical that you put on the table, we would not be able to walk -- we actually talked about that very prospect. And the debtors would be free to take that better plan, and so long as the relative treatment of the banks and the bonds was preserved, we're still in support. There's nothing here that stops the debtor from taking a better plan.

And with respect to putting a thumb on the scale, Your Honor, if you take a look at Page 5 of the settlement agreement that is attached to the debtors' motion --

THE COURT: Which paragraph?

MR. MAYER: It's Paragraph 1.4(3). It's right in the

middle of Page 5 of the settlement agreement. It's a very short paragraph.

THE COURT: The dilution paragraph?

MR. MAYER: That's correct. The concept here, Your Honor, is that if Your Honor disapproves the settlement, no, this deal doesn't blow up until May 20th because there might be another settlement, and it adjusts. And there's nothing to stop that negotiation from happening, and there's nothing that curbs the Court's ability to take whatever action it sees fit to take. We're not trying to push the Court one way or the other. We tried to design the settlement so that to the extent possible, it could survive a decision by this Court that is adverse to the settlement.

I'm not here to advocate in favor of that settlement or against it. It's not my point. My point is we tried to build in some flexibility. And the purpose of the agreement is to say, yeah, you've got a hearing on the bigger 9019, on the fraudulent transfer 9019, and the judge is going to make a decision or he won't, or he'll take some time, or there will be further negotiations, but this deal stays in place until May 20. And if, in fact, everybody else wants to push it another three months, it stays in place beyond that. But the deal is with respect to only this one building block of the plan of reorganization. Anything else the debtors can change. As long as it doesn't change our building block, we don't care.

And it's in place until May 20 to give the Court flexibility, to give the debtors flexibility to deal with the fact that there is this other big litigation, and that the world is not wholly predictable.

Judge, the last time we were here, you were very concerned that this settlement was contingent on the other settlement. So we took that out. This settlement is no longer contingent on the other settlement. If the other settlement blows up, there will be three months when -- probably less than that because, presumably, the trial will take some time, and Your Honor will take some time. It may be May 20th before there's a decision. But there's no attempt to put any pressure on the Court. There's an attempt to create flexibility such that this deal can move with whatever happens with respect to that settlement.

The creditors' committee's attempt to paint this as creating a fragile structure where if their motion -- their objection to the larger 9019 prevails and it blows up, suddenly, the debtor is somehow bound in iron; I don't think that's correct. All that this says is that there's this four-month period where the debtor is going to try to deliver a plan that has this one building block, and at the end of that four months if the debtor wants to try to go back to litigating this from ground zero it can.

And the reason that we care, Your Honor, and the

reason why we didn't view this as a fiduciary out situation is that sitting here today, we have a motion before Your Honor with respect to Section 507(b) relief, with respect to classification. And it's briefed and it's ready for a decision. And without meaning to presume, if we prevailed, we would know where we are and we'd be wherever we were, whereas if the debtor has the ability simply to wake up tomorrow and say, I have a fiduciary out and I'm gone, Mr. Siegel's withdrawn his objections, I've withdrawn my objections, and now we have to start over from square one.

So the thought was create a little stability in the case just through May 20th. The debtor is going to try to deliver a plan that has this one little block in it, and this plan, it can adjust it. They have all sorts of freedom to change, lots of other stuff; they can even change stuff relating to the larger 9019 settlement and this settlement adjusts. There's no effort to hogtie the debtor with respect to the settlement.

If you have any questions; otherwise, I'll sit down.

THE COURT: I'm going to keep listening.

Mr. Troop, you may continue.

MR. TROOP: Well, I think that Mr. Mayer and Mr. Siegel may have hit it all, Your Honor. Just one other thing --

(Counsel confer.)

MR. TROOP: Your Honor, I'm going to say what I was going to say before to present to you a proposal that was just made to me, which is acceptable to the debtors as perhaps a way to resolve this issue.

It seems that Your Honor is -- and people are focused on the question of, among other things, predominantly the impact of Section 5.9 on the settlement agreement -- in the settlement agreement. I believe that the debtors and BNY would be prepared to excise 5.5 from the settlement --

UNIDENTIFIED: 5.9.

MR. TROOP: -- 5.9 from the settlement, Your Honor, in order to maintain the benefit of its economics to alleviate any concerns that the Court has about people trying to drive the outcome of next week through this week, this settlement.

But there is -- I do have to check with the ad hoc group, with that --

THE COURT: I think you better, since they, presumably not inadvertently, wanted themselves made as third parties -- or parties for the purpose of 5.9, and it looked to me, and this was the major concern that I had when I read these papers, that they were looking for a means to use this agreement as giving them rights.

Now, as I indicated at the outset, I think it's a very good thing that you resolved the Bank of New York's concerns because I read the underlying papers on that, and I saw them

having a very strong motion, but at the same time fragging themselves with their own grenade because the estate can't afford the 360 million bucks or whatever that it would cost to pay them.

So the idea that you guys reached a settlement with them to address their legitimate needs and concerns without writing out a check was the portion that caused me to regard the settlement as a no-brainer. But at the same token, the debtor runs this case, not its secured lenders, and to the extent the debtor doesn't run this case, I do. The secured lenders don't.

So you can talk to the secured lenders, but that is my concern.

MR. TROOP: Understood, Your Honor.

Your Honor, may I ask for ten minutes?

THE COURT: I'm sorry?

MR. TROOP: Well, Mr. Golden would like to address Your Honor.

THE COURT: All right.

MR. GOLDEN: Good afternoon, Your Honor.

THE COURT: Mr. Golden.

MR. GOLDEN: Daniel Golden from Akin, Gump, Strauss, Hauer & Feld, counsel for Leverage Source.

Your Honor, let me just say right up front that the senior secured holders have no problem with the elimination of

Paragraph 5.9. We didn't insist that it be there, and we have no problem with its elimination.

We have obviously, the debtors, BNY, the senior secured noteholders who had played a major role in negotiating the economics of the BNY settlement, have obviously done a very poor job in communicating to the Court what we were intending to do.

The economics I don't think we need to talk about. Your Honor has already commented on the fact that you think it's a good economic arrangement. The creditors' committee has indicated in the very first sentence of its objection that they have no problem with the economics. I wouldn't have thought that they would have had any problems with the economics. As the steward of unsecured creditors, they should have been doing, in my view, handstands that we eliminated a potential super priority administrative claim of $561 million.

THE COURT: Did I understate the amount that was at risk?

MR. TROOP: (Not identified) No, Your Honor, it's three hundred and --

MR. GOLDEN: I'm sorry. I overstated the amount that was at risk.

THE COURT: Okay.

MR. GOLDEN: Your Honor, we -- but what I want to make crystal clear, and I want to make sure the Court fully

appreciates this before we leave the court, and we have not obviously done a good job in doing that, there was no -- no, not one attempt by the negotiation of this economic arrangement or the drafting of the settlement to incorporate the terms of the economic arrangement to in any way influence, put the thumb on the scale, tilt, whatever expression the Court would like to use, the outcome of the big 9019 settlement hearing that is scheduled to start next week. It's actually quite the opposite.

As Mr. Mayer said, we understood from Your Honor's prior comments that you would not approve a BNY settlement that was conditioned upon approval of the 9019. That has been removed.

The simple fact is you had economic parties negotiating. Every -- as Your Honor probably understands better than everybody else in this court, everybody perceives that they have a certain amount of leverage in their economic negotiations. BNY had filed an objection to the 9019 settlement motion. The debtors were attempting to resolve that objection. The senior secured noteholders were attempting to resolve that objection. And, in fact, this settlement resolves that objection based upon these economics that everybody in the court has already acknowledged are good economics.

What BNY was concerned about was that they reach this agreement, they withdraw their objection from the 9019

settlement that -- the hearing of which is supposed to begin next week, or is scheduled to begin next week, and then the debtor changes their mind. Well, that's an unfair position to put BNY in. And we certainly understood the concern that they raised.

In addition, simple disapproval of the 9019 settlement that's scheduled to begin next week is not the end of the premise of the plan that's on the table. I know that the plan as filed is conditioned upon a 9019 settlement. But, Your Honor, there are, as Mr. Mayer pointed out, a variety of alternatives that could result from the disapproval of the 9019 motion. We could start --

THE COURT: You're talking about next week's 9019?

MR. GOLDEN: Next week's, yes, Your Honor. And I'll call it the committee 9019 motion so there is no confusion.

We could start the trial at some appropriate point in time, and the debtors and the secured creditors could actually win that trial. And then we could take the economic guts of the plan that's on the table and go back with that plan having won the trial with respect to the fraudulent conveyance litigation. And all BNY was trying to protect themselves was in that scenario, that they would be able to keep the economic arrangement that they reach with the senior secured noteholders as to the sharing of the collateral. There is nothing inappropriate about that. And, frankly, I would have expected

nothing less from BNY when they gave up their rights with respect to their 507(b) and their disclosure statement classification motion. But, Your Honor, let me make it crystal clear: There was nothing in this document that was intended to in any way prejudge the outcome of next week's hearing. And I don't, frankly, think that a fair reading of the words of the settlement agreement can come to that result.

Now, I know that the committee has suggested that result, but I think they've done that for a different purpose. Their objection is not to the economics. It's tactical. As I said, frankly, I don't understand the committee not wanting the BNY settlement to be approved right now so that even if the -- next week's 9019 motion is disapproved, they will still have the benefit of the economics of this settlement. But they want to simply wash their hands of it, not because they don't like the economics of the settlement, but because they don't want progress being made towards confirmation of a plan.

Now, here's no surprise. In order to confirm the plan that's currently filed before this Court, the 9019 motion has to be approved. But that's not the only way that that plan can ultimately be approved. As they suggested, one way is to go to the litigation and the secured creditors prevail in the litigation, an outcome that the secured creditors certainly suggest would be the result in that eventuality. But there's other possibilities: Reliance; Joe Shmoe; anybody can come in

and make a cash offer, an all-cash offer. As long as the relative economics as between the senior secured noteholders and the BNY/Arco/Equistar noteholders are preserved in that all-cash settlement, keeping this settlement in place is a good thing, and giving the debtor a relatively brief breathing spell between the time Your Honor rules on next week's 9019 motion and May 20th didn't seem to much to ask for. And certainly, I don't understand how the committee can take that set of facts, which has been fully explained to them, and then suggest that it's a breach of the debtors' fiduciary duties to have agreed to that.

