

IN THE BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

IN RE:)
)
SSI LIQUIDATION COMPANY) CASE NO. 10-60702
)

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TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE MARILYN
SHEA-STONUM, UNITED STATES BANKRUPTCY COURT JUDGE,
COMMENCING AT 10:32 A.M., MAY 28, 2010.

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Proceedings recorded by mechanical stenography,
transcript produced by court reporter.

1 PROCEEDINGS

2 THE COURT: Please be seated. Good
3 morning.

4 VOICE: Morning. Would the clerk please
5 call the 10:30 docket.

6 BAILIFF: Case No. 10-60702, Schwab
7 Industries, Incorporated. Hearing on stay of amended
8 motion for 2004 examination for KeyBank, Huntington
9 Trust Company of Florida, and Huntington National
10 Bank.

11 THE COURT: And prior to coming into my
12 courtroom, we had circulated a sign-in sheet for
13 counsel. If anyone has not signed in, just raise your
14 hand and we'll pass it back. And as you are all
15 clearly aware, you're not where you thought you were
16 going to be this morning. You're in Akron, not in
17 Canton. Judge Kendig apparently experienced a pretty
18 bad case of food poisoning, and is still recovering.
19 So he had asked that we cover the needs in this case.

20 And as I understand it, the cash collateral
21 lender has the right to cease to allow the use of cash
22 collateral as of June 1. So this being the last
23 hearing date, regular hearing date prior to June 1, I
24 agreed to try to step in to this very simple matter.
25 Okay.

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1 So, Mr. DeMarco, please let me know what I
2 didn't really need to read last night. Please tell me
3 where -- tell me the status of the bidding, what
4 pleadings you understand. And obviously, you may not
5 -- I hope everybody has communicated with the Debtor
6 if you're not going forward on particular matters that
7 were raised. So what -- I do have this sheet. I do
8 have the Exhibit A, which sets forth the results of
9 the bidding. But probably I could use some
10 connotation to this one-page report on the results of
11 the bidding.

12 And then please let me know what it is that
13 has been resolved, what is still not resolved, whether
14 there's any chance that that which is not resolved
15 could be resolved with a little bit of additional
16 time, and what appears to be hard core disputes.

17 MR. DEMARCO: Thank you, your Honor.
18 First of all, thank you very much for making the
19 time -- your time to be available to all the parties
20 in this case. And we all extend wishes to
21 Judge Kendig for a speedy recovery.

22 To cut to the chase -- and I would like to
23 give the Court a more fulsome report, but we had a
24 more vigorous auction -- there's strong consensus as
25 to the highest and best bid. And of those six

1 objections that are pending, two have been resolved,
2 two may already be resolved, and two are yet to be
3 resolved. And those two, I think, would benefit from
4 a break as would -- a break to present the Court with
5 a sale order that, again, I believe there will be
6 strong consensus on.

7 THE COURT: Okay. And there had been a
8 draft of a Sale Order filed on May 26?

9 MR. DEMARCO: Consistent with prior Orders
10 of the Court, yes.

11 THE COURT: So is there already a new draft
12 of the Sale Order?

13 MR. DEMARCO: There's been about three at
14 least.

15 THE COURT: Well, I won't try to keep up
16 with every -- (inaudible). Just thank you for sparing
17 me, though.

18 MR. DEMARCO: If I may step back and make a
19 slightly broader report to the Court, your Honor,
20 there are six objections. And we have the court
21 reporter here who transcribed the auction proceedings
22 yesterday. And the two parties that have indicated
23 have not yet resolved, which are the Manatee County
24 Port Authority and the National Lime & Stone Company.
25 Their counsel have indicated to me that there's

1 nothing about the proceedings yesterday where we would
2 need to delve into evidence or what occurred at the
3 auction.

4 In deference to the cost to the estate, I
5 would like to relieve the court reporter if there's no
6 one who wants to delve into the auction
7 proceedings yesterday. And if the Court could call
8 for that, that would be helpful.

9 THE COURT: And the question has been put.
10 If there is any interested party who wishes to not see
11 the court reporter excused at this time, please step
12 forward. You don't have to explain why; you just have
13 to say not yet.

14 (Silence.)

15 THE COURT: Okay. Then the court reporter
16 is excused.

17 MR. DEMARCO: Thank you, your Honor.

18 THE COURT: Sounds like you had a long day
19 yesterday. Rest those fingers.

20 MR. DEMARCO: We actually wore out two
21 reporters yesterday, your Honor. And I'll give a
22 little report on that.

23 As I know that the Court may not have a
24 great deal of familiarity with the case, and I don't
25 want to take longer than we need, but this is a --

1 pardon me.

2 THE COURT: This is my familiarity. I read
3 that last night.

4 MR. DEMARCO: Well, I probably won't be
5 tell you anything you don't know. But I think, your
6 Honor, it's appropriate that you understand that this
7 company is primarily a ready-mix cement business,
8 operations in Ohio and Florida. In the sunny days of
9 2006, the company had over 200 million in revenues and
10 substantial 8 figures EBITDA. And we all know what's
11 happened to the construction markets and housing
12 markets and commercial real estate in the interim
13 period. And this company has been affected by that
14 and has taken a lot of steps to try and maintain
15 profitability and cash flow, and ultimately, sought
16 protection of the Bankruptcy Court earlier this year.

17 And the company has been able to maintain
18 its operations through additional financing, in part,
19 provided by a DIP lender that was new to the scene
20 that came on, and then by the existing lending group
21 in a later Debtor-In-Possession financing.

22 As the Court noted at the outset, cash
23 collateral use under the current order expires June 1.
24 So there was a very brisk sale process that was put in
25 place by the Court with the support of the lenders.

1 And I would at this point ask if anyone had
2 objection to my making a proffer about the sale
3 process. We have the investment bankers in the Court
4 who ran that process. And again, to sort of start
5 with the broadest, we went out to the market and then
6 eventually lead down to the Exhibit of what happened
7 at the auction, if the Court would please.

8 THE COURT: Before we do that, you
9 indicated that National Lime & Stone and Manatee are
10 the two objections that are plainly not yet resolved?

11 MR. DEMARCO: Yes.

12 THE COURT: What are the two that may be
13 resolved?

14 MR. DEMARCO: The two that may be resolved
15 are the objections of Holcim and St. Mary's Cement.
16 And those objections, your Honor, essentially go to
17 503(b)(9) claims. And one of them, St. Mary's, we've
18 been able to agree on an amount which would lead them
19 to withdraw any objection to the sale. The other,
20 Holcim, we've not been able to agree on an amount but
21 we've agreed on a reservation of rights that would
22 allow the sale to go forward.

23 THE COURT: Okay.

24 MR. DEMARCO: And that leaves the two that
25 are being withdrawn, Allen Concrete and the Committee.

1 THE COURT: Okay. And the reason I raise
2 that was I don't know whether -- well, why don't you
3 go forward with your summary of what happened in terms
4 of the bidding, and then I will -- (inaudible) -- at
5 that point -- well, I'll be open to whether -- we can
6 double track whether there is a -- whether with
7 respect to Manatee and National Lime & Stone there is
8 any further discussions that might go forward outside
9 of the courtroom while there are proceedings in the
10 courtroom not related to that.

11 MR. DEMARCO: I certainly wouldn't
12 discourage either National Lime or the Court to pursue
13 discussions outside the courtroom while we are
14 proceeding, but I will ask for a break, as I indicated
15 before, to address -- give those parties an
16 opportunity to address their objections.

17 Again, your Honor, Mr. Ken Hirsch and
18 Mr. Kevin Mayer are the Western Reserve Partners
19 investment bankers who conducted the sale process --

20 THE COURT: And if those gentlemen could
21 just stand --

22 MR. DEMARCO: Mr. Hirsch towards the back
23 and Mr. Mayer towards the front. Your Honor, I'd
24 just as soon make a proffer, but if there's someone
25 who would prefer that we did this by Q and A, I'd

1 rather not waste the time and just dive into the Q and
2 A.

3 THE COURT: You'll make a proffer, and if
4 anybody wishes to cross-examine --

5 MR. DEMARCO: Fair enough.

6 THE COURT: Please be clear as to which
7 gentlemen's testimony is being proffered so the
8 cross-examination will be more easily accomplished.

9 MR. DEMARCO: Your Honor, these two
10 gentlemen seem to have been joined at the hip every
11 time I've seen them in the last month. So what I'm
12 about to say either of them would be competent to
13 testify to. And I will try and remind myself if
14 there's anything that would be unique as I go.

15 Your Honor, the joint efforts of the
16 Debtors, their investment bankers and their other
17 professionals caused the Debtors to reach out to over
18 280 interested parties. And this resulted in 61
19 parties executing confidentiality agreements. So we
20 believe this is a very broad marketing of the company.
21 And as Judge Kendig is familiar, Western Reserve had
22 been engaged by the company prepetition, and had
23 exposed the company to the market for potential
24 transactions, not necessarily through a 363 sale, but
25 other transactions during the approximately one year

1 preceding the filing.

2 Of those 61 parties that executed
3 confidentiality agreements, they all had the
4 opportunity to enter an electronic data room. That
5 lead 12 of them to request the opportunity to come
6 on-site and visit, which Western Reserve conducted.
7 The bidding properties in the case required bids to be
8 submitted by last Friday -- Monday at 5 o'clock. We
9 did have bids come in early, and this is an indication
10 of some very good news that we did have a very robust
11 auction. And we'll be delighted to talk about Exhibit
12 A.

13 Eight separate bidders came forward. The
14 assets were presented in four baskets, is the
15 terminology that's come into use in this case. And if
16 I can refer to Exhibit A -- and perhaps we should turn
17 this around. Your Honor, the top line of this chart
18 -- does the Court need another copy?

19 THE COURT: No. I had two copies from the
20 law clerks.

21 MR. DEMARCO: Thank you, your Honor. If
22 you move across the top line of this page, we can
23 describe what those baskets, if you will, are. The
24 first column in which numbers appear is headed up
25 stalking horse, all core assets. And this is meant to

1 designate we were able to obtain a stalking horse
2 bidder, which I'll talk about in a minute, which was
3 willing to acquire substantially all of the core
4 assets of the business, with some minor exceptions.

5 The next set of columns is labeled
6 Corkscrew. Corkscrew is the name of a road in Florida
7 where the company owns about 2,100 acres which
8 operates as an orange grove. And you might well ask
9 why would a cement company want an orange grove. And
10 the reason is because of the limestone that is
11 underneath where the oranges grow. The property is
12 not presently permitted for mining. There's not
13 mining taking place now. But this was an strategic
14 asset of the company. And orange growing generated a
15 positive cash flow for the business. So we expected
16 there would be folks interested in the property as an
17 agricultural property as well as the minerals that
18 could be developed as well as a strategic adjunct to
19 their ready-mix business.

20 The next column, Ohio RMX, is a shorthand
21 for ready-mix. So this is the business that we're all
22 familiar with, with the cement trucks going down the
23 road hauling concrete to buildings or roads or
24 driveways.

25 The next column, ECC, is an abbreviation for

1 Eastern Cement, which is one of the Debtors. But this
2 particular designation focuses on the Port asset. And
3 as the Court has probably gleaned from the objections,
4 the County owns the Port. It is subject to a
5 long-term lease where the Debtors have agreed to
6 operate the Port. And there's something like 47 years
7 to go on the lease. So it's a substantial asset in
8 that regard. And the Port has infrastructure there
9 which allows for the importation of cement, stone and
10 other aggregate. There are four immense silos 20
11 stories tall which can accommodate a considerable
12 amount of aggregate. And the location of the Port
13 allows for shipments in on the Gulf coast of Florida.

14 The next column, your Honor, labeled
15 Ready-Mix, RMX, is the Florida ready-mix side of the
16 business.

17 So those four groupings of assets were
18 presented to interested parties. And we actually had
19 12 different bids among the 8 parties because some
20 parties bid on multiple baskets. Some parties bid on
21 just one basket.

22 So all those parties convened at our office
23 at 10 a.m. yesterday for an auction. And the auction
24 began at 10. By about 4 o'clock, I believe we were
25 ready to go into the auction of all assets. We had up

1 to that time been auctioning baskets of assets. And
2 then the auction continued until about 11, 11:30 in
3 the evening, until we had completed all the rounds
4 with every combination of bids and all assets. There
5 were essentially five bidders on the orange grove
6 quarry property.

7 There ended up being what we call three team
8 captains bidding on the entire business. And by that
9 I mean essentially companies that are in the
10 construction cement ready-mix business who either had
11 an interest in the Port and/or the Corkscrew property
12 were paired up with someone who did, or where the
13 Debtors basically married bidders on the baskets that
14 were being excluded by these three team captains.

15 So as a result of that, Mr. Hirsch or
16 Mr. Mayer would testify that the bids that were
17 submitted yielded the values reflected on Exhibit A.
18 And to review quickly, I think it's easiest to start
19 at the left-hand side with a stalking horse bid. I'll
20 start with the cash proceeds at close, 48,950,000.
21 That was the -- not the initial bid but the highest
22 cash portion of the bid that was advanced by the
23 stalking horse bidder.

24 During the course of the auction, they did
25 advance their bid. I'll skip over for the moment the

1 various adjustments in the column below and ask the
2 Court to direct your attention to the bold line that
3 reads transaction amount, where the Western Reserve
4 partners investment bankers in consultation with the
5 bettors and the lenders and the Creditors' Committee
6 valued that bid at a net of 55.6 million.

7 THE COURT: Okay. There are two
8 transaction amount bids?

9 MR. DEMARCO: Yes. I'm sorry. I'm talking
10 about --

11 THE COURT: Or transaction amounts. So
12 you're talking about the first one?

13 MR. DEMARCO: Correct. So because there
14 are advances in the bid to cover break-up fees and
15 overbids, which we passed in the early rounds, the
16 value of their highest bid was 57.7 million.

17 Now, if the Court now drops down to the next
18 line, a combined value, meaning if you were to take
19 this bidder, Cement Resources, as your lead bidder,
20 combine any other bidder you could combine it with,
21 which, in this case, none. The next number down
22 versus leading bid would reflect the dollars by which
23 that bid was either ahead or behind what we viewed as
24 the highest bid. We'll get to the highest bid in a
25 minute. This bid came in 280,000 behind the leading

1 bid, which you can see below that was an amount of
2 57.8 million.

3 The bid procedures call for the Debtors to
4 have the right to designate a reserve bidder for the
5 standard reasons. And the Debtors would designate
6 Cement Resources as that reserve bidder, based on the
7 bid reflected here.

8 THE COURT: In other words -- well, let me
9 -- should the winning bidder not go forward --

10 MR. DEMARCO: Correct.

11 THE COURT: -- Cement resources stands
12 ready to perform on its bid.

13 MR. DEMARCO: That's their obligation.

14 THE COURT: That's their obligation?

15 MR. DEMARCO: Yes.

16 THE COURT: Okay. I won't interrupt your
17 presentation at this point, but given the baskets,
18 eventually I'm going to be interested in what is the
19 safety net should any of the winning bidders with
20 respect to a basket not perform.

21 MR. DEMARCO: I will address that, your
22 Honor. Thank you.

23 Then the next four columns in which we've
24 identified the different baskets corresponds to Ohio
25 ready-mix, Port, and Florida ready-mix. We've

1 identified at the top of the column the bidder that
2 had the highest bid on that particular basket, and
3 then the bold number about in the middle of the page
4 under transaction amount being the value that Western
5 Reserve would place on each of those respective bids.

6 Now, I haven't yet talked about the far
7 right-hand column. And this ends up being the winning
8 bid. And I'll try and address what's going on in that
9 column. The bidder in that column is Oldcastle, who
10 is here today as the holder of the highest and best
11 bid, with whom we would ask the Court to approve a
12 sale. The Oldcastle bid ended up being a combination
13 of the Ohio and Florida ready-mix operations, as
14 indicated in the top on the far right column, and also
15 UCC, the Port. Oldcastle did not present a bid on the
16 Corkscrew property.

17 So what we did during the course of the
18 auction was Western Reserve, in effect, paired the
19 holder of the lead bid on the Corkscrew property with
20 the Oldcastle bid. So if you take the 12.7 million on
21 the Corkscrew property and add to it the \$45 million
22 value assigned by Western Reserve to the Oldcastle
23 bid, you come up with a combined bid -- I'm in the
24 lower right-hand corner now -- of 58.38 million.
25 There's no other single bid, combination of bid,

1 that's higher or higher and better than the Corkscrew
2 bid. Resource Land Holdings and the Oldcastle bid for
3 the other assets.

4 Now, there was, to address the Court's
5 question a minute ago, as I mentioned, five bidders on
6 the Corkscrew property. And a bidder under the name
7 of Ramsey Holdings ended up with the second highest,
8 and, therefore, reserve bid on the Corkscrew property.
9 And in the Sale Order, we have identified that bidder
10 and the amount of their bid. It's not reflected on
11 this particular presentation.

12 The auction, as I said, went until after 11,
13 after which the Debtors convened with the lenders and
14 the Creditors' Committee to evaluate whether the
15 combination of Oldcastle and Resource Land Holdings'
16 bid was not only highest, but highest and best. And
17 everyone present at that time had concluded that, in
18 fact, that was highest and best.

19 The Debtors had a Board meeting scheduled
20 for this morning to then address the question whether
21 the company would, indeed, come to the same
22 conclusions. And the company's Board deliberated and
23 ultimately concluded that it is, in fact, the highest
24 and best combination of bid. But the Board asked that
25 we inform the Court and the parties that these

1 deliberations were lengthy and spirited, because the
2 Debtors are a competitor of Oldcastle, and that raised
3 certain concerns for them throughout the process.

4 And at various points along the way,
5 discussion had turned to the antitrust implications of
6 a transaction involving Oldcastle. And one of reasons
7 for that, your Honor, is there is pending in a court
8 in Florida a private party and antitrust action where
9 Oldcastle is a Defendant. And I am certainly not --
10 and by the way, I've left the testimony of Western
11 Reserve. I'm now talking about the Board
12 deliberations.

13 THE COURT: And as you proffer the Court
14 deliberations, who would be the witness who would be
15 available for cross-examination with respect to this
16 proffer?

17 MR. DEMARCO: Mr. Goddard is the Chief
18 Restructuring Officer. He is not a Board member, but
19 he participated in the Board meeting.

20 THE COURT: And, Mr. Goddard, stand up.
21 Thank you.

22 MR. DEMARCO: And although the antitrust
23 action is in the early stages, all the Defendants are
24 denying liability. One of the Defendants in that
25 lawsuit is also one of the Debtor corporations,

1 because they delivered ready-mix cement somewhere
2 sometime so they got on the list.

3 In any event, the Board wrestled with those
4 issues. The Board also wrestled with the Port.

5 THE COURT: Let me -- the Oldcastle bid
6 appears to contemplate a cash closing of \$42,632,614?

7 MR. DEMARCO: Yes, your Honor.

8 THE COURT: And also appears -- I mean -- it
9 is a transaction that would -- where the estate would
10 have the funds in hand pretty promptly; is that
11 correct?

12 MR. DEMARCO: In fact, your Honor, because
13 cash collateral expires on June 1, we had put all the
14 bidders to a challenge to get to a closing by June
15 2nd. And Oldcastle indicated they're ready, willing
16 and able to do that. In fact, their counsel -- I
17 don't know if he got to sleep last night because he
18 was with my partner, Mr. Snyder, until at least 4 in
19 the morning -- completing the APA and the Resource
20 Land Holdings across the road property. Counsel,
21 Mr. Rand, was likewise engaged. So we have APAs
22 signed and ready to go.

23 THE COURT: Now, National Lime & Stone,
24 which had been a bidder on the Ohio Ready Mix, is the
25 same National Lime & Stone that is a lessee, is that

1 correct, or not correct?

2 MR. DEMARCO: Yes, that is correct, your
3 Honor. And National Lime is a supplier to the Debtor.
4 They're a lessee. They're also in some respects a
5 competitor. And they were a very active bidder
6 yesterday along with -- (inaudible) -- Resources Group
7 and the Oldcastle group.

8 So, your Honor, I think with that --

9 THE COURT: What does Oldcastle believe
10 that it would be getting -- and I should probably --
11 Oldcastle --

12 MR. DEMARCO: Mr. Rosenblatt is immediately
13 to my right.

14 THE COURT: Mr. Rosenblatt, what does your
15 client believe would be the rights it would be
16 acquiring as pertains to the property on which
17 National Lime & Stone is currently the lessee?

