

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF FLORIDA

3 IN RE: CASE NO. 08-10928-BKC-JKO

4 TOUSA, INC., et al.,

5 Debtors.

6 OFFICIAL COMMITTEE OF UNSECURED CREDITORS, ADV. NO. 08-1435-
7 BKC-JKO-A

8 Plaintiff,

9 vs.

10 CITICORP NORTH AMERICA, INC.,
11 et al.,

12 Defendants.

13 ALL MOTIONS ON THE CALENDAR

14 (1135), (1136), (1137), (1138), (1849), (1887),
15 (1926), (1928), (1929), (1930), (1931), (1959),
16 (109), (112), (113)

17 October 23, 2008

18 The above-entitled cause came on for
19 hearing before the HONORABLE JOHN K. OLSON,
20 one of the Judges of the UNITED STATES BANKRUPTCY
21 COURT, in and for the SOUTHERN DISTRICT OF FLORIDA,
22 at 299 East Broward Blvd., Fort Lauderdale, Broward
23 County, Florida, on Thursday, October 23, 2008,
24 commencing at or about 11:00 a.m., and the following
25 proceedings were had:

Reported By: Margaret Franzen

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APPEARANCES:

BERGER SINGERMAN, by
PAUL S. SINGERMAN, ESQUIRE
and
KIRKLAND & ELLIS, by
PAUL M. BASTA, ESQUIRE
M. NATASHA LABOVITZ, ATTORNEY-AT-LAW
DANIEL T. DONOVAN, ESQUIRE
JOSHUA A. SUSSBERG, ESQUIRE
on behalf of the Debtors

AKIN GUMP STRAUSS HAUER & FELD, by
DANIEL H. GOLDEN, ESQUIRE
PHILIP C. DUBLIN, ESQUIRE
and
STEARNS WEAVER, by
PATRICIA A. REDMOND, ATTORNEY-AT-LAW
on behalf of the Committee of Unsecured Creditors

ROBINS RUSSELL, by
LAWRENCE ROBBINS, ESQUIRE
MICHAEL WALDMAN, ESQUIRE
Special Counsel
on behalf of the Committee of Unsecured Creditors

GENOVESE JOBLOVE & BATTISTA, by
PAUL J. BATTISTA, ESQUIRE
on behalf of Aurelius Capital Master Limited, et al.

CHADBOURNE & PARKE, by
JOSEPH H. SMOLINSKY, ESQUIRE
THOMAS J. HALL, ESQUIRE
and
STICHTER RIEDEL BLAIN & PROSSER, by
RICHARD PROSSER, ESQUIRE
and
SMITH HULSEY & BUSEY, by
STEPHEN D. BUSEY, ESQUIRE
on behalf of Citicorp North America, Inc.

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BILZIN SUMBERG BAENA PRICE & AXELROD, by
SCOTT BAENA, ESQUIRE
and
BRACEWELL & GIULIANI, by
KURT MAYR, ESQUIRE
on behalf of the Second Lien Holders
and Wells Fargo, as successor administrative agent

MARKOWITZ DAVIS RINGEL & TRUSTY, by
RACHEL RUBIO, ATTORNEY-AT-LAW
and
WILLKIE FARR & GALLAGHER, by
DARREN GIBSON, ESQUIRE
on behalf of Alix Partners

AKERMAN SENTERFITT, by
MICHAEL GOLDBERG, ESQUIRE
and
MILLBANK TWEED, by
ANDREW LeBLANC, ESQUIRE
on behalf of Senior Transeastern Lenders

RICE PUGATCH ROBINSON & SCHILLER, by
MARC I. ROHER, ESQUIRE
on behalf of Strategic Capital Resources, Inc.

PROCOPIO CORY HARGREAVES & SAVITCH, by
GERALD P. KENNEDY, ESQUIRE (Via Telephone)
on behalf of SC Design of California

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ALSO PRESENT:

JOHN BOKEN
TOMMY McADEN
PAUL BERKOWITZ
SORANO GEORGESCU
CHRISTINA ROMERO, Judge Olson's Courtroom Deputy
JEDD BELLMAN, Judge Olson's Law Clerk

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1 THE COURT: Thank you. Please be
2 seated. Good morning, ladies and gentlemen. Let
3 me take appearances.

4 MR. SINGERMAN: Good morning, your
5 Honor. May it please the Court, I'm
6 Paul Singerman from Berger Singerman and our firm
7 is co-counsel to the debtors, along with the
8 Kirkland & Ellis firm.

9 Your Honor, I don't know if there are
10 any parties intending to participate
11 telephonically. Would you like to ---

12 THE COURT: There are, and I think
13 Mr. Bellman is getting the phone number. You may
14 have it already.

15 MR. SINGERMAN: Do you wish me to
16 proceed with the appearances?

17 THE COURT: Why don't you proceed,
18 Mr. Singerman.

19 MR. SINGERMAN: Thank you, your Honor.
20 Your Honor, along with me from the Kirkland &
21 Ellis firm today in court are my colleagues,
22 Paul Basta, Natasha Labovitz, Josh Sussberg and
23 Daniel Donovan and from the company on your left
24 side in the back, the company's CEO, John Boken;
25 the company's CFO, Tommy McAden; Paul Berkowitz,

1 the chief of staff; and Sorano Georgescu,
2 assistant general counsel.

3 THE COURT: Very good. Thank you.

4 MR. SINGERMAN: Thank you, your Honor.

5 THE COURT: Good morning, Mr. Golden.

6 MR. GOLDEN: Good morning, your Honor.

7 Daniel Golden, Akin Gump Strauss Hauer & Feld,
8 counsel for the official creditors' committee.
9 With me to my right is my partner, Phil Dublin.

10 Also in the Court this morning
11 representing the committee is special litigation
12 counsel, Larry Robbins and Michael Waldman, from
13 the Robbins Russell firm and I'm expecting
14 Trish Redmond from the Stearns Weaver firm.

15 THE COURT: Thank you.

16 MR. GOLDEN: Thank you.

17 MR. SMOLINSKY: Good morning, your
18 Honor.

19 THE COURT: Good morning,
20 Mr. Smolinsky.

21 MR. SMOLINSKY: Joe Smolinsky of
22 Chadborne & Parke on behalf of CitiCorp North
23 America, Inc., in the capacity as first lien
24 agent.

25 We have here my colleague, Tom Hall,

1 also from Chadborne & Parke; Mr. Steve Busey from
2 Smith Halsey & Busey, who is co-counsel for the
3 first lien revolver; as well as Richard Prosser
4 from Stichter Riedel, as co-counsel for the first
5 lien term loan.

6 Thank you, your Honor.

7 THE COURT: Thank you.

8 MR. BAENA: Good morning, your Honor.

9 Scott Baena on behalf of Wells Fargo, as the
10 second lien agent and I'm joined today by
11 Kurt Mayr from Bracewell Giuliani.

12 THE COURT: Very good. Anyone else in
13 the courtroom wish to make an appearance?

14 MS. RUBIO: Good morning, your Honor.

15 THE COURT: Good morning.

16 MS. RUBIO: Rachel Rubio of Markowitz
17 Davis Ringel & Trusy, as local counsel for
18 Willkie Farr & Gallagher, and appearing with me,
19 your Honor, is Darren Gibson, who is counsel at
20 Willkie Farr. He's been admitted to the Court to
21 appear pro hac vice on October 7, 2008, pursuant
22 to this Court's order.

23 THE COURT: And you're representing
24 Alix Partners?

25 MR. GIBSON: Correct.

1 THE COURT: Very good.

2 MR. GIBSON: Thank you, your Honor.

3 THE COURT: Thank you.

4 MR. GOLDBERG: Good morning, your
5 Honor. Mike Goldberg from Akerman Senterfitt on
6 behalf of the Senior Transeastern Lenders. With
7 me today is Andrew LeBlanc from the Millbank firm
8 in New York.

9 THE COURT: Very good.

10 MR. GOLDBERG: Thank you.

11 THE COURT: Good morning.

12 MR. BATTISTA: Good morning, Judge.

13 I'm Paul Battista from Genovese Joblove &
14 Battista and I represent note holders Aurelius,
15 GSO and Carlyle.

16 MR. ROHER: Good morning, your Honor.
17 Marc Roher from Rice Pugatch Robinson & Schiller
18 on behalf of Strategic Capital Resources, Inc.

19 THE COURT: Very good. Are you dialing
20 in?

21 MR. BELLMAN: yes.

22 THE COURT: Good morning, this is
23 Judge Olson in the TOUSA cases. I've just taken
24 appearances in the courtroom. Is there anyone on
25 the telephone conference who wishes to make an

1 appearance?

2 MR. KENNEDY: Gerald Kennedy in
3 California representing SC Design.

4 THE COURT: Thank you. Anyone else?
5 Okay. I'll just assume there are other lurkers
6 out there, but I won't worry about it.

7 Who is orchestrating this morning's
8 extravaganza? Ms. Labovitz, are you taking on
9 your usual role?

10 MS. LABOVITZ: I'll take my chance to
11 come up and say hello, Judge.

12 THE COURT: Good morning.

13 MS. LABOVITZ: Good morning. We filed
14 yesterday an amended agenda for today's
15 proceedings and I believe we had e-mailed that to
16 Chambers.

17 THE COURT: Yes, I believe I have it.

18 MS. LABOVITZ: I also believe events
19 have even overtaken that agenda a little bit,
20 so perhaps the first thing I should do is lay out
21 what I think in the litigation section is not
22 going forward today and then I will very quickly
23 turn it over to the litigators to address the
24 rest.

25 THE COURT: Okay.

1 MS. LABOVITZ: I think all of the
2 motions to dismiss have been adjourned to the
3 next hearing.

4 THE COURT: That's correct.

5 MS. LABOVITZ: So the first item on the
6 litigation agenda would be the motion to modify
7 the case management order. I think people would
8 like to present their views on that and the
9 issues may even have narrowed a bit from what was
10 presented in the pleadings.

11 The motion to compel discovery with
12 respect to Alix Partners will go forward. The
13 motion to compel with respect to the debtors will
14 not go forward.

15 THE COURT: Okay. Very good.

16 MS. LABOVITZ: After that, your Honor,
17 all of the operational matters will go forward
18 and I think whereas typically we present an
19 update on the business and how things are going
20 in the case at the beginning, in this case we'd
21 like to discuss that in the context of the
22 exclusivity motion, which comes at the end.

23 THE COURT: Okay. Very good. Thank
24 you.

25 MS. LABOVITZ: Thank you.

1 THE COURT: Then we are here first on
2 the committee's motion to modify the case
3 management order.

4 Mr. Robbins.

5 MR. ROBBINS: Good morning, your Honor.

6 THE COURT: Good morning.

7 MR. ROBBINS: As Ms. Labovitz
8 mentioned, the parties have been in close contact
9 and I believe, although I will obviously let my
10 co-counsel speak for themselves, I think we have
11 narrowed the ground of potential disagreement,
12 obviously subject to the Court's questions and
13 concerns.

14 I don't want to restate the points we
15 make in the brief. I think it is fair to say
16 that despite the diligent good faith efforts on
17 the parties on all sides, the pace of document
18 production, the pace of document analysis, both
19 for the experts and for fact witnesses, has
20 simply not lived up to the optimistic assumptions
21 that underlay the original case management order.

22 So we have -- we have proposed a
23 schedule that presumes that the experts need
24 three months longer to -- to do the work they
25 need to do, to provide opinions and testimony in

1 the case, and have suggested a schedule that
2 aligns with that basic assumption.

3 Let me say at the outset, your Honor,
4 subject to the Court's questions, I do recognize
5 the -- that there is an interplay, and an
6 important one, between the timing of this
7 litigation and the plan and that subject
8 Mr. Golden, who is very involved in the plan
9 process, as I am not, will address any questions
10 the Court has on that account.

11 THE COURT: Okay.

12 MR. ROBBINS: But with respect to the
13 timing of these events, I think we lay out in
14 some detail in our papers the simple fact that
15 documents have been produced not as speedily as
16 we had imagined, through no fault of anyone's,
17 and also, it's simply more voluminous than
18 anybody could have foreseen.

19 THE COURT: The number of pages that
20 are disclosed as having been produced is
21 staggering.

22 MR. ROBBINS: Yes, and just yesterday,
23 just yesterday we got 47,000 more from Ernst &
24 Young, though as of the time ---

25 THE COURT: That's just a rounding

1 error, isn't it, in this case?

2 MR. ROBBINS: Yeah. Well, perhaps so,
3 but it is striking in comparison to the fact that
4 as of the time we filed our brief, they had
5 produced only 3300 and obviously there is a
6 critical connection between the production of the
7 auditors' documents and the deposition of the
8 debtors, who were the audit client.

9 For all the reasons we set out in the
10 papers, we think that we have suggested a
11 rational schedule.

12 Now, I'm going to let the other lawyers
13 raise questions that they have. I will say that
14 with respect to the concerns articulated by my
15 brother counsel for the various lenders, I think
16 we have narrowed the ground of any lingering
17 debate, but rather than my trying to anticipate
18 or speak for them, maybe the best way to proceed,
19 your Honor, unless you have questions of me about
20 the underlying submission that we made, maybe
21 what I ought to do is let them address the
22 respects in which they disagree and then I can
23 come back and say a word or two about the extent
24 to which we can take a step in their direction.

25 THE COURT: Okay. That's fine.

1 MR. ROBBINS: Before I do, there is a
2 housekeeping matter that makes sense for me to
3 call to the Court's attention before I sit down
4 and yield to my co-counsel, and that is that we
5 were -- our firm was recently engaged as counsel
6 for Wachovia in the litigation surrounding the
7 contested acquisition of Wachovia by CitiBank and
8 Wells Fargo.

9 We were asked to help brief that
10 litigation in the District Court, potentially in
11 the Court of Appeals, on behalf of -- Wachovia is
12 a client and we would be supporting the
13 acquisition by Wells Fargo.

14 As the Court knows, Wachovia is a
15 lender under the revolver. Wells Fargo is
16 obviously the agent for the second lien lenders.
17 We have obtained waivers from all affected
18 parties.

