

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 Judge John K. Olson
4

5 In Re:

6 Case No. 08-10928-BKC-JKO

7 TOUSA, INC.,
8 Debtor.

9 OFFICIAL COMMITTEE OF
10 UNSECURED CREDITORS OF TOUSA, ET AL,
11 Plaintiff

12 vs. Case No. 08-1435-BKC-JKO-A

13 CITICORP NORTH AMERICA, INC.
14 Defendant.

15 ALL MOTIONS ON THE CALENDAR 1547, 1571, 1555,
16 1570, 1557, 1579, 1669, 1611, 1612, 1631, 1620,
17 1610, 1633, 1542, 1543, 1668, 1667, 8, 12, 10.

18 August 25, 2008

19
20 The above entitled cause came on for hearing before
21 the HONORABLE JOHN K. OLSON, one of the Judges in
22 the UNITED STATES BANKRUPTCY COURT, in and for the
23 SOUTHERN DISTRICT OF FLORIDA, at 299 East Broward
24 Boulevard, Fort Lauderdale, Broward County, Florida,
25 on August 25, 2008, commencing on or about 2:00 p.m.,
and the following proceedings were had:

Reported by: Jacquelyn Ann Jones, Court Reporter

1 APPEARANCES:

2 BERGER SINGERMAN
By: PAUL S. SINGERMAN, ESQUIRE
3 Co-counsel on behalf of the Debtors

4 KIRKLAND & ELLIS, LLP
By: M. NATASHA LABOVITZ, ESQUIRE
5 BRIAN SCHATZ, ESQUIRE
DANIEL DONOVAN, ESQUIRE
6 JEFFREY LANDIS, ESQUIRE
ASHLEIGH BLAYLOCK, ESQUIRE
7 On behalf of the Debtors

8 AKIN GUMP STRAUSS HAUER & FELD, LLP
By: BRIAN GELDERT, ESQUIRE
9 PHIL DUBLIN, ESQUIRE
On behalf of the Committee of Unsecured Creditors

10 STEARNS WEAVER
11 By: DAVID POLLACK, ESQUIRE
ANDREW MCNAMEE, ESQUIRE
12 On behalf of the Committee of Unsecured Creditors

13 GREENBERG TRAUIG
By: MARK BLOOM, ESQUIRE
14 On behalf of certain of the debtors to a specific
motion

15 ROBBINS RUSSELL
16 By: ALAN D. STRASSER, ESQUIRE
MICHAEL L. WALDMAN, ESQUIRE
17 On behalf of the Committee of Unsecured Creditors

18 BILZIN SUMBERG BAENA PRICE & AXELROD, LLP
By: MATTHEW KRAMER, ESQUIRE
19 On behalf of the Second Lien Lenders in Wells Fargo

20 BRACEWELL & GIULIANI
By: RICHARD F. WHITELEY, ESQUIRE (telephonic)
21 GREGORY W. NYE, ESQUIRE
On behalf of the Second Lien Lenders in Wells Fargo

22 CHADBOURNE & PARKE, LLP
23 By: JOSEPH H. SMOLINSKY, ESQUIRE
TOM HALL, ESQUIRE
24 On behalf of CitiCorp North America, Inc.

25

1 SMITH HULSEY & BUSEY
By: STEPHEN D. BUSEY, ESQUIRE
2 Co-counsel on behalf of the First Lien Revolver Agent

3 STICHTER RIEDEL BLAIN & PROSSER, P.A.
By: RICHARD C. PROSSER, ESQUIRE
4 Co-counsel on behalf of the First Lien Term Loan Agent

5 AKERMAN SENTERFITT
By: PHILIP LANDAU, ESQUIRE
6 On behalf of the Transeastern Defendants

7 MILLBANK TWEED
By: DENNIS O'DONNELL, ESQUIRE (telephonic)
8 On behalf of the Transeastern Defendants

9 GENOVESE JOBLOVE & BATTISTA, P.A.
By: PAUL J. BATTISTA, ESQUIRE
10 On behalf of Note Holders Aurelius, GSO, Carlisle

11 KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP
By: JONATHAN E. MINSKER, ESQUIRE (telephonic)
12 On behalf of Note Holders Aurelius, GSO, Carlisle

13 OFFICE OF THE U.S. TRUSTEE
By: STEVEN SCHNEIDERMAN, ESQUIRE (telephonic)
14

15 PROCOPIO CORY HARGREAVES & SAVITCH
By: GERALD KENNEDY, ESQUIRE (telephonic)
On behalf of SC Design

16

17 WEIL GOTSHAL
By: ROBERT LEMONS, ESQUIRE (telephonic)
KELLY ROGERS, ESQUIRE (telephonic)
18 On behalf of GMAC Model Homes Finance, LLC

19 DEBEVOISE & PLIMPTON
By: MAUREEN CRONIN, ESQUIRE (telephonic)
On behalf of Jeffries and Company

20

21 LATHAM & WATKINS
By: MICHAEL RIELA, ESQUIRE (telephonic)
On behalf of Moelis and Company, LLC

22

23 ALSO PRESENT:
Mr. John Boken
Mr. Paul Berkowitz
24 Sorana Georgescu

25

1 THE COURT: Good afternoon. Let me take
2 appearances. Oh, yes, we need to get the people on
3 the phone.

4 (The Court contacted parties by telephone.)

5 THE COURT: Good afternoon. This is Judge
6 Olson in the Touse case. I'm taking appearances
7 in the courtroom first.

8 MR. SINGERMAN: May it please the Court.
9 Good afternoon, Your Honor. I'm Paul Singerman from
10 Berger Singerman, and our firm is co-counsel to the
11 debtors, along with the Kirkland and Ellis firm.

12 With me from Kirkland and Ellis are my
13 colleagues, Natasha Labovitz at counsel table, behind
14 her, Brian Schartz, Ashleigh Blaylock, Daniel Donovan,
15 and Jeffrey Landis. And from the company today,
16 Your Honor, Paul Berkowitz, the chief of staff, and
17 Sorana Georgescu, assistant general counsel. Thank
18 you, Judge.

19 THE COURT: Good afternoon to all of you.
20 Who else?

21 MR. BLOOM: Good afternoon, Your Honor. I'm
22 Mark Bloom of Greenberg Traurig, appearing as special
23 counsel on behalf of certain of the debtors in
24 connection with one of the matters on today's agenda,
25 I believe it's item 2.

1 THE COURT: Thanks, Mr. Bloom.

2 MR. SMOLINSKY: Good afternoon, Your Honor.
3 Joe Smolinsky from Chadbourne and Parke on behalf of
4 CitiBank North America, Inc., as agent for the first
5 lien lenders.

6 I'm joined here today with Tom Hall, my
7 colleague, and as usual, I'm ably joined by my
8 co-counsel, Steve Busey and Richard Prosser.

9 THE COURT: Gentlemen, good afternoon to all
10 of you.

11 MR. LANDAU: Good afternoon, Your Honor.
12 Phil Landau of Akerman Senterfitt, on behalf of the
13 Transeastern defendants.

14 Your Honor, on the phone should be our
15 co-counsel, Dennis O'Donnell from the Millbank Tweed
16 McClosky firm.

17 THE COURT: Very good.

18 MR. KRAMER: Good afternoon, Your Honor.
19 Matt Kramer, Bilzin Sumberg, on behalf of Wells Fargo
20 and the second lien term loan lender group.

21 With me in the courtroom, Your Honor, is
22 Greg Nye from Bracewell and Giuliani.

23 MR. GELDERT: Good afternoon, Your Honor.
24 Brian Geldert from Akin, Gump, Strauss, Hauer and
25 Feld, on behalf of the official committee of unsecured

1 creditors.

2 In the courtroom today I have Phil Dublin,
3 also from Akin Gump, co-counsel in these cases from
4 Stearns Weaver, David Pollack and Andrew McNamee, and
5 special litigation counsel, with the Robbins Russell
6 firm, Mike Waldman and Alan Strasser.

7 MR. BATTISTA: Good afternoon, Judge.
8 Paul Battista of Genovese Joblove and Battista. I
9 represent note holders Aurelius, GSO and the Carlisle
10 Group.

11 THE COURT: Very good. And on the phone,
12 anybody want to make an appearance?

13 THE COURT: Good afternoon, Your Honor.
14 It's Robert Lemons and Kelly Rogers from Weil Gotshal,
15 on behalf of GMAC Model Homes Finance, LLC, and its
16 affiliates.

17 THE COURT: Very good.

18 MR. O'DONNELL: Your Honor, Dennis O'Donnell
19 from Millbank Tweed Hadley and McClosky, on behalf of
20 certain of the former Transeastern lenders who are now
21 defendants in the adversary.

22 MR. WHITELEY: Your Honor, Richard Whiteley
23 from Bracewell Giuliani on behalf of the second lien
24 agent.

25 MR. MINSKER: Your Honor, Jonathan Minsker

1 on behalf of note holders, Aurelius, Carlisle and GSO.

2 MS. CRONIN: Your Honor, Maureen Cronin of
3 Debevoise and Plimpton for Jeffries and Company.

4 MR. SCHNEIDERMAN: Steven Schneiderman for
5 the U.S. Trustee.

6 MR. RIELA: Good afternoon, Your Honor.
7 Michael Riela from --

8 THE COURT: I'm sorry, Counsel, if you
9 expect the court reporter to take your name down, you
10 have to say it slowly enough so that she can possibly
11 do that.

12 MR. RIELA: My apologies, Your Honor.
13 Michael Riela from Latham and Watkins, on behalf of
14 Moelis and Company, LLC.

15 THE COURT: Thank you. Anyone else?

16 MR. KENNEDY: Good afternoon, Your Honor.
17 Gerald Kennedy, Procopio, Cory, Hargreaves and
18 Savitch, on behalf of SC Design Interiors.

19 THE COURT: Anyone else? Very good.
20 Mr. Berger -- or Mr. Singerman, are you orchestrating
21 today or is Ms. Labovitz?

22 MR. SINGERMAN: Ms. Labovitz, Your Honor.

23 MS. LABOVITZ: Good afternoon, Your Honor.
24 I will not wish you happy birthday.

25 THE COURT: Thank you. I only need one of

1 those a year.

2 MS. LABOVITZ: I thought today, as we've
3 become accustomed, I would give a brief update on
4 operations, and then we'll continue through the
5 agenda, if that's all right, Your Honor.

6 THE COURT: That's great. Thanks.

7 UNIDENTIFIED SPEAKER: Your Honor, I'm sorry
8 to interrupt, but we're having difficulty hearing
9 Ms. Labovitz.

10 THE COURT: Then she'll have to belly-up to
11 the microphone.

12 MS. LABOVITZ: I'll try to adjust the mike.

13 UNIDENTIFIED SPEAKER: Thank you, I
14 appreciate it.

15 MS. LABOVITZ: Sure. As I just said, we'll
16 give a brief update on the debtors' business
17 operations, and then move on to cover the points
18 listed in the agenda.

19 In terms of operations, cash and liquidity
20 at this point are the company's strong point, and
21 continue to be. Operating cash at this time is
22 approximately 175 million dollars.

23 Then there is another amount segregated for
24 pay-down of the first lien debt in accordance with the
25 cash collateral order. And Judge, to give you an

1 update on how the process for that pay-down has played
2 out in practicality, approximately 75 million dollars
3 of the 175 million dollar authorized to pay-down has
4 actually been paid to the banks.

5 The banks representing the remaining 100
6 million dollars have not requested the pay-down at
7 this time, I think in part because they have elected
8 not to go through the process of certification related
9 to that payment.

10 The company is in full compliance with the
11 terms of the cash collateral order at this time, and
12 the company does expect that it will have sufficient
13 cash and liquidity to pass the liquidity covenant test
14 as of the end of this month. As of the end of July
15 the company had a substantial cushion with respect to
16 the monthly liquidity test.

17 Your Honor, the current liquidity situation
18 is comfortable for the company. The forecasts are
19 that external market factors related to the downturn
20 in the housing market, and generally challenging
21 economic conditions for the country, are continuing to
22 have a detrimental impact on the company's sales of
23 new homes, and that's been true as the Court is aware,
24 over the last six months in particular.

25 The downturn in sales numbers will begin to

1 have a negative impact on cash and liquidity, and the
2 reason that it is somewhat delayed, is that contracts
3 are sold -- houses are sold pursuant to a contract,
4 and then there's some time lag between the signing of
5 the contract and the sale.

6 So negative sales figures will begin to show
7 up in liquidity results as of the end of September, or
8 certainly by the end of October.

9 The company does not yet forecast that it
10 will be out of compliance with the cash collateral
11 covenants in that time frame. In other words, Judge,
12 the current forecasts show that the company will be in
13 compliance with those covenants. But the company and
14 its advisors have been working to make sure that all
15 constituencies are aware that the cushion of liquidity
16 that was forecast in those covenants is diminishing
17 and is expected to erode significantly.

18 The company, in part in response to these
19 factors, and in part as implementation of its new
20 business plan, has continued its efforts to reduce
21 costs through consolidation of divisional functions,
22 rejection or renegotiation of contracts, and other
23 efforts, some of which have been discussed with this
24 Court in connection with motions.

25 By the end of the fourth quarter of this

1 year, the company expects that its annual GNA run rate
2 will have been reduced by approximately 40 percent
3 from what it was at the outset of these cases.

4 THE COURT: By the end of this year?

5 MS. LABOVITZ: Yes, Your Honor.

6 That said, the Chapter 11 cases themselves
7 are expensive, and the cost of the case continues to
8 be a concern, both to the company's management and the
9 Touse, Inc. board.

10 Professional fees are running at a much
11 higher rate than was originally forecast, and this, as
12 the Court is undoubtedly aware, is largely as a result
13 of fees associated with the fraudulent conveyance
14 litigation.

15 From an operating standpoint, the company
16 continues to be challenged in the effort to meet its
17 net sales target. As the Court is aware, and as we've
18 observed on other occasions, nearly all of the
19 company's markets have been affected by the downturn
20 in residential real estate, and Florida and the west
21 continue to be significantly challenged.

22 July was a very difficult month, and as we
23 have alluded to, Touse missed its aggregate net sales
24 target substantially.

25 Management is taking significant efforts to

1 do what it can in face of the situation. It's not
2 optimistic that it will correct itself in the
3 immediate future, but they're still working to adjust
4 their marketing and incentive strategies to increase
5 sales volume without generating unprofitable sales
6 transactions.

7 The most significant external issues, as the
8 Court is aware, that are driving the situation, apply
9 not only to the company, but to all of its
10 competitors, and these include the credit crunch, in
11 that it's very difficult to get even well situated
12 potential buyers qualified for mortgage loans, and
13 that foreclosed homes are coming on the market at very
14 depressed prices.

15 THE COURT: I assume that most of you saw
16 the article in yesterday's New York Times, that is
17 quite startling, about the percentages of houses that
18 are under water in various markets, including this
19 one.

20 MS. LABOVITZ: Your Honor, the national news
21 does continue to be bleak.

22 In addition, the company's competitors have
23 at times not hesitated to allude to the Chapter 11
24 filing in among their many sales efforts, and as a
25 result, this company is facing a challenging

1 situation.

2 That said, Judge, the highlight from today's
3 news is that currently the cash position and the
4 liquidity remain strong and are forecasted to remain
5 in compliance with the cash collateral budget through
6 its term.

