

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

4 Case No.: 08-10928-BKC-JKO
5 Jointly Administered

6 In Re:
7 TOUSA, INC., et al.,
8 Debtor.

9 _____/

10

11

12 ALL MOTIONS ON THE CALENDAR

13 May 14, 2009

14 (2668), (2685), (2688), (2707), (2712), (2727),
15 (22), (24), (1), (9), (1), (14), (24), (28),
16 (7), (8)

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18 The above-entitled cause came on for hearing
19 before the HONORABLE JOHN K. OLSON, one of the Judges
20 of the UNITED STATES BANKRUPTCY COURT, in and for the
21 SOUTHERN DISTRICT OF FLORIDA, at 299 East Broward
22 Boulevard, Fort Lauderdale, Broward County, Florida,
23 on Thursday, May 14, 2009, commencing at or about
24 10:00 a.m., and the following proceedings were had:

25

26 REPORTED BY: Helayne Wills
27 OUELLETTE & MAULDIN COURT REPORTERS (305)358-8875

1 APPEARANCES:
2
3 BERGER SINGERMAN, by
4 PAUL S. SINGERMAN, ESQ. (via telephone)
5 and
6 KIRKLAND & ELLIS, by
7 JOSHUA SUSSBERG, ESQ., (via telephone)
8 BRIAN SCHATZ, ESQ., (via telephone)
9 on behalf of the Debtors
10
11 AKIN GUMP STRAUSS HAUER & FELD, by
12 BRIAN D. GELDERT, ESQ. (via telephone)
13 and
14 STEARNS WEAVER, by
15 PATRICIA A. REDMOND, ESQ. (via telephone)
16 on behalf of the Committee of Unsecured
17 Creditors
18
19 CHADBOURNE & PARKE, by
20 MEGHAN TOWERS, ESQ. (via telephone)
21 and
22 STICHTER RIEDEL BLAIN & PROSSER, by
23 RICHARD PROSSER, ESQ. (via telephone)
24 and
25 SMITH HULSEY & BUSEY, by
ALLAN WULBERN, ESQ. (via telephone)
on behalf of Citicorp

BILZIN SUMBERG BAENA PRICE & AXELROD, by
JEFFREY SNYDER, ESQ.
and
BRACEWELL & GIULIANI, by
RICHARD L. WHITLEY, ESQ. (via telephone)
on behalf of the Second Lien Holders and Wells
Fargo, as successor administrative agent

HOLLAND & KNIGHT, by
JOAQUIN ALEMANY, ESQ.
on behalf of Newmark/Buffington Brushy Creek

NADINE WHITE-BOYD, ESQ. (via telephone)
on behalf of Scott and Katrina Collette
Continued...

1 GREENBERG TRAUERIG, by
2 PADMAVATHI G. HINRICHS, ESQ.
3 Special Counsel on behalf of the Debtor

4 JAMES BEAGLE, P.A., by
5 JAMES BEAGLE, ESQ.
6 on behalf of Steven and Cheryl Levinson

7 HOPPING GREEN & SAMS, by
8 MICHAEL ECKERT, ESQ. (via telephone)
9 on behalf of Country Greens, Greater Lakes,
10 Sawgrass Bay, Heritage Landing, Highland
11 Meadows, Middle Village, Indigo Community
12 Development Districts

13 COATES LAW FIRM, by
14 SPENCER GOLLAHON, ESQ. (via telephone)
15 on behalf of Ron Carlton

16 HILL WARD & HENDERSON, by
17 MICHAEL BRUNDAGE, ESQ. (via telephone)
18 on behalf of MMA Capital Corporation

19 TEW CARDENAS, by
20 ROBIN RUBENS, ESQ. (via telephone)
21 on behalf of Larry and Dixie Bartlett

22 GERALD KENNEDY, ESQ. (via telephone)
23 on behalf of SC Design

24 RICE PUGATCH ROBINSON & SCHILLER, by
25 MARK ROHER, ESQ.
on behalf of Live Oak I and Live Oak II

ALSO PRESENT:
JEDD BELLMAN, Judge Olson's Law Clerk
CHRISTINA ROMERO, Courtroom Deputy
ISABEL ALOMIA

1 THE COURT: Good morning. This is Judge
2 Olson. Let me take appearances in the courtroom
3 first, if I may. Anyone who wishes to speak today,
4 let me hear from you.

5 MR. ALEMANY: Good morning, Your Honor.
6 Joaquin Alemany with Holland & Knight on behalf of
7 Newmark/Buffington Brushy Creek.

8 THE COURT: Thank you, Mr. Alemany.

9 MR. BEAGLE: Good morning, Your Honor.
10 James Beagle, from James Beagle, P.A. for Steven and
11 Cheryl Levinson.

12 MS. HINRICHS: Patty Hinrichs, Your Honor,
13 from Greenberg Traurig. I'm here on behalf of the
14 debtors.

15 MR. SNYDER: Good morning, Your Honor.
16 Jeffrey Snyder of Bilzin Sumberg on behalf of Wells
17 Fargo as Second Lien Agent.

18 THE COURT: Good morning.

19 MR. ECKERT: Good morning, Your Honor.
20 Michael Eckert, Hopping Green & Sams, on behalf of
21 Country Greens, Greater Lakes, Sawgrass Lakes,
22 Heritage Landing, Highland Meadows, Middle Village,
23 and Indigo Community Development Districts.

24 MR. GOLLAHON: Good morning, Judge.
25 Spencer Gollahon from the Coates Law Firm on behalf

1 of Ron Carlton.

2 MS. ALOMIA: Isabel Alomia. I'm here for
3 my husband and myself.

4 THE COURT: How do you spell your last
5 name, ma'am?

6 MS. ALOMIA: A-L-O-M-I-A.

7 THE COURT: On the phone.

8 MR. SUSSBERG: Good morning, Your Honor.
9 Joshua Sussberg and Brian Schartz of Kirkland Ellis,
10 on behalf of the debtors.

11 THE COURT: Very good.

12 MS. WHITE-BOYD: Good morning, Your Honor.
13 Nadine White-Boyd on behalf of Kevin Collette, and
14 also on behalf of Scott and Katrina Collette.

15 THE COURT: Thank you.

16 MR. BRUNDAGE: Good morning, Your Honor.
17 Mike Brundage from Hill Ward & Henderson, appearing
18 on behalf of MMA Capital Corporation.

19 MR. SINGERMAN: Paul Singerman. I'm
20 sorry, Your Honor. The delay on the conference line
21 is a little bit awkward. I don't mean to be rude or
22 interrupt.

23 THE COURT: That's quite all right. I've
24 forgotten there was a delay.

25 Anyone else?

1 MS. REDMOND: Patricia Redmond on behalf
2 of the committee.

3 THE COURT: Very good.

4 MR. GELDERT: Good morning, Your Honor.
5 Brian Geldert from Akin Gump, on behalf of the
6 committee, as well.

7 MR. WHITLEY: Good morning, Your Honor.
8 Richard Whitley from Bracewell & Giuliani, on behalf
9 of Wells Fargo, as the agent for the second lien
10 term loan.

11 MS. TOWERS: Good morning, Your Honor.
12 This is Meghan Towers from Chadbourne & Parke on
13 behalf of Citicorp North America as the first lien
14 agent.

15 MS. RUBENS: Good morning, Your Honor.
16 Robin Rubens from the law firm of Tew Cardenas on
17 behalf of Larry Bartlett and Dixie Bartlett.

18 MR. PROSSER: Good morning, Your Honor.
19 Richard Prosser on behalf of Citicorp first lien
20 term.

21 THE COURT: Thank you.

22 MR. KENNEDY: Good morning, Your Honor.
23 Gerald Kennedy on behalf of SC Design. We were just
24 hoping to hear a status report on the bankruptcy.

25 THE COURT: Very good. Thank you.

1 MR. WULBERN: Good morning, Your Honor.
2 Allan Wulbern with Smith Hulsey & Busey for Citicorp
3 North America, in its capacity as administrative
4 agent for the revolver.

