UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

In re:	)	Case No. 20-43597
	)	
BRIGGS & STRATTON CORPORATION, *et al.,*	)	Chapter 11
	)	
Debtors.	)	Jointly Administered

WILMINGTON TRUST, NATIONAL ASSOCIATION'S (I) STATEMENT IN SUPPORT OF THE SECOND AMENDED JOINT CHAPTER 11 PLAN OF BRIGGS & STRATTON CORPORATION AND ITS AFFILIATED DEBTORS AND (II) REPLY TO THE UNITED STATES TRUSTEE'S OBJECTION TO AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION OF BRIGGS & STRATTON CORPORATION AND ITS AFFILIATED DEBTORS

Wilmington Trust, National Association (the "Indenture Trustee"), in its capacity as successor indenture trustee for the 6.875% Senior Notes due 2020 (the "Unsecured Notes"), by and through its undersigned counsel, hereby submits this statement in support of the *Second Amended Joint Chapter 11 Plan of Briggs & Stratton Corporation and its Affiliated Debtors* [Dkt. No. 1434] (the "Plan") and reply to the *United States Trustee's Objection to Amended Joint Chapter 11 Plan of Reorganization of Briggs & Stratton Corporation and its Affiliated Debtors* [Dkt. No. 1405] (the "Objection"), filed by the United States Trustee for the Eastern District of Missouri (the "United States Trustee"). In support of its reply, the Indenture Trustee respectfully states as follows:

PRELIMINARY STATEMENT

The Indenture Trustee, the successor indenture trustee for over $195 million in outstanding Unsecured Notes, is supportive of confirmation of the Plan of Briggs & Stratton Corporation and its affiliated debtors (collectively, the "Debtors"). The Plan is the product of a heavily negotiated settlement (the "Global Settlement") between the Debtors and its creditor constituents and enjoys nearly universal support and acceptance. Pursuant to the terms of the Global Settlement, the Plan

provides, *inter alia*, for the payment of the Indenture Trustee's fees and expenses (the "Unsecured Notes Indenture Trustee Fees and Expenses"). Plan, ¶ 2.4.

The United States Trustee acknowledges the Indenture Trustee's right to the payment of its fees and expenses.[1] However, the United States Trustee argues that the Debtors cannot pay the Unsecured Notes Indenture Trustee Fees and Expenses unless the Indenture Trustee satisfies the requirements of Section 503(b) of the Bankruptcy Code. In so arguing, the United States Trustee incorrectly assumes that Section 503 of the Bankruptcy Code is the only route by which an indenture trustee may be paid in a chapter 11 case. However, the United States Trustee overlooks long-standing precedent, both in this district and in districts throughout the country, which have approved plans of reorganization that include payment of indenture trustee fees and expenses.

Moreover, the United States Trustee's argument also ignores the protracted negotiations the case parties engaged in to reach the Global Settlement contained in the Plan, and the Global Settlement's integral role in arriving at the consensual Plan. The United States Trustee effectively seeks to unwind the Global Settlement and excise the Unsecured Notes Indenture Trustee Fees and Expenses provision. Doing so inevitably alters the terms of the Global Settlement and would require the holders of the Unsecured Notes to shoulder the burden of paying the Unsecured Notes Indenture Trustee Fees and Expenses out of their Plan distribution. That result, however, was not contemplated when the holders of the Unsecured Notes and the other settling parties voted to support the Plan. Accordingly, the Indenture Trustee submits the Objection should be overruled and the Plan confirmed in its current form.

[1] The Objection notes "the Indenture Trustee shall also have the right to exercise its charging lien against distributions." Objection, ¶ 30.

ARGUMENT

1. The United States Trustee argues that Section 503 of the Bankruptcy Code is the exclusive provision pursuant to which the Debtors may pay the Unsecured Notes Indenture Trustee Fees and Expenses. However, the United States Trustee ignores other relevant provisions of the Bankruptcy Code, including Sections 1123(a)(4) and (b)(6) and Bankruptcy Rule 9019, which authorize the payment of an indenture trustee's fees pursuant to a settlement set forth in a plan.

2. While Section 503 is certainly one avenue for the payment of fees and expenses, it is not the only one. See Confirmation Hr'g Tr. 37:23-25, In re Southeastern Grocers, LLC, Case No. 18-10700 (MFW) (Bankr. D. Del. May 14, 2018) [Dkt. No. 492] ("With respect to the payment of expenses, 503(b)(3)(D) is not the only way where such expenses can be approved and paid in a case."). A copy of the Southeastern Grocers Confirmation Hearing Transcript is attached hereto as Exhibit A. A finding to the contrary is unprecedented in law, practice and good judgment. If, as the United States Trustee argues, a party can only be paid through one section of the Bankruptcy Code to the exclusion of all others, any pre-effective date payments by a debtor would be similarly improper. That would contravene common bankruptcy practice across the country, including relief typically granted at "first day hearings" such as authorization to pay critical vendors.

3. The United States Trustee's reliance on the non-binding Lehman Brothers decision is misplaced. See Objection, ¶ 32 (citing Davis v. Elliot Management Corp. (In re Lehman Bros. Holdings Inc.), 508 B.R. 283 (S.D.N.Y. 2014)). The Objection states that Section 503 is the "'sole source' of authority to pay post-petition professional fees on an administrative basis." Objection, ¶ 32. As an initial matter, Lehman is inapplicable as it addresses individual committee members' requests for the reimbursement of fees and expenses incurred in a case. Lehman, 508 B.R. at 287. While it is true that the Indenture Trustee is a member of the Official Committee of Unsecured

Creditors, the Plan contemplates payment of the Indenture Trustee's fees in its capacity as an indenture trustee. Second, unlike Lehman, the Indenture Trustee is seeking payment pursuant to the terms of a global settlement memorialized in the Plan, which was heavily negotiated and agreed to by the parties. In Lehman, the committee members filed an application for the payment of their fees pursuant to the terms of the plan or in the alternative, pursuant to § 503(b)(3)(D) and 503(b)(4) of the Bankruptcy Code. Id. at 288. Importantly, the plan provision under which the committee members in Lehman sought reimbursement describes those expenses as "Administrative Expense Claims." Id. at 291. Because the committee members sought their payment exclusively as an administrative expense, the District Court vacated the Bankruptcy Court's decision and found that the committee members were not entitled to the reimbursement of their fees. Id. at 296. By contrast, here, the Debtors propose to pay the Indenture Trustee's fees pursuant to the terms of the Global Settlement incorporated into the Plan. Specifically, the Plan provides that the payment of the Indenture Trustee's fees are to be paid, *inter alia*, "[p]ursuant to the terms of the Global Settlement . . . ." Plan, ¶ 2.4.

4. The United States Trustee unsuccessfully sought to disallow an indenture trustee's fees in another case in this district. See In re Arch Coal, Inc., Case No. 16-40120 (Bankr. E.D. Mo.) [Dkt. No. 1290]. In Arch Coal, the United States Trustee similarly argued that an indenture trustee can only be paid pursuant to Section 503(b). In overruling the objection and confirming the plan, the court approved the indenture trustee's payments pursuant to sections 363 and 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, finding that the payments constituted a good faith compromise and settlement. See In re Arch Coal, Inc., Dkt. No. 1334, ¶ 36. A copy of the Arch Coal Confirmation Hearing Transcript is attached hereto as Exhibit B.

5. The United States Trustee here similarly ignores well-established precedent in this district (as well as in districts across the country), which have resulted in approved plans that provide for the payment of an indenture trustee's fees and expenses. See In re Foresight Energy LP, Case No. 20-41308 (Bankr. E.D. Mo. June 24, 2020) [Dkt. No. 593] (confirming a plan which included the payment of the unsecured notes indenture trustee's fees as a condition precedent to the effective date); In re Abengoa Bioenergy US Holding, LLC, Case No. 16-41161 (Bankr. E.D. Mo. June 8, 2017) [Dkt. No. 1443] (payment of indenture trustee's fees was approved under the terms of the plan); In re Peabody Energy Corporation, Case No. 16-42529 (BSS) (Bankr. E.D. Mo. March 17, 2017) [Dkt. No. 2763] (same); In re Patriot Coal Corporation, Case No. 12-51502 (Bankr. E.D. Mo. Dec. 18, 2013) [Dkt. No. 5169] (confirming a plan which required payment "in full in Cash [of] all reasonable and documented fees and expenses" of the indenture trustees).

6. The United States Trustee acknowledges the Indenture Trustee's right to payment, but limits that right to the exercise of its charging lien against plan distributions. However, ignoring the Global Settlement embodied in the Plan and requiring the Indenture Trustee to exercise its charging lien against plan distributions will decrease the overall recovery to holders of the Unsecured Notes, notwithstanding the fact that all parties sought to avoid that result when they negotiated and drafted the Plan. Those same creditors voted to support the Plan, which Plan does not reduce recoveries to pay the Unsecured Notes Indenture Trustee Fees and Expenses. The Indenture Trustee submits that the United States Trustee should not be encouraged to cherry-pick one aspect of a global deal which will affect the integrated settlement, reduce the parties' bargained-for Plan consideration, and is otherwise supported by all creditor classes. Such an unprecedented result would introduce uncertainty into these cases and ultimately increase costs to the Debtors' estates.

CONCLUSION

7. For the reasons set forth herein, the Indenture Trustee respectfully requests that the Court confirm the Plan, including the provisions related to the payment of the Unsecured Notes Indenture Trustee Fees and Expenses.

Dated: December 16, 2020

Respectfully submitted,

PRYOR CASHMAN LLP

/s/ Seth H. Lieberman

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Attorneys for Wilmington Trust, National Association, in its capacity as Indenture Trustee

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was filed electronically on December 16, 2020 with the United States Bankruptcy Court, and has been served on the parties in interest via e-mail by the Court's CM/ECF System as listed on the Court's Electronic Mail Notice List.

/s/ Seth H. Lieberman
Seth H. Lieberman, Esq.

EXHIBIT A

In The Matter Of:

Southeastern Grocers, LLC, et al.,

Transcript of an Electronic Recording
May 14, 2018

Wilcox & Fetzer, Ltd.
1330 King Street
Wilmington, DE 19801
email: depos@wilfet.com, web: www.wilfet.com
phone: 302-655-0477, fax: 302-655-0497

Original File Southeastern Grocers 05-14-18 Transcript of Electronic Recording.txt

Min-U-Script® with Word Index

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
SOUTHEASTERN GROCERS, LLC, et al.,	)	Case No. 18-10700 (MFW)
	)	
Debtors.	)	(Jointly Administered)

Wilmington, Delaware
May 14, 2018
10:30 a.m.

TRANSCRIPT OF AN ELECTRONIC RECORDING
BEFORE THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

OMNIBUS/CONFIRMATION

APPEARANCES:

For the Debtors	DANIEL J. DeFRANCESCHI, ESQ. BRETT M. HAYWOOD, ESQ. RICHARDS LAYTON & FINGER, P.A. -and- RAY C. SCHROCK, ESQ. SUNNY SINGH, ESQ. ANDRIANA GEORGALLAS, ESQ. WEIL GOTSHAL & MANGES
For The Ad Hoc Committee	ROBERT K. MALONE, ESQ. PATRICK A. JACKSON, ESQ. DRINKER BIDDLE & REATH LLP
FOR Deutsche Bank AG New York Branch	MARGARET MANNING, ESQ. FOX ROTHSCHILD, LLP -and- ANDREW C. AMBRUOSO, ESQ. WHITE & CASE LLP
For Sun Trust Bank	IAN J. SILVERBRAND, ESQ. WHITE & CASE LLP
For the Ad Hoc Group Of Noteholders	DENNIS L. JENKINS, ESQ. MORRISON & FOERSTER LLP

(Appearances Cont'd:)

For Ahold U.S.A., Inc.	DANIEL N. BROGAN, ESQ. BAYARD P.A.
For WSFS, as Trustee/ Agent	ERIC J. MONZO, ESQ. MORRIS JAMES -and- SETH H. LIEBERMAN, ESQ. MATTHEW W. SILVERMAN, ESQ. PRYOR CASHMAN LLP
For Wells Fargo	MORGAN L. PATTERSON, ESQ. WOMBLE BOND & DICKINSON (US) LLP
For Wells Fargo, As Indenture Trustee	BENJAMIN D. FEDER, ESQ. KELLEY DRYE & WARREN LLP
For Aston Properties, Inc., et al.	SCOTT L. FLEISCHER, ESQ. KELLEY DRYE & WARREN LLP
For C&S Wholesale Grocers, Inc.	KERRI K. MUMFORD, ESQ. LANDIS RATH & COBB LLP
For Lone Star Parties	WILLIAM E. CHIPMAN, JR., ESQ. CHIPMAN BROWN CICERO & COLE LLP -and- AUSTIN W. JOWERS, ESQ. KING & SPALDING
For Aronov Realty, et al.	LAUREL D. ROGLEN, ESQ. BALLARD SPAHR LLP
For CenterPoint Properties	STUART BROWN, ESQ. JADE WILLIAMS, ESQ. DLA PIPER US, LLP
For Commodore Realty, Inc.	JOYCE A. KUHNS, ESQ. FRANK E. NOYES, II, ESQ.
For Nature's Hope LLC	THEODORE J. TACCONELLI, ESQ. FERRY JOSEPH, P.A.
For Kathy Chaves, et al.	STEPHEN B. GERALD, ESQ. WHITEFORD TAYLOR & PRESTON
For H&R Entities	AARON H. STULMAN, ESQ. WHITEFORD TAYLOR & PRESTON

(APPEARANCES CONT'D:)

For JEM Investments, LLC	CORY P. STEPHENSON, ESQ. BIELLI & KLAUDER, LLC
For The Chubb Companies	RICHARD W. RILEY, ESQ. DUANE MORRIS
For Hudson Crossing Ipanema Smokey Park	ELIHU E. ALLINSON, III, ESQ. SULLIVAN HAZELTINE ALLINSON
For U.S. Securities And Exchange Commission	THERESE SCHEUER, ESQ.
For 600 Realty, LLC	JULIA B. KLEIN, ESQ. KLEIN, LLC
For Gibbs & Hensley	MONIQUE B. DiSABATINO, ESQ. SAUL EWING ARNSTEIN & LEHR, LLP
For The Office of the U.S. Trustee	BENJAMIN HACKMAN, ESQ. ASSISTANT U.S. TRUSTEE

- - - - -

AUDIO OPERATOR:	BRANDON McCARTHY
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Proceedings recorded by electronic sound recording. Transcript produced by transcriptionist.

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THE COURT: Good morning.

MR. SCHROCK: Good morning, Your Honor. Your Honor, Ray Schrock of Weil Gotshal & Manges on behalf of the debtors. I'm here today with my colleagues, Sunny Singh, Adriana Georgallas and Gaby Smith.

Your Honor, we put a lot of paper in front of you --

THE COURT: Yes.

MR. SCHROCK: -- as I'm, as I'm sure you've seen. Happy belated Mother's Day.

We -- I do have, if you'd like it, Judge -- may I approach? I have a blackline of the plan if you need it. We did upload it.

THE COURT: All right.

MR. SCHROCK: But if you'd like a hard copy, I have a blackline of the plan and the confirmation order.

THE COURT: All right, go ahead and hand that up.

MR. SCHROCK: Okay.

THE COURT: All right. Thank you.

MR. SCHROCK: Your Honor, we have a few people present here in the courtroom with us today on behalf of the debtors. We have Mr. Anthony Hucker, who is the chief executive officer of the company; Brian Carney, chief financial officer of the company; Tim McDonagh, the senior managing director at FTI.

THE COURT: Good morning.

MR. SCHROCK: And Christina Pullo, vice president, and solicitation of public securities at Prime Clerk, the debtors' claims and noticing agent.

THE COURT: Okay.

MR. SCHROCK: Your Honor, we have filed an amended agenda for today's hearing on this past Friday. It's at

Docket No. 475. In terms of a roadmap, Judge, what I'd like to do is just go through the non-confirmation issues in the order in which they're presented in the agenda, give you a brief update on confirmation objections, a plan summary, move the declarations into evidence, and then I was planning to handle the U.S. Trustee's objection, and I'll be arguing that piece. Mr. Singh has -- will be handling the, the open landlord issues --

THE COURT: Okay.

MR. SCHROCK: -- which I believe we have six objections to the plan that are remaining, I'll take you through that, from landlords plus U.S. Trustee. And then, you know, following that we'd like to just take you through the changes to the order.

THE COURT: Okay.

MR. SCHROCK: But if that would be an acceptable order, I'll proceed.

THE COURT: That's fine.

MR. SCHROCK: Thank you.

Your Honor, one, one housekeeping item. There's -- I wanted to bring to your attention the stipulation that was filed yesterday at Docket No. 483. The stipulation was filed under certification of counsel and addresses the objection filed by Clermont 99-FL, LLC, which is the landlord for store No. 2334. The basis for Clermont's objection was that its

lease was terminated by virtue of a prepetition termination agreement, and that such termination was effective as of March 31, 2018, and that the lease was therefore not assumable.

The debtors agreed that the letter -- lease was terminated as of March 31, 2018. However, the debtors included Clermont's lease on its assumption list as the lease had not yet been terminated as of the petition date. For the avoidance of doubt, Clermont requested a stipulation with the debtors confirming that the lease was indeed terminated, and unless Your Honor has any questions, we'll move to the other items.

THE COURT: That's fine.

MR. SCHROCK: Okay. Your Honor, the first three items on the agenda have been resolved.

Item number 4 on the agenda is the motion of Winn-Dixie Warehouse Leasing, LLC, to extend the time to reject two unexpired warehouse distribution center leases.

Just to give Your Honor a little background, as we said in the motion, this is -- we have two warehouse distribution centers where we're not going to be able to get out of the warehouses until, you know, a few months from now, likely September, October. We were working, to be perfectly frank, with a, with a REIT, who is our landlord, and it's tough to break through, just trying to get, frankly, someone to be responsive on the other side. We end up having -- so,

you know, we said we can just consent and we'll stay in the leases. We didn't get a response, so we had to file the 365(d)(4) motion.

That's the reason that the plan for Warehouse -- or for Winn-Dixie distribution centers is being pushed out to October. It's consensual that the REIT did agree to the relief. It's just a -- it's a special-purpose entity that holds those two leases, among a couple of others that we'll go through in the context of confirmation.

We did file a certification -- a certificate of no objection at Docket No. 454, and Your Honor entered an order granting the relief requested in the motion at Docket No. 464. But I did want to provide that context for the Court --

THE COURT: Okay.

MR. SCHROCK: -- and parties of interest. That is why we requested the adjournment of that particular confirmation hearing.

Item number 5 on the agenda is the application of the debtors for authority to retain E & Y as tax advisors. We received informal comments from the U.S. Trustee, and on May 11th the debtor submitted a revised form of order under certificate of -- certification of counsel at Docket No. 472.

THE COURT: I did sign that this -- or approve that this morning, so it should be docketed shortly.

MR. SCHROCK: Excellent. Thank you, Your Honor.

Your Honor, item number 6 on the agenda is the motion of Winn-Dixie Warehousing, LLC, for authority to assume and assign certain unexpired leases of nonresidential real property. That was filed on April 23rd, 2018 at Docket No. 363. CenterPoint Properties Trust filed an objection and a reservation of rights at Docket No. 443. And the debtor, Winn-Dixie Warehouse Leasing, LLC, filed a reply at Docket No. 463.

We've conferred with counsel for CenterPoint Properties Trust, and the parties have agreed to present the lease termination issue before Your Honor pursuant to a scheduling order that will be agreed upon and submitted by the parties. Until Your Honor issues an evidentiary ruling resolving the matter, the lease for the Miami distribution center, which is the subject of the dispute, will remain with Winn-Dixie Warehouse Leasing, LLC.

As Your Honor is aware, the confirmation hearing has been adjourned. The notice of adjournment was filed on May 10, 2018.

Your Honor, we have withdrawn item number 7, which is the application of the debtors for authority to retain and employ Hilco Real Estate. We withdrew the application on May 11, 2018. Upon request from the U.S. Trustee, Hilco has agreed to be carved out of the exculpation provision in the plan since it is no longer seeking to be retained as a debtor

professional.

Their services were provided prepetition and, you know, we've, we've worked out with them since, you know, we're paying claims in full effectively, we're just not going to retain them. They're not going to be -- I don't believe there will be payments for post-petition services.

And item number 8 is the confirmation of the debtors' amended joint prepackaged plan, other than for Winn-Dixie Warehouse Leasing, LLC.

As I previewed at the beginning of my comments, we're pleased to report that of the 21 objections filed for confirmation of the debtors' plan, only six objections, I believe, remain outstanding. There is a number of resolutions we'll have to note in the order when we go through there, but the outstanding objections are the Office of the United States Trustee, Commodore Realty, Inc., JEM Investments Limited, Ipanema -- Ipanema -- Ipanema, okay, Ipanema Smokey Park, LLC, Hudson Crossing, LLC, and Nature's Hope, LLC.

As I noted, I will be addressing the objections raised by the U.S. Trustee, and Sunny Singh will address the remaining objections.