18 MR. ROSENBLATT: Good morning, your Honor.
19 Paul Rosenblatt on behalf of Oldcastle Materials.
20 Thank you for accommodating us today.

21 With regard to the real property that's
22 subject to the lease and supply agreement with
23 National Lime & Stone, and the Debtor is going to
24 assert this agreement, it's Oldcastle's position that
25 that real estate can be transferred to Oldcastle free

1 and clear of any lien claim or encumbrance, including
2 any possessory interest rights that National Lime &
3 Stone would have to that real property through its
4 lease under the theory that 363(f) trumps the rights
5 that a tenant would have under 365(h).

6 So it's our expectation that we would get
7 that real property free and clear --

8 THE COURT: What section of 363(f) do you
9 think operates to achieve that result?

10 MR. ROSENBLATT: That would be 363(f)(1),
11 in which a mortgage that was properly recorded would
12 be able to extinguish a lease subject to the same
13 property.

14 THE COURT: Thank you.

15 MR. ROSENBLATT: Thank you, your Honor.

16 MR. DEMARCO: If I may, your Honor, the
17 Court is, of course, familiar with the standards for a
18 363 sale. And I believe that we've demonstrated that
19 this is a proper exercise of the Debtor's business
20 judgment. This is an arm's length transaction through
21 this auction process that we've described -- and a
22 significant exposure of these assets -- a very
23 vigorous auction where bids were advanced. The
24 stalking horse bid was valued by Western Reserve going
25 into the auction at approximately a tad over 54

1 million, and we got to almost 58 million in the
2 auction.

3 I was speaking with Ms. Giannirakis, the
4 U.S. Trustee, before the hearing about how many times
5 we don't have vigorous auctions. And yesterday we
6 did. And so with that, your Honor, I'd like to turn
7 to the objections and address in a little more detail
8 the Port objection and the National Lime objection
9 just to set up what the issues are. And then
10 obviously, then the other parties would want to
11 address the Court. I wouldn't want to preclude that,
12 but then I would ask if the Court would allow us a
13 recess to see whether accommodations could be reached
14 with the Port and NLS.

15 THE COURT: One amendment that I would make
16 to that schedule is that before we recess, I would
17 like to hear from counsel for the Creditors' Committee
18 with respect to what, if any, analysis has been done
19 as to the effective return to creditors should it be
20 found that National Lime & Stone has a claim based
21 upon the breach of its lease.

22 MR. DEMARCO: Your Honor, if I may then
23 turn first to the Port and that objection. And I
24 believe the Court's aware that the Port not only had
25 filed an objection in a timely manner before the

1 hearing, but also filed a supplement to it this
2 morning early based on the results of the auction that
3 we were reporting to them.

4 And, in essence, this is a classic 365
5 assumption and assignment question. The component is
6 provided for under the APA with Oldcastle because
7 they've agreed to incur costs up to an amount which is
8 ample to include the cure amount from the Port. That,
9 I believe, takes us to an adequate assurance issue.

10 And the question on adequate assurance, in
11 the Debtor's view, is a financial question. The lease
12 provides for minimum payments. It also provides for
13 additional payments depending upon the usage of the
14 Port and the amount of materials that are imported and
15 the like.

16 What Oldcastle has indicated is that they
17 have the wherewithal to meet those obligations. It's
18 been indicated to me that they will actually take the
19 additional step of posting a letter of credit at least
20 for the first year that would support those minimum
21 obligations. And Mr. Goldblatt can certainly
22 elaborate on the financial strength of his client.

23 But Western Reserve would testify, if
24 so-called -- Mr. Mayor, in particular, has informed me
25 that the acquiring entity is an affiliate of

1 Oldcastle. And Oldcastle's parent company, CRH, is a
2 New York Stock Exchange Company. Its market
3 capitalization is in the range of 16 billion, and they
4 have 2 billion in cash on hand. The annual
5 obligations in the Port are something less than a
6 million. So I believe that with that proffer, that we
7 would meet those requirements.

8 Not to speak for the Port, but they raise in
9 the paper filed this morning a series of questions
10 that had to do with the utilization of the Port. And
11 as I mentioned earlier, the Board struggled with that
12 because they made commitments. There's the politics
13 to this and there's just the ethical obligation to
14 carry through on the deal. But I don't believe those
15 issues are pertinent to the 365 analysis.

16 And, again, Mr. Rosenblatt could elaborate,
17 but he's told me his client doesn't intend to use the
18 Port. I don't know how they'd respond to any of the
19 specifics of the questions that have been raised, but
20 I don't think it's relevant to the determination
21 before the Court. I don't know whether you want to
22 hear from the Port or go on to NLS.

23 THE COURT: Let's go on.

24 MR. DEMARCO: Thank you, your Honor. The
25 NLS lease, the Debtor -- one of Debtor's companies,

1 Medina Supply Company, owns various properties in and
2 around northeast Ohio. One of them, a Medina, Ohio
3 property is leased -- a substantial portion of it --
4 on the order of 20 out of 30 acres is leased to NLS.
5 And NLS has substantial operations on that property.
6 And they have a lease agreement. And the lease
7 agreement also incorporates various supply agreements.
8 As I said, they're a vendor to the Debtors and one of
9 the larger creditors. They're on the Creditors'
10 Committee.

11 But as to the lease, the issue, we believe,
12 is under 363(f)(1). And under applicable Bankruptcy
13 Law, we would look to Ohio law and we would look to
14 the fact that we have a prior recorded mortgage, and
15 then years later we have a Memorandum of Lease
16 recorded. And if the mortgagee were to foreclose on
17 that lease and give notice to NLS -- NLS has notice,
18 and they're here today -- the outcome would be that
19 the mortgage would foreclose the lease. To the extent
20 that adequate protection comes into play, as NLS has
21 indicated, we believe that would have to be evaluated
22 in relation to is there equity in the property. And
23 although we had a vigorous auction, we didn't have
24 enough to clear the secured debt on the property.

25 And I will now proffer what Mr. Goddard

1 would testify to as the Chief Restructuring Officer,
2 which is that the current liens that burden this
3 property are first a prime DIP loan to Naples Funding
4 Group, represented today by Mr. Herman. And that debt
5 is in the range of 34 and a half million. And then
6 there's prepetition debt owed to the KeyBank secured
7 lenders, represented by Mr. Lepene and Mr. Tuggle.
8 That debt is something on the order of 57, 58
9 million. That same group also made a \$2 million
10 Debtor-In-Possession loan.

11 So you total up the numbers, you're over 60
12 million. It start with a 6. So there would be no
13 equity for the holder of the lease, NLS, to assert a
14 right to adequate protection. And notice in the
15 process afforded here in the Court is all,
16 unfortunately, that NLS would be entitled to with
17 regards to its rights under the lease. And NLS is
18 here today represented by Mr. Jackson.

19 The company has worked with NLS for a long
20 time. They have a very good relationship. They
21 encouraged them to participate in the auction. NLS
22 stepped up and helped move the auction along. But
23 unfortunately, the Debtor has to vigorously assert
24 that under 363(f)(1), the NLS lease does not carry any
25 adequate protection right. And the title as well as

1 the possessory rights would go to Oldcastle upon
2 closing.

3 There are a number of aspects of the Sale
4 Order the parties are working on. But I can -- I'd
5 like to highlight for the Court just a couple things
6 that are perhaps not unusual but I think pertinent to
7 what I think may come before the Court later in the
8 day as we work through the Sale Order and make that
9 presentation to the Court.

10 The stalking horse bidder negotiated for
11 break-up fee. There were vigorous objections to that.
12 They were opposed. Ultimately an agreement was
13 reached. The break-up fee was permitted. We went
14 forward with the auction. Cement Resources did what
15 we wanted the stalking horse to do, to bring
16 legitimate bidders to the table and cause bids to be
17 advanced. And they advanced their bid during the day.
18 So their break-up fee of 1.9 million would be a part
19 of what the Debtors want allowed as part of the Sale
20 Order.

21 The Sale Order also would address the
22 various objections in the manner that I've indicated
23 this morning. It would also designate the reserve
24 bidders that I've indicated this morning. The Sale
25 Order also would contain fairly standard provisions

1 about the transfer of the assets. Because of the
2 exigencies of the case with cash collateral expiring,
3 we would ask the Court to waive any stay that
4 otherwise would apply under Rule 6006 or 6004 so we
5 could get to a closing on the timeline indicated.

6 To protect the estate, we also would ask the
7 Court establish that if there be any appeal from the
8 Order, that a bond equivalent to the value presented
9 on Exhibit A for the Oldcastle and Resource Land
10 Holdings bid be required in order to stay the closing
11 of the sale.

12 There is another aspect of the Sale Order,
13 your Honor, which the Court alluded to in respect to
14 the Committee's analysis of what, in effect, the
15 waterfall of funds becomes. And in the --

16 THE COURT: This hearing has aspects of an
17 initial status conference and end of game hearing.

18 MR. DEMARCO: Indeed, it does. And again,
19 we appreciate your Honor taking on this burden at this
20 hour. And I'm going to yield to Mr. Lepene to give
21 the Court an overview of how the funds would flow once
22 we get past the payment of break-up fees. We have the
23 Western Reserve fee. We have carve out amounts that
24 would be spun out.

25 THE COURT: Let me hear from Mr. Lepene.

1 MR. DEMARCO: So I will let Mr. Lepene
2 present.

3 THE COURT: Mr. Lepene, speak for yourself.

4 MR. LEPENE: Your Honor, as Mr. DeMarco has
5 alluded to, in the order, it memorializes the
6 agreement of the secured lenders. These are the
7 prepetition secured lenders and who have also made a
8 \$2 million post-petition DIP loan.

9 THE COURT: Huntington also participated
10 post-petition?

11 MR. LEPENE: Huntington is a pre-petition
12 lender and did participate post-petition as well, as
13 well as Bank of America. Key is the agent for itself
14 in those two secured lenders.

15 And what the Order provides is for carve out
16 from the recovery that the secured lenders are
17 entitled to receive or would receive from the proceeds
18 generated by the sale. There were carve outs
19 previously in a cash collateral order that was entered
20 on April the 15th, the DIP financing order that was
21 entered on May the 14th. And in addition to those
22 particular carve outs, there are carve outs for the
23 benefit of the unsecured creditors as a class as well
24 as additional carve outs to cover professional fees of
25 professionals retained both by the Debtor and the

1 Committee.

2 THE COURT: In my crash course last night,
3 I did not read the order that addresses this. Are
4 these dollar amounts? Are they percentages?

5 MR. LEPENE: They're both, your Honor. For
6 the benefit of the unsecured creditors, there's a base
7 carve out of \$850,000, again, directed for the benefit
8 of the unsecured creditors as a class. In addition,
9 carved out for the benefit of the unsecured creditors
10 is 15 percent of the net recovery of the secured
11 lenders in excess of \$51 million.

12 And fortunately, the sale -- and we can walk
13 through the formula -- I don't have those numbers off
14 the top of my head, but we can provide that in terms
15 of what we believe net recovery will be. It's an
16 estimate at this point. But whatever that recovery
17 is --

18 THE COURT: What's your rough estimate?
19 You'll not be held to it, but just help me get some
20 bearing.

21 MR. LEPENE: We have the net recovery from
22 the banks in -- (inaudible) -- maybe
23 Mr. Haverock(phonetic) -- so an additional 5 or
24 \$600,000. So at this point, we would estimate over
25 and above the base of \$850,000, an estimate of 500 to

1 \$600,000 would be made available for the benefit of
2 unsecured creditors. Is that -- we're still -- it was
3 a late night last night, and we're still going through
4 the numbers.

5 THE COURT: You're not -- no one is bound
6 by that number. I'm just trying to get some bearings.

7 MR. LEPENE: In addition, the secured
8 lenders would be waiving their deficiency claim. So
9 this recovery would not be diluted in any way by
10 virtue of the secured lender's deficiency claim.

11 On top of that, your Honor, for the -- in
12 order to provide recovery for the Committee
13 professionals and the Debtor professionals that worked
14 very hard throughout this process to generate this
15 recovery, there are -- and, again, this is in addition
16 to carve outs that exist in the cash collateral order
17 and the DIP financing order -- the total amount when
18 you look at the additional carve outs that are being
19 provided in the Sale Order itself and what we have
20 carved out previously, the total amount for the
21 benefit of the professionals representing the
22 Unsecured Creditors' Committee is 1,333,000. The
23 carve out for the benefit of the Debtor professionals
24 -- again, all-inclusive -- is approximately \$2.5
25 million. Again, based on an agreement budget that was

1 worked out at the outset of the case. And that takes
2 into account what will be necessary to complete the
3 administration.

4 THE COURT: Does that include the
5 investment banker's fee?

6 MR. LEPENE: I believe it does. No. The
7 investment banker's fee, I'm told, would be on top of
8 that. And that is provided for as well to come out of
9 the recovery. The carve outs are contingent, your
10 Honor, upon entry of the Sale Order that provides for
11 the net sale proceeds less carve outs being
12 distributed to the secured lenders.

13 That distribution is based on findings that
14 were made in the final cash collateral order and in
15 the DIP financing order that provides that the secured
16 lenders have valid claims secured by first priority
17 security interests and liens in all of the Debtor
18 assets. Those findings have been made.

19 The Committee did have the right to
20 investigate that for a 60-day period. That period
21 actually does expire May 31st, which would be prior to
22 the closing. And the Committee has said it is not
23 going to file any challenge with respect to that. So
24 that when we get to the closing, the findings --

25 THE COURT: I will inquire of counsel of

1 Committee with respect --

2 MR. LEPENE: But the findings that were
3 previously made would support the distribution that is
4 going to be made.

5 I should also point out that the Sale Order
6 does provide for the payment of the break-up fee to
7 Cement Resources. It provides for the payment out of
8 proceeds at closing to the lender that provided the
9 prime DIP financing, Naples Lending. And I think the
10 net amount owed -- there's an interest reserve, but
11 the net amount that will be distributed would be
12 somewhere in the approximate range of \$3.3 million.

13 On top of that, your Honor, the Sale Order
14 and the asset purchase agreement that is approved by
15 the Order provides that the buyer is assuming
16 administrative expense claims in the payment of 900,
17 \$1,000, is going to be paying 503(b)(9) claims up to
18 \$100,000. And the lenders in addition have agreed to
19 allow \$1,350,000 of the proceeds of our collateral to
20 be used to cover post-petition operating expenses.

21 So the amount that -- the total amount that
22 is actually being diverted from the secured lenders in
23 order to -- for the benefit of other constituents and
24 to complete this process from the beginning of this
25 case through completion or conclusion is in excess of

1 \$6 million.

2 So everybody has worked cooperatively to try
3 to get us to this point. The funding does expire at
4 the end of this month, which does put a premium on
5 achieving a very prompt closing.

6 One of the things that we evaluated when we
7 looked at all of the bids was certainty of closing.
8 And we were satisfied that in addition to Oldcastle,
9 in conjunction with the party that will be acquiring
10 the orange grove, in addition to that being the
11 highest bid, the certainty of closing and the ability
12 to close as early as Wednesday of this coming week was
13 something that was very important to us. So we look
14 forward to the conclusion of this proceeding and
15 moving on to a closing. Thank you.

16 THE COURT: I would now like to hear from
17 counsel for Manatee -- Manatee Port Authorities.

18 MR. DUNCAN: Yes, your Honor.

19 THE COURT: And the first question to you
20 is is this the most useful use of this -- yeah.
21 Should I talk to you now or should I talk to you after
22 recess?

23 MR. DUNCAN. Matthew Duncan from Manatee
24 County Port Authority. I was in discussions with
25 Mr. Rosenblatt before the hearing. One, the Port

1 Authority has a number of questions concerning
2 Oldcastle's intended use of the Port. Specifically
3 they're especially concerned as to how much waterborne
4 operations will take place at the Port and whether or
5 not Oldcastle intends to actively use the Port and to
6 return jobs to the County.

7 I was in discussions with Mr. Rosenblatt
8 before the hearing, and we think it would be useful to
9 continue those discussions. I also have a call in to
10 my client at this point.

11 THE COURT: Well, then we'll suspend this
12 discussion until after the afternoon recess.

13 MR. DUNCAN: Very good, your Honor.

14 THE COURT: I'd like to hear from counsel
15 -- from Mr. Jackson. Same question to you,
16 Mr. Jackson: Is this conversation most usefully had
17 now or after a recess?

18 MR. JACKSON: Thank you, your Honor.
19 Reginald Jackson on behalf of National Lime & Stone.
20 Your Honor, we're always ready, willing and able to
21 talk about a potential resolution. Discussions thus
22 far, although they've been limited, do not look like
23 they will be fruitful. But that being said,
24 Mr. Rosenblatt and I have not talked today, and I
25 don't know if he has anything that he wants to suggest

1 beyond what was talked about yesterday. So I'm not
2 sure whether the addition of the bank will be helpful,
3 but certainly we're willing to make an effort.

4 THE COURT: It wasn't as late a night for
5 me as it was for some of you, but it was pretty late.
6 So I just want to make sure that what I think I know
7 is accurate. I understand -- I think I understand
8 that your client's lease started as of January 2009;
9 is that correct?

10 MR. JACKSON: That is correct, your Honor.

11 THE COURT: And it's a ten-year lease and
12 two five-year renewals?

13 MR. JACKSON: That's correct.

14 THE COURT: Is there -- does the
15 documentation of the lease address the existing
16 mortgage or mortgages on the property? Was there any
17 discussion -- are you --

18 MR. JACKSON: There's no --

19 THE COURT: Do you have any evidence to
20 present today, documentary or otherwise, with respect
21 to the priority between filed mortgage and lease on
22 the property?

23 MR. JACKSON: Your Honor, we don't --
24 there's no subordination agreement that exists. And
25 we don't contend that the lease is prior to mortgage.

1 But what we do contend is that 363(f)(1) does not
2 provide what the Debtors and what the counsel for
3 Oldcastle has indicated relative to how that section
4 works as to the ability of the Debtor to sell free and
5 clear of an interest in property. The Debtor as
6 opposed to a mortgagor -- mortgagee, rather.

7 We understand that a mortgagee can file a
8 foreclosure action with the State law and wipe out a
9 lease.

10 THE COURT: Another way to put my question
11 to you, is there any -- do you wish to present any
12 evidence today?

13 MR. JACKSON: As to priority?

14 THE COURT: As to anything?

15 MR. JACKSON: Your Honor, only to the
16 extent that we've indicated in our papers the use to
17 which the property has been put and the significance
18 of the property to the operations of National Lime &
19 Stone. I'm not sure that that's in dispute here, that
20 significant piece of property. And Mr. DeMarco
21 already indicated that we have significant operations
22 there. So from that standpoint, that would be the
23 only thing we would address.

24 And the amount of potential damages, while
25 it's significant, your Honor, I don't know that it's

1 -- it's relevant. As to the legal issues before the
2 Court, I think whether the damages are 2 million or 5
3 million, the legal issue is the same, although the
4 damages would be significant.

5 Other than that, Mr. DeMarco has indicated
6 that the Debtor is not contesting that the property is
7 significant and an integral part of National Lime &
8 Stone's operations. So but for that, your Honor, we
9 wouldn't present any evidence.

10 Excuse me, your Honor. If the Court felt
11 that it wanted to hear about that specifically, we
12 would certainly do so.

13 THE COURT: I have the same answer to your
14 query about that as I do to every other one. The
15 Court doesn't have preference -- sometimes it has
16 preferences, but it doesn't matter.

17 MR. JACKSON: I understand, your Honor.

18 THE COURT: It's for you to present your
19 case. And I want to make sure you get a chance to
20 fully present your case. But I'm not looking for
21 anything in particular.

22 MR. JACKSON: May I have a moment, your
23 Honor?

24 THE COURT: Yes. And you can tell me after
25 the recess as well if there's any evidence you want to

1 put on.

2 MR. JACKSON: At present, your Honor, we're
3 comfortable with the presentation I made earlier. If
4 that changes, I'll advise the Court.

5 THE COURT: I would like now to hear from
6 counsel for the Creditors' Committee. Good morning.

7 MR. HAMMER: Good morning, your Honor. My
8 name is Aaron Hammer. And I am with the law firm of
9 Freeborn & Peters in Chicago. And I represent the
10 official Committee of Unsecured Creditors for Schwab
11 Industries, Inc. and their affiliates.

12 First, as a threshold matter, let me
13 apologize for the shuffling that's occurring behind me
14 and that I've been part of during the bulk of the
15 presentation.

