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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

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

TOUSA, INC., et al.,

Debtors.

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

Plaintiff,

vs.

CITICORP NORTH AMERICA, INC.,
et al.,

Defendants.

ALL MOTIONS ON THE CALENDAR

(2781), (2782), (2506), (2760), (2766), (2780),
(315), (335)

May 28, 2009

The above-entitled cause came on for hearing before the HONORABLE JOHN K. OLSON, one of the Judges of the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, at 299 East Broward Blvd., Fort Lauderdale, Broward County, Florida, on Thursday, May 28, 2009, commencing at or about 9:30 a.m., and the following proceedings were had:

Reported By: Margaret Franzen

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APPEARANCES:

BERGER SINGERMAN, by
PAUL S. SINGERMAN, ESQUIRE
and

KIRKLAND & ELLIS, by
M. NATASHA LABOVITZ, ATTORNEY-AT-LAW
MATTHEW PAPEZ, ESQUIRE
IGNACIO BULL ALDANA, ESQUIRE
on behalf of the Debtors

AKIN GUMP STRAUSS HAUER & FELD, by
DANIEL H GOLDEN, ESQUIRE
PHILIP C. DUBLIN, ESQUIRE
and

STEARNS WEAVER, by
PATRICIA A. REDMOND, ATTORNEY-AT-LAW
DAVID C. POLLACK, ESQUIRE
on behalf of the Committee of Unsecured Creditors

ROBBINS RUSSELL, by
LAWRENCE ROBBINS, ESQUIRE
MICHAEL L. WALDMAN, ESQUIRE
ALAN STRASSER, ESQUIRE (Via Telephone)
Litigation Counsel
on behalf of the Committee of Unsecured Creditors

CHADBOURNE & PARKE, by
THOMAS HALL, ESQUIRE
SEVEN RIVERA, ESQUIRE
and

STICHTER RIEDEL BLAIN & PROSSER, by
RICHARD PROSSER, ESQUIRE
and
SMITH HULSEY & BUSEY, by
STEPHEN D. BUSEY, ESQUIRE
on behalf of Citicorp

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BILZIN SUMBERG BAENA PRICE & AXELROD, by
JEFFREY SNYDER, ESQUIRE
and
BRACEWELL & GIULIANI, by
GREGORY W. NYE, ESQUIRE
on behalf of the Second Lien Holders
and Wells Fargo, as successor administrative agent

AKERMAN SENTERFITT, by
MICHAEL I. GOLDBERG, ESQUIRE
and
MILLBANK TWEED HADLEY & McCLOY, by
ATARA MILLER, ATTORNEY-AT-LAW
on behalf of the Senior Transeastern Lenders

SHUTTS & BOWEN, by
PETER SHAPIRO, ESQUIRE
on behalf of Moody Fedrick Holdings, LLC and
Scott Felder Homes, LLC

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

HUNTON & WILLIAMS, by
MATTHEW A. MANNERING, ESQUIRE (Via Telephone)
RICHARD P. NORTON, ESQUIRE (Via Telephone)
on behalf of CIT

HOPPING GREEN & SAMS, by
JERE L. EARLYWINE, ESQUIRE (Via Telephone)
on behalf of Highland Meadows, et al.

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OFFICE OF THE UNITED STATES TRUSTEE, by
STEVEN SCHNEIDERMAN, ESQUIRE (Via Telephone)
Attorney/Advisor
on behalf of the United States Trustee

ALSO PRESENT:

JEDD BELLMAN, Judge Olson's Law Clerk
CHRISTINA ROMERO, Courtroom Deputy
PAUL BERKOWITZ
GEORGE YEONAS
DENISE LORENZO
SORANO GEORGESCU
MICHAEL MOODY
SCOTT FELDER
BARRY SNOWDEN, ESQUIRE
STEVE KRASOFF

- - - - -

1 THE COURT: Very good. Let me take
2 appearances in TOUSA.

3 MR. SINGERMAN: Good morning, your
4 Honor. May it please the Court, I'm Paul
5 Singerman from Berger Singerman and our firm is
6 co-counsel to the TOUSA debtors.

7 With me in the courtroom at counsel
8 table is my colleague, Natasha Labovitz, and
9 behind her, Matt Papez, and for his first time
10 appearing in person in the case, your Honor,
11 another of our K & E colleagues,
12 Ignacio Bull Aldana. Ignacio is admitted in New
13 York and has not yet been admitted pro hac here.

14 THE COURT: I will happily admit him
15 pro hac and Mr. Aldana, welcome.

16 MR. SINGERMAN: Thank you. From the
17 company this morning, your Honor, we have
18 Paul Berkowitz; George Yeonas, our chief
19 operating officer; Sorano Georgescu, our
20 assistant general counsel; and Denise Lorenzo
21 from Zolfo Cooper.

22 THE COURT: Very good. Welcome to you
23 all.

24 MR. SINGERMAN: Thanks, Judge.

25 THE COURT: Thank you.

1 MR. GOLDEN: Good morning, your Honor.
2 Daniel Golden from Akin Gump, counsel for the
3 official creditors' committee. With me at
4 counsel table is my partner, Phil Dublin.

5 Also in the courtroom are Trish Redmond
6 and David Pollack from the Stearns Weaver firm
7 and Larry Robbins and Michael Waldman from the
8 Robbins Russell firm.

9 THE COURT: Very good. Good morning to
10 you all.

11 MR. HALL: Good morning, your Honor.
12 Tom Hall from Chadborne & Parke on behalf of
13 Citicorp and certain individual first lien
14 lenders. With me at counsel table is
15 Mr. Seven Rivera from my firm; Mr. Steve Busey,
16 co-counsel for the revolver; and
17 Mr. Richard Prosser, co-counsel for the first
18 lien term loan.

19 THE COURT: Good morning to you all.

20 MR. SNYDER: Good morning, your Honor.
21 Jeffrey Snyder of the Bilzin Sumberg firm on
22 behalf of Wells Fargo, as second lien agent.
23 With me in the courtroom is Gregory Nye of the
24 Bracewell & Giuliani firm, co-counsel on behalf
25 of Wells Fargo, as second lien agent and also on

1 behalf of certain of the individual second lien
2 lenders.

3 THE COURT: Very good. Thank you.

4 MR. SHAPIRO: Good morning, your Honor.
5 Peter Shapiro, Shutts & Bowen. I am here on
6 behalf of the purchasers of the Houston and
7 Austin Divisions. On the Houston side, present
8 in court on behalf of Moody Fedrick Holdings,
9 LLC, is Mr. Michael Moody, the CEO and real
10 estate counsel from Houston, Mr. Barry Snowden.

11 On the Austin side, the purchaser is
12 Scott Felder Homes, LLC. Present in court is
13 Mr. Scott Felder, the CEO and Mr. Steve Krasoff,
14 the president.

15 THE COURT: Good morning to you all,
16 folks.

17 MR. GOLDBERG: One more appearance,
18 your Honor. Michael Goldberg, Akerman
19 Senterfitt, on behalf of the Senior Transeastern
20 Lenders. With me is Ms. Atara Miller from the
21 Millbank firm.

22 THE COURT: Very good. Welcome.

23 Anyone else in the courtroom?

24 Anyone on the phone that wishes to make
25 an appearance?

1 MR. SCHNEIDERMAN: Steven Schneiderman
2 for the U.S. Trustee.

3 MR. EARLYWINE: This is Jere Earlywine
4 with Hopping Green & Sams on behalf of Highland
5 Meadows, Heritage Landing, Indigo Middle Village,
6 Country Greens and Greater Lakes Community
7 Development Districts.

8 THE COURT: Thank you.

9 MR. KENNEDY: Good morning, your Honor.
10 Gerald Kennedy, Procopio Cory Hargreaves &
11 Savitch, on behalf of S.C. Design.

12 THE COURT: Good morning. Anyone else?

13 MR. STRASSER: Good morning, your
14 Honor. It's Alan Strasser from Robbins Russell.

15 THE COURT: Mr. Strasser, good morning.

16 MR. MANNERING: Good morning, your
17 Honor. Matt Mannering on behalf of CIT and my
18 colleague, Rich Norton will also be on the line
19 shortly.

20 THE COURT: Very good. Mr. Mannering,
21 good morning.

22 Okay. Ms. Labovitz, the first thing
23 I'm going to ask you to do is to put that --
24 unless we're going to use it today, take -- no
25 take the -- not that one, the one that's up here

1 on the podium and lay it flat, if you will?

2 MR. BELLMAN: I'll do it.

3 MS. LABOVITZ: Thanks, Jedd.

4 THE COURT: I do not wish Mr. Aldana to
5 hide, even though he's got a second screen back
6 there.

7 MS. LABOVITZ: He won't try to hide,
8 Judge, we won't let him.

9 THE COURT: Very good.

10 MS. LABOVITZ: Good morning, your
11 Honor. It's nice to see you.

12 THE COURT: Nice to see you, too.

13 MS. LABOVITZ: Natasha Labovitz,
14 Kirkland & Ellis, representing the debtor.

15 THE COURT: Ladies and gentlemen on the
16 telephone, put your phone on mute, please. I
17 don't really want to hear a courtroom full of
18 people rattling papers. Thank you.

19 Ms. Labovitz, I apologize.

20 MS. LABOVITZ: Your Honor, we have this
21 morning mostly uncontested matters with respect
22 to the operational side of these Chapter 11 cases
23 and then some contested matters related to the
24 litigation.

25 I'll take the first two items on the

1 agenda and, Judge, for these, much of the factual
2 background overlaps, so I'll make introductory
3 remarks that relate to both motions, with the
4 Court's permission, and then take the specifics
5 of each motion up in turn.

6 These are the motions to sell assets in
7 Houston and Austin. Judge, at the outset I'll
8 note that each of these motions is uncontested.
9 We believe the language for the orders is
10 generally agreed.

11 THE COURT: And I've read the form of
12 order.

13 MS. LABOVITZ: Thank you, your Honor.
14 The buyers and the creditors' committee, I
15 believe, are still working out small language
16 differences in the orders, but we anticipate
17 those will be resolved before any orders are
18 finally submitted to the Court --

19 THE COURT: Okay.

20 MS. LABOVITZ: -- for signature.

21 Judge, since the motions are
22 uncontested, I don't see the need to take the
23 Court's time to present formal testimony,
24 although these are going concern asset sales
25 under Section 363. As Mr. Singerman has

1 identified, several members of the debtors'
2 management team that will be ongoing, as well as
3 the two members of the management team who will
4 be purchasing some of the assets, are all here in
5 the courtroom and would be available to testify
6 as needed.

7 THE COURT: Very good. Thank you.

8 MS. LABOVITZ: Judge, as everyone in
9 the courtroom, I believe, is aware, the debtors
10 have shifted their business strategy. They are
11 no longer initiating construction of new homes or
12 initiating new home sales, and in connection with
13 the wind down of their new business operations,
14 the debtors have explored asset sales of various
15 types and sizes.

16 From the beginning, in developing the
17 wind-down strategy, the debtors, in consultation
18 with all of the creditor groups, viewed the Texas
19 assets as different from assets in certain of the
20 other geographical locations, in that the Texas
21 operations had throughout the Chapter 11 cases
22 performed relatively better than the other
23 operations and seemed relatively less hard hit by
24 the downturn in the home building industry.

25 Therefore, beginning in mid February,

1 when the debtors began planning for their
2 wind down, the debtors worked with Lazard, their
3 investment banker, to market the Texas operations
4 as a going concern.

5 In that regard, there was a fair amount
6 of interest in purchase of the operations.
7 Lazard received 21 requests for initial due
8 diligence from parties and from those due
9 diligence efforts, nine preliminary proposals
10 were received from would be purchasers.

