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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Chapter 11
. Case No. 23-10935 (KBO)
VIEWRAY, INC., et al., .
. (Jointly Administered)
. .
. Courtroom No. 3
. 824 Market Street
Debtors. . Wilmington, Delaware 19801
. .
. Monday, August 21, 2023
. 1:08 p.m.

TRANSCRIPT OF ZOOM HEARING
BEFORE THE HONORABLE KAREN B. OWENS
UNITED STATES BANKRUPTCY JUDGE

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1 (Proceedings commenced at 1:08 p.m.)

2 THE COURT: Good afternoon. Nice to see everyone.
3 Please be seated.

4 Mr. Bambrick, nice to see you.

5 MR. BAMBRICK: Good afternoon, Your Honor. Nice
6 to see you as well. For the record, Ian Bambrick from Faegre
7 Drinker Biddle & Reath on behalf of the debtors, ViewRay,
8 Inc. and ViewRay Technologies, Inc. With me today are my
9 colleagues Patrick Jackson and Frank Velocci. And, on behalf
10 of the company, we have our declarant, Paul Ziegler,
11 ViewRay's president and chief executive officer, who is with
12 us via Zoom. And in the courtroom we have Mr. Perry
13 Mandarino from B. Riley, the debtors' investment banker, and
14 Bob Butler from BRG, the debtors' financial adviser.

15 First, Your Honor, we would like to thank you for
16 allowing us to adjourn the hearing from August 11th to today.
17 Although we were not able to fully resolve every item that
18 appears on today's agenda, we were able to resolve a
19 significant number, as the most recent amended agenda shows.

20 As to that point, Your Honor, the remaining open
21 items are the debtors' rejection procedures motion; the
22 debtors' original cash collateral motion, as supplemented by
23 the supplemental DIP motion; and the debtors' bidding
24 procedures and sale motion. I will be handling the first and
25 last of these, while Mr. Jackson will handle the DIP and cash

1 collateral motions.

2 Your Honor, the debtors would prefer to start with
3 the DIP and cash collateral motion, if the Court is amenable;
4 otherwise, we can work through the agenda in the order that's
5 naturally there.

6 THE COURT: You can proceed as you see fit.

7 MR. BAMBRICK: Thank you, Your Honor. With that,
8 I will cede the podium to Mr. Jackson.

9 MR. JACKSON: Good afternoon, Your Honor.

10 THE COURT: Mr. Jackson, you're looking a little
11 tan. Have you gone on vacation recently?

12 (Laughter)

13 MR. JACKSON: How did you know? I did the best I
14 could, yes. It's nice to see you in person, as it may
15 actually be my first time back in person since the lockdown,
16 which is kind of crazy, but it's wonderful to see you.
17 Patrick Jackson from Faegre Drinker Biddle & Reath, for the
18 record.

19 For the debtors' supplemental DIP motion, if it's
20 all the same for Your Honor, you know, unless you have any
21 questions that you'd like me to address before we get into
22 the record, I'd propose to just go ahead and lay down the
23 record, which will include moving a portion of Mr. Ziegler's
24 first day declaration, and then moving as the direct for Mr.
25 Mandarino his declaration. And I personally don't have any

1 opening remarks, I don't know if the committee had any, but I
2 don't. So we'd be happy to just move right into the
3 evidence, if it's all the same for Your Honor.

4 THE COURT: Okay. Should I yield to the committee
5 and you can tell me how you'd like to proceed.

6 MR. JACKSON: I hate to put you on the --

7 MR. BOTTER: No, that's okay.

8 MR. JACKSON: -- spot, but --

9 MR. BOTTER: Good afternoon, Your Honor, David
10 Botter, Lisa Schweitzer, and Brad Lenox from Cleary Gottlieb
11 Steen & Hamilton on behalf -- or proposed counsel for the
12 committee. I'm very happy to be appearing in front of Your
13 Honor today. I was remarking on the way down that I have not
14 appeared in a Delaware court since pre-pandemic, so this is
15 actually really a pleasant occurrence and we're happy to be
16 before Your Honor.

17 Your Honor, we're happy to be efficient here and
18 go directly to evidence and then do argument afterwards, if
19 that makes sense for Your Honor.

20 THE COURT: That would be fine with me. Thank
21 you.

22 MR. BOTTER: Thank you, Your Honor.

23 THE COURT: And nice to see you in the courtroom.

24 MR. BOTTER: Nice to see you as well.

25 MR. JACKSON: Thank you, Your Honor. And actually

1 I did have a housekeeping matter, which I forgot. We just
2 this morning filed a motion for leave for the excuse of our
3 late reply in support of the motion that we filed on Friday.
4 If Your Honor has any questions about that, I'm happy to
5 address that, but I did want to note that that was filed with
6 the second amended agenda today.

7 As far as our record, like I said, it will consist
8 of the first day declaration of Paul Ziegler; we included it
9 in the second amended agenda. Just for reference, it's
10 Docket Item 3. And, by agreement with the committee, we're
11 relying on and we're asking for paragraphs 1 through 52 of
12 Mr. Ziegler's first day declaration to come in.

13 And I don't believe the committee intends to cross
14 Mr. Ziegler. He is available on the Zoom, should Your Honor
15 have any questions or should anyone else wish to cross him,
16 if that's all right.

17 THE COURT: Okay.

18 MR. JACKSON: But, other than that, we would move
19 those portions of his first day declaration into the record.

20 THE COURT: All right, thank you.

21 Does anyone object to the admission of
22 Mr. Ziegler's declaration, paragraphs 1 through 52?

23 MR. BOTTER: No objection, Your Honor.

24 THE COURT: Okay. Hearing no objection, it's
25 admitted.

1 (Declaration of Paul Ziegler received in evidence)

2 MR. JACKSON: Thank you, Your Honor.

3 Turning next to Mr. Mandarino's declaration that
4 was filed in support of the motion, we would propose -- in
5 lieu of putting Mr. Mandarino on for direct, we'd propose to
6 move the declaration into evidence as his direct. And we do
7 understand that the committee does intend to cross-examine
8 Mr. Mandarino.

9 As another housekeeping matter, actually, my
10 colleague Frank Velocci will be handling the witness for us.
11 We filed a *pro hac vice* motion a short while ago, Your Honor
12 probably hasn't seen it yet, but I would orally move his
13 admission *pro hac* and then there are papers on file. He's
14 admitted in New Jersey, among other jurisdictions.

15 THE COURT: That's fine.

16 MR. JACKSON: Thank you, Your Honor.

17 THE COURT: Well, let me ask, does anyone object
18 to the admission of Mr. Mandarino's declaration into
19 evidence?

20 MS. SCHWEITZER: No objection, Your Honor. We
21 would like to cross-examine him, but we're happy to put the
22 evidence in first.

23 THE COURT: Okay, that would be fine. All right,
24 hearing no objection, his declaration is moved into evidence.

25 (Declaration of Perry M. Mandarino received in

1 evidence)

2 MR. JACKSON: Thank you, Your Honor. And I guess
3 with that, since they do intend to cross him, we'll go ahead
4 and call Perry Mandarino to the stand for cross.

5 MS. SCHWEITZER: Do you want to put your documents
6 in? Either way is fine.

7 MR. JACKSON: Yeah, actually, that's a fair point.
8 As far as documents, I don't think we have documentary
9 evidence per se. The record for our purposes is what has
10 been filed with the Court and is what appears under -- as
11 supporting documents under this agenda item. So I can, you
12 know, march through the docket references and ask I guess
13 that you take judicial notice. It's essentially the
14 operative documents --

15 THE COURT: I don't think that's necessary.

16 MR. JACKSON: Okay. But, yeah, we don't have
17 any -- at this time, anyway, we don't anticipate any
18 additional documentary evidence.

19 THE COURT: Okay. Thank you very much.

20 All right, Mr. Mandarino, can you please approach
21 and stand at the witness box to be sworn in?

22 PERRY M. MANDARINO, WITNESS, AFFIRMED

23 THE CLERK: Please state and spell your last name
24 for the record.

25 THE WITNESS: Perry Mandarino, M-a-n-d-a-r-i-n-o.

1 THE CLERK: Thank you.

2 THE COURT: Good afternoon. Thank you for making
3 yourself available.

4 THE WITNESS: Good afternoon, Your Honor.

5 MS. SCHWEITZER: Good afternoon, Your Honor, Lisa
6 Schweitzer of Cleary Gottlieb, the proposed counsel for the
7 Official Committee of Unsecured Creditors, and I just have a
8 few questions for Mr. Mandarino this afternoon.

9 CROSS-EXAMINATION

10 BY MS. SCHWEITZER:

11 Q Good afternoon, Mr. Mandarino.

12 A Good afternoon.

13 Q Just to start, it's your view that the DIP financing
14 would allow the debtors to continue to run their business as
15 a going concern throughout the sale process; is that correct?

16 A Yes.

17 Q And it's also your view that the DIP financing is going
18 to benefit stakeholders other than the DIP lenders in this
19 case; is that correct?

20 A Yes.

21 Q For example, you believe the DIP financing is going to
22 give customers confidence that they need to continue doing
23 business during the sale process; is that correct?

24 A It is.

25 Q But, in reality, there's no assurance that the DIP

1 lenders are going to lend any money under the DIP, is there?

2 A I believe there is.

3 Q Well, the DIP financing contemplates that there will be
4 an initial DIP loan of \$2 million that will be financed
5 during the week ending September 10th; is that right?

6 A That's right.

7 Q But before the occurrence of that time, under the DIP,
8 one of the conditions precedent to funding that loan is that
9 the debtors have to deliver to the DIP agent and the
10 prepetition agent a fully-executed stalking horse purchase
11 agreement; isn't that right?

12 A That is in the DIP term sheet, yes.

13 Q And it's in the DIP term sheet as a condition precedent
14 to the DIP lenders having to make any lender under the
15 facility; isn't that right?

16 A Right.

17 Q And, in addition to it being a condition precedent
18 under the DIP loan, there's also an event of default under
19 the loan if that stalking horse agreement isn't delivered to
20 the debtors on or before August 25th; is that right?

21 A There is a -- if the DIP is approved, then it would be
22 a default, yes.

23 Q Yeah, one of the events of default is the failure to
24 deliver the stalking horse agreement before August 25th.

25 That's right?

1 A That's right.

2 Q And so, if no stalking horse agreement is delivered to
3 the debtors by this Friday, then an event of default can be
4 called and no lending occurs under the DIP loan; is that
5 right?

6 A Not necessarily.

7 Q If they -- you're saying it's not possible that when no
8 event of default -- that there's no stalking horse agreement
9 is delivered, that it's not possible they're just going to
10 call an event of default and not lend?

11 A Well, I took your question as if it was an absolute, it
12 is not an absolute. I guess it's possible, but I believe
13 that to the -- if we don't have a stalking horse agreement
14 signed by Friday, this Friday, which I'm not sure if we will,
15 that the lenders, the prepetition, slash, DIP -- proposed DIP
16 lenders, who have been incredibly reasonable throughout this
17 whole process since I've been involved, will understand and
18 will waive that event of default, and that's based on a few
19 things, including my discussions with them as late as two
20 hours ago, as well as the proposed -- as well as the actual
21 status of the sale process, including one buyer which has
22 nine people right now in the company's Mountain View,
23 California location visiting right now, literally, as we
24 speak, they're in the vault. They also have 12 other people
25 participating in diligence meetings all week via Zoom or

1 other electronic capabilities.

2 And that's only one of about six different
3 potential buyers that are involved right now -- there's
4 actually nine, but I view the real universe as six. And I do
5 not believe that the prepetition lenders, who are also the
6 proposed DIP lenders, will act in a manner which is
7 inconsistent to their own best interests, most importantly,
8 but also to the debtors.

9 Q Well, I appreciate that long answer. From now on,
10 we'll stick to answering the questions that are asked, I
11 would appreciate. But to go back to the question that was
12 asked is that it is an event of default that they're able to
13 call on Friday if no stalking horse agreement is delivered to
14 them; is that correct?

15 A I'm sorry, and I believe I said yes at the beginning
16 and then I expanded.

17 Q Okay, thank you.

18 And then, even having all the information that you just
19 explained to them -- explained to the Court today, the DIP
20 lenders did not today agree to extend that deadline or remove
21 that condition precedent; is that correct?

22 A Yes.

23 Q And it's in their sole discretion on Friday whether
24 they want to call the event of default; is that correct?

25 A I think that --

1 Q Let me rephrase that.

2 A Yeah, please.

3 Q The condition precedent is an event of default that
4 they're able to call in their sole discretion, there's no
5 limitation on their discretion in the document on the right
6 to call the event of default; is that correct?

7 A Well, they have the discretion to not call it also.

8 Q Right, and that's completely in their sole discretion
9 to make that decision; that's correct, under the contract?

10 A Yeah, I don't want to make a legal conclusion on a
11 contract, but from a business perspective that's how I'd read
12 it, that they have a choice to declare the event of default
13 or not.

14 Q And in fact the loan agreement itself gives them
15 additional discretion, putting aside what they might want to
16 do or what their business judgment would tell them, just
17 talking about the words of the contract, that under the words
18 of the contract the lenders also have additional discretion
19 around the stalking horse in that the stalking horse
20 requirement either has to deliver them a stalking horse
21 agreement that both pays them off and is acceptable to them
22 in their reasonable discretion, or otherwise is acceptable to
23 them in their sole discretion; is that correct?

24 A When you say the loan agreement, there isn't a loan
25 agreement, you mean the term sheet; correct?

1 Q Well, yes, the term sheet, the terms of the loan --

2 A Sure.

3 Q -- the terms of the loan that they're lending under.

4 A Yeah, the DIP lender for sure has its rights, which are
5 clearly articulated in the agreement, so I would say yes, and
6 this is a process which is a little different. To explain
7 why that discretion exists, I think it's important --

8 MS. SCHWEITZER: Your Honor, would it be possible
9 for him to do that on redirect and answer the questions on
10 direct?

11 THE COURT: Yes. You can explain on redirect with
12 the help of your counsel.

13 THE WITNESS: Thank you.

14 BY MS. SCHWEITZER:

15 Q And I want to focus on another point, which is a more
16 technical point, but with respect to getting to the closing
17 of a sale under the proposed loan, is it correct that the DIP
18 loan contains an event of default if the order approving the
19 363 sale is not entered by September 27th?

20 A If the -- I believe September 27th is the correct date,
21 yes.

22 Q And the debtors today -- or over the weekend filed
23 bidding procedures that proposed the hearing on the sale
24 agreement won't occur until September 28th; is that correct?

25 A I didn't see that.

1 Q Okay.

2 A I didn't see what was filed this morning, I'm sorry
3 about that.

4 Q We'll address it in the record then whether that's an
5 event of default also that is outstanding.

6 The DIP loan agreement also requires the debtors to
7 pledge avoidance actions and their proceeds; is that correct?

8 A Yes.

9 Q And it's also true that there's a waiver of the
10 debtors' right to surcharge the lenders to preserve the value
11 of their collateral under 506, and that's -- the obtaining of
12 that is a condition precedent to making a loan; is that
13 correct?

14 A Under 506(c), yes.

15 Q Correct. And it's also a condition that the parties'
16 right to require the lenders to marshal assets has to be
17 waived as a condition precedent to making loans; is that
18 correct?

19 A Is that the 552 argument?

20 Q Right, the waiver of marshaling.

21 A Yes.

22 Q Yes.

23 A Yes.

24 Q So, with those waivers, the lenders under the loan
25 terms are seeking full discretion to determine which assets

1 of the debtors they may use to repay the loan; is that
2 correct?

3 A I don't know if I could make that conclusion. I
4 think -- I don't know if you're asking for a legal
5 conclusion, you know, with respect to 506(c) and 552.

6 Q Well --

7 A So --

8 Q -- as a business matter, did they indicate a
9 willingness to limit their discretion by agreeing to allow
10 marshaling or allow a surcharge on their collateral?

11 A They have not.

12 Q And a hundred percent of the debtors' assets would be
13 pledged to support the DIP loans and the rolled-up
14 prepetition loan under the terms of the term sheet; is that
15 correct?

16 A Correct.

17 Q And the debtors, even with all these protections, still
18 have reserved discretion whether to lend any money this
19 Friday -- or after this Friday if there's no stalking horse
20 agreement delivered on Friday; is that correct?

21 A I'm sorry, I think you may have said the debtors have,
22 you meant the lenders --

23 Q I'm sorry --

24 A -- have --

25 Q -- I apologize --

1 A -- sole discretion.

2 Q -- the lenders, correct, still reserve their full
3 discretion even with these protections; is that correct?

4 A The lenders have the discretion to lend, yes.

5 Q And I want to turn to the budget that's proposed in
6 connection with the DIP loan and some of the support to that
7 budget. You're aware in this case that the committee has a
8 statutory fiduciary duty to represent the interests of
9 unsecured creditors in this case; is that correct?

10 A I do.

11 Q And the revised DIP budget, which you referred to in
12 your declaration, provides for a total of approximately
13 \$1 million for the committee professionals through the
14 conclusion of the budget period; is that correct?

15 A Yes.

16 Q And originally the debtors and the lenders supporting
17 the budget proposed less than \$400,000 to be allocated to
18 committee fees; is that correct?

19 A It was \$390,000, yes.

20 Q There's some paper dispute, I understand, of whether
21 it's 290 or 390, but it's less than 400, we all agree on
22 that; is that fair?