So, you know, if you have any questions about that, Your Honor, I'd like to respond to them right now before we go out and take a recess, although I'm not sure we really need to take a recess because I think all the parties on this side of the room have agreed to eliminate Section 5.9. Now, if that resolves the committee's objection, that's great. It seems like we'll have a consensual order. I'll suggest, or I'll pre-suggest that I don't think that that's ultimately going to resolve the committee's objections, but we should hear from committee counsel on that point.

But I know I said it twice, I just want to say it one more time: There was nothing about this settlement, not the negotiations, not the economics involved, not the words on the page that were intended to put any pressure on this Court with

respect to next week's hearing.

Thank you, Your Honor.

THE COURT: I don't think a recess is necessary. I want to hear from Mr. Elstad, and then I'm going to give everybody on the left side of the courtroom as you're facing me a chance to reply after he's had a chance to be heard.

MR. ELSTAD: Good afternoon, Your Honor. For the record, John Elstad from Brown Rudnick for the creditors' committee.

Your Honor, we would be content if the parties here would state on the record that the debtors could walk from this settlement -- they don't have to, but they could walk from this settlement if the lender litigation settlement -- that's what it tends to be called in the pleadings -- is denied by this Court. It seems a simple thing to do.

The economics of the deal between the Bank of New York and the debtors have been trumpeted here. We've said from the start we don't object to them. They're completely understandable. In fact, they're so understandable it's hard to -- it's hard to comprehend how they would be lost. One thing in particular, the motion itself says that BONY will only withdraw its various motions as to its plan treatment without prejudice. The prejudice only takes effect on the effective date of a plan.

Your Honor has said that their objections are

powerful. I can't see why the debtors would ever withdraw from the deal. I can't see how they would be prejudiced going forward by just an agreement on the record that if the lender litigation settlement is not approved that the debtors have a fiduciary out.

I have to comment on some of the things that Mr. Mayer said. He pointed to the dilution provisions in the settlement agreement. Now, those protect the Bank of New York in case there's an alternative settlement that would have the effect of diluting them. It doesn't in any way prevent the stalemate that would come into effect on these proceedings if the lender litigation settlement is not approved, but this Bank of New York settlement has been approved in its present form because the debtors, as Mr. Troop has admitted, are bound to this plan until May 20th. It cannot be sufficiently modified in the event that the lender litigation settlement is not approved.

There is a provision in there that only up to a ninety-million-dollar change in the effect on the rights offering shares is allowed. The lender litigation settlement could have a much larger -- a denial of the lender litigation settlement would seem to have a much greater effect on the plan than that.

Mr. Golden, the last time this came before you on January 19th, he said something that I think is more correct than what he said today. He said:

"As Your Honor knows, the existing plan rises or falls in connection with the 9019 settlement with respect to the committee litigation. And to be totally fair, the beneficiaries of this settlement don't want to be hanging around forever waiting to find out whether they have a settlement or not that's going to be affected."

I agree with Mr. Golden on January 19th. If the lender litigation settlement is not approved, this plan is dead in the water. It can't be resurrected by a series of modest changes that Mr. Siegel spoke about or that Mr. Mayer spoke about. The --

THE COURT: Pause please, Mr. Elstad.

Suppose you're right, and although I don't want a thumb on the scales of the work I'm doing next week, and possibly thereafter, I do obviously understand the importance of the proposed settlement of the committee's litigation to the plan as it's now drafted.

But if, as I understand, all concerned to be willing to drop 5.9 so that the estate isn't at financial risk of my having disapproved the settlement if I ultimately agree with your guys, what's the harm to the estate?

MR. ELSTAD: For one thing, Your Honor, there's still Section 5.5 that provides for damages.

THE COURT: I thought 5.9 implements 5.5.

MR. ELSTAD: 5.5 provides that a cause of action

accrues immediately upon --

"The provisions of this settlement agreement shall be breached and a cause of action accrued thereon immediately on any party's commencement of any action inconsistent with this settlement agreement and in any such action, this settlement agreement may be asserted both as a defense and as a counterclaim, or a cross-claim."

Your Honor, as well, although the Bank of New York might be content with any plan, even a better plan, as long as its relative rights with respect to the senior secured lenders are kept the same, this settlement agreement still binds the estate to pursue the modified plan, and would stalemate these proceedings, at least until May 20th. That can't be in the best interests of the estates. And if -- I don't understand Mr. Golden to be saying that he would be waiving, but maybe he would say that he would be willing to waive specific performance as to pursue the plan. I'm distinguishing there between economic damages and an insistence on pursuit of the plan.

THE COURT: Well, 5.9 had provided for both specific performance and damages, right?

MR. ELSTAD: Right.

UNIDENTIFIED: Yes, Your Honor.

THE COURT: Other thoughts, Mr. Elstad?

MR. ELSTAD: No, Your Honor.

THE COURT: All right. I'll permit -- well, actually, anybody else want to be heard before I give reply?

(No verbal response.)

THE COURT: No? Okay.

Further comments on the settlement proponent's side? Mr. Siegel, come on up, please.

MS. SIEGEL: Your Honor, I think after listening to Mr. Elstad, I'm a little confused over who's holding what hostage to whom at this point. I don't know based on the committee construct how Bank of New York could have possibly negotiated an enforceable settlement agreement with the debtor. Basically, what the committee is saying is the debtor cannot enter into an agreement to resolve our objections without being able to walk away from them under any circumstances. And I don't think, first of all, that that's correct, and I don't think that's what this deal does.

I think that there is nothing in this agreement that affects anybody's rights other than the debtors' rights, vis-a-vis the Arco and the Equistar holders as agreed to between the Arco and Equistar holders and the senior secured lenders. As Mr. Golden said, you construct a plan within the available time period that looks like anything so long as the relative relationship between those parties remain in place.

The reason why this plan is filled -- not --

THE COURT: Well, what you said is very important, Mr.

Siegel, because if that were so, it would go a long way toward addressing the concerns that I articulated at the outset of the argument.

But does the agreement need a little massaging to say that as clearly as you do?

MS. SIEGEL: Well, assuming that everyone agrees with the construct that I've just provided, we can put it on the record, we can all agree to it, we can provide an additional paragraph, whatever Your Honor would like. But I think that's the way we all understood what we were negotiating. If we failed, as lawyers sometimes do, to not make that clear, then we can make it clear. But that's all we've been talking about here.

And the reason why there are all of these provisions in here that reserve BNY's rights vis-a-vis their objections, vis-a-vis their participation in the 9019 -- the committee 9019 litigation, vis-a-vis their participation in the lawsuit if it should go forward, is because we don't know even with this agreement whether or not we will ever achieve this treatment. Many things can happen, including the debtor can decide for some reason down the road past the May 20th date, or as extended, which Your Honor may remember is really tied to the exit financing under the plan because there is no plan if you can't finance a plan on the way out, we needed to be in a position where we haven't given up rights permanently for a

settlement that's not absolutely done.

There is a long path between now and confirmation of a plan. And in the event there are some unknown circumstances that put the debtor in a position where it doesn't believe it can maintain this agreement between the parties, we need to be free to go back to the litigation, to go back to doing what we were doing before because, obviously, the debtor -- not the debtor, excuse me, the Arco and the Equistar holders have no interest in the 9019 settlement, not this one but the committee 9019 settlement because they've now agreed to treatment that does not impact on how the lawsuit turns out. We've waived our deficiency claim and we are protected on any cost of the settlement.

Having done those two things, the Arco and the Equistar holders are indifferent as to the result of the lawsuit and, therefore, have no reason to participate. If that settlement were to go away, if this settlement were to go away, we are no longer indifferent to that and we need to protect our rights. That's why there's so much language in here about protecting us in case this settlement is not approved and not implemented.

That's why it's in here. This fiduciary out issue is frankly a red herring. The debtor can do whatever they want except for this settlement. The debtor has to have the ability to come before this Court, explain itself, and say, I wish to

settle a real substantial objection to my proposed plan; otherwise, all -- otherwise, parties would not settle if they said, I am willing at this point in time to agree to this settlement, but I reserve the right to change my mind based upon changed circumstances. Nobody could --

THE COURT: Oh, I quite agree with that. And is there a way to address either by amendment to the agreement or the approval order in a way that provides in substance the debtor can't change its mind, the senior secured can't change their mind, but nothing in this approval order will impair the debtors' ability to act in accordance with its fiduciary duties if it convinces me that some different plan might be required by its fiduciary duties so long as the relative rights of BNY vis-a-vis other parties in this case are preserved?

MR. SIEGEL: Your Honor, I'm sure we could draft language that would say that. I assume everybody --

MR. TROOP: I've got complete confidence in my associate Mr. Goldstein to do that.

THE COURT: Keep going, please, Mr. Siegel.

MS. SIEGEL: Okay. The -- and, again, I don't understand this concept of a stalemate with respect to our settlement if the lender litigation settlement, as they describe it, is not approved. If the lender litigation settlement is not approved, there is still an agreement in place between the Bank of New York and the debtor which says,

we will stand down from our objections provided you give us this treatment, whatever happens with the 9019 litigation taken to its extreme, what this means, if the committee were successful and they won a judgment against the senior secured lenders, the entirety of that judgment we would be insulated from. That's taken to its extreme.

It just doesn't -- we have created a treatment for the Arco and the Equistar holders where we are indifferent to the result. As long as we're locked in to that treatment where we're indifferent to the result, the lender litigation is irrelevant to us. It's just simply irrelevant to us. And I don't know how that puts pressure on anybody to do anything with respect to the settlement by virtue of our settlement because we just don't have a dog in that fight. We're done. That's what this does. That's my only other point.

THE COURT: All right. Mr. Mayer?

MR. MAYER: I want to talk a little bit about the calendar and about the reality of the case because Mr. Golden tried to talk about what could happen. And I think if you look at every possible outcome, you'll see that there is no meaningful impingement on the debtors' freedom of action.

You have a hearing next week on the big 9019 settlement. Now, let's assume that you deny that settlement. There are three things that could happen. One Mr. Golden's talked about, which is the banks could win. The other

alternative, which the committee would presumably talk about, is that the committee could win --

THE COURT: Wait. You mean the banks could ultimately win on the merits --

MR. MAYER: On the merits.

THE COURT: -- that are now being settled, or proposed to be settled?

MR. MAYER: On the big 9019 settlement, that's correct. On the committee's -- the fraudulent transfer action.

THE COURT: No, I lost you. Are you talking about the banks winning in the sense of me approving next week's settlement motion? Or if I disapprove the settlement, then the banks are continuing to do battle with the unsecureds and the banks could ultimately win anyway?