Very briefly, Your Honor, quick update on, on our, our efforts. This, this was an extraordinary prepack to be able to put together -- put together a, a plan where you're treating 502(b)(6) claims, paying them in full, closing, you

know, you know, almost -- or selling almost 100 locations, and being able to pay all operating company creditors in full, where the only classes of impaired creditors of the unsecured noteholders in Class 5 and the existing SEG equity interest in Class 8 was really literally a year in the planning.

The holders of the unsecured notes claims who voted collectively hold more than 475 million of the 497 million in outstanding principal amount of the unsecured notes. This represents 96 percent of the total outstanding principal amount as of the voting record date. All claims that voted, voted in favor of the plan.

The existing SEG equity interest, which represent the company's prepetition sponsors, have also voted to unanimously accept the plan.

As described in our memorandum of law, not a single creditor has voted to reject the plan. The plan provides for a reorganization transaction, pursuant to which, in exchange for cancellation of the unsecured notes, the unsecured noteholders will receive 100 percent of the new equity in reorganized SEG.

The company's prepetition sponsors receive a five-year warrant entitling them to 5 percent of the new percent -- new common stock. Your Honor, the support by virtually every single creditor entitled to vote on the plan speaks volumes, as do the plan's fairness, good-faith efforts and compliance

with the Bankruptcy Code. The plan provides the company with substantial reduction of its debt, equal to approximately $522 million, plus a reduction of approximately $40 million in annual debt service.

In connection with confirmation of the plan, we filed various pleadings that are noted in the agenda. And at this time I would like to offer into evidence the two declarations filed with the Court to form the basis of the evidentiary record and factual record for support for the confirmation hearing.

First, Your Honor, I would like to offer the declaration of Brian P. Carney, which is at Docket No. 457, as the direct testimony of Mr. Carney he would give if called to testify, and of course Mr. Carney is in the courtroom and available for questions or cross-examination.

THE COURT: Does anybody object?

All right, it will be admitted.

MR. SCHROCK: Your Honor, the debtors also move for the declaration of Christina Pullo regarding solicitation of votes and tabulation of ballots cast on the plan to be entered into evidence. That's at Docket No. 222. Ms. Pullo is also in the courtroom today and available for questions or cross-examination.

THE COURT: Any objection?

It will be admitted.

MR. SCHROCK: Thank you, Your Honor.

And before we proceed to the objections, Your Honor, we would respectfully request that Your Honor enter a proposed order for the debtors' motion for leave to exceed the pay limit in case you haven't --

THE COURT: I have to note, you filed 98 pages?

MR. SCHROCK: Yes. Yes.

THE COURT: Some of it was duplicative of Mr. Carney's declaration, I will point out. But I did read it. I'll, I'll grant the motion.

MR. SCHROCK: Thanks, thank you, Your Honor.

THE COURT: But, please --

MR. SCHROCK: We'll work on it being much more concise.

THE COURT: -- in the future.

MR. SCHROCK: We will definitely work on that. So noted. And thank you.

So, Your Honor, I think that in terms of 1129 of the Bankruptcy Code, I should also note that 1129(a)(5), we did file the plan supplement at Docket No. 317 and 355. And in response to a request by the U.S. Trustee, we'd just like to address that, that the disclosure of the identity and nature of any compensation to the insiders, the only insiders that will be retained by the reorganized debtors are Anthony Hucker, the company's current CEO, and Brian Carney, the

company's current CFO. Mr. Hucker's annual salary is 1 million. Mr. Carney's annual salary is 700,000. We are required to disclose that in connection with 1129(a)(5).

THE COURT: Okay.

MR. SCHROCK: Your Honor, as to the -- I'll next turn to the U.S. Trustee objection. And the U.S. Trustee has really argued a few objections, you know, relating to: 1, allowance of the general unsecured claims under the plan; 2, the payment of restructuring expenses and unsecured notes, of the unsecured -- and unsecured notes trustee expenses without showing substantial contribution, and contribution under 503(b), and the propriety of the third-party releases under the plan.

Your Honor, as to the first item, the U.S. Trustee contends the plan does not adequately provide for the allowance of general unsecured claims, in light of the fact that the debtors have not filed the schedules of assets and liabilities or SOFAs. However, Your Honor, the plan makes clear that general unsecured claims are, quote, allowed pursuant to the mechanics set forth in the definition of "allowed" in Section 110 of the plan. In the ordinary course of business invoices will be presented to the debtors for payment. If the debtors agree with the amount asserted, the amount will be paid as an allowed general unsecured claim. And to the extent objection or dispute arises, the underlying

claim becomes an allowed claim upon the resolution by the parties.

Finally, if the parties aren't able to reach a resolution, the claim becomes an allowed claim when the objection or dispute is determined in favor of the holder of the claim by a final order.

This mechanic and treatment of general unsecured claims is consistent with, to our knowledge, you know, virtually every single prepackaged Chapter 11 case that we prosecuted or read about. But not a single holder of the general unsecured claims has raised this issue.

As to the second issue, the U.S. Trustee argues the debtors may not pay the restructuring payments, restructuring expenses or unsecured notes trustee expenses, quote, unless a payment of the expenses is predicated on a showing of a substantial contribution under Section 503(b)(d) of the Bankruptcy Code.

The restructuring expenses implicated by the U.S. Trustee's objection include payments of all reasonable and documented out-of-pocket expenses incurred by any of the initial consenting noteholders relating to the restructuring, subject to an aggregate cap not to exceed $100,000, plus all reasonable and documented fees and expenses of the consenting party professionals incurred in their representation of the ad hoc group of unaffiliated noteholders can -- that comprise the

initial consenting noteholders, as well as certain holders of secured notes, or the consenting Lone Star Parties as applicable.

Your Honor, the payment of these restructuring expenses was an integral component of the global settlement. We did file -- we did sign fee letters, of course, coming into the case. You know, unsecured claims are being treated and are rendered unimpaired under the plan. But that global settlement could not have been reached and embodied in the restructuring support agreement of the plan had the debtors not agreed to pay the restructuring expenses.

We rely on the, you know, the evidentiary support set forth in the Carney affidavit, but we believe that approval of the restructuring expenses should be analyzed not by reference to the substantial contribution standard, but under the Martin factors, and in the context of the global settlement.

And as discussed more fully in our memo of law, the Martin factors are met with respect to the global settlement, because as set forth in the Carney declaration, which is undisputed, the outcome of litigating the valuation dispute and Lone Star claims is -- that's speculative. While the global settlement provides for definite and substantial certainty to the debtors and their stakeholders, litigating the valuation dispute and the Lone Star claims will likely be extremely expensive and can jeopardize the debtors' financing

of the exit facility and delay the payment of claims. And the debtors' major stakeholders support the global settlement, as evidenced by the unanimous votes in favor.

The global -- the global settlement was negotiated with the support and guidance of the competent, experienced counsel representing each of the parties, overseen by an independent committee comprised of Mr. Neal Goldman that approved it on behalf of the company. The global settlement is undoubtedly the product of the months of arm's length negotiations.

And moreover, Your Honor, prior to the petition date, as was the case in many other prepackaged and prenegotiated cases, the debtors entered into fee arrangements, as I mentioned earlier.

We're also required to pay the restructuring expenses to these parties as part of the restructuring support agreement. And given that the debtors are assuming the fee arrangements, we're obligated to pay these claims.

Alternatively, even if the fee arrangements and restructuring in support of the agreement were not executory contracts to be assumed under the plan, which of course they are, the debtors would nevertheless be required to pay the restructuring expenses under the fee agreements and the RSA, because the nonpayment of these fees would result in a contractual breach. If the debtors breach the fee

agreements and the RSA, the debtors would be required to pay any, any damages in full pursuant to the treatment of such claims under the plan. See Section 4.6(b) of the plan.

The U.S. Trustee cites to Davis vs. Elliott Management from the Lehman Brothers case -- it's at 508 BR 283-291, Southern District of New York, 2014 -- for the proposition that the allowance of professionals' fees of a creditor and ad hoc committee is specifically provided for in Section 503(b) of the Bankruptcy Code.

However, respectfully, we think the U.S. Trustee's reliance on Lehman is misplaced. We're quite familiar with that case as debtors' counsel, and the holding in Lehman is limited, as it merely construes a plan provision permitting members of the creditors' committee to be reimbursed for professional fees by virtue of their membership on a committee pursuant to 1123(b)(6).

The payments at issue in Lehman, which was far from a prepackaged case, probably as far as you can get, were expressly prohibited by the Bankruptcy Code and were not required to be paid by the Lehman debtors pursuant to prepetition contractual arrangements that were being assumed.

U.S. Trustee also contends that the payment of the unsecured notes expenses should be subject to review by the Court for reasonableness pursuant to 1129(a)(4). Your Honor, but the U.S. Trustee -- unsecured notes trustee expenses are

payable pursuant to Section 4.5 of the plan as unsecured notes claims. And allowance of unsecured notes claims expressly include any fees, charges and other amounts due but unpaid under the unsecured notes indenture. The unsecured notes indenture requires the payment of such fees.

Your Honor, moreover, courts have recognized that the Trust Indenture Act reflects Congressional concern for the significant economic considerations faced by indenture trustees, and as such, the unsecured notes indenture trustee is entitled to what is commonly called the charging lien and to be able to deduct its unpaid fees and expenses.

The plan expressly preserves for the important state law rights of the unsecured notes trustee to exercise its charging lien in the chapter 11 case.

In light of the above, and the overwhelming support for the plan, we believe that payment of the restructuring expenses and unsecured notes trustee expenses, without requiring 503(b) application, is appropriate.

Your Honor, third, the U.S. Trustee objects to the propriety of the third-party releases, specifically as to creditors who abstained from voting and did not opt out of the releases, and unimpaired creditors who did not formally object to the releases.

Now, we have agreed to strike Section 10.6(b)(1) from the plan, that such creditors who abstained from voting and

did not opt out of the third-party releases will no longer be deemed to have granted third-party releases. Now, Your Honor, the third-party releases from unimpaired creditors are releases of non-derivative claims held by third parties against the released parties.

These releases are being sought on a consensual basis because the parties had the option to file a timely objection with the Court and carve themselves out of the third-party releases. And the standard for approval in this Court is whether the releasing parties have consented. As explained in more detail in the debtors' memorandum of law, the debtors provided clear notice of the release exculpation injunction, and indicated that unimpaired creditors would be deemed to grant the third-party releases if they did not opt out by timely filing an objection of the plan.

The combined notice, which was served on all the debtors' known creditors and equity interest holders, and the publication notice each provided that holders of unimpaired claims or interest who did not timely object to the third-party releases would be deemed to have granted the releases. Courts in this district have upheld the deemed consent of unimpaired creditors who are presumed to accept the plan because creditors are being paid in full and have received substantial consideration for the releases. See Indianapolis Downs, among other cases.

Your Honor, here the debtors went a step further and provided unimpaired creditors with the opportunity to carve themselves out of third-party releases in the plan by filing a written objection. And in fact, the debtors received approximately 14 objections or joinders to objections to the third-party releases, and as a result, such creditors have been carved out of the third-party releases in the proposed confirmation order.

The objections demonstrate that the unimpaired creditors understood that they could avail themselves of that right and easily carve themselves out of the third-party releases by filing a timely objection.

We also note that Your Honor did find similar facts under a recent case in Homer City. We think that Homer City is analogous. And when I look at, you know, the fact that we have a hundred percent consensual plan, you know, I do think, you know, even if you put everything aside, if we had to look at the mortgage and Zenith factors, and the declaration of Brian Carney, that we would, that we would, in fact, meet that standard for the reasons set forth in the brief.

It's clear that there is an identity of interest that's -- that exists here between the debtors and the released parties. You know, we have a common goal of confirming the plan. All the released parties spent several months participating in good faith, arm's length negotiations.

The identity of the interest established where there is indemnification from the debtor, who is present here, which is also present here. And the third-party releases, I can tell you personally, were very critical to this reorganization. It is -- you've got indemnification obligations, you've got a lot of landlord claims that are being, frankly, paid under a 502(b)(6) cap. And if, if these releases were not granted, it's -- I can certainly say that, you know, we wouldn't have reached -- we would not have reached the global, the global settlement. The certainty associated with being able to, to have the releases go into effect and be able to walk away from the company was critical and the cornerstone of the global settlement.

Your Honor, I won't go through all of the arguments we make in the brief on, on, you know, on those potential -- or on the --

THE COURT: Okay.

MR. SCHROCK: -- on the other factors. But I think instead I'll allow the U.S. Trustee to speak, and I'm happy to address any questions that you may have in the meantime, Judge.

THE COURT: Okay. Thank you.

MR. SCHROCK: Thank you.

MR. HACKMAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. HACKMAN: May it please the Court, Ben Hackman for the U.S. Trustee.

Our office filed a confirmation objection at docket item 433, and it had raised four main points: Exculpation, third-party releases, the allowance of Class 6 claims, and the payment of professional fees.

Our exculpation objection is resolved.

On the third-party release issue, Article 10.6(b) of the plan would cause various creditors to grant third-party releases, including releases by impaired creditors who abstained from voting, and unimpaired creditors who did not formally object to the releases. And based on counsel's representation that creditors who were entitled to vote but who did not return ballots will not be deemed to give releases, I think just leaves our objection as to unimpaired class, in particular Class 6.

We don't believe Class 6 creditors should be deemed to consent to the third-party releases in the plan, simply because those creditors are unimpaired. They're poised to be paid in full under the plan or to ride through based on claims they have against the debtors, but it is not evident that those creditors will receive consideration for releasing claims they have against nondebtor third parties.

We referenced the SunEdison decision in New York of the Bankruptcy Court for the Southern District of New York

with respect to creditors who are entitled to vote but who did not return ballots, for the proposition that under New York law, silence is not consent where no duty to speak exists, and where silence is not misleading or indicative of consent. I think that the reasoning of that opinion applies to unimpaired creditors in this class -- in this case as well. The plan has a New York choice of law provision, and the fact that creditors in Class 6 who are unimpaired had the opportunity to object to the third-party releases but did not would not, by itself, transform their silence into consent.

We're also not convinced that extraordinary circumstances --

THE COURT: Well, but there are many instances where a party's required to file a response. And if the party does not, that is deemed to be consent to the request. Why is this different? There was a notice given to all unimpaireds requiring them to object if they had an objection specifically to the releases. Why is that not consent?

MR. HACKMAN: Your Honor, because the fact that they had notice and an opportunity consent did not make them duty bound to file anything. I don't believe that they were required to inform the debtors that no, we reject this part of the contract that's being proposed to us in order to prevent the debtors from asserting that your silence is allowing the contract to be formed.

THE COURT: How is that different from a complaint being filed and, you know, you have to file an answer, or a motion being filed and if you object to the relief requested in the motion, you have to answer? How is that any different?

MR. HACKMAN: Your Honor, I think in the setting of a complaint being filed, the, the defendant's legal rights are at issue.

THE COURT: So, so are these legal rights at issue.

MR. HACKMAN: I think for Class 6 the proposal is that their legal rights are going to be unaffected. The, the plan would -- those creditors' rights -- their claims arise through the bankruptcy.

THE COURT: Except the plan does say that they're releasing third parties.

MR. HACKMAN: That's right, Your Honor. We don't believe that -- as we read the SunEdison decision, and we recognize that there are cases in this district that have reached -- that have, that have holdings that are not necessarily consistent on their face with the SunEdison decision. I think it is important in this case that the plan does have a New York choice of law provision in it. And we would submit that the holding in the SunEdison decision, the Court's review of contract law in New York --

THE COURT: So there are no Third -- Southern District of New York decisions allowing third-party releases?

MR. HACKMAN: I -- I believe there are, and I believe the SunEdison decision had referenced I believe the DBSD decision being one of them as there being other cases in the Southern District where third-party releases had been given in that situation.

THE COURT: Okay.

MR. HACKMAN: If the Continental standard applies, Your Honor, we are not convinced that the standards in Continental would be met here. The requirements, the minimum requirements under that decision would be fairness, necessity to the reorganization, and specific factual findings to support those conclusions.

I think Your Honor wrote in the Washington Mutual decision that third-party releases are recognized in the Third Circuit as the exception and not the rule. It's not apparent to us that there are extraordinary circumstances here, such as a mass tort action or widespread claims against co-liable parties that would need to be resolved for the debtors to remain in business.

This is a big business, but I think fundamentally the plan is a balance sheet restructuring. The unsecured noteholders will become the new owners. The debtors will downsize slightly, but their business will continue on, largely as it had prepetition.

I'd also note that the Carney declaration and the

confirmation memorandum indicate that at least with respect to the creditor released parties, and the additional Lone Star parties, the debtors are not aware of any claims against those parties that would actually be released by the third-party releases. So it is -- it doesn't appear to us that a release as to those parties is necessary.

As to the allowance of Class 6, general unsecured claims, we objected because it is not clear to us how those creditors' claims will be allowed to receive the ride-through treatment that the plan proposes for them. The plan defines "allowed" in Article 1.A.1.10, and it says a Class 6 claim -- if you apply that definition of allowed to Class 6, the Class 6 claim would become allowed if no one objects to it, or if the debtors settle it or resolve it or otherwise compromise it, or if the Court enters an order allowing the Class 6 claim. The plan does not specifically allow Class 6 claims.

We do note that the debtors have not filed schedules or statements of financial affairs in this case. There has been no bar date. And our concern is that trade creditors may not know how the debtors intend to reconcile their claims or raise disputes or object to their claims and on what timeline.

I think that deeming Class 6 claims as being allowed will not give the Class 6 trade creditors a double recovery, because the treatment of Class 6 has an exception for claims that have been paid in full before the effective date.

There was an all trade motion that the debtors had filed at the first day, and I believe the debtors had authority before today to pay those trade claims. And to the extent they've already been paid, I don't believe that specifically allowing them under the plan would entitle those creditors to any additional recovery.

I also believe that the definition of allowed would not appear to prejudice the debtors' defenses and counterclaims to those -- to Class 6 claims because of language that's provided in the definition of allowed.

The bottom line for us, Your Honor, is that there are several hundred million dollars in trade claims here that are riding through, and we believe that the plan should give those creditors certainty that they will receive that ride-through treatment.

THE COURT: Well, how, how is their suggestion not assuring they will?

MR. HACKMAN: I mean --

THE COURT: What do you think will happen?

MR. HACKMAN: I don't -- I guess the concern, Your Honor, is that if creditors aren't sure what the status of their claim is or when the debtors might raise disputes as to it, they may be more prone to agreeing to less favorable treatment than they would otherwise be entitled to under their contracts, or that they might otherwise be entitled to outside

of bankruptcy.

THE COURT: Well, but the language says, if they look at the language, if nobody has filed a formal objection, their claim is allowed.

MR. HACKMAN: Right, Your Honor. I believe the plan -- and I would ask counsel to correct me if I'm wrong. I believe the plan would give the debtors 180 days to file claim objections, and I think typically plans give the debtors the ability to request extensions for claim objection deadlines.

So I guess the concern is that there would be room for certain claim disputes to become very protracted if, if the trade creditors need to wait -- need to go through that gating issue before their claim is specifically allowed.

THE COURT: Okay.

MR. HACKMAN: The final issue, Your Honor, is the payment of professional fees. Articles 5.2 and 9.2(j) of the plan provide for the payment of various fees and expenses, including the professional fees and expenses of an ad hoc group. The ad hoc group consists of I believe four members, and they hold a mix of unsecured notes and secured notes.

It will also provide for the payment of the professional fees and expenses of the debtors' nondebtor parent, of the Lone Star party. Article 2.4 of the plan would propose to pay the reasonable and documented attorney fees and expenses of the unsecured notes indenture trustee.

Our position is that for those expenses to be paid, those beneficiaries must show that they have made a substantial contribution in the case under Section 503(b)(3)(D) of the Bankruptcy Code. We believe that that provision specifically addresses the payment of professional fees and expenses of a creditor, an ad hoc committee, or a shareholder or an indenture trustee.

The plan does not overtly define those fees and expenses as administrative expenses, but we believe that it gives them substantially the same treatment that 1129(a)(9)(A) gives to allowed administrative expenses, which is payment in full, in cash, on the effective date.

I guess one difference is that the professional fees and expenses in this case would bypass the allowance process that other administrative expenses must go through, and would not be subject to Court oversight, which we believe creates an issue additionally under Section 1129(a)(4).

Under the case law in this circuit, the type of contribution that satisfies 503(b)(3)(D) is exceedingly narrow. A creditor must provide an actual and demonstrable benefit to the debtor's estate and to creditors. Extensive participation is not enough. And benefiting the estate as an incident to a creditor's protecting its own interests is not enough. The applicant's efforts must transcend self-protection. The applicant must show they provided a

direct and material benefit to the estate, and that there is a causal connection between their activities and a contribution to the estate.

We submit respectfully that the entities whose professional fees would be paid here have not been shown to have made a substantial contribution. The parties may have worked very hard for many months to achieve what's been achieved in this case, but again, extensive participation is not enough.

