IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
CONVERGEONE HOLDINGS, INC., *et al*.[1]	)	Case No. 24-90194 (CML)
Debtors.	)	(Jointly Administered)

AD HOC GROUP OF EXCLUDED LENDERS' OBJECTION TO CONFIRMATION OF JOINT PREPACKAGED CHAPTER 11 PLAN OF REORGANIZATION OF CONVERGEONE HOLDINGS, INC. AND ITS DEBTOR AFFILIATES

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: AAA Network Solutions, Inc. (7602); ConvergeOne Dedicated Services, LLC (3323); ConvergeOne Government Solutions, LLC (7538); ConvergeOne Holdings, Inc. (9427); ConvergeOne Managed Services, LLC (6277); ConvergeOne Systems Integration, Inc. (9098); ConvergeOne Technology Utilities, Inc. (6466); ConvergeOne Texas, LLC (5063); ConvergeOne Unified Technology Solutions, Inc. (2412); ConvergeOne, Inc. (3228); Integration Partners Corporation (7289); NetSource Communications Inc. (6228); NuAge Experts LLC (8150); Providea Conferencing, LLC (7448); PVKG Intermediate Holdings Inc. (4875); Silent IT, LLC (7730); and WrightCore, Inc. (3654). The Debtors' mailing address is 10900 Nesbitt Avenue South, Bloomington, Minnesota 55437.

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The Ad Hoc Group of Excluded Lenders (the "Excluded Lenders")[1] object to confirmation of the *Joint Prepackaged Chapter 11 Plan of Reorganization of ConvergeOne Holdings, Inc. and Its Debtor Affiliates* (the "Proposed Plan")[2] [Docket No. 27] and respectfully represent as follows:[3]

Preliminary Statement

1. Before filing these chapter 11 cases, the Debtors privately negotiated the terms of a proposed restructuring with a select group of creditors (including an affiliate of the Debtors' controlling insider) who collectively hold approximately 81% of the Debtors' First Lien Claims[4] (collectively, the "Majority Lenders"). This pact was memorialized in the Restructuring Support Agreement (the "RSA"), which requires the Debtors to raise $245 million by selling steeply discounted equity without any market test (the "Equity Rights Offering"). Only a portion of the investment opportunity is available to all members of Class 3. The balance (roughly $86 million) is reserved *exclusively* for purchase by the Majority Lenders. The RSA and Proposed Plan also require the Debtors to pay the Majority Lenders a "fee" in form of reorganized equity with an assumed value of $37.7 million.

2. The Proposed Plan is fatally flawed and confirmation must be denied because the Exclusive Investment Opportunities (as defined below) violate the equal treatment requirement in section 1123(a)(4) of the Bankruptcy Code by providing vastly different recoveries for Majority Lenders as compared to the Excluded Lenders, both of whom are in Class 3. Equality of

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1 The Excluded Lenders are identified in the *Supplemental Verified Statement of the Ad Hoc Group of Excluded Lenders Pursuant to Bankruptcy Rule 2019* [Docket No. 233].

2 Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Proposed Plan.

3 Attached hereto as **Exhibit A** is the *Declaration of Keshav Lall in Connection with Ad Hoc Group of Excluded Lenders' Objection to Confirmation of Joint Prepackaged Chapter 11 Plan of Reorganization of ConvergeOne Holdings, Inc. and Its Debtor Affiliates* (the "Lall Declaration").

4 In the Proposed Plan, all Holders of First Lien Claims are classified together in Class 3.

distribution among creditors in the same class is a central policy and Bankruptcy Code requirement. The Exclusive Investment Opportunities position the Majority Lenders to receive reorganized equity with an assumed value of $169.6 million in exchange for $85.75 million of new money. Moreover, on a relative recovery basis, the Exclusive Investment Opportunities enable the Majority Lenders, as a collective group, to receive not less than a [redacted]% recovery on their First Lien Claims, and maybe more depending upon the participation in the Takeback Term Loan Recovery Option—a staggering over [redacted]% enhancement over the recovery to the Excluded Lenders electing the equity option under the Proposed Plan. Because the Majority Lenders and Excluded Lenders are in the same class, this disparity, by definition, is unequal treatment and prohibited by the Bankruptcy Code.

3. The Debtors will try to characterize the Exclusive Investment Opportunities as compensation for new money commitments and not a distribution to the Majority Lenders on account of the First Lien Claims. That contention ignores reality. The Debtors agreed to provide the Exclusive Investment Opportunities for one plainly obvious reason: it was the price they had to pay to get the consent of the majority at the expense of the minority. Moreover, any argument that the Exclusive Investment Opportunities are on account of new money commitments fails because there was no market test here. In *Bank of America National Trust & Savings Association v. 203 N. LaSalle St. Partnership*, 526 U.S. 434 (1999) ("LaSalle"), the Supreme Court held that exclusive investment opportunities to existing stakeholders to buy discounted equity cannot constitute legitimate consideration for a new money commitment. An *exclusive* investment opportunity is, by definition, one without market scrutiny. That is precisely what doomed the plan in *LaSalle*.

4. Any effort to deny the direct connection between the Exclusive Investment Opportunities and the Majority Lenders' First Lien Claims is completely undercut by the fact that the Debtors have completely declined to consider even exploring a superior alternative proposal by the Excluded Lenders. *See* Lall Decl. ¶¶ 13-15. The alternative was rejected because the Debtors promised, as part of the RSA, to give Exclusive Investment Opportunities to the Majority Lenders on account of their agreement to vote their claims in favor of the Debtors' Proposed Plan.

5. The Debtors will insist that the Exclusive Investment Opportunities are required under the terms of the RSA and are an inextricable part of a holistic bargain. They will argue no other exit financing is "actionable" because it will not come with votes sufficient to carry an impaired accepting class required for plan confirmation. As a result of the Majority Lenders' blocking position , the Debtors will maintain this is best deal they could negotiate with their limited leverage and their business judgment should not be second-guessed. They will also point to the risk of a default under the DIP financing order, which in turn will lead to the oft-cited parade of horribles.

6. As a threshold matter, the deferential business judgment rule does not apply here because, as explained below, the RSA and Proposed Plan reflect a deal that includes substantial benefits for the Debtors' controlling shareholder, CVC Capital Partners ("CVC"), and its affiliate PVKG Lender (defined below). As result, the Proposed Plan (including the Equity Rights Offering) must be scrutinized under the exacting "entire fairness" standard, with the Debtors bearing the burden of proof.

7. In any case, if the promises made in the RSA cannot be achieved without violating the equal treatment rule, it is the RSA and the Proposed Plan that must give way, not the rule. As the Supreme Court has made clear, there are no "rare case" exceptions that allow plan distributions

in violation of the Bankruptcy Code. *See, e.g.*, *Czyzewski v. Jevic Holding Corp*., 580 U.S. 451, 470 (2017) (courts lack authority to approve transactions that sanction a "departure from the protections Congress granted particular classes of creditors").

8. Bankruptcy Judge Wiles powerfully expressed his concerns about just this type of strategy in the *Pacific Drilling* case:

> The theory of the Bankruptcy Code is that when the big creditors sit in a room and negotiate a deal, the little creditors who are in the same boat get the same deal. The Bankruptcy Code does not permit the unequal treatment of creditors in the same class; it also does not permit the payment of extra compensation to large creditors in exchange for their commitment to vote for a plan. The problem with special allocations in rights offerings, or with private placements that are limited to the bigger creditors who sat at the negotiating table, or big backstop fees that are paid to the bigger creditors who sat at the negotiating table but that are not even open to other creditors (and in particular to other creditors in the same class), is that it is far too easy for the people who sit at the negotiating table to use those tools primarily to take for themselves a bigger recovery than smaller creditors in the same classes will get.

In re Pacific Drilling S.A., Case No. 17-13193 (MEW), 2018 Bankr. LEXIS 3024, at *5 (Bankr. S.D.N.Y. Oct. 1, 2018).

9. For these reasons, confirmation of the Proposed Plan should be denied.

Relevant Background[5]

A. The Restructuring Support Agreement and The Debtors' Insider

10. On April 3, 2024, the Debtors entered into the RSA. *See Declaration of Salvatore Lombardi in Support of the Debtors' Chapter 11 Petitions and First Day Relief* [Docket No. 4] (the "Lombardi Declaration") ¶ 73. The parties to the RSA include (i) the First Lien Consenting Lenders, which includes PVKG Investment Holdings Inc. ("PVKG Lender"), as Holder of First

[5] The Excluded Lenders have served document requests on the Debtors and separately (by way of subpoena) on the Insiders (as defined below). The Excluded Lenders are in the process of evaluating the documents that have been produced to date and understand that additional documents are forthcoming. The Excluded Lenders also plan to take limited deposition discovery. Thus, the Excluded Lenders reserve the right to supplement this factual discussion through the presentation of evidence at the confirmation hearing or otherwise.

Lien Claims, (ii) the Second Lien Consenting Lenders, and (iii) the Consenting Sponsors, which includes PVKG Lender as a direct or indirect Holder of Existing C1 Interests. *See* RSA at 2. The parties to the RSA hold approximately $1,119.9 million (approximately 80.7%) of First Lien Claims. *See* Lall Decl., Exhibit 1.

11. PVKG Lender is controlled by CVC (together with PVKG Lender, the "Insider"), and holds approximately $193 million in principal amount of the Debtors' first lien debt (the "PVKG Note Claims"). Lombardi Decl. ¶ 36. Pursuant to the RSA and Proposed Plan, the PVKG Note Claims are proposed to be settled by allowing them in the amount of $213 million and treating them as First Lien Claims in Class 3. *See* Proposed Plan § IV.B; Lombardi Decl. ¶ 8.

12. The Debtors are *also* controlled by CVC through CVC's indirect 100% ownership of Debtor PVKG Intermediate Holdings Inc. Lombardi Decl. ¶¶ 13, 26-27.

13. The Excluded Lenders are certain holders of approximately $164 million of First Lien Claims.

B. The Equity Rights Offering, Including The Exclusive Investment Opportunities

14. The Debtors are required under the RSA to raise $245 in an Equity Rights Offering. *See* RSA, Exhibit B (Restructuring Term Sheet) at 2.

15. Under the Equity Rights Offering, the Debtors are required to sell reorganized common stock at a price that reflects a 35% discount (the "Plan Discount") to the Debtors' estimated $434 million post-emergence equity value under the Proposed Plan ("Plan Value"). *See* RSA, Exhibit 3 (Equity Rights Offering Term Sheet) to Exhibit B (Restructuring Term Sheet) at 2.

16. The Debtors are required to raise $159.25 million by offering discounted equity to all Holders of First Lien Claims in Class 3 on a *pro rata* basis (the "Open Equity Allocation"). *See* Proposed Plan §§ I.A.165-167, 171, III.C.3.c.

17. The remaining $85.75 million of discounted equity (worth $131.92 million at Plan Value) is required under the RSA to be reserved exclusively for purchase by the Majority Lenders who are Investors[6] (the "Preferred Majority Lenders"), resulting in an approximately 30.4% ownership stake (the "Exclusive Equity Allocation"). *See* Proposed Plan §§ I.A.51-52; Lall Decl. ¶ 7.

18. The Proposed Plan provides, by default, that Holders of First Lien Claims participate in the Open Equity Allocation and receive Takeback Term Loans (the "Default Option") in a principal amount equal to 15% of their First Lien Claims. Proposed Plan § I.A.171. Holders of First Lien Claims may elect to receive the Takeback Term Loan Recovery Option instead of participating in the Open Equity Allocation. *See* Proposed Plan § III.C.3.(c). The Takeback Term Loan Recovery Option provides a Holder that makes the election recovery solely in the form of Takeback Term Loans in a principal amount equal to 20% of such Holder's First Lien Claim. *Id.* § I.A.189. The Proposed Plan provides an adjustment mechanism (the "Adjustment") pursuant to which participation in each recovery option is limited to 50% of the total. Proposed Plan § III.C.3.(c).

19. The Majority Lenders committed in the RSA to buy their *pro rata* share of the Open Equity Allocation and the Exclusive Equity Allocation.[7] The RSA also provides that the Preferred Majority Lenders backstop the Equity Rights Offering by committing "to purchase from the [Debtors] in the Rights Offering the New Equity Interests that are not purchased by the Eligible Offerees in the Rights Offering . . . ." RSA, Exhibit 3 (Equity Rights Offering Term Sheet) to

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6 The "Investors" are the Majority Lenders set forth on Schedule I to the Equity Rights Offering Term Sheet to the RSA that will backstop the Equity Rights Offering and are party to the Backstop Agreement.

7 *See* RSA § 4.02(a)(ii) (providing that each Consenting Stakeholder (which includes the each Holder of First Lien Claims party to the RSA) "elect the Rights Offering Rights and Takeback Loan Recovery Option (if applicable to such Party) . . . .").

Exhibit B (Restructuring Term Sheet) at 3 (defining "Backstop Commitment") (emphasis added). The Eligible Offerees include only those Holders of First Lien Claims who elect the Default Option.[8] Moreover, the Proposed Plan defines the "Backstop Commitment" to mean "commitments to purchase up to $159,250,000 of the New Equity Interests at the Plan Discount, pursuant to the terms of the Rights Offering and in accordance with the Backstop Agreement . . . ." Proposed Plan § I.A.16 (emphasis added). Accordingly, the backstop commitment, according to both the RSA and Proposed Plan, relates solely to the $159.25 million Open Equity Allocation.

20. Despite the Majority Lenders' backstop commitment is limited to buying unsubscribed discounted equity in the Open Equity Allocation, the Debtors are nevertheless required to pay a "backstop fee" (called the "Put Option Premium" and together with the Exclusive Equity Allocation, the "Exclusive Investment Opportunities"), payable in equity at the Plan Discount, calculated as 10% of the ***entire*** Equity Rights Offering amount ($245 million). *See* Proposed Plan § I.A.145; RSA, Exhibit 3 (Equity Rights Offering Term Sheet) to Exhibit B (Restructuring Term Sheet) at 3. Put plainly, in exchange for agreeing to backstop the purchase of no more than approximately $30.7 million of the $159.25 million Open Equity Allocation (*i.e.*, 19%), the Debtors are required under the RSA to give the Majority Lenders an approximately 8.7% stake in the reorganized company by paying them a 10% fee calculated on the total $245 million Equity Rights Offering, which is payable in discounted equity and has a value of $37.7 million ($24.5 million worth of shares issued at a 35% discounted to Plan Value equals approximately $37.7 million in Plan Value). Lall Decl. ¶ 12. In short, the Debtors are required to pay $37.7

[8] "Eligible Offerees" is defined in the Equity Rights Offering Term Sheet to be Holders of First Lien Claims that elect the Rights Offering Rights and Takeback Term Loan Recovery Option (and satisfy certain requirements under securities laws). RSA, Exhibit 3 (Equity Rights Offering Term Sheet) to Exhibit B (Restructuring Term Sheet) at 1-2.

million in value to the Preferred Majority Lenders to backstop no more than $30.7 million of new equity. *Id.*

C. The Debtors' Restructuring-Related Governance

21. As set forth in the Lombardi Declaration, the Debtors began implementing certain initiatives to address their financial and strategic challenges in early 2023. This included certain governance-related changes. In January 2023, the Debtors appointed Jeffrey S. Russell to serve as Chief Executive Officer. Lombardi Decl. ¶ 60. Although the Lombardi Declaration is not entirely clear on this point, it is reasonable to assume that Mr. Russell was selected and appointed by CVC, by nature of CVC's control of the Debtors through its indirect 100% ownership of Debtor PVKG Intermediate Holdings Inc. *Id.* ¶¶ 13, 26-27.[9] Moreover, at least two CVC executives—Lars Haegg and James Christopoulos—currently sit on the Debtors' boards of directors. *See Declaration of Michael T. Mervis in Connection with Ad Hoc Group of Excluded Lenders' Objection to Confirmation of Joint Prepackaged Chapter 11 Plan of Reorganization of CovergeOne Holdings, Inc. and Its Debtor Affiliates*, dated May 7, 2024 ("Mervis Decl."), Exhibit 1.

22. The Debtors also engaged three advisors—White & Case LLP ("White & Case") as counsel, AlixPartners, LLP ("AlixPartners") as financial advisor, and Evercore Group L.L.C. ("Evercore", and collectively with White & Case and AlixPartners, the "Advisors") as investment banker—in connection with its strategic initiatives. Lombardi Decl. ¶ 62. White & Case had served as counsel for the Debtors since 2019,[10] and Evercore and AlixPartners were retained in

9 Because discovery is ongoing, the Excluded Lenders anticipate providing additional evidence, at the confirmation hearing or otherwise, regarding the governance matters discussed herein.

10 *Debtors' Application for Entry of an Order Authorizing the Retention and Employment of White & Case LLP as Attorneys to the Debtors Effective as of the Petition Date* [Docket No. 144].

March and May 2023, respectively.[11] Again, the retention of the Advisors was presumably approved by the Debtors' CVC-controlled board.

23. Following the retention of the Advisors, the Debtors began exploring restructuring options. Lombardi Decl. ¶ 67. They began negotiations with the Holders of First Lien Claims, among others, in May 2023, and included CVC in these discussions the following month. *Id.* According to the Debtors themselves, they "engaged in several rounds of negotiations with these parties on the terms of various proposals, and management and directors met regularly and extensively, including with the Company's advisors, to discuss the proposals and the Company's funding needs." *Id.*[12] During this entire period the Debtors' board was presumably controlled by CVC.

24. In December 2023,[13] *over six months after these negotiations began*, the Debtors appointed two new purportedly independent directors (Larry J. Nyhan and Sherman K. Edmiston III) to the boards of directors of PVKG Intermediate and C1 Holdings. *Id.* ¶ 71. In January 2024, the Debtors formed a Special Committee. *Id.* The Special Committee was formed to "review, evaluate, and approve strategic and financial alternatives, including the possibility of seeking additional financing or undertaking a recapitalization transaction or other reorganization or restructuring." *Id.* Notably, not only were the two new directors appointed to the Special Committee, but so was the Debtors' CEO, Mr. Russell. *Id.* The Special Committee did not retain its own advisors, nor was it explicitly authorized to do so in the resolution by which it was formed.

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11 *Debtors' Application for Entry of an Order Authorizing the Retention and Employment of AlixPartners, LLP as Financial Advisor Effective as of the Petition Date* [Docket No. 145]; *Debtors' Application for Entry of an Order Authorizing the Retention and Employment of Evercore Group L.L.C. as Investment Banker to the Debtors Effective as of the Petition Date* [Docket No. 146].

12 The Lombardi Declaration defined "Company" as being comprised of the Debtors. Lombardi Decl. ¶ 1.

13 *See* Mervis Decl., Exhibit 2.

Mervis Decl., Ex. 1. Rather, as stated in their responses to the Excluded Lenders' document requests (Mervis Decl. Ex. 3, response to Request 16), "White & Case LLP, Evercore Group LLC, and AlixPartners LLP, have been retained by, performed services, or otherwise provided advice to the Special Committee."

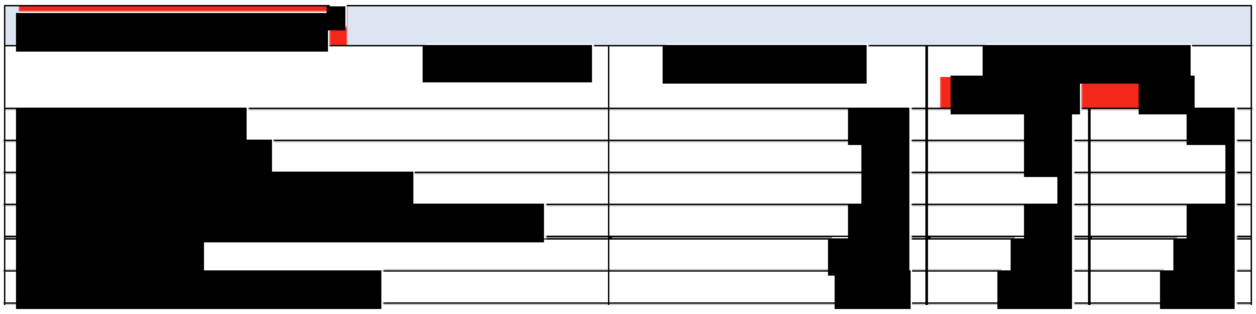
D. Impact on Excluded Lenders

25. Notionally, the Proposed Plan provides for Holders of First Lien Claims to share *pro rata* in the Takeback Term Loan Recovery Option, or the Open Equity Allocation, and receive an approximately 20.0% to [redacted]% recovery, depending upon the option elected. *See* Proposed Plan § III.C.3.(c); Lall Decl. ¶ 10. However, the Exclusive Investment Opportunities position the Majority Lenders to receive additional reorganized equity with an aggregate Plan Value of approximately $169.6 million in exchange for only $85.75 million of new money, providing them as a group exclusive value of approximately $83.9 million—an approximately [redacted]% recovery as outlined below:

Rights Offering	Rights Offering Split (%)	New Capital Raise	Purchase Price ($ Mn) (A)	% Equity of Reorganized Debtors	Total Plan Value ($ Mn)	Share of Plan Value ($ Mn) (B)	Distributable Value ($ Mn) (B – A)
Open Equity Allocation	65.0%	245	159.25	56.5%	434	245.0	85.8
Exclusive Equity Allocation	35.0%	245	85.75	30.4%	434	131.9	46.2
Total:			**245.0**	**86.8%**		**376.9**	**131.9**

Backstop Fees	Fee	New Capital Raise	Fee Amount ($ Mn) (A)	Put Option Premium distributed as equity at 35% discount to Plan Value (B)	Distributable Value ($ Mn) (A / B)
Put Option Premium	10%	245	24.5	24.5 / (1-0.35)	37.7

Total Exclusive Value Allocated to Majority Lenders:	**83.9**



Lall Decl. ¶¶ 10-11, Exhibit 1.

26. Thus, such favored lenders, *including the Insider*, stand to receive a more than 31.2% enhancement over the recovery provided to the Excluded Lenders electing the equity option even though all such lenders are in the same class (Class 3).

E. Excluded Lenders' Alternative Proposal

27. On April 26, 2024, the Excluded Lenders delivered to the Debtors an alternative restructuring proposal (the "Alternative Proposal") that does not illegally discriminate between members of the same class. Lall Decl. ¶ 13, Exhibit 2. The Alternative Proposal provides for the following modifications to the Proposed Plan:

(a) Holders of First Lien Claims in Class 3 will receive identical treatment in the form of their *pro rata* share of $388.6 million of New Equity Interests at the Plan Value instead of the Takeback Term Loans.

(b) Exit capital will be raised pursuant to an exit term loan facility (the "Exit Term Loan Facility") in the aggregate principal amount of $245 million on substantially the same terms as the proposed Takeback Term Loans.

(c) All Holders of First Lien Claims in Class 3 will have the opportunity to participate in the Exit Term Loan Facility (both on a *pro rata* basis and to backstop the facility).

28. On April 29, 2024, the Debtors rejected the Alternative Proposal. Lall Decl. ¶ 15, Exhibit 3.

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14 Assumes all First Lien Claims elect the Default Option, subject to 50% Adjustment pursuant to the Proposed Plan)

Objection

A. The Proposed Plan, Including The Equity Rights Offering, Is Subject To Entire Fairness Scrutiny

29. As a threshold matter, the Proposed Plan, including the transactions and settlements proposed to be effectuated through it, is subject to the entire fairness standard because the Insiders are on both sides of the Equity Rights Offering. Courts apply a "heightened scrutiny" or "entire fairness" standard when a transaction involves a debtor and its insiders. *In re LATAM Airlines Grp. S.A.*, 620 B.R. 722, 769 (Bankr. S.D.N.Y. 2020) (citing *In re MSR Hotels & Resorts, Inc.*, No. 13-11512, 2013 WL 5716897, at *1 (Bankr. S.D.N.Y. Oct. 1, 2013)). A heightened standard is necessary given that transactions with insiders "are inherently suspect because 'they are rife with the possibility of abuse.'" *Id.* (citation omitted).

30. In *Pepper v. Litton*, the Supreme Court noted that dealings between an entity and its controlling shareholder "are subjected to rigorous scrutiny and where any of [the insider's] contracts or engagements with the [entity] is challenged the burden is on the [insider to] not only prove the good faith of the transaction but also to show its inherent fairness." 308 U.S. 295, 306 (1939). The Fifth Circuit has adopted the Supreme Court's reasoning, holding that "a claim arising from the dealings between a debtor and an insider is to be rigorously scrutinized by the courts," and that, when applying this heightened scrutiny to an insider transaction with the debtor, the burden of proof shifts to the insider, *Fabricators, Inc. v. Technical Fabricators, Inc.*, *(In re Fabricators, Inc.)*, 926 F.2d 1458, 1465 (5th Cir. 1991), which then has the burden of proving the "inherent fairness and good faith of the challenged transaction," *Porretto v. Williams (In re Porretto)*, 761 F. App'x 437, 443 n.9, 444 (5th Cir. 2019) (quoting *In re Harford Sands Inc.*, 372 F.3d 637, 641 (4th Cir. 2004)) (affirming the District Court's decision).

31. Additionally, section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Section 1129(a)(3) requires that the debtor's conduct in proposing a plan comply with state law—here, requiring a showing of "entire fairness" under Delaware corporate law in connection with the Debtors' approval of insider transactions underpinning the Proposed Plan.[15] *See In re Zenith Elecs. Corp.*, 241 B.R. 92, 108 (Bankr. D. Del. 1999) ("We agree that section 1129(a)(3) does incorporate Delaware law (as well as any other applicable nonbankruptcy law)."); *see Nat'l Convenience Stores Inc. v. Shields (In re Schepps Food Stores, Inc.)*, 160 B.R. 792, 799 (Bankr. S.D. Tex. 1993) (noting that shareholders may object to confirmation under section 1129(a)(3) on basis of violation of state law); *see also In re Food City, Inc.*, 110 B.R. 808, 814 n.13 (Bankr. W.D. Tex. 1990) ("[A] plan *proposed* by means which violate the securities laws would violate section 1129(a)(3)." (emphasis in original)); *In re Dernick*, 624 B.R. 799, 812-13 (Bankr. S.D. Tex. 2020) (looking at whether the debtor's conduct in proposing the plan was forbidden by law).[16]

32. Under Delaware law, entire fairness is comprised of two components. The first, fair dealing, "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained." *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 700 (Del. 2023) (citation omitted). The second, fair price, "relates to the economic and financial

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[15] Because the Debtors are incorporated in Delaware, the entire fairness test under Delaware law is applicable to this Court's review of the Proposed Plan and transactions contemplated therein. *Dunn v. Chappelle (In re Alta Mesa Resources, Inc.)*, No. 19-35133, 2022 WL 7750353, at *5 (Bankr. S.D. Tex. Oct. 13, 2022) (for Delaware-incorporated debtor, "matters of corporate governance, such as fiduciary duties, are governed by Delaware corporate law").

[16] One court has held that section 1129(a)(3) does not require compliance with the entire fairness standard. *In re Charter Commc'ns*, 419 B.R. 221, 261 (Bankr. S.D.N.Y. 2009). The court in *Charter* noted that section 1129(a)(3) "speaks only to the proposal of a plan." *Id.* (internal citations and quotations omitted). That decision is not binding in this Court and, although discovery is ongoing, the Excluded Lenders believe the evidence presented at the confirmation hearing will distinguish *Charter* from the instant proceeding.

considerations of the proposed [transaction], including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of [the company]." *Id.* Meeting the fair price component "requires the proponent of a self-dealing transaction to demonstrate that 'the price offered was the highest value reasonably available under the circumstances.'" *LaMonica v. Tilton (In re Transcare Corp.)*, 81 F.4th 37, 52 (2d Cir. 2023) (quoting *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995). Notwithstanding these two components, "entire fairness is a unitary test, under which a reviewing court will scrutinize both the price and the process elements of the transaction as a whole." *In re Match Grp., Inc. Deriv. Litig.*, No. 368, 2024 WL 1449815, at *7 (Del. Apr. 4, 2024).

33. Notably, "the entire fairness standard is 'Delaware's most onerous standard . . . .'" *Tilton*, 81 F.4th at 49 (quoting *Burtch v. Opus, LLC (In re Opus E., LLC)*, 528 B.R. 30, 66 (Bankr. D. Del. 2015). As the Delaware Supreme Court stated in a landmark decision on the subject, "[t]he requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

34. The entire fairness standard unquestionably applies here because the Proposed Plan provides for (a) distributions to a select group of Majority Lenders that includes the Insiders, which directly or indirectly hold substantially all of the equity interests of the Debtors and approximately $213 million in proposed allowed amount of the Debtors' first lien debt,[17] and (b) the settlement of the PVKG Note Claims held by the Insiders.[18] The Proposed Plan provides the Insiders (who

[17] *Lombardi Decl.* ¶¶ 36-37. CVC's claims constitute approximately 15.35% of the Allowed First Lien Claims. *See* Proposed Plan § III.C.3.b. (providing for allowance of the PVKG Note Claims in the amount of $213,000,000 out of an aggregate amount of Allowed First Lien Claims totaling $1,387,538,807.33).

[18] *See* Proposed Plan § IV.B.

are Majority Lenders) the Exclusive Investment Opportunities. The value provided by the Exclusive Investment Opportunities would otherwise be available for distribution to *all* Holders of First Lien Claims in Class 3, including the Excluded Lenders.

35. It does not matter that the Insiders purportedly wear different hats (*i.e.*, as equity owner and as lenders) on the different sides of the transactions. *See Weinberger*, 457 A.2d at 710-11 (holding entire fairness standard applies even when individuals "act in a dual capacity as directors of two corporations"). Under Delaware Law, CVC's uncontested ownership stake in the Debtors renders it a controller. *See In re Pattern Energy Grp. Inc. S'holders Litig.*, No. 2020-0357, 2021 WL 1812674, at *37 (Del. Ch. May 6, 2021) (citation omitted) ("A majority stockholder's control flows principally from its voting power, which translates into the power to 'alter materially the nature of the corporation and the public stockholders' interests.'"). Moreover, courts may consider even "softer sources of power" such as "relationships with particular directors" or the "exercise of contractual rights to channel the corporation into a particular outcome." *Id.* (citation omitted) (recognizing that even a minority stockholder could be considered a controller upon "[b]roader indicia of effective control"). Here, both Lars Haegg and James Christopolous of CVC are directors of both ConvergeOne Holdings, Inc. and PVKG Intermediate Holdings, Inc.[19] And CVC, as a party to the RSA through PVKG Lender, stands to reap the benefits of the Equity Rights Offering. Thus, regardless of what CVC calls itself—equity owner or lender—its stance on both sides of the transaction is sufficient to trigger the entire fairness standard. *See Emerald Partners*

[19] Lars Haegg is Chairman of the boards of these two companies, further underscoring CVC's control on both sides. *See In re Pattern Energy Grp. Inc. S'holders Litig.*, 2021 WL 1812674, at *37 (noting the "the ability to exercise outsized influence in the board room or on committees, as through roles like CEO, Chairman, or founder" as an indication of control.)

v. Berlin, 726 A.2d 1215, 1221 n.8 (Del. 1999) ("Hall's stance on both sides as a corporate fiduciary, alone, is sufficient to require the demonstration of entire fairness.").

36. The Debtors will point to the fact that the Plan, RSA and Equity Rights Offering were approved by the Special Committee as evidence of entire fairness. As noted, discovery is just starting. But even the Debtors' first-day papers undermine the notion that the Special Committee's existence ensured entire fairness.

37. To be sure, two members of the Special Committee are, at least nominally, independent directors. But the third member, the Debtors' CEO—who was presumably appointed by the Debtors' CVC-controlled board long before the board had any independent directors on it—is clearly an insider. *See* 11 U.S.C. § 101(31)(B)(ii); *see also Voigt v. Metcalf*, No. CV 2018-0828, 2020 WL 614999, at *16 (Del. Ch. Feb. 10, 2020) ("Under the great weight of Delaware precedent, senior corporate officers generally lack independence for purposes of evaluating matters that implicate the interests of a controller").

38. Also significant—and undercutting any claim of entire fairness based on the existence of a Special Committee—is the fact that the Special Committee was advised by *the Debtors' own Advisors* even though they too were also presumably retained by the Debtors' CVC-controlled board long before it had any independent directors. *See, e.g.*, *In re Match Grp., Inc. Derivative Litig.*, No. 2020-0505, 2022 WL 3970159, at *21 (Del. Ch. Sept. 1, 2022) ("The effectiveness of a Special Committee often lies in the quality of the advice its members receive from their legal and financial advisors. As has been repeatedly held, special committee members should have access to knowledgeable *and independent* advisors, including legal and financial advisors.") (emphasis added) (citations omitted), *aff'd in part, rev'd in part*, 2024 WL 1449815 (Del. Apr. 4, 2024). This lack of independence is compounded by the fact that for months before

the nominally independent directors were appointed, the Debtors "engaged in several rounds of negotiations" with certain Holders of First Lien Claims "on the terms of various proposals, and management and directors met regularly and extensively, including with the [Debtors'] [A]dvisors, to discuss the proposals and the Company's funding needs." Lombardi Decl. ¶ 67. *See, e.g.*, *Mills Acquisition Co. v. Macmillan, Inc*., 559 A.2d 1261, 1267-68 (Del. 1989) (criticizing special committee's reliance on company's advisor where company's management interviewed "and for four weeks thereafter maintained intensive contact with" advisor and advisor and management had meetings involving "extensive discussions" concerning potential transactions); *Gesoff v. IIC Indus., Inc*., 902 A.2d 1130, 1138-39 (Del. Ch. 2006) (In holding that merger was not the product of fair dealing, court noted that (i) the individual on single-person special committee "had no real authority to choose either his own lawyer or his own financial advisor"; (ii) the special committee's lawyer "had long been [one of the merger parties'] main outside counsel, and had already spent considerable time working on the proposed transaction.").

39. In short, while the discovery record on entire fairness is only just being developed now, there is already ample reason to believe the Debtors will not be able to prove entire fairness. That should not come as surprise because, as discussed again below, the transaction at issue is grossly unfair..

B. The Proposed Plan Provides Unequal Treatment to Holders in Class 3 in Violation of Section 1123(a)(4) of the Bankruptcy Code

40. Even assuming the Debtors can meet their burden to prove entire fairness, the Exclusive Investment Opportunities nonetheless render the Proposed Plan unconfirmable by violating the equal treatment requirement set forth in Bankruptcy Code section 1123(a)(4). Equality of distribution among creditors is "a central policy of the Bankruptcy Code." *Begier v. IRS*, 496 U.S. 53, 58 (1990). Congress codified that policy into section 1123(a)(4) of the

Bankruptcy Code, which requires that a plan must "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). Courts have interpreted the "same treatment" requirement to mean that all claimants in a class must have "'the same opportunity' for recovery." *In re W.R. Grace & Co.*, 729 F.3d 311, 327 (3d Cir. 2013) (quoting *In re Dana Corp.*, 412 B.R. 53, 62 (S.D.N.Y. 2008)). The unequal treatment here is undisputable.

41. The Proposed Plan is predicated on the Exclusive Investment Opportunities, which result in unequal treatment in favor of the Majority Lenders in the following meaningful ways:

(a) The Direct Investment, available only to the Majority Lenders, positions the Majority Lenders to receive reorganized equity with an aggregate value of approximately $131.92 million (at the Plan Value), providing them with an approximately [redacted]% recovery while other Holders in Class 3 recover only between 20% and [redacted]% of their claims, assuming all Holders elect the equity option subject to the Adjustment.

(b) The Put Option Premium, again available only to the Majority Lenders, positions the Majority Lenders to own additional reorganized equity with an assumed value of $37.7 million, while none of that value is available for distribution to other Holders in Class 3.

42. In the aggregate, the Exclusive Investment Opportunities position the Majority Lenders to own reorganized equity under the Proposed Plan with a Plan Value of approximately $169.6 million, while none of that value is available for distribution to the Excluded Lenders in Class 3.

43. The Debtors will no doubt argue the Exclusive Investment Opportunities are on account of separate new money commitments and not as distribution on account of the Majority Lenders' preexisting claims. That claimed distinction is not credible; the RSA reveals the truth.

The Exclusive Investment Opportunities are explicitly tied to plan voting.[20] Voting is a right inexorably tied to a claim because the claim is what enables its holder to vote. *See* 11 U.S.C. § 1126(a) ("The holder of a claim . . . may accept or reject a plan.").

44. Moreover, any argument that the Exclusive Investment Opportunities are consideration for new money contributions must fail under the Supreme Court's holding in *LaSalle*. In that case the reorganized debtor's new equity was to be distributed to existing shareholders ("old equity") in exchange for new capital in the reorganized debtor. 526 U.S. at 440. A senior creditor who was denied a right to make the same investment objected, arguing the plan violated the absolute priority rule, which provides that when a senior class is not paid in full, "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property." 11 U.S.C. § 1129(b)(2)(B)(ii). The plan violated that rule, the senior creditor argued, because the right to purchase reorganized equity was granted exclusively to equity holders before the senior creditor was paid in full. *LaSalle*, 526 U.S. at 442. In response, the debtor argued that the exclusive investment right given to old equity was not granted "on account of" its old equity interest, but instead as consideration for old equity's new capital contribution. *Id*. at 442-43.