5 THE COURT: Thank you, Mr. Wulbern.
6 Anyone else?

7 Mr. Roher, are you here for somebody? Who
8 is your client?

9 MR. ROHER: Thank you, Your Honor. Mark
10 Roher on behalf of Hammocks Live Oak I Community
11 Development District and Life Oak II Community
12 Development District.

13 THE COURT: Anyone else on the phone want
14 to make an appearance?

15 Then Mr. Sussberg, are you orchestrating
16 today?

17 MR. SUSSBERG: Your Honor, I'm going to
18 orchestrate somewhat. I'm going to provide
19 everybody with a brief overview of where we stand.
20 I know SC Design is looking for an update, and I'm
21 happy to provide that. Then Mr. Schartz will take
22 over and run through the uncontested matters. Then
23 we'll turn it over to Ms. Hinrichs, who will handle
24 the adversary proceedings on behalf of the debtors.

25 THE COURT: Very good. Thank you.

1 MR. SUSSBERG: Today was supposed to have
2 been our disclosure statement hearing. We had filed
3 a plan and disclosure statement approximately a
4 month ago.

5 As I believe most parties in interest are
6 aware, we had agreed to adjourn the disclosure
7 statement hearing from today until the 22nd of May,
8 in the hope that we could work through some of the
9 issues that had been raised by, not only various
10 objecting parties, but also our major creditor
11 constituencies, in the hope that we could go forward
12 and present a disclosure statement that was at least
13 agreeable to by many of the major consistencies in
14 the case.

15 As we continue to work through various
16 issues that have been raised, unfortunately, the
17 litigation remains an impediment to moving forward
18 with the plan process. As we told the Court before,
19 in the context of the revised business plan, it was
20 the debtors' hope to move forward on an expeditious
21 basis, with the plan and disclosure statement, in an
22 effort to stave off unnecessary administrative
23 expenses.

24 We do not want to be in a situation where
25 we are incurring unnecessary administrative expenses

1 in the context of the plan and disclosure statement,
2 so we believe it's appropriate to continue to work
3 with our consistencies and various objectors to
4 resolve issues.

5 Unfortunately, at this time I'm not able
6 to tell you with certainty when it is we will be
7 going forward with the disclosure statement and the
8 overall plan process, but we are hopeful that we
9 will take this time now, pending the next hearing on
10 this matter, whenever that is to be -- and we will
11 certainly let parties understand the times on that,
12 and provide sufficient notice -- to work through
13 issues in an effort to present a disclosure
14 statement and a plan that we can work through
15 quickly and efficiently, without unnecessary expense
16 to the parties in interest.

17 THE COURT: Okay. I note from my calendar
18 that we have all of next Friday, the 22nd, blocked
19 off for TOUSA. How much of that time do you
20 anticipate you're actually going to use?

21 MR. SUSSBERG: I actually think, Your
22 Honor, we'll only need a brief period of time in the
23 morning, if that's okay with Your Honor.

24 THE COURT: That's fine. If you can do it
25 all by phone, that's fine, too. Like you, I would

1 prefer that people keep the expense of this all in
2 mind.

3 MR. SUSSBERG: Absolutely. We appreciate
4 that, Your Honor. I did want to thank you for
5 allowing many of us to participate by phone, which
6 certainly does help alleviate some unnecessary
7 expense.

8 THE COURT: Sure. And if you all conclude
9 that the matters that you would otherwise bring on
10 next Friday, the 22nd, can be dealt with on the
11 28th, when we have TOUSA hearings scheduled at 9:30,
12 that's fine with me. I suspect there are one or two
13 people whose families would love it if they could
14 pass on the Friday before Memorial Day.

15 MR. SUSSBERG: Point well taken, Your
16 Honor.

17 I actually think, subject to coordinating
18 with some folks on this end, I think that's probably
19 doable. We will take a look at that, make sure it
20 works. To the extent we need to speak with any
21 other parties that have matters set for the 22nd, we
22 can push things to the 28th, and then give a call to
23 your chambers, just to let you know.

24 THE COURT: That's fine. I intend to be
25 flexible. If you need a hearing on the 22nd, we'll

1 have a hearing on the 22nd. If you don't, and you
2 can juggle things, that's fine with me.

3 MR. SUSSBERG: We very much appreciate
4 that, Your Honor. We'll take that under advisement,
5 and we'll get back to you in short order.

6 THE COURT: Anything else on status that
7 you want to tell me about?

8 MR. SUSSBERG: No, Your Honor. I believe
9 that's overall where things stand.

10 We did file a few motions last night, two
11 of which deal with the sale of two of our divisions
12 in Texas, the Austin and the Houston divisions.
13 Those motions will be presented to the Court on the
14 28th of May.

15 All of our major creditor constituencies
16 have been very involved in the ongoing process to
17 market our assets, and they're aware of these sales.
18 We are very happy that we were able to get to a
19 point where those asset purchase agreements were
20 finalized, and we were able to put motions on file
21 and get them before Your Honor.

22 THE COURT: How's cash?

23 MR. SUSSBERG: Cash is king, Your Honor.

24 THE COURT: Yes, indeed. The question is,
25 what kind of a thrown is he sitting on?

1 MR. SUSSBERG: We did submit to Your
2 Honor, and we appreciate you entering the cash
3 collateral order that extends our use of cash
4 through the end of August. In connection with the
5 wind-down business plan, we are continuing to
6 generate cash from the sale of our assets and the
7 completion of homes under construction, and we are
8 building cash as we speak.

9 I don't have the number in front of me
10 right now, but I certainly will get an accurate
11 figure and present that to you on the 28th.

12 THE COURT: I'm less concerned with the
13 number than with the question of whether you are
14 ahead or behind business plan projections, and
15 whether there are any kind of business concerns that
16 I should be alerted to?

17 I'm gathering that the answer to that
18 question is no, and that's just fine.

19 MR. SUSSBERG: To my knowledge, Your
20 Honor, the answer to that question is no. We
21 certainly will alert you to anything that comes up
22 between now and the 28th.

23 THE COURT: Thanks. It's probably less
24 critical that I know than that the constituents in
25 the case know. I suspect they probably know a great

1 deal more about what's going on in this company than
2 in other cases.

3 MR. SUSSBERG: We definitely do keep our
4 constituents in the loop, regular calls and updates
5 regarding status of matters and business plan
6 projections and the like.

7 THE COURT: Very good. Thank you.

8 Now then, take us wherever we need to go
9 next.

10 MR. SUSSBERG: I am going to turn it over
11 to Mr. Schartz, who will run through the four
12 uncontested matter.

13 THE COURT: Very good. Mr. Schartz.

14 MR. SCHARTZ: Good morning, Your Honor.
15 Brian Schartz, for the record, Kirkland Ellis, on
16 behalf of the debtors.

17 I think in the interest of time, there are
18 four non-debtor operational motions on the agenda
19 this morning. As is our past practice with motions
20 like this, we have reached agreed orders with
21 respect to parties that filed the motions. We've
22 also previewed the relief with counsel for the
23 creditors' committee, the first lien lenders and the
24 second lien lenders. No objections were filed.

25 In the interest of time, unless the Court

1 has any other questions, or any party has any
2 questions, I would ask that the Court enter the
3 agreed order after the hearing, with one caveat to
4 that request.

5 With respect to the MMA motion for relief
6 from the automatic stay, docket entry 2707, there
7 are two things I think we should say on the record
8 here. The first is that with respect to the relief
9 sought in that motion, it also affects a prior
10 motion that was filed about three months ago --
11 actually, maybe ten months ago. That's the Salt
12 River Project, motion for relief from the stay.
13 That's docket number 2286.

14 When we agree to the relief that MMA is
15 seeking, we will essentially be mooted the relief
16 that Salt River Project is seeking in its motion.

17 That said, there is a little bit of a
18 question as to when the timing of the sale under the
19 MMA motion will occur. So we're also going to agree
20 to a stipulated order with Salt River that we'll
21 upload after this hearing, that will reference the
22 MMA order.