23 A Yes.

24 Q Okay. And I understand the debtors decided that no
25 more can be allocated to committee professionals under the

1 budget, but I want to walk through some of the other things
2 that the budget allocates money to, just to make sure we have
3 a common understanding.

4 The DIP budget allocates approximately 3.9 million,
5 just shy of \$4 million for the debtors' restructuring counsel
6 and financial advisers; is that right?

7 A I believe so. If you have the budget to show me, so I
8 don't have to -- I believe that's right.

9 MS. SCHWEITZER: Do you want to hand up --

10 BY MS. SCHWEITZER:

11 Q This is your backup to the budget, I'm happy to hand --
12 it's not marked as one of the debtors' exhibits, but I think
13 it's in your declaration, isn't it?

14 MS. SCHWEITZER: I think he refers to that in his
15 declaration.

16 BY MS. SCHWEITZER:

17 Q It's your declaration, paragraph 16(h) has the
18 reference to the debtors' fees --

19 MR. JACKSON: I can hand him what we filed, the
20 attachment that we filed.

21 MS. SCHWEITZER: Sure. It's in his declaration, I
22 think, and the fees also.

23 MR. JACKSON: Okay.

24 THE WITNESS: Thank you.

25 MR. JACKSON: Your Honor, for the record, I was

1 approaching Mr. Mandarino with a copy of the DIP budget that
2 was filed on the docket.

3 THE COURT: Okay. Thank you.

4 MS. SCHWEITZER: You can also give him -- I don't
5 know if you have a copy of the declaration or I'm happy to --
6 it has his statement in there.

7 MR. JACKSON: Yes.

8 (Pause)

9 MS. SCHWEITZER: His paragraph 16(h) is in force.

10 THE COURT: I'll also direct your attention to the
11 footnote on that page.

12 (Pause)

13 THE WITNESS: Yes, that's correct, it's 390,000
14 and more than a million, but I don't see the reference to the
15 \$3.9 million number -- but I believe that's right, I just --

16 MS. SCHWEITZER: Right, it's in the footnote, as
17 Your Honor is indicating.

18 THE WITNESS: Oh, I'm -- thank you, Your Honor.
19 I'm sorry.

20 THE COURT: You're welcome.

21 THE WITNESS: Yes, three point --

22 MS. SCHWEITZER: Team sport.

23 THE WITNESS: -- I was thinking -- I had four
24 million set in my mind, so -- because it's 3.96. So, yes,
25 that's correct, almost \$4 million.

1 BY MS. SCHWEITZER:

2 Q Right, I'm fine saying four million. It's less words,
3 so -- and the \$4 million of fees doesn't include any line
4 item internally for fees that would be incurred by Cravath as
5 counsel to the debtors; is that correct?

6 A I know Cravath has gotten a retainer, so I don't
7 believe there's anything additional.

8 Q Right. They may have another source of payment, but in
9 the overall budget, the overall budget for debtor
10 professional fees will exceed \$4 million; is that correct?

11 A More than likely.

12 Q And that compares to a million dollars allocated to the
13 committee; is that correct?

14 A That's correct.

15 Q So the committee's allocated budget is less than 25
16 percent of the debtors' allocated budget for professional
17 fees; is that correct?

18 A The math of one million divided by five million in --
19 one million divided by four million is just about 25 percent,
20 right.

21 Q But the four million doesn't include Cravath. So, if
22 you were to include Cravath, it's one over more than four,
23 which is less than 25 percent; is that correct?

24 A If they're over four, yes.

25 Q And the budget also allocates approximately 610,000 for

1 the fees of the DIP lender's own counsel; is that correct?

2 A That's right.

3 Q And the debtors also have budgeted approximately \$1.3
4 million for amounts to be paid under the KERP motion that's
5 pending for approval; is that correct?

6 A That's right.

7 Q And, while not in the budget, the debtors also have
8 just filed a motion to approve a KEIP where they contemplate
9 paying up to \$1.9 million for four employees; is that
10 correct?

11 A The KEIP is based on the -- would only be paid in the
12 results if there is a successful sale over certain thresholds
13 and dollar amounts. So it's not -- it's not -- if the sale
14 doesn't happen, then the KEIP would not get paid.

15 Q I understand it's a different source, but in terms of
16 the dollars being allocated to those employees, the debtors
17 are recommending a KEIP that would allocate up to
18 \$1.9 million to be paid to four employees; is that correct?

19 A One point one million -- or 1.9 or 1.1 -- I'm sorry,
20 the number that you said?

21 Q I believe it's 1.9, on the high side. It's a range
22 that goes up to 1.9; is that correct?

23 A Yeah, and at that level, then the secured creditor
24 would be totally paid off and there would be funds in the
25 estate left for others, yes.

1 Q That's your view, but not -- you're speculating on
2 future facts; is that correct?

3 A No. If I remember the KEIP motion correctly, the only
4 way they hit the upper limit is if the dollar amount of the
5 sale exceeds what the secured lenders and the DIP lenders
6 would be owed.

7 Q Right, and you'd have to also make assumptions about
8 the amount of administrative creditors that would exist;
9 correct?

10 A I don't think so. I'm doing a product of a formula.
11 You asked me -- if I understood your question, you asked me
12 how would the \$1.9 million be due, that is simply a product
13 of the sale price, not of anything else.

14 Q Well, my original question actually was just a question
15 whether the debtors have determined that they want a motion
16 to approve up to \$1.9 million of KEIP money that would be
17 paid to four employees --

18 A Right.

19 Q -- is that correct?

20 A So we are in total agreement, yes.

21 Q Okay.

22 MS. SCHWEITZER: No further questions.

23 MR. VELOCCI: Your Honor, if we could just take a
24 quick, three-minute break? I may not have any questions.

25 THE COURT: Okay.

1 MR. VELOCCI: Thank you.

2 THE COURT: I'm just going to stay here while we
3 take a break. Is that okay?

4 MR. VELOCCI: Absolutely.

5 THE COURT: Okay.

6 (Pause)

7 MR. VELOCCI: We're back, Your Honor. I do have a
8 couple of questions.

9 THE COURT: Great.

10 MR. VELOCCI: Thank you.

11 THE COURT: Please go ahead.

12 MR. VELOCCI: Frank Velocci, Faegre Drinker, on
13 behalf of the debtor, Your Honor.

14 REDIRECT EXAMINATION

15 BY MR. VELOCCI:

16 Q Mr. Mandarino, a couple of quick follow-up questions.
17 I'm going to allow you to answer that discretion question
18 regarding the lender's right and discretion to approve
19 effectively an APA from a stalking horse bidder. Can you
20 explain to the Court why that discretion is important?

21 A Sure. There's -- I guess you have to go back to what
22 this company does and what it is. So it's a company that has
23 a therapy, a radiation machine that is probably the size of
24 Your Honor's bench, as the background, and you go in like an
25 MRI. And the complexities of this product are mind-boggling.

1 It is not just your normal radiation machine, but it also
2 does scanning, so it can more target where the cancerous
3 cells are.

4 So what does that mean in relation to this? It is that
5 it is a company that has also burned a lot of cash during the
6 past few years in its existence. And so the potential
7 buyers, which are all industry buyers that are -- that
8 understand and have their own radiation products that are
9 based not only in the United States, but some are in Europe,
10 some are in the Far East, the amount of diligence that they
11 have to do is extraordinary. This company holds 250 patents
12 and in order to diligence the patents and diligence the
13 technology to make sure they're not going to get sued down
14 the road from a -- you know, from a potential competitor, and
15 to understand the technology is quite extraordinary.

16 So one buyer, for example, as I mentioned earlier, is
17 in Mountain View, California right now, with nine people, and
18 the diligence they're doing, they have not only the president
19 of their medical division, but they have their head of HR,
20 they have their general counsel; their CFO not only of the
21 medical division, but also of the parent company; along with
22 consultants and a whole team of others, sales, service --
23 because these machines also take a lot of servicing. So it's
24 not like it just gets delivered to a hospital and, boom, it
25 works, it costs, at minimum, a half million dollars a year

1 just to service the machines, which is another revenue stream
2 of the company. And so, therefore, doing -- performing the
3 diligence on this company, as I said probably twice already,
4 is extraordinary, so it takes more time.

5 And so, circling back to that, what does that mean? It
6 means that the DIP lender, as proposed DIP lenders seem to
7 do, they like to keep a tight leash, and it's market, it's
8 the market we're in. However, based on my -- and I said
9 before, they've been incredibly cooperative since I've been
10 involved in this case in terms of, you know, all the changes
11 that they made that are described in paragraph 16 of my
12 affidavit, all the concessions that they've made, you know.
13 And I get 506(c) and I get all that stuff, but they've been
14 commercial, they've been reasonable, and I don't believe --
15 now, I could be wrong and I could look, you know, really
16 stupid to you down the road, but I don't believe they're
17 going to pull the plug on this company because of the
18 seriousness that the buyers are exhibiting.

19 It's not just that one buyer that's there, that's just
20 an example, you know, we have a data room set up, buyers are
21 in the data room, literally, seven days a week. These are
22 companies -- some of the buyers are companies we all have
23 heard of and there is a real -- the best way to maximize
24 value for the company, for the estate, which would benefit
25 all creditors, is to let the sale process go.

1 And the buyers are also super sophisticated. The
2 buyers have super-sophisticated counsel that we've all heard
3 of and have appeared in these and other courts that are
4 probably watching right now, that they know they need to let
5 their clients know that they're not just, you know, wasting
6 time by doing all this, that the company has a shot to keep
7 going.

8 And the company is also running its day-to-day
9 business. And, you know, why did -- you know, I put in my
10 affidavit, then I was asked on cross-examination how this
11 sale would benefit other parties, the company has a couple
12 pretty big receivables due from clients in Europe who, when
13 the company filed, they just stopped paying. They were
14 paying fine, there was no problems, they stopped paying
15 because the company is in Chapter 11 now, so what does that
16 mean? So the company through, you know, the efforts of the
17 management team and of BRG have been working tirelessly to
18 get those receivables collected, which could also help, but
19 we can't count on that. We need to show the world that this
20 company has a chance of succeeding, which I believe it does.

21 And, you know, at the very least, there's been serious
22 interest in the patents only by one of the potential buyers,
23 which would still generate tens and tens and tens of millions
24 of dollars. So there's something here that's real. And
25 while this is not ideal, and I acknowledge that and, you

1 know, I've worked on billion dollars of DIPs during my career
2 and have seen this, and I've been in the committee position
3 before, this certainly, in my opinion, is a DIP that is
4 necessary in order to achieve the goal, in order to achieve
5 the fact of getting this company sold. And, you know, even
6 forget about the product for a second because sometimes that
7 doesn't matter, but it's what gets this -- this maximizes
8 value to the estate, which I view as my job.

9 MR. VELOCCI: Your Honor, that's all I have.
10 Thank you.

11 THE COURT: Okay. I actually have a question for
12 Mr. Mandarino and then I'll allow everyone to ask follow-up
13 questions to the extent you feel it's necessary.

14 VOIR DIRE EXAMINATION

15 THE COURT: Mr. Mandarino, I read your declaration
16 and I thought it was very helpful, and you explained the
17 differences between the original DIP and the current DIP.
18 What I did not see in that DIP was much discussion about the
19 exit fee. And so I thought you could walk me through what
20 you believe is the purpose of the exit fee and its interplay
21 with the rollup.

22 THE WITNESS: Sure.

23 THE COURT: First, I guess, start with my first
24 question, which is, in your view, why would the lenders -- or
25 what is the purpose of the exit fee?

1 THE WITNESS: Sure. Well, it's economics. I --
2 and it's -- I'd answer it a couple of different ways. Number
3 one, it's just economics. It's a market term that you see in
4 almost every DIP nowadays and even non-DIP, regular way
5 financing. It's just an economic term; it's a way for a
6 lender to get economics, number one.

7 Number two, it's a way to compensate them for the
8 risk that they're taking because, right, they have a
9 prepetition loan, let's just call that, you know, round
10 numbers, \$58 million, and then they have the DIP, which would
11 be potentially another nine, so we'll call that 67. And to
12 the extent that the company -- that we sell the company, the
13 debtor, for more than that, I guess they want to be
14 compensated for that -- for that -- for lending the money in
15 a risky situation.

16 Listen, I mean, I hear the committee's points, but
17 it's a risky situation. So, you know, they want some juice
18 for their dough if they get it. It's --

19 THE COURT: Okay. So --

20 THE WITNESS: -- lending in 2023.

21 THE COURT: Okay. So if I were to accept that, so
22 the juice for this nine million would be the interest rate,
23 the commitment fee, and the exit fee, virtually working in
24 tandem as one to compensate the lenders for the risk of
25 lending the money to the estate; am I understanding that

1 correct?

2 THE WITNESS: And that's right and I would
3 consider that market in today's lending environment.

4 THE COURT: So on the rollup, am I correct in
5 understanding there's a four percent fee being charged on the
6 rolled-up amounts from the prepetition debt?

7 THE WITNESS: That's right. So that would be --
8 you know, let's say the whole thing goes through, that would
9 be \$720,000 --

10 THE COURT: Okay.

11 THE WITNESS: -- that's right.

12 THE COURT: Right. So you said an exit fee is
13 typical in lending arrangements; correct?

14 THE WITNESS: Yes.

15 THE COURT: So did they receive an exit fee on the
16 prepetition loan?

17 THE WITNESS: I -- perhaps -- I see Mr. Harvey
18 standing up -- I believe --

19 THE COURT: But to the extent you know --

20 THE WITNESS: I believe --

21 THE COURT: -- and Mr. Harvey --

22 THE WITNESS: -- I believe they --

23 THE COURT: -- can cross-examine you on the
24 substance of my questions when the time comes.

25 THE WITNESS: Yeah, I do. If I mischaracterized

1 that, I apologize, but I believe they do, right.

2 THE COURT: Okay.

3 THE WITNESS: So, yeah, but I was answering your
4 question, the 720 is on just the nine million plus -- or is
5 on the rollup of the 18 million, but, yes, then they'd get
6 the four percent on the full -- on the rest of the loan,
7 which would be another 50 million, so another two million.

8 THE COURT: So --

9 THE WITNESS: I think that's --

10 THE COURT: -- maybe we're -- we may be
11 misunderstanding and that's because of my questioning.

12 So on the prepetition amounts, okay, is there --
13 did they -- is there a fee, an exit fee or anything on the
14 like that the debtors agreed to pay on the prepetition
15 amounts owed?

16 THE WITNESS: You mean before the company entered
17 in -- like on the -- or as part of the DIP?

18 THE COURT: No, as part of the prepetition
19 facility.

20 THE WITNESS: I don't recall, Your Honor, if there
21 was an exit fee on the prepetition loan.

22 THE COURT: Okay. On the benefits of the rollup
23 to the estate, putting aside that the lenders demand it,
24 what, in your opinion, are the benefits to the estate on the
25 rolled-up amounts? There was a reference in the declaration

1 or other documents that I read regarding the interest that's
2 being incurred on the roll-up amounts are paid in kind.

3 THE WITNESS: Right.

4 THE COURT: Right. Explain to me -- I guess let's
5 walk through that. What's the interest rate on the rolled-up
6 amounts post-petition if I were to approve the rollup, the
7 rate?

8 THE WITNESS: It's the same rate as the entire
9 DIP. And, I'm sorry, I forget the --

10 THE COURT: That's okay.

11 THE WITNESS: -- the exact words, SOFR plus ten,
12 perhaps. I --

13 THE COURT: Okay, so how does that relate to the
14 prepetition interest rate?

15 THE WITNESS: I believe it's a bit higher. I
16 don't recall the prepetition interest rate, Your Honor, I
17 apologize.

18 THE COURT: So it's higher?

19 THE WITNESS: I believe so.

20 THE COURT: Okay.

21 THE WITNESS: I -- hopefully, someone will ask me
22 if I'm wrong about that.

23 THE COURT: So it's a higher interest rate and
24 there's a \$720,000 fee being charged on the rollup amounts?

25 THE WITNESS: Yeah. I mean, it's the prepetition

1 lender is -- the DIP lender is viewing their extension of
2 this credit as risky and they're looking to be compensated
3 for it. It is -- you know, the whole issue of rollup, I
4 mean, I get it. To the extent that, you know, the company
5 does sell for more than they're owed, it doesn't matter.

6 THE COURT: More than what?

7 THE WITNESS: To the extent the company is sold
8 for at least what the total debt is, that it's rollup or not
9 doesn't really matter because they'd get their exit fee under
10 either situation, right? I guess --

11 THE COURT: I'm not following that.

12 THE WITNESS: If the -- if they are paid out on
13 their loan --

14 THE COURT: Uh-huh --

15 THE WITNESS: -- complete --

16 THE COURT: -- pre and post?

17 THE WITNESS: Pre and post --

18 THE COURT: Okay.

19 THE WITNESS: -- then that they rolled up doesn't
20 matter in terms of the how much they get versus how much the
21 estate gets.

22 THE COURT: And why is that?

23 THE WITNESS: Because they're paid in full. So if
24 it was -- you know, if it rolled over or didn't roll over,
25 they're still paid out in full.

1 THE COURT: Uh-huh, but --

2 THE WITNESS: Where it matters to your point is on
3 the interest, they get an extra \$720,000 based on --

4 THE COURT: Plus an extra 700 -- right, extra
5 720,000, yes.

6 THE WITNESS: Right, so that's where it changes.
7 It's their view being compensated for the risk and, you know,
8 in my experience, you know, in another deal we're working on,
9 the prepetition lender not only wants a three percent
10 commitment fee and a two percent exit fee, but a three
11 percent backstop fee, you know, to underwrite the loan. It
12 is the market that we are in. I didn't find -- I didn't find
13 any of the lender's rights to be inconsistent with market.