7 THE COURT: Very good. Thank you.

8 MS. LABOVITZ: Thank you, Judge.

9 Turning to the agenda --

10 THE COURT: Mr. Smolinsky, you wish to be
11 heard at this moment?

12 MR. SMOLINSKY: If I may, Your Honor. Joe
13 Smolinsky from Chadbourne and Parke.

14 I don't want to take away from the message
15 that Ms. Labovitz is conveying, but I do want to
16 clarify one statement that she made, and it was the
17 presumption that a large number of lenders haven't
18 taken the pay-down.

19 Your Honor, the procedures that were
20 negotiated in the cash collateral order were very
21 complex, and it left open, because of the disgorgement
22 mechanism and the certification mechanism, for lenders
23 to have to jump through hurdles in order to get their
24 pay-down. A number of lenders who did not want to
25 take the pay-down, sold out of the position, and the

1 agent is working in some instance to try to make sure
2 that they can track the pieces as they trade as to
3 whether or not a pay-down has been received or not.
4 And that's taking some time.

5 So I don't want to leave the Court with the
6 impression that it's necessarily the case that every
7 lender that's in this -- that's part of this hundred
8 million dollars that's still segregated, doesn't want
9 their pay-down. There's a process that's ongoing --

10 THE COURT: Or couldn't satisfy the
11 requirements. I think that's probably what you were
12 really trying to tell me.

13 MR. SMOLINSKY: Couldn't or didn't want to,
14 or they had already sold out a position and the agent
15 has to effectively close the assignment, and now needs
16 additional information in order to close out that
17 assignment.

18 So we may very well see that, in the near
19 future, a much more significant amount will be taken
20 out of that account.

21 THE COURT: Very good. Thank you.

22 MS. LABOVITZ: Thank you, Mr Smolinsky.

23 With that, Your Honor, with the Court's
24 permission, I'll turn to the motions set on the
25 agenda, and I would like to ask your indulgence,

1 Judge, to go a little out of order on today's agenda.

2 It occurred to me as I was preparing for the
3 hearing that several of the motions up for today
4 relate to, in one way or another, the debtors'
5 deadline to assume or reject real property leases, and
6 I thought it would be most efficient if we took all of
7 those together.

8 THE COURT: Very good.

9 MS. LABOVITZ: Before then turning to any
10 one of the motions, I thought it would be helpful to
11 explain the process by which the debtors approached
12 this deadline, and how we have ended up with the
13 package of relief that we're presenting to the Court
14 today.

15 The debtors used their leased
16 non-residential real property primarily in two ways.
17 First, as office space, and second, as model homes,
18 which are generally built by various of the debtors,
19 sold to third parties, and leased back for use in the
20 debtors' sales and marketing efforts.

21 For both of these --

22 THE COURT: I assume that's really just an
23 odd mechanism, it may not be odd at all in the
24 industry, but it strikes me as an unusual financing
25 mechanism for a home builder.

1 MS. LABOVITZ: I think it's not odd in the
2 industry, Your Honor.

3 THE COURT: Fair enough.

4 MS. LABOVITZ: And they're done in two
5 different ways. One, through strategic market players
6 that relate, for example, to the GMAC leases that have
7 been before the Court, and sometimes this is done in
8 one off transactions with individual buyers who buy a
9 home and for whatever reason, lease it back to the
10 debtors for a certain period of time.

11 For both of these types of leases, the
12 office space and the model homes, the debtors have
13 gone through a process of analyzing their space needs
14 in accord with the revised business plan that they
15 have developed, and with a eye toward reducing
16 overhead expenses.

17 They have been periodically rejecting
18 leases, as it became clear that they were no longer
19 needed, and, as the Court is aware, at almost every
20 hearing for the last couple of months, we have had an
21 omnibus motion to reject contracts. As a result,
22 there's no significant backlog of new rejections to
23 address at this hearing.

24 There were many leases remaining as the
25 debtors neared this deadline for assumption or

1 rejection, and for those the debtors have determined
2 either to assume them, and they are assuming the vast
3 majority of the leases that remain at this stage, to
4 negotiate amendments with the landlord and then assume
5 the lease as amended, and that has happened in two
6 cases, Judge, and there are two motions pending for
7 today, or to negotiate an extension of the deadline
8 for assumption or rejection to allow for further
9 negotiations with the landlord, and that's the case
10 for another two motions -- for another two leases.

11 For the remaining leases the debtors have
12 determined to allow the deadline to expire for a
13 deemed rejection. And Judge, the debtors went through
14 this process with the assistance of the Kroll Zolfo
15 Cooper team and lawyers from Kirkland, and also in
16 consultation with the creditors' committee's
17 professionals.

18 I think the first thing I should mention to
19 the Court is actually the leases for which there's no
20 motion pending today, the ones that will be deemed
21 rejections.

22 Your Honor, as we were thinking about these,
23 we didn't think it was necessary to go to the expense
24 of filing a motion to reject these leases, but we did
25 think that the landlords should get a notice of the

1 rejection so that they will know that the bar date
2 occurs for filing of the proof of claim for any
3 rejection damages 30 days after the rejection.

4 Accordingly, we propose to send a short two
5 or three page notice to each of the affected landlords
6 clearly stating the bar date, and to file that notice,
7 along with the certificate of service on the docket of
8 these cases, so that there will be no question later
9 as to whether the landlords were served.

10 Unless the Court thinks otherwise, we
11 wouldn't propose to file a motion to explicitly
12 approve that notice or to reject the leases.

13 THE COURT: Unless somebody wants to be
14 heard with a different suggestion, I'll adopt what
15 you've suggested.

16 MS. LABOVITZ: Thank you, Your Honor.

17 With that then, I'll turn to the motions
18 that we have filed that address these other three
19 categories of leases.

20 And the first is listed at tab 1 of the
21 agenda. This is a motion for authority to assume
22 approximately a dozen, I think it might be 13, office
23 space leases, and approximately 125 model home
24 leases.

25 Your Honor, the motion lists cure amounts as

1 they're shown in the debtors' books and records. For
2 the most part, because these leases were paid monthly
3 at the beginning of the month, there are no cure
4 amounts, but in some cases, Judge, there are, and
5 those are listed in the exhibit to the motion.

6 No objections have been received to the cure
7 amounts or any other aspect of the motion, and at this
8 time we would request that the Court approve the
9 assumption of those leases.

10 THE COURT: Does anyone wish to be heard?
11 Hearing no one, I will grant the motion.

12 MS. LABOVITZ: Thank you, Your Honor.

13 As I noted, I'm going to try to skip ahead
14 in the agenda to the other motions that relate to the
15 real property leases.

16 The first appears at number 5 in the agenda.
17 It's the motion to amend and assume a lease with CRP-2
18 Holdings DD, LC, which represents the lease for the
19 debtors' Denver office space, specifically Touse
20 Homes' Denver office space.

21 Under the negotiated amendment to the lease
22 the debtors will -- or Touse Homes will reduce the
23 leased space on a step-down basis. They'll vacate one
24 part of the leased premises now, and they'll vacate
25 another part of the leased space whenever the landlord

1 is able to rent it to an alternate tenant with at
2 least 30 days notice of the time to vacate. Tousa
3 Homes will continue to operate in one remaining
4 portion of the leased space.

5 The lease amendments contemplate associated
6 step-downs in rent. I believe the amendments may
7 ultimately save more than \$100,000 on an annualized
8 basis.

9 Upon amendment of the lease, Tousa Homes
10 contemplates assuming the lease as amended. The
11 debtors' books and records show no cure amount, and
12 the term of the lease, which is through November 1st,
13 2011, has not changed.

14 Again, Your Honor, the debtors have filed
15 this motion in consultation with the creditors'
16 committee. We believe there are no objections to the
17 relief requested.

18 THE COURT: Does anyone wish to be heard?
19 The motion will be granted.

20 MS. LABOVITZ: Thank you, Your Honor.

21 The next motion, which is going to sound
22 very much like an echo of the previous one, is number
23 6 in the agenda. It's the motion for entry -- for
24 authority to assume and amend -- amend and assume a
25 lease with CDR Presidential, LLC, which is the lease

1 of Touse, Inc. for the debtors' headquarters space in
2 Hollywood, Florida.

3 And the reason I said it would seem like an
4 echo, Your Honor, is that it's a staged step-down of
5 the occupied premises in which Touse will vacate one
6 portion of the premises now, one portion of the
7 premises later, slightly different, they don't have to
8 wait until the landlord finds another tenant, the
9 step-down will occur at the earlier of the end of this
10 year, or when the landlord finds another tenant with
11 at least 60 days notice to Touse.

12 For that portion of the space, Judge,
13 partially in consideration for the step-down, the
14 debtors have agreed to leave their office furniture
15 there for the benefit of the landlord. The other
16 amendment to the lease, Your Honor, is that Touse will
17 have the authority to terminate the lease on 48 months
18 notice. Right now the lease terminates in year 2016,
19 so this is an improvement.

20 With those amendments Touse would propose to
21 assume the lease, and that would involve paying a cure
22 amount of approximately \$3,600.

23 THE COURT: And is rent reduced
24 proportionately to the step-down in space?

25 MS. LABOVITZ: There is a step-down in rent

1 associated with the reduced occupancy.

2 THE COURT: Okay. Anyone wish to be heard?

3 Hearing no one, I'll grant the motion.

4 MS. LABOVITZ: Thank you, Your Honor.

5 For the last two motions we would skip to, I
6 believe item number 9 and 10 on the agenda. I'll
7 address these motions together with the Court's
8 permission, because they contemplate essentially the
9 same relief.

10 These are agreements with two landlords --

11 THE COURT: Hold on a second. Number 9 on
12 my list is a note holder's claim objection. Do I have
13 the wrong agenda.

14 MS. LABOVITZ: No, I may have -- there was
15 an amended agenda, Your Honor.

16 MR. SINGERMAN: May I approach, Your Honor?

17 THE COURT: Thank you. I've got one.

18 MS. LABOVITZ: Items 9 and 10 on the amended
19 agenda, Your Honor, relate to two ex parte motions
20 that we had filed recently that we need to have
21 entered today in order to comply with tomorrow's
22 365(d)(4) deadline.

23 THE COURT: Okay.

24 MS. LABOVITZ: Each of these represents an
25 agreement with a landlord to extend the deadline to

1 allow for further negotiations. And Your Honor,
2 neither one of them require the debtors to make any
3 payment for that extension.

4 THE COURT: Okay.

5 MS. LABOVITZ: The first one, appearing on
6 item 9 of the agenda is an agreement with ARI Central
7 and Donari Central to extend the deadline for the
8 debtors' Phoenix lease, and again, this a Tousa Homes
9 lease, for 37 days until September 28th.

10 And the second is an agreement with
11 Strategic Capital Resources for a number of model
12 homes as to which the debtors are making some
13 decisions now about space needs.

14 And the deadline with respect to that lease,
15 master lease, would extend for 22 days through
16 September 17th, which is the date of the next hearing
17 in these cases.

18 Again, Your Honor, the company is paying no
19 consideration for these extensions.

20 THE COURT: Okay. Does anybody wish to be
21 heard? Mr. Dublin.

22 MR. DUBLIN: Just quickly on the Strategic
23 Capital leases, Your Honor. We're still analyzing
24 whether or not those might be secured financings and
25 whether or not 365(d)(4) applies. So we're going to

1 reserve our right on that issue.

2 THE COURT: Okay. Fair enough. You need
3 orders entered today on these?

4 MS. LABOVITZ: Yes, Your Honor.

5 THE COURT: You've got them with you?

6 MS. LABOVITZ: I don't have them with us,
7 but we can submit them this afternoon, Your Honor.

8 THE COURT: Okay. My concern would be
9 whether they're to me in time for me to sign them, and
10 then for them to actually get docketed.

11 MS. LABOVITZ: The actual deadline is
12 tomorrow, so I think as long as they're docketed
13 tomorrow, that would be all right.

14 THE COURT: Okay.

15 MS. LABOVITZ: Thank you, Your Honor. With
16 that then, Judge, we're done with a pretty high
17 percentage of our motions for today.

18 THE COURT: Okay.

19 MS. LABOVITZ: We can return now to item 2
20 on the agenda, which is a motion related to GMAC.
21 Greenberg Traurig has been handling matters related to
22 GMAC in these cases, and my co-counsel, Mark Bloom
23 from Greenberg, will present this motion.

24 THE COURT: Very good.

25 MS. LABOVITZ: Thank you, Your Honor.

1 MR. BLOOM: Good afternoon again, Your
2 Honor.

3 THE COURT: Good afternoon.

4 MR. BLOOM: In our capacity as special
5 counsel we filed, back on August 8th, the motion that
6 appears as item 2 on the agenda, which is a motion for
7 entry of an order under Section 363 and 365 of the
8 Bankruptcy Code, and Federal Rule of Bankruptcy
9 Procedure 9019, to approve a settlement and lot swap
10 agreement with, what I will refer to collectively as
11 the GMAC parties. The lead party is GMAC Model Home
12 Finance, LLC, which I may refer from time to time in
13 the presentation as MHF, the same way it's referred to
14 in the motion.

15 When we filed the motion back on August 8th
16 it was accompanied as Exhibit 1 by a very advanced
17 draft of the proposed lot swap agreement that we're
18 asking the Court to approve.

19 As we mentioned though, there were certain
20 terms of that agreement that were still under
21 discussion with the GMAC parties, and still subject to
22 review by the creditors' committee. And so as we
23 indicated that we would, on August 21st we filed under
24 notice of filing the final form of settlement and lot
25 swap agreement in both modified and red line versions

1 reflecting the changes to the dozen or more
2 intermediary versions that had existed since the one
3 that we filed back on August 8th. So I believe it's
4 all before the Court right now, if Your Honor needs a
5 copy, I'll be happy to pass one up.

6 Perhaps though it might be easier for me
7 simply to go through and give a summary of what we're
8 seeking to do here.

9 This lot swap agreement as I'll refer to it,
10 reflects a detailed series of transactions which
11 individually are pretty similar in concept, but they
12 have a number of elements to them because of the
13 extensive pre-petition history that existed in the way
14 of business transactions between the Touse parties on
15 the one hand, and the GMAC parties on the other.

16 Your Honor has previously approved a pair of
17 stipulations relating to the model home relationship
18 that existed with GMAC. This agreement relates to the
19 lot option relationship that was reflected by a series
20 of option agreements and construction agreements and
21 apparent guarantees executed by Touse, Inc. over a
22 period of years prior to the Chapter 11 filings.

23 Pursuant to these agreements, Touse Homes
24 and Newmark Homes, two of the debtors before the
25 Court, were engaged as construction manager and

1 general contractor to develop lots in certain
2 properties owned by the GMAC entities, with either an
3 option or an obligation to purchase those lots at
4 various points in time.

5 After MHF purported to terminate the option
6 agreement before the end of 2007, Tousa filed a motion
7 to reject the option agreement and construction
8 agreements back in February, which Your Honor entered
9 by agreed, approved by agreed order in March.

10 The lot swap agreement is borne of the basic
11 notion that each of the DOA entities, those being the
12 GMAC affiliates that owned the lots in various
13 communities. The DOA entities and the Tousa parties
14 own lots in certain of the same communities that, for
15 a variety of business reasons relating to the
16 development, pricing, and sale of these lots, is
17 simply not commercially feasible for either side to
18 own a minority of the lots in a community where the
19 other controls the majority, and that where practical,
20 each side should exit the communities that are
21 controlled by the other.