23 THE COURT: That's fine. Let me just
24 raise the question so the record is clear. The
25 first of the uncontested matters is the

1 Newmark/Buffington Brushy Creek motion to compel.

2 Mr. Alemany, anything I need to know,
3 other than what Mr. Schartz has told me?

4 MR. ALEMANY: Your Honor, the only thing,
5 I have the copy of the agreed order.

6 THE COURT: It's usually easier for us to
7 enter them electronically. It gives a little less
8 pain to the clerk's office.

9 Assuming the form of order you have is the
10 same as the one Mr. Schartz will send me, let's just
11 do it electronically.

12 MR. ALEMANY: Absolutely.

13 THE COURT: Thanks, Mr. Alemany.

14 The second one is E.J. Strickland's motion
15 for stay relief. I'm not sure.

16 Was there an appearance by anyone for
17 Strickland?

18 MR. SCHARTZ: I didn't hear them on the
19 phone. If you want I can walk through it real
20 quickly.

21 THE COURT: No, that's fine. I assume
22 they're not present, on the phone at least, because
23 they're happy with the result, so I'll enter that
24 order.

25 Number 3 is MMA's motion for stay relief.

1 Mr. Brundage, anything I need to know, beyond what
2 Mr. Schartz has told me?

3 MR. BRUNDAGE: No. Mr. Schartz and I have
4 agreed to an order which is acceptable to us.

5 THE COURT: Splendid. Finally, Jericho's
6 motion for stay relief. I didn't hear anybody
7 appearing for Jericho All-Weather Opportunity Fund.
8 Anyone on the line for them?

9 Hearing none, I'll grant the relief,
10 Mr. Schartz.

11 MR. SCHARTZ: Thank you, Your Honor, for
12 handling that quickly.

13 THE COURT: Thank you.

14 MR. SCHARTZ: With that, I think we'll
15 pass it on to Patty Hinrichs, who I believe is in
16 the courtroom, to handle the contested adversary
17 matters.

18 THE COURT: Very good. Thank you.

19 MS. HINRICHS: Good morning, Your Honor.

20 The first item on the adversary list is in
21 the TOUSA versus Collette matter. That is
22 plaintiff's motion to continue the trial.

23 I believe we have an agreed order on that
24 issue.

25 THE COURT: How long are you planning to

1 continue it to?

2 MS. HINRICHS: It's Mr. Collette's motion,
3 so I'll let Ms. Boyd speak.

4 THE COURT: I thought TOUSA is the
5 plaintiff, and it's the plaintiff's motion to
6 continue.

7 MS. HINRICHS: That's actually not
8 accurate, Your Honor.

9 MS. WHITE-BOYD: This is Nadine
10 White-Boyd. I'm the attorney for Kevin Collette.

11 We filed a motion to continue the pretrial
12 conference, which is scheduled for today by the
13 Court. Nothing has been filed in this matter by
14 plaintiff, and the third-party defendants have
15 received an extension until tomorrow to answer the
16 complaint -- the third-party complaint -- and we
17 requested a continuation.

18 THE COURT: How much of a continuance are
19 you asking for, Ms. White-Boyd?

20 MS. WHITE-BOYD: Until --

21 THE COURT: That wasn't meant as a trick
22 question.

23 MS. WHITE-BOYD: I know, Your Honor.

24 Sixty days, but I do not have a specific
25 date.

1 THE COURT: Ms. Romero, what do we have in
2 July?

3 Do we have a TOUSA day in the last week of
4 July, Mr. Schartz or Mr. Sussberg? I don't see one
5 on my calendar.

6 MR. SUSSBERG: I think we have the trial
7 in July.

8 THE COURT: Oh, indeed we do, but I'm
9 talking about a day or a time to spend on other
10 things.

11 MR. SUSSBERG: I believe we have a date
12 scheduled in July.

13 MS. WHITE-BOYD: I don't mean to
14 interrupt. In my motion I asked for 90 days. I was
15 thinking of another motion.

16 THE COURT: Ms. White-Boyd, come to these
17 hearings prepared. You've got about 30 people on
18 the line.

19 So you want 90 days, so you want to do it
20 some time in August. Do we have any TOUSA days in
21 the last two weeks of August, or the last week of
22 August?

23 MS. ROMERO: August 27th.

24 THE COURT: How about August 27th?

25 MS. WHITE-BOYD: That's acceptable, Your

1 Honor.

2 THE COURT: Mr. Sussberg, does that work
3 for Kirkland?

4 MR. SUSSBERG: August 27th is a fine day.

5 THE COURT: Then August 27th is hereby
6 declared a TOUSA day. We will continue the pretrial
7 to August 27th.

8 Ms. White-Boyd, give me an order that does
9 so.

10 MS. WHITE-BOYD: Yes, Your Honor. Will
11 that be at 9:30 or 10:00 a.m.?

12 THE COURT: 10:00.

13 MS. RUBENS: Your Honor, Robin Rubens on
14 behalf of the third party defendants, the Bartletts.
15 I just want to clarify Ms. Boyd's comment.

16 Our response to the third-party complaint,
17 rather than the answer, is due tomorrow, thanks to
18 Ms. Boyd giving us a little bit more time. We had
19 come in recently. We will have that response ready
20 for tomorrow, Your Honor.

21 THE COURT: Very good. I gather from your
22 comment that the response may be something other
23 than an answer, but time will tell.

24 MS. RUBENS: Yes, sir.

25 THE COURT: Ms. Hinrichs.

1 MS. HINRICHS: The second item is TOUSA
2 versus Gottlieb. That matter has been settled. In
3 fact, it settled yesterday. We are working on
4 drawing up the settlement papers. That will be
5 dismissed shortly.

6 THE COURT: Very good. Courthouse steps
7 are a wonderful place.

8 MS. HINRICHS: The third item is TOUSA
9 versus Levinson. This is the hearing on the
10 pretrial conference. I would like to just mention a
11 couple of things about this case.

12 Yesterday at -- I had forwarded a pretrial
13 order to Mr. Beagle, who is counsel for the
14 Levinsons. I did not hear back until 12:02 a.m.
15 this morning.

16 THE COURT: Working late, Mr. Beagle?

17 MR. BEAGLE: I was, Your Honor, but I did
18 speak with Ms. Hinrichs yesterday on the phone.

19 MS. HINRICHS: He filed a motion to
20 continue the trial and for relief from stay. I
21 don't know if Your Honor has a copy.

22 THE COURT: I do not.

23 MR. BEAGLE: Your Honor, if I might
24 approach?

25 THE COURT: Well, if you want to, sure.

1 Give it to Mr. Bellman if you would.

2 Where are we in this case, folks?

3 MR. BEAGLE: Your Honor, if I might
4 explain. This case is becoming a little more
5 complicated than originally anticipated.

6 I have six clients, only two of whom are
7 before the Court. I believe there are other parties
8 that are going to be part of a litigation matter
9 that may not be subject to the jurisdiction of this
10 Court. That's why I'm moving for a continuance of
11 the trial and for relief from stay.

12 Now, if Your Honor proceeds on the
13 document before you, I presented it to the clerk
14 this morning, and she suggested that since she
15 hadn't seen a motion for relief from stay in an
16 adversary proceeding, I present it to Your Honor and
17 explain the circumstances and seek guidance.

18 I do believe that this matter would be
19 most appropriately handled in the Circuit Court of
20 Palm Beach County, rather than consuming this
21 Court's time, and bringing in a lot of parties who
22 are not subject to the jurisdiction of the Court.

23 THE COURT: Why are the parties not
24 subject to the jurisdiction of the Court? My arms
25 reach pretty far.

1 MR. BEAGLE: I would include some of the
2 principals of TOUSA, and I would include an
3 appraiser, who was procured by TOUSA in order to
4 further a RICO conspiracy.