16 THE COURT: I've been barely aware of it.

17 MR. HAMMER: At around two o'clock this
18 morning, my partner, who is with me, Mr. Thomas
19 Fawkes, and Mr. Lauter, were either volunteered or
20 were conscripted into handling the Sale Order, which
21 is roughly 40 pages now. And we're working diligently
22 to collect comments from the group.

23 As a second matter, I'd like to introduce my
24 partner Richard Lauter, my partner Thomas Fawkes, from
25 Freeborn & Peters, who have been representing the

1 Creditors' Committee with me, our local counsel, Doug
2 Lutz from Frost, Brown, Todd, and our financial
3 advisor, Connolly McKenzie, Mr. Joseph Garrity, and
4 Mr. John Peacock, who have been working with us since
5 the Committee was formed and retained their
6 professionals on March 9th.

7 I'll be brief, your Honor, but still create
8 a record, and that's to let you know that there's five
9 members on this Committee: Holcim U.S., Euclid
10 Chemical, St. Mary's Cement, Cemex, and National Lime
11 & Stone.

12 THE COURT: Only three of whom objected to
13 the sale, right?

14 MR. HAMMER: Some very, very large
15 companies. I understand that Cemex might be one of
16 largest companies in the world.

17 THE COURT: For those of you who are new to
18 my courtroom, please understand that while I sometimes
19 introduce levity, I take everything very seriously.

20 MR. HAMMER: Jokes are good. We could use
21 more jokes.

22 THE COURT: So every once in a while a
23 little bit of laughter is perhaps useful.

24 MR. HAMMER: Since the appointment of the
25 Creditors' Committee, the Committee has been very

1 active and supportive of a fair and open auction
2 process. The Committee's been involved and very
3 active as a Committee themselves. There have been
4 weekly meetings. Committee members have attended
5 virtually every court hearing, including National Lime
6 & Stone here today. And members of Holcim, who we
7 met, were at breakfast this morning. And three or
8 four Committee members attended the auction yesterday,
9 starting at 10 a.m., and some were there with us late
10 past midnight.

11 The public filings by the Committee have
12 been critical of the process. And there have been
13 some adversarial moments with Mr. DeMarco and
14 Mr. Oscar as well as Mr. Lepene and Mr. Tuggle. This
15 has been a hard fought case in some respects. But
16 behind the -- behind closed doors, there has been an
17 excellent working relationship amongst all of the
18 parties in interest to move the process forward and to
19 get to the right result.

20 And today, your Honor, I believe is that
21 crowning moment where the right result is before your
22 Honor. Tremendous amount of time and brain power has
23 been put into a process that brings us here before you
24 today. With Oldcastle having been the highest and
25 best bidder, the Committee can support the Debtor's

1 auction and sale process under the terms that will be
2 presented to you in the proposed Sale Order. That
3 includes the factual findings as to good faith conduct
4 and fairness in the entire process. And we're
5 comfortable with that Sale Order.

6 We've spent a lot of time negotiating it
7 with the various parties in interest. And we have to
8 thank the pre-petition lenders for being reasonable
9 and generous with the estate and unsecured creditors
10 in a case that would otherwise result in a zero
11 recovery for unsecured creditors.

12 There stands a nice prospect for a decent
13 recovery for unsecured creditors and for the estate to
14 be left in good shape post-closing.

15 THE COURT: What do the schedules show,
16 currently show in terms of unsecured claims?

17 MR. HAMMER: The schedules show \$13 million
18 of unsecured claims. We understand there's a
19 potential PPCG deficiency claim of 12 million. So
20 we've been operating under the assumption that there's
21 25 million in unsecured debt. With the banks
22 weighting their deficiency claim, that adds value to
23 the pot for unsecured creditors.

24 The numbers that Mr. Lepene quoted you
25 earlier are accurate. The Committee professionals

1 estimate between 2 and a half and \$3 million of total
2 carve outs for unsecured creditors, including
3 professional fees, plus avoidance actions, potential
4 litigation claims. Add a 2 and a half-million dollar
5 number, including professional fees, that would be a
6 10 percent return for unsecured creditors in a case
7 where they would otherwise receive nothing because of
8 the banks' deficiency claim. The bank is taking a
9 haircut. We are thankful for the carve outs that have
10 been made to us.

11 And we also want to let your Honor know that
12 the timing is critical from the Committee's
13 perspective, given the expiration of the lien
14 investigation period on May 31st. The whole process
15 that we've set forth doesn't work unless we get the
16 Order signed today. So that remains a material
17 component of the process. And hopefully, we, as a
18 group of professionals, can give you what needs to
19 make that happen.

20 Mr. Lepene was correct in his description of
21 the consideration being provided by Oldcastle to the
22 estate. \$900,000 worth of unpaid administrative
23 claims are being paid by Oldcastle, 500 --

24 THE COURT: You don't have --

25 MR. HAMMER: The point is, your Honor, the

1 estate is going to be left in great shape
2 post-closing. And it's the result -- the effort of a
3 lot of the professionals in this room to carefully
4 show that that happened.

5 Your Honor had a question, and I'll answer
6 that, and then I'll answer any questions you might
7 have. You asked for our analysis as to the effective
8 return for creditors if National Lime & Stone was
9 dispossessed from the property subject to their
10 objection. Our understanding is that their potential
11 damages claim is about \$1.8 million. And Mr. Jackson
12 can correct me if I'm wrong, but in the end, whether
13 it's 1.8 million or 2.5 million or 1.5, the claim will
14 dilute recoveries for unsecured creditors. No
15 question.

16 Is it of a significance that it will move
17 the Dow one way or another? What will move the Dow
18 one way or another is avoidance actions, litigation
19 claims. The estate is being put in a good position
20 for that next chapter of this case. So with that,
21 I'll ask your Honor if there's any questions, and
22 answer anything that you might have.

23 THE COURT: Not right now. Thank you.

24 MR. HAMMER: Thank you, your Honor.

25 THE COURT: Is there anyone else who wishes

1 to be heard prior to taking a recess to allow further
2 administration and possibly negotiation?

3 (Silence.)

4 THE COURT: It's now 11:34. I assume that
5 we've opened the witness rooms. Those are available?
6 And we used to have a room down the hall -- in GSA.
7 But right now that's under construction. So there are
8 two witness rooms. And in addition, there are no
9 other hearings in the courtroom today. We have a
10 cafeteria on 3, which is actually pretty decent. And
11 so given all those factors, what I would suggest is a
12 70-minute recess; that we would reconvene at 12:45.
13 Does that seem like -- is there any reason why
14 somebody thinks that more time is needed?

15 (Silence.)

16 THE COURT: Okay.

17 MR. DEMARCO: Your Honor, that appears
18 sufficient. Thank you.

19 THE COURT: Okay. I mentioned yesterday
20 when things were being moved up here, I do permit
21 bottled water in the courtroom. Anybody can bring
22 bottled water. I don't want any other food in the
23 courtroom. But with that, go see what you can
24 accomplish in the next 70 minutes. Thank you very
25 much.

1 (Recess taken.)

2 THE COURT: Please be seated.

3 Mr. DeMarco?

4 MR. DEMARCO: Thank you, your Honor. The
5 70-minute recess, I think, was extremely helpful.

6 THE COURT: 70-minute plus. How many
7 minutes?

8 MR. DEMARCO: We appreciate that. We've
9 circulated an Order, which although we're still
10 flyspecking, I believe, the Debtor's committee lender
11 and stalking horse bidder are in substantial
12 agreement, not to say that we wouldn't have some
13 tweaks here and there.

14 As for the Port and for NLS, I can report
15 that there's been progress but not resolution. And
16 unless there's some late-breaking news, I don't
17 believe there's going to be resolution in the near
18 term. What I might suggest to the Court would be if
19 the Court would want to walk through this Order with
20 the parties or take a recess so the Court would be
21 sufficiently informed to do that. And at the
22 conclusion of that, that we take up the objections if
23 they're not then resolved.

24 THE COURT: I'm not going to go through
25 this with counsel. We were reviewing it back in

1 chambers. I think given the limited amount of time, I
2 suggest -- (inaudible). Let me hear -- in counsel for
3 the Port --

4 MR. OSCAR: Your Honor, Mr. Oscar. Thank
5 you very much, your Honor. During the recess, I
6 received a call from the Debtor's Board. There's four
7 members of the Schwab family, and they wanted to
8 reconvene the Board meeting. And we just concluded
9 about a 40-minute Board call. And let me report to
10 you that the Board is deadlocked. Two of them favor
11 the Oldcastle. Two favor the Cement Resources
12 transaction.

13 And I think Mr. DeMarco laid out the facts
14 for you. And the other parties have their views, and
15 I hope we can proceed. But that's the state of
16 affairs.

17 THE COURT: Well, given, again, the
18 shortness of time -- let me make a few inquiries. I'm
19 not sure -- this isn't a CLE program. The motion --
20 the Motion to Sell was brought. The Motion to Sell
21 was authorized by the Board; is that correct?

22 MR. OSCAR: That is true.

23 THE COURT: The Motion to Sell having been
24 brought as an authorized agent of the
25 Debtor-In-Possession, does the Board think that they

1 override the Court's judgment in terms of what would
2 be the highest and best offer for the assets being
3 made?

4 MR. OSCAR: Absolutely not. The Board
5 believes that and the Board's counsel believes that
6 the Court and the parties are entitled to know what
7 the Board's views are in reaching a decision. And
8 since there was an indication from what was reported
9 earlier, we felt it was incumbent upon us to further
10 report.

11 THE COURT: As I said, levity is about the
12 only place to turn. At what point is the Board
13 estopped? This hearing opened with the report that
14 the Board had met, and that the Board had found the
15 Oldcastle offer to be the highest and best. Could you
16 please disclose to me what you know about what would
17 be the continuing involvement of any insider with
18 respect to either the Oldcastle deal or the Cement
19 Resources deal?

20 MR. OSCAR: I'd be happy to, your Honor. I
21 don't know anything specific. I do know that the
22 shareholders have had discussions with each of those.
23 It's my understanding there's been no change in the
24 bid from Cement Resources that Mr. DeMarco laid out
25 for you since this morning to cause that -- a vote

1 change. But they have had discussions with each. And
2 I don't know the level of the magnitude. And,
3 frankly, we've tried to stay out of them. But we've
4 disclosed in our initial motion that there were
5 discussions with Cement Resources. And I also am
6 aware that there have been discussions between
7 Oldcastle and the Schwab family members.

8 THE COURT: What do you know about Resource
9 Land Holdings?

10 MR. OSCAR: They're Colorado-based. My
11 understanding is they're a private equity firm that
12 invests in real estate. I believe their counsel is
13 here as well.

14 THE COURT: Sir, if you could come forward.

15 MR. RABB: Good afternoon, your Honor,
16 Howard Rabb on behalf of Resource Land Resources --
17 Resource Land Holdings. I was brought on two days
18 ago.

19 THE COURT: Well, you're a whole day, at
20 least, ahead of me. Your client is successful bidder
21 with respect to what's called the orange grove
22 property, correct?

23 MR. RABB: Correct.

24 THE COURT: What do you think, if anything,
25 about whether any of the current management or equity

1 holders would have any involvement with Resource Land
2 Holdings in their operation of this orange grove?

3 MR. RABB: Any of the current shareholders,
4 directors, officers of the Debtor?

5 THE COURT: Any insider of the Debtor.

6 MR. RABB: I believe there is no
7 involvement whatsoever. My client is a Colorado-based
8 company that has been solicited by the sale process,
9 notices, the advertisement that went out. And
10 that's --

11 THE COURT: I understand you make the point
12 they made a very good deal. That's what happens in
13 bankruptcy.

14 MR. RABB: I think it's a fair deal.

15 THE COURT: But it's been exposed to the
16 market.

17 MR. RABB: It's been exposed to the market,
18 that's correct.

19 THE COURT: And no one has suggested this
20 wasn't -- although it was -- the time for this was
21 pretty short, that it wasn't -- there was apparently
22 in the cash collateral, the early cash collateral
23 hearings the suggestion that this property had a much
24 higher value.

25 MR. RABB: I think the difficult part as

1 far as the value of this property -- and I know that
2 there were some initial hearings dealing with its
3 value, dealing with the minerals that are underground.
4 My clients view the availability of those minerals to
5 be extremely long term. I mean, we're talking in
6 excess of 7 years -- max is 7 to 10 years, actually.
7 There was -- in fact, there was a test case kind of in
8 that same area, I'm told, that is sort of a row of
9 property that's available to quarry. And that
10 property -- yesterday it was in front of the permanent
11 processor, and it was unsuccessful. So just to give
12 you an idea of whether or not our permit would ever be
13 able to move forward.

14 THE COURT: But the best of your knowledge,
15 your clients like to buy real estate, were attracted
16 to look at this pure and simply because of the nature
17 of the assets?

18 MR. RABB: My clients are going to operate
19 a citrus grove and potatoes. And hopefully somewhere
20 down the road they'll be able to take advantage of the
21 ability to quarry the property.

22 THE COURT: Thank you very much.

23 MR. RABB: Thank you, your Honor.

24 THE COURT: Let me hear from Creditors'
25 Committee counsel.

1 MR. HAMMER: Good afternoon, your Honor.
2 Thank you very much.

3 THE COURT: First, it's my habit to share
4 my working hypothesis, and it's only a working
5 hypothesis, but maybe it moves things along. I think
6 had the Board not authorized the motion -- the 363
7 motion, we'd have a different law school exam. But
8 the Board authorized the 363 motion. And while the
9 Board's view is evidence, I don't view it as
10 controlling the outcome of this Court hearing. This
11 Court hearing is about how to get best value for the
12 creditors of this estate.

13 I know that one of the things that had been
14 bumping around in this case was certain 2004 exams
15 that your client wanted to conduct. And that, as I
16 understand it, was partially granted and partially
17 adjourned.

18 MR. HAMMER: Granted with respect to the
19 insiders, and it will be withdrawn with respect to the
20 lenders upon entry of the Sale Order, your Honor.

21 THE COURT: Okay. As you said in your
22 earlier remarks, there were some adversarial blows
23 struck earlier in this case. And I doubt that those
24 swings are taken lightly. Do you have any concern --
25 do you have any information that should be brought to

1 the attention of the Bankruptcy Court that would in
2 any way impede a good faith binding to be included in
3 the Order with respect to this sale?

4 MR. HAMMER: Not with respect to Oldcastle
5 and Land Resource holdings, your Honor. Clearly --
6 let me say I thought I was very gracious this morning
7 to everyone involved, including the Debtors and their
8 professionals --

9 THE COURT: If you do say so yourself.

10 MR. HAMMER: You read our papers. I'm sure
11 that Mr. Oscar didn't intend to bring this problem
12 before your Honor.

13 THE COURT: No. Everybody -- we are where
14 we are. Wherever you go, they are.

15 MR. HAMMER: We might not be so gracious
16 this afternoon. Clearly in our mind, your Honor, you
17 have jurisdiction, given the filing of the Motion to
18 Sell the assets, to enter an Order authorizing the
19 sale of the assets to Oldcastle and Land Resource
20 Holdings. I do not believe that the asset purchase
21 agreement proffered by Oldcastle contains a
22 requirement that there be a Board resolution in favor
23 of the sale. And if there was, I'm sure
24 Mr. Rosenblatt's client would waive it.

25 Your Honor, here's what we know: We know on

1 the one hand Cement Resources has a lower offer, a
2 materially lower offer. The Oldcastle/Land Resource
3 holding bid was declared highest and best at the end
4 of a 12 to 14-hour auction yesterday. We know that
5 the Cement Resources transaction has insider element
6 to it. The extent of those insider elements have
7 never been fully disclosed to us. It's always been
8 fuzzy math. It's still being worked out. But there
9 is clearly a continuing role for management and
10 insiders contemplated under that transaction. Maybe
11 there's nothing wrong with that. Maybe there is,
12 depending on the scope of it.

13 THE COURT: Whatever that offer the Chapter
14 11 Debtor was seeking to have approved in an Order I
15 would be asked to sign. I would want to know about
16 that. But that is not the offer. And --

17 MR. HAMMER: I can tell you my
18 conversations with employees that call me up as lead
19 counsel to the Creditors' Committee and ask me and
20 offer information. And they are interested in what's
21 going to happen. They're watching this proceeding.
22 And they say, of course, management has a continuing
23 role in Cement Resources transaction. It's a private
24 equity fund, a financial buyer. And I don't think --
25 what my understanding is, the everyday average

1 employee doesn't view that transaction as having the
2 stability that's associated with being with a
3 strategic competitor, like Oldcastle.

4 I don't believe that the Oldcastle/Land
5 Resource holding bid has -- I don't believe they
6 anticipate to retain management going forward. I
7 guess it's always a possibility. But you clearly have
8 two different go-forward concepts here. And that's
9 been the battle from the beginning.

10 And here we are with one, hopefully, last
11 ditch attempt to derail a process that we have worked
12 extremely hard for.

13 THE COURT: And on the glass is half full
14 side, what Mr. Oscar has reported is not that the
15 Board has reversed its position, but, rather, is
16 deadlocked. And I think a deadlocked Board doesn't
17 change the earlier action. I mean, my days as a
18 corporate lawyer could be measured in a few calendar
19 squares. But if there is an action by the Board and
20 then it's revisited, and there's a deadlock, then it
21 would -- it would seem to me that the earlier majority
22 vote continues to control.

23 Again, I put that out there because that is
24 the working hypothesis that would inform my analysis.
25 And if anyone wants to point out why I'm not correct

1 about that, I really would welcome a tutorial on the
2 applicable corporate law.

3 MR. HAMMER: Clearly, from my perspective I
4 believe your Honor has the ultimate determination and
5 jurisdiction to make the determination as to the
6 highest and best bid. And it's up to the buyers to
7 accept whether they'll close under that condition.
8 Thank you.

9 THE COURT: Let me hear from Oldcastle.

10 MR. ROSENBLATT: Your Honor, I really -- I
11 don't even know where to begin on what has transpired
12 during this process. And it is beyond outrageous what
13 was just told to the Court. Throughout this whole
14 process, my client, at least we believe, was prejudice
15 against to avoid them participating in the auction
16 process. We had been told by Western Reserve as we
17 were submitting our proposals that we were the highest
18 bid dollar-wise, yet, we were not selected as the
19 stalking horse party.

20 Not only were we not selected as the
21 stalking horse party, but the Debtor filed an
22 emergency motion seeking to foreclose us from further
23 bidding on the assets because we were not seeking to
24 include the orange grove in our bid. And the motion
25 that the Debtor filed to establish amended bidding

1 procedures, because the original bidding procedures
2 contemplated submitting component bids, the revised
3 bidding procedures would require bidders to bid on all
4 assets only.

5 So notwithstanding the fact that my clients
6 bid on three of the four assets, plus the remainder
7 value of the fourth asset was higher than the Atlas
8 bid, they nonetheless went forward with the Atlas bid
9 and proposed to exclude my client from further
10 bidding --

11 THE COURT: Is Atlas bid -- (inaudible).

12 MR. ROSENBLATT: Yes, Cement Resources.

13 And then proposed something like a 6 percent combined
14 break-up fee expense reimbursement, or something
15 higher than that. It was so high I'm surprised I
16 don't remember what the amount was -- but some
17 ridiculous number -- when at the time my client had a
18 higher and better bid on the table. At least in our
19 opinion. And maybe there's a dispute over that. But
20 there's always been interest in the grove. And one of
21 the grove bidders could easily have been paired up
22 with us at that time, like they were last night, to
23 arrive at a higher and better bid.

24 So fierce objections were filed to the
25 Debtor's emergency motion. And not only that, but

1 they sought to severely constrict the time frame for
2 other parties to come in and bid. So people filed
3 fierce objections with regard to the changes that the
4 Debtor made to the bidding procedures to accelerate
5 the process and to exclude anyone else from the
6 process. And the Debtor backed off -- in light of
7 those objections, the Debtor backed off on the
8 requirement that bids needed to be submitted for all
9 assets and still allowed people to submit component
10 bids. And that was at the hearing.

11 Well, what happened was the Debtor filed an
12 emergency motion on, like, Sunday night to have this
13 heard in, like, two days, or some very short period of
14 time. And the Judge was unavailable so he heard it
15 the following week. And so we said we still think we
16 need to be the stalking horse party or at least there
17 should be a stalking horse party and the estate should
18 not be penalized for a 6 percent break-up fee when we
19 have a higher and better bid on the table.