19 We have submitted those waivers to the
20 committee and we will be providing a supplemental
21 disclosure to the Court that reflects the fact
22 that we have obtained these waivers, that
23 everyone is satisfied that we have a conflict
24 free representation and that we will be providing
25 that forthwith, but I did not want my first

1 appearance to pass without calling that fact to
2 the Court's attention.

3 THE COURT: Is Wachovia a participant
4 in any of these financings that are part of this
5 case?

6 MR. ROBBINS: My understanding is they
7 are a participant in the lending -- they are a
8 lender under the revolver.

9 THE COURT: Under the revolver only?

10 MR. ROBBINS: Correct. That is the --
11 to my -- my understanding is that's the limited
12 extent to which they're involved, but the
13 revolver folks could correct me. That's my
14 understanding. If I am not correct about that,
15 I'll yield to the experts who know better.

16 MR. SMOLINSKY: Your Honor, it's --
17 it's possible that Wachovia is in the revolver, I
18 really don't know. I think the conclusion you
19 could reach from that is that they're not a very
20 active player in that regard and so we ---

21 THE COURT: They, and the institution
22 you represent, have other fish to fry.

23 MR. SMOLINSKY: We have no objection
24 to ---

25 THE COURT: Fine. Okay.

1 MR. ROBBINS: Obviously, we took a
2 conservative view of our conflict obligations and
3 so notwithstanding their, perhaps peripheral role
4 in the matter, we thought it prudent to get a
5 waiver anyway.

6 THE COURT: Yeah, I think that's
7 prudent and unless somebody has a problem with
8 it, I don't. But if someone does, then please
9 alert me to it so that an issue can be hashed out
10 as quickly as possible.

11 MR. GOLDEN: Your Honor, let me just
12 add that when Mr. Robbins brought this situation
13 to my attention, we did speak to the committee.
14 The committee will be a signatory to the waiver
15 agreement.

16 I have brought this matter to the
17 attention of the United States Trustee's Office.
18 Mr. Schneiderman didn't opine an opinion one way
19 or another, but wanted to ensure that a
20 supplemental disclosure was going to be filed.
21 As Mr. Robbins said, that will be filed shortly,
22 which will have a copy of the waiver attached, so
23 from the committee's perspective we are
24 satisfied.

25 THE COURT: Very good. Thank you. I

1 guess my principal question to you, I think,
2 after reviewing the papers is, what is your view
3 of the propriety or not of post-expert deposition
4 discovery of the debtor, which is sought by one
5 or another of the banks?

6 MR. ROBBINS: It's actually sought by
7 Wells Fargo and CitiBank. We are not advocating
8 that. We are not opposing it. But if the Court
9 is inclined to grant it, as I know my brother
10 counsel will advocate for, I do think there are
11 rational ways to do it and, perhaps, less
12 rational ways to do it.

13 The more rational way, in my view, your
14 Honor, would be to have a clear prescription of
15 the starting date and the ending date, number one
16 and number two, that time period should be the
17 same for both the committee and for the lenders.
18 Finally, that period of time ought to occur
19 before the depositions of the experts so that
20 when they raise their right hands and swear to
21 their opinions under oath, they are aware of all
22 facts, including the so-called supplemental
23 facts, that have been developed.

24 So while we're not propounding it, and
25 I have to confess, I've never been in a

1 litigation where that has happened, although I'm
2 not opposed to it --

3 THE COURT: Okay.

4 MR. ROBBINS: -- but I do think there
5 are better and poorer ways to proceed and in our
6 view, if it's going to happen, the best way is to
7 have a defined period of time with a triggering
8 date.

9 For example, they get 30 or 40 days
10 from the time we provide the plaintiff's expert
11 report. We get 30 -- the same 30 or 40 days from
12 the time they provide the defense expert report.
13 We finish those 30 and 40-day periods and then
14 the experts are deposed.

15 That's one way to do it. It's not the
16 only way to do it, but I do think that if we're
17 going to have this, it ought not be free
18 floating, you know, so that the experts find
19 themselves shooting at moving targets and don't
20 even know until the time they get on the stand in
21 this courtroom precisely what they're shooting
22 at.

23 But with that, unless the Court has
24 questions of me, maybe we should hear from the
25 counsel who have different views from the ones

1 we've submitted in our papers.

2 THE COURT: Very good.

3 MR. ROBBINS: Thank you, your Honor.

4 THE COURT: Thank you, Mr. Robbins.

5 Mr. Hall.

6 MR. HALL: Good morning, your Honor.

7 As I think we indicated in our papers, the
8 three-month requested extension for the trial
9 date seems reasonable in light of where we find
10 ourselves in documentary discovery. We have not
11 stipulated to that -- we haven't opposed it, but
12 we haven't stipulated to it because there may be
13 an interplay between the resolution of the
14 litigation and the plan. You know, we heard just
15 a few months ago that there definitely was under
16 the plan as filed.

17 It seems as though the debtor no longer
18 thinks that. Whether that plan is confirmable,
19 we don't know. We remain willing to keep the
20 peddle to the metal and to keep on a very
21 expedited schedule, but if your Honor is inclined
22 to push out the schedule, we find the three-month
23 extension to be reasonable.

24 I think where we find ourselves is,
25 really the issue your Honor raised is the sole

1 remaining issue of dispute, and I don't think
2 there's any real dispute that there should be
3 some fact discovery during the expert phase.
4 This goes back, your Honor, to the request by the
5 committee a couple of months ago to get direct
6 access to the debtors' database and we expressed
7 concern that the reports they would generate and
8 rely on would not be produced during fact
9 discovery, that we would see them for the first
10 time in expert discovery attached to the expert
11 reports. We wanted the ability to go back into
12 the debtors' records and to depose the debtors'
13 witnesses concerning those reports.

14 The sole issue, and I don't think it's
15 a big one, is how we structure that. The way we
16 structured it, there's a two-month period of
17 expert discovery. We simply overlaid the fact
18 discovery of the debtors with that. It wouldn't
19 extend the schedule.

20 They had proposed that we each have a
21 30 or 40-day window to do that. I don't know if
22 that's sufficient for the debtor to produce
23 documents and produce witnesses for depositions.
24 It would also -- they would tack that onto the
25 expert process, so that would add two or three

1 months to the overall schedule, which gives us
2 some concern.

3 We think that simply allowing that type
4 of very limited, I think, fact discovery to go
5 forward during the expert phase with a lot of
6 cooperation, we can get it done before the expert
7 depositions and without adding to the overall
8 schedule.

9 The other points, your Honor, I think
10 we have reached agreement that we would go back
11 to -- on the depositions to the staging concept.
12 We would do some debtor depositions first. We
13 are willing, as we've expressed, to commence
14 those depositions in November, but if the overall
15 schedule is being pushed out, we have no
16 objection to waiting until December 1 for those
17 and on the other things, the motion to dismiss
18 scheduling and including a date for completion of
19 document production, I think we've reached
20 agreement on those.

21 THE COURT: Okay.

22 MR. HALL: Thank you.

23 THE COURT: Thank you. Mr. Baena.

24 MR. BAENA: May it please the Court,
25 your Honor, on behalf of Wells Fargo. I gather

1 you're getting the point. It's not if, it's how
2 we accommodate the additional discovery in
3 respect of the experts and there are two
4 different views and in somewhat of a sociological
5 experience for me, we are actually siding with
6 those who are suing us.

7 We do believe that there should be an
8 identified period of time that separates the
9 process of promulgation of reports and discovery
10 by deposition of the experts while we accomplish
11 what we're looking for, and that is to have
12 access to the debtor, its records, in order to
13 vet the reports.

14 Whichever proposal you accept, we're
15 concerned that without this defined period of
16 discovery, specifically in respect of the
17 reports, and the overlay, as Mr. Hall describes
18 it, of fact discovery continuing throughout that
19 period, it just presents so many opportunities
20 for mischief, and I don't mean that in a highly
21 critical way, in a case where there is such a
22 proliferation of parties at this point, and this
23 just seems to be a neater way of doing it.

24 And so we would urge that we move in
25 the direction that Mr. Robbins described as

1 rational.

2 THE COURT: Thank you.

3 MR. BAENA: Thank you, sir.

4 THE COURT: Mr. Donovan.

5 MR. DONOVAN: Yes, your Honor. Good
6 morning. On behalf of the debtors, we didn't
7 take a position on the scheduling dispute
8 explicitly, but I would like to raise a few
9 issues for your consideration, that Mr. Basta
10 will address in more detail related to the plan
11 process, but I feel a little bit like an Old
12 Testament prophet. I keep saying the same thing
13 every time we come here, the trial date, the
14 trial date, the trial date, and everyone involved
15 in litigation continues to push the trial date
16 and I understand the rationale, but it will have
17 impacts on the debtor.

18 For context, which I think is important
19 here, the committee originally proposed a
20 January 19th trial date, that was the original
21 date. There was then negotiations. The CMO --
22 CMO that was signed and proposed by the parties
23 was a March 9th trial date. We're now having a
24 proposal for a June 15th trial date.

25 As you see, the slippage continues and

1 as counsel for the debtors, we have several
2 concerns. First, as Mr. Basta will address in
3 more detail in his presentation related to the
4 plan, the debtors continued stay in bankruptcy is
5 negatively impacting the business and the
6 parties' proposed schedule, now taking it out
7 until a June trial date with some disputes with
8 potential other bumps, demonstrates that this
9 fraudulent conveyance litigation really should be
10 divorced from the plan process.

11 Moreover, because most of the discovery
12 has been focused at my clients, the debtors, we
13 also have concern about the breadth of the
14 discovery. You've heard about the pages that
15 have been produced. We've produced it. We don't
16 think it's all relevant or needed to be, but
17 we've all been working together, I agree with
18 that. There's been a lot of production.

19 Against the background of the cost and
20 over-breadth, it bears -- really bears some
21 emphasis that no depositions have occurred yet
22 and that will be one of the most expensive parts
23 of the case. A deposition of one of the debtors'
24 employees will likely involve a room full of
25 lawyers and experts all day on multiple

1 occasions.

2 So in the end, the debtors wanted to
3 raise these concerns with your Honor as you
4 consider this, and as I said, Mr. Basta will
5 address it more in the plan context.

6 The one other issue is related to this
7 kind of tail discovery of the debtor. On that we
8 would object for several reasons. One, I won't
9 re-go through it, but this is the S-Face issue,
10 your Honor. This was where everyone is running
11 their own reports on S-Face and from my
12 discussions with the client, someone puts some
13 report that someone else ran and said, what is
14 it? They're going to say, I don't know, go to
15 who ran it.

16 I guess I have some concern about what
17 that's going to involve. I think that's going to
18 be a bit futile.

19 THE COURT: Well, that might make for a
20 very short deposition.

21 MR. DUBLIN: Very well. I just want to
22 tie that back. That comes back to the issue we
23 had concerns about before that we're not sure
24 what it would accomplish because I believe it's
25 related to that issue.

1 THE COURT: But I can foresee somebody
2 wanting to take the debtors' temperature on
3 whether some report that's been run is reflective
4 of the debtors' perception of reality. I
5 appreciate that that -- that that may require
6 somebody to look at a report that they didn't
7 have anything to do with generating, and it may
8 lead to answers that are along the lines of
9 darned if I know, which is what you're
10 suggesting --

11 MR. DUBLIN: Right.

12 THE COURT: -- or else, well, if that's
13 what you got out of the computer when you asked
14 that question, then I guess the answer is yeah.

15 MR. DUBLIN: Right.

16 THE COURT: But I think that at a more
17 fundamental level, there's going to be questions
18 that say that there will be specific kinds of
19 information that the parties will want to
20 validate. I can certainly foresee the
21 desirability on the part of the litigants to have
22 validation or not of whatever their pet theory is
23 from the debtor and to have the debtor pin down
24 before the experts are deposed so that, as
25 somebody suggested this morning, it doesn't turn

1 into a mischief making event, in which new facts
2 squibble out at the last minute causing everybody
3 to -- I mean, we've all had days like that and
4 nights like that, but let's minimize them,
5 particularly because of the importance of the
6 litigation to everybody.

7 Now ---

8 MR. DUBLIN: And just so -- I'm sorry.

9 THE COURT: No, go ahead.

10 MR. DUBLIN: Just so your Honor is
11 aware, that's been happening.

12 THE COURT: Sure.

13 MR. DUBLIN: I mean, Mr. Boken and his
14 team has been providing information, telephone
15 calls, that's been going on. I guess my only
16 concern, and we raised it before, is kind of the
17 efficiency of it, but it sounds like your Honor
18 understands our position. We'll deal with it.

19 THE COURT: Yeah, and I'm very
20 sensitive to the expense of it. I've spoken on
21 that subject before and I don't need to repeat
22 myself, I don't think, but inherently this is
23 incredibly expensive litigation and I'm not quite
24 sure how to solve that problem.

25 Okay. Let me hear from Mr. Basta about

1 how this -- or do you want to speak later,
2 Mr. Basta, about plan issues?

3 MR. DUBLIN: I think he's going to
4 address it more in a plan presentation.

5 THE COURT: Okay, that's fine.

6 MR. BASTA: I think we can proceed with
7 the litigation and I can deal with it in the
8 context of exclusivity, your Honor.

9 THE COURT: Great, thanks.

10 MR. LeBLANC: Good morning, your Honor.
11 Andrew LeBlanc of Millbank Tweed on behalf of the
12 Senior Transeastern Lenders.

13 Your Honor, I can offer one suggestion
14 for how to make this litigation less expensive,
15 at least for one group of litigants, and really
16 the one group that is unique ---

17 THE COURT: Let you out, yeah, I'm
18 sure.

19 MR. LeBLANC: Well, hear our motion to
20 dismiss would be certainly one, but, your Honor,
21 we did not oppose the committee's suggestion. We
22 don't oppose a three-month extension of the
23 period for trial. We agree with the debtors
24 significantly, seeing the plan that has now been
25 filed, that this, in fact, can be divorced from

1 the plan process.