5 THE COURT: You're going to bring a RICO
6 case as a counterclaim?

7 MR. BEAGLE: That is our hope.

8 THE COURT: What is this particular
9 lawsuit about, Ms. Hinrichs?

10 MS. HINRICHS: TOUSA is the plaintiff in
11 this case. We are seeking the release of escrow
12 funds that were paid by Mr. and Mrs. Levinson for
13 deposit on a purchase of a home. They're in an
14 escrow account at SunTrust, and we filed a complaint
15 to seek the release of these funds, because the
16 Levinsons failed to close.

17 This complaint was filed on January 29th.
18 Mr. and Mrs. Levinson, the named parties in this
19 case, were served respectively on February 5th and
20 February 14th. After numerous extensions,
21 Mr. Beagle filed an answer on their behalf on
22 April 20th. No affirmative defenses were raised, no
23 counterclaim was asserted. It's simply an answer.
24 What Mr. Beagle seeks to assert now is a compulsory
25 counterclaim that he failed to raise when he filed

1 his answer.

2 With respect to these non-parties, I don't
3 understand why they're part of this case. This
4 lawsuit involves one transaction, and that's with
5 Steven Levinson and Cheryl Levinson. This motion to
6 continue mentions non-parties Fred and Louise
7 Levinson, and Craig and Laurie Terrazi (phonetic).

8 This case has nothing to do with those
9 transactions. I believe this was an improperly --
10 an attempt to file a compulsory counterclaim after
11 it's been waived.

12 We're prepared to go to trial.

13 THE COURT: How much time do you think
14 trial will take?

15 MS. HINRICHS: Four hours.

16 THE COURT: Mr. Beagle, why do you think
17 it's appropriate in an adversary proceeding brought
18 by TOUSA Homes against Steven and Cheryl Levinson
19 and the escrow agent to add other parties, and did
20 you do so in your answer?

21 MR. BEAGLE: I did not do so in my answer.

22 THE COURT: Why?

23 MR. BEAGLE: Because it's a very
24 complicated matter. I didn't want to bring RICO
25 matters without having fully investigated the facts.

1 That's why I brought to Your Honor's attention that
2 there are many parties involved here.

3 THE COURT: Right now there are three
4 defendants and one plaintiff.

5 MR. BEAGLE: I understand. It's \$58,824,
6 which was deposited by my clients for the ostensible
7 benefit of TOUSA. The only reason why it's
8 implicated here is, it would be available as a
9 setoff with regard to the other claims.

10 THE COURT: Did you plead it as a setoff?

11 MR. BEAGLE: No, I didn't.

12 THE COURT: Isn't that a compulsory
13 counterclaim?

14 MR. BEAGLE: I believe not, Your Honor.
15 Rule 7013 states that it's a compulsory counterclaim
16 only -- not when a debtor-in-possession has brought
17 the suit. I didn't hold back on it for that reason.
18 I held back because I didn't want to bring any
19 allegations that were untoward or that I wasn't
20 prepared to back up.

21 In any event, Your Honor, we'll proceed in
22 any way that Your Honor perceives appropriate, but
23 the main thing was, we don't want to allow the
24 \$58,000 to not be available to offset any claims
25 against TOUSA.

1 THE COURT: Have your clients filed
2 claims?

3 MR. BEAGLE: On that --

4 THE COURT: We have a claims procedure.
5 There's a bar date. People file claims, all that
6 stuff.

7 Have your clients filed claims?

8 MR. BEAGLE: We haven't.

9 THE COURT: Mr. Sussberg or Mr. Schartz,
10 what was the bar date in this case, or is there one?

11 MR. SUSSBERG: I believe it was May 18,
12 2008.

13 THE COURT: And no claims were filed by
14 the Levinsons or the Terrazis?

15 MS. HINRICHS: We're not aware of any such
16 claims, Your Honor.

17 THE COURT: You're not aware of any
18 either, Mr. Beagle?

19 MR. BEAGLE: I believe there weren't any,
20 Your Honor.

21 THE COURT: How is it that you can assert
22 a claim without having filed a timely proof of
23 claim?

24 MR. BEAGLE: Well, Your Honor, these
25 circumstances haven't come up until recently.

1 THE COURT: Well --

2 MR. BEAGLE: I wasn't even retained
3 until --

4 THE COURT: If your client didn't hire a
5 lawyer on a timely basis, there's not much I can do
6 about that.

7 If you want to file a motion to permit a
8 late filed claim, we can entertain that. As things
9 now stand, your clients have no claim, and have no
10 ability to assert a claim. This arises out of a
11 pre-petition transaction, not a post-petition
12 transaction. So I don't know what jurisdiction
13 there would be under 28 U.S.C. Section 959 that
14 would permit litigation to go forward.

15 Tell me, Mr. Beagle, since I have never
16 seen one, under what authority do you file a motion
17 for stay relief in an adversary proceeding?

18 MR. BEAGLE: Your Honor, I don't know.
19 That's why the clerk told me that she believed it
20 was probably more appropriately filed in the main
21 proceeding.

22 THE COURT: Did you pay a filing fee for
23 the stay relief motion?

24 MR. BEAGLE: I did offer to, but the clerk
25 suggested that I bring it up before Your Honor.

1 THE COURT: Anything else you want to tell
2 me about your motion to continue or for stay relief
3 that was filed this morning?

4 MR. BEAGLE: The only thing is, we want to
5 make sure that the \$58,000 is not simply consumed,
6 because in the normal course of doing business, it
7 was a forfeited deposit.

8 These circumstances that give rise to a
9 RICO action are new facts that we've only recently
10 realized by interviewing, not only the Levinsons,
11 but Mr. Levinson's father and brother and their
12 spouses, to realize that there was a pattern of
13 falsifying appraisals in the sale of these houses.
14 That's only the most egregious part of the plan.

15 What it comes down to is selling the
16 houses for beyond their actual value, and doing it
17 in such a way that the buyers were defrauded.

18 THE COURT: In retrospect, I suspect that
19 would apply to every sale of a house in Florida in
20 2005, '6, '7, and maybe the beginning of 2008. In
21 retrospect, we all look like drunken fools.

22 MR. BEAGLE: May I point out the
23 difference here, Your Honor? First of all, the
24 appraiser was procured by TOUSA, and the appraisal
25 was fraudulent.

1 THE COURT: If you have a fraud claim, if
2 you have the claim, it seems to me that you have an
3 obligation on behalf of your client to file a motion
4 to permit you to file a late-filed claim.

5 We're pretty good in this court in
6 adjudicating fraud claims. It's not an unknown word
7 here. I haven't heard much of it in connection with
8 this case. We're probably a lot faster to go to
9 trial than the Circuit Court for Palm Beach County,
10 which is underfunded and overwhelmed with
11 foreclosure cases.

12 Anything else you want to tell me about
13 the motion you filed this morning?

14 MR. BEAGLE: Your Honor, only that any
15 guidance would be gratefully accepted, and that the
16 main thing that we would like is a continuance, so
17 that we can make sure we bring the case properly
18 before the Court, if that's what Your Honor thinks
19 is advisable?

20 MS. HINRICHS: Your Honor, if I may?

21 THE COURT: Yes, ma'am.

22 MS. HINRICHS: I object to the
23 continuance. This has been pending since January.
24 The Levinsons were served in February, and I tried
25 repeatedly to contact Mr. Beagle to move this case

1 forward. There is no reason for a continuance.

2 With respect to the third parties that are
3 mentioned in this motion, those are separate and
4 apart from the transaction at issue in this
5 adversary proceeding, and the trial on this
6 proceeding should move forward.

7 MR. BEAGLE: Your Honor, I would submit
8 that TOUSA has no prejudice involved in the granting
9 of a continuance. Any matters that they worked on
10 in preparing for the case up to this moment are
11 still valid, and are going to be useful in the
12 bringing of the litigation.

13 THE COURT: Well, I haven't heard anything
14 from you, Mr. Beagle, that says that you can't be
15 prepared for trial in 30 days.

