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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 11-10614 (MG)

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In the Matter of:

BORDERS GROUP, INC., et al.,

Debtors.

- - - - -x

U.S. Bankruptcy Court
One Bowling Green
New York, New York

March 15, 2011
10:02 AM

B E F O R E:
HON. MARTIN GLENN
U.S. BANKRUPTCY JUDGE

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FINAL Hearing Re: Debtor in Possession Financing [Docket Nos. 27, 69]

DEBTORS' Motion Pursuant to 11 U.S.C. Sections 105(a), 327, and 330 for Authorization to Employ Professionals Utilized in the Ordinary Course of Business, Nunc Pro Tunc to the Commencement Date [Docket No. 36]

APPLICATION to Employ and Retain Kasowitz, Benson, Torres & Friedman, LLP as Debtors' General Counsel [Docket No. 37]

DEBTORS' Application to Employ and Retain Jefferies & Company, Inc. as Financial Advisors and Investment Bankers to the Debtors [Docket No. 39]

APPLICATION of the Debtors to Employ Ken Hiltz as Senior Vice President of Restructuring Nunc Pro Tunc to the Commencement Date [Docket No. 206]

DEBTORS' Application to Employ and Retain Baker & McKenzie as Debtors' Special Corporate Counsel, Nunc Pro Tunc to the Commencement Date [Docket No. 48]

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DEBTORS' Application to Employ DJM Realty Services, LLC as Real Estate Consultant to the Debtors, Nunc Pro Tunc to the Commencement Date [Docket No. 49]

DEBTORS' Application to Employ and Retain The Garden City Group as Administrative Agent Nunc Pro Tunc to the Commencement Date [Docket No. 51]

FINAL Hearing Re: Debtors' Motion Requesting (I) Authority to (A) Continue to Operate the Debtors' Cash Management System, (B) Honor Certain Prepetition Obligations on Account of Service Charges Related Thereto, (C) Maintain Existing Bank Accounts and Business Forms, (D) Maintain the Ability to Use Debit, Wire and ACH Payments, and (E) Honor the Continued use of Certain Corporate Credit Cards; and (II) An Extension of Time to Comply with Section 345(b) of the Bankruptcy Code [Docket Nos. 21, 78]

DEBTORS' Motion Pursuant to 11 U.S.C. Sections 105, 365(a) and 554(a) Requesting Approval of Procedures for the Rejection of Unexpired Leases [Docket No. 44]

DEBTORS' Motion Pursuant to 11 U.S.C. Sections 105(a) and 331 to Establish Procedures for Interim Compensation and Reimbursement of Expenses of Professionals [Docket No. 53]

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DEBTORS' Application to Employ Dickinson Wright PLLC as Special Counsel to the Debtors Nunc Pro Tunc to the Petition Date [Docket No. 203]

FINAL Hearing Re: Debtors' Motion Requesting Authority to Pay Prepetition Taxes and Assessments [Docket Nos. 17, 58]

APPLICATION of the Debtors Pursuant to 11 U.S.C. Section 363 to Employ and Retain AP Services, LLC and Designate Holly Felder Etlin as Chief Restructuring Officer to the Debtors Nunc Pro Tunc to the Commencement Date [Docket No. 46]

FINAL Hearing Re: Debtors' Motion for (I) Authority to (A) Continue the Debtors' Insurance Policies and (B) Pay all Obligations in Respect Thereof, and (II) to Direct Financial Institutions to Honor and Process Checks and Transfers Related to Such Insurance Obligations [Docket Nos. 15, 61]

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FINAL Hearing Re: Motion (I) Authorizing the Debtors to Pay
Certain Employee Obligations and Maintain and Continue Employee
Benefits and Programs and (II) For Banks to Honor and Process
Checks and Transfers Related to Such Obligations [Docket Nos.
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DEBTORS' Motion Pursuant to 11 U.S.C. Sections 105(a),
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1 NOTICE of Proposed Order/Notice of Further Revised Proposed
2 Order Approving Debtors' Application Pursuant to Sections
3 327(a) and 328(a) of the Bankruptcy Code and Rule 2014 of the
4 Federal Rules of Bankruptcy Procedure for Authorization to
5 Employ and Retain DJM Realty Services, LLC as Real Estate
6 Consultants to the Debtors, Nunc Pro Tunc to the Commencement
7 Date [Docket No. 375]

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25 Transcribed by: Sara Davis

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A P P E A R A N C E S :

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP

Attorneys for Debtors

1633 Broadway

New York, NY 10019

BY: DAVID M. FRIEDMAN, ESQ.

ANDREW K. GLENN, ESQ.

JEFFREY R. GLEIT, ESQ.

MORGAN LEWIS & BICKLUS LLP

Attorneys for GE Capital

101 Park Avenue

New York, NY 10178

BY: WENDY S. WALKER, ESQ.

RIEMER & BRAUNSTEIN LLP

Attorneys for GA Capital LLC

Three Center Plaza

Boston, MA 02108

BY: KEVIN J. SIMARD, ESQ.

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LOWENSTEIN SANDLER PC

Attorneys for the Official Committee of Unsecured
Creditors

65 Livingston Avenue
Roseland, NJ 07068

BY: BRUCE BUECHLER, ESQ.
PAUL KIZEL, ESQ.

BALLARD SPAHR LLP

Attorneys for Centro Properties Group, UBS Realty
Investors, Aronov Realty, Federal Realty Investment
Trust, Trademark Realty Management, BIT, The Hutessky
Group, Marketplace Philadelphia Management, Kravco Simon
Company

1735 Market Street, 51st Floor
Philadelphia, PA 19103

BY: DAVID L. POLLACK, ESQ.

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KELLEY DRYE & WARREN LLP

101 Park Avenue

New York, NY 10178

BY: GILBERT R. SAYDAH, ESQ.