14 THE COURT: When you say market, just so we're
15 clear, are you referring to the marketplace or what courts
16 approve?

17 THE WITNESS: Uh, both.

18 THE COURT: Okay. So, in your experience, how
19 often do you see fees charged on rollup amounts being
20 approved by courts, Bankruptcy Courts?

21 THE WITNESS: Often.

22 THE COURT: In what percentage?

23 THE WITNESS: It's hard for me to answer that
24 accurately, Your Honor. You know, some, not all.

25 THE COURT: One percent, two percent, three

1 percent?

2 THE WITNESS: I --

3 THE COURT: I get to ask you these questions
4 because you're the expert.

5 THE WITNESS: No, I understand. I'm trying to put
6 it in -- and I'm very sensitive to that, so I'm trying to
7 give you an accurate answer and I don't want to -- I don't
8 want to be glib.

9 THE COURT: Okay.

10 THE WITNESS: It's -- I mean, I'm thinking about
11 the Core Scientific case, which we're actually -- my firm is
12 actually the DIP lender in it; we're not the adviser, we're
13 actually the lender, and I manage that. We weren't the
14 prepetition lender, but there we took out a prepetition
15 lender and they got a roll-up, they got interest on the fee.
16 So that's one I know for sure.

17 And another case it wasn't the prepetition -- I
18 would -- I'm throwing a dart on the board, Your Honor, maybe,
19 you know, a quarter to a half, it may be more or maybe -- I
20 haven't fully surveyed the market on that specific question.

21 THE COURT: So a quarter to a half --

22 THE WITNESS: That's my guess.

23 THE COURT: -- of approvals in Bankruptcy Court?

24 THE WITNESS: Yes.

25 THE COURT: Okay. And how many rollups in

1 Bankruptcy Court do you see being approved with a higher
2 interest rate?

3 THE WITNESS: Well, I mean, we were involved in
4 the David's Bridal case. We worked for the lenders on that
5 one; that was approved with a higher interest rate for sure.
6 That is something that I typically see happen.

7 I mean, sometimes it depends on what the
8 prepetition interest rate was, right? So, for example, if
9 the loan was entered into like three years ago when interest
10 rates were a lot lower than they are today, absolutely,
11 almost without question, the interest rate would be higher.
12 So it's really timing because the market has changed -- not
13 the Chapter 11 debtor DIP-approved market, but the lending
14 market has changed in terms of interest rates in the past few
15 years, as we all know.

16 THE COURT: Okay. All right, thank you very much.
17 I appreciate your answering my questions so candidly, and I'm
18 sure that parties have questions based on my questions, so I
19 will leave you to them.

20 THE WITNESS: Thank you. Hopefully, not too many.

21 MR. BOTTER: Your Honor, and a number of the
22 questions that you had we can clarify in closing arguments
23 because it's part of the documentary evidence.

24 THE COURT: Okay.

25 MR. BOTTER: Just one last question for

1 Mr. Mandarino.

2 RE CROSS-EXAMINATION

3 BY MR. BOTTER:

4 Q Was there any other lender out there that was willing
5 to take this risk?

6 A No.

7 MS. SCHWEITZER: Your Honor, very brief questions
8 for the witness. Again, Lisa Schweitzer, just for the
9 record.

10 RE CROSS-EXAMINATION

11 BY MS. SCHWEITZER:

12 Q Mr. Mandarino, at the start of your redirect testimony,
13 you explained the complexity of the sale process and the
14 diligence process to the Court; is that right?

15 A Yes.

16 Q And you also, I'm sure, explained that same complexity
17 of the sale process and the diligence process to the lenders;
18 is that right?

19 A Yes.

20 Q And you explained to the lenders the importance of
21 having committed financing in place such that bidders would
22 actually be encouraged and willing to stay the whole sale
23 process; is that right?

24 A Yes.

25 Q And you explained to the lenders the importance of not

1 having an event of default declared on Friday and the loan
2 going away on Friday; is that right?

3 A Yes.

4 Q And they still to today have not been willing to take
5 out that event of default condition; is that right?

6 A They have not.

7 Q And I know you've said it's possible that they might,
8 you know, waive it, extend, or forbear on such an event of
9 default condition, but in fact it's up to the lenders, again,
10 having sole discretion whether to approve a loan that doesn't
11 pay them in full; is that correct?

12 A It is -- it is their sole discretion to determine what
13 they want to do. You know, the second clause of your
14 question, I don't know, you'd have to ask them, but I know
15 that we certainly need -- the best way to get this company
16 sold is to ensure that we have the funding to do so. So I
17 don't want there -- I don't want like the wish to be the
18 father of the thought that everything is going to fall apart
19 and, without a DIP, that's what I feel that would happen.

20 Q Right. And you just a minute ago were describing how
21 the lenders are entitled to much richer fees because they're
22 willing to take on a risky loan; is that correct?

23 A Yes.

24 Q But in fact the conditions precedent to making a loan
25 is that the debtors either deliver them a stalking horse bid

1 that takes them out fully or they have sole discretion
2 whether to make a loan at all; is that correct?

3 A I guess they would also have sole discretion to waive
4 the default, or change their mind or change the rules to.

5 Q Right. So they have sole discretion whether they want
6 to take on any risk, even though up front the loan is
7 approving substantial exit fees and other fees for them; is
8 that correct?

9 A Yeah. I mean, I guess we'd have to ask the lenders on
10 how they think, I don't want to think for them, but per the
11 documents what they have, I can only talk about what I think
12 will happen, and what I think will happen is that we're going
13 to get there and they're not going to call a default if we
14 don't have a stalking horse on Friday, and the sale process
15 will continue. That's what I know today, that's the best of
16 my knowledge and what I believe is the best interest of this
17 estate.

18 Q Right. I'm just pointing to very simple facts, which
19 is, number one, you testified that the reason that the
20 lenders would ask for or be entitled to substantial fees is
21 because they're willing to take on a risky loan; is that
22 right?

23 A That's one of the things I testified to, yes.

24 Q Right. And, under the loan agreement, it's a condition
25 precedent to them advancing any money, that they get taken

1 out -- they have a stalking horse that takes them out in full
2 or otherwise they just have discretion, complete discretion
3 whether they want to make a loan or not; is that correct?

4 A Right. My answer hasn't changed from a few minutes
5 ago, right.

6 Q So they have complete discretion, that's the only thing
7 I wanted to establish. Thank you very much.

8 THE COURT: Mr. Harvey, you had stood up, did you
9 want to ask the witness any questions?

10 MR. HARVEY: Good afternoon, Your Honor, Matthew
11 Harvey from Morris, Nichols, Arsht & Tunnell on behalf of the
12 DIP lenders and prepetition secured parties. I don't rise to
13 ask Mr. Mandarino a question because I'm not sure that he's
14 aware of this fact, I -- and this is an awkward point to say
15 it in the hearing, but I wanted to clarify a couple things on
16 the fees. The --

17 THE COURT: Why don't we just wait until argument
18 then?

19 MR. HARVEY: Okay, we can do that in argument.

20 THE COURT: Okay.

21 MR. HARVEY: And we have a fee letter from the
22 prepetition loan documents that we can get in front of the
23 Court, but the exit fee is four percent under the prepetition
24 documents, it's four percent under the DIP. So rolling the
25 prepetition rather than insisting that the four percent be

1 paid now, it's actually extending it out because you could
2 deem this as a satisfaction of the prepetition, as a rollup
3 is. So it's not changing the economics, it's just moving it
4 into a post-petition loan.

5 THE COURT: Okay. Thank you.

6 MR. HARVEY: Thank you, Your Honor.

7 THE COURT: Okay. Redirect for this witness and
8 then we will release him?

9 MR. JACKSON: Nothing further from us for the
10 witness, Your Honor.

11 THE COURT: Okay. Mr. Mandarino, thank you so
12 much for your time and attention to this matter today, it was
13 very helpful.

14 THE WITNESS: Thank you, Your Honor.

15 MR. JACKSON: I'm going to go reclaim the
16 documents that I handed him.

17 THE COURT: Oh, okay. All right.

18 (Pause)

19 MR. JACKSON: Your Honor, for the record, Patrick
20 Jackson, Faegre Drinker, for the debtors.

21 Actually, what Mr. Harvey just said, I was going
22 to propose that I would largely defer to him on explaining
23 quickly what the answer is. I think it's --

24 THE COURT: Actually, can I interrupt you for one
25 second? And let me just ask the committee, do you have any

1 evidence to present today or are we complete on the
2 evidentiary record?

3 MR. BOTTER: We do not, Your Honor, just argument.

4 THE COURT: Okay, okay. So are we moving into
5 argument?

6 (No verbal response)

7 THE COURT: All right, okay.

8 MR. JACKSON: If it pleases Your Honor, yeah --

9 THE COURT: I just like to --

10 MR. JACKSON: -- or we can take --

11 THE COURT: -- know where I am.

12 MR. JACKSON: -- if you need a break, yeah --

13 THE COURT: I do not.

14 MR. JACKSON: -- let us know. Okay.

15 THE COURT: I'm happy to give you a break, if you
16 would like one, but I do not need one at the moment.

17 MR. JACKSON: I think I'm okay, Your Honor.

18 THE COURT: Okay, great.

19 MR. JACKSON: So that was -- Mr. Harvey's
20 clarification was helpful and I have no reason to quibble
21 with that; that was my understanding. I think, as a
22 technical matter, the fee letter that he was referring to is
23 not in the record. The prepetition credit agreement itself
24 was attached as Exhibit C to the notice of filing of the
25 blackline of the order because there were certain -- when

1 they amended the term sheet to make it self-executing without
2 need of a new credit agreement, there were some definitions
3 that were incorporated by reference into the term sheet. So
4 we filed the credit agreement sans exhibits --

5 THE COURT: Okay.

6 MR. JACKSON: -- just for the -- you know, those
7 terms, but I was looking through it and I couldn't find the
8 letter. So, if Your Honor would like us to supplement the
9 record with the fee letter, but Mr. Harvey's recollection of
10 it is -- and description of it is consistent with my
11 recollection of it, for what that's worth.

12 The other point, just to jump -- since it's fresh,
13 your line of questioning about the exit fee on the rolled-up
14 amount, the prepetition lenders as part of -- and we had
15 talked about this in the motion, in the supplemental motion
16 itself -- as part of the adequate protection package for the
17 prepetition lenders, they're getting cash pay interest on the
18 amount, so -- or on the outstanding loan amount.

19 So one of the sort of benefits to the estate, if
20 we were going to roll the entire 18 million on day one, which
21 we're not now under the -- but if we had, that actually would
22 have saved us cash and liquidity up until the sale, at the
23 cost of picking a higher interest amount. But, you know,
24 we're kind of in liquidity mode right now. So that was, from
25 our perspective, a benefit of the rollup in light of where we

1 landed on the adequate protection package for the prepetition
2 secured parties.

3 So I think now we've lost a little bit of that
4 benefit by making the rollup, you know, tied to advances. I
5 still think there's a net benefit because, once amounts are
6 rolled, it's no longer included in the calculation for the
7 adequate protection payment, it's, you know, picked at a
8 slightly higher -- I can represent to you that the
9 prepetition credit agreement, the interest rate was
10 approximately 13.75 percent, is my understanding, compared to
11 15 on the DIP.

12 So, as Mr. Harvey said, the exit fee is kind of a
13 wash, it's just deferred -- and it is a fair point that he
14 raised -- if anything, it's a fee that could be callable upon
15 a rollup, but it was not. And --

16 THE COURT: I appreciate that explanation.

17 MR. JACKSON: -- we get the benefit of some
18 liquidity in exchange for picking some more expensive
19 interest. So --

20 THE COURT: Okay, that's very helpful. Thank you.

21 MR. JACKSON: I think a couple of other -- and
22 this is my chance to be awkward, I guess, as far as there
23 were some questions asked of Mr. Mandarino on the KERP and
24 the KEIP and he -- I think, as he sat there, wasn't familiar
25 with the documents that were being referred to. I can

1 represent that if we were to look at the motions themselves,
2 on the face of the motions, the KERP, which is scheduled for
3 hearing on the 7th, although I think we'll be submitting an
4 order under cert of counsel, but I can represent that the 1.3
5 million of the total KERP pool, if you will, it's phased into
6 three segments as when it would be payable; a portion of it
7 upon entry of the order approving the KERP, a portion of it
8 upon conclusion of the sale, and then a portion of it on a
9 Plan exit.

10 So, really, for purposes of this budget, just to
11 talk applies to apples, the KERP amount, which would be
12 reflected in the budget, you know, line items relating to
13 employees, only the first two slices of that are relevant for
14 this budget. This budget doesn't go through to a Plan, as we
15 know, as one of the issues that the Committee raised.

16 So 1.3 million isn't the amount. It's two-thirds
17 of that and it's split up between the approval of the motion
18 and a sale, and if a sale never happens, then that second
19 slug of a third of the KERP payments doesn't get paid and
20 that's -- I'll represent to you that's all set forth in the
21 KERP motion.

22 The KEIP, just to clarify, I actually am not
23 entirely sure where the number that was being used to -- I
24 think it was a \$1.9 million figure. The KEIP -- and again,
25 just by reference to the motion that was filed, also on for

1 the 7th, there's a couple of tiers of sale proceeds and if
2 each tier of proceeds is hit, then there's a fixed KEIP pool.
3 So the first tier is a \$200,000 pool, goes up to a \$400,000
4 pool, and then it goes up to a \$750,000 pool and then that's
5 around the time or the value that the debt would be retired
6 and then beyond that it's a 2.5 percent of proceeds. And
7 it's non-cumulative so each -- you know, wherever the
8 proceeds land, that's the pool amount. So I don't know if
9 1.9 was, you know, a calculation of if we got a bid and if we
10 achieved a sale that took out the lenders, then maybe there's
11 a -- conceivably, a percentage that would yield that.

12 That's not a -- not reflected in the budget. The
13 budget that we have in front of us doesn't actually reflect
14 any specific amount that I'm aware of for KEIP because the
15 KEIP is only payable, as Mr. Mandarino said, upon the sale.

16 So if the purpose of the line of questioning was,
17 and I think it was, to kind of, like Ms. Schweitzer said,
18 well, we know the debtor is not spending money on increasing
19 the Committee's line item; what else are they spending money
20 on in the budget, I don't think -- it's not -- you know, the
21 KERP isn't really kind of what the -- what it was being made
22 out to be and I don't think the KEIP is either.

23 I just wanted to clarify those, and it's just by
24 reference to the filed pleadings, and if -- you know, I'm
25 sure it'll come up in argument and we can talk more about it,

1 if need be.

2 THE COURT: Okay.

3 MR. JACKSON: I guess, zooming out now from the
4 particulars back to the general, this is a challenging case.
5 It's a freefall sale case, as Your Honor knows. We're here
6 on consensual use of cash collateral. As I stated at the
7 First Day hearing, the debtors were not in a position to make
8 a showing of adequate protection that would've been necessary
9 to get contested cash collateral use, I think we said in our
10 papers and Mr. Mandarin's declaration. We're not in a
11 different position today.

12 So -- and I think that's important to keep in
13 mind. We're talking a lot about the DIP, but this order that
14 we're asking you to enter today is both a DIP order and also
15 the final cash collateral order. So -- and I think that's
16 important to keep in mind. We have used -- and by the time
17 we get to Friday, this inflection point where we either have
18 an APA or not and be asking for a waiver of an event in
19 default or not, we will have expended a great deal of the
20 cash that was on hand, almost all of the cash that was
21 already on hand, and that was with the consent of lenders in
22 exchange for what they had asked for and by way of their
23 adequate protection package, and the pre-petition lenders
24 adequate protection package includes the 506(c) waiver, the
25 552(b) waiver, the marshaling waiver, and I think, not

1 surprisingly, the DIP -- you know, those lenders wearing
2 their DIP lender hat, have also conditioned the DIP on those
3 things.

4 But I wanted to point out that those are also
5 conditions of the cash collateral order going final and I
6 raise that because we're talking about a hypothetical default
7 Friday. Well, there's a default I think it happens tomorrow
8 if we don't get a final 506(c) -- if we don't get a final
9 cash collateral order that provides those waivers, and
10 nothing I can do about that. I'm just telling you that from
11 the perspective of the debtor who is surviving on consensual
12 cash collateral use and has no alternative available and,
13 certainly on this record, there's no record that could
14 suggest that the lenders couldn't call a default tomorrow if
15 Your Honor didn't enter final cash collateral with those
16 waivers today.

17 So that's where I'm at. We're -- since we started
18 the case -- like I said, it's a freefall sale case. Mr.
19 Mandarino reported kind of where we are with bidders right
20 now. We're cautiously optimistic that there's -- that at
21 least, you know, one of the main goals of the case of keeping
22 this technology out there in the world, we're cautiously
23 optimistic that one way or another that will be achieved;
24 that it will continue in somebody's hands. We'd also like --
25 you know, on our wish list is that the business continue is a

1 going concern; that the vendors, the customers, the
2 suppliers, the employees have a place to land and we're
3 optimistic that, at least the sort of leading candidate
4 bidder that Mr. Mandarino referred to, is interested in
5 obtaining a business in that shape.