16 MR. BEAGLE: Only, Your Honor, that I
17 would like to bring in the matter of the setoff and
18 the counterclaim.

19 THE COURT: Well, you didn't plead a
20 setoff and you didn't file a counterclaim. How am I
21 supposed to set them for trial? I don't understand
22 the timing of this either.

23 When do you think you should have filed an
24 affirmative defense of setoff?

25 MR. BEAGLE: If I had known about it --

1 THE COURT: When did you find out about
2 it, Mr. Beagle?

3 MR. BEAGLE: Just within the last few
4 weeks.

5 THE COURT: What facts are new since 2008,
6 just your clients hadn't bothered to tell a lawyer?

7 MR. BEAGLE: No, Your Honor. I don't have
8 an explanation as to why they wouldn't have hired a
9 lawyer in 2008 with regard to this bankruptcy
10 proceeding. Frankly, I haven't discussed it with my
11 clients.

12 The fact is, we have seen that the same
13 pattern has taken place with all three sets of
14 claimants here.

15 THE COURT: So you've got three sets of
16 claimants who have claims that they haven't filed,
17 and if you want to file a motion to permit the
18 filing of late-filed claims, okay. Bring it on.
19 Probably if you file it quickly we may hear it on
20 May 28th, which is in two weeks.

21 I'm going to set this matter for trial.
22 Frankly, if the money leaves the escrow account, the
23 funds remain in custodial legis. This estate is not
24 broke. If it's appropriate, if the litigation
25 proves that your clients have valid claims, they'll

1 be dealt with.

2 I don't want cases like this to us bog
3 down, because frankly, I've got a docket that's
4 getting exciting, as you can appreciate, in this
5 real estate market.

6 Let's set this case for trial. Do you
7 think it will take more than half a day, Mr. Beagle,
8 on the pleadings as they stand?

9 MR. BEAGLE: On the pleadings as they
10 stand, absolutely not.

11 THE COURT: How about June 29th, or the
12 morning of the 22nd? How are you folks on the
13 morning of June 22nd?

14 MS. HINRICHS: I'm available, Your Honor.

15 MR. BEAGLE: Just a moment, Your Honor.

16 THE COURT: Sure.

17 MR. SUSSBERG: Your Honor, I believe
18 there's a hearing on June 23rd.

19 THE COURT: Yes, there is, at 10:00. I've
20 got another matter set in the afternoon that day. I
21 don't know how much time the hearings on the 23rd
22 are going to take. This is a matter that I wouldn't
23 expect the main parties in interest to come to in
24 this adversary.

25 MR. BEAGLE: The 29th is fine for us.

1 THE COURT: How about the 22nd?

2 MR. BEAGLE: Also.

3 THE COURT: Let's do it at 9:30 on
4 June 22nd.

5 Ms. Hinrichs, would you give me a standard
6 form of trial order that, among other things,
7 requires the exchange of witnesses and exhibits.
8 Make sure that I have the exhibits no later than the
9 18th.

10 MS. HINRICHS: Yes, Your Honor.

11 THE COURT: Your clients, I don't think,
12 are fundamentally prejudiced by moving this piece of
13 the case forward.

14 MR. BEAGLE: Thank you, Your Honor.

15 THE COURT: You're welcome.

16 Ms. Hinrichs.

17 MS. HINRICHS: The next case is Gavra.

18 THE COURT: Would you grab Mr. Beagle
19 again?

20 I'm sorry, Mr. Beagle. Having sort of
21 disposed of your motion, I'm going to deny the
22 motion to continue trial and deny the motion for
23 stay relief. If you want to file a motion for stay
24 relief, it would have to be filed in the main case,
25 but I wouldn't suggest that you're going to get very

1 far with that, simply because I think we can handle
2 those issues here faster than you're going to get
3 them handled in the Circuit Court.

4 MR. BEAGLE: Thank you very much.

5 THE COURT: Ms. Hinrichs, would you give
6 me an order denying the motion?

7 MS. HINRICHS: I will, Your Honor.

8 MR. BEAGLE: May I be excused, Your Honor?

9 THE COURT: Yes.

10 Gavra.

11 MS. HINRICHS: This case, we had moved for
12 entry of a clerk's default, and after we filed that
13 and after the default was entered, we noticed there
14 was an error, and that one of the defendants had not
15 been served. So we are asking to vacate the default
16 against one defendant.

17 THE COURT: But only in respect to one of
18 the defendants?

19 MS. HINRICHS: Correct, Your Honor.

20 We also ask that an alias summons be
21 issued.

22 THE COURT: If you'll give me an order
23 vacating the default only as to Marcia Borba, and
24 directing the clerk to issue an alias summons.

25 I presume you wish me to enter a final

1 judgment as to the other defendants?

2 MS. HINRICHS: Yes.

3 THE COURT: Has that motion been filed?

4 MS. HINRICHS: It was, and then we noticed
5 an error, so we didn't set that one for hearing.

6 THE COURT: Why don't you file a separate
7 motion for final judgment as to the other
8 defendants, and we'll dispose of that, piecemeal if
9 we have to.

10 MS. HINRICHS: I will do that.

11 The last item on the agenda is the case of
12 Scott and Katrina Collette versus TOUSA Homes. I,
13 on behalf of TOUSA, filed a motion to dismiss.

14 THE COURT: There is a response to the
15 motion to dismiss, and on this, Ms. White-Boyd, I'll
16 be looking to hear from you first on this point, and
17 that is, that TOUSA Homes, Inc. as defendant has
18 moved to dismiss Counts II, III, IV and V.

19 Your response, docket entry 10, in
20 adversary 09-1246, argues that the motion to dismiss
21 should be denied as to Counts II and IV, but does
22 not address Counts III and V.

23 Are you conceding, Ms. White-Boyd, that
24 Counts III and V should be dismissed?

25 MS. WHITE-BOYD: Yes, Your Honor. I spoke

1 with counsel, Ms. Hinrichs, and I indicated that we
2 would be agreeable to dismissing those two counts.

3 THE COURT: Okay. As part of whatever
4 order I will direct one of the parties to draft, I
5 will wish you to include that Counts III and V are
6 dismissed by agreement.

7 Now then, with respect to Count II, Ms.
8 Hinrichs, why should I dismiss Count II?

9 MS. HINRICHS: Your Honor, the allegations
10 regarding the FDUTPA count is essentially that the
11 contract is somehow unfair or unlawful, because it
12 contained a financing contingency that permitted the
13 existence of certain contingencies, and that it
14 permitted to extend the deadline for obtaining the
15 financing approval.

16 THE COURT: This was financing that needed
17 to be obtained by the Collettes, in connection with
18 their purchase of a TOUSA home?

19 MS. HINRICHS: Correct, Your Honor.

20 Now, as I've explained in my motion, there
21 is no Florida law that prohibits the use of a
22 financing contingency in a contract. In fact, as I
23 go through in my motion, there's the all cash at
24 closing transaction, which puts all the risk on the
25 buyer, and then there's the complete financing

1 contingency, and this is in the middle. "We'll bear
2 the risk of financing --"

3 THE COURT: "We" who?

4 MS. HINRICHS: "TOUSA will bear the risk
5 that you will be unable to get financing, if you
6 follow these certain steps." It's a limited
7 financing contingency that requires the buyers to
8 take certain steps.

9 There are no allegations in the complaint
10 that the buyers did so. If you look at Paragraph 1
11 of the contract, which contains the financing
12 contingency, it makes clear that the default is that
13 it's an all cash at closing transaction, and that
14 they can spread the risk if the buyers take certain
15 steps, which is applying for a mortgage with the
16 preferred lender within a certain time period, and
17 if they're unable to obtain financing within 30 days
18 of application, and they provide written notice to
19 TOUSA within that 30-day window that they were
20 unable to get financing, they will get their deposit
21 back.

22 They have not alleged those facts here.
23 They sort of bypassed that.

24 What they do allege is that they were
25 unable to get financing in September 2008. If you

1 look at the contract, it was executed March 2007.
2 Not only is the existence of the finance contingency
3 not illegal or unfair under Florida law, but they
4 fail to allege they even complied with the terms of
5 the contract in order for the financing contingency
6 to arise. That's the basis for the dismissal.

