

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

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In re:

CONVERGEONE HOLDINGS, INC., *et al.*<sup>1</sup>

Debtors.

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)  
) Chapter 11  
)  
) Case No. 24-90194 (CML)  
)  
) (Jointly Administered)  
)

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**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**

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<sup>1</sup> 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”)<sup>1</sup> object to confirmation of the *Joint Prepackaged Chapter 11 Plan of Reorganization of ConvergeOne Holdings, Inc. and Its Debtor Affiliates* (the “Proposed Plan”)<sup>2</sup> [Docket No. 27] and respectfully represent as follows:<sup>3</sup>

### **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<sup>4</sup> (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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<sup>1</sup> 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].

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

<sup>3</sup> 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”).

<sup>4</sup> 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 horrors.

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<sup>5</sup>**

#### **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

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<sup>5</sup> 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<sup>6</sup> (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.<sup>7</sup> 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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<sup>6</sup> 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.

<sup>7</sup> 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.<sup>8</sup> 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

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<sup>8</sup> “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.<sup>9</sup> 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,<sup>10</sup> and Evercore and AlixPartners were retained in

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

<sup>10</sup> *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.<sup>11</sup> 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.*<sup>12</sup> During this entire period the Debtors’ board was presumably controlled by CVC.

24. In December 2023,<sup>13</sup> *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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<sup>11</sup> *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].

<sup>12</sup> The Lombardi Declaration defined “Company” as being comprised of the Debtors. Lombardi Decl. ¶ 1.

<sup>13</sup> 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
<b>Total:</b>			<b>245.0</b>	<b>86.8%</b>		<b>376.9</b>	<b>131.9</b>

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

<b>Total Exclusive Value Allocated to Majority Lenders:</b>	<b>83.9</b>
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[illegible]

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.

<sup>14</sup> 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.<sup>15</sup> 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).<sup>16</sup>

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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<sup>15</sup> 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”).

<sup>16</sup> 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,<sup>17</sup> and (b) the settlement of the PVKG Note Claims held by the Insiders.<sup>18</sup> The Proposed Plan provides the Insiders (who

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<sup>17</sup> *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).

<sup>18</sup> *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.<sup>19</sup> 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*

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<sup>19</sup> 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.<sup>20</sup> 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

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<sup>20</sup> *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.<sup>21</sup>

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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<sup>21</sup> 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).<sup>22</sup>

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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<sup>22</sup> 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).<sup>23</sup> This

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<sup>23</sup> 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.<sup>24</sup>

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 . . .”).

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<sup>24</sup> 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).

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**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 7<sup>th</sup> day of May, 2024.

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**COUNSEL TO THE AD HOC GROUP  
OF EXCLUDED LENDERS**



**Certificate of Service**

The undersigned hereby certifies that on the 7<sup>th</sup> 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., <i>et al.</i> <sup>1</sup>	)	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

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<sup>1</sup> 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.<sup>2</sup>

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

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<sup>2</sup> 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;<sup>3</sup> 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

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<sup>3</sup> 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 7<sup>th</sup> day of May, 2024 in New York, New York.

/s/ Keshav Lall  
Keshav Lall

**EXHIBIT 1**



**Debtors Proposed Plan**

Uzzi &amp; Lall

**1 Current Capital Structure**

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

**Exit Capital Structure**

Debt	Amount (\$ Mn)
Exit ABL	125.0
Exit Term Loan (1L Takeback)	243.0
<b>Total Debt</b>	<b>368.0</b>

1a. 1L Claims	Amount (\$ Mn)	%
Majority Lenders	1,119.9	80.7%
Excluded Group	267.6	19.3%
<b>Total</b>	<b>1,387.5</b>	<b>100%</b>

**2 Plan Details**

Plan Value	Amount (\$ Mn)
Stipulated Equity Value	434.0
Rights offering discount	35.0%
<b>Discounted Equity Value</b>	<b>282.1</b>

New Equity Split	%	Amount (\$ Mn)
1L	95.625%	415.0
2L	4.375%	19.0
<b>Total</b>	<b>100%</b>	<b>434.0</b>



**Excluded Lender Alternative Plan**

Uzzi &amp; Lall

**1 Current Capital Structure**

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

**Exit Capital Structure**

Debt	Amount (\$ Mn)
Exit ABL	125.0
Exit Term Loan (1L Takeback)	245.0
<b>Total Debt</b>	<b>370.0</b>

**2 Plan Details**

<b>2a. Plan Value</b>	<b>Amount (\$ Mn)</b>
Stipulated Equity Value	434.0
Difference in Exit Facility	-2.0
<b>Distributable Equity Value</b>	<b>432</b>

<b>2b. 1L Fees</b>					
<b>(10% Exit Facility)</b>	<b>Exit Facility</b>	<b>Fee</b>	<b>Amount (\$ Mn)</b>	<b>Distributable Equity Value</b>	<b>% Equity at Distributable</b>
			<b>(A)</b>	<b>(B)</b>	<b>Value</b>
					<b>(A / B)</b>
Exit Facility Fee	245.0	10%	24.5	432	5.7%

<b>2c. Equity Split</b>	<b>Split (%)</b>	<b>Distributable Equity Value</b>	<b>Amount (\$ Mn)</b>
1L	90.0%	432.0	388.6
1L Fee	5.7%	432.0	24.5
2L	4.4%	432.0	18.9
<b>Total</b>	<b>100.0%</b>		<b>432.0</b>

**3 Recovery**

Uzzi &amp; Lall

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

\* Assumes 100% participation

**EXHIBIT 2**



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

April 26, 2024

**By Email**

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

David M. Hillman  
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[DHillman@proskauer.com](mailto:DHillman@proskauer.com)  
[www.proskauer.com](http://www.proskauer.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”),<sup>1</sup> 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

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<sup>1</sup> Capitalized terms used herein that are not otherwise defined shall have the meanings given to them in the Proposed Plan.



April 26, 2024

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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).<sup>2</sup> 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.<sup>3</sup> 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

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<sup>2</sup> 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).

<sup>3</sup> 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.



April 26, 2024

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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.<sup>4</sup>

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

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<sup>4</sup> 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

<b>Exit Term Loan Facility</b>	<p>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.</p> <p><u>Interest Rate:</u> At the option of the Debtors, (i) SOFR (to be defined in a customary manner and subject to a floor of 0.00%) <i>plus</i> the Applicable Rate or (ii) Base Rate (to be defined in a customary manner and subject to a floor of 0.00%) <i>plus</i> the Applicable Rate, in each case payable in cash; <i>provided</i> that at any time an event of default exists under the Exit Term Loan Facility, the Debtors shall not be able to elect SOFR.</p> <p><u>Applicable Rate:</u> 4.75% in the case of Base Rate loans and 5.75% in the case of SOFR loans.</p> <p><u>Default Interest:</u> 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.</p> <p><u>Interest Payment Dates:</u> 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).</p> <p><u>Interest Period:</u> At the option of the Debtors, one, three, or six months.</p> <p><u>Amortization:</u> None.</p> <p><u>Tenor:</u> Six years, provided that if, in the reasonable determination of the Required Excluded Lenders<sup>5</sup> in good faith consultation with the</p>
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<sup>5</sup> “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.

	<p>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.</p> <p><u>Fees</u>: 10% of aggregate principal amount (consisting of a 5% exit fee available to all Holders of First Lien Claims who participate in their <i>pro rata</i> 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 “<u>Facility Fees</u>”), plus annual agency fee. The Facility Fees are payable in New Equity Interests at the Stipulated Equity Value.</p> <p><u>Security</u>: 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.</p> <p><u>Documentation Principles</u>: 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</p>
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(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.

<b>Treatment of First Lien Claims</b>	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 <i>pro rata</i> share of \$388.6 million of New Equity Interests at the Stipulated Equity Value (the “ <u>First Lien Claim Recovery</u> ”).
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**Exhibit B**

Recovery Analysis

**A C1 Restructuring Plan - Ad hoc Group****Uzzi & Lall****1 Current Capital Structure**

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

**Exit Capital Structure**

Debt	Amount (\$ Mn)
Exit ABL	125.0
Exit Term Loan (1L Takeback)	243.0
<b>Total Debt</b>	<b>368.0</b>

1a. 1L Claims	Amount (\$ Mn)	%
Ad hoc Group	1,117.5	80.5%
Excluded Group	270.0	19.5%
<b>Total</b>	<b>1,387.5</b>	<b>100%</b>

**2 Plan Details**

Plan Value	Amount (\$ Mn)
Stipulated Equity Value	434.0
Rights offering discount	35.0%
<b>Discounted Equity Value</b>	<b>282.1</b>

New Equity Split	%	Amount (\$ Mn)
1L	95.625%	415.0
2L	4.375%	19.0
<b>Total</b>	<b>100%</b>	<b>434.0</b>

# Uzzi & Lall

2a. <u>Rights Offering</u>	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
<b>Total Rights Offer and Direct Investment</b>		<b>245</b>	<b>86.8%</b>	<b>376.9</b>	<b>131.9</b>

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

## 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	-	
<b>Total Recovery</b>	<b>348.6</b>	<b>64.0</b>	
1L Claims	1,118	270	
<b>1L Recovery (%)</b>	<b>31.2%</b>	<b>23.7%</b>	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		
<b>2L Recovery (%)</b>	<b>6.6%</b>		

# Uzzi & Lall

## B C1 Restructuring Plan - Alternative

### 1 Current Capital Structure

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

### Exit Capital Structure

Debt	Amount (\$ Mn)
Exit ABL	125
Exit Term Loan	245
<b>Total Debt</b>	<b>370</b>

### 2 Plan Details

<b>2a. Plan Value</b>	<b>Amount (\$ Mn)</b>
Stipulated Equity Value	434.0
Difference in Exit Facility	- 2.0
<b>Distributable Equity Value</b>	<b>432</b>

<b>2b. 1L Fees</b>	<b>Fee</b>	<b>Amount (\$ Mn)</b>	<b>% Equity</b>
<b>(10% Exit Facility)</b>			
Exit Facility Fee	10%	24.5	5.67%
<b>Total Fees</b>		<b>24.5</b>	<b>5.67%</b>

<b>2c. Equity Split</b>	<b>Split (%)</b>	<b>Amount (\$ Mn)</b>
1L	89.95%	388.6
1L Fee	5.7%	24.5
2L	4.375%	18.9
<b>Total Rights Offer</b>		<b>432.0</b>



Uzzi & Lall

### 3 Recovery

<i>\$ Mn</i>	Total 1L	Ad hoc Group	Excluded Group
Equity (1L)	388.6	313.0	75.6
Exit Facility Fee	24.5	19.7	4.8
<b>Total Recovery</b>	<b>413.1</b>	<b>332.7</b>	<b>80.4</b>
1L Claims	1,388	1,118	270
<b>1L Recovery Without Exit Fee (%)</b>	<b>28.0%</b>	<b>28.0%</b>	<b>28.0%</b>
<b>1L Recovery with Exit Fee (%)</b>	<b>29.8%</b>	<b>29.8%</b>	<b>29.8%</b>
2L Recovery	18.9		
2L Claims	286.5		
<b>2L Recovery (%)</b>	<b>6.6%</b>		

Assumes 100% participation

**EXHIBIT 3**

April 29, 2024

VIA E-MAIL

**Confidential – Subject to FRE 408**

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Chicago, Illinois 60606-4302  
T +1 312 881 5400

[whitecase.com](http://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”).<sup>1</sup> 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

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

April 29, 2024

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**

SOUTHERN DISTRICT OF NEW YORK

**In the Matters of:**

-----X

THE BANK OF NEW YORK MELLON TRUST COMPANY,

LLC and MPM Finance Escrow Corp. 8.875%

-----X

300 Quarropas Street

**June 19, 2014**

**B E F O R E:**

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)



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)

**eScribers, LLC | (973) 406-2250**  
**operations@escribers.net | www.escribers.net**

1

2

Motion to Intervene / Motion of Ad Hoc Committee of Second Lien

3

Noteholders for Entry of Order Pursuant to 11 U.S.C. Section

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1109(b) and Fed.R.Civ.P. 24(a) Granting Right to Intervene in

5

Adversary Proceeding Commenced by Debtors, filed by Dennis F.

6

Dunne on behalf of Ad Hoc Committee of Second Lien Noteholders

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(document #10)

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Transcribed by: Penina Wolicki

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eScribers, LLC

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Performance Materials Holdings LLC

**MPM SILICONES, LLC, et al.**

13

1 P R O C E E D I N G S

2 THE COURT: Please be seated.

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

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

9 THE COURT: Fine.

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

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

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

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

**MPM SILICONES, LLC, et al.**

14

1 THE COURT: Okay.

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

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

9 MR. FELDMAN: It is unopposed, Your Honor.

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

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

6 MR. FELDMAN: That is correct, Your Honor.

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

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

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

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

**MPM SILICONES, LLC, et al.**

16

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

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

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

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

20 THE COURT: And they're at the end.

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

23 THE COURT: Okay.

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

25 THE COURT: Okay.

**MPM SILICONES, LLC, et al.**

17

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

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

**MPM SILICONES, LLC, et al.**

18

1 collectively.

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

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

11 THE COURT: Okay.

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

14 THE COURT: That's fine.

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

21 THE COURT: Sure.

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



**MPM SILICONES, LLC, et al.**

19

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

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

11 MR. FELDMAN: It just tracks the RSA --

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

13 (Microphone malfunction)

14 THE COURT: Do you know what to do?

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

17 Thank you.

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

23 Your Honor, on June 4th, 2014 the debtors made William  
24 Carter, their CFO, available for a 30(b)(6) deposition.

25 Mr. Carter has also submitted a declaration in support of

**MPM SILICONES, LLC, et al.**

20

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

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

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

**MPM SILICONES, LLC, et al.**

21

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

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

25 Throughout the last part of February, March, and the

**MPM SILICONES, LLC, et al.**

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

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

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

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1 will pay general unsecured creditors in full with interest.

2 And perhaps most importantly, Your Honor, the debtors were able  
3 to file in a very stable and pre-planned way that brought  
4 stability to the company's vendors and customers, which has  
5 allowed the company to continue to operate on relatively stable  
6 ground since the filing back in April.

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

15 And what have the debtors given up? Because after  
16 all, that's what the objectors have largely focused on. The  
17 debtors have given up, under certain circumstances, a fee of  
18 five percent of the 600 million dollars, or 30 million dollars,  
19 under, again, certain limited circumstances. From the debtors'  
20 perspective, Your Honor -- and this is set forth in  
21 Mr. Carter's, both, deposition as well as his affidavit -- that  
22 without this deal in place, given the size of the company,  
23 given the sales they have, given the profitability -- remember,  
24 in the first quarter of 2014, the debtors did approximately  
25 1.29 billion dollars in sales, or it had revenue of 1.29

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

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

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

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

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

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

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



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

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

3 THE COURT: Talking about post-petition interest?

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

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

15 THE COURT: Okay.

16 MR. DUNNE: Good morning, Your Honor.

17 THE COURT: Good morning.

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

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



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

12 The creditors' committee also objected to Section  
13 6.18(d) of the original backstop commitment agreement, which  
14 set out the right to the parties, of us and others, to credit-  
15 bid in the event of a termination or a failed plan. We were  
16 asked to remove that and live with whatever rights we have  
17 under the Code and applicable law. We agreed. The creditors'  
18 committee requested a broad preference waiver and the right for  
19 general unsecured creditors to receive post-petition interest;  
20 we agreed on both points.