45. The *LaSalle* Court rejected that argument, holding that the exclusive opportunity to invest in the reorganized debtor was property "in its own right." *Id.* at 455. The Court noted that "given that the [exclusive investment] opportunity is of some value, the question arises why old equity alone should obtain it, not to mention at no cost whatsoever." *Id.* at 456. Distributing the

[20] *See* RSA §§ 4.02 (plan voting); 12.01(q) (termination if court grants relief inconsistent with Restructuring Term Sheet); RSA Exhibit B (Restructuring Term Sheet) at 2, 6 (incorporating Rights Offering Term Sheet).

right to buy discounted equity constituted impermissible favoritism of the shareholders and was not appropriate consideration for a new money contribution. *Id*. at 457.

46. The *LaSalle* Court further held that a stakeholder receives property "on account of" its claim or interest when a "causal relationship" exists between "holding the prior claim or interest and receiving or retaining property . . . ." *Id.* at 451. Payment at "full value," the Court emphasized, is *essential* to breaking the causal connection between the exclusive investment right and the preexisting claim or interest: "if the price to be paid for the equity interest is the best obtainable, old equity does not need the protection of exclusiveness (unless to trump an equal offer from someone else); if it is not the best, there is no apparent reason for giving old equity a bargain." *Id*. at 456. That causal link may only be broken where the stakeholder pays "full value," because then such right is given solely for the new value being provided rather than the preexisting claim or interest. *Id*. at 453-54. A plan is "doomed" "by its provision for vesting equity in the reorganized business in [old equity] without extending an opportunity to anyone else to either compete for that equity or propose a competing reorganization plan." *Id*. at 454. The "best way to determine value is exposure to the market." *Id*. at 457.

47. The *LaSalle* Court's analysis applies with equal force here. The legal tests are identical: just as the absolute priority rule of section 1129(b) prohibits junior stakeholders from receiving property before senior stakeholders "on account of" their junior claims or interests, so does the equal treatment rule of section 1123(a)(4) prohibit a plan from providing unequal treatment for claims within the same class "on account of" those claims. In other words, a plan is unconfirmable when (as here) it distributes property unequally within a class, except when property is conveyed for full value after a market test as part of a separate, legitimate new funding contribution.

48. Exclusivity and the absence of full value are fatal to the Direct Investment Opportunities here. As in *LaSalle*, a select group of stakeholders—here, those who can provide the Debtors with the votes to carry an impaired accepting class—are being offered an exclusive opportunity to invest in equity of the reorganized debtors at a significant discount. If the Exclusive Investment Opportunities had been market tested and the price offered had been demonstrably "the best obtainable [value,]" there would be no reason to restrict the investment opportunity solely to the Majority Lenders, which would not need "the protection of exclusiveness (unless to trump an equal offer from someone else)." *Id*. at 456. The only "apparent reason" to give the Majority Lenders "a bargain" was, at least in part, to do the Majority Lenders a favor—in exchange for their agreement to vote in favor of the Proposed Plan—not to provide them legitimate consideration for the new funding they agreed to backstop.[21]

49. Moreover, the Put Option Premium here is *per se* unreasonable and evidence the true purpose of the fee is to pay the Majority Lenders for their agreement to vote in favor of the Proposed Plan. The amount of the Put Option Premium is disproportionate to the actual risk posed to the Majority Lenders. The Majority Lenders, who committed under the RSA and the Backstop

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[21] In response, the Debtors may highlight *In re Peabody Energy Corp.*, 933 F.3d 918 (8th Cir. 2019), where the Eighth Circuit affirmed a judgment confirming a plan containing a rights offering with a direct allocation and rejected an unfair discrimination objection, distinguishing *LaSalle*. *Peabody* is distinguishable because, unlike here, the investment opportunity there was not completely exclusive. As a result, the *Peabody* court found that the objecting creditors had the same "opportunity for recovery" as other creditors in their class. That is not the case here.

The Debtors may also cite to the approved rights offering in *In re LATAM Airlines Grp. S.A.*, 2022 WL 790414 (Bankr. S.D.N.Y. Mar. 15, 2022), where the court approved a 20% fee to backstop a rights offering. *LATAM* is distinguishable because (1) the plan and rights offering were the product of mediation (not exclusive negotiation behind closed doors), (2) the debtors considered and explored multiple restructuring and exit financing proposals from numerous investment funds and other third parties before agreeing to the backstop agreement, and (3) the backstop parties were exposed to significant risk requiring them to reserve cash for at least eight months after confirmation while the reorganized debtors sought shareholder authority to issue securities in Chilean markets. *See LATAM*, 2022 WL 790414, at *14. None of those factors are present here. Moreover, the objecting parties in *LATAM* did not assert or otherwise address the argument presented here that the Exclusive Investment Opportunities are treatment on account of the Majority Lenders' claims under the precedent established in *LaSalle*.

Agreement to their *pro rata* share of the Open Equity Allocation and the Exclusive Equity Allocation, represent approximately 81% of First Lien Claims. As noted above, the backstop commitment relates solely to the $159.25 million Open Equity Allocation according to the RSA and Proposed Plan. *See supra* para. 19.

50. The Majority Lenders would therefore only be at risk of backstopping no more than approximately $30.7 million of the $245 million in new equity capital (*i.e.*, 19%). And the magnitude of even *that* "risk" is likely quite small given the deep discount at which the reorganized equity is being offered relative to Plan Value.

51. Nonetheless, the RSA and Proposed Plan require the Debtors to pay the Majority Lenders a 10% fee calculated on the ***total $245 million Equity Rights Offering***, which is payable in discounted equity and has a value of $37.7 million. Lall Decl. ¶ 9. In short, the Debtors are required to pay $37.7 million in value to the Majority Lenders to backstop no more than $30.7 million of new equity (and in reality likely none or only a fraction of that already relatively small amount)—a 122.7% fee. *Id.* ¶ 12.

52. *Momentive Performance Materials Inc.*, Case No. 14-22503 (RDD) (Bankr. S.D.N.Y. June 19, 2014), is instructive here. In *Momentive*, former Bankruptcy Judge Robert Drain denied a request for the payment of backstop fees "as a matter of fairness" where the backstopping parties (like the Preferred Majority Lenders here) had already committed to purchase large portions of the rights offerings they were backstopping. In *Momentive*, certain creditors sought a purported 5% backstop fee on the entirety of a $600 million rights offering, which was offered at a 15% discount to plan value, and to which those creditors had already committed to subscribe to 85% of the rights offering. Presented with this backstop request, Judge Drain surmised that "based on the state of the play today . . . where there is, at most, fifteen percent

uncommitted, although more likely ten percent uncommitted – a thirty-million-dollar fee is far outside the range that has been quoted to me, which is roughly three to six percent. It isn't really the five-percent fee, it's more like a thirty-five percent fee for that fifteen percent [theretofore uncommitted]. So standing alone as a fee, it doesn't make sense." *Momentive Performance Materials Inc.*, Case No. 14-22503 (RDD) (Bankr. S.D.N.Y. June 19, 2014).[22]

53. The Debtors may also argue that the Exclusive Investment Opportunities are intertwined with the overall bargain embodied under the RSA, and that no other exit financing option is "actionable" because it will not be attached to the votes needed to carry an impaired accepting class required for plan confirmation. Such justifications have no legal force, however. If the Exclusive Investment Opportunities are forbidden by law (and they are), then it does not matter that the Debtors say there is no other choice. This is especially so given the application of the entire fairness standard here.

C. The Alternative Proposal Provides the Debtors a Confirmable Path Forward

54. Denying confirmation of the Proposed Plan does not leave the Debtors without any options to restructure as a going concern. The Excluded Lenders have provided the Debtors an Alternative Proposal that, with relatively limited modifications to the Equity Rights Offering, remedy its legal infirmities. The Alternative Proposal is superior to the Proposed Plan and confirmable for the following reasons.

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[22] Hr'g Tr. 195:10-19. A copy of the hearing transcript is attached hereto as **Exhibit B**. *See also Pacific Drilling*, 2018 Bankr. LEXIS 3024, at *10 ("I cannot help but continue to be skeptical based on the evidence I have as to the proposed backstop fee and the alleged need for it in this case. That is particularly true as to the Ad Hoc Group's own commitments to exercise their rights in the rights offering. They have ample economic incentive to exercise those rights and, in fact, participated in structuring those rights to make them attractive to themselves. They have already committed to exercise their rights as part of a Plan Support Agreement with other parties. ***I am concerned that nobody else was given a similar opportunity, which raises the possibility that the backstop fee is really just an extra payment and an extra recovery rather than a reasonable, stand-alone financing term.***" (emphasis added)).

55. Unlike the Proposed Plan, the Alternative Proposal respects the equal treatment requirement set forth in section 1123(a)(4) by providing all Holders of First Lien Claims in Class 3 with the same treatment and opportunities. All Holders in Class 3 will receive their *pro rata* share of $388.6 million of New Equity Interests and have the opportunity to participate in the Exit Term Loan Facility (both on a *pro rata* basis and to backstop the facility). This does not materially impact the Reorganized Debtors' leverage, which remains at $245 million, just as proposed under the Proposed Plan. Under the Alternative Proposal, members of Class 3 will recover between 28.0% and 29.8% (depending on whether a Holder participates in the Exit Term Loan Facility), whereas under the Proposed Plan the Majority Lenders will receive a [redacted]% recovery while other Holders in Class 3 will recover only between a 20% and [redacted]%.

56. While the Majority Lenders are composed of approximately 81% of the Debtors' first lien debt and would presumably vote to reject the Alternative Proposal because it deprives them of the return on account of their illegal Exclusive Investment Opportunities, (a) the Excluded Lenders intend to seek entry of an order designating the Majority Lenders' rejecting votes pursuant to section 1126(e) of the Bankruptcy Code, for which the facts set forth in this Objection establish sufficient grounds, and (b) and CVC's vote (through PVKG Lender) on account of the $213 million PVKG Note Claims (approximately 15.35% of the Allowed First Lien Claims) would be disregarded pursuant to section 1129(a)(10) of the Bankruptcy Code.

57. Section 1126(e) permits a court to designate (*i.e.*, disregard) the votes of "any entity whose acceptance or rejection of such plan was not in good faith." 11 U.S.C. 1126(e).[23] This

[23] The Bankruptcy Code does not define "good faith" or "bad faith" and, as such, "determining which exists is a fact specific venture." *In re Dernick*, 624 B.R. at 808*; see also In re Save Our Springs (S.O.S.) All., Inc.*, 388 B.R. 202, 230 (Bankr. W.D. Tex. 2008) ("Good faith – and its converse, bad faith – are not defined in the Bankruptcy Code. Thus, the courts have developed the meaning of good (and bad) faith on the basis of the facts of each particular case.") (internal citations omitted), *aff'd*, 2009 WL 8637183 (W.D. Tex. Sept. 29, 2009), *aff'd*, 632 F.3d 168 (5th Cir. 2011).

Court has previously determined votes should be designated and disregarded pursuant to section 1126(e) where "the creditor's self-interest results in a vote for the 'purpose [of obstructing] a fair and feasible reorganization *in the hope that someone would pay [it] more than the ratable equivalent of [its] proportionate part of the bankrupt assets.*'" *In re Dernick*, 624 B.R. at 808-09 (quoting *Young v. Higbee Co.*, 324 U.S. 204, 210–11 (1945)) (emphasis added).

58. Here, under the Proposed Plan, the Majority Lenders seek to impermissibly reallocate approximately $83.95 million of value from the Excluded Lenders to benefit themselves, in violation of section 1123(a)(4). Any vote by the Majority Lenders' to reject the Alternative Proposal because it does not contain the Exclusive Investment Opportunities for the Majority Lenders would not be in good faith as it would be motivated by a desire to impermissibly receive value unavailable to the Excluded Lenders, despite being in the same class.[24]

59. CVC's vote on account of its $213 million claim (through PVKG Lender) would also be disregarded pursuant to section 1129(a)(10). Section 1129(a)(10) of the Bankruptcy Code provides that confirmation of a plan requires that "at least one class of claims that is impaired under the plan has accepted the plan, *determined without including any acceptance of the plan by any insider*." 11 U.S.C. § 1129(a)(10) (emphasis added). An "insider" pursuant to section 101(31)(B) includes a "person in control of the debtor" and any "affiliate, or insider of an affiliate as if such affiliate were the debtor." *Id.* §§ 101(31)(B)(iii), 101(31)(E), 101(2) (defining "affiliate" to mean an "entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor . . . .").

[24] Indeed, the RSA provides that the Majority Lenders agree not to vote for any alternative plan (*See* RSA § 4.01(b)(ii)), presumably for this very reason.

60. Here, ConvergeOne Investment LP, controlled by CVC, is the Debtors' ultimate parent. Lombardi Decl. ¶ 26. PVKG Lender, an entity controlled by CVC, holds $213 million of PVKG Note Claims proposed to be settled pursuant to the RSA and Proposed Plan. *Id.* ¶¶ 36-37. Accordingly, CVC's vote on account of its First Lien Claims held by PVKG Lender would be disregarded pursuant to section 1129(a)(10). *See In re Featherworks Corp.*, 25 B.R. 634, 639-40 (Bankr. E.D.N.Y. 1982) (disregarding votes of corporate parents holding largest claims against debtor), *aff'd*, 36 B.R. 460 (E.D.N.Y. 1984).

[*Remainder of Page Left Intentionally Blank*]

Conclusion

WHEREFORE, the Excluded Lenders request the Court (a) deny confirmation of the Proposed Plan and (b) grant such other and further relief as the Court deems appropriate under the circumstances.

Respectfully submitted this 7th day of May, 2024.

GRAY REED

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COUNSEL TO THE AD HOC GROUP OF EXCLUDED LENDERS

Certificate of Service

The undersigned hereby certifies that on the 7th day of May, 2024, he caused a true and correct copy of the foregoing document to be served via the Court's CM/ECF system.

/s/ Jason S. Brookner
Jason S. Brookner

EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
CONVERGEONE HOLDINGS, INC., *et al.*[1]	)	Case No. 24-90194 (CML)
Debtors.	)	(Jointly Administered)

DECLARATION OF KESHAV LALL IN CONNECTION WITH AD HOC GROUP OF EXCLUDED LENDERS' OBJECTION TO CONFIRMATION OF JOINT PREPACKAGED CHAPTER 11 PLAN OF REORGANIZATION OF CONVERGEONE HOLDINGS, INC. AND ITS DEBTOR AFFILIATES

I, Keshav Lall, hereby declare as follows:

1. I am a co-founder and Managing Partner of Uzzi & Lall ("U&L"). U&L is financial advisory services firm, and is financial advisor to an *ad hoc* group of holders of the Debtors' first lien term loan debt (the "Excluded Lenders") in the above-captioned matter.

2. At U&L, I advise clients in connection with corporate restructurings, financings and mergers and acquisitions. I have approximately 20 years of experience working as an advisor, corporate leader and investor in a wide range of strategic matters. Prior to the formation of U&L in 2024, I was a Senior Managing Director at M-III Partners LP. Prior thereto, I was Chief Executive Officer of Essar Capital Americas. I have also held principal investing positions at Balyasny Asset Management, Citadel Investment Group and Deutsche Bank. I started my career

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: AAA Network Solutions, Inc. (7602); ConvergeOne Dedicated Services, LLC (3323); ConvergeOne Government Solutions, LLC (7538); ConvergeOne Holdings, Inc. (9427); ConvergeOne Managed Services, LLC (6277); ConvergeOne Systems Integration, Inc. (9098); ConvergeOne Technology Utilities, Inc. (6466); ConvergeOne Texas, LLC (5063); ConvergeOne Unified Technology Solutions, Inc. (2412); ConvergeOne, Inc. (3228); Integration Partners Corporation (7289); NetSource Communications Inc. (6228); NuAge Experts LLC (8150); Providea Conferencing, LLC (7448); PVKG Intermediate Holdings Inc. (4875); Silent IT, LLC (7730); and WrightCore, Inc. (3654). The Debtors' mailing address is 10900 Nesbitt Avenue South, Bloomington, Minnesota 55437.

in the M&A Investment Banking Department at Deutsche Bank. In such capacities, I have been involved in, among other things, complex bankruptcies relating to chapter 11 plan negotiations, rights offerings, backstops, DIP financings, cash collateral usage and/or new money recapitalizations. I graduated from Cornell University cum laude with a B.S. in Applied Economics and Business Management.

3. I submit this Declaration in connection with the *Ad Hoc Group of Excluded Lenders' Objection to Confirmation of Joint Prepackaged Chapter 11 Plan of Reorganization of ConvergeOne Holdings, Inc. and Its Debtor Affiliates* (the "Objection") filed contemporaneously herewith.[2]

4. Unless otherwise stated herein, the statements in this Declaration are based on my knowledge or opinion, on information that I have received from counsel for the Excluded Lenders, the Debtors' *Disclosure Statement for the Joint Prepackaged Chapter 11 Plan of Reorganization of ConvergeOne Holdings, Inc. and Its Debtor Affiliates* [Docket No. 26] (the "Disclosure Statement"), or employees of U&L working directly with me or under my supervision, direction, or control.

A. The Equity Rights Offering, Including The Exclusive Investment Opportunity

5. I understand that the Debtors' Proposed Plan seeks to raise $245 million of new capital through the issuance of new equity at a 35% discount, representing an 86.8 percent ownership stake in the Reorganized Debtors, pursuant to an equity rights offering and a direct investment opportunity. The undiscounted value of new common stock available in connection with this new capital raise is $376.9 million, or 86.8 percent of the Debtors' Stipulated Equity

[2] Capitalized terms used but not defined herein shall have the meanings given to them in the Objection or the *Joint Prepackaged Chapter 11 Plan of Reorganization of ConvergeOne Holdings, Inc. and Its Debtor Affiliates* [Docket No. 27] (the "Proposed Plan"), as applicable.

Value of $434 million. The discount to Stipulated Equity Value applied in connection with the capital raise is 35 percent (the "Plan Discount").

6. Of the $245 million of new capital to be raised, $159.25 million will be raised pursuant to a rights offering available to all Holders in Class 3 on a *pro rata* basis (the "Open Equity Allocation"). The common stock available for purchase through the Open Equity Allocation represents an approximate 56.5 percent ownership stake in the Reorganized Debtors.

7. The remaining $85.75 million of new capital will be raised through a direct investment opportunity (the "Exclusive Equity Allocation") reserved exclusively for purchase by certain parties to the RSA (the "Majority Lenders"). RSA, Exhibit 3 (Equity Rights Offering Term Sheet) to Exhibit B (Restructuring Term Sheet) at 1. The common stock available for purchase through the Exclusive Equity Allocation represents an approximate 30.4 percent ownership stake in the Reorganized Debtors and has a value of approximately $131.9 million at Stipulated Equity Value. The difference between the value of the equity available in the Exclusive Equity Allocation at Stipulated Equity Value and the amount paid for such equity is equal to $46.2 million.

8. The Proposed Plan provides, by default, that Holders of First Lien Claims participate in the Open Equity Allocation and receive Takeback Term Loans in a principal amount equal to 15 percent of their First Lien Claims. Proposed Plan § III.C.3.(c). Holders of First Lien Claims may elect to receive the Takeback Term Loan Recovery Option instead of participating in the Open Equity Allocation. *Id.* The Takeback Term Loan Recovery Option provides a Holder that makes such election with a recovery solely in the form of Takeback Term Loans in a principal amount equal to 20 percent of such Holder's First Lien Claim. *Id.* The Proposed Plan provides an adjustment mechanism pursuant to which participation in each recovery option is limited to 50 percent of the total. *Id.*

9. The RSA also grants certain parties thereto with a backstop fee defined as a "Put Option Premium." This Put Option Premium is equal to 10 percent of the total capital raise of $245 million, payable in equity at the Plan Discount. When such discount is applied, the value of the Put Option Premium is equal to $37.7 million at the Stipulated Equity Value and represents an approximate 8.7 percent ownership stake in the Reorganized Debtors. RSA, Exhibit 3 (Equity Rights Offering Term Sheet) to Exhibit B (Restructuring Term Sheet) at 3. The Put Premium Option is a direct grant of equity that does not require the investment of additional funds. *Id*.

B. Impact on Excluded Lenders

10. The Debtors project a recovery to the Excluded Lenders in Class 3 to be between 20 percent and 27.4 percent in the Disclosure Statement;[3] provided, however, the recoveries for Excluded Lenders, when considering the actual results of the recovery option elections, are (a) 20.0 percent for Holders electing the Takeback Term Loan Recovery Option and (b) [redacted] percent for Holders electing to participate in the Open Equity Allocation. *See* **Exhibit 1** hereto**.**

11. When considering the actual results of the recovery option elections, the recoveries for the Majority Lenders as a group are [redacted] percent if the value received by them in the Exclusive Investment Opportunities is considered to be a part of their recovery on their First Lien Claims. This recovery reflects an enhancement of more than [redacted] percent over the recovery provided to the Excluded Lenders electing to participate in the Open Equity Allocation. *See* **Exhibit 1** hereto.

C. The Put Option Premium

12. The Disclosure Statement provides that creditors holding 81 percent of the First Lien Claims support the Debtors' proposed restructuring pursuant to the terms of the RSA. Disclosure Statement at 1. Assuming 81 percent of the First Lien Claims were committed to

[3] *See* Disclosure Statement at 5.

exercise the full share of rights available to them in the Open Equity Allocation, 19 percent of the equity available in the Open Equity Allocation was at risk of not being purchased by the Excluded Lenders. The funding commitment to backstop the equity available to Excluded Lenders was $30.7 (the "Excluded Lender Backstop"). The Put Option Premium of $37.7 million reflects a fee of 122.7 percent against the Excluded Lender Backstop.

D. The Alternative Proposal

13. On April 26, 2024, the Excluded Lenders delivered to the Debtors an alternative proposal (the "Alternative Proposal"), a copy of which is attached hereto as **Exhibit 2** hereto.

14. The Alternative Proposal provides all Holders in Class 3 with recoveries between 28.0 percent and 29.8 percent (depending on whether a Holder participates in the Exit Term Loan Facility) as compared to [redacted] percent under the Proposed Plan excluding the Exclusive Investment Opportunity. *See* **Exhibit 1** hereto for a comparison of the Alternative Proposal versus the Proposed Plan. The Alternative Proposal maintains substantially identical leverage and debt terms as contemplated under the Proposed Plan.

15. On April 29, 2024, the Debtors rejected the Alternative Proposal. *See* **Exhibit 3** hereto.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 7th day of May, 2024 in New York, New York.

/s/ *Keshav Lall*
Keshav Lall

EXHIBIT 1

Debtors Proposed Plan

Uzzi & Lall

1 Current Capital Structure

Debt	Amount ($ Mn)
ABL	190.0
Total ABL	**190.0**
1L	1,095.7
KL Management	78.8
PVKG Note	213.0
1L Group	**1,387.5**
Total First Lien Debt	**1,577.5**
2L	286.5
Total Secured Debt	**1,864.1**

Exit Capital Structure

Debt	Amount ($ Mn)
Exit ABL	125.0
Exit Term Loan (1L Takeback)	243.0
Total Debt	**368.0**

1a. 1L Claims

1L Claims	Amount ($ Mn)	%
Majority Lenders	1,119.9	80.7%
Excluded Group	267.6	19.3%
Total	**1,387.5**	**100%**

2 Plan Details

Plan Value	Amount ($ Mn)
Stipulated Equity Value	434.0
Rights offering discount	35.0%
Discounted Equity Value	**282.1**

New Equity Split	%	Amount ($ Mn)
1L	95.625%	415.0
2L	4.375%	19.0
Total	**100%**	**434.0**

Uzzi & Lall

2a. Rights Offering	Rights Offer Split (%)	Purchase Price ($ Mn) (A)	% Equity	Share of Stipulated Equity Value ($ Mn) (B)	Distributable Value ($ Mn) (B - A)
Open Equity Allocation Amount	65.0%	159.25	56.5%	245.0	85.8
Exclusive Equity Allocation Amount	35.0%	85.75	30.4%	131.9	46.2
Total Open Equity Allocation and Exclusive Equity Allocation		**245.0**	**86.8%**	**376.9**	**131.9**

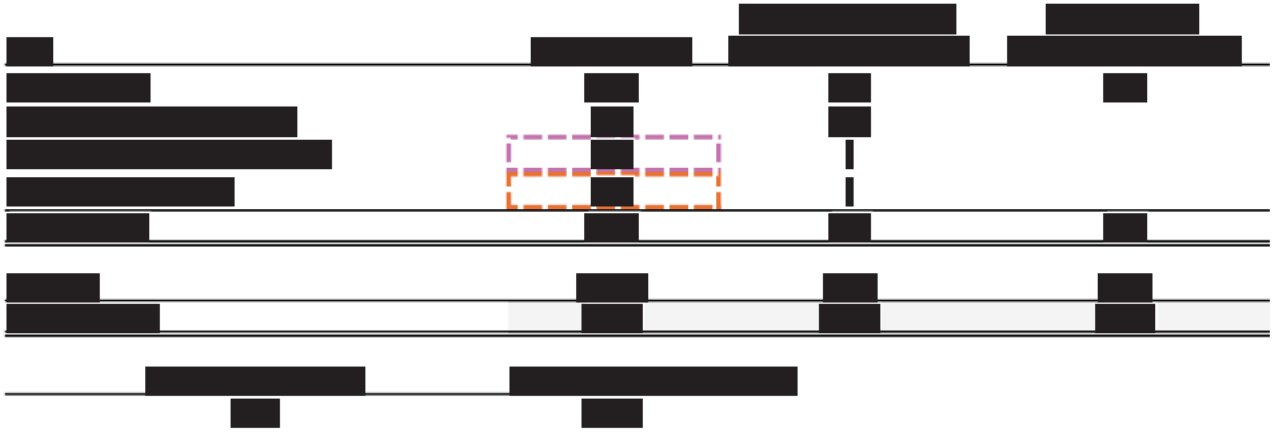
2b. Put Option Premium	Fee	New Capital Raise (Rights Issue)	Fee Amount (A)	Fee distributed as equity at 35% discount of Plan Disc (B)	Distributable Value ($ Mn) (A / B)
	10%	245.0	24.5	24.5 / (1-0.35)	37.7

Put Option Premium as % Equity in Reorganized Company

Put Option Premiun (Backstop Fee) (A)	37.7
Stipulated Equity Value (B)	434.0
% of Equity in the Reorganized Company (A/ B)	**8.7%**

Backstop of Excluded Lenders ($ Mn)	30.7
Put Option Premium ($ Mn)	37.7
% Fee of Put Option Premium against excluded Lender Backstop	122.7%

3 Recovery



Excluded Lender Alternative Plan

Uzzi & Lall

1 Current Capital Structure

Debt	Amount ($ Mn)
ABL	190.0
1L	1,095.7
KL Management	78.8
PVKG Note	213.0
1L Group	**1,387.5**
Total First Lien Debt	**1,577.5**
2L	286.5
Total Secured Debt	**1,864.1**

Exit Capital Structure

Debt	Amount ($ Mn)
Exit ABL	125.0
Exit Term Loan (1L Takeback)	245.0
Total Debt	**370.0**

2 Plan Details

2a. Plan Value

Plan Value	Amount ($ Mn)
Stipulated Equity Value	434.0
Difference in Exit Facility	-2.0
Distributable Equity Value	**432**

2b. 1L Fees (10% Exit Facility)

	Exit Facility	Fee	Amount ($ Mn) (A)	Distributable Equity Value (B)	% Equity at Distributable Value (A / B)
Exit Facility Fee	245.0	10%	24.5	432	5.7%

2c. Equity Split

	Split (%)	Distributable Equity Value	Amount ($ Mn)
1L	90.0%	432.0	388.6
1L Fee	5.7%	432.0	24.5
2L	4.4%	432.0	18.9
Total	100.0%		**432.0**

3 Recovery

Uzzi & Lall

$ Mn	Total 1L	Majority Lenders	Excluded Group
Equity (1L)	388.6	313.7	74.9
Exit Facility Fee*	24.5	19.8	4.7
Total Recovery	**413.1**	**333.4**	**79.7**
1L Claims	1,387.5	1,119.9	267.6
1L Recovery Without Exit Fee (%)	**28.0%**	**28.0%**	**28.0%**
1L Recovery with Exit Fee (%)	**29.8%**	**29.8%**	**29.8%**

* Assumes 100% participation

EXHIBIT 2

Proskauer Rose LLP Eleven Times Square New York, NY 10036-8299

April 26, 2024

David M. Hillman
Member of the Firm
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By Email

White & Case LLP
111 South Wacker Drive, Suite 5100
Chicago, IL 60606
Attn: Bojan Guzina (bojan.guzina@whitecase.com)

Re: ConvergeOne Holdings, Inc., *et. al.* (Case No. 24-90194-CML)

Dear Bojan:

We represent a group of excluded lenders (the "Excluded Lenders") that hold, manage, or represent approximately $164 million (roughly 15%) of non-insider, first-lien term loan debt arising under that certain *First Lien Term Loan Credit Agreement*, dated as of January 4, 2019 (as amended by Amendment No. 1 dated as of March 14, 2019 and Amendment No. 2 dated as of December 17, 2021), by and among ConvergeOne Holdings Inc. (together with its direct and indirect subsidiaries, the "Company") as borrower, PVKG Intermediate Holdings Inc. ("PVKG Intermediate"), as holdings, Deutsche Bank AG New York Branch, as administrative agent and collateral agent, and certain lenders from time to time party thereto.

We ask that you share this letter with Larry J. Nyhan and Sherman K. Edmiston III as the independent directors on the boards of the Company and PVKG Intermediate (the "Independent Directors") and Jeffrey S. Russell as Chief Executive Officer of the Company.

We write with respect to the restructuring transaction (the "Proposed Transaction") proposed by the Company and its affiliated debtors (collectively, the "Debtors") in their joint chapter 11 plan, dated April 3, 2024 (the "Proposed Plan"),[1] and that certain Restructuring Support Agreement, dated April 3, 2024 (the "RSA"). As you know, the Excluded Lenders oppose the Proposed Transaction and are deeply troubled by the Special Committee's willingness to approve a transaction that is plainly designed to benefit a select group of lenders (the "Majority Lenders"), which includes the Company's equity sponsor, CVC Capital Partners and its affiliates, to the detriment of other similarly-situated creditors without first exploring market-based alternatives, and doing so on a self-imposed, hyper-aggressive timeline. Simply put, fiduciaries do not act this way.

The Proposed Transaction is not executable because, among other deficiencies, it violates the equal treatment requirement of section 1123(a)(4) of the Bankruptcy Code. The Proposed Plan is predicated on the Rights Offering under which (a) a direct investment opportunity to purchase $131.9 million of new equity at a substantial discount to Stipulate Equity Value is reserved

[1] Capitalized terms used herein that are not otherwise defined shall have the meanings given to them in the Proposed Plan.

exclusively for the Majority Lenders, and (b) a Put Option Premium in the form of a direct grant of $37.7 million of new equity at Stipulated Equity Value is also reserved exclusively for the Majority Lenders (together, the "Exclusive Investment Opportunity"). The Exclusive Investment Opportunity positions the Majority Lenders to receive unfairly reorganized equity with an aggregate value of approximately $169.7 million at Stipulated Equity Value in exchange for only $85.75 million of new money. The Excluded Lenders were denied any participation in the Exclusive Investment Opportunity.

The Supreme Court held that chapter 11 plans of reorganizations providing exclusive investment opportunities to existing stakeholders are, in absence of a legitimate market test, unconfirmable as a matter of law. *Bank of America Nat. Trust and Savings Assoc. v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999).[2] Here, there was no effort whatsoever to market test the exclusive arrangement and, indeed, no need for an exclusive arrangement as the Excluded Lenders were and remain ready, willing and able to participate in the Exclusive Investment Opportunity. Even if *LaSalle* were not applied, the transaction will nonetheless be subject to the exacting entire fairness standard of review given its participation by insiders. This transaction is on its face patently unfair. It seems obvious that the transaction was structured in this manner to garner improperly the votes of a majority at the expense of the minority in violation of the basic principles of chapter 11.

As our fiduciaries, you are duty-bound to pivot. To that end, the Excluded Lenders have developed a viable and superior alternative plan which is fair to all and set forth in the term sheet attached hereto as **Exhibit A** (the "Alternative Proposal"). The Alternative Proposal provides that Class 3 Holders will receive identical treatment in the form of their *pro rata* share of $388.6 million of New Equity Interests at the Stipulated Equity Value. Instead of raising capital through a highly dilutive and legally flawed Rights Offering, exit capital will be raised pursuant to an exit term loan facility (the "Exit Term Loan Facility") in the aggregate principal amount of $245 million on substantially the same terms as the proposed Takeback Loans.[3] All Class 3 Holders will have the opportunity to participate in the Exit Term Loan Facility (both on a *pro rata* basis and to backstop the facility). The cornerstone of the Alternative Proposal is equality of treatment for all Class 3 Holders.

The Alternative Proposal is superior to the Proposed Plan for at least four reasons:

1. The Alternative Proposal (unlike the Proposed Plan) respects the equal treatment requirement for all Class 3 Holders and is therefore confirmable.

2. The Alternative Proposal provides Class 3 Holders as a class with a significantly enhanced recovery relative to the Proposed Plan. The Alternative Proposal

[2] The deficiencies preventing confirmation of the Proposed Plan are further highlighted in the Excluded Lenders' emergency motion filed on April 15, 2024 (Docket No. 152).

[3] The Excluded Lenders are interested in providing a backstop for some or all of the Exit Term Loan Facility and are in active dialogue with third parties who have expressed interest in providing the backstop.

Proskauer

provides a recovery of between **28.0% and 29.8%** to all Holders of First Lien Claims as compared to the Proposed Plan, which provides a recovery of only between 20% and 23.7% on account of claims, excluding the Exclusive Investment Opportunity available only to the Majority Lenders. Including the Exclusive Investment Opportunity, Majority Lenders will receive not less than a 31.2% recovery, and maybe more depending upon the participation in the Takeback Term Loan Recovery Option, a staggering over 50% enhancement over the recovery provided to the Excluded Lenders.[4]

3. The Alternative Proposal maintains the Reorganized Debtors' leverage at $245 million.

We ask the that the Independent Directors cease pursuit of the unconfirmable Proposed Plan, engage with us on the Alternative Proposal and allow for good faith negotiations on the terms of an actionable alternative to the unconfirmable Proposed Plan. We believe engagement is a far better path for the Debtors as compared with value-destructive litigation leading up to, and in connection with, a contested confirmation hearing. Let us know how you would like to proceed by no later than **April 30, 2024**.

We are available to discuss your questions or comments on our Alternative Proposal.

Very truly yours,

David M. Hillman

Enclosure

[4] A comparison of the recoveries between the Proposed Plan and the Alternative Proposal is attached hereto as **Exhibit B**.

Exhibit A

ConvergeOne Holdings, Inc.
Excluded Lenders' Alternative Proposal

Exit Term Loan Facility	In lieu of the Rights Offering and Direct Investment, on the Effective Date, the Reorganized Debtors shall be capitalized through a secured term loan facility in the aggregate principal amount of not greater than $245 million under an exit financing credit agreement on substantially the same terms as the Exit Term Loan Facility described in the Proposed Plan and RSA, and as set forth below. Interest Rate: At the option of the Debtors, (i) SOFR (to be defined in a customary manner and subject to a floor of 0.00%) *plus* the Applicable Rate or (ii) Base Rate (to be defined in a customary manner and subject to a floor of 0.00%) *plus* the Applicable Rate, in each case payable in cash; *provided* that at any time an event of default exists under the Exit Term Loan Facility, the Debtors shall not be able to elect SOFR. Applicable Rate: 4.75% in the case of Base Rate loans and 5.75% in the case of SOFR loans. Default Interest: During the continuance of an Event of Default, the Takeback Term Loans will bear interest at an additional 2.00% per annum and any overdue amounts (including overdue interest and fees) will bear interest at the applicable non-default interest rate plus an additional 2.00% per annum. Default interest shall be payable in cash on demand. Interest Payment Dates: Interest on (i) Base Rate loans shall be payable on the last business day of each fiscal quarter in arrears and (ii) SOFR loans shall be payable on the last day of each Interest Period in arrears (or, if earlier, the three-month anniversary of the commencement of such Interest Period). Interest Period: At the option of the Debtors, one, three, or six months. Amortization: None. Tenor: Six years, provided that if, in the reasonable determination of the Required Excluded Lenders[5] in good faith consultation with the

[5] "Required Excluded Lenders" shall mean, as of the relevant date, the Excluded Lenders, collectively, in excess of 66 2/3% of the aggregate First Lien Claims collectively held by the Excluded Lenders.