MR. MAYER: That's what I mean, Your Honor, yes.

THE COURT: All right.

MR. MAYER: And you've got roughly three months between February 19th and May 20th. I think I counted my months right. March, April, May -- three months, okay. During that three months, let's assume, which I'm not in any way assuming that you would do this that fast, but let's say you had all three months. Let's assume on February 19th you say, nope, settlement don't work. You got three months. Three things can happen in those three months:

One, the banks could defeat the suit on the merits;

Two, the committee could win on the merits;

Three, there could be another settlement.

Well, Judge, I submit that the probability of there being an ultimate victory for either side during those three months is very small, just because it takes time to try a case, and I am not for a moment assuming that you would rule on the 19th and we would be done.

The only likely outcome during the three months that are at issue is that there's another settlement, in which case the settlement agreement adjusts. So, in fact, there is no meaningful impediment to the debtors' ability to do anything because if the settlement goes away, if you say, that big settlement, it doesn't work, well, you have a live litigation. The only way to get rid of that live litigation is either another settlement through a plan or otherwise, which works under the terms of this deal, or through an ultimate victory which is going to take beyond May 20th, in any event.

And so, for that reason, Your Honor, I think with the elimination of Section 5.9, and sort of a side point, perhaps, against my interests to point out, 5.9 works both ways, right? I mean, specific performance and damages was available against Bank of New York, too. That's the reason why people draft provisions like 5.9. It wasn't that anybody was trying to tie up the debtor. People were trying to tie up everybody and say everybody was bound. 5.5 probably suffices. I think it does.

I think we strike 5.9 to take care of Your Honor's concerns. I think we are fine. And I don't think that what this settlement does is either put a thumb on the scale for next week or tie the debtors' hands in any way that is material.

THE COURT: All right. Anybody else? Mr. Troop?

MR. TROOP: One of the things about going last, Your Honor, and trying not to be repetitive is that you have to go through your notes. So if I could just have a second?

(Pause in proceedings.)

MR. TROOP: Your Honor, I'd like to make two observations, maybe three. The first is, Your Honor, and if I weren't -- was not sufficiently clear, I apologize. From the debtors' perspective, the ability to continue this, to use Mr. Mayer's building block analogy, or to use Mr. Golden's relationship analogy, in place, given the uncertainties of what might happen if the settlement, now meaning the lender litigation settlement, is not approved, was of substantial value to the debtors. It means that this huge potential intercreditor dispute as well as claims against the estate are done. And I think that it is fair to say that, what everyone has said, is if that if we're buying that piece so to speak, we should be obliged to the extent that we can continue to act and perform.

The second thing I would say, Your Honor, to echo Mr. Siegel is that the fiduciary out is a red herring. And it's a

red herring for two reasons, Your Honor. The first is, is that if the debtors come to you and say that we have to exercise our fiduciary out because there is a better alternative, phrasing the issue answers the question because the better alternative that preserves the relative rights between these parties will be accretive to them necessarily, and it's inconceivable that you wouldn't let us do it, and frankly it's hard to believe they wouldn't either, but that would be for another day.

THE COURT: Well, pause, because that's why I thought we needed clarification in any approval order or in the underlying agreement.

You posited the hypothetical which I had also posited, which was Joe Smith coming off the street and bidding 25 billion bucks, in which case you would have to scrap the three As and the -- some of the aspects of this plan, but you'd have a very nice pot of cash that you could give to your stakeholders. And I think that all would agree that a debtor would have to have the ability to bring that to my attention, but it couldn't walk from the deal that Bank of New York struck with the senior secured to divvy up proceeds in accordance with the agreement.

Now, if we're all on the same page, I'm not sure if you're saying something the same or different than what I just said.

MR. TROOP: I'm trying to say the same thing, Your

Honor.

THE COURT: All right. So then you still would need your fiduciary out so you could do your job as a debtor-in-possession, but you wouldn't be able to use the fiduciary out as a means of finking on the deal with Bank of New York.

MR. TROOP: That's correct, Your Honor.

THE COURT: Well, that's where I'm trying to get.

MR. TROOP: I think that's fine with us, Your Honor.

THE COURT: All right. Keep going.

MR. TROOP: I'm looking at Mr. Elstad to see if it's fine with him, too, which I think it is.

MR. ELSTAD: A suitable fiduciary out is fine with the committee, of course.

THE COURT: All right. Well, what I regard as a suitable fiduciary out might or might not be the same thing that Mr. Elstad had in mind, but I think we're making progress here.

Continue, please.

MR. TROOP: And then, finally, Your Honor, I just want to underscore the following, which I think is where I started. And that is that this settlement was not intended, and we apologize to the extent that you were left with the impression that it did, to impact next week's thinking at all. As everyone has said, the intent here was to resolve an intercreditor dispute to keep the benefits of it for the estate

and all creditors in a variety of we'll just say unknown resolutions at the moment of what might happen next week.

And as I think we've said, and adopting your words again, Your Honor, it was to create a construct where the debtors just couldn't decide they didn't like it anymore in light of what we are getting people to give up in order to resolve what everyone agrees are important issues to be resolved consensually in a context where the economics have not been challenged in the least.

Your Honor, I'll answer questions because I'm not sure if I continue talking I'd add anything at this point.

THE COURT: No, I think I don't have any further ones.

Mr. Golden, do you want another opportunity to comment?

MR. GOLDEN: No, Your Honor.

THE COURT: Okay.

MR. GOLDEN: Thank you.

THE COURT: Has everybody now had a chance to speak their piece?

(No verbal response.)

THE COURT: All right. I don't need to take a recess, but I want everybody to sit in place for a minute. Have a seat, please, Mr. Troop.

(Pause in proceedings.)

THE COURT: All right. Ladies and gentlemen, with the

modifications seemingly agreed to in today's proceeding with the deletion of Paragraph 5.9, I'm approving the settlement subject to some clarifying language being put in the approval order consistent with what I heard from Mr. Mayer, Mr. Siegel, and to a lesser extent Mr. Troop. And the following are the bases for the exercise of my discretion in this regard:

As I noted in colloquy with counsel, this settlement in its economic terms is to say the least very sensible. In fact, it's what back in the days when I used to be an engineer, engineers would call an elegant solution. It addresses very reasonable concerns articulated by the Bank of New York, and satisfies them by means of a currency that is potentially destructive to everybody in the room. It also displays a sensitivity to Bank of New York's legitimate needs and concerns without, at the same time, prejudicing critical liquidity that is important, if not essential, to the debtors' continued health going forward.

The issue, as I articulated it at the beginning of oral argument, was never whether the underlying deal was a good one, but whether there were provisions in it that could, (a) impair the debtors' ability to maximize value if a Joe Smith were to come down the road to make a cash offer for the estate that was sufficiently attractive and which might require abandonment of the existing plan, or, (b) that would unfairly prejudice the creditors' committee in a matter of great

importance to both sides that we are beginning -- we are going to hear next week.

If either of those were to transpire, either in an inability of the debtors to maximize value or something that would no longer permit the parties to have a fair fight next week, that would, of course, be a matter of material concern to me.

With the deletion of 5.9, the adverse consequences to the debtor which, of course, is a proxy for its stakeholders, technically we have multiple debtors, it applies to all of them, can be eliminated, and with that, I am satisfied that there is no longer a thumb on the scale, as I used that expression in my opening remarks, that would make the litigation starting next week unfair.

Conversely, various people in questioning and answering as part of oral argument have given me comfort that nobody quarrels with the notion that these debtors, like any debtors, will have the continuing ability to take such steps as are appropriate to maximize value, what I refer to in slang as the fiduciary out.

When I say "fiduciary out," I want to emphasize, and frankly I'd be more comfortable if any approval order says it in very nearly baby talk, the debtor can't change its mind, I'm walking from this deal, because it decides it doesn't like the deal anymore. Likewise, I understand and respect the fact that

the allocation of value as between Bank of New York and other secured lenders is a matter of great importance to Bank of New York, as, if I were Bank of New York's lawyer, I would similarly consider it to be, and that can't be modified in any way materially adverse to Bank of New York.

But now we have come to a place where everybody's legitimate needs and concerns can be addressed if we just put some clarifying language in the approval order and/or in the underlying agreement.

In addition to the deletion of 5.9, I would like to confirm, and my notes frankly aren't detailed enough to list them all, but basically that which was said by Mr. Siegel and Mr. Mayer. What we're trying to do here is to preserve the intercreditor agreement that was made between the different groups of secured lenders, which is a legitimate need and concern on the part of both sides, and which, as long as the debtors can maximize value and we're not adversely affecting the litigation with the creditors' committee, is now not only agreeable to me, but I fully understand, respect, and agree with.

Bank of New York's relative rights must be preserved. I think that's the intent now. And it should continue. If, as I sense, that was what people were trying to accomplish, that concept is wholly agreeable to me.

If, either by reason of my lack of full comprehension

when I read the motion papers or if my lack of understanding resulted from people's failure to express it more clearly than they did, or anything in between is not important to the decision. What is important is that with this modification, Bank of New York gets its legitimate needs and concerns addressed, the estates needs and concerns are appropriately addressed, and the estate is protected from liability, and the debtor has the continuing ability to maximize value.

Not by way of re-argument, is there anything that I need to address that I should address, but I haven't, or that I failed to deal with sufficiently clearly?

MR. TROOP: I believe that everything's covered, Your Honor. I think that probably the thing that we should do is spend a little time and work on the order, and we'll re-submit an order that people had an opportunity to review.

THE COURT: Very good.

MR. TROOP: Your Honor, if I could have one minute, maybe two, to talk about some housekeeping matters?

THE COURT: Sure.

MR. TROOP: Thank you, Your Honor.

Your Honor, I believe that -- I hope that you know -- are aware that as a placeholder, we have scheduled the hearing on the disclosure statement and on approval of the equity commitment agreement to start on February 22nd, so a week from Monday. That date was picked in the hopes -- not the hopes,

but -- not the expectation, but the hopes that the 9019 -- the lender litigation 9019 will be concluded next week and would be ruled upon by Your Honor in a way that would permit us to go forward.

I don't think, though, Your Honor, since we're now going to start the 9019 next Tuesday that we are necessarily in a position to know for sure whether the 22nd will hold or it will be some later date.