Article 5.1(a) of the plan would establish a substantial contribution as having been provided by the consenting noteholders and the Lone Star related parties. But I believe the case law is clear that a plan cannot deem an entity to have made a substantial contribution.

And we also don't believe that the debtors' agreement to pay professional fees and expenses as an inducement for parties to sign a restructuring support agreement satisfies the statute. Nor do we believe that it is appropriate for a debtor that is in bankruptcy to pay for the professional fees and expenses of its parent company which is not in bankruptcy.

So in conclusion, Your Honor, we submit that Class 6 claims under the plan should be expressly allowed, that the third-party releases should not be deemed -- that Class 6 creditors who did not -- that Class 6 creditors who are unimpaired should not be deemed to consent to the third-party

releases, and that the professional fees that would be paid to the ad hoc group, the Lone Star parent company, and the unsecured notes indenture trustee should not be approved because there is not a showing of substantial contribution.

Unless Your Honor has any questions, that's all I have.

THE COURT: No.

Let me hear any response by the debtor.

MR. HACKMAN: Thank you, Your Honor.

MR. SCHROCK: Your Honor, just briefly, again, Ray Schrock, Weil Gotshal, for the debtors.

Your Honor, this -- I guess the first thing I just noticed that, you know, the evidentiary record in this, in this case, and, you know, on these issues is undisputed. We have put in the evidence to satisfy the global settlement. We think the Carney declaration speaks to itself.

I think that on the issue of silence, that, you know, there are plenty of cases that have looked at what is -- what constitutes consent and, you know, in the -- when you're dealing with a plan here, you know, this is -- you know, Delaware law is going to apply as to what, what is deemed consent.

We think that to the extent that Your Honor had to look at the Continental factors that they are satisfied, but we really -- I personally don't think that that's -- I think

that consent would be the right way for the Court to decide the issue.

Just to correct the U.S. Trustee on the, the mechanic for allowance, it's -- 180 days is if somebody files a proof of claim. Otherwise, these claims, the general unsecured claims are just going to be resolved in the ordinary course of business, as they always have been and will be in an ongoing relationship with the debtors. And he is correct that the abstention -- the abstained issue has been resolved as well as exculpation.

But other than that, Your Honor, subject to any questions you have, I rest on the brief.

THE COURT: Well, let me ask you a question with respect to the payment of creditors in the ordinary course. Do we have any idea how many have not been paid? How many have been disputed in the ordinary course, if you will?

MR. SCHROCK: Just a moment, Your Honor.

THE COURT: Yes.

And could the party on the phone please mute their phones? Somebody is making noise.

MR. SCHROCK: Your Honor, with, with the all trade motion having been granted in these cases, and otherwise, it's not -- as you may recall, we paid about 350 million, we had authority to pay $350 million worth of trade. It's very small, we think under 30 million. But we're just resolving,

you know, we're just resolving those, those matters in the ordinary course. And there's -- I would say in my experience, that's the way you do it because, you know, the message to the trade and our vendors at large when we filed of course was great news, we're paying you in full, nothing has changed, you know, you're unimpaired. But it's rough -- it's a small amount.

THE COURT: Okay. All right, I didn't mean to interrupt you.

MR. SCHROCK: No, that's all right, Your Honor. I was just, I was just wrapping up, actually, Judge. Unless you have any further questions, we'd rest on our papers, and we'd ask you to overrule the U.S. Trustee's objection.

THE COURT: All right. I'm sorry, somebody else wish to be heard? Thank you.

MR. FADER: Good morning, Your Honor. Benjamin Fader of Kelley Drye & Warren on behalf of Wells Fargo Bank, as unsecured notes indenture trustee.

Just very briefly. We filed a reply to the U.S.T. objection on the point of payment of indenture trustee fees and expenses, Docket No. 467. We believe 1123(b)(6) of the Bankruptcy Code, as Judge Gerber stated in the Adelphia case, is a broad grant of authority for a debtor seeking to confirm a plan, and that 503(b) -- Section 503(b) is not the sole means by which fees and expenses of non-estate professionals

can be paid.

The indenture trustee has the right to assert its charging lien. No one contradicts or argues against that in any way.

And in a case particularly where, as here, the plan consideration for the noteholders is entirely in new equity of the reorganized debtor, the payment of fees and expenses in cash, separate and apart, is entirely appropriate and squarely within 1123(b)(6). Otherwise, you have significant logistical and administrative burdens involved, not only in determining how much equity needs to be allocated to the U.S. Trustee, but also in order to monetize those shares.

And this is a case where there is at least immediately, according to the debtors' disclosure statement, not going to be a, a market. These shares are not immediately going to be publicly traded.

And therefore, Your Honor, it could very well be the case that the additional costs that get imposed upon the estate and the other parties, not to mention the indenture trustee, who will still be able to assert those costs as part of the charging lien, that those costs -- that those additional costs from being (Inaudible) the charging lien, could, especially in a short case like this, exceed the amount of the fees and expenses at issue in the first place.

So for that, you know, for that reason alone, I think

in this situation 1123(b)(6) clearly provides sufficient authority for the debtors to be paying the fees and expenses of the indenture trustee separately in cash. Thank you.

THE COURT: Thank you.

Anybody else?

MR. JENKINS: Your Honor, Dennis Jenkins of Morrison & Foerster for the Ad Hoc Group of Noteholders here. I wanted to just stand up briefly first so that the case doesn't go by and I don't get the chance to stand up and introduce myself.

But second, and more importantly, I'd like to just tie a few of the threads together that counsel was weaving for us.

As has been highlighted in the, in the papers, we filed a joinder as the ad hoc group joining the pleadings of the debtors in seeking approval of this plan. And by way of background, additional background, and I know this has been stated in the papers, our group, Your Honor, holds a majority of both the secured notes and the unsecured notes. And we've been at this process for the better part of the last year, putting an enormous amount of time negotiating the terms of this settlement, this global settlement and the terms of this plan.

And while for the secured noteholders, yes, their notes are getting refinanced, there is over a billion dollars of unsecured notes here that are not getting paid that are getting equitized. And those noteholders have spent a lot of

time thinking about this business plan, thinking about this business and how best to set it on a path going forward to success, obviously for their own pecuniary interest, but also for the many employees and the people who matter as a part of this business.

And so we -- I want to just state for the record that we do disagree with the U.S. Trustee. We are not seeking at this time to have our fees allowed under 502(b), in part because we don't think that's necessary. While we believe we could go and make that showing and compel those payments, given all the work that's been done here, as counsel has pointed out, fee letters were signed before we entered into this. It was looking at this from the front end. These noteholders knew that this would be a lot of work, a lot of cost, and before they entered on this course, wanted to know their fees would be paid. The fee letters assured them of that. The RSA assured them of that, and now the plan assured them of that. And that was the global deal they entered into and expected those fees to be paid, part and parcel of all the work that they've been going through to get this plan to confirmation for all the reasons stated in the pleading.

So with that, Your Honor, I'll rest. Thank you.

THE COURT: Thank you.

Anybody else?

All right, well let me make my ruling on the U.S.

Trustee's objections to confirmation.

First, with respect to the third-party releases, I will overrule that objection. The unimpaired creditors were, in fact, given notice and required to object to the releases, and I deem that to be consent. The concept of being required to take an action in order to protect one's rights is not a novel concept, either in civil litigation or in the bankruptcy context. And I will note that many, in fact, did object, and have been carved out in accordance with the terms of the plan. So I think that that is sufficient in this case.

Even if they had not, I do think that the Continental and Zenith factors are met here with respect to third-party releases. There's overwhelming support of all the impaired creditors. Creditors are being paid in full, pursuant to the Bankruptcy Code, both the impaired and the unimpaired with the exception of the noteholders who have consented to taking equity.

The releases are necessary to the plan. There is an identity of interest of all the parties in reorganizing this debtor along the terms of the global settlement reached before the bankruptcy. So I think that the releases in either event are appropriate in this case.

With respect to the payment of expenses, 503(b)(3)(D) is not the only way where such expenses can be approved and paid in a case. And I think it is perfectly appropriate to

agree prebankruptcy to the payment of those expenses without the necessity of a court having to approve them after the fact in order to get the parties to come to the table and negotiate what ultimately in this case is a very successful reorganization of this entity.

So I think that the fact that the debtors agreed to that prebankruptcy was perfectly appropriate, and that there is no necessity that I review those expenses or otherwise interfere with that agreement.

With respect to the allowance of the general unsecured, I think that the plan language is sufficient. I'm satisfied, given the fact that over 90 percent of the trade that the debtors were authorized to pay on the first day have in fact been paid, quote, in the ordinary course of business, and that there is a mechanism in place to resolve those if need be. There is a mechanism that allows the filing of proofs of claim, that allows creditors to bring this to the Court's attention if they are not in fact being paid, in their view, in the ordinary course.

So I will overrule the U.S. Trustee's objections.

MR. SINGH: Thank you, Your Honor. Sunny Singh, Weil Gotshal, on behalf of the debtors.

THE COURT: Yes.

MR. SINGH: Your Honor, so then that leaves us, and we can turn to the remaining objections to confirmation filed by

certain landlords that are still remaining. And just for the record, Your Honor, I know Mr. Schrock reviewed them earlier, but just to be clear that we're talking about Commodore Realty, that's open, Ipanema, Hudson Crossing, JEM Investments and Nature's Hope.

With respect to the last one, Your Honor, I'm pleased to report that just this morning before the start of the hearing, Nature's Hope, we were able to resolve that objection. The period for that lease only goes till November 18, 2018, and so the parties have agreed to have discussions regarding an earlier termination, all rights reserved, of course, but we will engage in those discussions to see if we can exit the premises earlier.

So, Your Honor, with that, I believe their objection is resolved.

So, Your Honor, that leaves us with the remaining objections, as I mentioned. Before reviewing those objections, Judge, I'd like to review with you just a few of the confirmation order and plan changes that addressed a large number of landlord objections, and that we believe address most of the open points that these landlords have raised that are still outstanding and just to frame the discussion for Your Honor, if that's okay.

So, Your Honor, first, there were a number of objections where landlords and other parties complaining about

the prohibition against their rights to setoffs, seek subrogation, et cetera. We have clarified in paragraph 32 of the proposed confirmation order, Your Honor, that nothing in the order or the plan is in any way limiting their setoff rights, to the extent they have those defenses. It's not just one way as against the debtors.

Of course they are limited by the Bankruptcy Code. So if the cap on their damages is under 502(b)(6), you know, they're subject to the cap but they have setoff rights and defenses.

THE COURT: Setoff and recoupment?

MR. SINGH: Yes, and recoupment, Your Honor.

THE COURT: Okay.

MR. SINGH: It's -- all of those are reflected in there.

THE COURT: All right.

MR. SINGH: Setoff, subrogation, or recoupment against the debtors.

THE COURT: Okay.

MR. SINGH: Your Honor, next, a number of landlords requested language to make it clear that the reorganized debtors, or SEG II here, are going to bear the benefits and burdens of any unexpired lease, and clarification that the certain provisions within the leases are not going to be affected, i.e., that they truly are unimpaired and unaffected

by the, by the plan. We have clarified that and made it clear in probably a three-page statement, that I wish could have been shorter, on paragraph 26(B), which makes it clear that all the obligations of the leases will be honored going forward, and as specified, a number of provisions that landlords felt very near and dear to their hearts that have to be culled out expressly, so we've got that all in here.

THE COURT: Okay.

MR. SINGH: Your Honor, next, several parties requested that the debtors fix a date by which disputed and undisputed amounts under assumption and rejection, amounts would be paid, you know, sort of defining what ordinary course meant. So we've added language to make it clear that rejection claims will be paid within 10 days of resolution of the dispute, as well as cure claims, same, same timeline.

If we've got undisputed, and they're already currently due and outstanding, and again, Your Honor, as Mr. Schrock mentioned earlier to the ordinary course trade motion, most of that has been paid timely. But as they are resolved, to the extent that they are then late, they will be paid within 10 days.

THE COURT: So within 10 days of resolution --

MR. SINGH: Of resolution.

THE COURT: -- or decision?

MR. SINGH: Yes, resolution or decision, exactly. It

can be as agreed by the parties or as determined, you know, either by Your Honor or another Court of competent jurisdiction, depending on the dispute.

THE COURT: Okay.

MR. SINGH: Next, Your Honor, several parties, including the U.S. Trustee's Office, just requested clarification that litigation claims, as well as unimpaired claims, truly are riding through, are not going to be affected by the plan injunction -- this is as against the debtors -- plan injunction and releases.

So paragraph 36 of the latest version of the order makes it clear that general unsecured claims, as well as priority non-tax claims, there is a small -- we don't think there is anybody left there, but just in case, those claims are not released under the plan or prohibited from prosecution unless and until they actually are satisfied in full. So true ride-through treatment with respect to those claims.

THE COURT: Okay.

MR. SINGH: And, Your Honor, we did cull out a number of class action litigations. There were a few motions for stay relief that had been filed to make it clear that following the effective date those litigations could continue on an unimpaired basis, and of course should they get a judgment, they would then be treated as general unsecured creditors or a settlement, however that ends up playing out.

THE COURT: Okay.

MR. SINGH: So, Your Honor, next, the U.S. Trustee also wanted confirmation of language that the debtors -- as we originally intended, exculpated parties will be limited to estate fiduciaries, and would not include the commitment parties under the exit loan. So we provided that language in paragraph (kk) of the confirmation order in the finding there.

And similar to that, Your Honor, the SEC requested language that the exculpation is -- only goes to the fullest extent permitted by 1125(e), and so we did add that language as well I believe to paragraph 34 of the order, Your Honor, if I have my number correctly. 32, excuse me, Your Honor, 32.

THE COURT: Okay.

MR. SINGH: So, Judge, that took care of a number of repeat objections that you see throughout these papers. And so really what we're left with is, for the most part with respect to these landlords, is adequate assurance of future performance.

And just a couple of notes, Your Honor, and we will -- you know, I'll allow each of the landlords to come up and address the Court and respond. But a few observations and comments on their objections, Your Honor.

All of them allege that they are shopping centers and, therefore -- and I'm talking about all the remaining landlords -- that they're shopping centers and therefore a

heightened burden applies with respect to the assumption or the assumption and assignment to SEG II.

Your Honor, we would note that they all bear the burden of actually proving that they are shopping centers, and none of them have actually come even close to satisfying or even trying to satisfy, other than simply allege that these are shopping centers. So we don't think that that burden would, would apply -- or has been satisfied, excuse me, and we don't think that that standard would apply.

Even if it did, what you really come down to is adequate assurance of future performance, because percentage rent, tenant mix, none of those issues are really on the table because the debtors are assuming these leases, and intend to continue to operate them as grocery stores with a reduced debt burden, or they're going to SEG II. But even in SEG II, there is the master lease agreement where the debtors are continuing to operate these stores.

There are two stores, Your Honor, remaining that are dark, and so there are no operations there. We think we've, we've gone dark in compliance with bankruptcy law, of course, and we did it pursuant to Your Honor's GOB procedures. But really what's going on there, and I can address the specifics if those landlords continue to press, is there are a few remaining terms on the lease, and I'm talking about JEM Investment and Hudson Crossing right now, where we've got less

than a year remaining rent on those properties, remaining term.

And so rather than reject the leases today, pay a 502(b)(6) claim on the effective date, from a liquidity perspective -- and it's not a ton of dollars, Your Honor -- but from a liquidity perspective, it makes a lot more sense for the debtors to pay those lease amounts over time, even though the store has gone dark.

Your Honor, additionally, with respect to adequate assurance, we would note that it's now in the record and undisputed in the Carney declaration that the debtors, on a reorganized basis, will have approximately $217 million of cash and ABL availability, in addition to the reduced debt load and interest capacity burden that the company has to bear coming out, which is a saving of $500 million in principal amount, and then about $40 million in interest per year.

So, and finally, Your Honor, I would note that with respect to SEG II, some of the landlords, or all of the landlords, I should say, have ignored the fact that they have lease guarantees, the SEG II, I mean a lot of that structure was created because of the lease guarantees. And they have lease guarantees from Ahold Delhaize, a company who, based upon their own public filings and on their public website, has 6 billion euro of free cash as of 2018. And we do have those records here for the Court and parties in interest if they'd

like to see them.

So, Your Honor, we think we've satisfied adequate assurance. None of the parties satisfied their burden to show that they are shopping centers. Even if they did, you really just come back down to the adequate assurance issue, which again, we think we've satisfied.

I would note that there is one party, and it's Commodore, where there is a dispute about whether or not this lease has been terminated. There's two leases as to both of those leases. As to one of them, Commodore, I believe, would like a ruling or determination today that the lease has actually been terminated. This issue has been disputed in state court. It's still ongoing, and, Your Honor, we cite it in our papers, the Orion Pictures standard from the Second Circuit, which has also been followed by courts in the Third Circuit, that assumption is a summary proceeding. It's not an opportunity or a forum for a detailed evidentiary hearing.

So, Your Honor, we would recommend and suggest that assumption be dealt with, this dispute regarding termination be dealt with in the context of a separate evidentiary hearing, sort of how we've agreed with the Miami DC landlord, that we would, you know, enter --

THE COURT: Well, do you want them to go back to state court or do you want me to decide --

MR. SINGH: No, Your Honor, both parties agreed that

we'd like you to determine it. They have no objection, so we would say that the state court stay would continue. We'd prefer Your Honor decide the issue in the context of the assumption dispute. I'm sorry to say that, Judge. Hopefully we can resolve it. But, you know, we think that would be the right approach here. It is an assumption dispute. We think under Orion you can authorize assumption pending a later determination of whether or not the lease has been terminated. Their rights are not affected or prejudiced because if the lease turns out to have been terminated, they're right, they would be treated as a general unsecured claim and paid under 502(b)(6). If they're wrong, as we believe they are, Your Honor, then the assumption will have been approved today and you will have made a determination on the termination issue.

So, Judge, unless you have questions for me now, I will allow the landlord counsel to speak and reserve right to, to respond, if that's okay.

THE COURT: Okay.

MR. SINGH: Thank you.

MS. KUHNS: I have a lot of paper, but my remarks are all deliberate.

THE COURT: Okay.

MS. KUHNS: Joyce Kuhns, Your Honor, of Offit Kurman on behalf of Commodore Realty, the landlord for the Tavernier and Palmetto store numbers 328 and 2448 respectively.

I agree with counsel that a number of our issues on cure and adequate assurance can be deferred to another day. Certainly with respect to the Palmetto lease there is no dispute that that is an unexpired lease subject to assumption, and, and we have -- and I certainly am willing to take them up on their offer to resolve this dispute appropriately, we believe, before Your Honor. And that that be done and specially set and that we walk away today, because in fact there is a Florida proceeding pending initiated by the debtor, a declaratory action, that we walk away today with an actual hearing date so we can advise the court in Florida of that.

Both leases were defaulted for the same primary reason: the debtors' inaccurate and incomplete recording of gross sales on which to calculate percentage rent obligation, and its related failure to then pay the percentage rent obligations due under both leases.

Both leases are longstanding. Both date back to 1977. Each have been amended a number of times. Never has there been a dispute raised, nor has there been an amendment suggested because gross rent was ambiguous. This is an issue that was raised recently, and we truly believe in the context, a tactical decision to accumulate cash.

So Tavernier is different because the lease was in fact terminated in accordance with Section 20 of the lease upon a default and after notice and passage of a 30-day cure

period on September 30, 2017, by letter dated August 24, 2017. And, Your Honor, that letter appears at Docket No. 266, and I assume that the debtor has no objection to stipulating to that, nor to stipulating to the lease, the leases themselves, which appear at Docket No. 469, both the Tavernier and the Palmetto lease.

So we -- the August 24 default or termination letter makes clear that prior notices of this percentage rent and reporting default were previously sent, remained uncured. And essentially the August 24, 2017 letter is your last-call letter. "Debtor: If we don't get this resolved within 30 days, your lease is terminated on September 30, 2017." That is what the letter said.

What did Winn-Dixie do? Surprisingly, nothing. September passed. October passed. And then on November 20, 2017, the debtor filed a declaratory action, not in the jurisdiction where the real estate was located, but in Miami-Dade County.

Since that time the actions are being transferred to Monroe County, because what Commodore then did two days later is it served an eviction proceeding and -- in Monroe County.

Your Honor, I have the dockets here, and I can put them into evidence and you can take judicial notice of them. And what you're going to see from that is that nothing substantive has happened in Florida. This has been a transfer

of venue skirmish from day one. You have two proceedings filed in inappropriate venues that are now being transferred to the appropriate venue in Monroe County.

THE COURT: Well, am I deciding this factually today?

MS. KUHNS: Well, Your Honor, I'm just going to point out --

THE COURT: Okay.

MS. KUHNS: -- what I was going to point out is, and what the dockets will show, is that in fact the debtors allowed termination to occur.

THE COURT: All right, well --

MS. KUHNS: The proceedings were filed in November. I believe the debtor may even stipulate to that, that its declarations were filed in November, after September 30, 2017.