2 In light of events of yesterday
3 afternoon, your Honor, with your Honor sua sponte
4 delaying the motion to dismiss, we feel compelled
5 to rise again to ask, as we did last time we were
6 here, that we impose a little bit of normalcy to
7 this process now that we have what appears to be
8 a litigation divorced from the plan process or at
9 least the ability to divorce the litigation from
10 the plan process.

11 We have now been engaged in discovery
12 at enormous expense and the one party here or the
13 one group of entities here that are not estate
14 funded, at enormous expense to us without ever
15 having the legal sufficiency of the claims
16 against us tested.

17 The contemplation now under the
18 proposed schedule is we don't have a hearing --
19 if I understand correctly, we don't have a
20 hearing on that until December, which would
21 entail six more weeks or more of enormous costs
22 for our clients.

23 We've produced -- I think in their
24 schedule we've produced 150,000 or so pages. I
25 think we've produced another hundred thousand or

1 so, I don't have the exact numbers. We probably
2 have another, possibly as much as a million pages
3 to go to be produced. It is enormously expensive
4 for this group of clients.

5 What we would recommend, your Honor,
6 frankly, in light of the decision to delay the
7 motion to dismiss, we think -- and the divorcing
8 of this litigation from the plan process, we
9 think the time is appropriate to consider putting
10 a hold on discovery, letting motions to dismiss
11 be heard by all of the new defendants that have
12 come into the case pursuant to the amended
13 complaint and our clients.

14 Let those motions to dismiss be heard,
15 treat this as you would -- as any court would, a
16 normal litigation in that you don't have
17 discovery ongoing while there's questions as to
18 the legal sufficiency of the allegations.

19 Your Honor, I'm not going to argue in
20 any respect our motion to dismiss, but we think
21 there are significant questions about this
22 complaint. It is not the case that we would be
23 here in any respect were these claims against us
24 dismissed, we simply would be off doing other
25 things. These financial institutions would be

1 off doing other things. They wouldn't be
2 involved in this litigation at all.

3 THE COURT: Would they be engaged in
4 lending?

5 MR. LeBLANC: Well, I certainly hope
6 so, your Honor. It would be nice to see that for
7 everybody's sake. But, your Honor, we aren't
8 parties to this case otherwise.

9 As your Honor is well aware, for the
10 most part, some of them have different
11 capacities, some of them wear more than one hat,
12 but most of these lenders are in this case only
13 because of this litigation. We weren't here --
14 you didn't see my face until we were sued, your
15 Honor.

16 So we would recommend, we would
17 strongly encourage that the Court consider
18 whether it is appropriate to put this case on
19 hold, put the discovery aspects of this case on
20 hold until the Court is able to test the legal
21 sufficiency of the allegations, at least as
22 against my client.

23 THE COURT: What is the current
24 response due date on the amended complaint?

25 MR. LeBLANC: I believe it is -- there

1 was 18 days. It's sometime in November under
2 their -- under Chadborne's proposed schedule. I
3 don't know exactly the date, but I know the reply
4 comes in, I believe it's November 25th under
5 their proposed schedule, with a contemplated
6 hearing in early December is my understanding.
7 And because we aren't taking a position on this,
8 your Honor, we haven't been involved in any
9 discussions that have been going on over the last
10 couple of days.

11 We had discussions with the committee.
12 We told them we're not going to oppose your
13 request, so we haven't really been involved. We
14 also thought that was all in contemplation of us
15 being here today to argue a motion to dismiss.

16 THE COURT: And I, frankly,
17 Mr. LeBlanc, concluded that arguing a motion to
18 dismiss on a complaint that's already been
19 superseded is frivolous.

20 MR. LeBLANC: Well, your Honor ---

21 THE COURT: I mean, the substance of
22 certain arguments may be exactly the same, but
23 I'm not sure you know that and I sure don't know
24 that.

25 MR. LeBLANC: Understood, your Honor.

1 We would submit, as we did in our response to the
2 committee's, I guess it was termed a suggestion,
3 that it would have resolved any issue in the
4 case. We think there's a single fundamental
5 legal question that if it is answered as we think
6 it should be, then the complaint and the amended
7 complaint go away.

8 I don't want to argue that, your Honor
9 put that off, but I have great concern that we're
10 going to be involved in this case for another six
11 weeks before the legal sufficiency of the
12 allegations are even tested and it is at enormous
13 expense, not being funded by the debtor, and
14 whether that's good or bad -- it's clearly good
15 from the estate's perspective, but it certainly
16 is not from our client's perspective.

17 So we'd ask that the Court impose some
18 rationality on this and from the perspective of
19 our clients, and from the perspective of the new
20 defendants that have been added, and test the
21 legal sufficiency before we damage the clients to
22 the extent that it will be through this
23 discovery.

24 THE COURT: Is it now contemplated that
25 the motions to dismiss be heard on December 4th

1 or is it a different date?

2 MR. LeBLANC: The proposal -- I don't
3 know if there's been changes, but the proposal,
4 as I understand it, your Honor, was that at a
5 December hearing there would be a motion on and
6 some of the people who have been involved in, you
7 know, negotiating the schedule may be able to
8 tell your Honor exactly. But my understanding is
9 that it was proposed to be sometime in December.

10 THE COURT: I'm currently looking at my
11 calendar and I note that I've got a trial in the
12 TOUSA case scheduled for Wednesday, the 3rd of
13 December, and omnibus hearings on TOUSA on the
14 4th and I don't see any other dates in December
15 marked for TOUSA.

16 Does anybody know any different?
17 Ms. Labovitz, are you the calendar person?

18 MS. LABOVITZ: I think that's right, at
19 least with respect to the omnibus dates.

20 THE COURT: Okay. That means that the
21 response date for the motions to dismiss is two
22 days before Thanksgiving and the argument is a
23 week after Thanksgiving. I'm not sure how you
24 compact that schedule, Mr. LeBlanc.

25 MR. LeBLANC: No, I think your Honor

1 has made the decision that the motions will be
2 heard with respect to the amended complaint only,
3 that's fine.

4 What we would suggest is that there be
5 a stay on discovery during this period of time
6 because it impacts a majority of the defendants
7 in this case. It now impacts all of the new
8 defendants because the committee has suggested
9 that those new defendants have an argument that
10 they intend to make that is diametrically opposed
11 to our argument.

12 We think that's extraordinarily
13 unlikely that it will be made, but if they intend
14 to make it, they will make it. We will make our
15 arguments and then we will be here on
16 December 4th and we would treat this like any
17 other litigation, where motions to dismiss are
18 heard before discovery commences and in this
19 case, before discovery is complete for many of
20 the parties.

21 THE COURT: If I were to do that, isn't
22 that going to add six weeks to the litigation
23 schedule and so we're talking about a July trial?

24 MR. LeBLANC: I think it should, your
25 Honor. Your Honor, it's not -- it ---

1 THE COURT: Do you know what the burn
2 rate in this case is, Mr. LeBlanc?

3 MR. LeBLANC: Well, if we put a stay on
4 discovery, I would expect the burn rate in this
5 case with respect to the litigation would be
6 significantly less and the debtors' plan
7 contemplates emergence with this litigation being
8 assigned to a litigation trust.

9 It isn't as though the debtors couldn't
10 emerge and they've made clear in their plan, they
11 could emerge and let this pass to a litigation
12 trust and continue.

13 So the burn rate, I think, is wholly
14 apart from this and what it would allow the
15 parties to do, I fully expect Mr. Smolinsky is
16 going to make an argument with respect to the
17 revolving lenders, we have our argument, the
18 mezzanine Transeastern Lenders have their
19 argument, it will allow the Court to understand
20 who the parties are before discovery really
21 recommences.

22 Your Honor, it's not so outlandish a
23 thought. It's what happens in virtually every
24 litigation where motions to dismiss are heard
25 before discovery commences in earnest. The only

1 reason suggested, and the last time we were here
2 there was no plan proposed, so when I said let's
3 put a hold on discovery while motions to dismiss
4 are being heard, it was -- it wasn't -- it wasn't
5 a suggestion that was well taken because there
6 was no plan. It was contemplated, as it has
7 always been in this case, that the conclusion of
8 this litigation was a gating issue.

9 Well, your Honor, that no longer is the
10 case. That isn't the case. It's clear that even
11 if this plan is not confirmable, some other plan
12 could happen that assigns these claims to a
13 litigation trust and we can then treat this the
14 way that every other litigation is treated so
15 parties don't spend all of the money in discovery
16 before they even know if they're appropriately
17 there. That's all we're asking, your Honor. I
18 think it would be entirely appropriate.

19 It would add six weeks to the schedule,
20 but it would do so in a way that would save an
21 enormous amount of resources, both for us and for
22 all of the parties who are taking our discovery
23 and reviewing our discovery. Those expenses
24 would go away. We think it would be a very
25 logical step in light of the events of the last

1 several weeks.

2 THE COURT: I understand your argument.

3 Thank you, Mr. LeBlanc.

4 Mr. Robbins.

5 MR. ROBBINS: Four very quick points,
6 your Honor. Mr. Hall's suggestion that this 30
7 days be an overlay over the current -- over our
8 proposed expert schedule, I think it's important
9 to see that there is a sort of -- what the
10 implications of that are. Because the
11 plaintiff's expert report is provided 30 days
12 before the defendants' expert report, if that is
13 the triggering event for a continuous
14 supplemental discovery schedule, the consequence
15 is that they get 30 days more than we do to
16 engage in this supplemental fact discovery.

17 That is why I share with Mr. Baena the
18 view that we ought to predescribe a particular
19 period of time and it ought to be the same period
20 of time for both parties with a beginning and
21 ending date that makes rational sense.

22 Point two, to the extent that the
23 slippage of the trial date has implications for
24 the plan or doesn't, I yield that to Mr. Golden,
25 who will address it at whatever time the Court

1 wishes to hear that point.

2 Third, I don't want to dwell on it at
3 length, but I do think that Mr. LeBlanc's
4 argument rests, I respectfully suggest, on a
5 mistaken impression about how litigation
6 ordinarily proceeds. In my experience, the
7 pendency of a motion to dismiss does not mean
8 that discovery -- does not mean that it grinds to
9 a halt or doesn't begin.

10 Indeed, the law makes, I think, rather
11 specific and infrequent exceptions to the general
12 rule that discovery goes forward. For example,
13 Congress had to enact PSLRA in order to provide
14 that discovery in a securities case -- class
15 action case when there's a pending motion to
16 dismiss, it does, in fact, create a freeze on
17 discovery, but that's the rare counter example.

18 As I said the last time when this issue
19 arose, I don't think even if, I respectfully
20 suggest in the unlikely event, but I could be
21 wrong, I've been wrong before, but even if the
22 Transeastern -- Senior Transeastern Lenders'
23 motion to dismiss prevails on December 4th, I
24 don't think that would relieve them of a
25 discovery obligation anyway, any more so than

1 E & Y that was never a defendant in this case,
2 Alix Partners, which has never been named as a
3 defendant or Lehman Brothers. They're third
4 parties. They provided discovery.

5 In other words, I don't think the
6 disposition of this motion, even had it been
7 heard and resolved today, would have alleviated
8 the burdens of discovery that Mr. LeBlanc,
9 understandably for his client, is concerned
10 about.

11 I mean, so I think it begins with a
12 false assumption and I also think it sort of
13 misses the mark because they would absorb those
14 costs anyway, as the Court noted and as
15 Mr. LeBlanc, I thought appropriately,
16 acknowledged. It would also lengthen a schedule
17 that none of the other parties are looking to
18 lengthen beyond the agreed to three months.

19 Let me just say, finally, if the Court
20 is agreeable on the broad principles on which the
21 parties have generally agreed, on the somewhat
22 smaller details of, for example, when a
23 particular set of discovery deadlines will end or
24 begin, I suspect it would be easier for the
25 parties to sit down after today's proceeding, if

1 the Court agrees on the general principles, for
2 us to simply negotiate those details on which I
3 doubt we will have any material disagreements and
4 submit a joint order consistent with the Court's
5 rulings.

6 Thank you, your Honor.

7 THE COURT: Thank you. Anyone else
8 wish to be heard further?

9 Mr. Hall.

10 MR. HALL: Your Honor, just one very
11 minor point of clarification. Mr. Robbins
12 misspoke when he said there was a 30-day period
13 built in between the expert reports. Actually,
14 it's about -- under our schedule, plaintiff's
15 expert report is due March 16, defendants' on
16 April 3, so it's about two, two and a half weeks.

17 THE COURT: Okay. What is it under
18 your schedule, Mr. Robbins, due the same time
19 or ---

20 MR. ROBBINS: No, let me just come to
21 the page. Our -- the spread between our report,
22 our report would be on 3-27, theirs would be on
23 4-17, but I thought I read their proposed
24 schedule to say -- I'm sorry, I should be ---

25 THE COURT: It's okay.

1 MR. ROBBINS: I thought I had read the
2 plaintiff's expert report is 3-16 and there is --
3 I'm not sure which document to be reading because
4 there's a proposed order and there's a comparison
5 of dates.

6 THE COURT: Comparison of dates is
7 attached to Docket 123, is the one I was looking
8 at.

9 MR. ROBBINS: Yeah, yeah. That appears
10 if ours is submitted on the 16th of March, theirs
11 is submitted on the 3rd of April, so that would
12 be, what, 15, 18 days. So I guess they would
13 have -- if that's what they would have in mind,
14 it would be not 30, that's correct, 18 days, but
15 I guess our -- the principal remains the same.
16 We think it ought to be the same period of time,
17 whatever the triggering event is.

18 THE COURT: My question for both of you
19 is that I'm somewhat confused. Are the expert
20 depositions occurring before, simultaneously with
21 or after the conclusion of the return to the
22 debtor depositions?

23 MR. HALL: Your Honor, the current
24 schedule has -- at least our proposed schedule
25 has plaintiff's expert report March 16,

1 defendants' expert report April 3, plaintiff's
2 expert depositions beginning on April 13th and
3 defendants' expert depositions beginning or
4 running into early May. So there's a 30 day --
5 at least a 30-day window there between the report
6 and the depositions.