	Debtors, the Restructuring Transaction (as modified by the Alternative Proposal) cannot be effectuated in a manner that causes a taxable transaction to the lenders for U.S. federal and applicable state and local income tax purposes by causing a Reorganized Debtor, other than C1 Holdings, to be the issuer of the Exit Term Loans, because such structure would reasonably be expected to result in material adverse tax consequences to the Reorganized Debtors as compared to the tax consequences to the Reorganized Debtors had C1 Holdings been the issuer of the Exit Term Loans, subject to the consent of the Required Excluded Lenders, the tenor will be reduced to 4.75 years and in that case the Applicable Rate will be reduced to 4.25% in the case of Base Rate loans and 5.25% in the case of SOFR loans. Fees: 10% of aggregate principal amount (consisting of a 5% exit fee available to all Holders of First Lien Claims who participate in their *pro rata* share of the Exit Term Loan Facility, and a 5% backstop fee available to all Holders of First Lien Claims who elect to backstop the Exit Term Loan Facility) (collectively, the "Facility Fees"), plus annual agency fee. The Facility Fees are payable in New Equity Interests at the Stipulated Equity Value. Security: A (x) first-priority lien on all collateral securing the First Lien Claims and any other collateral not previously pledged, in each case, that constitute Term Loan Priority Collateral (as defined in the ABL Intercreditor Agreement (as such term is defined in the Prepetition First Lien Term Credit Agreement)), and a first-priority lien on (A) that certain real property of the Reorganized Debtors located at 2368 Corporate Lane, Suite 112, Naperville, IL 60563 and (B) any other owned real property of the Reorganized Debtors and (y) a second-priority lien on all collateral securing the First Lien Claims and any other collateral not previously pledged, in each case, that constitutes ABL Priority Collateral (as defined in the ABL Intercreditor Agreement (as such term is defined in the Prepetition First Lien Term Credit Agreement)), which second-priority liens shall be subordinated to the liens on such collateral securing the Exit ABL Facility, in the case of either clause (x) or (y) above, subject to customary exclusions consistent with the exclusions under the Prepetition First Lien Credit Agreement (including the exclusion of 35% of the equity interests of any first-tier foreign subsidiaries) and otherwise as may be agreed by the Reorganized Debtors and the Required Consenting Lenders. Documentation Principles: The Exit Term Loan Credit Agreement with respect to the Exit Term Loan Facility shall (i) be based upon the Prepetition First Lien Term Loan Credit Agreement; (ii) include such modifications as are necessary to reflect the Restructuring Transaction

	(as modified by the Alternative Proposal), as implemented through the Chapter 11 Cases, and the fact that the Exit Term Loan Facility is an exit financing; (iii) include appropriate modifications to reflect changes in law or accounting standards since the date of such precedent; and (iv) shall incorporate the following: • Affirmative Covenants: Consistent with the First Lien Term Loan Credit Agreement (but modified in a manner acceptable to the Debtors and the Required Excluded Lenders to provide for modified reporting requirements and information rights that are customary for facilities of this type and relate to reporting and information readily available to the Debtors in the ordinary course of business). • Negative Covenants: Consistent with the First Lien Term Loan Credit Agreement, but modified as may be required to effectuate the Restructuring Transaction (as modified by the Alternative Proposal), in each case, in a manner acceptable to the Debtors and the Required Excluded Lenders; *provided* that the Exit Term Loan Facility shall not include any financial covenants. • Miscellaneous: Shall also include certain customary liability management protections in form and substance acceptable to the Debtors and the Required Excluded Lenders. Intercreditor Agreements: The Exit Term Loan Facility shall be subject to the Exit Intercreditor Agreement. Ratings: The Reorganized Debtors shall use commercially reasonable efforts to have the Takeback Term Loans rated by Moody's and S&P within sixty days of the Effective Date. Backstop: Each Holder of a First Lien Claim shall have the opportunity to participate in the backstop of the Exit Term Loan Facility and receive their *pro rata* portion of the Backstop Fee. The Excluded Lenders are interested in providing a backstop for some or all of the Exit Term Loan Facility and are in active dialogue with third parties who have expressed interest in providing the backstop. First Lien Claim Participation: Each Holder of a First Lien Claim shall have the participate in their *pro rata* portion of the Exit Term Loan Facility.

Treatment of First Lien Claims	Each Holder of a First Lien Claim (or its designated Affiliate, managed fund or account or other designee) shall receive, in full and final satisfaction, settlement, release, and discharge of such Claim, on the Effective Date, its *pro rata* share of $388.6 million of New Equity Interests at the Stipulated Equity Value (the "First Lien Claim Recovery").

Exhibit B

Recovery Analysis

A C1 Restructuring Plan - Ad hoc Group

Uzzi & Lall

1 Current Capital Structure

Debt	Amount ($ Mn)
ABL	190.0
Total ABL	**190.0**
1L	1,095.7
KL Management	78.8
PVKG Note Purchase	213.0
1L Group	**1,387.5**
Total First Lien Debt	**1,577.5**
2L	286.5
Total Secured Debt	**1,864.1**

Exit Capital Structure

Debt	Amount ($ Mn)
Exit ABL	125.0
Exit Term Loan (1L Takeback)	243.0
Total Debt	**368.0**

1a. 1L Claims

1L Claims	Amount ($ Mn)	%
Ad hoc Group	1,117.5	80.5%
Excluded Group	270.0	19.5%
Total	**1,387.5**	**100%**

2 Plan Details

Plan Value	Amount ($ Mn)
Stipulated Equity Value	434.0
Rights offering discount	35.0%
Discounted Equity Value	**282.1**

New Equity Split	%	Amount ($ Mn)
1L	95.625%	415.0
2L	4.375%	19.0
Total	**100%**	**434.0**

Uzzi & Lall

2a. Rights Offering	Rights Offer Split (%)	Purchase Price ($ Mn) (A)	% Equity	Stipulated Equity Value ($ Mn) (B)	Distributable Value ($ Mn) (B - A)
Rights Offer Amount	65.0%	159.25	56.5%	245.0	85.8
Direct Investment Amount	35.0%	85.75	30.4%	131.92	46.2
Total Rights Offer and Direct Investment		**245**	**86.8%**	**376.9**	**131.9**

2b. Backstop Fees	Fee	% Stipulated Equity Value	Fee Amount ($ Mn)
Put Option Premium	10%	5.6%	24.5
Plan Discount Value	10%	3.0%	13.2
Total Fees		**8.7%**	**37.7**

3 Recovery

$ Mn	Ad hoc Group	Excluded Group	
Take Back Debt	195.7	47.3	
Rights Offer Amount	69.1	16.7	Assuming 100% subscription to Rights Offer
Direct Investment Amount	46.2	-	
Put Option Premium Fee	37.7	-	
Total Recovery	**348.6**	**64.0**	
1L Claims	1,118	270	
1L Recovery (%)	**31.2%**	**23.7%**	Assuming equal pro rata participation in Takeback Term Loan Recovery Option and Rights Offering and Takeback Term Loan Recovery Option
2L Recovery at Plan Value	19.0		
2L Claims	286.5		
2L Recovery (%)	**6.6%**		

B C1 Restructuring Plan - Alternative

Uzzi & Lall

1 Current Capital Structure

Debt	Amount ($ Mn)
ABL	190.0
1L	1,095.7
KL Management	78.8
PVKG Note Purchase	213.0
1L Group	**1,387.5**
Total First Lien Debt	**1,577.5**
2L	286.5
Total Secured Debt	**1,864.1**

Exit Capital Structure

Debt	Amount ($ Mn)
Exit ABL	125
Exit Term Loan	245
Total Debt	**370**

2 Plan Details

2a.

Plan Value		Amount ($ Mn)
Stipulated Equity Value		434.0
Difference in Exit Facility	-	2.0
Distributable Equity Value		**432**

2b.

1L Fees (10% Exit Facility)	Fee	Amount ($ Mn)	% Equity
Exit Facility Fee	10%	24.5	5.67%
Total Fees		**24.5**	**5.67%**

2c.

Equity Split	Split (%)	Amount ($ Mn)
1L	89.95%	388.6
1L Fee	5.7%	24.5
2L	4.375%	18.9
Total Rights Offer		**432.0**

3 Recovery

Uzzi & Lall

$ Mn	Total 1L	Ad hoc Group	Excluded Group	
Equity (1L)	388.6	313.0	75.6	
Exit Facility Fee	24.5	19.7	4.8	Assumes 100% participation
Total Recovery	**413.1**	**332.7**	**80.4**	
1L Claims	1,388	1,118	270	
1L Recovery Without Exit Fee (%)	**28.0%**	**28.0%**	**28.0%**	
1L Recovery with Exit Fee (%)	**29.8%**	**29.8%**	**29.8%**	
2L Recovery	18.9			
2L Claims	286.5			
2L Recovery (%)	**6.6%**			

EXHIBIT 3

WHITE & CASE

April 29, 2024

VIA E-MAIL

Confidential – Subject to FRE 408

White & Case LLP
111 South Wacker Drive
Suite 5100
Chicago, Illinois 60606-4302
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whitecase.com

Proskauer Rose LLP
Eleven Times Square
New York, NY
10036-8299
Attn: David M. Hillman (DHillman@proskauer.com)

RE: *April 26, 2024 Letter – ConvergeOne Holdings, Inc., et. al.* (Case No. 24-90194-CML)

Dear David:

I am responding to your letter dated April 26, 2024 regarding ConvergeOne Holdings, Inc. and its affiliated debtors ("ConvergeOne" or the "Debtors").[1] The Debtors appreciate the interest of the ad hoc group of minority first lien lenders (the "Minority Ad Hoc Group") in providing exit financing for the Debtors as part of the Alternative Proposal. The Independent Directors have considered the Alternative Proposal. The Independent Directors have determined that the Alternative Proposal would not result in higher or otherwise better recoveries for the Debtors' stakeholders than the restructuring transaction that is embodied in the RSA and the Plan.

The Alternative Proposal suffers from three principal deficiencies that render it unworkable:

- **Lack of Financing Commitments**. The Alternative Proposal is not backed by committed capital. Your letter states that the Minority Ad Hoc Group is "interested in providing a backstop for some or all of the Exit Term Loan Facility and [is] in active dialogue with third parties who have expressed interest in providing the backstop." This "interest" is not sufficient to make the Alternative Proposal a viable option. Committed capital is essential. While we appreciate that your clients may be in "active dialogue" with potential third party lenders, this is far short of committed capital. New lenders will likely require significant due diligence before they commit capital and we do not know the terms of any potential commitment. We also ask that you disclose the identities of all third parties that the Minority Ad Hoc Group has approached regarding a potential financing commitment.

- **Potential Loss of DIP Loan Commitments**. If the Debtors were to abandon the RSA and pivot to the Alternative Proposal, the Debtors would risk losing the DIP term loan (which cross-defaults to the RSA) and would be forced to find alternative DIP financing. The Debtors would

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in your letter or the Plan, as applicable.

also face a cross-default on the ABL DIP facility. The Alternative Proposal does nothing to address any of these consequences. Your clients have not offered to replace the current DIP facilities, nor does your letter explain how the chapter 11 cases or the Debtors' business would be funded while the Debtors pursue the Alternative Proposal, which would require a longer timeline to confirmation than the current Plan.

- **Extension of Current Timeline**. The confirmation hearing for the current Plan is in less than three weeks. If the Debtors were to abandon the Plan and pivot to the Alternative Proposal, the current case timeline would be extended by several weeks if not months. Pivoting to the Alternative Proposal would require a new plan and disclosure statement, and a new solicitation and voting period. Your letter completely ignores the negative impacts that this would have on the Debtors' business, and does not account for the additional administrative costs that the Debtors would incur. There are significant business harms resulting from additional time in chapter 11, in addition to significant professional fees that accrue with each additional day in bankruptcy.

The Alternative Proposal also lacks any meaningful stakeholder support. Your group appears to speak for less than 10% in amount of the Class 3 claims. In contrast, the Proposed Transaction is not only fully funded and backstopped, but is supported by approximately 89% in amount of Class 3 claims and 100% in amount of the Class 4 claims that voted on the Plan.

Stakeholder support for the Proposed Transaction under the RSA is based in part on the opportunity for Class 3 to receive takeback debt. The takeback debt structure included in the Proposed Transaction is important to certain Class 3 Holders that cannot, or do not wish to, receive equity as part of their Plan treatment. Approximately 8% of the Class 3 Holders of First Lien Claims elected to receive takeback debt and no equity as their Plan treatment. They would not have that option under the Alternative Proposal.

Your suggestion that the Debtors' current path is the result of an abdication of the Independent Directors' fiduciary duties is outrageous and wrong. Your supposedly superior proposal is premised on a nearly identical equity value and pro forma capital structure as the Proposed Transaction. It does nothing to increase the value of the business post-emergence relative to the Proposed Transaction, but would add significant cost, delay, and risk to the process. The Independent Directors could not possibly discharge their fiduciary duties by abandoning the fully-committed and backstopped Plan in favor of this uncommitted Alternative Proposal.

There is no basis to question the integrity of the Independent Directors or the process that resulted in the RSA and the Plan. The Independent Directors are highly experienced restructuring professionals. They have served the Debtors with professionalism, care, and integrity. For more than three months, the Independent Directors and Mr. Russell have diligently explored all potential restructuring alternatives for the Debtors. The Proposed Transaction was the best, and indeed the only, viable option available to the Debtors. It is the result of hard-fought negotiations that resulted in significantly improved terms for the Debtors. Members of the Minority Ad Hoc Group were well aware of the ongoing restructuring discussions that were taking place during this time, but they did not present an alternative proposal to the Debtors until more than three weeks after the Petition Date and less than three weeks before the Confirmation Hearing. The Independent Directors and Mr. Russell made a reasonable and justified decision to embrace the Proposed Transaction as the best alternative available to the Debtors. The overwhelming creditor support for the Plan is clear indication that the Debtors' stakeholders agree with that decision.

April 29, 2024

If you want the Debtors to re-consider the Alternative Proposal, please fix the infirmities identified above and submit an actionable proposal that would allow the Debtors to emerge from bankruptcy on a substantially similar timeline as the current Plan. We will continue to engage with you in good faith, consistent with our fiduciary duties. Time is of the essence. All rights are reserved.

Best regards,

/s/ Bojan Guzina

Bojan Guzina

T +1 312 881 5365
E bojan.guzina@whitecase.com

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
- -x
In the Matters of:
MPM SILICONES, LLC, et al., Case No.
Debtors. 14-22503-rdd
- -x
MOMENTIVE PERFORMANCE MATERIALS INC., et al.,
Plaintiffs, Adv. Proc. No.
-against- 14-08227-rdd
THE BANK OF NEW YORK MELLON TRUST COMPANY,
N.A., solely as Trustee for the MPM Escrow
LLC and MPM Finance Escrow Corp. 8.875%
First Priority Senior Secured Notes due 2020,
Defendant.
- -x
United States Bankruptcy Court
300 Quarropas Street
White Plains, New York
June 19, 2014
10:19 AM
B E F O R E:
HON. ROBERT D. DRAIN
U.S. BANKRUPTCY JUDGE

Application to Employ and Retain Ernst & Young LLP as Tax Advisor for the Debtors and Debtors-in-Possession Pursuant to Sections 327(a), 330, 331 and 1107(b) of the Bankruptcy Code Nunc Pro Tunc to the Petition Date, filed by Matthew Allen Feldman on behalf of MPM Silicones, LLC., et al. (document #313)

Debtors' Application to Employ and Retain KPMG LLP as Tax Advisor Nunc Pro Tunc to the Petition Date (related document(s) 314)

Application to Employ and Retain PricewaterhouseCoopers LLP as Independent Auditors and Tax Consultants for the Debtors and Debtors-in-Possession Pursuant to Sections 327(a), 330, 331 and 1107(b) of the Bankruptcy Code, filed by Matthew Allen Feldman on behalf of MPM Silicones, LLC., et al. (document #316)

Debtors' Motion for Orders (I) Authorizing the Debtors to Assume the Restructuring Support Agreement and (II) Authorizing and Approving the Debtors' (A) Entry Into and Performance Under the Backstop Commitment Agreement, (B) Payment of Related Fees and Expenses, and (C) Incurrence of Certain Indemnification Obligations (document #147)

Debtors' Motion for Order: (I) Approving Disclosure Statement; (II) Establishing Date of Confirmation Hearing; (III) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Plan, Including (A) Approving Form and Manner of Solicitation Packages, (B) Approving Form and Manner of Notice of Confirmation Hearing, (C) Establishing Record Date and Approving Procedures for Distribution of Solicitation Packages, (D) Approving Forms of Ballots, (E) Establishing Deadline for Receipt of Ballots, and (F) Approving Procedures for Vote Tabulations; (IV) Establishing Deadline and Procedures for Filing Objections to Confirmation of Plan; (V) Approving Rights Offering Procedures; and (VI) Granting Related Relief

Re: Adv. Proc. 14-08227-rdd:

Motion to Approve / Debtors' Motion for an Order Establishing a Time Line for Confirmation- and Adversary Proceeding-Related Discovery (document #317)

Motion to Intervene / Motion of Apollo Global Management, LLC and Certain of its Affiliated Funds for an Order Permitting Intervention in Adversary Proceeding No. 14-08227 (RDD), filed by Philip Dublin on behalf of Apollo Global Management, LLC (document #9)

Motion to Intervene / Motion of Ad Hoc Committee of Second Lien Noteholders for Entry of Order Pursuant to 11 U.S.C. Section 1109(b) and Fed.R.Civ.P. 24(a) Granting Right to Intervene in Adversary Proceeding Commenced by Debtors, filed by Dennis F. Dunne on behalf of Ad Hoc Committee of Second Lien Noteholders (document #10)

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ALSO PRESENT:

WILLIAM H. CARTER, Executive Vice President, Momentive Performance Materials Holdings LLC

P R O C E E D I N G S

THE COURT: Please be seated.

Okay, good morning. In re MPM Silicones, LLC.

MR. FELDMAN: Good morning, Your Honor. For the debtors, Matthew Feldman from the law firm of Willkie, Farr & Gallagher LLP. Your Honor, other attorneys from Willkie may be appearing today and I will let them introduce themselves as the hearing proceeds.

THE COURT: Fine.

MR. FELDMAN: Do you want to take other notices of appearance before we begin?

THE COURT: Well, given the number of people, maybe it makes better sense, assuming you've all given your card to the ECRO operator already, just to announce yourself when you speak.

MR. FELDMAN: Thank you, Your Honor. Your Honor, we have the agenda today that we had filed with the Court, and I believe we filed an amended agenda late last night to accommodate one additional response or objection that was received, and just making sure that the Court was aware of all the various pleadings.

There are a number of matters, Your Honor, that are not contested and will go relatively quickly, and it would be my proposal to handle things this morning in the order of the agenda, particularly on the uncontested matters.

THE COURT: Okay.

MR. FELDMAN: Your Honor, number 1 on the agenda is the motion of Chemtrade Refinery for payment of an administrative claim. I believe we've resolved that. My understanding is that Chemtrade's counsel's going to present an order to chambers; so that does not need to be heard and is not going forward this morning.

THE COURT: Well, it's unopposed, right?

MR. FELDMAN: It is unopposed, Your Honor.

THE COURT: So I'll look for an e-mail to chambers of an order granting the motion.

MR. FELDMAN: Thank you, Your Honor. With respect to matters 2, 3 and 4 on the agenda, I'm going to deal with them collectively since they cover three out of the Big Four accounting firms. Your Honor, there are no objections to this. Each of the applicants has filed a supplemental declaration or supplement affidavit, as requested by the U.S. Trustee. In essence, Your Honor, these accounting firms do different things for the companies. As you know, the companies' enterprise is large and complex. With respect to Ernst & Young, they provide foreign tax advice to the companies. With respect to KPMG, they largely do compliance work for the companies. And with respect to PwC, they are the companies' auditors and are working with the company on fresh-start accounting. We do not believe there is significant, if any, overlap on their areas of

expertise and what they're being asked to do. It is important to the company to keep this group of accounting firms working. And we would ask the Court to approve those this morning.

THE COURT: Okay. And these are each Section 330 retentions and --

MR. FELDMAN: That is correct, Your Honor.

THE COURT: -- and primarily, in some cases exclusively, hourly-rate retentions. I think there're a couple tasks that have a cap on them.

MR. FELDMAN: Correct, Your Honor, but these are --

THE COURT: Okay.

MR. FELDMAN: -- essentially 330 hourly-rate retentions.

THE COURT: Right. Okay. All right, does anyone have anything to say on any of these three retentions?

Okay, I reviewed the applications and I'll grant each of them. So you can e-mail that order to chambers.

MR. FELDMAN: We will do that, Your Honor. Thank you.

Your Honor, with respect to the next three items on the agenda -- items 5, 6 and 7; that is the balance of the agenda this morning -- two of the items are closely connected to each other; those are the debtors' motion for orders authorizing the debtors to assume the restructuring support agreement and authorizing the debtors' entry into an approval of the backstop commitment agreement. That really is connected

to, obviously, the disclosure statement which the debtors are asking the Court to approve today so we can begin the solicitation process. And then finally, the last item on the agenda, Your Honor, is the debtors' proposed time line for the three litigations that are currently pending before Your Honor: two with respect to make-whole litigation or redemption litigation, and then the third filed by the subdebt trustee with respect to the subordination issue vis-a-vis the second-liens.

It would make sense from the company's perspective, Your Honor, for you to hear the RSA-BCA, hear the disclosure statement. If as a result of the last item on the agenda -- the timing -- we have to update the disclosure statement, we can certainly do that. But it would be our proposal, Your Honor, to have the more substantive issues go forward.

THE COURT: That's fine. There's also -- there're motions to intervene, too; I think they're on.

MR. FELDMAN: I'm sorry, Your Honor; I should have mentioned that. The motions to intervene --

THE COURT: And they're at the end.

MR. FELDMAN: -- I really view as part of the timeline discussion.

THE COURT: Okay.

MR. FELDMAN: That will all get done at one time.

THE COURT: Okay.

MR. FELDMAN: By way of background, Your Honor, the debtors today are seeking approval of the restructuring support agreement and backstop commitment agreement. The debtors filed this motion on May 9th, 2014. The motion was filed and service was commenced on May 9th, and affidavits of service are on file with the Court. The debtors initially received timely objections and joinders from six parties-in-interest: the official committee of unsecured creditors; the first-lien indenture trustee; the 1.5-lien indenture trustee; the trustee for the subdebt, U.S. Bank, which filed a joinder to the official committee's objection; and then a series of smaller second-lien holders, initially Fortress and D. E. Shaw and Napier Park Global, and the last two were filed, Your Honor, out of time but are simply joinders to the Fortress objection. We would propose to address all three of those together.

Your Honor, I am pleased to announce to the Court today that in fact the debtors and the ad hoc second-lien lenders and Apollo have reached resolution with the official committee of unsecured creditors, so we will put on the record -- and it was reflected in what was filed with the Court yesterday -- we will put on the record what that resolution is; and again, it is contained in the various blackline documents that were filed, including the RSA order, the BCA order, as well as the revised plan and disclosure statement, because their objection was dealt with in each of those documents

collectively.

THE COURT: All right. And I've reviewed those blacklines.

MR. FELDMAN: Your Honor, before I commence, there is one additional change that was agreed to this morning with respect to the first-lien indenture trustee; it does not begin to resolve the first-lien trustee's objection, so I don't want to suggest that, but it is some additional language in the order and I would propose, if it's acceptable to Your Honor, to hand that up to you now --

THE COURT: Okay.

MR. FELDMAN: -- so that you have it as we begin today.

THE COURT: That's fine.

MR. FELDMAN: And, Your Honor, while I do have extra copies, I don't have enough for everybody in the courtroom; I could not, frankly, have anticipated how many people would be in the courtroom. So if it's acceptable, I would just like to read onto the record what the change is and then I will hand it up to Your Honor.

THE COURT: Sure.

MR. FELDMAN: It adds a new paragraph 19, and this is to the order authorizing the backstop commitment and approving the backstop commitment, and it's intended to create a parallel provision from the restructuring support agreement order. And

it says, "For the avoidance of doubt, nothing in this order is intended to prejudice the rights of any party-in-interest (i) relating to any litigation or settlement with respect to whether any make-whole claim, pre-payment premium or applicable premium", and there's a footnote defining applicable premium, "is allowable, or (ii) under that certain intercreditor agreement dated as of November 16, 2012 to which MPM is a party." If I may approach and hand that up?

THE COURT: Okay. So that just tracks language that's in --

MR. FELDMAN: It just tracks the RSA --

THE COURT: -- in one or the other orders. Okay.

(Microphone malfunction)

THE COURT: Do you know what to do?

Usually when that happens, someone moves one of the microphones, but that person's not here.

Thank you.

MR. FELDMAN: Your Honor, just to round out the additional items that were filed, the debtors did receive a statement in support -- or a reply in support by the ad hoc committee of second-lien lenders, which was then joined by Apollo's counsel at Akin Gump.

Your Honor, on June 4th, 2014 the debtors made William Carter, their CFO, available for a 30(b)(6) deposition. Mr. Carter has also submitted a declaration in support of

today's RSA-BCA motion. He's in the courtroom today and we'll make him available later in the hearing if parties-in-interest have questions they would like to ask him and if that's acceptable to the Court. We also rely on his first-day declaration -- we also rely on his first-day declaration previously submitted into evidence in these cases. In addition, Your Honor, the debtors have filed and rely on the reply that they filed on June 17th, 2014 and, again, the statements in support filed by the second-lienholders and Apollo.

So, Your Honor, where are we and how did we get here? In December 2013 the debtors' board and management recognized that a restructuring was coming the company's way; that realization was made clear based on where the company's performance had been during 2013. And as they were heading towards a balance-sheet restructuring, they tasked their financial advisors from Moelis with organizing the debtors' second-lienholders. Moelis reached out to the largest holders of the second lien, who then organized themselves, as is typical in situations of this kind. It isn't really the company that organizes the ad hoc group; it's the ad hoc group that organizes itself.

The reason that the company and Moelis reached out to the second-lienholders is that it was the company's view preliminarily that that was going to be the fulcrum security.

But differently, that was the lowest tranche of debt in the capital structure that was going to be entitled to a recovery if the company were to file Chapter 11. And while it wasn't clear that the company was going to file Chapter 11, it was certainly among the options that the board and the company had to consider at that time.

This assumed that the second-liens were going to be willing to make an equity investment in the company through a rights offering or otherwise, that the debt markets would permit, and would continue to permit, the refinancing or payment of the first-liens and the one-and-a-half lien facilities, recognizing that the amount of capital for those facilities was unknown given the uncertainty surrounding the potential make-whole litigation. And it assumed that the debtors actually could raise, as I indicated earlier, 600 million dollars from the second-lienholders; that was the amount of capital that the debtors identified as being necessary for their plan to be feasible going forward. That turned out not to be a contentious discussion or decision by the debtors. In fact, I think the second-liens, when they took a look at the company and when they took a look at the various range that had been prepared by the company, they also settled on 600 million dollars as the amount of money that the company would need.

Throughout the last part of February, March, and the

beginning of April, the parties negotiated in good faith and at arm's length and, frankly, at times contentiously, over what a reorganization would look like. And what emerged out of those discussions, at least initially, was the restructuring support agreement, which was filed with the case on the first day of the case, and a plan term sheet, which was an exhibit to the restructuring support agreement. Ultimately, the parties negotiated and agreed on a backstop commitment agreement, and the actual plan was negotiated and filed.

Your Honor, I think it's in the papers but I think it's worth highlighting that the debtors have derived enormous benefits already out of the RSA and BCA. First of all, we've received consent from GE Capital to being primed in these cases, something which in my experience is highly unusual. And one of the reasons they were willing to be primed was because of the existence of the RSA and ultimately the BSA (sic). They were also able to receive 570 million dollars of debtor-in-possession financing, again, conditioned on the BSA and the RSA and certain various milestones.

In addition, they received a commitment for exit financing of 1.3 billion dollars; and again, that exit commitment would not exist but for the RSA and the BSA. It is obviously worth highlighting that the BSA provides for 600 million dollars of new equity financing committed to by the backstop parties. We're also able to put forward a plan that

will pay general unsecured creditors in full with interest. And perhaps most importantly, Your Honor, the debtors were able to file in a very stable and pre-planned way that brought stability to the company's vendors and customers, which has allowed the company to continue to operate on relatively stable ground since the filing back in April.

What will the debtors receive? They're going to receive a prompt exit from Chapter 11. They're going to have new ownership with at least two owners who have a track record -- their two largest owners -- of being sophisticated and strong shareholders and managers. And they have a new capital structure which reduces their current debt load of approximately 4 billion dollars down to about 1.3 or 1.4 billion dollars.

And what have the debtors given up? Because after all, that's what the objectors have largely focused on. The debtors have given up, under certain circumstances, a fee of five percent of the 600 million dollars, or 30 million dollars, under, again, certain limited circumstances. From the debtors' perspective, Your Honor -- and this is set forth in Mr. Carter's, both, deposition as well as his affidavit -- that without this deal in place, given the size of the company, given the sales they have, given the profitability -- remember, in the first quarter of 2014, the debtors did approximately 1.29 billion dollars in sales, or it had revenue of 1.29

billion, and segment EBITDA of 117 million. The thirty million dollars that the debtors could potentially have to pay in connection with the backstop parties, assuming a deal didn't ultimately happen and the cases didn't confirm, is frankly a drop in the bucket when you compare the debtors' size, revenue, profitability and when you look at the risk to the enterprise, if they had filed a -- I think we all recognize the term "freefall Chapter 11", without a deal in place. And from the debtors' perspective, that potential thirty-million-dollar claim is really dwarfed by the risk to the company had they not been able to file with the backstop and RSA.

In addition, the debtors have given up and agreed to indemnify the backstop parties. I think you're going to hear a lot about this today in connection with the objections. The debtors have clarified -- and it was in the proposed orders that were -- blacklined orders that were submitted yesterday with the official committee, that that indemnity does have limitations and, in particular, it would not apply if the subdebt holders were successful in asserting successfully their claim that they are not in fact subordinated to the second-liens.

But in addition, the first-liens and the one-and-a-halves will continue to talk about the indemnity. I'm not going to argue the objections at this moment, but I want to highlight for the Court that that is something that the Court

will hear about. But I will say, from the company's perspective, there was never a moment where the idea of not indemnifying parties willing to put up 600 million dollars ever made sense to the company; it didn't make sense in a broader context. I think the official committee, which we appreciate their assistance, got it exactly right; they carved it back for an appropriate purpose; we support that and we are happy with the change. But I think, in general, when you put up 600 million dollars of capital, you're entitled to ask and demand certain things.

And then the final point, Your Honor, is that we have agreed to reimburse the second-lienholder's ad hoc committee's professionals and Apollo's professionals. Again, weighing the size of the risk to the company versus the potential cost, again, this seemed, from the company's perspective, as not being significant.

So, Your Honor, we did in fact submit the Carter declaration, as I indicated. Mr. Carter said that the debtors had established a process in connection with negotiating the RSA and the BCA; that at all times each of the parties was well represented by counsel and financial advisors, and that included the company, and that included Apollo, and those were obviously separate advisors -- separate financial advisors, separate counsel; negotiations were conducted over the course of months at arm's length and good faith; that the conflicts

committee of the board, which is comprised of two independent members of the board, was the portion of the board that we as counsel and the financial advisors dealt with in the first instance; they are authorized and vested with authority to make recommendations to the full board. The full board could have ignored those recommendations; that's not how it unfolded. The conflicts committee was unanimous in recommending and approving entering into the RSA and BCA; they made that recommendation to the board, the board followed the recommendation, and ultimately the votes in favor were unanimous.

Your Honor, with respect to the objections, again, the creditors' committee objection set forth an appropriate concern for a scenario in which the RSA and BCA were approved but the plan failed because the subdebt was successful in its litigation. And to resolve this dispute, a number of changes were made that I'm going to run through quickly. And then I'm going to, at least for just a short period of time, yield the podium to either counsel for the ad hoc second-lienholders or the official committee to see where I get it wrong, as I inevitably do.

The first item that got changed is there is no backstop premium fee if there is no final nonappealable order entered into in connection with the subdebt litigation. The language that is actually in the order is a little more fulsome than that, but in substance that's what it says. The same

holds true with respect to the indemnity: if there is no final nonappealable order entered in connection with the subdebt litigation, the second-lienholders would not be entitled to the indemnity. The provision providing for credit-bidding by the second-lienholders, which was objected to not just by the official committee but by the first-liens and the one-and-a-halves as well, has also been just stricken completely; no circumstances in which that's dealt with in either the BCA or the RSA order.

In addition, the shared-services agreement modification deadline, which was coming up on us very quickly and we have not made as much progress on that as people hoped, has been moved back; it's effectively going to be near the end of July or in the last week of July. It's now based on commencement of voting period. And so that deadline now has been moved, which presumably gives the parties an opportunity to do what they need to do.

The other changes, Your Honor, are contained in the plan. The debtors have agreed, with respect to the exculpation clauses, that that should apply to the official committee and its members, and we've modified the plan to reflect that. The committee negotiated hard, and we have agreed, that general unsecured creditors will be entitled to interest under the plan. And in fact, there has been a condition added to the plan that the interest can't exceed a certain amount or parties

have to revisit. But we feel very comfortable and that'll be really a plan-confirmation issue.

THE COURT: Talking about post-petition interest?

MR. FELDMAN: I'm talking post-petition interest. I apologize. Yes. We feel very comfortable with the cap that got negotiated.

And the final issue is that there has been a waiver of preference claims built into the plan now which was not in the plan otherwise. I know that there's an additional representation that the parties want to make, and so at this point, Your Honor, if it's acceptable, I would cede the podium for a short period of time to let counsel, I think, put on the record one additional agreement that's been reached between them.

THE COURT: Okay.

MR. DUNNE: Good morning, Your Honor.

THE COURT: Good morning.

MR. DUNNE: Dennis Dunne from Milbank, Tweed, Hadley & McCloy, counsel for the ad hoc committee of second-lien noteholders.

I'm just going to address now the part that Mr. Feldman was putting on the record, with respect to what went into the settlement with the official creditors' committee. I'll be back up to the deal with the objections later. But I do want to give the Court some perspective and

then one clarification.

The second-lien ad hoc committee was deeply involved in these negotiations with the official creditors' committee and we made substantial concessions in order to garner their consent; I'm going to just go through them and clarify one and then make a brief statement at the end.

Several parties, in addition to the creditors' committee, have objected to the payment of the backstop premium, the fee, the thirty million dollars, if the plan were to fail because the debtors are wrong on their notion of what constitutes senior indebtedness under the subordinated note indenture. While we believe, obviously, that we'll prevail on that, we agreed to the change. But let me walk through the conditions of that nonpayment that it set out in the order, and I'll get to one clarification.

First, if Your Honor disagrees and the plan fails, not confirmed as a result of Your Honor believing that the second-lien indebtedness is not senior indebtedness, there would be no premium paid unless that order was reversed or vacated on appeal.

THE COURT: Because it's contingent on a final order, the ruling.

MR. DUNNE: Yes. Second, if Your Honor agrees that our indebtedness is senior indebtedness but that ruling is in turn appealed and reversed, it would not be paid if that occurs

prior to the payment. And this is the clarification. Let's assume that we have confirmation of this plan, which is predicated on the second-lien debt being senior indebtedness, and there is an appeal that's pending when we close but there's no stay, in effect, of closing. Then the backstop commitment premium would be paid in accordance with the terms of the backstop commitment agreement and any other applicable order, assuming it's entered today. So it has to -- by the time we get to the date it's otherwise due and payable, either Your Honor has ruled against the debtors on that or there's been a reverse or some other relief on appeal.

The creditors' committee also objected to Section 6.18(d) of the original backstop commitment agreement, which set out the right to the parties, of us and others, to credit-bid in the event of a termination or a failed plan. We were asked to remove that and live with whatever rights we have under the Code and applicable law. We agreed. The creditors' committee requested a broad preference waiver and the right for general unsecured creditors to receive post-petition interest; we agreed on both points.

THE COURT: For purposes of this plan?

MR. DUNNE: For purposes of this plan only, Your Honor. And there are a few other minor points, which we worked through with them or which we were unwilling to give but we reached an agreement. And as a result of these changes, Your

Honor, I make one final note: both estate fiduciaries support moving forward with the plan as is and the entry of the backstop commitment agreement and the restructuring support agreement, recognizing that there'll be other parties that'll litigate the issue of whether or not we constitute senior indebtedness.

THE COURT: Okay.

MR. DUNNE: Thank you.

THE COURT: So on the first point -- and I guess counsel for the committee's going to confirm this, too -- notwithstanding the final-order language in the various orders that I got the blackline of, if there's no stay of confirmation because of a ruling and the plan is implemented, including the five-percent-in-stock fee, it's moot notwithstanding what some appellate court says as far as that fee is concerned?

MR. DUNNE: Yes.

THE COURT: Okay.

MR. BOGDANOFF: Your Honor, Lee Bogdanoff for the official creditors' committee --

THE COURT: Good morning.

MR. BOGDANOFF: -- member of Klee, Tuchin, Bogdanoff & Stern.

Yeah, in that instance, Your Honor, it would be payable in stock, not in cash.

THE COURT: Right.

MR. BOGDANOFF: First and foremost, the committee is withdrawing its objection because the resolution satisfactorily addresses the committee's concern. Doesn't perfectly address the committee's concern; satisfactorily. The committee is not in a position to tell Your Honor that we support approval. We're not the movant. We filed an objection; the objection has been addressed to our satisfaction. So I'm not telling you that the official representative of unsecured creditors is telling you to grant this motion; we're telling you we're withdrawing our objection.

THE COURT: Okay.

MR. BOGDANOFF: There is one additional change that was negotiated, relating to the shared-services agreement, that has not been discussed with Your Honor as set forth in the papers. If the RSA parties are unable to reach an agreement on an amended RSA and the agreement is terminated as a result, that is a termination event under --

THE COURT: The RSA is terminated.

MR. BOGDANOFF: Excuse me.

THE COURT: Right.

MR. BOGDANOFF: An amended SSA. -- and as a result of that failure the RSA or the backstop are terminated, an RSA party will only be entitled to the backstop fee, which is payable under various circumstances -- an RSA will not be entitled to its share of that fee if that party failed to

negotiate in good faith. And that's going to be in an amendment --

THE COURT: Right.

MR. BOGDANOFF: -- to the backstop agreement that will be presented to Your Honor.