Under your case management order, and in discussions with your chambers from time-to-time, if the disclosure statement hearing were to proceed on the 22nd, our replies to the existing objections would need to be filed with you probably next Tuesday, Your Honor. I don't mean to be presumptuous, but I also don't want to try to make extra work for people. And I was wondering whether we might be able to say that we would revisit the timing question at the start of the disclosure statement hearing, perhaps next Tuesday or Wednesday while we're before you, and be able to get our disclosure statement objections in to you based upon what we conclude at that time.

We are trying to use the time in the interim, Your Honor, to eliminate as many of those objections as we can so that if we get to a disclosure statement hearing, there's as much consensus as we can deliver to you, and there are as narrow -- the issues to be -- that you might need to -- excuse

me, the issues that you might need to decide are as narrowly tailored as we've been able to make them.

THE COURT: Sure, although I don't think that we're likely to be in a position to give you a better answer on Tuesday of next week than we are at this point. And if you think the disclosure statement is going to have to deal with how I've ruled on the 9019, I think you can fairly assume that the chances of you having a ruling on the 22nd on that issue when the hearing may or may not even be completed on the 19th are not very great.

I'll share with you, as I've shared with everybody in all of the cases on my watch, that my preferred approach on disclosure statements is when somebody says he wants something in a disclosure statement, you just give him the sentences or paragraph or whatever he wants, and you move on, and you articulate it like, Joe Smith contends that, and then just give him what he wants. And that, in my experience, makes about ninety percent of disclosure statements go away.

In more extreme cases and more confrontational cases, and God knows we've had them in this court over the last five years, the alternative, of course, is to let everybody have a position paper of a few pages that they have the right to stick into the disclosure statement. And once again, that makes disclosure statements proceed much more smoothly.

Lastly, I'll tell everybody in the world that

disclosure statement time is not the time for the Court to rule on confirmation objections, and at most, what we're talking about is somebody contends -- Joe Smith contends that the plan is non-confirmable for the next two sentences worth of reasons. Somehow, I suspect that you don't need me to have said that, and that was your mind set anyway on revising the disclosure statement, but, hopefully, that will mean that your reply to any disclosure statement objections needn't be a very time-consuming one.

MR. TROOP: That's what we are striving for, Your Honor.

THE COURT: Okay. Anything else, Mr. Troop?

MR. TROOP: That's it, I think, Your Honor, from me.

THE COURT: Okay. Very well. Then we're adjourned.

(Proceedings concluded at 3:08 p.m.)

*****

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

February 11, 2010

Cathryn Lynch, NJ Cert. No. 565

Certified Court Transcriptionist

For Rand Reporting & Transcription, LLC

Exhibit E

In re Owens Corning, No. 00-03837 (JFK), Hr'g Tr. at 9-10 (Bankr. D. Del. June 23, 2006) (Dkt. No. 18233)

Debtor filed a motion seeking to enter into a plan support agreement (Dkt. No. 17835). The United States Trustee filed an objection (Dkt. No. 18022). Supplemental responses in support were filed by bondholders (Dkt. No. 18124), the debtors (Dkt. No. 18125), and agent for the bank group (Dkt. No. 18127), and the United States Trustee filed a supplemental statement in opposition (Dkt. No. 18121). The Court held a hearing on June 19, 2006 and granted the motion in a bench ruling on June 23, 2006. An order was entered on June 29, 2006 (Dkt. No. 18208).

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	. Case No. 00-3837
	.
OWENS CORNING, et al.,	. 5414 USX Tower
	. 600 Grant Street
Debtors.	. Pittsburgh, PA 15219
	.
	. June 23, 2006
. . . . .	. 9:32 a.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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For Kensington Int'l:	Stutman Treister & Glatt, P.C. By: K. JOHN SHAFFER, ESQ. 1901 Avenue of the Stars Los Angeles, CA 90067 (Telephonic appearance)

THE COURT: You're all here for Owens, right?

(Pause)

THE COURT: Good morning. Please be seated. This is the matter of Owens Corning, Bankruptcy Number 00-3837, pending in the District of Delaware. The participants I have listed by phone, Marti Murray, Howard Ressler, William Sudell, Andy Chang, Stephen Vogel, Christine Jagde, Francis Monaco, John Elstad, Christine Daley, Edward Leen, Teresa Currier, Eric Kay, Denise Wildes, John Christy, James Gibb, Kate Stickles, Dallas Albaugh, Sharon Zieg, Judy Liu, Rebecca Butcher, Mark Hurford, Peter Lockwood, Eric Sutty, Mitchell Sussman, Hadley Van Vactor, Nathan Chaney, Oliver Butt, Jay Lifton, Bruce White, Marc Casarino, Joseph Gibbons, Gordon Harris, James McClammy, and John Shaffer. I'll take entries in Court, please.

MR. PERNICK: Good morning, Your Honor. Norman Pernick from Saul Ewing, for the debtors.

MR. NEAL: Good morning, Your Honor. Guy Neal, Sidley Austin, for the debtors.

MR. STEEN: Good morning, Your Honor. Jeffrey Steen, S-t-e-e-n, also of Sidley Austin, on behalf of the debtors.

MR. RAICHT: Good morning, Your Honor. Geoffrey Raicht, Sidley Austin.

MR. KRESS: Good morning, Your Honor. Andrew Kress, Kaye Scholer, on behalf of the futures rep.

MR. KRUGER: R. Lewis Kruger, Stroock & Stroock &

Lavan, on behalf of various bond holders.

MR. LAWRENCE: Good morning, Your Honor. Brett Lawrence, Stroock & Stroock & Lavan, on behalf of various bond holders.

MR. PASQUALE: Ken Pasquale from Stroock & Stroock & Lavan for certain bond holders.

MR. KLAUDER: Good morning, Your Honor. David Klauder for the United States Trustee.

MR. THOMPSON: Good morning, Your Honor. Mark Thompson, Simpson Thacher, for JP Morgan Securities. With me is Alice Eaton, also of Simpson Thacher.

THE COURT: Mr. Pernick?

MR. PERNICK: Your Honor, we actually have two items. We didn't officially put the first one on the agenda because we didn't think the Court was asking for further argument.

THE COURT: No.

MR. PERNICK: I think you saw all the submissions.

THE COURT: I did.

MR. PERNICK: But I would suggest -- I don't know how the Court wants to handle that one.

THE COURT: I'm ready to give you a ruling on --

MR. PERNICK: Okay.

THE COURT: -- on the Plan Support Agreement. All right. The Plan Support Agreement I have concluded, after very careful review and discussion with my law clerk, both as to the

terms of the agreement and the cases that we were able to find and look at from the submissions of the parties, I have determined that the Plan Support Agreement is not a solicitation, and therefore the issues that I was concerned with with respect to a disclosure statement and its review are not applicable at all, but let me go through the rationale that I have arrived -- that let me to this conclusion.

First of all, cases define the act of solicitation very narrowly. One case goes so far as to say that the solicitation has to be in the context of a specific request for an official vote. That's the Zentex GBV Fund case at 19 Fed. App. 238 at 247-48. It's a 6th Circuit 2001 case. Of course, in this instance this Plan Support Agreement is clearly to a request for an official vote. There is no ballot, no plan.

Cases also point out the difference between the solicitation and negotiation processes, and recognize that communication between creditors and between the debtors and creditors is crucial to effectuate the goal of the Bankruptcy Code, and that goal, in this instance, the one I'm speaking about, is to achieve consensual resolution of disputes. The Dow Corning case, the Gulph Woods case, and others identify that process and make that distinction.

Here, the Plan Support Agreement is an effort to settle what I think can fairly be called extraordinarily complex litigation, the equitable subordination actions, the

estimation of asbestos personal injury claims, and the fraudulent transfer adversary that's pending in the District Court. Debtors have now been in bankruptcy for over six years, and in that time there has been shifting sands in terms of who holds the blocking position for plan treatment in several classes. The parties have engaged in years of discovery, weeks of trial, and months of appeals, and all the while trying to preserve -- the debtors have been trying to preserve their core businesses and resolve the legacy liability to the satisfaction of the asbestos personal injury claimants.

I think the plan proponents are in a very difficult situation here. They want to propose a plan that meets the consent of all constituents, but determining who the constituents are is a daily changing task. In addition, unless the various litigation is settled, the appeals could stymie confirmation for more years to come. With the automatic stay in place, in that entire time no resolution will occur of the merits of any pre-petition claim, especially those of the asbestos PI claimants who cannot pursue the debtors' assets, but also those of the holders of the bank and bond debt. Meanwhile, interest continues to accrue on the secured portion of the debt, all of which means that there will be less available to the unsecured creditors and tort claimants ultimately. It's time for these debtors to leave bankruptcy behind them, emerge from Chapter 11, and go on with the

successful business lines that they have achieved for decades, so the question is how can the debtors accomplish the goal of emerging without first ascertaining the positions of the creditor constituents regarding the plan? Because successful as the debtors' businesses are, they do not generate sufficient cash -- or, pardon me, let me restate that. They do not have sufficient cash on hand today to be able to pay the $7 billion in tort claims, the $1.8 billion in bond debt, and I have forgotten the exact number of the bank debt. I think it's upwards of $2 billion at this point. Is that correct, Mr. Pernick?

MR. PERNICK: With interest and fees it's a little above 2.3.

THE COURT: All right. $2.3 billion of bank debt. To successfully do that the debtors need the inflow of cash, and that is what the debtors hope to attain through the equity commitment motion that's also set for hearing today. With an enterprise value of $5.858 billion, the debtors obviously need additional capital to pay the claims more than those claims would achieve in a Chapter 7 liquidation. And, of course, JP Morgan has a substantial interest in making sure that when it commits its $2.187 billion for the purpose of providing that equity backstop, that the creditors are actually going to support the debtors' efforts to reorganize in this fashion.

To achieve the consensual resolution of all of these

complex issues, find the funding for a plan, and emerge from Chapter 11 with a confirmed plan, the parties have crafted a settlement agreement in the form of the Plan Support Agreement and presented to the debtors their view of what a plan must contain in order to gather their support. The debtors have 3expressed the intent since the beginning of this case to achieve a consensual plan. Now the debtors have that opportunity. That is the essence of negotiation, not of solicitation.

The agreement is contingent on the debtors filing a disclosure statement and plan that meets with the consent of the participants to the Plan Support Agreement. If those documents do not meet with the constituents' satisfaction, they are not committed to vote for the plan. Credit Suisse, as agent for the banks, is not a party to the plan support agreement, but has nonetheless also submitted a response supporting it.