6 So, as we said in the declaration and the papers,
7 what's necessary in order to keep the wheels on the bus
8 through the conclusion of a sale process is more liquidity
9 and -- because, right now, we are projecting, absent some
10 outperformance of the budget, which is possible, but we can't
11 count on it, we're anticipating running out of cash and
12 needing a DIP draw the week of September 10th, I believe, and
13 if that's true and we run out of cash and, again, the wheels
14 fall off the bus, so to say, we're not going to be able to
15 deliver an uninterrupted business platform to the buyers and
16 they may react negatively to that. At a minimum, even if
17 they are still willing to participate, we would figure the
18 interruption cost is going to be priced into the bid, and I
19 just think that's exceedingly obvious.

20 So we're, as debtors often are in these freefall-
21 type scenarios, particularly where we're dependent on
22 consensual cash collateral usage, we're very much walking a
23 highwire and we have been from day one and it's a case of
24 tiny victories and we've achieved little victories here and
25 there and it allows us to fight another day and we're

1 certainly hoping that if we can string enough of these tiny
2 victories together, eventually, this will -- the complexion
3 of this case could totally change with a significant enough
4 bid or with some other developments, maybe some
5 outperformance of the budget. But we are where we are today
6 and that's the only thing I can be is where I am today asking
7 you for the relief I need today.

8 So we're on a highwire and we would like a net and
9 we found a net and it's not the best net, I'll admit. It's
10 gotten a lot better since we explained it to you at first at
11 the First Day hearing and you told us to go back to the
12 drawing board. It got a lot better between then and the time
13 we filed the supplemental DIP motion and it's gotten a lot
14 better since then. It's as good as it can be right now.
15 What we filed Friday, as far as the amendments to the term
16 sheet, the amendments to the order, that's where we could get
17 the lenders.

18 As Mr. Mandarino said, they have been commercial.
19 They have been responsive to the needs of the case. They
20 were unwilling to pre-waive an event of default if a stalking
21 horse APA is not delivered this Friday. We asked. They
22 weren't willing to do that. I'm not in a position today to
23 make them, to make any record that would allow us to make
24 them.

25 But we are optimistic that, you know, given the

1 way things seem to be trending, that if it turns out we don't
2 get a stalking horse bid on Friday, which we'd very much like
3 to have, that all will not be lost and, you know, commercial
4 sentiments will prevail and we'll still have a case. We just
5 don't know that as we stand here today. But one thing that
6 Mr. Mandarino testified to in his declaration is that there
7 is a cost to adopting kind of a wait and see approach on the
8 DIP and it's the -- I think as he put it actually on his
9 redirect, the father -- or the wish is the father of the
10 thoughter. I'm probably brutalizing it. But, anyway, he
11 said the -- it's a self-fulfilling prophecy, potentially, if
12 we say, well, let's wait and see what happens before we know
13 if we need to talk about whether this DIP should be approved
14 because we may not need it.

15 Well, as he said in the declaration, not having
16 the DIP in place might actually influence the bidders'
17 decision of whether to put in a bid on Friday.

18 So, from the perspective of the debtor's business
19 judgment, we need the -- we know we need the cash to get
20 through the sale process. We've been; and I apologize, I
21 know we've been kind of ad nauseum throughout the papers on
22 that, we think it's important that the DIP get in place today
23 and not next week for that reason because it would be, in our
24 view, very foolish to pass up the opportunity to put in place
25 the safety net that we do have just to see if we'll need it.

1 That's not a really good time to -- you know, wait until I've
2 fallen off the highwire to see if I need the net.

3 We agree with the Committee in the concept of
4 there's like lots of ways that they suggested it could be
5 better. Yeah, that's objectively true. It could be better
6 if, you know, these other circumstances were -- you know, if
7 there were certain changes, fine, but that's not where we are
8 and where we are is we'd like a safety net. We understand it
9 could be better. The net we've proposed is better than none.
10 And, frankly, for -- to circle back to the, you know, the
11 legal standard, today, it is the debtor's business judgment
12 that is the legal standard.

13 We are here on full notice. The Committee is up
14 and running. The motion went out on full notice. We were
15 able to extend the hearing. Further interim cash collateral
16 use got an extension of the milestones that would've required
17 final cash collateral on August 11th and that allowed us to
18 put the supplemental motion on full notice.

19 So we're here under a straight business judgement,
20 non-Rule 6003. You know, no need to show irreparable harm.
21 What have we shown? We've shown that we think it would be
22 better for the estate to have the DIP approved today instead
23 of waiting and seeing and that -- you know, respectfully,
24 Your Honor, I think that carries the day.

25 The Committee doesn't have any evidence. They've

1 crossed our witness, and we'll -- I'm sure they'll get into
2 that. But as far as the record that you have before you
3 today, compared to the record that you had at the First Day,
4 it's, you know, apples and oranges, Your Honor, totally
5 different scenario.

6 A couple of the specific points about the
7 Committee's budget. We -- as we stated in the papers, yes,
8 it was 390 or I guess some dispute about whether it was
9 originally 290 or 390, under 400,000. It's now a million.
10 That's a million, compared to what's in the budget for the
11 debtor's Professionals. There's a little wrinkle about
12 Cravath. I suppose -- there was some questioning, just to
13 give you a little more color on that, Your Honor, if it
14 wasn't obvious from the questioning.

15 The budget line item detail that was shared with
16 the Committee breaks it down into the particular
17 Professionals. What's in the budget that was filed with the
18 Court is just the all-in Chapter 11 restructuring costs.
19 There are specific line items for Faegre Drinker and BRG and
20 then there's no line item for Cravath. Cravath is our
21 proposed 327(e) special counsel. Their retention has -- is
22 still subject to approval. They have a retainer, about a
23 \$250,000 retainer. So we don't have anything in the budget
24 for -- specifically allocated to Cravath. So it's 3.96 -- 95
25 million for the debtor's Professionals, a million for the

1 Committee's Professionals. It's slightly better than a 25
2 percent ratio.

3 And I think the questioning about Cravath and you
4 don't think they're -- you know, it's going to be more
5 than -- you know, the cost of the case is going to be more
6 than what's in the budget line item, I think Mr. Mandarino
7 said, yes, probably. I just wanted to make sure that we
8 understand what that means.

9 That doesn't mean so when the debtor's
10 Professionals go past their line item we're going to
11 magically find money that -- you know, it's just going to
12 fall out of the sky. Absent some change in budget
13 performance, you know, that we're kind of holding back and
14 there's going to be some -- you know, magically, the budget's
15 going to go up to -- the road will sort of rise up to meet us
16 and meet exactly what the debtor's Professionals need, no.
17 On the current budget as it stands today, if we, collectively
18 on the debtor's side exceed that, we have to live with what's
19 in the budget. It's no different from the scenario, as a
20 practical matter, that I think the Committee faces. If this
21 budget gets approved, they've got a million for now unless,
22 again, some budgetary things happen that allow that to
23 change, and if they exceed it, then it is what it is.
24 There's a difference, as we've said in the papers, between
25 the allowance of fees and the incurrence of fees and the

1 payment of fees.

2 I think the budget, as it stands now, with a ratio
3 of about 25 percent Committee to the debtor's Professionals,
4 it's right down the middle of the fairway as far as what the
5 ratio normally is. It certainly doesn't prevent anybody from
6 doing their job. I know if -- you know, if we run up against
7 some risk because we're pressing up against our budget line
8 items, it's not going to limit the advice that I give to my
9 client. It's not going to really limit what I do on behalf
10 of my client. We're -- and we've made this point in our
11 papers. We're all professionals. We'll make it work. With
12 any luck, we'll all be out of the soup, you know, soon enough
13 because we'll get a good result that'll change the complexion
14 of this case.

15 But, for right now, there's certainly nothing in
16 the scenario that limits the Committee's ability to exercise
17 its fiduciary duties and, as a practical matter, there's no
18 evidence before Your Honor that there's any source from which
19 to raise the million dollar line item critically.

20 Turning to the other point, and then I'll cede the
21 podium, the waivers. I think, as we pointed out in the
22 papers, and I don't think is really disputed, the hard
23 economics of the DIP loan have largely been relieved or
24 deferred by the changes to the loan. You know, the roll-up,
25 the fees, they're now tied to actual advances. I do think

1 those were all substantial improvements. And what does that
2 mean? Well, today -- what does it cost the estate today? I
3 already talked about what it costs the estate if we don't
4 have a DIP order. What does it cost the estate to have a DIP
5 order today? From my perspective, unless I'm missing
6 something, it costs 506(c) rights, 552(b) equities of the
7 case rights, and the marshaling argument.

8 And, unfortunately, if the case -- if we don't
9 have continued use of cash collateral, and eventually DIP
10 financing, but more immediately, if we lose cash collateral
11 usage, all of those things and a quarter will buy us a phone
12 call, frankly, to put it crassly. Like the ability to
13 surcharge the collateral requires that there be a sale of the
14 collateral.

15 So we put in the declaration and I think it's --
16 you know, it's rebutted. If we run out of money, we're
17 unable to pursue a going concern sale, if there is a case at
18 that point, it's going to be a fire sale of the intellectual
19 property portfolio.

20 And not to pre-judge a 506(c), you know, action in
21 the future, but it's hard to imagine a scenario where the
22 estate, having burned through more than \$10 million of cash
23 collateral, will then do a fire sale of its intellectual
24 property portfolio and surcharge that portfolio's sale
25 proceeds for enough costs of the case to put creditors in the

1 money. It's kind of inconceivable for me to imagine that.

2 So putting aside, you know, that these waivers are
3 absolutely, you know, marked, so to say, just, you know, if
4 you think through what does it mean to retain these rights,
5 it's really of dubious value compared to what is the risk
6 imposed upon the estate and, again, that is why we're here in
7 our business judgment saying, look, we understand that
8 getting the order today means we've waived these rights. The
9 Committee is up and running. They've had a -- they will have
10 had a chance to be heard on it. They're here. They're being
11 heard on it. We still think the better course of action is
12 to approve the DIP today. And, as far as the evidentiary
13 record, there's no evidence to rebut what has been put out
14 there to support the debtor's business judgment.

15 So, with that, I know I've been kind of speaking
16 at a high level of generality, if there's particular terms of
17 the DIP that, you know, Your Honor would like me to touch on,
18 I'm happy to do that or any other questions. Otherwise,
19 I'll -- I think I've talked long enough and I'll yield the
20 podium.

21 THE COURT: My only question is clarification of
22 the event of default. I know that there was questioning of
23 the witness but I didn't catch it entirely. So what is the
24 language of the event of default for Friday?

25 MR. JACKSON: Sure.

1 THE COURT: What does the stalking horse agreement
2 need to look like?

3 MR. JACKSON: So there was a -- in the interim
4 cash collateral order which, absent anything, is currently
5 operative, there's an event of default if a final cash
6 collateral -- or if a stalking horse bid is not received
7 by -- I think there it was August 18th.

8 So, in the context of kicking this hearing out and
9 filing the motion, the lenders agreed to kick the date of the
10 milestone to the 28th -- or I'm sorry, not the 18th -- it was
11 20 -- they've agreed --

12 THE COURT: 20 --

13 MR. JACKSON: Sorry. They've agreed to kick it to
14 the 25th.

15 THE COURT: Okay.

16 MR. JACKSON: So, as worded, it provides that
17 the -- it's an event of default if, by August 25th, there's
18 not either a stalking horse -- an executed stalking horse APA
19 that provides for payment in full of the secured obligations
20 and is otherwise acceptable to the lenders, in their
21 reasonable discretion, or that there's another APA in hand
22 that is acceptable to the lenders, in their sole discretion.

23 So that's the -- those are the kind of two paths.
24 If it pays them in full, then their discretion is limited by
25 reasonableness. If it doesn't pay them in full, then that is

1 where, admittedly, we're in the scenario of, you know, do you
2 still want to proceed or, of course, they could just agree
3 not to call the default for -- to -- you know, to begin with.
4 That's the event of default.

5 The -- it's similar, but not identical, for what
6 it's worth, to the conditioned proceeding -- to the initial
7 DIP borrowing. A conditioned proceeding to the initial DIP
8 borrowing is that the lenders will have received a APA, an
9 executed APA, that is acceptable to them and the like. But
10 we will have -- the initial DIP borrowing is not expected to
11 be needed until the week of September. So, as a practical
12 matter, we'll hit the default this Friday without an APA in
13 hand unless we get a waiver. So that's how --

14 THE COURT: Okay.

15 MR. JACKSON: -- those two interplay, if that
16 helps.

17 THE COURT: Okay. Thank you.

18 MR. BOTTER: Your Honor? Good afternoon, again,
19 Your Honor. David Botter, of Cleary Gottlieb, on -- proposed
20 counsel for the Creditor's Committee.

21 Your Honor, this is a very uncomfortable objection
22 for a Committee to make. We are fully supportive of the
23 debtor's sale process. We want that process to be as robust
24 as possible. We are fully supportive of a going concern
25 sale. Frankly, many of our creditors in a going concern sale

1 may be benefited by the assumption of the executory
2 contracts, thereby reducing the size of the unsecured class
3 and getting our -- you know, some of our unsecured creditors
4 paid in full. So that's something that we want to see.

5 We also understand and support the debtor's desire
6 to have committed funding to support the sales process. We
7 get that. But, unfortunately, there is no committed funding,
8 and that's the problem, Judge.

9 We did make a lot of progress around the edges, as
10 you saw from the debtor's response and the revised order, and
11 that was, you know, Committee doing what Committees do, which
12 is negotiating with debtors and the lenders to get some
13 progress.

14 But we didn't get the real points. The real
15 points were an actual commitment to lend, and there isn't
16 any. And I'll go to where Mr. Jackson finished up his
17 argument. What the debtors are giving up here, what the
18 lenders are getting the benefit of, is exactly those
19 protections that are afforded to an estate and its creditors,
20 506(c), 552. Those are mechanics that are available to
21 charge back on a secured lender if, in fact, the case is
22 being done for their benefit.

23 So, here, we have a secured lender who is not
24 committed to lend. I mean we all agree. We are not
25 committed to lend at all and, yet, they're going to get, if

1 Your Honor enters the order today, those real benefits. Your
2 Honor, I think we've all seen and heard arguments in cases
3 like this that the secured lender, if in fact it is taking
4 the benefits of the Chapter 11 process, is actually required
5 to be the freight of that process.

6 I'm not suggesting to the Court that we should be
7 paid \$10 million for what we do. But what Mr. Jackson has
8 suggested to the Court is that the parties here before Your
9 Honor take the risk, full risk, of administrative insolvency
10 and, frankly, that the lenders walk away with not having to
11 pay anything. And if we walk out of the sale process, sure,
12 I hope Mr. Mandarino is amazing, like he always is, and he
13 can run up the price so that we're all looking at each other
14 and we're confirming a Plan and Your Honor is confirming a
15 Plan that takes care of administrative creditors and gives a
16 distribution to unsecured creditors. We all hope that. But
17 we don't know that that's going to happen. And so what we
18 are left with, Your Honor, at this point, is a request by the
19 debtors in their business judgment to approve a DIP that
20 gives lenders substantial benefits today, today, and gives
21 the debtors potentially no benefits whatsoever. That's
22 problematic.

23 And I think that -- I'm not sure how it is within
24 the business judgment of the debtors to go forward. If
25 Mr. Mandarino had said to use well, yes, in fact, the lenders

1 have agreed up front to waive the Friday default, that's
2 terrific. If they had said to us yes, in the interim, the
3 lenders have agreed to make the \$2 million initial draw
4 unconditional, that would be terrific. But we don't have any
5 of those things.

6 And a couple of more points, Your Honor, for
7 context and, again, this is going to be subject to the
8 Committee's challenge rights, which obviously are preserved
9 and they're all taken care of, but, Your Honor, first, these
10 lenders took \$21 million in a paydown on May 10th. Had that
11 money stayed in the estate, we could be talking about a very
12 different liquidity profile for this case. So that's one
13 piece of context.

14 In addition, Your Honor, there are questions
15 relating to the perfection that the lenders have in cash
16 collateral. So we've talked about the debtors having used
17 all of the cash. There are questions about whether or not
18 their DACAs were in place. There are issues with respect to
19 receivership. One of the banks was subject to a receivership
20 order and so there are legal issues as to whether or not, in
21 fact, they're perfected in cash. But those are important
22 questions that the Committee has to look at and is required
23 to look at and to do that and fulfill its fiduciary duty, it
24 has to have funding and, frankly, that's part of the burden
25 that the lenders have in bringing this case into court.

1 The lenders could've foreclosed on their
2 collateral in State Court, Judge. Do you think that that
3 would've been as good a result as we're going to get in
4 front -- in this Court? Unlikely. And that's part of the
5 bargain that the lenders struck in coming to Your Honor and
6 having a controlled sale, hopefully a controlled sale that
7 maintains the full value of the company. But they're not
8 taking that -- taking on that burden and I think that's
9 really part of the problem.

10 We are -- we want to work constructively with the
11 parties. We've had -- as you can see from the changes to the
12 order, we've had those constructive discussions. But we just
13 are in a position here where Your Honor is being asked to
14 give substantial benefits to the lenders without the estate
15 getting any concomitant benefits at all today.

16 So, Your Honor, I think that, unless there are
17 changes, we are in the uncomfortable position of suggesting
18 that the motion should be denied. We're happy to continue to
19 work with the parties to get through changes that make this
20 make sense for the estate and all of its stakeholders. But
21 at this moment in time, it doesn't, Your Honor.