21 THE COURT: For purposes of this plan?

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

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

7 THE COURT: Okay.

8 MR. DUNNE: Thank you.

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

16 MR. DUNNE: Yes.

17 THE COURT: Okay.

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

20 THE COURT: Good morning.

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

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

25 THE COURT: Right.

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

11 THE COURT: Okay.

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

18 THE COURT: The RSA is terminated.

19 MR. BOGDANOFF: Excuse me.

20 THE COURT: Right.

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

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

3 THE COURT: Right.

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

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

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

10 THE COURT: Okay.

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

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

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

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

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

25 THE COURT: Okay.

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

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

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



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

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

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

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

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

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

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

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

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

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

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

17 MR. FELDMAN: Correct.

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

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

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

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

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

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

13 THE COURT: Right.

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

16 THE COURT: We'll pay the prepayment.

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

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1 even suggesting this --

2 THE COURT: But at that --

3 MR. FELDMAN: -- but it does exist.

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

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

9 THE COURT: They would.

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

11 THE COURT: Right. Okay.

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

16 THE COURT: Okay.

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

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

21 THE COURT: Right.

22 MR. HANSEN: Good morning, Your Honor.

23 THE COURT: Good morning.

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

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

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

4 MR. HANSEN: Yes, we do.

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

8 Okay. Would you raise your right hand, please?

9 (Witness sworn)

10 THE COURT: Okay. And it is Christopher?

11 THE WITNESS: Oh, William.

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

13 THE WITNESS: Yes.

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

15 MR. CANFIELD: Thank you.

16 CROSS-EXAMINATION

17 BY MR. CANFIELD:

18 Q. Good morning, Mr. Carter.

19 A. Good morning.

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

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

3 Q. And this deal was presented to the company by both Apollo  
4 and what's been termed the ad hoc second-lien noteholders. Is  
5 that correct?

7 Q. And the restructuring support agreement contemplates a  
8 600-million-dollar rights offering, does it not?

10 Q. And that restructuring support agreement was negotiated  
11 both between the board and your counsel with the holders of the  
12 second-lien notes. Is that correct? The ad hoc group -- to  
13 clarify, the ad hoc group of holders of the second-lien notes?

15 Q. It was also negotiated with the debtors' equity sponsor,  
16 Apollo, correct?

18 Q. But it was negotiated with Apollo, that's correct?

20 Q. Are you unsure or do you know?

21 A. Well, I guess I'm -- I believe they were part of the ad  
22 hoc -- they negotiated with the ad hoc committee along with our  
23 counsel in terms of writing the agreement.

24 Q. Did you, as a member of the board, ever directly negotiate  
25 with Apollo?



5 | A. Yes.

10 A. Yes, approximately.

14 A. Yes.

21	A.	No.
----	----	-----

23	A. Yes.
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1 if they would be willing to subscribe to the rights offering?

2 A. Yes.

3 Q. So the backstop parties, they're required to purchase  
4 their pro rata allocation of the rights offering shares. Is  
5 that correct?

6 A. Yes.

7 Q. And you believe that the backstop parties would not commit  
8 to the backstop and support the plan without the payment of the  
9 thirty-million-dollar fee. Is that correct?

10 A. Yes.

11 Q. Apollo's the largest second-lien noteholder, are they not?

12 A. I believe they are, yes.

13 Q. And they also own most of the equity in the company. Is  
14 that correct?

15 A. Yes, they do.

16 Q. So you would agree with me that Apollo is the largest  
17 beneficiary of the backstop fee, is that correct?

18 MR. BAIO: Objection.

19 MR. CANFIELD: I'll rephrase.

20 Q. Given that Apollo is the largest second-lien noteholder,  
21 on a pro rata basis, they would be entitled to the largest  
22 portion of the fee?

23 A. I believe that's correct. Yes.

24 Q. Did the board ever attempt to see if the backstop parties  
25 would take a lower fee?

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1 A. Yes.

2 Q. But the backstop parties wouldn't agree to a lower fee?

3 A. The board, in discussions with our legal counsel, in terms  
4 of discussing all the provisions of the backstop fee, was  
5 certainly, my recollection, interested in having as low a fee  
6 as possible and directed, you know, our counsel, who was  
7 negotiating with the backstop parties on many different  
8 provisions of the agreement, to get the best agreement they  
9 could for the company.

10 Q. So then it's your understanding that the thirty-million-  
11 dollar fee which represents five percent of the entire rights  
12 offering amount was the lowest fee that the company could  
13 obtain from the backstop parties?

14 A. I guess I would say in conjunction with all the other  
15 components of the backstop commitment agreement, that was the  
16 lowest fee we could get.

17 Q. I understand but I'm asking just about the fees  
18 specifically.

19 MR. BAIO: Objection.

20 MR. FELDMAN: I think he answered the question, Your  
21 Honor.

22 THE COURT: Well, did you -- I think implicit in the  
23 answer is that they didn't isolate the fee separately from  
24 everything else.

25 THE WITNESS: Yes. I remember discussing a number of

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

6 MR. CANFIELD: Thank you, Your Honor.

7 THE COURT: Okay.

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

12 A. Yes.

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

16 A. Yes.

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

23 MR. BAIIO: Object to the form.

24 MR. CANFIELD: I'll rephrase.

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

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1 rephrase it.

2 MR. CANFIELD: Sure.

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

4 Q. Sure.

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

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

7 THE WITNESS: Oh. I'm sorry.

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

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

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

19 A. Yes.

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

24 MR. BAIIO: Objection. I'm not sure what he means by  
25 that.

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1 THE COURT: No, I think -- I think he can answer that  
2 question.

3 MR. CANFIELD: I'll move on.

4 THE COURT: No, I overruled the objection.

5 MR. CANFIELD: Okay.

6 A. Yes, we believed that it was appropriate to have that fee  
7 in the backstop agreement to get the agreement done.

8 Q. Again, because you believed that the parties -- the  
9 backstop parties were going to walk away from their deal if you  
10 did not pay them the fee?

11 A. Yes, I guess -- is at the end of the day in counsel -- in  
12 discussion with our counsel and his involvement in the  
13 negotiation, we believed that that was required to get it done  
14 and was a critical component of the agreement.

15 Q. To pay them a fee for their own deal?

16 MR. BAI0: Objection.

17 MR. CANFIELD: I'll withdraw the question.

18 THE COURT: You've asked that previously.

19 Q. Did the board ever ask itself why it was paying a backstop  
20 fee on the full 600 million dollars of the rights offering,  
21 when the backstop parties were already subscribing for what  
22 amounted to 510 million, based on their pro rata ownings?

23 A. I don't recall that specific discussion.

24 Q. You never thought that was an important question to ask as  
25 a director?

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1 A. Again, I don't recall. We had a significant number of  
2 discussions, and I don't recall that discussion.

3 Q. So is it fair to say what the board is really approving  
4 here is a subscription fee combined with a backstop fee? In  
5 other words, what I mean by that is what the board really  
6 approved here is a subscription fee for the parties to purchase  
7 their own allocation of the 510 million dollars of the 600-  
8 million-dollar rights offering, and a backstop fee to backstop  
9 the portion of the unsubscribed shares that were allocated to  
10 the notes that they did not own?

11 MR. BAIIO: Objection, Your Honor. It's a legal  
12 question.

13 THE COURT: No, you could answer that question.

14 A. Yeah, I guess I don't -- in terms of the legalities of  
15 what you're explaining, I don't feel comfortable answering.

16 Q. So you never -- the board never thought of this as a  
17 subscription fee and a backstop fee?

18 A. Can you define a subscription fee?

19 Q. Sure. A fee -- the backstop parties owned eighty-five  
20 percent of the second-lien notes. The backstop agreement  
21 requires them to purchase their own allocation of the notes.  
22 Was it the board's thought that they were backstopping their  
23 own purchase of the notes?

24 A. I guess I would say from my recollection it was our view  
25 that they were committing to invest 600 million dollars and

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

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

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

10 A. I believe we had that discussion.

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

12 A. I have.

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

16 A. I don't remember the specifics.

17 Q. But that is your understanding?

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

20 Q. Do you recall ever reading that provision?

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

22 Q. Asking questions to your counsel?

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



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

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

6 MR. BAIO: Objection.

7 THE COURT: I'm sorry, which hole?

8 MR. CANFIELD: Sure.

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

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

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

18 A. Yes.

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

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

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

6 Q. So really what happened here is the board approved the  
7 payment of a five-percent backstop fee for an agreement that  
8 really doesn't ensure a fully subscribed rights offering.  
9 Isn't that correct?

11 THE COURT: He's testified he doesn't know what  
12 happens if one of the backstoppers default.

14 Q. You believe the backstop agreement represents the best  
15 possible deal terms that the debtors can achieve. Is that  
16 correct?

18 Q. The company never attempted to speak to any other second-  
19 lien noteholders, correct?

21 Q. And you are aware, other second-lien noteholders attempted  
22 to reach out to your advisors, isn't that correct?

24 Q. Were you aware that they never got a return phone call?

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1 Q. The company never sought out any sort of third-party  
2 financing as an alternative to the backstop for the rights  
3 offering, did it?

4 A. Not to my recollection.

5 Q. The company never attempted to speak to the subordinated  
6 noteholders prior to the petition date, did they?

7 A. I don't believe so; no.

8 Q. So really what happened, at end, is the board more or less  
9 had a deal dropped in its lap by Apollo, the company's insider,  
10 certain second-lien noteholders, and they took it. Isn't that  
11 true?

12 MR. BAIO: Objection.

13 THE COURT: On what basis --

14 MR. BAIO: Objection.

15 THE COURT: -- on what basis?

16 MR. BAIO: I think he's simply testifying, lack of  
17 foundation, inconsistent as to what we've heard, and  
18 argumentative.

19 THE COURT: Well, it is a question -- I mean, you  
20 understood the question, right?

21 THE WITNESS: Yeah, could you --

22 THE COURT: Why don't you repeat it?

23 THE WITNESS: Maybe he could repeat it.

24 Q. So essentially what happened here is the board had a deal  
25 dropped in its lap by the company's equity sponsor, as well as

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1 certain second-lien noteholders, and they took it?

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

4 THE WITNESS: I disagree.

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

12 MR. BAIO: Objection.

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

15 MR. CANFIELD: Thank you.

16 Q. Why do you disagree that the company --

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

20 MR. CANFIELD: If I could have a moment?

21 THE COURT: Okay.

22 MR. CANFIELD: No further questions.

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

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

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

4 CROSS-EXAMINATION

5 BY MR. KIRPALANI:

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

9 A. Yes.

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

11 A. Somewhat familiar.

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

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

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

19 A. Yes, I believe so.

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

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

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

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1 Isn't that a foundation of your consideration?

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

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

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

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

12 MR. KIRPALANI: Sure. If you could look at the  
13 supplemental declaration of William H. Carter dated June 13th,  
14 2014, and the very last sentence of paragraph 16 says,  
15 "Throughout the entire process of negotiating and approving the  
16 backstop commitment agreement, the board received legal advice  
17 from its counsel at Willkie Farr." That same type of language  
18 appears several times.

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

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

4 THE WITNESS: Could you just repeat the question?

5 BY MR. KIRPALANI:

10 MR. BAI0: I believe -- I have the same objection. He  
11 includes legal advice.

14 THE WITNESS: Okay.

17 THE WITNESS: Fine.

18 A. Okay. I would say yes, to Moelis.

21 A. I think in terms of -- I know definitively I learned it  
22 when I came to the first-day hearing, because there was  
23 specific discussion about it. I don't remember before that,  
24 specific date.

25 Q. Are you aware that I met with your advisors prior to

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

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

8 MR. KIRPALANI: May I respond? Okay?

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

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

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

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

22 MR. KIRPALANI: Fair enough.

23 I have no other questions. Thank you.

24 MR. SAGE: Good morning, Your Honor.

25 THE COURT: Good morning.



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1 THE WITNESS: Good morning.

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

4 CROSS-EXAMINATION

5 BY MR. SAGE:

6 Q. Just a couple questions, sir.

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

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

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

19 A. I don't recall.

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

24 A. I don't recall.

25 Q. Thank you, sir.

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

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

4 THE WITNESS: Yes, Your Honor.

5 THE COURT: On the shared-services agreement --

6 THE WITNESS: Yes.

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

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

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

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

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

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1 believe they will be involved.

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

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

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

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

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

22 THE WITNESS: Yeah.

23 THE COURT: -- to get them to subscribe.

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

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

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

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

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

17 THE WITNESS: Yes, that was our belief.

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

20 Okay. Do you have any redirect?

21 MR. BAIIO: No, Your Honor.

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

23 THE WITNESS: Thank you.

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

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1 introduce?

2 Okay, go ahead.

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

6 THE COURT: Okay.

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

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

17 THE COURT: Okay.

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

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

23 THE COURT: Do you mean, the nonbankruptcy lawsuit?

24 MR. SAGE: Correct.

25 THE COURT: Okay.

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

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

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

12 THE COURT: The factual record, yes.

13 MR. SAGE: The evidentiary record.

14 THE COURT: Right.

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

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

23 THE COURT: I don't --

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

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

3 THE COURT: It's all about money.

6 THE COURT: Okay.

8 THE COURT: Okay.

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

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

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

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1           In the backdrop of what they filed yesterday in their  
2 disclosure statement, the terms, just a couple of them, T plus  
3 150 for our notes, no call protection, no potential covenants,  
4 this invites a fight and there will be one in this case, almost  
5 certainly. And the time frame to have that fight, which is a  
6 valuation fight in part, is simply very tight.

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

15           There's no testimony as to that. There's no testimony  
16 as to a melting ice cube. There's no testimony as to the  
17 business, degradation of the business. All we really know is  
18 that the second-liens in Apollo have set certain deadlines  
19 which appear arbitrary by which they're forcing us all to run  
20 through hoops to get to when, again, they have an October --  
21 mid-October outside debt which, by the way, I don't need to  
22 necessarily accept that that October date is the date, but even  
23 if we accept for argument's sake that their financing end date  
24 of October 14, I believe, is the date, October 22nd -- August  
25 22nd to October 14th is a long period of time.

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

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

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

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

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

5 THE COURT: It's the backstop agreement?

6 MR. SAGE: Yes.

7 THE COURT: It's not -- okay.

8 MR. SAGE: Yes.

9 THE COURT: Right.

10 MR. SAGE: Okay, page 61.

11 (Pause)

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

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

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

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

21 THE COURT: I mean, I --

22 MR. SAGE: -- okay, but I hear what you're saying.

23 I'm sorry, I didn't mean to interrupt you, Your Honor.

24 THE COURT: No, that's okay.

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

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

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

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

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

16 MR. SAGE: Correct.

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

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

25 THE COURT: Okay. I understand that point.



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

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

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

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

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

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

8 (Pause)

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

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

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

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

18 THE COURT: Subordination rights.

19 MR. FELDMAN: Yeah.

20 THE COURT: Okay.

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

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

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

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1 the breach of subordination.

2 THE COURT: Not your lawsuit but the --

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

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

10 MR. SAGE: I understand.

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

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

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

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

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

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



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

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

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1 In fact, I should -- the language that Mr. Feldman  
2 alluded to earlier is a step in the right direction in  
3 paragraph 19. In the beginning he said we negotiated paragraph  
4 19 to deal with this. It --

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

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

7 THE COURT: The order.

8 MR. SAGE: -- RSA order.

9 THE COURT: Right.

10 MR. SAGE: Your Honor, if I may?

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

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

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

15 MR. SAGE: 8.1.

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

18 MR. SAGE: Correct. For the back --

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

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

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

8 THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. SAGE: Correct.

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1 THE COURT: Okay.