MR. SINGH: Your Honor, Sunny Singh. This is being handled by local litigation counsel. I am not prepared to stipulate to anything here today. And this shows why this is not appropriate for today. We're at the confirmation hearing.

THE COURT: Yeah. I --

MR. SINGH: We should have an evidentiary hearing, tee this up, take discovery and be back.

MS. KUHNS: Well, Your Honor, the reason I believe it is appropriate today is that the debtors chose to assume this lease under Section 365, and 365 says only unexpired leases can be assumed. And Section 365(c)(3) says the trustee may

not assume a lease if it's been terminated under applicable nonbankruptcy law. And then Section 365(d)(4) says that a lease that is not assumed or rejected of an entry of the confirmation order is deemed --

THE COURT: Well, if you're correct, and after an evidentiary hearing, then your lease will not be assumed.

MS. KUHNS: Your Honor, there is nothing in Section 365(d)(4) that allows that determination being made after entry of the confirmation order. If they're right, it's an unexpired contract, that decision has to be made on entry of the order. That's what 365(d)(4) says.

Now, this is a prepack. They chose to file a prepack. This is an expedited timeline, and that's the conundrum that they're in today. The conundrum that they're in is 365(d)(4) says that that decision must be made on the unexpired lease on entry of the order of confirmation, which I believe is going to be today or tomorrow.

So that's what's different about Tavernier. And I believe that the only thing that could be determined, and as I said, I'm happy to put the docket in so that you can see there was a termination under state law. I'm not hearing there wasn't a termination effective in accordance with this lease under state law on September the 30th. And the only thing that it seems to me that this Court could determine today is in fact the debtor has not met its burden. The debtor is

talking about the landlord burden on shopping center. Well, the debtor has the burden to show it's an unexpired lease and is therefore assumable.

We believe the only thing this Court could find is the debtor has not met its burden to show the Tavernier lease is unexpired and assumable, and therefore in accordance with the code and the lease and state law is terminated. And that is what we're requesting the Court do today.

And I'm happy to put in the dockets, because the dockets are there. As I said, we, we have the default letter, which is part of the objection; we have the leases, which are supplements and part of the docket; and I'm happy to put in and ask the Court to take judicial notice of the dockets in Florida. I have copies of them. And that --

THE COURT: You may hand them up.

MS. KUHNS: Thank you. Yes, Your Honor, I'm only going to hand up the dockets for Tavernier. I don't need to burden the record with --

THE COURT: Thank you.

MS. KUHNS: -- anymore paper, I am sure.

THE COURT: You may hand it up to me. Thank you.

The debtor wish to respond?

MR. SINGH: Yes, Your Honor. Your Honor, I just -- a couple of things, just to take a step back for a second and just reframe the dispute and the issue that we're having here.

THE COURT: Um-hum.

MR. SINGH: The underlying dispute is really about the fact that the debtors have a below-market lease, and they've been fighting with the landlord because the landlord has been trying to find a way to bring us up to market. There have been discussions that the parties are trying to resolve this dispute.

THE COURT: No, no, I don't need any of that.

MR. SINGH: No, no, I'm not giving you --

THE COURT: What evidence do you have that the lease was not terminated, in light of the evidence that's been presented by the landlord?

MR. SINGH: Well, Your Honor, what I would say is that putting that issue -- we can get to the evidence. But our view is, and our position is that, Your Honor, you do not have to decide that issue today under the Orion Pictures standard, which they have not disputed at all. They have not refuted the fact that under the Bankruptcy Code Your Honor can make or defer an assumption decision, even if you choose to, pending a determination of whether or not the lease has been terminated. And that's why it should be a proper -- appropriately put before Your Honor.

They filed a 17-page objection that didn't attach most of what they've been referring to today, or I'm not sure attached anything. And so, Your Honor, you know, this is not

the appropriate forum to show up and have an evidentiary hearing without having taken discovery, parties {sic} being exchanged between the parties, and a true termination dispute being decided by Your Honor. There is not enough in the record here for you to make that determination, and you're not required to make that determination under applicable law, because we're just in an assumption proceeding that's a summary proceeding. It is not --

THE COURT: Well, we're at confirmation, and you have to have decided by confirmation whether to assume or reject. And don't I have to enter an order?

MR. SINGH: Well, we have decided to assume the lease. We have made that determination. The issue is whether or not there is a dispute. And 365(d)(4) just says what happens if you don't assume a lease by the time of the confirmation hearing? It's deemed rejected. It doesn't actually say you must have a final determination by Your Honor to say yes, the lease is not deemed assumed. So we have made a decision.

And I would note, Your Honor, it's pretty typical in plan provisions, as is in our plan provision, that says if there is an assumption dispute pending, that those leases can continue towards assumption. And we've got it in Section 8.2 or 8.3 of the plan that say all leases are being assumed other than those where there is an assumption dispute pending before Your Honor, precisely for this reason. You don't have

confirmation hearings, particularly in prepacks, where, you know, a number of these types of assumption disputes are being decided. They can be deferred. We have made our decision. We have struck the language in the plan that says we can't change our decision, right. We can no longer come back and say we will later reject the lease if X, Y or Z happens. We've taken that provision out of the plan, so we've made our decision, Your Honor.

And now all that's left is for you to decide, following an evidentiary hearing, following discovery between the parties on this very particular dispute, whether or not there has been a termination. And we think we will be able to show Your Honor in that context, after we've gotten appropriate discovery, that there has not been a termination. But again, you don't need to decide that today.

MS. KUHNS: Well, I believe the literal language of Section 365(d)(4), and as the debtor has chosen its course here, actually compels you to make that decision. Clearly at issue -- and the debtor has the burden on whether this is an unexpired lease. And, Your Honor, I didn't properly identify the Monroe eviction docket is 3A, and the declaratory docket from Miami-Dade County as 3B, but I'll do so now.

That said, this debtor had an option here. It filed a prepack plan that took a lot of effort, and I congratulate it on restructuring its balance sheet. However, on day one it

could have moved for an expedited determination of the status of this lease in front of this Court.

THE COURT: But it doesn't have to, does it?

MS. KUHNS: It doesn't, it doesn't have --

THE COURT: It did make an unequivocal decision to assume your lease.

MS. KUHNS: I don't think it followed -- well, Your Honor, it has not actually dealt with the unexpired lease language. That's a predicate of its decision, and that is in the code for a reason.

THE COURT: It is asserting it's an unexpired lease. You dispute that.

MS. KUHNS: I understand, Your Honor. I'm just saying that determination needs to be made in order for an entry of a confirmation order, because otherwise, you will have our deemed rejection under Section 365(d)(4) automatically by virtue of the literal language of the section.

But the plan can say whatever it wants. The plan does not get to rewrite the code. The debtor does not get to rewrite the code. The code says what it says. And that's why we're asking for the relief we're asking for.

The debtor is in a prepack situation. That's why I'm suggesting --

THE COURT: But there are -- but there are many cases that say that the decision does not have to be made on

confirmation. Do you have any cases that say the Court has to actually make a determination as to whether the lease is assumable on or before confirmation?

MS. KUHNS: Well, Your Honor, I have to admit, it may be that people hadn't squarely raised it and they allowed that to be deferred until the effective date. But my client is not willing to waive it or defer it until the effective date. There is nothing in this section that says it's conditional. It's not subject to some future event. It's only subject to entry of the confirmation order.

As I said, the debtor's created its own conundrum here. We didn't. There is a dispute now whether it's an unexpired lease. In order to not have it deemed rejected today, that determination would need to be made. Otherwise, it will be rejected on entry of the confirmation order by virtue of the literal language of the section.

MR. SINGH: Your Honor, could I briefly respond just one moment on the language of this -- of the code?

THE COURT: Yes.

MR. SINGH: If you, if you look at the -- I'll just -- Sunny Singh here, Your Honor, again for the debtors.

Just to read the language again. Subject to subparagraph -- I'm in 365(d)(4)(A). Subject to subparagraph (B), an unexpired lease of nonresidential real property under which a debtor is the lessee shall be deemed rejected, and the

trustee shall immediately surrender that nonresidential real property to lessor if the trustee does not assume or reject the unexpired lease the trustee, i.e., the debtor has moved to assume.

There is nothing here that requires a Court order by Your Honor before that date. There is nothing here that requires Your Honor to make a determination whether or not something has been terminated by that date. We just have to provide our intent, the trustee has to assume, and that is what we've sought to do.

Your Honor, unless you have any questions, I think that's all I have on the issue.

THE COURT: Well, I agree with the debtor. There are many cases that say that the debtor just needs to unequivocally state its intention in the plan without the ability to change its mind, and that is sufficient to meet 365(d)(4).

MS. KUHNS: Thank you, Your Honor. One thing that we would need, as I said before, before we leave I think, because of what is pending in Florida, would be actually a hearing date. We can do that at the end. But I think in fairness to everybody, including the courts down there, that would be appropriate. So, thank you.

THE COURT: Yeah, I'm going to require that the parties meet and get a date.

MR. SINGH: Yeah, Your Honor, that's fine. We'll meet and have litigation counsel and come back to Your Honor with a date.

So, Your Honor, I think there may be some other landlord objections.

THE COURT: I'm waiting for anybody else who wants to --

MR. SINGH: Okay, I'll wait to, I'll wait to respond.

THE COURT: Go ahead.

MR. ALLINSON: Thank you, Your Honor. Elihu Allinson on behalf of Ipanema Smokey Park, LLC.

I think, sort of as a, as a housekeeping matter here, my client is trying to get a read on whether its right to challenge adequate assurance of future performance is preserved for its assumption dispute, pursuant to its assumption objection timely filed, or whether that the issue of SEG II's financial wherewithal and ability to perform is being heard here today.

MR. SINGH: Your Honor, it's being, it's being heard here today. Cure disputes are reserved, but assumption is going forward, and if you'd like me to address their comments.

MR. ALLINSON: So, Your Honor, I would object procedurally. I think -- I don't think this provides appropriate due process. The, the definition of assumption dispute at 1.14 of the plan explicitly provides that it

includes cure or adequate assurance of future performance. And the plan provides that assumption disputes can be continued until after the plan, as long as they're resolved before the effective date. And so we would request that, that that language be enforced or that the Court schedule a separate evidentiary hearing on this matter for Ipanema.

MR. SINGH: Your Honor, I may have misread. Could counsel just tell us where they're looking to see that assumption disputes other than cure can be adjourned? Or have to be adjourned?

MR. ALLINSON: It says at -- the plan provides at Section 8.2(b) that if there is an assumption dispute pertaining to assumption of an executory contract or unexpired lease, such dispute shall be heard by the Bankruptcy Court prior to such assumption being effective, provided, however, before the effective date. And then it goes on.

MR. SINGH: It goes on with respect to cure disputes.

So, Your Honor, just, just, and I'm happy to address it. But that's -- there's not a due process issue, Judge. We had provided notice -- I mean that's what this case has primarily been about is leases. People have known, we provided a number of notices, they're all in the record, of when disputes have to be asserted. They have asserted an adequate assurance dispute.

Ipanema has a lease that is being assigned to SEG II.

It's already in the record, Your Honor, that SEG II will have from the debtors funding of $25 million, as well as -- excuse me, $21 million on the effective date, as well as an additional commitment for 25 million. And, Your Honor, not to mention, there is an Ahold guarantee with respect to this lease. The SEG II leases enjoy the benefit of an Ahold guarantee. And trust me, I mean Ahold has appeared in this case. Trust me, they are not happy about that. And the Ahold guarantee, I mean we've got information, we're happy to share it with counsel, that is publicly available that makes it clear that Ahold holds -- has access to cash -- I'm just talking about their free cash, not even assets -- of 6 billion euro as of April 2018, their most recently filed report, which guaranty, Your Honor, has been what has exactly been the document that has been providing them assurance of performance in addition to the debtors' performance.

So the debtor is going to continue to operate this property. SEG II is going to have access to $46 million with respect to all their properties. And there is no impairment or effect on the Ahold guarantee that has been provided to the landlord.

THE COURT: Okay. Anything in response by Ipanema?

MR. ALLINSON: Well, Your Honor, if, if we're, if we're joining the issue of whether the plan has established or the debtors have established that SEG II is adequately funded

to provide adequate assurance of future performance, I would, I would respectfully disagree. I think that there is information in Mr. Carney's declaration and otherwise about what assets are going to be made available as to SEG II, as counsel just recited. But there is nothing in there about what liabilities it has.

There's also -- you know, there's 40 or so leases, there's $46 million, comes out to an average of, you know, a million dollars or so a lease. Our remaining obligation is 2.3 million. There's, there's been no financial analysis of that.

As far as SEG II itself, the plan documents show that that entity was established for the primary purpose of mitigating leases, not performing them. So where is the adequate assurance of future performance in that?

And finally, as to Ahold guarantees, that's neither here nor there. There's nothing in this plan that says that the debtors can state with certainty that Ahold is going to perform obligations that the debtors or their assignee, SEG II, may not. There's simply nothing to that effect in here.

That would be my response, Your Honor.

THE COURT: All right. Well, I'm going to hold that as to Ipanema that it can raise adequate assurance issue at the time the cure dispute is resolved.

MR. SINGH: Very well, Your Honor. Thank you.

THE COURT: Anybody else?

MR. ALLINSON: Your Honor, I think I'm also next up for Hudson Crossing --

THE COURT: Okay.

MR. ALLINSON: -- LLC. On that the changes that the debtors have proposed do address substantially all of our concerns, and so we're going to stand down on that objection.

THE COURT: All right. Thank you.

MR. SINGH: Your Honor, just one clarification. If there is going to be a reservation with respect to that assumption dispute, the -- because of the short term that is remaining, it may just be easier, Your Honor, for the debtor to reject that lease and potentially do away with the benefit of having the remaining term. So unless the party has a dispute, I think we would want that right reserved because we're not technically assuming today because the issue is being deferred.

THE COURT: Well, yeah, you are. You're deciding -- you have to decide today whether you're going to assume or reject.

MR. SINGH: Right. So, understood, Your Honor. Understood.

THE COURT: Do we want to take a break or --

MR. SINGH: No, Your Honor, I think it's, I think it's, I think it's okay.

THE COURT: All right, anybody else?

You don't have to respond. He's not -- he's not -- he's changing that statement.

MR. SINGH: Your Honor, sorry. I misclarified. If it's not later authorized to be assumed by Your Honor because we failed to show adequate assurance, right, then wouldn't the lease -- I think you would, you would disallow it and it would be rejected, is the point. Not that we are changing our determination, but that Your Honor is not allowing the assumption at a later point.

THE COURT: Because you have not proven adequate assurance of future performance.

MR. SINGH: Right, if that dispute isn't later resolved.

MR. ALLINSON: Your Honor, I think that's calling for an advisory opinion. It won't happen until we get there.

MR. SINGH: Okay, Your Honor, that's fine.

THE COURT: Okay.

MR. STEPHENSON: Cory Stephenson, Your Honor, here on behalf of JEM Investors, LLC.

JEM has two leases that were originally with Samson Merger Sub, store number 2446 and 2479. One of those stores, 2479, is one of the dark stores that were referenced a little bit earlier, and that's where a lot of our concerns arise.

JEM had asked for a few things, particularly some kind

of process for -- the debtors' counsel specified that there would be a specific time where resolved cure defaults would be paid. But JEM was looking for some kind of process where we could submit and then receive some kind of response from the debtor or the assignee with respect to any alleged cure defaults, so that there be would be an actual timeline rather than this, this ordinary course language, which essentially just leaves us with very little with respect to guidance as to when we may be able to resolve these issues. Other than, you know, we can request that the cures be -- or I'm sorry, request that the defaults be cured, file something, show up for a hearing, and then at some point wait for a ruling, and then we would have the 10-day payment, or presumably the 10-day payment for whatever the cures are.

Now, one of the big issues at the dark property is nonmonetary defaults. There are some issues with respect to deterioration at the building and also in the parking area. JEM had also requested to the extent that, you know, the debtor isn't going to resolve those immediately, that JEM be able to go in and resolve and remediate those issues on the property, rather than let the property simply deteriorate.

That's particularly concerning to my client because the property is vacant. There is no one monitoring who's trying to access the building or even successfully accessing the building.

THE COURT: Okay.

MR. STEPHENSON: It creates a bit of a safety issue. And the condition of the building certainly isn't going to improve with the, the paint peeling off the side and, you know, the potholes widening.

And the final issue is JEM had asked for guidance with respect to what the plans were for the two properties. I know the one is still operating, and debtors' counsel said that the other, I suppose the intent is just to let it sit and pay the rent as time goes on. So if that is the case, then that's fine. But really we're just looking for a little more guidance and the opportunity to move in. And to the extent the debtor is not complying with the contracts, do whatever kind of preventative maintenance is required.

THE COURT: I'll hear from the debtor on that.

MR. SINGH: Your Honor, the only thing I would say is, you know, for an expedited determination we're trying to address these as quickly as we can. I'm happy to commit to counsel that, you know, we can speak next week and try to get the clients together to have a discussion about these issues.

With respect to going in and fixing, you know, damages or asserted damages at the property, we're going to go by whatever the lease says. Yes, it's gone dark, but that doesn't mean we're not complying.

THE COURT: Well, they say you're not maintaining.

MR. SINGH: No, I understand that.

THE COURT: You say you are.

MR. SINGH: Yeah, I mean we should have a discussion about it, and if there is still a dispute after the fact then they can -- it's a cure dispute, right. We're not maintaining that there's some monetary damage that's associated with that that they want to assert against us, right, because there has been some sort of alleged default. And so we will deal with that in the appropriate time. But I think we should have a conversation and see if we can address whatever those, whatever those defaults are.

THE COURT: All right, I will give you the time to have that conversation, but if it's not satisfactory to JEM, then they can seek an immediate hearing to --

MR. SINGH: Right.

THE COURT: -- discuss it.

MR. SINGH: That's fine, Your Honor.

MR. STEPHENSON: I have nothing further. Thank you, Your Honor.

THE COURT: Thank you.

Anybody else wish to be heard?

Does that resolve all of the objections then?

Do you want to take a break?

MR. SINGH: Yes. I apologize, Your Honor. Could we just have just a five-minute break?

THE COURT: All right, we'll stand adjourned for a recess.

(Recess from 12:05 p.m. until 12:38 p.m.)

THE COURT: All right, we're back on the record, and sorry for the delay.

MR. SCHROCK: Thank you for giving us the time, Your Honor. Ray Schrock on behalf of Weil Gotshal for the debtors.

THE COURT: So you settled everything and --

MR. SCHROCK: I think we did, Judge. I think we resolved, I think we resolved the point.

Thanks for the time. We did -- it was helpful to have it. And this is just really -- this is just a clarifying comment. In Section 8.1 of the plan, and the reason we were having this back-and-forth on the -- from the debtor and sponsor side, there is a concept of a defined term called an Assumed SEG II Lease. And in that, when we had drafted the plan, we had contemplated that we would have assumption issues, including adequate assurance, with respect to the Assumed SEG II Leases, as that defined term is used in the last sentence of 8.1(a), resolved at the time of the confirmation hearing.

And just in light of Your Honor's order, which of course we're, we're perfectly fine with, to adjourn the assumption decision on one particular lease that we were going to assumed -- have assumed, we just want to make clear for the

record that, you know, that lease in particular would not be an Assumed SEG II Lease, unless and until Your Honor actually enters an order allowing for the assumption and assignment of the lease. And of course if it's not, you know, if it's not, then it will be -- the plan's terms will be there.

But just in light of this, there's this language here that just states that -- you know, makes clear that it's drafted with the implicit notion that assumption issues would be decided by the state. And we just want to make clear, it's only going to be as Assumed SEG II Lease if Your Honor allows for the assumption.

With that, Your Honor --

THE COURT: All right, well, does the landlord agree with that?

MR. ALLINSON: Your Honor, Ipanema objects. The documents are very clear. The definition of Assumed SEG II Lease is very clear. It means that they were attached to the plan as a specific schedule. It includes the Ipanema lease. The provisions of the plan are very clear that the debtors are not permitted to reject an Assumed SEG II Lease. It doesn't say upon assumption and assignment of an Assumed SEG II Lease.

THE COURT: But you're saying they can't assume it.

MR. ALLINSON: No, no, Your Honor. They haven't demonstrated adequate assurance of future performance. That's all I'm saying.

THE COURT: Well, and in the absence of that, they can't assume that.

MR. ALLINSON: That's not what I'm saying, Your Honor. I'm saying they will reserve that -- the way this plan is arranged, we reserve our rights to bring that issue up at the assumption dispute.

MR. SCHROCK: Your Honor, this is what I'm talking about. They're trying to get a catch-22 where you don't order an assumption, and then somehow we're deemed not to have rejected it. But the code is binary. If we don't assume it --

THE COURT: It's rejected.

MR. SCHROCK: -- it's rejected. That's the only way we can resolve this issue. And so when we saw this ambiguity in the plan language, we just felt compelled to bring it up for the record. Listen, that's, that's the law.

MR. ALLINSON: Your Honor, we're not trying to gain a catch-22 here. The debtors are trying to gain a catch-22. They have to -- they've made their decision --

THE COURT: Yes.