22 By way of example, in one of our communities
23 up in Broward County, the Parkland Community, the DOA
24 entities own 242 lots, the Tousa entities own five.
25 In the Marbaya (phonetic) Lakes Community the DOA

1 entities own 505 lots, the debtors own 85.

2 In certain communities where the ownership
3 is relatively equal, or at least not that unequal, the
4 sensible solution in order to enable each side to be
5 able to control its own destiny with respect to the
6 development, sale, joint venture, or other disposition
7 of these units is to aggregate and divide the
8 ownership in such a way that each one owns a series of
9 contiguous parcels. And so what the agreement does,
10 and one development in particular where there's a road
11 down the middle, we wind up with the lots on one side
12 of the road, and the DOA entities will wind up with
13 the lots on the other side of the road.

14 As part of the business judgment behind
15 these transactions, the Touse parties determined that
16 rather than separately value each lot, and engage in a
17 series of back and forth cash transactions and
18 credits, and many back and forth, the appropriate
19 currency was the lots themselves, just do a swap of
20 the lots.

21 The result is that the Touse parties will
22 receive approximately 245 vacant lots, including eight
23 that they'll receive and hold in escrow as security
24 for an obligation I'll get to in a moment, and convey
25 111 lots out. So basically we're conveying 111 lots

1 to the DOA entities, and we are receiving back 245
2 lots.

3 For obvious reasons relating to the future
4 development and recourse to warranties in connection
5 with existing development on the lots that are
6 involved in the exchange, the GMAC parties requested
7 that they take an assignment of any contracts and
8 unexpired leases associated with the lots that we are
9 conveying to GMAC.

10 This request, of course, necessitates that
11 the Tousa parties assume and assign to the applicable
12 DOA entity the series of executory contracts and
13 potentially unexpired leases, only one of which has
14 been identified today.

15 Accordingly, based upon the incomplete
16 nature of that identification and those discussions,
17 the motion requests the Court to authorize, but not
18 direct the debtors to assume and assign executory
19 contracts and unexpired leases to the DOA entities
20 under a process which involves a number of features.

21 As soon as the closing occurs, the parties
22 will review the lists that are provided of executory
23 contracts and unexpired leases that each one may have.
24 The DOA entities will then identify and designate
25 those of our executory contracts that they wish to

1 assume and assign. We will similarly designate, if
2 there are any, any contracts that at the time the DOA
3 entities entered into that we would like assigned back
4 to the Tousa parties.

5 There's 90 days following the identification
6 and designation within which to complete the
7 assumption and assignment.

8 Now, in structuring the agreement in this
9 fashion, we've sought to protect the estates from
10 liability in three different ways.

11 First of all, unlike the typical situation
12 of assumption and assignment where the debtor pays the
13 cure, and the assignee provides the adequate assurance
14 of future performance, here, in respect of the Tousa
15 contracts to be assumed and assigned, it will be the
16 DOA entities or their affiliates that have the
17 responsibility to pay the cure, as well as provide
18 adequate assurance of future performance.

19 So far, with respect to the one engineering
20 contract that's been identified for assumption and
21 assignment as part of the order that we would like to
22 submit at the end of the day, the debtors believe that
23 that particular agreement is current, there's no cure
24 amount involved at all.

25 The second protection for the estates is

1 obviously that which arise under Section 365(k), in
2 that by operation of law, once a contract is assumed
3 and assigned, the Touse parties will have no further
4 obligation with respect to any liabilities that may
5 arise under that contract.

6 And third, as a matter of protection for the
7 estates, in the event that for any reason the
8 assignment to the DOA entity or affiliate is not
9 actually effectuated, for an example, an inability of
10 the DOA entity to come to an agreement with the
11 character party on the proper amount and payment of
12 the cure costs, or for any other reason, the debtors
13 have retained the right to come back in and seek to
14 reject any such contract or lease under 365(a).

15 So to be clear, the only contract designated
16 today is one with the site engineer or on the Marbaya
17 property, no other counter party has received notice
18 of the motion of the proceeding today, so any future
19 rejection or assumption and assignment of any lease or
20 contract associated with any of the lots that we're
21 conveying as part of the swap, would have to occur by
22 way of a separate motion and notice in front of the
23 Court.

24 As one protection for the GMAC parties in
25 respect of this transaction, in the event that the DOA

1 entity which is to receive assignment of a contract or
2 lease is unable to resolve a dispute or a calculation
3 with respect to the cure amounts, then the DOA entity
4 would have the right to come in and ask Your Honor to
5 resolve the cure amount, much as the Court would do if
6 it were the Tousa parties, the debtor that was paying
7 the cure.

8 This agreement, of course, is reciprocal.
9 We, the Tousa parties, will take assignments of
10 contracts, if any, that the GMAC parties have. As of
11 now we've identified none, but there is a reciprocal
12 provision for that.

13 So the primary features of the agreement
14 then are the swap of the lots, and the assignment of
15 contract rights that are associated with those lots.

16 There are other features that I'll just go
17 through very briefly. One involves a draw by MHF on a
18 pre-petition 1.278 million dollar letter of credit
19 that had been posted for the account of Tousa in
20 respect of certain obligations relating to one of our
21 developments. That's the Chatfield Development in
22 which the Tousa parties will own all of the lots after
23 the lot swap agreement is closed.

24 It's another feature involving what we refer
25 to as the Parkland Security, and that is that the GMAC

1 parent will substitute security with Broward County in
2 respect of approximately \$715,000 of security now
3 posted by Tousa in the form of a letter of credit and
4 certain proceeds. They will use their best efforts to
5 substitute other security with the County by December
6 31st on 2008.

7 In the event that they don't do that, then
8 those so-called Ribbondale security lots that I've
9 referred to, that will be placed in escrow, subject to
10 the control of the escrow agent, if GMAC is unable to
11 replace this obligation such that the Tousa parties
12 remain liable, potentially liable to Broward County,
13 then those lots will come out of escrow to the Tousa
14 parties, and that's a mechanism to secure GMAC's
15 obligation to go ahead and replace that performance
16 bond.

17 Similarly, there's a performance bond open
18 for Collier County. That's a joint performance bond
19 for about 1.1 million dollars. Again, the GMAC
20 parties are supposed to replace it, but they're also
21 indemnifying Tousa against any claims in respect
22 of that bond.

23 The other features of the agreement, Your
24 Honor, really are simply the general indemnities and
25 releases that one would see as part of a type of

1 disengagement or disentanglement of a corporate
2 business relationship. This is, in fact, what the lot
3 swap agreement is intended to effectuate, a
4 disengagement of the lot option relationship between
5 the Tousa parties on the one hand, and the GMAC
6 parties on the other.

7 It is our view, it is the view of the Tousa
8 parties, that the individual consideration ought not
9 be looked at on a point by point basis, but rather in
10 the context of the multifaceted swap, assumption,
11 assignment, and the releases and indemnities. We've
12 had extensive discussions with counsel for the
13 committee over any number of those features, and it's
14 our belief that they have no objection to the
15 transaction going forward.

16 So Your Honor, for those reasons, and the
17 fact that we believe that the lot swaps and the
18 proposed assumption and assignment satisfy the
19 business judgment test, and the proposed settlement
20 taken in the aggregate, of which those features are a
21 part, satisfies the reasonableness standard of Rule
22 9019, we would ask that the Court approve the motion
23 and enter an order.

24 THE COURT: Mr. Bloom, you've told me an
25 enormous amount of detail about the mechanics of the

1 disengagement. What I don't think I heard anything of
2 is, how come?

3 MR. BLOOM: How come?

4 THE COURT: Why?

5 MR. BLOOM: Well, I think the why has to do
6 with the fact that it's from the business judgment of
7 the Touse parties, simply not tenable for them to own
8 a minority of lots in a community in which the vast
9 majority are owned by GMAC. The option agreements and
10 construction agreements have been rejected. GMAC
11 therefore, no longer has extended to us the right to
12 take down those lots, nor do we have the obligation to
13 take down any of those lots.

14 And this is simply a process by which we can
15 exit the communities which we're not going to develop,
16 leaving it to the GMAC parties to go and do whatever
17 they would like to do with some other developer or on
18 their own, and we can focus our efforts on the
19 development or sale and disposition otherwise of
20 communities of lots within specific communities that
21 we do control. It has to do with unwinding and a
22 control of own destiny by each side.

23 THE COURT: Thank you. Anyone wish to be
24 heard? Mr. Geldert.

25 MR. GELDERT: Your Honor, thank you. Brian

1 Geldert on behalf of the committee.

2 Your Honor, the debtors consulted with the
3 committee throughout the entire process with respect
4 to the relief requested in the motion. We were able
5 to fully vet the relief requested, including review of
6 the lots being acquired and lots being given to GMAC,
7 the GMAC parties, including taking comments to the
8 order and the agreement itself.

9 THE COURT: And the committee is not only
10 happy with the specifics, but with the whole concept
11 as well?

12 MR. GELDERT: Yes, Your Honor. We believe
13 the relief requested is in the best interest of the
14 estate.

15 THE COURT: Okay. Thank you. Anyone else
16 wish to be heard? Then Mr. Bloom, give me an order
17 granting the motion.

18 MR. BLOOM: Will do, Your Honor. May we
19 depart the proceeding now, rather than charging the
20 estate for the burden of our presence?

21 THE COURT: Well, you know, you could just
22 stay and enjoy the show on your own nickel.

23 MR. BLOOM: That was my third option, Your
24 Honor.

25 THE COURT: I gathered.

1 MR. LEMONS: Your Honor, this is Robert
2 Lemons and Kelly Rogers. Since this was the only
3 matter that our client was interested in, may we exit
4 the telephonic hearing?

5 THE COURT: Of course. And Mr. Bloom, if
6 you don't want to stick around, then by all means,
7 make it back to Miami before it rains.

8 MR. BLOOM: Thank you, Your Honor.

9 THE COURT: You're welcome.

10 MR. SCHARTZ: Good afternoon, Your Honor.
11 Brian Schartz from Kirkland and Ellis, on behalf of
12 the debtors.

13 Going back to the motions that Ms. Labovitz
14 presented earlier on the amended agenda 1, 5, 6, 9 and
15 10, our team back in New York is going to upload those
16 orders for you so they will be available after the
17 hearing.

18 THE COURT: Okay. Great, Mr. SCHARTZ.

19 MR. SCHARTZ: The next item on the agenda is
20 item number 30, going slightly out of order, I think.
21 This is the debtors' motion pursuant to Bankruptcy
22 Rule 9019 and 363 of the Bankruptcy Code, authorizing
23 Tousa Homes to enter into a settlement and release
24 agreement with Highland Cassidy, LLC. It's docket
25 entry number 1557.

1 Your Honor, this motion seeks to settle
2 pre-petition State Court litigation that Highland
3 commenced against Touse Homes and two other defendants
4 with respect to a development in Polk County, Florida,
5 known as Highland Meadows.

6 The Highland Meadows development is part of
7 a community development district, or CDD that has the
8 authority under Florida state law to impose certain
9 taxes and other obligations on land owners in the
10 development, mostly developers, the purpose of which
11 is to provide financing for infrastructure that the
12 developers end up using, streets, roads, schools.

13 In the State Court action Highland seeks
14 damages of approximately \$50,000 from Touse Homes
15 based on Touse Homes' alleged oral agreement to
16 reimburse Highland for certain amounts due and owing
17 on account of the CDD.

18 Importantly, at the same time that Highland
19 filed their State Court action, they also filed a
20 notice of lis pendens. The lis pendens effectively
21 encumbers various lots that Touse Homes owns in the
22 Highland Meadows development, and as a result of the
23 filing of the lis pendens, the title insurer for
24 property that Touse Homes sold since, has held
25 approximately \$150,000 in escrow.

1 Your Honor, after assessing the merits of
2 the State Court action, and challenging the lis
3 pendens in State Court, the debtors met with Highland
4 and entered in settlement negotiations so that they
5 could resolve this issue.

6 The settlement in brief, is that Touse Homes
7 will pay \$32,500 to Highland. In return Highland will
8 release and discharge Touse Homes from any and all
9 claims asserted in the State Court action, and will
10 discharge the lis pendens. This also includes
11 releasing a proof of claim that Highland filed on the
12 claims register.

13 The release of lis pendens will permit the
14 title insurer to release the approximately \$150,000 in
15 escrow so that it will come into the debtors'
16 estates.

17 Your Honor, we have discussed this motion
18 with the creditors' committee, and answered their
19 questions. The objection deadline was August 20th,
20 and no objection has been filed.

21 Unless there are any questions or concerns,
22 I would request that the Court enter an order
23 authorizing the debtors to enter into settlement and
24 release agreement with Highland.

25 THE COURT: Where in beautiful imperial Polk

1 County is this development?

2 MR. SCHARTZ: I actually prepared for that
3 question and looked on the map, and my answer is that
4 it's somewhere in the middle, just south of the
5 Panhandle.

6 THE COURT: That, I think, is a better
7 description of Tropical Storm Fay than it is of Polk
8 County. But I accept that answer. Good for you, Mr.
9 Schartz.

10 MR. SCHARTZ: Thank you, Your Honor, and
11 we'll upload the order after the hearing.

12 THE COURT: Very good. Thank you. It is,
13 of course, granted.

14 THE COURT: I once represented imperial Polk
15 County in the GAC Chapter 10 bankruptcy, and learned
16 in that experience the interesting description that
17 the county attorney had of a good deal of the property
18 that was purportedly under development. He referred
19 to it as dry season pasture. Ya'll can reach your own
20 conclusion about what it was like this time of year.

21 MS. LABOVITZ: I was going to say, Your
22 Honor, I don't think this is the dry season.

23 THE COURT: Not this year. Moving right
24 along, Ms. Labovitz.

25 MS. LABOVITZ: Moving through the agenda,

1 Judge, we're coming back to item 4. This is a motion
2 to approve another settlement that will have the
3 effect of bringing funds into the debtors' estates.
4 In this case, approximately 1.5 million dollars to be
5 allocated as appropriate among various of the
6 operating debtors.

7 Judge, this dispute arose out of certain
8 purchasing contracts between the debtors and Masco
9 Corporation, which makes and supplies and installs
10 various kinds of home improvement products that are
11 used in Touse Homes.

12 Typical of purchasing programs for national
13 entities, various of the debtor entities across
14 divisions have worked together with Masco to
15 consolidate their purchasing power, and therefore, buy
16 goods and earn customer rebates for Masco on favorable
17 terms.

18 The debtors' relationship with Masco was
19 governed by a series of four written agreements, which
20 are further detailed in the motion, and also was under
21 the terms of a separate incentive program called the
22 Masco Builder Program, which is administered through
23 on-line claims submissions. And, at least according
24 to Masco, the terms and conditions set forth on the
25 website established additional terms for the Masco

1 Tousa relationship beyond what was set forth in the
2 four written contracts.

3 Judge, as you can predict, perhaps a dispute
4 arose between the debtors and Masco related to whether
5 it was the written contracts that governed or the
6 website terms and conditions.

7 This mattered, because the website said that
8 rebates could not be earned if an account was in
9 default, and also allowed for triangular setoff,
10 where, if an amount was owed to Masco by one of the
11 debtor entities, Masco asserted that it could then
12 withhold the rebates, or take setoffs from others of
13 the debtor entities, and the debtors disagreed with
14 this position.