THE COURT: And that was consistent with the debtors' response to you all, but now you're putting it in writing?

MR. BOGDANOFF: That's correct; that has been put in writing.

THE COURT: Okay.

MR. BOGDANOFF: If Your Honor rules against the RSA parties on the subordination issue and that ruling is reversed on appeal, okay, so that they're then on the winning side, the agreement that is set forth in the order provides that that fee still will not be paid if there is a right to a further appeal.

THE COURT: It's a final-order provision.

MR. BOGDANOFF: That's correct, Your Honor. And with those clarifications, I'm done. Thank you.

THE COURT: Okay. All right. I think the record's clear on all that.

MR. FELDMAN: Thank you, Your Honor. I'm going to quickly run through the other objections and then we will make Mr. Carter available; if parties want to be heard on the objections, we can do it at that time.

THE COURT: Okay.

MR. FELDMAN: Your Honor, as I mentioned earlier, U.S. Bank, as indenture trustee for the subdebt, had filed a joinder with the official committee. I'm going to assume that -- notwithstanding the official committee's withdrawal of their objection, that that joinder will stand alone as an objection; so I'm going to comment on it briefly.

Your Honor, in essence, U.S. Bank argues two things: One, they argue that we've gotten standard wrong in terms of what standard the Court ought to apply in determining whether to approve the RSA and the BCA, that rather than being a state-law standard of business judgment with great deference to the debtors' board, that the Court ought to look to Orion and what I would characterize as the dicta of Orion, since I, frankly, worked on Orion and remember it all too well. But nonetheless, what Orion says: that the court has an independent duty and obligation. And then finally -- so I don't have to do it twice -- the first-liens then argue neither of those applies; in fact, it ought to be the entire fairness standard, given the myriad relationships between the equity, the board and Apollo.

Your Honor, we think, and we would propose, that regardless of what standard the Court wants to apply, we've met it. So we're not going to spend a lot of time, at least in the first instance, talking about business judgment versus other standards. What U.S. Bank would like the Court to do is to look at their 300-million-dollar claim and our 4-billion-dollar

capital structure and put the brakes on the plan of reorganization until you resolve, and some appeals court and then some appeals court after that and perhaps another appeals court after that resolves, whether or not they are in fact subordinated.

We do agree with U.S. Bank that if this Court were to find in the first instance that they are not subordinated, the plan that is currently before the Court and that is currently contemplated by the disclosure statement and is currently expected to go forward under the RSA and BCA could not be confirmed and we would withdraw and have to renegotiate a new plan. We don't believe that would be a complicated process if we were to get that guidance from the Court, but it's also not a reason to stop the train today. That litigation ought to be heard and we encourage that it be heard no later than confirmation, because, frankly, it's very difficult to confirm this plan until this Court makes a ruling on it.

But that said, we should not just go off on the sidelines and watch this company wither, watch our financing fall away, watch our exit financing fall away, while the subdebt gets to litigate its issue in the way it wants to litigate it. So we would ask the Court to overrule that objection.

The additional objection from others in the second-liens from Fortress, D.E. Shaw, and Napier Park, in essence,

says you're giving away a lot of goodies and we want those goodies too. Your Honor, respectfully, their objections are primarily confirmation objections and will be dealt with at confirmation. But again, I think it's worth pointing out that it is not the company that determines who are its ad hoc group of lenders. What the company wants is a group large enough to confirm a plan of reorganization with the largest holders being leaders and with people willing to restrict themselves. It was, in fact, the ad hoc group of lenders that formed themselves. The fact that they chose to put someone in or someone not in is really up to them. And, frankly, it's not as if this alternate group is saying we will write a check for 600 million dollars and we'll do it less expensively. If they were saying that, we'd have to pay a lot more attention to that and we do have a fiduciary responsibility and a fiduciary out from the BCA.

So that, it seems to me, Your Honor, ought to be heard in connection with confirmation, to the extent that objection continues to apply, but ought not to stop the train today.

And then, finally, Your Honor, we have the objection of the first-liens and the one-and-a-halves. And there are a large number of objections that they've put forward to the Court, some of which have just been simply unilaterally resolved by changes we made to the order and that are reflected in the blacklines including the one submitted this morning.

But as I was clear in saying, that does not ultimately resolve their objections to the RSA and BCA because in their mind, it's inexorably tied to the time line and intervention litigation that you're going to -- or motion that you're going to hear later today.

We have, however, Your Honor, obviously, resolved their credit-bidding objection. We have added them as a notice party to both the RSA and the BCA that resolves that, and we have given a broad reservation of rights for them with respect to the fact that there's nothing being approved by the Court today has any impact on the intercreditor agreement. And I guess, at least with respect to the first-liens, that was critically important since they filed a state-law -- I believe state law but I haven't had a chance to look at it -- lawsuit last night as between themselves and the second-lienholders. That's not before the Court. Frankly, don't know that it impacts the debtor. Haven't had a chance to look at it. But it's also not relevant to today's proceedings, at least in the debtors' perspective.

Your Honor, I think it would be better to let the first-liens and the one-and-halves raise their objections, remaining objections to you directly and then we can address and try -- as opposed to trying to get in front of them. But I would finally point out that under the plan, what is proposed is that they get exactly what they're entitled to get under

Section 1129; no more and no less. And what's really before the Court is what's the size of their claim and then ultimately whether the treatment proposed is appropriate. But what is proposed is an 1129 treatment.

THE COURT: But unlike your resolution with the committee over the sub-debt condition, if the plan is not confirmed either because it's not accepted by the first and 1.5 classes or the Court doesn't do a cram-down or determine that their allowed claim is as asserted, the thirty million is triggered at that point. Right?

MR. FELDMAN: Yes, Your Honor. But I would -- I want to clarify and, perhaps, even disagree; we can confirm the plan with or without the consent of the first-liens and the one-and-a-halves.

THE COURT: Well, right. Unlike the sub situation, they have the right to vote.

MR. FELDMAN: Correct.

THE COURT: Although you're reserving your right on impairment. But they have the right to vote so they could vote yes and one of the treatments does purport to give them the prepayment but in the form of notes, and you can also convince the Court that the plan is confirmable over their negative vote.

MR. FELDMAN: We could, Your Honor, and frankly, we could also unimpair them if we got to that point and the Court

was otherwise not prepared to confirm a cram-down plan. So there are --

THE COURT: Well, that's an interesting issue. I know the plan reserves the right to contend that they are unimpaired, but if you amended the plan to unimpairment -- unimpair them, would that trigger the thirty million?

MR. FELDMAN: No, Your Honor. We could only amend the plan to unimpair them if, in fact, we were going forward with the deal that's on the table.

Put differently, if at confirmation, the Court was unprepared to cram them down, which we think is unlikely but let's say that's the case --

THE COURT: Right.

MR. FELDMAN: -- and we stood up and said, Your Honor, we have sufficient liquidity, here's the testimony on that --

THE COURT: We'll pay the prepayment.

MR. FELDMAN: -- we're now going to pay them and the second-liens who are in the courtroom accept and agree with that in the right numbers and in the right amounts, the trade is being paid in full. You would have already ruled on the sub-debt because we can't do this without you ruling on the sub-debt, and there are no other impaired classes. So we could and would ask the Court to go forward. It would require the sub-debt to agree that they're still putting up 600 million dollars. That's really -- I'm sure they're very unhappy I'm

even suggesting this --

THE COURT: But at that --

MR. FELDMAN: -- but it does exist.

THE COURT: -- you're saying if they agreed to that, they wouldn't get the thirty -- the backstoppers wouldn't get the thirty million?

MR. FELDMAN: Well, they would get their fee, Your Honor --

THE COURT: They would.

MR. FELDMAN: -- but they would also put up the money.

THE COURT: Right. Okay.

MR. FELDMAN: Your Honor, again, Mr. Carter's in the courtroom. I think, since he completes our case-in-chief, I would move to admit his declaration and make him available to the extent parties want to cross him.

THE COURT: Okay.

(Affidavit of Mr. Carter was hereby received into evidence as a Debtor's exhibit, as of this date.)

THE COURT: Does anyone want to cross-examine Mr. Carter?

THE COURT: Right.

MR. HANSEN: Good morning, Your Honor.

THE COURT: Good morning.

MR. HANSEN: Kris Hansen with Stroock & Stroock & Lavan on behalf of Fortress and D.E. Shaw. I'll handle the

argument part of it, but my colleague Mr. Canfield will handle the cross-examination of Mr. Carter.

THE COURT: Okay. So you do want to cross-examine?

MR. HANSEN: Yes, we do.

THE COURT: All right. So Mr. Carter, could you sit up here and we don't have a microphone there for some reason so I think -- yeah, take that one.

Okay. Would you raise your right hand, please?

(Witness sworn)

THE COURT: Okay. And it is Christopher?

THE WITNESS: Oh, William.

THE COURT: William, I'm sorry. Carter.

THE WITNESS: Yes.

THE COURT: Okay. All right. You can go ahead.

MR. CANFIELD: Thank you.

CROSS-EXAMINATION

BY MR. CANFIELD:

Q. Good morning, Mr. Carter.

A. Good morning.

Q. Again, for the record, my name is Jon Canfield and I am representing the -- and this is a tongue-twister -- the ad hoc group of non-backstop party second-lien noteholders.

So the restructuring support agreement that's in front of us today for approval, that serves as the foundation for the plan path that the debtors are currently embarked on. Is that

correct?
A. Yes.
Q. And this deal was presented to the company by both Apollo and what's been termed the ad hoc second-lien noteholders. Is that correct?
A. Yes, it was presented through our counsel, Willkie Farr.
Q. And the restructuring support agreement contemplates a 600-million-dollar rights offering, does it not?
A. Yes.
Q. And that restructuring support agreement was negotiated both between the board and your counsel with the holders of the second-lien notes. Is that correct? The ad hoc group -- to clarify, the ad hoc group of holders of the second-lien notes?
A. Yes.
Q. It was also negotiated with the debtors' equity sponsor, Apollo, correct?
A. I guess in their role as a member of the ad hoc committee.
Q. But it was negotiated with Apollo, that's correct?
A. I believe so, yes.
Q. Are you unsure or do you know?
A. Well, I guess I'm -- I believe they were part of the ad hoc -- they negotiated with the ad hoc committee along with our counsel in terms of writing the agreement.
Q. Did you, as a member of the board, ever directly negotiate with Apollo?

A. No.
Q. So these same RSA support parties, the ad hoc group and Apollo, they're also parties to the backstop agreement. Is that correct?
A. Yes.
Q. And it's fair to say that these -- this collective group of parties, or the ad hoc second-lien noteholders and Apollo represent eighty-five percent of all second-lien notes, approximately. Is that correct?
A. Yes, approximately.
Q. So really, there's only fifteen percent of second-lien notes that are not party to the restructuring support agreement or the backstop agreement. Is that correct?
A. Yes.
Q. So in that case, even though eighty-five percent of all the second-lien noteholders are party to the restructuring support agreement, the company never directed its advisors, its counsel, to find out whether the remaining fifteen percent, the second-lien notes, were willing to subscribe to the rights offering?
A. No.
Q. So that discussion never came up?
A. Yes.
Q. Just to be clear, the company, the board, never directed its advisors to negotiate with the other fifteen percent to see

if they would be willing to subscribe to the rights offering?
A. Yes.
Q. So the backstop parties, they're required to purchase their pro rata allocation of the rights offering shares. Is that correct?
A. Yes.
Q. And you believe that the backstop parties would not commit to the backstop and support the plan without the payment of the thirty-million-dollar fee. Is that correct?
A. Yes.
Q. Apollo's the largest second-lien noteholder, are they not?
A. I believe they are, yes.
Q. And they also own most of the equity in the company. Is that correct?
A. Yes, they do.
Q. So you would agree with me that Apollo is the largest beneficiary of the backstop fee, is that correct?
MR. BAIO: Objection.
MR. CANFIELD: I'll rephrase.
Q. Given that Apollo is the largest second-lien noteholder, on a pro rata basis, they would be entitled to the largest portion of the fee?
A. I believe that's correct. Yes.
Q. Did the board ever attempt to see if the backstop parties would take a lower fee?

A. Yes.
Q. But the backstop parties wouldn't agree to a lower fee?
A. The board, in discussions with our legal counsel, in terms of discussing all the provisions of the backstop fee, was certainly, my recollection, interested in having as low a fee as possible and directed, you know, our counsel, who was negotiating with the backstop parties on many different provisions of the agreement, to get the best agreement they could for the company.
Q. So then it's your understanding that the thirty-million-dollar fee which represents five percent of the entire rights offering amount was the lowest fee that the company could obtain from the backstop parties?
A. I guess I would say in conjunction with all the other components of the backstop commitment agreement, that was the lowest fee we could get.
Q. I understand but I'm asking just about the fees specifically.
MR. BAIO: Objection.
MR. FELDMAN: I think he answered the question, Your Honor.
THE COURT: Well, did you -- I think implicit in the answer is that they didn't isolate the fee separately from everything else.
THE WITNESS: Yes. I remember discussing a number of

issues; the fee was one of those issues as our counsel explained the agreement, talked about the negotiating process. And again, we had a dialogue on a number of things of let's get the best deal we can, knowing that we needed the 600 million, and believed that was the best deal we could get.

MR. CANFIELD: Thank you, Your Honor.

THE COURT: Okay.

Q. So the board never requested that the backstop parties take a wait-and-see approach to see whether the rights offering could be subscribed before signing the backstop agreement. Is that correct?

A. Yes.

Q. Never directed your counsel to attempt to get the backstop parties to wait and see before negotiating and signing the agreement?

A. Yes.

Q. And the reason for that is because the board believed that if they did not pay the company -- I'm sorry -- did not pay the backstop parties the thirty-million-dollar fee, which is the same group of people, mind you, that cut this deal, that the backstop parties were going to walk away from the plan that was on the table?

MR. BAIO: Object to the form.

MR. CANFIELD: I'll rephrase.

THE COURT: I think you should -- I think you should

rephrase it.

MR. CANFIELD: Sure.

A. Could you just repeat the question one more time?

Q. Sure.

A. I want to make sure I get it right.

THE COURT: Well, he's going to rephrase it.

THE WITNESS: Oh. I'm sorry.

Q. Was it the company's belief that if they did not pay the thirty-million-dollar fee to the backstop parties, that they would walk away from the deal that was on the table?

A. Yes. I guess my belief was as a provision of the backstop agreement, and that fee was a provision of that agreement, that it was important to get -- the board believed important to get the agreement done to be able to continue the process and that, yes, that fee was part of that agreement and we thought -- we voted yes and approved that agreement.

Q. But this is the same rights offering that the company negotiated with the backstop parties; is that not correct?

A. Yes.

Q. This is their deal? So it was the board's belief that the company was going to -- that the backstop parties would walk away from their own deal if they weren't paid a fee for that deal?

MR. BAIO: Objection. I'm not sure what he means by that.

THE COURT: No, I think -- I think he can answer that question.
MR. CANFIELD: I'll move on.
THE COURT: No, I overruled the objection.
MR. CANFIELD: Okay.
A. Yes, we believed that it was appropriate to have that fee in the backstop agreement to get the agreement done.
Q. Again, because you believed that the parties -- the backstop parties were going to walk away from their deal if you did not pay them the fee?
A. Yes, I guess -- is at the end of the day in counsel -- in discussion with our counsel and his involvement in the negotiation, we believed that that was required to get it done and was a critical component of the agreement.
Q. To pay them a fee for their own deal?
MR. BAIO: Objection.
MR. CANFIELD: I'll withdraw the question.
THE COURT: You've asked that previously.
Q. Did the board ever ask itself why it was paying a backstop fee on the full 600 million dollars of the rights offering, when the backstop parties were already subscribing for what amounted to 510 million, based on their pro rata ownings?
A. I don't recall that specific discussion.
Q. You never thought that was an important question to ask as a director?

A. Again, I don't recall. We had a significant number of discussions, and I don't recall that discussion.
Q. So is it fair to say what the board is really approving here is a subscription fee combined with a backstop fee? In other words, what I mean by that is what the board really approved here is a subscription fee for the parties to purchase their own allocation of the 510 million dollars of the 600-million-dollar rights offering, and a backstop fee to backstop the portion of the unsubscribed shares that were allocated to the notes that they did not own?
MR. BAIO: Objection, Your Honor. It's a legal question.
THE COURT: No, you could answer that question.
A. Yeah, I guess I don't -- in terms of the legalities of what you're explaining, I don't feel comfortable answering.
Q. So you never -- the board never thought of this as a subscription fee and a backstop fee?
A. Can you define a subscription fee?
Q. Sure. A fee -- the backstop parties owned eighty-five percent of the second-lien notes. The backstop agreement requires them to purchase their own allocation of the notes. Was it the board's thought that they were backstopping their own purchase of the notes?
A. I guess I would say from my recollection it was our view that they were committing to invest 600 million dollars and

that the 30-million-dollar backstop fee was a component of their commitment to invest that money.

Q. So they were committing to invest, in your opinion, in purchasing the shares that they were allocated, while also backstopping the shares that they weren't allocated?

A. Yes, on the -- yes, I -- yes.

Q. Did the board ever ask what happens in the event a backstop party defaults on its obligation to backstop the purchase of the subscription rights -- subscription shares?

A. I believe we had that discussion.

Q. And you've read the backstop agreement, correct?

A. I have.

Q. So you are aware, then, that the backstop agreement does not require the non-defaulting backstop parties to purchase shares of a defaulting backstop party. Is that correct?

A. I don't remember the specifics.

Q. But that is your understanding?

A. Again, as I sit here today, I can't remember the specifics of each provision of the agreement.

Q. Do you recall ever reading that provision?

A. I can't recall, as I sit here today.

Q. Asking questions to your counsel?

A. I do recall we had substantial discussions with our counsel about the backstop agreement, both in draft forms at a number of different board meetings. So I am -- I can only

speculate that I am sure we did talk about it, because we talked about all the individual provisions. I just can't remember, today, that discussion.

Q. Did the board ever attempt to close this hole that was in the agreement?

MR. BAIO: Objection.

THE COURT: I'm sorry, which hole?

MR. CANFIELD: Sure.

Q. To the extent that a backstop party defaults, did the board ever attempt to negotiate for a requirement that the other non-defaulting backstop parties be mandated to subscribe for the defaulting backstop party's shares?

A. I can't recall a discussion. I don't recall today that discussion.

Q. It is your testimony, though, that the intent of the backstop agreement is to ensure that the rights offering is fully subscribed, correct?

A. Yes.

Q. But the backstop agreement doesn't really do that, does it?

A. Again, I can't recall the discussions, so I can't opine yes or no.

Q. So it's your testimony that you don't really know if the backstop agreement requires non-defaulting parties, non-defaulting backstop parties, to cover a defaulting backstop

party's shares? You don't know that?
A. As I said, we had a number of discussions about all the provisions of the backstop agreement at a number of board meetings. I just don't recall today, all the provisions of the agreement.
Q. So really what happened here is the board approved the payment of a five-percent backstop fee for an agreement that really doesn't ensure a fully subscribed rights offering. Isn't that correct?
MR. BAIO: Objection.
THE COURT: He's testified he doesn't know what happens if one of the backstoppers default.
MR. CANFIELD: I'll move on.
Q. You believe the backstop agreement represents the best possible deal terms that the debtors can achieve. Is that correct?
A. Yes.
Q. The company never attempted to speak to any other second-lien noteholders, correct?
A. I don't believe so, no.
Q. And you are aware, other second-lien noteholders attempted to reach out to your advisors, isn't that correct?
A. I do recall we got some letters, yes.
Q. Were you aware that they never got a return phone call?
A. I can't recall.

Q. The company never sought out any sort of third-party financing as an alternative to the backstop for the rights offering, did it?
A. Not to my recollection.
Q. The company never attempted to speak to the subordinated noteholders prior to the petition date, did they?
A. I don't believe so; no.
Q. So really what happened, at end, is the board more or less had a deal dropped in its lap by Apollo, the company's insider, certain second-lien noteholders, and they took it. Isn't that true?
MR. BAIO: Objection.
THE COURT: On what basis --
MR. BAIO: Objection.
THE COURT: -- on what basis?
MR. BAIO: I think he's simply testifying, lack of foundation, inconsistent as to what we've heard, and argumentative.
THE COURT: Well, it is a question -- I mean, you understood the question, right?
THE WITNESS: Yeah, could you --
THE COURT: Why don't you repeat it?
THE WITNESS: Maybe he could repeat it.
Q. So essentially what happened here is the board had a deal dropped in its lap by the company's equity sponsor, as well as

certain second-lien noteholders, and they took it?

THE COURT: So do you agree with that statement or disagree?

THE WITNESS: I disagree.

Q. You just testified a second ago that you didn't attempt to reach out to other second-lien noteholders, even though they reached out to you; you didn't reach out to the subordinated noteholders, although they attempted to reach out to the company. All you did was negotiate with this group of second-lien noteholders, the ad hoc group and Apollo, which is your equity sponsor?

MR. BAIO: Objection.

THE COURT: Sustained. Why don't you ask him why he disagrees?

MR. CANFIELD: Thank you.

Q. Why do you disagree that the company --

THE COURT: You don't have to. You can move on. But at that point, you really weren't asking a question. So I sustain the objection.

MR. CANFIELD: If I could have a moment?

THE COURT: Okay.

MR. CANFIELD: No further questions.

THE COURT: Okay. Does anyone else have any questions for Mr. Carter?

MR. KIRPALANI: Thank you, Your Honor. For the

record, Susheel Kirpalani from Quinn Emanuel, counsel to U.S. Bank National Association as indenture trustee for the senior subordinated notes.

CROSS-EXAMINATION

BY MR. KIRPALANI:

Q. Mr. Carter, you're familiar -- although you're not the signatory, you're familiar with the RSA agreement that's the subject of this motion, correct?

A. Yes.

Q. Are you familiar with the termination events in the RSA?

A. Somewhat familiar.

Q. Are you aware, sir, that the plan support parties, under the RSA, have certain milestones that are required or else they could terminate the RSA?

A. Yeah, I do remember there are provisions for milestones.

Q. And in fact, the timing that's being requested for confirmation today, pursuant to your disclosure statement, is largely driven by those milestones. Isn't that fair?

A. Yes, I believe so.

Q. Okay. When the company negotiated those dates, you believed those dates were reasonable and fair, did you not?

A. Yes, we approved the agreement and believed it was appropriate.

Q. And you were advised at that time by Moelis and your counsel that the second priority notes were the fulcrum class.

Isn't that a foundation of your consideration?

MR. BAIO: I only object insofar as the question could be invading the attorney-client privilege.

THE COURT: Right. Take out the counsel part, all right?

MR. KIRPALANI: Well, Your Honor, in his affidavit, he specifically refers to the counsel part at least twice. So I'm just asking him to set up the question if his affidavit is true. I could find the provisions, but I would assume that the objecting counsel wrote that affidavit, so he should know.

MR. BAIO: I'd like to know the paragraphs, please.

MR. KIRPALANI: Sure. If you could look at the supplemental declaration of William H. Carter dated June 13th, 2014, and the very last sentence of paragraph 16 says, "Throughout the entire process of negotiating and approving the backstop commitment agreement, the board received legal advice from its counsel at Willkie Farr." That same type of language appears several times.

I don't think I asked anything about legal advice that was given. I just asked if he believed if it was fair and if he was advised -- which he also says that the second-liens were the fulcrum class. I don't know what I'm invading.

THE COURT: Okay, so you can answer that question. But your counsel has an objection as to the substance of any of that advice.

MR. BAIO: Yes, Your Honor.
THE COURT: So you should hold off on that until I see if that follow-up question is asked.
THE WITNESS: Could you just repeat the question?
BY MR. KIRPALANI:
Q. Yes. At the time you negotiated the RSA and believed that these dates were reasonable, you were advised by Moelis and by your counsel that the second priority notes were the fulcrum class?
MR. BAIO: I believe -- I have the same objection. He includes legal advice.
THE COURT: I'll sustain that. You shouldn't disclose what your counsel told you.
THE WITNESS: Okay.
THE COURT: So assume that the question is just asking about Moelis' advice.
THE WITNESS: Fine.
A. Okay. I would say yes, to Moelis.
Q. When did you first learn that the subordination issue would need to be litigated in this bankruptcy?
A. I think in terms of -- I know definitively I learned it when I came to the first-day hearing, because there was specific discussion about it. I don't remember before that, a specific date.
Q. Are you aware that I met with your advisors prior to

commencing litigation in front of this Court to explain U.S. Bank's position on the issue of subordination?

MR. BAIO: Object to the form -- to the question to the extent it's seeking communications from counsel. I also note, we seem to be going far afield of what we are talking about today, the RSA. And meetings about a case that might be relevant. So I object to that.

MR. KIRPALANI: May I respond? Okay?

I'm trying to explore the reasonableness of these deadlines which were negotiated during the time period before this witness had any consideration of the issues that have now subsequently developed and need to be litigated. That's all. I'm not trying to go far afield at all. It is this very motion and this very RSA that is driving the entire timing of the case.

THE COURT: His affidavit doesn't really deal with deadlines.

MR. KIRPALANI: That is true too, Your Honor.

THE COURT: So I don't -- I'm not precluding your ability to raise that point, I just think you have the wrong person to be asking about it.

MR. KIRPALANI: Fair enough.

I have no other questions. Thank you.

MR. SAGE: Good morning, Your Honor.

THE COURT: Good morning.

THE WITNESS: Good morning.

MR. SAGE: Michael Sage of Dechert on behalf of the first-lien trustee.

CROSS-EXAMINATION

BY MR. SAGE:

Q. Just a couple questions, sir.

Prior to the bankruptcy filing, are you aware of any discussions the company had -- any representative of the company -- with the first-lien trustee regarding the terms of the plan?

A. I don't recall specific discussions. Our counsel did brief us as we were going through the negotiation process and talked about our counsel's discussions with a number of parties. But I don't have any specific recollection of first-lien trustee.

Q. Do you recall whether the board ever directed counsel to reach out to the first-lien trustee prior to the filing, with respect to any treatment of the first-liens under the RSA plan?

A. I don't recall.

Q. And last question that I have. Are you aware of any effort to negotiate the terms of the plan with the first-lien trustee prior to the time the lawsuit on the make-whole was filed?

A. I don't recall.

Q. Thank you, sir.

THE COURT: Okay, anyone else want to question Mr. Carter?

Okay, Mr. Carter, I had a couple of questions for you.

THE WITNESS: Yes, Your Honor.

THE COURT: On the shared-services agreement --

THE WITNESS: Yes.

THE COURT: -- who is negotiating that on each side?

THE WITNESS: We are just in process of setting that process up right now. We're going to have a meeting on Tuesday of next week to begin that. The process we're setting up is there are advisors to the ad hoc committee, Houlihan Lokey. They are hiring an expert. We have advisors to the debtor, Alix & Associates, that will begin a process.

It's my understanding that as we work through both putting together the transition services framework as well as making the amendments to the plan that are called for in the various documents, that we will then get the approval of both the board of directors of both entities for those changes and we will also go back to the principals of the ad hoc committee to ensure that we are executing on the changes that they were requesting.

THE COURT: Is it contemplated that Apollo will be actively involved in those negotiations?

THE WITNESS: I believe they will be involved, yes. I don't yet know how to maybe define the word "active", but I

believe they will be involved.

THE COURT: At the creditor level or at the board/ company level?

THE WITNESS: I think probably both in terms of their negotiations with the ad hoc committee originally over what the changes being requested were, and certainly at the board level in terms of having to approve any changes we make to the shared-services agreement, because it's a material contract.

THE COURT: Okay. And then I think from your testimony as well as your declaration, I get the impression, at least, that the terms of the backstop, including the fee, was negotiated holistically to get the support of the backstop parties to both the RSA and the backstop?

THE WITNESS: Yes. I think we looked through all the terms of the BCA in terms of -- as a board, considering the agreement in its entirety and whether we believed it was appropriate.

THE COURT: Was there advice as to whether the fifteen-percent discount for the subscription was insufficient to induce the backstop parties to agree to subscribe? Again, whether a fee in addition was necessary --

THE WITNESS: Yeah.

THE COURT: -- to get them to subscribe.

THE WITNESS: I guess the process we went through with both our attorneys and Moelis, given the fact that many of us

on the board had not been through a bankruptcy before, is we asked them to bring us similar types of agreements that we could look at in terms of what was the practice in the realm of bankruptcy and for backstop support agreements, what was -- what would be considered appropriate in the circumstance. And I guess, as a board, we kind of looked at what they brought us, talked about what our advisors had seen in other circumstances in terms of eventually approving this agreement.

THE COURT: And that included not only fees, but also the terms of the subscription?

THE WITNESS: Right, the terms of the subscription, various terms of the agreement.

THE COURT: And was it your view that -- just focusing now, on the subscription agreement -- that the terms of the subscription agreement, including the backstop, were market or reasonable?

THE WITNESS: Yes, that was our belief.

THE COURT: Okay. Does anyone have any questions on that before we go to redirect?

Okay. Do you have any redirect?

MR. BAIO: No, Your Honor.

THE COURT: Okay, you can step down, sir.

THE WITNESS: Thank you.

THE COURT: Okay, does anyone -- before Mr. Feldman proceeds, does anyone have any other evidence they want to

introduce?

Okay, go ahead.

MR. FELDMAN: Your Honor, at this point, the debtors would rest in terms of their evidence and invite objectors to come up in whatever order they prefer to come up.

THE COURT: Okay.

MR. SAGE: Good morning, again. Michael Sage of Dechert.

I was purposely vague a moment ago when I said first-lien trustee. Last night the noteholders -- the first-lien noteholders replaced the trustee. I didn't want to involve that in the testimony aspect, but I just wanted to advise the Court that the trustee now, for the first-liens is Bank of Oklahoma, BOKF N.A. So we will file the appropriate notices of appearances, withdrawals, within the next day or so. But I wanted the Court to know.

THE COURT: Okay.

MR. SAGE: Last night, a condition to the replacement of Bank of New York with Bank of Oklahoma, the lawsuit, as Mr. Feldman mentioned, was filed against various members of the second-lien group.

I should also say, just as a housekeeping matter --

THE COURT: Do you mean, the nonbankruptcy lawsuit?

MR. SAGE: Correct.

THE COURT: Okay.

MR. SAGE: Yes, thank you, Your Honor. Because you're right, yesterday the first-liens also filed their response to the make-whole and counterclaim, so there could be confusion there.

Just as a matter of disclosure, Dechert has a conflict or many conflicts with the second-lienholders, and therefore is not the law firm of record with respect to -- or the law firm at all, with respect to that lawsuit. It's the firm of Irell & Manella in Los Angeles, and the local firm is doing it.

I just want to confirm also, the record is now closed, correct?

THE COURT: The factual record, yes.

MR. SAGE: The evidentiary record.

THE COURT: Right.

MR. SAGE: Okay. So I want to just make a couple of contextual remarks, and then I'll get right to our remaining issues with the RSA and BCA.

In context, if you read the responses to our objection and some of what Mr. Feldman said this morning, you would believe that the first-liens and 1.5s were taking sort of a reckless approach to this case, risking everything in pursuing their own individual agenda.

THE COURT: I don't --

MR. SAGE: Okay, maybe you didn't read that --

THE COURT: None of that really -- I mean, look.

That's kind of window dressing.

MR. SAGE: Okay. Then I won't --

THE COURT: It's all about money.

MR. SAGE: Then I won't address it, since the Court sees it that way.

THE COURT: Okay.

MR. SAGE: Which I happen to agree with that.

THE COURT: Okay.

MR. SAGE: The reality is that despite their sort of comments about eighty-five percent of one class going along, and now the committee, which is a change, the fact remains that two billion dollars of funded debt has not been included; it wasn't included pre-petition; it hasn't been included now; and is litigating with the company on various issues. So this is a non -- there's not a lot of -- there's consensus with some parties but with many other parties, there's no consensus.

The crux of our -- and Mr. Feldman sort of presaged to you, the crux of our difficulty with the RSA remains the deadlines, the time line. Mr. Moeller-Sally of the Ropes firm is going to address that with more specificity than I am but I am going to talk about that with you now also because we do have several remaining objections to the RSA that affect the ones and the 1.5s uniquely; focus on those.

Again, regarding the time lines, my overriding remarks are as follows: one -- there are two things that we care about

obviously most: one is the confirmation schedule, and two is the adversary proceeding schedule. They filed the adversary proceedings. We're entitled to in that context, it's a lawsuit, entitled to have fulsome discovery. If we need the expert reports, a time frame that works. Again, Mr. Moeller-Sally is going to go into why we think it doesn't work but suffice it to say, we think it's very, very compressed to litigate for us the main issue in that case and we think we need the appropriate amount of time to have motion practice if we need it and otherwise, to deal with it in an appropriate way.

Two, the plan --

THE COURT: Well, again, we're focusing on the RSA and in particular, the right to terminate the RSA and the backstop agreement --

MR. SAGE: That's --

THE COURT: -- and trigger of fees. So what is the specific deadline that you're complaining about?

MR. SAGE: Thank you. Well, the backend deadline is confirmation, April (sic) 22nd -- I'm sorry, April -- August 22nd. That's their end point -- that's their end time point. And again, I don't propose to go into detail right now as to why that doesn't work, but we think that's a very tight time frame to achieve a confirmation fight on cram-down notes which is almost inevitable here or I think inevitable.

In the backdrop of what they filed yesterday in their disclosure statement, the terms, just a couple of them, T plus 150 for our notes, no call protection, no potential covenants, this invites a fight and there will be one in this case, almost certainly. And the time frame to have that fight, which is a valuation fight in part, is simply very tight.

We also don't quite understand why August 22nd is their drop-dead -- I mean, we understand, we've been in this position before representing other creditors why they want a tight deadline. We understand that; I think people want to put people's feet to the fire. They want them to get out quickly. We understand those things. Same time, their financing commitment we believe expires in mid-October and don't quite understand why they have a two-month cushion in the middle.

There's no testimony as to that. There's no testimony as to a melting ice cube. There's no testimony as to the business, degradation of the business. All we really know is that the second-liens in Apollo have set certain deadlines which appear arbitrary by which they're forcing us all to run through hoops to get to when, again, they have an October -- mid-October outside debt which, by the way, I don't need to necessarily accept that that October date is the date, but even if we accept for argument's sake that their financing end date of October 14, I believe, is the date, October 22nd -- August 22nd to October 14th is a long period of time.

So the Court was touching on this with Mr. Feldman earlier and I want to address it now and that is, one of the particular provisions, in addition to the milestones because they have -- they get a fee if the milestones aren't met of thirty million dollars unless they waive it, what else is the problem for us? And one of them, the Court touched on which is they don't like the cram-down notes -- and again, the baseline is this T plus 150 note that they offered us -- if they don't like that note -- and it does say -- in fairness, it says, "T plus 150 plus whatever the Court determines," but the plan -- if the plan gets amended -- the plan that's filed right now envisions that note. If the plan gets amended in a way or the confirmation order is not acceptable to them, they get in a way that reflects a cram-down hearing or the Court rules differently than that treatment or a treatment that they don't like, imposing a treatment on us that they don't like because it's too high, they get to walk away and collect thirty million dollars.

Mr. Feldman's right. It's -- requisite investors could accept it.

THE COURT: Well, can you point me to that because the --

MR. SAGE: Yeah, it's 9.2(h) of the BCA.

THE COURT: Can you read it because it's going to take me a while to find it.

MR. SAGE: I don't have it in front of me. I can get to it. Yeah. This is the termination events.

THE COURT: For -- I'm sorry, for the --

MR. SAGE: It's on page 61 of the BCA, Your Honor.

THE COURT: It's the backstop agreement?

MR. SAGE: Yes.

THE COURT: It's not -- okay.

MR. SAGE: Yes.

THE COURT: Right.

MR. SAGE: Okay, page 61.

(Pause)

THE COURT: So but the plan wouldn't be amended, would it? The treatment says this or whatever it takes.

MR. SAGE: So if the rule that we're establishing which I don't -- didn't understand to be the case because we tried to negotiate this, if the rule that we're establishing that any rate determined by the Court and any terms of the note determined by the Court can be determined --

THE COURT: Well, if that's what the plan says --

MR. SAGE: In other words, if the Court determines --

THE COURT: I mean, I --

MR. SAGE: -- okay, but I hear what you're saying. I'm sorry, I didn't mean to interrupt you, Your Honor.

THE COURT: No, that's okay.

MR. SAGE: I hear what you're saying, but my

understanding of what they mean is not that. My understanding of what they mean is not that. My understanding of what they mean is that if the rate -- because we tried to discuss this -- if the rate is higher than what they find acceptable, then they're not giving up their termination right and thirty-million-dollar right. If --

THE COURT: Well, I don't know. We should clarify that, I guess. I mean, the text doesn't seem to say that.

MR. SAGE: I don't think it's entirely clear, personally, because it doesn't say another rate. My point is simply this: if they're going to live with the Court's determination on cram-down and there's no walk right, then I'm dropping this point because that's not important.

THE COURT: I mean, I agree with you. It doesn't give you a whole lot of incentive to vote in favor of the plan the way it is but --

MR. SAGE: Correct.

THE COURT: -- you know that's the way it's drafted.

MR. SAGE: I'm not discussing that. That's not my point right now. My point is simply that if my understanding is right and it may not be, that they have a walk right and a termination, a thirty-million-dollar right, if the Court determines it's T plus 200 basis points, then I think it's a problem because they shouldn't be able to tilt the balance at the confirmation hearing in that way; they shouldn't get a --

THE COURT: Okay. I understand that point.