20 So we cobbled together schedules ourselves
21 from the stalking horse bid that was filed with the
22 Bankruptcy Court, signed an APA and delivered it to
23 the Debtor prior to the hearing that was scheduled a
24 week later. And on a value basis, our bid was
25 something like 5 to \$10 million higher than the Atlas

1 bid. It was -- or 4 or 6. Some large amount that was
2 higher. And the Debtors still selected the Atlas bid
3 as the stalking horse bid. But okay. That was fine,
4 because we were now allowed to bid on a component
5 basis.

6 Well, the process went on. And then we're
7 told we're competitors so we're not allowed to see
8 certain contracts that the Debtor has, which are
9 material to the business, because those contracts will
10 need to be fulfilled by the buyer after closing, but
11 we were told we could see them. So instead of keeping
12 a fair plane and saying whether you're a strategic
13 buyer like my client or a financial buyer, no one can
14 see them, my understanding is Atlas, as a financial
15 buyer, got an open book and got to see all those
16 contracts. So we were prejudiced in that regard.

17 And I'm really sorry, your Honor, that I
18 have to bring this up, because my client and I decided
19 that we were going to win this auction on an
20 aboveboard basis, and we were not going to raise these
21 little issues. We were just going to jump over each
22 roadblock that was put in our way. And our goal was
23 to get to an open auction; highest dollar takes it.
24 That was our goal here. But we kept getting these
25 roadblocks put in our way.

1 We would show up to visit sites. The
2 security guard would say you're not authorized to see
3 this site. And then the next day we were told oh, the
4 security guard made a mistake. Okay. But we worked
5 through that issue. And other things happened as
6 well.

7 And we saw in the Atlas bid that they were
8 negotiating to give employment agreements to
9 management as well as an equity piece in the acquiring
10 entity to Debtors' management. So we said okay. It
11 looks like management is favoring that bid because
12 they're doing that. We have no choice but to propose
13 the same thing to management, at least, to equalize
14 the playing field.

15 So my client prepared some management
16 agreement and a performance agreement and submitted it
17 to the Schwabs. And that's -- they have -- I don't
18 believe they've responded to the agreement. I think
19 they still have that.

20 And then we submitted our bid, and we were
21 qualified for the auction as well as something like 8
22 or 10 other parties. So then an initial bid grid was
23 circulated for the auction. And throughout the entire
24 case, the assets were -- we were leaving behind
25 certain assets in addition to Corkscrew Road, like

1 accounts receivable and a few pieces of real property.
2 Each month the case went on the assets we were leaving
3 behind, the assets got devalued further and further,
4 to the point where when we showed up at the auction,
5 our bid was no longer \$5 million better than the Atlas
6 bid. It was something like \$100,000 less than the
7 Atlas bid. And we were told --

8 THE COURT: And whose valuation was that?

9 MR. ROSENBLATT: Western Reserve -- the
10 Debtor's valuation. It was the Debtor's valuation,
11 along with their investment banker, Western Reserve.
12 So we said fine. We're in the auction. We want to
13 bid. We're here to bid. So the Debtor raised a bunch
14 of tangible and intangible issues to us, like you're
15 not taking the accounts receivable. We consider that
16 to be a problem. We said okay. Fine. We bought the
17 account receivable.

18 They said you have an inventory adjustment
19 peg. We want you to remove that. We said fine.
20 We'll remove that. These are all things that happened
21 throughout the auction.

22 At one point in the auction we were \$500,000
23 better than Atlas. Atlas refused to advance their
24 bid. And the Debtor would not declare us the highest
25 and best bid. So at that point we said what's it

1 going to take for -- what's the dollar figure for us
2 to be the highest and best bid here.

3 THE COURT: You're talking now yesterday?

4 MR. ROSENBLATT: Yesterday, yes, last
5 night. And I'm sorry if I'm mixing it up, because I'm
6 really -- it's difficult to even think in light of
7 what's just happened. I said look, how much better do
8 I have to be than Atlas to be the highest and best
9 bid? Because the bidding procedures Order provided
10 for a \$1.9 million break-up fee. So I already had to
11 cover that, which Atlas got a credit before, and you
12 had to top the bid by \$250,000.

13 So I'm thinking, okay. Higher and better is
14 250. But no. Additional intangible issues were put
15 on my client. And I said okay. Well, tell me what it
16 is I need to cover. So people caucused and they came
17 back and they told me that even though I was \$500,000
18 higher than Atlas at the time, I needed to increase my
19 bid by another \$1.5 million to be \$2 million higher
20 than the Atlas bid as well as make a couple minor
21 adjustments, and at that time reduce the inventory peg
22 and another small issue or two.

23 So we thought about it, and we said okay.
24 This is not a fair process, but we're here to win
25 these assets. And if this is what it takes, then

1 we're going to do that. So we put the million and a
2 half dollars on the table. And we were \$2 million
3 higher than the Atlas bid at that time. Atlas then
4 made some changes to the bid resulting in them
5 becoming \$30,000 less than my bid. So they didn't put
6 additional cash on the table, but they agreed to
7 assume some additional expenses. I think they put
8 \$600,000 cash and they agreed to assume some
9 additional expenses. And now they're \$30,000 less
10 than my bid.

11 And at that point, the Debtor still would
12 not declare us the highest and best bid, even though
13 Atlas moved and didn't even cover where we were. So
14 they said do you have another bid. So we said okay.
15 Fine. This is still playing the game. It's still not
16 high enough. We'll bid what was at that time the
17 minimum bid increment of \$250,000. Okay.

18 So we said okay. We'll add another 250. So
19 now we're \$280,000 ahead of Atlas. And Atlas says
20 we're walking. They're going to leave. And they said
21 -- everybody said okay. Fine. We shook hands. And I
22 stayed up until I guess it was 4 in the morning
23 finalizing the APA and finalizing the Sale Order.

24 And Debtor's counsel was there. And the
25 bank's counsel was there. And Committee counsel was

1 there. And we all worked on the documents. And at
2 4 o'clock in the morning we had a substantial draft of
3 a Sale Order, although some additional changes had
4 been made. And we had a complete APA with schedules.
5 I went to sleep for 2 hours, drove down here.

6 I was told the Board was going to meet at
7 8:30, but given what happened, I couldn't have
8 imagined after I told them yesterday specifically at
9 the auction what is it going to take for me to
10 eliminate these, quote, unquote, intangibles that
11 other people don't have to eliminate -- I eliminated
12 them and I still wasn't declared the highest and best
13 bid.

14 So they came in this morning, and they said
15 okay. We had a Board meeting. You're the highest and
16 best bid. The court reporter was discharged. We're
17 spending time working on the Sale Order. I sent my
18 client home on a plane. And then they come in at this
19 last minute and say the Board split. You're still not
20 higher and better.

21 Now, I don't know what offer Atlas has with
22 management other than I was told that there are other
23 offers out there that are significantly better than
24 the offer my client made to the Debtors' ownership.

25 THE COURT: All right. Are you suggesting

1 that there was any intimation to you that Atlas was
2 aware of potential purchasers to whom it might put
3 some or all of these assets immediately or in the near
4 term?

5 MR. ROSENBLATT: My understanding is that
6 they were going to sell off some of the assets. But I
7 don't recall who told me that. I mean, they're a
8 financial buyer. There's a mix of assets here, ports,
9 orange grove. The orange grove also contains -- it's
10 11 acres of oranges, 600 acres of potatoes, and then
11 the cement terminals and whatnot.

12 My understanding is they were going to sell
13 -- they were going to sell off some of those
14 properties. My understanding is that they also may
15 have had a deal with the orange -- with the high
16 orange grove bidder to possibly flip the orange grove
17 to that buyer if they were the highest and best bid.

18 Toward the end of the auction, they cut a
19 deal with National Lime & Stone. And National Lime &
20 Stone stopped bidding at some point last night. They
21 then cut a deal with National Lime & Stone with regard
22 to this aggregate terminal that's the subject of their
23 objection. I raised an issue last night saying hey,
24 it seems like you guys are joint bidding. Are you?
25 And they disclosed that yes, they did reach an

1 agreement on some sort of terms with regard to Atlas
2 continuing to allow National Lime & Stone to use -- to
3 continue under that lease under some terms. But the
4 terms weren't disclosed to me.

5 THE COURT: I'm going to ask you to have a
6 seat.

7 MR. ROSENBLATT: Thank you, your Honor.

8 MR. LEPENE: May I be heard?

9 THE COURT: Yes, Mr. Lepene, you may.

10 MR. LEPENE: Alan Lepene on behalf of Key
11 Bank as agent for the pre-petition secured lenders.

12 Your Honor, I don't believe that it is
13 necessary to get into what transpired during the
14 auction, because I think your working hypothesis is
15 absolutely correct.

16 I will say that with respect to some of
17 these intangible issues, the secured lenders were
18 concerned about the fact that receivables were not
19 being purchased. And how do you value that if they're
20 left behind and then efforts made to go out and
21 collect them? What are they really worth under those
22 circumstances?

23 With respect to other issues, we were the
24 source of some of that concern. Our motives have
25 always been to generate the highest recovery through

1 the highest --

2 THE COURT: The most money you can for your
3 client. There's no argument there.

4 MR. LEPENE: Absolutely. And I think that
5 certainly has been the motivation behind the
6 Creditors' Committee as well. As I say, I think you
7 have analyzed this and you are spot on with respect to
8 the way you are approaching the issue that is now
9 before you.

10 The motion is before the Court. It is up to
11 the Court to determine the highest and best bid.

12 THE COURT: And let me -- it's now almost
13 two o'clock, but I'm going to refine my working
14 hypothesis. I believe that the auction process
15 certainly caused people participating in it to say
16 well, what is this worth to me. And Oldcastle decided
17 to go to the number that it went to.

18 This is not my case. But in signing a Sale
19 Order today, I may leave as an open issue the
20 entitlement of the so-called stalking horse to the
21 break-up bid, because I am concerned about what's been
22 reported. And I don't think that there is -- I think
23 that that is a severable issue. And I will allow
24 three minutes to each interested party who wants to be
25 heard on that topic.

1 And I'll start with you, Mr. Lepene.

2 MR. LEPENE: Okay. Well, let me just --
3 just a few other points. And I think to a certain
4 extent they weigh into the question that you're
5 asking. The views of the constituents obviously as to
6 what is the highest and best bid are relevant. But as
7 you say, it's evidence. It's up to the Court to make
8 the determination. The motivations behind the views
9 of the constituents are also relevant. Who are the
10 parties with the economic stake in the result of
11 either -- whether Cement Resources' bid were to be the
12 -- determined the winning bid or Oldcastle, who are
13 the parties with the economic stake.

14 It's the secured lenders and it's the
15 Unsecured Creditors' Committee. And the motivation of
16 both is to generate the highest recovery. You've
17 heard some statements made as to what may be
18 motivating the position of at least two of the members
19 of the Board of Directors. So that certainly is
20 something to take into account.

21 The one other point that I think is very
22 relevant in this regard is that the bid procedures
23 themselves, which were approved by Judge Kendig, and
24 Order of the Court, obviously something that had been
25 passed upon by the Board and approved by the Board,

1 specifically provide that the selection of the winning
2 bidder at the auction has to be with the consent of
3 the secured lenders. The secured lenders will not
4 consent to a sale to Cement Resources based on the
5 results of the auction that has been conducted.

6 The secured lenders have determined that it
7 is Oldcastle who's made the highest and best bid. And
8 so consistent with the bid procedures at this point,
9 it is simply not something that the secured lenders
10 are willing to consent to in terms of the -- a
11 possibility that a sale to Cement Resources, who has
12 bid less, would be determined to be the winning
13 bidder.

14 And, again, this is something that was
15 passed upon by the Board. It was approved by
16 Judge Kendig in a previous Order. I think it's
17 controlling under those circumstances.

18 Relative to the issue of the break-up fee, I
19 really don't have any position in that regard. We
20 were not privy to whatever discussions were going on
21 as between the Schwab family and Cement Resources or,
22 for that matter, whatever discussions may have gone on
23 between the Schwab family and Oldcastle.

24 THE COURT: You're beyond your 2 minutes.

25 MR. LEPENE: I am, your Honor, and I'll sit

1 down.

2 MR. ROUTH: Your Honor, Ryan Routh, Cement
3 Resources.

4 THE COURT: Please come forward. Again,
5 say your name.

6 MR. ROUTH: Ryan Routh, R-o-u-t-h, Cement
7 Resources, LLC. Your Honor, I think what just
8 happened is the one thing we tried at all costs to
9 avoid happening today. And, you know, may I ask I
10 have longer than 3 minutes, because I feel other
11 parties have had longer than 3 minutes.

12 THE COURT: Given my working hypothesis, I
13 think you're entitled to longer than 3 minutes.

14 MR. ROUTH: Thank you, your Honor.

15 Last night when the auction ended, my client
16 felt they were the highest and best bid. We were
17 \$280,000 behind in cash. We felt there were
18 intangible items to our bid that made us the highest
19 and best bid. Mr. Rosenblatt, I'm sure, can come up
20 here and argue his intangibles. We had our
21 intangibles. We had the National Lime objection
22 resolved. We had the Port objection resolved if we
23 were the winning bidder. He had things probably as
24 well.

25 We did not come here to challenge the sale.

1 We said we think we're highest and best. But the
2 Debtor made a ruling, the Debtor's professionals made
3 a ruling. My clients didn't want to litigate today.
4 We came here to make sure our break-up fee got
5 approved.

6 Your Honor, if we were told we were the
7 highest and best bidder, we would have stayed up all
8 last night, just like Mr. Rosenblatt did, and we would
9 do the deal. We made the offer -- if you told us
10 right now that you wanted us -- wanted to pursue the
11 Cement Resources deal, we would do the deal. But we
12 did not come here trying to upset the deal. And I
13 want to make that very clear for the Court.

14 Your Honor, my client knows that Oldcastle
15 is a large public company, like Mr. DeMarco said at
16 the start of the hearing. And in any bidding war,
17 they probably could outbid us. When the Debtors said
18 that the \$280,000 spread was enough for them, we said,
19 you know, we could be here all night. We're just
20 going to let it go. And that was that.

21 There's so much that was said before I got
22 up here, your Honor. My apologies. We're very
23 mindful of the process, and we were trying to be very
24 careful in what we did. When we were looking to buy
25 the company -- my client started looking to buy the

1 company prior to the bankruptcy. They met with the
2 Schwab family. The Schwab family knew them. They
3 were talking to them. They had discussions.

4 You know, like Mr. Hammer said, my clients
5 are financial buyers. They're private equity funds.
6 They wouldn't come in and run the company themselves.
7 They would need somebody to run them. It's absolutely
8 natural for them to have discussions regarding would
9 you be interested in staying if we bought the company.
10 Are you asking for \$20 million a year. There's
11 nothing signed. There's no firm offer out there.
12 Some numbers have been discussed.

13 The Schwab family also -- you don't know all
14 of the facts of the case, obviously, but they own a
15 significant number of vehicles that are used in the
16 business. Anybody who buys the business -- maybe a
17 strategic buyer has replacement vehicles. Somebody
18 buying the business as a whole needs those vehicles.
19 We had discussions about, you know, can we -- would
20 you sell the vehicles to the business.

21 When the discussion turns to do we want to
22 pay cash or do the Schwabs want to take equity, we
23 listened. There were discussions in that regard. I
24 don't believe it was giving equity over the head of
25 the banks.

1 THE COURT: Let me ask you, were the
2 Schwabs separately represented? Did they have
3 separate counsel?

4 MR. ROSENBLATT: We are not counsel.

5 THE COURT: I understand that. Okay.

6 MR. ROSENBLATT: We don't know if they have
7 counsel, your Honor.

8 MR. ROUTH: And nobody from my firm has
9 spoken to them or their counsel. The business people
10 have had discussions. We've asked about the substance
11 of those discussions, and we've been told -- I've been
12 told by my clients what they've been.

13 Your Honor, you know, Mr. Rosenblatt makes a
14 lot of allegations about the entirety of the process.
15 I don't want to go back -- I don't agree with most of
16 the facts.

17 THE COURT: And let me just say I'm
18 babysitting this case.

19 MR. ROUTH: I understand.

20 THE COURT: I'm babysitting this case today
21 because there are -- there are time exigencies that we
22 in the Northern District of Ohio work very hard to pay
23 attention to.

24 MR. ROUTH: Understood.

25 THE COURT: And what I am suggesting today

1 is that the Sale Order -- the authorization of the
2 Sale Order need not close this issue. I don't intend
3 myself to get to resolution of this issue.

4 MR. ROUTH: Your Honor, let me just -- can
5 I just --

6 THE COURT: Well, you know what I'm going
7 to do, I'm going to take a recess -- because this has
8 been sprung on you.

9 MR. ROUTH: Can I just make one point about
10 the exigencies?

11 THE COURT: Yes.

12 MR. ROUTH: The original bid procedures
13 order that was existing in -- that was entered in mid
14 to late April had an auction that was going to be held
15 all the way out in June, and with a potential closing
16 date in the middle of June. And there was a cash
17 shortfall in the case, your Honor. And all of a
18 sudden, the banks are being asked to fund the case for
19 a while. And at the exact same time we were trying to
20 negotiate our stalking horse bid. And we were asked
21 if we could close on an accelerated timeline.

22 We want the business. We said yes. So I
23 almost feel as if -- and when the motion was filed,
24 when the motion was filed, the revised bid procedures
25 motion was filed that would shorten the timeline, we

1 disclosed that we were talking with the Schwabs. It
2 was out there. We hadn't been asked any questions
3 about that. We saw the Committee's objection. But
4 other than reading their objection, they never came to
5 talk to us --

6 THE COURT: Sir, sit down. I do not
7 tolerate anyone speaking other than the person who is
8 at the podium with the Court's permission. You will
9 be given ample time. Thank you.

10 MR. ROUTH: So I guess, you know, we had the
11 break -- the break-up fee was clearly approved.
12 Judge Kendig's Order presently says it's supposed to
13 be paid from the sale proceeds. Paragraph 11 of his
14 May 14th order says that that's what's supposed to
15 happen. There was no objection to our break-up fee
16 filed anywhere until now.

17 And now, my client has not come in and
18 objected to the sale. We haven't come in and said,
19 you know, somebody -- somebody asked us if we would
20 increase our offer. We said we don't want to upset
21 the process. We're not going to increase our offer.
22 We're not going to be bomb throwers. And I almost
23 feel like there's absolutely nothing we could have
24 done to protect the right that we thought we
25 guaranteed back on May 14th. I almost -- help me know

1 what I could have done, your Honor.

2 THE COURT: I don't tell counsel what they
3 could have done or what they should do.

4 MR. ROUTH: Fair point.

5 THE COURT: Because that's why all of you
6 get the big bucks. You can look at the Congressional
7 record about judicial pay. But I love my job.

8 I am not suggesting that \$1.9 million of the
9 sale proceeds would not be available for the payment
10 of the break-up fee. All I'm saying is I do not think
11 that -- I think that that fund should be segregated,
12 and that Judge Kendig would decide whether all of this
13 was transparent enough when your client was designated
14 the stalking horse -- the stalking horse or not.

15 I do think that the 1.9 million would not go
16 anywhere without further Court Order. But I don't
17 think that -- I think that there is -- there have been
18 issues raised, and they may have been fully raised
19 earlier in the case. And were Judge Kendig sitting
20 here today, he might have told counsel for Oldcastle,
21 we have trod this ground before. I do think that it
22 is an issue which I feel far more comfortable
23 reserving.

24 MR. ROUTH: If I may make a proposal.
25 First, we believe that the break-up fee should be

1 approved. Absent that, we have an Order from
2 Judge Kendig that directs the winning bidder to pay
3 the stalking horse \$1.9 million. If your Honor simply
4 didn't rule on that issue in the Sale Order, we
5 believe this Order currently governs. If somebody has
6 allegations to make and wants to file a motion to
7 reconsider Judge Kendig's order, they can do that.
8 But right now, I have an Order of Judge Kendig that
9 hasn't been appealed.

10 THE COURT: Counsel -- (inaudible.)

11 MR. ROUTH: And I would -- your Honor, I
12 would note that it was an agreed order, agreed to by
13 the Committee and the banks as well as the Debtors.

14 THE COURT: All right. At this point, I'm
15 going to -- I'm not going to hear anything more about
16 the break-up fee right now. I think there are two
17 pending objections to the sale to Oldcastle which I
18 think take priority in terms of my intention. I'm
19 going to take -- I'm going to hear from counsel for
20 those two parties either now or after a recess, and
21 that's at their discretion.