This, in the Court's view, is a major accomplishment toward confirmation because one of the stumbling blocks throughout this case has been the absence of agreement between the banks and the bonds as to their respective treatments under the plan. The parties have attempted to resolve those differences in a variety of ways, through mediation, through settlement discussions with the Court, through litigation and appeals. Now an agreement has the chance of coming to light

and of remaining in place due to the trading conditions that the parties agreed to if the Plan Support Agreement is approved. The participants to the Plan Support Agreement and Credit Suisse are highly sophisticated, well represented parties in interest. They all have counsel, financial advisors, investment advisors, and those with financial trading arms actively participate in the market for Owens bond and bank debt. After six years of bankruptcy with years of discovery on virtually every aspect of the debtors' businesses, these parties probably don't even need a disclosure statement to inform their ability to vote. But, of course, the negotiations have taken place in light of the fact that the Court did approve a disclosure statement two years ago, and although plan classifications and treatment of some creditor groups has changed due to the reversal of the substantive consolidation ruling, the parties, through their counsel, know all there is to know about the debtors and how the debtors' operations have changed in the two years since the disclosure statement was approved. This is a publicly traded company. There are publicly filed documents. Bargaining after approval of a disclosure statement is clearly appropriate.

There is, of course, need to approve a disclosure statement that comports with the plan that the debtors will advocate for confirmation, and other parties who are not parties to the Plan Support Agreement will need that

information. Further, no vote will be permitted until a disclosure statement that comports with the plan offered for confirmation has been approved. If the disclosure statement and plan proffered for confirmation contain materially different treatment for the classes, then the Plan Support Agreement sets out the parties are not bound to vote for the plan. There is nothing in the Plan Support Agreement that demands or solicits a vote unless the plan proposed meets with the satisfaction of the Plan Support Agreement parties. And those parties have put together in the Plan Support Agreement the information that tells the plan proponents what the parameters of the plan must be to achieve the favorable vote of the creditors who are parties.

The Plan Support Agreement is the written memorialization of the negotiations towards settlement of the legal disputes that have prevented confirmation to date, and of the negotiations toward confirmation of a plan, and that is not the solicitation of a vote. There are no cases that the Court or any party has found that address whether the disclosure statement that the Court approves before solicitation has to be that accompanying the plan that is out for vote; however, I do not need to decide that question today. Here there was no solicitation of any plan. I do note, however, that the sixth amended plan, which is coming up for disclosure statement and confirmation -- let me state that again. I note that the sixth

amended plan and the disclosure statement accompanying that plan had not been filed when the Plan Support Agreement was negotiated. The parties were, in fact, negotiating to arrive at the consensual terms of that plan. The cases approve of negotiation and they are clear that negotiation and settlement do not constitute solicitation in violation of the Bankruptcy Code.

To the extent that there is a fine line between negotiation and solicitation, that line is not crossed here. An order will be entered approving the debtors' request to enter into the Plan Support Agreement.

MR. PERNICK: And, Your Honor, we'll submit a form of order. We still have to finish working out Century's language just for the reservation of rights, which we got, but unfortunately a lot of us were traveling here yesterday, so we'll do that after the hearing.

THE COURT: All right. I'll take it when I get it on a C.O.C. Thank you.

MR. PERNICK: Thank you. Your Honor, the next item is actually Item Number 1 on the agenda that went to the Court, which is the motion to enter into the Equity Commitment Agreement and Guy Neal from Sidley is going to present that.

MR. NEAL: Good morning, Your Honor. Guy Neal, Sidley Austin, co-counsel for the debtors. Your Honor, we're here today on the debtors' motion for an order pursuant to

Section 105(a), 363(b), and 1125(e), for authority to enter into the Equity Commitment Agreement dated May 10th, 2006 between Owens Corning and JP Morgan Securities, Inc. in the form attached to the motion as Exhibit A, pay the related fees and expenses, and furnish certain related -- and what we submit are standard indemnities.

Also seeking approval as part of this order, Your Honor, is approval of the syndication agreement dated May 10th, 2006, in the form attached as Exhibit B to the motion that was executed by and between the investor, D.E. Shaw Laminar Portfolios, Plainfield Special Situations Master Fund Limited, and certain other investor parties. They are referred to as ultimate purchasers and we seek the Court's approval of that agreement as well as a related document to the Equity Commitment Agreement.

Your Honor, only one objection has been filed and we take that objection very seriously, by the Office of the United States Trustee, and with the additional time associated with the movement of this hearing from January 13th to today -- excuse me -- from June 19th to today, we have met with Mr. Klauder of the U.S. Trustee's Office. We have tried to address, in our best efforts, all of his concerns, and Mr. Klauder will speak today, of course, as to his objection.

Yesterday, Your Honor, as you know, we filed a motion for leave to file a reply brief, which I believe Your Honor

kindly granted, and we limited our reply as rules require, to five pages, which was a feat in and of itself, Your Honor.

THE COURT: But said everything it needed to say.

(Laughter)

MR. NEAL: Very good. We appreciate that. This was not to be an evidentiary hearing back on the 19th, but in any event we submitted the declaration -- two declarations, in fact, and JP Morgan submitted one declaration, to pinpoint, target, and address the very specific concerns raised by Mr. Klauder in his objection. So, what we have is, we have the declaration of Mr. Stephen K. Kroll, Senior Vice President, General Counsel, and Secretary of Owens Corning. We also have a declaration, a little bit longer than Mr. Kroll's declaration, but important nonetheless, of Robert Kost of Lazard, the debtors' financial advisors, both of which address the negotiations, often contested, often heated, and certainly burning midnight oil associated with the negotiation of the Equity Commitment Agreement, as well as the debtors' business judgment that this is the best deal the debtors were able to negotiate under the very specific facts and circumstances of this case.

Now, Your Honor, I believe we have the agreement of the U.S Trustee on this point, and we'd like to proceed as follows, if it makes sense to Your Honor. We would like to have those declarations submitted as the proffer of the direct

testimony of these two witnesses. And I believe Mr. Klauder has no objection to that. And Mr. Klauder certainly has the right to cross examine should he feel that that is necessary.

THE COURT: Mr. Klauder, is there any objection to my accepting the declarations as the direct case of the --

MR. KLAUDER: No, there is not.

THE COURT: All right. I will accept the declarations of Mr. Kost from Lazard and Mr. Kroll from Owens Corning as proffered. And do you want to finish your recitation first before I see if there's --

MR. NEAL: Sure, Your Honor -- I'm sorry. I cut you off. Before?

THE COURT: There is cross examination?

MR. NEAL: Yes, Your Honor. If you would?

THE COURT: All right.

MR. NEAL: I appreciate that. And let me stress -- of course, Your Honor, that we have both Mr. Kroll and Mr. Kost in the courtroom today to effectuate the cross examination. They're not by phone. They're here in person, and are willing to address any questions Mr. Klauder or the Court may have. Let me briefly, Your Honor, turn to the evidence that's set forth in these declarations, and then address the United States Trustee's concerns. First, as set forth in fair detail in the declaration of Stephen Kroll, it's the debtors' business judgment reached after consultation with Lazard, their

financial and restructuring advisor, as well as, and this is important, Your Honor, as well as the debtors' co-plan proponents and every other key creditor constituency in these cases that the Equity Commitment Agreement is a critical and integral component of the debtors' Chapter 11 cases, which has been documented in the settlement term sheet and which is reflective in some part in the Plan Support Agreement that Your Honor is now very familiar with, and as well as the sixth amended plan that was on file earlier this month. As set forth in Mr. Kroll's declaration, the Equity Commitment Agreement largely removes the potential risks and uncertainties of the capital markets, mitigates against the financial impact of the cyclicality of these businesses, and provides the claimants that have reached the settlement as set forth in the Plan Support Agreement and the plan. It provides them adequate assurance that the sixth amended plan is or will be feasible. For this reason, Your Honor, the motion has the support of the $7 billion in asbestos claimants subject to a response that was filed by Mr. Kress, as well as approximately 1.5 million of the bond holder claims, and every other major stakeholder in these Chapter 11 cases. Indeed, no claim holder or equity holder, Your Honor, has objected to the merits of the relief that the debtors seek today.

Second, Your Honor, as set forth at fair length in the declaration of Mr. Kost of Lazard, that this Equity

Commitment Agreement and the terms and conditions of it fall well within the four corners of backstop commitments that this Court has approved and that other Courts have approved. And real brief, Your Honor, I won't read, you know, verbatim, and take the Court's time, but real brief, in the declaration of Mr. Kost, it sets forth, specifically in Paragraphs 11, 12, and 13, that the terms and the condition of the Equity Commitment Agreement were heavily negotiated at arm's length between the debtors and the investor and the key variables that Lazard and the debtors and the other parties negotiated with the investor were the period of the time commitment, the conditionality of the time commitment, including what else would apply to it, strike price for the rights offering, and the amount and the nature of the commitment fee and the related fees and expenses.

In paragraph 14 of Mr. Kost's declaration it is Lazard's opinion, certainly shared by the debtors, that the combination of a lengthy commitment period, a firm backstop price, and a firm underwritten backstop commitment makes the terms of the Equity Commitment Agreement no less favorable than the backstop commitment provided in the USG Corporation Chapter 11 case, and largely unprecedented and underwritten rights offering of the size and the complexity of the one contemplated here. The Equity Commitment Agreement as negotiated provides the debtors with extraordinarily high level of assurance that they will ultimately raise and receive the equity capital

necessary to make the payments under the sixth amended plan.

And lastly, Your Honor, in terms of what the declarations say and what I'm trying to underscore, Your Honor, in part, is that in Lazard's opinion the amount and the nature of the backstop and related fees and expense reimbursement undertakings and the other terms are fair and reasonable given the significant benefits to the debtors, the strength and time period of the commitment by an entity such as JP Morgan, and a comparison to other underwritten rights offerings, including USG, as well as the volatility, risks and uncertainty associated with the capital markets, as well as the cyclicality of the debtors' business.

I will now turn my presentation and try to be brief with respect to responding to the anticipated objection or some points raised by the Office of the U.S. Trustee. Now, we've had the opportunity, given an extra few days to put this hearing together, to have a conference call, about an hour, with the Office of the U.S. Trustee to walk the Trustee through some of these economic points and why this deal, we would submit, although USG does not have to be the template that this deal, in many respects, is superior to USG in terms of what we were able to negotiate with JP Morgan in this environment.