15 And that dispute essentially has been
16 holding up approximately 1.5 million dollars in
17 rebates that Masco would have otherwise agreed were
18 due.

19 At the beginning of the Chapter 11 case it
20 appeared that these were significant issues. The
21 schedules show an aggregate of over \$250,000 owed to
22 Masco from various of the debtor entities. And some
23 of the Masco affiliates filed proofs of claim in these
24 cases for still more amounts due.

25 But since that time, through a combination

1 of claims reconciliation, and payment of pre-petition
2 lien claims under the authority granted by this
3 Court's first day orders, the amount at issue has
4 become substantially less significant.

5 At this point, the debtors think that
6 Masco's pre-petition unpaid claim is a little less
7 than \$7,000 across all the debtors, and Masco thinks
8 it's a little more than \$10,000.

9 THE COURT: I hope nobody is spending too
10 much time resolving that.

11 MS. LABOVITZ: No, Your Honor. Once we got
12 to that point, it became relatively easy to get the
13 1.5 million dollars into the estates, although not as
14 easy as you might think.

15 At this time the debtors seek authority to
16 enter into a settlement that allows Masco to setoff
17 the approximately 10,600 that it believes to be due,
18 without regard to which debtor entity the claims are
19 against, and pay the debtors more than 1.5 million
20 dollars in owed rebate amounts.

21 And Judge, Masco has already escrowed that
22 money, and we're just waiting for court approval now
23 to bring it into the estates.

24 THE COURT: I note from the committee's
25 response that they were satisfied with strict

1 mutuality was observed in connection with the setoffs.
2 You've just told me that the 10,600 would be paid
3 regardless of the entity who owed it. Is that
4 inconsistent with the committee's assessment of this?

5 MS. LABOVITZ: It's not in the end, Your
6 Honor. The agreement with Masco, vis-a-vis Masco,
7 because of their argument that the triangular setoff
8 was permitted, state that the setoffs may occur
9 without regard to the debtor entity.

10 In fact, when you trace it through, each
11 of the debtor entities has with what to set off the
12 amount that would be due from it. So as the committee
13 has observed, it did not end up becoming an issue.

14 It's important though, Judge, because the
15 parties have agreed as part of this settlement to
16 clarify certain terms under the contracts. And one of
17 the things they've agreed to clarify is that the
18 website terms and conditions do govern the
19 relationship. So this has been an important point for
20 Masco. In the future they would have that right of
21 triangular setoff.

22 THE COURT: Okay.

23 MS. LABOVITZ: As a contractual matter.

24 Judge, a couple of other agreements of the
25 parties in connection with the settlement. The

1 parties have agreed to extend one of the contracts
2 through the end of this year, and to assume all of the
3 contracts. The contracts do have various termination
4 provisions, so this does not lock the debtors in for a
5 long time, although I believe they have represented to
6 Masco that they have no current plans, or plans in
7 place to terminate the contracts.

8 A final point, and this, I think, again,
9 relates to the committee's statement. The money, when
10 it's paid in from Masco, will come to Touse Homes, and
11 this is because Touse Homes was the debtor entity that
12 acted as the consolidator for the purchasing
13 relationship, but when it is paid into Touse Homes it
14 will then, after that, be allocated among various
15 of the debtor entities according to their actual
16 purchase history with Masco. And the debtors have
17 provided an allocation schedule to the committee.

18 THE COURT: Okay.

19 MS. LABOVITZ: With that, Judge, I think
20 there are no objections.

21 THE COURT: Mr. Dublin.

22 MR. DUBLIN: Your Honor, I would just like
23 to request one clarification to the order that will
24 provide that, with respect to any post-petition
25 triangular setoffs, that the provisions of the cash

1 collateral order governing intercompany transactions
2 and allocations is adhered to, which provides that to
3 the extent one debtor does a transaction for the
4 benefit of another debtor, there will be corresponding
5 benefits and debits as appropriate.

6 MS. LABOVITZ: I think we can agree on
7 language in the order. Your Honor, I think the
8 likelihood of that occurring, because of the rebate
9 nature of the relationship, seems relatively small,
10 but we, I think, can agree on language in the order.

11 THE COURT: Okay. Good.

12 MS. LABOVITZ: Thank you, Your Honor.

13 THE COURT: I will grant the motion.

14 MS. LABOVITZ: And with that I will, I
15 believe accede the podium to Mr. Geldert, who will
16 present the committee retention applications.

17 MR. GELDERT: Good afternoon again, Your
18 Honor.

19 Your Honor, by way of procedure, if I could
20 indulge the Court to kind of take these two retention
21 applications the committee has filed that kind of
22 related to each other, and just take them together.

23 THE COURT: Sure.

24 MR. GELDERT: To the extent, Your Honor has
25 any questions with respect to the individual

1 application, that's not an issue.

2 Your Honor, on February 19th the committee
3 selected Jeffries and Co. as their financial advisors
4 in these Chapter 11 cases. March 25th the committee
5 filed a retention application seeking court approval
6 under Sections 328, 1103, and Bankruptcy Rule 2014
7 approving the retention of Jeffries and Co. as the
8 financial advisor and investment banker for the
9 official committee.

10 As Your Honor has previously been advised by
11 my colleague, Danny Golden, since the filing of the
12 committee's retention application for Jeffries there's
13 been a change at Jeffries. Many of the members at
14 Jeffries who were assigned to the Tousa team left to
15 join a new firm called Moelis and Co. Moelis is the
16 second retention application on file for the
17 committee.

18 This change necessitated having to file a
19 revised retention application for Jeffries and Co. and
20 a retention application for Moelis and Co. as well.
21 These applications were filed on August 8th seeking
22 court approval, and served accordingly.

23 Shortly thereafter the committee withdrew
24 its initial application seeking employment of
25 Jeffries, as the new Jeffries application is amended

1 and restated and there was no further need for that to
2 be on the docket.

3 At the outset, Your Honor, I just want to
4 reiterate something that the committee has been pretty
5 adamant about at earlier hearings, is that, the filing
6 of these two retention applications will be no more
7 expensive for the estate than that which was proposed
8 in the initial Jeffries retention.

9 Essentially what occurred over the course
10 since the filing of the Jeffries is, effective July
11 15th, the final transition from Jeffries to Moelis of
12 the Touse team concluded. It's the same team now at
13 Moelis advising the committee that was previously at
14 Jeffries.

15 Pursuant to an agreement reached between the
16 Jeffries and Moelis firms, Jeffries is going to be
17 entitled to seek monthly compensation the monthly fees
18 in the amount of \$150,000 from February 14th, subject
19 to approval of this Court, through July 14th.

20 Moelis, on the other hand, will be entitled
21 to seek monthly fees in the same amount for the period
22 July 15th going forward.

23 As part of this agreement only Moelis will
24 be entitled to seek a completion or success fee in the
25 amount of 3 million dollars, if warranted, in

1 connection with these Chapter 11 cases.

2 So essentially the Moelis Jeffries agreement
3 provides for a clean split, much the same as if a
4 debtor changed law firms midstream through cases and
5 there's no overlap.

6 Because the members of Jeffries that moved
7 to Moelis had already gained a vital understanding of
8 the debtors and their financial affairs, the committee
9 decided to seek to retain Moelis and terminate the
10 services of Jeffries as of July 15th.

11 In light of the size and complexity of these
12 Chapter 11 cases, the committee requires the services
13 of a seasoned, experienced, financial advisor and
14 investment banker. Both Jeffries and Moelis are
15 nationally known investment banks, highly qualified to
16 represent the committee in these matters.

17 The committee submits that the terms and
18 conditions of the employment are reasonable and
19 comparable to compensation charged in similar
20 circumstances and similar engagements.

21 In addition, Your Honor, under certain
22 circumstances, Jeffries and Moelis would be entitled
23 to indemnification from the debtors. On that point,
24 Your Honor, it was brought to the committee's
25 attention that certain modifications that were made in

1 the Lasard (phonetic) retention order at the onset of
2 these Chapter 11 cases, or if they might have been
3 made subsequently, regarding those indemnification
4 obligations, was not conformed between the Moelis and
5 Jeffries orders and between the Lasard order itself.

6 We did have a revised order that we
7 circulated once this issue was brought for Jeffries
8 retention, once it was brought to the committee's
9 attention by the U.S. Trustee and the debtors, and
10 that conforming change has been made, and I have a
11 black line, if I may hand up the order to Your
12 Honor.

13 THE COURT: Sure. Thanks.

14 MR. GELDERT: Again, Your Honor, the change
15 that was necessary was just to bring the Jeffries
16 order, the indemnification obligations, into
17 conformity with the debtors' financial advisors, and
18 with the Moelis order, which was just an inadvertent
19 omission.

20 THE COURT: Okay. Does anyone wish to be
21 heard in connection with these two applications that
22 are sort of successor firms?

23 MS. LABOVITZ: No, Your Honor. We had
24 reviewed the motion and the proposed order, and
25 discussed them with the United States Trustee, and

1 with the changes to the orders that Mr. Geldert has
2 explained, the debtors are comfortable with the
3 proposed application.

4 THE COURT: Mr. Schneiderman.

5 MR. SCHNEIDERMAN: Yes, Your Honor. Thank
6 you. I reviewed the orders, and of course, stated the
7 changes were made.

8 The only thing I would come comment on, Your
9 Honor, was, it was an oversight on my part on the
10 initial retention of Lasard, and was not consistent
11 with the prior orders that have been entered regarding
12 investment bankers, was the provision regarding the
13 right of the U.S. Trustee to review the fees under all
14 grounds, including the reasonableness standard under
15 330, which is a typical provision we insert in these
16 orders, and it was not in Lasard's for whatever
17 reason. I missed it, Your Honor.

18 The typical language has that, as well as
19 for the Court to be able to review it under those same
20 grounds. It wasn't in Lasard's and Jeffries, and more
21 importantly, Moelis didn't want it in theirs because
22 it wasn't in Lasard's, and to have the orders
23 consistent within this case.

24 I can't go back and change Lasard's order
25 now as an oversight on my part, Your Honor, but I just

1 wanted it on the record for future cases, that this is
2 not something that I will miss twice.

3 THE COURT: On the other hand, if at the end
4 of the day, Mr. Schneiderman, you conclude that
5 Lasard's fees are inappropriate, I suspect that if you
6 filed something under Section 330, that I'd probably
7 hear you.

8 MR. SCHNEIDERMAN: I appreciate that, Your
9 Honor.

10 THE COURT: But you caught it this time.

11 MR. SCHNEIDERMAN: Caught it a little late,
12 but yes, I caught it. And it was an oversight.

13 THE COURT: Okay. But you're happy, or
14 you're at least acquiescent with the order that Mr.
15 Geldert has circulated?

16 MR. SCHNEIDERMAN: Yes, Your Honor. I was
17 deferring to the committee and the debtor with respect
18 to the financial terms on the monthly compensation
19 and the success fee, and in this case, leaving it to
20 the debtor and the debtors' team to comment on the 3
21 million dollar transaction or success fee, as well as
22 the monthly fee.

23 THE COURT: Very good. I'll grant the
24 applications. Thank you, Mr. Geldert.

25 MR. GELDERT: Thank you, Your Honor.

1 MS. LABOVITZ: Your Honor, we've gone a
2 little bit out of order on the agenda, but I believe
3 we've now finished the operational motions that are
4 before the Court today, and the only remaining motion
5 is that of the official committee on account of its
6 discovery request.

7 THE COURT: Okay.

8 MR. SCHNEIDERMAN: Your Honor, on that note,
9 this is Steven Schneiderman. May I be excused?

10 THE COURT: You may, Mr. Schneiderman,
11 unless you want to hear all sorts of things about
12 electronic database review.

13 MR. SCHNEIDERMAN: No, Your Honor. I think
14 I'll look out my window and look to see if Mr. Bloom
15 is coming down I95.

16 THE COURT: Fair enough. And no doubt
17 counting cranes as he goes looking for his inventory.

18 MR. SCHNEIDERMAN: Thank you.

19 THE COURT: Thank you.

20 MS. CRONIN: Your Honor, this is Maureen
21 Cronin. Although the electronic discovery sounds
22 fascinating, I will sign off as well.

23 THE COURT: Very good. Anybody who wants to
24 leave is welcome to do so, but you're certainly
25 welcome to stay.

1 Mr. Waldman, isn't it?

2 MR. WALDMAN: Yes, it is, Your Honor.

3 Your Honor, unfortunately, we are back in
4 front of you this week. The efforts by the parties to
5 resolve it have been -- this dispute, have been
6 unsuccessful, and we have submitted proposed orders.

7 THE COURT: I saw one from the debtors, and
8 then I was handed a mark-up by Mr. Donovan.

9 MR. DONOVAN: That's right, Your Honor.

10 THE COURT: Now, does the mark-up reflect
11 the committee's changes, or no?

12 MR. DONOVAN: No. The committee did not
13 submit any. Between the two of us there is apparently
14 no proposal. That does reflect that we'll get to the
15 other parties' proposal.

16 MR. WALDMAN: Your Honor, we submitted a
17 proposal. Do you have our --

18 THE COURT: I do not.

19 MR. WALDMAN: We submitted it to chambers
20 Friday afternoon.

21 THE COURT: Oh, dear. What docket entry is
22 it, Mr. Waldman?

23 MR. DONOVAN: I don't have it either, Your
24 Honor.

25 THE COURT: And how was it sent if it wasn't

1 filed as a docket entry?

2 MR. WALDMAN: Your Honor, our local counsel
3 e-mailed it to your chambers and e-mailed it to all
4 the local counsel here, as well as some of the other
5 counsel. And I apologize, Your Honor, if it wasn't
6 received. We were informed by our counsel that that
7 was the correct way to do these things, but if that's
8 not the case, I apologize.

9 THE COURT: Well, I'm not so concerned about
10 propriety as I am about making sure that people have
11 seen it.

12 Mr. Smolinsky, have you seen it?

13 MR. SMOLINSKY: Your Honor, we did -- Your
14 Honor, I believe Seven Rivera of my office did receive
15 an e-mail, I think late Friday, and circulated it
16 amongst our firm.

17 THE COURT: All right. So you have it. Mr.
18 Nye, does your firm have it?

19 MR. NYE: Yes, Your Honor.

20 THE COURT: Okay. Does the debtor have it?

21 MR. DONOVAN: I don't know if the debtor
22 does, Your Honor. I don't have it, but Mr. Waldman
23 just gave me a copy, and I'm looking at it now. I
24 haven't seen it before now.

25 MS. LABOVITZ: I don't have it, Your

1 Honor.

2 THE COURT: Okay. Do we need to make some
3 extra copies for people?

4 MR. WALDMAN: Your Honor, I have a few extra
5 copies, I believe, and again, I apologize to the
6 Court. Let me hand it to the debtor.