7 THE COURT: Well, then I see this thing
8 that also says conclusion of supplemental fact
9 discovery for purpose of clarifying or addressing
10 issues raised in expert discovery, which runs to
11 May 15th on your schedule and that's after the
12 depositions of the experts.

13 And so my question to the parties is:
14 Should the supplemental fact discovery occur and
15 be concluded prior to the commencement of the
16 expert depositions?

17 MR. HALL: I think our proposal allows
18 for both, that some can be done in advance so
19 that we can get more facts for those depositions,
20 but to the extent we learn things from the expert
21 depositions that cause us to need to go back to
22 the debtors for more information, we would want
23 the ability to do that, your Honor.

24 THE COURT: Yeah, I think that there is
25 a limited number of times I'm prepared to let

1 people go to the well.

2 MR. ROBBINS: I also think, in fairness
3 to the experts, they really need to know what the
4 factual record is on which there are sworn
5 opinions. I really think that when folks raise
6 their right hand and swear to tell the truth,
7 they ought to have the fact record complete.

8 THE COURT: That's certainly the ideal
9 and there are times when I wonder.

10 MR. ROBBINS: It's at least worth --
11 it's at least the hortatory goal.

12 THE COURT: Well, let's honor it in
13 expectation.

14 MR. ROBBINS: Well, that being the
15 case, I guess, I think that -- and again, we're
16 not a proponent of this 30-day window, but I do
17 think if we're going to have it, it ought to be
18 triggered by the propounding of expert reports.
19 It ought to come to an end at a prescribed period
20 of time and then there should be expert
21 depositions that take -- allow the experts on
22 both sides to take account of all the facts,
23 including the so-called supplemental facts.

24 THE COURT: I, frankly, think that's a
25 more sensible way to proceed. I appreciate that

1 it would be nice to be able to go back to the
2 well a few times before, during and after
3 depositions of experts, but I can only foresee
4 that as turning into a complete nightmare for the
5 experts, if not for the litigators.

6 So is there anyone else who wishes to
7 be heard at all in connection with this motion
8 before I go on? Okay. I will adopt the
9 suggestion by the committee and direct the
10 preparation of a new case management order that
11 provides for an extended period of time,
12 primarily the result of the extraordinary number
13 of documents that have been produced and the
14 difficulties in time of production, and I note
15 that no one is criticizing anybody in the case
16 with respect to the production of documents and I
17 find that to be encouraging.

18 I am perfectly content for you to build
19 in a schedule that says the expert reports come
20 when they come, on the dates that you all agree,
21 for there to be a supplemental go back to the
22 well period of time that's of whatever duration
23 you all agree, and then after that is concluded,
24 for the expert depositions to be taken and I'm
25 not going to elaborate on what I said previously.

1 I just think that's a fairer way to treat the
2 experts.

3 The question of the trial date becomes
4 interesting because I note that I am normally
5 expected to be at some Florida Bar functions that
6 occur on June 24th and 25th, the afternoon of the
7 24th and -- Mr. Singerman, is the Bar this year
8 in Orlando or is it in ---

9 MR. SINGERMAN: Your Honor, I may be
10 able to tell you in one moment.

11 THE COURT: Yeah. Mr. Busey ought to
12 know the answer to that question, too, but I
13 don't see him scanning his Blackberry.

14 MR. SINGERMAN: Orlando, your Honor.

15 THE COURT: Okay. That kind of kicks
16 two days out of what would be the second week of
17 the trial if we started on the 15th and
18 scheduling something in the week that ends on
19 July 4th is tricky for me.

20 Best guesses on how many days we're
21 actually going to consume for trial, gentlemen,
22 ladies? You all want to whisper together before
23 you want to answer that question?

24 MR. ROBBINS: I think our original
25 expectation of two weeks probably remains valid.

1 THE COURT: Okay.

2 MR. HALL: Will your Honor consider, as
3 I've seen in a lot of Bankruptcy Courts, taking
4 direct testimony by way of affidavit, which may
5 speed things up? I think we still will need two
6 weeks, but I think that might help expedite the
7 process.

8 THE COURT: Yeah, we've done that
9 typically here. Unless there's some reason why
10 either -- if there's an issue of credibility of a
11 witness, I'm troubled by written testimony simply
12 because I know who's going to write it, it's one
13 of you guys.

14 So if there's a credibility issue and,
15 you know, it's obviously highly desirable to
16 provide written testimony of a witness whom you
17 can't force to say the things you'd like them to
18 say, but otherwise, if it's a fact witness who
19 is -- whose credibility is not an issue, I will
20 accept that and we ought to in pretrial time talk
21 about whether there are specific witnesses whose
22 direct needs to be taken in the courtroom rather
23 than in writing.

24 I'm inclined to start the trial
25 something like June 11th and figure that we'll

1 conclude it on June 26th.

2 MR. WALDMAN: Your Honor --

3 THE COURT: Yes, sir.

4 MR. WALDMAN -- under our proposed
5 schedule we had a trial date of June 15th.

6 THE COURT: Right.

7 MR. WALDMAN: If your Honor is going to
8 build in an additional period of 30 days or 40
9 days, whatever is agreed to, it's going to push
10 things into July, as I understand.

11 THE COURT: Oh, okay. Well, are we now
12 then taking -- would you all be more comfortable
13 moving it to July? Mr. Donovan, I note your
14 objection.

15 MR. DONOVAN: Judge, one point of
16 clarification. I thought the period was already
17 built in, it was kind of ---

18 THE COURT: Well, I ---

19 MR. DONOVAN: Maybe we should work this
20 out and then come back to you. I'm a little
21 concerned the date just keeps moving even while
22 I'm standing here.

23 MR. ROBBINS: Just so it's clear, we
24 were never -- I'm sorry --

25 MR. DONOVAN: Please, go ahead.

1 MR. ROBBINS: -- I don't mean to
2 interrupt you. We were never the proponent of
3 this 30-day supplemental fact discovery. So our
4 schedule that moves the experts three months and,
5 therefore, the trial three months, begins the
6 trial on June 15th, but that was without regard
7 to this supplemental date.

8 If, as the Court has now ruled, we are
9 to permit a 30-day period of time before the
10 expert depositions begin, which I obviously agree
11 is the right approach, the consequence is that it
12 moves the trial date into July.

13 THE COURT: It has to move it into
14 July.

15 MR. DONOVAN: May I have one moment
16 with counsel, your Honor?

17 THE COURT: Sure. Folks, if you all
18 think it would be productive for you to have a
19 conversation without me, it's pushing lunchtime,
20 we can have lunch and we can come back this
21 afternoon.

22 MS. LABOVITZ: Your Honor, we may be
23 able to do some of the administrative motions
24 while the litigators converse.

25 MR. ROBBINS: Why don't the guys in

1 suits go ---

2 THE COURT: The guys in suits, okay,
3 I'm not sure I'm following that.

4 MS. LABOVITZ: I know I don't count,
5 so I can do these motions, Judge.

6 THE COURT: I don't see anything except
7 suits in here.

8 Moving into the other parts of this
9 hearing.

10 MS. LABOVITZ: Judge, just to tie us
11 back to the agenda for a moment, there was one
12 other litigation item that I think we'll need to
13 get to, but we need the guys in suits for that,
14 too.

15 THE COURT: Right, that's the Alix
16 Partners stuff.

17 MS. LABOVITZ: Exactly. What we can
18 do, I hope to fill the time, is to quickly turn
19 to what are a number of really administrative
20 motions in the main bankruptcy case.

21 THE COURT: I then turn to the
22 uncontested matters starting on Page 4 of the
23 amended agenda.

24 MS. LABOVITZ: Precisely, Judge. Item
25 1 truly proves my point that these are

1 administrative. You Honor, we filed amended
2 schedules some time ago to reflect payments that
3 were made pursuant to the Court's first day
4 orders and certain reconciliations, particularly
5 with regard to what's a lien claim and what's not
6 a lien claim.

7 When we filed it, we followed the same
8 practice that we had followed in the initial
9 filing of redacting for the public records
10 certain employee specific information and we
11 have, at the request of the U.S. Trustee and the
12 clerk, filed a motion to file unredacted versions
13 of the schedule under seal.

14 I don't believe there's any objection.

15 THE COURT: Any objection? Without
16 objection I'll grant the motion.

17 MS. LABOVITZ: Thank you, your Honor.
18 We'll follow our past practice of submitting
19 orders to you after.

20 THE COURT: Very good.

21 MS. LABOVITZ: Tab 2 is another repeat
22 of a motion that the Court has seen many times
23 before. We have filed a motion to reject several
24 contracts that the debtors have come across in
25 their review of contracts that are no longer

1 necessary for the business. This relates to one
2 copier lease, two communications services
3 agreements, and one purchase and sale agreement
4 for real property that the debtors actually
5 terminated. They didn't need to reject it, but
6 we had agreed with the other party to the
7 contract, just to clarify things so that they
8 know they're under no further obligation, that we
9 would reject to the extent not terminated and
10 include it on this rejection schedule.

11 THE COURT: Any objections?

12 Mr. Roher.

13 MR. ROHER: I'm not sure what Ms. ---

14 MS. LABOVITZ: This is the North Pointe
15 agreement.

16 MR. ROHER: This isn't my client?

17 MS. LABOVITZ: No, I believe this one
18 is Mr. Hartog's client.

19 THE COURT: Without objection I'll
20 grant the motion.

21 MS. LABOVITZ: Item 3 on the agenda,
22 Judge, is our third motion to extend the debtors'
23 period for removal of civil actions. As we've
24 explained before, we don't believe that there is
25 any litigation at this point that we will want to

1 remove, but we'd like to continue to preserve the
2 option to do that in the context of claims
3 review.

4 THE COURT: Any objection? Hearing
5 none, the motion is granted.

6 MS. LABOVITZ: Thank you, Judge. Tab 4
7 or Item 4 on the agenda, I should spend just a
8 little bit of time on. This is a motion to
9 approve a sale of real property that I believe
10 ordinarily we would have used our bulk sale
11 procedures for, but because the consideration for
12 the sale will be half in cash and half in a note
13 from the purchaser, we thought it would be more
14 prudent just to provide a motion to explain to
15 the parties what the terms of the sale were.

16 Unfortunately, we did ourselves a
17 disservice because the motion, and this is partly
18 as a result of there being amendments to the
19 contract as we were drafting the motion, the
20 motion had some discrepancies between the
21 contracts which were attached and the description
22 in the motion.

23 So I think the fastest and easiest way
24 to do this is to lay out the terms on the
25 record --

1 THE COURT: Okay.

2 MS. LABOVITZ: -- so that it's clear
3 what the terms of the sale are and then move
4 forward.

5 The motion concerns the sale of about
6 400 hundred lots in Woodland Pines, Texas. It's
7 a community in Harris County, which I'm told is
8 in Northeast Houston. Newmark Homes, which is
9 one of the debtors, originally owned about 1100
10 lots in the Woodland Pines area and about 700 of
11 those either have been sold already or are under
12 construction.

13 These lots are the remaining 400 that
14 are undeveloped. The debtors have learned that
15 the local municipal authority that's responsible
16 for providing water and sewage and similar
17 services, which is not in control of the debtors,
18 can't provide those services to those lots for
19 another two years, which obviously impacts the
20 ability to develop and sell homes.

21 So the debtors have decided to sell the
22 lots rather than waiting to develop them and
23 they're seeking Court approval for a sale to Elan
24 Land Investments (phonetic) and the reason this
25 isn't happening under the bulk sales motion is

1 that the consideration is 50 percent cash and 50
2 percent in notes.

3 The purchase price is just over a
4 million and a half dollars for the 400 lots.
5 It's 1,570 -- no, \$1,570,800, which is about
6 \$22,000 per acre.

7 At the closing, which will occur
8 between October 15th and November 21st of this
9 year, I go into that detail because that was one
10 of the minor discrepancies, Judge, the consideration
11 will be paid part in cash, part in a note. The note
12 will have a three-year term. It's non-recourse. It
13 will carry interest at the prime rate and it will be
14 secured by liens in the property.

15 The payments on the notes will be made
16 as follows, there are quarterly interest
17 payments, amortizing principal payments at the
18 end of years one and two and the balance of the
19 note paid at the end of three years from the date
20 of the closing.

21 TOUSA has already received some
22 consideration under the contract. The original
23 contract provided for \$10,000 in earnest money to
24 be paid to the company and the third amendment --
25 Judge, there are five amendments.

1 THE COURT: A whole \$10,000?

2 MS. LABOVITZ: A whole \$10,000. The
3 third amendment provided for an additional \$5,000
4 in earnest money to be paid. That earnest money
5 is refundable in part if the purchaser exercised
6 a right to terminate the agreement based on due
7 diligence findings, but that right expired in
8 June of 2008. Accordingly, all of the earnest
9 money that was paid would offset the cash portion
10 of the purchase price at closing and, Judge, it's
11 on those terms that we seek approval of this
12 Woodland Pines sales.

13 THE COURT: With respect to the liens
14 that you are taking back, are they subordinated
15 to other purchase money financing that's being
16 obtained by the purchaser or are they first
17 liens?

18 MS. LABOVITZ: They are first liens, I
19 believe, Judge. They are seller's liens and it
20 would be a first lien note.

21 THE COURT: Okay. The property is
22 otherwise unencumbered except to the folks who
23 are seated in this room?

24 MS. LABOVITZ: Mr. Berkowitz is
25 nodding.

1 THE COURT: Okay. Any objections or
2 comments? Mr. Dublin.

3 MR. DUBLIN: Just one thing, your
4 Honor, we would like a provision added to the
5 order, based on the discrepancies between the
6 motion and the underlying agreements, that the
7 agreements control and not the motion with
8 respect to the transaction.

9 MS. LABOVITZ: Yeah, we'll work with
10 the creditors' committee on that.

11 THE COURT: Fine, and I'll grant the
12 motion.

13 MS. LABOVITZ: Thank you, your Honor.
14 Mr. Sussberg will present the remaining three,
15 unless, perhaps -- let's just go through those
16 three. I think they will be very quick.