22 But the only thing I'm going to take another
23 recess is hear from the two of them -- I'll take a
24 recess. I'll come back and I'll deal with -- I will
25 deal with those two objections.

1 And the language you handed up to me is
2 quite plain about the break-up fee -- the money for
3 the break-up fee doesn't become an asset of the
4 estate, although it also talks about it being super
5 priority. I love -- (inaudible) -- drafted. And I'm
6 not going to hear anything more right now. I'm going
7 to take the recess, except that I will hear from the
8 counsel for the two parties whose objections to this
9 transaction still are pending. Do you want to be
10 heard now or after recess?

11 MR. JACKSON: If it please the Court, your
12 Honor, Reginald Jackson on behalf of National Lime &
13 Stone --

14 THE COURT: We rely upon electronic
15 recording, so get yourself close to the microphone.

16 MR. JACKSON: I apologize, your Honor.
17 Reginald Jackson on behalf of National Lime & Stone.

18 Your Honor, we have no problem with going
19 after recess, given the discussions that we just had
20 here. We think the dust maybe ought to settle a
21 little bit and come back and take a fresh look at the
22 objection issues.

23 THE COURT: Okay. Mr. DeMarco, what is
24 your suggestion with respect to the length of this
25 recess?

1 MR. DEMARCO: I would yield to other
2 parties, your Honor.

3 THE COURT: Mr. Jackson, do you think any
4 progress can be made toward resolving your client's
5 issues during a recess?

6 MR. JACKSON: Your Honor, although there
7 were discussions during the break which were helpful,
8 Mr. Rosenblatt made himself available and we did
9 exchange discussions, we don't believe today we'll
10 make a progress that will result in the objection not
11 having to be heard. So a short recess is fine, your
12 Honor.

13 THE COURT: Same for the --

14 VOICE: That's correct.

15 THE COURT: Okay. Well, then we'll take a
16 10-minute recess. I notice we still -- our clock
17 still is on standard time. But we'll be back -- the
18 timepiece I'm using here says 2:15. Let's be back at
19 2:25.

20 (Recess taken.)

21 THE COURT: Please be seated. Okay. I'll
22 hear from Mr. Jackson first.

23 MR. JACKSON: Thank you, your Honor. If it
24 please the Court, Reginald Jackson, Vorys, Sater,
25 Seymour & Pease, on behalf of National Lime & Stone.

1 Your Honor, as the Court no doubt is well
2 aware, and I think the Court's read the limited
3 objection we filed and is familiar with the lease, we
4 appreciate the fact that this process, the 363 sale
5 process is a process -- the process that brings us
6 here today is important to all the parties here in the
7 courtroom. People spent a lot of time and a lot of
8 effort and a lot of money putting this deal together
9 and going through the sale process. And certainly we
10 respect that time and attention counsel has given to
11 the process.

12 In that connection, as Mr. DeMarco has
13 alluded to earlier, my client, National Lime & Stone,
14 was also substantially involved in this process. The
15 representative was chair of the Creditors' Committee.
16 And, likewise, they were interested bidder at the
17 auction yesterday, were an active participant until
18 the bidding just got too steep for them, your Honor,
19 and they just had to drop out.

20 So we're not here today to challenge the
21 Debtor's right to sell its assets, for the most part.
22 We're not trying to stop this proceeding or process.
23 But we are here to indicate that despite the
24 exigencies of the situation which indicate the 363 is
25 necessary to sell assets, that even in that context,

1 the rights of National Lime & Stone and other
2 interested parties need to be protected as part of
3 that process. And so in that context, our party is --
4 our client is subject to a lease, your Honor, with the
5 Debtor. The lease of property that's owned by the
6 Debtor that's included in the sale to Oldcastle.

7 As the Court noted, it's a 20-year lease.
8 We're into the second year of that particular lease.
9 And as our papers indicate, this particular property
10 is critical to this particular -- to our business.
11 And the business that we're in, your Honor, having
12 access within a 10 to 15 mile radius of your clientele
13 is significant and important. And that's what this
14 particular site gives to National Lime & Stone.

15 It's so critical that National Lime & Stone
16 has invested significant dollars, your Honor, in terms
17 of upgrading the property, maintaining the rail line,
18 and other steps which would have improved the property
19 to a significant degree. And if forced to leave,
20 National Lime & Stone would have to find a new
21 location, find the property, get it zoned to be able
22 to handle the same type of business --

23 THE COURT: I'm going to interrupt because
24 as you know, what my task today is is to apply the law
25 to the circumstances that apparently are uncontested.

1 Your client leased property at the beginning of 2009.
2 And when it leased that property, it either knew or
3 should have known that the property was subject to a
4 number of mortgages.

5 One of the most horrific parts of the
6 current residential mortgage crisis, as far as I'm
7 concerned, is people who rented houses and their
8 lessor wasn't paying the mortgage and suddenly they're
9 being evicted. And I think that is -- there are
10 direct parallels to your client's situation. The
11 difference, I would submit, is your client is a
12 sophisticated business entity which could have
13 insisted as part of the deal that there be a
14 subordination of the mortgagee's right.

15 And as I understood earlier today, you
16 conceded that there was no such agreement reached with
17 the mortgagees, whose security interest in these
18 properties predate your client's rights as lessees.
19 So your client's rights are -- your client could only
20 lease that which the lessor had, which was property
21 subject to a mortgage.

22 And in -- as I understand Ohio law -- and,
23 again, I'm absolutely serious about this. I welcome
24 any tutorials. But as I understand Ohio law, if the
25 mortgagor, lessor, is delinquent upon -- is delinquent

1 with respect to the obligations secured by the
2 mortgage, unless the mortgagee has agreed to the
3 contrary, the mortgagee has the right to foreclose the
4 property. And that right of foreclosure is a right
5 that the Debtor is arguing meets the obligation --
6 pardon me -- the description in 363(f)(1). Tell me
7 why they're wrong.

8 MR. JACKSON: Your Honor, two things, the
9 separation between Bankruptcy Law and state law is
10 significant here and who is trying to exercise those
11 rights. Under 363(f)(1), it applies to does the
12 Debtor have the right under state law to sell the
13 asset free and clear of the interest in question. We
14 would submit to the Court the Debtor doesn't have the
15 right.

16 For example, if the Debtor in a
17 non-bankruptcy context wanted to sell this property,
18 it could not sell that property to a third-party free
19 and clear of all leases. It couldn't do it. It is
20 true that a mortgage holder in a foreclosure context
21 could sell the property in a foreclosure context at
22 Sheriff's sale. But that's not what we have here. We
23 don't have a mortgagor -- or mortgagee, rather,
24 looking to sell this property at a -- (inaudible) --
25 context. We have the Debtor in its own capacity

1 filing a motion to sell property free and clear of an
2 interest that it created in a property. And that's
3 the distinction, your Honor. The distinction between
4 what the Debtor can do under state law as compared to
5 what a mortgage holder can do in a completely
6 different context.

7 That's why we would argue the 363(f) in the
8 context of the way the Debtor is attempting to use it
9 doesn't apply in this situation, so they don't have a
10 right to sell free and clear of this interest.

11 Your Honor, another example. If we had a
12 situation we had a mortgage holder and a junior
13 mortgage holder on property. The Debtor wanted to do
14 a 363 sale, wanted to sell free and clear of both
15 mortgages. Under 363(f), it could not do so unless
16 that party consented, it was in dispute or otherwise
17 they paid enough to satisfy both mortgages. If that
18 junior mortgage was unsecured because of the value of
19 the property, what could the Debtor do? It can't sell
20 free and clear in a 363(f) alone. It's got to file a
21 valuation matter to have a determination made where
22 that second mortgage does not attach to the value and,
23 therefore, it's unsecured. Then they can sell free
24 and clear. We're no different than that junior
25 mortgage holder in this situation.

1 THE COURT: Except doesn't the auction
2 operate as the valuation?

3 MR. JACKSON: Your Honor, certainly the
4 auction tests the marketplace for the assets in
5 question. But the difference is the Debtor that's
6 selling the property. The mortgage holder is not
7 foreclosing in this context. The Debtor is selling
8 its property trying to --(inaudible) -- a 363(f)(1).
9 And we're contesting that the Debtor can sell the
10 property, but they can't sell it free and clear,
11 because they could not do it under state law. This
12 Debtor cannot do so. Mortgage holder could do so.
13 Perhaps a receiver could do so. But the Debtor could
14 not do so under state law. So we don't believe 363(f)
15 applies in this particular situation.

16 But let's assume for a moment that it did
17 apply. And we don't think it applies, your Honor.
18 The Debtors say that that happens under 363. Then
19 they're entitled to adequate protection. Because
20 clearly we have an interest in property. The Debtor
21 suggests that adequate protection is the 363 sale
22 process. Your Honor, we think that's inappropriate
23 and inaccurate.

24 The Court mentioned earlier does not the
25 sale process kind of determine value. We have a

1 possessor in interest. That's what our interest in
2 this property is. It cannot be measured in monetary
3 measures directly. So when the Debtor says there's no
4 equity in the property, therefore, we get no adequate
5 protection, that's incorrect. Because our adequate
6 protection for us is continued possession of the
7 property. The indubitable equivalent is possession.

8 There's not a cash component to be paid to
9 us that can sacrifice for substitution of possession
10 of the property. So from that standpoint, your
11 Honor -- and even when we think about a typical
12 bankruptcy sale context in the priority scheme, when
13 you sell a particular asset, in this case you're
14 selling the property, you're not selling a lease.
15 You're selling the property. It is the lease that's
16 entitled to protection. That's the interest. So
17 there's money being generated for the lease directly
18 in this particular concept, in this situation.

19 And, in fact, all the money being generated
20 is subject to the mortgage owner's liens except for
21 what they've agreed to be carved out.

22 So, again, this is not a typical adequate
23 protection scenario. We're not a mortgage holder.
24 We're a lease holder. We have a right to possession.
25 It is that right that needs to be protected. And we

1 suggest that the Debtor, even if it has the right to
2 sell the 363(f)(1), has not provided adequate
3 protection.

4 Now, what would be adequate protection. We
5 would argue that, again, continued possession. And
6 that's consistent with 365(h,) which says that if a
7 debtor rejects a contract and we're the lessee, we
8 have the right to maintain possession of the property.
9 Now, the Debtor will argue that 363 -- 365(h) doesn't
10 apply if the 363(f) is the means by which the property
11 sold. Again, we think that's incorrect.

12 For example, a Sixth Circuit -- a Bankruptcy
13 Court case in the Sixth Circuit, In Re: Samaritan
14 Alliance at 2007 WestLaw 41-6298, 2007, Eastern
15 District of Kentucky, ruled in this case that 365(h)
16 overrides 363(f). And that makes sense, your Honor,
17 if you just look at the statutory scheme. A sale
18 under 363(f)(1) is a sale of the 363(b) or(c) under
19 the Bankruptcy Code. 363(l) says subject to the
20 provisions of Section 365, the Trustee may use, sell
21 his property under Section (b) or (c) of this section.

22 So 363(l), which implicates 363(b) and (c),
23 which are the terms upon which 363(f) applies,
24 specifically says that sales under (b) and (c) are
25 subject to 365. You turn to 365(h), we have our right

1 to maintain possession of the property.

2 So it's our position that if adequate
3 protection is appropriate here, the only adequate
4 protection that's adequate is the maintenance of our
5 right to possession under 365(h). The sale
6 contemplated here gives the buyer 45 days post-closing
7 to the time where they can assume or reject. Now,
8 Oldcastle hasn't decided whether to assume or reject,
9 or maybe they have and haven't told us. But we're
10 competitors. We're in the same business. They have
11 -- they have business and locations that are near
12 where we have businesses and locations in Ohio. So it
13 is certainly likely that they will choose not to
14 assume this contract, pay \$1.9 million in past due
15 payments under the contract and instead reject it and
16 try to tell National Lime & Stone to move off the
17 property. So we expect that is what will happen.

18 And so in the context of this case, the fact
19 that the contract provides for the assumption of all
20 these contracts subject to the later right to reject
21 is no form of adequate protection. Because one, it
22 doesn't guarantee our rights under 365(h). And if we
23 wait 45 days or until they decide to reject should
24 they choose to do so, then we're coming back to this
25 Court after the Sale Order has been entered. There's

1 not any relief for us that will be appropriate nor be
2 able to substitute for continued possession of the
3 property. So in that context, your Honor, we think
4 the Debtor does not have the right to sell this
5 property free and clear under 363(f)(1), No. 1.
6 No. 2 -- or sell free and clear of our lease. They
7 can sell the property. Just not free and clear of our
8 lease.

9 No. 2, to the extent adequate protection,
10 we're entitled to it if they have the right to sell,
11 the only adequate protection that is adequate is
12 continued possession under 365(h). And by definition,
13 under 363(l), which incorporates 363(b) and (c), which
14 is the terms upon which the 363(f) sale is
15 contemplated, incorporates 365 explicitly, 365(h)
16 gives us that right to maintain possession of the
17 property.

18 So, your Honor, for those reasons, we
19 believe the sale that's contemplated here cannot be
20 made free and clear of the leasehold interest of
21 National Lime & Stone. Are there any questions I can
22 answer?

23 THE COURT: Not just yet. I will give you
24 an opportunity to respond to arguments that I expect
25 shall be forthcoming.

1 MR. JACKSON: Thank you.

2 THE COURT: Okay. Generally, what -- is
3 there anybody who wishes to speak in support of
4 National Lime & Stone's position?

5 (Silence.)

6 THE COURT: What party wishes to be heard
7 in opposition to the objection that has been raised by
8 National Lime & Stone?

9 MR. DEMARCO: Debtors would, your Honor.

10 MR. ROSENBLATT: I'd like to make just a
11 brief statement.

12 THE COURT: Well, is the --

13 MR. ROSENBLATT: Would you like me to go
14 first?

15 THE COURT: Yes. I like to play with as
16 many cards up at possible.

17 MR. ROSENBLATT: Thank you, your Honor. As
18 I indicated before, we believe that because the
19 tenant, National Lime & Stone, did not obtain a
20 subordination or other type of agreement with the
21 existing landlord, that lease from Day One was subject
22 to the risk of being foreclosed on it by the
23 mortgagee. The Qualtech case, 363(f)(1), provides for
24 the sale of that property free and clear of that
25 leasehold interest. And we agree with the Debtor's

1 argument that because the value of the assets was
2 insufficient to clear the hurdle of the secured
3 lender's liens, that there is no equity in that
4 leasehold interest, and, therefore, there would be no
5 need to provide adequate protection with regard to the
6 rejection of the lease or the requirement of the party
7 to make --

8 THE COURT: You're not suggesting the lease
9 is being rejected?

10 MR. ROSENBLATT: We haven't made that
11 decision yet. We have a period of time to make that
12 decision. But we can accelerate that decision process
13 if it's going to make an impact. The other --

14 THE COURT: Is Mr. Jackson correct in
15 assuming that the answer to the question of whether
16 your client would assume this lease is self-evident?

17 MR. ROSENBLATT: It is self-evident, your
18 Honor. There's a \$2 million cure claim about that.
19 And my client is in the business of -- one of its
20 businesses is operating aggregate terminals. So it's
21 likely self-evident what's going to occur.

22 The lease provides, if it was terminated,
23 that National Lime & Stone would have 60 days to
24 vacate. And we're willing to extend that an
25 additional 30 days to make that a 90-day period for

1 them to vacate the property if your Honor ruled in
2 favor of the Debtor's position on this issue. Thank
3 you.

4 THE COURT: Mr. DeMarco?

5 MR. DEMARCO: Thank you, your Honor. For
6 the Debtors, we filed a response paper yesterday in
7 which we outlined our arguments in response to the
8 National Lime & Stone objection. So we would
9 certainly advance all of those arguments. I
10 summarized them earlier this morning. I think there
11 are two points that are worth commenting on in light
12 of Mr. Jackson's presentation, and I'd be happy to
13 address any questions the Court has.

14 One point is Mr. Jackson, I think, has
15 failed to respond to the Court's question about why is
16 this any different than what we see in the sub-prime
17 mortgage crisis with tenants and mortgages that go
18 unpaid by their landlords. And I think the Court has
19 very aptly keyed in the fact that unlike perhaps some
20 tenants, this organization, National Lime & Stone, was
21 in a position --

22 THE COURT: I think actually Mr. Jackson
23 did attempt to answer the question. And he said in
24 the horrific situation, it's someone standing in the
25 shoes of the mortgagee that is foreclosing. And here

1 it is not the mortgagee that is taking this action,
2 rather, it is the Debtor-In-Possession. And so I
3 think --

4 MR. DEMARCO: I'll address that.

5 THE COURT: Right.

6 MR. DEMARCO: Let me turn to that. The
7 Bankruptcy Code, I don't think, gives Mr. Jackson
8 comfort here, because 363(f) says the Trustee may sell
9 property, etc., only if, 1, applicable non-bankruptcy
10 law permits sale of such property free and clear of
11 such interest.

12 Now, Congress could have said applicable
13 non-bankruptcy law -- try it again --

14 THE COURT: Such sale.

15 MR. DEMARCO: Applicable non-bankruptcy law
16 permits a debtor to sell or permits a sale by Debtor
17 --

18 THE COURT: This comes down to parcing the
19 statutory language. And Mr. Jackson's argument would
20 be much stronger if the such did not modify property
21 but, rather, modified sale. Applicable non-bankruptcy
22 law permits such sale of property of such property
23 free and clear of such interest. But Congress was
24 very liberal with the such, and did not use it to say
25 such sale. It says permits sale of such property free

1 and clear of such interest. And you probably don't
2 want to say any more on that subject. But I'm going
3 to give Mr. Jackson an opportunity to be heard on
4 that, because I think the absence of the modifier such
5 with respect to the sale is not very helpful to
6 Mr. Jackson's position.

7 MR. DEMARCO: I think the Court grasps it
8 entirely. I don't feel the need to elaborate. These
9 working hypotheses, your Honor, are helpful in
10 advancing the process, I will agree. So I will turn
11 to the one other point I wanted to make, which is not
12 plain from our filing, which is Mr. Jackson referenced
13 the Samaritan Alliance case in his presentation. It
14 is part of his filing. We responded to it in our
15 footnote 5. And our footnote says that case is
16 distinguishable because in that case, the tenant
17 claimed that it did not receive notice.

18 And, again, to harken back to the sub-prime
19 loan situation, we might be more likely to reach out
20 to a party that did not receive notice as opposed to a
21 party that has been in the middle of every event of
22 consequence in this case from the day it filed.

23 And, in fact, before it filed, myself and
24 Mr. Snyder, who worked with Mr. Rosenblatt on the
25 deal, met with National Lime the first week of

1 February -- that was within the first 7 days that we
2 were hired by the Debtor prepetition -- to talk about
3 how bankruptcy might be averted and how this
4 particular lease obligation might be addressed, and a
5 host of other things. So I think that the notice
6 point goes against them and the Samaritan Alliance is
7 not helpful. Thank you.

8 THE COURT: Does anybody wish to be heard
9 who is allied with the Debtor? Anyone else who wishes
10 to be heard on this point who is allied with the
11 Debtor?

12 (Silence.)

13 THE COURT: All right. Mr. Jackson.

14 MR. JACKSON. Thank you, your Honor. Fairly
15 briefly. I won't spend much time other than this
16 point -- the Court indicated your concern with respect
17 to the language -- only to say, your Honor, that if
18 you look at 363 in its entirety, the sale is being
19 contemplated here as a sale under 363 via the
20 Bankruptcy Code. 363(1) of the Bankruptcy Code, it
21 says that any sale under 363(b) of the Code is subject
22 to -- let me look at exact language -- subject to the
23 provisions of 365, the Trustee may use, sale or lease
24 property. So this sale under 363(f)(1), because it's
25 a sale under 363(b) outside the course of ordinary

1 business, is subject pursuant to 363(1) of the
2 requirements of 365. Section 365, that if the Debtor
3 rejects a contract, as a lessee we get to stay in the
4 property.

5 Oldcastle's counsel made the point, and it's
6 true, that they've not yet rejected this lease. Well,
7 two things: 1, they've admitted that that rejection
8 is coming, No. 1. No. 2, it is clear that a sale of
9 this property free and clear of this lease is a
10 repudiation of the lease and effectuates a rejection.
11 So we would be putting form over substance to suggest
12 that this sale if an Order goes on allowing the
13 property be sold free and clear does not effectuate a
14 rejection, irrespective of what Oldcastle does here.