MR. SAGE: Okay. Similar point -- actually -- thanks. A similar point, and this relates to the litigation that was filed last night, if the releases and exculpations in the plan are amended in a way that they don't find satisfactory, they have a thirty-million-dollar right. We have suggested that the releases and exculpations should carve-out the results or anything having to do with the litigation that has been filed, and they've not taken the comment, so that --

THE COURT: All right. But as I read the releases, there's the consensual release, I mean, the right to opt-out.

MR. SAGE: Correct.

THE COURT: And then it says, "to the fullest extent permitted by applicable law."

MR. SAGE: Again --

THE COURT: It's hard to complain with that. You know, it's like Phil Rizzuto says, "You only have to pay interest on what you own." He's excited about The Money Store.

MR. SAGE: Your Honor, I take the point. If that means that if the releases carve-out or --

THE COURT: No, I mean, you don't need a specific carve-out because it says, "to the fullest extent permitted by applicable law."

MR. SAGE: So there's no ability later for them to argue that the release -- I mean, based on what you're saying --

THE COURT: They could certainly argue that applicable law permits this release and you could say no, it doesn't.

MR. SAGE: But why should -- I guess I don't quite follow why they should be exculpated and have insulation from liability with respect to claims that are live right now and exist in dispute that aren't in front of this Court and involve nondebtors. It doesn't --

THE COURT: All I'm saying is I don't have to decide that issue now, I think, unless I'm missing something. I read the release carefully today.

MR. SAGE: Right.

THE COURT: I actually think it included the language that -- I don't know if it was you guys or one of the people that joined in suggested which is to the extent provided by applicable law; it had that language in there.

MR. SAGE: Right. Okay. I'll move from the point but I --

THE COURT: I do have -- I might as well raise this now, so that the debtors and the other parties supporting this motion can think about it. The standard carve-out from indemnification and release provisions that I'm used to -- I think it's standard in the Southern District -- adds another clause that is not in any of these provisions. You know it says, "Except for gross negligence and willful misconduct"; it usually also says, "and any breach of fiduciary duty, if any,"

so that there's no acknowledgement that anyone has a fiduciary duty but to the extent there is one, that's also an exception.

MR. SAGE: Thanks. Mr. Greer, my colleague, points out that the exculpation is not carved-out by applicable law. So it may be in the release but it's not in the exculpation provision and I was addressing both earlier.

THE COURT: Let me just take a look at that.

(Pause)

THE COURT: Okay. But isn't there another provision of this plan that says that subordination agreements are to be fully enforced?

MR. FELDMAN: I'm sorry, Your Honor?

THE COURT: Isn't there another provision of this plan that says subordination agreements are to be fully enforced? I mean, that's the underlying premise of the plan.

MR. FELDMAN: Yes, Your Honor. There's nothing in the plan that seeks to eliminate or limit subordination --

THE COURT: Subordination rights.

MR. FELDMAN: Yeah.

THE COURT: Okay.

MR. SAGE: I'm not sure that fully addresses it though, I mean, it doesn't --

THE COURT: Well, isn't the premise of your lawsuit subordination?

MR. SAGE: A breach of the lawsuit, it's a premise of

the breach of subordination.

THE COURT: Not your lawsuit but the --

MR. SAGE: Yes, but it doesn't necessarily mean -- the fact that subordination is going to be enforced doesn't follow that you insulate someone from liability for having breached it. The exculpation could be read to insulate somebody from lia --

THE COURT: Well, frankly, I was focusing on the release provision as opposed to the exculpation.

MR. SAGE: I understand.

THE COURT: But my thought was again that the plan also enforces all subordination agreements. So I guess there is a conflict there, but I would think the subordination agreement would trump it.

MR. SAGE: Maybe I'm just not following it, understand why the fact that the subordination is enforced --

THE COURT: I don't see how if you could have an exculpation for anything done in connection with the plan, which would include enforcing subordination agreements and then say that I don't have to enforce any subordination agreement. The plan contemplates the subordination agreements being enforced.

MR. SAGE: What we're asking for is a carve-out --

THE COURT: It's more a question for the debtors.

MR. SAGE: I mean, what we've asked for is a carve-out

of intercreditor, so that bid section -- a recognition that the intercreditor is not affected by it.

THE COURT: Well, again, I'm not too keen on specific carve-outs, but I think that -- I don't see how an exculpation provision which exculpates people for what they have done in connection with the plan could be in contradiction of a particular plan provision including a provision that enforces subordination agreements.

MR. SAGE: I'm not sure that's what they intend.

THE COURT: I think the specific provision would govern over the general one.

MR. SAGE: Okay. A couple of more points, Your Honor. One, Mr. Feldman talked about the indemnity and the "appropriate carve-back of the indemnity" -- I'm talking about the indemnity in the BCA now -- the appropriate carve-out -- carve-back of the indemnity for the committee settlement and he sort of painted it as if we were attacking the indemnity in total. We're not.

The indemnification obligations, we're not -- we do not believe -- it's a similar point to what I was just getting at that under the BCA, parties should be indemnified for violations of the intercreditor, and we ask only for that, that there be no debtor indemnity of the RSA parties for anything that they might have done that is a violation of the intercreditor agreement.

In fact, I should -- the language that Mr. Feldman alluded to earlier is a step in the right direction in paragraph 19. In the beginning he said we negotiated paragraph 19 to deal with this. It --

THE COURT: I'm sorry, paragraph 19 of?

MR. SAGE: 19 of the BCA order and the --

THE COURT: The order.

MR. SAGE: -- RSA order.

THE COURT: Right.

MR. SAGE: Your Honor, if I may?

THE COURT: Well, where is the indemnity in the RSA?

MR. SAGE: The indemnity in the RSA is -- I'm sorry, I'm talking about the BCA. It's the BCA.

THE COURT: Okay. So we're talking about the BCA.

MR. SAGE: 8.1.

THE COURT: So it's an indemnification in connection with the backstop agreement.

MR. SAGE: Correct. For the back --

THE COURT: I don't see how this is really your issue.

MR. SAGE: Because these agreements are cross-defaulted as the debtors' right and the other parties' right. They're interrelated agreements. They made that point; it's the same parties. So, I mean, if what the Court is saying is because it's in the BCA, there is no indemnity for activities that --

THE COURT: Well, let's read -- it is 8.1, right?

MR. SAGE: Correct.

THE COURT: Okay. I mean, you're right, it is broader. It is a broad indemnity.

MR. SAGE: Right. So just to simplify things, all we have asked for -- and I have a revised paragraph 19 if I can hand it up to you, Your Honor.

THE COURT: Right.

MR. SAGE: This is an e-mail, so I apologize for not having blacklining but I can walk you through it pretty quickly. It's a little bit different than the paragraph 19 that's in the RSA order and now in the BCA order. The differences are really two, in principle; one is, they had written in the second line, "Nothing is intended to prejudice the rights." We added, "Or shall," since intention is only half the battle.

And then we also added language that says -- we clarified the make-whole to just specifically reference the adversary proceedings in Romanette ii. That's I think almost drafting. But we also referenced -- excuse me, Your Honor -- yeah, I --

THE COURT: You're referring me to the little Roman ii there.

MR. SAGE: Yeah, I was but I got ahead of myself. In the introduction -- let me start over. That was jumbled.

We added in the second line, "or shall prejudice," and then we also added on the third line, "or insulate any party from liability," and that's the point, so that the insulation is what we're getting at -- no insulating of liability, cut back -- the indemnity should not have the effect of providing insulation or debtor indemnity for violations of the intercreditor. And if there's a better way to say it, we're open to hearing it because we didn't really have a lot of negotiation of the point, right? We just think, as we wrote in our pleading, that the effect of the indemnity should not be insulation of liability or debtor backstop of the parties for their own -- the parties' violation of the intercreditor, if they did.

Our last point, Your Honor, is just on the SSA. There's nothing in the record as to how that -- there's very little in the record as to how that negotiation will take place. It appears to us that there's -- it seems that Apollo -- Apollo was definitely on one side of the negotiation; that we know. And we think or it looks like they're going to participate with the seconds on the other. Either way, we have two Apollo entities negotiating an agreement where if they don't success to negotiate an agreement, there's a thirty-million-dollar payment due if the parties didn't act in good faith.

Now, that's not an easy standard to prove and it

invites litigation, but it just strikes us as not the best dynamic to have Apollo entities on both sides in negotiation and have that be something that could be a termination event. Albeit with this good faith standard that was added now, but I submit not the easiest thing to measure and invites litigation.

So in sum, Your Honor, while we heard Mr. Feldman talking about the soft landing and the benefits that the RSA has given the company, we understand that RSAs in general can pave their way to the beginning of the case but it doesn't give them license for anything and everything. It doesn't give them license to have milestones that jam us in the litigation, intentionally or not. It doesn't give them license to have a thirty-million-dollar payment that I haven't heard clarification. Maybe they'll clarify that it's the way Your Honor thinks, but it doesn't give them license to have a thirty-million-dollar payment due if they don't like the results in a cram-down trial. It doesn't give them license to have a debtor guarantee on the indemnity effectively to back up their -- a debtor guarantee or debtor payment to back them up for violations of the intercreditor agreement if they did violate it. And it doesn't guarantee the other item, the SSA issue that I mentioned.

So I guess in sum, I would ask the Court not to approve the agreement, the BCA or the RSA unless and until these items have been remedied. Mr. Moeller-Sally will address

carefully the issues around the schedule. I've given you highlights but there are specific issues that need to be talked about and we ask you not to rule on this particular motion until you've at least heard the other one.

And I just can't help but observe that the thirty-million-dollar drop in the bucket for termination fees is ironic to us, given that they're fighting with us about our legal fees for defending the make-whole, and as future potential cram-down noteholders, we don't like the idea of the company paying thirty million dollars for no good reason and with triggers that we mentioned, that just don't seem fair to tilt the balance against us.

THE COURT: Well, the thirty million dollars wouldn't come out of your guy's pocket.

MR. SAGE: No, but if we're holders in the company, it affects the company that they paid thirty million dollars. They have less that they paid that. I mean, it's not -- I can't say that it is the be-all and end-all but it's just -- it's not a drop in the bucket and we may be noteholders of the company. Their notes have no financial covenants whatsoever. So we have no checks. Their notes are low interest rate and their notes are otherwise nonconsensual, so --

THE COURT: You mean the proposed notes under the plan?

MR. SAGE: Correct.

THE COURT: Okay.

MR. SAGE: So as potential noteholders, we don't like the idea of the company wasting assets.

THE COURT: Okay.

MR. SAGE: Thank you, Your Honor.

THE COURT: Okay.

MR. MOELLER-SALLY: Good morning, Your Honor. Stephen Moeller-Sally of Ropes & Gray, LLP on behalf of Wilmington Trust National Association, the 1.5 lien indenture trustee. I just want to make a couple of follow-up points. The 1.5 lien indenture trustee does join in the objection of the first-lien trustee.

Mr. Sage mentioned that I'll be discussing the milestones and the time line. I'll be doing that in connection with the debtors' discovery motion and I just wanted to repeat Mr. Sage's comment that we respectfully request that the Court not rule on any of the motions that are yet to be heard today until they have all been heard completely because scheduling issues actually interweave both in the scheduling motion, not surprisingly, but also in the motion to approve the disclosure statement which sets a confirmation hearing and sets the solicitation deadlines, as well as the RSA.

A couple of other points we'd like to repeat: one, we just want to reaffirm the comment that the exculpation does not include the carve-out to the extent permitted by law. We think

it's appropriate for that to be added. And two, we also think that it's appropriate for the RSA parties to affirm on the record that they will live with the outcome of the make-whole litigation and the cram-down notes so that our holders aren't put in a position of having gone through an entire litigation to reach those results and then have the BCA and the RSA abandoned. Thank you.

MR. KIRPALANI: Thank you, Your Honor. Susheel Kirpalani from Quinn Emmanuel on behalf of U.S. Bank, National Association.

I just want to echo a couple of the comments that were made by counsel for the first and one-and-a-half liens. In process, there is often substance and that's certainly true when it comes to legal proceedings. Mr. Feldman got up this morning and the first thing he said, which was pretty important, is: I'd like to tell you how the agenda should run and if it's okay with Your Honor, I think we should deal with the RSA motion first, get that done and then move on to the discovery motion.

But I think just like the counsel who appeared before me, that just doesn't make sense. Your Honor should definitely defer consideration of this motion until you've heard the issues, if you haven't already, and I'm sure Your Honor has and your chambers has read the papers filed in opposition to the discovery motion, but it's a trap. It is, Your Honor.

The deadlines that are set forth in the RSA which are part of this motion but, as the Court pointed out when I was asking questions of Mr. Carter, he's not the right witness for that because he never talked about the reasonableness of those deadlines in his affidavits. So how could I cross-examine him on why those are still reasonable because the fact is, Your Honor, there is no evidence before you that --

THE COURT: It's not the -- it's the evidence on what the Court ultimately decides is a proper amount of time to have a confirmation hearing. I don't need evidence on that. I could hear the parties on that. I've had, I can't count, the number of pre-trial conferences in the last twelve years; I could figure that out.

MR. KIRPALANI: That's fine, Your Honor. All I want to make sure is that there's nothing further that the debtors could suggest would make the deadlines imposed in the RSA more reasonable because the record is closed on that and that was their choice. I do agree that Your Honor knows better than all of us what's the right way to have litigation done.

THE COURT: I didn't say that, but I don't think it's really a matter of evidence as to --

MR. KIRPALANI: Okay. Well, Your Honor, the one thing I just want to point out, to the extent the Court hadn't noticed, the termination events in the RSA, it's October -- mid-October is the outside date. That's the date by which the

plan has to go effective. It's mid-October. So all of these horrible imaginings about how we have to get something done by the middle of August is an artificial deadline that was inserted by the second-lienholders because that's the agenda they wanted. It's not because it's reasonable on an objective basis and it's not because it's required in order to ensure the plan goes effective in time.

Those were the points I just wanted to stress and if Your Honor is going to defer consideration until after you've heard all of the issues, I just didn't want the Court to be lured into a trap that if you approve the RSA, suddenly you don't have discretion now to set a schedule that actually makes sense for the case and satisfies due process, Your Honor.

THE COURT: Okay.

MR. KIRPALANI: Thank you.

MR. HANSEN: I'm still on morning. Good morning, Your Honor. Kris Hansen again on behalf of Fortress and D. E. Shaw; I'm with Stroock & Stroock & Lavan.

Your Honor, I'd like to start just by addressing what Mr. Feldman tried to sprint from immediately when he sat up here this morning which was how you evaluate. We're objecting to the backstop fee and how you evaluate that. So Mr. Feldman got up and said, look, this is not entire fairness standard. We have an independent committee and it's standard business judgment and we've got a witness and we'll put him on and we've

met that burden.

The reality is that there's nothing in the record. In fact, the only thing in the record, I guess, is paragraph 8 of the Carter declaration that says that the independent committee doesn't have the authority to bind the company to any of these. It has to make recommendations to the full board. The full board is obviously inclusive of Apollo representatives and Apollo is on both sides of the transaction.

So to me that says you've got to adjudicate it on the entire fairness because there's no independent committee that has the sole responsibility and decision-making capacity. That was never given to them. Plus, there's nothing in the record that demonstrate what resolutions went into effect to create that committee, what its actual authority is, and when and how it has to report back.

So I think with that lack of evidence completely, it's really just counsel saying take my word for it. We followed all the rights things and we don't need to cover the entire fairness standard. We'll just stick in the land of business judgment.

But even if you go to business judgment --

THE COURT: Well, they did vote in favor of the deal.

MR. HANSEN: They did. The independent committee, according to the declaration, recommended the deal to the full board and then the full board, which included the Apollo

representatives said okay, but there's been no -- there's nothing else that's been put into the record with respect to that except for Mr. Carter's testimony that they didn't do anything here other than negotiate the deal that was presented to them. They did nothing affirmative to seek third-party financing; he testified to that. They did not engage in any discussion with other second-lienholders, Fortress and D.E. Shaw, both of whom reached out to the company, at least one of them in writing, myself, and we didn't get a response.

And you also heard that they didn't do anything with respect to the subordinated noteholders. I have the unique position of having represented them prior to the filing and that's -- there's nothing in the record with respect to that and you've heard Mr. Carter say, yeah, we didn't talk to them either. We didn't think it was necessary. I was told that this was a good deal and I should take it.

There's been no -- there's nothing in the record about actual negotiation over any of the specific components. It's all just hiding behind this concept of a package deal. And as you, yourself, pointed out, Your Honor, a fifteen-percent discount on an attractive plan valuation is a good deal and that --

THE COURT: I didn't point that out.

MR. HANSEN: Well, you point -- you request -- you asked the question --

THE COURT: I don't know whether fifteen percent is a good deal or a bad deal or that the 2.2 billion is a good value or a bad value for this. And I don't see anyone else saying I'll underwrite 600 million.

MR. HANSEN: Well, it's interesting when you talk about the 600 million, Your Honor, and that's another thing here which is, having never shopped the deal, having never talked to a single party, the debtor can't say there was no one willing to underwrite 600 million. They never went out and looked.

We approached them and what we said to them was, as you saw in the letter that we attached to our filing, that we will subscribe with no fee for -- we'll subscribe for our pro rata share and with respect to this piece that's actually really the only backstop here because it's a misnomer. Everybody refers to this as a backstop. It's not a backstop. It's a subscription. It's a fee for subscribing for your pro rata share, and then what it is is a fee for backstopping this fifteen percent which has now shrunk to ten percent because you see in the courtroom D.E. Shaw and Fortress and Napier who collectively hold around five percent. So you kind of take that and you translate it over and it gets down to about ten percent.

THE COURT: Well, they haven't committed.

MR. HANSEN: Fortress and D.E. Shaw, in writing, said

we would subscribe with no fee and we would agree to backstop for three percent just the stub portion. No one ever engaged with us on that. The only thing I got was an e-mail from Mr. Feldman that said, if I can get you the backstop, I would but it's not my call. Not, can we explore that further? Can we figure out are you guys willing to subscribe for 600 million dollars? You know, are you willing to do a direct purchase for 600 million dollars? If that was important to them, you'd think they would have come back and said it to us.

And I think the interesting thing is, Mr. Carter's testimony didn't even bear out that they went back to the noteholders and said listen, you're taking effectively this fee on the backs of the people that you chose to exclude from your group. Would you guys consider not doing that? There's been no -- there was nothing in the record that says that they even attempted to do that.

And so that what we're left with is the reality that the ad hoc group says look, if I can get away with this, I'll get away with it. And I would find it pretty shocking that a group that holds eighty-five percent of this billion-three-plus class who structured this deal at a fifteen-percent discount to a plan value, that if you don't subscribe in that rights offering, the recovery you get on your second-lien notes is really not good. That you have to subscribe for it.

I'd be pretty surprised if the Court or the debtor

ever took the position and said, I'm sorry, you're not getting the thirty-million-dollar fee or you have to wait and see and you can only get the fee on that actual piece that's unsubscribed, that they would say, that's it; I'm terminating. I'm tearing up the agreement and I'm leaving.

Apollo owns this company now. They're going to own a lot of this company in the future. They're the largest holder by a mile of those second-lien notes. They're not going anywhere. Oaktree is a very large holder in the second-lien notes.

THE COURT: Well, let me ask you, what exactly is Fortress offering to do?

MR. HANSEN: Well so, Your Honor, what Fortress and D.E. Shaw said they would -- Fortress said they would do, then D.E. Shaw joined us and we'll have to hear from Napier whether they would be willing to do it, as well.

THE COURT: I'm sorry, the last one?

MR. HANSEN: Napier Park.

THE COURT: Napier, right. They filed something last night.

MR. HANSEN: They're here represented by Kramer Levin. They filed a joinder last night.

Fortress and D.E. Shaw said what they would do is for their pro rata share, just like the members of the ad hoc committee, they would agree to subscribe for that. So

therefore, you take the fifteen percent and it shrinks because we are obviously in that fifteen percent that wasn't in the other eighty-five percent.

So we would subscribe directly and we would agree to backstop like a true backstop, the remaining portion of unsubscribed. So now it's down to ten percent and we would do that for three-percent fee of that piece. So when you look at the fee it's thirty million dollars. Now granted, they're going to say, well, I won't subscribe for my own pro rata share if I don't get my fee, but we're willing to do that and for that stub portion, we'll do it at three percent.

So if that's, by my math, I think that leaves you with three percent of sixty million is 1.8 million dollars. So we'd go ahead and backstop that stub piece at ten percent; that's the only true backstop in this deal for -- assuming Napier made the same representation. If they didn't, it would be about two million dollars. It's all -- it's hundreds of thousands of dollars instead of millions.

When you look at it, you have about 1.8 million dollars to backstop what really needs to be backstopped versus thirty million dollars to backstop what really needs to be backstopped and we think that that's totally unfair.

We think that again, this just smacks of an insider deal and it was just kind of a look, let's push it and see where we can get with it. We certainly said to them, look it's

not fair that you're doing this on our backs. We'll go along with you if you want us to but we're also willing to do this ourselves because we think it's just more fair to the parties that you're excluding by your own desire and --

THE COURT: But this is not the full 600. It's just your portion of it.

MR. HANSEN: It's not the full 600, Your Honor, because we don't believe that the full 600 is necessary. Again, you have eighty-five percent of this class that negotiated their own deal with the company and they're saying I have to get a fee for subscribing my pro rata share. And when you read through the backstop agreement as Mr. Canfield pointed out in his cross-examination of Mr. Carter, it's not -- there's no true backstop there.

If for some reason Apollo said I'm not going to invest, the company's left with a specific performance remedy and a request to the other backstop parties, would you cover their share. There's no obligation of the other parties to cover it. Sometimes we refer to that as a backstop to the backstop but here it's effect -- that would be the backstop.

So what you have is everyone saying I'm subscribing for my pro rata share and for this now ten percent that's effectively unsubscribed, I'll backstop that. So they're only backstopping a very small portion outside of their own pro rata share.

And again, Your Honor, given where they are in the case, given who they are in the case, waiting to see when the subscription ballots come back to see what was actually unsubscribed and even applying a five-percent fee to just that truly unsubscribed portion is pretty fair and it doesn't seem like it would upset the apple cart of this case at all.

So of course, Mr. Dunne will probably come up and say that's not true; if you take this away, we're gone but we haven't heard that yet. And in fact, we heard from the company: I never even asked the question because I didn't think I had to. I was told it was a good deal. It was on a package basis.

There's been no testimony today from an expert on behalf of the debtor. I kind of find it amazing that Moelis isn't here testifying saying all the work that they did, that's usually pretty standard in connection with a backstop approval but they're not here and that speaks volume. And the record, as Mr. Sage pointed out, was closed from an evidentiary perspective.

So, Your Honor, I think when you step back and look at this and Mr. Feldman says, you know what, all this is about is them wanting the goodies, too, that's not true. What this is about is us not wanting a group of eighty-five percent who chose -- who was in and out of their group, which included the company's sponsor, to do this on our backs. And Mr. Feldman

says, look, it's not up to us to select who gets in or out. But they didn't do anything to as a fiduciary, to defend those parties that they owe that duty to. As a matter of fact, they signed this deal up with a no-shop in it and a fiduciary out. Did they really need the no-shop on top of that?

It seems amazing. I mean, if it was a third party that came in and said look, I'm going to be your stalking horse, I'm going to buy it; I need to be protected with a limited no-shop until the Court approves the bidding procedures, I get that. But with respect to an insider of the company saying we're the dominant party here; we want to do this plan with you and it has to be protected by a no-shop where you have a fiduciary out, that's tough, Your Honor. That speaks volumes about what this company did not do and what it was willing to do for its insider.

And the last thing I'd say, Your Honor, as Mr. Feldman also said, we would have paid a lot more attention to parties if they had shown up and said, hey, we'll write a six-million-dollar check. They didn't pay any attention to any party who approached them at any level. As a matter of fact, they never even affirmatively went and did it.

So, Your Honor, I could speak a lot more about the legal issues that we had on the papers, but I think you've read them. You know the issues. Our view here is that when you have a subscription right, when you get down into the whole sub

rosa and disparate treatment arguments which they've responded to by saying look, those are A) confirmation objections and B) if this is a sub rosa, then every backstop on the face of the earth is a sub rosa, i's not really true. Most backstop agreements that we see are never subscribed to by eighty-five percent. It's usually some lower number and people are actually stepping up to cover a much bigger, unfunded balance.

But here what they're saying is ,we're only covering the small balance. Your Honor, that just doesn't fly. And when you get into the sub rosa and disparate treatment arguments when it's a subscription -- if people are saying, I'm getting a fee for subscribing my notes, which is effectively what they're doing, that does have to get offered to everybody. You can't hide behind hey, I'm a new financer. When you're saying, I'm getting a fee for putting in my share and I'm only backstopping this tiny little share but I'm taking a fee on everything, that really turns this into a subscription. And if it was pre-bankruptcy or outside of bankruptcy when they went out on a consent and they were going to pay a consent fee for a tender or they were going to pay a fee to specific holders in exchange for new money, they would have to offer that to everybody.

So obviously, you haven't heard the last of us on this, Your Honor, but those are the arguments and we believe that the Court should deny the backstop fee.

THE COURT: Okay.

MR. HANSEN: All right. Thank you.

MR. ZIEGLER: Good morning, Your Honor.

THE COURT: Good morning.

MR. ZIEGLER: I'll be very brief. I'm Matthew Ziegler of Kramer Levin on behalf of Napier Park.

I just wanted to, without retreading Mr. Hansen's comments, just echo a couple of I think the most important sentiments here and also to confirm, per what Mr. Hansen was just saying, that Napier Park would be happy to sign up for the type of backstop arrangement that Mr. Hansen just described to the Court.

Your Honor, frankly, we believe that the thirty-million-dollar fee is an expensive inducement to the backstopping parties to take action that's already in their self-interest. We believe that that is inappropriate.

Standing in the courtroom before Your Honor are the representatives for a substantial portion of the supposedly unsubscribed, at-risk shares. And so, Your Honor, I just believe that given the limited resources available in this case, and given the obvious willingness of a substantial portion of the outside noteholders to engage in something that would be cheaper for the estate and still provide adequate assurances that the rights offering will be successful, we would submit that the thirty-million-dollar fee should be

denied.

THE COURT: Let me ask you, and I should have asked Mr. Hansen this, too, in terms of what your clients are willing to do, are you willing also to backstop a party's -- a breaching party's share or just the backstop the unsubscribed piece?

MR. ZIEGLER: Your Honor, I haven't discussed that with my client. I will say that given that part of the nature of our objection is that the existing agreement is inadequate in that respect, I think that is certainly that we would be willing to discuss.

THE COURT: Okay.

MR. ZIEGLER: Thank you.

THE COURT: You're looking over your shoulder. Do you have a position on that, Mr. Hansen?

MR. HANSEN: Your Honor, we'd have to discuss it with our clients but I think the answer would probably be yes because it's a much smaller amount and given the fact that we're smaller, I don't think that would be a problem.

THE COURT: Well, yeah, you would be doing your pro rata share of the -- let me make sure I under -- I mean, let's assume that the largest holder of the notes that signed up to the backstop doesn't -- that breaches the commitment.

MR. HANSEN: Oh, so for example, if Apollo --

THE COURT: Yeah.

MR. HANSEN: Your question is not for the stub piece.
THE COURT: Right.
MR. HANSEN: You're saying if Apollo walked --
THE COURT: No, I --
MR. HANSEN: -- would we be willing --
THE COURT: Right.
MR. HANSEN: -- I'd have to talk with Fortress and D.E. Shaw, Your Honor.
THE COURT: Right.
MR. HANSEN: We've never been asked --
THE COURT: Okay.
MR. HANSEN: -- so I don't have an answer for you today.
THE COURT: Okay. Anyone else before I hear from the company? Any other supporters of the motion? Okay.
MR. FELDMAN: Your Honor, just some clarifications and then I will respond. On the clarification front, Your Honor, the plan does provide that if the Court were to cram down the first-liens and the one-and-a-halves under 1129(b), that their 510 subordination rights would go away because you would have determined their claim as part of that.
THE COURT: Well, they'd be paid.
MR. FELDMAN: They'd be paid, right.
THE COURT: All right.
MR. FELDMAN: So I just want to be clear because you

had said that their 510 rights are not being given up. That is correct but it does provide, obviously, if they are paid as you determined, then they're paid as you determined.

THE COURT: So what would be left to the lawsuit at that point in the state court?

MR. FELDMAN: I don't think anything would be left to the lawsuit. I mean, let's assume, Your Honor, hypothetically that you determined the make-whole is due and owing but that we can give them notes, whatever those notes look like. They will have been paid in full. If they want to argue that somehow the seconds were not entitled to receive anything, the plan would provide they can't then pursue the seconds for some additional recovery because you will have determined already that they were paid in full as provided for 1129(b).

THE COURT: Okay.

MR. FELDMAN: The second clarification, Your Honor, is I think we are all comfortable and I don't know why it was not -- I don't know what the oversight was, adding "breach of fiduciary duty" to the carve-out.

THE COURT: Okay.

MR. FELDMAN: So we'll make that change and reflect that. I'm just making sure I'm getting clarifications before I launch into argument.

THE COURT: Right.

MR. FELDMAN: Your Honor, in response and I'll take

them in the order --

THE COURT: Well, could I --

MR. FELDMAN: Sure.

THE COURT: I had one clarification actually because Mr. Sage, I think maybe did not actually accurately describe the plan. I've gone back and looked at the treatment of the first-lien and 1.5-lien note claims and I don't think it actually says that they'll get whatever is cram-downable, unless I'm missing that. It says --

MR. FELDMAN: Your Honor, this goes to what the appropriate treatment would be for 1129(b) and if you were to disagree with the plan?

THE COURT: Right. It says -- yeah, it says that they get replacement -- this is if they vote to reject. "They get replacement first-lien notes with a present value equal to the allowed amount of such holders first-lien note claim which may include in addition to the allowed amount pursuant to the 5.4(a) which is without the make-whole," the make-whole.

So the reason I'm hesitant is that the definition of replacement first-lien notes basically says on such terms as are acceptable to the parties. So I don't think I have -- I think that if I said it's not the note that you are in the plan saying will be their note but a note with a different interest rate, for example, I think if I said that, it would trigger the fee.

MR. FELDMAN: Your Honor, I'm going to let Mr. Dunne address it. I'm happy to let him do it now but I think --

THE COURT: Okay. I mean, if it was contrary, it would solve some issues but I don't think --

MR. FELDMAN: Right, I don't believe it's contrary.

THE COURT: Okay.

MR. FELDMAN: But I'm going to let --

MR. SAGE: I can clarify one thing. The point that I was quoting was --

THE CLERK: Please speak into the microphone?

MR. SAGE: Okay. I wasn't purporting, Your Honor, to describe the plan. It's the disclosure statement that says that language.

THE COURT: All right. Okay.

MR. SAGE: It does --

THE COURT: Fine.

MR. DUNNE: Your Honor, let me try to end this. For the record, Dennis Dunne from Milbank Tweed on behalf of the ad hoc committee of second-lien noteholders.

The way this works is -- and I think Your Honor was looking at the term sheet previously that was correct that, we're going out with a margin of 150 basis points. Your Honor may decide that it needs to be higher. And I think the debate is what happens if you do in fact say that it's higher than that.

THE COURT: Right. Is the fee triggered?

MR. DUNNE: And the answer there is that -- well, let me get to the fee in a second -- is that we would move forward with the plan, unless there's something else going on like the sub-debt litigation but we'll just isolate this issue.

THE COURT: Right.

MR. DUNNE: We would move forward with the plan but we would retain our option as -- and I think this is the point that Mr. Feldman was trying to make -- to amend it. Let's assume that you can -- take an extreme hypothetical.

THE COURT: Okay.

MR. DUNNE: Let's assume that --

THE COURT: That's fine. But as far as triggering the --

MR. DUNNE: The fee is paid if we close, right? So if we close, the fee is paid in equity and I think what Mr. Sage was concerned about --

THE COURT: No, but I'm concerned about the thirty million in cash if --

MR. DUNNE: If it's terminated ---

THE COURT: Right.

MR. DUNNE: -- as a result of that. And what I'm saying is that we would not terminate or be capable of terminating if you increased the fee or the rate rather, to whatever --

THE COURT: Right.
MR. DUNNE: -- but --
THE COURT: To meet the cram-down test.
MR. DUNNE: -- to accomplish cram-down, but we're reserving our right, as it says elsewhere, that if it's unacceptable, we may go to Mr. Feldman and say let's do something else with them --
THE COURT: Okay.
MR. DUNNE: -- if you ended up saying it was L plus twenty that they needed or something.
THE COURT: I'm not sure that that is actually reflected in the --
MR. DUNNE: And we can clarify the language wherever it needs to be.
THE COURT: Okay. All right.
MR. DUNNE: But that's the intent.
THE COURT: Okay. All right. Thank you.
MR. FELDMAN: Your Honor, I will say this was the last change made last night, so I'm sure it probably isn't clear everywhere --
THE COURT: Okay.
MR. FELDMAN: -- but I did want Mr. Dunne to go on the record --
THE COURT: Okay.
MR. FELDMAN: -- so that I was not speaking for him.

Your Honor, a couple of points on the shared-services agreement. In fact, and I think this has come out but sort of indirectly, related party transactions under the conflicts committee charter which existed long before this company filed for Chapter 11, require the conflicts committee of the board to be directly involved and make the recommendation.

It is true what Mr. Hansen said; it's not a subset of the board-given authority but certainly the experience has been the conflicts committee has been involved and has made its recommendations and those recommendations, at least to date, have been followed. And that's how the shared-services agreement will be handled, at least on the company side.

THE COURT: And they can call on company counsel and company advisors, just to advise them in connection with that?

MR. FELDMAN: Correct. And we have regular conflicts committee meetings that do not involve the entire board and I regularly update them without involving the entire board. And that's how the shared services will be dealt with.

And again, I think this was already touched on, but in the restructuring support agreement, there is the good faith requirement that the parties negotiate the SSA in good faith and if it turns out they haven't acted in good faith, then they would not be entitled to their fee. I accept the proposition that there could be a litigation over what constitutes good faith, but that just is what it is.

THE COURT: Right.

MR. FELDMAN: With respect to the time lines and the deadlines, I'm actually not going to address them. If the Court wants to hold off approvals until it hears everything today, that's up to the Court. I don't think it's worthy of me addressing them. I do think they are separate fights. I hear what Mr. Sage says about all the work he has to do; lucky for him, I do disagree with him. We have agreed to pay his fees. It's we haven't agreed to pay his financial advisor's fees. And obviously, if he's successful, he'll figure out a way to get himself paid and if he's not, he'll figure out a way to get himself paid. So I don't think that's really a compelling argument one way or another.

With respect to the indemnification, the issue with Mr. Sage's language is that, in fact, we have agreed to indemnify the second-liens. The second-liens are putting up 600 million dollars, notwithstanding what Mr. Hansen tried to say before Your Honor, and we'll talk about that when we get to Mr. Hansen.

And in exchange for that, just like any other lender, they are entitled to be indemnified. That isn't a backdoor way to get them out from underneath the litigation. They have to defend that litigation. Whatever comes out of that litigation under the intercreditor, they've done whatever they've done and the debtors are not defending that litigation for them. That's

not correct.

THE COURT: But I think as I --

MR. FELDMAN: But if there's a damage claim --

THE COURT: Yeah, I think as I read it, if they have, wearing not their backstopper hat but their second-lien hat, I mean, I have not --

MR. FELDMAN: That is --

THE COURT: -- I haven't seen this complaint. I don't know what it says. I don't know what the cause of action is.

MR. FELDMAN: That makes two of us, Your Honor.

THE COURT: But if their found liable for breaching the subordination agreement or the intercreditor agreement, the company would be indemnified then, right?

MR. FELDMAN: That is correct, Your Honor.

THE COURT: Okay.

MR. FELDMAN: I don't mean to suggest otherwise but what I am saying is that in the context of this deal, particularly where the first-liens, whatever they are owed, get paid here, whether they get paid in paper or in cash, they get paid, it's sort of hard to understand how this is --

THE COURT: It's a small amount, you're saying.

MR. FELDMAN: -- a big deal.

THE COURT: At most, it's fees --

MR. FELDMAN: Correct, Your Honor. And so while --

THE COURT: -- which you're paying anyway.

MR. FELDMAN: Which I'm paying anyways. And while I'm sure --

THE COURT: Well, I'm not sure you're paying the fees of the California firm but you're paying the fees in the bankruptcy case.

MR. FELDMAN: Correct. And while I could have pages of reservations of rights, I acknowledge that there is nothing being done under the RSA or the BCA order that limits in any way the first-lien's rights to bring claims under the intercreditor against the second-liens.

THE COURT: Right.

MR. FELDMAN: That will be what it will be.

THE COURT: But you're just basically saying that as far as Mr. Sage's issue, this indemnity isn't really a big deal.

MR. FELDMAN: I don't think it is, Your Honor.

THE COURT: Okay.

MR. FELDMAN: Mr. Sage made a point to say that there was no evidence with respect to degradation of business. I differ and disagree with that. In fact, Mr. Carter's affidavit does lay out the risks of the business from the filing.

You know, one of the problems was --

THE COURT: The first day affidavit.