7 MR. SINGERMAN: Your Honor, if I may, it
8 appears it was e-mailed to Your Honor at orders --

9 THE COURT: Oh, that figures. Nobody ever
10 looks at the box marked orders.

11 MR. SINGERMAN: -- at 6 p.m. on Friday.

12 THE COURT: Okay. Well, it remains in
13 electronic obscurity. Would it be useful, Ladies and
14 Gentlemen, for the parties to have a few minutes to
15 have a real chat? It seems to me that --

16 MR. DONOVAN: That would be great, Judge.

17 THE COURT: Why don't we take a 15 minute
18 break, and if you have a spare copy, Mr. Waldman, I'll
19 read it too.

20 MR. WALDMAN: Yes, Your Honor.

21 THE COURT: And in the future, if you want
22 to send in orders that you actually want somebody to
23 read, if you'd e-mail them directly to my law clerk,
24 and just call us and let us know that something is
25 coming, because that way chances are better that

1 somebody will see it. What do you think, folks, 10
2 minutes, 15? You tell me.

3 MR. DONOVAN: Your Honor, I think 5 or 10 is
4 fine. It appears to be almost their original, but if
5 I could have a few minutes that would be great.

6 THE COURT: Sure. I'll be back in 10.
7 Don't get up.

8 (A recess was taken.)

9 MR. WALDMAN: Your Honor, I wish I could
10 report that that resolved the entire issue, but
11 unfortunately it did not.

12 THE COURT: I'm not shocked to hear that.

13 MR. WALDMAN: What I would like to do, Your
14 Honor, is to outline our proposed order, and the
15 reasoning behind it, and contrast it with the debtors'
16 proposed order, which we believe is overly complicated
17 and likely to be more costly for all, and to increase
18 the burden on the debtors' estate.

19 The first and most important part of our
20 proposed order, Your Honor, is that our experts would
21 receive immediate access to the financial and
22 accounting database, and be allowed to use it
23 throughout discovery.

24 This need for immediate access to the
25 database is based on our advisors prior experience

1 actually using the database. Our experts had access
2 to the database from April to July for the purpose of
3 evaluating the business plan.

4 They had access because the debtors' own
5 personnel told them that, there's really useful
6 information in this database, and you really need
7 access to it. It was the debtors' own personnel who
8 said, you know, it's more efficient for you to access
9 the database directly, rather than to go through us.

10 And our advisors, having now worked with it
11 for a number of months, agree with that assessment.
12 Use of the accounting and financial database was
13 central to their work on evaluating the business
14 plan.

15 So Your Honor, when we were retained as
16 counsel, one of the first things the experts told us
17 was, we, the experts, really need access to this
18 database in order to do our work for the adversary
19 proceeding.

20 So more than a month ago we asked the
21 debtors that the same access that our advisors had in
22 connection with evaluating the business plan, we ask
23 for the adversary proceeding. And quite frankly,
24 we've been very surprised about their unwillingness to
25 grant that same access.

1 In contrast to our proposal of immediate
2 access to the database, the debtors' proposal is that
3 the parties have access to the database for basically
4 only a few weeks in September and October.

5 I would note, Your Honor, that the expert
6 reports, the first expert reports in the case, are not
7 due until the end of December, until December 29th.
8 But under the proposal of the debtors, the access to
9 the database would be for a few weeks in September and
10 October.

11 We believe that this limited access that the
12 debtors propose is inconsistent with this Court's
13 direction at the last hearing where the Court
14 indicated that it was -- believed that free access was
15 necessary in order to, and I think Your Honor used the
16 words, to let the experts play around with the
17 database. And we believe Your Honor got that exactly
18 right. The database is something that one needs to
19 play around with.

20 What our experts described to us is an
21 iterative process. They do one report. It then leads
22 to the next report. They then modify that report, and
23 it takes them somewhere else that needs to be
24 tweaked.

25 They will look at a report and get a report

1 and realize that it's actually not a helpful report
2 sometimes, and that's a dead end. So there are some
3 dead ends and some sort of eureka moments. It's an
4 iterative process, it's described as a fluid process.
5 It's not a static type of activity.

6 So for example, Your Honor, when recently at
7 the last hearing the debtors suggested that we provide
8 a list of reports that the debtors offered to make
9 copies for us to provide for us, to generate from the
10 system, and that would go to everybody, and we asked
11 our experts to do that, and the first thing our
12 experts told us is, this is a starting point.

13 What we heard from our experts is, this is a
14 starting point. They need that to start that process
15 going, to start developing new reports, to start
16 manipulating it.

17 And what they also told us, the second part
18 they told us is, you know, this may be more reports
19 than we will turn out to actually need. We may not
20 need some of these reports. But the only way for us
21 to know that is to actually do, to work with the
22 reports and see that this is a dead end. So we may be
23 asking for more than we would actually use.

24 So I think at some level this idea of the
25 debtors that they're running reports is more

1 efficient, is questionable. It may turn out that it's
2 less efficient, because if our people did it
3 themselves they would be able to eliminate some
4 reports early on it turns out that they don't need to
5 know -- they don't need to use.

6 And one other thing I think that's useful to
7 Your Honor to know, is that running these reports is a
8 relatively quick process. They decide what type of
9 report you want, you get a few -- you decide on a
10 couple of parameters frequently that are queried by
11 the system, and the report is generated in a couple of
12 minutes. It's a you know, two or three minute
13 operation.

14 So it's not a long extended time period.
15 You do the queries and it pops up in a couple of
16 minutes.

17 So the first part, Your Honor, is that the
18 committees' professionals need immediate access.

19 The second part of the committee's proposed
20 order would have the parties exchanging any database
21 reports that an expert relied on, any database reports
22 that are used by the experts, relied on by the
23 experts, would be provided at the same time as the
24 expert reports.

25 And along with providing those database

1 reports that the experts rely on, the committee would
2 propose that the parties, whoever is providing these
3 database reports, would provide the queries, or
4 whatever information is necessary to show how that
5 database report was created, how it was generated.

6 So that the other side could then test the
7 report. They could duplicate it. They could verify
8 the accuracy of the information in that database
9 report, and we think that should be a relatively cut
10 and dried process. They'll see the query path,
11 they'll do it, and we assume it will be fairly
12 straightforward as to verifying the accuracy of the
13 reports.

14 We believe that this proposal that the
15 committee has put forward has the virtue of
16 simplicity, and is typical of how things are done in
17 most litigations. In my more than 20 years of
18 litigating I've never seen actually, the sort of
19 elaborate process that the debtors' proposal seems to
20 contemplate.

21 The other virtue of the committee's approach
22 is that it's consistent with what our advisors say
23 about the use of the database. It may be again, that
24 they run off several hundred, or even, you know, more
25 than a thousand reports, but then our experts may find

1 that they only need to use a smaller number of
2 reports. That when it comes time to putting together
3 the expert reports it will be a smaller universe of
4 reports that's necessary.

5 So I think our proposed approach would be,
6 let's wait until the end to see what that number of
7 reports is, we think it will be a smaller number, and
8 then the parties can go verify and see the accuracy of
9 those reports.

10 Again, in contrast, Your Honor, we believe
11 the debtors' more complicated process is misguided.
12 We think it's wrong at the beginning, wrong at the
13 middle, and wrong at the end.

14 At the beginning the debtors' proposed order
15 is centered on this list of database reports that we
16 provided to them. That's Exhibit A. Exhibit A is
17 something that we were asked to provide. And I think
18 the committee's sense is, there's a little bit of a
19 bait and switch here. We were told this is a set of
20 reports that we, the debtors, can generate quickly for
21 you, and we can give it to all the parties and save
22 everybody time and effort. Well, we were told we
23 would get it quickly.

24 Now we're being told, well, we'll get it by
25 September 30th. And now we're being told, or at least

1 it's being suggested, that not only will we not get it
2 until September 30th, but it may be several weeks
3 before you get access, this is in lieu of access to
4 the database itself. And we believe, Your Honor,
5 that's not appropriate.

6 Again, our people need access to that
7 database to begin this iterative process. These
8 reports are, again, a launching off place, a starting
9 place. They're not an ending place.

10 The problem in the middle, which is really
11 the problem that the debtors have said, well, this is
12 only -- the database has limitations, that you
13 shouldn't allow, and Your Honor shouldn't allow the
14 committee access to the database because it has
15 limitations.

16 For example, it's not organized by a legal
17 entity, and it doesn't address inter-company balances,
18 according to the debtor. And because of the
19 limitations, you shouldn't allow us any access, or
20 give us very limited access to the database.

21 Your Honor, our experts have worked with
22 this database for months in connection with evaluating
23 the business plan. They're well aware of what
24 information is in the database and what's not in the
25 database.

1 The database plainly has large quantities of
2 information that would be very helpful to the
3 committee. I've never heard of a situation where a
4 party's access to some information is prevented, is
5 not allowed, because there's some additional
6 information, because it's not a comprehensive set, we
7 shouldn't have any access.

8 Yes, we will need to augment the information
9 in this database, but it's a very important, very
10 useful starting place, and we need access to it now.

11 We also believe the debtors are wrong about
12 the end of the process. The debtors assume, and the
13 whole premise of their proposed order seems to be that
14 there will a big dispute at the end, and so they want
15 to push the dispute up early into the process, move
16 everything up earlier.

17 So again, expert reports are not due until
18 the end of December, but they would have the parties,
19 in their proposed order, finalizing reports and being
20 limited to a set of reports that are generated in
21 September and October, and finalized by early
22 November, weeks and weeks and weeks before the expert
23 reports are actually necessary.

24 A couple of problems with that. We think
25 it's badly flawed.

1 First, we will not know what key database
2 reports we need, what they are, until we've played
3 with the database, and until we've developed our
4 expert opinions.

5 So we could end up in this process the
6 debtors suggest, arguing in October and November about
7 reports that ultimately our experts decide they don't
8 need, that aren't useful.

9 The other major problem, Your Honor, is
10 again, I think Your Honor hit the nail right on the
11 head last week, a lot of this is work product, it's
12 our thought process, it's where we're going or where
13 we are thinking about going.

14 We shouldn't be required, in order to have
15 access to this database, to give our work product.
16 Let's wait until the end, wait until the expert
17 reports, and then there will be a much smaller
18 universe of reports, and all these issues about work
19 product, it's not required that we waive it. We think
20 that's the fairer approach, Your Honor.

21 We also, I think questioned the fundamental
22 premise that there's going to be some big huge dispute
23 at the end. Under our proposed order, each side
24 provided the queries, provided the path on which these
25 reports are generated. We think it's going to be a

1 relatively straightforward matter of verifying whether
2 they're accurate or not accurate.

3 The debtors' elaborate procedure is all
4 premised on this idea of this fight at the end. The
5 fight at the end is speculation, Your Honor. It's
6 possible it might happen, but there's also a terrific
7 chance that it won't happen. And we think to put in
8 place such an elaborate process for something which
9 may never come to pass is just not necessary or called
10 for.

11 And lastly, Your Honor, the debtors express
12 concern that the parties will come back to the
13 debtors' personnel to run the reports as a way of
14 resolving their disputes over the database, that the
15 debtors will end up being the arbitrator of disputes
16 over the database.

17 Again, that doesn't make sense to us,
18 because our advisors, our experts, have run these
19 reports for months and months and months. They've run
20 hundreds and hundreds of these reports. I don't know
21 why they would need to go back to the debtors in order
22 to be some sort of arbitrator. We don't think there
23 will be these disputes.

24 But more importantly, I think the bottom
25 line, the committee is not -- is going to be very

1 reluctant to ask the debtors to resolve any disputes.
2 We have great respect for the debtors and their
3 counsel. We are sure that they are very capable
4 attorneys, they are acting in good faith, but the
5 debtor here has different interests than the
6 committee, Your Honor.

7 Counsel for the debtors were the same
8 counsel who advised the debtors in July of 2007 in
9 doing the TransEastern transactions, that was Mr.
10 Donovan's firm. It is the same board of directors who
11 did the TransEastern deal in July of 2007 that are
12 still in place. This board was urged to file a
13 petition in October so as to make the Transeastern
14 transaction within the preference period, and the
15 company, at the advice of this same counsel, declined
16 to do so.

17 Your Honor I think is aware that the issue
18 of the breach of fiduciary duty action against the
19 board, and actions against the board's advisors have
20 been raised in the past and may be raised in the
21 future.

22 Very recently Defendant CitiCorp has named
23 the debtors as a defendant in a cross-claim relating
24 to the representations in the TransEastern
25 transaction, should the committee prevail in the

1 fraudulent conveyance action.

2 So we are very well aware that the debtors
3 and their counsel have very different interests here
4 than the committee. And we are, I think, highly
5 unlikely to turn to the debtors as the arbitrators of
6 any discovery disputes.

7 What the debtors do have here is critically
8 important information that our experts, our advisors
9 need, and given the very rigorous schedule that we're
10 under, our advisors need that information right away,
11 Your Honor.

12 THE COURT: Thank you, Mr. Waldman.

13 Mr. Donovan, instead of hearing from you,
14 let me hear from the parties to the lawsuit.

15 MR. HALL: Good afternoon, Your Honor. Tom
16 Hall from Chadbourne and Parke, on behalf of the first
17 lien agent.

18 To begin with, Your Honor, Mr. Waldman says
19 he's never seen this type of process proposed in a
20 customary litigation. This is not a customary
21 litigation.

22 We are scheduled to try an 800 million
23 dollar case in a little more than six months, and
24 we're at the inception of discovery.

25 THE COURT: Wasn't it you who was

1 enthusiastic for an even faster timetable?

2 MR. HALL: It was not us, no, Your Honor. I
3 think it was the debtor.

4 THE COURT: Well, I know the debtor was.
5 You would like this to be tried sometime later, Mr.
6 Hall?

7 MR. HALL: No, Your Honor, we wouldn't. But
8 we want the process, the litigation process set up
9 such that we can get there, and get there with
10 accurate data that we can all use to try this case.

11 There's two diametrically opposed approaches
12 here. Under the debtors' order it's a six step
13 approach. First, the debtor will provide baseline
14 data that we can all use. The debtor presumably will
15 stand behind that data for evidentiary purpose.

16 Then complete unfettered access by all
17 parties to the system. They can play with the system,
18 do whatever they want.

19 Then production, whichever reports each
20 decide to use, we must produce to the other side. No
21 violation of work product. We're not asking for
22 reports that we're not going to use.

23 Then quite importantly to us, once we get --

24 THE COURT: Wait a minute. How quickly are
25 they supposed to produce?

1 MR. HALL: Under the debtors' proposal,
2 October 22.

3 THE COURT: Well, how are they are going to
4 know, when their expert reports aren't due for two
5 months, how are they going to know what reports
6 they're going to use two months before the expert
7 reports?

8 MR. HALL: They may not know all of them,
9 Your Honor, but I suspect they're going know a vast
10 majority of them. We carve-out, we can make
11 exceptions. If they don't know and they have to
12 produce some later, we can deal with that. But
13 there's got to be a whole host of them they know by
14 October 22 that they're going to use.

15 Most importantly to us, Your Honor, once
16 these reports are exchanged, I know we're going to
17 want renewed access to the system so that we can check
18 the veracity. Their order does not provide for
19 that.

20 THE COURT: Sure, it does. It says you can
21 keep on keeping on.

22 MR. HALL: Well, the problem is --

23 THE COURT: And you get their reports when
24 you get their expert's reports.

25 MR. HALL: The problem is, that's December

1 29th. Fact discovery closes December 2nd. So if we
2 get the reports December 29th, one, we no longer have
3 access to the system --

4 THE COURT: Wait. Where does it say that in
5 the proposed order?

6 MR. HALL: It says that in the scheduling
7 order, Your Honor.

8 THE COURT: Okay. I wouldn't have supposed
9 that this was -- well, okay. Then maybe we need to
10 address that question. Because I certainly agree with
11 you that it would be wrong to have a scheduling order
12 that says you can't go into the database after you get
13 the other side's expert report that relies on pieces
14 of the data -- tests of the database that you haven't
15 run before.