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

4 THE COURT: Okay.

5 MR. SAGE: Thank you, Your Honor.

6 THE COURT: Okay.

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

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

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

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

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

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

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



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

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

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

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

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

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

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

14 THE COURT: Okay.

15 MR. KIRPALANI: Thank you.

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

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



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

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

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

23 THE COURT: I didn't point that out.

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

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

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

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

24 THE COURT: Well, they haven't committed.

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

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1 we would subscribe with no fee and we would agree to backstop  
2 for three percent just the stub portion. No one ever engaged  
3 with us on that. The only thing I got was an e-mail from Mr.  
4 Feldman that said, if I can get you the backstop, I would but  
5 it's not my call. Not, can we explore that further? Can we  
6 figure out are you guys willing to subscribe for 600 million  
7 dollars? You know, are you willing to do a direct purchase for  
8 600 million dollars? If that was important to them, you'd  
9 think they would have come back and said it to us.

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

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

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



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

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

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

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

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



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

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

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

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

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



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

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

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

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

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

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

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1 THE COURT: Okay.

2 MR. HANSEN: All right. Thank you.

3 MR. ZIEGLER: Good morning, Your Honor.

4 THE COURT: Good morning.

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

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

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

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

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1 denied.

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

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

12 THE COURT: Okay.

13 MR. ZIEGLER: Thank you.

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

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

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

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

25 THE COURT: Yeah.

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1 MR. HANSEN: Your question is not for the stub piece.

2 THE COURT: Right.

3 MR. HANSEN: You're saying if Apollo walked --

4 THE COURT: No, I --

5 MR. HANSEN: -- would we be willing --

6 THE COURT: Right.

7 MR. HANSEN: -- I'd have to talk with Fortress and

8 D.E. Shaw, Your Honor.

9 THE COURT: Right.

10 MR. HANSEN: We've never been asked --

11 THE COURT: Okay.

12 MR. HANSEN: -- so I don't have an answer for you  
13 today.

14 THE COURT: Okay. Anyone else before I hear from the  
15 company? Any other supporters of the motion? Okay.

16 MR. FELDMAN: Your Honor, just some clarifications and  
17 then I will respond. On the clarification front, Your Honor,  
18 the plan does provide that if the Court were to cram down the  
19 first-liens and the one-and-a-halves under 1129(b), that their  
20 510 subordination rights would go away because you would have  
21 determined their claim as part of that.

22 THE COURT: Well, they'd be paid.

23 MR. FELDMAN: They'd be paid, right.

24 THE COURT: All right.

25 MR. FELDMAN: So I just want to be clear because you

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

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

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

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



3 MR. FELDMAN: Sure.

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

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

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

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

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

6 THE COURT: Okay.

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

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

10 THE CLERK: Please speak into the microphone?

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

14 THE COURT: All right. Okay.

15 MR. SAGE: It does --

16 THE COURT: Fine.

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

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

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1 THE COURT: Right. Is the fee triggered?

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

6 THE COURT: Right.

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

11 THE COURT: Okay.

12 MR. DUNNE: Let's assume that --

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

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

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

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

21 THE COURT: Right.

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

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1 THE COURT: Right.

2 MR. DUNNE: -- but --

3 THE COURT: To meet the cram-down test.

4 MR. DUNNE: -- to accomplish cram-down, but we're  
5 reserving our right, as it says elsewhere, that if it's  
6 unacceptable, we may go to Mr. Feldman and say let's do  
7 something else with them --

8 THE COURT: Okay.

9 MR. DUNNE: -- if you ended up saying it was L plus  
10 twenty that they needed or something.

11 THE COURT: I'm not sure that that is actually  
12 reflected in the --

13 MR. DUNNE: And we can clarify the language wherever  
14 it needs to be.

15 THE COURT: Okay. All right.

16 MR. DUNNE: But that's the intent.

17 THE COURT: Okay. All right. Thank you.

18 MR. FELDMAN: Your Honor, I will say this was the last  
19 change made last night, so I'm sure it probably isn't clear  
20 everywhere --

21 THE COURT: Okay.

22 MR. FELDMAN: -- but I did want Mr. Dunne to go on the  
23 record --

24 THE COURT: Okay.

25 MR. FELDMAN: -- so that I was not speaking for him.

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

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

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

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

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

14               With respect to the indemnification, the issue with  
15   Mr. Sage's language is that, in fact, we have agreed to  
16   indemnify the second-liens. The second-liens are putting up  
17   600 million dollars, notwithstanding what Mr. Hansen tried to  
18   say before Your Honor, and we'll talk about that when we get to  
19   Mr. Hansen.

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

1 not correct.

2 THE COURT: But I think as I --

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

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

7 MR. FELDMAN: That is --

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

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

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

14 MR. FELDMAN: That is correct, Your Honor.

15 THE COURT: Okay.

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

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

22 MR. FELDMAN: -- a big deal.

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

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

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

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

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

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

11 THE COURT: Right.

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

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

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

17 THE COURT: Okay.

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

22 You know, one of the problems was --

23 THE COURT: The first day affidavit.

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



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

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

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

8           THE COURT: Okay.

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

11          THE COURT: Right.

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

16          THE COURT: Okay.

17          MR. FELDMAN: Your Honor, I --

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

20          MR. FELDMAN: We did --

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

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

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

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

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

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

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

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

15 THE COURT: But that --

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

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

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

3 MR. FELDMAN: I don't --

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

7 MR. FELDMAN: Napier.

8 THE COURT: Napier. And --

9 MR. FELDMAN: But --

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

12 MR. FELDMAN: Nor are they willing --

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

18 MR. FELDMAN: Your --

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

22 MR. FELDMAN: But Your Honor --

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

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

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1 that, though. We have to pull apart what they're saying.

2 They're saying that if you assume the eighty-five percent stays  
3 in place --

4 THE COURT: Right.

5 MR. FELDMAN: -- if you assume --

6 THE COURT: No, I understand that.

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

9 THE COURT: Right.

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

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

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

23 THE COURT: Who didn't testify --

24 MR. FELDMAN: -- reasonableness of the deal.

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

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1 sketchy.

2 MR. FELDMAN: Who did not testify today --

3 THE COURT: Right.

4 MR. FELDMAN: -- but not an unwillingness to testify.

5 But the --

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

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

12 THE COURT: No --

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

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

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

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

21 MR. FELDMAN: -- in that disclosure statement.

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

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



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

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

13 The cases that you cite and the chart you show just  
14 show us the fee, and in a vacuum I can say, yeah, a five-  
15 percent fee for a backstop is okay, except I don't know what  
16 they were backstopping. I don't know if they were backstopping  
17 300 million or what we're talking about here, which is 15  
18 percent of 600 million.

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

24 THE COURT: Right.

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

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

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

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

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

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

14 THE COURT: Well --

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

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

17 MR. FELDMAN: -- is not unreasonable.

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

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

22 THE COURT: Well --

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

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

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

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

20 THE COURT: -- withdrawn, but --

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

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

15 THE COURT: That's the --

16 MR. DUNNE: -- in the intercreditor --

17 THE COURT: -- the nonbankruptcy --

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

25 On the business judgment point, which I think a number

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

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

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

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

9 THE COURT: Yeah, sure.

12 THE COURT: Right.

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

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

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

25 THE COURT: Right.



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

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

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

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

16 THE COURT: Okay.

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

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

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1 a thirty-three-percent fee?

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

4 THE COURT: No, but --

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

7 THE COURT: No, but no --

8 MR. DUNNE: -- the fact that --

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

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

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

13 MR. DUNNE: Correct.

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

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

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1 dollars --

2 THE COURT: Right.

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

5 THE COURT: Right.

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

8 THE COURT: Right.

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

11 THE COURT: Right.

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

15 THE COURT: All true.

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

20 THE COURT: He did say that.

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

25 THE COURT: Even if you're really only backstopping

5 THE COURT: Well --

7 THE COURT: -- I mean --

9 THE COURT: -- is there --

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

16 THE COURT: So --

18 THE COURT: So I think they knew it was fifteen  
19 percent that they were really backstopping.

22 THE COURT: No, I understand that.

24 THE COURT: Right.

25 MR. DUNNE: -- that included their ownership of it,

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1 which the market is -- you get the rights and a fee for that,  
2 as well as the commitment --

3 THE COURT: Except -- well --

4 MR. DUNNE: Look, and I understand Your Honor's  
5 difficulties with the nature of the record, which I can't fix  
6 here, but I echo Mr. Feldman's comment that to the extent you  
7 want to put somebody from Moelis on there to talk about the  
8 market and how this came about, that would be one path forward.

9 THE COURT: But I guess -- I mean, let's assume your  
10 group included a hundred percent. Would the -- at that part  
11 would you be paying the five -- I mean, you wouldn't be paying  
12 the five --

13 MR. DUNNE: Yes, because we're being logically  
14 consistent, it's yes. It doesn't -- it can't be that we did --

15 THE COURT: But why? Why would you do that?

16 MR. DUNNE: Because it's committed -- you're  
17 committing -- the dollars that you're holding back for the six-  
18 month period to fund whatever your portion is, the market says  
19 the shares come in at a discount and you get a fee for that.  
20 It's hundreds of millions of dollars that get --

21 THE COURT: But there would be no backstop. There  
22 wouldn't be a backstop fee.

23 MR. DUNNE: No, but I'm saying the nomenclature can't  
24 dec -- whether you call it a subscription fee or -- because  
25 there would only be a subscription fee, in your hypothetical of

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1 a hundred percent or not --

2 THE COURT: Right.

3 MR. DUNNE: -- it results in the same economics.

4 THE COURT: But I mean, certainly all the exhibits  
5 show backstop fees. And I've had two or three of these where  
6 there's a backstop fee and there was a substantial amount that  
7 wasn't committed.

8 MR. DUNNE: Well, I don't think anybody's made this  
9 distinction. I mean, I would view those as the backstop fee  
10 was including whether you were at ninety percent or ten  
11 percent. I --

12 THE COURT: Well, I don't know.

13 MR. DUNNE: I'm not aware of anybody making -- I  
14 don't -- I'm unaware of anybody making that distinction. And  
15 I'm saying I don't think it matters because I answered your  
16 hypothetical that way, that if it was a hundred percent, those  
17 fees would still be appropriate. And it was our group that  
18 took the market risks --

19 THE COURT: So you --

20 MR. DUNNE: -- the credit risks from --

21 THE COURT: So it's almost like a twenty-percent  
22 discount that -- it's close to a twenty-percent --

23 MR. DUNNE: It depends --

24 THE COURT: It's like eighteen percent or something.

25 MR. DUNNE: It depends how you value the cash on top

3 MR. DUNNE: Let me just pause for a second, Your  
4 Honor, and see if I have anything else.

6 THE COURT: Can I -- actually, this is something no  
7 one's really addressed. You're asking me to assume an  
8 agreement, a pre-petition agreement, to approve the debtors'  
9 assumption of the pre-petition agreement. So it's conditioned  
0 on bankruptcy court approval to be assumed. The agreement --  
1 is the agreement itself conditioned on bankruptcy court  
2 approval?

14 MR. FELDMAN: Yeah, it's in the time line, Your Honor.

16 MR. FELDMAN: Yes.

17 THE COURT: All right. So should I even be looking at  
18 what it was like six months ago or just the state of facts  
19 today where I have people falling over themselves to join this  
20 group? I mean, this group were heroes, terrific, they were  
21 great, they -- I suppose they helped themselves out to do that.  
22 I don't see anyone trying to back out of the deal. Maybe I  
23 just look at the record today.

24 MR. DUNNE: My response to that, Your Honor, would be  
25 that that violates an important public policy point. And

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1 what's the public policy?

2 THE COURT: But is it to say --

3 MR. DUNNE: It's to try to get things done before you  
4 file --

5 THE COURT: Well --

6 MR. DUNNE: -- and try to have as an organized --

7 THE COURT: -- I --

8 MR. DUNNE: -- a filing -- and we know in a prepack  
9 situation the courts -- there's lots of case law that says they  
10 encourage that. And you recognize that there were pre-petition  
11 agreements that were done that you're going to bring into the  
12 Chapter 11.

13 THE COURT: Yeah.

14 MR. DUNNE: And it's not policy that I think militates  
15 in favor of us looking back to that time.

16 THE COURT: I under --

17 MR. DUNNE: Otherwise, what you're saying is we should  
18 have filed April 1st and just done it.

19 THE COURT: I understand that.

20 MR. DUNNE: And that's a bad policy.

21 THE COURT: On the other hand, you have quite a bit of  
22 case law saying that there's no breakup fee until there's a  
23 breakup fee. I mean, you might have some contribution claim  
24 under 503(b), maybe perhaps, but I think you do look at the  
25 record today, as opposed to the condition of the world six



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1 months ago, because it's an assumption motion. And I don't  
2 think there's a breach claim, because it's conditioned on the  
3 court approving it.

4 MR. DUNNE: I'm not sure, in the sense that, Your  
5 Honor, it may have said it was also earned on April -- you're  
6 going to the point of whether there'd be a pre-petition claim.  
7 I believe there would be.

8 THE COURT: I think the order says it's actually  
9 earned when the order's entered.

10 MR. DUNNE: Okay.

11 THE COURT: The proposed order.

12 MR. DUNNE: But, Your Honor, I -- the point -- I don't  
13 think that you can --

14 THE COURT: But let me -- Mr. Feldman, do you have  
15 someone who is prepared to testify --

16 MR. FELDMAN: I do --

17 THE COURT: -- that eighteen-percent discount is  
18 appropriate?

19 MR. FELDMAN: I do, Your Honor, and I would move to  
20 reopen the record for that limited purpose. And others may  
21 want to object.

22 I do want to make one comment, though, about what  
23 point in time the Court should be looking at it.

24 THE COURT: Right.

25 MR. FELDMAN: Even if you were to look at where we are

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1 today, Your Honor, you have to look today and the importance of  
2 the contract going forward, if you want to --

3 THE COURT: No, I --

4 MR. FELDMAN: -- if you want to say thank you very  
5 much --

6 THE COURT: I appreciate that.

7 MR. FELDMAN: -- for the last two months.

8 THE COURT: At some point there is an element of  
9 chicken in this; people can say I don't like it.

10 MR. FELDMAN: Yes.

11 THE COURT: I don't -- I really want that five  
12 percent.

13 MR. FELDMAN: We would move to reopen the record, Your  
14 Honor, just on this one narrow issue, and we would also ask for  
15 a ten-minute adjournment, if we could.

16 THE COURT: Well, why don't I hear from other people  
17 about reopening the record first?

18 MR. KIRPALANI: Your Honor, Susheel Kirpalani from  
19 U.S. Bank, N.A.

20 I would object to reopening the record. It was asked  
21 three or four times, is the record closed. And this is the way  
22 the adversarial system works. The debtors have a burden of  
23 proof --

24 THE COURT: Well, was any --

25 MR. KIRPALANI: -- and they have to bring evidence.

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1 THE COURT: I mean, there was some discovery in  
2 connection with this motion, right?

3 MR. KIRPALANI: There was some, and this issue was not  
4 adequately developed in discovery.

5 THE COURT: Well, was anyone from Moelis sought to be  
6 deposed or offered up, or anything like that?

7 MR. KIRPALANI: I don't know, but it's not our burden.

8 THE COURT: Did you have a list of witnesses or  
9 anything like that?

10 MR. BAIIO: No one sought to depose --

11 THE COURT: Was there a list of --

12 MR. BAIIO: -- anyone from Moelis.

13 THE COURT: Was there -- did the debtor say we're only  
14 calling Mr. Carter?

15 MR. KIRPALANI: I want to just push pause for one  
16 second, please, Your Honor. This entire record was set up with  
17 a certain legal framework called business judgment that now,  
18 after Your Honor's comments at the last hearing, after the  
19 objections that were filed, after the legal and the law was  
20 pointed out that it's actually the Court has to make an  
21 independent assessment, which is exactly what Your Honor is  
22 doing.