22 THE COURT: Is your issue -- I read your objection
23 and you've had many issues and then, of course, you've been
24 working with the debtors to solve some of those issues. So,
25 obviously, the event of default and the conditions to lending

1 is the number one issue for you. It seems as if the
2 Committee fee number is still an open issue?

3 MR. BOTTER: It is, Your Honor.

4 THE COURT: Okay. And what else is still an open
5 issue?

6 MR. BOTTER: Lien or avoidance actions. And,
7 frankly, Your Honor, that -- absent our effectively
8 challenging any of their liens, that's the only unencumbered
9 asset that appears to benefit the estate and its creditors
10 right now. So we have a real issue with respect to granting
11 a lien on avoidance actions and the proceeds thereof.

12 And, frankly, Your Honor, some of the most
13 significant avoidance actions here may be against the lenders
14 themselves. So we'll roundtrip the cash to the lenders
15 because they're the ones who have the liens on it and,
16 instead of having an avoidance action benefit the estate and
17 its unsecured creditors, it'll just be roundtripped to --
18 from one pocket of the lenders to the next. So that's a real
19 problem, Your Honor.

20 Again, I mean the biggest problem here is,
21 frankly, that the DIP itself may never come to fruition. We
22 also -- you know, in a perfect world, Judge, and I think in a
23 perfect world for all of us, there would be funding to get
24 this case to conclusion. There isn't. Right now, we have a
25 maturity date of October 5th and the sale is going to -- is

1 required to be closed by that date and the lenders will take
2 their cash and then we'll be looking at each other with, you
3 know, a \$100,000 burial carveout, so the case will tank
4 immediately. So that's uncomfortable for everybody in the
5 room.

6 I think with the changes that were made to the
7 order on Friday night, those are the main remaining issues,
8 Your Honor. It is the Committee's ability to act. And I
9 think on that point, you know, Your Honor, I think that one
10 significant piece of all of this is, you know, a Creditor's
11 Committee isn't a catch-up role. The debtors have been --
12 you know, the debtors and the lenders have been at this
13 process for a while. What we have not idea; we've not even
14 asked, what the pre-petition spending was on their fees. But
15 the Committee, once appointed, has to get up to speed very
16 quickly, and we have been doing that and we've been working
17 cooperatively with the debtors. We have arrived at a
18 conclusion on bidding procedures on all the First Day
19 motions. We've signed off, I believe at this point, on the
20 KERF. So that's done. So we've been working as hard as we
21 can but, you know, when you compare the \$4 million budget or
22 \$4 plus million budget to the million dollars for the
23 Committee, it doesn't take into account the ramp-up costs
24 associates with a Committee representation, which are
25 substantial at the outset.

1 THE COURT: And what is the -- have you exchanged
2 the number that you would feel comfortable with accepting?

3 MR. BOTTER: We have, Your Honor.

4 THE COURT: And what is that number?

5 MR. BOTTER: Your Honor, we were looking for --
6 originally, we were looking for \$2 ½ million. The debtor
7 said we just cannot do that, and we've worked our way as far
8 down as a million and a half, which is incredibly
9 uncomfortable for us but, again, we want to represent our
10 client's interest the best way that we can and work within
11 the parameters of this case. But, at the end of the day, I
12 mean you probably -- I mean I haven't run the rates or run,
13 you know, where we are at this point, but even at a million
14 and a half dollars, I would imagine that between us and FTI
15 and the Potter Anderson firm, we're probably 5 or \$600,000 at
16 the outset of the case without having gone through a sales
17 process, and that's not, you know, with -- that's just with
18 getting up to speed and getting into the DIP and
19 understanding the case itself.

20 THE COURT: Okay. All right.

21 MS. SCHWEITZER: Your Honor, may I just speak
22 from --

23 THE COURT: Absolutely.

24 MS. SCHWEITZER: Sorry.

25 THE COURT: Yes. Take your time.

1 MS. SCHWEITZER: This is just a technical point,
2 but I just wanted to add it to the list of -- that it was
3 raised on cross-examination also is that just the orders
4 aligning each other, that the proposed bidding procedures are
5 now seeking a sale hearing as of September 28th, but the event
6 of default under the DIP still remains September 27th. So
7 it's a technical default, but it would be a default if the
8 order is not entered because the sale hearing physically
9 hasn't occurred. So it's obviously lesser than the other
10 ones, but that should be corrected as well.

11 THE COURT: Okay. Thank you. Okay. I'm happy to
12 hear from lender's counsel if you want to address the Court
13 or anyone else that wishes to be heard in connection with the
14 financing request. I note that there were two other
15 objections that were filed as well and I'm not clear what the
16 state of those are currently, so.

17 MR. HARVEY: Thank you, Your Honor. Matthew
18 Harvey, from Morris Nichols Arsht & Tunnell, on behalf of the
19 lenders, and debtor's counsel can speak to the other two
20 objections. I think shortly before the hearing, I saw some
21 language that came across that I think that the lenders
22 agreed to that will resolve that and effectively pump the
23 issue, preserving everyone's rights as to who's senior as
24 between the reclamation and lien claimants and --

25 THE COURT: Okay.

1 MR. HARVEY: -- the pre-petition and the DIP
2 lenders with all parties' rights reserved.

3 And, Your Honor, I was hesitant to stand because
4 I -- we filed a what is somewhat maybe more lengthy objection
5 and it was really the past or response and it's really the
6 past prologue here and it was to give Your Honor a sense of
7 why the lenders feel like they've been so accommodating to
8 date and that it's really -- stretches back to -- and I
9 appreciate that the Committee is just getting up to speed and
10 they have to vet all this information, and this isn't
11 evidence before you today on our history, but it was to give
12 Your Honor a sense of how the lenders view their role in
13 these cases which has, in their view, been exceptionally
14 accommodating, and maybe this didn't across clearly in the
15 First Day hearing, but, you know, we were sort of there to
16 provide a DIP because the debtors wanted it. We never viewed
17 a -- this as a reach for economics.

18 We heard your concerns loud and clear and I think
19 we've addressed, if not all of them, substantially all of
20 them. I'll address the economics just very quickly because
21 the committee fee of three percent is only on the new money
22 portion of the DIP loan. It was moved to the actual draws,
23 which is a comment Your Honor had at the First Day. The exit
24 fee is one-for-one of what the pre-petition exit fee was and
25 is moved to the actual draws. The role-ups moved to the

1 actual draws.

2 So a big concern that the Committee had, and I
3 think Your Honor had, was the debtor incurring hard economics
4 when it hasn't actually drawn on the loan. We think we've
5 fixed those.

6 The Committee also essentially makes an argument
7 that the debtor is giving up a lot today and not getting
8 anything in return. What the Committee is missing is that,
9 by the end of this week, the debtor will have burned through
10 11.3 million of the lender's cash collateral out of 16.7 as
11 of the petition date. So that's \$11.3 million that the
12 lenders right now have no incremental collateral protection
13 on. I mean they do, whatever liens that are not avoidance
14 actions, but we're all proceeding on the basis -- and I
15 understand the Committee has their challenge rights; it's not
16 an issue for today, but the lenders, effectively, will
17 have -- you know, in an effort to be accommodating, the
18 debtors have gotten through 11.3 million by the end of this
19 week. It's another -- it's actually about 3 million less.
20 It'll be 3 million by the end of the week, out of 11.3
21 million.

22 We don't have a lien on avoidance actions at this
23 point. I can't recommend to my client that they allow
24 another day of cash collateral use without those because, as
25 Swedeland says, the Third Circuit case, you can't give me

1 back what I have as adequate protection; it's not
2 incremental. Same thing with the DIP collateral. We're
3 putting the DIP in on top and putting another \$9 million of
4 new money in with no incremental collateral protection
5 without the avoidance actions.

6 And then the idea that the avoidance action
7 proceeds of claims against ourselves with roundtrip, it's a
8 little complicated if you think about it, Your Honor, but
9 that can never happen and if you'll bear --

10 THE COURT: Why is that?

11 MR. HARVEY: If you bear with me, I'll give a very
12 short hypothetical. Let's just -- not this debtor or any
13 debtor, but \$60 million that debtors owed pre-petition -- or
14 a lender has -- sorry, lender is owed 60 million of
15 collateral. So lender enters the bankruptcy case with 60
16 million collateral position. Say it's 20 million in cash
17 collateral, 20 million in IP, and 20 million in equipment.

18 THE COURT: Okay.

19 MR. HARVEY: And they're all fixed value. They're
20 not -- there's no diminution, except to the extent of use,
21 you burn through all the \$20 million of cash collateral and
22 you get to the end of the period, and let's say the Committee
23 avoids the liens on the IP, that means my collateral position
24 as of the petition date was 40 million, not 60, because my IP
25 lien is gone. But the debtors burned through \$20 million of

1 my cash collateral, which the lien was not avoided on, so I
2 need to be restored to a \$40 million collateral position in
3 order to have adequate protection.

4 If the IP that's now unencumbered is the only
5 thing that's available to fill that hole, all you've given me
6 is adequate protection. You haven't improved my position.

7 Now, there's scenarios you'd say why would a
8 Committee do that. Well, if the Committee is out pursuing 40
9 million total avoidance actions and it brings in 20 from the
10 IP and 20 from third-party vendors, the estate nets 20 above
11 what my \$40 million collateral position is. But when you're
12 in a case like this where the only thing anyone's identified
13 that is unencumbered as of the petition date is avoidance
14 actions, then I need those as my replacement collateral.

15 And just to take the analogy a little further, if
16 you -- the Committee is focused on a DACA and avoidance of
17 liens on cash collateral, it wouldn't surprise you to learn
18 we think there's nothing there and, as they get more educated
19 they'll agree with us, but let's say in my hypothetical they
20 avoid the \$20 million of liens on the cash collateral and
21 everything else stays constant, that just means I don't have
22 a diminution in value claim. My collateral position as of
23 the petition date was 40 million. I end the period with 40
24 million of IP, 40 million of equipment. I don't have a
25 diminution in value claim.

1 So you're never improving my position by giving me
2 a lien because I only get a lien to the extent of diminution
3 in value and if you avoid the thing I had a lien in and
4 that's what suffered the diminution, I don't have a
5 diminution in value claim.

6 So it's not a net improvement to the lender's
7 position to give them adequate protection liens on avoidance
8 actions or even DIP liens on avoidance actions.

9 THE COURT: Okay.

10 MR. HARVEY: Then as far as the -- and one thing I
11 want to technically point out is there is the "burial
12 carveout" has been approved to 200,000. You know, I've been
13 in cases like this and Your Honor has been in cases like this
14 for years where sometimes the parties are able to work out a
15 winddown budget and everything in advance of a DIP hearing.
16 Sometimes it takes longer and I think where this case shakes
17 out for everybody is going to depend, to a large degree, on
18 the sale and the sale proceeds and the hope I think for
19 everybody is a rising tide lifts all boats and that's why I
20 think the debtors think it's so important to try to get to
21 the sale.

22 And then in terms of the waivers and the
23 protections, and this goes to the same thing as the avoidance
24 actions, Your Honor, we're in the situation where, in an
25 effort to be accommodating, we moved our final cash

1 collateral order out ten days from August 11th to August 21st.
2 We're not over 35 days into the case, I believe. We don't
3 have the customary waivers. We don't have the lien on
4 avoidance actions. The debtor will burn through an
5 additional \$3 million just to get to the end of this week and
6 we're being asked to -- you know, people saying we're not
7 giving up everything, we're being asked to continue to allow
8 that use of cash collateral without any of the customary
9 protections and what we can't have happen --

10 THE COURT: But you're not funding, as we sit here
11 today. I just -- sorry to interrupt.

12 MR. HARVEY: No, that's fine.

13 THE COURT: Okay.

14 MR. HARVEY: That's fine, Your Honor.

15 THE COURT: As we sit here today, we don't have a
16 fully funded case budget to get you through a reasonable sale
17 process.

18 MR. HARVEY: I think that's correct, Your Honor.

19 THE COURT: Okay. We can assume, as we --

20 MR. HARVEY: Unless the condition --

21 THE COURT: -- sit here today --

22 MR. HARVEY: Unless the conditions precedent are
23 met.

24 THE COURT: Okay.

25 MR. HARVEY: And then as to --

1 THE COURT: And so how -- hold on.

2 MR. HARVEY: Sorry, Your Honor.

3 THE COURT: How is this case unlike every other
4 case that I have? Okay? So how -- why is this case unique,
5 because the terms are certainly unique. The facts are not
6 unique. So why do the lenders deserve a 506(c) waiver and
7 all the other goodies when the budget has not been -- when we
8 don't have a funded budget to go through the sales process?

9 MR. HARVEY: We do have a funded budget as long as
10 the conditions continue to be met and we removed from the
11 subsequent condition; the sole discretion is now tied to
12 there being no material adverse effect on the sale documents
13 so that we're not in a situation where we're continuing to
14 fund into a sale that's clearly not going to close.

15 THE COURT: Um-hum.

16 MR. HARVEY: I will say that I don't think this
17 case is that different.

18 THE COURT: Okay.

19 MR. HARVEY: The dynamic that's different here is
20 the timing issue.

21 THE COURT: Right.

22 MR. HARVEY: Often, a lender -- a debtor is able
23 to secure or thinks they can secure a stalking horse before
24 they enter -- and somebody who does a lot of company side
25 work, it's a race to get two things done before you get in.

1 It's a race to get your DIP funding and it's a race to get
2 your stalking horse. And if those two people would be
3 different people, you have a chicken and egg problem where,
4 particularly -- it's actually not a chicken and egg problem,
5 you're DIP lender is saying I don't want you to enter and I
6 don't want to commit to fund a dollar on day one to bridge
7 you to a sale until you have a stalking horse in hand.

8 Right?

9 So then they get the --

10 THE COURT: I'm sorry. I'm sorry. You're saying
11 that's typical?

12 MR. HARVEY: I think many cases where you enter
13 bankruptcy with a stalking horse, the DIP lenders insisted on
14 a stalking horse in order to fund from day one at an interim
15 hearing.

16 So you see many cases, Your Honor, I'm sure, where
17 there's a stalking horse on day one and the debtor's moving
18 for approval to enter into it three weeks later, but they've
19 come in in their First Day declaration and say I have a
20 stalking horse purchaser, I have a DIP lender that's
21 supportive, but in all of those things, and we could go all
22 pull and look at them, if the stalking horse lender backs out
23 at some point, it's an acceleration in an event of default
24 under the DIP.

25 So if you have a delayed draw term loan, which

1 many of these DIPs are, and six weeks into the case the
2 stalking horse lender backs out, that just means the
3 remaining of funding isn't there. It's at the lender's
4 discretion at that point. If there's something else, another
5 fish circling the hook and the investment banker says I can
6 bait them and bring them in, the lender may or may not decide
7 to continue to fund.

8 Here, it's actually -- we've been far more
9 accommodating. We didn't insist that -- we would've loved
10 the debtor to have a stalking horse buyer going in pre-
11 petition. We've let them get five, six weeks into the case;
12 by the end of this week, six weeks into the case, where they
13 don't have one and what we're saying is before you burn
14 through the remainder of -- which after this week will
15 be 6 -- 5 to \$7 million of cash collateral and you asked us
16 to double-down and put 9 million more in, we want to know
17 that you have a piece of paper from a purchaser that is
18 making this process worth it because the -- you know, the
19 Committee made the point, well, you guys aren't committing to
20 fund anything. We have. We've already funded by the end of
21 this week 12 million -- \$11.3 million out of our cash
22 collateral and the only people who are losing something
23 through today are us. The Professionals fees are being
24 escrowed. My understanding is the debtors believe their
25 budgeting reasonable admin fees.

1 We're the ones who have taken all the risk at this
2 point and, frankly, we're going to take all the risk if we
3 get past Friday, whether the debtors have an APA or it's
4 something else that's acceptable to us and we continue to
5 lend and we continue -- or we get to the lending and we
6 continue to allow the use of cash collateral.

7 So I understand it's a little bit atypical case,
8 but I don't think it's unreasonable for a lender to say
9 before I put more money in, I want to know whether it's good
10 money after that. We're already allowing --

11 THE COURT: Okay. Let's just stop and run a
12 hypothetical.

13 MR. HARVEY: Sure.

14 THE COURT: So if you don't get the 506(c) waiver
15 for the DIP --

16 MR. HARVEY: Um-hum.

17 THE COURT: So the DIP comes off the table, what
18 we have right now is a request for final use of cash
19 collateral?

20 MR. HARVEY: Um-hum.

21 THE COURT: Correct? And you want a 506(c) waiver
22 in connection with that?

23 MR. HARVEY: We want a 506(c) --

24 THE COURT: Well, and I'll --

25 MR. HARVEY: -- 552(b) and --

1 THE COURT: -- I'll just use that generically --

2 MR. HARVEY: Yes. Correct.

3 THE COURT: -- as the three goodies that everyone
4 wants in exchange --

5 MR. HARVEY: Correct.

6 THE COURT: -- for funding a budget.

7 MR. HARVEY: Right.

8 THE COURT: But as we sit here today, the budget
9 isn't funded --

10 MR. HARVEY: The budget --

11 THE COURT: -- through the sales process because
12 we have un rebutted -- you know, everyone agrees the money
13 will run out before the sales process has ended.

14 So, as we sit here today, just looking at cash
15 collateral usage, under our ordinary course application of
16 the rule, you would not be entitled to the 506(c) waiver.