MR. ALLINSON: -- as of today that they are assuming and assigning all the leases on the Assumed SEG II Lease schedule. That includes the Ipanema lease.

What we're --

THE COURT: Well then your objection to their

assumption of that is withdrawn?

MR. ALLINSON: It's not of drawn -- withdrawn. What we're saying is that the way they have set this --

THE COURT: What do you think the effect of having the hearing on the cure also be the hearing on adequate assurance of future performance? What will happen at that hearing if I determine that you are correct and they have not given adequate assurance of future performance?

MR. ALLINSON: Then I think they can move the lease to the assumed leases bucket.

THE COURT: No, it can't be assumed if they haven't established adequate assurance of future performance.

MR. ALLINSON: The assumed, the assumed lease bucket, Your Honor, for the reorganized debtors, not for SEG II. They established they have $517 million worth of funding available to satisfy adequate assurance of future performance with regard to those leases.

MR. SCHROCK: Your Honor, see, but, this is, this is a marginal store.

THE COURT: You need to speak into a microphone to be sure that you're being heard.

MR. SCHROCK: Yes, sorry, sorry. Sorry, Your Honor.

Your Honor, it's a marginal store. We are going to assume it to SEG II. And if we can find another, you know, solution for it, we will. Otherwise, we're going to reject

it.

And I think what the landlord is pointing to is there's a provision in the plan that, that I said, you know, that it's a very general provision, 8.1(a) that says if there is a pending adequate assurance dispute, you know, the lease is not deemed assumed. But there's a further provision that says in no event shall any debtor or reorganized debtor, as applicable, be permitted to reject, in a quote, assumed SEG II or assumed lease subject to the Green Co. letter agreement.

And I think what, what we're hearing is I'm just saying listen, if Your Honor doesn't enter an order assuming it, then it's going to be treated in accordance with the plan. And this, this cannot be an Assumed SEG II Lease if Your Honor does not order that it be assumed. And we're not going to have this lease get stuck with the reorganized enterprise. It's being carved off, you know, for SEG II. And, you know, we hope that it finds a home, but if it, if it does not, then, you know, it will be resolved in that fashion.

And so, listen, it's our plan, and to the extent that they want us to clarify in the language, I'm certainly clarifying it now that it's only on the Assumed SEG II Lease schedule, to the extent Your Honor issues an order allowing for the assumption.

MR. ALLINSON: Your Honor, this Court should not countenance a claim at this time that if they cannot square

away a certain lease on the SE -- on the Assumed SEG II Lease's schedule, they can reject it. There is nothing in this plan that says that. That -- I think that's a primary point that we need to resolve right here before going any further.

MR. SCHROCK: I actually didn't think it was such a controversial point, Judge. We're not assuming a lease if your, if Your Honor doesn't allow for its assumption. And so I just didn't want to get caught in a defined term where we had contemplated that we would, you know, deal with these adequate assurance issues for SEG II, and somehow the reorganized company gets stuck with a lease to which it never intended, which it be ferreted out, it sounds like that's exactly what the landlord had intended.

THE COURT: Let me look at the plan.

MR. SCHROCK: So, Your Honor, we could resolve it in a couple different ways. One, you know, to the extent the debtors can clarify for the record it's only an SEG -- Assumed SEG II Lease to the extent that Your Honor issues an assumption order, that would be fine. I think otherwise --

THE COURT: Is there a definition? Assumed means those leases identified on the schedule --

MR. SCHROCK: Right.

THE COURT: -- of assumed leases.

MR. SCHROCK: Right. And my clarifying change was

simply going to note that, you know, we'd add a note to the schedule that says, you know, to the extent it's -- the Court actually enters an assumption order. I don't, I don't want to twist this plan provision into forcing the reorganized entity to be liable for this lease, and if there is any question about it, the other alternative is we'll just reject the lease. But we can't have the reorganized entity get saddled, you know, with this obligation. And I think that -- I'm not aware of any court ever, you know, saying you can't satisfy adequate assurance so let's put it, let's put it back. I've only seen this issue be resolved the way I just noted, which is either it's assumed or it's rejected. That's the way the code works.

MR. ALLINSON: Your Honor, that argument is disingenuous. There was language in the plan, actually I'll wait till Your Honor's --

MR. SCHROCK: Disingenuous, certainly wasn't disingenuous but --

THE COURT: I'm sorry, go ahead.

MR. ALLINSON: Your Honor, the argument that it's either assume or reject is disingenuous. The plan provides at Section, I believe it's 8.2(b) under "Determination of Assumption Disputes and Deemed Consent," I'm sorry, the plan provided -- it has since been amended. But it originally provided as follows: "To the extent the assumption dispute is

resolved or determined unfavorably to the debtor or the reorganized debtor, as applicable, such debtor or reorganized debtor, as applicable, may reject with the consent of the requisite consenting noteholders the applicable executory contract or unexpired lease, after such determination, provided that in no event shall any debtor or reorganized debtor, as applicable, be permitted to reject an Assumed SEG II Lease or Assumed Lease" -- capital A, capital L -- "or Assumed Lease, subject to the Green Co. letter agreement."

That has been changed in the amended plan to lop off everything before "provided that"; that is, to take out all reference to the unfavorable determination to the debtors of an assumption determination -- an assumption dispute. And what was left is simply the very last clause, which is now an independent sentence. "In no event shall any debtor or reorganized debtor, as applicable, be permitted to reject an Assumed SEG II Lease," defined term, "or an Assumed Lease," defined term, "subject to the Green Co. letter agreement." What could be more clear?

THE COURT: Well, I think what's not clear is they're defining an assumed SEG lease as a lease on that list, regardless of whether or not the assumption is approved by the Court.

MR. ALLINSON: That is correct, Your Honor. Because they're deemed to be -- have made their decision today, and

the assumption becomes effective no later than the effective date. And in the meantime, there can be an assumption dispute. And if that assumption dispute is resolved unfavorably, the prior treatment was they can't reject.

THE COURT: Well, but what's being determined unfavorably is that the debtor has established the predicate to assuming a lease, and that is adequate assurance of future performance.

MR. ALLINSON: Adequate assurance of future performance is explicitly contained within the definition of what can be contained in an assumption dispute.

THE COURT: I understand. However, the problem is that if there is no adequate assurance of future performance, there can be no assumption under 365. Whether you call it assumed or not, it can't be assumed.

MR. ALLINSON: Well, Your Honor, we didn't draft this plan. They drafted it.

THE COURT: I know, and they're trying to clarify it for the record --

MR. ALLINSON: Your Honor --

THE COURT: -- that that can't be what is intended.

MR. ALLINSON: Your Honor, they, they took and defined a term as Assumed SEG II Lease to mean well, the Court hasn't approved that it's assumed. It's just on this list. But we're calling that an Assumed SEG II Lease. That's the way

they set this up.

THE COURT: I know, and he's trying to clarify that that can't be what was intended.

MR. ALLINSON: He's trying to make a material change to the plan at the confirmation hearing, Your Honor.

MR. SCHROCK: Judge, we are certainly not trying to make a material change to the confirmation -- to this plan at the hearing. I'm trying to make clear what I think is, you know, that make sure that the plan doesn't -- isn't contrary to applicable law.

THE COURT: I think that's correct. It's the provision that says it can't be rejected --

MR. ALLINSON: They have other alternatives.

THE COURT: There is no other alternative.

MR. ALLINSON: There are other alternatives. In fact, we suggested --

THE COURT: If they can't be assumed, it's got to be rejected.

MR. ALLINSON: It can be put on the assumed leases schedule, as opposed to the assumed SEG II leases schedule.

THE COURT: It could be, but the debtor is not intending that. And that -- there is nothing in this language that would suggest that's the alternative, that anybody would have read that as the alternative.

MR. ALLINSON: I read that as the alternative and

shared that with the debtors. They didn't respond.

THE COURT: I'm sure there is a definition of assumed leases.

MR. SCHROCK: There is.

MR. ALLINSON: Yes, Your Honor, it's --

THE COURT: And that's all on the other schedule.

MR. ALLINSON: Exactly.

THE COURT: And you're not on that schedule.

MR. ALLINSON: That's correct.

THE COURT: So how can that be the default?

MR. ALLINSON: Because if -- I'm not saying it's the default. I'm saying it's another option. They could put us on that schedule and then there wouldn't be an adequate assurance problem.

THE COURT: But they don't want to put you on that. They've put you on the assumed SEG leases. But if it cannot be assumed, it's got to be rejected.

MR. ALLINSON: We also suggested another alternative as to how they could satisfy adequate assurance of future performance. And that would be specifically to have SEG II earmark $2.3 million for this lease to the extent, to the extent it was not otherwise resolved, such as by an early termination agreement.

THE COURT: Well, that can be addressed in the adequate assurance, and they can make their -- you can discuss

or they can -- you can put on your evidence and they can put on their evidence, and that is an option that they could do. But if they don't elect to do that, I can't approve assumption of that lease, correct, in the face of your objection to adequate assurance?

MR. ALLINSON: Your Honor, they've set this entire mechanism up in a certain way. What that mechanism was was that the leases on assumed lists couldn't be rejected, and that assumption disputes could be put off until after confirmation. Now --

THE COURT: But equally, equally, an equal -- equally valid reading of this is regardless of what I say, if it's on the assumed SEG lease, it's assumed? I mean that's the plain language of it, regardless of what your objection may be.

MR. ALLINSON: That's what they brought to the Court, Your Honor.

MR. SCHROCK: And we're seeking to clarify that if Your Honor doesn't order that the lease can be assumed, then listen, it's not an assumed --

THE COURT: It's deemed rejected.

MR. SCHROCK: It is. I don't know any other way for the law to, to work, Your Honor. And I, I -- we saw the ambiguity. We wanted to clear it up. And, you know, we think that's the way we should deal with it.

MR. ALLINSON: Your Honor, there, there is an

alternative. There are a couple of alternatives that I can think of right away. I've mentioned them both. They can earmark their own funds, their own --

THE COURT: But they don't have to do that.

MR. SCHROCK: We're not doing that.

THE COURT: They don't have to do that.

MR. SCHROCK: We are not doing that.

MR. ALLINSON: Well, Your Honor, then I don't know what to make of the language that says that they can't reject leases that are on those lists.

THE COURT: They can't reject, but if it's not assumed, under 365 it's deemed rejected.

MR. ALLINSON: I understand that.

THE COURT: And it's not by their election. That's how it could be read. The debtor can't elect to reject it.

MR. ALLINSON: Well, then --

THE COURT: They've elected to assume and assign it to SEG.

MR. ALLINSON: And then I go back to my original objection here, Your Honor. We're here today on a dearth of due process. If we're going to have a full-blown adequate assurance evidentiary hearing today, that should have been made more clear.

THE COURT: And I've held that you can reserve that evidentiary ruling until the cure dispute. But the effect

will be no different from if I decided it today, and if I decided it today, it would be deemed rejected if it is not assumed and assigned.

MR. ALLINSON: Well then, Your Honor, I don't see any reason to go forward with a dispute on adequate assurance. What's the point?

THE COURT: You may want them to reject -- it to be deemed rejected. I don't know.

MR. ALLINSON: We don't, Your Honor. That's why we suggested that they earmark funds. What we want to make sure is that there are sufficient funds that either they or their assignee will adequately perform all of the obligations to the end of this lease, and they have not established, respectfully we submit they have not established they can do that. They've said it's 44 leases and 46 million. That's about a million --

THE COURT: Well, they may do that for your lease because your lease is the only one to which there is that -- and I'm going to reserve any ruling on whether or not whatever evidence they present about SEG's ability to perform is satisfactory, or whether some other adequate assurance of future protection can be offered to you for that lease.

MR. ALLINSON: As long as you're reserving your ruling on that, Your Honor, that's fine.

THE COURT: Oh, I am.

But I think for the record, if I determine what is

offered is not adequate assurance, I think it would result in the deemed rejection, not an elected rejection by the debtor.

MR. SCHROCK: Thank you very much, Your Honor.

Your Honor, I don't believe we have any other landlord objections at this stage.

THE COURT: So I think that has resolved all objections pending, am I right?

MR. SCHROCK: That's correct, Your Honor.

THE COURT: Okay. Then I will confirm the plan. Do you want to go through the changes? Do we need to go through any other changes? I know that the landlord changes were incorporated in here, and I think you mentioned the resolution as to SEC.

MR. SCHROCK: Yes.

THE COURT: Was there anything else?

MR. SINGH: Those are just -- the redline that we handed up just incorporated some of those additional language changes. And then the remaining changes I don't think are material, Your Honor. They are clarifying and supplementing the fact on the exit fees are being approved by Your Honor, and that nature. I'm happy to go through them, but I don't think we need to.

THE COURT: Okay.

MR. SCHROCK: Okay. Thank you very much, Your Honor. We really appreciate your time.

THE COURT: And have you uploaded the, the order?

MR. SINGH: Yes, Your Honor, it's been --

THE COURT: And the blackline, again, has no other changes other than articulated?

MR. SINGH: No, Your Honor, unless you would like us to incorporate any changes from today, your ruling, but I think the record is clear so I'm not sure we need to.

THE COURT: Okay. All right, you uploaded this order?

MR. SINGH: Yes, that's uploaded for Your Honor.

THE COURT: All right, then I'll enter the order approving confirmation.

MR. SCHROCK: Thank you very much, Your Honor.

MR. SINGH: Thank you, Your Honor.

MR. SCHROCK: Thank you.

THE COURT: And congratulations on getting here over many obstacles, including today.

MR. SCHROCK: Thank you. Thank you, Your Honor. All right.

THE COURT: All right, we'll stand adjourned then. Thank you.

MR. SCHROCK: Thank you.

(The hearing adjourned at 1:02 p.m.)

C E R T I F I C A T I O N

I, Julie H. Parrack, transcriber, certify that the foregoing is a correct transcript, to the best of my ability, from the official electronic sound recording of the

/s/Julie H. Parrack May 15, 2018
Julie H. Parrack

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EXHIBIT B

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI (ST. LOUIS)

In re	) Case No. 16-40120
	) St. Louis, Missouri
ARCH COAL, et al.,	)
	) September 13, 2016
Debtors.	) 11:06 AM

TRANSCRIPT OF CONTINUED HEARINGS RE:
MOTION FOR RELIEF FROM STAY,
FILED BY CREDITOR ERVIN LEE ARMBRUSTER [717];
MOTION FOR RELIEF FROM STAY,
FILED BY CREDITOR CDS FAMILY TRUST, LLC [930];
MOTION FOR TEMPORARY ALLOWANCE OF CLAIMS SOLELY FOR THE PURPOSES OF VOTING ON THE DEBTORS' PROPOSED PLAN OF REORGANIZATION, FILED BY CREDITORS IRONSHORE INDEMNITY, INC., BOND SAFEGUARD INSURANCE COMPANY, LEXON INSURANCE COMPANY [1147];
MOTION TO ESTIMATE AND TEMPORARILY ALLOW CLAIMS, PURSUANT TO RULE 3018(A), FOR THE PURPOSES OF ACCEPTING OR REJECTING ANY PROPOSED PLAN OF REORGANIZATION, FILED BY CREDITORS INDEMNITY NATIONAL INSURANCE CO., WESTCHESTER FIRE INSURANCE CO., ZURICH NORTH AMERICA [1187]

HEARING RE: MOTION TO APPROVE ABANDONMENT AND DESTRUCTION OF CERTAIN BUSINESS AND OTHER RECORDS RELATED TO HORIZON NATURAL RESOURCES COMPANY AND ITS AFFILIATED ENTITIES, FILED BY DEBTOR ARCH COAL, INC. [1266]

BEFORE THE HONORABLE CHARLES E. RENDLEN, III,
UNITED STATES BANKRUPTCY JUDGE

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THE CLERK: We're on the record.

THE COURT: Thank you.

We're here on our 11 o'clock matter, and we'll go ahead and take appearances.

MR. HUEBNER: Good morning, Your Honor. For the record, Marshall Huebner and Michelle McGreal of Davis Polk & Wardwell, on behalf of the debtor. Also with us in court today, as always, is our faithful colleague and local friend, Brian Walsh of the Bryan Cave firm.

THE COURT: And in case somebody dialed in on the wrong case, this is Arch Coal, Inc., 16-40120.

MR. HUEBNER: Thank you, Your Honor.

THE COURT: And I heard a chuckle. I don't blame you. Nobody be on the wrong phone call on this one.

MR. MANNAL: Good morning, Your Honor. Doug Mannal from the firm of Kramer Levin, on behalf of the unsecured-creditors' committee. And Eric Peterson from the Spencer Fane firm is also here in the courtroom.

MS. LONG: Good morning, Your Honor. Leonora Long on behalf of the U.S. Trustee.

MS. ALPER-PRESSMAN: Good morning, Your Honor. Wendi Alper-Pressman on behalf of PNC Bank. And in here in the courtroom today is Brian Trust and Christine Walsh.

MR. WARFIELD: Good morning, Your Honor. David Warfield on behalf of the ad hoc committee of term-loan

lenders. And also appearing are Mr. Scott Talmadge and Mr. Brian Hermann.

MS. CLAIR: Good morning, Your Honor. Bonnie Clair as local counsel for the United Mine Workers of America 1974 Pension Plan, the United Mine Workers of America 1992 Benefit Plan, and the United Mine Workers of America Combined Benefit Fund. With me, on the telephone this morning is Matthew Ziegler of Morgan Lewis, in New York.

MR. FEDER: Good morning, Your Honor. Benjamin Feder, Kelley Drye & Warren, on behalf of UMB Bank as indenture trustee.

MS. SPECKHART: Good morning, Your Honor. Cullen Speckhart of Wolcott Rivers Gates, on behalf of Wyoming Machinery, who is the committee co-chair.

MR. DOYLE: Good morning, Your Honor. Dan Doyle, Lashly & Baer, on behalf of Caterpillar Financial Services Corporation and Digital Printers Square, LLC. With me, on the phone, for Digital Printers is Ivan Gold.

MR. SMOTKIN: Good morning, Your Honor. Howard Smotkin, Stone, Leyton & Gershman, on behalf of The Crab Orchard Coal and Land Company, Great Northern Properties Limited Partnership, Natural Resources Partners L.P., WPP LLC, and ACIN LLC.

MR. SANT: Good morning, Your Honor. Tal Sant from Affinity Law Group, on behalf of Kinder Morgan.

MR. RISKE: Good morning, Your Honor. Tom Riske, Desai Eggman Mason, local counsel to Wilmington Savings Fund. With me today is my lead counsel, Howard Steel of the law firm of Brown Rudnick, and also Pat Healy on behalf of Wilmington.

MR. LANGFORD: Good morning, Your Honor. Mike Langford with Kilpatrick Townsend & Stockton, representing U.S. Bank as indenture trustee for 500 million dollars in unsecured notes due 2020. Thank you.

MR. SCHWARTZ: Good morning, Your Honor. Steven Schwartz representing the Kentucky Utilities Company.

MR. PARRES: Good morning, Your Honor. Larry Parres on behalf of the firm, Lewis Rice, here on behalf of Lexon Insurance Company and Ironshore Indemnity Company.

THE COURT: All right. Anyone on the phone want to show their appearance?

MR. TAYLOR: Good morning --

MR. COHEN: Good morning, Your Honor. Good morning, Your Honor. This is Ron Cohen from Seward & Kissel, on behalf of Wilmington Trust as DIP agent.

MR. TAYLOR: Good morning, Your Honor. This is Greg Taylor of Ashby & Geddes, on behalf of Union Pacific Railroad Company.

MS. ALVES: Good morning, Your Honor. This is Arlene Alves of Seward & Kissel, on behalf of Wilmington Trust as first-lien agent.

MR. FAWKES: Good morning, Your Honor. Thomas Fawkes, F-A-W-K-E-S, appearing on behalf of Sierra Club, Ohio Valley Environmental Coalition, and West Virginia Highlands Conservancy.

MS. THOMPSON: Good morning, Your Honor. Elizabeth Thompson, Stites & Harbison, appearing on behalf of the Indemnity National Insurance Company, Westchester Fire Insurance Company, and Zurich North America.

MR. COLLINS: Good morning, Your Honor. Michael Collins, Manier & Herod, on behalf of Arch Insurance Company.

MS. THOMS: Good morning, Your Honor. This is Laura Thoms with the U.S. Department of Justice, on behalf of the Department of Interior, Office of Surface Mining Reclamation and Enforcement.

MR. PERSINGER: Good morning, Your Honor. Thomas Persinger, pro hac vice, Charleston, West Virginia, with Mr. Smotkin, on behalf of The Crab Orchard Coal and Land Company.

MR. SHAPIRO: Good morning, Your Honor. This is Seth Shapiro with the United States Department of Justice, Civil Division, on behalf of the Federal Communications Commission, the Department of the Interior, and the Department of Labor.

THE COURT: Are those all the individuals on the phone?

Hearing no one further, we'll go ahead and turn it

over to Mr. Huebner.