KATTEN MUCHIN ROSENMAN LLP

Attorneys for the The Macerich Company, RRGGF Management
Related Companies

2029 Century Park East, Suite 2600

Los Angeles, CA 90067

BY: DUSTIN P. BRANCH, ESQ.

PAUL HASTINGS JANOFSKY & WALKER LLP

75 East 55th Street

New York, NY 10022

BY: CHRISTOPHER J. FONG, ESQ.

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MCLAUGHLIN & STERN LLP
260 Madison Avenue
New York, NY 10016

BY: TOM H. BRAEGLEMANN, ESQ.

BINGHAM MCCUTCHEN LLP
Attorneys for Bank of America, N.A.
399 Park Avenue
New York, NY 10022

BY: STEPHANIE W. MAI, ESQ.

U.S. DEPARTMENT OF JUSTICE
Office of the U.S. Trustee
33 Whitehall Street
21st Floor
New York, NY 10004

BY: SUSAN D. GOLDEN, ESQ.

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APPEARING TELEPHONICALLY:

KUPELIAN ORMOND & MAGY PC, Attorneys for Landlords
Counsel, DAVID M. BLAU, ESQ.

DICKINSON WRIGHT PLLC, Attorneys for Debtors, MICHAEL
HAMMER, ESQ.

WOMBLE CARLYLE SANDRIDGE & RICE, Attorneys for Allegro
Corporation, THOMAS HORAN, ESQ.

STOEL RIVES LLP, Attorneys for Valley Mall, LLC and
Bridgeport Village, LLC, CHRISTINE KOSYDAR, ESQ.

BLAKELEY & BLAKELEY LLP, Attorneys for Google, DAVID M.
MANNION, ESQ.

KROKIDAS & BLUESTEIN LLP, Attorneys for OCW - Retail
Hyannis LLC, VINCENT PISEGNA, ESQ.

DAVIS WRIGHT TREMAINE LLP, Attorneys for Starbucks, RAGAN
POWERS, ESQ.

ROYAL BANK OF SCOTLAND, COURTNEY ROGERS for Courtney
Rogers

PUBLISHERS WEEKLY, JUDITH ROSEN for Judith Rosen

MCDERMOTT WILL & EMORY, Attorneys for Source Interlink
Company, GREGORY KOPACZ, ESQ.

THE GARDNER LAW FIRM PC, Attorneys for Wenzel, MARY
OLSEN, ESQ.

KING & SPALDING LLP, Attorneys for UPS, JONATHAN W.
JORDAN, ESQ.

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P R O C E E D I N G S

THE COURT: Please be seated. All right, we're here in Borders Groups, Inc. It's number 11-10614. I have a list of appearances in front of me. You can proceed.

MR. GLENN: Good morning, Your Honor. Andrew Glenn, Kasowitz, Benson, Torres & Friedman on behalf of the debtors and debtors-in-possession. I'm joined today by my colleagues David Friedman and Jeffrey Gleit. By way of very brief background, the good news to report as reflected on the agenda last night was the announcement that we have reached an agreement with the creditors' committee on the debtor-in-possession financing in this case. That's going to be the big ticket item regardless. I'm sure there's a lot of issues that the Court will want to address on the order, but in any event, there's no objections pending.

The other matters to which there were objections were the utilities motion which is now fully consensual and the motion to extend the deadline to assume or reject unexpired leases of nonresidential real property. I believe there are only one, maybe two pending objections with that.

With Your Honor's approval, I would go through the agenda as we submitted it in order with the exception of the DIP motion which we'd like to put to the end and the lease motion which we'd like to put immediately before that.

THE COURT: All right, that's fine. I just want to

1 make clear that -- and I'm pleased that you've resolved most of
2 the objections, but I have some problems with some of the
3 orders that have been submitted. When we go through the
4 motions, we'll -- if I have a problem, I'm going to let you
5 know. So don't assume just because you've consensually
6 resolved objections that all issues are off the table.

7 MR. GLENN: We completely understand, Your Honor, and
8 folks are here to address any changes that Your Honor might
9 have.

10 THE COURT: Okay. All right, go ahead.

11 MR. GLENN: Okay. Let's start first please with
12 docket number 36 which is the debtors' motion for authorization
13 to employ professionals in the ordinary course of business.
14 Your Honor, this is a standard motion for which we're going to
15 submit only lawyers. The company has a number of lawyers in
16 relatively small specialized litigations and corporate and real
17 estate matters. The ordinary course order in this case
18 provides for thresholds of 40,000 a month and 300,000 dollars a
19 year. If professionals exceed those thresholds either on a
20 monthly or annual basis, they will be subject to customary fee
21 application requirements for retained professionals.

22 There are standard procedures for notices to parties
23 in interest about their -- about retentions and fee
24 applications and the like. We've supported that with the
25 declaration of Scott Henry and unless Your Honor has any

1 questions, we'd like that order entered.

2 THE COURT: All right. Does anybody else wish to be
3 heard with respect to the ordinary course professionals motion?

4 All right, hearing no one, that motion is granted.

5 MR. GLENN: Okay. The second --

6 THE COURT: Just hang on. If you're on the phone, you
7 need to put your phone on mute because we're picking up some
8 background noise.

9 Go ahead, Mr. Glenn.

10 MR. GLENN: Thank you. The second motion is docket
11 number 53 which is the debtors' motion to establish procedures
12 for interim compensation and reimbursement of expenses. Your
13 Honor, this is another standard order in this district. The
14 order -- the proposed order provides for payment of eighty
15 percent of fees on a monthly basis and a hundred percent of
16 expenses. Parties are required to submit fee statements to the
17 United States Trustee, the committee and the debtors and
18 parties are required to file quarterly fee applications to
19 maintain their status as being entitled to interim compensation
20 on this basis. We have not received any objections to this
21 motion and unless Your Honor has any questions, we'd like that
22 entered.