15 So now we make those two points, and again
16 make the point that in this context, there is case law
17 which provides 365(h) has a separate and distinct
18 standing, separate and distinct from 363(f). And in
19 some cases rule that it, in fact, trumps 363(f). And
20 if it didn't, your Honor, then what would be the
21 benefit of the benefit of protection given by 365(h)?
22 It was put in the Bankruptcy Code to protect the
23 interests of lessees --

24 THE COURT: H deals with co-owners.

25 MR. JACKSON: 365(h), your Honor?

1 THE COURT: Yes, deals with co-owners.

2 MR. JACKSON: I'm looking at 365(h,) where
3 it provides that if the Trustee rejects an unexpired
4 lease of your property under which the Debtor is the
5 lessor --

6 THE COURT: Oh, yes. I'm sorry.

7 MR. JACKSON: 365(h,) your Honor, yes. So
8 it's 365(h) that gives the right of National Lime &
9 Stone as the tenant, as the lessee, to remain in
10 possession of this property. And we can imagine why
11 that's the case. Here we have a company that's
12 expended millions of dollars in this particular area.
13 It's a critical aspect of the business. So replace
14 it, you know -- Mr. Rosenblatt said we'll give him 90
15 days. We appreciate that offer, your Honor. But the
16 idea of moving millions of pounds of aggregate and all
17 the other aspects of our business located at the site,
18 and to even find another location, 90 days doesn't
19 even begin to speak to that issue, not to mention the
20 damages we would suffer in excess of the cure amounts
21 that will not be paid by virtue of rejection.

22 THE COURT: I'm going to just try to
23 backfill here.

24 MR. JACKSON: Thank you, your Honor.

25 THE COURT: The operation that your client

1 leases, had it been an ongoing operation as of January
2 2009? Was the property already being put to that use?

3 MR. JACKSON: I'll turn to my client a
4 second, your Honor. My understanding is the Debtor --
5 it's a 30-acre site, your Honor, of which 20 or 18 to
6 20 acres are leased by National Lime & Stone. The
7 Debtor operates a ready-mix concrete, ready-mix
8 center -- or facility at that site. So it was being
9 used for that purpose by the Debtor at the time the
10 lease was entered, is my understanding. The site has
11 rail line access, which makes it particularly helpful
12 to off load aggregate in terms of making it available
13 to customers.

14 And so while it was being used by Debtor for
15 some purpose, it was not being used by Debtor, to my
16 knowledge, for the purpose that National Lime & Stone
17 is using it for. And, in fact, part of the contract
18 in the least is the fact that there is a requirements
19 contract between the Debtor and National Lime & Stone
20 relative to we supply all the aggregate they may need
21 and they buy what they need from us, and we are
22 limited in selling to others to some extent by virtue
23 of that contract with the Debtors. So it was a
24 mutually satisfactory arrangement between both the
25 Debtor and National Lime & Stone.

1 I hope that answers the Court's question,
2 your Honor. That's all we have. Thank you. I'm
3 sorry. Just one other issue I want to address
4 quickly, but I'll wait until the Court asks this
5 question.

6 THE COURT: I have lots of
7 license. This is an initial status conference. Your
8 client leased both realty and personally, correct?

9 MR. JACKSON: No, your Honor. We leased
10 the real estate by virtue of the agreement we have
11 with the Debtor. We had access to use of their
12 scaling equipment and use of their office. So it's
13 covered by --

14 THE COURT: It's a license --

15 MR. JACKSON. -- effectively, your Honor.
16 The lease covers the real estate itself and includes
17 the right to access to his other locations.

18 THE COURT: So this is -- as much as it can
19 be, it's purely about real estate. It's not about
20 lease of personal property as well.

21 MR. JACKSON: That's correct, your Honor.

22 THE COURT: So incorporated in the lease is
23 a license to use some of the equipment. And we don't
24 have to figure out whether it's attached or not
25 attached, whatever. We're in a pure real estate, not

1 personal property, analysis.

2 MR. JACKSON: You Honor, only to the extent
3 that the contract does contain a supply agreement
4 aspect to it. But in terms of the lease aspects of
5 it, it contains the right to access to use the
6 facility on the property. I don't believe it contains
7 any relation or specific personal property equipment
8 that's part of that -- that's part of the lease
9 arrangement.

10 THE COURT: Now, let's go to looking at
11 (363(f)). The Trustee may sell property under
12 subsection (b) or (c) of this section free and clear
13 of any interest in such property of an entity other
14 than the estate only if applicable non-bankruptcy law
15 permits sale of such property free and clear of such
16 interest.

17 Now, here -- and in another part of the Code
18 there is -- it's made clear that the use of Trustee
19 includes Debtor-In-Possession. So all those -- and
20 365 and 363 discusses sometimes whether
21 Debtor-In-Possession's included becomes more debatable
22 in the 365 area. But in the 363 area, you don't
23 dispute that Trustee should be read
24 Debtor-In-Possession as well?

25 MR. JACKSON: We agree, your Honor.

1 THE COURT: Okay. When the
2 Debtor-In-Possession is liquidating property that is
3 subject to mortgages and security interests, tell me
4 why I should not read the language in 1 in the manner
5 that I talked about earlier; that the fact that
6 Congress used the word "such" twice in that phrase,
7 not three times.

8 MR. JACKSON: Your Honor, two things. We
9 will readily agree that the language of 363(f)(1) is
10 broad language. That is clear. We would make two
11 points; one, with respect to subset one, applicable
12 non-bankruptcy law permits sale. We would ask the
13 question, sale by whom? And you go back to 363(f).
14 It says the Trustee or the Debtor may sell. So when
15 (f)(1) talks about sale, it's talking about the sale
16 that could be consummated by the Trustee or the
17 Debtor. That's the position we take. And under state
18 law, the Trustee or the Debtor could not sell free and
19 clear of liens under state law. So that's how we
20 would interpret the language. But I understand the
21 point the Court is making.

22 THE COURT: The Trustee could certainly
23 sell and transfer the right to the fund.

24 MR. JACKSON: Yes. Well, two things. If
25 it's subject to a lien or a security interest, subject

1 to compliance with all the other provisions of 363(f)
2 or one of one -- (inaudible) -- the Trustee can do so.
3 But, for example, if that property is subject to a
4 lien or security interest and is not being sold for
5 more than what that lienholder is owed, and lienholder
6 says no, I don't consent to it, it's not a bona fide
7 dispute, it clearly can take -- then the Trustee can't
8 do it. And we would argue that's why 363(f)(5) is
9 there, because it helped -- under (f)(5) it makes the
10 point such -- (inaudible) -- can be compelled in a
11 legal or equitable proceeding to accept a money
12 satisfaction of such interest.

13 In this case, we cannot be compelled in a
14 legal equity proceeding to take a money satisfaction
15 of this particular interest we have in property of the
16 lease. And so you read 1 and 5 together, our argument
17 is it helps us to appreciate why 1 is limited to what
18 the Debtor's ability -- the Trustee's ability is to
19 accomplish under state laws and post-hold mortgage
20 holder. And we harken back to --

21 THE COURT: A Trustee could certainly sell
22 this property and transfer the bank's right and your
23 right to that fund; yes or no?

24 MR. JACKSON: I think the answer, your
25 Honor, is the sale process is deemed to be a bona fide

1 -- a valid sale proceeding. And I think the answer to
2 that would be yes. Because presumably, if it's a sale
3 that is subject to appropriate advertisement, and what
4 have you, that in that context, the lienholder's
5 receiving the value of the collateral by having its
6 lien attached to the proceeds. But the lienholder --
7 the Trustee doesn't have the unfettered right to do
8 so. The lienholder would have the ability to come in
9 and object to the manner in which the Trustee proposes
10 to sell its property, arguing it's not the best way to
11 get the highest and best result.

12 THE COURT: But you're not arguing that.
13 You're not arguing -- you are not arguing that the 363
14 sale procedures here are defective in terms of
15 obtaining reasonable value.

16 MR. JACKSON: You mean the sale procedures
17 in this case?

18 THE COURT: Right.

19 MR. JACKSON: No, we're not arguing that
20 the manner in which the sale was conducted somehow
21 would result in our client receiving less than it
22 might otherwise get for the property from a value
23 standpoint.

24 We would argue instead, your Honor, that the
25 question of -- for example, the equity question, the

1 argument of the Debtor would suggest that if this
2 property were worth, let's say, \$1 million and it sold
3 for \$2 million, and we still had a lease on the
4 property, that we would get that extra million dollars
5 to the extent that we had a claim for \$1 million.

6 And I would assert that under the Bankruptcy
7 Code, we wouldn't get that. And that's why it's not
8 adequate protection. Why it's not applicable to us.
9 Under Bankruptcy Code, we would just be an unsecured
10 creditor like every other unsecured creditor. We'd
11 have to share pro rata in that distribution.

12 So the Creditors' Committee would jump up
13 and down and say look, you're going to take \$1 million
14 because you reject a lease? That wouldn't happen. So
15 that's why the --

16 THE COURT: But it --

17 MR. JACKSON: I'm sorry, your Honor.

18 THE COURT: Your client finds itself in the
19 position it finds itself because of the way in which
20 the January 2009 transaction was structured. It was
21 structured as a lease of mortgaged property where
22 there was no subordination of the mortgage holder's
23 rights. So your client leased property -- your client
24 leased the Debtor's interest in that property which
25 was already burdened with that mortgage.

1 MR. JACKSON: Couple responses, your Honor.
2 If the question is could we have asked for a
3 non-disturbance or a subordination, the answer is yes,
4 we could have asked for it. Whether we would have got
5 it, who knows. But that's not the whole point the
6 Court is making, I understand. In the circumstance
7 where -- the statutory framework is what it is. So
8 while it may be true that we could have asked for a
9 subordination agreement, the fact we are where we are
10 at now is not because we didn't do so. The fact is
11 because the Debtor is seeking to sell the property
12 free and clear of our lien -- lease interests in the
13 property. And so that's why we're in this particular
14 position. And the interests we have in the property
15 is possessory interests as to the -- to the possession
16 of the property. That's what's being cut off. It's
17 not -- so we have the right to possession.

18 THE COURT: But in a State Court action,
19 had the mortgage holders foreclosed, they would have
20 been entitled to evict you from the property in their
21 foreclosure -- if they were successful in their
22 foreclosure action.

23 MR. JACKSON: Your Honor, that's correct.
24 In a State Court foreclosure action filed by the
25 mortgage holder, they would have been able to do that,

1 yes.

2 THE COURT: Right.

3 MR. JACKSON: We think this situation is
4 different, as we indicated before, but we understand
5 the Court's position.

6 THE COURT: All right. Thus applicable
7 non-bankruptcy law permits sale of such property free
8 and clear of such interest.

9 MR. JACKSON: In a foreclosure proceeding
10 filed by the mortgage holder, the answer to that
11 question is yes, your Honor. I understand the
12 distinction you're making and the point you're making
13 to the Court. And the statute is not drafted as
14 cleanly as I would like it to be drafted. I agree
15 with the Court there.

16 THE COURT: Because -- I spent a lot of my
17 life worrying about 365 and 363. I think you remember
18 some of those days in Columbus.

19 MR. JACKSON: Yes, your Honor, we do.

20 THE COURT: And what -- as I read -- as I
21 try to interpret or as I try to apply 363 and 365, and
22 you can't apply it without interpretation, I believe
23 that what Congress was trying to do was to do an
24 overlay without disturbing the rights,
25 except sometimes temporally. You have the automatic

1 stay and such. Your argument, I believe, leads to a
2 potentially incongruous result, which is that I'm a
3 business. I've got -- I leased -- pardon me -- I
4 mortgaged my property. Now I'm going to lease that
5 same mortgaged property -- well, the value of the
6 property -- the value of leasing property that's
7 unencumbered versus the value of leasing property
8 that's encumbered, you think there's a difference?

9 MR. JACKSON: Recognize, your Honor, from a
10 risk standpoint, in a non-bankruptcy context, we
11 understand our lease with the Debtor is subject to the
12 Debtor defaulting in its arrangement with the lenders
13 and our lease being wiped out in a foreclosure action.
14 But I guess we would suggest that even in that
15 context, in a bankruptcy context mortgage holders as
16 well, lienholders as well have the right, subject to a
17 lease, layered over what the Bankruptcy Court says --

18 THE COURT: But in state law, in state law,
19 other than getting a subordination agreement from the
20 mortgage holder, your ability -- your ability as a
21 lessor to maintain your possessory right of property
22 in a foreclosure action is -- it's junior to the
23 mortgagee absent a subordination agreement.

24 MR. JACKSON: That's correct. And we would
25 argue the other side of that coin -- we're not

1 debating that point, that 365(h), that the rights of a
2 mortgage holder that has a mortgage upon property
3 owned by a debtor are subject to the rights of that
4 lessee under 365(h) in the Bankruptcy Code, in the
5 bankruptcy context. And just as we can get a
6 subordination agreement, the mortgage holder can get a
7 provision that says look, you're prohibited from
8 leasing this property out unless I give you my prior
9 approval, because of my concerns about 365(h), as an
10 example, your Honor.

11 But even separate and distinct from the
12 363(f) circumstance, our position is that we still
13 have the right to maintain possession under 365(h) in
14 the event that this property is rejected. And that's
15 why we ask that the rejection, if it's going to
16 happen, be done at this hearing. If it happens later,
17 the Court deems it's effective, then the 365(h) rights
18 are deemed to be implicated at that point in time.

19 THE COURT: And, again, with respect -- I
20 mean, rejection -- I have generally -- I'm generally
21 of the school that rejection is just another word for
22 breach. And your lease -- your client's lease is
23 being breached by this activity.

24 MR. JACKSON: And we would agree with that,
25 your Honor.

1 THE COURT: And you'll have a claim.

2 MR. JACKSON: We would argue that we have a
3 claim or we have our rights under 365(h). I
4 understand the Court's position.

5 THE COURT: See, you're reading that 365(h)
6 would inflate the rights that you would otherwise have
7 under state law.

8 MR. JACKSON: We would argue that it does,
9 because the mortgage holder can always, if it chooses
10 to get relief from stay, foreclose, wipe out our
11 lease. They have that right to do so. Everybody is a
12 sophisticated party in this proceeding. We made that
13 point earlier. Any bidders on this property doing
14 their due diligence knew quite well that this lease --
15 this property is subject to this lease. So they had
16 the ability to adjust their purchase price or take
17 such other action they deem appropriate. It wasn't
18 incumbent necessarily on National Lime & Stone other
19 than following this objection to take some action to
20 protect its lease. That's why we're here now. But
21 everybody else certainly had the ability, its own
22 notice. It's filed the record in State Court. And
23 the parties know that this property is subject to this
24 lease. So anybody bidding on these assets is aware of
25 that lease right. They're aware of 365(h). So they

1 have the ability to protect themselves.

2 And the mortgage holder, if they chose to be
3 part of the bankruptcy proceeding, which I understand,
4 they also then are surrendering to whatever rights
5 might be implicated by Bankruptcy Code.

6 THE COURT: But your agreement
7 suggests that in a nut -- in a lease negotiation,
8 before any bankruptcy is filed or even contemplated,
9 the shadow of 365(h) operates.

10

11 MR. JACKSON: Your Honor, it's pretty --
12 fairly common in our experience that -- (inaudible) --
13 leases you're trying to incorporate things like what's
14 adequate assurance of future performance, how do you
15 handle cure rights, what's a reasonable time frame.
16 And likewise, in the context of a potential
17 bankruptcy, you have sophisticated mortgagees taking
18 into consideration that 365(h) could implicate this
19 property if it's leased by their borrower, the Debtor,
20 to a third-party.

21 THE COURT: Now, to be clear, Oldcastle has
22 made an unequivocal offer to allow National Lime &
23 Stone to a 90-day period following the closing of this
24 transaction should it be approved. They have 90 days.
25 That's not a negotiation position. That's a -- that

1 is -- that's just --

2 MR. ROSENBLATT: Paul Rosenblatt. That is
3 certainly -- Paul Rosenblatt for Oldcastle. Yes, your
4 Honor, that is most certainly correct. We are putting
5 that on the table, 90 days, which is an extension of
6 the 60-day provision that's in the lease. So they
7 would have a total of 90 days after the entry of the
8 Sale Order.

9 THE COURT: And to be clear, since their
10 lease is being breached, you're not expecting them to
11 be paying rent in that time frame?

12 MR. ROSENBLATT: I mean, if that's -- I'm
13 not sure if that's a proposal. I know that's not
14 negotiated --

15 THE COURT: I just want to send this case
16 back to Judge Kendig with as much clarity as possible.

17 MR. ROSENBLATT: The rent, I understand, is
18 150,000 a year. We will -- okay. Whatever the rent
19 is, we'll waive the pro rata portion for those three
20 months. If they've paid it already, it wouldn't be
21 returned by the Debtor. But if they haven't paid it
22 yet for those three months, we will waive that pro
23 rata portion.

24 THE COURT: And it sounds like it's almost
25 a diminimus amount.

1 MR. JACKSON: Your Honor, could I respond
2 very briefly?

3 THE COURT: You may.

4 MR. JACKSON: And I know the Court hasn't
5 issued its decision yet. Should the Court rule in any
6 fashion in which you deem the Debtor has the right to
7 make this transfer free and clear of our lease
8 interest, we think the reliance upon the lease which
9 is being rejected for determination of how long we get
10 to leave the property is not necessarily the
11 appropriate measuring stick.

12 From an equitable standpoint, your Honor,
13 given the impact on National Lime & Stone, we need, we
14 believe, a minimum of six months to vacate this
15 property. We have, like I said, tons of inventory at
16 this location. We have work done every day and
17 servicing our clients every day out of this location.
18 So it's not as simple as picking up and moving -- and
19 I appreciate the offer. But to the extent the Court
20 is going to make a decision in that realm, we would
21 ask that the time frame be at least six months, your
22 Honor.

23 And the final point I'd make, your Honor,
24 unless the Court has questions, is that to the extent
25 the Sale Order is approved by the Court and it

1 includes the provision which allows sales free and
2 clear by lease interest, a comment was made earlier by
3 Mr. DeMarco, I believe, asking about the bond from the
4 appeal be twice the value of, I think, the purchase
5 price. We would ask --

6 THE COURT: I don't think he said twice.

7 MR. DEMARCO: -- (inaudible).

8 MR. JACKSON: I'm sorry. Excuse me.

9 We would ask that in the event that National
10 Lime & Stone decides to appeal the Order, we're not
11 suggesting that you -- (inaudible) -- in an Order,
12 your Honor, against us. But nonetheless, we would ask
13 that that bond be tied to the value of this real
14 estate as opposed to the value of the rest of this
15 transaction.

16 THE COURT: Thank you. Let me hear from
17 the Port. One second. I would like to be an
18 optimist, but I don't think we're going to finished by
19 5. Maybe we will. But I'm going to ask for
20 additional -- like we're getting some already -- air.
21 And by the way, it's getting really warm in here. If
22 people want to take their jackets off, they may do so.
23 It's really uncomfortable. I'm going to go ask for
24 additional utilities, and I'm thinking I would ask for
25 7:30. And after that, if we go beyond that, I don't

1 care if you sweat. Okay. I mean, again, little
2 levity.

3 MR. DEMARCO: I think that's feasible, your
4 Honor.

5 (Recess taken.)

6 THE COURT: Please be seated.

7 MR. DUNCAN: Thank you. Good afternoon,
8 your Honor. Matthew Duncan again for the Manatee
9 County Port Authority.

10 As Mr. DeMarco had said previously, the Port
11 Authority has a 40-year lease with Eastern Cement for
12 use of the cement facility and the Port. The lease
13 provides that there be a minimum tonnage of cement
14 materials go through the Port, 300,000 tons per year.

15 We filed our objection on two grounds. The
16 first was that the cure amount that was proposed by
17 the Debtor was inaccurate. Since then we resolved
18 that issue. The response that was filed by the Debtor
19 acknowledges the correct amount that was in our
20 objection.

21 The second basis for our objection was the
22 failure to provide adequate assurance of future
23 performance under the lease. We have resolved that
24 issue with Cement Resources. However, the Port has
25 been concerned about Oldcastle's intentions with

1 regard to the Port.