MR. FELDMAN: His first day affidavit and even his supplemental affidavit talks about the benefits that the

company got out of having an RSA and BCA in place. One of the problems we're having today, not with Mr. Kirpalani's issues but certainly with Mr. Sage and more importantly, with Mr. Hansen is that they're trying to take a moment in time today as opposed to looking at when this put together back in February and March and then immediately post-filing and what was going on at that time and the importance and benefits that we got out of this and the complete reversal that would occur if we were not able to go out today and announce publicly that these had been approved.

And that isn't to put pressure on Your Honor or try to hijack the Court, but we are where we are and to say that we could just simply say, oh, let's defer this or as Mr. Hansen said, I can't imagine anybody walking away and this is really a subscription agreement. Yeah, he can't imagine it but he won't have to deal with the fallout, so --

THE COURT: Well, I do have one --

MR. FELDMAN: -- it's easy to say.

THE COURT: -- question on timing that I want to ask now, as opposed to later, which is a couple of the objectors had pointed to the fact that the RSA has a different date for emergence of October. Part of the benefits that you have touted here, which is I believe right, although it's not directly in the RSA, but it's certainly tied to it, is the exit financing commitment.

So is there anything to be done? Let's assume that there were confirmation August 22nd or August 30th or something like that; is there anything to be done in terms of raising that new money or going to market or doing anything that would hold off emergence for the next month and a half?

MR. FELDMAN: Not a forty-five day -- there's not a forty-five day need post-confirmation.

THE COURT: Okay.

MR. FELDMAN: Obviously, this would be a large, complicated corporate closing --

THE COURT: Right.

MR. FELDMAN: -- that needs some time to occur, certainly a couple of weeks. But no, there are not substantial conditions subsequent that are going to have to be satisfied in connection with confirmation.

THE COURT: Okay.

MR. FELDMAN: Your Honor, I --

THE COURT: No, I know you negotiated that provision, the October date, with -- a long time ago.

MR. FELDMAN: We did --

THE COURT: So you were contemplating -- you didn't know exactly what your schedule would be.

MR. FELDMAN: We did and I can assure both the Court and everyone in the court that this was not the original time line proposed by the ad hoc committee. To suggest that somehow

we had a deal handed to us is somewhat amusing from where I sit but that is what it is. This was the time line that the company, frankly, wanted. It gave parties-in-interest enough time and we didn't feel like we were jamming everyone. On the other hand, the company doesn't want to linger in Chapter 11. No company does. Particularly when we have a deal that includes so much support and so much momentum. But, no, it is not a forty-five day need to get out of bankruptcy once a plan is confirmed.

THE COURT: Okay.

MR. FELDMAN: Your Honor, with respect to Mr. Hansen's clients and Kramer Levin's clients, the reality is that they have no idea whether people will walk away from this. In essence, they want to penalize the company and the ad hoc group frankly, because it's the ad hoc group that put their group together for doing too good a job, for getting eighty-five percent of the debt and leaving the stub. They can characterize it any way they want but the RSA was signed pre-petition. If in the two weeks, three weeks, four weeks following the petition date this company had performed differently and this bankruptcy had had a different impact, Mr. Hansen and the gentleman from Kramer Levin wouldn't be standing here offering to even take their own stock at a fifteen-percent discount, let alone backstop something else.

THE COURT: Well, I appreciate that and we've all seen

how markets can change dramatically over a matter of days, but I am troubled by the fact that it does appear to me that the thirty-million-dollar -- in terms of five percent of the stock -- fee is, given the amount of the subscription, and I think this is consistent with Mr. Carter's testimony, as much an inducement to subscribe as opposed to be compensated for a backstop.

And that alone wouldn't be troubling to me because, an inducement to subscribe could come in different ways but I really don't have anything to tell me that twenty-five million or twenty-six million plus a fifteen-percent discount is right. And I have three financial institutions saying I'm ready to subscribe now for one million, in addition to the fifteen-percent discount.

MR. FELDMAN: Your Honor, a couple of points. I think you do have what's in the public record which is attached to our reply brief.

THE COURT: But that public record only says what the fee is. It doesn't say what the terms of the rights offering were in any case. It doesn't say that there was an X-percent discount, as against plan value or Y-percent discount or anything like that or whether it was offered to everybody.

So I can't -- that doesn't really help me too much. If it were just -- if there was evidence in the record that said that this fifteen-percent discount really isn't enough to

incentivize people to subscribe, if there was evidence that said to the opposite, that this is the right number -- fifteen percent's the right number, I guess there's information in the record to say that, in other cases, a fee for a backstop is okay but even there I wouldn't really know what they were backstopping and in what context. I mean, in any of these cases were there people who showed up and said I'm willing to do it for less? I don't know.

MR. FELDMAN: Your Honor, I don't know the answer to that in all of the cases. I was involved in some of the cases, but that's neither here nor there; I'm not going to testify. But what I will say, Your Honor, is that what Mr. Carter did testify to was that this was all part of an overall package to induce these parties to step forward. And I want to --

THE COURT: But that --

MR. FELDMAN: -- go to one other point, Your Honor, and --

THE COURT: I'm not sure how great that is, because I don't know --

MR. FELDMAN: But what the parties also said is that they will, in good faith, consider picking up other parties' pieces, if they fall away, and if not, the company has the right to assert specific performance against those parties. If this was so lucrative --

THE COURT: Well, that's kind of ice in winter too,

isn't it? I mean, they're saying that they'll do it if they want to, and if not, you can sue the people who breached.

MR. FELDMAN: I don't --

THE COURT: But look, that's less of an issue to me, because my only market test here is Fortress and what do they -- they begin with an N?

MR. FELDMAN: Napier.

THE COURT: Napier. And --

MR. FELDMAN: But --

THE COURT: -- they're not willing to say that they would pick up default or shares.

MR. FELDMAN: Nor are they willing --

THE COURT: So I'm just focusing on the fee piece. I'm focusing on the five percent on top of the fifteen-percent discount. And I'm not so sure I have any real evidence to show that that's warranted here, that it's really market, in any respect.

MR. FELDMAN: Your --

THE COURT: And I have other financial institutions who are saying they're willing to commit today for a lot less than that --

MR. FELDMAN: But Your Honor --

THE COURT: -- the equivalent of a fraction of a percent of the common stock.

MR. FELDMAN: Your Honor, they're really not saying

that, though. We have to pull apart what they're saying. They're saying that if you assume the eighty-five percent stays in place --

THE COURT: Right.

MR. FELDMAN: -- if you assume --

THE COURT: No, I understand that.

MR. FELDMAN: -- that leaves a very small amount of money, 15 percent of the 600 million.

THE COURT: Right.

MR. FELDMAN: And we will subscribe for our share at a lower fee, and we might, if there were other defaulting parties, be willing to pick up the defaulting parties' piece. And I want to --

THE COURT: And I'm just ignoring that part, but I am saying that they're kind of falling all over themselves to subscribe. And I appreciate that you're saying they're getting on a nice cruise boat, as opposed to one that has a year or so left to go on it, and they've had the flu and everything. But on the other hand, that's where we are at this point.

MR. FELDMAN: But you also have evidence that Mr. Carter solicited information from his financial advisor about the --

THE COURT: Who didn't testify --

MR. FELDMAN: -- reasonableness of the deal.

THE COURT: And it was pretty -- it was pretty

sketchy.

MR. FELDMAN: Who did not testify today --

THE COURT: Right.

MR. FELDMAN: -- but not an unwillingness to testify. But the --

THE COURT: No, but I have to go with what I have, and there are really two pieces of it that I have nothing to go on. I don't know whether 2.2 billion dollars is the right plan value upon which to have a fifteen-percent discount.

MR. FELDMAN: No, but you also have no objections to that, Your Honor, and you have --

THE COURT: No --

MR. FELDMAN: -- and you have a --

THE COURT: -- because all I have is the other folks wanting to jump in on that.

MR. FELDMAN: And you have a disclosure statement that you'll hear next that has that value right in the middle of the range of what the financial advisor has said --

THE COURT: Okay. And then I have a fifteen-percent --

MR. FELDMAN: -- in that disclosure statement.

THE COURT: Then I have a fifteen-percent discount off of that, before the extra five percent gets issued.

MR. FELDMAN: Correct, Your Honor, but even within the fees that are attached to the reply, there are fees that are

higher. And I understand you don't have all the --

THE COURT: But I don't know -- but the testimony, I think -- correct me if I'm wrong -- is that this five percent, or thirty million dollars in cash, depending on the circumstances, was really not so much to backstop the other fifteen percent. It was to get them on board with the 600-million-dollar rights offering commitment and the other benefits to the company of the deal, the RSA. And what I don't have, though, is whether, in fact, other than it was required to get them on board, in a kind of a restrictive negotiation -- there was no marketing here of this -- it's really market on top of a fifteen-percent discount.

The cases that you cite and the chart you show just show us the fee, and in a vacuum I can say, yeah, a five-percent fee for a backstop is okay, except I don't know what they were backstopping. I don't know if they were backstopping 300 million or what we're talking about here, which is 15 percent of 600 million.

MR. FELDMAN: But Your Honor, can I comment on the no market test for a moment, because you're right, we have not affirmatively gone out and shopped this backstop, but I don't want the Court to be confused by what Mr. Hansen said at the podium. Pre-petition, Mr. Hansen represented the sub-debt.

THE COURT: Right.

MR. FELDMAN: Post-petition, other clients hired him,

and on May 30th, he sent a letter to the company offering to potentially backstop up to fifteen percent, the stop --

THE COURT: After you had the deal done. I appreciate that.

MR. FELDMAN: Not only after we had the deal done, but with no assurance on 600 million dollars.

THE COURT: But what I don't have in the record is, except for a very general statement, based on my questioning of Mr. Carter, that the advice was that this was reasonable, as a whole, in light of the market. And he's basically saying that's what he was told.

MR. FELDMAN: Your Honor, the problem I have is that I didn't have your objection before --

THE COURT: Well --

MR. FELDMAN: -- we commenced today, which is not --

THE COURT: But it's -- I mean --

MR. FELDMAN: -- is not unreasonable.

THE COURT: But it's not my object -- I think it's Fortress' objection. I mean --

MR. FELDMAN: But I've now got a closed record that I can't supplement.

THE COURT: Well --

MR. FELDMAN: So I'm not sure how to respond to the Court's concern, unless the Court's prepared to reopen the record, in which case we would put on financial advisor

evidence to demonstrate what they looked at and what was presented. So I think, in terms of where we are, that's where we are for today, at this moment. And we can -- you and I can go back and forth for the next half hour; I don't think it's beneficial. And so I would cede to Mr. Dunne at this point.

THE COURT: Okay.

MR. DUNNE: Good afternoon, Your Honor. Dennis Dunne from Milbank Tweed on behalf of the second-lien ad hoc group.

Let me just -- I'll get to that eventually. Let me deal with some of the other points. I'll start with Mr. Kirpalani. The subordinated note trustee joined in the creditors' committee's objection, which we took great pains to resolve, and I think that that resolution should resolve the joinder to that objection.

THE COURT: Right. I know some judges say joinders go away when --

MR. DUNNE: Right.

THE COURT: -- the objection you joined in is --

MR. DUNNE: And I think Mr. --

THE COURT: -- withdrawn, but --

MR. DUNNE: -- Mr. Kirpalani really focused on timing, and so let me just address that. And on the timing, I view that in the, kind of, no good deed goes unpunished, where every, kind of, positive is recharacterized as something negative, because we provided a six-month commitment here,

which people have pointed out, that extends out for the 600 million dollars, to October 10th, I believe. It is the debtors who told us that they needed 600 million dollars of new capital. And it is the debtors that requested, A, that we give them six months. And it's with them that we negotiated the interim milestones.

I would agree with what Mr. Feldman said that we don't -- we're not looking to create some type of trap, I think it was called, by having Your Honor approve those interim dates now, and then an hour from now, when we're talking about the scheduling of various pieces of litigation, we say, ah-hah, we can't go past those dates. We think they're reasonable, and we think we'll prove to the Court that it's reasonable. But let's do it.

THE COURT: Okay.

MR. DUNNE: And then the reason that we provided October 10th, frankly, is that if the Court believes it's not reasonable, there is some cushion in there.

THE COURT: Okay.

MR. DUNNE: So let me turn to the first-lienholders. And I think it was actually Your Honor, in a comment to counsel for the first-lienholders, they got it right, that at the end of the day I think it's all about the money, and that we can't lose sight, because this kind of permeates their objection and the litigation by Bank of Oklahoma, that they're clearly

getting a hundred cent recovery. They could get that in cash right now. This is all about getting more than a hundred cent recovery, when obviously the make-whole isn't crystal clear, otherwise there wouldn't be any dispute about it.

And I say that, because this is going to come back to Your Honor shortly, and Mr. Feldman alluded to it as well, and we'll talk about it in the release and indemnity in a second. Basically, the dispute in the intercreditor agreement is whether anybody over here can contest obligations. They have a certain amount of obligations that have to be due and paid in full before the seconds receive anything. Their argument is, well, if we think we're worth -- we have a billion-dollar claim, you can't contest that. We disagree. That'll be the piece of litigation --

THE COURT: That's the --

MR. DUNNE: -- in the intercreditor --

THE COURT: -- the nonbankruptcy --

MR. DUNNE: -- or it may before you, if it gets removed, because I think it disappears after the plan. If the plan was confirmed and you ruled on the make-whole, what we're concerned about is the inconsistent judgment ruling and the risk of having two different triers of fact on the same exact issue in the make-whole. But I'll come back to that in a second.

On the business judgment point, which I think a number

of parties have alluded to, I echo what Mr. Feldman said, that these were lengthy, longer than we thought, kind of, negotiations. And from our perspective, we're not an insider. My group is comprised of independent investors. They're a separate ad hoc committee. I think at some point people incorrectly alluded to Apollo being in our group; that's incorrect. Apollo actually was the counter-party adversary, whatever, that we were negotiating against. And it took us weeks to get through that. And I don't think there's any evidence that they weren't good-faith negotiations or arm's length, at least in all aspects of which the ad hoc second-lien group that I represent was involved.

The indemnity, Your Honor -- that's in the BCA -- I want to address for a minute. And I want to also point out that the indemnity does contain the typical carve-outs with respect to willful misconduct, fraud, gross negligence. But what the effect is of Mr. Sage's request would be they bring a claim under the intercreditor agreement, which we took pains and the clarifications to make sure we were doing nothing to affect their ability to actually bring and prosecute and maintain that action under the intercreditor agreement. But now they're trying to strip us of the indemnity and potential compensation for defending and prevailing on such a claim, which we submit is unfair.

THE COURT: Well, you guys don't get indemnified only

if you win.

MR. DUNNE: No, I'm saying we would still be indemnified even if we prevailed, for the defense calls, as Your Honor was --

THE COURT: No, but you're also indemnified if you lose. I'm not saying you would lose but --

MR. DUNNE: Unless the Court makes certain findings, right? If the Court makes findings with respect to --

THE COURT: Yeah, sure.

MR. DUNNE: Right. And so if we lose and weren't a bad actor, yes. If we lose and we were a bad actor, no.

THE COURT: Right.

MR. DUNNE: And if we prevail, and --

THE COURT: But Mr. Feldman's point is that this in a context where the damages to the first and the 1.5's are kind of hard to see because the things you're indemnified for are all related to a plan where they're going to be paid in full or they vote in favor of.

MR. DUNNE: And that's ultimately the answer, Your Honor, where -- and that's why I was saying it's all about them getting more than in full, but if this plan gets confirmed, they're getting paid at least in full, and whatever else Your Honor says they may be entitled to.

And that goes to the last point, because they made a big statement about the fee, the five percent of the thirty

million dollars, that they were objecting to that because they may be a future noteholder in the company through the take-back paper. And a couple of points on that, Your Honor. If this plan is confirmed, you have made all of the requisite findings under 1129 with respect to cram-down and it gets paid in equity. So they would be a noteholder that has that thirty million dollars paid below them in common stock of the borrower. I think that there is no cause to complain about that. With respect to -- and with respect to the payment of it in cash, if there is some alternative transaction or something else occurs, that's a better result for them, because that's presumably the world where Mr. Feldman has decided that something else has materialized that is better, and it's not this plan that's getting confirmed, it's not this plan that they're objecting to that's getting confirmed. They may win or lose on the make-whole on that, but that's not for this plan.

Let me address the Fortress, D. E. Shaw, Napier objection that keeps growing. I think Your Honor's clear on this, but I want to make sure that the fifteen percent, the discount goes to everyone who participates in the rights offering. It's not going to the signatories -- solely the signatories to the backstop commitment agreement. The only thing that goes solely to the BCA signatories would be the five-percent fee which gets paid in equity --

THE COURT: Right.

MR. DUNNE: -- if this plan is confirmed.

The other point that I think needs to be --

THE COURT: But my point is why do they need that? Why is that fair?

MR. DUNNE: Well, I -- this goes back to the evidentiary --

THE COURT: I understand some backstop fee is fair; I get that. But the record is that they're sort of getting this for committing as well as for backstopping. And I'm not sure that that's right. I mean, the fifteen percent is being offered to other people, not the fee. So I --

MR. DUNNE: Well, there's two --

THE COURT: -- I just don't see why --

MR. DUNNE: A, I'll address the evidentiary record in a second.

THE COURT: Okay.

MR. DUNNE: But the broader point is --

THE COURT: I mean, if it's fair to the others to give the fifteen percent, why is it fair to have this extra go to the initial backstoppers? I understand a backstop fee is appropriate, but you kind of have to look at what you're backstopping.

MR. DUNNE: I think there's two points here.

THE COURT: It's not really -- I mean, I -- why is the argument wrong that this really isn't a five-percent fee, it's

a thirty-three-percent fee?

MR. DUNNE: Well, I think that is wrong, because I think at the end of the day it's 600 million dollars.

THE COURT: No, but --

MR. DUNNE: And what they're trying to say is back out --

THE COURT: No, but no --

MR. DUNNE: -- the fact that --

THE COURT: -- no, no, no, no, no --

MR. DUNNE: -- you hold eighty-five perc --

THE COURT: -- but they're not backstopping 600 million dollars. They committed to 600 million dollars.

MR. DUNNE: Correct.

THE COURT: But they're being compensated for that with the fifteen percent, like everyone else who wants to participate for the extra -- their share of it. So it can't be really for the commitment; it's for the backstop. But they're only backstopping because they've all committed the full amount. They're only really backstopping fifteen percent.

MR. DUNNE: This is the part -- I am struggling on this, Your Honor, because this is -- when I started that it seems like no good deed goes unpunished, here we actually got, which was a high -- which is rare -- over 80 percent of the class to agree to -- whether you call it subscription or backstop, whatever, do both, to get to the 600 million

dollars --

THE COURT: Right.

MR. DUNNE: -- which is really the issue. The company needed 600 million dollars --

THE COURT: Right.

MR. DUNNE: -- which D.E. Shaw, Fortress, Napier can't get to. They can't get to the 600 million dollars.

THE COURT: Right.

MR. DUNNE: And we can also deliver the class, because we're more than two-thirds, in dollar amount, for that.

THE COURT: Right.

MR. DUNNE: And it gave the company the confidence that they could proceed down this path on a plan that's predicated on the 600 million dollars.

THE COURT: All true.

MR. DUNNE: And -- this is the evidentiary part -- I thought that the witness testified that after receiving the Moelis advice and other counsel comments, which we didn't go into, they had concluded it was market.

THE COURT: He did say that.

MR. DUNNE: And we believe it's market. The reason we -- we didn't make this up, Judge. We asked our financial advisors to do the same thing. Do you get the discount and a fee? And the answer is yes.

THE COURT: Even if you're really only backstopping

fifteen percent?

MR. DUNNE: But that's the part -- Your Honor's basically saying if you do too good a job; we should have actually held back --

THE COURT: Well --

MR. DUNNE: -- Your Honor --

THE COURT: -- I mean --

MR. DUNNE: -- and --

THE COURT: -- is there --

MR. DUNNE: -- instead --

THE COURT: Was this a case where everyone agreed at once, or did they agree seriatim? I mean, the agreement is signed by everybody. I get the impression everyone kind of signed up at the same time.

MR. DUNNE: They all signed on the same date --

THE COURT: So --

MR. DUNNE: -- which was, I think, April 13th.

THE COURT: So I think they knew it was fifteen percent that they were really backstopping.

MR. DUNNE: I think they all knew that they were committing the capital for a six-month period of time --

THE COURT: No, I understand that.

MR. DUNNE: -- that included their ownership of it --

THE COURT: Right.

MR. DUNNE: -- that included their ownership of it,

which the market is -- you get the rights and a fee for that, as well as the commitment --

THE COURT: Except -- well --

MR. DUNNE: Look, and I understand Your Honor's difficulties with the nature of the record, which I can't fix here, but I echo Mr. Feldman's comment that to the extent you want to put somebody from Moelis on there to talk about the market and how this came about, that would be one path forward.

THE COURT: But I guess -- I mean, let's assume your group included a hundred percent. Would the -- at that part would you be paying the five -- I mean, you wouldn't be paying the five --

MR. DUNNE: Yes, because we're being logically consistent, it's yes. It doesn't -- it can't be that we did --

THE COURT: But why? Why would you do that?

MR. DUNNE: Because it's committed -- you're committing -- the dollars that you're holding back for the six-month period to fund whatever your portion is, the market says the shares come in at a discount and you get a fee for that. It's hundreds of millions of dollars that get --

THE COURT: But there would be no backstop. There wouldn't be a backstop fee.

MR. DUNNE: No, but I'm saying the nomenclature can't dec -- whether you call it a subscription fee or -- because there would only be a subscription fee, in your hypothetical of

a hundred percent or not --

THE COURT: Right.

MR. DUNNE: -- it results in the same economics.

THE COURT: But I mean, certainly all the exhibits show backstop fees. And I've had two or three of these where there's a backstop fee and there was a substantial amount that wasn't committed.

MR. DUNNE: Well, I don't think anybody's made this distinction. I mean, I would view those as the backstop fee was including whether you were at ninety percent or ten percent. I --

THE COURT: Well, I don't know.

MR. DUNNE: I'm not aware of anybody making -- I don't -- I'm unaware of anybody making that distinction. And I'm saying I don't think it matters because I answered your hypothetical that way, that if it was a hundred percent, those fees would still be appropriate. And it was our group that took the market risks --

THE COURT: So you --

MR. DUNNE: -- the credit risks from --

THE COURT: So it's almost like a twenty-percent discount that -- it's close to a twenty-percent --

MR. DUNNE: It depends --

THE COURT: It's like eighteen percent or something.

MR. DUNNE: It depends how you value the cash on top

of it. Right.

THE COURT: Okay.

MR. DUNNE: Let me just pause for a second, Your Honor, and see if I have anything else.

I think that's it, Your Honor.

THE COURT: Can I -- actually, this is something no one's really addressed. You're asking me to assume an agreement, a pre-petition agreement, to approve the debtors' assumption of the pre-petition agreement. So it's conditioned on bankruptcy court approval to be assumed. The agreement -- is the agreement itself conditioned on bankruptcy court approval?

MR. DUNNE: I believe so, Your Honor.

MR. FELDMAN: Yeah, it's in the time line, Your Honor.

THE COURT: The whole agreement?

MR. FELDMAN: Yes.

THE COURT: All right. So should I even be looking at what it was like six months ago or just the state of facts today where I have people falling over themselves to join this group? I mean, this group were heroes, terrific, they were great, they -- I suppose they helped themselves out to do that. I don't see anyone trying to back out of the deal. Maybe I just look at the record today.

MR. DUNNE: My response to that, Your Honor, would be that that violates an important public policy point. And

what's the public policy?

THE COURT: But is it to say --

MR. DUNNE: It's to try to get things done before you file --

THE COURT: Well --

MR. DUNNE: -- and try to have as an organized --

THE COURT: -- I --

MR. DUNNE: -- a filing -- and we know in a prepack situation the courts -- there's lots of case law that says they encourage that. And you recognize that there were pre-petition agreements that were done that you're going to bring into the Chapter 11.

THE COURT: Yeah.

MR. DUNNE: And it's not policy that I think militates in favor of us looking back to that time.

THE COURT: I under --

MR. DUNNE: Otherwise, what you're saying is we should have filed April 1st and just done it.

THE COURT: I understand that.

MR. DUNNE: And that's a bad policy.

THE COURT: On the other hand, you have quite a bit of case law saying that there's no breakup fee until there's a breakup fee. I mean, you might have some contribution claim under 503(b), maybe perhaps, but I think you do look at the record today, as opposed to the condition of the world six

months ago, because it's an assumption motion. And I don't think there's a breach claim, because it's conditioned on the court approving it.

MR. DUNNE: I'm not sure, in the sense that, Your Honor, it may have said it was also earned on April -- you're going to the point of whether there'd be a pre-petition claim. I believe there would be.

THE COURT: I think the order says it's actually earned when the order's entered.

MR. DUNNE: Okay.

THE COURT: The proposed order.

MR. DUNNE: But, Your Honor, I -- the point -- I don't think that you can --

THE COURT: But let me -- Mr. Feldman, do you have someone who is prepared to testify --

MR. FELDMAN: I do --

THE COURT: -- that eighteen-percent discount is appropriate?

MR. FELDMAN: I do, Your Honor, and I would move to reopen the record for that limited purpose. And others may want to object.

I do want to make one comment, though, about what point in time the Court should be looking at it.

THE COURT: Right.

MR. FELDMAN: Even if you were to look at where we are

today, Your Honor, you have to look today and the importance of the contract going forward, if you want to --

THE COURT: No, I --

MR. FELDMAN: -- if you want to say thank you very much --

THE COURT: I appreciate that.

MR. FELDMAN: -- for the last two months.

THE COURT: At some point there is an element of chicken in this; people can say I don't like it.

MR. FELDMAN: Yes.

THE COURT: I don't -- I really want that five percent.

MR. FELDMAN: We would move to reopen the record, Your Honor, just on this one narrow issue, and we would also ask for a ten-minute adjournment, if we could.

THE COURT: Well, why don't I hear from other people about reopening the record first?

MR. KIRPALANI: Your Honor, Susheel Kirpalani from U.S. Bank, N.A.

I would object to reopening the record. It was asked three or four times, is the record closed. And this is the way the adversarial system works. The debtors have a burden of proof --

THE COURT: Well, was any --

MR. KIRPALANI: -- and they have to bring evidence.

THE COURT: I mean, there was some discovery in connection with this motion, right?

MR. KIRPALANI: There was some, and this issue was not adequately developed in discovery.

THE COURT: Well, was anyone from Moelis sought to be deposed or offered up, or anything like that?

MR. KIRPALANI: I don't know, but it's not our burden.

THE COURT: Did you have a list of witnesses or anything like that?

MR. BAIO: No one sought to depose --

THE COURT: Was there a list of --

MR. BAIO: -- anyone from Moelis.

THE COURT: Was there -- did the debtor say we're only calling Mr. Carter?

MR. KIRPALANI: I want to just push pause for one second, please, Your Honor. This entire record was set up with a certain legal framework called business judgment that now, after Your Honor's comments at the last hearing, after the objections that were filed, after the legal and the law was pointed out that it's actually the Court has to make an independent assessment, which is exactly what Your Honor is doing.

So no, there was no record created pre-bankruptcy to show and meet the legal standard that now seems to be applying, because they thought that Your Honor would just say, well, it

was voted on, it was unanimous, business judgment, don't touch it. Okay?

THE COURT: Well --

MR. KIRPALANI: And that's just not the law.

THE COURT: -- I mean, Mr. Feldman didn't say that.

MR. KIRPALANI: No --

THE COURT: He said --

MR. KIRPALANI: -- well, actually --

THE COURT: -- it satisfies every standard, so --

MR. KIRPALANI: That's what he said here today, but that's not the way this case has been proceeding up till today, which is why we are where we are.

MR. HANSEN: Your Honor, Kris Hansen again, with Stroock, on behalf of Fortress and D.E. Shaw.

Prior to the hearing, we had called Willkie Farr, probably a week ago, asked them what witnesses they would be presenting, and asked them for the opportunity to depose those witnesses. We were told that Mr. Carter was the only witness that would be proffered today, that he was previously deposed by the creditors' committee, that they didn't think we should have a second bite at him, but take a look at his deposition transcript and let us know if we wanted to depose him. So we looked at the deposition transcript and it was -- I don't want to make a remark about it; we'll just say that we didn't feel the need to have a separate deposition. We then saw the

supplemental declaration, didn't think that that needed a deposition.

So here we stand today, with extremely sophisticated counsel. This is not like somebody who doesn't know what they're doing; this is very sophisticated counsel who made an affirmative decision to move forward on this record. And now, when they've been confronted with what's been in our objection for weeks, and which we have informed them of prior to that, are saying, you know what, Judge, let me have a second bite at the apple. I don't think that's appropriate.

And truthfully, Judge, if you do contemplate opening the record to bring in another witness, kind of a surprise witness that we're going to have enter here in ten minutes, I want the opportunity to depose that witness. I want to know what that witness is going to say. I want to know what exhibits they're going to rely on. I want to know what market precedents they have. And candidly, I'm entitled to that, not to be sandbagged in a ten-minute shock to put this person on here today. So if you do contemplate it, I would like that opportunity, Your Honor.

And the other thing I'd say is I've heard all the responses; one question I asked when I was at the podium was if anybody said they were going to deny the five points, is there anybody in here saying I'm tearing this up and leaving? We still haven't heard that.

THE COURT: Okay. Well, you're not proposing denying the five points. You're proposing either apply it once you see what isn't subscribed, or more likely, apply it to the currently unsubscribed piece, right, not to the whole 600 million.

MR. HANSEN: Fortress and D.E. Shaw would be fine with that, Your Honor, if it was five percent of the actual unsubscribed piece. I know you've heard three parties come up and say that they'll actually subscribe with no fee if it was just five points. If they want to take that money for themselves, it's a couple million dollars, have at it; we would be fine with that.

THE COURT: Okay.

MR. SAGE: Your Honor, Michael Sage, Dechert.

I just want to buttress what Mr. Hansen was saying. Mr. Hansen said he's entitled to depositions and so forth. He's entitled to that, pursuant to your rules. The --

THE COURT: All right. But this isn't really your issue. I mean, the only one to talk about whether this fee was appropriate or not was the Fortress --

MR. SAGE: I agree; I'm only pointing out that there's a five-day rule -- chambers rule here before anything happens.

THE COURT: Oh, okay.

MR. SAGE: And I also --

THE COURT: That's fair.

MR. SAGE: And I also took pains to ask that the record be closed.

THE COURT: Okay. Do you want a break or --

MR. FELDMAN: I would like a brief adjournment, Your Honor, if I might.

THE COURT: Okay.

MR. FELDMAN: And you can rule on whether you'll reopen the record at the end of it. That's fine.

THE COURT: Okay.

MR. FELDMAN: Thank you.

THE COURT: Okay. So this is more like a bio break?

MR. FELDMAN: Your Honor, I'd be happy with ten minutes --

THE COURT: Okay.

MR. FELDMAN: -- as I said before. All right?

THE COURT: That's fine. I'll come back at, like, five after 1.

MR. FELDMAN: Okay. Thank you.

(Recess from 12:56 p.m. until 1:09 p.m.)

THE COURT: Please be seated. Okay. We're back on the record in MPM Silicones. I had pending a request to reopen the record, and given the issues regarding surprise and inability to prepare, and the representations made to me by a couple of the objector's counsel that they were told a specific list of witnesses, I'm not going to reopen the record.

So I am going to hold off ruling on the motion until we get to the -- or we conclude the discussion about the timing issues in the case, which I'm happy to get to now, or we can go to the disclosure statement hearing.

MR. FELDMAN: Your Honor, I think originally I was suggesting we should go to the disclosure statement, but I think given the circumstances this morning, it probably makes more sense, unless the Court disagrees, to go to the timing.

THE COURT: I think that's probably a good idea --

MR. FELDMAN: Right.

THE COURT: -- to go to the timing points.

MR. FELDMAN: Okay. I'm going to cede the podium to one of my colleagues.

THE COURT: Okay.

MR. FELDMAN: One second.

THE COURT: Okay.

MR. SAGE: Your Honor, if I could, I'd like to make one comment in response to something that Mr. Dunne said, if that's okay --

THE COURT: Okay.

MR. SAGE: -- regarding the RSA -- the BCA, and that is -- and it was almost Mr. Feldman as well. There was discussion about what's the quantum of damages on the indemnity claim. And while that's not -- it's not something I'm actually representing my client on, I just want to observe two things.

One, it's not only a question about the payment in full. The creditor envisions payment in full in cash. That could change the damage component.

The other piece I want to mention is that --

THE COURT: Well, no, because you only cram down if it's the indubitable equivalent so --

MR. SAGE: Right, but a litigant could argue that the notes they got, since it's not payment in full -- that's why certain subordination agreements say payment in full in cash and some don't. It creates that issue that there could be a damage claim against --

THE COURT: Right.

MR. SAGE: The other piece of it, though, Your Honor --

THE COURT: I think -- well, frankly, given the construct, that lawsuit seems a bit of a much ado about nothing.

MR. DUNNE: Well, Your Honor, I must object. Mr. Sage, I think, started off his remarks by saying he doesn't represent his clients on this matter, so I --

THE COURT: Well, no, but --

MR. SAGE: I'm just clarifying --

THE COURT: -- he's responding to the point on the indemnification --

MR. SAGE: Right.

THE COURT: -- as opposed to getting into anything more than that.

MR. SAGE: The other piece of it, Your Honor, regardless of cash in full, putting that aside for the moment, one of the claims that will be part of the litig -- I've read the litigation -- is whether if a premium is disallowed by this court, there may be a claim of the firsts against the seconds to recover that. So if that's a viable claim, then it's more than just attorneys' fees or costs; it's something altogether different. So I just wanted to make you understand that it's not quite as simple as they say.

THE COURT: Okay.

MR. SAGE: Thank you, Your Honor.

MR. KOZUSKO: Good afternoon, Your Honor. Dan Kozusko from Willkie Farr & Gallagher, LLP, on behalf of the debtors.

And I rise in support of the debtors' motion to establish a litigation time line in connection with confirmation-related discovery and adversary proceeding-related discovery.

Your Honor, the threshold issue on this motion, which was filed on June 5th, in all of the Chapter 11 cases and the three adversary proceedings in this case, and from which we've received objections jointly from the firsts and the one-and-a-half liens, and also from U.S. Bank, as the subnotes trustee, and which also has had replies in support of it filed by the ad

hoc committee of second-lien noteholders and by Apollo is the threshold issue is when the confirmation trial should occur here, Your Honor. And the debtors have proposed that that trial proceed on August 14, 2014, and there are a number of reasons why the debtors believe that confirmation on this timetable is important and as well, on this, have been joined in by several of the other parties.

If the timetable were to be delayed, for example, just in one of the objections, the first and the first-and-a-half liens, have said that the timetable should be adjourned sine die, until after the Court determines the adversary proceedings that they have filed on whether a redemption premium is due and owing.

Any delay in confirmation, be it too far beyond the august deadline, would endanger -- would trigger events of default under the RSA and the backstop commitment agreement, of course, if those agreements are approved by the Court. It would also endanger the financing commitments that the debtors have secured that would allow them to pay the first-liens and the one-and-a-half liens in cash.

In particular, the debtors have 1.8 billion dollars in total commitments. That includes commitments to pay the one-and-a-half liens and also from the ad hocs and from Apollo to make a 600-dollar equity -- a 600-million-dollar equity commitment. And those commitments would be due to expire if

confirmation is delayed unnecessarily, and indeed, as proposed by the first-liens and the one-and-a-half liens, if delayed indefinitely.

The debtors also cannot be sure that if these agreements expire that they could obtain financing commitments on similar terms, or as favorable terms. Additionally, if these commitments -- if these plan support parties' commitment to vote in favor of the plan is entitled to last, the debtors could be sent back -- set back months in their restructuring process, and in the process, potentially incur exponentially higher restructuring fees and also harm to their business.

So from the debtors' perspective -- and I know other parties want to be heard on this matter as well -- we think it makes sense to proceed with the confirmation time line expeditiously, and on the current dates that we have proposed of August 14th, 2014.

The debtors anticipate that in connection with that confirmation hearing that various parties will want to take discovery. In addition, there are the three adversary proceedings that I've mentioned that were filed in connection with these Chapter 11 cases.

Two of the adversary proceedings concern whether, under the language of their respective indentures, holders of the first lien and one-and-a-half lien notes are entitled to receive a redemption premium.

The remaining adversary proceeding, filed more than six weeks after the petition date, seeks a declaratory judgment that holders of the senior subordinated notes are not contractually subordinate in right of payment to the holders of the second-lien notes.

The plan that the debtors will ask this Court to confirm requires resolution of the issues raised in all three adversary proceedings. That is, the plan expressly provides that holders of the first lien and 1.5 lien notes will not receive any redemption premium, and that holders of senior subordinated notes are not entitled to any recovery solely on account of the contractual subordination provision in that indenture.

THE COURT: Well, it doesn't exactly provide that. I mean, there's a choice --

MR. KOZUSKO: There's a choice.

THE COURT: -- that the first lien and the 1.5 lieners have. But I understand your point, which is that that issue, to the extent it's joined, as opposed to an affirmative vote on the plan, is front and center in the confirmation.

MR. KOZUSKO: That's absolutely right, Your Honor.

And in order to complete any discovery that is necessary in connection with confirmation, including the resolving the issues presented by the adversary proceedings, which, as Your Honor said, will be front and center at

confirmation, one of them, the only way to do that between now and August 14th is on a discovery schedule that the debtors have proposed. And by this motion, the debtors asked the Court to establish such a discovery schedule under both Section 105(a) of the Bankruptcy Code, and this Court's inherent authority to manage its own docket.