23 THE COURT: Does anybody wish to be heard with respect
24 to the interim compensation motion?

25 MR. BUECHLER: Your Honor, Bruce Buechler from

1 Lowenstein Sandler on behalf of the office committee of
2 unsecured creditors. We did provide the debtors some informal
3 comments which were incorporated into a revised form of order
4 so we just simply wish to make sure that the debtors have
5 submitted to the Court the revised form of order that the
6 committee has signed off on.

7 THE COURT: Thank you, Mr. Buechler.

8 MR. GLENN: Also represent and we'll provide Mr.
9 Buechler with another copy of that --

10 THE COURT: All right.

11 MR. GLENN: -- just so we can verify it.

12 THE COURT: I'm going to grant the motion. I am going
13 to have, when we get to some of the other motions, I am going
14 to have some comments to make about professional compensation.
15 But I'll deal with it -- I am granting the motion as presented
16 and I'll deal with my comments as we move along.

17 MR. GLENN: Fair enough. Okay. The next motion is
18 the employee wage motion, docket number 12. This is another of
19 the standard suite of motions to continue the company's
20 compensation practices based on its pre-petition programs.
21 Judge Gonzalez heard this on the first day and granted the
22 motion on an interim basis. The only two pending issues that
23 were left unresolved from Judge Gonzalez's consideration were
24 number one, pre-petition severance payments and number two, all
25 of the bonus programs. And I believe the Court did not have

1 specific concerns about those but rather --

2 THE COURT: He wanted a committee in place --

3 MR. GLENN: Exactly.

4 THE COURT: -- before --

5 MR. GLENN: So --

6 THE COURT: -- I understand.

7 MR. GLENN: -- what we've done with respect to those
8 is we've shared with the U.S. Trustee and the -- more
9 importantly, the committee in this case all of the revisions
10 and the details of those programs and the amounts that we
11 propose to pay. The good news is that on the bonus program,
12 the payments are over a million dollars less than what we
13 originally contemplated. So at this point, there are no
14 pending objections to this motion and unless Your Honor has any
15 questions, we would ask for that motion to be granted.

16 THE COURT: Mr. Buechler?

17 MR. BUECHLER: Your Honor, the committee did review
18 that and has no objection. We simply would like to see the
19 proposed order which we have not seen on this motion -- for
20 this limited piece before it's submitted.

21 THE COURT: All right. Anyone else wish to be heard
22 with respect to the employee wage motion?

23 All right. Subject to Mr. Buechler having the
24 opportunity to review the proposed order, that motion is
25 granted as well.

1 MR. GLENN: Okay. Thank you, Your Honor.

2 Next is docket number 15, the motion for authority to
3 continue the debtors' insurance policies and payment practices
4 and honoring related obligations. Your Honor, it's obviously
5 important in any business for a debtor this size to maintain
6 their insurance on a continuous basis to ensure uninterrupted
7 coverage in case there are any claims that would inure to the
8 benefit of the estate. Again, Judge Gonzalez entered an
9 interim order on this motion. We have allowed the committee to
10 vet all of these policies and I don't believe there are nay
11 pending objections. Therefore, we'd ask that the motion be
12 granted unless Your Honor has any question.

13 THE COURT: All right. Does anybody wish to be heard
14 with respect to the insurance motion?

15 All right. Hearing none, that motion is granted as
16 well.

17 MR. GLENN: Next is docket number 16, the distribution
18 network vendors motion, Your Honor. The debtor has a number of
19 common carriers that transport its goods in the ordinary course
20 of business and has set forth in our motion papers and the
21 declaration of Scott Henry, if a common carrier or other vendor
22 of transportation services exercise remedies to seize goods or
23 otherwise disrupted the normal flow of goods to our sales
24 channels, that could be highly disruptive to the business.
25 Therefore we've asked for authority t pay all such expenses as

1 articulated in the motion. Judge Gonzalez granted this motion
2 on an interim basis on the first day and unless Your Honor has
3 any questions, we would ask that this motion be granted.

4 THE COURT: Does anyone wish to be heard with respect
5 to this distribution network vendors motion?

6 All right, motion is granted.

7 MR. GLENN: Next, Your Honor -- thank you, is docket
8 number 17, the tax motion, a request to pay pre-petition taxes
9 and assessments as set forth in the motion and the declaration
10 of Scott Henry in support. The debtor has a number of tax
11 obligations including sales and use taxes which are subject to
12 the trust Fund Doctrine and other related taxes that we believe
13 are appropriate to pay under the circumstances. The -- Judge
14 Gonzalez, as I should say, approved this motion on an interim
15 basis and there are no pending objections. So unless Your
16 Honor has questions, we would ask for this motion to be
17 granted.

18 THE COURT: Does anybody wish to be heard with respect
19 to the payment of taxes motion?

20 All right. The motion is granted.

21 MR. GLENN: Okay. Next, Your Honor, is docket number
22 19 which we've styled as the equity and claim trading motion,
23 sometimes referred as an NOL.

24 THE COURT: Count -- how large are the NOLs?

25 MR. GLENN: I believe they're over 200 million dollars

1 in this case. 220, I believe, in that neighborhood. What this
2 motion seeks to accomplish is what has become the state of the
3 art in this district and in Delaware. It's a notice procedure.
4 If parties wish to trade in securities or trade claims in
5 certain thresholds, they are required to give notice of
6 potential status that would trigger the thresholds articulated
7 in the motion. If there are any oppositions to that kind of
8 trading, we would bring that to Your Honor's attention and
9 those would be addressed in due course before Your Honor.

10 The debtors have not received any objections to this
11 motion and the committee's reviewed this matter. We believe
12 that this NOL is potentially a significant asset of this estate
13 and given that the motion seeks only notice of potential
14 trading and preserves all parties' rights to trade subject
15 before a hearing before Your Honor, we would ask for this
16 motion to be granted.