16 I'd be surprised if you ran terribly
17 different ones at the end of the day, but I've been
18 surprised before.

19 MR. HALL: Well, let me talk to that, Your
20 Honor, because Mr. Waldman says this should be a
21 straightforward matter, we print out some reports.

22 The accounting system is kept on a
23 divisional basis, not on a subsidiary. There are
24 eight divisions and 30 some odd subsidiaries.

25 So the committee presumably has got to get

1 from the divisional level down to the subsidiary
2 level. We think that may be impossible. If not
3 impossible, it's incredibly complicated and time
4 consuming.

5 THE COURT: Am I hearing a preliminary run
6 at the substantive consolidation?

7 MR. HALL: That's for Mr. Smolinsky to
8 address, Your Honor.

9 But we're going to want perhaps some heavy
10 duty discovery on that analysis, how they get from a
11 divisional level down to the subsidiary level. We're
12 going to need time for that. We may want to depose
13 the debtors on that analysis. We may want some
14 documentary discovery on that analysis. That's our
15 primary issue, verification.

16 We don't want these reports produced after
17 the close of fact discovery. They limit their
18 obligation to produce the reports to those reports
19 their experts are relying on.

20 The debtors' order is broader. If they're
21 going to use those reports for any purpose, including
22 at trial, irrespective of whether their experts are
23 relying on them, we want them produced in the
24 discovery phase so we can test their veracity.

25 THE COURT: Well, isn't that sort of

1 putting -- why doesn't that create a real work product
2 problem?

3 Look, I'm assuming Mr. Waldman is going to
4 ask a question, or Mr. Waldman's expert is going to
5 ask some kind of an interesting question of the
6 database. I don't know what it is. Wouldn't telling
7 you what that question was, at the beginning, when the
8 question is asked, tell you what their thinking is?

9 MR. HALL: That's not what we're looking
10 for, Your Honor. We're looking for ultimately -- it's
11 quite simple, Your Honor. If they're going to use a
12 report in this case, they're waiving work product as
13 to that report. I think they would agree to that.

14 We simply want to be able to conduct
15 discovery on that report. We don't want it produced
16 after the close of discovery --

17 THE COURT: But how are they going to know,
18 how are you going to know what reports you're going to
19 rely on until your expert is done with the expert
20 report?

21 MR. HALL: Maybe that's the case, Your
22 Honor. But if so, we have to build in a discovery
23 schedule after expert reports. It's that simple.

24 Either way, all I'm looking for is the
25 ability to verify, through discovery, their analysis.

1 It's that simple. That's my only concern.

2 THE COURT: Well, that's a fair concern.

3 And let's assume, for purposes of our
4 discussion, that I am inclined to enter the
5 committee's short form order. What kind of
6 discovery -- modification to discovery schedule would
7 Citi Group like?

8 MR. HALL: For starters, Your Honor, their
9 expert report is due December 29th. Ours is due
10 January 19th.

11 Even if we were to allow discovery to go
12 forward in that time frame, it can't be completed that
13 quickly, and certainly we couldn't get our expert
14 report done based on that discovery. I think it
15 builds another month or two into the schedule after
16 the disclosure of their expert reports, unfortunately.

17 We don't want to get -- that's why we're
18 trying to front-load it. We're trying to move that
19 aspect of it into October. Maybe it can't be done.
20 But we thought if we moved it, front-loaded it, they
21 produced those reports in late October, we can still
22 do to the discovery based on our current schedule, get
23 the expert reports done and move on.

24 The alternative is to build that discovery
25 period into January, which unfortunately, puts things

1 off.

2 THE COURT: Well, that's not the end of the
3 world.

4 I'm just really concerned about how, as a
5 practical matter, how you're going to know in October
6 what reports you're going to need to run, when the
7 committee's lawyers aren't going to have their expert
8 report until the end of December for you to look at,
9 and your expert report isn't due for another three
10 weeks. And until you see their expert report, I'm
11 slightly confused as to how exactly you're going to
12 know what you need to counter.

13 Clearly, we know what the case is about, but
14 when you get into the real minutia of it, I'm just
15 troubled by this October kind of time frame for
16 everybody to do their heavy thinking up front before
17 their experts have done their noodling. I mean,
18 somebody could be really surprised and really standing
19 out there fairly naked.

20 MR. HALL: I think you may be right. Which
21 is why, in my view, the only way that the December
22 January expert schedule works, is if we get reports
23 they're relying on in October. If that's impossible,
24 then I think Your Honor is right, I think the January
25 expert time frame can't work. It just can't work.

1 THE COURT: Okay. And I suppose the same is
2 true for them to have a fair shot at crossing or --
3 exploring your expert's opinions. You're telling me
4 you need more time between the time that the
5 committee's expert gives you its report and the time
6 your expert produces a report, if you've got to go
7 back into the database.

8 MR. HALL: That's right.

9 THE COURT: And then presumably we're
10 talking about adding weeks again after your expert's
11 report is in. And does that do violence to anything
12 except a trial date?

13 MR. HALL: I think it's a trial date. But
14 I think most people in this room are concerned about
15 trying to hold on to that trial date for the benefit
16 of the debtor, which is why we've been trying to
17 front-load a reports exchange. And if it doesn't
18 work, it doesn't work, but that's been the
19 motivation.

20 THE COURT: Okay. What else should I know?

21 MR. HALL: That's really it, Your Honor. We
22 just want the ability to go in and verify. We think
23 the discovery on the verification, you know, maybe
24 we'll be surprised, but it could be heavy duty, we
25 just don't know yet.

1 THE COURT: Fair enough. Mr. Nye.

2 MR. NYE: Thank you, Judge.

3 I see the Court's thinking, and I understand
4 that it might be typical to have a process where these
5 kinds of reports are produced at the end of the case.

6 But Judge, I sat in on the negotiation of
7 the CMO, the case management order that was entered
8 by the Court, I believe on July 15th. This proposal
9 by the committee, who, I understand predecessor
10 counsel were the ones I was dealing with, but it's my
11 belief that this proposal really kind of stands the
12 CMO on its head.

13 All the parties agreed that this was about a
14 two year trial that was going to be compressed into
15 nine months. And the only way to do it was to
16 front-load all of the documentary evidence, get it all
17 out in the open. That's the way the CMO was
18 structured. There's a lengthy period of document
19 production, followed by fact depositions, and then
20 finally the experts.

21 Judge, I heard your remarks about work
22 product, and I respectfully disagree. What we're
23 talking about here is a huge database, and I heard Mr.
24 Waldman talking about playing around with it,
25 manipulating it. It's only going to generate facts,

1 and it's not, I would respectfully say, Judge, that
2 this is not work product.

3 These experts, to the extent that they are
4 manipulating data, running reports, even though they
5 may not be reports that finally get into their expert
6 report, anything that an expert witness considers,
7 runs, rejects, is going to be discoverable.

8 And what I see happening here with a
9 database, and I've sat in on at least two sessions,
10 it's been explained to us as lawyers, and we've had
11 our experts there, this is a very complex database,
12 Judge.

13 And as the debtor puts in its memorandum, it
14 doesn't generate, without going back to the
15 handwritten document sometimes, going back to the
16 people who worked on the accounts, it can't get to the
17 necessary information that really is the key to this
18 case, which is solvency, or one of the keys, and
19 benefits.

20 So if you have that concern with a database,
21 and I think everyone in this room should have that
22 concern after listening to this, now I hear at the
23 very back end of this case, we're going to get the
24 experts, what they decided, the singular reports that
25 they've decided best manipulate or play around with

1 that data, that's what's going to be produced.

2 Well, I've got a baseline issue with that.

3 Because I want to see what other things they played
4 around with. At least the debtors --

5 THE COURT: Why isn't the other things they
6 played around with work product?

7 MR. NYE: Anything an expert considers in a
8 course of developing an actual opinion, as opposed to
9 generating a fact report, is discoverable, Judge. It
10 has to be. Because it could have influenced his
11 decision, or her decision. And I think the case law
12 bears that out. Certainly that's been my experience
13 for 25 years of trial lawyer work, Judge.

14 At least the debtors' proposal accomplishes
15 transparency with a complex database. Everyone is
16 going to know the factual predicates that the experts
17 are going to then opine on. The committee will know
18 what our experts are -- what reports they've run,
19 we'll know what reports they've run, we'll see how
20 they were run. The debtor, who has the actual
21 experience with this complex database, will be
22 verifying.

23 All of that is lost. And what we have just
24 before trial, is, we have some select reports that the
25 experts considered, not all of them, and I think I'm

1 entitled to all of them, and we've got one month and
2 one week of depositions.

3 And Mr. Hall raises a good point, because
4 fact discovery is over when we finally get these
5 reports, we have no one to talk to about them. Under
6 Mr. Walden's proposal we have the parameters that they
7 were run under, but we don't have the ability to talk
8 to the debtor as to whether those were appropriate,
9 and whether this report really is evidence of
10 anything.

11 So I understand where Mr. Waldman is coming
12 from. I just want to say that the transparency and
13 the up front need to see the facts of this case is
14 what the CMO was premised on, and I think what the
15 debtors' proposal accomplishes.

16 THE COURT: Thanks. Mr. Donovan.

17 MR. DONOVAN: Good afternoon, Your Honor.

18 THE COURT: Good afternoon.

19 MR. DONOVAN: Well, you've heard from
20 several people, so I'd first like to start by asking
21 if you would like me to answer any questions before I
22 get into the proposal, on the database or how it's
23 accessed.

24 And let me just say, we've all kind of
25 wrestled with these issues. And I've spoken with each

1 of the committees, or each of the constituencies, and
2 it is a tough issue.

3 But I do think a couple of things to put in
4 perspective, if I may submit. First, this is the type
5 of case that the manual for complex litigation really
6 speaks to, which requires active management, whether
7 that's by discovery, or the Court, or what you've told
8 us we should do, which is by the parties.

9 This is, as everyone understands, not a car
10 accident case. It is quite a large case that, I've
11 litigated before fraudulent conveyance, but they are
12 always complicated. There's always some issue. And
13 here it's the number of subsidiaries and the time that
14 we have.

15 So I just don't think, and I submit this is
16 a, take your medicine now or take it later, and from
17 the debtors' perspective we are concerned about the
18 trial date and the company going forward, and as this
19 case will fill the time every month, you extend the
20 trial date, and look, we're all just trying to do our
21 job --

22 THE COURT: Sure. I understand.

23 MR. DONOVAN: But it is going to extend an
24 fill the space.

25 THE COURT: Sure.

1 MR. DONOVAN: So I do think, I think it was
2 Mr. Hall that raised, the committee, if you adopt
3 that, at least as it was presented to you, explodes
4 the scheduling order. It will need to be redone. And
5 that isn't the motion they submitted, and we can all
6 revisit that. But I do want Your Honor, at least from
7 the debtors' perspective, to understand that's our
8 view.

9 With that, I would like to at least briefly
10 walk through our proposal. I don't think it's all
11 that complicated. And I want to say at the outset,
12 the dates are fungible. It is really, you know, no
13 one came to me with different dates. So I would like
14 to walk through it in that sense.

15 And I just updated the slides from last time
16 to have two additional slides. To summarize the
17 proposal -- and at the beginning that kicked all this
18 off, we got a letter from the committee's counsel that
19 said there's 30 reports, and they can characterize
20 them however they'd like, but there's 30 reports. And
21 I spoke with the Kroll folks and they said we could
22 produce most of this pretty quickly, at least by the
23 end of September at the outset, or at the outside.

24 So we said, great. At least those we could
25 produce and the two professionals that would do those

1 could sit down and, under oath, tell you and the
2 others how they did it. And frankly, this is going to
3 come up later, I think that's the only way you get
4 them into evidence.

5 But as I told the committee counsel, they
6 litigate their own case and take their own risks, but
7 I frankly, think something that is run by the company
8 is going to have some real evidentiary issues if it is
9 only attached to expert reports, and the case law says
10 that is not, in and of itself evidence. Experts can
11 rely on it, but that in and of itself is not evidence.
12 So I just want to front that issue.

13 But we can get these reports out there, and
14 then here's where we get to where the dates are
15 fungible. But we gave everyone unfettered access. We
16 heard Your Honor, we talked to everybody, we said,
17 fine, we'll produce these 30 reports that seemed to be
18 the baseline that Mr. Waldman had said maybe they
19 won't even need all of those. Everyone can play
20 around with those. Everyone can generate their own.
21 And they don't even need to make those available to
22 other people.

23 But if you're going to use them in this
24 case, Your Honor, whether they're attached to the
25 expert reports, or to cross examine someone on the

1 stand, we'd submit, at some point before the close of
2 fact discovery, these parties and the Court should
3 want those to be produced. And again, there could be
4 some safety valve. But if they are not produced, Your
5 Honor, I don't know how they get verified, how they
6 get at least the disputes raised during fact
7 discovery.

8 And again, these dates can be played with.
9 This was at the suggestion of the two committees, we
10 actually had two periods, so the parties were
11 basically, make them available.

12 THE COURT: The dates were the suggestion of
13 the committees or the banks?

14 MR. DONOVAN: My bad. The constituencies,
15 the banks.

16 THE COURT: The banks.

17 MR. WALDMAN: The banks, I'm sorry. Not the
18 committee, Your Honor.

19 MR. DONOVAN: To be clear, the committee
20 does not want to give anyone any reports until
21 December 29th. We all get that.

22 So Your Honor, so we proposed a period to do
23 that, and then we would say, look, obviously everyone
24 is going to dispute, you still have access well into
25 November. And by November 11th, basically a month

1 with the holidays, before the expert reports are due,
2 at least the ones you intend to rely on, and again,
3 there can be some safety valve, need to be produced so
4 there can be depositions on them and they can be
5 vetted.

6 After December 5th, which is the close of
7 fact discovery, under the current schedule there would
8 be no way to test the veracity, other than expert
9 depositions.

10 Now I understand it is definitely in Your
11 Honor's discretion to change that. I just wanted to
12 make you aware that we were trying to fit this into
13 the current schedule.

14 Now, a couple of points in response to Mr.
15 Waldman primarily. And to be clear, they do not want
16 to produce any reports until December 29th for a trial
17 date that is only a few months later.

18 First of all, I don't think that's
19 efficient. That's not the kind of active management
20 between the parties or respectfully, the Court, should
21 give to such a complex undertaking.

22 And to repeat Mr. Nye's statement, Your
23 Honor, this is not work product. Okay. If it was
24 work product, it is only our numbers, and this is my
25 point is, I want -- I suggest that this litigation

1 should be about the effect of the data, not about the
2 data. And I submit if we adopt the committee's
3 proposal, it will be a litigation about the data.

4 Because I actually raised this with
5 committee's counsel, and although Mr. Waldman just
6 represented to you that it's their intent they
7 wouldn't have to ask the debtors, they previously told
8 me they would come to Your Honor and ask for a good
9 faith exception to the scheduling order to take
10 depositions of the debtors if it doesn't get vetted.
11 That's my very concern. That would blow the trial
12 date.