11 At that point, Lazard and the debtors'
12 management team engaged in preliminary
13 discussions with each of those nine potential
14 purchasers regarding structure and pricing, and
15 from those discussions, five formal offers were
16 ultimately received with respect to the Texas
17 assets.

18 Out of those five offers, only two were
19 for all of the debtors' Texas operations, the
20 other three were for only certain regions within
21 Texas.

22 After analyzing the offers and after
23 discussing them with the various creditor
24 constituents, the debtors, with Lazard,
25 determined that it would be more profitable to

1 sell the Texas assets in pieces rather than as a
2 whole and, therefore, the result today is two
3 motions to sell substantial parts of the Texas
4 operations. They're owned, Judge, by the way, by
5 debtor, Newmark Homes, L.P. and so the motions
6 before the Court today represent the Houston
7 Division and the Austin Division.

8 The remaining assets within Texas,
9 including some of the assets in Houston and
10 Austin, will be sold according to the wind-down
11 plan over time.

12 I'll turn now to the specifics of the
13 motion to sell assets within the Houston
14 Division. Judge, after consideration of the
15 various offers received as a result of the
16 marketing efforts that I described, the debtors,
17 their advisors, and the creditor groups in
18 consultation with them, determined that the offer
19 received from Moody Fedrick Holdings represented
20 the highest and best offer for purchase of the
21 debtors' Houston assets.

22 As noted by counsel for Moody Fedrick,
23 the Moody Fedrick operational team includes
24 certain managers who were formally part of the
25 debtors' Houston management team, including

1 Mike Moody, who is the president of Newmark
2 Homes, Houston Division. They have a solid
3 knowledge of the Houston operations and
4 therefore, are viewed as a credible bidder by the
5 debtors.

6 Moody Fedrick has entered into a
7 purchase agreement with Newmark Homes. That
8 purchase agreement was attached to the filed
9 motion. It was subject to higher and better
10 offers received between the time of filing the
11 motion and this hearing day, but, Judge, no
12 higher and better offers have been received.

13 Therefore, it is the Moody Fedrick
14 purchase agreement that is before the Court today
15 for approval. It contemplates the sale of -- the
16 going concern sale to Moody Fedrick of 19 out of
17 the 32 communities within the Houston Division
18 and again, Judge, the remaining holdings will be
19 sold pursuant to the wind-down business plan, of
20 which the Court is aware.

21 The general structure of the sale is in
22 a staged takedown structure under which lots in
23 those 19 communities will be purchased by
24 Moody Fedrick in equal installments over three
25 90-day periods, that would be following the

1 initial closing. In addition, certain identified
2 contracts and leases will be assumed, to the
3 extent they are prepetition, and will be assigned
4 to the buyer.

5 The overall purchase price is
6 approximately \$8.6 million and the purchase
7 agreement contemplates that there will be an
8 earnest money deposit of \$645,000 that will be
9 held and credited against purchase price
10 obligations at closing in each of the three
11 takedown periods.

12 THE COURT: And when is the -- when is
13 the earnest money due?

14 MS. LABOVITZ: I believe the earnest
15 money has been paid.

16 THE COURT: I see large nods from the
17 back of the courtroom, including from
18 Mr. Berkowitz, who presumably has the money.

19 MS. LABOVITZ: I believe the money is
20 being held by the debtors' title operations.

21 If the sale takedowns are not completed
22 as scheduled, the earnest money will be retained
23 by Newmark Homes.

24 The sale structure also contemplates a
25 post-closing agreement to allow for the

1 transition of business operations to the buyer,
2 and also to assist in the continuation of
3 operations at the Houston communities that will
4 remain with the debtors.

5 Specifically, there will be a sharing
6 of certain employees over a period of five
7 months, with the cost of those employees
8 progressively more and more to be borne by
9 Moody Fedrick over time; a joint use of the
10 design center for Newmark Homes, for which the
11 buyer will pay Newmark Homes \$12,000 per month
12 beginning 60 days after closing; and certain
13 services will be provided by the buyer to Newmark
14 Homes, including assistance in selling the
15 non-purchased assets related to the Houston
16 Division.

17 Finally, and this is a point that we
18 promised Mr. Schneiderman we would highlight, the
19 sale contemplates an indemnity from Newmark Homes
20 to Moody Fedrick, holding Moody Fedrick harmless
21 from future claims related to the purchased
22 assets and contracts, as well as post-closing
23 operations by Newmark Homes and certain actions
24 that Moody Fedrick does on behalf of Newmark
25 Homes under the post-closing services agreement.

1 The indemnity obligations will survive
2 post closing until December 31, 2010, which is
3 consistent with the timeframe for the debtors'
4 intended wind down and, Judge, the order makes
5 clear that the indemnity obligations will not
6 survive after that time.

7 The debtors believe that their
8 extensive marketing efforts conducted through
9 Lazard, and in consultation with all of their
10 major creditor constituencies, demonstrate that
11 the proposed purchase agreement represents the
12 best available offer for purchase of the Houston
13 assets.

14 In addition, Judge, as I noted, since
15 the filing of the motion, no party has come
16 forward with a higher or otherwise better offer.
17 Therefore, I -- oh, and an additional point.
18 Judge, I hope it goes without saying that the
19 debtors and their advisors conducted the
20 marketing process in good faith and in addition,
21 it is the debtors' universal view that the buyer,
22 in addition, has conducted its actions in good
23 faith.

24 As I noted, Judge, we have
25 representatives of both seller and buyer in the

1 courtroom today in case the Court has any
2 questions.

3 THE COURT: Very good. The only
4 question I have is for Mr. Shapiro, and that is
5 if he would like to proffer anything with respect
6 to good faith of the buyer that would underline a
7 363 -- or would support a 363(m) finding.

8 MR. SHAPIRO: Judge, actually, I would
9 like to do that. As Ms. Labovitz disclosed, and
10 as was disclosed in the motion, certain
11 principals of the purchaser were former officers
12 of the debtor. That notwithstanding, based on
13 the purchase price, the debtors' marketing
14 efforts to sell the property, we believe the
15 transaction is fair and reasonable and arm's
16 length and if Mr. Moody were to testify, he would
17 testify to that fact.

18 There were no side agreements, the
19 consideration that's in the purchase agreement is
20 the only consideration to be paid by the
21 purchaser. There's been no collusion with any
22 other party. We have not violated Section 363(n)
23 in anyway, and we believe the purchaser should be
24 afforded good faith status.

25 THE COURT: Very good. Thank you.

1 Does anyone wish to be heard -- anyone
2 else wish to be heard in connection with the
3 proposed sale by Newmark Homes to Moody of the
4 Houston Division, or at least large parts of it?
5 Hearing none ---

6 MR. SCHNEIDERMAN: Your Honor --

7 THE COURT: Mr. Schneiderman.

8 MR. SCHNEIDERMAN: -- this is

9 Steve Schneiderman. Yes, your Honor.

10 I appreciate Ms. Labovitz highlighting
11 that one issue, your Honor. Obviously that
12 caused us some concern with an open
13 indemnification and the length of time with
14 respect to how long this case would then be
15 pending, because obviously if there's a potential
16 for a large or any administrative claim, the case
17 obviously will be held in kind of abeyance until
18 that December 2010 -- as far as distributions go,
19 will be held in abeyance until that December 2010
20 date passes.

21 THE COURT: Well, I'll let that issue
22 play out later. I don't recall what the plan
23 provides in respect of such potential
24 administrative claims. On the other hand, I
25 don't think that that's a particularly crucial

1 fact that I need to -- or issue that I need to
2 determine, i.e., whether distributions would be
3 held up pending the determination of
4 administrative claims of that sort.

5 MR. SCHNEIDERMAN: Yes, sir. We
6 weren't objecting, just pointing that out because
7 it does cause some concern that will have to be
8 addressed, clearly as you stated, but we wanted
9 to highlight that because we did notice that in
10 the contract that would cause an open-ended
11 question here.

12 THE COURT: Fine, and I think that the
13 termination date at least gives us some comfort
14 in respect of that.

15 Thank you, Mr. Schneiderman.

16 MR. DUBLIN: Your Honor, Phil Dublin
17 for the committee.

18 The indemnification provision is
19 something that the committee vetted very closely,
20 as well as the purchase price, and based on the
21 various offers that were received for the assets
22 and the continued -- continuing of value that's
23 going to remain behind for the estate to monetize
24 over time, we were comfortable with the
25 indemnification agreements.

1 THE COURT: Very good. Thank you.

2 MR. SCHNEIDERMAN: As a side issue,
3 your Honor, I wasn't sure how the sale triggered
4 anything with compensation for Lazard, if that's
5 being sought as a separate matter or is it just
6 automatic? Perhaps counsel can address that.

7 As a sale to potentially technically
8 insiders, I wasn't sure how that was covered and
9 if it was being approved as part of the sale
10 process.

11 THE COURT: Well, first question to
12 you, Ms. Labovitz, how recently have Mr. Moody
13 and the others who were involved with his company
14 been officers of Newmark Homes?

15 MS. LABOVITZ: Judge, certainly
16 recently, I believe they may yet be.

17 THE COURT: Okay.

18 MR. SCHNEIDERMAN: I'm sorry, your
19 Honor, I didn't hear her answer.

20 THE COURT: Perhaps even as we speak,
21 Mr. Schneiderman.

22 MR. SCHNEIDERMAN: Okay, sir. Thank
23 you.

24 THE COURT: And the other point that
25 Mr. Schneiderman made, Mr. Labovitz?

1 MS. LABOVITZ: With respect to Lazard's
2 fees, certainly no aspect of the approval of
3 Lazard's fees is presented by this motion. I
4 believe that Lazard's engagement letter has
5 already been approved by the Court and I
6 apologize, Judge, I did not look at the terms of
7 that engagement letter before coming before the
8 Court today, but I would note to Mr. Schneiderman
9 that nothing additional beyond what has already
10 been approved is being requested today.

11 THE COURT: Okay. Thanks.

12 MR. SCHNEIDERMAN: Your Honor, one
13 last ---

14 THE COURT: Mr. Schneiderman, why don't
15 you give me all that you have for me right now.

16 MR. SCHNEIDERMAN: This is the last
17 thing, sir. I received a letter from about a
18 dozen of the employees of Newmark. I'm not sure
19 if it's the -- it's the Austin Division.

20 THE COURT: Well, then, we're talking
21 about Houston, so we'll go to the other part of
22 the Davy Crockett duo shortly.

23 MR. SCHNEIDERMAN: Very well, sir.

24 THE COURT: Thank you. Anything else
25 anyone wishes to put on the record?

1 On the debtors' motion for an order
2 pursuant to Sections 363(b), (f), (m) and 365,
3 with respect to the sale of the Houston Division
4 of Newmark Homes, L.P. to Moody Fedrick Holdings,
5 LLC, I find that the sale is in the best interest
6 of the debtors, that due and appropriate notice
7 of the sale was given, that the due diligence
8 undertaken by the debtors in connection with the
9 sale was fair and appropriate, that the buyer is
10 a buyer in good faith, that the indemnity
11 provisions are reasonable in the circumstances,
12 and that the sale should be approved.

13 Is there anything else that I need to
14 say, other than what will be in the order?

15 MS. LABOVITZ: I believe you've well
16 covered it, your Honor.

17 THE COURT: Okay. Very good. Now
18 then, from Houston to Austin.

19 MS. LABOVITZ: We'll move slightly
20 north. And, Judge, I will strive not to be
21 repetitive in my presentation, but,
22 unfortunately, to adequately cover the factual
23 findings that are required in the order, I will
24 need to take some time to describe the terms of
25 the Austin sale, which in many aspects do mirror

1 the terms of the Houston sale.