23 So no, there was no record created pre-bankruptcy to  
24 show and meet the legal standard that now seems to be applying,  
25 because they thought that Your Honor would just say, well, it

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1 was voted on, it was unanimous, business judgment, don't touch  
2 it. Okay?

3 THE COURT: Well --

4 MR. KIRPALANI: And that's just not the law.

5 THE COURT: -- I mean, Mr. Feldman didn't say that.

6 MR. KIRPALANI: No --

7 THE COURT: He said --

8 MR. KIRPALANI: -- well, actually --

9 THE COURT: -- it satisfies every standard, so --

10 MR. KIRPALANI: That's what he said here today, but  
11 that's not the way this case has been proceeding up till today,  
12 which is why we are where we are.

13 MR. HANSEN: Your Honor, Kris Hansen again, with  
14 Stroock, on behalf of Fortress and D.E. Shaw.

15 Prior to the hearing, we had called Willkie Farr,  
16 probably a week ago, asked them what witnesses they would be  
17 presenting, and asked them for the opportunity to depose those  
18 witnesses. We were told that Mr. Carter was the only witness  
19 that would be proffered today, that he was previously deposed  
20 by the creditors' committee, that they didn't think we should  
21 have a second bite at him, but take a look at his deposition  
22 transcript and let us know if we wanted to depose him. So we  
23 looked at the deposition transcript and it was -- I don't want  
24 to make a remark about it; we'll just say that we didn't feel  
25 the need to have a separate deposition. We then saw the



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1 THE COURT: Okay. Well, you're not proposing denying  
2 the five points. You're proposing either apply it once you see  
3 what isn't subscribed, or more likely, apply it to the  
4 currently unsubscribed piece, right, not to the whole 600  
5 million.

6 MR. HANSEN: Fortress and D.E. Shaw would be fine with  
7 that, Your Honor, if it was five percent of the actual  
8 unsubscribed piece. I know you've heard three parties come up  
9 and say that they'll actually subscribe with no fee if it was  
10 just five points. If they want to take that money for  
11 themselves, it's a couple million dollars, have at it; we would  
12 be fine with that.

13 THE COURT: Okay.

14 MR. SAGE: Your Honor, Michael Sage, Dechert.

15 I just want to buttress what Mr. Hansen was saying.  
16 Mr. Hansen said he's entitled to depositions and so forth.  
17 He's entitled to that, pursuant to your rules. The --

18 THE COURT: All right. But this isn't really your  
19 issue. I mean, the only one to talk about whether this fee was  
20 appropriate or not was the Fortress --

21 MR. SAGE: I agree; I'm only pointing out that there's  
22 a five-day rule -- chambers rule here before anything happens.

23 THE COURT: Oh, okay.

24 MR. SAGE: And I also --

25 THE COURT: That's fair.

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1 MR. SAGE: And I also took pains to ask that the  
2 record be closed.

3 THE COURT: Okay. Do you want a break or --

4 MR. FELDMAN: I would like a brief adjournment, Your  
5 Honor, if I might.

6 THE COURT: Okay.

7 MR. FELDMAN: And you can rule on whether you'll  
8 reopen the record at the end of it. That's fine.

9 THE COURT: Okay.

10 MR. FELDMAN: Thank you.

11 THE COURT: Okay. So this is more like a bio break?

12 MR. FELDMAN: Your Honor, I'd be happy with ten  
13 minutes --

14 THE COURT: Okay.

15 MR. FELDMAN: -- as I said before. All right?

16 THE COURT: That's fine. I'll come back at, like,  
17 five after 1.

18 MR. FELDMAN: Okay. Thank you.

19 (Recess from 12:56 p.m. until 1:09 p.m.)

20 THE COURT: Please be seated. Okay. We're back on  
21 the record in MPM Silicones. I had pending a request to reopen  
22 the record, and given the issues regarding surprise and  
23 inability to prepare, and the representations made to me by a  
24 couple of the objector's counsel that they were told a specific  
25 list of witnesses, I'm not going to reopen the record.

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1           So I am going to hold off ruling on the motion until  
2 we get to the -- or we conclude the discussion about the timing  
3 issues in the case, which I'm happy to get to now, or we can go  
4 to the disclosure statement hearing.

5           MR. FELDMAN: Your Honor, I think originally I was  
6 suggesting we should go to the disclosure statement, but I  
7 think given the circumstances this morning, it probably makes  
8 more sense, unless the Court disagrees, to go to the timing.

9           THE COURT: I think that's probably a good idea --

10          MR. FELDMAN: Right.

11          THE COURT: -- to go to the timing points.

12          MR. FELDMAN: Okay. I'm going to cede the podium to  
13 one of my colleagues.

14          THE COURT: Okay.

15          MR. FELDMAN: One second.

16          THE COURT: Okay.

17          MR. SAGE: Your Honor, if I could, I'd like to make  
18 one comment in response to something that Mr. Dunne said, if  
19 that's okay --

20          THE COURT: Okay.

21          MR. SAGE: -- regarding the RSA -- the BCA, and that  
22 is -- and it was almost Mr. Feldman as well. There was  
23 discussion about what's the quantum of damages on the indemnity  
24 claim. And while that's not -- it's not something I'm actually  
25 representing my client on, I just want to observe two things.



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1 One, it's not only a question about the payment in full. The  
2 creditor envisions payment in full in cash. That could change  
3 the damage component.

4 The other piece I want to mention is that --

5 THE COURT: Well, no, because you only cram down if  
6 it's the indubitable equivalent so --

7 MR. SAGE: Right, but a litigant could argue that the  
8 notes they got, since it's not payment in full -- that's why  
9 certain subordination agreements say payment in full in cash  
10 and some don't. It creates that issue that there could be a  
11 damage claim against --

12 THE COURT: Right.

13 MR. SAGE: The other piece of it, though, Your  
14 Honor --

15 THE COURT: I think -- well, frankly, given the  
16 construct, that lawsuit seems a bit of a much ado about  
17 nothing.

18 MR. DUNNE: Well, Your Honor, I must object. Mr.  
19 Sage, I think, started off his remarks by saying he doesn't  
20 represent his clients on this matter, so I --

21 THE COURT: Well, no, but --

22 MR. SAGE: I'm just clarifying --

23 THE COURT: -- he's responding to the point on the  
24 indemnification --

25 MR. SAGE: Right.

12 THE COURT: Okay.

14 MR. KOZUSKO: Good afternoon, Your Honor. Dan Kozusko  
15 from Willkie Farr & Gallagher, LLP, on behalf of the debtors.

20           Your Honor, the threshold issue on this motion, which  
21       was filed on June 5th, in all of the Chapter 11 cases and the  
22       three adversary proceedings in this case, and from which we've  
23       received objections jointly from the firsts and the one-and-a-  
24       half liens, and also from U.S. Bank, as the subnotes trustee,  
25       and which also has had replies in support of it filed by the ad

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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

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1 confirmation is delayed unnecessarily, and indeed, as proposed  
2 by the first-liens and the one-and-a-half liens, if delayed  
3 indefinitely.

4           The debtors also cannot be sure that if these  
5 agreements expire that they could obtain financing commitments  
6 on similar terms, or as favorable terms. Additionally, if  
7 these commitments -- if these plan support parties' commitment  
8 to vote in favor of the plan is entitled to last, the debtors  
9 could be sent back -- set back months in their restructuring  
10 process, and in the process, potentially incur exponentially  
11 higher restructuring fees and also harm to their business.

12           So from the debtors' perspective -- and I know other  
13 parties want to be heard on this matter as well -- we think it  
14 makes sense to proceed with the confirmation time line  
15 expeditiously, and on the current dates that we have proposed  
16 of August 14th, 2014.

17           The debtors anticipate that in connection with that  
18 confirmation hearing that various parties will want to take  
19 discovery. In addition, there are the three adversary  
20 proceedings that I've mentioned that were filed in connection  
21 with these Chapter 11 cases.

22           Two of the adversary proceedings concern whether,  
23 under the language of their respective indentures, holders of  
24 the first lien and one-and-a-half lien notes are entitled to  
25 receive a redemption premium.

14 THE COURT: Well, it doesn't exactly provide that. I  
15 mean, there's a choice --

17 THE COURT: -- that the first lien and the 1.5 lieners  
18 have. But I understand your point, which is that that issue,  
19 to the extent it's joined, as opposed to an affirmative vote on  
20 the plan, is front and center in the confirmation.

22           And in order to complete any discovery that is  
23   necessary in connection with confirmation, including the  
24   resolving the issues presented by the adversary proceedings,  
25   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

9 MR. KOZUSKO: Your Honor, I can't speak for the other  
0 parties to those adversary proceedings. The only discovery  
1 that the debtors are contemplating is in the -- certain  
2 provisions are potentially susceptible of multiple  
3 interpretations which would render them ambiguous and require,  
4 I think, a resort to parol evidence.

20 THE COURT: So you would want to have depositions of  
21 the people that were around when these agreements were  
22 negotiated?

23 MR. KOZUSKO: That's one -- I believe that's an option  
24 that the senior subnotes have mentioned in their response among  
25 the discovery they listed.

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1 THE COURT: Okay.

2 MR. KOZUSKO: But I think -- it's a matter of there  
3 also can be limited parol evidence. For example, the senior  
4 subnotes cite a Fitch report in order to support their  
5 interpretation of the indenture language there.

6 THE COURT: A what report?

7 MR. KOZUSKO: Fitch, the rating agency. It's  
8 mentioned in the senior subordinated complaints.

9 THE COURT: You mean how someone else would read this?

10 MR. KOZUSKO: They're looking to similar language to  
11 how Fitch was construing anti-layering provisions around the  
12 time as parol evidence to interpret the contract, at least  
13 that's how I read the complaint. I don't purport to speak for  
14 their counsel here, but there is reference to parol evidence in  
15 support of the contract interpretation they advance in the  
16 complaint. So it's occurred to them -- the possibility of  
17 using parol evidence has occurred to the trustee, for example.

18 THE COURT: All right. And as far as expert  
19 testimony?

20 MR. KOZUSKO: Your Honor, we think expert testimony  
21 would be, at most, very limited here. For example, I know it's  
22 in some of the joinders that were filed to our motions that  
23 they may need to understand how the market views the  
24 interaction of certain provisions at the time. We think expert  
25 discovery would be very limited, and I can't, sitting here



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1 today, even say that the debtors would propound any expert  
2 discovery.

3 THE COURT: And then there was something in the  
4 pleadings about a laches argument, or something -- I didn't  
5 quite follow it.

6 MR. KOZUSKO: That was -- correct, Your Honor. I  
7 believe that was in the pleading filed by the ad hoc committee.

8 THE COURT: Okay. So I'll ask Mr. --

9 MR. KOZUSKO: But I --

10 THE COURT: -- Dunne about that.

11 MR. KOZUSKO: -- understand the point they're making  
12 is that -- and that, I think, was directed specifically to the  
13 subnotes trustee's argument, that summary judgment briefing  
14 should begin tomorrow before any of the defendants have had a  
15 chance to respond to the complaint. And, again, I don't  
16 purport to speak for the ad hocs, but --

17 THE COURT: But I guess -- well, I'll ask Mr. Dunne  
18 about that. Okay.

19 MR. KOZUSKO: The point -- although the debtors do  
20 join us to the extent that we do think that we should respond  
21 to the complaint before any -- certainly, before any summary  
22 judgment briefing commences.

23 THE COURT: To me this is a little schizophrenic. I  
24 mean, you have a confirmation hearing scheduled; you had a plan  
25 filed early in the case. These issues were all flagged in

13 THE COURT: I mean, is there any issue -- this is  
14 really a question more for the other parties. Is there any  
15 notion that a ruling, if these issues end up actually being  
16 contested and decided at plan confirmation, wouldn't be --  
17 claim an issue preclusive in another context?

22 THE COURT: Okay.

25 THE COURT: All right. So then there's -- I mean, I

12 THE COURT: Well, I'm assuming -- I mean, that,  
13 clearly, is a subject for expert testimony talking about --

15 THE COURT: -- proper --

25 THE COURT: Would you contemplate fact discovery with

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1 the cram-down or just the experts?

2 MR. KOZUSKO: I can't speak for the other parties; I  
3 don't -- we'd have to take a look at their papers to see  
4 whether we might serve any discovery response, for example.  
5 But I can't speak for what discovery they would seek in  
6 connection with that.

7 THE COURT: I think you have all experts on sort of  
8 the same timetable?

9 MR. KOZUSKO: That is how the plan is set forth.

10 THE COURT: Have you considered having a different  
11 timetable and different people being involved in doing the  
12 cram-down issue, which may be a separate -- might have a  
13 separate timetable?

14 MR. KOZUSKO: The debtors have no objection to it  
15 occurring on a separate timetable as long as it doesn't --

16 THE COURT: As long as it ends.

17 MR. KOZUSKO: Exac -- we have no problem dual tracking  
18 that. But candidly, Your Honor, after we sent this proposed  
19 schedule out two weeks ago, that Your Honor was the first to  
20 suggest this sort of dual-track discovery approach. And again,  
21 as long as it does not delay the end date here, the debtors  
22 have no objection to doing expert discovery on different tracks  
23 to the extent it involves different issues that need different  
24 time lines. For example, some expert issues might not require  
25 any fact depositions in order for the experts to opine, or the

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1 document production is very limited, and we can move up those  
2 expert deadlines, whereas others may require a tailoring. And  
3 the debtors are fine with tailoring those at the margins, as  
4 long as we arrive at the same end date and tailor it to  
5 whatever the expert discovery issue is.

6 THE COURT: Okay. Well, do you have anything more?

7 MR. KOZUSKO: Well, Your Honor, I would -- it's up  
8 to -- I have responses to the objections that were --

9 THE COURT: Right.

10 MR. KOZUSKO: -- interposed, but similar to what Mr.  
11 Feldman did this morning, with Your Honor's permission, I would  
12 await the objectors presenting their cases to go in and have  
13 the debtors refute theirs --

14 THE COURT: Okay.

15 MR. KOZUSKO: -- because some -- Your Honor may moot  
16 some of those objections, for example, with your suggestion of  
17 dual-track --

18 THE COURT: Okay.

19 MR. KOZUSKO: -- expert discovery.

20 THE COURT: All right. So before I hear from the  
21 objectors, what discovery would other -- I mean, I know there's  
22 the motion to intervene in the adversaries, but everyone could  
23 be heard on the confirmation. What discovery would the seconds  
24 want to take?

25 MR. DUNNE: Your Honor, it's Dennis Dunne again.

1 I don't believe we need to take discovery; I don't  
2 think that the issues that we have with respect to the  
3 subordinated note trustee requires expert opinion or lay  
4 witness testimony. And I'm not sure how much of a disagreement  
5 we have with Mr. Kirpalani, so I may reserve the right to  
6 respond after he sets out his position. But let me be clear on  
7 it.

8 I think that what I want to avoid Your Honor doing is  
9 having a kind of truncated view of just reading this one  
10 paragraph mechanistically in isolation. I think we win on the  
11 plain language, but it's also clear that the cases here,  
12 Tribune and Metromedia, urge you to make sure that that -- that  
13 you look at other areas of that document --

14 THE COURT: Well, sure.

15 MR. DUNNE: -- and other related documents to make  
16 sure --

17 THE COURT: But that's all the -- that's the doc --  
18 but I'm talking about --

19 MR. DUNNE: I'm not --

20 THE COURT: -- parol evidence as opposed to the --

21 MR. DUNNE: No, but to be clear, I'm talking about --  
22 it may be other indentures, too, to see how all of the capital  
23 structure works together. But it's all documentary.

24 THE COURT: Right.

25 MR. DUNNE: So in that sense, Your Honor, it's easy;

5 THE COURT: But someone on your guy's side was raising  
6 something about lac -- discovery about laches, or waivers, or  
7 the like.