17 MR. SUSSBERG: Good mid day, your
18 Honor.

19 THE COURT: And to you, Mr. Sussberg.

20 MR. SUSSBERG: I'm going to handle
21 Items 5, 6 and 7 on the agenda. I will be brief
22 because there have been no objections to any of
23 them.

24 Item Number 5 is a motion to authorize
25 the assumption of an amended contract relating to

1 TOUSA Homes and Newmark Homes' interest in the
2 Brushy Creek Partnership. The motion was filed
3 on September 17th, and as I mentioned, no
4 objections have been filed. The motion and the
5 agreement attached to the motion effectuate a
6 replacement of TOUSA as the general partner of
7 what's called the Buffington Partnership. This
8 was a partnership that was formed to acquire land
9 in Texas and it was ultimately to be developed as
10 a master plan community to be known as the Ranch
11 at Brushy Creek.

12 As a result of the bankruptcy filing by
13 TOUSA Homes and Newmark, there was a technical
14 default under the separate financing that was
15 utilized by the partnership to acquire the
16 property and the bank has indicated that they
17 would like to switch out TOUSA Homes as the
18 general partner and replace them with Castletop,
19 which is our general partner under a separate
20 partnership that was formed to acquire the
21 property in question.

22 So all we've done is effectuated a
23 redistribution of partnership interest and
24 swapped out TOUSA Homes as the general partner,
25 really more of an optic than anything.

1 THE COURT: Okay. Any objections?

2 Grant the motion.

3 MR. SUSSBERG: Thank you, your Honor.

4 Item Number 6 on the agenda is a motion seeking
5 approval of TOUSA Homes' entry into a lot swap
6 agreement with Lo Land Assets, LP. This motion
7 was filed on shortened time. Your Honor entered
8 an order, we appreciate that, at 1973, and no
9 objections have been filed.

10 This is a very straightforward
11 agreement that we're seeking to have approved
12 that contemplates the swap of 21 lots in the
13 community known as Diamonte, which is located in
14 Clark County, Nevada, on the outskirts of
15 Las Vegas.

16 The property is divided into two
17 sections, East Diamonte and West Diamonte. TOUSA
18 has a larger presence on the west side, Lo Land
19 has a larger presence on the east side. The
20 parties will swap 21 lots, so that each party
21 will have a more significant presence in their
22 relatively larger space.

23 THE COURT: Any objections? Grant the
24 relief.

25 MR. SUSSBERG: Thank you, your Honor.

1 Item Number 7 on the agenda is a motion to enter
2 into an agreement to purchase certain model homes
3 from Strategic Capital Resources. The debtors in
4 the ordinary course leased numerous model homes
5 in their various locations to serve as the
6 debtors' sale center in a given community.

7 Prepetition the debtors were party to
8 11 master lease agreements with Strategic. We
9 had hoped to negotiate an agreement to continue
10 that lease, but we were unsuccessful in doing so
11 and in that process we identified eight of the
12 models that were under the master lease
13 agreements that were necessary to ongoing
14 operations.

15 Rather than have concerns over
16 assumption of master lease agreements that
17 included leases that we did not need, we
18 negotiated an agreement whereby TOUSA Homes and
19 Newmark Homes will purchase the eight models in
20 question. The purchase price is \$1.625 million.
21 There have been no objections to this motion.

22 THE COURT: Any objections today?

23 MR. ROHER: No, your Honor. Obviously,
24 we are interested in having the order entered
25 now, please, your Honor. If I can have your

1 Honor enter it, I'll run it downstairs. It's ---

2 THE COURT: Are you in a hurry?

3 MR. ROHER: Well, I'm not in -- well,

4 I'm actually not in a hurry. My client is

5 anxious to have the order entered.

6 THE COURT: Well, the usual pattern is

7 that they get uploaded.

8 MR. ROHER: I understand, your Honor.

9 If you can maybe make an exception in this case,
10 I'd appreciate it, otherwise, whatever your Honor
11 wants is fine.

12 I'd just like to also just state on the
13 record, your Honor, we're reserving all our
14 rights to make any other -- further claims,
15 administrative claims, but if -- I don't want to
16 impose.

17 THE COURT: Do you have a form of order
18 with you, Mr. Sussberg?

19 MR. SUSSBERG: Mr. Roher actually has
20 the form of order.

21 THE COURT: I'm not surprised.

22 MR. SUSSBERG: We have no objection to
23 the order being entered.

24 THE COURT: Okay. Does anybody else
25 wish to review the form of order, the committee?

1 MR. SUSSBERG: I would think it would
2 be appropriate if we could pass it along to
3 Mr. Dublin.

4 MR. ROHER: Well, it was -- your Honor,
5 it was the exact same order that was attached to
6 the motion and I put in the date.

7 THE COURT: Ms. Romero has the magic
8 stamp.

9 MR. SUSSBERG: With that, your Honor, I
10 will turn the podium over to Mr. Basta,
11 unless ---

12 THE COURT: Should we finish up the
13 litigation issue?

14 MS. LABOVITZ: I think the litigators
15 are ready to pick up again.

16 THE COURT: I have executed the order
17 for you, Mr. Roher. You may take it downstairs
18 and return home safe and sound.

19 MR. ROHER: Thank you, I really
20 appreciate it.

21 THE COURT: My pleasure.

22 MR. DONOVAN: Your Honor, we'll work
23 all together and get you an order. We cut that
24 period down to two weeks instead of 30 days.

25 THE COURT: Okay.

1 MR. DONOVAN: I think the agreement of
2 the trial date, based on where that falls still,
3 if you add two weeks to the trial date is ---

4 MR. ROBBINS: I believe is the Tuesday
5 following July 4th weekend, which I guess is
6 July 7th.

7 THE COURT: How would it be if we did
8 the weeks of July 13th and 20th, would that work
9 on your calendars, folks?

10 MR. ROBBINS: That would be fine with
11 us, your Honor.

12 THE COURT: That takes you two weeks to
13 three. Mr. Donovan will swallow another week.

14 MR. DONOVAN: We'll appear.

15 THE COURT: Trial date commencing
16 July 13th.

17 MR. ROBBINS: Thank you, your Honor,
18 and We'll submit an order.

19 THE COURT: Yeah, and I expect you can
20 work out the rest of the dates a whole lot more
21 efficiently without me.

22 MR. ROBBINS: Yeah, there will be no
23 problem.

24 MR. DONOVAN: Thank you, your Honor.

25 THE COURT: Super. Okay. Now,

1 then ---

2 MS. LABOVITZ: Judge, should we next do
3 the remaining litigation matter, the committee's
4 motion to compel discovery?

5 THE COURT: Yeah. How long do you
6 anticipate the rest of the calendar to go? I'm
7 asking only because I'm happy to let you run
8 through the lunch hour or come back, it's
9 entirely up to you.

10 MR. SINGERMAN: Judge, I think that our
11 preference is to continue and we expect that from
12 the debtors' perspective Mr. Basta's presentation
13 will be about 30 minutes.

14 THE COURT: Okay. Okay. Then, unless
15 the court reporter has to go feed the parking
16 meter, then, okay, let's do the motion to compel
17 discovery of Alix Partners.

18 Thank you very much.

19 MR. WALDMAN: Good afternoon, your
20 Honor.

21 THE COURT: Good afternoon,
22 Mr. Waldman.

23 MR. WALDMAN: Your Honor, in this
24 motion to compel, we are seeking to obtain
25 certain Alix Partners documents that we believe

1 are important to our case, but which Alix
2 Partners refuses to produce. We've talked and
3 written at great length with Alix Partners in the
4 last three months since we've issued our subpoena
5 to them.

6 THE COURT: And I've read it reasonably
7 at great length, so I think I know what the
8 issues are, and I am not wishing to short circuit
9 you at all.

10 The first question I have is: Do I
11 have jurisdiction?

12 MR. WALDMAN: Your Honor, I thought
13 that might be your first question and we believe
14 you do.

15 THE COURT: Okay.

16 MR. WALDMAN: And let me run through
17 sort of our thinking as it evolved here because
18 we were aware of the rules for subpoenaing
19 non-parties who reside outside the jurisdiction
20 and that's why we issued the subpoena initially
21 out of the Northern District of Illinois.

22 And when we were unable to reach
23 resolution with Alix Partners, we gave some
24 thought to filing in the Northern District of
25 Illinois and we ultimately decided to file in

1 this Court because we hoped to avoid the cost and
2 expense of filing in the Northern District of
3 Illinois, having to hire local counsel, having to
4 go through the process of getting them approved
5 by the Court, having to educate local counsel,
6 having to educate a new judge about the issues
7 here.

8 So our hope was that we would file here
9 and Alix Partners would agree to consent to
10 jurisdiction here and be able to resolve it in
11 front of the Court and if that did not happen,
12 our thought was that the Court could provide some
13 guidance.

14 The court is very familiar with these
15 issues and it would be helpful to the Northern
16 District of Illinois Court, if it came to that,
17 to hear its views about some of the relevancy
18 issues and the like that have been raised because
19 I think this Court is in the best position to
20 address those, and our thought was the Court's
21 advice on those issues or views on those issues
22 might also help resolve the issue without having
23 to go to the Northern District of Illinois.

24 But we've now learned through the Alix
25 Partners filing that they have now filed a claim

1 in this Court.

2 THE COURT: Oh, Okay.

3 MR. WALDMAN: And that is in Footnote 4
4 of the Alix Partners brief and their counsel has,
5 before we ever filed our motion, your Honor, our
6 motion to compel, their counsel made an
7 appearance in this Court in connection with the
8 claim and we believe that as a result, this Court
9 affirmatively has jurisdiction in this case.

10 Alix Partners has availed itself of the
11 jurisdiction of this Court. Having affirmatively
12 come into this Court and submitted to this
13 Court's jurisdiction, we believe it's subject to
14 the orders and subpoenas in this Court.

15 Now, in their Footnote 4, your Honor,
16 Alix Partners concedes it's filed a claim. It
17 tells us it's filed a claim, but it says, well,
18 that doesn't mean they are a party for the
19 adversary proceeding and they cite a case that
20 says they're not necessarily a party to the
21 adversary proceeding.

22 We believe that misses the point, your
23 Honor. We are not saying that they are a party
24 to the proceeding, we are saying that this Court
25 has jurisdiction over them, even as a non-party,

1 and that this Court could, as a result, issue a
2 non-party subpoena that would be proper and that
3 would require them to produce the documents. By
4 invoking this Court's jurisdiction they've
5 submitted themselves to the orders of this Court
6 and they can't pick and choose which ones to
7 obey.

8 If it's necessary for us to provide
9 them with a new subpoena issued out of this
10 Court, we're happy to do so, but we believe then
11 the issues are all teed up and the Court is
12 ready -- should be ready to address them and
13 there's no reason to come back two weeks from now
14 to do that, they're all currently before the
15 Court.

16 The only other thing in the
17 Alix Partners discussion of their jurisdictional
18 defense is they say, well, and they say this
19 indirectly, they have a quote that says, well,
20 this is a subject matter jurisdiction issue.

21 I assume they anticipated the fact that
22 they've come in here and availed themselves of
23 the Court means they have some -- this Court
24 clearly has personal jurisdiction over them and
25 to say that it's a subject matter jurisdiction, I

1 think they believed helped them, but we just
2 don't believe that's correct, your Honor.

3 It's well accepted that the Court
4 handling the underlying action can have -- can
5 treat a motion to dismiss if the parties come in
6 and consent to treatment, that means that the
7 Court can make a decision on the motion to
8 compel. If that's the case, then this Court
9 clearly has subject matter jurisdiction.

10 THE COURT: Because patently you can't
11 create subject matter jurisdiction by consent.

12 MR. WALDMAN: Correct, your Honor.
13 Correct, your Honor, and we have cases that show
14 that you can clearly consent to having the matter
15 heard by the underlying Court, this Court, and we
16 believe as a result, and there are other cases
17 that we can go through, but your Honor
18 understands the point, and we believe as a
19 result, this Court has jurisdiction.

20 THE COURT: Okay.

21 MR. WALDMAN: I'm happy, your Honor,
22 to -- I mean, we believe that these are very
23 relevant documents. I believe our papers have
24 addressed them, but they go very much to the
25 experience that Alix Partners has because we're

1 asking for what other home building or real
2 estate engagements they have, what other home
3 building and real estate engagements they
4 provided solvency opinions on, how much they
5 charged for those types of engagements, and
6 whether they have turned down similar types of
7 engagements and why.

8 Clearly, if they are -- for example,
9 we've sought their other solvency opinions in the
10 home building area. If they're using one
11 methodology for other types of home builders, but
12 for some reason for our case they used a
13 different methodology, that's something we want
14 to explore with them, but without the documents
15 we're not in a position to do that.

16 They come in and also, your Honor,
17 argue that they -- that this would create a
18 burden on them. But what I'm used to seeing,
19 your Honor, when somebody comes in and says
20 there's a burden in producing these documents, is
21 an affidavit from somebody that says there are
22 1200 boxes in the warehouse and we can't find
23 them, it would require 12,000 manhours to do it,
24 et cetera. I don't see any of that here.

25 It's hard for me to believe that

1 Alix Partners can't, with a reasonable degree of
2 effort, come up with a list of what other home
3 builders they've done solvency opinions for.

4 Your Honor, I think the record is
5 clear, we've worked very hard to provide
6 alternatives to try to minimize the burden on
7 Alix Partners. We've agreed to all sorts of
8 steps that would accommodate their concerns and
9 we just haven't gotten any attempt on their part,
10 we think, to really address -- get us the
11 information we need.

12 We're willing to continue to work with
13 them, your Honor, but without their putting
14 anything on the table basically, we believe we
15 need this Court to compel them to produce these
16 documents.

17 THE COURT: I can certainly understand
18 your contentions in respect of relevance as to
19 real estate engagements in which a solvency
20 opinion was given. Does your discovery seek
21 documents that simply relate to valuation issues
22 of pieces of real estate? There's some
23 suggestion that they're going to have to look at
24 every file that they have ever done to see if
25 there's any dirt in there.