2 THE COURT: Okay.

3 MS. LABOVITZ: I will not repeat the
4 description of the marketing efforts, except to
5 note at the point at which the debtors were
6 evaluating the five formal offers for the Texas
7 assets, the debtors and Lazard determined, in
8 consultation with their major creditor groups,
9 that the offer received from Scott Felder Homes
10 represented the highest and best offer for the
11 debtors' Austin assets.

12 Similar to the situation with the
13 Houston sale, one of the principals of Scott
14 Felder Homes is Steve Krasoff, who is the
15 debtors' senior vice president for land.
16 Mr. Krasoff has a very solid knowledge of the
17 Houston operations and for this reason the
18 debtors viewed Scott Felder as a credible bidder
19 and on these terms Scott Felder has entered into
20 a purchase agreement with Newmark Homes.

21 That purchase agreement, like the one
22 for the Houston Division, was subject to higher
23 and better offers being received from the time of
24 entry into the purchase agreement to the date of
25 the hearing on the motion and to this date, no

1 higher or otherwise better offer has been
2 received.

3 The purchase agreement contemplates the
4 going concern sale to Scott Felder of 16 out of
5 the 23 communities operated by Newmark Homes,
6 L.P. in the Austin Division and again, similar to
7 the Houston situation, the remaining holdings
8 will be sold pursuant to the wind down business
9 plan of the debtors that was previously outlined
10 to this Court.

11 Similar to the Houston sale, the
12 general structure of this Austin sale is on a
13 staged takedown structure. In this case, the
14 lots relating to the 16 communities that will be
15 sold will be purchased by the buyer in equal
16 installments over five specified periods
17 following the initial closing. The entire
18 takedown will be completed in 390 days following
19 the closing.

20 In addition, certain contracts will be
21 assumed, if prepetition, and assigned to the
22 buyer. This includes model home leases with
23 certain landlords in the 16 communities, includes
24 certain options, identified lot sale agreements,
25 and in this case, it also includes an assignment

1 of a condominium agreement and certain software
2 rights.

3 THE COURT: Software rights?

4 MS. LABOVITZ: Rights related to
5 operations, your Honor. I don't believe they're
6 significant.

7 In addition, in this case Newmark Homes
8 will be granting Scott Felder a sublease of
9 Newmark Homes' main office and design center in
10 the Austin Division. The lease payments will be
11 for \$10,000 a month beginning in January 2010 and
12 will continue until the lease expires in the
13 second half of 2010.

14 The overall purchase price for the
15 Austin Division assets is approximately
16 \$11.5 million. The purchase agreement
17 contemplates a payment of approximately
18 \$1.1 million in earnest money. Like the Houston
19 Division, I believe that earnest money has
20 already been received and it will be held to
21 secure the buyer's obligations under the
22 agreement and will be credited pro rata against
23 purchase price obligations at closing. If the
24 buyer does not perform its obligations under the
25 agreement, the earnest money will be retained by

1 Newmark Homes.

2 Finally, similar to the Houston
3 division, the sale does contemplate an indemnity
4 from Newmark Homes to Scott Felder, holding
5 Scott Felder harmless from future claims related
6 to the pre-closing operations related to the
7 purchased assets, as well as certain retained
8 liabilities specified in the purchase agreement,
9 and obligations arising from breach by
10 Newmark Homes of any representations and
11 warranties in the agreement.

12 And, Judge, those indemnity obligations
13 will survive post closing until one year
14 following the last post-closing true-up date
15 under the purchase agreement.

16 THE COURT: So they would extend until
17 sometime in the summer of 2011.

18 MS. LABOVITZ: They do extend somewhat
19 longer, your Honor, and similar to what
20 Mr. Schneiderman alluded to and the Court alluded
21 to in the context of the Houston sale, we believe
22 we would be able to adequately reserve for any
23 such liabilities in the context of a plan, but
24 that the finite ending date for the
25 indemnification will ultimately allow for

1 distributions.

2 THE COURT: Am I correct in assuming
3 that warranty claims should have been filed as
4 claims already.

5 MS. LABOVITZ: We did not require
6 customers to file warranty claims, but, Judge,
7 as you may recall, the warranty claims for these
8 cases are generally backed by insurance.

9 THE COURT: Right.

10 MS. LABOVITZ: And there is insurance
11 to cover construction that's ongoing since the
12 petition date.

13 THE COURT: Okay. Thank you.

14 MS. LABOVITZ: Judge, similar to the
15 Houston sale, the debtors believe that their
16 extensive marketing efforts, which were conducted
17 in consultation with the major creditor
18 constituencies demonstrate that the proposed
19 purchase agreement represents the best available
20 offer for the purchase of the Austin assets and
21 as I noted, since the filing of the motion, no
22 party has come forward to present a higher or
23 otherwise better offer for the assets.

24 As with the Houston Division, the
25 debtors and their advisors conducted the

1 marketing process in good faith and in addition,
2 the management team believes that the
3 Scott Felder representatives engaged in the sale
4 process and negotiations with Newmark Homes in
5 good faith.

6 I note again, your Honor, that in
7 addition to representatives from the company,
8 Steve Krasoff is here in the courtroom and
9 available to testify should the Court have any
10 questions.

11 THE COURT: Mr. Shapiro, do you want to
12 make the same or similar remarks?

13 MR. SHAPIRO: Thank you, Judge. The
14 same download. On behalf of the purchaser of the
15 Austin Division, Scott Felder Homes, Mr. Krasoff
16 and Mr. Felder are both present in court. If
17 called to testify, either of them would testify
18 that the transaction was negotiated in good
19 faith, at arm's length.

20 Mr. Krasoff's prior employment as an
21 officer of the debtors has been disclosed to all.
22 All of the consideration that is part of the
23 transaction is embodied in the purchase
24 agreement. There's been no collusion and they
25 would request that the Court afford them good

1 faith status.

2 THE COURT: Thank you.

3 Mr. Dublin, any comments on this
4 somewhat more extensive indemnity term?

5 MR. DUBLIN: Very similar to the last
6 one, your Honor. We are comfortable with this
7 indemnity, as well, with the definite ending
8 period and our belief that distributions will be
9 able to be completed shortly after the indemnity
10 period expires.

11 I would like to note that, as
12 Ms. Labovitz mentioned at the beginning, we did
13 have some comments to both orders, just
14 clarifying what the continuing obligations are of
15 the company, and that the continuing liabilities
16 for the company relate solely to the
17 indemnification obligations, and that will be
18 included in the order.

19 THE COURT: Very good. Thank you.

20 Does anyone else wish to be heard in
21 connection with the proposed sale of
22 Newmark Homes' Austin Division, or at least
23 significant parts of it, to Scott Felder Homes?

24 MR. SCHNEIDERMAN: Your Honor,
25 Steven Schneiderman again for the U.S. Trustee.

1 Without repeating those other issues that we've
2 already discussed, I did want to put on the
3 record that we did receive a letter from about a
4 dozen of the employees from the Austin Division
5 concerned over their continued employment, the
6 severance packages and whether or not it was
7 appropriate for the sale of this division to be
8 a -- in essence, having them start over as new
9 employees of a new company without the tenure.

10 I advised the representative, I guess
11 the lead employee, Ms. Forrest, that they should
12 retain counsel. I explained to them the
13 difference between the U.S. Trustee and the case
14 trustee, which there is no trustee, obviously, in
15 this case.

16 The letter was somewhat confusing. I
17 gave her Mr. Berkowitz' phone information, as
18 well as Mr. Sussberg's, and again advised her to
19 retain counsel and to review the severance motion
20 that had previously been approved by the Court.

21 I don't know if there's anyone in the
22 courtroom today representing the employees or if
23 they're on the phone, but I wanted to let you
24 know that we did respond to the letter
25 telephonically that we had received on May --

1 late in the evening, I believe it was, on
2 May 21st.

3 THE COURT: Thank you,
4 Mr. Schneiderman.

5 Does anyone else wish to be heard in
6 connection with the motion?

7 Okay. In respect of those last
8 comments of Mr. Schneiderman's, anyone who wished
9 to raise an objection to the sale was certainly
10 invited to do so and able to do so. I have seen
11 none and heard none.

12 I find that the sale of 16 of 23
13 communities in the Austin Division of
14 Newmark Homes, L.P. to Scott Felder Homes, LLC is
15 in the best interest of the debtors and their
16 estates, that appropriate marketing and sales
17 efforts were conducted by the debtors in order to
18 obtain the highest and best offer, which they
19 have received.

20 I find that the buyer is a buyer in
21 good faith within the meaning of Section 363(m)
22 of the Bankruptcy Code, and I will accordingly
23 grant the motion pursuant to Section 363(b),
24 363(f), 363(m) and 365 of the Bankruptcy Code.

25 Did I leave anything out?

1 MS. LABOVITZ: No, your Honor.

2 THE COURT: Okay. Very good. Thank
3 you.

4 The sales are approved, and those of
5 you who are interested in those sales, unless you
6 want to stick around for some interesting
7 excitement later, you're certainly free to be
8 excused.

9 MR. SHAPIRO: Thank you, Judge.

10 THE COURT: Thank you very much.

11 MS. LABOVITZ: Thank you, Judge.

12 THE COURT: You're welcome. There are
13 a couple of other things.

14 MS. LABOVITZ: The next item on the
15 agenda is all Mr. Golden's and I will let him
16 present it --

17 THE COURT: Very good.

18 MS. LABOVITZ: -- for the moment.

19 MR. GOLDEN: Good morning, your Honor.

20 THE COURT: Good morning, Mr. Golden.

21 MR. GOLDEN: By motion dated
22 February 27th of this year, the committee seeks
23 authority to prosecute certain causes of actions
24 on behalf of the debtors' estates against two
25 groups of individuals, the first group consisting

1 of officers and directors or their functional
2 equivalent of the debtors' subsidiaries, whose
3 debtors' subsidiaries' balance sheet was utilized
4 to fund the July 31, 2007 Transeastern settlement
5 transaction.

6 The second group of potential
7 defendants is the -- is the corporate entity,
8 Technical Olympic, S.A., which is the majority
9 stockholder of TOUSA, Inc.

10 Your Honor, as explained in very
11 specific detail, both in the motion and in the
12 draft complaint attached to the motion as
13 Exhibit A, the claims against the officers and
14 directors of the -- what we've come to call in
15 this courtroom, the conveying subsidiaries, are
16 for claims for breach of their common law and
17 statutory fiduciary duties to the general
18 unsecured creditors of the conveying subsidiary
19 estates.

20 We believe, and as alleged in the
21 motion and in the draft complaint, it is that --
22 it is those breaches of fiduciary duty arising
23 from the officers' and directors' participation
24 in the July 31, 2007 Transeastern settlement
25 transaction that gives rise to these claims.

1 Likewise, as set forth in the motion,
2 the committee seeks to hold Technical Olympic,
3 S.A., as the majority stockholder, for
4 encouraging, inducing, aiding and abetting those
5 breaches of fiduciary duties, which are the
6 claims that the committee seeks to bring against
7 that Greek corporate entity.

8 Your Honor, no objection has been filed
9 to the relief requested in the motion and, in
10 fact, the debtors, the first lien lenders, and
11 the committee have, I think, agreed upon a form
12 of order to be presented to this Court should
13 your Honor approve the motion.

14 There are some changes to the proposed
15 form of order that I'll review with the Court in
16 a couple of moments, but I understand that we are
17 under some tight timeframe to get all the
18 contested matters handled this morning. So I
19 would, unless the Court has specific questions
20 about the motion, the draft complaint, the
21 underlying facts -- one of the reasons I've
22 determined not to set forth the litany of the
23 underlying facts, because obviously they are the
24 same underlying facts that give rise to the
25 fraudulent conveyance action, which your Honor

1 has previously entered an order authorizing the
2 committee to commence on behalf of the estate,
3 and I don't want to unnecessarily inflame parties
4 in the courtroom with that trial being a mere 45
5 days off as to its commencement.