17 THE COURT: Anybody wish to be heard with respect to the
18 equity and claim trading motion? Mr. Buechler?

19 MR. BUECHLER: Sure, thank you, Your Honor. The
20 committee did make comments on the interim order before it was
21 submitted to Judge Gonzalez. I would simply ask Mr. Glenn to
22 confirm that those same changes have been incorporated in the
23 final order and that we have no issue. Thank you.

24 MR. GLENN: That's confirmed, Your Honor, and we will
25 again share that motion -- that order with Mr. Buechler.

1 THE COURT: All right. The motion is granted.

2 MR. GLENN: Okay. Thank you, Your Honor.

3 next is docket number 21, the cash management motion.

4 That was approve by Judge Gonzlaez on an intrim basis on the
5 first day hearing. There was one issue that the U.S. Trustee
6 had with that motion. The company had an account at BlackRock
7 which did not technically conform to the U.S. Trustee's
8 guidelines in this respect and the proposed order reflects an
9 agreement that's been reached with the U.S. Trustee that the
10 debtors will discontinue the BlackRock fund account and confirm
11 that the BlackRock account has not been utilized since February
12 18th and that any funds that otherwise would have been swept
13 into that account or any other overnight investment will be put
14 in the bank accounts with PNC or Bank of America.

15 I believe with that, there are no pending objections
16 to the cash management motion, Your Honor. And we would ask
17 for the order to be entered unless Your Honor has any
18 questions.

19 THE COURT: All right. Does anybody have -- anybody
20 want to be heard with respect to the cash management motion?
21 Ms. Golden?

22 MS. GOLDEN: Good morning, Your Honor. For the
23 record, Susan Golden for the U.S. Trustee. That is correct, we
24 did reach an agreement. We would just request that we have a
25 look at the order before it's submitted.

1 THE COURT: Okay. Anybody else wish to be heard?

2 All right. The motion is granted subject to the U.S.
3 Trustee having the opportunity to review the motion -- the
4 order, excuse me.

5 MR. GLENN: Thank you. The next matter on the agenda
6 is the DIP at docket number 27. We'll put that over.

7 The next matter on the agenda, therefore, is the
8 utilities motion, docket number 41. I'm going to turn the
9 podium over to my colleague, Jeff Gleit.

10 THE COURT: Just give me a second.

11 Go ahead, Mr. Gleit.

12 MR. GLEIT: Okay. Good morning, Your Honor, Jeff
13 Gleit of Kasowitz on behalf of the debtors.

14 Your Honor, as Mr. Glenn stated, the next motion
15 before Your Honor is the debtors' motion for entry of an order
16 establishing adequate assurance procedures with respect to
17 utility companies and granting other related relief. Your
18 Honor, in addition to the proposed two week escrow account that
19 the debtor's proposing to establish for utilities, the motion
20 also requests, just to be clear, to pay small amounts to their
21 third party administrators which is ICOM (ph.) and Kas (ph.).

22 Your Honor, there was five objections filed to the
23 procedures motion that we filed, four of them being
24 consensually resolved. There was one objection filed by
25 Allegheny Power et al. which we're adjourning to April 7th. In

1 the order seeking approval of the motion, we provide in there
2 for the adjournment and the reservation of rights by the
3 utilities and the debtors, you know, during the three week
4 period.

5 Unless Your Honor has any questions about the
6 procedures or the escrow account, we would ask that Your Honor
7 approve the motion.

8 THE COURT: I do have questions.

9 MR. GLEIT: Sure.

10 THE COURT: And I'm going to take -- I've got a number
11 of points I want to raise. First, with respect to the motion
12 itself. In the memorandum at page 14, it states that the
13 relief requested in this motion is similar to the relief
14 granted by courts in this district and other districts in other
15 recent Chapter 11 cases filed after BAPCPA became effective.
16 And among the list of cases that you provide are three cases in
17 which -- which are my cases, Uno Restaurant, Lexington
18 Precision and PRC. And on page 14 you in fact provide the
19 references to the docket numbers where the orders were entered
20 in those cases. Your statement that the relief requested in
21 this motion is similar to the relief granted by courts in this
22 district is not correct, is not accurate with respect to my
23 three cases. Nor is it correct as to some of the others, but I
24 was more focused on my cases. And it's on a fundamental point
25 that I think you've attached in your reply, you've attached the

1 transcript from the PRC case --

2 MR. GLEIT: Yeah.

3 THE COURT: -- during the PRC, but this also came up
4 in the Uno case, Pizzeria Uno Restaurant Group.

5 Let me ask first, who wrote the motion?

6 MR. GLEIT: Your Honor, ultimately it was me, Your
7 Honor. So that would be, you know, a team at Kasowitz but
8 ultimately it was me.

9 THE COURT: Okay. And who wrote the reply brief?

10 MR. GLEIT: Ultimately it was me, Your Honor.

11 THE COURT: All right. If you had looked at the
12 orders in my three cases you would see that I have refused in
13 prior cases to approve the single escrow account that you
14 propose here. And I have required payments directly to the
15 utilities. When I say payments, in one of the forms accepted
16 under 366, but I've expressly declined to approve the use of a
17 single escrow account because I don't believe it complies with
18 366 and I don't believe it provides adequate assurance to
19 utilities. So that's one point.

20 So I think, you know, it's a source of some
21 consternation and frustration, not only to me but my colleagues
22 as well when it's sort of become much too standard for lawyers
23 to simply refer to orders entered in other cases without any
24 indication about the context, whether the issues were
25 contested. This was not -- those three orders that I entered

1 were -- some issues were contested but they were resolved in a
2 way reflected in the order. Other issues in there were not
3 contested and it's simply --

4 MR. GLEIT: I apologize, Your Honor.

5 THE COURT: Well, you know, from now on, any time you
6 cite an order entered in another case, I expect a copy of the
7 order to be provided. Okay. Because -- and I also expect
8 there to be an indication about the context whether it was
9 contested, whether it was completely consensual or what have
10 you. On -- yes, there are cases where courts and this court or
11 judges on this court have approved the use of a single escrow
12 account. its' not clear to me whether the issue was contested
13 in those cases or not. I know of at least one judge who also
14 has declined to approve adequate assurance procedures with the
15 use of a single escrow account, largely, the reasons that I've
16 declined in the past.