1 MR. WALDMAN: Your Honor, we don't want
2 every file they've ever done.

3 THE COURT: Yeah.

4 MR. WALDMAN: We, for example, your
5 Honor, we propose that we simply receive a
6 declaration from them as to what their real --
7 what their other real estate engagements were and
8 we asked them for their solvency opinions as to
9 those real estate engagements. We don't want all
10 the backup. We don't want the work papers.
11 We're willing to settle for the solvency opinion
12 and the list.

13 And, your Honor, we may then want to
14 take additional discovery based on that and they
15 would, of course, have all rights to object to
16 that. We may want to ask people questions, they
17 may want to object to that, and we might end up
18 back in front of your Honor, but here we're
19 willing to accept the fairly limited universe, at
20 least as a starting place.

21 If it turns out, for example, your
22 Honor, that the list is too -- they've only done
23 two other engagements, that on the one hand tells
24 us something about their level of experience and
25 secondly, we may want to explore in greater

1 detail what those engagements are and some of the
2 backup papers. But if they give us a list of a
3 hundred different engagements that they've done,
4 you know, I'm not going to want to look at a
5 hundred boxes -- a hundred engagements in great
6 detail.

7 So at least we thought this was a good
8 starting place and that's why we asked for it.

9 THE COURT: Okay. Thank you.

10 MR. WALDMAN: Thank you, your Honor.

11 THE COURT: Mr. Gibson.

12 MR. GIBSON: Good afternoon, your
13 Honor.

14 THE COURT: Good afternoon.

15 MR. GIBSON: I would just like to start
16 and reiterate the point that was raised regarding
17 the difference between subject matter
18 jurisdiction and personal jurisdiction.

19 We were very well aware that Alix
20 Partners has filed a claim. We wanted to be
21 upfront with that and we clearly are a claimant
22 in the bankruptcy proceeding. But let's talk
23 about who -- which court is the proper court to
24 hear this motion.

25 Robbins Russell was very well aware

1 that they needed to go to the Northern District
2 of Illinois to seek discovery. They did so. The
3 case law is undeniably clear that the proper
4 court to hear a motion to compel on a subpoena
5 issued out of the Northern District of Illinois
6 is the Northern District of Illinois.

7 Case law is also explicitly clear that
8 the respondents to that subpoena, in this case
9 Alix Partners, themselves cannot even consent to
10 have the litigating court hear a motion on such a
11 subpoena. If you go to the Technec case, which
12 we cited, the respondents to the subpoena brought
13 motions to quash in the underlying Bankruptcy
14 Court rather than the Court that issued the
15 subpoenas.

16 The Bankruptcy Court said, we do not
17 have subject matter jurisdiction over these
18 motions.

19 THE COURT: Well, Mr. Waldman just
20 represented to me otherwise, that with the
21 agreement of the parties, the Court in which the
22 underlying litigation is pending does have
23 jurisdiction.

24 MR. GIBSON: Only with the agreement of
25 the parties and the consent of the issuing court.

1 The issuing court can refer the motion to the
2 litigating court. The parties themselves cannot
3 take away that subject matter jurisdiction from
4 the issuing court.

5 THE COURT: And what case do you say
6 stands for that proposition?

7 MR. GIBSON: Technec. It's cited in
8 our brief. It's 2006 Westlaw 2497531.

9 THE COURT: So let's suppose,
10 Mr. Gibson, since your client has subject to --
11 has subjected itself to in personam jurisdiction
12 here, let us suppose that Mr. Waldman issues a
13 new subpoena headed in this Court, do you got any
14 defenses, other than -- are there any
15 jurisdictional defenses you have in that event?

16 MR. GIBSON: For the purposes of this
17 adversary proceeding, I do not think Alix
18 Partners is appropriately considered a party
19 under the rules, the Bankruptcy Rules and the
20 Federal Rules of Civil Procedure, as adopted by
21 the Bankruptcy Rules.

22 The case is very clear, that merely
23 because we filed a proof of claim does not bring
24 us under the rubric and the burdens that are put
25 on parties in adversary proceedings. The

1 discovery mechanisms are very different. There
2 is a reason for the difference under the rules.
3 There is a reason that non-parties like
4 Alix Partners are given protections from
5 burdensome discovery and that merely because in
6 the overarching bankruptcy proceeding we have
7 filed a proof of claim, does not automatically
8 subject us to the burdens of being a party in
9 this litigation.

10 THE COURT: Okay. So let's have
11 Mr. Golden issue or Mr. Dublin issue a subpoena
12 in the main case, you got any subject matter
13 jurisdictional defenses there?

14 MR. GIBSON: If they want to issue a
15 subpoena in the main case ---

16 THE COURT: For the same stuff.

17 MR. GIBSON: That would only be
18 relevant to the adversary proceeding.

19 THE COURT: Oh, I don't know. The
20 adversary proceeding is itself relevant to the
21 case.

22 Look, I'm not wishing to engage
23 particularly in an exercise here, but I'm not
24 interested in engaging in a frivolous exercise
25 either. It strikes me, Mr. Gibson, that these

1 documents are extremely relevant to the adversary
2 proceeding.

3 It matters to me, for purposes of
4 evaluating the solvency opinion which Alix
5 Partners issued, as to whether Alix Partners has
6 ever issued any solvency opinions in real estate
7 cases and if you have, what methodology did you
8 use and did you use different methodology here.
9 I really don't understand the argument that these
10 documents are not relevant.

11 Now, your jurisdictional argument is
12 obviously troublesome to me because I'm not
13 inclined to stretch my arms further than they are
14 able to reach. On the other hand, it would
15 surprise me if Alix Partners wanted to get a
16 reputation in the Southern District of Florida or
17 in any other jurisdiction, of resisting turning
18 over documents that are relevant in a bankruptcy
19 litigation.

20 MR. GIBSON: If your Honor finds these
21 documents relevant, we have no interest
22 whatsoever in resisting that. We have an
23 interest in following the law, following the
24 rules of law and not being subject to discovery
25 that is not provided for under the rules.

1 THE COURT: Well, you'll appreciate
2 this litigation is high stakes for everybody
3 who's participating in it. I appreciate that
4 it's a pain in the butt for anybody who is a
5 non-party to have to produce anything and
6 Mr. LeBlanc made an impassioned argument that
7 it's a pain in the butt for even a defendant in
8 the litigation until the complaint has been
9 tested, and I think you've probably seen some of
10 the papers that indicate what the volume of
11 discovery has been so far.

12 It's very hard for me to know how
13 anybody on either side of this litigation is
14 really going to be able to evaluate the
15 insolvency opinion and where it plays into the
16 litigation results without understanding the
17 context in which Alix Partners was giving that
18 advice.

19 If my sort of going to the bottom line
20 from my perspective is helpful to Alix Partners
21 in assessing whether it really wishes to resist
22 the subpoenas, then good. But I am trying to
23 help the parties do this case with as little
24 expense as possible.

25 I recognize that opening discovery on

1 questions -- on Documents 17, 18, 19 and 20 is
2 going to cause expense to Alix Partners, but I
3 don't know how to avoid that. I mean, this
4 litigation is about \$800 million and with the
5 stakes that high, I don't know how the committee
6 couldn't look under the rock.

7 Of course, the defendants may be
8 perfectly happy with the answer that comes out,
9 who knows. The committee may be perfectly
10 unhappy with the answer that comes out, who
11 knows. You may know, your client might know, but
12 that's the perils of asking questions in
13 discovery.

14 Now, what shall we do?

15 MR. GIBSON: A couple of thoughts, your
16 Honor. First, it is very helpful for Alix
17 Partners to hear your perspective on the
18 relevance of the requested documents, so thank
19 you. I think -- let me -- if I can go to the
20 relevance point --

21 THE COURT: Sure.

22 MR. GIBSON: -- and just to clarify a
23 couple of statements that have been made.

24 The requests as drafted, your Honor, do
25 seek documents, I think, that are much broader

1 than as described by counsel for the committee.
2 If I may, they do seek documents regarding
3 valuation services. As you can imagine, an
4 organization like Alix Partners does valuations
5 all the time --

6 THE COURT: Sure.

7 MR. GIBSON: -- for a variety of
8 different clients. For instance, and I think we
9 did point this out in our brief, we could be
10 engaged by a client to assess the value of a real
11 estate company that that client may be interested
12 in investing into. Okay. We could be, as part
13 of a litigation such as this, we could be tasked
14 with valuing a subsidiary that is in the real
15 estate business.

16 THE COURT: Or, indeed, a particular
17 piece of dirt --

18 MR. GIBSON: Exactly.

19 THE COURT: -- a hotel, whatever.

20 MR. GIBSON: Exactly.

21 THE COURT: And that was my concern
22 about Category 17, which is -- and maybe the
23 question there is one of defining value of any
24 company because I think what the committee is
25 focusing on isn't assessment or valuation of

1 individual pieces of collateral, it's rather a
2 company sort of valuation because assessing the
3 values of particular pieces of collateral I don't
4 think was what you were engaged in here. I think
5 it was a much broader question.

6 Okay. Keep on going. I'm sorry.

7 MR. GIBSON: And to the extent that
8 Alix Partners has engaged in valuing real estate
9 companies or subsidiaries of companies that
10 engage in real estate, that is -- we don't want
11 that to be excluded if we are required to provide
12 such documents because we know what that's going
13 to be used for. So if we fail to include that
14 experience, that is going to be viewed as a
15 negative on our work.

16 However, the effort that goes into
17 requiring -- to finding all of that experience,
18 is extremely burdensome. I mean, we literally
19 have to go to every engagement and identify
20 whether or not there was a valuation of a real
21 estate or home building company that was involved
22 in that engagement.

23 THE COURT: Mr. Waldman, is there a way
24 these questions can be narrowed somewhat? I
25 appreciate that there was correspondence back and

1 forth, but perhaps now with the overlay of my
2 expression as to the relevance certainly of
3 solvency opinions and such, Alix Partners may
4 have a slightly different view than they did
5 earlier.

6 MR. WALDMAN: Your Honor, we're always
7 willing to work with the other side on this.
8 This is sort of the first time that some of these
9 issues have been aired with us and I think, for
10 example, there are, as I understand it, 80
11 partners at Alix Partners, that we're only asking
12 for a year or two of their experience over the
13 last two years.

14 I don't see why the 80 partners
15 couldn't review their engagements over the last
16 two years and say which of those engagements
17 involved, you know, home building or real estate
18 evaluations and we can work with them to come up
19 with what the correct universe is there, what the
20 wording is. We're happy to do that.

21 Again, we're not looking for them to
22 have to go through every file or the like and
23 we're willing to be creative about it, but I
24 think your Honor understands what we're trying to
25 accomplish.

1 THE COURT: Yeah, and my question to
2 both of you, and this, I guess, extends out to
3 the other parties in the lawsuit, is this the
4 sort of thing that I should lock you all in a
5 room right now and, you know, not let you out or
6 is this something that it would be productive to
7 come back in a couple of days and have it hashed
8 out if, if you can't reach an agreement in a
9 couple of days?

10 MR. GIBSON: Well, your Honor, assuming
11 we can resolve the jurisdictional issue, which I
12 think we can, I think we can work together with
13 Mr. Waldman, particularly given the offer on a
14 declaration. I think that that offer -- I was
15 very happy to see that offer. Again, for the
16 various reasons, we declined that offer at the
17 time. However, as I now have different
18 information, and again, it's difficult as a
19 non-party to always understand the ---

20 THE COURT: Sure, sure, and I fully
21 appreciate that you have a client, too.

22 MR. GIBSON: Absolutely, and it's very
23 difficult for a client in this situation to
24 understand always why things need to be done.

25 THE COURT: Yeah, and would it be

1 useful for you to invite me to come back if we
2 have a dispute next Tuesday?

3 MR. GIBSON: Sure, I don't think that
4 will be necessary --

5 THE COURT: Okay.

6 MR. GIBSON: -- but absolutely.

7 MR. WALDMAN: That's fine.

8 THE COURT: Unless I get an order
9 between now and then, I'll expect to see you
10 Tuesday morning at what time, Ms. Romero?

11 MS. ROMERO: 9:30.

12 THE COURT: 9:30, Tuesday morning,
13 October 28th.

14 MR. WALDMAN: Your Honor, can I address
15 one thing?

16 THE COURT: Yes, sir.

17 MR. WALDMAN: Your Honor, I made some
18 representations to the Court that there were
19 cases that were well accepted and my brother
20 counsel had a different view.

21 The issue, as you will recall, was
22 whether one could consent to jurisdiction as to a
23 party who is not from the jurisdiction, but could
24 consent to the underlying court handling the
25 matter. I would cite your Honor to H & I Corp.

1 v. Advanced Medical Design, 2000 Westlaw 4181900,
2 Middle District of Florida, 2007.

3 THE COURT: 418900?

4 MR. WALDMAN: 4181900.

5 THE COURT: 1900.

6 MR. WALDMAN: I can also send these to
7 your Honor. Middle District of Florida, 2007 and
8 another case is Highland Tank ---

9 THE COURT: I'm sorry, you said that
10 was ---

11 MR. WALDMAN: Highland ---

12 THE COURT: No, H & I is 2000 or 2007?

13 MR. WALDMAN: 2007. I'm sorry I wasn't
14 clear. 2007 Westlaw 4181900, Middle District of
15 Florida, 2007.

16 THE COURT: Which judge was that?

17 MR. WALDMAN: I don't know that, your
18 Honor.

19 THE COURT: Fair enough.

20 MR. WALDMAN: Another case for the same
21 proposition is Highland Tank v. PS International,
22 227 FRD 374 at 381, Western District of
23 Pennsylvania, 2005 and, your Honor, we can have
24 other cases.

25 The case that counsel cited ---

1 THE COURT: Technec.

2 MR. WALDMAN: In Technec the issue
3 there, your Honor, is whether if the subpoena
4 issues out of the other jurisdiction, can the
5 other court transfer it to the underlying court.
6 The Circuits go both ways. There is a
7 disagreement as to whether, if it's without the
8 consent of the party, the Court can transfer it
9 to the underlying court and that's my
10 understanding of what Technec applies to, but
11 that if a court -- if a party wants to come in
12 and to consent, that that is accepted, as these
13 other cases show.