2 THE COURT: Well, let me interrupt for a
3 moment. And I'm going to ask for Oldcastle's counsel
4 to make whatever representations he can with respect
5 to -- you know, you may not be able to, but I don't
6 want to shadow box if shadow boxing isn't necessary.
7 So, sir, if you could state whatever -- first, my
8 working assumptions. Your client is assuming this
9 lease?

10 MR. ROSENBLATT: That is correct, your
11 Honor.

12 THE COURT: The entity that's assuming this
13 lease, can you address its capitalization?

14 MR. ROSENBLATT: The entity that's assuming
15 the lease is going to be an affiliate subsidiary of
16 Oldcastle.

17 THE COURT: Does it have assets now?

18 MR. ROSENBLATT: It has assets but it's --
19 I mean, it's --

20 THE COURT: It just has the assets to do
21 this deal?

22 MR. ROSENBLATT. No. It's an operating
23 company. It's an -- (inaudible) -- company. But to
24 avoid -- as I stated earlier, Oldcastle's parent is
25 one of the largest suppliers of building materials in

1 the world. And the U.S. division, Oldcastle
2 Materials, is about one-third of their business. With
3 regard --

4 THE COURT: But is Oldcastle -- what is
5 Oldcastle's role -- what would be Oldcastle's role as
6 guaranty or surety of the performance of the assumed
7 lease?

8 MR. ROSENBLATT: What we're going to do is
9 post a letter of credit --

10 THE COURT: For one year?

11 MR. ROSENBLATT: We'll post it for five
12 years.

13 THE COURT: Is that the first time the Port
14 may be hearing five years?

15 MR. ROSENBLATT: I'm not sure how somebody
16 -- I think the Debtor stated one year. I thought --

17 THE COURT: I thought I heard one year.

18 MR. ROSENBLATT: I don't know if that was
19 -- how that was conveyed or where that came from, but
20 we're willing to do that for five years, a \$300,000
21 letter of credit, which would be the amount that would
22 be due if the minimum amount of material was put
23 through the Port. And we believe that that -- that in
24 conjunction with the fact that this designee's
25 affiliate is Oldcastle Materials, and who they are is

1 sufficient to address the adequate assurance issue
2 with regard to this lease.

3 THE COURT: Thank you, sir.

4 MR. ROSENBLATT: Thank you.

5 THE COURT: Does that in any way -- well,
6 you're at the podium. Did you hear anything for the
7 first time?

8 MR. DUNCAN: We hadn't. This is the first
9 time we had heard, your Honor, of the five-year letter
10 of credit. That hadn't been communicated to us
11 previously.

12 THE COURT: Do you have a client
13 representative in the courtroom?

14 MR. DUNCAN: We do not. They're in Florida.
15 However, we did have another basis for our objection.
16 The Port --

17 THE COURT: Well, with respect to the
18 adequate protection, let's not discuss that right now.
19 I will give you -- and I will call a five-minute
20 recess to allow you to consult with your client to see
21 whether that changes your client's position with
22 respect to the adequate protection issue. And I will
23 hear the other issue.

24 MR. DUNCAN: Well, actually, it was in
25 regards to the adequate protection. My client is

1 additionally concerned as to whether or not Oldcastle
2 would commit to bring in the 300,000 tons per year via
3 waterborne traffic. The Port is heavily dependent on
4 waterborne shipment into the Port as opposed to truck
5 traffic both for duties as well as --

6 THE COURT: Is the lease -- is the --

7 MR. DUNCAN: -- to generate jobs.

8 THE COURT: Does the current lease specify
9 that as a term?

10 MR. DUNCAN: The current lease provides that
11 300,000 tons must come in.

12 THE COURT: Does it specify the means of
13 transport of that 300,000 tons?

14 MR. DUNCAN: If the tonnage isn't by ship,
15 then a wharfage fee has to be paid.

16 THE COURT: And that's a provision of the
17 lease?

18 MR. DUNCAN. That's a provision of the
19 lease.

20 THE COURT: Right. So Mr. Goldblatt's
21 client is assuming the lease. And so Mr. Goldblatt's
22 client -- Mr. Goldblatt's client would like to assume
23 the lease. If we have Mr. Goldblatt's client assumes
24 the lease and it doesn't perform in accordance with
25 the lease, your client would have its remedies under

1 the lease?

2 MR. DUNCAN: Correct, your Honor. Just to
3 put on the record as well, we had -- I discussed with
4 Mr. Rosenblatt as well some other questions that the
5 Port had had. And we agreed to put their responses to
6 those on the record. Namely, whether the -- whether
7 Oldcastle would commit to reopen the Port within a
8 given period of time. They've committed to do that
9 within -- or said they intended to do that within 60
10 to 90 days. And also to use the Port for waterborne
11 traffic and to pay the cure amount at closing. And in
12 exchange, the Port is willing to commit, if the Court
13 approves Oldcastle as the winning bidder in this case,
14 to use its best effort to assist them with getting the
15 correct licenses in place and following all the Port
16 procedures that are now in place after 9/11.

17 So we feel that if we had more time to
18 discuss it with them and for them to meet with the
19 Port Board, that this is likely something that we'd be
20 able to work out.

21 THE COURT: It's a lot -- in my experience,
22 the assumption of a lease is a lot better news than
23 the rejection of a lease.

24 MR. DUNCAN: Correct.

25 THE COURT: And I -- it may seem like I

1 live in a cave, but I understand that, you know, port
2 authorities often perceive that one of their functions
3 to be job creation. And obviously -- I shouldn't say
4 obviously. It seems obvious to me -- and I try to
5 call out things that seem obvious to me so that it's
6 not affecting my decision without giving people a
7 chance to say well, it seem obvious to you, Judge, but
8 had you thought. It seems obvious to me that
9 Oldcastle, if it assumes this lease and it is the
10 operator, it's going to be interested in trying to
11 make that operation as successful as possible; that,
12 in essence, this is one of those situations where
13 there -- after the assumption of the lease there would
14 be a community of interest. Tell me whether -- what
15 seems obvious to me is loopholes.

16 MR. DUNCAN: No. I believe that's the
17 case. Part of the issue that my client is dealing
18 with is that for us to be able to resolve the
19 objection, the Port Board would have to meet. To do
20 that -- they have a schedule. They're not scheduled
21 to meet for another three weeks. So we couldn't
22 resolve the objection today. But we have made
23 significant progress, I believe.

24 THE COURT: Okay. I'm going to ask
25 Mr. Goldblatt to confirm your -- to confirm or

1 otherwise clarify the clarification that you've made
2 about re-opening.

3 MR. DUNCAN: Okay. Thank you, your Honor.

4 MR. ROSENBLATT. Thank you, your Honor. I'd
5 like to make a motion to correct the record. All
6 references to Mr. Goldblatt should be to
7 Mr. Rosenblatt.

8 THE COURT: I'm sorry.

9 MR. ROSENBLATT: That's okay.

10 THE COURT: Some people in this courtroom
11 have heard this before. I'm one of five kids. I'm
12 the only daughter. My mother would generally get my
13 name correct by at least the fourth time. I really do
14 apologize.

15 MR. ROSENBLATT: It's no problem.

16 We believe we've sufficiently addressed the
17 legal issue of adequate assurance. The questions that
18 the Port are asking go beyond what the requirements of
19 the lease are. They don't actually require the
20 importation or movement of any product through there.
21 But if you don't move it, you have to pay a minimum
22 wharfage fee. I can represent to you today that it is
23 my clients' intention to use the Port both for truck
24 traffic as well as ship traffic. And that is our
25 intent, to use that wharf for a profit company, and

1 that's what we intend to use.

2 We intend to get the operation up and
3 running in 60 to 90 days. And I can represent that to
4 you as well. And under the APA, we've agreed to pay
5 cure costs with respect to the Port up to a certain
6 amount, and the Debtor pays the amount over that. And
7 we're prepared to pay that at closing if -- well,
8 whenever those checks are going to get cut. I assume
9 at closing for the Port.

10 I'm not sure how else to answer the
11 questions, but I do believe they go beyond the issue
12 of what's required for adequate assurance in order to
13 assign a lease under Bankruptcy Code.

14 THE COURT: Just, again, to recap, there
15 will be a letter of credit in the amount of \$300,000
16 that would operate for the duration of five years?

17 MR. ROSENBLATT: That's correct, your Honor.

18 THE COURT: Let me hear from Mr. Duncan
19 again.

20 MR. DUNCAN: I really have nothing further
21 to add at this point, your Honor.

22 THE COURT: Well, and I don't mean to put
23 you on the spot. But it seems to me what you have is
24 a situation where your client operates -- (inaudible)
25 -- operates through a Board, and its scheduled

1 meetings contemplate the pace at which this
2 proceeding --

3 MR. DUNCAN: That's correct. And their
4 main concern, obviously, is job creation. And again,
5 had we had more time to discuss and have it go before
6 the Board, I think we likely would have been able to
7 resolve the objection.

8 THE COURT: And to the -- I do not find
9 anything in the objection that was filed that should
10 be sustained. It is my understanding that your
11 client's lease is to be assumed, and then your client
12 will have all of the contractual rights for which your
13 client bargained for. And with respect to the
14 adequate protection, the letter that has been
15 described appears to me to be satisfactory.

16 MR. DUNCAN: Okay. Thank you very much.

17 THE COURT: Anybody else have a phone on?
18 Turn it off. Put it on silent. It doesn't have to be
19 absolutely turned off, but it had better be on silent.
20 Next time I'm going to own that phone.

21 Mr. DeMarco.

22 MR. DEMARCO: There is one other matter I'd
23 like to address in terms of objections, your Honor.
24 I'd indicated earlier that Allen Concrete's objection
25 had been resolved. And we had committed to counsel

1 for Allen Concrete that we would place on the record
2 the statement that the partnership interest that
3 Debtors have in that entity were not subject to sale
4 at yesterday's auction and are not subject to sale
5 approval at this hearing. And with that, I have
6 nothing --

7 THE COURT: But the Debtor's interest in
8 that partnership is being sold?

9 MR. DEMARCO: Debtor's interest in their
10 partnership is not being sold. It's an excluded asset
11 for all intents and purposes.

12 THE COURT: Okay. It's an excluded asset.
13 Thank you.

14 MR. DEMARCO: Thank you for that
15 clarification.

16 THE COURT: And in the Sale Order, there's
17 reference to Oster, to a contract with Oster. I have
18 no idea what that's about.

19 MR. ROSENBLATT: Paul Rosenblatt
20 for Oldcastle.

21 Oster is landlord with respect to one of the
22 properties that the Debtor leases. And the initial
23 term of the lease was going to expire --

24 THE COURT: And so it was a post-petition
25 transaction with respect to that?

1 MR. ROSENBLATT: That's correct.

2 THE COURT: And you're assuming
3 post-petition arrangement?

4 MR. ROSENBLATT. Well, Oster sent a
5 termination letter post-petition without getting stay
6 relief. So that termination should be deemed void and
7 the lease should automatically extend for the second
8 term. And it's our intention that we would take an
9 assignment of that, the second term of that lease.

10 THE COURT: Has Oster's counsel seen --
11 does Oster have counsel? They terminated the lease in
12 violation of the automatic stay. That's a good
13 question. Does Oster have counsel in this proceeding?

14 MR. DEMARCO: Your Honor, my colleague,
15 Mr. Peer, will correct me, but I don't know if they
16 formally entered an appearance in the case. But we
17 did receive a letter from their counsel that
18 Mr. Rosenblatt has described that purports to
19 terminate that lease. And we had had oral
20 communications, within a minimum, that indicated that
21 was, in our view, a violation of the Stay --

22 THE COURT: Okay.

23 MR. DEMARCO: -- and Order, and they should
24 seek relief in this Court if they wanted to pursue
25 that relief.

1 THE COURT: Okay. So --

2 MR. ROSENBLATT: Your Honor, I just want to
3 add one other point for the record. Oster has been
4 scheduled as a creditor from Day One. They've
5 received notice of these proceedings. Thank you.

6 THE COURT: And did the lease -- just --
7 the Oster lease, was it terminated because it was end
8 of the term or was it terminated because of
9 non-performance?

10 MR. PEER: The stated reason, your Honor,
11 was that it was terminated due to a clause under the
12 contract. However, the course of dealing between
13 Oster and the Debtors for years had been to continue
14 this contract and to continue to work. And my belief
15 is post-petition they have continued to work, although
16 I would like to confirm that with my client.

17 THE COURT: Mr. Rosenblatt, you were rising
18 to say something about Oster --

19 MR. PEER: May it please the Court. I have
20 confirmed that with my client, that the Debtors do
21 continue to operate in that location as they did
22 before the letter and following the letter and
23 following the communications.

24 THE COURT: Is there a written lease with
25 respect to that premises?

1 MR. PEER: There is, your Honor. I believe
2 Mr. Rosenblatt and his client has seen it.

3 THE COURT: (Inaudible).

4 MR. ROSENBLATT: Thank you, your Honor.
5 Based upon the representations of Debtor's counsel,
6 Oster is aware of the proceedings, would have received
7 notice of the sale.

8 THE COURT: And the provision in the Sale
9 Order was part of the relief that was requested in the
10 motion; yes or no. It's a question.

11 MR. DEMARCO: I don't think it was -- that
12 provision as in the Order today, no.

13 THE COURT: Because they're not here.
14 They're not participating. If I -- I'm pretty
15 old-fashioned. If you've asked for the relief and
16 seek default, you get the relief. But you don't put
17 something in an Order that wasn't part of the prayer.
18 Very, old-fashioned.

19 MR. ROSENBLATT: Your Honor, maybe we could
20 approach this with a negative notice provision?

21 THE COURT: I would urge you to think of
22 something, because to the extent that it was not in
23 the prayer for relief in the motion, I won't include
24 it in an Order that he signed -- I won't allow you to
25 -- we're going to take another recess and you can type

1 one up.

2 MR. ROSENBLATT: We can put in a negative
3 notice provision, serve the Order on them. And if
4 they have an objection to it, they can come in and the
5 -- the issue would be freshly addressed by the Court.

6 THE COURT: And you could set up a checking
7 account.

8 MR. ROSENBLATT: And for --

9 THE COURT: (Inaudible) -- very happy.

10 MR. ROSENBLATT: We certainly would, your
11 Honor.

12 MR. DEMARCO: Thank you, your Honor.

13 THE COURT: I feel like I'm pulling off a
14 scab, and I'm not sure I want to pull this scab off.
15 I have looked at the language with respect to the
16 stalking horse fee. Please help me understand with
17 respect to Exhibit A whether there's any
18 reflection of the stalking horse bid in Exhibit A.

19 MR. DEMARCO: Your Honor, the stalking
20 horse bidder is the first column where numbers appear,
21 moving left to right. And I would have to go back to
22 the --

23 THE COURT: And the break-up fee -- the
24 break-up fee is in the first column under the first
25 transaction amount. It's added -- so the transaction

1 amount from Cement Resources was \$57,791,543. It is
2 what that sheet says it is.

3 MR. DEMARCO: As evaluated by Western
4 Reserve, yes, Your Honor.

5 THE COURT: Then the Oldcastle bid --

6 MR. DEMARCO: I should say, your Honor, not
7 to interrupt, but that was the last bid in the course
8 of the auction submitted Cement Resources. It was not
9 the initial stalking horse bid or the initial bid at
10 the beginning of the auction.

11 THE COURT: What I'm trying to figure out
12 is the flow of funds. The flow of funds should -- the
13 Order that was entered by Judge Kendig with respect to
14 the break-up fee, not -- should I not interfere with
15 that today?

16 MR. DEMARCO: I think perhaps a way to
17 respond to that, your Honor, is that the stalking
18 horse bid presented by Cement Resources Group, valued
19 by Western Reserve at the commencement of the auction,
20 would be not the 57.7 you see here, but 54.3 million
21 rounding to the nearest hundred thousand, if memory
22 serves. So the net gain issued during the auction
23 whether from Cement Resources or Mr. Rosenblatt's
24 client was substantially greater than that million 9
25 and the 250 which under Judge Kendig's Order was a

1 minimum topping bid.

2 THE COURT: And I'm pretty sure, although
3 he signed the Order, he didn't draft the Order. And
4 the Order talks about the break-up fee having a
5 superpriority status. But then it also talks about it
6 not -- about it not being property of the estate. And
7 those just seem to me diametrically apart. And you
8 have now two successful bidders. So I'm going to take
9 a recess. I'd like to come back. I'd like to address
10 if there is -- if -- I'd like to address from what
11 source the 1.9 million would be funded. And you can
12 tell me whether I'm wrong in detecting tension in the
13 Order that was entered by Judge Kendig.

14 MR. DEMARCO: I'd be inclined to blurt out
15 sale proceeds would be the source. And I don't know
16 if anyone would have a different view.

17 THE COURT: I want you both to look at that
18 Order. I want to understand who under that Order has
19 liability for paying that. Because it sounds -- I
20 mean, it sounds like it's a payment directly from the
21 successful bidder to the disappointed bidder, not
22 going through the estate. But then there's also this
23 superpriority, and you now have two successful
24 bidders.

25 MR. DEMARCO: That's a helpful working

1 hypothesis, your Honor.

2 THE COURT: That's not a working
3 hypothesis. It's an observation.

4 Mr. Rosenblatt.

5 MR. ROSENBLATT: I don't know what -- what
6 further discussions we're going to have, your Honor.
7 I wanted to correct the value of the stalking horse
8 bid at the end of the day last night. It's not
9 57,791,543. It's the number below that. It's the
10 57,541. That 57,791 was accidentally giving Atlas
11 credit for the initial over-bid amount, which was --
12 which is not correct. They don't get a credit for the
13 250. And that's why the 57 --

14 THE COURT: You did the over-bid. Not
15 them.

16 MR. ROSENBLATT: Right. So they shouldn't
17 be getting a credit for that the whole ride up.
18 Whereas they did get a credit for the break-up fee the
19 whole ride up.

20 THE COURT: The 250, the offer bid, that
21 should be struck?

22 MR. ROSENBLATT: Right. That's just an
23 error that wasn't corrected last night.

24 THE COURT: Well, then I would like -- I
25 mean, I'm really relying on Exhibit A. So I'm going

1 to take a break. I want Exhibit A -- I want people to
2 agree that Exhibit A is correct as it is or give me a
3 marked-up Exhibit A.

4 MR. DEMARCO: Mr. Rosenblatt is correct
5 that we need to determine exactly how we would
6 interlineate this to be 100 percent true and accurate.

7 THE COURT: Because it's really, you
8 know --

9 MR. DEMARCO: The Court will note a time
10 stamp here of 11:12 p.m.

11 THE COURT: I was up later than that.

12 MR. HAMMER: Your Honor, Aaron Hammer for
13 the Creditors' Committee. One short statement. It's
14 obvious to unsecured creditors that the break-up fee
15 saved would accrue to the benefit of the estate. My
16 partner, Bill Howard, who is here with me now -- I
17 don't know if now is the appropriate time or perhaps
18 after we reconvene -- would like to speak to events
19 that happened after the entry of Judge Kendig's May
20 14th order that potentially put payment of the
21 break-up fee at risk for Cement Resources. Mr. Howard
22 will have a presentation to the Court. And if you
23 would entertain us --

24 THE COURT: Not before the break. I would
25 like -- whether I take the scab off or not, I don't

1 know. I'm trying -- I'm really trying to figure it
2 out.

3 MR. HAMMER: I know.

4 THE COURT: And among other things --

5 MR. HAMMER: I think you will want to hear
6 what we have to say on this point.

7 THE COURT: I don't want people in the
8 courtroom to be hearing it for the first time. So I
9 would like you to particularly inform Cement
10 Resources's counsel, because I would assume that --
11 I'm just guessing -- that the gravamen of his remarks
12 have to do with Cement Resources.

13 MR. HAMMER: Okay.

14 THE COURT: At this point, I'm going to
15 take a 15-minute break. I would like not to be using
16 that air at 7:30. I'd like to get us out of here. If
17 at the -- when I come back from break, I'm going to
18 ask each interested party to identify any unfinished
19 business that I haven't focused on, and we will
20 assemble an agenda for the balance. And this is the
21 last break until we get finished, I think.

22 MR. LEPENE: Your Honor, I think -- some of
23 us are in a parking garage where we have to remove the
24 cars by 7 p.m.

25 THE COURT: You've got real incentive.

1 MR. LEPENE: Absolutely, your Honor. Would
2 it be appropriate to do that now or -- when you said
3 this would be the last break, that's the only reason
4 I --

5 THE COURT: I think we're going to be done
6 before 7. Just like telling -- I'm not going to tell
7 you how to practice law, I'm not going to tell you
8 what to do with your car.