17 MR. HARVEY: I'm not sure I'm following Your
18 Honor.

19 THE COURT: Taking away the DIP --

20 MR. HARVEY: Right.

21 THE COURT: -- we're sitting here and we're
22 looking at a budget of what the debtor needs to run a
23 reasonable sales process.

24 MR. HARVEY: Right.

25 THE COURT: And it's not fully funded because the

1 debtor needs more cash, correct?

2 MR. HARVEY: Right. Correct.

3 THE COURT: So under our ordinary application of
4 the rule, the lenders would not be entitled to a 506(c)
5 waiver because you have not paid the freight of a reasonable
6 sales process to liquidate your collateral.

7 MR. HARVEY: We would be funding through the pivot
8 point at which it became clear that the sale process wasn't
9 worth pursuing anymore.

10 THE COURT: Is that the state of the application
11 of our rules to obtain a 506(c) waiver in this District?

12 MR. HARVEY: I think it is, Your Honor, insofar as
13 there's no guarantee in any final cash collateral order or
14 any final DIP order that, if there isn't a default or that
15 they're -- or there's no guarantee in any of those orders
16 that if a default happens, that the lender -- the lender
17 funds through the period of a default and then the lender
18 ceases use of cash collateral and if the lender, whether
19 three weeks ago, a month ago, two months ago, obtained a
20 506(c) waiver, that was the cost of accessing a lender's cash
21 collateral in a case where the debtor admittedly can't
22 demonstrate adequate protection. And so we're out here --
23 you know, the best case scenario is that we get avoidance
24 actions and those -- if the music stops, that those can
25 satisfy the amount that we've already allowed to be spent.

1 But it's not trying to take advantage, Your Honor. It's a
2 recognition of the fact of the significant amount of cash
3 collateral that's already been spent, is going to be spent
4 just to get, again, through this Friday.

5 So I don't think it's -- I think it's a reality of
6 every loan in every cash collateral order this Court approves
7 that there's a possibility that --

8 THE COURT: There's always a possibility --

9 MR. HARVEY: Um-hum.

10 THE COURT: -- that the roof will cave in, and
11 I'll be here on an event of default and we're going to have a
12 dispute over whether you could pursue your remedies and what
13 that pursuit looks like, whether you'd have to fund the
14 budget to pursue your remedies, whether, you know, there'd be
15 some other conditional approval to pursue your remedies in an
16 event of default. Okay?

17 But when we sit and we enter, and we're all here
18 at the time that you enter the final DIP order, the budget
19 shows that the process is funded.

20 MR. HARVEY: The debtor's budget does show that.
21 Again, subject to --

22 THE COURT: Well, the sale hearing is the 27.

23 MR. HARVEY: Yep.

24 THE COURT: Okay? And I've been told you'll run
25 out of cash collateral usage on the 10th, the week of the 10th.

1 MR. HARVEY: Right. The budget will -- the --

2 THE COURT: So putting aside the DIP --

3 MR. HARVEY: Okay.

4 THE COURT: -- as we sit here today on the cash
5 collateral usage, it's insufficient, correct?

6 MR. HARVEY: Correct.

7 THE COURT: Okay. So you need a DIP, the company
8 needs a DIP to make up --

9 MR. HARVEY: Correct.

10 THE COURT: -- to make up the shortfall.

11 MR. HARVEY: Correct.

12 THE COURT: And it's not committed, correct?

13 MR. HARVEY: It is committed if the debtor can get
14 to us an APA that clears our debt and the reasonably
15 satisfactory point, Your Honor, as the Committee had in their
16 papers, well, if it hits the number, we should take it. But,
17 obviously, if it hits the number and it's subject to an
18 unreasonable condition precedent, just as an example, you
19 know, that's why it needs to be reasonably acceptable to us.

20 If it doesn't clear the debt and then -- then it
21 goes to a sole discretion standpoint and, at that point,
22 because, depending -- I mean we could be looking at a bid,
23 and I'm -- that's so far below our debt that we really have a
24 hard decision to make whether to fund on that, but we have
25 the option. We don't have to terminate. We could waive. We

1 could forebear. We could let the process play out. We
2 obviously are going to --

3 THE COURT: I mean what's the alternative? You
4 would just convert the case and you'll be dealing with the
5 Chapter 7 Trustee and receive a fraction of your recovery.

6 MR. HARVEY: I think that's the alternative.

7 THE COURT: Okay.

8 MR. HARVEY: And alternatively, I mean we're
9 commercial actors, Your Honor, so if the -- to some extent, I
10 think we're all talking past each other because everybody's
11 interests are aligned here. We all -- everybody in this
12 room, despite all our disagreements, wants the same thing.
13 We want these assets to get --

14 THE COURT: I think so, but it's the level of
15 control, quite frankly, just on my observation, and you may
16 be coming really, quite frankly, at the -- really a
17 confluence of issues that we've been seeing in this Court
18 recently.

19 MR. HARVEY: Um-hum. Oh, and I fully appreciate
20 that.

21 THE COURT: With extraordinary --

22 MR. HARVEY: Yeah.

23 THE COURT: -- attempts to modify the fundamentals
24 of the DIPs and the sales processes and you're just perhaps
25 the last person on the scale. Okay?

1 MR. HARVEY: I --

2 THE COURT: But I've been sitting in countless
3 hearings where the fundamentals are being attempted to be
4 changed.

5 MR. HARVEY: I --

6 THE COURT: And I've had to push back on every
7 single one and my colleagues are pushing back on every single
8 one, and it's extraordinary. It's really been an
9 extraordinary time period that has caused us to have given
10 serious thought to what is happening in our cases, which I
11 don't think is really a great position anyone wants to be in
12 from our side or for your side. And this is extraordinary.
13 I've never seen a term like this before, never seen a
14 Committee standing up at this level at this point. And if
15 everything goes as planned, as you want, you -- your clients
16 have put -- have received a 506(c) waiver and all the others
17 without fully funding a case and that would be extraordinary.
18 That would be something we could take now and apply it to
19 other cases, isn't it?

20 MR. HARVEY: Again, Your Honor, I think it's just
21 the unique way this case came in. I don't think that that's
22 any different than a case where I get to a final DIP hearing
23 21 days in the case, I have a stalking horse, I can't fund on
24 cash collateral loan. I need the DIP to get through, or even
25 if I can fund on a cash collateral loan, it requires

1 continued consensual use and then I get to day 35 of the case
2 and the stalking horse lender has walked or there's been an
3 event of default. You know, you see these ABLs retesting now
4 and that's what's happening in a lot of these cases and the
5 collateral base has eroded and the lender is, you know,
6 pulling the plug for one way or the other or the purchaser is
7 back out and there's no ready purchaser. And, again, they
8 funded through that date, because that's what the budget is
9 allowing the debtors to do and then there's a carve-out
10 established for the professionals.

11 I understand that this case is sort of backwards
12 in the order in that, but it's fundamentally the same thing
13 from our perspective. We don't think we're pushing the
14 boundary here. I appreciate Your Honor's hesitation,
15 particularly in light of, I know the cases you've been seeing
16 lately, with people pushing the boundaries to extremes.

17 We don't view this as pushing the boundary. We
18 view it as requesting reasonable and customary protections
19 for a lender that has already funded a substantial amount of
20 cash collateral. We'll fund another, I think it's \$3 million
21 just to get through this week, and my clients, in order to
22 get, even past today, if we don't get there, the debtors burn
23 through all this cash collateral and in order, really -- and
24 we tried to convey this in our response -- we really are
25 trying to do the right thing here and trying to make sure

1 that this is a product that has a reason to exist. This is a
2 company that has a reason to exist. We're hopeful that the
3 debtors' sale process is going to, not just bring the
4 greatest economic return to us, but have a going-concern that
5 maintains the debtors' mission, but there's a breaking point
6 at which the lenders can't go any further. And to say that
7 we should continue to fund using cash collateral and fund a
8 DIP when whatever's presented to us -- and we're hopeful this
9 is -- this is all academic, that's the hope -- but what's
10 been presented to us doesn't make any economic sense, not
11 just for us, like, I didn't think a Committee or a debtor, if
12 it's not an attractive enough sale, that we feel great about
13 it, but that just means that the debtor (indiscernible)
14 saying, why don't you incur this DIP funding to push us all
15 further down the cap structure or the cap table. I'm not
16 sure anybody else wants that, but the -- you know, and I'm
17 not trying to put Your Honor in a tough spot, but I don't
18 think my clients can get past today.

19 And we would have been here on the 11th and may be
20 the compression of the timing wouldn't have been so great,
21 but we tried to accommodate the Committee and we tried to
22 accommodate the debtors, and, frankly, we didn't want to make
23 Your Honor have two hearings on, you know, similar issues.
24 So, we are where we are. And we've tried to do our best.
25 We've tried to push all the economics out. We've cut some of

1 the economics. We've substantially curtailed the discretion.
2 We had absolute discretion through now. We eliminated that
3 for subsequent draws. We placed it with, effectively, a MAP-
4 (phonetic) or MAE-like provision.

5 You know, had -- Your Honor observed at the first
6 day hearing, the purchase agreement that effectively, you
7 know, any purchase agreement we could veto. We now can't
8 veto any purchase agreement and there's a whole bunch of
9 things --

10 THE COURT: Well, let me be clear. I do
11 appreciate that. I'm sure your clients are listening today,
12 and I very much appreciate that and I acknowledge those
13 efforts and the olive branch. I see it as an olive branch.
14 I see it as someone who's listening and trying to make
15 corrections to help, you know, satiate any concerns, as well
16 as others, but it doesn't necessarily bless all terms going
17 forward, and so we have to take every issue as it comes,
18 individually, or perhaps as a whole, depending on how
19 important it is.

20 I am struggling and I want to give you a chance to
21 try to help me understand why you view the timing aspect,
22 really of no consequence with respect to the 506(c) bucket of
23 waivers, we'll call them.

24 MR. HARVEY: In terms of --

25 THE COURT: And I'm really not understanding.

1 I'll admit, I'm not understanding why this is like every
2 other case.

3 MR. HARVEY: Well, I think that why it's like
4 every other case is because you could get to a hearing on the
5 twenty-first day of the case, whenever your final DIP hearing
6 is, and you approve a 506(c) waiver and you approve a DIP
7 budget and cash collateral budget, but built into those
8 documents are customary events of default. And I've
9 looked -- I don't have them in front of me, Your Honor -- but
10 a customary event of default in the case, is a sales case is
11 that the stalking horse backs out, right.

12 If I'm lending on the premise that the debtor is
13 going to have, you know, a pot at the end of the rainbow from
14 which to pay back by DIP and to compensate me for the use of
15 my cash collateral, if I'm doing that, I want to know that
16 that person is around. And if ever it becomes unclear or
17 even uncertain that they're not around, I'm pulling that.

18 So, you've approved something on the premise that
19 it's beginning to get from A to B and everything is going to
20 get funded, but in none of these cases is there a guarantee.
21 I understand your point that it's a little more acute here
22 because we don't have the stalking horse yet and we would
23 love to have the stalking horse on day one and not be having
24 this debate right now, but I don't think Your Honor would
25 have had as much hesitation at a hearing where the debtor

1 already had a stalking horse, even the reality being that a
2 week later, the stalking horse could have spit the bit.
3 Maybe the debtor gets to keep the good faith deposit or not,
4 but it's resulting in acceleration and the debtor can't
5 complete a sale process now or in many of these cases,
6 everyone is going back to the negotiating table and figuring
7 out what can we do with the resources we have now and the
8 time we have now and let's tack our sails and get commercial
9 and do the best we can.

10 But what we want, what my clients need is the
11 ability to assess those facts on the ground, when it comes
12 Friday or Monday or whenever, and make that determination and
13 have that discretion as curtailed in these documents, have
14 that discretion to see if Mr. Mandarino -- I mean, if they
15 get us the APA and it clears our debt, I don't think we're
16 having this conversation; again, it's got to be
17 (indiscernible) reasonable. And if there's --

18 THE COURT: I hope we're not having this
19 conversation because you're going to get paid in full.

20 MR. HARVEY: You know, I can't stand here today
21 and tell you we're not having that conversation, but the
22 first conversation that's going to be had, if that doesn't
23 happen is among all the people in the room about where we go
24 and hopefully we don't have to come before you, but I think
25 it's reasonable for my clients -- and I fully appreciate Your

1 Honor's hesitation -- it's reasonable of my clients to say,
2 We've gotten eleven, \$12 million into the case in terms of
3 used cash collateral and we don't want to go any further
4 without, at least the normal customary protections.

5 THE COURT: Okay.

6 MR. HARVEY: And then just to close the loop on
7 that, the reason the incremental for the DIP today, because
8 we insist on those for cash collateral. They're customary in
9 a DIP, too, but there is no actual DIP actually getting
10 funded until a few weeks from now, and so although there will
11 be conceptually a DIP, there is not a claim for which DIP
12 liens attach to, if that's the right way to think about it.
13 So, those (indiscernible) as the economics of the DIP come
14 into play. So, they're being conceptually approved today,
15 but the economics don't actually become real. There is an
16 actual collateral that's glomming onto because there isn't a
17 claim to support it.

18 THE COURT: I understand.

19 MR. HARVEY: Thank you, Your Honor.

20 THE COURT: I'm losing track of who I heard, so
21 whoever would like to speak is welcome to get up.

22 MR. JACKSON: Your Honor, Patrick Jackson, Faegre
23 Drinker for the debtors. If I may, I can pick up on a couple
24 of things that Mr. Botter said and I might have an
25 observation that could help on your colloquy with Mr. Harvey,

1 but then I think I will be done and give Mr. Botter the final
2 word.

3 The DIP lien on avoidance actions, my view on
4 that, and I think we expressed it in the papers, is, I think
5 what was raised in the Committee objection was specifically
6 the DIP lien. That's what we addressed. And DIP collateral
7 only becomes relevant if a DIP loan has been extended and is
8 now outstanding and is now in default and, you know, we're in
9 the scenario of having recourse to the DIP collateral.

10 The point we made in our papers is that if we're
11 in that scenario, you know, DIP loans need to be repaid and
12 even if you didn't have a lien on avoidance actions, it's an
13 estate asset. It comes in and the only way us out of the
14 case are going to be a plan at which the DIP is going to have
15 to be paid using whatever you have to pay it, or if you're
16 going to do a structured dismissal, you're not going to be
17 able to skip the DIP, right, like, it's an admin expense.

18 So even if you carve that out of the DIP
19 collateral, it doesn't really do the general unsecured
20 creditors any good unless the DIP's paid, as a practical
21 matter. Now, as part of a -- you know, obviously, they still
22 have challenge rights and there could be a lot that happens
23 with respect to that, but, you know, incrementally, like,
24 it's in my experience, normal, that a DIP lender would take a
25 lien, and as we pointed out, 364 of the Code expressly

1 contemplates that for new post-petition, secured financing, a
2 lien on encumbered assets, all we have are Chapter 5 actions.
3 So, it's not unusual for a DIP lender wearing their DIP
4 lender hat to have a lien on avoidance actions.

5 You know, I think we've gone around the merry-go-
6 round, you know, the benefits today, you know, Mr. Botter
7 said there's no benefit today of entering the order. There's
8 continued use of cash collateral. That's why I pointed out
9 that today's also the final cash collateral hearing.

10 And I guess to your question to Mr. Harvey on, you
11 know, the rule, I'm familiar with the rule. This is an
12 interesting scenario in that it doesn't present the
13 application of the rule for 506(c) in the normal way that you
14 see it come up with a bundled, you know, cash collateral and
15 DIP or maybe cash collateral usage from existing lenders and
16 DIP being provided by somebody else.

17 But I guess at the risk of putting a question back
18 to you, if we're looking at this solely as cash collateral
19 usage and we've kind of taken the DIP out of it, what more
20 could a cash collateral lender give in exchange --

21 THE COURT: Nothing.

22 MR. JACKSON: -- for a waiver --

23 THE COURT: It would never be approved.

24 MR. JACKSON: -- except use of all the cash?

25 They can't let us use more than all of the cash.

1 THE COURT: Right. And it would just never be
2 approved. You wouldn't be here saying please fund a process,
3 but we don't have the money to fund it. That's simply not a
4 scenario.

5 MR. JACKSON: Well, it's an unusual scenario. I
6 wouldn't say never have it, because here we are, and like I
7 said in my remarks, I mean, we've been -- this is a case of
8 tiny victories, like I said.

9 THE COURT: Uh-huh.

10 MR. JACKSON: We think kicking off a process, even
11 if we don't have the certainty of funding of how to end it,
12 is still better than the alternative, which was folding. You
13 know, certainly, before we filed, the scenario was, is there
14 any purpose in filing or should we just, you know, pack it up
15 now? And, you know, and we all concluded, collectively,
16 including with the lenders, there's some value to the
17 process, so we commenced, like I said, truly, a free fall
18 process.

19 Here we are. We think we've gained some momentum.
20 Still, you know, it would be nice to have it, but we don't
21 have it. But there's still value in staying on the path and
22 I think that's what's a little unusual.