MR. HUEBNER: Good morning, Your Honor. Thank you very much. What I would like to do, if it is okay with the Court, is to actually take confirmation up first, because I think, obviously, there are quite a few people waiting for that resolution, and it would also potentially turn off a whole lot of meters, enable us to throw many people out of the courtroom, since they don't need to stay for the two very small matters. So is it acceptable to the Court to take the agenda out of order?

THE COURT: That is exactly fine with me.

MR. HUEBNER: Terrific.

THE COURT: Let us deal with the big issue.

MR. HUEBNER: Terrific.

Your Honor, for the record, Marshall Huebner of Davis Polk & Wardwell LLP, on behalf of the debtors.

I have the privilege of standing here almost exactly eight months to the day since our first hearing before you, today seeking confirmation of the debtors' plan of reorganization. This plan has the approval of over ninety-six percent of all voting claims, representing over 4.4 billion dollars of affirmative claimants.

At the first-day hearing, either cheekily or optimistically, we aspired, and I think we promised that we would try, to get an eight-and-a-half-month case. We told you

there would be no labor issues, no 1113, no 1114, no pension termination, no LBO litigation, no good co/bad co structure; just a very complex five-billion-dollar balance-sheet restructuring with intercreditor and absolute-priority issues. Your Honor, I think it is fair to say as we stand here today that we have delivered on every single one of our promises.

As Your Honor knows well, having been with us since January, the plan has been the result of many months and dog years of intense negotiations with various parties and their advisors. Before I start, I would like to acknowledge the many -- some of the many parties who have made all this possible. First and foremost, of course, is a huge thank-you to the Court, including Ms. Willie; the Clerk's Office and the U.S. Trustee's office, including Ms. Long, for getting up to speed on this case before we even arrived for our first-day hearing, and for being available, flexible and accommodating as we have moved throughout the length of the proceedings; Arch's employees, who never lost their focus even for a minute. And Arch's operational record and environmental record and safety record continued basically untrammeled through the case.

Your Honor, with us today in the courtroom is the senior management team of Arch: Mr. John Eaves, the chief executive officer; Mr. John Drexler, the chief financial officer; Mr. Bob Jones, the general counsel; and others as

well, here, in part, out of respect for Your Honor and for what we very much hope will be the conclusion of these extraordinarily successful proceedings.

Your Honor, the debtor professionals -- I won't give ourselves a victory lap except to call out Ms. McGreal, who I have joked at almost every hearing, tells me what to do most days before I go home, when other people tell me what to do; and her performance has been nothing shy of extraordinary throughout.

Your Honor, there were very complex days and nights and days and nights, among the debtors, the UCC and its professionals, and the lenders and their professionals. But professionalism, in fact, carried the day at all times. People did their jobs intensely and well. And we are grateful to the professionals of both the lenders and the UCC, for their extraordinary efforts resolving some very thorny intercreditor and related issues that, frankly, in pretty much all other cases not only would have, but did, descend into extremely costly litigation, which, frankly, ultimately is paid for by the company itself. The soft costs and the distraction and the pain is at least as harmful to operations and to the company's future as the actual bills paid for all the professionals that we were able to avoid in this case.

Our colleagues from Kramer Levin, from Spencer Fane, Jefferies, Blackacre, Brian Foley, Berkeley. And of course

the senior lenders: Paul Weiss, Kaye Scholer, and Houlihan Lokey were with us at all times. And while they were the least problematic of counterparties -- in fact, they were wonderful -- I absolutely want to call out PNC Bank, our securitization partners, and their counsel Mayer Brown, who, as Your Honor heard on the first day, rolled the securitization facility into essentially a DIP and are now rolling it again into an exit, which has been extremely beneficial for the company and its capital structure. Hopefully a good deal for them as well, as we continue to honor all of our obligations. And they have been great and extremely professional and courteous to work with.

Your Honor, getting here today was not without its challenges. There were months of negotiations and many turning points that could have ended differently. But what do we have? We have every economic stakeholder in this case -- and there are more than 40,000 of them -- on board. Arch has the financing and the credit support in place, not only to refinance the necessary existing obligations, to emerge as a viable business, to have an appropriate-size capital structure, to make it a mean, lean, fighting machine for the coming era, which will remain challenging and complicated for the U.S. coal industry, but also to deal with, as you know, our self-bonding obligations.

We discussed with you at our last hearing that Arch

was very much on track and planned to have the third-party credit support in place in connection with emergence and no longer rely on self-bonding, which is really a fundamental shift in the U.S. coal industry, certainly in the western U.S. coal industry.

Our regulators made it relatively clear to us, in some cases very clear to us, that self-bonding would no longer be available, in their minds, not leaving anything to chance and avoiding all where it's possible for us to do so. The debtors have succeeded in arranging for all of their current self-bonding obligations to be replaced by third-party surety bonds within fifteen days of the effective date, if not sooner.

Your Honor, of course, I'm sure noted that objections that were not filed, as well as the very few that were filed, and neither of the Office of Surface Mining or the Wyoming environmental regulators filed objections, because we in fact worked out language with all of them to allay their concerns completely.

While we're taking about the lack of objections, let me hit that point a little more pointedly, Your Honor. The voting certification was filed on September 10th, which evidences the following results: Approximately 3,500 ballots were cast. 96.66 percent of those ballots represent votes to accept the plan, representing over 4.4 billion dollars of yes

votes, or 96.86 percent of all voting claims. Of the 188 classes entitled to vote on the plan, 185 of those classes have voted to accept and 3 classes of much smaller debtors not at Arch Coal itself, voted to reject. The debtors' largest category of voting creditors, holding 3.3 billion dollars of note claims, voted to accept the plan by an overwhelming 98.98 percent in amount and 97.32 percent in number.

The plan, as Your Honor knows, is fully supported by the official committee of statutory creditors, which filed a statement of support on the docket yesterday, as well as the lenders under the debtor's pre-petition term credit facility, which I believe, as of the time of filing, if my memory is right, was 1.896 billion dollars or so.

Your Honor, the other thing that we promised to you at the beginning of the case was that our doors were open and our phone lines were up twenty-four hours a day. And we urged everybody, at all junctures, to contact us before filing, but that didn't stop us. The minute somebody filed an objection that we didn't know was coming, we got to work assiduously and with alacrity to get it resolved.

Those efforts bore fruit yet again today. Of the seven filed objections, only two have not been resolved: one by a pro se creditor, who in fact does not object to confirmation, I believe, as I'll discuss in a few minutes in detail, and the other by the United States Trustee, which is

limited to two plan provisions, which I'll also discuss in a few minutes.

Again, I'll say it for the last time, but given the 40,000 parties-in-interest and the 7,000 claims filed or scheduled, the fact that we are down to essentially one objection from a noneconomic party is actually a remarkable tribute to many people in this case.

On September 12th, Your Honor, we filed a memorandum of law in support of confirmation, replying to the outstanding objections, and declarations in support of confirmation, by Mr. John Drexler, the company's chief financial officer, and Mr. Mark Buschmann, for PJT Partners, the company's tireless and lead financial advisor. We also filed a proposed confirmation order.

At this time, Your Honor, I would move for the admission of Mr. Drexler and Mr. Buschmann's declarations. We know of no party that wants to discuss anything with them, and we would ask that they be admitted for part of record of the confirmation hearing.

THE COURT: All right, are there any objections or does anyone have any preliminary questions before these affidavits are admitted into evidence?

Hearing none, they will be accepted.

(Declaration of John Drexler was hereby received into evidence as a Debtors' exhibit, as of this date.)

(Declaration of Mark Buschmann was hereby received into evidence as a Debtors' exhibit, as of this date.)

MR. HUEBNER: Thank you, Your Honor.

Your Honor, our memorandum of law sets forth in detail how the debtors believe the plan easily meets all the confirmation standards set forth in the Bankruptcy Code. We also filed a fourth amended plan on September 11th, along with a blackline against a third amended plan that was filed in connection with the disclosure statement and approved for dissemination by Your Honor on July 7.

I think it's fair to say these changes are almost exclusively technical changes or they represent the settlements that we reached with the five specific parties who raised confirmation objections and with whom we have now resolved all issues. Walking through some of them very quickly, in section 5.5(c), Romanette (ii), we have expressly provided what we have basically been telling people orally, that the debtors' self-bonding in Wyoming will be replaced with surety, cash, or other forms of third-party financial assurance, within fifteen days of the effective date. That is the provision that got both the OSM and Wyoming comfortable that, as we told them all along, they really have not very much to worry about.

We've also made other changes towards all of the concerns presented by the DOJ, with respect to executory

contracts and leases. In section 9.2, we clarify which was already true but, as I think we've told you before, people say, can you just put in language to clarify it? Rather than fight, we just invariably say yes. So section 9.2 now further clarifies that the mere fact that we have listed an item on our plan schedules does not mean that it has been judicially determined to be an executory contract rather than a permit, license, or other form of instrument.

In section 11.4(d) where we had already provided that various regulatory or other obligations to governmental units are not discharged, we've added Coal Act liabilities and FCC licenses to the litany of things that are not discharged.

And in section 9.3 we included language that was agreed to with the debtors' surety-bond providers that assures that all surety bonds will be assumed along with the obligations that underlie them, and that all rights and remedies of surety-bond providers, with respect to the surety bonds, will be preserved.

Since that filing, Your Honor, which admittedly was a couple of days ago, we've made only two further changes to the plan: one is literally a typo that certainly the record doesn't need to bother itself with; and one is, again, a further clarification that we are waiving all avoidance actions, which we've said all along was the deal. It was actually one of the pillars of the deal among the creditors'

committee, the lenders and us. The pillar was already there. We certainly announced it in technicolor and put in the disclosure statement, but it's been further clarified.

Your Honor, there are also a few changed pages to the confirmation order that reflect a limited number of changes since the version filed on Sunday night; mostly it's these two fixes that I just mentioned, and a few nonsubstantive cleanups. And then there are a few additional changes in paragraphs 100 through 103, to resolve the objections filed by Crab Orchard Coal and Land, Great Northern Limited Partnership, and Union Pacific, which I'll describe in a minute, and then a cure objection.

If it's okay, Your Honor, I thought I would just take a couple of minutes again. These changes are quite minor but just to walk -- so that the record is perfectly clear, since we are changing the confirmation order very slightly from the form that was filed publicly on the record. And we kind of love due process, but --

So, let me turn to the objections, because I think that that's probably the best way to then walk through what the new language is and why it is there. Three objections, Your Honor, were filed by lessors of nonresidential real property that had articulated concerns to us related to the treatment of their leases pursuant to the plan.

On Crab Orchard Coal and Land, we have added language

to the plan, regarding assurances with respect to their performance of certain obligations pursuant to a lease being assumed pursuant to the plan. That is the change in paragraph 100 of the confirmation order. I think, actually, just flipping pages so I don't skip anything, the change on page 11 is a typo.

The change on page 18 just adds the words "as defined in the DIP credit agreement" to show where a term was defined; I think that's certainly irrelevant. Page 55 fixes a section reference where there was an extra capital Arabic letter -- sorry; not Arabic letter -- or capital English letter.

Page 66, Your Honor, is the avoidance-action language, where we just took out, sort of, the list of people against who it was waived and just made it an even more blanket waiver, which was always the business deal. And people are more comfortable just saying all avoidance actions waived, as opposed to all avoidance actions against everyone are waived. So we actually took out some lawyer words that have the effect of saying "against everyone".

So now we get to the resolutions, Your Honor. The language in paragraph 100 on page 74 is the Crab Orchard language. Then we have the Great Northern Properties Limited Partnership, which is actually the language in paragraph 102, which relates to a lease that had terminated pre-petition, but the lessor was concerned with respect to certain post-

termination obligations. And so we basically said, to the extent something is not a claim that can be discharged under the Code, it's not discharged under the Code. Again, these are sort of truisms but if people feel better seeing their truisms in writing, if they went to the trouble to file an objection, rather than fight them on it, we were happy to do it.

Natural Resources Partner, Your Honor, was concerned about the debtors' prompt payment of their cure amounts with respect to their assumed leases, and we've agreed that their concerns are resolved and their objection withdrawn after the debtors directly provide them with assurance that the cure payments will be made promptly.

Your Honor, turning to the agenda, in case anybody is following along, that relates to certain of the items, that brings us to item E on the list of the objections, which is the Sierra Club, West Virginia Highlands Conservancy, and Ohio Valley Environmental Coalition. This actually was not an objection; it was just a limited reservation of rights filed by three environmental groups. We had already worked with these groups at the time of the disclosure statement and already added language clarifying yet again, in yet another place, that things that are not claims that are not discharged are not claims and are not discharged. So, nothing interesting to see there. Moving right along.

Number F on the objection list on the agenda is the Kentucky Utilities Company. This objection has been withdrawn and resolved by paragraph 98 of the confirmation order, which actually came before the recent blackline, which is why it's not in the blackline pack, that confirms they can continue to hold and apply their adequate-assurance deposit post-emergence.

Then that brings us to G, which is the Union Pacific Railroad. They wanted to ensure that they will continue to have recourse to insurance proceeds in connection with certain pre-petition claims that have not yet even been asserted against the debtors. This objection was resolved by adding language to the confirmation order, at paragraph 101, which makes it clear that Union Pacific is free to seek to recover any applicable insurance proceeds but that in no event will the debtors themselves be liable.

So, Your Honor, I'm getting ready now to turn to the two objections, or two pleadings, that are not resolved. But I do want to, I think, pause for a moment and just have it be clear that we now believe that this resolves every single thing, with the exception of the U.S. Trustee and the letter from Mr. and Mrs. Pabian, which I will discuss in a minute. And I don't know if anybody of those parties needs to get up and say yes we agree, or he didn't lie to you. But in case anybody wants to speak, this might be a logical time to ask if

anybody disagrees with the settlements or the fact that the language that I pointed the Court to fully resolves their concerns.

THE COURT: Anyone have any further comments or clarifications that were not covered by Mr. Huebner on these changes that appear in the fourth amended plan?

Hearing none, let us proceed to the two objections.

MR. HUEBNER: Terrific. Your Honor, of the two objections, the first was a letter sent to the Court by Mr. Joseph J. and Ms. Sharon L. Pabian with respect to certain pension benefits that Mr. Pabian seeks to be paid as a lump sum.

Your Honor, as Debtors' counsel, I think it's fair to say we're quite sensitive to the impact that a Chapter 11 can have on a company and its current and former employees. In this case in general, we were all spared a lot of heartache because neither pensions nor retiree benefits had to be impaired at all. So when the letter first arrived, we were a little bit confused because we didn't think we were taking things away.

So, Mr. Pabian's documents indicate that he was an employee of Evergreen Mining Company and that his pension plan is the Horizon NR LLC pension plan. Neither Evergreen Mining Company nor Horizon NR LLC is a debtor in these cases.

After some investigation, here's what we have figured

out: Evergreen Mining and Horizon NR are former subsidiaries of Horizon Natural Resources and were among the debtors in the Chapter 11 proceedings of Horizon and its affiliates, that were commenced in 2004.

In 2011, one of our debtors, International Coal Group, bought certain assets from the Horizon debtors; and so, via this acquisition, Mr. [peh-bee'-yen], or [pay'-bee-yen] -- I'm not sure which way they pronounce it -- eventually became an employee of one of the debtors' affiliates. But the debtor never accepted or took on or became liable for any of the pension obligations of employees who were at Evergreen Mining or, in fact, at any of the Horizon debtors. Those are separate entities who made separate pension promises that simply don't have anything to do with the debtors. So, as far as the debtors are aware, we don't directly or indirectly have any responsibility for Mr. Pabian's pension benefits.

More importantly, Your Honor, even if it turns out we're wrong, and I don't think we are, it's just a claim objection, which he is welcome to prosecute. There's a claim on file; I think we'll be objecting to it, because we just don't think we're the party that is liable. And either we will prevail or they will prevail. And if they prevail, they will receive whatever treatment they're entitled to under the plan. And I think that's all they're seeking, and I don't want to speak for them, but their objection does not actually

hit 1129 or say the plan shouldn't be confirmed; it just says, I am owed this money.

We will address that in the context of claim reconciliation, but we thought it was important to explain to the Court that we spent a while to try to figure this all out, and we actually are quite confident that they just simply don't have a claim against the debtors at all; they have a claim against the Horizon NR --

THE COURT: Yeah --

MR. HUEBNER: -- LLC pension.

THE COURT: -- which we're not asked to rule on today, so --

MR. HUEBNER: Correct.

THE COURT: -- that's -- make clear that --

MR. HUEBNER: Correct. So we asked --

THE COURT: -- this isn't an objection to the plan, this is --

MR. HUEBNER: Correct.

THE COURT: -- to be deferred till we deal with claims.

MR. HUEBNER: Exactly. So we would ask that his confirmation objection, to the extent it is one, and we're not sure it, quote, "really" is --

THE COURT: I understand.

MR. HUEBNER: -- be overruled and without prejudice

to him raising any and all arguments as, of course, we are free to do as well, in connection with his proof of claim.

THE COURT: Anyone want to speak to this issue?

Hearing no one, it'll be overruled and I'll look for an order allowing it.

MR. HUEBNER: Thank you, Your Honor. I think the form of confirmation order that we'll serve up will --

THE COURT: I know. It --

MR. HUEBNER: -- will do that and it'll be --

THE COURT: -- takes care of it.

MR. HUEBNER: -- it'll be built in.

THE COURT: Right.

MR. HUEBNER: So, Your Honor, that, sort of ironically, brings us to the United States Trustee, because our tens of thousands of creditors and economic parties-in-interest now have no objections left to the plan. And there are tens of thousands of people very hopeful and excited that the plan will be confirmed today. In fact, it's a little bit shocking the United States Trustee's office, charged with promoting the integrity and efficiency of the system, actually filed a pleading seeking --

THE COURT: Well --

MR. HUEBNER: -- the denial --

THE COURT: -- don't --

MR. HUEBNER: -- of confirmation.

THE COURT: We don't even want to go there. I was three years that person, and you wouldn't even be hearing from them in this case, on this issue.

MR. HUEBNER: Fair enough.

THE COURT: You know me.

MR. HUEBNER: Yeah. So let me, at this --

THE COURT: I was their boss once.

MR. HUEBNER: Yep.

THE COURT: Anyway. But I understand what you're saying.

MR. HUEBNER: Yep.

THE COURT: And --

MR. HUEBNER: So let me --

THE COURT: -- I got other issues and it's not with Ms. Long.

MR. HUEBNER: Yeah. And we love Ms. Long. We have no issues with Ms. Long, either.

THE COURT: She is great. Everybody loves her --

MR. HUEBNER: I know.

THE COURT: -- especially in big --

MR. HUEBNER: She actually gives --

THE COURT: -- 11s.

MR. HUEBNER: She gives my family vacation advice.

THE COURT: She understands it. She's taught me a lot about them.

MR. HUEBNER: But we really do have quite a serious problem with this objection, so now let me hit the substance of the two points, because we actually feel -- we and our lenders and our committee, I believe, feel that it should be overruled.

Your Honor, there are only two prongs of the objection; the first is the exculpation provision. Your Honor, given this case in particular and the fact that this was essentially one of the most brutally and intensely negotiated three-way deals, where everybody participated from all three sides for literally weeks and months, this is a case where the exculpation provision is, without any question, integral to the plan, which is essentially a settlement agreement between the unsecureds, the secureds, and the company, and it is both customary and narrowly tailored.

The U.S. Trustee's position that the exculpations must be limited to estate fiduciaries is in fact without basis in law and in fact flies directly in the face of a very long line of cases both in this district and in many other jurisdictions, where the courts have recognized that there is no bar whatsoever on --

THE COURT: I think I --

MR. HUEBNER: -- exculpation.

THE COURT: -- recognized that.

Right, Mr. Warfield? Oh, wait a minute; you're on

your phone.

But -- I'm teasing.

MR. HUEBNER: So --

THE COURT: Isn't it -- didn't we take care of one of the most difficult cases that we've ever had in this -- in my courtroom? This one's not near as difficult; it's a lot more money, but --

MR. HUEBNER: So --

THE COURT: With that particular provision, everybody knows how I'm going to rule when things --

MR. HUEBNER: Right.

THE COURT: -- get to this much of an agreement.

MR. WARFIELD: Yeah.

MR. HUEBNER: And that's exactly the point, which is, if there were tons of people not on board and objecting, it would be one thing. But the silence is, as they say, deafening. This was an integrated deal. And if you look at the other deals, both from within this jurisdiction, including on this very floor, and other places, you'll see this is the way courts rule. Patriot Coal I: The list of parties is almost identical. It happened right across the hall, in a very similar, ultimately consensual, confirmation hearing.

From within the District of Minnesota, we had In re American Banco (sic) Corporation and Otter Tail Ag --

THE COURT: Well --

MR. HUEBNER: -- Enterprises.

THE COURT: -- do we want to just hear from Ms. Long on who they're representing here, other than something that came out of the beltway?

MR. HUEBNER: Sure. But let me just say one last thing on this, Your Honor, and then, I guess, if you want to go point by point, I'll certainly sit down.