9 MR. LEPENE: There is a sign up that says if
10 we don't get it out, it will be there on Tuesday.

11 THE COURT: Okay. The really good garage
12 for future reference is the public library garage.
13 Assuming you'll take care of the cars, we'll have a
14 20-minute break. So back at 4:20.

15 (Brief recess taken.)

16 BAILIFF: Please be seated.

17 MR. ROSENBLATT: Your Honor, I have the
18 amended Exhibit A if you'd like to start out with
19 that.

20 THE COURT: Please.

21 MR. ROSENBLATT: Just one?

22 THE COURT: One for me and the law clerk.

23 MR. ROUTH: Ryan Routh. Your Honor, Cement
24 Resources does believe that Amended Exhibit A is
25 correct in its valuation of our bid. We've been

1 discussing some of the break-up fee issues with the
2 Committee and the other estate professionals, and we
3 believe we have it resolved amongst ourselves, if it's
4 acceptable to the Court. I'd like to indicate what I
5 believe we've reached a resolution on, subject to your
6 Honor's blessing.

7 Cement Resources, in order to remove the
8 arguable cloud over our head which we think is
9 unjustified, but that's beside the point, we're
10 willing to state and we do state that we do not want
11 our bid to be considered the highest and best bid at
12 this auction. And we would ask that the Court not
13 consider --

14 THE COURT: You can -- (inaudible).

15 MR. ROUTH: So we're making that statement
16 crystal clear at this stage. We're willing to state
17 -- we're willing to agree to the language regarding
18 the reserve bidder that was in the draft form of order
19 that was presented to the Court naming us the reserve
20 bidder so that the Debtors may have some protection if
21 Oldcastle does not close their transaction.

22 In exchange, my understanding is the
23 Committee is willing to indicate it has no objection
24 to have the break-up fee that's also in the current
25 proposed order, which would have the proceeds paid out

1 of the sale, out of the Oldcastle sale. We were
2 contemplating a direct wire. And that would
3 satisfy the Debtor's obligation.

4 THE COURT: A direct wire?

5 MR. ROUTH: From Oldcastle to my client.

6 THE COURT: Again, is the money to come
7 from the proceeds -- the proceeds at closing or is it
8 to come -- is it to be a direct transfer from
9 Oldcastle to Cement Resources? I may be the only one
10 that's like, you know --

11 MR. ROUTH: The funds flow will still have
12 them pay the same amount that's on Exhibit A. They'll
13 pay -- it's --

14 MR. HAMMER: It's always been, your Honor,
15 a carve out of the bank's collateral, because the bank
16 is under-secured.

17 THE COURT: Right. I understand.

18 MR. HAMMER: The payment of the break-up
19 fee is effectively a carve out of their collateral.
20 Perhaps the Order needs to state so expressly to
21 remove any doubt on that issue.

22 THE COURT: Well, all right. I can -- let
23 me -- and, again, I may be the only person who is not
24 clear about this, and I'm in a newcomer status. But
25 as I understand it, from the proceeds -- at the

1 closing -- at the closing there will be wired to
2 Cement Resources 1.9 million?

3 MR. HAMMER: Correct.

4 THE COURT: And that 1.9 million will not
5 be viewed as having flowed into the estate, but,
6 rather, be -- it is a fee -- you know what --

7 MR. ROUTH: They will get credit for it.

8 THE COURT: They get credit for it. As
9 long as you folks know what's happening, I'm fine with
10 it. I'm fine with it. I'm just, you know -- I do
11 think, you know, some point down the line some
12 accountant is going to want to understand exactly who
13 did what.

14 MR. ROUTH: And there will be a funds flow
15 that will lay it all out.

16 THE COURT: The issue is put to rest.

17 MR. HAMMER: The only thing that I wanted to
18 clarify, your Honor, is Cement Resources is formally
19 withdrawing their bid from consideration as highest
20 and best but preserving their back-up bidding status.
21 Not that they don't want to be considered highest and
22 best, but they are withdrawing the bid from
23 consideration.

24 THE COURT: And there are many different
25 things you can hear. And when Mr. Rosenblatt was

1 giving his view of what had transpired, my take-away
2 from that was that Cement Resources hadn't done such a
3 bad job as a stalking horse. It got value into the
4 estate. Okay. Well, if anybody is agreed, I'm fine.
5 And Cement Resources does acknowledge that should
6 Oldcastle fail to close, which seems to me exceedingly
7 unlikely, you continue -- you would be obligated then
8 as the --

9 MR. ROSENBLATT: Because they're a two-part
10 transaction --

11 THE COURT: Right.

12 MR. ROSENBLATT: -- obviously if one part
13 closes, we're the whole thing.

14 THE COURT: Right.

15 MR. ROSENBLATT: So that's one stumbling
16 block. There's also other conditions in our APA. So
17 we would close under our APA as modified by our bid.

18 THE COURT: Thank you very much. Okay. As
19 I said before I took the recess, I was going to ask
20 any parties -- any interested party to identify any
21 issues that are -- that were raised in any of the
22 pleadings coming into this matter which I haven't
23 addressed. Are there any such issues that need to be
24 put on the table?

25 MR. WALTERS: Good afternoon, your Honor.

1 Dan Walters from Cavitch, Familo & Durkin on behalf of
2 U.S. Inc., creditor. This will be relatively brief,
3 for the blessing of everyone here probably.

4 The objections that we had before have been
5 resolved and the Sale Order -- after review of the
6 Sale Order, in paragraphs 30 and paragraphs G. In
7 essence, the first part of the objection was to the
8 treatment of the 503(b)(9) claim. We're withdrawing
9 the objection as to the treatment of that claim.
10 However, we're reserving the right to fully adjudicate
11 the proper amount of the claim.

12 Secondly, we had opposed some of the
13 language as to the payment of some either
14 administrative claimants and/or some of the
15 professionals that were not carved out and that were
16 outside the ordinary course of business. And I
17 believe the language in the Order
18 reflects that the timing of those payments will be
19 held until a full adjudication of the claim as well.

20 THE COURT: Will that be further
21 memorialized in an interim order or simply relied
22 upon -- (inaudible).

23 MR. WALTERS: In the language in the Sale
24 Order as well provide for same and provide for
25 withdrawal of the objection based on those

1 representations.

2 THE COURT: Thank you.

3 MR. WALTERS: Thank you.

4 THE COURT: Mr. Rosenblatt.

5 MR. ROSENBLATT: Good afternoon. Your
6 Honor, just as a procedural issue, a few additional
7 changes have been made to the formal Sale Order that
8 was previously provided to you, such as the Oster
9 negative notice provision and a few other ones. So it
10 would be appropriate at some point to recirculate an
11 additional revised order.

12 THE COURT: And which reminds me --
13 (pause).

14 MR. ROSENBLATT: Your Honor, if I may, I
15 wanted to make one clarification on the Oster issue.
16 I have in front of me a Certificate of Service of the
17 Notice of Potential Assumption and Assignment of
18 Executory Contracts. And Oster is on that list as a
19 party who received notice of the potential assumption
20 and assignment of their executory contract. Thank
21 you.

22 THE COURT: Thank you. With respect to
23 Oster, do you still intend to give the negative notice
24 just to balance -- (inaudible). Okay. Two of my law
25 clerks have gone through the proposed Order, and we

1 had a few typographical errors, or whatever. We'll
2 give you those.

3 With respect to the cure amounts, paragraph
4 W, the cure amounts set forth on Exhibit A to the cure
5 notice are true and correct cure amounts. Somehow
6 they've gone from estimated to true and correct. How
7 did that happen? In the Motion to Assume and Assign
8 there were estimated cure amounts. Now it's the cure
9 amounts set forth on Exhibit A to the cure notice are
10 true and correct amounts and are hereby authorized --
11 have -- I'm not following -- I'm not sure I can say
12 this.

13 MR. DEMARCO: Your Honor, the basis on
14 which we'd be we asking you to say this is that we
15 commenced the process with estimated cure amounts
16 based on the Debtor's books and records at a point in
17 time where bidders were doing due diligence, notice
18 was going out to those Debtor parties. They've had an
19 opportunity to respond. Some of them are here today.
20 St. Mary's, Holcim, Allen Concrete, NLS. So we're now
21 at a point where because of the court process and the
22 notice provided --

23 THE COURT: At a minimum, it would be
24 unless otherwise addressed on the record today.

25 MR. DEMARCO: That would be true, although

1 we're making every effort to incorporate all those --

2 THE COURT: In Exhibit A.

3 MR. DEMARCO: Well, actually, in the body
4 of the Order.

5 THE COURT: Cure amounts set forth on
6 Exhibit A. Is Exhibit A being revised?

7 MR. DEMARCO: It's an Exhibit to the notice
8 that went out. So we're not attaching an Exhibit A to
9 this Order.

10 THE COURT: Right. And that's why I say
11 the cure amounts put forth on Exhibit A --

12 MR. DEMARCO: Except as otherwise provided
13 in this Order?

14 THE COURT: Or except as otherwise agreed
15 to on the record, the hearing record. There have been
16 changes to that Exhibit A.

17 MR. DEMARCO: We would agreed. I think
18 that language would be appropriate.

19 THE COURT: Okay. Well --

20 MR. DEMARCO: May I approach, your Honor?

21 THE COURT: Okay. Mr. Jackson, during the
22 recess, I did some additional research. And I thought
23 -- I'm overruling your objection. I'm doing it
24 narrowly on the facts and circumstances of this case
25 because, you know, the interpretation of 363(f) is

1 going to make for a lot of good CLE programs going
2 forward.

3 But in this instance, I find that this -- I
4 mean, at first, I was kind of scratching my head
5 saying why didn't they get the subordination of the
6 lenders.

7 It really appears that this is -- your
8 arrangement is more supply -- your client's
9 arrangement was more supply agreement than really
10 lease of land, although it was also a lease of land.
11 But the lease -- the amounts that were being paid for
12 the lease were really nominal, all things considered.
13 And I do believe that both -- I believe that one can
14 find support for selling free and clear of that lease
15 in both 363(f)(1) and 363(f)(5).

16 363(f)(5) talks about such entity could be
17 compelled in a legal or equitable proceeding to accept
18 money satisfaction of such interest. In a foreclosure
19 action, and -- and 5 -- I think 5 quite clearly does
20 not relate back to the Trustee.

21 In a foreclosure action, your client would
22 have been named as a Defendant because its interest
23 was recorded.

24 MR. JACKSON: Yes.

25 THE COURT: It would be presumably junior.

1 And I believe that the record today establishes that
2 in a foreclosure action, had your client defended
3 based upon the right under the lease, your client
4 might well have had a claim for money damages for
5 being disturbed in its possession and could have been
6 compelled to accept a money judgment for that
7 disturbance. And today's record, I think, is replete
8 with sufficient valuation evidence that I do not
9 believe your client would have -- in that foreclosure
10 action, your client would not have any basis to assert
11 they have the right to emerge with a possessory right
12 still intact.

13 And I previously had discussed my reading of
14 applicable non-bankruptcy law permitting sale of such
15 property free and clear of such interest. Again, I
16 think in the foreclosure action, the -- your client
17 could have been dispossessed because of its junior --
18 its junior position to the existing mortgagees.

19 I do believe that your client does have a
20 claim for dispossession. But that's for a later day.
21 But I do overrule your objection based upon that
22 reading of 363(f).

23 MR. JACKSON: Your Honor, can I ask for one
24 clarification point? Is it the Court's ruling that in
25 addition, 365(h) does not apply to National Lime &

1 Stone's circumstances in this instance as well or that
2 365(h), those rights, whatever they are, don't trump
3 what the Court just stated relative to 363(f)(1)?

4 THE COURT: On the narrow facts and
5 circumstances of this case, yes, I do so find. I do
6 not believe that 365(h) is meant to trump the ability
7 of senior -- senior recorded rights in the real estate
8 to -- that have not agreed to the continued possessory
9 right of the entity with the junior right. I do not
10 believe that 365(h) is appropriately read to give rise
11 to that right -- to such right.

12 I think that the possessory right -- 365(h,)
13 I think, was meant to avoid a moral hazard of somebody
14 saying well, yes. I'm leasing you this property but,
15 you know, I can get more if I reject this lease and
16 lease it to some other entity. I don't think it was
17 meant to increase your rights vis-a-vie creditors with
18 rights senior to yours -- to your client. That would
19 be an alternative holding because they are proceeding
20 under 363(h). And -- I'm sorry. 363(f).

21 But on the facts and circumstances of this
22 case, I do not believe that it would be an appropriate
23 reading to say that notwithstanding the fact that the
24 mortgagees, who are senior in interest in time to your
25 client, that their rights are diminished by 365(h) by

1 virtue of affording your client a possessory -- an
2 ongoing possessory interest that would diminish the
3 value of their preexisting security interest.

4 MR. JACKSON: Thank you, your Honor. I
5 appreciate that. Thank you for the Court's time.

6 THE COURT: You're welcome. With respect
7 to the -- you had also asked with respect to the bond
8 issue. I would require a bond in the amount of the
9 final bid of National Lime -- National Lime & Stone
10 was bidding on.

11 MR. JACKSON: Your Honor, we were bidding
12 on the Ohio Ready Mix, which has a value -- which
13 includes this property, which also has a value
14 unrelated to this property as well. We've had some
15 discussions with counsel, although there's been no
16 agreement on that issue. And, your Honor, should we
17 file a Notice of Appeal, one suggestion we would have
18 is to take that up at the time as to what the
19 appropriate bond should be.

20 We would strenuously object to a bond being
21 in the amount of our bid, which was at the time
22 40-some --

23 THE COURT: You know what? If you file a
24 Notice of Appeal, you can talk to Judge Kendig about
25 that.

1 MR. JACKSON: Thank you, your Honor.

2 THE COURT: Any other unfinished business?

3 Mr. Rosenblatt.

4 MR. ROSENBLATT: Ruled on Port --

5 (inaudible).

6 THE COURT: I overruled their objection.

7 MR. ROSENBLATT: Thank you.

8 MR. DEMARCO: Your Honor, my colleague,
9 Mr. Peer, reminds me that we have been talking about a
10 resolution with St. Mary's Cement, but I hadn't put on
11 the record the fact that we not only obtained a
12 withdrawal of their objection to the sale, but we've
13 also agreed with the amount of their 503(b)(9) claim.

14 THE COURT: Is St. Mary's counsel in the
15 room?

16 MR. THOMAS: Yes.

17 THE COURT: Just come forward, sir. And
18 your name, please, sir?

19 MR. THOMAS: My name is Matt Thomas for
20 St. Mary's Cement.

21 THE COURT: Okay. And, Mr. Thomas, you
22 concur in the remarks of Mr. DeMarco?

23 MR. THOMAS: I concur in the remarks of
24 Mr. DeMarco as well, yes.

25 THE COURT: And the amount of the

1 503(b)(9)?

2 MR. THOMAS: 69,063.19. And it's combined
3 for sales to two of the Debtor's entities.

4 THE COURT: Thank you.

5 MR. DEMARCO: Thank you, your Honor.

6 THE COURT: Other matters? Okay. I do not
7 -- I will sign an Order -- I'll sign an Order if you
8 can get it processed quickly.

9 MR. DEMARCO: Your Honor, on the Port --
10 and maybe everyone else in the room remembers this. I
11 don't -- whether the Port had stipulated to the
12 withdrawal of its objection to the sale or whether the
13 Court had actually entered an Order sustaining or
14 overruling that objection?

15 THE COURT: Mr. Duncan's left.

16 MR. DEMARCO: I believe that Mr. Rosenblatt
17 made some representations on the record.

18 THE COURT: Right.

19 MR. DEMARCO: That in the Debtor's view go
20 beyond the requirements of the statute.

21 THE COURT: Mr. Duncan, as I recall it,
22 Mr. Duncan did not have client authority to withdraw
23 the objection because of the governmental nature of
24 his client and the inability to get client approval of
25 the withdrawal. I therefore overruled the objection,

1 but in doing so, I relied upon the --

2 MR. DEMARCO: Representations.

3 THE COURT: -- representations by
4 Mr. Rosenblatt as to the relations, including the
5 five-year letter of credit at the rate of -- in the
6 amount of \$300,000, and also the intention of
7 Oldcastle, the intention of Oldcastle to begin
8 operations at the Port within 60 to 90 days. And that
9 was stated, I think -- I think it's basically viewed
10 as a best efforts undertaking, not an etched in stone,
11 but that they're going to -- they want to put that
12 asset to work.

13 MR. DEMARCO: Your Honor, I don't believe I
14 had moved the admission of Debtor's Exhibit A or
15 Debtor's Exhibit Amended A, and I'd like to do that so
16 the record is complete.

17 THE COURT: Debtor's Exhibit A and Debtor's
18 Exhibit Amended A are received in the record. Do you
19 want to be heard on that? They're received. Please
20 give those to the Deputy in Canton so they'll find
21 their way into the appropriate repository. Anything
22 else?

23 MR. HAMMER: Aaron Hammer for the
24 Creditors' Committee. Since I heard your Honor say
25 that she was going to enter the Order --

1 THE COURT: I can't enter it. I'm sorry.
2 I can sign it. Electronic filing works marvelously
3 for counsel. What I can do once it's in the final
4 form, it can get -- you can do it. Oh, never mind.

5 MR. HAMMER: Notwithstanding the procedural
6 issue, I want to thank your Honor on behalf of the
7 Creditors' Committee. We understand you were put in
8 an almost untenable situation having to deal with the
9 various matters today. And we thank you very, very
10 much for giving us this opportunity.

11 THE COURT: It was not dull.

12 MR. ROSENBLATT: Your Honor, when you said
13 quickly provide an Order to you, what time frame are
14 you looking at?

15 THE COURT: I'm assuming that someone is
16 like working on the -- if you want --

17 MR. ROSENBLATT: So 10 minutes?

18 THE COURT: If you want me to do it, you're
19 going to hold both me and Ms. Henninger hostage until
20 it's finished. So I would say -- 6 o'clock? I'll say
21 6 o'clock.

22 MR. ROSENBLATT: That will work. Thank
23 you.

24 THE COURT: Mr. Jackson.

25 MR. JACKSON: If I might raise one other

1 issue, your Honor. When we had the earlier
2 presentation, the Court addressed briefly the issue of
3 the time frame in which National Lime would have to
4 vacate the property should Oldcastle decide to reject
5 the lease and supply agreement. The Court didn't
6 address that in its comments. When its Order was --

7 THE COURT: What I would suggest is you may
8 want to sit with whoever is, you know, doing the final
9 tweaks to the Sale Order, you and Mr. Rosenblatt, and
10 see whether you can find agreeable language or you may
11 agree to do that in a side letter, whichever you chose
12 to do. Mr. Rosenblatt?

13 MR. ROSENBLATT: We had some brief
14 discussions about that in the hallway, and I don't
15 know -- we had some brief discussions about that in
16 the hallway, and I don't know if we're going to be
17 able to reach agreement on that. The lease says 60
18 days. We're willing to extend that to 90 days. And
19 we're not foreclosing any additional discussions with
20 them if we could otherwise reach a resolution. But
21 that's what we're willing to do at this time.

22 THE COURT: But basically you are
23 committing on the record that it's a 90-day time
24 frame?

25 MR. ROSENBLATT: Right. They would have to

1 vacate within 90 days unless we reach some other
2 arrangement.

3 THE COURT: 90 days. That's on the record.
4 You can get -- you can get that portion of the record
5 and -- so --

6 MR. JACKSON: That's acceptable, your
7 Honor. I appreciate Mr. Rosenblatt making that
8 statement on the record as well. So if we understand,
9 if we can work something else out, we'll work with him
10 to do so.

11 THE COURT: Any other dangling threads?
12 (Silence.)

13 THE COURT: Okay. I believe we're going to
14 have to -- somebody is going to have to go down and
15 get you out of the building somehow, because until 6
16 o'clock -- if you have any difficulty getting out of
17 the building, let us know and we'll spring you. Thank
18 you all. It really has been a fascinating day.

19 (Hearing concluded at 5:07 p.m.)

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CERTIFICATE

I, Cheryl L. Baker, court approved transcriber,
certify that the foregoing is a correct transcript
from the official electronic sound recording of the
proceedings in the above-entitled matter.

Signature of Approved Transcriber

03-26-14
Date

Cheryl L. Baker

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