14 THE COURT: Okay. Well, it would
15 appear to me that I'm not going to have to decide
16 that question and if I do, then come back on
17 Tuesday and tell me so. Otherwise, if there's an
18 agreement, then wonderful.

19 Okay. Thank you very much, gentlemen.

20 MR. GIBSON: If your Honor doesn't
21 mind, may I be excused from ---

22 THE COURT: Yes, you may, Mr. Gibson,
23 of course.

24 MR. GIBSON: Thank you very much.

25 THE COURT: Thank you, sir.

1 Mr. Basta.

2 MR. BASTA: Good afternoon, your Honor.

3 The next item on the agenda is the company's
4 second exclusivity motion. We filed this motion
5 prior to filing our plan and the motion sought to
6 extend the exclusive period to file a plan to
7 February 22, 2009, and the exclusive period to
8 solicit acceptances to the plan to April 23,
9 2009.

10 As we did during the last exclusivity
11 hearing, and as customary in our practice, we
12 would like to use this exclusivity hearing to
13 provide the Court with an update of the status of
14 the business and the circumstances surrounding
15 the filing of our plan, which we did on
16 October 13, 2008.

17 The status is as follows: This company
18 needs to get out of bankruptcy as soon as
19 possible. There are numerous catchy phrases that
20 I could use to describe the company's situation,
21 the surgery is killing the patient, don't throw
22 out the baby with the bath, the curse is worse
23 than the disease, but the truth of the matter is
24 more serious than any of these catchy phrases.

25 The Chapter 11 is having a negative

1 impact on the debtors' business. Competitors
2 continue to poison potential home buyers. It is
3 very difficult for management to execute new land
4 option agreements in areas where we need more
5 land because counter parties are hesitant to do
6 business with the debtors. The debtors continue
7 to lose critical employees due to the uncertainty
8 of this situation. The process remains a
9 distraction for management and the administrative
10 expense of this bankruptcy is very high.

11 The debtors estimate that the
12 professional burn rate, including the ongoing
13 litigation, is approximately \$7 million a month
14 and that does not include, as Mr. Donovan pointed
15 out in his remarks, that the deposition phase of
16 the litigation has not started yet and the
17 reality is that the debtors have already used
18 Chapter 11 to effectuate their operational
19 restructuring initiatives.

20 We have downsized the organization by
21 approximately half. We have reduced general and
22 administrative expense in the organization by
23 \$40 million. We have or are poised in connection
24 with the plan process to complete the assumption
25 and rejection of contracts. We have completed

1 our business plan, obviously subject to further
2 refinement for market conditions. We have
3 analyzed whether a prolonged stay in bankruptcy
4 is viable and determined that it is extremely
5 risky and today, prior to today to be fair, we
6 understand that the litigation is going to be
7 extended for several months.

8 We believe that we need to divorce the
9 litigation from the business so that the business
10 can survive. If this company were to liquidate,
11 we believe every constituency would be hurt. The
12 business would fail, the jobs would be lost. We
13 think the secured creditors would get less value
14 and if the secured creditors get less value, then
15 we think by definition the unsecured creditors
16 would get less value because the asset that they
17 can seek to recover in the litigation is the
18 distributions that would be made to the secured
19 creditors.

20 Mindful of these concerns and, of
21 course, the Court's comments at the last hearing,
22 we filed our plan and the plan is a product of a
23 comprehensive process that was designed to
24 maximize value.

25 Your Honor will remember that we

1 started the case with an agreement with our
2 senior note holders to provide them with the
3 equity of the reorganized company and to seek
4 \$200 million of additional capital to help
5 support the fact that we would have the first and
6 second lien debt on top of that.

7 In that regard, the debtors and their
8 advisors contacted 27 parties, including
9 strategic buyers and financial buyers and hedge
10 funds, to see if there was an interest in
11 pursuing that reorganization transaction or any
12 other reorganization transaction.

13 For approximately six months, we were
14 engaged in discussions with a plan sponsor that
15 aimed at implementing a plan similar to the one
16 outlined at the time of the filing and that plan
17 would have provided some value to unsecured
18 creditors in addition to interests in the
19 litigation.

20 These negotiations ceased in the midst
21 of the market turmoil in mid September and at
22 that point, the debtors and the second lien
23 lenders immediately began discussions regarding a
24 plan that would convert substantially all or a
25 great portion of their second lien debt into

1 equity.

2 Notwithstanding our plan filing, your
3 Honor, we continued to have discussions with
4 certain interested parties on a plan that could
5 provide more value, or would be better from a
6 structural perspective, and we have endeavored to
7 keep our creditor constituencies advised of those
8 discussions.

9 Now, this is an exclusivity hearing,
10 it's not a confirmation hearing or a disclosure
11 statement hearing. Mr. Golden wants to make sure
12 that I don't pre-argue plan issues in the context
13 of this exclusivity hearing, but I think it's
14 fair to say and, your Honor, it will come as no
15 surprise, that there are issues associated with
16 this plan that certain of our constituencies do
17 not fully support.

18 THE COURT: I'm shocked.

19 MR. BASTA: I know you're shocked. And
20 so, to the extent your Honor desires, although
21 I'm not pushing it, I could use this opportunity
22 to overview the plan and give a preview of some
23 of the issues that are coming down the pike or,
24 if your Honor would prefer, we can leave that for
25 another day and deal with them in the course of

1 the disclosure statement process.

2 THE COURT: Although I'm reluctant to
3 mix apples and oranges, as one of my predecessors
4 on the Bench used to say, I think that might
5 actually be useful just so that I have a heads up
6 of where the fault lines are.

7 MR. BASTA: I will give a summary of
8 the plan and I will outline, I think, from a very
9 big picture what I think the issues are and I
10 will hold back arguing the merits.

11 The plan is a separate Chapter 11 plan
12 for each of the 39 debtors. From a big picture,
13 it eliminates approximately a billion seven of
14 liabilities and the second lien debt, which at
15 this point, your Honor, has accrued to
16 approximately \$360 million. Substantially all of
17 that will be converted into equity of the
18 company.

19 It's the reduced debt burden from that
20 being equity that would enable us to exit
21 bankruptcy without having to raise capital in
22 this market.

23 The new first lien lenders would
24 receive new notes and the second lien lenders
25 would get the equity that I described earlier and

1 in each case, the consideration to the first lien
2 lenders and the second lien lenders would be
3 subject to disgorgement or transfer based upon
4 the outcome of the litigation.

5 The unsecured creditors would receive
6 interests in a litigation trust that would obtain
7 the recoveries based upon the litigation.
8 Post-confirmation there would be a \$3 million
9 loan to the liquidation -- litigation trust. If
10 I could use your system --

11 THE COURT: Sure.

12 MR. BASTA: -- your Honor, and just
13 give a brief description of the treatments under
14 the plan. I don't know how to ---

15 THE COURT: Just put the paper down and
16 back up.

17 MR. BASTA: And back off, okay. Can I
18 move it a little bit so we can see both?

19 THE COURT: Sure, and you might need to
20 move that cord.

21 MR. BASTA: This is going to be hard
22 for people to read.

23 THE COURT: Just slide it over to the
24 left a little more. There you go.

25 MR. BASTA: The first lien revolver

1 claims will get new notes subject to
2 disgorgement. The first lien term loan would get
3 a new note subject to disgorgement. The second
4 liens would get a new PIK note of \$15 million and
5 a hundred percent of the stock of new TOUSA
6 subject to dilution or cancellation based upon
7 the outcome of the litigation.

8 The class of other secured claims would
9 be paid in full in cash without interest.

10 We have priority claims that we pay in
11 full in cash and senior note claims would get a
12 pro rata share of the litigation trust interests.

13 The general unsecureds and intercompany
14 claims would get a pro rata share of the
15 litigation trust interest and the subordinated
16 note claims would get the same, as well as the
17 PIK note claims and the intercompany claims would
18 be reinstated in an amount to the extent allowed
19 under the plan. Then the equity interests in the
20 subsidiary would be transferred up to a new
21 holding company.

22 So what is the preview? This is always
23 dangerous because every constituency has what it
24 believes is most important and I'm not going to
25 today try to speak for them.

1 From our perspective, we divide the
2 issues into three categories, what's colossally
3 important, what is material and what should be
4 worked out. We believe we've accomplished what
5 is colossally important, which is to come out
6 with a plan structure that can divorce the
7 litigation from the company and facilitate the
8 exit from bankruptcy while preserving the
9 litigation claims for the unsecured creditors.

10 What do we think is going to be
11 important and material? Well, we're sure the
12 first lien lenders are going to want to take a
13 look at the terms of the new notes that they're
14 getting under the plan. We're sure that the
15 unsecured creditors are going to be concerned
16 about the distributions made to the secured
17 creditors while they are challenging those claims
18 in the litigation.

19 We think the unsecureds will obviously
20 pay close attention to the corporate governance
21 of the business pending the outcome of the
22 litigation and whether the plan otherwise impairs
23 their ability to prosecute the litigation.

24 We know that there are a myriad of open
25 issues and there is a constant and healthy

1 dialogue with the constituencies to try to make
2 progress on them and we will continue to work
3 with them.

4 This is our proposed schedule. Between
5 now and November 11th, we want to continue to
6 explore alternatives with other interested
7 parties to see if there's a better transaction
8 that we can bring to the Court. We have our
9 disclosure hearing scheduled for November 12th
10 and our -- with our solicitation period --
11 solicitation occurring between November and
12 December and we're proposing, your Honor, if it's
13 convenient with the Court's schedule, a
14 confirmation hearing on January 21st.

15 THE COURT: I think I blocked off
16 January 21st and 22nd for TOUSA hearings.

17 MR. BASTA: Your Honor, before I turn
18 the podium over to my compatriots here, I want to
19 make sure I see if the Court has any questions
20 regarding the plan.

21 THE COURT: Well, I'm sure I will, but
22 really what I was looking for was precisely the
23 kind of overview you've given, so thank you.

24 MR. BASTA: Thank you, your Honor.

25 MR. SMOLINSKY: Your Honor, first let

1 me start -- Joe Smolinsky on behalf of the first
2 lien agents -- by saying that we have no
3 objection to the extension of exclusivity and we
4 note that the order provides for a reservation of
5 rights for parties to seek to terminate that
6 exclusivity.

7 Your Honor, this is a very difficult
8 case for every constituency in this room and let
9 me assure you that the first lien agents have
10 been focused very much so on the global issues in
11 this case and not solely focused on the
12 litigation and just taking it and running.

13 We've been vocal since the early days
14 of this case that the fees that are being
15 generated in this case could very well kill the
16 company and we've been very mindful of that, but
17 at the same time needing to defend ourselves
18 against very serious litigation, as your Honor
19 has identified.

20 Let me qualify my very few thoughts by
21 saying that we're still going through the
22 disclosure statement. We still have not yet
23 received a full business plan and we look forward
24 to that and working with the company.

25 There's been a paradigm shift from the

1 perspective of the parties in the room as to
2 some, I'll call them, immovable facts that
3 existed when we first started talking about plan
4 structures. The first is that everyone was in
5 agreement that the litigation had to be resolved
6 before the company emerged from bankruptcy.

7 The second was that the company
8 believed that it needed to raise \$200 million in
9 order to make sure that as of the emergence date
10 it would have the capital available to be able to
11 move forward and increase the business once the
12 market changed because right now it's in
13 basically a holding pattern. It's still
14 shrinking, but then it's going to go into a
15 holding pattern. It's going to go into
16 effectively hibernation until something happens.

17 Why is that important? For us it's a
18 huge feasibility issue because the plan proposes
19 that we're going to get a five year bullet note,
20 so effectively, whatever happens over five years,
21 we sit there and wait and so feasibility of the
22 plan is very important to us.

23 Now, obviously under the plan, the
24 debtors have abandoned the notion of those
25 immovable facts being true and they're trying to

1 divorce the litigation from the plan and we have
2 no problem with that. We understand that the
3 company needs to get out of bankruptcy. We're
4 very supportive of that notion.

5 However, we also understand, and this
6 is the difficult part of this case, that the plan
7 has to be in the best interest of the estate and
8 unfortunately from where we're sitting today, we
9 see a situation where the plan helps the
10 business, it gets the business out of bankruptcy,
11 but there are going to be additional costs
12 associated with this plan.

13 For example, the company is currently
14 paying adequate protection based on an interest
15 rate that was fixed at the time that we did this
16 financing. This is a very difficult environment.
17 Triple A rated companies are trading -- their
18 paper is trading below par.

19 So when you talk about how we're going
20 to get to an end result where the lenders end up
21 getting a piece of paper worth a hundred cents,
22 we really have to spend a lot of time working on
23 that and figuring out how we're going to
24 accomplish that.

25 Our lenders are a disparate group of

1 parties, they all have their own agenda -- views
2 of where this case should come out. The only
3 thing that's consistent, and it's our job to kind
4 of build consensus around a plan, the consistent
5 message is that as long as the litigation is
6 going on, and maybe it has to, but they want to
7 make sure that when the company exits they have a
8 piece of paper that's worth a hundred cents
9 because otherwise they're going to be in a
10 situation where they're taking a very large
11 discount on their secured claim and it's
12 something that we're going -- you know, we're
13 going to be talking to you as we go forward, but
14 that's a significant issue.

15 With respect to disgorgement, we
16 understand that there has to be a disgorgement
17 mechanism. This has been a constant issue in
18 this case, but now that the company is emerging
19 from bankruptcy, you know, first of all,
20 obviously, it's unacceptable that we would --
21 that interest would be paid into escrow because
22 we think that affects the value of the
23 distribution. But putting that aside, the
24 company -- let me go back to the statement that
25 the business needs to be able to ramp up once the

1 market improves.