We have a very long list of cases, including every major recent --

THE COURT: I --

MR. HUEBNER: -- coal case --

THE COURT: I recognize a lot of them.

MR. HUEBNER: -- where this was done. And the parties here are the core negotiating parties, and that in fact is where courts say, where it was central to reaching agreement -- and this was essentially a set of release-like provisions -- it goes through and it always goes through. And in fact, the releases, which is any exculpations, were really a sine qua non, because what people bought in their various give-ups was global peace. And to have a noneconomic actor at the twelfth hour beyond say, wait, it just doesn't work and we can't --

THE COURT: You might see where this is going. I want to hear from Ms. Long on who the core people are that are being represented by this objection, other than standard

language that we get as directives from the U.S. Trustee, before we go into the specifics of a particular case. I'm really narrowing it down, so you don't have to take a long time; you can jump to the bottom line.

MS. LONG: Your Honor, what the U.S. Trustee is concerned about is the fact that the exculpation clause should be limited to only those fiduciaries in the case, because this Court supervises them in many ways. The Court reviews what they do with regard to substantive matters and rules on those, and then they approve the estate's professionals. So if the debtor, the debtor's professionals, and those officers and directors have an exculpation clause, the U.S. Trustee doesn't object to that.

Further, the creditors' committee is also a fiduciary in this case. And I think that it's Judge Walrath, who was in the Washington Mutual case, who said that it's the limited -- exculpation to be limited to those fiduciaries.

We realize every case is complicated. Just because the issue was not raised in another case does not mean that that case stands for the principle that the Court considered strongly that exculpation clause in an independent way and gave legal justification for it in its analysis.

The long string of citations that are listed in the response -- I think nothing in those explains what the basis is for the coverage or whether it was appropriate or legal.

They just -- it was included in the order.

Even the citation, that F & H case that's cited -- the problem I have with that is there was no transcript provided, and so it's -- they quoted a case that I don't have the actual language from the judge, because there was no transcript cited (sic). But the argument that there's a significant contribution made is not sufficient to give a legal basis for exculpation.

So we appreciate the fact that the Washington Mutual argument -- Judge Walrath -- makes clear that exculpation provision doesn't state a standard to which estate fiduciaries should be held; it is here too that exculpation should be limited to the estate fiduciaries of the debtor and its professionals, and the committee and its professionals.

THE COURT: Okay. And the reply is, for the record?

MR. HUEBNER: It is true that one judge in one case in Delaware said something that supports Ms. Long's position. I think our confirmation brief actually has a variety of cases in it that are not just string cites, that were uncontested. There's absolutely reason that goes the other way about exculpation being appropriate under circumstances, frankly --

THE COURT: Well --

MR. HUEBNER: -- like these, where a) it's fully consensual among all economic parties. Again, it was -- it's kind of a "through the looking glass" experience to have every

economic party have reached an interdependent deal that they all fully agree to, and having the U.S. government saying, stop, I don't want you to go forward with your deal that you all consent to, when all the people that are charged with protecting are standing here holding hands, ready to announce a glorious new future for this company.

So, Your Honor, I'm not going to belabor the point. I think, if you look at our confirmation brief, in particular at the bottom of page 37 and then it actually goes on for a while, you'll actually see analysis and not just string cites --

THE COURT: Well, and not only that. I'm of the state of mind -- and we had a much harder case -- of course Mr. Warfield will -- Fidelis -- that had far more rights and obligations that were kicked out and settled through that case, through elaborate and horrible negotiations to make this stuff -- a lot more money but a lot easier --

MR. HUEBNER: Right.

THE COURT: -- than what they went through. And the whole concept is that, once you get everyone in the room and all the players, and super well represented -- that's my job to determine: was this negotiated in total good faith; did everybody arrive at a less than perfect solution for their individual rights but globally for everyone involved? And in this case, it's overwhelming at ninety-six and ninety-eight

percent, for what would be the major classes and the money involved. These little things need to be cleaned up, and they were cleaned in the plan and agreed to by the parties. And with that in mind, I must overrule their objection.

MR. HUEBNER: Thank you, Your Honor.

The second issue, Your Honor, raised by the U.S. Trustee also is -- well, the word "irony" is almost always misused. The second objection is actually genuinely ironic, which is, a big part of the negotiation not only was about essentially how much value, in their view, the senior secureds were leaving behind for the unsecureds or, in the unsecureds' view, how much value they were willing to accept as part of a global deal, but there were also very complicated dynamics within the unsecured body, because there were bondholders with guarantees and different kinds of claims, and general unsecureds. And it actually took probably, I think it's fair to say, days to negotiate and craft splits in distributions, even within the unsecured group. And so, for example, the unsecured-creditors' committee was very focused on a separate reimbursement provision for indenture trustees so that their fees would be known and the negotiated amounts for the unsecured creditors would go one hundred percent directly to them.

And so we actually could have done it, which is why it sort of -- it's an irony, for two reasons: one, the U.S.

Trustee is actually trying to take money away from unsecured creditors by saying, don't pay these fees to the unsecured trustees. Well, if we don't pay those fees, all that happens is, when the distributions that are now smaller go to the unsecured trustees to distribute, they first exercise their charging lien; they take the exact same money away from unsecured creditors and then give them the net amount.

So what she's actually asking to do is to actually transfer money, from unsecured creditors to secured creditors, that the secured creditors have already agreed to leave behind -- or not leave behind; agreed --

THE COURT: Allow.

MR. HUEBNER: --to have the distribution.

MR. HUEBNER: Yeah. That's their irony number one. Irony number two, again, is that no party has objected. This is, sort of, the senior creditors' money or it's the money of the unsecured bondholders or it's the money of the unsecured nonbondholders. And they've all agreed.

And so for the U.S. government to come in on an economic-distributional issue and say, I want you to move money from one party to another, that's not even an issue of law; that's just weird.

And so we could have, as I said, just increased the distributions in the first instance and gotten the exact same economic result, and they would just exercise their charging

lien and we would have ended up to the penny like this. But because everybody wanted specificity about what each person was getting, we broke it out and it was negotiated with excruciating care so that people would know. And it's sort of like blaming the good guy. I think everybody on both the creditors' committee's side and the lenders' side have the right to (ph.) deal, which is, we don't want an ambiguity and we don't want any surprises and we don't want -- oh, wait a minute, I'm taking 100,000 more off the top.

THE COURT: Okay --

MR. HUEBNER: So we did it this way.

THE COURT: -- let's get Ms. Long up here and explain the machinations of D.C., because Ms. Long sometimes doesn't --

MS. LONG: My client's not weirdly thinking this is an issue --

THE COURT: Oh, wait a minute.

MS. LONG: -- that's outside the Court's --

THE COURT: You don't want me to --

MS. LONG: You called it weird.

THE COURT: -- go off on my diatribe, do you, when I worked for them?

MS. LONG: No. I'm not going to repeat my arguments in the brief. But simply put, there's no legal basis for what they agreed to. To make a select number of what's at best

unsecured creditors, also on administrative expenses, the Code's very specific; it contemplates a way for these indenture trustees to get paid. They can file a motion for their substantial contribution. That's one way. We could -- you could confirm the plan --

THE COURT: Um-hum.

MS. LONG: -- today and tell them to file their motion for substantial contribution, if they made such a substantial contribution to the case. They wanted certainty but they still have to follow the law.

The Code contemplates this way for them to do it. 1129(a)(4) provides no independent authority to pay these fees on a priority basis, outside of 503. And the district court in the Lehman case -- people may not like what the district court said, but the district court in the Lehman case -- which was really a complicated case. I know everybody thinks their cases are complicated. And every time --

THE COURT: That one would be.

MS. LONG: -- we come to court in these big cases, this is really special. But, Your Honor, in this case the Lehman district court said that you can't undercut 503.

Now, we have no problem when the independent indenture trustees want to reserve their rights and want to pursue the claims as permitted by the Code. But you can't short-circuit what the Code says. We think compliance with

the law is integral and paramount to the process in the Bankruptcy Code. And we know this Court agrees with that.

The debtors' policy arguments are misguided. The denial of the fee provision could result in additional value for lien lenders, because the reorganized debtor would save cash; sure. And the debtors are well-connected parties with responsible jobs in creating how this could happen. But assuming the plan's feasible without the infusion of additional funds, then sound bankruptcy policy would compel that additional funds go to the general unsecured creditors rather than the reorganized debtor.

And similar notions of fairness explain why a liquidation analysis is a confirmation requirement. But even if the redirection of funds wouldn't directly implicate 1129(a)(7), there's no question that the plan could direct those funds to all unsecured creditors in an appropriate way.

Further, it would seem that the debtor is required to put on the record, make an offer of proof even, that there's financial evidence that this administrative-expense claim is actually part of their claim. They haven't done so.

So, in effect, Your Honor, we believe that the Court could confirm the plan and segregate out these fees, for their attempt to make a motion for substantial contribution. Clearly, they have not disclosed how much they have in fees, what they spent the money on, what the fees are for, to this

Court, until there was a disclosure late last night when somebody filed something saying exactly how much they thought the fees were, for each one of the indenture trustees.

So we respectfully request that this Court consider this argument that there's another way of doing this. The parties chose to make these administrative expenses and we think that there's no legal basis for it. If this Court were to consider, we would like a specific finding that these are not administrative expenses. Thank you.

THE COURT: Well, I could defer it.

MS. LONG: Oh, that'd be fine, too, Judge. You could confirm --

THE COURT: I could defer it.

MS. LONG: -- the plan and defer --

THE COURT: And I'm not going to pay anybody to substantiate it --

MS. LONG: And let them file their motion for --

THE COURT: -- outside of them earning their fee.

MS. LONG: -- substantial contribution.

THE COURT: I could do that and we could get this all done today --

MS. LONG: Right. We could confirm --

THE COURT: -- and defer that argument.

MS. LONG: -- the plan today.

THE COURT: I'm not going to hold this plan up --

MS. LONG: No, Your Honor. Don't need to, because I think they can file their motion for substantial contribution.

THE COURT: And we could still -- we could still get to the finish line real quick, because it can fit --

MS. LONG: Before lunchtime, Judge.

THE COURT: Are we calling it an apple or are we calling it an orange? I mean --

MS. LONG: But, Your Honor, regardless of what --

THE COURT: -- that's what I'm starting to hear here.

MS. LONG: -- what produce we choose, it still has to conform to the Code. And the substantial contribution is the perfect vehicle for that to happen.

THE COURT: Well, and I'm going to have a feeling they've got a heck of an argument on substantial contribution.

MR. HUEBNER: Yeah. Your Honor --

MS. LONG: Yes.

MR. HUEBNER: -- I'm going to -- I'm going to suggest that we think about this another way, because, I got to tell you, when someone's standing up and says something that I did is without legal basis, they better be prepared to back it up.

So let me be very clear. Once again, there is one decision that says something that is slightly helpful to Ms. Long. The Lehman case, with which I was extraordinarily intimately involved, involved the payment of the professional fees of creditors'-committee members and in fact has nothing

to do with what we're talking about today. Rather, the cases that do have everything to do with what we're talking about today are cited in our confirmation brief and, in fact, they make clear that 1123(b)(6) of the Bankruptcy Code provides the directly applicable legal support for exactly what we're doing here.

As Judge Gerber cautioned, it is very dangerous for courts to declare a plan provision's not appropriate and try to excise things individually, unless it is truly illegal, because, and I quote, "reorganization plans, after they get the requisite assent", which of course we got here overwhelmingly, "may allocate and distribute the value of debtors' estates by a broad array of means. The various interests of maintaining the necessary flexibility for plan proponents and other parties in interest, maintaining predictability in the bankruptcy courts of this district and elsewhere, and avoiding judicial legislation all suggest a construction of Section 1123(b)(6) under which judges act with restraint in declaring plan provisions not to be appropriate based on anything short of bankruptcy case law, nonbankruptcy statutory or case law, or clear public policy concerns."

THE COURT: And this is followed by Judge Peck and Lane and some of the others.

MR. HUEBNER: Correct. American Airlines; pretty big --

THE COURT: Right.

MR. HUEBNER: -- famous case. In Lehman itself, Your Honor, this rubric was also done. The fight was not about indenture-trustee fees going up to the district court; it was about individual reimbursement of UCC expenses. It was also followed in Adelphia. Three of the biggest cases.

THE COURT: Right.

MR. HUEBNER: Ms. Long aspires to a rule of law that says 503 substantial contribution is the only available avenue to pay X. But, of course, that's totally wrong also, because, as I said before, if we had just said the unsecured-creditor distribution, instead of being X million in cash, is X plus two million in cash, and then naturally they exercise their charging liens before sending out X, the net result would be exactly the same.

So the notion that you need a 503(b) substantial-contribution application for indenture trustees who have first-call dollars on monies being distributed out by the indenture, is just flat wrong.

So in other words, to say it simply, let's say there were no unsecured creditors here other than bonds, and the deal between the banks and the bonds just said the banks get X and the bonds get twelve million dollars. And we gave the bonds twelve million. The trustee said, wait, there's a waterfall, first my fees come off, that's 1.5, and now I give

10.5 to everybody else. She wouldn't have an objection, because the deal is just 12 for the unsecureds and the rest for the banks. Here, that's all that happened. But as opposed to saying we're giving 12 to the bonds --

AUTOMATED VOICE MESSAGE SYSTEM: Your input is invalid.

MR. HUEBNER: That's not true. I think my arguments are excellent.

Your Honor, I think I have the Big Government at work --

THE COURT: Yes.

MR. HUEBNER: -- and I object.

THE COURT: Big Brother needs to get off the phone. Isn't that great?

MR. HUEBNER: I guess with Ms. Long it's been constant.

THE COURT: Yeah, how did she do --

MR. HUEBNER: But --

THE COURT: I want to know -- I want to know how to do that, so I can have those buttons installed here.

MR. HUEBNER: Yeah.

MS. LONG: Your Honor, I've asked Mr. Huebner to embrace technology.

THE COURT: That was -- that's great.

MR. HUEBNER: So, Your Honor, I guess the short

answer is, it's not at all the case. Even if the Lehman district-court case said what she wished it did, a) it's certainly not --

THE COURT: It's --

MR. HUEBNER: -- remotely binding.

THE COURT: It's a nuanced case with a nuanced issue.

MR. HUEBNER: Correct. But --

THE COURT: And the basic -- the vast majority of these cases --

MR. HUEBNER: Correct. But here --

THE COURT: -- don't have a problem --

MR. HUEBNER: -- this is just as simple as -- this is just part of the distribution to unsecured creditors --

THE COURT: Well --

MR. HUEBNER: -- that was agreed to by the unsecured creditors themselves and by the secured creditors and by the debtors. And the notion that the only pathway to pay trustees -- let me say it simply: no court in the United States of America, that I know of, has ever said in any case that indenture-trustee fees for unsecured bonds must be paid only pursuant to 503. No decision has ever so held.

THE COURT: It's too nuanced. It's --

MR. HUEBNER: Rather --

THE COURT: It's too difficult.

MS. LONG: -- in every case that I know of, the deals

look a lot like this one, because, in fact, people, among other things, want to control the expenses and know that they're runaway. And there were some caps that were put in place as part of the negotiated deal --

THE COURT: Yeah.

MR. HUEBNER: -- to protect, among other things --

THE COURT: That's --

MR. HUEBNER: -- the unsecured creditors themselves from their own trustees and to protect the senior lenders from having unexpectedly large amounts.

So, again, this was exquisitely negotiated as part of the deal. There's no case law supporting the view. Judge Gerber's admonition of saying, I'm going to start crossing out provisions of the plan, unless it is flatly illegal -- and this one is actually flatly legal.

And again, you'll see in our confirmation brief, Your Honor, besides the three decisions I cited that reasoned the issue out and expressly said, with all due respect, that's just wrong and 1123(b)(6) is fine, once again, look around: Patriot Coal, Alpha, Versa (ph.).

This is just the efficient way to do it, for all the salutary reasons of cost control and policy that I explained. And I think we and the creditors' committee and the lenders, the, sort of, three-legged stool -- and I would ask Mr. Mannal to speak a bit for himself, because I've represented a fair

number of things about the way they think -- we feel very strongly. And we're not -- we don't want to save the money. This is appropriate, this was agreed, this was negotiated, and it is quite central to the deal that was struck in the plan.

THE COURT: Absolutely. And I understand where you're coming from.

MR. MANNAL: Good morning, Your Honor. Doug Mannal on behalf of the unsecured-creditors' committee.

I didn't think I was going to get the chance, but I'm very pleased to have the chance. First off, Your Honor, I too would just like to thank the Court making themselves available. And it's been a pleasure working with Ms. Long and the U.S. Trustee's office and all the parties, to get where we are today.

And it should not be lost on folks; we were ready to go to war. We have pending -- excuse me -- two standing motions and three complaints. And I really thought we would be spending the summer fighting. And it was only because the parties, in a last-ditch attempt at the office of Davis Polk to realize a settlement -- the debtors were in attendance; the secured lenders, the secured lenders' professionals and their principals; the committee, all of its members participated, including GSO, the bondholders, the indenture trustees, the various trade creditors, including Kinder Morgan, Wyoming Machinery, and Nelson Brothers. And only as a result of that

meeting were the parties able to essentially resolve their issues.

And Mr. Huebner talked about the two issues that were resolved; it was both what the unsecured creditors as a group were receiving and what the various types of unsecured creditors would receive under this plan. That was -- it took a long time and a lot of negotiations.

A key element of that settlement is the payment of the trustee fees, for the reasons Mr. Huebner stated. The trustees have the ability to assert a charging lien, and that -- when they assert that charging lien, it would reduce the amount going into the amounts of the beneficial holders of those bonds. And that is why it was always a part of the deal. It's included in the RSA, it was made clear in the disclosure statement, and it's an integral part of this plan that the trustee's fees essentially get paid. It's not an administrative claim.

If you look at section 6.1 of the plan, there is no provision that says that they're entitled to administrative priority of any sort. They are receiving this on account of this settlement. This is a global settlement and one which provides global peace between the secured and unsecured constituents. If the trustee fees were not to be approved as part of this global settlement, the cash consideration going to the beneficial holders would be reduced materially. In

fact, I believe it's about seven and a half percent of the cash consideration would be essentially reduced as a result.

Forcing the trustees to rely on their charging lien would result in a different plan, the one that was agreed to, one that was contained in the plan and the disclosure statement, that was solicited, and one that was voted on by all the parties with overwhelming consent.

To the extent the trustee fees are not paid, it's a different plan and it would require a potential reopening of the settlement discussions, potentially a continued prosecution of those standing motions and litigation claims, and clearly a re-solicitation of the plan and disclosure statement. We're in a different world at that point.

Again, Mr. Huebner cited the relevant cases. Clearly, 503 is not the only manner in which the trustee fees can get paid. And, Your Honor, I think we're happy to amend the plan if there's disclosure required or clarification required over the administrative nature of these fees. But again, it's an integral part --

THE COURT: That's okay.

MR. MANNAL: -- of the plan.

THE COURT: I've heard enough.

Ms. Long, you got anything more to say?

MS. LONG: No. Yeah. Let's go, actually. Yeah.

MR. HUEBNER: Well, we'll do that.

MS. LONG: Right. That's part of it.

Your Honor, Mr. Huebner and I were just discussing; we do think it's very important that this issue be addressed, either today or at a later time, as a separate couple of -- separate sentences within the confirmation order. If you want to confirm the plan today and cut out the opportunity for these indenture trustees, for these unsecured claims and these unsecured debts to have their opportunity to make a substantial contribution, we find that would be an easy way to get to the end game today that's so important to creditors. They're the ones that negotiated the statement that allowed them to get their money upfront without any disclosure to the Court of what the amount was or what it was for or how --

THE COURT: I --

MS. LONG: -- how it was going to be paid. And that is --

THE COURT: Okay.

MS. LONG: -- that should be an issue for -- well, it is an issue for the U.S. Trustee.

If they would -- if they're saying that this comes out of their distribution to the noteholders, and if it's clear from the confirmation order that this amount is coming out of their distribution -- I don't want to negotiate this up here, but the U.S. Trustee, I think, finds it uncomfortable that they've decided to pay the secret amount in a separate

way that seems like, walks like a duck, an administrative expense. But if they make it clear that it's out of the distribution, and an express representation that these fees are not created out of 1129(a)(4), I think we can get somewhere. I think we can get the confirmation --

THE COURT: Well --

MS. LONG: -- done today and --

THE COURT: -- I didn't read it that way that they were secret fees. I never read --

MS. LONG: Well --

THE COURT: -- that anywhere.

MS. LONG: -- we didn't know what the amounts were. The amounts were not disclosed until relatively recently. But they also didn't want the Court to make any review or make any -- have anybody else make a review.

And so I do think that there's a way that we possibly could come up with an order -- a confirmation order, in two ways --

THE COURT: Well --

MS. LONG: -- either put it off for a substantial-contribution motion, which is easy for them to do, because they have all talked about how important their role was in the case and what contribution they made, or --

THE COURT: Well, there's not much --

MS. LONG: -- this other aspect to it.

THE COURT: -- risk in this case if we know what the ceiling is.