The schedule the debtors have proposed provides for all discovery requests to be served by this coming Monday, although it bears emphasis that weeks ago the debtors encouraged all parties to do so sooner in order to speed up the process.

Responses and objections to those discovery requests would be due by next Friday with document productions substantially complete by July 9th. Following that there would be both fact witness depositions and expert discovery, including --

THE COURT: Can I interrupt you?

MR. KOZUSKO: Sure.

THE COURT: The two issues at stake, the contractual subordination issue and the make-whole issue, unless there's an ambiguity in the documents, I would think are just straight contract claims, right? You just read the -- you go with the plain meaning of the agreements.

So I don't -- I guess if it's not -- I guess if it's ambiguous, I would certainly take extrinsic testimony, although

I doubt that any particular holder of this debt was around when the debt was issued -- maybe I'm wrong; I'm assuming its traded since then -- except, perhaps, maybe Apollo.

But are there other factors here? I mean, I understand the cram-down issue, and I'll get to that; I'm putting that aside for a second. But just on the make-whole and subordination issue, what discovery are people contemplating?

MR. KOZUSKO: Your Honor, I can't speak for the other parties to those adversary proceedings. The only discovery that the debtors are contemplating is in the -- certain provisions are potentially susceptible of multiple interpretations which would render them ambiguous and require, I think, a resort to parol evidence.

Now, it's possible, as Your Honor said, that the Court will find it's not ambiguous. But it's also possible the Court will find it is ambiguous. And in the event the Court makes such a finding, we would want to have the discovery completed so --

THE COURT: So you would want to have depositions of the people that were around when these agreements were negotiated?

MR. KOZUSKO: That's one -- I believe that's an option that the senior subnotes have mentioned in their response among the discovery they listed.

THE COURT: Okay.

MR. KOZUSKO: But I think -- it's a matter of there also can be limited parol evidence. For example, the senior subnotes cite a Fitch report in order to support their interpretation of the indenture language there.

THE COURT: A what report?

MR. KOZUSKO: Fitch, the rating agency. It's mentioned in the senior subordinated complaints.

THE COURT: You mean how someone else would read this?

MR. KOZUSKO: They're looking to similar language to how Fitch was construing anti-layering provisions around the time as parol evidence to interpret the contract, at least that's how I read the complaint. I don't purport to speak for their counsel here, but there is reference to parol evidence in support of the contract interpretation they advance in the complaint. So it's occurred to them -- the possibility of using parol evidence has occurred to the trustee, for example.

THE COURT: All right. And as far as expert testimony?

MR. KOZUSKO: Your Honor, we think expert testimony would be, at most, very limited here. For example, I know it's in some of the joinders that were filed to our motions that they may need to understand how the market views the interaction of certain provisions at the time. We think expert discovery would be very limited, and I can't, sitting here

today, even say that the debtors would propound any expert discovery.

THE COURT: And then there was something in the pleadings about a laches argument, or something -- I didn't quite follow it.

MR. KOZUSKO: That was -- correct, Your Honor. I believe that was in the pleading filed by the ad hoc committee.

THE COURT: Okay. So I'll ask Mr. --

MR. KOZUSKO: But I --

THE COURT: -- Dunne about that.

MR. KOZUSKO: -- understand the point they're making is that -- and that, I think, was directed specifically to the subnotes trustee's argument, that summary judgment briefing should begin tomorrow before any of the defendants have had a chance to respond to the complaint. And, again, I don't purport to speak for the ad hocs, but --

THE COURT: But I guess -- well, I'll ask Mr. Dunne about that. Okay.

MR. KOZUSKO: The point -- although the debtors do join us to the extent that we do think that we should respond to the complaint before any -- certainly, before any summary judgment briefing commences.

THE COURT: To me this is a little schizophrenic. I mean, you have a confirmation hearing scheduled; you had a plan filed early in the case. These issues were all flagged in

terms of talking about the plan. I understand why one might want to file a declaratory judgment action separate and apart from that, because maybe the debtors would change their plan and someone might want some declaration anyway, but I'm having a very hard time seeing why the plan schedule wouldn't govern here. I mean, that's an issue where the plan proponent has the burden of proof and you just go ahead with it. I don't understand what the --

MR. KOZUSKO: Your Honor, that's precisely the result that the debtors are asking for here. That is, we want both discovery and briefing on the adversary proceedings and confirmation to occur contemporaneously.

THE COURT: I mean, is there any issue -- this is really a question more for the other parties. Is there any notion that a ruling, if these issues end up actually being contested and decided at plan confirmation, wouldn't be -- claim an issue preclusive in another context?

MR. KOZUSKO: Your Honor, our papers take the position that any decision you render in connection with plan confirmation would be subject to the doctrines of res judicata and collateral estoppel.

THE COURT: Okay.

MR. KOZUSKO: And we think that, as a result, they would be dispositive of issues in the adversary proceedings.

THE COURT: All right. So then there's -- I mean, I

want to hear from the other parties about the discovery on the sub issue and the make-whole issue, but then there is a potential here for a cram-down fight where we're talking about whether the paper that's being proposed on a cram-down basis is the indubitable equivalent of what the firsts and 1.5s have. You believe that that discovery also can take place during this time?

MR. KOZUSKO: Right, exactly. We think that would be done in connection with confirmation. I can't speak for what discovery they would want to take in connection with that, for example, but we think that can occur over the time --

THE COURT: Well, I'm assuming -- I mean, that, clearly, is a subject for expert testimony talking about --

MR. KOZUSKO: Yes. Yes, Your Honor.

THE COURT: -- proper --

MR. KOZUSKO: And we've provided for expert testimony in the discovery schedule we've proposed. And on that one -- and there's ample time to take discovery on that one issue, and whatever very limited expert discovery might occur on the issues presented by the three adversary proceedings. And the debtors believe that the schedule they've proposed allows all that discovery to be accomplished in advance of confirmation and in advance of the objection deadline that was proposed in the disclosure statement motion.

THE COURT: Would you contemplate fact discovery with

the cram-down or just the experts?

MR. KOZUSKO: I can't speak for the other parties; I don't -- we'd have to take a look at their papers to see whether we might serve any discovery response, for example. But I can't speak for what discovery they would seek in connection with that.

THE COURT: I think you have all experts on sort of the same timetable?

MR. KOZUSKO: That is how the plan is set forth.

THE COURT: Have you considered having a different timetable and different people being involved in doing the cram-down issue, which may be a separate -- might have a separate timetable?

MR. KOZUSKO: The debtors have no objection to it occurring on a separate timetable as long as it doesn't --

THE COURT: As long as it ends.

MR. KOZUSKO: Exac -- we have no problem dual tracking that. But candidly, Your Honor, after we sent this proposed schedule out two weeks ago, that Your Honor was the first to suggest this sort of dual-track discovery approach. And again, as long as it does not delay the end date here, the debtors have no objection to doing expert discovery on different tracks to the extent it involves different issues that need different time lines. For example, some expert issues might not require any fact depositions in order for the experts to opine, or the

document production is very limited, and we can move up those expert deadlines, whereas others may require a tailoring. And the debtors are fine with tailoring those at the margins, as long as we arrive at the same end date and tailor it to whatever the expert discovery issue is.

THE COURT: Okay. Well, do you have anything more?

MR. KOZUSKO: Well, Your Honor, I would -- it's up to -- I have responses to the objections that were --

THE COURT: Right.

MR. KOZUSKO: -- interposed, but similar to what Mr. Feldman did this morning, with Your Honor's permission, I would await the objectors presenting their cases to go in and have the debtors refute theirs --

THE COURT: Okay.

MR. KOZUSKO: -- because some -- Your Honor may moot some of those objections, for example, with your suggestion of dual-track --

THE COURT: Okay.

MR. KOZUSKO: -- expert discovery.

THE COURT: All right. So before I hear from the objectors, what discovery would other -- I mean, I know there's the motion to intervene in the adversaries, but everyone could be heard on the confirmation. What discovery would the seconds want to take?

MR. DUNNE: Your Honor, it's Dennis Dunne again.

I don't believe we need to take discovery; I don't think that the issues that we have with respect to the subordinated note trustee requires expert opinion or lay witness testimony. And I'm not sure how much of a disagreement we have with Mr. Kirpalani, so I may reserve the right to respond after he sets out his position. But let me be clear on it.

I think that what I want to avoid Your Honor doing is having a kind of truncated view of just reading this one paragraph mechanistically in isolation. I think we win on the plain language, but it's also clear that the cases here, Tribune and Metromedia, urge you to make sure that that -- that you look at other areas of that document --

THE COURT: Well, sure.

MR. DUNNE: -- and other related documents to make sure --

THE COURT: But that's all the -- that's the doc -- but I'm talking about --

MR. DUNNE: I'm not --

THE COURT: -- parol evidence as opposed to the --

MR. DUNNE: No, but to be clear, I'm talking about -- it may be other indentures, too, to see how all of the capital structure works together. But it's all documentary.

THE COURT: Right.

MR. DUNNE: So in that sense, Your Honor, it's easy;

we can attach them as exhibits.

And said another way, Mr. Kirpalani said that they may move for summary judgment. I think it's better dealt with in the plan process.

THE COURT: But someone on your guy's side was raising something about lac -- discovery about laches, or waivers, or the like.

MR. DUNNE: Well, let me address that point because it is in our response --

THE COURT: Okay.

MR. DUNNE: -- Your Honor. Which is -- and this really ties back to what I was saying about getting the whole universe of operative documents in front of you.

There was 2013 indenture for the subordinated notes, there was a resale indenture that expressly references that we are senior inden -- the second-lien debt is senior indebtedness. The trustee was -- the laches argument goes to the trustee's awareness of that and didn't do anything with respect to that.

THE COURT: All right. But it's not really something that requires a whole deposition festival?

MR. DUNNE: No, the documents speak for themselves on this, and you'll draw whatever conclusions or factual findings from it.

THE COURT: Okay. Okay, so why don't I hear from the

objectors.

MR. KIRPALANI: Thank you, Your Honor. Susheel Kirpalani from Quinn Emanuel.

Just I will start where Mr. Dunne left off, because it's just better for the flow. I agree with Mr. Dunne, we don't need discovery; we think it's a pure legal issue. We don't think it's even an issue for experts.

This is why we do believe it's prudent to move on our adversary proceeding independent of confirmation. Your Honor asked why -- why wouldn't this all be done under the plan, and I can give you some very pragmatic reasons.

First, the debtors cite a couple of cases explaining how -- they're the first filed, somehow, and they say that we're engaging in forum shopping. They say this in their papers and that what we're trying to do is litigate things, and gamesmanship, and they cite a couple of cases that chastise parties for doing this kind of thing.

First, to make it abundantly clear, if it's not clear already, we are here, and we are asking to litigate right here. The first bankruptcy case they cite is Lear Corporation. Judge Gropper dismissed an adversary proceeding in favor of an action filed in State Court in Illinois four years earlier. It has nothing to do with this case.

THE COURT: Well, he says in that case though, that, of course, if a plan had been teed up, I would have the case --

I mean, Judge Gropper. I mean, come on.

MR. KIRPALANI: No, what he said --

THE COURT: The whole point of the Chapter 11 case is to see if you get a plan confirmed.

MR. KIRPALANI: Yeah, but --

THE COURT: I think we should do this in the context of a plan.

MR. KIRPALANI: Your Honor, what he said is "Plaintiff's tactic of commencing a new action," this is a quote, "in the debtor's Chapter 11 cases" --

THE COURT: I'm not --

MR. KIRPALANI: -- "allows them to argue in a new forum something they argued four years ago."

THE COURT: I'm not --

MR. KIRPALANI: Does that resemble our case at all?

THE COURT: But then he has the caveat: of course, if there were a plan in front of me I would do it -- I would rule differently. And I think that's what we have here, there's a plan.

MR. KIRPALANI: Okay.

THE COURT: Let's do it in the context of a plan.

MR. KIRPALANI: Well, we can take a look at the other case that the debtors cite, and perhaps they cited it and gave it to us yesterday in the hopes that we wouldn't read it, or in the hopes that Your Honor wouldn't read it. It's One

Canandaigua Properties -- it's Judge Kaplan in Buffalo -- 140 B.R. 616. If we look at the jump cite on page 618, but I guess they didn't look at what it says right before the jump cite. And what the Court does, it says there are -- comes up with various instances where it does make sense to consider issues before confirmation. And this is the quote from Judge Kaplan. "These cases demonstrate that there are factors which might lead a bankruptcy court to exercise its discretion to rule on 'confirmability' issues prior to a hearing on confirmation and thereby achieve economy of resources and time. It can be seen from these cases that would typically be done where the plan of reorganization is either nonconfirmable on its face," which is not what we're arguing, "or where the issue requiring resolution will have to be resolved sooner or later, and a sooner resolution is in the economic best interests of all parties."

THE COURT: But you're not asking for sooner or later; you're asking --

MR. KIRPALANI: I'm asking for sooner.

THE COURT: -- for later.

MR. KIRPALANI: No, I'm asking for sooner, Your Honor.

THE COURT: I'd rather just do it in -- really, I wouldn't do it in context of a plan, none of this --

MR. KIRPALANI: Your Honor, I'm concerned that the Court has been hearing a side that may not be accurate with our

position.

THE COURT: No, I haven't --

MR. KIRPALANI: Where does the Court believe that we're asking for things to be delayed?

THE COURT: You're right, the other folks are later.

MR. KIRPALANI: Much later.

THE COURT: But I would rather do this in the context of a plan. And because, ultimately, if it's going to be settled, it will be settled in the context of a plan. And that's it. I'm not going to debate this anymore; I'm exercising my discretion on this point.

MR. KIRPALANI: Okay, with respect to the issue of, Your Honor mentioned Fitch, and I think there was some confusion. And, again, this is the risk of the Court hearing people characterize things that we filed before Your Honor's had an opportunity to actually read them. We're not citing Fitch to say that that's parol evidence, and the intent of Fitch should govern here. This comes from -- it all starts with --

THE COURT: I was just trying to figure out what discovery people wanted. It sounds like you guys don't -- this could be done on a timetable consistent with what the debtors have proposed.

MR. KIRPALANI: Provided that discovery is not necessary to our adversary proceeding --

THE COURT: Right.

MR. KIRPALANI: -- which we don't believe it is, and that's why we set forth our letters.

THE COURT: I don't think anyone is really saying that it is.

MR. KIRPALANI: Your Honor, can I just address the practical issues?

THE COURT: Am I right about that?

MR. KIRPALANI: This --

THE COURT: I mean, you aren't looking -- it sounds like you weren't looking for it either. They're not looking for it, they're not looking to introduce parol evidence.

MR. KOZUSKO: No, Your Honor, we're not looking necessarily to use parol evidence --

THE COURT: All right.

MR. KOZUSKO: -- although we do think that certain language in the indenture that the trustee cites is potentially susceptible to multiple interpretations.

THE COURT: So it's going to be a documentary case then, right, including the Fitch document and everything else.

MR. KIRPALANI: Right, it seems like that.

THE COURT: And even -- let's go to the last point on this, then, which is experts. Is either side contemplating some sort of professor or ex-I don't know what, head of bond trading at Lehman Brothers who would testify that this is what

this means? I would hope not?

MR. KOZUSKO: Not for us, Your Honor.

MR. KIRPALANI: No, we don't think it's necessary, Your Honor, but --

THE COURT: So this is simple.

MR. KIRPALANI: This is simple.

THE COURT: Okay.

MR. KIRPALANI: I agree with that. That's why our timetable had it potentially resolvable by July 28th, but -- and without Your Honor yet ruling on when confirmation would be, we know we have until October under the outside date, which is why we thought our schedule made the most sense. We weren't playing gamesmanship. We weren't --

THE COURT: No, I said nothing about that.

MR. KIRPALANI: We've been accused by it in multiple papers. I'm happy Your Honor laughs when you read those things, but --

THE COURT: Okay.

MR. KIRPALANI: -- we take it seriously.

THE COURT: Okay.

MR. KIRPALANI: But there still remains another practical problem. If we -- are we to engage in discovery -- right now, if the debtors are right, the value of the debtor has absolutely no relevance to us, right?

THE COURT: Right.

MR. KIRPALANI: Whether the make-whole should be paid or not paid, and the indubitable equivalent of their take-back paper, or whatever is given to them, makes no difference, because we get nothing. Do we need to engage in all discovery relating to potential valuation in the event that if this is going to be litigated in connection with confirmation, so will valuation. And even if the Court denies confirmation because they have misread my indenture, would the valuation evidence be law of the case now, or will there be another opportunity? It's important, Your Honor, because we're spending money on trying to litigate the issues we think are relevant in the most judicious way.

THE COURT: I'm sorry, maybe I'm -- if I don't confirm the plan --

MR. KIRPALANI: Right.

THE COURT: -- then we're at square one, we wouldn't have a valuation contest.

MR. KIRPALANI: Okay. So then whatever findings Your Honor makes, whatever evidence Your Honor makes on projections, discount rates, multiples, comps, whatever, irrelevant.

THE COURT: There wouldn't be a ruling. I would just say the plan --

MR. KIRPALANI: There wouldn't be a ruling.

THE COURT: -- can't be confirmed.

MR. KIRPALANI: There wouldn't be a ruling, but there

will be evidence, which I would prefer not to partake in.

THE COURT: You can stand up and say, this is not binding on me for purposes of this particular plan.

MR. KIRPALANI: Yes. That's all I wanted to confirm.

THE COURT: The only thing that would be binding on you is the things where you actually litigated and you --

MR. KIRPALANI: But the fact that I'll be sitting here, at counsel table, and not saying anything when I hear testimony --

THE COURT: You can say it once at the beginning, and that'll be enough.

MR. KIRPALANI: No, no, I don't need to say it again if Your Honor says it today.

THE COURT: Well, I think you -- I wouldn't blame you if you did --

MR. KIRPALANI: Okay. I think that --

THE COURT: -- say that as far as we are seeking to defeat this plan on one grounds, and one grounds only, but that does that mean that if we win, the evidence on valuation will be binding on us, because we're not -- that's not at issue.

MR. KIRPALANI: There'll have to be a new plan with a new valuation --

THE COURT: Correct.

MR. KIRPALANI: -- and new contemporaneous --

THE COURT: Correct.

MR. KIRPALANI: -- evidence. Yes, Your Honor?

THE COURT: Okay.

MR. KIRPALANI: Thank you, Your Honor.

MR. MOELLER-SALLY: Good afternoon, Your Honor, Stephen Moeller-Sally, from Ropes & Gray, for Wilmington Trust National Association, the 1.5 lien trustee.

Let me start by saying that the 1.5 lien trustee has no objection to all discovery, including in the adversary proceedings and confirmation, proceeding simultaneously. We understood that that was the nature of the debtor's motion. Our principal complaint is a question of timing, and we have, essentially, two species of timing complaints. One is a timing complaint that relates to the solicitation of the plan. And the second relates to the timing of the discovery and the need for that to happen in an orderly process that allows people to do so in a meaningful way.

I know you've been asking people about what discovery they might take, so let me jump to that before I say anything else.

THE COURT: Okay.

MR. MOELLER-SALLY: On the make-whole litigation, we think that expert discovery may be involved. We might call an expert to testify to industry custom and practice, in terms of make-wholes in indentures. It is also possible that we might need expert testimony on the pricing of the notes at the time

the deal was entered, which may have an impact on, or be germane to the question of whether there were assumptions about payment of the make-whole upon default or not.

Obviously, you take the confirmation hearing separately. We have a whole host of potential expert issues and include valuation, that include cram-down interest rate and, sort of, the normal cram-down litigation and confirmation.

THE COURT: Well, the valuation of your recovery, right? I mean --

MR. MOELLER-SALLY: Correct, correct.

THE COURT: Okay.

MR. MOELLER-SALLY: Although we may also have a valuation issue -- and this is why we think that, actually, all three adversary proceedings and confirmation should proceed simultaneously -- if it turns out that valuation leaves the 1.5 liens with a deficiency claim, then we have a potential interest in the subordination litigation. That may be a litigation that affects us. And we think that we should not be forced to rush into that dispute without having an opportunity to do discovery along with all our other confirmation issues and understand what the valuation risks are.

THE COURT: Well, we just -- the people who are primarily involved in that dispute agreed that there didn't need to be any discovery except for getting the documents together on that dispute.

MR. MOELLER-SALLY: And the sole point I'm making, Your Honor, is that we believe that that litigation should go along --

THE COURT: Right.

MR. MOELLER-SALLY: -- with confirmation --

THE COURT: Okay.

MR. MOELLER-SALLY: -- and the other adversary proceedings. That's all.

THE COURT: But you're not contemplating additional --

MR. MOELLER-SALLY: No, we're not contemplating additional discovery --

THE COURT: Okay.

MR. MOELLER-SALLY: -- except to the extent that we do discovery on valuation in connection with confirmation.

So that is a summary of the kinds of discovery that we have on the expert side. In terms of fact discovery, we would certainly want to do discovery on the negotiation and drafting of the notes. We would want to do discovery on negotiation and drafting of the plan, in terms of what was contemplated in the treatment of the notes.

THE COURT: Why would you -- I don't follow that part.

MR. MOELLER-SALLY: One of the questions that's going to be raised in our adversary proceeding is whether the treatment under the plan is a redemption. And so there's going to be a question as to -- for example, the debtors have

admitted that this is a balance sheet restructuring. So essentially, what they're doing with the first-liens and the 1.5 liens is refinancing. That is a fact that may have some bearing on whether the Court decides that the treatment we're getting under a plan is a redemption.

THE COURT: But with the financing, you get the make-whole. If you're given notes, you get the make-whole.

MR. MOELLER-SALLY: If we're given note -- the plan treatment, just to be clear, is not take cash with no make-whole or take notes with the make-whole. The plan provides us with a treatment that says take cash if you accept. And if you reject, you get whatever's decided.

THE COURT: Okay.

MR. MOELLER-SALLY: It's not --

THE COURT: You're right.

MR. MOELLER-SALLY: -- a settlement offer that way.

THE COURT: You're right.

MR. MOELLER-SALLY: So we're still litigating over the make-whole in the confirmation contract.

THE COURT: And you're saying that --

MR. MOELLER-SALLY: Yep.

THE COURT: -- those notes would be -- I understand.

MR. MOELLER-SALLY: That's right.

THE COURT: Okay.

MR. MOELLER-SALLY: So --

THE COURT: But that's fairly limited discovery, then.

MR. MOELLER-SALLY: That's probably fairly limited discovery.

THE COURT: Okay.

MR. MOELLER-SALLY: On the fact side, in terms of confirmation, we may also need some discovery on the current financial state of the company at the time of emergence, just so we could understand the value of the replacement notes we may be receiving if the class rejects. So those are the types of things that -- the types of discovery that we would imagine taking in connection with both the adversary and confirmation.

THE COURT: Okay.

MR. MOELLER-SALLY: And as I said, we're fully willing to proceed with both the adversary and confirmation simultaneously.

THE COURT: Okay.

MR. MOELLER-SALLY: Let me pause --

THE COURT: And can you, two-track it? I mean, there's the cram-down issues, separate and apart from whether there's a make-whole in there or not, really contemplate different teams, I would think. I mean, you have different experts; you have different set-up things to think about. They're valuation-related; they're interest rate-related, et cetera. Can you two-track that?

MR. MOELLER-SALLY: I think that we would be willing

to two-track that. I think just to pause on one of our points with relation to the discovery schedule, as it's been proposed by the debtors, and something that we've tried to cure in our alternative schedule, and maybe it makes sense for me, right now, to -- I've a demonstrative that just sets the two schedules side-by-side, if I may approach?

THE COURT: Okay, sure. Thanks.

MR. MOELLER-SALLY: So one of our -- just in terms of the process that the debtors are proposing, they've said that August 14th is the be-all and end-all date and that the only thing to do is to work back from there and cram in discovery of all kinds, fact discovery, expert discovery, et cetera, all into that very short period. The problem is, is that what their schedule does -- and this is illustrated by the side-by-side time line -- is it requires expert discovery to begin, and nearly be completed, before fact discovery is even completed.

In our view, this is just a violation of standard custom and practice. You set the factual record, and once you have the factual record, the experts can decide on what basis they're going to make their expert opinions. And you do the reports; you go back and forth. And the proper sequence for this, and the proper sequence in any litigation, is to complete fact discovery before proceeding to expert discovery.

Now, if we are to work with the Court and work with the other parties to do a dual track, it may happen that fact

discovery on one track may be a little shorter; expert discovery may be a little longer. We need to sort out all those issues; that's not a proposal that's currently in front of the Court today. And that's something that I think the parties would have to retreat and discuss, with the Court's guidance, on what's appropriate for that. But just fundamentally, mashing together expert discovery and fact discovery, we think, is inappropriate, and that the final discovery time line, whatever it may be, or the final dual-track discovery time lines, should only allow for expert discovery after the factual discovery is completed in each case.

THE COURT: Well, what facts would the experts on the make-whole need to know?

MR. MOELLER-SALLY: On the make-whole --

THE COURT: Aren't they just talking about general custom and practice in the industry?

MR. MOELLER-SALLY: I think on the make-whole, it would be -- I mean, I think you're talking mostly industry custom and practice, and you're talking about -- I guess the facts would be what I mentioned earlier about the pricing of the notes and negotiation and documentation of the notes. We'd want to see drafts; we'd want to see how the --

THE COURT: But the experts can give their opinion based on assumptions on that. If it's X, it's one thing; if

it's Y, it's another. They don't need to know the pricing. In fact, their expert opinion, to my mind, would be more meaningful if they just said custom and practice -- if it's priced a certain way, is X, and if it's priced a certain other way, it's Y.

MR. MOELLER-SALLY: That may be true of the pricing issue, but then there is simply -- there is the language issue and looking at the indenture and having indenture precedents and having drafts, understanding the precedents from which our current indenture was derived. That's information that we would want to have in connection with the make-whole litigation.

THE COURT: They can get that pretty quickly; can't they? I'm assuming you people have been looking at this for the last three months. I'm assuming your clients have been pricing it and asking some people to write memos about it, so they can decide whether to buy or sell this debt. You're not starting from square one, in other words.

MR. MOELLER-SALLY: We're not arguing that we are, necessarily, Your Honor, but we are -- we would like the opportunity to take discovery in connection with this, both some limited facts discovery and some expert discovery.

THE COURT: But I guess -- so the substantial completion of fact witnesses, you pretty much have the same --

MR. MOELLER-SALLY: That's right.

THE COURT: -- couple days, which is over a month from now. The parties should be able to identify the underlying documents today, right? And as far as any precedents upon which they're to be made, wouldn't that be a document request? So that's July 9th, or July 7th in your -- so that -- it's just the documents.

MR. MOELLER-SALLY: That's right. I mean --

THE COURT: So you don't need to --

MR. MOELLER-SALLY: -- Your Honor, just to be clear, if you look at our schedule, we're -- we have not --

THE COURT: No, but what I'm saying is, I don't see why the experts would have to wait several months -- several weeks after the documents are produced to write their report. I mean, they could write it very shortly after the documents are produced.

MR. MOELLER-SALLY: Well --

THE COURT: I mean, if they're experts, they should know what these documents mean, right? I mean, once they see it, they don't have to do a lot of research; they're experts.

MR. MOELLER-SALLY: I take your point, Your Honor, and again, if we're going to dual-track the adversary and the confirmation litigation, in terms of the schedules, that it may be appropriate to have shorter fact discovery for one or the other and longer expert discovery for one of the other; we're not --

THE COURT: Well, yeah.

MR. MOELLER-SALLY: -- we're not disputing that.

THE COURT: I mean, my thought was that right now I've reserved five days for a confirmation hearing. That would tie the longest trial I've ever had. And it's not for want of having difficult matters. I just -- I don't have long trials. And all of you are on notice of that. And I do trials -- and this'll be baked into any order -- any witness under the party's control submits a declaration or an affidavit, so we don't have direct testimony. You can cross-examine that person; they need to be here, but -- and you're to agree on all of the -- on the admissibility of as many exhibits as possible and have a joint exhibit book.

And so I believe I could do a confirmation hearing in five days here. But I also think that the cram-down aspect of it should be at the back end. And if the schedule isn't working, my inclination would be to add a couple -- move that back end to a later time. But I'd like the parties to try to make it work. That's the aspect of it that gives me pause, not the make-whole and subordination issue but the cram-down issue. That may, depending on how it goes, take more time.

MR. MOELLER-SALLY: Your Honor, we totally agree with you. And that's one of the reasons why we think that the current confirmation date is unworkable, because --

THE COURT: Well, not if you do the cram-down part at

the end and reserve the ability to adjourn it from the 21st and 22nd to some date in September if I learn, in the July period, that you legitimately need some more time. I'm not sure you will. I mean, you're at the top of the capital structure. So valuation issues aren't that important.

And I'm on record on this, and I'll say it again, I believe in following the Supreme Court. And the Supreme Court in Till said what it said.

MR. MOELLER-SALLY: The Supreme Court in Till said what it said --

THE COURT: So I'm not going to have a twenty-day trial on discount rates; I'm not going to do that.

MR. MOELLER-SALLY: But the Supreme Court said what it said in terms of applying an interest rate in the absence of market rate.

THE COURT: No. If you read footnote 14, what they said is, a real market is zero. Now, we as bankruptcy lawyers may disagree with that. But we're not the Supreme Court; the Supreme Court has spoken. There's a range: one to three percent plus a risk premium. My colleagues have followed it in the Southern District, and I'm on record for several years. And the case law is turning in that way at the circuit level. I don't see how the Fourth Circuit could have overruled the Supreme Court. But luckily the Second Circuit hasn't, and the Supreme Court has said.

So I don't think that's a big issue. There may be some issues on valuation and the like, but the discount rate isn't the issue. You could take that up to the Supreme Court and see if they wanted to change their mind.

MR. MOELLER-SALLY: And perhaps we will, Your Honor.

THE COURT: Okay.

MR. MOELLER-SALLY: The question for today, though, let's go back to the discovery schedule --

THE COURT: No, I --

MR. MOELLER-SALLY: -- the question for today is, again, we agree with you, the confirmation and the adversary should go on at the same time.

THE COURT: Right.

MR. MOELLER-SALLY: So the question is, while it may make sense to dual track, there might be different teams doing it and things like that. If we're ultimately dealing with the same range of end dates --

THE COURT: Right.

MR. MOELLER-SALLY: -- we've got to deal with the realities --

THE COURT: Look --

MR. MOELLER-SALLY: -- of discovery.

THE COURT: -- this is relevant for today, because there are deadlines in the RSA.

MR. MOELLER-SALLY: That's correct.

THE COURT: What I want the parties to do, and I believe this is consistent with the RSA, is to meet promptly and confer about the cram-down aspect of this and come up with the shortest possible schedule you can come up with. I am comfortable with the debtors' schedule as far as the make-whole aspect of it. I'm not yet comfortable on the cram-down part, but I believe that -- my inclination, at least, is that we specifically reserve those issues for the 21st and 22nd, and if, in fact, the discovery is just not working, I'll give you more time. Or if after you meet and confer -- because after all, it's the debtors' burden; they want to put on a good case -- the debtor decides they'd rather have a couple more weeks, we'll be in September.

MR. MOELLER-SALLY: Before we get too far down this road, I did want to mention one scheduling issue related to solicitation. The treatment of the first-liens and the 1.5 liens is actually unprecedented. We have a so-called toggle plan, where if our holders vote in favor of the plan, they get cash, as we discussed, and if they reject the plan, the get replacement notes in some amount. Maybe it's going to be par plus crude; maybe it's going to be par plus crude plus the make-whole. No one knows.

So our holders are basically faced with a choice, how to vote on the plan. Is it favorable; is it not? That's the choice that everybody has. Our holders have a choice that,

again, is unprecedented. We're either being asked to accept the plan and take one form of currency or reject the plan and take another form of currency in a totally unknown amount.

Now, we accept that there are plenty of times when parties vote for plans and don't know what the ultimate amount of their distribution is going to be. But they have a single proposed treatment. And they can choose to accept that treatment or reject that treatment. We're in a position where we have alternate treatments. We have alternate treatments that are, in fact, not up to each individual to choose. We don't have an option. We basically vote to accept, vote to reject. To the extent the class votes, each individual creditor is bound to either accept cash with no make-whole or take replacement notes in some unknown amount.

I'm jumping ahead, if you'll forgive me, to disclosure statement standards. But our contention is that a hypothetical investor, typical of a note holder, would not be able to make that decision without knowing the amount of the make-whole.

THE COURT: I'm sure they've talked to their lawyers about that and figured out what the risk would be. I mean, life is full of uncertainty.

MR. MOELLER-SALLY: Life may be full of uncertainties. We do want to respond to the cases that the debtor cited that simply don't apply to this instance. In one case, it was the K-V Discovery Solutions case; the question was the size of the

pool. That's fine. Everybody deals with that on a regular basis; that's not an issue. In another case, it was a litigation trust; nobody knew what the litigation was going to be worth. Again, that's fine. The also cite to A&P --

THE COURT: Isn't this a litigation?

MR. MOELLER-SALLY: What's that?

THE COURT: Isn't this a litigation?

MR. MOELLER-SALLY: Again, it's a toggle plan. It's not --

THE COURT: No, but isn't the issue --

MR. MOELLER-SALLY: -- it's not --

THE COURT: -- isn't the uncertainty a litigation issue?

MR. MOELLER-SALLY: The uncertainty is a litigation issue; that's correct.

THE COURT: Okay, and these are -- the people that own this debt, I think -- tell me if I'm wrong -- they're not grandma, right? Although actually --

MR. MOELLER-SALLY: I think --

THE COURT: -- actually, my grandma --

MR. MOELLER-SALLY: There --

THE COURT: -- would actually be --

MR. MOELLER-SALLY: I believe that --

THE COURT: -- pretty sharp on this, but they're not -- they're institutional investors.

MR. MOELLER-SALLY: I believe that the notes are registered, Your Honor, and I don't know that we necessarily know whether they're all institutional investors.

THE COURT: They have an indenture trustee, too --

MR. MOELLER-SALLY: They do have an indenture trustee, that's correct.

THE COURT: -- who's able, and I guess could make a recommendation on it, too. But in my experience, literally personal experience, institutional investors, as part of their business, hire lawyers to help them decide litigation risk. In fact, many institutional investors overdo that. Their whole investing model is based on that. They can do it. If you can handicap the risk of a civil war in Iraq, you can certainly handicap the risk of a dispute over make-whole and probably settle it.

MR. MOELLER-SALLY: Your Honor, we're certainly open to any reasonable settlement discussions on the make-whole at any time.

THE COURT: Well, I --

MR. MOELLER-SALLY: There's no question about it.

THE COURT: -- I've thrown it out twice now.

MR. MOELLER-SALLY: Our issue here is just simply we're being presented with a choice, that holders --

THE COURT: I'm not -- look, we are jumping ahead with the disclosure statement, but I don't believe it's appropriate

to hold up voting on a plan when there's a -- an issue like this. I don't think it -- it doesn't affect the business. It affects one class, and that class is sophisticated and has sophisticated people representing it. And the issues are pretty clear. And if anyone really is that bothered by it, they can get involved, as several people have. It's just -- it's not in the cards.

MR. MOELLER-SALLY: Well, Your Honor what I --

THE COURT: Part of -- part of the Bankruptcy Code is voting for compromise provisions. And people can vote.

The premise, as clarified by Mr. Dunne, is that this plan, if they vote no, gets them what they're entitled to under the law. That's -- that's not a bad choice. You get all your principal and accrued interest in cash -- some people like cash -- or you get notes, to the extent that the law requires.

MR. MOELLER-SALLY: But again, Your Honor, just --

THE COURT: It's not a big deal.

MR. MOELLER-SALLY: -- to be -- but it's not a big deal, but again, we're being presented with a case where individual holders are going to be bound by the class vote. The person who likes cash --

THE COURT: That's -- talk to Congress about that.

MR. MOELLER-SALLY: -- may not get cash.

THE COURT: That's what bankruptcy's all about.

MR. MOELLER-SALLY: Well, I don't know. We look at

the A&P case, and in the -- the debtors cite the A&P case, and the choice there was you vote yes, you get cash with no make-whole. You vote no, you can either opt cash or no make-whole or you could get notes in whatever amount is determined by the court.

We think that would sort of resolve the disclosure issues and basically give our holders a choice that they could reasonably make. And then those people who want to spend money on lawyers, and go consult, and figure out whether they want to take the flyer on the litigation, they can do that. But the party who is being carried along against their will doesn't have to sacrifice the --

THE COURT: Well, that was --

MR. MOELLER-SALLY: -- option for cash.

THE COURT: -- that was a compromise solution. People can negotiate something like that if they want to. And again, as far as the cost and the risk, people are free to do that, which is why, again, I think I'd rather not have this drag out more than potentially a couple more weeks after the debtors' schedule if you cannot see your way to a reasonable period for dealing with the cram-down issues, which again, I understand what people are saying today. It may not even be an issue. Conceivably, people would rather have cash. They could go invest in the equity once they get the cash and buy it from Fortress.

MR. MOELLER-SALLY: Last thing, last comment then, Your Honor, is I don't know what decision you're going to make about the debtors' schedule and what litigation it should apply to and whatnot.