Now, even if you accept that USG is an apples to apples comparison --

THE COURT: Well --

MR. NEAL: Yes.

THE COURT: -- let me start this. I am very familiar with the USG equity commitment backstop offering, since it took place in my Court. I do not see that the two cases are in a parity for a number of reasons. First of all, USG was advocating 100 percent plan for all creditor constituents except the asbestos PI creditors with interest, and that plan was already on the table and set for confirmation in a very short period of time at the time that the backstop offering was going forward by the parties. I don't think the plan itself had been set for confirmation. I think the timing -- that what I'm trying to get to is that the short timing involved in that equity rights commitment letter led to an immediate confirmation hearing, and in fact, the case is already confirmed. So, I think the timing issues were significantly different. In addition, Berkshire Hathaway was a major shareholder of the debtor and had some additional incentives, perhaps, to come up with the agreement in the fashion that it did. I am also aware, from that case, as well as the declarations submitted in this one, that there is a significant difference between the regulatory forces facing Berkshire Hathaway and JP Morgan as the offeror of this particular agreement. So, I don't think that they are on a parity for those reasons. There are some issues, however, that I think should be addressed, and I'm not totally comfortable that they

are addressed, as well, in Owens. In that case, not having the fees and expenses reviewed by the Court seemed somewhat less of a concern to me because of the fact that everybody was being paid 100 percent on the dollar with interest and the effective date of the plan was expected to be in a very short time thereafter. I don't know yet because this plan hasn't come up in that kind of a context, whether Owens is in the same position. And I don't know how I'm going to get to confirmation without getting some assurance in this case that the fees and expenses are reasonable, and I don't know how I'm going to get that assurance unless I see them. So, I am a little bit concerned about the fees and expenses in this context. I don't even know what they are. I don't know how I'm going to judge that they're reasonable.

MR. NEAL: Very good, Your Honor. Let me address that specific point. I mean, it certainly is a requirement here under the ECA that the fees and expenses both be non-refundable and the professional fees, which is what Your Honor's point is that they be -- they be paid as part of the deal. Your Honor, this is all a matter of negotiation, and on the one hand you could say --

THE COURT: Regardless, there is a confirmation issue that says I need to make a finding and I don't know how you're going to have me make that finding without telling me what they hare and submitting those fees and expenses to the Court under

the conditions of this case.

MR. THOMPSON: May I speak?

MR. NEAL: Certainly.

MR. THOMPSON: For the record, it's Mark Thompson of Simpson and Thacher. I suspect it's mostly my fees that we're talking about, so I thought I should step up, Your Honor. Your Honor, I've already spoken to the U.S. Trustee just before Your Honor took the bench, and we have no objection in submitting our invoices and the backup detail to whatever protocol there is in this case for paying fees, you know, just like a DIP lender would do in any other case, you know, with -- this is just an equity version of a, you know, exit financing. We're happy to do something like that. I note -- and I think the U.S. Trustee has no objection, I haven't, in anticipation of that, prepared our time records and, you know, fee application guideline conformance, but I am happy to provide whatever detail we would ever provide to a client, you know, to Your Honor or to whatever system Your Honor wants to set up.

THE COURT: All right. Thank you. That will help.

MR. NEAL: And perhaps Mr. Pernick can address -- we already have a mechanism in place that Mr. Pernick is very well familiar with respect to the banks' fees, and that process --

MR. PERNICK: Your Honor, and we just had this thought while we were talking before the hearing. You may recall that under the bank standstill agreement the banks

actually submit their attorneys and financial advisor fees to the debtors and they are reviewed. I can't recall whether anybody else gets a copy, but I don't think that would be an issue.

THE COURT: No, but before we get to confirmation somebody is going to have to tell me what those fees are --

MR. PERNICK: Right.

THE COURT: -- because I'm going to have to determine that they are reasonable, too, so --

MR. PERNICK: Absolutely. Well, there will be --

THE COURT: -- it's the same issue.

MR. PERNICK: That issue has already been anticipated in that there has to be agreement on what the final number for the banks is. Of course, the Court has to approve that, so -- but we would be happy to do the same mechanism, and I think the Court may recall that Owens Corning's legal department actually has a review process that meaningfully goes through these bills, questions its every advisor, every lawyer, every financial advisor, so there is a process that's already in place, and if I recall correctly, I think that's what got Your Honor comfortable with the bank standstill procedure.

THE COURT: That was it. But for confirmation purposes we still need to go the next step.

MR. PERNICK: Not a problem.

THE COURT: All right. Well, it appears -- I'll hear

from Mr. Klauder if there is a concern about that process when he speaks later, but at least from -- for my concern right now I think at least this is a workable issue.

MR. NEAL: Okay. Very good, Your Honor. Unless Your Honor has any other specific concerns that you'd like me to address first, let me just go through some of the issues raised by the U.S. Trustee in our response, and which we tried to put forth in our five-page reply. Next we just talked about the magnitude of the $100 million backstop fee. As set forth in the declaration of Mr. Kost, you know, that amount of fee, that fee, 100 million backstop fee, is not unreasonable under the circumstances of this case. Again, Your Honor has pointed out the differences between this case and USG, and that the USG percentage shouldn't be necessarily used as the ceiling for this deal. Indeed, there are other backstop commitments that have been approved by other Courts in which the fee was higher than the fee being sought here. And again, with USG, just sticking with that for now, we don't have a Warren Buffett willing to backstop 2.187 billion in this instance. You know, no other single investor or group of investors has come forward willing to provide an alternative or superior backstop arrangement. This has been out. My math I don't have in front of me, but this motion has been on file since May 10th, and we have over a 40 day period in which this has been out in the marketplace and public. We have in the declarations of Mr.

Kost as well as Mr. Kroll, you know, a detailed explanation of how the debtors and Lazard have made themselves available to any parties wishing to discuss this arrangement, wishing to submit a competing proposal. No party has put forward a formal expression of interest, and certainly no party has come forward through today, as of now in this hearing, willing to do it under any different terms for any less amount of money. So, in this regard, you know, based on information provided to Owens Corning by Lazard, the fees contemplated are well within the range of similar fees and are certainly market, Your Honor, which is an important consideration.

The Trustee makes an issue concerning the escrow, and really what arguably could be semantical in many respects of what is an escrow? Does this escrow that we propose that exists on an economic and regulatory basis, whether that compares or is equal or is on par with the USG escrow arrangement. Your Honor, we submitted, unfortunately after the 12 noon deadline yesterday, but nonetheless, Your Honor, we did our best efforts to submit a declaration or have JP Morgan, I should say more accurately, submit a declaration on point with the escrow consideration. And as, Your Honor, as we set forth in our papers, there is tantamount under the rules and regulations of the SEC and the Federal Reserve, a requirement that JP Morgan, once this order is approved, allocate 100 percent of that money towards this deal such that they have

opportunity cost concerns of having this money tied up that was the same concerns that this Court really focused on in the hearing in February in USG and for that reason, we submit, what flows from that is the irrevocable nature of the fee. They are agreeing, JP Morgan, the investor, to tie up a significant amount of money on a regulatory basis on their books and records for a comparatively longer period of time, and not only with the risks associated with this deal which we address, and I can touch upon briefly, but the length of that time, we submit, that the irrevocable nature of that fee is also reasonable in this context.

Turning to the release and exculpation provisions, I'll be brief on this, Your Honor, I believe we have been successful in addressing the U.S. Trustee's concerns with respect to the release and exculpation provisions in this order. As Your Honor is well aware, given several of the voting procedure motions that have been on file, and statements, and representations made in the plan and disclosure statement, we're proposing a rights offering effective pre-confirmation, Your Honor. And whereas if you, again, use USG as a comparison, those release and exculpation provisions came in the confirmation order with the rights offering to follow. Here we're proposing similar release and exculpation provisions, again with the rights offering to follow. We submit that that's standard in the other backstop agreements

that we have reviewed, either JL French, Intermet, or certainly in USG. And I believe, again, we have addressed the U.S. Trustee's concerns in that issue.

A couple more points, Your Honor, and then I'll sit down and turn this over to Mr. Klauder or the other plan proponents who might want to say something in support. There is the issue of the syndicate structure. Again, I believe we've addressed the U.S. Trustee's concerns in that regard. We have carefully walked the U.S. Trustee's Office through the nature of the agreement and underscored how this is an agreement -- and we do this in the reply as well, as Your Honor is familiar, between the debtor and JP Morgan only. JP Morgan takes the entire risk in the first instance and is liable to the company for the full backstop amount, and we believe and we have confidence, and this is set forward in Mr. Kost's declaration, that, you know, relying on the good faith and creditworthiness of JP Morgan is certainly a very reasonable thing for the debtors to do in this instance.

This morning, Your Honor, unless Mr. Klauder says otherwise, we might have been able to, you know, convince Mr. Klauder with respect to the commitment, the outs, or in some nomenclature they're called, you know, hell or high water commitments associated with this deal. Your Honor, this is a very similar deal to USG, even accepting that as an apples to apples comparison, but it's very similar in terms of the

limited ability of the investor in this instance to back out of this deal. Importantly, there is no material adverse change clause either from a business or operational perspective of Owens Corning should, God forbid, something happen in the near term, or in terms of the market generally. That is, there are no triggers that would allow, or floor that would allow JP Morgan to back out should the market continue what we have submitted in certain -- in our declaration and exhibits, continue a downward trend in the building product sector. So, we have -- I would not go so far as to use the nomenclature hell or high water, because that's been defined differently in different contexts, but we have a similar arrangement, a very firm backstop commitment of JP Morgan that we believe is reasonable in this marketplace.

Lastly, Your Honor, and we put this at the end of Mr. Kost's declaration. We addressed this in our reply. The parties and the other -- the parties in this case, the debtors and the other key constituents can't ignore the fundamental economics of the marketplace these days. We have submitted a series of exhibits attached to the back of Mr. Kost's declaration which show the performance of the stock prices in the housing sector companies and the declines, fairly steep declines, Your Honor, I mean, to the extent you were a patient in a hospital you would not want this to be your chart hanging on your door reflecting the percentage decline in building

sector companies comparable to Owens Corning. And, Your Honor, you can slice this many different ways. I mean, you can look at it in a six month window. You can look at it in a three month window. But really all you need to do is look at it since May 10th, and the declines associated from May 10th to today in the market with these building sector stocks, the percentage decline is about 20 percent, Your Honor. For that reason, Your Honor, the deal we struck, we submit, has been affirmed, not only from a business judgment standard, but by any standard a being a great deal, and a timely deal for these cases such that, Your Honor, the market has changed dramatically. We do not want to be in a position, Your Honor, to have to renegotiate that deal, which is set to expire unless an order is entered on June 30. So, the market has spoken, Your Honor, to sum up, that this is a reasonable deal. This is a good deal for the estates, and it will put us on a path, on the expedited time track consistent with the sixth amended plan to emerge from bankruptcy, hopefully in the third quarter of this year.