MS. LONG: Nobody's talking about --

THE COURT: But we do want --

MS. LONG: -- having them re-ballot the whole case.

THE COURT: -- transparency. And I'm a big guy on transparency. But there's a lot of --

MS. LONG: Right.

THE COURT: -- ways to get to yes on this one.

MR. TALMADGE: Your Honor, if I may. Scott Talmadge from Kaye Scholer, on behalf of the ad hoc committee of secured term-loan lenders. Also here today is Brian Hermann from Paul Weiss, also representing the ad hoc committee of term-loan lend -- secured term-loan lenders.

Your Honor, I'm going to be really brief on this, because everything's been said, but one thing hasn't. We knew what these fees were. We explicitly asked what the amounts were. Mr. Huebner used the word "exquisitely negotiated". I would say it was exactingly negotiated. We kept asking and asking what these numbers were, because we wanted to know, because we -- our lenders thought it was our money that was being used to pay these fees.

And if we allow this process to drag on and make substantial-contribution applications, the estate -- the company is actually going to have to pay for those fees as

well, because there is a provision that provides that --

THE COURT: Well, it's --

MR. TALMADGE: -- the reasonable fees get paid. So why are we paying even more money out of this company to get these fees paid that everybody agreed, as part of a -- I used the term earlier; it's a 10,000-piece jigsaw puzzle. Every piece was laid into this puzzle one at a time.

THE COURT: Had they shared those numbers with Ms. Long?

MR. TALMADGE: I don't know if those numbers were shared with Ms. Long.

MR. MANNAL: Yeah, they were.

MR. TALMADGE: I know they were shared with our constituents.

THE COURT: They were?

MR. MANNAL: Yes, Your Honor. We filed it in our pleading, as Ms. Long indicated.

MS. LONG: Last night, Judge.

THE COURT: Oh, that was the one last night.

MS. LONG: Filed it last night.

MR. TALMADGE: So the numbers are now disclosed. The whole world knows.

MS. LONG: Your Honor, we're not arguing that the people in the room knew. We're talking transparency; you're talking about as to the colloquy in general.

MR. HUEBNER: Sure.

Your Honor, let me jump in, because I think it's --

THE COURT: Yeah, but if people in the public would have wanted to know, they would have filed an objection to that particular area. I'm not hearing an objection in this case; it isn't teed up correctly. It is disclosed before we finally take care of it. And I haven't heard anybody waving their arms and screaming bloody murder about this situation.

MR. HUEBNER: Sure. Well, let me help for a minute, because this sort of miasma of there was something undisclosed here is actually very troubling to me, and I think we need to take a step back, because I'd like to dispel that. The transparency of this case has been extraordinary.

THE COURT: I know.

MR. HUEBNER: And this is no exception. Had the unsecured creditors' distribution just been X million dollars larger, it never would have been disclosed or known to anybody what percent the trustee took off the top pursuant to its charging lien. It doesn't need court approval for that. That's the way the indenture works. Indentures all say -- and there are tens of thousands of them -- when money comes into the trustee, it is paid out in the following order of priority.

And so this actually has more transparency than would normally be the case, because had the deal for the bonds just

been the current amount plus two million, nobody would have ever known that there even were separate items for trustees.

So, I have to say, I take really serious issue with any implication here that things were undisclosed.

The people whose money it was, the people who were giving it from their own creditors' distributions and splitting off their overall between their trustees and themselves, the official statutory committee, the senior lenders and the debtors, knew these numbers. As soon as anyone raised an issue and had we been called earlier, we would have been happy to put estimates in the disclosure statement or -- the minute Ms. Long raised an issue in her very next pleading -- and, by the way, the committee's pleading, I believe, was at noon yesterday, not late last night; just in the interest of exactitude.

So this is just not hard. It's public. It's appropriate. It's actually more transparent than it would normally be. These are monies the trustees would be entitled to, not because they're administrative claims but because of their charging lien. But in order to cabin them and let the actual creditors know what they were getting and what they were not getting, we simply split for convenience the total amount going to unsecured creditors, into three buckets: the trustees, the bondholders themselves, and the nonbondholders.

Don't penalize the parties for having reached an

unusually candid, thoughtful, precise set of distributions as well as just saying unsecureds get X million and that's all the public needs to know. In fact, the exactitude is now fully public. And the notion that anything was kept from the Court is wrong. The notion that the Court would normally have the ability to approve these fees is wrong. The notion that 503(b) is the only vehicle is wrong. And in fact, the case law that actually applies, which is the troika of cases from the Southern District in mega cases, as well as the endless litany of cases that do this every day, make it very clear that this provision, which in this case is part of an unbelievably carefully calibrated negotiation by the payors and the payees and the give-ups, is appropriate.

It is very, very important to Arch that the Court enter the confirmation order, and the world is sort of waiting to hear that the nation's second largest coal company has had its plan confirmed. And we would respectfully ask in the strongest possible terms -- there're 40,000 economic parties-in-interest, thousands of employees; every one of them wants this plan confirmed; not one of them has objected to this provision. It's an economics point. It's absolutely legal --

THE COURT: Well, and even the UST --

MR. HUEBNER: -- and should be overruled.

THE COURT: -- said they wanted it confirmed; they're just picking around. And since I heard none of the other

40,000 individuals who are directly related to it, there -- no reason for me to -- I overrule the objection -- to go with that objection at this time.

And furthermore --

Oh, you want to say something, Ms. Long?

MS. LONG: Your Honor, would you please consider making a finding that the amount of money to pay -- it's clear that it's not -- that it is part of their distribution?

THE COURT: Well, I read the plan; I thought I caught that.

MR. HUEBNER: Yeah, Your Honor, we're --

THE COURT: I thought I read that. I was looking for that when I reviewed it yesterday, or the fourth amended.

MR. HUEBNER: Yeah.

THE COURT: Is everybody --

MR. HUEBNER: Yes. Your Honor, let me help --

THE COURT: I didn't find any language that said any different.

MR. HUEBNER: Yeah. Your Honor, we are not seeking any sort of finding that this is an administrative expense. This is just part of the deal.

THE COURT: It's part of the deal.

MR. HUEBNER: And what I was whispering before --

THE COURT: Yeah.

MR. HUEBNER: -- to try to see if we could quickly

have peace break out is I think we're happy -- I look to my left and watch the body language -- to add language to the confirmation order that says --

THE COURT: It's when we've got so many moving parts --

MR. HUEBNER: -- there's no finding --

THE COURT: Yeah.

MR. HUEBNER: -- that these are administrative expenses, and they would otherwise be paid out of the distributions to bondholders.

MS. LONG: We would appreciate that additional language. Thank you, Your Honor.

THE COURT: I think it's in there. I read it in -- well, here's the problem: if somebody told me to enforce it, that's the way I read it --

MR. HUEBNER: Yeah.

THE COURT: -- because I was looking for that provision.

MR. HUEBNER: Yep.

THE COURT: So, Ms. Long, I think we're back to where we had a complete discussion about this issue, and we've come to the same conclusion: that everything's in place. It's just we're talking -- I think we're talking over each other --

MR. HUEBNER: Yeah. We'll --

THE COURT: -- or we're trying to --

MR. HUEBNER: We'll look right now, as a --

THE COURT: -- emphasize different sections.

MR. HUEBNER: -- as a four-legged table, to see if there are a couple of language tweaks. But to be clear, and so the record's clear --

THE COURT: It looked good.

MR. HUEBNER: -- so Ms. Long can be comfortable --

THE COURT: Yeah.

MR. HUEBNER: -- we're not asking for any finding that these constitute administrative expenses under the Code, and we believe that, as I said, I think, probably nine times now, these are funds that would otherwise have been taken off the distributions to bondholders; so the deal would have just been less sophisticated, the bondholder distributions would have been bigger, and then they just would have taken it privately off the top. We just made it more precise, in part, as way to control costs.

So we're very comfortable with both of the, I think, conceptual things that Ms. Long is looking for comfort on. The Court's not finding on expenses. This is the bondholders' money either way; it's just going to their agent. And with that, I think the miasma has been dissipated and we would ask that the Court --

THE COURT: Well --

MR. HUEBNER: -- at least orally rule that the

confirmation is approved and the order will be entered.

THE COURT: Thank you. And the Court will rule that all provisions of the Code, and 1129 in particular, have all been met; that the Arch plan is actually a model of negotiation and people actually getting along, because we always have to have a few little convulsions in order to make everybody feel like they're doing their job. But I appreciate it. I appreciate the effort, because I know this has been a focus and a focal point of many attorneys. It's made my life really quite great, considering the size, magnitude and the 40,000 moving parts, and the fact that we're in an economic time of incredible distress, I guess is all you can say about the coal industry, and that for you to come up with a plan, as I read it, is this viable and, like you say, lean and mean -- some words I've used in the past -- and comports to meet so many different criterion from many different angles, as we just went through here, which they tend to cause discussions sometimes -- it's not necessary but to get it on the record -- that there's no reason not to approve this plan, with the ninety-six and ninety-eight percents and the incredible amount of work. I think it gives the company a lot of latitude for the future. It looks like it did, anyway. At least, though, they can meet these challenging economic times for the coal industry.

And I don't see any items that should come into major

question as this case goes forward. We aren't doing anything -- there's nothing in your plan that is new or monumental or controversial that you're doing. You solved the environmental arguments incredibly adroitly, in moving beyond the self-bonding issue. I mean, people don't realize all the hubbub that's going on in that particular area alone, let alone some of these other items. And I just wanted to note that; didn't go unnoticed by the Court; but yet it wasn't a big deal today, because Arch took total responsibility, and it shows that they should get the good-citizen award in the coal industry. Lot of good it does coming from the bankruptcy court. But --

MR. HUEBNER: Your Honor, well enough. So let me just -- media: Arch should get the good-citizen award in the coal industry. We'll take that one, Your Honor.

THE COURT: Yeah. And, believe me, they'll listen to it.

MR. HUEBNER: So -- but, Your Honor, thank you very much. Obviously, this is a critical day and, frankly, I think it's dangerous in the court to make sure that the role of the lawyers is not overstated. In fact, Arch's miracles really emanate from Arch itself and from the management team and from the incredible people that work at the company every day. The lawyers and the bankers are sort of tools in the hands of the craftsmen, but the real craftsmen obviously are the management

team, who have been just really extraordinary.

So we are honored and gratified by your oral ruling. I'm sure it'll be picked up in the press within minutes, if it has not already. We will see if we can do a tweak or two to the order that further satisfy Ms. Long as best we can, and then we will submit it forthwith to chambers.

We would ask that it be entered as quickly as is convenient, because, obviously, the order hitting the docket will start a chain of things --

THE COURT: I think we're in a position to handle that.

MR. HUEBNER: Terrific. So, with that, unless others have things to say, I wanted to end --

THE COURT: Anybody want to say anything, now that we're almost off the record, or -- anything for the record, still?

MR. FEDER: One last thing.

THE COURT: Yes.

MR. FEDER: Thank you, Your Honor. Once again, Benjamin Feder, Kelley Drye & Warren, on behalf of UMB Bank, one of the indenture trustees that we have just been discussing.

Just a very minor point, Your Honor, and just to clarify what was in the debtors' brief and response last night, just so there's no misunderstandings. We were asked at

the end of last week, in connection with the responses to the UST's objection, to provide an estimate of our fees and expenses to date and also to demonstrate that the fees post-approval of the RSA were within the 75,000-dollar cap that was -- that had been negotiated. And so we provided that number.

The debtors described it as being an estimate through the effective date. I just want to make clear we simply provided a good-faith estimate of our fees and expenses through the date we were asked as of the end of last week. And so I just don't -- it is -- and we made clear that it was subject, in all respects, to our submission of invoices to the debtors on the effective date.

So I just want to clarify that, make sure there's no misunderstanding.

THE COURT: Yeah.

MR. FEDER: Thank you.

THE COURT: Thank you.

Mr. Doyle.

MR. DOYLE: Your Honor, Dan Doyle --

(Disconnection beeps broadcasting over the speakers)

MR. DOYLE: I think my input is being taken, but I'm not sure.

THE COURT: No, no. No. You're okay. Somebody had to get off the phone --

(Disconnection beeps broadcasting over the speakers)

THE COURT: -- go to Court.

MR. DOYLE: Obviously, the force of my personality is making people leave the line. But nevertheless; Dan Doyle for Digital Printers Square.

Just a point of clarification. There was an objection to the cure amount, filed last night. The confirmation order anticipates that the Court will retain jurisdiction over those disputes, and those will be decided later.

THE COURT: Okay. And that's right. We know. There were a lot of things retained by the Court as we grind this -- as I said earlier, maybe another way to put it, as we do often in this court, is that I don't really know what went into the sausage but I sure like the finished product.

MR. HUEBNER: Your Honor, you can't expect us to disengage cold turkey from you. I mean, we have to withdraw slowly over the next few weeks.

THE COURT: And we have a tag for you, so you can go hunting.

MR. HUEBNER: Your Honor, with that --

THE COURT: So --

MR. HUEBNER: -- I think we're ready to move on to the other agenda items --

THE COURT: Sure.

MR. HUEBNER: -- having completed confirmation. Again, we're deeply grateful for Your Honor confirming the plan. And if I may, let me turn it over to the indefatigable Ms. McGreal to handle the two other agenda items.

Your Honor, I would ask, on behalf of those on the phone and in the courtroom --

(Disconnection beeps broadcasting over the speakers)

MR. HUEBNER: Although I hear some are not leaving, there's really no reason for most of the people in this room to stay, because there're --

THE COURT: Yeah. What are -- the --

MR. HUEBNER: There're two --

THE COURT: For the record --

MR. HUEBNER: There're two, just --

THE COURT: -- tell them what the two issues are.

MS. MCGREAL: Yes, Your Honor. It's the --

THE COURT: Ms. McGreal.

MS. MCGREAL: It's the motion to destroy or abandon certain Horizon Natural Resource records, and then two objections to the debtors' sixth omnibus rejection notice.

THE COURT: Okay. And unless somebody's having to deal with those, shall we say, tangential issues, we'll give a moment for everybody to get off the phone and/or leave the room if they want to.

(Disconnection beeps broadcasting over the speakers)

MR. HUEBNER: And for the New Yorkers, there's a 1:30 flight at the gate if you left right now.

THE COURT: Who's got a 1:30 flight?

MR. HUEBNER: No --

THE COURT: Oh.

MR. HUEBNER: -- I'm just telling all the New Yorkers, if they leave right now, they can try to catch the --

THE COURT: They can --

MR. HUEBNER: -- 1:30.

(Series of disconnection beeps broadcasting over the speakers)

MR. HUEBNER: Look how much money we're saving.

THE COURT: Are we ready?

(Disconnection beeps broadcasting over the speakers)

MS. MCGREAL: Good morning, Your Honor. For the record, Michelle McGreal on behalf of the debtors.

We have just two other items on the agenda today; I'll take them in the order they appear on the agenda. First is the debtors' motion to approve the abandonment and destruction of certain business records and other records related to Horizon Natural Resources Company, which, as Mr. Huebner previously noted, had filed for Chapter 11 with the bankruptcy court for the Eastern District of Kentucky in November 2002, and in June 2004 Debtor ICG purchased certain assets of Horizon.

As part of the purchase, ICG obtained ownership of certain business and other records from Horizon. In August 2006, acting on a motion filed by ICG, that Kentucky bankruptcy court entered an order permitting ICG to abandon or destroy the Horizon records. Before ICG could destroy the records, ICG became aware of certain litigation matters and delayed destruction in case the litigation matters gave rise to any internal litigation hold over the documents. To the debtors' knowledge, all of the litigation matters have been resolved, except one, and there's no pending request for documents in that one remaining litigation.

The Kentucky bankruptcy court order clearly permits the debtors to now destroy or abandon these records. However, ICG later realized that they were in possession of additional Horizon records that are not covered by the Kentucky bankruptcy court order.

So, out of an abundance of caution, the debtors are now seeking relief under Sections 544 and 105(a) to abandon or destroy all Horizon-related records, both those that were under the Kentucky bankruptcy court order, and the new additional records that they have found. The records are voluminous and there is significant cost for storage space. The retention periods under ICG's internal records-retention policy has now expired. And there are, again, no pending requests for documents in any of the Horizon matters.

THE COURT: And no pending litigation or anything like that?

MS. MCGREAL: There is one, but there's no pending document request at this point. And I'll note for the record the debtors provided notice to the parties in that --

THE COURT: Oh.

MS. MCGREAL: -- litigation, in case they needed anything and wanted to come to the Court and say anything, and we haven't heard anything.

THE COURT: I think you would. It must be PI or insurance or something like --

MS. MCGREAL: That's right, Your Honor.

THE COURT: Okay.

MS. MCGREAL: And we also sent a notice to the Horizon bankruptcy authorized representative and liquidating trustee, so that, in case they needed it for the Horizon pending bankruptcy proceedings, they could let us know. We also didn't hear anything.

So at this point, we have no objections. And unless Your Honor has any questions, we'd ask that the order be entered.

THE COURT: It will be.

MS. MCGREAL: Thank you, Your Honor.

The last two matters are two objections to the debtors' sixth omnibus rejection notice. The debtors filed

the notice approximately four months ago, on May 10th. in advance of the objection deadline, the debtors received objections from two counterparties to easements that the debtors had in Pike County, Kentucky. The counterparties are Lassie Hatfield and Junior Justice.

After the objections were filed, the Court approved the rejection of the agreements and the sixth omnibus rejection notice, except for those two easements. The debtors sought to present the two rejections to the Court at the August 10th omnibus hearing; right before the hearing, Ms. Hatfield filed a pleading stating that distance and financial means would prevent her from attending, and suggested that the debtors contact her to attempt to achieve a consensual resolution. The debtors were happy to do so; they adjourned this matter from the August 10th hearing. And on August 15th the debtors sent letters to Mr. Justice and Mrs. Hatfield, in an attempt to see if they could resolve the parties' concerns.

On August 19th the debtors participated in a telephone call with Ms. Hatfield and two of Mr. Justice's children, that ended without a resolution. Subsequent attempts to resolve the issue by Ms. Ringer of Kramer Levin, counsel to the creditors' committee, have also been unsuccessful. Thus, the debtors scheduled the matters to be heard today in light of confirmation.

Your Honor, our argument is relatively short and straightforward. Objections to rejection are rare. The standard is simply whether the debtors have exercised their business judgment, i.e., whether it benefits the estates. And here the two easements are no longer needed. The mining operation is no longer active. Although the debtors recognize this may cause hardship, the debtors believe they've exercised their business judgment.

The objections themselves do not present any legal grounds for denying rejection. Ms. Hatfield cites safety and environmental concerns, and Mr. Justice cites alleged property damage caused by the runoff, all of which are more appropriate in connection with rejection-damages claims.

THE COURT: They still have other places to go if something comes up, but as far as the direct easement goes -- yeah.

MS. MCGREAL: That's right, Your Honor. Each of the parties will have thirty days to file a new proof of claim or amended proof of claim; and, obviously, discussions can happen at that point.

So, unless Your Honor has any questions, we'd ask that the rejections be approved.

THE COURT: They will be.

MS. MCGREAL: That is the end of the agenda, Your Honor.

THE COURT: Is there anything else that we want to talk about? How have things been going this last quarter? Anybody know any financials?

MR. HUEBNER: Well, Your Honor, Arch is a public company and, so, announcing specific financial information in between our public reporting cycle --

THE COURT: Oh. Wait a minute. Okay, so --

MR. HUEBNER: -- is kind of --

THE COURT: -- you can't --

MS. LONG: -- like, illegal. But it has --

THE COURT: Well, wait a minute --

MR. HUEBNER: -- been publicly --

THE COURT: -- don't I trump SEC on that?

MR. HUEBNER: Are they still on the line?

THE COURT: But some day -- it depends. I think the answer is it depends, right --

MR. HUEBNER: I --

THE COURT: -- how important is it.

MR. HUEBNER: Yeah.

THE COURT: It's not.

MR. HUEBNER: Yeah, what I would say is this, Your Honor: It --

THE COURT: We can discuss it later.

MR. HUEBNER: It continues to be a very interesting time in the coal markets. Many of the systemic challenges

certainly remain, I think as we all see at the gas pump, frankly. There has been, of late, interesting changes in metallurgical-coal pricing, which is part of Arch's product base. Thermal is --

THE COURT: Yeah.

MR. HUEBNER: -- different.

So it'll be an interesting time, but I think most importantly, for today's perspective, with our due balance sheet and our extraordinary operations and team, if anyone's going to do great in the coming market, we think it's going to be Arch.

THE COURT: Well, you're sure postured for that.

Anything else to come before the Court before we go off the record?

MR. HUEBNER: We're done, Your Honor.

THE COURT: We'll be off the record.

MR. HUEBNER: Thank you.

(Whereupon these proceedings were concluded at 12:24 PM)

I N D E X

C E R T I F I C A T I O N

I, Clara Rubin, the court approved transcriber, do hereby certify the foregoing is a true and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

September 15, 2016

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CLARA RUBIN DATE

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