10 THE COURT: Okay.

14           There was 2013 indenture for the subordinated notes,  
15   there was a resale indenture that expressly references that we  
16   are senior inden -- the second-lien debt is senior  
17   indebtedness. The trustee was -- the laches argument goes to  
18   the trustee's awareness of that and didn't do anything with  
19   respect to that.

22 MR. DUNNE: No, the documents speak for themselves on  
23 this, and you'll draw whatever conclusions or factual findings  
24 from it.

25 THE COURT: Okay. Okay, so why don't I hear from the

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1 objectors.

2 MR. KIRPALANI: Thank you, Your Honor. Susheel  
3 Kirpalani from Quinn Emanuel.

4 Just I will start where Mr. Dunne left off, because  
5 it's just better for the flow. I agree with Mr. Dunne, we  
6 don't need discovery; we think it's a pure legal issue. We  
7 don't think it's even an issue for experts.

8 This is why we do believe it's prudent to move on our  
9 adversary proceeding independent of confirmation. Your Honor  
10 asked why -- why wouldn't this all be done under the plan, and  
11 I can give you some very pragmatic reasons.

12 First, the debtors cite a couple of cases explaining  
13 how -- they're the first filed, somehow, and they say that  
14 we're engaging in forum shopping. They say this in their  
15 papers and that what we're trying to do is litigate things, and  
16 gamesmanship, and they cite a couple of cases that chastise  
17 parties for doing this kind of thing.

18 First, to make it abundantly clear, if it's not clear  
19 already, we are here, and we are asking to litigate right here.  
20 The first bankruptcy case they cite is Lear Corporation. Judge  
21 Gropper dismissed an adversary proceeding in favor of an action  
22 filed in State Court in Illinois four years earlier. It has  
23 nothing to do with this case.

24 THE COURT: Well, he says in that case though, that,  
25 of course, if a plan had been teed up, I would have the case --



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1 I mean, Judge Gropper. I mean, come on.

2 MR. KIRPALANI: No, what he said --

3 THE COURT: The whole point of the Chapter 11 case is  
4 to see if you get a plan confirmed.

5 MR. KIRPALANI: Yeah, but --

6 THE COURT: I think we should do this in the context  
7 of a plan.

8 MR. KIRPALANI: Your Honor, what he said is  
9 "Plaintiff's tactic of commencing a new action," this is a  
10 quote, "in the debtor's Chapter 11 cases" --

11 THE COURT: I'm not --

12 MR. KIRPALANI: -- "allows them to argue in a new  
13 forum something they argued four years ago."

14 THE COURT: I'm not --

15 MR. KIRPALANI: Does that resemble our case at all?

16 THE COURT: But then he has the caveat: of course, if  
17 there were a plan in front of me I would do it -- I would rule  
18 differently. And I think that's what we have here, there's a  
19 plan.

20 MR. KIRPALANI: Okay.

21 THE COURT: Let's do it in the context of a plan.

22 MR. KIRPALANI: Well, we can take a look at the other  
23 case that the debtors cite, and perhaps they cited it and gave  
24 it to us yesterday in the hopes that we wouldn't read it, or in  
25 the hopes that Your Honor wouldn't read it. It's One

24 MR. KIRPALANI: Your Honor, I'm concerned that the  
25 Court has been hearing a side that may not be accurate with our

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1 position.

2 THE COURT: No, I haven't --

3 MR. KIRPALANI: Where does the Court believe that  
4 we're asking for things to be delayed?

5 THE COURT: You're right, the other folks are later.

6 MR. KIRPALANI: Much later.

7 THE COURT: But I would rather do this in the context  
8 of a plan. And because, ultimately, if it's going to be  
9 settled, it will be settled in the context of a plan. And  
10 that's it. I'm not going to debate this anymore; I'm  
11 exercising my discretion on this point.

12 MR. KIRPALANI: Okay, with respect to the issue of,  
13 Your Honor mentioned Fitch, and I think there was some  
14 confusion. And, again, this is the risk of the Court hearing  
15 people characterize things that we filed before Your Honor's  
16 had an opportunity to actually read them. We're not citing  
17 Fitch to say that that's parol evidence, and the intent of  
18 Fitch should govern here. This comes from -- it all starts  
19 with --

20 THE COURT: I was just trying to figure out what  
21 discovery people wanted. It sounds like you guys don't -- this  
22 could be done on a timetable consistent with what the debtors  
23 have proposed.

24 MR. KIRPALANI: Provided that discovery is not  
25 necessary to our adversary proceeding --

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1 THE COURT: Right.

2 MR. KIRPALANI: -- which we don't believe it is, and  
3 that's why we set forth our letters.

4 THE COURT: I don't think anyone is really saying that  
5 it is.

6 MR. KIRPALANI: Your Honor, can I just address the  
7 practical issues?

8 THE COURT: Am I right about that?

9 MR. KIRPALANI: This --

10 THE COURT: I mean, you aren't looking -- it sounds  
11 like you weren't looking for it either. They're not looking  
12 for it, they're not looking to introduce parol evidence.

13 MR. KOZUSKO: No, Your Honor, we're not looking  
14 necessarily to use parol evidence --

15 THE COURT: All right.

16 MR. KOZUSKO: -- although we do think that certain  
17 language in the indenture that the trustee cites is potentially  
18 susceptible to multiple interpretations.

19 THE COURT: So it's going to be a documentary case  
20 then, right, including the Fitch document and everything else.

21 MR. KIRPALANI: Right, it seems like that.

22 THE COURT: And even -- let's go to the last point on  
23 this, then, which is experts. Is either side contemplating  
24 some sort of professor or ex-I don't know what, head of bond  
25 trading at Lehman Brothers who would testify that this is what

3 MR. KIRPALANI: No, we don't think it's necessary,  
4 Your Honor, but --

6 MR. KIRPALANI: This is simple.

8 MR. KIRPALANI: I agree with that. That's why our  
9 timetable had it potentially resolvable by July 28th, but --  
10 and without Your Honor yet ruling on when confirmation would  
11 be, we know we have until October under the outside date, which  
12 is why we thought our schedule made the most sense. We weren't  
13 playing gamesmanship. We weren't --

15 MR. KIRPALANI: We've been accused by it in multiple  
16 papers. I'm happy Your Honor laughs when you read those  
17 things, but --

19 MR. KIRPALANI: -- we take it seriously.

21 MR. KIRPALANI: But there still remains another  
22 practical problem. If we -- are we to engage in discovery --  
23 right now, if the debtors are right, the value of the debtor  
24 has absolutely no relevance to us, right?

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1 MR. KIRPALANI: Whether the make-whole should be paid  
2 or not paid, and the indubitable equivalent of their take-back  
3 paper, or whatever is given to them, makes no difference,  
4 because we get nothing. Do we need to engage in all discovery  
5 relating to potential valuation in the event that if this is  
6 going to be litigated in connection with confirmation, so will  
7 valuation. And even if the Court denies confirmation because  
8 they have misread my indenture, would the valuation evidence be  
9 law of the case now, or will there be another opportunity?  
10 It's important, Your Honor, because we're spending money on  
11 trying to litigate the issues we think are relevant in the most  
12 judicious way.

13 THE COURT: I'm sorry, maybe I'm -- if I don't confirm  
14 the plan --

15 MR. KIRPALANI: Right.

16 THE COURT: -- then we're at square one, we wouldn't  
17 have a valuation contest.

18 MR. KIRPALANI: Okay. So then whatever findings Your  
19 Honor makes, whatever evidence Your Honor makes on projections,  
20 discount rates, multiples, comps, whatever, irrelevant.

21 THE COURT: There wouldn't be a ruling. I would just  
22 say the plan --

23 MR. KIRPALANI: There wouldn't be a ruling.

24 THE COURT: -- can't be confirmed.

25 MR. KIRPALANI: There wouldn't be a ruling, but there

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1 will be evidence, which I would prefer not to partake in.

2 THE COURT: You can stand up and say, this is not  
3 binding on me for purposes of this particular plan.

4 MR. KIRPALANI: Yes. That's all I wanted to confirm.

5 THE COURT: The only thing that would be binding on  
6 you is the things where you actually litigated and you --

7 MR. KIRPALANI: But the fact that I'll be sitting  
8 here, at counsel table, and not saying anything when I hear  
9 testimony --

10 THE COURT: You can say it once at the beginning, and  
11 that'll be enough.

12 MR. KIRPALANI: No, no, I don't need to say it again  
13 if Your Honor says it today.

14 THE COURT: Well, I think you -- I wouldn't blame you  
15 if you did --

16 MR. KIRPALANI: Okay. I think that --

17 THE COURT: -- say that as far as we are seeking to  
18 defeat this plan on one grounds, and one grounds only, but that  
19 does that mean that if we win, the evidence on valuation will  
20 be binding on us, because we're not -- that's not at issue.

21 MR. KIRPALANI: There'll have to be a new plan with a  
22 new valuation --

23 THE COURT: Correct.

24 MR. KIRPALANI: -- and new contemporaneous --

25 THE COURT: Correct.

1 MR. KIRPALANI: -- evidence. Yes, Your Honor?

2 THE COURT: Okay.

3 MR. KIRPALANI: Thank you, Your Honor.

4 MR. MOELLER-SALLY: Good afternoon, Your Honor,  
5 Stephen Moeller-Sally, from Ropes & Gray, for Wilmington Trust  
6 National Association, the 1.5 lien trustee.

7 Let me start by saying that the 1.5 lien trustee has  
8 no objection to all discovery, including in the adversary  
9 proceedings and confirmation, proceeding simultaneously. We  
10 understood that that was the nature of the debtor's motion.  
11 Our principal complaint is a question of timing, and we have,  
12 essentially, two species of timing complaints. One is a timing  
13 complaint that relates to the solicitation of the plan. And  
14 the second relates to the timing of the discovery and the need  
15 for that to happen in an orderly process that allows people to  
16 do so in a meaningful way.

17 I know you've been asking people about what discovery  
18 they might take, so let me jump to that before I say anything  
19 else.

20 THE COURT: Okay.

21 MR. MOELLER-SALLY: On the make-whole litigation, we  
22 think that expert discovery may be involved. We might call an  
23 expert to testify to industry custom and practice, in terms of  
24 make-wholes in indentures. It is also possible that we might  
25 need expert testimony on the pricing of the notes at the time



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1 the deal was entered, which may have an impact on, or be  
2 germane to the question of whether there were assumptions about  
3 payment of the make-whole upon default or not.

4 Obviously, you take the confirmation hearing  
5 separately. We have a whole host of potential expert issues  
6 and include valuation, that include cram-down interest rate  
7 and, sort of, the normal cram-down litigation and confirmation.

8 THE COURT: Well, the valuation of your recovery,  
9 right? I mean --

10 MR. MOELLER-SALLY: Correct, correct.

11 THE COURT: Okay.

12 MR. MOELLER-SALLY: Although we may also have a  
13 valuation issue -- and this is why we think that, actually, all  
14 three adversary proceedings and confirmation should proceed  
15 simultaneously -- if it turns out that valuation leaves the 1.5  
16 liens with a deficiency claim, then we have a potential  
17 interest in the subordination litigation. That may be a  
18 litigation that affects us. And we think that we should not be  
19 forced to rush into that dispute without having an opportunity  
20 to do discovery along with all our other confirmation issues  
21 and understand what the valuation risks are.

22 THE COURT: Well, we just -- the people who are  
23 primarily involved in that dispute agreed that there didn't  
24 need to be any discovery except for getting the documents  
25 together on that dispute.

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1 MR. MOELLER-SALLY: And the sole point I'm making,  
2 Your Honor, is that we believe that that litigation should go  
3 along --

4 THE COURT: Right.

5 MR. MOELLER-SALLY: -- with confirmation --

6 THE COURT: Okay.

7 MR. MOELLER-SALLY: -- and the other adversary  
8 proceedings. That's all.

9 THE COURT: But you're not contemplating additional --

10 MR. MOELLER-SALLY: No, we're not contemplating  
11 additional discovery --

12 THE COURT: Okay.

13 MR. MOELLER-SALLY: -- except to the extent that we do  
14 discovery on valuation in connection with confirmation.

15 So that is a summary of the kinds of discovery that we  
16 have on the expert side. In terms of fact discovery, we would  
17 certainly want to do discovery on the negotiation and drafting  
18 of the notes. We would want to do discovery on negotiation and  
19 drafting of the plan, in terms of what was contemplated in the  
20 treatment of the notes.

21 THE COURT: Why would you -- I don't follow that part.

22 MR. MOELLER-SALLY: One of the questions that's going  
23 to be raised in our adversary proceeding is whether the  
24 treatment under the plan is a redemption. And so there's going  
25 to be a question as to -- for example, the debtors have

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1 admitted that this is a balance sheet restructuring. So  
2 essentially, what they're doing with the first-liens and the  
3 1.5 liens is refinancing. That is a fact that may have some  
4 bearing on whether the Court decides that the treatment we're  
5 getting under a plan is a redemption.

6 THE COURT: But with the financing, you get the make-  
7 whole. If you're given notes, you get the make-whole.

8 MR. MOELLER-SALLY: If we're given note -- the plan  
9 treatment, just to be clear, is not take cash with no make-  
10 whole or take notes with the make-whole. The plan provides us  
11 with a treatment that says take cash if you accept. And if you  
12 reject, you get whatever's decided.

13 THE COURT: Okay.

14 MR. MOELLER-SALLY: It's not --

15 THE COURT: You're right.

16 MR. MOELLER-SALLY: -- a settlement offer that way.

17 THE COURT: You're right.

18 MR. MOELLER-SALLY: So we're still litigating over the  
19 make-whole in the confirmation contract.

20 THE COURT: And you're saying that --

21 MR. MOELLER-SALLY: Yep.

22 THE COURT: -- those notes would be -- I understand.

23 MR. MOELLER-SALLY: That's right.

24 THE COURT: Okay.

25 MR. MOELLER-SALLY: So --

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1 THE COURT: But that's fairly limited discovery, then.

2 MR. MOELLER-SALLY: That's probably fairly limited  
3 discovery.

4 THE COURT: Okay.

5 MR. MOELLER-SALLY: On the fact side, in terms of  
6 confirmation, we may also need some discovery on the current  
7 financial state of the company at the time of emergence, just  
8 so we could understand the value of the replacement notes we  
9 may be receiving if the class rejects. So those are the types  
10 of things that -- the types of discovery that we would imagine  
11 taking in connection with both the adversary and confirmation.

12 THE COURT: Okay.

13 MR. MOELLER-SALLY: And as I said, we're fully willing  
14 to proceed with both the adversary and confirmation  
15 simultaneously.

16 THE COURT: Okay.

17 MR. MOELLER-SALLY: Let me pause --

18 THE COURT: And can you, two-track it? I mean,  
19 there's the cram-down issues, separate and apart from whether  
20 there's a make-whole in there or not, really contemplate  
21 different teams, I would think. I mean, you have different  
22 experts; you have different set-up things to think about.  
23 They're valuation-related; they're interest rate-related, et  
24 cetera. Can you two-track that?

25 MR. MOELLER-SALLY: I think that we would be willing

1 to two-track that. I think just to pause on one of our points  
2 with relation to the discovery schedule, as it's been proposed  
3 by the debtors, and something that we've tried to cure in our  
4 alternative schedule, and maybe it makes sense for me, right  
5 now, to -- I've a demonstrative that just sets the two  
6 schedules side-by-side, if I may approach?