17 Okay. So that's point number one. Point number two,
18 I'll begin with a quote. "Imitation is the sincerest form of
19 flattery." I will cite the original of that. It's from an
20 1820 publication by -- the author was Charles Caleb Colton.

21 Mr. Gleit, the reply brief other than the caption and
22 the first paragraph is virtually verbatim from Weil, Gotshal's
23 reply brief in the Blockbuster case. Your opening memorandum,
24 after going through the specifics of -- about this debtor, the
25 discussion of the law in that brief is taken virtually verbatim

1 from Weil, Gotshal's motion in the Blockbuster case. And so
2 when I asked the question who wrote the briefs, there's no
3 attribution given to Weil, Gotshal. I expect -- I didn't go
4 through and examine every other motion in these binders that I
5 have in front of me. But at the time you submit any fee
6 application, I expect that you or your colleagues will provide
7 a declaration indicating which of these motions are
8 substantially copied from the work product of another law firm.
9 And I anticipate that Ms. Golden or her colleagues, when they
10 review fee applications as they do very carefully in all cases,
11 will also be inquisitive about whether the work product that's
12 been provided to the Court reflects the work of you and your
13 colleagues or whether it's copied from the work product of
14 another law firm.

15 MR. GLEIT: Understood, Your Honor. If I may
16 address --

17 THE COURT: Let me just finish.

18 MR. GLEIT: Sure, Your Honor.

19 THE COURT: I will not, just so we're clear, with
20 respect to the utilities motion which I haven't ruled on yet,
21 do not include any time at all in your fee application for any
22 work including changing the caption and putting an initial
23 description. So no fees will be awarded to debtors' counsel in
24 connection with the utilities motion because for the reasons
25 I've said, you've provided substantially the work of Weil,

1 Gotshal and not of you and your colleagues.

2 I don't know -- I didn't want to take the time to go
3 through all the other motions. It sort of popped out at us
4 with respect to Blockbuster even though that case is not my
5 case. One of my law clerks happened to look at the briefs in
6 Blockbuster and said this looked very familiar.

7 Go ahead, Mr. Gleit.

8 MR. GLEIT: One, I want to apologize to the Court if
9 the Court was offended. The first issue I just want to raise
10 is with respect to all of our pleadings and all of the orders
11 cited. While they weren't submitted to chambers, we do bring
12 them on the first day and the second day to court for purposes
13 -- if any issue arises, Your Honor.

14 And the second point, I do apologize about the
15 Blockbuster. I will say this; I used to work at Weil,
16 Gotshal --

17 THE COURT: I know that.

18 MR. GLEIT: Okay, Your Honor. And oftentimes, you
19 know, my -- just the way I was trained as a lawyer, I look to
20 what they're doing, you know, especially when I'm representing
21 a debtor case. And I -- it was a good brief, Your Honor,
22 and --

23 THE COURT: yeah, they did a good job.

24 MR. GLEIT: So -- and they even attached your
25 transcripts, so, you know, I apologize for any insult. You

1 know, when I look at their pleadings sometimes, I see parts
2 that I have drafted years ago that are still used. So in
3 some -- not -- I wasn't there at the time of BAPCPA so I had
4 nothing to do with the Blockbuster brief. But I understand
5 Your Honor's point and it's well taken.

6 THE COURT: Okay. I just want to reiterate that when
7 I get that first -- when the first fee application is filed, I
8 expect a declaration indicating -- because I, you know, I'm not
9 going to take the time to go through these three big binders
10 and compare your briefs in these cases against briefs in other
11 cases. We just happened to look at Blockbuster for other
12 reasons and lo and behold. So --

13 MR. GLEIT: Your --

14 THE COURT: -- I expect a declaration that sets forth
15 (indiscernible) whether substantially duplicates the work
16 product. Yes, I understand, you put in the moving papers
17 itself, you know, the first section of it dealt with this
18 debtor. But then the law was copied.

19 MR. GLEIT: I understand Your Honor's point and we
20 will add that affidavit. I -- like in my head, I know what
21 cases I looked at for what pleadings, so, you know, there are
22 more than just Blockbuster out there. But I understand --

23 THE COURT: It's clearly appropriate --

24 MR. GLEIT: -- Your Honor's point.

25 THE COURT: -- to look at briefs in other cases but I

1 expect that when you submit papers here with your name on it,
2 unless you're attributing the work product to somebody else
3 that it will be the work product of your firm. I mean, I had
4 Weil, Gotshal in plenty of cases and I see the same briefs of
5 theirs in multiple cases. I expect that's reflected in their
6 fee statement that they haven't changed more than once for the
7 same work product or brief. But it's when you use somebody --
8 another firm's work product -- I would say on somewhat slightly
9 different facts but not vastly different, there's at least one
10 bankruptcy decision imposing sanctions on a law firm for
11 substantially copying work without giving attribution to it.
12 So I want to head it off at the pass.

13 MR. GLEIT: Understood, Your Honor --

14 THE COURT: And I should say --

15 MR. GLEIT: -- very clear.

16 THE COURT: -- in the other case, there was a bill
17 submitted to a client, actually, it was not the debtor. It was
18 a creditor's counsel who had charged his client for the work
19 the judge discovered wasn't the lawyer's work. Okay.

20 Now, with respect to the utilities motion itself.
21 What I'm -- I will tell you, I mean, I flagged this issue that
22 I -- to the best of my -- it's possible that when I first came
23 on the bench I may have approved orders that were submitted to
24 me that weren't contested. I don't remember approving a single
25 escrow account, which is what you propose. I understand,

1 administratively, it's more convenient. But I've not approved
2 it.