6 I do think that the motion fully
7 details the potential claims that the committee
8 seeks to bring against the officers and directors
9 and Technical Olympic. It also sets forth, in
10 rather specific detail, why we think that we have
11 satisfied the generally recognized four-part test
12 that the Court must review when a third party,
13 other than the debtor, seeks authority to bring
14 or prosecute estate causes of action on the
15 estate's behalf in the place of the debtor.

16 We have made a written demand. That
17 demand has not actually been refused, it just
18 hasn't been responded to, but I think given the
19 nature of the claims and the fact that the claims
20 are sought to be commenced against both former
21 and current officers and directors of the debtor,
22 and the majority stockholder of the debtor, it's
23 understandable why the debtor has not seen fit to
24 respond in writing to the written demand. I
25 think it speaks volumes, though, that the debtor

1 has not lodged an objection to the underlying
2 motion.

3 I think also that the details set forth
4 in the motion and in the draft complaint set
5 forth the -- or satisfy the standard of
6 demonstrating that we have or the estates have at
7 least colorable claims against the officers and
8 directors and obviously we are here this morning
9 seeking permission, which satisfies the fourth
10 prong, which is that the Court must grant leave
11 before a third party can bring an action on
12 behalf of the estate in the place of the debtor.

13 Your Honor, unless you have any
14 specific questions about the underlying claims or
15 facts, I would like to hand up a form of proposed
16 other and just walk the Court through the
17 proposed changes.

18 THE COURT: Well, okay. Fine.

19 Have those changes been vetted with the
20 debtor and the other --

21 MR. GOLDEN: They have, your Honor.

22 THE COURT: -- relevant parties?

23 MR. GOLDEN: They have.

24 THE COURT: Okay.

25 MR. GOLDEN: Your Honor, I will say

1 that I think at least counsel for the first lien
2 lenders would like to make a statement in respect
3 of the motion before the Court deliberates, but
4 as I understand it, there is no objection.

5 Your Honor, if I can just draw your
6 attention to Page 2, Paragraph G, the middle of
7 the page. You'll see a black line where we add
8 the words, as modified in this order. So it's to
9 make sure that the order will reflect the
10 changes.

11 In Paragraph 3, it provides the
12 committee shall be, and hereby is authorized on
13 behalf of the debtors' estates, to investigate,
14 commence, prosecute the claims with the full
15 rights and privileges, and then there's a
16 parenthetical that's been added, consistent with
17 the Court's order dated January 7, 2009 regarding
18 such privileges.

19 This was to ensure that we don't have
20 another litigation over the issue of
21 attorney/client privilege and what the committee
22 can do with the documents that belong to the
23 debtor.

24 Also in Paragraph 3, continuing on,
25 where it says provided, however, that to the

1 extent that the committee files a complaint with
2 respect to the claims prior to the conclusion of
3 the trial in the pending adversary proceeding
4 currently scheduled to begin on January 13, 2009,
5 all deadlines --

6 THE COURT: July 13, 2009.

7 MR. GOLDEN: July. Excuse me,
8 July 13th, all deadlines, including service of
9 process are suspended until 30 days from the
10 earlier of the conclusion of the trial or entry
11 of any order, I'm paraphrasing, entry of any
12 order approving a settlement of the pending
13 adversary proceeding.

14 That was an accommodation that was
15 agreed to by the committee, given the fact that
16 so many of the facts underlying this proposed
17 complaint are similar, if not exactly or exact to
18 the facts underlying the pending adversary
19 proceeding, we determined that we would await the
20 outcome of the pending adversary proceeding
21 before prosecuting this complaint against the
22 current and former officers and directors and
23 Technical Olympic.

24 This order would permit the filing of
25 the complaint, so as to stay any statute of

1 limitations, and to put the insurance carrier,
2 the D and O carrier on notice of the claims, but
3 that there would be no further prosecution of the
4 complaint until at least 30 days from the
5 conclusion of the trial.

6 I think that makes sense from all
7 parties' perspective to await the outcome of the
8 pending adversary proceeding so as to determine
9 the best course of action as to how to proceed
10 with this complaint.

11 And then finally, your Honor, on
12 Paragraph 5, this was a point of contention you
13 may recall in the original standing motion
14 brought by the debtors to commence the current
15 adversary proceeding. This paragraph provides
16 that the committee shall have the right and
17 authority to negotiate and enter into a
18 settlement on behalf of the debtors' estates with
19 respect to the claims, provided, however, that
20 the debtor shall also retain their authority and
21 right to negotiate and enter into settlements on
22 behalf of their estates with respect to their
23 claims.

24 So we didn't have to get into the
25 dispute as to who had, if anybody had, sole

1 settlement authority and I think this was a
2 sensible resolution of that issue.

3 With that, your Honor, again, unless
4 the Court has questions, I would ask -- I think,
5 as I said, the first lien lenders wanted to make
6 a statement with respect to the motion.

7 THE COURT: Very good.

8 Mr. Rivera, good morning.

9 MR. RIVERA: Good morning, your Honor.

10 Seven Rivera with Chadbourne & Parke on
11 behalf of the prepetition first lien agents.

12 Your Honor, we were going to object to
13 this motion when it was originally filed. It
14 just didn't make sense to us to add even more
15 litigation and more professional fees to the case
16 at this point, but as Mr. Golden noted, the
17 committee agreed to wait to prosecute the
18 complaint until after the fraudulent conveyance
19 litigation, so we decided not to object.

20 With that said, however, there are two
21 points I would like to make in connection with
22 this motion. First, even though we've decided
23 not to object, we're still not completely sure
24 why the standing issue needs to be decided today.
25 The plan that's currently on file provides for a

1 litigation trust and that this cause of action
2 would be transferred to the litigation trust and
3 pursued on behalf of the estate, and I don't
4 think that the committee has really articulated
5 any reason why that mechanism would be
6 insufficient or why we have to go forward with
7 this issue today.

8 I know there was some discussion of a
9 statute of limitations or notice to the insurance
10 carrier, but we're not aware of any pending
11 statute of limitations issue or any reason we
12 couldn't have gone forward as the plan had
13 originally envisioned it.

14 But my second point is actually a
15 reservation of rights. The security agreements
16 that were executed in connection with the three
17 prepetition secured facilities, provided for a
18 lien on all general intangibles and under the
19 New York UCC, general intangibles include certain
20 causes of action. So, if and when our liens are
21 confirmed to be valid, I would like to reserve
22 our rights to assert a lien on the -- on this D
23 and O litigation as appropriate.

24 Thank you, your Honor.

25 THE COURT: Thank you, Mr. Rivera.

1 Ms. Labovitz.

2 MS. LABOVITZ: Judge, Mr. Golden is
3 correct, that the debtors are not objecting to
4 the committee's request for standing to pursue
5 the causes of action that they have outlined.
6 It's the debtors' view, similar to that
7 articulated by the first lien lenders, that
8 there's been enough litigation in this case.

9 That said, we've taken the view that it
10 doesn't make sense to have a litigation over
11 standing or a litigation over whether the
12 statutes of limitations would apply or wouldn't
13 apply, and whether the complaint needs to be
14 filed or doesn't need to be filed at this time,
15 whether the D and O insurers are already on
16 notice or not, it's fine if Mr. Golden wants to
17 file his complaint.

18 We applaud the decision not to
19 prosecute their complaint or require any
20 responses until after the trial. I would not
21 want there to be any inference from the debtors'
22 lack of objection to this motion that the debtors
23 believe there's any merit at all to this lawsuit.

24 The debtors believe that the record has
25 adequately shown, and will continue to show

1 through trial, that the officers and directors in
2 question and the shareholder in question acted in
3 good faith, in the best of their business
4 judgment at the time, in a very challenging
5 industry and under difficult economic conditions
6 to do the best they could to maximize value for
7 the benefit of constituencies.

8 Issues for another day, but, Judge, I
9 didn't want to let this moment pass without
10 making very clear the debtors' view of that
11 situation.

12 THE COURT: Very good. I'm tempted to
13 note that the D and O carrier will be very
14 pleased with you and you're certainly cooperating
15 fully.

16 MS. LABOVITZ: On both sides, Judge.
17 Second point, your Honor, relevant to
18 the D and O insurance, I believe that because the
19 response deadlines will become automatically
20 hard, if you will, at points later on related to
21 the conclusion of the trial or any settlement,
22 the debtors will at some point relatively soon be
23 filing a motion for authorization to access D and
24 O insurance proceeds to allow for the defense of
25 the litigation.

1 THE COURT: I note that the form of
2 order in Paragraph 3 says, deadlines are
3 suspended until 30 days from the earlier of the
4 conclusion of the trial, including any post
5 trial, but prejudgment submissions.

6 I assume that means that it's not 30
7 days from the conclusion of the trial because I
8 expect that if we go forward with trial and if I
9 don't rule from the Bench, that there will be
10 post-trial submissions. So I don't think people
11 should be operating under the assumption that the
12 clock will start ticking at the end of August, I
13 suspect it will be somewhat later than that.

14 MS. LABOVITZ: Understood, your Honor.

15 THE COURT: Thank you, and I appreciate
16 and understand the reservation of rights by both
17 Citibank as first lien agent and by the debtors.

18 MS. LABOVITZ: Thank you, your Honor.

19 THE COURT: Thank you. Does anyone
20 else wish to be heard in connection with this
21 motion?

22 MR. SCHNEIDERMAN: Your Honor, this is
23 Steven Schneiderman for the U.S. Trustee.

24 The only question we had was,
25 compensation arrangements, would it be under the

1 same terms as the existing litigation that the
2 committee is pursuing with the same counsel or
3 will it be separate counsel?

4 MR. GOLDEN: Mr. Schneiderman, it's
5 Danny Golden.

6 Your Honor, to the extent that this
7 action will be prosecuted, it will be prosecuted
8 by my firm, Akin Gump. We will not be utilizing
9 special conflicts' counsel simply because we
10 don't have or we don't believe that we have a
11 conflict that would preclude us from prosecuting
12 this action and, therefore, it would fall under
13 our general engagement arrangements as approved
14 by the Court.

15 THE COURT: Does that satisfy your
16 concern, Mr. Schneiderman?

17 MR. SCHNEIDERMAN: Yes, sir. I just
18 wanted disclosure to the Court as to who was
19 going to be representing the estate's interest in
20 this matter --

21 THE COURT: Okay.

22 MR. SCHNEIDERMAN: -- and the terms of
23 compensation so when we get these monthly
24 invoices, we know why they're going up or down or
25 who's doing what.

1 THE COURT: I'll look forward to the
2 ones that go down.

3 MR. SCHNEIDERMAN: I'll join you in
4 that, your Honor.

5 THE COURT: No doubt. Okay. Anyone
6 else wish to be heard?

7 I find on the motion by the creditors'
8 committee seeking authority to prosecute and, if
9 appropriate, settle certain causes of action on
10 behalf of the debtors' estates relating to
11 insiders, officers, directors and shareholders,
12 in connection with their already existing
13 litigation challenging the bona fides of the
14 Transeastern settlement, that all of the
15 statutory and case law requirements for approval
16 of that motion exist.

17 There was written demand, no response
18 from the debtors, which is perfectly appropriate
19 and understandable in these circumstances, the
20 claims are at least colorable and with permission
21 from the Court, the committee may proceed. I
22 accordingly will grant the motion and look
23 forward to this revised form of order,
24 Mr. Golden.

25 MR. GOLDEN: Thank you, your Honor.

1 THE COURT: Thank you.

2 MR. GOLDEN: It will be uplifted, if
3 that's the right term, uploaded.

4 THE COURT: Uploaded.

5 MR. GOLDEN: Uploaded.

6 THE COURT: Uplifting is some entirely
7 different concept.

8 MR. GOLDEN: That seems to have alluded
9 us so far.

10 Thank you, your Honor.

11 THE COURT: I understand that Number 4
12 on the docket, Country Green's motion, an agreed
13 order has come up and similarly, Item 5, C.P. Red
14 Oak's motion to compel, that there is an agreed
15 order waiting entry, and that brings us, I think,
16 to the last matter on the calendar in the main
17 case, the debtors' motion to sell membership
18 interests in Centex/TOUSA at Wellington, LLC.