7 THE COURT: Okay, sure. Thanks.

8 MR. MOELLER-SALLY: So one of our -- just in terms of  
9 the process that the debtors are proposing, they've said that  
10 August 14th is the be-all and end-all date and that the only  
11 thing to do is to work back from there and cram in discovery of  
12 all kinds, fact discovery, expert discovery, et cetera, all  
13 into that very short period. The problem is, is that what  
14 their schedule does -- and this is illustrated by the side-by-  
15 side time line -- is it requires expert discovery to begin, and  
16 nearly be completed, before fact discovery is even completed.

17 In our view, this is just a violation of standard  
18 custom and practice. You set the factual record, and once you  
19 have the factual record, the experts can decide on what basis  
20 they're going to make their expert opinions. And you do the  
21 reports; you go back and forth. And the proper sequence for  
22 this, and the proper sequence in any litigation, is to complete  
23 fact discovery before proceeding to expert discovery.

24 Now, if we are to work with the Court and work with  
25 the other parties to do a dual track, it may happen that fact

1 discovery on one track may be a little shorter; expert  
2 discovery may be a little longer. We need to sort out all  
3 those issues; that's not a proposal that's currently in front  
4 of the Court today. And that's something that I think the  
5 parties would have to retreat and discuss, with the Court's  
6 guidance, on what's appropriate for that. But just  
7 fundamentally, mashing together expert discovery and fact  
8 discovery, we think, is inappropriate, and that the final  
9 discovery time line, whatever it may be, or the final dual-  
10 track discovery time lines, should only allow for expert  
11 discovery after the factual discovery is completed in each  
12 case.

13 THE COURT: Well, what facts would the experts on the  
14 make-whole need to know?

15 MR. MOELLER-SALLY: On the make-whole --

16 THE COURT: Aren't they just talking about general  
17 custom and practice in the industry?

18 MR. MOELLER-SALLY: I think on the make-whole, it  
19 would be -- I mean, I think you're talking mostly industry  
20 custom and practice, and you're talking about -- I guess the  
21 facts would be what I mentioned earlier about the pricing of  
22 the notes and negotiation and documentation of the notes. We'd  
23 want to see drafts; we'd want to see how the --

24 THE COURT: But the experts can give their opinion  
25 based on assumptions on that. If it's X, it's one thing; if

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1 it's Y, it's another. They don't need to know the pricing. In  
2 fact, their expert opinion, to my mind, would be more  
3 meaningful if they just said custom and practice -- if it's  
4 priced a certain way, is X, and if it's priced a certain other  
5 way, it's Y.

6 MR. MOELLER-SALLY: That may be true of the pricing  
7 issue, but then there is simply -- there is the language issue  
8 and looking at the indenture and having indenture precedents  
9 and having drafts, understanding the precedents from which our  
10 current indenture was derived. That's information that we  
11 would want to have in connection with the make-whole  
12 litigation.

13 THE COURT: They can get that pretty quickly; can't  
14 they? I'm assuming you people have been looking at this for  
15 the last three months. I'm assuming your clients have been  
16 pricing it and asking some people to write memos about it, so  
17 they can decide whether to buy or sell this debt. You're not  
18 starting from square one, in other words.

19 MR. MOELLER-SALLY: We're not arguing that we are,  
20 necessarily, Your Honor, but we are -- we would like the  
21 opportunity to take discovery in connection with this, both  
22 some limited facts discovery and some expert discovery.

23 THE COURT: But I guess -- so the substantial  
24 completion of fact witnesses, you pretty much have the same --

25 MR. MOELLER-SALLY: That's right.

8 THE COURT: So you don't need to --

11 THE COURT: No, but what I'm saying is, I don't see  
12 why the experts would have to wait several months -- several  
13 weeks after the documents are produced to write their report.  
14 I mean, they could write it very shortly after the documents  
15 are produced.

17 THE COURT: I mean, if they're experts, they should  
18 know what these documents mean, right? I mean, once they see  
19 it, they don't have to do a lot of research; they're experts.

20 MR. MOELLER-SALLY: I take your point, Your Honor, and  
21 again, if we're going to dual-track the adversary and the  
22 confirmation litigation, in terms of the schedules, that it may  
23 be appropriate to have shorter fact discovery for one or the  
24 other and longer expert discovery for one of the other; we're  
25 not --



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1 THE COURT: Well, yeah.

2 MR. MOELLER-SALLY: -- we're not disputing that.

3 THE COURT: I mean, my thought was that right now I've  
4 reserved five days for a confirmation hearing. That would tie  
5 the longest trial I've ever had. And it's not for want of  
6 having difficult matters. I just -- I don't have long trials.  
7 And all of you are on notice of that. And I do trials -- and  
8 this'll be baked into any order -- any witness under the  
9 party's control submits a declaration or an affidavit, so we  
10 don't have direct testimony. You can cross-examine that  
11 person; they need to be here, but -- and you're to agree on all  
12 of the -- on the admissibility of as many exhibits as possible  
13 and have a joint exhibit book.

14 And so I believe I could do a confirmation hearing in  
15 five days here. But I also think that the cram-down aspect of  
16 it should be at the back end. And if the schedule isn't  
17 working, my inclination would be to add a couple -- move that  
18 back end to a later time. But I'd like the parties to try to  
19 make it work. That's the aspect of it that gives me pause, not  
20 the make-whole and subordination issue but the cram-down issue.  
21 That may, depending on how it goes, take more time.

22 MR. MOELLER-SALLY: Your Honor, we totally agree with  
23 you. And that's one of the reasons why we think that the  
24 current confirmation date is unworkable, because --

25 THE COURT: Well, not if you do the cram-down part at

9 MR. MOELLER-SALLY: The Supreme Court in Till said  
10 what it said --

13 MR. MOELLER-SALLY: But the Supreme Court said what it  
14 said in terms of applying an interest rate in the absence of  
15 market rate.

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1           So I don't think that's a big issue. There may be  
2 some issues on valuation and the like, but the discount rate  
3 isn't the issue. You could take that up to the Supreme Court  
4 and see if they wanted to change their mind.

5           MR. MOELLER-SALLY: And perhaps we will, Your Honor.

6           THE COURT: Okay.

7           MR. MOELLER-SALLY: The question for today, though,  
8 let's go back to the discovery schedule --

9           THE COURT: No, I --

10          MR. MOELLER-SALLY: -- the question for today is,  
11 again, we agree with you, the confirmation and the adversary  
12 should go on at the same time.

13          THE COURT: Right.

14          MR. MOELLER-SALLY: So the question is, while it may  
15 make sense to dual track, there might be different teams doing  
16 it and things like that. If we're ultimately dealing with the  
17 same range of end dates --

18          THE COURT: Right.

19          MR. MOELLER-SALLY: -- we've got to deal with the  
20 realities --

21          THE COURT: Look --

22          MR. MOELLER-SALLY: -- of discovery.

23          THE COURT: -- this is relevant for today, because  
24 there are deadlines in the RSA.

25          MR. MOELLER-SALLY: That's correct.

14 MR. MOELLER-SALLY: Before we get too far down this  
15 road, I did want to mention one scheduling issue related to  
16 solicitation. The treatment of the first-liens and the 1.5  
17 liens is actually unprecedented. We have a so-called toggle  
18 plan, where if our holders vote in favor of the plan, they get  
19 cash, as we discussed, and if they reject the plan, they get  
20 replacement notes in some amount. Maybe it's going to be par  
21 plus crude; maybe it's going to be par plus crude plus the  
22 make-whole. No one knows.

23               So our holders are basically faced with a choice, how  
24 to vote on the plan. Is it favorable; is it not? That's the  
25 choice that everybody has. Our holders have a choice that,

1 again, is unprecedented. We're either being asked to accept  
2 the plan and take one form of currency or reject the plan and  
3 take another form of currency in a totally unknown amount.

4 Now, we accept that there are plenty of times when  
5 parties vote for plans and don't know what the ultimate amount  
6 of their distribution is going to be. But they have a single  
7 proposed treatment. And they can choose to accept that  
8 treatment or reject that treatment. We're in a position where  
9 we have alternate treatments. We have alternate treatments  
10 that are, in fact, not up to each individual to choose. We  
11 don't have an option. We basically vote to accept, vote to  
12 reject. To the extent the class votes, each individual  
13 creditor is bound to either accept cash with no make-whole or  
14 take replacement notes in some unknown amount.

15 I'm jumping ahead, if you'll forgive me, to disclosure  
16 statement standards. But our contention is that a hypothetical  
17 investor, typical of a note holder, would not be able to make  
18 that decision without knowing the amount of the make-whole.

19 THE COURT: I'm sure they've talked to their lawyers  
20 about that and figured out what the risk would be. I mean,  
21 life is full of uncertainty.

22 MR. MOELLER-SALLY: Life may be full of uncertainties.  
23 We do want to respond to the cases that the debtor cited that  
24 simply don't apply to this instance. In one case, it was the  
25 K-V Discovery Solutions case; the question was the size of the

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1 pool. That's fine. Everybody deals with that on a regular  
2 basis; that's not an issue. In another case, it was a  
3 litigation trust; nobody knew what the litigation was going to  
4 be worth. Again, that's fine. The also cite to A&P --

5 THE COURT: Isn't this a litigation?

6 MR. MOELLER-SALLY: What's that?

7 THE COURT: Isn't this a litigation?

8 MR. MOELLER-SALLY: Again, it's a toggle plan. It's  
9 not --

10 THE COURT: No, but isn't the issue --

11 MR. MOELLER-SALLY: -- it's not --

12 THE COURT: -- isn't the uncertainty a litigation  
13 issue?

14 MR. MOELLER-SALLY: The uncertainty is a litigation  
15 issue; that's correct.

16 THE COURT: Okay, and these are -- the people that own  
17 this debt, I think -- tell me if I'm wrong -- they're not  
18 grandma, right? Although actually --

19 MR. MOELLER-SALLY: I think --

20 THE COURT: -- actually, my grandma --

21 MR. MOELLER-SALLY: There --

22 THE COURT: -- would actually be --

23 MR. MOELLER-SALLY: I believe that --

24 THE COURT: -- pretty sharp on this, but they're  
25 not -- they're institutional investors.

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1 MR. MOELLER-SALLY: I believe that the notes are  
2 registered, Your Honor, and I don't know that we necessarily  
3 know whether they're all institutional investors.

4 THE COURT: They have an indenture trustee, too --

5 MR. MOELLER-SALLY: They do have an indenture trustee,  
6 that's correct.

7 THE COURT: -- who's able, and I guess could make a  
8 recommendation on it, too. But in my experience, literally  
9 personal experience, institutional investors, as part of their  
10 business, hire lawyers to help them decide litigation risk. In  
11 fact, many institutional investors overdo that. Their whole  
12 investing model is based on that. They can do it. If you can  
13 handicap the risk of a civil war in Iraq, you can certainly  
14 handicap the risk of a dispute over make-whole and probably  
15 settle it.

16 MR. MOELLER-SALLY: Your Honor, we're certainly open  
17 to any reasonable settlement discussions on the make-whole at  
18 any time.

19 THE COURT: Well, I --

20 MR. MOELLER-SALLY: There's no question about it.

21 THE COURT: -- I've thrown it out twice now.

22 MR. MOELLER-SALLY: Our issue here is just simply  
23 we're being presented with a choice, that holders --

24 THE COURT: I'm not -- look, we are jumping ahead with  
25 the disclosure statement, but I don't believe it's appropriate

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1 to hold up voting on a plan when there's a -- an issue like  
2 this. I don't think it -- it doesn't affect the business. It  
3 affects one class, and that class is sophisticated and has  
4 sophisticated people representing it. And the issues are  
5 pretty clear. And if anyone really is that bothered by it,  
6 they can get involved, as several people have. It's just --  
7 it's not in the cards.

8 MR. MOELLER-SALLY: Well, Your Honor what I --

9 THE COURT: Part of -- part of the Bankruptcy Code is  
10 voting for compromise provisions. And people can vote.

11 The premise, as clarified by Mr. Dunne, is that this  
12 plan, if they vote no, gets them what they're entitled to under  
13 the law. That's -- that's not a bad choice. You get all your  
14 principal and accrued interest in cash -- some people like  
15 cash -- or you get notes, to the extent that the law requires.

16 MR. MOELLER-SALLY: But again, Your Honor, just --

17 THE COURT: It's not a big deal.

18 MR. MOELLER-SALLY: -- to be -- but it's not a big  
19 deal, but again, we're being presented with a case where  
20 individual holders are going to be bound by the class vote.  
21 The person who likes cash --

22 THE COURT: That's -- talk to Congress about that.

23 MR. MOELLER-SALLY: -- may not get cash.

24 THE COURT: That's what bankruptcy's all about.

25 MR. MOELLER-SALLY: Well, I don't know. We look at



1 the A&P case, and in the -- the debtors cite the A&P case, and  
2 the choice there was you vote yes, you get cash with no make-  
3 whole. You vote no, you can either opt cash or no make-whole  
4 or you could get notes in whatever amount is determined by the  
5 court.

6 We think that would sort of resolve the disclosure  
7 issues and basically give our holders a choice that they could  
8 reasonably make. And then those people who want to spend money  
9 on lawyers, and go consult, and figure out whether they want to  
10 take the flyer on the litigation, they can do that. But the  
11 party who is being carried along against their will doesn't  
12 have to sacrifice the --

13 THE COURT: Well, that was --

14 MR. MOELLER-SALLY: -- option for cash.

15 THE COURT: -- that was a compromise solution. People  
16 can negotiate something like that if they want to. And again,  
17 as far as the cost and the risk, people are free to do that,  
18 which is why, again, I think I'd rather not have this drag out  
19 more than potentially a couple more weeks after the debtors'  
20 schedule if you cannot see your way to a reasonable period for  
21 dealing with the cram-down issues, which again, I understand  
22 what people are saying today. It may not even be an issue.  
23 Conceivably, people would rather have cash. They could go  
24 invest in the equity once they get the cash and buy it from  
25 Fortress.

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1 MR. MOELLER-SALLY: Last thing, last comment then,  
2 Your Honor, is I don't know what decision you're going to make  
3 about the debtors' schedule and what litigation it should apply  
4 to and whatnot.

5 THE COURT: Well --

6 MR. MOELLER-SALLY: We just respectfully request that,  
7 whatever the schedule is, that we not be put in a position  
8 where experts have to start doing -- I mean, they can start and  
9 we can maybe have deadlines that sort of reflect their ability  
10 to start on their work, but that we don't have full expert  
11 discovery and reports going, which is what the debtors'  
12 schedule provides: reports being written, both initial expert  
13 reports, and rebuttal reports, before the factual records  
14 close. That just doesn't any sense.

15 THE COURT: Well, I -- again, I think this should be  
16 divided in two. I don't believe that you'll be having expert  
17 reports written before the -- relevant to them -- factual  
18 record is closed on the make-whole issue. I think that for the  
19 cram-down experts, we need to rethink that. And I'll impose a  
20 schedule on Monday, if you aren't able to suggest one to me  
21 together, after meeting and conferring today and tomorrow about  
22 it, on that aspect of it.

23 On the other one, the debtors point out it's supposed  
24 to be rolling discovery. They need to -- the documents need to  
25 set out -- and it's early enough; it's July 9th -- they need to

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1 set out what the models were for the indenture. I mean,  
2 there's nothing -- there's really nothing more than that, I  
3 don't think. I mean, I -- what's the expert going to say? I  
4 mean, at some point, if the expert's just commenting on the  
5 facts, I could do that. I mean, it's just, in this context --  
6 not in the -- not in the cram-down context.