THE COURT: Any of the other plan proponents wish to address this?

MR. KRESS: I do, Your Honor.

THE COURT: Mr. Kress?

MR. KRESS: Perhaps I think I'd like to wait until the U.S. Trustee speaks.

THE COURT: All right. Mr. Klauder?

MR. KLAUDER: Thank you, Your Honor. David Klauder for the United States Trustee. It's nice to make my first trip to Pittsburgh and to this courtroom, no matter how long it took me to get here last night. Your Honor, I want to make a few --

THE COURT: People had trouble getting home, too, Mr. Klauder, if that's any consolation.

MR. KLAUDER: I guess I'd better cancel my dinner plans. I wanted to make a few comments about our objection and then the presentation and the evidence put forth by the debtors to sort of put some context around the pleading that we filed. I want to make it abundantly clear that the U.S. Trustee was not looking to, quote, unquote, blow up this deal. We understand the impact of the deal and the importance of forging the consensus to get to confirmation.

We felt we would not be complying with our statutory duty if we did not closely review the transaction, especially when you're dealing with the payment of $100 million commitment fee on an unconditional non-refundable basis. The payment of such a large amount has to be scrutinized not only by the economic parties which it appears it has, but also by our office, and of course the Court. We felt that the recent transaction in the USG case provided guidance to the Court, and we can look toward those terms and the Court's decision not necessarily as a barometer, but as guidance. Contrary to what

the debtor stated in their reply, we are not looking at the USG deal as a one-size-fits-all transaction, but as we so often do as lawyers, we look towards other cases to see if similar transactions occurred and compare those to the particular transaction that is happening in the case. We also feel it's important to look at different cases and similar transactions because the debtor does have a burden to meet here, and to do so would help in determining whether the debtor has met its burden.

We felt USG especially instructive because it was a very recent case in front of Your Honor here in the District of Delaware, not necessarily here, but in the District of Delaware, and a similar type of bankruptcy case in the sense of a mass tort asbestos bankruptcy case. In our objection we highlighted three major differences with the USG deal that we felt were particularly important in that case and to the Court's decision to approve the USG deal. In the time frame from which the equity commitment motion and agreement was filed and from when our objection was filed we were able to discuss these issues with the debtors in a meaningful way, both in a lengthy conference call and in other phone calls and in a meeting prior to Court today that certainly provides comfort to our office as to the deal that is going forward.

Those particular provisions or those particular differences were as follows. Number one, the no escrowing of

the backstop money. Of course, the Court found that as a major factor in approving the USG deal and the commitment fee. We now understand the differences between the deal, between JP Morgan and Berkshire Hathaway and certainly the arrangement that -- or the -- how they put forth how JP Morgan is subject to regulatory -- subject to regulations, provides us some comfort on that issue. Secondly, here we are dealing with a group of investors instead of the one investor in USG. I think that issue is tempered by the fact that the debtors have put forth today that JP Morgan is solely liable and that debtors can look solely to JP Morgan if something happens with this deal. Finally, we indicated the no hell of high water provisions. We were concerned with the investor, JP Morgan, possibly getting out of this deal. The debtors have assured us from a market type perspective that they have negotiated as many outs as possible out of this deal, and that JP Morgan is assuming a huge risk again provides us comfort on this issue.

Your Honor, we did have to distinct other objections. We've already addressed the first one, and that being the fees and expenses of the attorneys. We certainly were going to request that Your Honor set up some type of process for Court approval of those fees and expenses, and it appears we have done so. It may need some tinkering, I think, with the order, because we're -- it's different -- a different type of process than what is set out in the initial agreement, but as the Court

has proposed and as the parties it appears have agreed, I think we can agree with that process.

Finally, we indicated the release and exculpation provisions. Your Honor, we were concerned that there wouldn't be -- we were concerned with far-reaching on those particular provisions. We don't want to see, quote, unquote, confirmation type releases happening here. It's my understanding that the releases are solely related to this particular transaction, that being the rights offering and the Equity Commitment Agreement, and provided that that is the case, we have no objection to the release provisions -- to release provisions like that. Therefore, Your Honor, that's the end of my presentation. While I'm not withdrawing the objection, per se, I think these comments can be instructive and help the Court in making its decision.

THE COURT: All right. Thank you.

MR. KLAUDER: Thank you.

MR. NEAL: Your Honor, Guy Neal for the debtors. Just to quickly confirm the final two points raised by Mr. Klauder, that we, I think, are in full agreement on. First, the fees and expenses mechanism, as described by Mr. Thompson as well, we're prepared to work out an arrangement in the proposed form of order that will reflect an arrangement that's been consistent, perhaps, relating to the banks but also this Court's review of the reasonableness of those fees. Second,

the release and exculpation provisions I just want to point out, we believe, and the debtors maintain that the existing form of the order is clear that the release and exculpation is related solely to such parties' participation and the transactions contemplated by the Equity Commitment Agreement and the syndication agreement, and any activities arising therefrom. So, they are limited in the respect that Mr. Klauder states. We just wanted to confirm that.

THE COURT: Okay. I think that can be clarified in an order too, so that the U.S. Trustee's Office is comfortable that the order does, in fact, say that they are limited to the specifics of this transaction. I think the agreement --

MR. NEAL: Very well. We'll run the order back by Mr. Klauder again --

THE COURT: Okay.

MR. NEAL: -- before it's submitted.

THE COURT: I think you need to do that with respect to the fees and expense issue anyway.

MR. NEAL: Very good.

THE COURT: All right. Mr. Kress?

MR. KRESS: We agree, Your Honor, that obviously the Equity Commitment Agreement is a key part of the negotiated settlement, but that has been reached. But likewise, Your Honor, there are other key aspects of that settlement agreement which have to be approved by the investor, JP Morgan, the

futures representative, the ACC, as well as the backstop providers, and those include what is called the collar agreements and the registration rights agreement. Unfortunately, Your Honor, during the six-and-a-half week period we had from the time the settlement agreement was reached, until just last week we have not seen any of those documents and we got them for the first time last week. Within 72 hours the futures representative and the ACC submitted a detailed comment. We had our first negotiating session Tuesday, which I would say is productive, Your Honor. Progress was made. However, we're not there yet. We do not have final agreements on the collars. We do not have final agreement on the registration rights agreement. We did get revised documents last night, obviously not -- did not have an opportunity to see if they have raised new issues. And the concern we have, Your Honor, is very simple, that unless those agreements are negotiated satisfactory to the parties, which would be the investor, the future rep, the company, the ACC, as well as the backstop providers, there really isn't a deal. And to allow the company to pay $100 million non-refundable deposit, unless the parties can actually say to this Court, yes, the deal is done, we're ready to go, it seems is not in the best interest of all creditors and the estate, and therefore while this is not -- should not be deemed an objection, per se, to the terms of the equity commitment

agreement because obviously it is a key part of the deal, we do believe, Your Honor, that any payment of the $100 million fees, and preferably the entry of the order should be conditioned upon there being final agreement reached on the two key sets of documents that have to be agreed to for there to be a deal in this case.

THE COURT: All right. Mr. Neal?

MR. NEAL: If you can give me just 20 seconds, Your Honor?

(Pause)

MR. NEAL: Your Honor, for the record, Guy Neal again. Your Honor, we have tried to resolve, right outside the courtroom immediately before Your Honor took the bench, Mr. Kress's concerns and it relates to the interplay of a couple things, Your Honor. First and foremost certainly is the terminable event of this equity commitment agreement if an order is not entered by June 30th. We've already moved this hearing from the 19th to today to allow for more time, and we were hopeful, we thought we would get there.

THE COURT: Well, you've got a week.

MR. NEAL: We've got a week, Your Honor. It might make sense for two things, Your Honor. First, if we could explore your potential availability perhaps by phone next week, number one, and then take a brief adjournment and try to see how we could work out Mr. Kress's concerns. One avenue to

proceed, and I'm not sure we're all in agreement on it just yet, Your Honor, is perhaps to have a hearing date, a telephonic hearing date slotted for Friday, which I believe is the 30th --

THE COURT: I can't do it Friday. I'm going to be traveling to Denver. I can do it Thursday at some point, but I'm going to be on a plane, and, you know, given the weather, I'm not sure when and how --

MR. NEAL: Well, Your Honor, before we commit to that, we could have -- Thursday is a realistic possibility is what Your Honor is saying?

THE COURT: Thursday is realistic, but I need to tell you when, so just a second.

MR. NEAL: Okay. Very good.

THE COURT: It might be midnight, but -- we'll see here.

MR. PERNICK: Be careful what you promise, Your Honor.

THE COURT: Midnight on Wednesday, Mr. Pernick.

MR. PERNICK: Much better.

MR. NEAL: To the extent it matters, Your Honor, we believe that the conference would be very brief.

THE COURT: Well, it looks as though my first motion on motions day doesn't start until 9:15, so maybe we could start at 9:00 Thursday morning. I have a really, as you may

imagine, jammed schedule that day since I'm going to be out of town the following day, and the afternoon is tied up with Pittsburgh Corning and NARCO and GIT.

MR. NEAL: And before we adjourn, that would be telephonic, right, Your Honor?

THE COURT: Telephonic is fine.

MR. NEAL: All right. Very good. Your Honor, if we could just have maybe 15 minutes, with the Court's indulgence?

THE COURT: All right.

MR. NEAL: Thank you so much.

THE COURT: We're in recess.

(Recess)

THE CLERK: All rise.

THE COURT: Please be seated. Mr. Neal?

MR. NEAL: Yes, Your Honor. I believe when you left the bench, Your Honor -- Guy Neal for the record. When you left the bench, I think Mr. Lockwood had a comment to make regarding scheduling of next Thursday.

THE COURT: Okay.

MR. NEAL: He's here by phone.

THE COURT: Mr. Lockwood?

MR. LOCKWOOD: Your Honor, it had to do with your statement that Thursday afternoon matters were Pittsburgh Corning and NARCO/GIT?

THE COURT: Yes.