19 Ms. Labovitz.

20 MS. LABOVITZ: Your Honor, I think we
21 can dispatch with this motion relatively quickly.
22 I will note at the outset that this is an
23 uncontested motion and I believe the form of
24 order has been agreed.

25 This is a motion addressing, as we have

1 done from time to time in these cases, one of the
2 debtors' joint ventures. This is a joint venture
3 between TOUSA and Centex to construct, develop
4 and sell homes in the Florida area.

5 As with some of the other joint
6 ventures that we've taken up and addressed in
7 these cases, the joint venture had its own
8 financing. In this case it was a \$50 million
9 line. It was guaranteed under several different
10 completion or guaranty agreements by both of the
11 joint venture parties.

12 There's approximately \$35 million
13 outstanding on the joint venture's loan at this
14 time. The joint venture has determined that the
15 overall value of its assets is less than the
16 amount of the loan outstanding that arguably
17 would result in a claim against the debtors'
18 estates in these cases.

19 The proposed transaction is a sale of
20 the debtors' joint venture interests to an
21 affiliate of their joint venture partner, Centex.
22 The sale would be for approximately \$1.1 million
23 in consideration. There would be an exchange of
24 releases between the two joint venture partners
25 and very importantly, your Honor, there would be

1 a release from the lenders of all guaranty
2 liability, which we view as ---

3 THE COURT: How did you negotiate that?

4 MS. LABOVITZ: Mr. Sussberg again, your
5 Honor, and I should give due credit to
6 Mr. Berkowitz, as well.

7 With that result, your Honor, we think
8 that it is undisputed, indisputable, perhaps,
9 that entering into the transaction is in the best
10 interest of the estates and as there are no
11 objections, we would request it be approved.

12 THE COURT: Does anyone wish to be
13 heard?

14 Let me simply comment in connection
15 with my approval and the granting this motion,
16 that I'm impressed. I don't know how you get out
17 of a -- out of a guaranty and sell your joint
18 venture interest at a profit in respect of a
19 joint venture that is under water.

20 Presumably, Centex thinks that
21 Wellington has some value in the long run or
22 perhaps, Mr. Berkowitz would wish to come forward
23 and offer some pixie dust to explain.

24 MR. BERKOWITZ: I would be remiss,
25 Judge, if I accepted the compliments without

1 explaining. We are conveying 44 lots that we had
2 purchased from the joint venture --

3 THE COURT: I see.

4 MR. BERKOWITZ: -- in exchange for that
5 1.1 million, so it's not all up side, Judge. We
6 are giving up something.

7 THE COURT: Okay. Fair enough.

8 MR. BERKOWITZ: Yes, we are being
9 relieved from all the liabilities under the
10 guaranties.

11 THE COURT: Very good. Since I'm told
12 there's no objection, I will grant the motion.

13 MS. LABOVITZ: Thank you, your Honor.

14 THE COURT: Now, I think that leaves
15 only issues relating to the cross motions for
16 summary judgment with respect to Count XIX of the
17 third amended complaint.

18 Let's take a two minute break. Anybody
19 who needs to leave the courtroom, go and do so
20 and we'll have a shift of players and you can
21 keep your seats.

22 (Thereupon, a brief recess was taken, after
23 which the following proceedings were had:)

24 THE COURT: Thanks, please be seated.

25 In connection with Citibank's --

1 Citicorp's motion for summary judgment, and the
2 committee's cross motion and the various
3 pleadings which I found extraordinarily well
4 done, I wanted to give some preliminary thinking
5 that I think might be useful for the parties in
6 guiding the argument.

7 There is no doubt in my mind that a
8 security interest in general intangibles was --
9 in favor of all of the lenders involved, and
10 certainly including Citicorp North America as
11 administrative agent for the first term lender,
12 that a security interest in general intangibles
13 was created on July 31, 2007 and perfected on
14 August 1, 2007.

15 Similarly, there is no doubt in my mind
16 that a debtor's prospective tax refund is a
17 general intangible. The real question, which I
18 think is actually fairly -- well, not fairly,
19 it's very narrow, is whether the debtor acquired
20 rights in the property transferred within the
21 meaning of Section 547(e)(3) prior to the end of
22 the 2007 tax year, which occurred on December 31,
23 2007. What rights did the debtor acquire prior
24 to 12-31-07?

25 It seems to me that the issue of

1 perfection of a security interest under
2 applicable New York law is a very different
3 question from transfer as defined in
4 Section 101.54 of the Code, and is limited for
5 purposes of a preference analysis by Section
6 547(e)(3).

7 A transfer under 101.54 is very broadly
8 defined. A transfer under 547(e)(3) is quite a
9 bit narrower.

10 I hope those comments are helpful in
11 telling you the things I'm concerned about and in
12 telling you the things that I'm, frankly, not
13 very concerned about.

14 So, with that, Mr. Hall.

15 MR. HALL: That is helpful, your Honor.
16 Good morning, Thomas Hall on behalf of -- from
17 Chadborne & Parke on behalf of Citicorp.

18 I think, your Honor, that the starting
19 point in my analysis is choice of law, state
20 versus federal, because I do think that the
21 committee's briefing sows some confusion on the
22 issue.

23 The initial question, your Honor, is a
24 federal law question, when was the transfer made
25 and we turn to 547(e)(3) for the answer to that.

1 It's when the debtor has acquired rights in the
2 property transferred, and to be sure that is
3 federal law question and the committee seems to
4 want to stop there and insist in its final
5 briefing that we're talking solely about federal
6 law not state law.

7 But you have to take it a level further
8 because the answer -- to answer the question of
9 when the debtor has acquired rights, you need to
10 go -- you need to go to state law. And how do we
11 know that? We know that from several 11th
12 Circuit cases, In Re: Thomas, In Re: Bracewell,
13 In Re: Lewis, which held the nature and
14 existence of the debtor's right to property is
15 determined by looking at state law.

16 There are a couple other 11th Circuit
17 cases in that line, one is the Alvarez case, and
18 the Alvarez case, it didn't address the issue.
19 The Alvarez case seemed to suggest that there was
20 an open question of whether it was state law or
21 federal law, but said in the end, it doesn't make
22 any difference to our analysis.

23 THE COURT: Well, isn't there one
24 question, and I apologize for interrupting you,
25 but isn't there one question beyond that, which

1 is, okay, as a general proposition, a debtor's
2 right in property is determined by looking at
3 state law, but the right to receive a tax refund
4 is purely a creature of the Internal Revenue
5 Code, not a matter of state law, isn't it?

6 Doesn't a right to get a tax refund
7 depend on Title 26, not on state law?

8 MR. HALL: The right to receive a tax
9 refund, indeed, is determined the IRS Code, but I
10 think you would look to state law in this
11 situation, where you are mid year, you're pre the
12 end of the year, we acknowledge we don't have a
13 vested or matured right to the tax refund until
14 the end of the year.

15 But I think the case law points you to
16 state law to decide whether or not a contingent
17 or non-vested right is adequate -- is adequate to
18 give you a right under state law and thereby,
19 satisfy 547(e)(2). I mean, they're not divorced
20 from each other, your Honor.

21 THE COURT: But until the end of a tax
22 year, how do you know, and isn't the end of a tax
23 year a condition precedent to determining the
24 right to a refund?

25 MR. HALL: Well ---

1 THE COURT: Because all of the -- all
2 of the losses that we're talking about were 2007
3 losses to be set off, and successfully so by the
4 debtors, and I think we've all been happy by
5 their work in doing so, to set off against the
6 income realized in 2005 and 6.

7 But don't you have to get to the end of
8 the tax year for that right actually to come into
9 being, rather than ratably during the course of
10 the year or as losses are realized and, frankly,
11 I'm mystified by what GAAP has to do with any of
12 that because it seems to me this is a tax
13 accounting question, not a GAAP question?

14 MR. HALL: I agree with that, your
15 Honor. I think the answer is that the right
16 to -- the right to a tax refund, that is the
17 right to receive the tax refund does not arise
18 until January 31, but that's ---

19 THE COURT: December 31.

20 MR. HALL: Well, January 1st --

21 THE COURT: January 1st, fair enough.

22 MR. HALL: -- 12:01 a.m., but that does
23 not speak to 547, which talks about rights in. I
24 think rights in is something that can be more
25 contingent, non-vested than rights to.

1 So if you look at the IRS Code, yes,
2 when are you entitled to a tax refund, the answer
3 there is 12:01 a.m. on January 1 if you've
4 satisfied all the requirements.

5 But if you look at both New York state
6 and federal law, whether it's Siegel v. Rochelle
7 or In Re: Matthews, they clearly recognize that a
8 taxpayer has rights in a tax refund mid year,
9 provided that at that point in time the
10 requirements have been met.

11 Now, of course, those cases recognize,
12 and we recognize, that it's conceivable that
13 right could evaporate as the year progresses, if
14 the losses are set off, and the like, but that
15 does not at all undermine the fact that once the
16 requirements are met mid year, the taxpayer has
17 rights in that tax refund and New York state law
18 is consistent with that, your Honor.

19 New York state law says you can have
20 rights in a contingent property right, that was
21 the New York Court of Appeals in Cole v. Seavy
22 (phonetic). There was a contingent interest in
23 a -- well, a contingent interest in her
24 grandfather's estate, contingent upon her
25 outliving the grandfather, and the Court there

1 found that to be a right -- a property right in
2 the estate, even though it had not matured, even
3 though she did not yet have rights to the
4 proceeds from the estate, the high Court of
5 New York recognized that she had rights in that
6 estate, even though they were contingent.

7 Likewise, Comment 6 of the New York UCC
8 recognizes that a person can have limited rights
9 that constitute an interest in property.

10 Siegel v. Rochelle and In Re: Matthews,
11 your Honor, recognize that property interests
12 exist in a tax refund mid year, even though the
13 right to the tax refund is not yet fully
14 realized.

15 So I do think, your Honor, as a
16 matter -- on a choice of law analysis, you do
17 have to look at both state and federal law to
18 determine the nature of the interest that the
19 debtor has.

20 The committee -- if I can just respond
21 to three main points in their briefing? One is
22 they suggest that the U.S. Supreme Court's
23 decision in Siegel is no longer good law. I
24 think if you look at that -- and they rely on the
25 Bracewell case that seems to undermine a part of

1 Siegel, but we deal with that in our brief.

2 I think the high points are -- the
3 Bracewell discussion of Siegel has nothing to do
4 with its holding. It is in the aspect of the
5 decision where the majority is engaged in some
6 legal jousting with the descents. So certainly
7 it's dicta, certainly it has nothing to do or is
8 not dispositive of the case.

9 Secondly, this is probably the most
10 important point, the facts in Bracewell were
11 clearly distinguishable from the facts at hand.
12 In Bracewell the law that allowed for the federal
13 subsidiary, it wasn't a tax payment case, a
14 refund case, it was a federal subsidiary case,
15 came into effect two years after the fact, two
16 years after the petition date. Clearly no
17 property interest existed because the law did not
18 exist that would allow any property interest to
19 attach prepetition.

20 Lastly on that point, your Honor, I
21 think Siegel really has been routinely followed
22 in this circuit. I can point to the 11th Circuit
23 decision in Witco, a 2004 case; the Middle
24 District of Florida's decision in Matthews, In
25 Re: Matthews; and your Honor's decision in In Re:

1 Taylor, all of which cited Siegel approvingly and
2 all of which specifically noted the holding of
3 Siegel, to the effect that a property interest
4 can attach to a tax refund mid year before it
5 matures at the end of the year.