7 Essentially, there are no allegations that
8 they took the steps required to comply for the
9 financing contingency to arise. That's really the
10 basis for both the dismissal of the FDUTPA claim,
11 and Count IV for breach of contract. That also
12 raises the same issue that TOUSA breached the
13 contract, because it failed to comply with the
14 financing contingency.

15 THE COURT: The allegation in Paragraph 35
16 of the complaint is, "The granting of a finance
17 contingency by TOUSA in the contract, and the
18 subsequent rendering impossible the satisfying of
19 that that financing contingency renders the contract
20 illusory at best, and possibly fraudulent."

21 What is the allegation, as you see it, in
22 the complaint that the financing contingency was
23 rendered impossible? Is there any allegation?

24 MS. HINRICHS: No, Your Honor.

25 THE COURT: Anything else you want to tell

1 me about Count II?

2 I guess you're making effectively the same
3 argument with respect to Count IV?

4 MS. HINRICHS: Yes.

5 THE COURT: Ms. White-Boyd, show me the
6 allegation in the complaint that the finance
7 contingency was rendered impossible.

8 MS. WHITE-BOYD: Your Honor, Paragraph 24.

9 THE COURT: Twenty-four is addressed to a
10 declaratory judgment count, is it not?

11 MS. WHITE-BOYD: Correct, Your Honor.

12 THE COURT: We aren't arguing about a
13 declaratory judgment action this morning, are we?

14 MS. WHITE-BOYD: No, we're not, Your
15 Honor.

16 THE COURT: Okay. Then --

17 MS. WHITE-BOYD: I know Paragraph 27 also
18 addresses the declaratory judgment paragraph.

19 Paragraph 27 of the complaint states, "The contract
20 is void for lack of mutuality of performance. The
21 financing provision of the contract is
22 irreconcilable with the provision that the Collettes
23 shall not be excused from performance under the
24 contract for their failure or inability to satisfy
25 any contingency required by TOUSA's affiliated

1 company."

2 THE COURT: What does that mean?

3 Translate that into English for me.

4 MS. WHITE-BOYD: What that means, Your
5 Honor, is that the buyers were asked to enter into a
6 financing contingency agreement, which we are not
7 maintaining is unlawful, as counsel has indicated.
8 We're just saying this is unconscionable --

9 THE COURT: Ms. White-Boyd, let me ask you
10 a couple of questions that will focus this for me,
11 at least. If you want to expand upon your answer
12 after you tell me your answer to my questions, I'll
13 be perfectly happy with that.

14 As I understand it, the contract says,
15 "You, the buyer, have 30 days to apply for
16 financing, and to tell us that you couldn't get it.
17 If you apply, and if you can't get financing, then
18 you can get your deposit back."

19 Is that what it says, in translating it
20 from contract language to simple terms?

21 MS. WHITE-BOYD: It says that, Your Honor,
22 and it also says that -- and I'm just
23 paraphrasing -- in the event that the lender who
24 approves a mortgage, in the event the lender has now
25 set certain guidelines that they cannot satisfy,

1 then TOUSA has the right to then determine that that
2 is not an approval of a mortgage.

3 THE COURT: I'm sorry. I'm a little vague
4 on what you meant by that.

5 MS. WHITE-BOYD: That's the problem, Your
6 Honor. The financing clause is not clear.

7 The fact that they have prepared this
8 financing agreement, and it's all cash, or yes,
9 there's financing, but our clients, once they
10 applied through PHMC, which is an organization --
11 their approved lender, once they applied through
12 PHMC, then the financing contingency came into
13 place.

14 But then if PHMC made certain stipulations
15 as to when they should not -- some additional
16 requirements, TOUSA now is in the position of
17 saying, "Well, sorry, it's now back to being an
18 all-cash transaction."

19 THE COURT: Well, you agree that there's
20 nothing unconscionable under Florida law to require
21 an all-cash transaction, yes?

22 MS. WHITE-BOYD: Correct, Your Honor.

23 THE COURT: And you agree that it's
24 perfectly fine to have a full financing contingency
25 that says that if the buyer can't or doesn't get

1 financing, it can walk, right?

2 MS. WHITE-BOYD: Correct.

3 THE COURT: Tell me why it is
4 unconscionable for a buyer to have 30 days to obtain
5 financing, and if they don't obtain financing, and
6 tell the seller within 30 days that they have been
7 unable to obtain financing, why is it unconscionable
8 for the deal to then turn into an all-cash deal?

9 If an all-cash deal isn't unconscionable
10 up front, why is giving the buyer 30 days to obtain
11 financing, or to tell the seller that, "We couldn't,
12 and therefore we can walk," why is it unconscionable
13 for the deal to go hard after 30 days?

14 MS. WHITE-BOYD: Because, Your Honor, that
15 was not what the contract called for.

16 THE COURT: What provision of the contract
17 says otherwise?

18 MS. WHITE-BOYD: The financing
19 contingency, Your Honor.

20 THE COURT: And doesn't it say, "You have
21 30 days to seek financing, and if you don't get it,
22 to tell us that you couldn't get it"? Isn't that
23 what it says?

24 MS. WHITE-BOYD: Well, it does not say
25 that, Your Honor.

1 THE COURT: Read me the words then.

2 MS. WHITE-BOYD: "As the result of
3 purchasers' failure or inability to satisfy any
4 contingency in the commitment. If purchaser is
5 unable to obtain a commitment within 30 days from
6 the submission of an application to PHMC, purchaser
7 shall notify seller thereof in writing within said
8 period. Seller has the right, but not the
9 obligation to extend said period."

10 Now, I'm speaking. This is not part of
11 the contract.

12 The seller --

13 THE COURT: Did the seller extend the
14 30-day period?

15 MS. WHITE-BOYD: Yes, Your Honor. The
16 seller --

17 THE COURT: Back up a minute.

18 Did your client give notice to TOUSA
19 within 30 days that it could not obtain financing?

20 MS. WHITE-BOYD: They gave notice to PHMC,
21 the affiliated party of TOUSA.

22 THE COURT: Did they give notice to the
23 seller?

24 "Seller" is a defined term in this
25 agreement, as TOUSA Homes, Inc. d/b/a Engle Homes

1 South Florida.

2 Did your client give notice in 30 days to
3 TOUSA Homes, Inc. d/b/a Engle Homes South Florida,
4 that it was unable to obtain financing?

5 MS. WHITE-BOYD: Your Honor, that's the
6 information we would like to be able to present to
7 the Court --

8 THE COURT: I'm sorry, but show me the
9 allegation in the complaint that says that you gave
10 notice, because I couldn't find it.

11 MS. WHITE-BOYD: There is not an
12 allegation, Your Honor, as to that, because it was
13 given to PHMC, the affiliated party of TOUSA.

14 THE COURT: Have you alleged that PHMC is
15 an affiliate of TOUSA? Where is that allegation?

16 MS. WHITE-BOYD: That allegation is in --

17 THE COURT: I'm sorry. I see it in
18 Paragraph 13.

19 How is it possible to give notice to one
20 corporation, that the contract says you're required
21 to give to another corporation, how is it that the
22 notice to the one constitutes notice to the other?

23 MS. WHITE-BOYD: Because, Your Honor,
24 PHMC, together with TOUSA, had communications which,
25 based on discovery, we'll be able to provide to the

1 Court. That was the notice that was given to the
2 seller.

3 THE COURT: Show me where you allege
4 notice was given.

5 MS. WHITE-BOYD: It does not indicate in
6 here that notice was given to the seller directly.
7 It was through PHMC.

8 THE COURT: What else do you want to tell
9 me about Count II or Count IV?

10 MS. WHITE-BOYD: Your Honor, as indicated
11 in our response to TOUSA's motion, the Court should
12 consider that these facts that we have alleged in
13 our complaint can be proven at trial, can be proven
14 from further discovery. A motion to dismiss does
15 not allow for us to be able to prove. A motion to
16 dismiss at this point will not allow us to proceed
17 on facts that we will be able to show to this Court.