2 Under the plan, as long as the
3 litigation is continuing, any refinancing of
4 our -- our new debt would presumably go into
5 escrow and from our perspective, the lenders are
6 not going to be getting full value until they get
7 the cash in hand. We wouldn't accept a quarter
8 of a percent interest with the money sitting in
9 an escrow account while it's refinanced and new
10 money comes in.

11 So the question that we'll be exploring
12 is how is the company going to be able to move to
13 the next stage in its reorganization and after
14 all, it's the job of this Court and all the
15 parties in this room to make sure that this
16 reorganization is not followed by a further
17 restructuring.

18 So the question -- the question long
19 term is how do we allow the company to refinance?
20 The dynamics of the plan is that once the plan is
21 confirmed, the committee really has no -- they're
22 not getting anything under the plan other than
23 the litigation, so the ability to settle the
24 first lien issues early on in the, you know, in
25 the post-plan era is very difficult to imagine

1 under that scenario. We really have to plan for
2 that litigation to go on for a lengthy period of
3 time.

4 In the meantime, the company continues
5 to have the expenses of litigation because of the
6 indemnities not only by the agent, but the
7 individual lenders, and all that has to be taken
8 into account with a business plan and loaded in.

9 I don't want my comments to be viewed
10 as that we're going to -- scorched earth. I
11 think you've seen that we haven't taken that
12 position and I don't think we're going to, but I
13 just want to highlight some of the issues that
14 we're going to be focused on as we go towards
15 confirmation and the parties are going to be
16 working together. I think that's all I have at
17 this point.

18 Thank you, your Honor.

19 THE COURT: Thank you.

20 MR. GOLDEN: Good afternoon, your
21 Honor. Daniel Golden, Akin Gump Strauss Hauer &
22 Feld, counsel for the official creditors'
23 committee. I do agree with a statement just made
24 by Mr. Smolinsky that during the course of this
25 case there has been a radical shift in thinking.

1 I think it's fair to say that initially
2 when the subject matter of the fraudulent
3 conveyance litigation was first raised with this
4 Court, many of us, maybe all of us, maybe even
5 including the Court, was under the belief or the
6 view that because this litigation went to the
7 fundamental capital structure of the company's
8 debt structure, I'll say, that this litigation
9 might well have to be finally resolved either
10 through litigation or settlement before an
11 effective plan could be crafted, debated and
12 ultimately confirmed.

13 That thinking has, in fact, changed. I
14 think it's a result of the litigation, the timing
15 of the litigation, but I think probably most
16 important it's ---

17 THE COURT: To the person who is having
18 interesting nasal issues, you might wish to mute
19 your phone.

20 MR. GOLDEN: Thank you, your Honor.

21 THE COURT: I'm going to take those as
22 unrelated to your comments, Mr. Golden.

23 MR. GOLDEN: I appreciate that, your
24 Honor.

25 I think the biggest driver of that

1 change in thought process is the financial crisis
2 that this country finds itself in and I think
3 there is a recognition, clearly by the debtors,
4 presumably by the lenders, and certainly by the
5 committee, that this economy, now and for the
6 foreseeable future, is not going to be kind and
7 treat home builders with kind recognition.

8 It was, I think, largely based upon
9 that recognition that parties started to try to
10 come up with creative alternatives or strategies
11 for dealing with this litigation because what
12 remains true is that the ultimate distributions
13 in this case, whether initially through a plan or
14 otherwise, cannot be ultimately determined until
15 the litigation is resolved, again, by settlement
16 or by litigation.

17 Mr. Basta pointed out that the plan
18 just filed by the debtors contemplates the
19 creation of a litigation trust that would allow
20 the litigation to go forward post-confirmation of
21 a plan. And, frankly, your Honor, the creditors'
22 committee has bought into that notion because,
23 frankly, we don't see an alternative.

24 While tactically that may not be best
25 for the committee, the committee definitely

1 recognizes, I think a point your Honor was
2 stressing at the last hearing, that we can fight
3 until the cows come home, but we may all be
4 fighting and one day wake up and see all the
5 fighting was for naught because there is no
6 recovery because there is no real value in the
7 assets of this company.

8 THE COURT: So all the cows are dead.

9 MR. GOLDEN: All the cows are dead.

10 But that's not to say, even though the committee
11 has ultimately determined that a
12 post-confirmation litigation will be the way that
13 any plan in this case will have to go, that there
14 are not important issues that need to be
15 resolved, hopefully consensually, and if not
16 resolved, will be the subject of hearings before
17 this Court either in connection with the
18 disclosure statement or in connection with
19 confirmation of those -- of the plan because the
20 guiding premise needs to be that despite the fact
21 that the litigation will be conducted largely
22 post-confirmation, if Mr. Basta's schedule can be
23 achieved, which I have to say we have some doubts
24 about, but we'll talk about that in a moment, the
25 guiding principle has to be that the litigation

1 can be conducted without prejudicing that
2 litigation and that implicates at least four
3 specific issues: The funding of a litigation
4 trust, the identity and designation of the
5 trustee and the litigation trust committee, the
6 post-confirmation corporate governance and
7 management of the organized debtors and
8 appropriate disgorgement provisions.

9 Now, I don't intend to argue any of
10 those positions, simply to report that as those
11 issues are currently dealt with in the plan
12 that's been filed by the debtors, are wholly
13 unsatisfactory to the official creditors'
14 committee.

15 The plan is an ambitious plan. It is
16 the view of the committee that absent consensus,
17 the plan actually is patently unconfirmable. I
18 don't intend to argue that or debate that, I
19 just -- so that the Court understands the
20 positions of the parties, because it ultimately
21 provides for a distribution and a recovery to
22 creditors whose claims are disputed. We don't
23 believe that the Code provides for a plan process
24 that allows distribution and recovery to
25 creditors whose claims are disputed and that is

1 why it is essential, in the view of the
2 committee, that we attempt to reach a global
3 resolution because we believe absent a global
4 resolution, both on the plan process and how the
5 litigation will be treated post-confirmation,
6 this plan may well be destined to failure.

7 One last thought process. I know that
8 the debtor is yearning to get out of Chapter 11
9 and for very good reasons. Mr. Basta gave you a
10 list of reasons and largely the debtors don't --
11 the committee doesn't dispute them, but that
12 doesn't mean that we, in a haste to get out of
13 Chapter 11, we can do things or take shortcuts or
14 approve disclosure statements that aren't
15 fully -- don't provide full disclosure of what
16 creditors are going to be asked to vote on with
17 respect to a plan.

18 The disclosure statement, in our view,
19 is largely incomplete. There are many documents
20 that aren't even appended to the disclosure
21 statement, either in its body or in its exhibits.
22 We've had discussions with the debtors about some
23 of those omissions. Some they intend to fix,
24 others we're not sure of.

25 But the schedule of holding a

1 disclosure statement hearing on November 12th,
2 which requires 25 days' notice to creditors, and
3 I think your Honor knows the committee and knows
4 my firm well enough, we don't generally stand on
5 ceremony about procedural rules, but when large
6 aspects of the disclosure statement are simply
7 not in there for creditors to make an informed
8 decision, I'm not sure we can go forward on
9 November 12th.

10 So I guess what I'm really suggesting,
11 your Honor, and urging the debtors, is to
12 complete the disclosure statement as much as they
13 possibly can, not simply rely on a supplement
14 that's going to be filed either days before the
15 disclosure statement or, in some cases, not even
16 before the disclosure statement, but prior to
17 confirmation, because I don't want to have to
18 argue come November 12th we shouldn't be going
19 forward at all simply because the disclosure
20 statement doesn't contain the information
21 required pursuant to 1125 of the Bankruptcy Code.

22 THE COURT: I note your shot across the
23 bows and I'm sure Mr. Basta does, too.

24 MR. GOLDEN: Your Honor, I will say in
25 closing that the committee understands the

1 message given by the Court that we cannot be
2 holding out for the last nickel, probably not
3 holding out for the last dime in this case.

4 THE COURT: That was not directed
5 exclusively at the committee.

6 MR. GOLDEN: I understand that and I
7 didn't take the message that it was directed at
8 the committee. I assumed it was being directed
9 to all the parties in interest.

10 THE COURT: It was a universal message
11 which I attempted to convey.

12 MR. GOLDEN: And I believe, frankly,
13 that all the parties in interest understood the
14 message as communicated, but that message cannot
15 mean that one party, at the expense of all
16 others, are going to be at the short end of the
17 stick.

18 It is the view of the committee that
19 they will work hard with the debtors, the first
20 lien holders and the second lien holders to see
21 if we can come up with a consensual plan
22 construct that allows this company to emerge from
23 Chapter 11. I represent that we will do that in
24 the weeks leading up to the disclosure statement
25 if, in fact, it goes forward on December 12th or

1 not.

2 THE COURT: November.

3 MR. GOLDEN: November 12th or not. We
4 have also encouraged, and one of the parties that
5 the company is actually now engaged in some
6 discussions with, some third party about
7 potentially being a plan sponsor, was a party
8 that the creditors' committee actually brought to
9 the debtors' attention. So we will also fully
10 pursue that avenue to determine whether a
11 third-party sponsored plan, as opposed to a
12 strict stand alone plan may yield a better result
13 for all creditors.

14 But the parties need to work hard here
15 and the debtors, notwithstanding the fact that
16 they need to get out of Chapter 11, need to do
17 their part, and from our perspective, doing their
18 part means doing all of the things necessary to
19 get the disclosure statement and the plan in
20 shape so that it's capable of being debated in a
21 form like this on a fair and open basis.

22 Thank you, your Honor.

23 THE COURT: Thank you, Mr. Golden.

24 Does anyone else wish to be heard?

25 Mr. Mayr.

1 MR. MAYR: I guess we're at afternoon.

2 Good afternoon, your Honor.

3 THE COURT: Good afternoon.

4 MR. MAYR: Kurt Mayr on behalf of the
5 second lien agent and the second lien lenders.
6 My remarks will be brief.

7 I agree with Mr. Golden, nobody wants
8 to take any unnecessary shortcuts here. I would
9 note that one shortcut we have taken is in the
10 capital structure and it's one that turns the
11 second lien secured debt into equity and that is
12 a sacrifice that our clients have been willing to
13 consider in light of not only the message that
14 your Honor sent, but also the message that the
15 market has sent.

16 We have our views on the issues that
17 have been outlined, we have some issues of our
18 own. I won't belabor them here. I think we've
19 sort of heard enough about that stuff, but I will
20 say I'm glad to see that the parties that are
21 here today are committing themselves to talk and
22 work to move this particular plan forward or
23 whatever version it is we're here talking about
24 on November 12th and with all deliberate speed.

25 THE COURT: Thank you. Thank you very

1 much.

2 Mr. Basta.

3 MR. BASTA: Your Honor, the debtor
4 appreciates the statements of all the
5 constituents and thinks that everyone is going to
6 work constructively to try to get something done
7 here. We believe our plan is confirmable and we
8 intend to show that.

9 With respect to Mr. Golden's comments
10 regarding the schedule of the disclosure
11 statement, we agree it's ambitious. We are
12 working extremely hard to complete the financial
13 information and the updates to get everybody the
14 information that they need and we're going to get
15 it to them as soon as possible.

16 If getting it to them means they're
17 being jammed, then we may be back to the Court
18 and say it needs to be moved, you know, a bit so
19 that they're not jammed, but what we're trying to
20 do is to make sure that the material information
21 that would allow constituencies to be able to
22 make an informed decision is included, but that
23 we're not delaying it for additional information
24 where the expense of providing that information,
25 which may not be absolutely material for a vote,

1 delays the process.

2 THE COURT: I appreciate that it's a
3 constant exercise in trade offs. I appreciate
4 that there is -- that there are those things that
5 are clearly material and those, I think, probably
6 do need to be spelled out.

7 MR. BASTA: Yes.

8 THE COURT: And I'm very impressed with
9 the way that the parties have worked it out. I
10 think the change in capital structure from what
11 was originally discussed when this case was
12 filed, which was that the equity would be held by
13 the subordinated or senior notes and the
14 unsecureds, the notion that the second lien
15 lenders are now putting themselves in that
16 posture, as well, is an interesting one,
17 certainly and I think is a realistic evaluation
18 of what the market is telling us, not anything
19 that we invented here.

20 I attempted at the last hearing to
21 light a fire under everybody. I want you to
22 understand that I continue to wish you to act as
23 if the fire is there, but that to the extent you
24 need some modifications of timing, I'm agreeable
25 to that so long as it isn't a manifestation of

1 lack of diligence on people's part or that you're
2 at a position where you want delay because you're
3 at loggerheads, because if that's the issue, then
4 I'll have to decide things.

5 MR. BASTA: Yes. Your Honor, we
6 intend, as the debtor, to drive this as hard as
7 we possibly can so that we resolve where we can,
8 but we seek the Court's assistance in getting
9 rulings. I think we just sort of have a
10 fundamental goal out there, which is to get the
11 company out and preserve the litigation and we're
12 going to do everything we can to keep striving
13 for that.

14 THE COURT: Great. Thank you.
15 Ms. Labovitz. Oh.

16 MR. BASTA: Your Honor, we'd ask for
17 approval of the exclusivity motion.

18 THE COURT: Without objection, and I've
19 heard none, I'll grant the motion.

20 Is there anything else we need to do
21 today?

22 MS. LABOVITZ: No, your Honor. I think
23 we have our work cut out for us, but you can go
24 have lunch.

25 THE COURT: Okay, and you can, too.

1 MS. LABOVITZ: Thank very, Judge.

2 THE COURT: Thanks very much. I'll see
3 you all soon.

4 (Thereupon, the hearing was concluded.)

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CERTIFICATION

STATE OF FLORIDA:
COUNTY OF DADE:

I, Margaret Franzen, Shorthand Reporter
and Notary Public in and for the State of Florida
at Large, do hereby certify that the foregoing
proceedings were taken before me at the date and
place as stated in the caption hereto on Page 1;
that the foregoing computer-aided transcription is
a true record of my stenographic notes taken at said
proceedings.

WITNESS my hand this 30th day of
October, 2008.

Margaret Franzen
Court Reporter and Notary Public
in and for the State of Florida at Large
My Commission Expires: April 14, 2010