23 I, personally, haven't worked on -- I can't really
24 think of any other case quite with this dynamic, but in that
25 scenario, I don't think it's necessarily a deviation from the

1 normal rule of, you know, you've got to fund the case in
2 order to get the waiver. I think it's just an application of
3 the rule in a slightly different scenario and, again, I'd ask
4 if, from a -- wearing their cash collateral lender hat, what
5 more could they give in exchange? You know, they can't let
6 us use more than all the cash, so I think it's appropriate to
7 look --

8 THE COURT: Well, I guess --

9 MR. JACKSON: -- at that, instead of, as opposed
10 to the rule of thumb, I think it's appropriate to, then,
11 evaluate. Okay. Well, we don't often have to do this
12 because we have the convenient rule of thumb about, like,
13 this is what, you know, waivers cost.

14 THE COURT: Everybody knows what that means and we
15 have an expectation as to what needs to be done to get the
16 waivers and this is not that, correct?

17 MR. JACKSON: Not exactly. This actually bleeds
18 into my next point.

19 THE COURT: Well, walk me through it, because I
20 would like to learn and if there needs to be a movement in
21 our law, then I'm happy to consider it.

22 MR. JACKSON: Well, I'd submit that the rule of
23 thumb is only useful so long as it's useful. And I think if
24 we're in a scenario where if you'll grant me that you can't
25 let a debtor use more than all the cash, so -- and if we're

1 going to keep the DIP lending out of it for the moment, I
2 think, then, you're in a situation where it devolves to,
3 let's go to the Code. Let's go to the standard.

4 The debtor is saying, I understand I have a 506(c)
5 right. I understand I theoretically have an ability to file
6 a motion and say that the equities of the case should allow
7 me to sell non-cash assets and then have the prepetition lien
8 not attach to them. Vanishingly rare that that actually
9 happens or succeeds.

10 And I think this is a scenario where it's relevant
11 to think about that. It's relevant not to prejudge it, but
12 just to think, is it reasonable? Is this the -- describe the
13 "bird in the hand, two in the bush" scenario. But it's not
14 really even two in the bush; that's the thing. I don't know
15 under the scenario here that what's being given up is really
16 all that valuable and it's kind of, to mix metaphors, from my
17 perspective, and truly from the debtors' perspective, it
18 would be the tail wagging the dog to possibly condemn the
19 case to conversion today in the interests of preserving the
20 Chapter 7 Trustee's ability to attempt to surcharge
21 collateral or to attempt to argue that there's some equity of
22 the case, which is hitherto not in the record, understanding,
23 you know, there's investigations and challenges and the like.
24 But there hasn't been any suggestion of what that equity
25 would be that would make this the vanishingly rare case where

1 that waiver would actually stick and would matter.

2 And you've got the debtor before you sitting,
3 begging, look, we just need to live to fight another day. So
4 far, we've been able to do that. We've made a lot of
5 progress. We've gained a lot of momentum. We're not there
6 yet. We'd like to continue trying because it's the right
7 thing to do. That's where we're at.

8 THE COURT: Right.

9 MR. JACKSON: So, I don't think it's flouting the
10 rule of thumb. I think it's just recognizing it as a rule of
11 thumb and applying it a little bit differently.

12 Now, to get into the DIP, this kind of bleeds into
13 my next point. Let's bring the DIP back into it. Okay.
14 Well, yeah, the debtor can't be given permission to use more
15 cash than it has, so if we need more cash, which everybody
16 seems to agree, where's it's going to come from?

17 As I stand here today, it's going to come from
18 lending. If I was, you know, going to leave today with some
19 certainty of funding -- so, let's just run the hypothetical
20 out -- not to give Mr. Harvey agita, but let's say that we
21 just remove all the conditionality of the DIP and they're
22 committing to 9 million. That's still 9 million that needs
23 to be repaid as an administrative expense.

24 So it doesn't actually address the risk of
25 administrative insolvency, technically. Even if we can take

1 some of those proceeds and then use them to pay case
2 professionals, we still need to pay that back.

3 THE COURT: Uh-huh.

4 MR. JACKSON: So that doesn't solve the -- you
5 know, DIP liens on avoidance actions, not having those,
6 again, isn't going to net improve anything for general
7 unsecureds, as long as now the case is being run with 9
8 million of additional administrative expense funding.

9 So, I think, you know, unfortunately, and I go
10 back to what I said, we're all in this, too. We are where we
11 are. The professionals are all going to do the best we can.
12 Hopefully, there'll be some, you know, event that changes the
13 complexion of the case for everybody. I agree with Mr.
14 Harvey, we are all interested in the same thing and I think
15 we're kind of coming at it, you know, in different ways. And
16 to some extent, I think we are somewhat talking past each
17 other. This is a challenging case.

18 But from the debtors' perspective, being that
19 we're, for the moment anyway, the ones in the driver's seat,
20 we think the best path forward is to let us continue on this
21 path, understanding that what it will cost is the waiver of
22 some of the traditional protections. We think under the
23 circumstances, it's still a better deal for the estate than
24 the alternative of an imminent cash collateral default and
25 possible conversion.

1 I certainly hope that if we go there, that that's
2 not what happens and we can negotiate our way out of it, but
3 it would be responsible of me to welcome that result and say,
4 you know, bring it on, because I'm going to go, you know,
5 wrestle Mr. Harvey in the hallway and come back with a
6 magical solution for the case. It's definitely not going to
7 be that easy, even if it is possible.

8 THE COURT: When's your bid deadline or when's
9 your designation deadline for a stalking horse?

10 MR. JACKSON: For the event of default under
11 the --

12 THE COURT: It's Friday.

13 MR. JACKSON: Yeah, it's Friday, right.

14 And then I think the actual bid deadline under the
15 bid procedures is mid-September -- September 19th. But,
16 yeah, as far as the imminent issue of the Friday deadline,
17 it's Friday.

18 THE COURT: Okay.

19 MR. JACKSON: Thank you, Your Honor.

20 THE COURT: Sorry. I've been on the bench for too
21 long.

22 MR. BOTTER: Your Honor, for the record, David
23 Botter, Cleary Gottlieb. And I'm going to apologize in
24 advance, because I might bounce a little bit to various
25 different places.

1 So, Mr. Jackson said we call concluded with the
2 lenders that there is value to conduct the sale process.
3 That's actually in Mr. Ziegler's first day affidavit, that
4 they met with the lenders and they all concluded, including
5 the lenders, that there was value to conducting the sale
6 process, here in Chapter 11.

7 Going to what Mr. Harvey said, he basically, at
8 least how David Botter thinks of it, was saying that the
9 conditions precedent to making the loans, whether it be the
10 initial draw or any subsequent draws, are a free option for
11 the lenders to stop and say, Oh, is this going okay? Can I
12 put more money into this process?

13 And that's not an initial commitment to fund the
14 sales process. That's a free option for the lenders to say,
15 This is going well or it's not going well, and, ultimately,
16 kind of the free option that is being exercised here, at
17 least, I think is the *indicia* that, in fact, this case is
18 just being run for the lenders' return. Mr. Jackson said it.
19 Everybody said it. We are hopeful that's not the case, but
20 unfortunately, that's where we find ourselves at the moment.

21 Mr. Harvey ran through a hypothetical on the lien
22 issue. I actually didn't agree with the hypothetical,
23 because in our situation, if the avoidance action -- and,
24 again, I'm saying this only because we've heard this in our
25 initial discussions -- if the avoidance action is centered on

1 their interest in cash collateral, the \$16 million that was
2 in the debtors' bank accounts on day one would have been
3 encumbered cash. That would have been subject to our rights,
4 certainly the lenders' deficiency claim rights, as then, an
5 unsecured creditor, but we would have had interest in that
6 \$16 million of cash. A little bit different than the
7 hypothetical that Mr. Harvey described.

8 We talked about extraordinariness -- that's not a
9 word -- we talked about how extraordinary this case might be.
10 I think it would have been less extraordinary if the DIP loan
11 had been entered into and the debtors had the ability to draw
12 on it to run the process. That's, in my experience, that's
13 kind of how these things generally work.

14 THE COURT: In everyone's experience.

15 MR. BOTTER: Thank you, Your Honor.

16 THE COURT: I don't think there's any disagreement
17 on that.

18 MR. BOTTER: Okay. So that's -- and that's what
19 we would like to see here.

20 And so if we had a situation where you used cash
21 collateral, whether or not it is, in fact, their cash
22 collateral, an issue to resolve down the road, you have a DIP
23 loan. The DIP loan and use of cash collateral is adequate to
24 fund the case. That's when the 506(c) waivers, at large, are
25 appropriate. We don't have that case here.

1 Last point, in terms of small wins, you know, we
2 could talk about an interim, another interim cash collateral
3 order. Mr. Harvey may not like that. I'm just saying we
4 could talk about it and the lenders could waive their final
5 order deadline for that and we could talk about -- and maybe
6 the lenders get more comfortable that their investment is
7 being de-risked as a result of the good work of
8 Mr. Mandarino. I mean, that's, basically, what we all heard
9 today.

10 We heard the lenders want to de-risk the process.
11 They want to de-risk the process and their further investment
12 by seeing whether or not there is a stalking horse asset
13 purchase agreement that's acceptable to them. We would think
14 that paying them off in full would be acceptable and there
15 would be nothing else (indiscernible) but, obviously, that's
16 not the case. The lenders want to de-risk any subsequent
17 draws to make sure that, in fact, that stays in place.

18 Well, we may have a real auction process. I hope
19 we do. Why would the lenders ever have the right to
20 terminate if we've got people in the auction room and the
21 stalking horse disappears? Hopefully, that's going to be --
22 well, that may not be the greatest results of the auction,
23 but at least we have an active auction process and we may get
24 a return.

25 I think at the end of the day, Your Honor, the

1 lenders have to make a decision. The lenders are the one who
2 have decided with the debtors at the outset of the case to
3 use the Chapter 11 process to maximize their own value. If
4 they think this is the right forum to maximum their value,
5 they've got to pay the freight associated with it.

6 Thank you, Your Honor.

7 THE COURT: Thank you.

8 I'm going to take a short -- oh, Mr. Brown?

9 MR. BROWN: Your Honor, really quick?

10 THE COURT: I've saved the best for last.

11 MR. BROWN: Yeah, just because you asked, Your
12 Honor, I did file a limited objection. I wanted to let you
13 know that that's been resolved. Mr. Jackson has submitted
14 some "reservation of rights" language that we agreed to an
15 understand the lenders had agreed to, as well.

16 THE COURT: I thank you for confirming that.

17 All right. And I believe Ms. Manne is on Zoom and
18 wishes to be heard, as well.

19 MS. MANNE: Good afternoon, Your Honor. Yes,
20 Beverly Weiss Manne for the Thermo Fisher Scientific
21 entities. We have filed an objection, which is the procedure
22 of these cases, you might start thinking is our standard
23 objection and, yes, it is, with respect to reclamation
24 rights, as well as with respect to a sale process, with
25 respect to regulated healthcare-type entities to make sure

1 that in the context of any bids and sales, that any qualified
2 bidder ultimately be providing adequate assurance, not just
3 from a financial perspective, but from a regulatory and
4 operational perspective. The debtor has added language to
5 the DIP, well, will be adding language to the DIP order on
6 preservation of our -- the reclamation rights of us and I
7 presume others, who have properly documented a reclamation
8 claim and they've also added the appropriate language on
9 reclamation and the contract assumption to the proposed sale
10 motion.

11 So our limited objection and reservation of rights
12 has been addressed by the debtor and, therefore, those --
13 they're moot at this point, Your Honor.

14 THE COURT: Okay. Thank you very much for
15 confirming that.

16 MR. JACKSON: And, Your Honor, I apologize. I had
17 meant to -- that was another housekeeping matter. I can hand
18 up the DIP order inserts that have been agreed by both of
19 these parties if that's helpful, but not, obviously, if
20 you're inclined to enter a DIP order.

21 THE COURT: Okay. I'm happy to receive it. Thank
22 you.

23 Okay. All right. Is there anyone else that
24 wishes to be heard in connection with the final DIP and cash
25 collateral?

1 Mr. Harvey?

2 MR. HARVEY: Your Honor, no further argument on
3 it. I just wanted to clarify two things. One,
4 Ms. Schweitzer had raised the point that the milestone date
5 or EOD date for the sale hearing where the sale order was
6 the 27th. I think it was moved to the 28th, based on Your
7 Honor's availability. So, I mean, obviously, I'll need to
8 confer with my clients. I don't perceive it moving the date
9 one day is an issue, so we'll deal with that.

10 And then the point that Mr. Botter just raised,
11 just to clarify, the construct about there being a purchase
12 agreement in place is the stalking horse, or like an equal or
13 greater one that replaces it, so if we're in an auction and
14 people are bidding up the stalking horse bid, that's not an
15 event of default that, you know, it's not the stalking horse
16 anymore. The concept is a purchase agreement, generally, it
17 starts with a stalking horse. Whether before we get to an
18 auction or we get to an auction and someone's topped that bid
19 on equal or greater terms, and, of course, we're all excited
20 about that, so it's not just the stalking horse bid. Just to
21 clarify those two points, Your Honor.

22 THE COURT: Okay. I appreciate that. Thank you
23 very much.

24 Okay. I'm going to take a short break and I'll
25 come back and I'll give my ruling. Thank you.

1 (Recess taken at 3:13 p.m.)

2 (Proceedings resumed at 3:59 p.m.)

3 THE CLERK: All rise.

4 THE COURT: Thank you very much for the few
5 minutes.

6 Please be seated.

7 As always, I run over every estimate I ever give,
8 and so today I tried to not give an estimate and still ran
9 over the time. But, no, thank you all very much for the
10 thorough presentations today. I appreciate the time of
11 Mr. Mandarino, as well. It was all very helpful to my
12 decision-making process today.

13 Ultimately, here's where I come down. I think all
14 of the commercial terms of the final DIP are reasonable, save
15 except for the initial funding event of default. I view this
16 as an unreasonable case control that leaves the estates
17 inadequately funded as we sit here today and as a result,
18 Section 506(c) marshaling waiver -- marshaling and 552(b)
19 waivers are not appropriate.

20 I understand the necessity of the DIP to the sales
21 process, but as of now, the lack of confidence in the process
22 is of the lender's own making and quite frankly it's not
23 cured by the entry of an order today, as there still will
24 remain uncertainty regarding the sales process until at least
25 Friday.

1 The lender, to adopt Mr. Botter's language, the
2 lender needs to make a decision and the time to make that
3 decision is today.

4 On the issue on avoidance actions, this is a
5 customary protection and I do not find it unreasonable, given
6 the lack of unencumbered collateral for the lenders.

7 On the Committee fee issue, I can't say I see this
8 often, I am not going to require an increase in the line item
9 of the budget. I am approving the budget to -- I would be
10 prepared to approve the budget, but be aware that,
11 ultimately, your budget does not determine my award or
12 allocation of fees at the end of the case.

13 I gave you the last two rulings because I don't
14 know where this will go and I know you all need to talk.
15 There's been a suggestion that there could be -- I'm not
16 going to presuppose what the lenders are willing to do here
17 today, I just want to give you some options. And my options
18 are based on the fact that I'm not in the office next week.

19 I understand the position that you could get
20 through with interim cash collateral uses or, perhaps, at a
21 continued hearing after the stalking horse bids come in, but
22 that would require a hearing next week and I'm not available.
23 I could find a duty judge for you if absolutely necessary; of
24 course, it is what it is. I know everyone has different
25 feelings on how duty judges handle cases, but in terms of a

1 final DIP order, obviously, we would need to get one for the
2 case to continue. I understand that.

3 I would, of course, be willing to entertain a
4 final DIP order under certification of counsel if it's
5 consensual, following the receipt of stalking horse
6 agreements and a more structured path going forward, but
7 again, I don't think we really know the answers to where this
8 will head based on what has been represented to me as I sit
9 here today, so I think there needs to be some discussion
10 amongst the parties and you can tell me what you would like
11 to do.

12 So, based on that, we're going to move on to the
13 sale order, but should we -- how do we want to move forward?

14 MR. JACKSON: Well, I guess, Your Honor, I
15 appreciate that. Patrick Jackson for the record from Faegre
16 Drinker.

17 Just to clarify, when you say the -- let's see --
18 the condition, the initial funding event of default, if we --
19 just so I understand what the ask is or the task is, I should
20 say. Judge's don't ask; they tell. The event of default
21 that we have, the stalking horse bid in hand by Friday, if we
22 were to obtain a waiver of that event of default, are you
23 saying that it's the event of default waiver that's needed --

24 THE COURT: I may have -- I apologize.

25 MR. JACKSON: -- or that the conditionality of the

1 initial draw of funding --

2 THE COURT: Yes.

3 MR. JACKSON: -- also could not be conditioned on
4 an APA?

5 THE COURT: Yeah, we need committed funding today.

6 MR. JACKSON: Okay. So just --

7 THE COURT: And I'm not sure how many events of
8 defaults or milestones or what other terms of the DIP,
9 because I'm sure it's in many different forms.

10 MR. JACKSON: Whatever we need to do to get from
11 here to committed funding, notwithstanding the Friday, sort
12 of, event that we've been talking about.

13 THE COURT: Yes, we need a committed funded budget
14 in order to get a 506(c) waiver, as well as other waivers.

15 MR. JACKSON: Okay. I think as far as -- yeah, I
16 think it does make sense to pivot to the remainder of the
17 business for the agenda, subject to thoughts that Mr. Botter
18 may have. I'll just note that it's -- I mentioned earlier
19 that it is an event of default not to have a final cash
20 collateral order. The date for that event of default is
21 actually tomorrow.