13 And frankly, as I've talked with the Kroll
14 professionals, they said the only way they could
15 really attempt to authenticate or verify a report is
16 in most cases to say rerun the report due to the
17 complexity of the system.

18 And finally, just to briefly address,
19 because I don't think we have to spend much time in
20 front of Your Honor, at least I hope we don't, Mr.
21 Waldman kind of, from where I come from, took some
22 shots at my firm and what we're trying to do. With
23 all due respect, I don't think that's appropriate
24 here.

25 We've been trying to work on this. Under In

1 Re Ford, the debtors could have objected to this. And
2 under 11th Circuit precedent, Your Honor, we would
3 submit, they would have no access other than discovery
4 requests. So any kind of suggestion that my firm or
5 the debtors are in any way trying to block access are
6 unsupported, and frankly, I don't think they're
7 appropriate. And with that, Your Honor, we're happy
8 to answer any questions.

9 THE COURT: Thanks, Mr. Donovan.

10 MR. DONOVAN: Thank you, Your Honor.

11 THE COURT: Mr. Waldman.

12 MR. O'DONNELL: Dennis O'Donnell from
13 Millbank Tweed.

14 THE COURT: Yes, Mr. O'Donnell.

15 MR. O'DONNELL: May I be heard for a moment?

16 THE COURT: Sure.

17 MR. O'DONNELL: As we said at the beginning,
18 we represent a group of the former TransEastern
19 lenders who are now defendants in the adversary
20 proceeding. We believe at this time we will wind up
21 representing virtually all of the former TransEastern
22 lenders in this connection.

23 And we do, at this point in time, support
24 the debtors' proposed structure and the set of
25 limitations that go with it, on the understanding that

1 we will be a beneficiary of that structure.

2 Based on e-mail traffic today, I believe
3 that that is acceptable to the debtors. But the form
4 of order before Your Honor at the moment does not
5 include the former Transeastern lenders as a group as
6 a beneficiary of this order. To the extent that it
7 does, we do support what the debtors have proposed.

8 THE COURT: Okay.

9 MR. DONOVAN: That's correct, Your Honor.
10 We had e-mail communication up to the time of this
11 hearing. We have no objection to adding that
12 constituency to this order.

13 THE COURT: Okay. Thank you.

14 MR. O'DONNELL: Thank you, Mr. O'Donnell.
15 Mr. Waldman.

16 MR. WALDMAN: Your Honor, I will be brief.
17 First of all, in response to Mr. Nye, I actually
18 negotiated the case management order. That was done,
19 I know, because they kept using my conference call
20 number, and I had to sit in on those meetings. It was
21 completely redone when we entered the case. And it
22 was done as any other case management order.

23 As any other complex litigation I've ever
24 been involved in, you have fact discovery. When fact
25 discovery ends, you begin expert discovery. And then

1 after expert discovery ends, you have the trial.

2 Now, it would be nice in every complex
3 litigation to take fact discovery, then expert
4 reports, and then do more fact discovery. I would
5 love to do that in most of my complex litigation. But
6 that's not how it's typically done. And I don't
7 understand really why the other parties believe that
8 it's necessary to do so here.

9 Again, these reports are considered by
10 experts, and what an expert considers is a fairly
11 broad range, and I know it would be nice to take
12 additional discovery, but I just don't understand the
13 requirement and why people believe that this case is
14 any different than other complex litigation.

15 I hear the people are ganging up on me, and
16 we've got the --

17 THE COURT: Well, they're all defendants.

18 MR. WALDMAN: That's actually my point, Your
19 Honor, which is, the defendants -- we have the burden
20 in this case.

21 THE COURT: Indeed.

22 MR. WALDMAN: And I think the defendants
23 don't have a strong interest in having these analyses
24 be done in a folsom manner. And so to set early
25 deadlines and limited time periods, I think, given the

1 fact that we have the burden, that the Court should
2 take that into account that their interests may not be
3 quite as innocent, shall I say, as they might be
4 portraying it.

5 What has been suggested by the debtors and
6 the first liens is a very elaborate process. I heard
7 a six step process.

8 And I would submit, Your Honor, that if we
9 go down this road, we're going to be back in front of
10 you a lot. Because you know, these are very
11 sophisticated parties, very sophisticated and
12 aggressive law firms, and there are just going to be
13 tons of issues about how this complicated six step
14 process is supposed to be administered.

15 And I would suggest that a simple approach,
16 an approach which is used in other litigation, is the
17 appropriate way to go here.

18 There was talk about work product, well,
19 this can't be work product, they say. Your Honor,
20 I think clearly understands this issue, because you
21 noted, it's our thought process, it's what queries we
22 do clearly tell them where we're going, what we're
23 thinking.

24 The idea that everything, every query that
25 is made, every report made has to be reviewed by the

1 Court, has to be part of the record in the case, just
2 isn't right.

3 For example, if we were to use a consulting
4 expert, not a testifying expert, our consulting expert
5 may want to run reports that would never be seen by
6 the testifying expert, and that is clearly work
7 product, that's the whole point of a consulting
8 expert. So I really don't understand that point at
9 all, and I don't think it's correct as a matter of
10 law.

11 Lastly, Your Honor, I just, you know, I know
12 professed adherence to the trial date, everybody wants
13 the case to move forward, and we do too.

14 I would just remind the Court how we got
15 here. Five weeks ago we said, you know, we've been
16 using this database, it's very helpful, we would like
17 to use it in the adversary proceeding. And all of a
18 sudden, somehow we're being accused of slowing down
19 the process. If they had simply said yes there,
20 we would have been working for the last five weeks,
21 and Your Honor, we would submit, we would be better
22 able to meet this very rigorous schedule that we have.
23 Thank you, Your Honor.

24 THE COURT: Thank you. Mr. Hall.

25 MR. HALL: Briefly, Your Honor.

1 Mr. Waldman questions why this case is
2 different from other cases. I think it's quite
3 simple. In the ordinary case the debtor comes before
4 Your Honor and files financial statements. Here we do
5 not have financial statements for these debtors, at
6 least not the subsidiaries. They need to be created,
7 if they can be created.

8 The committee presumably intends to do so,
9 but wants to do so after the close of fact discovery
10 when we cannot challenge it. Thank you.

11 THE COURT: But there's nothing to prevent
12 you from preparing financial statements now yourself,
13 is there?

14 MR. HALL: No, there is not, Your Honor.

15 THE COURT: Okay.

16 MR. HALL: But they're going to want to do
17 discovery of that too, I presume. And the assumption
18 is that they go and do it, which is all we're asking
19 for, Your Honor.

20 THE COURT: Okay. Anyone else?

21 MR. DONOVAN: A couple of quick points, Your
22 Honor.

23 Number one, contrary to Mr. Waldman's
24 statement, unfettered access to a database consistent
25 with the Ford case, is the exception. I'm not saying

1 it's not permissible under these circumstances, but it
2 is the exception.

3 Number two --

4 THE COURT: Well, my understanding of the
5 Ford case, and correct me if I'm wrong, is that that
6 was a case in which the debtor objected to unfettered
7 access to its database.

8 MR. DONOVAN: And that's my point, Your
9 Honor, that is a different case, but my point being
10 is, in that case the 11th Circuit, the normal case, in
11 most cases, the defendant would be objecting.

12 Here the debtor is saying, we want the
13 information, we want to move this case along to get to
14 a conclusion.

15 So my point is, this is the exception.
16 That's why we do think it needs to be a little
17 different, because it is the exception.

18 And then to address Mr. Waldman's point that
19 kind of five weeks have passed, in fact, we have made
20 the database available in trying to get to this order.
21 And in fact, last Thursday we had a lot of these
22 people up in our New York office, and they were going
23 to provide us a list of some 30 odd questions after we
24 had about a two hour presentation Q and A. So I do
25 think a lot of progress -- again, the informal method

1 to be sure, not the formal, but we've been trying to
2 kind of keep things moving even during this period.

3 THE COURT: Thank you.

4 I don't see any evidence here that anybody
5 is trying to proceed in bad faith. I think that there
6 are different approaches that the plaintiff and the
7 defendants in this very large adversary proceeding
8 have with respect to how to conduct discovery and how
9 to access information in the company's database.

10 Mr. Donovan -- well, I guess that Mr. Hall
11 raises questions of how discovery -- how queries taken
12 in the database by the committee are going to be
13 introduced into evidence. If that doesn't trouble Mr.
14 Waldman, I don't know why it should trouble me today.
15 And I would be surprised if that ultimately proved to
16 be a problem. But like I said, I've been surprised
17 before.

18 I think that the debtors are trying hard to
19 to be helpful, but I think that because the committee
20 has the burden of proof in every element of this
21 litigation, its proposal to have open access to the
22 database is not an unreasonable proposal. I don't see
23 it leading to significant problems in the course of
24 the discovery itself.

25 It seems to me that in respect of reports

1 that are reviewed by the expert but not -- that it's a
2 fair question, Mr. Hall, in discovery or in the
3 deposition of an expert what reports he looked at,
4 whether he relied on them as such, or not, and if he
5 looked at other stuff, I think you're probably
6 entitled to see it, but that motion isn't before me.

7 I am inclined to enter the committee's
8 order, unless someone of you tells me right now what
9 specific problems there are with the language of that
10 order that you see creating a problem that I'm not
11 anticipating as I am sitting here today.

12 I just see, Mr. Donovan, as much as I
13 respect the good work that you all have done in trying
14 to broker a proposal, I see a lot of places in your
15 six step methodology that may cause me to wish to
16 enter into a 12 step methodology in attempting to
17 resolve those problems.

18 But with all seriousness, if there are
19 things in the committee's order that create problems
20 that I'm not -- that I haven't thought through, tell
21 me what they are, and if you want to take a couple of
22 minutes to think about that, come up and talk. Mr.
23 Hall.

24 MR. HALL: Your Honor, three things come to
25 mind. I'm not quite sure it requires any

1 modifications, as long as we're all on the same
2 page.

3 One is paragraph 3 requires production of
4 the reports that are going to be relied on upon the
5 expert. I think the defendants here are reserving
6 their right that they can go beyond that and seek
7 reports that the expert may not have relied on, but
8 looked at, et cetera, et cetera. So as long as we
9 reserve those rights --

10 THE COURT: That strikes me as fair game,
11 and I want to hear from Mr. Waldman if he disagrees.

12 MR. HALL: And in paragraph 4, Your Honor,
13 they are obligated to give us the queries and other
14 information that would enable us to reproduce the
15 report.

16 I'm not computer literate enough to know
17 what queries are, but just so we're all on the same
18 page, we want to be able to go back into the system
19 and pinpoint every data point that they used to get at
20 their report. As long as that's their understanding,
21 I think we're on the same page.

22 The third point, Your Honor, is, whether we
23 address it now or address it later, how do we address
24 the impact of this on the overall scheduling order.

25 THE COURT: Okay. Mr. Waldman, on the two

1 technical points, do you concede that Mr. Hall's point
2 on paragraph 3 of the order, that reliance is not
3 intended to necessarily limit that which can be sought
4 from an expert as to what he looked at?

5 MR. WALDMAN: Yes, Your Honor. I assume
6 we'll fight that battle in the future.

7 THE COURT: Yes. I'd ironically, be
8 surprised if there was a real fight on that point, but
9 okay.

10 Number 4, queries or other information, is
11 that, Mr. Donovan, is that technical computer language
12 that applies to the database, queries or other
13 information, was that intended to be universal?

14 MR. DONOVAN: I think that's Mr. Waldman's
15 language.

16 THE COURT: Fair enough. Does it cover the
17 waterfront?

18 MR. WALDMAN: Are you asking me or Mr. --

19 THE COURT: Well, I'll start with you --

20 MR. WALDMAN: Well, I'm not a technical
21 person either, Your Honor. I think --

22 THE COURT: Oh God, it's going to be a whole
23 courtroom full of amateurs.

24 MR. WALDMAN: I think the intent was the
25 same as counsel described it, which was, that it can

1 be reproduced, and that everybody will have the same
2 understanding of where the data was generated.

3 THE COURT: Okay. Anybody from Kroll able
4 to shed light on this for you, Mr. Donovan?

5 MR. DONOVAN: People in the know say
6 queries, if you know what you're doing, you should be
7 able to provide the needed information.

8 THE COURT: Okay. I hope we're all at the
9 stage where those who are asking the queries actually
10 know what they're doing.

11 MR. DONOVAN: I have a couple of points,
12 Your Honor, on the order.

13 THE COURT: Sure.

14 MR. DONOVAN: One is operational. I believe
15 we're going to need a limit on the number of people, I
16 know the committee was suggesting at some point they
17 wanted seven to eight people to have access. I'm not
18 sure if that's simultaneously, but I think two to
19 three is what the Kroll folks tell me is really, if
20 you want this thing to run at a reasonable speed, and
21 we now have four different constituencies. It needs
22 to be somewhat limited operationally.

23 THE COURT: Okay. I can accept that
24 proposition as a general one. Mr. Waldman, how many
25 people --

1 MR. WALDMAN: Your Honor, there's been talk
2 about getting a copy of the database, and I think that
3 would be a better solution. But the number of people
4 strikes me as something that Your Honor may not want
5 to put in an order, but hopefully the parties can work
6 it out amongst themselves.

7 THE COURT: Well, let me ask that, Mr.
8 Donovan, and maybe you want to go to back into the
9 back of the room before you answer, is there a
10 feasible way to provide either a mirror image or a
11 copy of the database that you can hand over to the
12 parties and they can go make merry without screwing up
13 your hardware?

14 MR. DONOVAN: May I have a moment, Your
15 Honor?

16 THE COURT: Sure.

17 MR. DONOVAN: I don't think we can give an
18 answer right now, Your Honor. It's very large. It
19 may be able to be done, is what I'm told.

20 I guess there's a couple of issues. One is,
21 they're not sure technically it can really be done.
22 They think it's possible, but they're not sure.

23 Number two is, whatever they would be given
24 would be frozen in time. This obviously is an
25 operational day to day thing that continues to run.

1 I'm not sure that any of the constituencies care about
2 that.

3 THE COURT: Well, isn't frozen in time
4 perfectly acceptable? I mean, this isn't like a
5 normal Chapter 11 case. This is a piece of historic
6 information.

7 MR. DONOVAN: I just wanted to raise the
8 issue, Your Honor.

9 THE COURT: As long as everybody has got the
10 same date, I don't suppose that's a particular
11 problem, unless there were retrospective adjustments
12 made that I suspect would be awkward right about now.

13 MR. DONOVAN: So Your Honor, the short
14 answer is, we need to chat. It may be possible, we're
15 just not sure, but we'll find out if we can. If we
16 can that may be the easiest way.

17 THE COURT: Yeah, if you can, give them the
18 disks and they can go make merry. I do appreciate the
19 point you've made before, Mr. Donovan, and I don't
20 want to leave here without saying it. The debtors are
21 obviously concerned about the expense of all this, and
22 an army of people mucking around in the database is
23 presumably an army that wants to get fed at some
24 point.

25 And I want to emphasize to all of you that I

1 regard that the people with fiduciary duties in the
2 case have an obligation to look at the expenses that
3 are being incurred by everybody in the case, including
4 the others who have fiduciary obligations, but
5 everybody else who is feeding from the same trough.
6 And if there is an abuse going on, to come tell me of
7 that at the appropriate time, whether the appropriate
8 time is on an interim or the final.