THE COURT: Well --

MR. MOELLER-SALLY: We just respectfully request that, whatever the schedule is, that we not be put in a position where experts have to start doing -- I mean, they can start and we can maybe have deadlines that sort of reflect their ability to start on their work, but that we don't have full expert discovery and reports going, which is what the debtors' schedule provides: reports being written, both initial expert reports, and rebuttal reports, before the factual records close. That just doesn't any sense.

THE COURT: Well, I -- again, I think this should be divided in two. I don't believe that you'll be having expert reports written before the -- relevant to them -- factual record is closed on the make-whole issue. I think that for the cram-down experts, we need to rethink that. And I'll impose a schedule on Monday, if you aren't able to suggest one to me together, after meeting and conferring today and tomorrow about it, on that aspect of it.

On the other one, the debtors point out it's supposed to be rolling discovery. They need to -- the documents need to set out -- and it's early enough; it's July 9th -- they need to

set out what the models were for the indenture. I mean, there's nothing -- there's really nothing more than that, I don't think. I mean, I -- what's the expert going to say? I mean, at some point, if the expert's just commenting on the facts, I could do that. I mean, it's just, in this context -- not in the -- not in the cram-down context.

MR. MOELLER-SALLY: Okay. I have nothing further, Your Honor. Thank you.

THE COURT: So but on -- so I think, to be clear then, I'll impose a schedule on Monday, if you can't agree on one. I really want you all to meet and confer over the next couple of days, focusing on really two things: first and foremost on the cram-down case and the fact discovery for that, and the expert discovery for that, because my belief is that, at best for the debtors, it would be the last couple of days of the case and with a caveat in the discovery ruling that if this isn't -- because I think it's going to be very tight -- if it isn't working, I'll adjourn the cram-down fight for a couple of weeks, so that you could have that extra time.

And then the second thing to focus on is making sure that the -- but I think it's here, the production of documents is complete for the make-whole experts. Right now, it's really only a week before their report's due. I think you should be able to get it in more than that, just for the make-whole people. I think you should be able to get that in, at least by

the end of June. I mean, I think you've probably identified the documents already. So that would give them three weeks to think about it.

MR. MOELLER-SALLY: Okay, the only last thing that I'll say is in light of Your Honor's comment, concerning the flexibility in the schedule and potential adjournments as a result of the cram-down litigation, we would respectfully request that any approval of the RSA or any other document with milestones that that --

THE COURT: To have that flexibility in it.

MR. MOELLER-SALLY: -- adjournment might trigger, that --

THE COURT: I would be -- I would contemplate an outside date for the confirmation hearing on September 14th, I think, just to be safe.

MR. MOELLER-SALLY: Okay, thank you, Your Honor.

THE COURT: And that's to accommodate the discovery on the cram-down. I mean, obviously if there's no cram-down then you don't need to go that far. I'm still keeping these four days, five days.

MR. BOGDANOFF: Hello, Your Honor. Lee Bogdanoff again for the creditors' committee. I just wanted to make one suggestion, and we certainly heard Your Honor's strong view that both subordination and make-whole adversary proceeding issues should be resolved in conjunction with confirmation.

The subordination issue is a gating issue. The plan fails if the RSA parties fail to prevail on that question. And I would suggest that it might be appropriate for the Court to take that up first at the confirmation hearing.

THE COURT: That's prob --

MR. BOGDANOFF: We may get some guidance from you.

THE COURT: Yeah, that's fair. That's a good point.

MR. BOGDANOFF: Thank you, Your Honor.

THE COURT: After the preliminaries. So can you all meet and confer on that? But my hope would be that you would be able to have an earlier date for the production of documents on the make-whole, like the end of June, and then talk about your experts and what they would need on the cram-down.

MR. FELDMAN: We will meet and confer, Your Honor. I think we've got enough guidance. We ought to be able to adapt our schedule. But if not, we've heard you.

THE COURT: Okay, and as far as the RSA is concerned, I mean I think that the date -- the only date that has been giving people pause was the August 22nd date, and I would like to extend that, for a couple of reasons, to September 14th.

MR. FELDMAN: I'm sorry, Your Honor, September 14th?

THE COURT: To September 14th. You've heard me loud and clear: that's only if it's necessary. I'm mean, I've reserved this time already through the 22nd, and my intention, if it's all possible to do that, but I don't want to trip

people up on either making their case or defending their case. And I think that September 14th is a reasonable time for the plan proponents. It still leaves a month, in essence, to close.

MR. DUNNE: Your Honor, I don't have that authority right now, but I suspect we'll get it.

THE COURT: Okay.

MR. DUNNE: And that's a reasonable date.

THE COURT: Okay. So then I think that leads us back to the restructure and support agreement and the backstop agreement. And I appreciate the work that the debtors, the second-lien lenders, and the committee have done to resolve objections. I'll note that issues that had been raised that were resolved were ones that I had real concern about, and I believe they've been appropriately resolved.

The remaining objections, however, still need to be dealt with, and before turning to them specifically, I should note the context in which I'm evaluating this motion.

The debtors have stated that whatever context -- I'm sorry, whatever standard I apply to the motion, they will -- they would meet it, recognizing as they must that they have the ultimate burden of proof here. And they have listed those standards as from hardest to meet to most easiest to meet: the heightened scrutiny standard by which a court closely examines transactions involving insiders.

Second, a business judgment standard that is not the corporate law business judgment standard with a substantial deference, as long as procedural formalities have been met.

Two (sic), the debtors' business judgment as set forth, in, for example, In re: Integrated Resources, Inc., 147 B.R. 650 (S.D.N.Y. 1992), which applied that standard only by analogy at 656.

And I should note that, at least under Delaware law, even that standard is not a free pass as the Delaware Chancery Court held in Clements v. Rogers, 790 A.2d 1222, 1247 (Del. Ch. 2001), "A fully functioning special committee, at best, shifts the burden of proving fairness to the plaintiff," in this case the objectors.

And then finally, rather than the business-judgment standard that I was referring to in option number two, which is the Court's determination of whether the proposed transaction makes good business sense.

There is the third standard, which is the easiest to meet, which as noted by the Integrated Resources court, and as I've cited from Clements v. Rogers, is not a free pass. It has a greater degree of deference being given to the determination of the board, where the board is not dominated or unduly affected by an insider.

I am satisfied that the heightened scrutiny standard should not apply generally to this motion. The debtors'

controlling shareholder is a party to both of the agreements that the debtors are asking me to approve -- Apollo, that is -- not acting in its capacity as a shareholder, of course, but as a creditor and as a potential backstopping party on a rights offering. But they're not the only creditor, and more importantly, are the only party to those agreements on the creditor side or backstopper side.

But more importantly, the debtors have represented to the Court, and I accept the representation, that these transactions not only reflect the active advice and involvement of the debtors' professionals, counsel, and financial advisors, but also were independently reviewed by, and recommended by, and voted in favor of by the independent directors constituting an independent -- knowing that their independent review has critical importance.

These were pre-petition transactions, but they did contemplate a future bankruptcy case. In fact, the backstop commitment agreement isn't truly effective until Court approval. And in light of that, I infer that the independent directors not only were aware of the nonbankruptcy corporate law requiring their active involvement, but also the bankruptcy law, and took their duties seriously.

On the other hand, I have never believed, given the plain terms of Section 363(b) and Section 365 of the Bankruptcy Code, which require court approval of transactions out of the

ordinary course, and the assumption of an executory contract, that the Court should apply the nonbankruptcy business judgment test. In fact, the context is wholly different.

The nonbankruptcy business judgment test is applied after the fact, primarily, where people have challenged a transaction that's already happened, whereas, the Bankruptcy Code requires notice of a hearing and court approval of a transaction that is being proposed.

Thus, I believe, and I believe this is consistent with the Second Circuit case law, that the Court ultimately must make its own decision as to whether the proposed transaction makes good business sense and is in the best interests of the debtor and fair and equitable.

The degree that the Court scrutinizes the transaction increases when there are meaningful objections to it, consistent with the construct of 363(b) and 365, which highlights the need for independent review by the Court as informed by the parties.

I believe, and have held for many years now, that this is also laid out by the Second Circuit in In re: Orion Pictures, 4 F.3d 1095 (2d Cir. 1992) where the Second Circuit refers to the bankruptcy judge exercising his or her judgment in reviewing, in that case, the assumption of an executory contract. And I believe that's the right approach to take.

So the issue for me is whether, in light of Orion and

Lionel and the other cases set forth by the parties under which a proposed transaction that is not fundamentally or primarily an insider transaction should be reviewed, whether this transaction makes good business sense, is in the best interest of the debtors, and is fair and equitable.

The remaining objections have been dealt with on today's record, and I'll go through them in no particular order. The remaining objectors really fall into two groups. There are representatives of sub-debt holders and representatives of first and 1.5 lien holders, each of whom are currently unhappy with the debtors' proposed plan which is the subject of the restructure and support agreement and which is in some respects a lightning rod for, or trigger for the fee to be earned under the backstop commitment agreement.

The timing issues or the objections to the plan -- I'm sorry, to the structure and support agreement and the backstop commitment agreement that have been raised I've already dealt with. There are deadlines for the effectiveness or the continued effectiveness of these agreements -- in both agreements. One of those deadlines is an August 22nd confirmation date. Although with all of the deadlines dependent upon the bankruptcy court, there is a recognition in these agreements that it is subject ultimately to reasonable discretion of the bankruptcy court to comply with the general time line the parties have set out.

And I agree that under certain circumstances, it would be unreasonable to have a drop-dead date of August 22nd for the confirmation of the debtors' plan, for the reasons I've stated earlier today, and believe that the proper date should be September 14th instead. No other deadlines have been quarreled with, as far as I can tell.

The deadlines themselves are not particularly important here, in terms of actual monetary effect, except for the fact that the passing of a deadline without the event taking place would trigger the right to the backstop purchasers to have a claim for thirty million dollars in cash. And I believe, again as I said, that it is unreasonable to fix August 22nd as a deadline for that event, although fixing September 14th would be reasonable.

A related objection is as to another trigger in the agreement that there be a agreed-to shared-services agreement. The deadline for that agreement has been extended to I believe a reasonable date at this time, and no one has objected to the new extension.

On the other hand, parties have objected to the fact that given the potential ability for backstop parties, including Apollo, to be not only involved in the negotiations over the SSA, but also involved in a way that might give them an ability to cause that condition to fail, and therefore trigger a thirty-million-dollar cash obligation on the part of

the company, the approval of this agreement would, in essence, let the wolf into the henhouse.

I don't agree with that view, given two changes that have been made to the agreement since the objections were originally made. First, the change that was agreed to between the debtors and the plan support parties, including Apollo, and the creditors' committee as to the condition that the fee would not be earned if the failure to meet the deadline was caused by a party to the -- by that party's acting on a good faith with regard to the negotiations of the SSA.

Secondly, the parties have agreed to add an exception to the exoneration provisions and indemnity provisions that run through these various agreements, to also carve out breaches of fiduciary duty, if any. I believe, particularly given the microscope that is placed on Apollo in this case by the various objecting parties, that, in fact, with those protections it is unlikely that any party, but particularly Apollo, would use the SSA negotiations in a way that would jeopardize not only its thirty-million-dollar -- share of a thirty-million-dollar trigger on its backstop fee, but also its position in the whole case. So I do not believe that objection should be sustained.

It's also argued that the indemnification provision in the backstop agreement, which is a broad indemnification provision, unduly risks the estate's payment under that indemnity with respect to nonbankruptcy court -- or litigation

that has been commenced in -- not in this Court, but in another court, by the trustees for the senior secured debt.

And I certainly can foresee a circumstance where this indemnity might be triggered, notwithstanding its carve-outs, which as I said, have been expanded on the record today to include breach of fiduciary duty, if that litigation proved to be successful for the plaintiffs.

On the other hand, I accept the argument made by counsel for the debtors as well as the ad hoc committee, that given the plan itself which contemplates either acceptance of the plan by those classes of creditors or a cram-down treatment that would pay the creditors in full, that the amount of indemnification would be meaningful, particularly when weighed with the risks of whether that lawsuit would prove to be successful in the first place.

So I do not believe that the indemnification language should be changed as contemplated or suggested by counsel for the first and 1.5 lienholders.

The order has clarified that this indemnification is not intended -- that means including by the Court -- to -- since it's the Court's order, to in any way affect the lienholders' rights in that nonbankruptcy court litigation, and in fact, that that issue has been taken care of before the hearing.

I believe that the solutions negotiated by the debtors

and the creditors' committee have adequately addressed the other objections by the indenture trustees and the holders of both the subordinated notes and the senior notes.

That leaves the other objection which was made by Fortress and joined in by two other holders of second-lien debt. That objection goes to a discrete issue.

Under the debtors' proposed plan, there will be a 600-million-dollar rights offering. It is clear to me that that rights offering has substantial value to the debtors, and it was equally clear to me that there is substantial value to the debtors in having a group committed to that rights offering. And here, eighty-five percent in dollar value of the class is, in fact, committed through the RSA and the backstop agreement, subject to Court approval, to the rights offering.

The rights offering itself will be available to all classes -- I'm sorry, to all members of the class. That is, all members of the second-lien class will have the right to participate in the rights offering at a fifteen-percent discount to plan value, which is 2.2 billion dollars.

The issue that is raised by the Fortress objection is whether the fee proposed in the backstop agreement to backstop the rights offering is a proper fee. I should note that the fee is derived from Sections 3.1 and 2.2 of the backstop agreement.

Section 3.1 says, "Subject to Section 3.2, as

consideration for the put option, the backstop commitment and the other agreements of the commitment parties in this agreement, the debtors shall pay or cause to be paid a nonrefundable aggregate premium in the amount of thirty million dollars, which represents five percent of the rights offering amount, without application of the discount to equity value payable, in accordance with Section 3.2, to the commitment parties, in accordance with their commitment percentages."

3.2 provides that "The premium shall be fully earned and nonrefundable and nonavoidable upon entry of the BCA approval order," i.e. this Court's order approving the agreement, and shall be paid in either -- "and that amount shall be paid either in stock or become a cash obligation under certain circumstances."

The put option as the meaning set forth in Section 2.2, under its definition, and the put option requires each commitment party to purchase unsubscribed shares on the closing date. At this time, unsubscribed shares only represent fifteen percent of the 600 million. Moreover, the objectors on this ground, including those who have joined into Fortress' objection, have said publically that they would commit also or will commit also to their share, which they represent takes the -- would take the unsubscribed shares down to about ten percent.

They are willing to receive and participate in the

backstop under 2.2 of the agreement, only based on a percentage of the remaining unsubscribed shares. That is, their pro rata share would not be based on five percent of the whole 600 million but only five percent of ten percent of 600 million. I'm using the ten percent roughly.

The objection, therefore, raises the issue what is it that the debtors are paying or agreeing to pay thirty million dollars of value for, either in the form of five percent of the reorganized common stock, or thirty million dollars in cash, on the breach of various conditions under the agreement.

There was one witness put on in support of the motion: Mr. Carter. And on this point, his testimony was credible but vague. Most of his testimony on cross-examination was to the effect that the backstop agreement, including the thirty-million-dollar put-option fee, was negotiated as a whole in order to obtain not only a backstop, but also commitment to the funding of each member's pro rata share of the 600 million dollars, as well as their support for the plan, generally. I accept that testimony, which is somewhat reiterated in his supplemental affidavit.

He also testified that the board obtained advice from the debtors' professionals that the terms of the backstop agreement, including the thirty-million-dollar fee and the other terms, were reasonable as a whole, and as a whole, market-based. He testified, however, that that was based in

large part upon a discussion of comparable transactions. The debtors have offered up lists of comparable transactions that show a fee where this five percent would be in a range of those lists.

What neither Mr. Carter nor the debtors' exhibits have established, however, is how that fee related to what was not committed to, and therefore, what was being backstopped, as well as the other inducements to participate in the subscription to the offering.

And without that information, I cannot evaluate whether, in fact, this type of fee is proper. It appears to me clearly the case that based on the state of the play today, the record today -- where there is, at most, fifteen percent uncommitted, although more likely ten percent uncommitted -- a thirty-million-dollar fee is far outside of the range that has been quoted to me, which is roughly three to six percent. It isn't really the five-percent fee; it's more like a thirty-five-percent fee for that fifteen percent.

So standing alone as a fee, it doesn't make sense. It could only make sense as another inducement to commit to subscribe to shares. And, again, I have Mr. Carter's testimony that that was how this was ultimately evaluated.

On the other hand, I have two other potent pieces of evidence. First, the plan itself contemplates and offers up to the rest of the class subscription without the fee, just for

the fifteen-percent discount. Second, I have three institutions, not dissimilar to the institutions who have signed up to the subscription -- I'm sorry; the backstop agreement, which includes -- and the RSA, which includes a reference to subscribing to the 600-million-dollar offering -- who say they are prepared to do it on a very different basis with regard to the thirty million dollars; i.e., they're willing to subscribe now and lock themselves in and to have the fee calculated only on the unsubscribed portion as opposed to the whole 600 million. To me, that's very telling.

I appreciate the argument made by counsel for most of the signatories to this agreement -- all of them except Apollo -- that I would be rewarding Johnny-come-latelies and unduly changing an agreement that had been negotiated at a time when people were, in fact, taking more risk, and that there was value to the company in taking that risk. And I've considered that argument carefully.

I also note that if I rule so as to grant Fortress' objection, to some extent I would be playing chicken with the parties who have signed this agreement, because they have the right to walk on that basis, and no court particularly likes to do that.

And going back to the first point, it's well recognized in the case law, including, most recently, by Judge Lane in In re Genco Shipping and Trading Ltd., 509 B.R. 455

(Bankr. S.D.N.Y. 2014), that the Court should encourage -- as Congress has -- pre-petition negotiations, including agreements of this sort, on a generic basis. However, I believe that I need to view this agreement on today's record, i.e., based on the state of facts that exist today. I do not have any sense that this is, as far as the RSA/backstop parties are concerned, a plan that they are eager to get out of. I also have a strong sense that the thirty-million-dollar fee is imbalanced and not supported by the evidence, whereas a fee based on the truly uncommitted amount is.

Moreover, although this agreement was entered into pre-petition, it's effective only upon an order of the Court approving it. There's no rejection claim, on the other hand. There is an element of this agreement that does recognize the substantial contribution that the parties to the agreement have made, which is the provision providing for the payment of their fees and expenses, which I believe is appropriate, given the benefit to the debtors of having these agreements. But I do not believe that on top of the fifteen-percent discount, another five-percent VIG (ph.) is appropriate here, and I can't approve it.

It would not fall into the percentage rates that I've been shown is appropriate for a backstop agreement without also having evidence that all that was being backstopped was ten to fifteen percent of unsubscribed shares, nor do I have

sufficient evidence that a right that is being offered to all other members of the class for merely the fifteen-percent discount is not fair without another five-percent recovery which the rest of the class is not being offered.

That's not a plan ruling; it's just a ruling on basic fairness. So I would, based on the record today, approve the agreement with the two changes that I've outlined: the September 14th confirmation date and a commitment fee premised upon the actual unsubscribed shares as of today. But I cannot approve the agreement without those two changes, as well as the other changes that have been agreed to on the record.

MR. DUNNE: Your Honor, Dennis Dunne of Milbank Tweed (indiscernible). Just for the record, I don't know what the RSA signatories reviewed at (indiscernible). We may --

THE COURT: Right.

MR. DUNNE: -- (indiscernible). I do know that they're going to -- not do this without (indiscernible). There's no precedent for doing this completely without (indiscernible) fee, and I hear Your Honor saying that this simply wouldn't be appropriate. I just want to point out one thing. I suspect, with a high degree of confidence, that the three-to-six percent range was calculated across the entire amount. It didn't do the math you did. And when adjusted for that, I suspect it was different.

THE COURT: Well, you can certainly come back for

approval of that aspect of it on a proper record, and you can do that promptly, if you want to. I'm looking at Mr. Feldman, as well as your clients.

MR. FELDMAN: Your Honor, we clearly would like the opportunity to do that.

THE COURT: Right.

MR. FELDMAN: Obviously, we just want to establish (indiscernible) that would mean some discovery associated with that, of course, in creating that record.

THE COURT: Well, okay.

MR. FELDMAN: But that's fine, if you want to hold this over, we'll get a date, and we can come back before Your Honor, let market impose (indiscernible) evidence --

THE COURT: That's fine.

MR. FELDMAN: That's fine? Thank you, Your Honor.

THE COURT: Right. Or conceivably, it could be something that's worked out.

MR. FELDMAN: Understood. And that's a possibility.

THE COURT: I mean, again, my review of this is based on there being an objection.

MR. FELDMAN: Understood.

THE COURT: If all the parties who are participants in this agree that there's a fair amount that will get them to agree, it's a different issue.

MR. FELDMAN: Understood.

THE COURT: And I -- again, I don't believe that this is an issue that other objectors have raised, so I hope it could be dealt with promptly.

I don't believe it should -- I also don't believe it should hold up the other matters that are on the calendar today.

MR. FELDMAN: That's correct, Your Honor. We would be willing to proceed (indiscernible).

THE COURT: Okay.

MR. HANSEN: Your Honor, Kris Hansen with Stroock on behalf of Fortress and D. E. Shaw. I just wanted to -- you mentioned before -- you asked me a question earlier, whether or not our client would be prepared to take the backstop (indiscernible) on someone else's (indiscernible). We never really (indiscernible), so I have requested Mr. (indiscernible) an opportunity to (indiscernible).

THE COURT: Well, I mean --

MR. HANSEN: I just wanted to know --

THE COURT: That's fine. I mean, that aspect of this, to me, was not as big an issue; I know we all lived through 2008, and financial institutions that people thought would never disappear disappeared, but it seems to me that in the context of approving this agreement, that type of backstop would not necessarily be required unless it's market. I don't have the sense it's market.

MR. HANSEN: Thank you. Just wanted (indiscernible).

THE COURT: Okay. Do you want to turn to the disclosure statement, then?

UNIDENTIFIED SPEAKER: We do, Your Honor.

THE COURT: Okay.

MS. HARDY: Good afternoon, Your Honor; Jennifer Hardy, Willkie Farr & Gallagher, for the debtors. Your Honor, I believe, with our replies to the disclosure statement that was filed yesterday, and with some briefings here in the courtroom that was put on the record, I believe the actual disclosure objections and (indiscernible) objections have now been resolved, so -- with some additions, but --

THE COURT: Okay.

MS. HARDY: -- the disclosure statement has been (indiscernible).

THE COURT: Okay.

MS. HARDY: I don't believe there's any remaining objections.

THE COURT: Okay.

MS. HARDY: But I can go through this.

THE COURT: That's fine. Before you do that, I had one question.

MS. HARDY: Yes.

THE COURT: In a number of places in the blackline, there are either bracketed dollar amounts or brackets with no

amounts. How are you proposing to deal with that before it goes out for a vote?

MS. HARDY: Well, the brackets you were talking about relate to the fact that we are dual-tracking our rights offerings.

THE COURT: Right.

MS. HARDY: Two rights offerings, in essence, the 1145 rights offerings and the Section 482 rights offerings. And the brackets you're talking about relate to the split of the shares between what will be 1145, what will be 482. And we had the various financial advisors to the debtors and to the second-lien parties that were working on the capital gains would (indiscernible) --

THE COURT: So what goes out would not be bracketed.

MS. HARDY: Exactly. What goes out would not be bracketed, and I'm sure there'll have to be some recalculation of those on -- that backs up (indiscernible).

THE COURT: Okay. There was one other --

MS. HARDY: (Indiscernible) those calculations.

THE COURT: There was one other place where there were brackets that I don't think falls into that category. Two, actually. 5.4, it says the first lien note claims should be deemed allowed claims in the amount of 1.1 million.

MS. HARDY: 1.1 billion. Yeah, that's the --

THE COURT: Billion.

MS. HARDY: -- (indiscernible). The first lien noteholders?

THE COURT: Yeah.

MS. HARDY: (Indiscernible).

THE COURT: Okay. And then 5.9, for the PIK note claims, it says the product share of 8.938 million.

MS. HARDY: You can take out those brackets.

THE COURT: Okay.

MS. HARDY: (Indiscernible).

THE COURT: Okay. All right. All right; so I interrupted you. You were going to be going through the changes that you've agreed to with each party.

MS. HARDY: I absolutely will. (Indiscernible). So another change to the order, we would like to push out by two days the (indiscernible) solicitation, especially in the order to (indiscernible). We'd like to push that out to June 25th instead of the number on the docket (indiscernible) finalize and (indiscernible). And then that would also push out the voting deadline so that there's no actual change in the (indiscernible) --

THE COURT: Right. Well, the voting deadline was well before confirmation, so --

MS. HARDY: That's right; it was set at July 23rd --

THE COURT: Right.

MS. HARDY: -- so we won't (indiscernible) until July

(indiscernible).

THE COURT: Okay. And I, given the confirmation date, if it takes you a little longer to resolve what I just ruled on, I'm prepared to move -- I mean, I'm prepared to move that a couple of days further, easily.

MS. HARDY: We may have to, so in the order we submit to chambers, it may tee off of the (indiscernible) --

THE COURT: Right.

MS. HARDY: -- and need an order.

THE COURT: Right.

MS. HARDY: So we'll have to look at that (indiscernible), but we will keep the same number of these moving --

THE COURT: Right.

MS. HARDY: -- as to the various comments.

The -- we will seek stiff redactions to the disclosure statement. As mentioned, in the redlines that were filed yesterday, we resolved the objections of the creditors' committee, the PBGC, GE Capital and the (indiscernible).

The other objection, we've resolve in the courtroom, and that is filed. I will need to stress that we want it to happen (indiscernible) first-lien trustee. I still believe we addressed many of those points of objection in the revised disclosure statement that was filed. And we also agreed in the courtroom that the exculpation provision -- a plan issue

both -- we'll put it both in the plan and the disclosure statement that the exculpation will specifically say that it's something (indiscernible) to the extent (indiscernible) applicable.

THE COURT: Okay.

MS. HARDY: And the other thing that we'll mention, the lawsuit that was filed yesterday. We received (indiscernible). We'll put together a (indiscernible) settlement on the lawsuit, and (indiscernible) the disclosure statement.

And with those two changes, I believe, all of the objections to the disclosure statement have been resolved that I recognize.

The remainder of the motion, other than the timing, which we already discussed --

THE COURT: Can I -- I'm sorry. I haven't seen the ballot, but you're -- you have the opt-out form and you're going to describe that --

MS. HARDY: I certainly can. Well, I don't have it in front of me, but I can tell you how --

THE COURT: There are cross-references to the plan provisions that talk about the release, okay.

MS. HARDY: Exactly. It's actually a tab to the proposed disclosure statement order, so you should have it, but it has a provision and cross-references to the provision and

says parties-in-interest (ph.) "check the box".

THE COURT: Okay. The -- you've reserved this right in a couple of places to deem someone unimpaired even though you're giving them ballots. I don't know if you want to drop a footnote in your chart where -- because you say, for example, on the first-lien note claims, "entitled to vote: yes". Well, that's true. That's not inaccurate. But I don't know if you want to drop a footnote that says the debtors have reserved the right to say that such vote is not required or they're unimpaired.

MS. HARDY: In the chart in the --

THE COURT: Yeah. Like at page -- like this would be at page 14 and 15. And just for the record, I don't have a problem with that reservation, because you're letting them vote, so I mean, I have a problem with the other way around, if you say, they were unimpaired, but if the Court determined that they were impaired, you haven't sent them a ballot. That wouldn't work.

MS. HARDY: Understood. So the motion also (indiscernible) very proper procedures; folks have the (indiscernible) procedures, the rights offering procedures and including the (indiscernible) agreement -- subscription agreement perfect form, and this perfect procedures, a confirmation hearing notice. We did make a change to the confirmation hearing notice as of (indiscernible) to note that

if a party -- if ordered, the general unsecured claims believe that they're entitled to a contractual rate of international -- that they notify -- that they're required to notify the debtors of that. We put that on the confirmation hearing notice, and that is the redline that we filed.

So this -- we didn't receive any objection to the procedures themselves. We prepared them consistent with other applicable vote tabulation and rights offering procedures. And with the resolutions, I suppose, have the objections, both based on the redline filed yesterday and in this courtroom, we (indiscernible) pertaining to adequate information notice, it will have to be modified to an extent (indiscernible).

THE COURT: Okay. Does anyone have anything further to say on the disclosure statement?

All right. I reviewed it and, except for that very minor comment I gave you, I have no other comments on it either. I think your changes address the objections, and in light of that, I'll approve the disclosure statement.

As far as the plan procedures are concerned, I did not have the chance to review the redline on that. Do you have any provision that says that if you send in a ballot, but don't say yes or no, it's counted yes, or anything like that? Or anything -- I don't like that provision.

MS. HARDY: You don't like the provision, anyway.

THE COURT: Right, so if that's in there --

MS. HARDY: I believe we might, but if we say --
THE COURT: Just say the ballots that say yes or no won't be counted. Just that --
MS. HARDY: Ballots that don't say yes or no on them --
THE COURT: Right.
MS. HARDY: -- won't be counted.
THE COURT: And then, also, I don't like provisions that say merely that the debtors, in their discretion, can extend the ballot date. Wherever it says that, it should be subject to any necessary court approval.
MS. HARDY: Subject to --
THE COURT: To any necessary court approval.
MS. HARDY: Okay.
THE COURT: Those will probably be my only issues with that.
MS. HARDY: Okay, I believe (indiscernible).
THE COURT: Okay.
MS. HARDY: (Indiscernible).
MR. FELDMAN: I just wanted to ask for clarification, Judge --
THE COURT: Sure.
MR. FELDMAN: -- (indiscernible) just again, to be clear. I think we all heard this, but I want to make sure. Assuming that the current backstop parties agree to the new

date and the objections of the three second-lienholders are withdrawn, we would be in a position to submit --

THE COURT: I think you could submit it then. I mean, I -- I think you need to circulate to the committee and the other interested parties --

MR. FELDMAN: Well, of course, and we would submit it to the first-lien --

THE COURT: But if it's an improvement on the deal, I'm assuming that it'll get entered and approved.

MR. FELDMAN: Improvement's in the eye of the beholder.

THE COURT: Well, I understand.

MR. FELDMAN: It wouldn't be objected to. I mean, the counsel (indiscernible) --

THE COURT: Right.

MR. FELDMAN: -- (indiscernible) were all getting out of their parties-in-interests. I just wanted to make sure we heard you correctly.

THE COURT: Okay.

MR. FELDMAN: (Indiscernible), I guess.

THE COURT: Right. So the intervene -- those who want to intervene, front and center.

MR. CARNEY: Good afternoon, Your Honor. Brian Carney of Akin Gump Strauss Hauer & Feld for Apollo.

Your Honor, based on the conversation from earlier

today, it appears that maybe this motion to intervene doesn't -- I don't need to drone on and on and on about this, because it's an issue that can be handled at confirmation. I assume the objectors do not dispute that Apollo is a party-in-interest in connection with confirmation proceedings. So if this issue is going to be addressed in confirmation, then I --

THE COURT: Well, let -- why don't we deal with a couple of points first. The first is, I think it's clear from your response that -- and I think this is clear from -- on both motions -- that the intervenors are not looking to get any sort of control over any estate rights. They're just acting as creditors.

MR. CARNEY: Yeah, that's correct. And I know that one of the objectors, in their briefing, did suggest that we're trying to preserve the debtors' rights (indiscernible) over the redemption in the adversary proceeding.

THE COURT: Right.

MR. CARNEY: So that's not accurate.

THE COURT: Right.

MR. CARNEY: We're not trying to do that at all. All we're trying to do is protect our interest as a key stakeholder in these Chapter 11 cases, and in connection with protecting that interest, we just are asking for what are basically typical intervention rights, which include if necessary, briefing, discovery. Again, just to reiterate, we're not

looking to duplicate effort; we're not looking to run up the tab here. I don't think that's to anyone's benefit, including ours, so we're just looking to protect our rights as typical intervenors.

THE COURT: Okay.

MR. KIRPALANI: Yes. Susheel Kirpalani, Quinn Emanuel. I'm a little confused as to what the status of our adversary proceeding is, and I heard --

THE COURT: Well, they're proceeding on the same track.

MR. KIRPALANI: Oh.

THE COURT: So they would be intervening in the adversary. I mean, you're still making a motion to intervene in the adversary proceedings, right?

MR. CARNEY: Correct, Your Honor. It just --

THE COURT: Right.

MR. CARNEY: --seems like it's going --

THE COURT: So they're going to be -- they would be participating as -- I mean, even if it wasn't going on the same track they would be participating in most of what's -- if not all, of what would be happening because of the confirmation hearing.

MR. KIRPALANI: Okay. But the first -- the first thing that gets filed on that issue, given that the plan was already filed, our complaint was filed, it gets lost. What's

the first thing that gets filed on the issue? Is it our objection to confirmation?

THE COURT: Yes.

MR. KIRPALANI: And they all file a response?

THE COURT: That's what I think, yeah.

MR. KIRPALANI: As well as (indiscernible).

THE COURT: Yeah.

MR. ESPANA: Good afternoon, Judge. Mauricio Espana from Dechert. We have the first lien trustee.

THE COURT: Good afternoon.

MR. ESPANA: We understand, Judge, that the proposing the (indiscernible) don't want people to usurp the debtors' control. And they just want to have the rights to ensure that their rights are not being impeded, which is why we don't understand why these limitations are unreasonable. They claim that it's just to make sure, if necessary, that they need to file motion practice to participate in discovery. So it would seem reasonable for them to agree to these restrictions, and, if necessary, they can seek court order to file a motion if necessary or to take discovery.

I mean, to allow two additional parties to potentially have two additional litigation fronts dealing with the make-whole I think would be unreasonable for the trustees.

THE COURT: Well, with one exception, which I'll come back to, I'm going to have a scheduling order, and they're not

looking to enlarge the time on that.

MR. ESPANA: But what we're concerned about is their ability to file additional motions, their ability to file additional discovery requests, their ability to take depositions, to participate in the depositions.

THE COURT: Well, I'm contempl -- I mean, they were not involved in the timeline discussion, so I'm assuming they're riding along, but they can participate in the depositions that are being called. That's what I've assumed. I mean they didn't stand up and say we want all this extra discovery on top of that.

MR. ESPANA: And we are fine with them participating. They can sit in on depositions. They can receive all discovery. What we want is a restriction that they cannot actually take the depositions.

THE COURT: No, they can ask questions. But I would assume that they would be last or they would -- hopefully they'll be whispering in someone's ear at a break and say ask that question, because it's a tight schedule. And they're not -- we're going to stick to that schedule unless there's a reasonable reason not to.

MR. ESPANA: And the same concern is with regard to motion practice.

THE COURT: Well, on the motion practice, I recognize that -- I'm not a huge person on page limits. I rarely enforce

those. I rarely get upset about them, because I figure you actually do better with a shorter brief, so you're kind of hurting yourself with a long brief. So if you feel that you have to respond to more than they do because of something they've written, that's fine. I'm not going to limit you on that.

But as far as motion practice, I'm not sure what motion -- I mean, look. If someone files a stupid motion I'll tell them it's a stupid motion. But this is a confirmation hearing, so I'm not sure what motions they're going to file. I mean, they're going to be standing up --in fact, they didn't stand up today, but I'm assuming, like Mr. Dunne, they're going to stand up and support the plan. They might file a short brief in support of the plan. They might respond to objections that go directly to them, but I don't even -- it's hard for me to think what motion practice there would be in connection with a plan confirmation.

MR. ESPANA: We have the same sort of --

THE COURT: Well --

MR. ESPANA: --maybe the reason why it shouldn't be so --

THE COURT: Well, I don't -- to actually get a motion to be heard, you have to get on the calendar, which is no mean feat with Ms. Li upstairs. And she would talk to me, and if someone -- if counsel for Apollo or the ad hoc committee asks

to have a motion be heard on an expedited basis, I'll know what it is, decide whether it needs to be heard.

But I don't think it's a -- I mean, they clearly have the right, under the Caldor case, to be heard, and I trust that they will not again turn the discovery into a circus. And that's particularly because when we were talking about the discovery schedule they didn't have anything more to say than what Willkie was saying and the other side was saying.

MR. ESPANA: Thank you, Your Honor.

THE COURT: Okay.

MR. KHALIL: Your Honor, Sam Khalil, Milbank, Tweed, on behalf of the ad hoc second-lien noteholders. We also filed motions to core proceedings --

THE COURT: Right. And you're not looking to control any causes of action of the debtors either at any settlement or anything like that?

MR. KHALIL: That's correct.

THE COURT: Except in your capacity as a creditor.

MR. KHALIL: Correct.

THE COURT: Okay. All right. So, again, I'll grant that motion and trust that you all won't turn it into a litigation festival.

MR. KHALIL: (Indiscernible).

THE COURT: Okay. Okay.

MR. FELDMAN: I think that's it for today, Your Honor

unless the Court has anything.

THE COURT: Okay. All right. Thank you.

And I want to reiterate. If I need to, I'll have a short hearing on this point if you want to present a new backstop to me. But hopefully you can reach agreement on something.

And I hope, also, you all heard me about as things move along, potentially talking to the firsts, and the firsts talking to you guys.

UNIDENTIFIED SPEAKER: (Indiscernible).

THE COURT: Okay.

UNIDENTIFIED SPEAKER: You know we have a meet-and-confer, Your Honor?

THE COURT: Yes, yeah. Okay. Thank you.

(Whereupon these proceedings were concluded at 3:07 PM)

I N D E X

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

____

PENINA WOLICKI
AAERT Certified Electronic Transcriber CET**D 569

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Date: June 23, 2014

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