3 MR. GLEIT: Your Honor --

4 THE COURT: It's one thing if there's a consensual
5 agreement with the utility. But in the proposed order you've
6 submitted, you have the first -- in paragraph 2, "The debtors'
7 proposed adequate assurance satisfies the requirements of
8 Section 366 of the Bankruptcy Code," and I will not find that.
9 I will not -- I would not reach that conclusion.

10 There are -- I understand that you've adjourned one
11 objection. You've resolved a group of others. And you include
12 in paragraph 12 of the black-line order that I was given, that
13 I'm supposed to be hereby approving all of the separate deals
14 you've cut with utilities. I haven't seen any of them. I
15 don't know what any of them are. I'm not approving anything I
16 haven't seen.

17 MR. GLEIT: With respect to that point, Your Honor,
18 how would you like us to address that?

19 THE COURT: Well, let's -- I'm not finished going
20 through this.

21 MR. GLEIT: Okay.

22 THE COURT: Okay. You also -- in paragraph 4 of the
23 proposed order, it provides that "the debtor shall deposit as
24 adequate assurance, \$2,288,210.96, the adequate assurance
25 deposit, into a newly created segregated interest-bearing

1 escrow account, the adequate assurance account, within twenty
2 days of the commencement date." Well, we're twenty-eight days
3 from the commencement date. Have you deposited the money in an
4 account? Have you created the account?

5 MR. GLEIT: The motion, Your Honor, I think says
6 thirty days.

7 THE COURT: No, no, no.

8 MR. GLEIT: And it was -- no, we have not. It was --

9 THE COURT: No. The order --

10 MR. GLEIT: I see, Your Honor.

11 THE COURT: -- the motion is quite inconsistent on
12 this --

13 MR. GLEIT: Sure.

14 THE COURT: -- subject. I had issues about the
15 motion. But you've submitted an order that says you created
16 the account within twenty days. You didn't do that, right?

17 MR. GLEIT: We did not, Your Honor. I have -- I've
18 been working on setting up the account, and the goal was --

19 THE COURT: You know, I raised this issue. You
20 adjourned -- this hearing on the utilities motion was
21 previously scheduled. You had an uncontested motion on
22 rejection on --

23 MR. BUECHLER: Assume and assign.

24 THE COURT: -- on assuming and assigning a lease. And
25 I raised at the time my concern that you had adjourned the

1 utilities motion. And I said -- I think I probably said, you
2 do it at your own risk, because we're at twenty-eight days, and
3 consequences flow under Section 366, when you hit thirty days.
4 And the section, which is not the height of clarity in
5 draftsmanship, you know, certain things are supposed to happen
6 within twenty days.

7 Within twenty days, you're supposed to make an
8 adequate assurance payment. Okay. That hasn't happened.
9 That's in 366(b), I believe. Okay. And then it's -- but the
10 utility is not supposed to shut off your utilities for thirty
11 days. But what's unclear to me is, is that only if you've
12 gotten something within the first twenty days. So the section
13 is not the height of clarity.

14 But consequences come at the thirtieth day. You're at
15 the twenty-eighth day. You've not made any deposit. You've
16 put a provision in the order that says you did create the
17 account; you didn't. And then someplace else it says, well,
18 you'll make the payments within three days of the date the
19 order is entered. So I'm really at something of a loss about
20 where things stand, Mr. Gleit.

21 MR. GLEIT: Your Honor, there are -- one, obviously,
22 if Your Honor indicates exactly what they would like -- what
23 the Court would like us to do, we will do. We do have the
24 money. We have actually a trust set up -- trust fund document
25 set up. And we also have a segregated bank account set up

1 where we could put the funds, and we were just waiting until
2 entry of the order to do that.

3 And I just do want to note, Your Honor -- and I guess
4 this is where you're saying that escrows are not permitted.
5 But in 366(b)(c) -- was it -- 366(c)(1)(B) -- no (c)(1)(A)(vi),
6 where it says "another form of security that that is mutually
7 agreed on between the utility and the debtor or the trustee,"
8 the way we are handling it and the way I've handled it in other
9 cases, is when a utility objects or sends us an informal
10 objection, which we received many, and we're in discussions, if
11 they're unhappy with the escrow account, the way it works is,
12 you can then agree upon either a cash deposit, a letter of
13 credit, a CD, a surety bond, with those utilities. And we work
14 with them --

15 THE COURT: Well, that was supposed to happen before
16 thirty days. We're twenty-eight days into the case. That was
17 part of my concern about you bringing on a motion on the
18 twenty-eighth -- continuing it until the twenty-eighth day.

19 MR. GLEIT: Well, Your Honor, the hearing that we had
20 gotten from the Court was already twenty-one days after the
21 16th. And I had read cases where you then flip the twenty days
22 to the thirty days based on 366(3) -- 366(c)(1)(2). And I
23 believe some of the cases say that in Chapter 11 cases, it's a
24 thirty day -- there's confusion among the courts. The majority
25 of the courts say that within Chapter 11 cases, it's a thirty-

1 day period to provide the deposit, which to me, makes logical
2 sense.

3 We're not dealing with a small debtor here. We have
4 about 800 utilities. It's a major undertaking. A lot of
5 utilities don't -- you know, government monopolies within the
6 state and there's -- it's a slow process sometimes to resolve
7 their issues. By filing a motion like this, we're trying to
8 streamline the process to add a little -- to make it a little
9 easier for the company.

10 THE COURT: I agree with -- I want to be careful how I
11 says this, because somebody will take a transcript and cite it
12 in the next case.

13 In principle, I agree with those cases like Circuit
14 City that have approved adequate assurance procedures along the
15 lines that you've proposed. But importantly, in Circuit City,
16 the relief that was granted -- and there was a single account,
17 and I think that the Court in its opinion indicated there were
18 no objections as to the form of the relief. So in Circuit
19 City, there was -- as I understand from reading the opinion,
20 there was no objection to the use of the escrow account. The
21 Court in Circuit City thought that the escrow account was
22 equivalent to a letter of credit.