22 So I think from my perspective, one thing we may
23 be able to do is, if it's possible -- and I'm not sure it
24 will be -- but if it were possible to button everything up
25 and submit an order under cert of counsel this week and get

1 an order in, you know, either tomorrow or later with an
2 extension of that EOD from the lenders. I think it would
3 certainly be better to get something in sooner than pushing
4 it to next week and possibly having a duty judge and the
5 like.

6 So, our hope would be if we could resolve
7 something, to get it to Your Honor this week.

8 THE COURT: And that would be fine, and I'm
9 available to look at orders while I'm away next week. It's
10 just difficulty in handling hearings. And to be clear,
11 without a DIP, I'm not prepared to give a 506(c) waiver and
12 the like to the prepetition lenders on a final cash
13 collateral basis, because we don't have a funded budget.

14 MR. JACKSON: Okay.

15 MR. BOTTER: Thank you, Your Honor.

16 I guess -- again, for the record, David Botter,
17 Cleary Gottlieb, I would make the suggestion to the parties
18 that we consider dealing with tomorrow's deadline with
19 another interim cash collateral order as I suggested before.
20 We're happy to continue to work with the parties to get there
21 so that we don't have a case-ending situation and we would
22 hope that we could get to some kind of order, agreed order
23 where we could send it to Your Honor for ultimate approval.

24 THE COURT: I'll really defer to the parties on
25 this if consensus can be reached. I mean, Mr. Harvey, he

1 needs to speak with his clients, I assume, so nothing can get
2 really happening right now.

3 I guess the question I have really before me is,
4 should we continue with the agenda?

5 MR. HARVEY: Your Honor, just before I -- I think
6 the debtor would probably like to get to their agenda, but
7 I'll defer to them.

8 And Mr. Jackson is correct that the cash
9 collateral milestone, which has already been extended by over
10 10 days, I believe, is tomorrow. And as I mentioned earlier
11 today, we weren't prepared coming into this hearing to
12 consent to further use of cash collateral without those
13 waivers, so I don't know where that leaves us.

14 THE COURT: Okay.

15 MR. HARVEY: And I'll have to talk with my clients
16 and see if something can be done before tomorrow, but that's
17 where we're at.

18 THE COURT: I understand.

19 MR. HARVEY: Thank you, Your Honor.

20 THE COURT: I'm available at -- I will make time
21 for you this week if I can. My hearings are -- I have a jam-
22 packed week, but they're slowly coming off, as you know how
23 things get resolved and taken care of by parties, hearings
24 get canceled. So, what looked to be a very busy week is
25 freeing up, so I have time and can help you, as needed.

1 MR. HARVEY: I appreciate it, Your Honor.

2 THE COURT: Okay.

3 MR. HARVEY: Thank you.

4 THE COURT: All right. So I think it does make
5 sense to move forward with the agenda and we'll leave the
6 final DIP and final cash collateral order open for the
7 moment.

8 MR. BAMBRICK: Thank you, Your Honor. For the
9 record, Ian Bambrick from Faegre Drinker Biddle & Reath. I
10 have a sneaking suspicion that you were trying to avoid the
11 scintillating procedures of lease rejection and sale and
12 bidding procedures.

13 The next item on the agenda is actually Item 4.
14 This is our rejection procedures motion. Your Honor, this
15 was filed in order to try to put in place a procedure that
16 would expedite and create a cost-efficient mechanism to deal
17 with the contracts and leases that the debtors have. We have
18 filed one rejection motion and would like to streamline that
19 process going forward.

20 After we filed the motion, we received an informal
21 response from one of our landlords BXP Research.

22 THE COURT: Okay.

23 MR. BAMBRICK: BXP Research had specific concerns
24 around the clarity around the procedures. The debtors
25 believe that the procedures, although they were legally, they

1 met the standard. They provided what they needed to.

2 Really, from the debtors' perspective, what BXP
3 was looking was to pull forward some of the clarity that
4 would come later with the notice process.

5 THE COURT: Okay.

6 MR. BAMBRICK: And so to make it explicit in the
7 notice that the form notice that we provided exactly what
8 would be included. The specific concern, I think, was around
9 abandoned property and part of that is related to this debtor
10 or some of the property they have, given the nature of the
11 equipment that they have, that there would need to be some
12 clarity around there. And there was a concern, I think, that
13 is greater than it normally is.

14 We worked with BXP. We significantly revised the
15 procedures. We believe the procedures now are both legally
16 justified and then also clearer. They're just clearer.

17 And so, with that, we filed a COC, and I believe
18 the COC was filed about a week ago.

19 THE COURT: I did receive the COC.

20 MR. BAMBRICK: Yes. And I thought --

21 THE COURT: I had comments to the COC.

22 MR. BAMBRICK: -- I thought you probably had some
23 comments and that's why it had not yet been entered.

24 THE COURT: Yeah, I do.

25 As landlords are, and probably acutely and

1 unfortunately aware, I have recently started looking at these
2 orders a little bit closer and my opinion, as has been
3 painfully made clear in another case, is that I'm not willing
4 to approve free and clear abandonment.

5 MR. BAMBRICK: Okay.

6 THE COURT: I do not believe that is appropriate
7 under the Code. And so I have some tweaks to this that are
8 consistent with what I've done in cases going forward after
9 having ruled on this issue on a contested basis in my Corner
10 Bakery case, if you'd like to look at that transcript. But
11 it comes in many parts, because there's a few notices and
12 orders attached --

13 MR. BAMBRICK: Yes.

14 THE COURT: -- so I don't know if you have
15 everything in front of you, but I'll just start on page 4.

16 MR. BAMBRICK: Now, Your Honor, is that page 4 of
17 the redline or of the --

18 THE COURT: So, my apologies.

19 It's -- I'm in your certification of counsel --

20 MR. BAMBRICK: Yep?

21 THE COURT: -- and I guess it would be page 5 of
22 15.

23 MR. BAMBRICK: Okay.

24 THE COURT: All right. And do you see where it's
25 Subpart (f) and it says, "remaining property"?

1 MR. BAMBRICK: Yes.

2 THE COURT: Okay. And you go down three lines and
3 it says, "and the landlords may dispose of any FF&E in their
4 sole discretion, free and clear of all liens, claims, and
5 encumbrances, and interests."

6 MR. BAMBRICK: Yes, Your Honor.

7 THE COURT: Okay. And it then it says, And
8 without any ability to the debtors and any third party --
9 without any liability to the debtors and any third party.

10 My requested change is that you strike the
11 language "free and clear after all liens, claims,
12 encumbrances, and interests" and your insert the word
13 "consenting" after "third party." So, it would read,
14 "Landlords may dispose of any FF&E in their sole discretion
15 and without any liability to the debtors and any consenting
16 third party."

17 MR. BAMBRICK: Duly noted, Your Honor.

18 THE COURT: Okay. And then that change would
19 follow through on page 10 of 15. There's the second
20 paragraph, it says, "Please take further notice that upon the
21 rejection effective date" so that just isn't duplicative
22 language, but this is in the form of the notice that would go
23 to landlords.

24 MR. BAMBRICK: Yes.

25 THE COURT: Okay. And then that same change would

1 need to be made to the proposed rejection order, which is
2 page 14 of 15.

3 MR. BAMBRICK: Understood, Your Honor.

4 THE COURT: Okay. And then I'll just point out
5 one other item that was caught upon review of this, is that
6 on page 11 of 15 -- I'm in the notice --

7 MR. BAMBRICK: Yes?

8 THE COURT: -- the first -- sorry, the second
9 paragraph and the third paragraph don't actually conform to
10 the procedures.

11 MR. BAMBRICK: Okay.

12 THE COURT: So, paragraph 2 says, "Please take
13 further notice that pursuant to the terms of the procedures
14 order, if the debtors have deposited monies with the contract
15 or lease counterparty as a security deposit..." I think
16 there's a reference that's missing to letters of credit.

17 MR. BAMBRICK: Understood, Your Honor.

18 THE COURT: Okay. And then in the third paragraph
19 -- I rewrote these notes a while ago, so I'm refreshing my
20 recollection on them -- it says, "Please take further notice
21 that pursuant to the terms of the procedures order, you will
22 receive a copy of any order entered rejecting any contract or
23 lease no later than five days after the entry of such order."

24 I think it should be that the debtors will serve
25 the order no later than five days.

1 MR. BAMBRICK: Understood, Your Honor.

2 THE COURT: I think. So, I would just ask you to
3 look at that. I think you're going to serve something out.

4 MR. BAMBRICK: Understood, Your Honor, and I
5 agree, I do believe that was the intent.

6 THE COURT: Okay. Listen, I understand landlords
7 have a view on this abandonment issue, but I heard argument
8 on it, very, very vigorous argument in another case on the
9 ability to abandon property free and clear under 554. I
10 don't believe that that comports with the language of the
11 Code. I understand it imposes some hardships on landlords,
12 but I cannot authorize that bottom.

13 MR. BAMBRICK: Understood, Your Honor.

14 THE COURT: I see Ms. Bifferato you're on the
15 line. I'm trying not to make eye contact, but --

16 (Laughter)

17 MS. BIFFERATO: Yeah.

18 THE COURT: -- but I understand you may want to be
19 heard on this issue or you have concerns.

20 MS. BIFFERATO: Tully, Your Honor, thank you very
21 much. Karen Bifferato on behalf of the BXP Research Park LP.
22 I'm going to defer to my co-counsel who's also on the line,
23 because I know he wanted to speak. I don't even know. The
24 "free and clear" language might be a separate issue. I think
25 he wanted to speak separately on something else, as well.

1 But I will also limit any comments. And I need to
2 read the Corner Bakery transcript, for sure.

3 (Laughter)

4 MS. BIFFERATO: Thank you.

5 THE COURT: Thank you.

6 Okay. Mr. Gage?

7 MR. GAGE: Good afternoon, Your Honor.

8 Can you hear me okay?

9 THE COURT: I can, yes.

10 MR. GAGE: Great. Thank you very much.

11 Brendan Gage, Goulston & Storrs on behalf of BXP
12 Research Park.

13 I just had a question on the "free and clear" and
14 the "consent" change. So, obviously, the rejection notice is
15 now being revised, so that it's going out to all known third
16 parties who have -- who might have an interest in fixtures,
17 the lab equipment, and furniture, is this frickin language --
18 I guess the concern is they get notice and then they haven't
19 objected to removal of the property and then somehow the
20 landlords are back on the hook again if they've disclosed
21 that nothing has happened.

22 THE COURT: I understand that that is an open
23 issue. I think the open issue, quite frankly, it has not yet
24 been presented to me on a contested matter, is whether
25 service of the notice and failure to object would be

1 considered consent.

2 MR. GAGE: Okay.

3 THE COURT: I understand that leaves you in a
4 difficult position at the moment and I'm happy to hear that
5 issue if and when it becomes ripe and I receive briefing on
6 that issue.

7 MR. GAGE: Okay. Understood.

8 Thank you, Your Honor.

9 THE COURT: All right. Thank you.

10 MR. BAMBRICK: Apologies, Your Honor. I'm just
11 taking some quick notes.

12 So with that, Your Honor, I think what would make
13 sense for that is we will go back, we will confer with
14 Mr. Gage, revise the order, and then hopefully be in a
15 position, subject to reaching an agreement to provide a
16 revised order under certification of counsel after the
17 hearing. Most likely tomorrow.

18 THE COURT: Okay.

19 MR. BAMBRICK: Thank you, Your Honor.

20 THE COURT: Thank you very much.

21 MR. BAMBRICK: So, Your Honor, next is Item 9 on
22 the agenda, which is Docket 69 and that is the debtors'
23 bidding procedures and sale motion.

24 Your Honor, the debtors seek, at this stage,
25 approval of the bidding procedures which are attached as

1 Exhibit 1 to the proposed order; procedures for designating a
2 stalking horse bidder, and seeking approval of bid
3 protections; assignment procedures for the assumption and
4 assignment of assumed contracts; and approval of the sale-
5 related notices that are attached to the back of the order.

6 The debtors received formal or informal objections
7 and responses from NAMSA, PDC Facilities, Thermo Fisher
8 Scientific, Cigna, the U.S. Trustee, and the Committee. The
9 debtors have worked with the responding parties to revise the
10 procedures to address the various concerns raised and at this
11 point, we received confirmation that all of the open
12 objections and responses have been addressed.

13 What we did do is earlier this morning, we were in
14 a position to file earlier than we normally are, to file a
15 revised order with a redline. That redline shows all the
16 changes. There have not been any since we filed that.

17 As far as next steps, I would ask (indiscernible)
18 for the Court, would you like to walk through the changes,
19 because there were obviously a number and I thought the Court
20 may have some questions, but we can proceed at whatever you
21 think is the most-effective way to address the changes that
22 were made.

23 THE COURT: I had the chance to review it.

24 MR. BAMBRICK: Okay.

25 THE COURT: I have no questions or concerns and I

1 appreciate you working with all the parties. Why don't I
2 hear from other parties in interest that wish to be heard and
3 then we'll take it from there.

4 MR. BAMBRICK: Thank you, Your Honor.

5 THE COURT: Okay. Thank you.

6 MR. BOTTER: Good afternoon, again, Your Honor,
7 David Botter, Cleary Gottlieb, on behalf of the Committee.

8 With the changes that were -- that appear in the
9 redline, it could be as no further questions.

10 THE COURT: Okay. Thank you.

11 MR. BOTTER: Thank you.

12 THE COURT: Mr. Hazeltine?

13 MR. HAZELTINE: Good afternoon, Your Honor.
14 William Hazeltine on behalf of PDC Facilities.

15 We had filed a limited objection and our objection
16 was resolved with language inserted in paragraph 9(a) of the
17 order.

18 THE COURT: Okay. Thank you very much.

19 MR. HAZELTINE: Thank you, Your Honor.

20 THE COURT: Mr. Wisler, how are you?

21 MR. WISLER: Good. Good afternoon, Your Honor.
22 Jeffrey Wisler on behalf of Cigna Health and Life Insurance
23 Company.

24 The changes that the debtors made to the
25 procedures and some other unique circumstances in this case

1 made -- resolved Cigna's objection to the procedures.

2 THE COURT: Wonderful. Thank you.

3 MR. WISLER: Thank you.

4 THE COURT: Ms. Manne, did you wish to be heard?

5 MS. MANNE: Hi, yes, Your Honor. First, I didn't
6 thank you before for allowing me to appear remotely. When
7 I -- my counsel was not available and I tried to go in and
8 book flights and everyone seemed to be going to Philadelphia.
9 There was no way to get to you today, Your Honor, so I
10 appreciate that you were -- your accommodation and let us do
11 a remote appearance.

12 As I mentioned before, we filed a limited
13 objection and reservation of rights to the bid procedures and
14 sale. The debtor in the revised order and the blackline have
15 made changes and those are acceptable, and therefore, our
16 objections and reservations of rights have be addressed
17 and/or are moot, Your Honor. Thank you.

18 THE COURT: Thank you for confirming that.

19 All right. Anyone else?

20 (No verbal response)

21 THE COURT: Okay. I'm not seeing anyone in the
22 courtroom or on Zoom.

23 All right. Well, Mr. Bambrick, I reviewed the
24 changes. As I mentioned, I have no questions. I appreciate
25 you working productively with all the parties to reach

1 consensus and I am happy to enter the order --

2 MR. BAMBRICK: Thank you, Your Honor.

3 THE COURT: -- as it's been submitted, and will do
4 so.

5 Do you need to make any further tweaks or changes
6 or has the final version been uploaded so that we can enter
7 it after the conclusion of today's hearing?

8 MR. BAMBRICK: We do need to make a few tweaks or
9 changes. I believe there's bracket items that we need to
10 fill and there's also cross-references to a final DIP order
11 that we'll need to decide how to address.

12 THE COURT: Okay.

13 MR. BAMBRICK: And so, with that, what I would
14 propose is that we will, likely with the rejection procedures
15 motion, we will file a revised under certification of
16 counsel.

17 THE COURT: Okay. And I assume you obtained the
18 hearing date in September from my chambers?

19 MR. BAMBRICK: Correct, Your Honor. Yes.

20 THE COURT: Okay. Because I did not cross-check
21 my schedule on that, so I trust Ms. Lopez with my calendar.

22 Excellent. Great. Well, then, I will wait to
23 receive that and once it's received, I assume I will have no
24 questions and I'll have it entered as soon as I can.

25 MR. BAMBRICK: Thank you very much, Your Honor.

1 THE COURT: As I mentioned, I will be hear all
2 week, so I will look for guidance from you all. You can
3 reach out to Ms. Lopez if you need me this week.

4 If you want to provide a status, you're welcome to
5 do that, as well. Whatever you think is appropriate, please
6 go ahead and contact Ms. Lopez and she'll advise as to the
7 best way to move forward.

8 MR. BAMBRICK: Thank you, Your Honor.

9 THE COURT: All right. Well, then, if there's
10 nothing else, the hearing is adjourned.

11 COUNSEL: Thank you, Your Honor.

12 THE COURT: All right. Thank you.

13 (Proceedings concluded at 4:21 p.m.)

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CERTIFICATION

1
2 We certify that the foregoing is a correct
3 transcript from the electronic sound recording of the
4 proceedings in the above-entitled matter to the best of our
5 knowledge and ability.

6
7 /s/ William J. Garling

August 22, 2023

8 William J. Garling, CET-543

9 Certified Court Transcriptionist

10 For Reliable

11
12 /s/ Tracey J. Williams

August 22, 2023

13 Tracey J. Williams, CET-914

14 Certified Court Transcriptionist

15 For Reliable
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