18 THE COURT: Well, it's seems to me that
19 your fundamental allegations are that because TOUSA
20 had the unilateral ability to extend the 30-day
21 period, and did not do so, that that is inconsistent
22 with the requirement that your client give notice to
23 TOUSA within 30 days that it couldn't and didn't
24 obtain financing.

25 I do not understand how it can be that

1 discretion given to the seller of property to extend
2 a deadline allows the other party to the contract to
3 extend the deadline. My experience, in life and in
4 financing transactions, is that it is frequently the
5 case that the seller is authorized to waive or
6 extend various legal requirements of the contract,
7 but that doesn't permit the other party to get out
8 from its obligation.

9 In this case, it had an obligation, if it
10 wanted to get out of the contract -- your clients
11 wanted to get out of the contract -- they had to
12 give notice. You've nowhere alleged that you gave
13 that notice.

14 MS. WHITE-BOYD: Your Honor, they
15 continued to deal with the Collettes. They
16 continued to have conversations concerning the
17 building of the property, concerning the financing.

18 At no time -- and I understand the clients
19 indicated they wanted to be out of the contract, but
20 both parties continued to deal with each other, and
21 based on that, Your Honor, the Collettes continued
22 to proceed with their loan application.

23 THE COURT: Isn't all of that within the
24 ambit of your declaratory judgment count? Is there
25 anything you just told me that would not constitute

1 a defense or, I guess a recovery basis, under the
2 dec action?

3 The reason I'm asking that is, FDUTPA
4 claims create issues that are quite different from a
5 declaratory judgment. I can well understand why a
6 defendant would like to get rid of some of the legal
7 pieces. I just don't see that your allegations
8 state a claim under FDUTPA.

9 I don't understand how the financing
10 contingency is illusory. Tell me why it is.

11 MS. WHITE-BOYD: I'll continue with the
12 language that's in the contract.

13 THE COURT: Okay.

14 MS. WHITE-BOYD: This is continuing the
15 notification.

16 "If seller is not so notified --"

17 THE COURT: How far down?

18 MS. WHITE-BOYD: Approximately --

19 THE COURT: I see where it is.

20 MS. WHITE-BOYD: -- "then seller shall
21 conclusively presume that purchaser has waived the
22 provisions of this paragraph and purchasers'
23 inability to obtain a commitment shall not entitle
24 them to a refund of the deposit."

25 It's illusory, because they are using,

1 without determining, "Okay, well, they have not
2 given notice," that they get the right to make a
3 certain presumption.

4 THE COURT: What's wrong with that?

5 You haven't alleged that notice was given.
6 In fact, you sort of said, I think, that notice
7 wasn't given. So why is requiring that notice be
8 given -- we could have an argument about first level
9 law school contract law, "Did you put the notice in
10 the mail, so was it delivered," but we aren't there,
11 but it seems to me you affirmatively told me that
12 notice was not given.

13 What is it that required notice to be
14 given, that creates an illusory contract?

15 MS. WHITE-BOYD: Your Honor, as I
16 indicated, TOUSA received notice. It was indirectly
17 through PHMC.

18 THE COURT: But there's a disclosure in
19 this paragraph that PHMC is a related or affiliated
20 entity, and the contract also provides, "The
21 purchaser acknowledges that he/she/it may apply to
22 any other lending institution in Florida."

23 So your client chose to apply through
24 PHMC, presumably because it was easy, but your
25 client clearly wasn't required to do so. All it was

1 required to do was to tell the seller that within 30
2 days, "We haven't been able to obtain financing."

3 MS. WHITE-BOYD: Correct, but further down
4 it actually states the grounds for default under
5 that financing agreement. The 30-day notice is not
6 one of the bases for default. That's why it's
7 illusory.

8 Is this the basis for default, the four
9 grounds that they reflect, or is it the notice that
10 is the basis for default?

11 We maintain, Your Honor, that the
12 Collettes complied with the four, and they gave
13 notice through the affiliated party, and they
14 complied with numbers one through four.

15 THE COURT: Numbers one through four are
16 where?

17 MS. WHITE-BOYD: Paragraph 1, the fifth
18 line from the bottom. You have, "If purchaser
19 elects to seek mortgage commitment from PHMC, it
20 shall be a default if purchaser--"

21 THE COURT: "If purchaser elects to seek a
22 mortgage commitment from PHMC, it shall be a default
23 under this agreement if purchaser fails to, 1, make
24 the timely application for or otherwise make a
25 reasonable effort to obtain such commitment, 2,

1 maintain such commission once obtained, 3, remove
2 any contingencies from it, 4, furnish any
3 information requested by seller or PHMC, 5, or
4 execute all customary mortgage documents."

5 That just says that if you're going to
6 apply through PHMC, you've got to do some stuff, and
7 the stuff is, you've got to timely apply, you've got
8 to keep out of default under the terms of the
9 mortgage commitment, you've got to keep the
10 application alive and keep the commitment alive, and
11 remove any contingencies under the commitment,
12 provide information, and sign the normal closing
13 documents.

14 There's nothing in that that's
15 inconsistent with the requirement that you tell the
16 seller within 30 days that you haven't got
17 financing, and therefore, you want out of the
18 contract.

19 Now, there's nothing in your complaint
20 that says that notice to PHMC constituted notice to
21 seller. If you choose to go that route, you're
22 going to have to do a pretty fancy dance of
23 establishing the absence of, or to pierce the
24 corporate veil. Having done some of that litigation
25 in my life as a lawyer, I wouldn't highly commend it

1 to you, because it's a pretty expensive proposition,
2 and will require you to muck around in corporate
3 documents and such that are probably going to be
4 way, way, way more expensive than this litigation
5 would support.

6 But the fundamental issue on a motion to
7 dismiss is, you haven't alleged, A, what the notice
8 was you gave to PHMC, or B, that notice to PHMC
9 constituted notice to seller under the language of
10 Paragraph 1 of the contract.

11 I believe those two things to be true. If
12 you have made those allegations, if you point them
13 out to me in the complaint.

14 MS. WHITE-BOYD: I can't point those out,
15 Your Honor.

16 THE COURT: Anything else you want to tell
17 me about either Count II or Count IV?

18 MS. WHITE-BOYD: With respect to Count IV,
19 we also maintain that we complied with the
20 requirements of the agreement, which sets forth that
21 there was a contract, and that we complied with the
22 terms of the contract.

23 Again, Your Honor, we have the same issue
24 with the notice. I just wanted to point that out to
25 the Court. We still maintain that there was, in

1 fact, notice given.

2 THE COURT: Where is that in Count IV?

3 MS. WHITE-BOYD: That's not in Count IV,
4 Your Honor.

5 THE COURT: Where is it that I should look
6 at it otherwise?

7 Is it the allegation of default which you
8 contend underlies Count IV that TOUSA didn't give
9 the deposit back? Is that the default you're
10 alleging?

11 I'm reading Paragraph 47.

12 MS. WHITE-BOYD: Well, the failure to
13 close.

14 THE COURT: Your client didn't have the
15 money to close.

16 MS. WHITE-BOYD: Once we did not close,
17 then they needed to return the deposit, because it
18 was a financing contingency, which our clients did
19 not obtain the financing. So it was not an all-cash
20 transaction.

21 THE COURT: Is that the default that you
22 allege in the words, "TOUSA owed a duty to S & K
23 Collette to perform, and TOUSA failed to perform its
24 duties and obligations in accordance with the terms
25 and conditions of the contract"?

1 Is the single contention of
2 non-performance by TOUSA its failure to return the
3 deposit?

4 MS. WHITE-BOYD: Yes, Your Honor.

5 THE COURT: Now, Paragraph 48, "S & K
6 Collette relied on TOUSA's statement and actions to
7 their detriment and performed all their duties under
8 the contract."