7 MR. MOELLER-SALLY: Okay. I have nothing further,  
8 Your Honor. Thank you.

9 THE COURT: So but on -- so I think, to be clear then,  
10 I'll impose a schedule on Monday, if you can't agree on one. I  
11 really want you all to meet and confer over the next couple of  
12 days, focusing on really two things: first and foremost on the  
13 cram-down case and the fact discovery for that, and the expert  
14 discovery for that, because my belief is that, at best for the  
15 debtors, it would be the last couple of days of the case and  
16 with a caveat in the discovery ruling that if this isn't --  
17 because I think it's going to be very tight -- if it isn't  
18 working, I'll adjourn the cram-down fight for a couple of  
19 weeks, so that you could have that extra time.

20 And then the second thing to focus on is making sure  
21 that the -- but I think it's here, the production of documents  
22 is complete for the make-whole experts. Right now, it's really  
23 only a week before their report's due. I think you should be  
24 able to get it in more than that, just for the make-whole  
25 people. I think you should be able to get that in, at least by



6 MR. BOGDANOFF: We may get some guidance from you.

8 MR. BOGDANOFF: Thank you, Your Honor.

14 MR. FELDMAN: We will meet and confer, Your Honor. I  
15 think we've got enough guidance. We ought to be able to adapt  
16 our schedule. But if not, we've heard you.

21 MR. FELDMAN: I'm sorry, Your Honor, September 14th?

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7 THE COURT: Okay.

9 THE COURT: Okay. So then I think that leads us back  
0 to the restructure and support agreement and the backstop  
1 agreement. And I appreciate the work that the debtors, the  
2 second-lien lenders, and the committee have done to resolve  
3 objections. I'll note that issues that had been raised that  
4 were resolved were ones that I had real concern about, and I  
5 believe they've been appropriately resolved.

19           The debtors have stated that whatever context -- I'm  
20   sorry, whatever standard I apply to the motion, they will --  
21   they would meet it, recognizing as they must that they have the  
22   ultimate burden of proof here. And they have listed those  
23   standards as from hardest to meet to most easiest to meet: the  
24   heightened scrutiny standard by which a court closely examines  
25   transactions involving insiders.

8 And I should note that, at least under Delaware law,  
9 even that standard is not a free pass as the Delaware Chancery  
0 Court held in *Clements v. Rogers*, 790 A.2d 1222, 1247 (Del. Ch.  
1 2001), "A fully functioning special committee, at best, shifts  
2 the burden of proving fairness to the plaintiff," in this case  
3 the objectors.

18           There is the third standard, which is the easiest to  
19 meet, which as noted by the Integrated Resources court, and as  
20 I've cited from Clements v. Rogers, is not a free pass. It has  
21 a greater degree of deference being given to the determination  
22 of the board, where the board is not dominated or unduly  
23 affected by an insider.

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16           These were pre-petition transactions, but they did  
17   contemplate a future bankruptcy case. In fact, the backstop  
18   commitment agreement isn't truly effective until Court  
19   approval. And in light of that, I infer that the independent  
20   directors not only were aware of the nonbankruptcy corporate  
21   law requiring their active involvement, but also the bankruptcy  
22   law, and took their duties seriously.

23           On the other hand, I have never believed, given the  
24   plain terms of Section 363(b) and Section 365 of the Bankruptcy  
25   Code, which require court approval of transactions out of the



9           Thus, I believe, and I believe this is consistent with  
10   the Second Circuit case law, that the Court ultimately must  
11   make its own decision as to whether the proposed transaction  
12   makes good business sense and is in the best interests of the  
13   debtor and fair and equitable.

19 I believe, and have held for many years now, that this  
20 is also laid out by the Second Circuit in *In re: Orion*  
21 *Pictures*, 4 F.3d 1095 (2d Cir. 1992) where the Second Circuit  
22 refers to the bankruptcy judge exercising his or her judgment  
23 in reviewing, in that case, the assumption of an executory  
24 contract. And I believe that's the right approach to take.

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15           The timing issues or the objections to the plan -- I'm  
16   sorry, to the structure and support agreement and the backstop  
17   commitment agreement that have been raised I've already dealt  
18   with. There are deadlines for the effectiveness or the  
19   continued effectiveness of these agreements -- in both  
20   agreements. One of those deadlines is an August 22nd  
21   confirmation date. Although with all of the deadlines  
22   dependent upon the bankruptcy court, there is a recognition in  
23   these agreements that it is subject ultimately to reasonable  
24   discretion of the bankruptcy court to comply with the general  
25   time line the parties have set out.

15 A related objection is as to another trigger in the  
16 agreement that there be a agreed-to shared-services agreement.  
17 The deadline for that agreement has been extended to I believe  
18 a reasonable date at this time, and no one has objected to the  
19 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

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1 the company, the approval of this agreement would, in essence,  
2 let the wolf into the henhouse.

3 I don't agree with that view, given two changes that  
4 have been made to the agreement since the objections were  
5 originally made. First, the change that was agreed to between  
6 the debtors and the plan support parties, including Apollo, and  
7 the creditors' committee as to the condition that the fee would  
8 not be earned if the failure to meet the deadline was caused by  
9 a party to the -- by that party's acting on a good faith with  
10 regard to the negotiations of the SSA.

11 Secondly, the parties have agreed to add an exception  
12 to the exoneration provisions and indemnity provisions that run  
13 through these various agreements, to also carve out breaches of  
14 fiduciary duty, if any. I believe, particularly given the  
15 microscope that is placed on Apollo in this case by the various  
16 objecting parties, that, in fact, with those protections it is  
17 unlikely that any party, but particularly Apollo, would use the  
18 SSA negotiations in a way that would jeopardize not only its  
19 thirty-million-dollar -- share of a thirty-million-dollar  
20 trigger on its backstop fee, but also its position in the whole  
21 case. So I do not believe that objection should be sustained.

22 It's also argued that the indemnification provision in  
23 the backstop agreement, which is a broad indemnification  
24 provision, unduly risks the estate's payment under that  
25 indemnity with respect to nonbankruptcy court -- or litigation

3           And I certainly can foresee a circumstance where this  
4 indemnity might be triggered, notwithstanding its carve-outs,  
5 which as I said, have been expanded on the record today to  
6 include breach of fiduciary duty, if that litigation proved to  
7 be successful for the plaintiffs.

8           On the other hand, I accept the argument made by  
9   counsel for the debtors as well as the ad hoc committee, that  
10   given the plan itself which contemplates either acceptance of  
11   the plan by those classes of creditors or a cram-down treatment  
12   that would pay the creditors in full, that the amount of  
13   indemnification would be meaningful, particularly when weighed  
14   with the risks of whether that lawsuit would prove to be  
15   successful in the first place.

16           So I do not believe that the indemnification language  
17   should be changed as contemplated or suggested by counsel for  
18   the first and 1.5 lienholders.

19           The order has clarified that this indemnification is  
20 not intended -- that means including by the Court -- to --  
21 since it's the Court's order, to in any way affect the  
22 lienholders' rights in that nonbankruptcy court litigation, and  
23 in fact, that that issue has been taken care of before the  
24 hearing.

25 I believe that the solutions negotiated by the debtors

1 and the creditors' committee have adequately addressed the  
2 other objections by the indenture trustees and the holders of  
3 both the subordinated notes and the senior notes.

4 That leaves the other objection which was made by  
5 Fortress and joined in by two other holders of second-lien  
6 debt. That objection goes to a discrete issue.

7 Under the debtors' proposed plan, there will be a 600-  
8 million-dollar rights offering. It is clear to me that that  
9 rights offering has substantial value to the debtors, and it  
10 was equally clear to me that there is substantial value to the  
11 debtors in having a group committed to that rights offering.  
12 And here, eighty-five percent in dollar value of the class is,  
13 in fact, committed through the RSA and the backstop agreement,  
14 subject to Court approval, to the rights offering.

15 The rights offering itself will be available to all  
16 classes -- I'm sorry, to all members of the class. That is,  
17 all members of the second-lien class will have the right to  
18 participate in the rights offering at a fifteen-percent  
19 discount to plan value, which is 2.2 billion dollars.

20 The issue that is raised by the Fortress objection is  
21 whether the fee proposed in the backstop agreement to backstop  
22 the rights offering is a proper fee. I should note that the  
23 fee is derived from Sections 3.1 and 2.2 of the backstop  
24 agreement.

25 Section 3.1 says, "Subject to Section 3.2, as

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1 consideration for the put option, the backstop commitment and  
2 the other agreements of the commitment parties in this  
3 agreement, the debtors shall pay or cause to be paid a  
4 nonrefundable aggregate premium in the amount of thirty million  
5 dollars, which represents five percent of the rights offering  
6 amount, without application of the discount to equity value  
7 payable, in accordance with Section 3.2, to the commitment  
8 parties, in accordance with their commitment percentages."

9 3.2 provides that "The premium shall be fully earned  
10 and nonrefundable and nonavoidable upon entry of the BCA  
11 approval order," i.e. this Court's order approving the  
12 agreement, and shall be paid in either -- "and that amount  
13 shall be paid either in stock or become a cash obligation under  
14 certain circumstances."

15 The put option as the meaning set forth in Section  
16 2.2, under its definition, and the put option requires each  
17 commitment party to purchase unsubscribed shares on the closing  
18 date. At this time, unsubscribed shares only represent fifteen  
19 percent of the 600 million. Moreover, the objectors on this  
20 ground, including those who have joined into Fortress'  
21 objection, have said publically that they would commit also or  
22 will commit also to their share, which they represent takes  
23 the -- would take the unsubscribed shares down to about ten  
24 percent.

25 They are willing to receive and participate in the

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1 backstop under 2.2 of the agreement, only based on a percentage  
2 of the remaining unsubscribed shares. That is, their pro rata  
3 share would not be based on five percent of the whole 600  
4 million but only five percent of ten percent of 600 million.  
5 I'm using the ten percent roughly.

6 The objection, therefore, raises the issue what is it  
7 that the debtors are paying or agreeing to pay thirty million  
8 dollars of value for, either in the form of five percent of the  
9 reorganized common stock, or thirty million dollars in cash, on  
10 the breach of various conditions under the agreement.

11 There was one witness put on in support of the motion:  
12 Mr. Carter. And on this point, his testimony was credible but  
13 vague. Most of his testimony on cross-examination was to the  
14 effect that the backstop agreement, including the thirty-  
15 million-dollar put-option fee, was negotiated as a whole in  
16 order to obtain not only a backstop, but also commitment to the  
17 funding of each member's pro rata share of the 600 million  
18 dollars, as well as their support for the plan, generally. I  
19 accept that testimony, which is somewhat reiterated in his  
20 supplemental affidavit.

21 He also testified that the board obtained advice from  
22 the debtors' professionals that the terms of the backstop  
23 agreement, including the thirty-million-dollar fee and the  
24 other terms, were reasonable as a whole, and as a whole,  
25 market-based. He testified, however, that that was based in



10           And without that information, I cannot evaluate  
11 whether, in fact, this type of fee is proper. It appears to me  
12 clearly the case that based on the state of the play today, the  
13 record today -- where there is, at most, fifteen percent  
14 uncommitted, although more likely ten percent uncommitted -- a  
15 thirty-million-dollar fee is far outside of the range that has  
16 been quoted to me, which is roughly three to six percent. It  
17 isn't really the five-percent fee; it's more like a thirty-  
18 five-percent fee for that fifteen percent.

19           So standing alone as a fee, it doesn't make sense. It  
20   could only make sense as another inducement to commit to  
21   subscribe to shares. And, again, I have Mr. Carter's testimony  
22   that that was how this was ultimately evaluated.

23           On the other hand, I have two other potent pieces of  
24 evidence. First, the plan itself contemplates and offers up to  
25 the rest of the class subscription without the fee, just for

11 I appreciate the argument made by counsel for most of  
12 the signatories to this agreement -- all of them except  
13 Apollo -- that I would be rewarding Johnny-come-latelies and  
14 unduly changing an agreement that had been negotiated at a time  
15 when people were, in fact, taking more risk, and that there was  
16 value to the company in taking that risk. And I've considered  
17 that argument carefully.

18 I also note that if I rule so as to grant Fortress'  
19 objection, to some extent I would be playing chicken with the  
20 parties who have signed this agreement, because they have the  
21 right to walk on that basis, and no court particularly likes to  
22 do that.

23 And going back to the first point, it's well  
24 recognized in the case law, including, most recently, by Judge  
25 Lane in *In re Genco Shipping and Trading Ltd.*, 509 B.R. 455

11           Moreover, although this agreement was entered into  
12 pre-petition, it's effective only upon an order of the Court  
13 approving it. There's no rejection claim, on the other hand.  
14 There is an element of this agreement that does recognize the  
15 substantial contribution that the parties to the agreement have  
16 made, which is the provision providing for the payment of their  
17 fees and expenses, which I believe is appropriate, given the  
18 benefit to the debtors of having these agreements. But I do  
19 not believe that on top of the fifteen-percent discount,  
20 another five-percent VIG (ph.) is appropriate here, and I can't  
21 approve it.

22           It would not fall into the percentage rates that I've  
23   been shown is appropriate for a backstop agreement without also  
24   having evidence that all that was being backstopped was ten to  
25   fifteen percent of unsubscribed shares, nor do I have

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1 sufficient evidence that a right that is being offered to all  
2 other members of the class for merely the fifteen-percent  
3 discount is not fair without another five-percent recovery  
4 which the rest of the class is not being offered.

5 That's not a plan ruling; it's just a ruling on basic  
6 fairness. So I would, based on the record today, approve the  
7 agreement with the two changes that I've outlined: the  
8 September 14th confirmation date and a commitment fee premised  
9 upon the actual unsubscribed shares as of today. But I cannot  
10 approve the agreement without those two changes, as well as the  
11 other changes that have been agreed to on the record.

12 MR. DUNNE: Your Honor, Dennis Dunne of Milbank Tweed  
13 (indiscernible). Just for the record, I don't know what the  
14 RSA signatories reviewed at (indiscernible). We may --

15 THE COURT: Right.

16 MR. DUNNE: -- (indiscernible). I do know that  
17 they're going to -- not do this without (indiscernible).  
18 There's no precedent for doing this completely without  
19 (indiscernible) fee, and I hear Your Honor saying that this  
20 simply wouldn't be appropriate. I just want to point out one  
21 thing. I suspect, with a high degree of confidence, that the  
22 three-to-six percent range was calculated across the entire  
23 amount. It didn't do the math you did. And when adjusted for  
24 that, I suspect it was different.

25 THE COURT: Well, you can certainly come back for

6 THE COURT: Right.

10 THE COURT: Well, okay.

14 THE COURT: That's fine.

16 THE COURT: Right. Or conceivably, it could be  
17 something that's worked out.

19 THE COURT: I mean, again, my review of this is based  
20 on there being an objection.

22 THE COURT: If all the parties who are participants in  
23 this agree that there's a fair amount that will get them to  
24 agree, it's a different issue.

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7 MR. FELDMAN: That's correct, Your Honor. We would be  
8 willing to proceed (indiscernible).

10 MR. HANSEN: Your Honor, Kris Hansen with Stroock on  
11 behalf of Fortress and D. E. Shaw. I just wanted to -- you  
12 mentioned before -- you asked me a question earlier, whether or  
13 not our client would be prepared to take the backstop  
14 (indiscernible) on someone else's (indiscernible). We never  
15 really (indiscernible), so I have requested Mr. (indiscernible)  
16 an opportunity to (indiscernible).

18 MR. HANSEN: I just wanted to know --

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1 MR. HANSEN: Thank you. Just wanted (indiscernible).