6 The second point that the committee
7 makes that I'd like to address is they -- in
8 their final brief, they cite to some, what I'll
9 call relation back cases. They cite the Redmond
10 case out of the District of Kansas, and there the
11 issue was when a judgment lien attached for
12 preference purposes.

13 State law there said that the judgment
14 lien -- the rights in the judgment lien attached
15 obviously when the judgment is -- is docketed,
16 but Kansas had a relation back provision saying
17 we'll bring perfection back four months.

18 The Federal Court there refused to
19 recognize that relation back period for two
20 reasons, one is it had nothing to do with when
21 rights in the judgment lien arose, state law
22 acknowledged that those rights occurred when the
23 judgment was docketed, and the Court was not
24 inclined to artificially go back four months.

25 Secondly, it was inconsistent with

1 547(e)(1), which had a ten-day relation back
2 period from the date of perfection and the Court
3 found that we'll follow the ten-day rule, but not
4 the state four month rule, which was inconsistent
5 with federal law.

6 Clearly, your Honor, if you're in a
7 situation where state law that you have to go to
8 is inconsistent with controlling federal
9 principles, federal law will govern, but that's
10 certainly not the situation here.

11 I think New York state law, which
12 allows for rights to attach to contingent
13 interests, as well as federal law, are entirely
14 harmonious.

15 The last point I'd like to address that
16 the committee raises is the standard they try to
17 apply. They look at 547(e)(3) and want to ignore
18 the language. It talks about rights in property.
19 They seem to suggest the standard to be applied
20 there is whether the debtor is -- whether the
21 property became estate property and when that
22 happened. That's not the standard under
23 547(e)(3).

24 The issue before your Honor in this
25 case is not when the tax refund became property

1 of the estate, it is when under 547(e)(3) the
2 debtor obtained rights in that property and we
3 submit that both, as a matter of state law and
4 federal law, that was well before the preference
5 period.

6 Unless your Honor has any questions, I
7 will reserve some time to respond to committee's
8 counsel.

9 THE COURT: Thank you, Mr. Hall.

10 Before you come up, Mr. Robbins, I
11 wondered if Mr. Nye, since you have a me, too, on
12 file, and I suspect that Mr. Robbins' comments
13 will want to address any differences or
14 additional arguments that you have, I'll invite
15 you to be heard now.

16 MR. NYE: Thank you, your Honor.

17 Yes, we did join in the motion and just
18 for the record, to the extent that the motion is
19 granted in favor of Citi, we would, as noted in
20 the motion, we'd like it granted for our benefit,
21 as well.

22 In our reply, we've noted that there
23 are -- on the cross motion that there is a ---

24 THE COURT: There are issues of fact,
25 right.

1 MR. NYE: I believe the committee has
2 acknowledged that in their reply.

3 THE COURT: I interpreted the
4 committee's final pleading as saying that they
5 were really -- that all they sought in connection
6 with their summary judgment motion was a
7 determination that the transfer occurred on
8 January 1, 2008, rather than on August 1, 2007,
9 but that they were not seeking summary judgment
10 on the preference ---

11 MR. NYE: That's how I read it, as
12 well, your Honor. So with that understood, I
13 have nothing further to add.

14 THE COURT: Very good. Thank you.

15 MR. ROBBINS: Good morning, your Honor.

16 THE COURT: Good morning, Mr. Robbins.

17 MR. ROBBINS: Let me just say for the
18 record that Mr. Nye's understanding of our reply
19 brief is correct and, therefore, the relief that
20 we -- the ruling that we seek is limited to the
21 way the Court just described our position.

22 It seems to me, your Honor, that the
23 legal issue presented to the Court turns on the
24 plain meaning of two federal statutes and nothing
25 else.

1 I'm sorry, is that ---

2 THE COURT: If there's a fire alarm
3 going off in your office, folks, if you would put
4 your phone on mute, that would be nice. If there
5 is a fire alarm going off in the courtroom, I
6 think we would have heard it somewhat louder,
7 Mr. Robbins.

8 MR. ROBBINS: I think that's probably
9 right.

10 As I say, I think this case, the
11 question before the Court is controlled by the
12 plain language of two statutes and it sounds like
13 we have common ground on the first of those
14 statutes, and that's 547(e)(3).

15 And as the Court's questions at the
16 outset of the argument suggested, the question
17 framed by 547(e)(3) is for transfer purposes,
18 when did the debtor have rights in the
19 collateral?

20 Where we -- where the waters part,
21 Judge, is on the second question, and that is,
22 when exactly -- how exactly do you decide when a
23 debtor has rights in a federal tax refund and
24 there, I think the answer is provided by the
25 Internal Revenue Code and that is the second

1 statute whose plain meaning decides the question
2 presented.

3 The Internal Revenue Code, I think,
4 makes as clear as the Internal Revenue Code ever
5 makes clear, that there is no right to a net
6 operating loss carry back until a year, taxable
7 year has concluded. The language, I think, says
8 about as clearly as it could, that a quote, "net
9 operating loss for any taxable year, shall be a
10 net operating loss carry back to each of the two
11 years preceding taxable year of such loss."

12 The implementing regulation, which is
13 26 CFR 1.172-2 ---

14 THE COURT: 1.7 ---

15 MR. ROBBINS: 1.172-2, reinforces this
16 point by stating in plain terms, a net operating
17 loss is sustained by a corporation in any taxable
18 year if, and to the extent that, for such year
19 there is in excess of deductions allowed by
20 Chapter 1 of the Code over gross income computed
21 thereunder.

22 Again, both the Code and the
23 implementing regulation make clear that the
24 substantive right is tied to the taxable year and
25 not a minute earlier.

1 Giving these statutes and regulations
2 their plain meaning accords not only with the
3 majority of the case law and -- accords with the
4 majority of the case law and in our view, with
5 common sense. We cited a number of cases, one of
6 which I think is really on all fours, it's the
7 TMC Electronics case, holding that quote,
8 "neither the amount, nor even the existence of a
9 tax refund is ascertainable until the end of the
10 tax year. Only once the tax year has ended, have
11 all the events determining entitlement to the tax
12 refunds occur and net operating loss is no
13 exception. In any given year, a company may
14 swing from a net profit to a net loss, from
15 pillar to post until the end of the tax year."

16 Now ---

17 THE COURT: Which do we have here,
18 pillar or post?

19 MR. ROBBINS: Well, I think we're
20 mainly, as the -- as the trial, I think, in July
21 will suggest, we are mainly at the post.

22 THE COURT: Or at the post hole, I'm
23 not sure.

24 MR. ROBBINS: And what's interesting is
25 that the liens capitalize on that by saying,

1 look, the place was in such -- you know, that
2 TOUSA was in such desperate straits by July, that
3 nothing for the rest of the year could possibly
4 have put them back into the black, so, therefore,
5 we ought to be able to sort of take the snapshot
6 on July 31st and say the game is over for
7 purposes of a net operating loss carry back.

8 Couple of things to be said about that.

9 First of all ---

10 THE COURT: Is that an admission for
11 purposes of other litigation on the fraudulent
12 transfers, Mr. Robbins?

13 MR. ROBBINS: Well, we may remind them
14 of that argument at some point, but it cannot be
15 first and foremost that the disposition of the
16 legal issue can turn on the special facts of this
17 case. In other words, it cannot be that you can
18 have a mid year right to a loss carry back
19 because your particular case has, you know, such
20 a deteriorating economic circumstance for the
21 company. There must be a principle here, a rule
22 of interpretation that is true for TOUSA as it
23 is, let's say, for SHMOUSA, which on July 31st,
24 let's suppose, was \$1 in the red, but the next
25 week was \$1 in the black. The same rule applies

1 to the TOUSAs and the SHMOUSAs under this
2 statute. You can't have a special rule just
3 because their circumstances, as we will prove in
4 July, were so dire.

5 The second thing to be said is that the
6 meaning of a federal -- the meaning and
7 application of the federal tax law cannot
8 possibly turn on state law. That would be a
9 remarkable revelation to the Internal Revenue
10 Service, that the taxpayers of the 50 states are
11 entitled to apply and seek refunds at different
12 times during the year because of, you know, the
13 individual variations from state to state. That
14 simply cannot be.

15 This is a question, first and last, of
16 federal law, and as I say, federal law provides
17 the answer.

18 Now, in the face of the plain meaning,
19 it seems to me the liens have made -- defendants,
20 I should say, have made, I thought four
21 arguments, but they gave one up this morning.
22 They've relinquished on the accounting principles
23 argument and I think that was wise, so let me
24 just talk about two others -- three others.

25 One is their Siegel argument, one is

1 their New York law argument, which I think I've
2 already averted to, and one is their argument
3 from public policy. The argument on Siegel, I
4 think, simply is no longer viable in the wake of
5 the Bracewell case. To say that Bracewell, as
6 Mr. Hall did this morning, didn't really affect
7 the core of the Siegel decision, but really dealt
8 with it only -- only dealt with it in a sort of
9 dictum like way, I think doesn't really reckon
10 with what Bracewell said.

11 Bracewell said, look, in essence, the
12 Supreme Court in Siegel was dealing with a pre --
13 a statute that had not yet been enacted and
14 wouldn't be enacted for another 12 years. It was
15 dealing with the previous Bankruptcy Act and the
16 analysis that was central Justice Harlan's
17 opinion for the Court in Siegel, turned entirely
18 on a set of policy judgments that essentially
19 Bracewell said have been overtaken by the plain
20 language of the new Bankruptcy Code.

21 I think it is fair to say that the sort
22 of deeply rooted in the past or sufficiently
23 rooted in the past analysis that Justice Harlan
24 invoked in Siegel, has not survived the enactment
25 of the Bankruptcy Code.

1 THE COURT: I think there's a
2 concession from Citibank that the deeply rooted
3 in the past provision of Section 70(a)(5) is no
4 longer viable.

5 MR. ROBBINS: Yes, but then they say,
6 there are nevertheless at least two legs under
7 the stool remaining. I can't find them. I've
8 read Siegel a raft of times and I don't find
9 anything left standing. It seems to me in the
10 wake of Bracewell, you know, Siegle is a Potemkin
11 village and there's just nothing left.

12 But the one and only thing that the
13 liens say is left from Siegel is the analysis of
14 transferability. They say, well, Siegel also
15 addressed the questions, when is something
16 transferrable, and they tell you in their reply
17 brief that transferability is the question
18 presented.

19 But it isn't, because as Mr. Hall, I
20 think properly recognized this morning,
21 547(e)(3), which I notice is still up on the
22 screen, does not say, as New York law does, but
23 the federal statute says that the transfer is
24 when the debtor has rights in the collateral.

25 Whether and to what extent there can be

1 a transfer may be a nice question of New York
2 law, but it is not a question under Section 547.
3 The question is, first and last, rights in the
4 collateral. That is resolved, I suggest, by the
5 federal tax code.

6 So that leaves public policy, and they
7 make some arguments about why the rule for which
8 we contend is bad policy, and I'm tempted to take
9 another page from Bracewell and paraphrase just
10 slightly. This is from Judge Carnes' opinion,
11 making just two ellipses.

12 This is what Judge Carnes has to say
13 about policy arguments in the context of these --
14 the tax arguments. He says, if, in the face of
15 plain statutory language, an argument runs on
16 about purposes and policies, it is a sure sign
17 that the revision knife is out and an effort is
18 being made to slice and dice clear language to
19 make way for the policy preferences of the
20 advocate.

21 That is, I think, where we find
22 ourselves. My first suggestion is, if Mr. Hall's
23 clients and Mr. Nye's clients and others don't
24 like the policy, that is something they need to
25 take up with Congress. Congress gave us both

1 547(e)(3) and the net operating loss carry back
2 provision and policy preferences are obviously
3 for Congress to resolve, but let's, for
4 argument's sake, take these policy concerns, and
5 there are two that they identified.