MR. LOCKWOOD: As you know, I'm involved with both of those. I have the agendas for those two hearings, the second one being the amended agenda for the GIT hearing, which is the later of the two beginning at two. The Pittsburgh Corning hearing, you know, as Your Honor knows, is basically nothing but status conferences on some motions, and that's scheduled for an hour, and based on past experience and the matters on the agenda, it doesn't sound like that's going to take up a heck of a lot more time than an hour, if that. The GIT/NARCO is likewise status conferences, and albeit one of them has to do with the adjourned confirmation hearing, based on my own personal knowledge there's not going to be an extended discussion of where that's going for the moment. And so, I just wanted to observe, it seemed to me it would be pretty likely that Your Honor would be likely, depending on how early Your Honor has to leave the bench that day, and assuming that there's nothing else on that Your Honor might be able -- would highly likely have some time, you know, 4:30, five o'clock, or something like that, for a short call, if that's all this is going to take.

THE COURT: I have an appointment that's in another -- one of the suburbs in the city at six o'clock, Mr. Lockwood, so I'm going to have to leave probably by five at the very latest, and maybe a few minutes earlier depending on what the weather is like and how traffic is going to be that day, so,

you know, if you're telling me that we can be done by -- done with PCC, NARCO and GIT by three, we could do this at three. Otherwise I think we're probably safer at nine.

MR. LOCKWOOD: Three I think is -- I couldn't make that sort of a representation, particularly not without counsel for those debtors around, but my impression from hearing the parties talk is that they're not looking for, you know, a two hour hearing Thursday. They're looking more for a much shorter period of time, but I'll let Mr. Neal and his compatriots address that.

THE COURT: Mr. Lockwood, I'm going to ask my clerk. Maybe she can go give Mr. Ziegler a call while we're on the phone, because he's usually pretty good at estimating the time frames, too, so she'll go make a phone call and come back and see whether he confirms your understanding, and maybe we can --

MR. LOCKWOOD: Yes. Well, my understanding, as I say, it would be likely to be over by four, or something like that. If you really think we're going to need -- if the parties think we're going to need a two hour hearing, then I think we've got a lot bigger problems than that, since you were talking about only giving us from nine until 9:30.

THE COURT: Nine to 9:15.

MR. LOCKWOOD: Even worse.

MR. NEAL: Your Honor, if I may speak to that briefly, Your Honor? We would think that four o'clock, for

instance, would be appropriate, subject to confirming with other debtors' counsel. But, Your Honor, as a point of clarification, Your Honor, subject to the resolution of Mr. Kress's concerns and the two points with respect to the order, with respect to the U.S. Trustee, that being the fees and expenses of the professionals and perhaps a clarification on the release and exculpation provisions, it's our understanding, Your Honor, maybe I should ask in a more affirmative way, is that the Court's proposal to enter the order, Your Honor, such that the hearing on Thursday can simply be whether or not we have resolved the U.S. Trustee's points on the order and Mr. Kress's concerns.

THE COURT: Yes. I think from Mr. Klauder's recitation that concerning the exculpation and release provisions, if he's satisfied with what the agreement says without clarification in the order, then I don't know that it has to go into the order. If you'd prefer that the order simply clarify that those provisions relate only to the terms of this transaction and nothing further, that's an easy half of a sentence to put into the order. And with respect to the fees and expenses I think you'll be able to work out a process. I don't think that's going to cause a problem. Mr. Klauder?

MR. KLAUDER: Your Honor, David Klauder for the United States Trustee. Let me put the one issue to bed. I've looked at the order with the release language, and it's fine.

It's appropriate.

THE COURT: All right.

MR. KLAUDER: We have no issues with it.

THE COURT: Okay. That's fine. So then, you're down to the fees and expense issue, and I can't imagine, based on JP Morgan's agreement to have that submitted, that that's going to tie up this process. So, I think you're down to Mr. Kress's issue, and as soon as you folks tell me that they are resolved and show me what the final documents are, then I think I'm prepared to enter an order. If you can't resolve it and I have to have a hearing, then that -- you know, that's going to be a different issue. But I am sympathetic to Mr. Kress's concern that $100 million is a lot of money in absolute dollar terms, and until all of the documents are in place I'm not going to be entering an order that approves this transaction, so get it done.

MR. NEAL: Very well, Your Honor. We appreciate that -- event, and we think four o'clock would be, to the extent it works for Your Honor, an appropriate time.

THE COURT: Well, at four you get, you know, until let's say 4:50. Is that going to be enough, because -- if you've got it resolved you'll submit it on a --

UNIDENTIFIED ATTORNEY: We're either going to tell you, Your Honor, that we've reached agreement on the documents and we're ready to go, or we're going to tell you we're not

there.

THE COURT: Okay.

UNIDENTIFIED ATTORNEY: And presumably if we're not there we're going to have to talk among ourselves to decide how we're going to get there. Because obviously everyone is moving to try to get this done as quickly as we can, believe me, Your Honor. Unfortunately we've got these type of complicated, complex corporate transactions and documentation. It takes time, issues can come up.

THE COURT: Okay.

MR. NEAL: In the interim, Your Honor, it might make sense to turn to other housekeeping matters that Mr. Pernick has on the scheduling issues.

THE COURT: All right.

MR. PERNICK: Your Honor, I just have one housekeeping matter. In the spirit of sort of continuing what I think we all believe, at least on the debtors' side is an exciting march towards confirmation, we are planning on filing a motion to approve for exit financing purposes a commitment letter. It's in the final stages -- that deal is in the final stages of being negotiated, and we'd like to offer the Court two possible ways of doing this. One is if we could put it on for the July 24th hearing, and that would mean that the Court is shortening time somewhat to hear it. The other one is if the Court is uncomfortable with that, that we have some kind of

hearing date between the July and August hearing dates. And the reason for that is we don't believe the lenders will be able to start the syndication process until the commitment -- until the debtor is authorized to enter into it. And waiting until the end of August really makes it very tight and very difficult.

THE COURT: When are you going to file the documents? Shortened time means shortened by how much time?

MR. PERNICK: I think we could probably file them no later than Wednesday, which is the 28th, and I believe the July hearing is July 24th.

THE COURT: That's fine.

MR. PERNICK: Okay.

THE COURT: Okay. Mr. Ziegler apparently thinks that those three cases should be finished by three o'clock or shortly thereafter, Mr. Lockwood.

MR. LOCKWOOD: That certainly doesn't -- I would have no reason to disagree with that. I was convinced they would be done before four, so if he thinks it's even earlier than that, he's likely to have a little better information than I would.

THE COURT: So, I could schedule this -- if it's going to be by phone, I would suggest 3:30, maybe, because it probably won't -- well, I don't know -- I don't know whether I'll be finished exactly at three, so perhaps 3:30 would give you an hour and a half, roughly. That should surely be enough

time.

MR. NEAL: Very well, Your Honor. Thank you so much.

THE COURT: All right. So, Item 1 is continued to June the 29th at 3:30 by phone. I've forgotten, are you using Court Call?

MR. PERNICK: Yes.

THE COURT: Okay. So, we'll have the dial in number for that process. Are you -- if this is finished before then are you going to submit a final document on a C.O.C.?

MR. PERNICK: I think we would do that.

THE COURT: But are these portions going to be under seal? The --

UNIDENTIFIED ATTORNEY: The documents I was referring to?

THE COURT: Yes, sir.

UNIDENTIFIED ATTORNEY: Oh. They have to -- they will be attached to the plan, obviously have to be fully set forth in the disclosure statement.

THE COURT: Okay. So, they won't be under seal even for purposes of this motion?

UNIDENTIFIED ATTORNEY: No, no. There has to be full disclosure. These are key documents in terms of the registration of rights, for example, between the parties, and the collars, which have -- yes, all that is going to have to be disclosed.

THE COURT: Okay. Well, if you get them done before June 29th, so that you don't need this call, then I guess you could submit them on a certification and attach the new documents to them.

UNIDENTIFIED ATTORNEY: I think the only thing we would be submitting is the order approving the equity commitment agreement because those documents form part of the plan which would ultimately get approved as part of the confirmation order, Your Honor.

THE COURT: Okay. I still want to see them.

UNIDENTIFIED ATTORNEY: I understand. I'm just saying, Your Honor.

THE COURT: Okay.

MR. NEAL: I'm sorry, Your Honor. Guy Neal again. For clarification, I mean, to the extent we make Mr. Kress happy on these issues, are you expecting those documents to be attached in advance of the 3:30 hearing on Thursday?

THE COURT: Yes. If you can -- if you get them finished and can file them on a certification of counsel with an order that approves the agreement with these portions attached and that meets Mr. Klauder's concern with respect to the fees and expenses, I would expect just to approve that order at that time, because then there won't be any objections to the entry of the order and you won't need a hearing. If you --

MR. NEAL: Very good. To the extent, Your Honor, we have agreement in principle reached at 3:29 on Thursday on the documents but not the documents, we'll still go forward.

THE COURT: If the documents are not filed on a C.O.C., we're having a hearing.

MR. NEAL: Very good.

THE COURT: Okay. Because I'm going to want to know what the outcome is, so there will be a hearing unless, you know, by like, say, noon, because if you don't file them by noon, I won't know about them anyway. So, if you get them filed by noon, then I guess, Mr. Pernick, have someone call my chambers and let me know that they are there, because they obviously won't come across my desk that fast.

UNIDENTIFIED ATTORNEY: That's fine, Your Honor.

THE COURT: And we'll cancel the hearing. If they're not filed, then -- even if you've got an agreement in principle you can tell me that, because even if you have an agreement in principle, if you don't get an order entered the next day, and frankly that's not going to happen. So, it's either the 29th or it's not going to be until the following week some time.

MR. PERNICK: Okay. Your Honor, from the debtors' perspective we have nothing further. Again, we appreciate the Court continuing to help us move this towards confirmation.

THE COURT: Okay. Anyone else have any issues? Okay. This item is adjourned, then, until June 29th at 3:30 by

phone, and I will accept the order on the carryover matter from the hearing earlier this week on the Plan Support Agreement when I get it from you, Mr. Pernick, on a certification of counsel.

MR. PERNICK: Okay, Your Honor.

THE COURT: Okay. Thanks. We're adjourned.

MR. NEAL: Thank you.

MR. LOCKWOOD: Thank you, Your Honor.

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C E R T I F I C A T I O N

I, TAMMY DeRISI, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter and to the best of my ability.

/s/ Tammy DeRisi Date: June 27, 2006

TAMMY DeRISI

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