2 THE COURT: Okay. Do you want to turn to the  
3 disclosure statement, then?

4 UNIDENTIFIED SPEAKER: We do, Your Honor.

5 THE COURT: Okay.

6 MS. HARDY: Good afternoon, Your Honor; Jennifer  
7 Hardy, Willkie Farr & Gallagher, for the debtors. Your Honor,  
8 I believe, with our replies to the disclosure statement that  
9 was filed yesterday, and with some briefings here in the  
10 courtroom that was put on the record, I believe the actual  
11 disclosure objections and (indiscernible) objections have now  
12 been resolved, so -- with some additions, but --

13 THE COURT: Okay.

14 MS. HARDY: -- the disclosure statement has been  
15 (indiscernible).

16 THE COURT: Okay.

17 MS. HARDY: I don't believe there's any  
18 remaining objections.

19 THE COURT: Okay.

20 MS. HARDY: But I can go through this.

21 THE COURT: That's fine. Before you do that, I had  
22 one question.

23 MS. HARDY: Yes.

24 THE COURT: In a number of places in the blackline,  
25 there are either bracketed dollar amounts or brackets with no

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1 amounts. How are you proposing to deal with that before it  
2 goes out for a vote?

3 MS. HARDY: Well, the brackets you were talking about  
4 relate to the fact that we are dual-tracking our rights  
5 offerings.

6 THE COURT: Right.

7 MS. HARDY: Two rights offerings, in essence, the 1145  
8 rights offerings and the Section 482 rights offerings. And the  
9 brackets you're talking about relate to the split of the shares  
10 between what will be 1145, what will be 482. And we had the  
11 various financial advisors to the debtors and to the second-  
12 lien parties that were working on the capital gains would  
13 (indiscernible) --

14 THE COURT: So what goes out would not be bracketed.

15 MS. HARDY: Exactly. What goes out would not be  
16 bracketed, and I'm sure there'll have to be some recalculation  
17 of those on -- that backs up (indiscernible).

18 THE COURT: Okay. There was one other --

19 MS. HARDY: (Indiscernible) those calculations.

20 THE COURT: There was one other place where there were  
21 brackets that I don't think falls into that category. Two,  
22 actually. 5.4, it says the first lien note claims should be  
23 deemed allowed claims in the amount of 1.1 million.

24 MS. HARDY: 1.1 billion. Yeah, that's the --

25 THE COURT: Billion.



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1 MS. HARDY: -- (indiscernible). The first lien  
2 noteholders?

3 THE COURT: Yeah.

4 MS. HARDY: (Indiscernible).

5 THE COURT: Okay. And then 5.9, for the PIK note  
6 claims, it says the product share of 8.938 million.

7 MS. HARDY: You can take out those brackets.

8 THE COURT: Okay.

9 MS. HARDY: (Indiscernible).

10 THE COURT: Okay. All right. All right; so I  
11 interrupted you. You were going to be going through the  
12 changes that you've agreed to with each party.

13 MS. HARDY: I absolutely will. (Indiscernible). So  
14 another change to the order, we would like to push out by two  
15 days the (indiscernible) solicitation, especially in the order  
16 to (indiscernible). We'd like to push that out to June 25th  
17 instead of the number on the docket (indiscernible) finalize  
18 and (indiscernible). And then that would also push out the  
19 voting deadline so that there's no actual change in the  
20 (indiscernible) --

21 THE COURT: Right. Well, the voting deadline was well  
22 before confirmation, so --

23 MS. HARDY: That's right; it was set at July 23rd --

24 THE COURT: Right.

25 MS. HARDY: -- so we won't (indiscernible) until July

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1 (indiscernible).

2 THE COURT: Okay. And I, given the confirmation date,  
3 if it takes you a little longer to resolve what I just ruled  
4 on, I'm prepared to move -- I mean, I'm prepared to move that a  
5 couple of days further, easily.

6 MS. HARDY: We may have to, so in the order we submit  
7 to chambers, it may tee off of the (indiscernible) --

8 THE COURT: Right.

9 MS. HARDY: -- and need an order.

10 THE COURT: Right.

11 MS. HARDY: So we'll have to look at that  
12 (indiscernible), but we will keep the same number of these  
13 moving --

14 THE COURT: Right.

15 MS. HARDY: -- as to the various comments.

16 The -- we will seek stiff redactions to the disclosure  
17 statement. As mentioned, in the redlines that were filed  
18 yesterday, we resolved the objections of the creditors'  
19 committee, the PBGC, GE Capital and the (indiscernible).

20 The other objection, we've resolve in the courtroom,  
21 and that is filed. I will need to stress that we want it to  
22 happen (indiscernible) first-lien trustee. I still believe we  
23 addressed many of those points of objection in the revised  
24 disclosure statement that was filed. And we also agreed in the  
25 courtroom that the exculpation provision -- a plan issue

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1 both -- we'll put it both in the plan and the disclosure  
2 statement that the exculpation will specifically say that it's  
3 something (indiscernible) to the extent (indiscernible)  
4 applicable.

5 THE COURT: Okay.

6 MS. HARDY: And the other thing that we'll mention,  
7 the lawsuit that was filed yesterday. We received  
8 (indiscernible). We'll put together a (indiscernible)  
9 settlement on the lawsuit, and (indiscernible) the disclosure  
10 statement.

11 And with those two changes, I believe, all of the  
12 objections to the disclosure statement have been resolved that  
13 I recognize.

14 The remainder of the motion, other than the timing,  
15 which we already discussed --

16 THE COURT: Can I -- I'm sorry. I haven't seen the  
17 ballot, but you're -- you have the opt-out form and you're  
18 going to describe that --

19 MS. HARDY: I certainly can. Well, I don't have it in  
20 front of me, but I can tell you how --

21 THE COURT: There are cross-references to the plan  
22 provisions that talk about the release, okay.

23 MS. HARDY: Exactly. It's actually a tab to the  
24 proposed disclosure statement order, so you should have it, but  
25 it has a provision and cross-references to the provision and

1 says parties-in-interest (ph.) "check the box".

2 THE COURT: Okay. The -- you've reserved this right  
3 in a couple of places to deem someone unimpaired even though  
4 you're giving them ballots. I don't know if you want to drop a  
5 footnote in your chart where -- because you say, for example,  
6 on the first-lien note claims, "entitled to vote: yes". Well,  
7 that's true. That's not inaccurate. But I don't know if you  
8 want to drop a footnote that says the debtors have reserved the  
9 right to say that such vote is not required or they're  
10 unimpaired.

11 MS. HARDY: In the chart in the --

12 THE COURT: Yeah. Like at page -- like this would be  
13 at page 14 and 15. And just for the record, I don't have a  
14 problem with that reservation, because you're letting them  
15 vote, so I mean, I have a problem with the other way around, if  
16 you say, they were unimpaired, but if the Court determined that  
17 they were impaired, you haven't sent them a ballot. That  
18 wouldn't work.

19 MS. HARDY: Understood. So the motion also  
20 (indiscernible) very proper procedures; folks have the  
21 (indiscernible) procedures, the rights offering procedures and  
22 including the (indiscernible) agreement -- subscription  
23 agreement perfect form, and this perfect procedures, a  
24 confirmation hearing notice. We did make a change to the  
25 confirmation hearing notice as of (indiscernible) to note that

6           So this -- we didn't receive any objection to the  
7   procedures themselves. We prepared them consistent with other  
8   applicable vote tabulation and rights offering procedures. And  
9   with the resolutions, I suppose, have the objections, both  
10  based on the redline filed yesterday and in this courtroom, we  
11  (indiscernible) pertaining to adequate information notice, it  
12  will have to be modified to an extent (indiscernible).

13 THE COURT: Okay. Does anyone have anything further  
14 to say on the disclosure statement?

15 All right. I reviewed it and, except for that very  
16 minor comment I gave you, I have no other comments on it  
17 either. I think your changes address the objections, and in  
18 light of that, I'll approve the disclosure statement.

19           As far as the plan procedures are concerned, I did not  
20 have the chance to review the redline on that. Do you have any  
21 provision that says that if you send in a ballot, but don't say  
22 yes or no, it's counted yes, or anything like that? Or  
23 anything -- I don't like that provision.

24 MS. HARDY: You don't like the provision, anyway.

25 THE COURT: Right, so if that's in there --

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1 MS. HARDY: I believe we might, but if we say --

2 THE COURT: Just say the ballots that say yes or no  
3 won't be counted. Just that --

4 MS. HARDY: Ballots that don't say yes or no on  
5 them --

6 THE COURT: Right.

7 MS. HARDY: -- won't be counted.

8 THE COURT: And then, also, I don't like provisions  
9 that say merely that the debtors, in their discretion, can  
10 extend the ballot date. Wherever it says that, it should be  
11 subject to any necessary court approval.

12 MS. HARDY: Subject to --

13 THE COURT: To any necessary court approval.

14 MS. HARDY: Okay.

15 THE COURT: Those will probably be my only issues with  
16 that.

17 MS. HARDY: Okay, I believe (indiscernible).

18 THE COURT: Okay.

19 MS. HARDY: (Indiscernible).

20 MR. FELDMAN: I just wanted to ask for clarification,  
21 Judge --

22 THE COURT: Sure.

23 MR. FELDMAN: -- (indiscernible) just again, to be  
24 clear. I think we all heard this, but I want to make sure.

25 Assuming that the current backstop parties agree to the new

6 MR. FELDMAN: Well, of course, and we would submit it  
7 to the first-lien --

10 MR. FELDMAN: Improvement's in the eye of the  
11 beholder.

13 MR. FELDMAN: It wouldn't be objected to. I mean, the  
14 counsel (indiscernible) --

16 MR. FELDMAN: -- (indiscernible) were all getting out  
17 of their parties-in-interests. I just wanted to make sure we  
18 heard you correctly.

21 THE COURT: Right. So the intervene -- those who want  
22 to intervene, front and center.

25 Your Honor, based on the conversation from earlier

13 MR. CARNEY: Yeah, that's correct. And I know that  
14 one of the objectors, in their briefing, did suggest that we're  
15 trying to preserve the debtors' rights (indiscernible) over the  
16 redemption in the adversary proceeding.

18 MR. CARNEY: So that's not accurate.

20 MR. CARNEY: We're not trying to do that at all. All  
21 we're trying to do is protect our interest as a key stakeholder  
22 in these Chapter 11 cases, and in connection with protecting  
23 that interest, we just are asking for what are basically  
24 typical intervention rights, which include if necessary,  
25 briefing, discovery. Again, just to reiterate, we're not



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1 looking to duplicate effort; we're not looking to run up the  
2 tab here. I don't think that's to anyone's benefit, including  
3 ours, so we're just looking to protect our rights as typical  
4 intervenors.

5 THE COURT: Okay.

6 MR. KIRPALANI: Yes. Susheel Kirpalani, Quinn  
7 Emanuel. I'm a little confused as to what the status of our  
8 adversary proceeding is, and I heard --

9 THE COURT: Well, they're proceeding on the same  
10 track.

11 MR. KIRPALANI: Oh.

12 THE COURT: So they would be intervening in the  
13 adversary. I mean, you're still making a motion to intervene  
14 in the adversary proceedings, right?

15 MR. CARNEY: Correct, Your Honor. It just --

16 THE COURT: Right.

17 MR. CARNEY: --seems like it's going --

18 THE COURT: So they're going to be -- they would be  
19 participating as -- I mean, even if it wasn't going on the same  
20 track they would be participating in most of what's -- if not  
21 all, of what would be happening because of the confirmation  
22 hearing.

23 MR. KIRPALANI: Okay. But the first -- the first  
24 thing that gets filed on that issue, given that the plan was  
25 already filed, our complaint was filed, it gets lost. What's

1 the first thing that gets filed on the issue? Is it our  
2 objection to confirmation?

3 THE COURT: Yes.

4 MR. KIRPALANI: And they all file a response?

5 THE COURT: That's what I think, yeah.

6 MR. KIRPALANI: As well as (indiscernible).

7 THE COURT: Yeah.

8 MR. ESPANA: Good afternoon, Judge. Mauricio Espana  
9 from Dechert. We have the first lien trustee.

10 THE COURT: Good afternoon.

11 MR. ESPANA: We understand, Judge, that the proposing  
12 the (indiscernible) don't want people to usurp the debtors'  
13 control. And they just want to have the rights to ensure that  
14 their rights are not being impeded, which is why we don't  
15 understand why these limitations are unreasonable. They claim  
16 that it's just to make sure, if necessary, that they need to  
17 file motion practice to participate in discovery. So it would  
18 seem reasonable for them to agree to these restrictions, and,  
19 if necessary, they can seek court order to file a motion if  
20 necessary or to take discovery.

21 I mean, to allow two additional parties to potentially  
22 have two additional litigation fronts dealing with the make-  
23 whole I think would be unreasonable for the trustees.

24 THE COURT: Well, with one exception, which I'll come  
25 back to, I'm going to have a scheduling order, and they're not

2 MR. ESPANA: But what we're concerned about is their  
3 ability to file additional motions, their ability to file  
4 additional discovery requests, their ability to take  
5 depositions, to participate in the depositions.

6 THE COURT: Well, I'm contempl -- I mean, they were  
7 not involved in the timeline discussion, so I'm assuming  
8 they're riding along, but they can participate in the  
9 depositions that are being called. That's what I've assumed.  
10 I mean they didn't stand up and say we want all this extra  
11 discovery on top of that.

12 MR. ESPANA: And we are fine with them participating.  
13 They can sit in on depositions. They can receive all  
14 discovery. What we want is a restriction that they cannot  
15 actually take the depositions.

16 THE COURT: No, they can ask questions. But I would  
17 assume that they would be last or they would -- hopefully  
18 they'll be whispering in someone's ear at a break and say ask  
19 that question, because it's a tight schedule. And they're  
20 not -- we're going to stick to that schedule unless there's a  
21 reasonable reason not to.

22 MR. ESPANA: And the same concern is with regard to  
23 motion practice.

24 THE COURT: Well, on the motion practice, I recognize  
25 that -- I'm not a huge person on page limits. I rarely enforce

22 THE COURT: Well, I don't -- to actually get a motion  
23 to be heard, you have to get on the calendar, which is no mean  
24 feat with Ms. Li upstairs. And she would talk to me, and if  
25 someone -- if counsel for Apollo or the ad hoc committee asks

1 to have a motion be heard on an expedited basis, I'll know what  
2 it is, decide whether it needs to be heard.

3 But I don't think it's a -- I mean, they clearly have  
4 the right, under the Caldor case, to be heard, and I trust that  
5 they will not again turn the discovery into a circus. And  
6 that's particularly because when we were talking about the  
7 discovery schedule they didn't have anything more to say than  
8 what Willkie was saying and the other side was saying.

9 MR. ESPANA: Thank you, Your Honor.

10 THE COURT: Okay.

11 MR. KHALIL: Your Honor, Sam Khalil, Milbank, Tweed,  
12 on behalf of the ad hoc second-lien noteholders. We also filed  
13 motions to core proceedings --

14 THE COURT: Right. And you're not looking to control  
15 any causes of action of the debtors either at any settlement or  
16 anything like that?

17 MR. KHALIL: That's correct.

18 THE COURT: Except in your capacity as a creditor.

19 MR. KHALIL: Correct.

20 THE COURT: Okay. All right. So, again, I'll grant  
21 that motion and trust that you all won't turn it into a  
22 litigation festival.

23 MR. KHALIL: (Indiscernible).

24 THE COURT: Okay. Okay.

25 MR. FELDMAN: I think that's it for today, Your Honor

3                   And I want to reiterate.  If I need to, I'll have a  
4 short hearing on this point if you want to present a new  
5 backstop to me.  But hopefully you can reach agreement on  
6 something.

10 UNIDENTIFIED SPEAKER: (Indiscernible).

12 UNIDENTIFIED SPEAKER: You know we have a meet-and-  
13 confer, Your Honor?

15 (Whereupon these proceedings were concluded at 3:07 PM)

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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

eScribers

700 West 192nd Street, Suite #607

New York, NY 10040

Date: June 23, 2014

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**(12) feel - Fortress**

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