6 They first say that there's a bright
7 line test. All you have to do is ask whether on
8 the date a lien attached under state law, there
9 was or wasn't a net operating loss that could be
10 carried back to two prior tax years. I suggest
11 that is not any brighter a line than ours.

12 Ours says you have a net operating
13 carry back or you don't by looking at the end of
14 the year, and I'm not so sure that theirs is such
15 a bright line anyway. How easy is it to tell
16 whether at a moment the lien attaches there are
17 net operating losses. As I said, TOUSA may be an
18 easier case than some, but other cases will be
19 closer calls and dependent on how future events
20 unfold.

21 They also say, well, your rule, our
22 rule, the rule for which we contend and which we
23 think is controlled by the statute, our rule is
24 manipulable by the debtor. For example, they say
25 that a debtor might rush to file a bankruptcy

1 petition on December 30th if it thinks it will
2 have a net loss by midnight December 31st.

3 My reaction, your Honor, is again, if
4 public policy is an appropriate inquiry anyway,
5 which I suggest it isn't, the fact is any legal
6 rule is manipulable by those who are bound and
7 determined to manipulate it.

8 Under defendant's approach, a debtor
9 may file a petition and then -- you know, file a
10 petition and then try to shift its accrued
11 expenses and thus, its net operating loss to the
12 remaining part of the year by, for example, you
13 know, timing the expenses that will drive down
14 the net -- whether there is a net operating loss
15 or not until the time of the year that follows
16 his bankruptcy petition.

17 And now the fact of the matter is, as
18 soon as you set what the rules are, crafty
19 people, aided and abetted by crafty lawyers ---

20 THE COURT: And this case has plenty of
21 them.

22 MR. ROBBINS: Yeah, will doubtlessly
23 find a way to capitalize. You know, there's
24 nothing wrong about that, that's the way the
25 rules work. I'm sure our rule can be

1 manipulated. I'm sure -- I'm quite sure their
2 rule can be manipulated, but in the end, the
3 question of who would be manipulated by whom is
4 the kind of thing for which we elect congressmen
5 and senators. They made this decision, not us.

6 Then I just -- I guess I would say,
7 your Honor, let's step back from what the
8 question really is before the Court this morning.
9 When is there an enforceable right to a tax
10 refund? And, you know, I realize that it's --
11 it's kind of a law school adage that there's no
12 right without a remedy and I think we've learned
13 over the years that sometimes there are rights
14 without remedies, but typically, if there is a
15 right, there is a means of enforcing it.

16 So I ask myself, well, if I had a right
17 to a net operating loss carry back, how would I
18 enforce it? Well, I would enforce it by filing a
19 tax refund, filing for a tax refund and if I
20 didn't get it, I would go to whatever the
21 appropriate court is or administrative body you
22 go to to enforce that right.

23 So I have a question for the first and
24 second liens, and the question is, if you went
25 into court on July 31st or August 1st and you

1 tried to get the government to pay you the net
2 operating loss carry back that you think you have
3 a right to on August 1st, what are the odds that
4 the Department of Treasury would agree?

5 I think the odds are quite low because
6 the tax code says you don't have that right until
7 the year has ended. But in the end, Judge, I
8 know I'm sounding like a broken record, I don't
9 think this is a question that is resolved on
10 public policy grounds.

11 Everybody knows, every first year law
12 student knows that for every public policy and
13 purpose there is an equal and opposite public
14 policy and purpose, and that's all the more
15 reason to stick with the text and the text is
16 clear. The net operating loss -- net operating
17 loss carry back is a loss, quote, "for any
18 taxable year." Until the buzzer sounds at year
19 end, the game is not over.

20 Unless the Court has other questions, I
21 would be happy to yield the floor to Mr. Hall.

22 THE COURT: Very good. Thank you,
23 Mr. Robbins.

24 MR. HALL: Your Honor, a few points in
25 response. As to Mr. Robbins last point about

1 where is -- is the remedy. There's not a fully
2 matured remedy mid year, but there is a more
3 limited remedy, as we set forth in our brief. If
4 someone has -- if an entity has suffered net
5 operating losses mid year, it can -- it can delay
6 or suspend payment of its prior year taxes. So
7 here, TOUSA realizing net operating losses
8 through 2007, had it not paid its 2006 taxes,
9 could have deferred payment of those under the
10 IRS code.

11 THE COURT: But it did pay them.

12 MR. HALL: It did pay them.

13 THE COURT: When did it pay them?

14 MR. HALL: I think it paid them
15 quarterly. It paid them the first and second
16 quarter, I think, and then perhaps didn't pay any
17 after that, but ---

18 THE COURT: First and second quarter of
19 2007 it paid?

20 MR. HALL: I'm sorry, 2007. I don't
21 know when it paid 2006 taxes, your Honor.

22 THE COURT: Well, you were suggesting
23 that if they hadn't paid 2006 taxes and they were
24 suffering an NOL or they were suffering
25 significant losses in 2007, that they could have

1 sought to delay or avoid payment under what
2 section of the Internal Revenue Code is that?

3 MR. HALL: It's in our ---

4 THE COURT: Is it in your brief?

5 MR. HALL: It's in our reply brief,
6 your Honor.

7 THE COURT: Okay. Thank you.

8 MR. HALL: The next point, your Honor,
9 is the TMCi case, which the committee relies on,
10 one, applies California law, which is irrelevant,
11 but two, applies California law, meaning it
12 follows the same analysis that we suggest is the
13 appropriate analysis, which is you start at
14 547(e)(3) and then go to state law.

15 And the Court there was quite clear at
16 Page 559, the present issue, after it discusses
17 some federal principles, it said, the present
18 issue, however, concerns California state law,
19 namely whether the debtor acquired rights in its
20 1998 tax refund pursuant to the California
21 Commercial Code.

22 We submit the same ---

23 THE COURT: Was that to a tax refund
24 arising under federal law?

25 MR. HALL: Yes, I believe so, your

1 Honor.

2 THE COURT: Okay. Okay.

3 MR. HALL: But they went to state law,
4 as we suggest it's appropriate for the Court to
5 do here, but obviously going to New York state
6 law and not California law because New York state
7 law governs the security agreements here.

8 Next, your Honor, Mr. Robbins suggests
9 that the principle here should not turn on the
10 facts of the case. We just disagree with that.
11 I think both Siegel and In Re: Matthews quite
12 clearly say it should turn on the facts of the
13 case and the rights in the tax refund only arise
14 if certain criteria are satisfied mid year.
15 That's very fact specific. Clearly there's no
16 dispute, I don't think, that we satisfied those
17 factual criteria here.

18 Lastly, I believe we may disagree on
19 some of the aspects of Bracewell, but I think the
20 committee agrees that if nothing else, the
21 transferability determination of Siegel was not
22 attacked, was not undermined by Bracewell.

23 In Siegel the Court, the Supreme Court
24 determined that a taxpayer mid year had a right
25 to transfer its rights to the tax refund, even

1 though it hadn't yet matured, and the committee
2 doesn't suggest otherwise. That's still good law
3 and I would ask how a taxpayer can have a right
4 to transfer an interest if it has no rights and
5 if it has no interests.

6 Thank you, your Honor.

7 THE COURT: Thank you, Mr. Hall.

8 MR. ROBBINS: May I have one minute?

9 THE COURT: Certainly.

10 MR. ROBBINS: Mr. Hall is correct, to a
11 limited extent, when he says TMCI Electronics
12 applied California law. It did in passing for
13 certain of the points in the opinion.

14 But in the respect that we are relying
15 on it, which is at 279 bankruptcy B.R. 560, it
16 applies settled federal law and when it says
17 quote, "As a general proposition, neither the
18 amount nor even the existence of a tax refund is
19 ascertainable until the end of the tax year.
20 Only once a tax year has ended have all the
21 events determining entitlement to the tax refund
22 occurred."

23 And then it cites an Eastern District
24 of Pennsylvania federal case, a Bankruptcy Court
25 from the Northern District of Illinois, a

1 Bankruptcy Court from the Southern District of
2 Ohio. It cites no California cases for that
3 proposition, nor is there anything in the opinion
4 that would suggest that the bankruptcy judge in
5 the TMC Electronics case thought that the rights
6 under the Internal Revenue Code would be
7 susceptible to state law determinations.

8 Last point is, I do not believe that
9 the language at the end of Justice Harlan's
10 opinion regarding transferability withstands the
11 analysis in *Bracewell*, but even if it did, it's
12 an answer to the wrong question because under
13 547(e)(3) transferability is not the
14 determinative question.

15 The question is rights in the
16 collateral and if those were the same thing, as
17 Mr. Hall suggests, I don't know why the state of
18 New York would see fit to make the moment of
19 attachment turn on either rights in the
20 collateral or when it could be transferred.

21 Evidently, the New York state
22 legislature thought those were different things.
23 Congress picked one of them, it picked rights in
24 the collateral. It's narrower and it's
25 dispositive.

1 Thank you, your Honor.

2 THE COURT: Thank you. This has been
3 one of those arguments that as a judge you look
4 forward to because the writing is great and the
5 oral arguments are great.

6 I'm going to take the issue under
7 advisement. I want to read some of the cases
8 more thoroughly than I have. You have this
9 morning directed me at the issues that I was
10 concerned about, added some other issues, as
11 well.

12 I will try to get out an order as
13 quickly as I can, recognizing, as I do, that this
14 is an issue that needs to be dealt with before we
15 get to trial in six weeks. I'm not sure whether
16 ruling soon is particularly helpful to the
17 settlement negotiations, which I suspect may be
18 going on, but I'm going to play this one straight
19 and we'll get an order out as quickly as I can.

20 Anything else we need to do here this
21 morning?

22 MR. HALL: Your Honor, in connection
23 with the litigation we've been discussing, the
24 CMO provides for a July 7 pretrial conference or
25 such earlier date as the Court and the parties

1 may agree.

2 We think it would be helpful to have a
3 much -- obviously, we can keep that date for some
4 real detailed discussions, but the parties all
5 thought it would be helpful if well before that
6 date, either today or in the next week or two, we
7 at least had a conference with your Honor to
8 discuss some macro issues concerning the trial
9 and process and things like that.

10 THE COURT: Okay. Is this sort of
11 motion in limine day or just sort of going to be
12 chatting?

13 MR. HALL: It's more how the trial is
14 going to proceed, is your Honor going to take
15 openings, pretrial briefs, direct by way of
16 affidavit. Are we going to keep to that time
17 schedule and if we are, what are we going to do
18 to move things along and get all the evidence
19 before your Honor in the time period we have,
20 things like that.

21 THE COURT: Okay. Mr. Robbins, you
22 think that would be useful and if so, how soon?

23 MR. ROBBINS: It would be useful, I do
24 agree with Mr. Hall. I have a slight scheduling
25 complication, which is that I am actually on

1 trial starting Monday in the bustling metropolis
2 of Las Vegas, but ---

3 THE COURT: There are even more
4 foreclosures there than there are here.

5 MR. ROBBINS: Indeed, but I'm sure ---

6 THE COURT: When are you out of trial?

7 MR. ROBBINS: I think probably by the
8 third week of June, but I think it's important,
9 and I agree with Tom about this, your Honor.
10 Mike can step in for me on this. I think it's
11 valuable to the parties and, you know, we're
12 trying to, I think, reach some consensus among
13 the lawyers, which I think we'll be able to make
14 some progress on, but among the questions are,
15 you know, how long the trial can be.