23 But the Court said, in note 14 -- footnote 14:
24 "Furthermore, the appealing utilities never objected to the
25 amount or method of the assurance payment they were offered by

1 the debtors. The Court notes that each was resolved
2 consensually."

3 So in Circuit City, which you rely on, and I think
4 it's a good case -- I don't agree with some of the earlier
5 decisions that came down, the approved procedures -- but in
6 Circuit City, the procedures were much more specific. You
7 haven't set forth in the proposed order or in the proposed
8 procedures how this escrow account is supposed to work, how
9 does a utility draw on it. I believe in Circuit City, if I'm
10 not -- I don't have the opinion in front of me, but if I
11 recall, the procedure there allowed a utility that claimed
12 there was a default to simply draw on the escrow account
13 without further order of the Court. It was, in effect, as if
14 the money was in its hands.

15 You say we'll tell them later how we're going to deal
16 with the escrow account. You don't say how much they can draw
17 down. And one of the things I've expressed in prior cases
18 about the single escrow account is, it leaves -- it's the risk
19 that the utilities are not getting adequate assurance, because
20 if the debtor begins to default with any of the utilities,
21 there may not be enough money in the account to cover each of
22 them. And it leads to the potential of a stampede, because
23 they all come running into court because of fear that there
24 won't be money left for them.

25 You haven't said whether each utility can draw down up

1 to the amount of the deposit allocated to it. So you
2 haven't -- you know, in Circuit City that was all there. You
3 haven't done any of that. We're twenty-eight days into this
4 case. Thirty days your utilities can start shutting off your
5 utilities, and you haven't -- you make a proposal but you don't
6 give any of the details of it. You haven't been specific
7 enough.

8 MR. GLEIT: A couple of things, Your Honor. One, if
9 you'd like, I can walk you through the proposal we have for the
10 escrow account. Two, for --

11 THE COURT: Proposals don't do anything for me, Mr.
12 Gleit, because I -- you know, I sign orders. And the Code
13 requires I find that there's adequate assurance. I will
14 approve adequate assurance procedures, but I'm not writing you
15 a blank check. And that's what you're asking for.

16 MR. GLEIT: I understand, Your Honor. And may I ask,
17 how would Your Honor propose that I address your issues with
18 the motion?

19 THE COURT: Well, first tell me, the \$2,288,210.96,
20 how was that computed?

21 MR. GLEIT: It was based on the two week average for
22 the yearly rate of utility bills that the debtor had received.
23 From the letters we've received generally, it's actually been a
24 little higher than the two week average that utilities have
25 been submitting to the company.

1 Once in a while we have a utility that comes in and --
2 like in December, if the store was located in Alaska, you might
3 have a higher bill for heat for that month. But for the
4 average, we've been -- it's above.

5 THE COURT: All right. First let me ask, does anybody
6 else want to be heard with respect to the utilities motion?

7 (Pause)

8 THE COURT: All right. I'm prepared to approve an
9 interim order with respect to adequate assurance of utilities.
10 I'm going to require that the debtor deposit into a segregated
11 interest-bearing escrow account the amount of \$2,288,210.96, by
12 5 p.m. Wednesday, March 16, 2011. Pending further hearing of
13 the Court on April 7th, no utility may alter, refuse, terminate
14 or discontinue utility services to and/or discriminated against
15 the debtors on the basis of the commencement of these Chapter
16 11 cases or on account of outstanding pre-petition invoices, or
17 require additional assurance of payment, other than the
18 adequate assurance that I've ordered now as a condition to the
19 debtors receiving such utility services.

20 At the hearing on April 7th I will consider further
21 the adequate assurance procedures with the following changes.
22 I'm going to shorten the time periods you've provided.

23 (Pause)

24 THE COURT: I'm going to leave the utilities time to
25 file requests for additional assurance the same as it is now,

1 but I'm going to shorten the debtor's time to ten days --
2 actually to fourteen days; I try to keep everything in seven-
3 day multiples -- to fourteen days, to negotiate with the
4 requesting utility.

5 And on or before April 7, the debtor shall either have
6 consensual stipulations as to the form that the adequate
7 assurance deposit or payment will take, or to the extent it
8 doesn't have such consensual resolutions, the Court will
9 require that adequate assurance payments be made in any of the
10 manners consistent with 366(c)(1)(A), it's really (i) through
11 (vi), but (vi) is the one that allows any way consensual. But
12 otherwise, it's got to be any of the first five.

13 So if the utilities are satisfied with a single escrow
14 deposit, as long as it's segregated, they know how much is
15 theirs, I mean, you can work that out. But absent a consensual
16 stipulation, you need to comply with 366(c)(1)(A)(i) through
17 (v).

18 MR. GLEIT: Understood, Your Honor.

19 THE COURT: And that will have to be done before the
20 April 7th hearing. So I'm allowing the money to be deposited
21 now into the single interest-bearing escrow account, but by
22 April 7th, this issue needs to be resolved either consensually
23 or with payments made directly. Obviously, to the extent you
24 make payments directly to the utilities, I will, at that time,
25 permit you to withdraw it from the escrow account.

1 MR. GLEIT: That's the one question I do have for Your
2 Honor, as a practical matter. With respect to utilities that
3 have not made additional adequate assurances to us and it could
4 be several hundred, you would want the debtor to either set up
5 a deposit with that specific utility or --

6 THE COURT: You can --

7 MR. GLEIT: -- or one of the forms -- a CD with that
8 specific utility?

9 THE COURT: -- you can do a letter of credit. I mean,
10 you may prefer the letter of credit rather than having
11 deposited cash. But I'm leaving it to you. The Code is clear
12 what the permissible forms of adequate assurance take in. I'm
13 permitting you only, with some reluctance, because we're at the
14 twenty-eighth day, to deposit the cash. But I want it fixed by
15 April 7th.