9 Let me split that into two parts. Tell me
10 what statement and actions your clients relied upon.

11 MS. WHITE-BOYD: Statements essentially
12 waiving the need to give them a notice within the 30
13 days, that they were not able to obtain financing.
14 These are things we'd be able to show in a trial.

15 THE COURT: And your allegation is that
16 TOUSA waived the condition of 30 days' notice?

17 MS. WHITE-BOYD: Correct, Your Honor.

18 THE COURT: Where is that alleged?

19 MS. WHITE-BOYD: That is not alleged here,
20 Your Honor.

21 THE COURT: Where is it alleged anywhere
22 in your complaint?

23 MS. WHITE-BOYD: It's implied in Paragraph
24 48, Your Honor.

25 THE COURT: It's implied in Paragraph 48.

1 Frankly, Ms. White-Boyd, I can't find it in those
2 words.

3 My second question about Paragraph 48 is,
4 what appears to be an allegation that S & K Collette
5 performed all their duties under the contract.

6 Did they come to a closing with money to
7 close? What duties is it that they performed?

8 MS. WHITE-BOYD: They performed their
9 duties to apply for financing, and to continue to
10 apply for financing in order to maintain the
11 financing contingency through PHMC.

12 When they were not able to get the
13 financing through PHMC, and even though TOUSA
14 continued to maintain discussions, and even
15 entertained with the Collettes discussions
16 concerning modifying the terms of the contract even
17 as late as August of 2008, they continued to apply
18 for financing, based on the contract.

19 THE COURT: Did they ever get it?

20 MS. WHITE-BOYD: And a proposed
21 modification. The modification was -- I do not
22 believe any parties signed the modification to the
23 contract.

24 THE COURT: So the parties talked after
25 the 30 days, but they never entered into an

1 agreement to modify the contract?

2 MS. WHITE-BOYD: No, Your Honor.

3 THE COURT: Okay.

4 MS. WHITE-BOYD: But notwithstanding the
5 modification, they continued to negotiate, and the
6 Collettes were continuing to perform under the terms
7 of the existing contract.

8 At the time they were not able to get
9 financing, at that point, that's when the Collettes
10 contacted TOUSA to request their deposit, based on
11 the fact that they were complying and performing
12 under the terms. They were not able to go to
13 closing, because they did not receive funding from
14 PHMC.

15 THE COURT: Or from anybody else?

16 MS. WHITE-BOYD: Or from anyone else.

17 THE COURT: Anything else you want to tell
18 me, Ms. White-Boyd?

19 MS. WHITE-BOYD: No, Your Honor.

20 THE COURT: Anything else, Ms. Hinrichs?

21 MS. HINRICHS: No, Your Honor.

22 THE COURT: I will grant the motion to
23 dismiss Counts II and IV, in addition to Count III
24 and V. I will grant leave to amend in respect of
25 Counts II and IV.

1 I frankly think that you're trying to
2 climb a glass mountain here, Ms. White-Boyd, but I'm
3 not going to reach that conclusion until I give you
4 an opportunity to re-plead. There have been some
5 things that you told me this morning that aren't in
6 the complaint. So let's have another look at Counts
7 II and IV, if you want to re-plead them.

8 Counts III and V are dismissed with
9 prejudice. Counts II and IV are dismissed with
10 leave to amend.

11 How much time do you wish, Ms. White-Boyd,
12 to have a shot at amending?

13 MS. WHITE-BOYD: Your Honor, the pretrial
14 conference is set for June 17th. Could we have
15 until June 17th to amend?

16 THE COURT: You need a month to amend?
17 This isn't state court.

18 MS. WHITE-BOYD: Can I have 20 days to
19 amend?

20 THE COURT: You may have 20 days to amend.

21 Ms. Hinrichs, include in the order
22 granting your motion that the pretrial conference
23 will be moved, and just leave a blank date. Ms.
24 Romero will fill that blank in.

25 Why don't you show Ms. White-Boyd the

1 order before you submit it, just so if there are any
2 disputes, you can work them out? If you can't work
3 them out, you can submit competing forms of order
4 through Mr. Bellman.

5 MS. HINRICHS: Thank you, Your Honor.

6 THE COURT: Anything else we're doing this
7 morning?

8 MS. WHITE-BOYD: Thank you for allowing me
9 to appear by phone.

10 THE COURT: I'm pleased to do so, although
11 I must tell you that when you're going to have a
12 substantive argument, I don't recommend that you do
13 it by phone. Obviously, I don't permit evidentiary
14 matters by phone, but if you're going to have a
15 substantive argument, you probably ought to be here.

16 MS. WHITE-BOYD: Thank you, Your Honor.

17 THE COURT: Now then, anything else we
18 have on the calendar this morning? There may be
19 some people here --

20 MR. SUSSBERG: Your Honor, I'm looking at
21 Mr. Schartz to confirm, but I believe that is
22 everything that we have on the calendar.

23 THE COURT: Ms. Alomia is here, and I'm
24 not quite sure why.

25 MS. ALOMIA: It's like the same case, like

1 the last case she told you. We paid some deposits
2 for some home, and we didn't have funds available to
3 close. We were always with them, and they didn't
4 notify that we couldn't close.

5 THE COURT: Is there a lawsuit pending in
6 which you're a party?

7 MS. ALOMIA: Uh-huh.

8 THE COURT: Do you have the case number?

9 MS. ALOMIA: No.

10 THE COURT: What papers do you have with
11 you that might be helpful? Let me just take a look.

12 You filed a proof of claim for \$47,749 as
13 a contract deposit. Was this matter set for hearing
14 today, or are you just here?

15 MS. ALOMIA: We're just here.

16 THE COURT: If TOUSA has an objection to
17 your claim, they will file an objection, and that
18 will create a contested matter before me. As things
19 now stand, your claim is presumed to be correct.
20 They have an extended period of time within which to
21 file objections.

22 If they object, then that matter will come
23 on for hearing, and you'll get a specific notice
24 that you should come on that day. That will come to
25 you in the mail. Until you get such a notice, these

1 hearings will probably do nothing for you except
2 frustrate you, and they'll probably waste your time,
3 as well.

4 I have hearings in this case every couple
5 of weeks. Unless your specific matter is involved,
6 while you're certainly welcome here, I think all
7 you'll be doing is putting quarters in the parking
8 meters across the street, and not advancing the ball
9 for yourself. You're always welcome, but if there's
10 an objection, it will come in the mail. You'll have
11 notice of a hearing.

12 Everybody who files a claim, and everybody
13 who TOUSA knows is a creditor, will get notices of
14 disclosure statements and other things. This is
15 just a notice that goes to everybody. At this stage
16 there's no reason for you to be too concerned about
17 that sort of thing.

18 What happens in a case like this, if a
19 disclosure statement is approved, then the debtor
20 will send out a ballot, and you get to vote on
21 whether you like the plan or not. The fight over
22 whether the plan will be confirmed or not is
23 probably not something that you should waste your
24 time coming to. You can come if you want to, of
25 course, but if there's a fight at that level, it's

1 going to be between lawyers in much more expensive
2 suits than I own, fighting over big deal legal
3 fights.

4 The thing you ought to be concerned about
5 is what happens to your claim, and you will get
6 specific notice of that that makes clear what's
7 going on.

8 Thank you. Good luck. Sorry to have
9 wasted your time today.

10 Anything else we need to do in the TOUSA
11 case, Mr. Schartz, Mr. Sussberg?

12 MR. SUSSBERG: That is it, Your Honor.

13 THE COURT: Anyone else for the good of
14 the order?

15 Then I will perhaps see or hear from you
16 on the 22nd, but certainly on the 28th. If I don't
17 see you before Memorial Day, have a good three-day
18 weekend. Re-introduce yourself to your spouses or
19 significant others. June should be fun.

20 Thank's very much. We're adjourned.

21 (Thereupon, the hearing was concluded.)

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CERTIFICATION

STATE OF FLORIDA:
COUNTY OF DADE:

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

WITNESS my hand this 18th day of May,
2009.

HELAYNE F. WILLS
Court Reporter and Notary Public
In and For the State of Florida at Large