16 The Court has referred to a two-week
17 trial and we actually believe we can adhere to
18 that and are trying to prune witnesses and think
19 about ways of expediting the presentation of
20 proof, including, as Mr. Hall mentions, through
21 the submission of directs just on paper. You
22 know, questions like whether the Court wishes
23 openings be presented orally or in writing. If
24 so, if orally, you know, do we get the same
25 amount of time and how much time.

1 These are some things that could well,
2 by the way, be done by conference call.

3 THE COURT: Sure.

4 MR. ROBBINS: And to that end, let me
5 say, the trial court in Las Vegas does not start
6 his trial day until 10:30 Pacific time, so I
7 actually have morning -- east coast time mornings
8 available --

9 THE COURT: Okay.

10 MR. ROBBINS: -- to participate. If
11 the Court is willing to do this conference by
12 dial in, I would be pleased to participate on
13 whatever schedule suits the Court and my fellow
14 lawyers.

15 THE COURT: Okay. Mr. Prosser, I note
16 that on June 18th we have a Continuum hearing in
17 the Whitehouse matter. Is that still viable as a
18 dispute?

19 MR. PROSSER: Your Honor, we have
20 mediation on June 1 and I believe that the matter
21 will be resolved. I don't mean to sound overly
22 optimistic.

23 THE COURT: Would you have a problem if
24 I were to push Continuum in the afternoon so we
25 could have a morning hearing here?

1 MR. PROSSER: That would be fine, your
2 Honor.

3 THE COURT: 10:30 Pacific time is what,
4 1:30 our time?

5 MR. ROBBINS: Yes, I would need to
6 be -- assuming we're still on trial, which I
7 dearly hope we're not, so 10:30 here would be
8 7:30 ---

9 THE COURT: Right, but 10:30 there,
10 which is when he starts, is 1:30 in the afternoon
11 here.

12 MR. ROBBINS: Correct, so I would be
13 available through, I would think, you know, 12:30
14 or so east coast time --

15 THE COURT: Okay.

16 MR. ROBBINS: -- on any day the Court
17 wishes.

18 THE COURT: Do any of you have calendar
19 issues and do you want to do this the week of the
20 15th of June or you want to do it sooner?

21 MR. PAPEZ: Your Honor, if I may ---

22 THE COURT: Yes.

23 MR. PAPEZ: Matt Papez for the debtors.

24 THE COURT: Mr. Papez, yes.

25 MR. PAPEZ: And, you know, we are

1 mostly taking a back seat in the upcoming trial,
2 but for purposes of scheduling witnesses, there
3 have been approximately, I think, 20 or so
4 witnesses who live in Florida and a lot of those
5 are debtors' employees. In order for us to
6 accommodate the parties and their requests to
7 call witnesses live, given that a significant
8 portion of the trial is in typical summer
9 vacation season for debtors' employees and for
10 everybody else, as well, we would request that we
11 try to figure out at least some of these issues
12 earlier than the 15th.

13 THE COURT: Okay.

14 MR. PAPEZ: In particular, whether, you
15 know, the Court would accept deposition
16 designations, notwithstanding that some of these
17 parties or people are within the subpoena power
18 of the Court. We see that as a pretty
19 substantial issue, not only in terms of
20 scheduling the witnesses, but also to proceed
21 with the trial as quickly as we can.

22 THE COURT: Fair enough. I've got a
23 TOUSA trial or hearing at ten o'clock on the
24 morning of June 3rd, that's in 08-1111. Does
25 anybody know anything about that adversary?

1 Mr. Bellman, take a look and see what
2 that's about.

3 MS. LABOVITZ: It's probably a customer
4 deposit adversary, your Honor. Unfortunately
5 Ms. Hinrichs is not here.

6 THE COURT: I can do it the morning of
7 June 4th, does that work for people?

8 MR. ROBBINS: I have every reason to
9 believe so, your Honor, for the committee.

10 THE COURT: Okay, and I'll happily do
11 it telephonically. There's no reason why people
12 have to get themselves here to talk about this
13 kind of stuff.

14 MR. ROBBINS: I appreciate that, your
15 Honor.

16 THE COURT: For purposes of your
17 preparation for that conference, I'm inclined to
18 be happy with opening statements that are in
19 writing. I'll want to hear your comments on
20 whether direct testimony should be in writing or
21 live. Certainly it's hard to -- hard to judge
22 the credibility of a witness whose testimony is
23 presented by his lawyers.

24 I have read many articulate affidavits
25 given by witnesses that did not appear to have

1 much relation to what the witness could
2 subsequently articulate.

3 So you all chew on that one, but
4 opening statements, I expect that you're going to
5 be as lucid and articulate in those if they're in
6 writing as if they're oral and I promise I'll
7 read them.

8 How about 9:30 on Thursday, June 4th?

9 MR. HALL: That's fine, your Honor.

10 THE COURT: Mr. Nye.

11 MR. NYE: Do you have a preference, I
12 think it might help us in getting ready for the
13 June 4th conference, in terms of pretrial
14 submissions other than openings? Are you -- and
15 on the post trial end of it, are you looking for
16 proposed findings of fact, typically and
17 conclusions of law?

18 THE COURT: I think in a case like this
19 I will be looking for proposed findings and
20 conclusions, which is, of course, going to
21 require that you all have access to the -- to the
22 transcripts and I think you need collectively to
23 figure out with the court reporter -- court
24 reporter company how quickly you can get those.

25 In terms of other pretrial submissions,

1 other than -- well, I certainly would expect to
2 read before trial the stuff as to which I
3 entered a calendaring order yesterday.

4 What else did you have in mind,
5 Mr. Nye?

6 MR. NYE: Some judges ask for proposed
7 findings before the trial. You're looking at
8 post trial?

9 THE COURT: I think I'm looking at it
10 post trial. I would expect that you would try to
11 articulate in your openings what you intend to
12 prove and maybe, to some extent, how you intend
13 to prove it, but please don't feel the need to
14 give me War and Peace.

15 As I said on the first hearing of this
16 case, I value, above all other attributes,
17 courtesy, clarity and brevity. So I commend all
18 three of those to you and courtesy has obviously
19 been no problem in this case. I am very pleased
20 with how it's proceeded. The clarity has been
21 quite remarkable and I will be enthusiastic about
22 brevity.

23 MR. NYE: Along those lines, I think
24 most counsel in this case have assumed that we
25 would be proceeding with either deposition

1 excerpts or affidavits or some sort of written
2 submission on direct because some of the people
3 who have appeared in front of you say that often
4 that is the way you conduct the trial.

5 I think the concern that Mr. Robbins
6 raised about timing, how much time there will be
7 for the trial, I think that that decision may
8 impact significantly the timing.

9 THE COURT: Well, I'd like you to think
10 about whether, for witnesses who are fact
11 witnesses, rather than expert witnesses or
12 opinion witnesses, whether you believe, having
13 taken the depositions presumably, that either
14 deposition excerpts or affidavits are
15 satisfactory to both sides, and it may be that
16 you come up with a list of witnesses that one
17 side or the other wants me to -- wants me to see
18 live or in person for the whole thing and I'm not
19 going to tell you how I want to do that until
20 you've told me what you have in mind.

21 You know what I mean about the value
22 of -- you want me to assess the candor and
23 demeanor of the witness. Some witnesses can't
24 articulate the facts nearly as well the lawyers
25 can write it down and so you all need to make

1 value decisions on that.

2 I suppose that I wouldn't be adverse to
3 having both sides have veto power over whether
4 you will allow somebody who's presumably a
5 witness for the other side to testify in writing
6 on direct.

7 But by saying that, I'm not indicating
8 to you that I have a preference one way or the
9 other, you all need to chew on it because you've
10 got by far the bigger burden than I do.

11 MS. MILLER: Your Honor, Atara Miller
12 from Millbank Tweed on behalf of the Senior
13 Transeastern Lenders.

14 THE COURT: Yes, good morning.

15 MS. MILLER: Good morning. One thing
16 that I want to note in this regard is that as the
17 complaint is currently alleged against our
18 clients, the committee is alleging that we
19 fraudulently received -- that we are subsequent
20 transferees of the fraudulent conveyance and we,
21 therefore, believe that we have the right to
22 advance a good faith defense.

23 In that connection it is our current
24 intention to submit testimony from each or as
25 many of the current holders as we possibly can.

1 So just in terms of timing and in terms of
2 whether direct should be in the form of affidavit
3 or live, you know, we're talking about probably
4 around 20 additional witnesses in that regard.

5 THE COURT: Have those witnesses been
6 identified?

7 MS. MILLER: They have been identified
8 in our interrogatory responses and they will be
9 identified on witness lists when we exchange
10 them.

11 THE COURT: Okay. Well, that's a
12 factor to take into account. It certainly is my
13 goal to finish this case in two weeks. You know
14 I live real near the courthouse.

15 MR. NYE: We will be, too.

16 THE COURT: Anything else that would be
17 helpful or useful to do this morning?

18 MR. PAPEZ: Your Honor, just one more
19 point.

20 THE COURT: Yes, Mr. Papez.

21 MR. PAPEZ: This is in connection with
22 a motion to strike that the debtors had filed
23 long ago. Let me just give you a little bit of
24 background. The Senior Transeastern Lenders --
25 and I'm not here to argue that motion today, I

1 just basically want to put it on your radar
2 screen.

3 The Senior Transeastern lenders filed a
4 third-party complaint against the debtors in
5 February of this year. In response to that, we
6 filed a motion to strike. We engaged in a lot of
7 good faith negotiations with the Senior
8 Transeastern Lenders to try to resolve that
9 motion to strike. We have not been able to do
10 so.

11 It was originally scheduled to be heard
12 here today. Due to an accommodation that we
13 absolutely had to grant to, and we're happy to do
14 so, to grant to the Senior Transeastern Lenders
15 because their lead trial lawyer had a personal
16 family issue to attend to, that motion to strike
17 is now, I think, going to be heard on July 2nd,
18 which is very late in the process, but
19 unfortunately it's the only date that we could
20 sort of land on.

21 THE COURT: How about June 9th? I've
22 got TOUSA all afternoon.

23 MR. PAPEZ: It's my understanding that,
24 again, the counsel for the Senior Transeastern
25 Lenders is not available that day.

1 THE COURT: When is counsel for the
2 Senior Transeastern Lenders available, ma'am?

3 MS. MILLER: I believe that the
4 earliest date -- we went over the TOUSA hearing
5 dates and that the earlier date is the July 2nd
6 date.

7 THE COURT: Well, I want to know when
8 he is first available.

9 MS. MILLER: He is first available the
10 week of June 15th.

11 THE COURT: Okay. June 18th at 9:30.

12 Mr. Prosser, if this is -- how long do
13 you expect that hearing will be?

14 MR. PAPEZ: I think it would be at most
15 not even an hour, your Honor, and it could be
16 even something that we do telephonically. I
17 don't want to commit to that yet --

18 THE COURT: Okay.

19 MR. PAPEZ: -- but let me think about
20 that.

21 THE COURT: Okay. Well, let's do it at
22 9:30 on June 18th, if you'd make sure that's on,
23 Ms. Romero, and that means, Mr. Prosser, that if
24 Whitehouse is still alive in Continuum, that we
25 might start a little late.

1 MR. PROSSER: That's fine, your Honor.

2 THE COURT: Thanks.

3 MS. MILLER: Thank you, your Honor.

4 THE COURT: Okay. Thank you, because I
5 agree, pushing it off into July is going to
6 make -- there will be a lot of unnecessary angst.

7 MR. PAPEZ: Thank you, your Honor.

8 THE COURT: I'm doing my best to create
9 as much angst as I can, but to minimize the
10 inconvenience.

11 Anything else we need to do? Okay.

12 Then we're adjourned. Thanks.

13 (Thereupon, the hearing was concluded.)

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CERTIFICATION

STATE OF FLORIDA:
COUNTY OF DADE:

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

WITNESS my hand this 29th day of
May, 2009.

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