9 You know, if somebody has gone and run amuck
10 in incurring expenses in connection with the
11 litigation, I'm going to be no more amused at the end
12 of the day than I would be if somebody has run amuck
13 during the course of the case.

14 But I think that fiduciaries have fiduciary
15 obligations, and unpleasant as complaining about
16 somebody's fees may be, that's something that, if
17 there is an excess amount being spent on this
18 litigation, or on anything else in the case, then the
19 debtor and the committee have a duty to come and talk
20 to me.

21 MR. DONOVAN: Understood, Your Honor.

22 THE COURT: Not a suggestion that anybody is
23 going to be running amuck, but you know, if fees are
24 incurred, oh, for example, in filing pleadings that
25 are pointless, you know, I don't think that people get

1 a free pass whether they get paid on a monthly basis
2 without an order, or whether they need to file fee
3 applications on a regular basis or not.

4 So that's a general proposition. I don't
5 enjoy reading fee applications, and I don't enjoy fee
6 fights, but if they need to be had, they need to be
7 had.

8 Okay. Well then, I will leave it insofar as
9 the how many people are going to have access question,
10 and is there a way to give the information to the
11 defendants and the plaintiff so that they can do it
12 without slowing down your equipment, I'll leave it to
13 you all to manage that. If you need intervention, you
14 know how to find me.

15 MR. DONOVAN: I think it's fine, Judge.
16 I think either we can and we will, or we can't, and we
17 can't.

18 THE COURT: Yeah. And in that case, if you
19 have a problem working out of how many people can play
20 at a given time, then come tell me about that as
21 well.

22 MR. DONOVAN: One point of clarification
23 from the company, Your Honor. Based on, I understand
24 your order, and the company kind of needs to
25 prioritize its time, it understands that now it does

1 not have a duty to run those 30 reports, and those
2 will be done, and this is a serious concern, Your
3 Honor, is, what we understood this to be was, they
4 said this is a more efficient way, and the folks at
5 Kroll are very time sensitive on a lot of issues.
6 This is the concern.

7 We understand that it is not being ordered,
8 but I want to raise that, because I was asked by the
9 folks at Kroll.

10 THE COURT: Sure. Is it the expectation,
11 Mr. Waldman, that the company would not run the
12 reports?

13 MR. WALDMAN: That's fine, Your Honor, we
14 don't mind running the reports ourselves.

15 THE COURT: Okay. Mr. Hall.

16 MR. HALL: Your Honor, two points. It would
17 be our hope that the debtor would run those reports
18 instead of having the rest of us run them
19 independently. They could still be checked by Mr.
20 Waldman's expert, that would be fine, but I think
21 having Kroll Zolfo run them instead of our expert, and
22 their expert, and Mr. Nye's expert, I think would be
23 far more efficient in the first instance.

24 The only other issue I have, Your Honor, is
25 on paragraph 3 where they say, each party shall

1 produce to the other parties at the time it produces
2 the report. I'd like to propose we change, at the
3 time, to no later than the time, in the hopes that as
4 parties know they are going to be using reports in
5 advance of the due date for their expert report, those
6 can be then exchanged in advance. So instead of at
7 the time, no later than the time.

8 THE COURT: Mr. Waldman, any issue with that
9 language?

10 MR. WALDMAN: As long as it's not mandatory,
11 no, Your Honor.

12 THE COURT: Okay. Well, if you all can work
13 that out, that's fine. Why don't you make that change
14 in the language, Mr. Waldman, or Mr. McNamee, I guess
15 it's on your word processor these days.

16 MR. MCNAMEE: Yes, Your Honor.

17 MR. NYE: Judge, one last point. I believe
18 you mentioned a few minutes ago that when the issue of
19 the case management order came up that you might
20 entertain some thoughts, if not an order today,
21 concerning this change regarding the database.

22 My thought, and it addresses Mr. Hall's
23 concerns as well, and I just throw it out for this
24 group, that I think that there needs to be some
25 ability to access witnesses at the debtor during the

1 period from December 29th to February 19th. That's
2 the period when these reports are now going to be
3 produced.

4 And maybe it doesn't have to be open access,
5 I know the debtor is concerned, but on an as needed
6 basis if we can convince the other side or Your Honor,
7 I would at least like the case management order to
8 note that there may be some need to access the debtors
9 concerning these new reports that we're going to get
10 late December.

11 THE COURT: Well, it's now August 25th.
12 I understand your request. It's not particularly --
13 you obviously haven't thought it through more than
14 having had the opportunity to think it through this
15 afternoon.

16 MR. NYE: Correct.

17 THE COURT: Why don't you give it some
18 thought, raise the question with others, and if
19 there's an agreeable modification to the case
20 management order, fine. If there isn't, then a motion
21 ought to be filed.

22 I do have one question -- well, let me close
23 the circle on this order.

24 In respect of the debtors' question, do we
25 need to run the reports, given the nature of the order

1 I'm about to enter, the answer is no. The parties to
2 the litigation can handle the litigation, and the
3 debtors' effort to be of further assistance is
4 something that I'm not going to require, and not going
5 to call on the debtor to do. And I'm sure that Kroll
6 Zolfo Cooper has plenty of other things to do in the
7 company.

8 There's an unrelated question that I have in
9 connection with the litigation, and that is that, at
10 least some of the pleadings filed have suggested that
11 in respect of the first lien lenders and the revolver
12 lender, that Citi is, in fact, the only party that
13 needs to be named and needs to be a party to the
14 litigation. I think Wells Fargo filed something
15 similar in its motion.

16 Mr. Waldman, has the committee thought
17 through whether dropping other parties is appropriate
18 in light of the representations that have been made,
19 or how long will it take you to reach a conclusion on
20 that subject? Because I'll want to know the answer to
21 that no later than the 17th of September when we're
22 back.

23 MR. WALDMAN: Your Honor, Mr. Strasser
24 will --

25 THE COURT: Mr. Strasser.

1 MR. STRASSER: Good afternoon.

2 THE COURT: I premissed my question, and I
3 should say that, so that you understand where I'm
4 coming from, when the clerk's office noted the number
5 of defendants in this case, they became alarmed at how
6 to keep pleadings filed by that many parties in line,
7 and I counted the number of seats that bodies can fill
8 in this courtroom, and while we added a few recently,
9 I don't know that 80 or 90 or 100 parties are going to
10 be comfortable. So what's your thinking?

11 MR. STRASSER: I think the short answer,
12 Your Honor, is that we're still analyzing this issue,
13 and we have to address it, because that's part of the
14 Wells Fargo motion that's before the Court. And I
15 expect we will address it as part of our response to
16 that motion.

17 Secondly, I don't think 80 parties would
18 uncomfortably fit in this courtroom, so I understand
19 the Court's practical concern here. But I wonder if
20 it's going to turn out to be that many parties
21 because --

22 THE COURT: Well, you know, somebody is
23 renting Invesco Field for this evening, or later this
24 week, so maybe we could do it at Marlins stadium.
25 That ought to take care of everybody pretty quickly.

1 MR. STRASSER: They won't be using that in
2 October, Your Honor?

3 THE COURT: Well, right now we're aiming for
4 March for the trial.

5 MR. STRASSER: I was thinking about the
6 hearings before that.

7 THE COURT: Ah, yes.

8 MR. STRASSER: What I was getting at, Your
9 Honor, is, I think that even if there are that many
10 parties who have to be joined, as a matter of fact, in
11 a way that will bind them to whatever outcome there is
12 in this case, that as a practical matter, they're
13 going to fall into groups represented by counsel, and
14 so we're not going to have 80 party representatives
15 here, and we're not going to have 80 lawyers here
16 either, just because of the economics of it. We're
17 not going to have parties each hiring counsel here.

18 So I would never minimize the concern of the
19 clerk's office in any case handled in any court, but I
20 don't think it's going to turn out to be as big a
21 practical problem as that.

22 But all that being said, I don't yet have an
23 answer for you.

24 THE COURT: Okay. That's fair. Thank you,
25 Mr. Strasser. Mr. Smolinsky.

1 MR. SMOLINSKY: Your Honor, again, Joe
2 Smolinsky.

3 I just wanted to state for the record, I
4 don't think that the first lien agent has taken a
5 position with respect to the effect of naming or not
6 naming. I think the second lien agents have filed a
7 motion to dismiss. I think we've been silent on it.
8 We're taking the litigation as it comes. And I think
9 the plaintiff has to decide which way to go.

10 In terms of when --

11 THE COURT: Didn't the -- Mr. Busey, didn't
12 the revolver take a position on that?

13 MR. BUSEY: No, Your Honor.

14 THE COURT: Okay. Then I apologize.

15 MR. SMOLINSKY: We filed a motion to
16 dismiss, but on other issues.

17 MR. BUSEY: That was not one of our
18 grounds.

19 THE COURT: Okay.

20 MR. SMOLINSKY: And the lenders in the first
21 lien facilities have not yet been individually named.
22 If there is some overlap, it's because they're
23 Transeastern lenders, but they're assuming that
24 they're being sued in the capacity as Transeastern
25 lenders if they've been individually named.

1 THE COURT: Okay.

2 MR. SMOLINSKY: So the list would only get
3 larger if the committee sought to name all of the
4 lenders. The existing list are lenders that have
5 already -- need to be named and will be proceeding.
6 No one should be dropping off on that list.

7 THE COURT: Okay. Thanks.

8 MR. O'DONNELL: Your Honor, Dennis O'Donnell
9 from Millbank Tweed here.

10 THE COURT: I thought I'd hear from you.

11 MR. O'DONNELL: I will not speak to the
12 issue of new defense to be added, but as to the
13 existing defendants, are currently subject to
14 finalizing engagement letters with a number of parties
15 that we will be representing, approximately 16
16 institutions covering probably 63 of the 69 defendants
17 in the caption. So I think, at least with the
18 defendants currently before the Court, we will not
19 occupy that many seats.

20 THE COURT: Grand. Well, you're always
21 welcome here, Mr. O'Donnell, and I'm sure I'll see you
22 sometime soon.

23 Okay. Is there anything else we need to do
24 today in this case to move it forward?

25 MS. LABOVITZ: One thing, Your Honor.

1 Looking ahead at hearing dates for what I'm sure will
2 be a very full and interesting autumn season, we have
3 hearing dates currently scheduled for September 17th
4 and October 2nd. I think it probably makes sense, so
5 that parties can plan filings and travel schedules, to
6 set another hearing toward the end of October. And
7 Judge, we've generally had the practice of scheduling
8 hearings about three weeks apart, so I would posit
9 October 23rd, and if I hear any suggestions --

10 THE COURT: Well, we have one scheduled on
11 the 16th of October. That's on my calendar at
12 least.

13 MS. LABOVITZ: Is that in the litigation
14 schedule?

15 THE COURT: It just says Touse on my
16 calendar. Are you suggesting that I move that to the
17 23rd? Maybe we just did it internally and didn't --

18 MS. ROMERO: No, I spoke to Carmen Cruz
19 (phonetic).

20 MS. LABOVITZ: Your Honor, we did not have
21 that on our calendar, and I had thought October 2nd
22 was the last date that we had scheduled in open court.
23 It may be that another date was scheduled. If so, I
24 do think just from a perspective of trying to limit
25 the expense of these cases, it makes sense to have the

1 hearings a little bit farther apart so that we're not
2 all down here in court and flying here every two
3 weeks. If we could move it to October 23rd, I think
4 that would be helpful.

5 THE COURT: Any objection? October 23rd it
6 is. Cancel the 16th. Is it better to start in the
7 afternoon? Can people fly down in the morning, or
8 does it matter?

9 MS. LABOVITZ: We had hoped that we would be
10 able to fly down in the morning and save some expense
11 that way, but Your Honor, I had a recent experience
12 that suggests otherwise.

13 THE COURT: Never take the last plane out of
14 town on the night before.

15 MS. LABOVITZ: I tried to take the first
16 plane out that morning and it was not -- it was too
17 close for comfort.

18 Judge, I think mid-morning is a good start,
19 from our perspective, and it let's people more
20 comfortably make planes at the end of the day.

21 THE COURT: Mr. Waldman.

22 MR. WALDMAN: We actually like the
23 afternoon, Your Honor. We've been able to, at least
24 from Washington, come back and forth. So I don't know
25 what that means, but I pass it along.

1 THE COURT: Well, if I schedule them in the
2 early afternoon, are you having problems getting out
3 in the afternoon from here?

4 MS. LABOVITZ: There have been a lot of
5 missed flights and people getting back in the wee
6 hours, Your Honor. We're happy to do what it takes,
7 I think is the message, but to the extent that
8 mid-morning works and you can catch an early flight
9 from Washington, it would be helpful.

10 THE COURT: Define mid-morning. This is a
11 Florida question, not a New York question. I
12 appreciate --

13 MS. LABOVITZ: In New York, Your Honor,
14 mid-morning is about 2:00 in the afternoon.

15 THE COURT: That's what I was thinking.

16 MS. LABOVITZ: From our perspective, an 11
17 a.m. start, which is what I believe we've decided
18 among the parties to set for September 17th, seems to
19 work for people.

20 THE COURT: Mr. Dublin.

21 MR. DUBLIN: Your Honor, I don't know if
22 there are any flights that would allow us from New
23 York to come down that morning. Our luck has been
24 getting down in the morning and not getting out at
25 night because of the weather in the summer time.

1 Maybe for everybody, it would be if we can alternate
2 morning, afternoon, so that people can get the benefit
3 of all possible flight times.

4 THE COURT: You know, I never knew I'd be a
5 travel agent when I took this job.

6 MS. LABOVITZ: As you can see, Judge, there
7 are many disputes we have in this case. We'll
8 accommodate what's needed.

9 THE COURT: Do we have anything scheduled on
10 the 23rd right now?

11 MS. ROMERO: Nothing.

12 THE COURT: Okay. Let's put these fine
13 folks at 11:00 in the morning on the 23rd, and Mr.
14 Dublin, you get the next one.

15 MR. DUBLIN: Thank you, Your Honor.

16 THE COURT: We'll keep the 2nd at 2:00, and
17 move the one on the 16th to the 23rd. Do you want to
18 schedule something out in the middle of November then?

19 MS. LABOVITZ: Your Honor, I'd rather wait
20 until the next hearing to do that. As I continue to
21 mention to the Court, the debtors are working very
22 hard to try to move the case forward in terms of a
23 plan process, because we're concerned about the
24 expenses of the litigation, and I'm hoping that by the
25 next hearing we would be able to give more color on a

1 time frame for that.

2 THE COURT: Okay. Very good. Anything else
3 we need to do? Then we're adjourned.

4 MS. LABOVITZ: Thank you, Your Honor.

5 (The proceedings were concluded at 4:40 p.m.)

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3 The State of Florida)

4 County of Palm Beach)

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6 I, JACQUELYN ANN JONES, Court Reporter,
7 certify that I was authorized to and did
8 stenographically report the foregoing hearing; and
9 that the transcript is a true record of my
10 stenographic notes.

11 I further certify that I am not a relative,
12 employee, attorney or counsel of any of the parties,
13 nor am I a relative or employee of any of the parties'
14 attorney or counsel connected with the action, nor am
15 I financially interested in the action.

16

17 In witness whereof I have hereunto set my
18 hand and seal this 29th day of August, 2008.

19

20

21 _____
JACQUELYN ANN JONES

22 Commission No. CC 995956

23 Expires Feb 18, 2009

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