16 MR. GLEIT: Understood, Your Honor. Okay. We'll
17 submit a revised order addressing Your Honor's concerns.

18 THE COURT: And make sure Mr. Buechler and the U.S.
19 Trustee have an opportunity to review. And if there are any
20 utilities counsels here, they can review it as well. I'm going
21 to carry -- you know, it's -- if all I had before me was an
22 adjournment of one objection and resolution of the others,
23 which you've asked in the order that I approve when I haven't
24 seen any of them -- and I'm not approving anything I don't see.
25 But if that's all there was, I would strike the language about

1 "the proposed adequate assurance satisfies the requirements of
2 366." But this vast unwashed group of utilities, it doesn't
3 comply with 366.

4 They didn't file objections. But the form of adequate
5 assurance is specified in the Code. I required it in Uno. I
6 required it in PRC. I required in the other cases, whether
7 there were objections or not. It just doesn't comply with the
8 Code.

9 MR. GLEIT: Understood, Your Honor. We'll remedy
10 that.

11 The next matter, Your Honor, is the debtors' motion
12 for approval of procedures for the rejection of unexpired
13 leases. Not that I want to step on a land mine, Your Honor,
14 but in that declaration we'll be submitting regarding the
15 pleadings, I think one of the cases I had looked at was A&P, so
16 I will have that in the declaration. I was looking for a form
17 of lease rejection procedures that I thought was appropriate
18 for this case. As Your Honor is aware --

19 THE COURT: I don't -- you know if there are -- if
20 there's an order entered that sets forth the procedures, it's
21 appropriate to say that in the A&P case, similar procedures
22 were entered. I do expect to know whether it was consensual or
23 not, whether it was contested. But there's nothing wrong, in
24 and of itself, in saying the same order has been entered in six
25 cases, whether your firm did it or some other firm did it.

1 That's not my complaint. Okay.

2 I think proposed orders are -- there, you've pointed
3 to proposed ord -- the actual orders that were entered in
4 cases. You haven't indicated the context or whether they were
5 contested or not. But you have. My biggest gripe was when I
6 read a brief that was verbatim from another brief. That's
7 another story.

8 MR. GLEIT: Understood, Your Honor.

9 THE COURT: But go ahead with respect to this.

10 MR. GLEIT: Your Honor, we did receive objections
11 from -- both informal and formal objections to the procedures.
12 We did make some changes to the revised procedures to address
13 all of the objections that we received. Both --

14 THE COURT: It looks like there are five -- as of your
15 amended docket -- amended agenda, it looks like there were five
16 objections that were not resolved. Have they now been
17 resolved?

18 MR. GLEIT: Yes, Your Honor. This is the -- you're
19 saying the amended agenda, Your Honor.

20 THE COURT: It's all I have.

21 MR. GLEIT: It's under -- on page 9 --

22 THE COURT: Okay. You list on page 10 under status --

23 MR. GLEIT: Oh, Your Honor, that's a different motion.
24 That's a 365(d)(4) extension motion, Your Honor.

25 THE COURT: All right. Which one are we looking at

1 now.

2 MR. GLEIT: It's on page 9 --

3 THE COURT: Okay.

4 MR. GLEIT: -- and it was --

5 THE COURT: All right.

6 MR. GLEIT: -- subsection (I). If Your Honor wants, I
7 could walk you through the changes that were made to the order
8 that was filed with the Court.

9 THE COURT: Go ahead and do that.

10 MR. GLEIT: Okay. Your Honor, just in paragraph 2(a)
11 we had altered the notice provisions to make sure: 1) that
12 Lowenstein, as counsel for the committee, got a copy of the
13 notice; 2) that subtenants at the premises got a copy of the
14 notice; and 3) that counsel for Seattle's Best Coffee would get
15 notice of the rejections. The purpose of Seattle's Best Coffee
16 getting notice was, just so Your Honor is aware, is we have a
17 master license agreement with them. We own the property in the
18 stores, but they do have signage up there.

19 In paragraph 2(c), again, it was to update just for
20 Mr. Buechler, was the main change. A substantive change, Your
21 Honor, was in 2(d). The original proposed motion had the
22 rejection being effective either upon the filing and service of
23 a notice or if someone had objected, you know, we would have
24 been in discussions with that landlord. The revised procedures
25 provide: 1) for the later -- the rejection to be effective the

1 later of the date the debtors file and serve a rejection
2 notice; 2) the date the debtors relinquish control of the
3 premises by notifying the effective landlord in writing of the
4 debtors' surrender of the premises and turning over keys, key
5 codes and security codes to the effective landlord; and 3) is
6 the collection deadline, which is defined later on, Your Honor,
7 as -- it's when personal property is removed from the premises.

8 Your Honor, all the objections we received, basically,
9 had some form of this language, and we had circulated the order
10 to all the landlords prior to this hearing.

11 In paragraph 5 we dealt with Seattle's Best's concern.
12 And they didn't want the order to trump their rights under the
13 master license agreement or to affect various of their other
14 rights as against the debtor.

15 And in paragraph 7, landlords had wanted to reserve
16 their right to seek an admin claim for any property damage from
17 the removal of FF&E.

18 MR. GLEIT: So it makes clear, one, that they've
19 reserved that right -- the debtor reserves the right to contest
20 any admin claim or two, landlords can put ahead the damages to
21 rejection claim. You know, and that's either a dispute
22 hopefully that would be resolved later on between --

23 THE COURT: I want to repeat -- one thing for me. The
24 rejection is effective the later of -- what were the
25 alternatives?

1 MR. GLEIT: Your Honor, it's in 2.

2 THE COURT: The filing of the notice, what else?

3 MR. GLEIT: It's the filing of the notice, the date
4 the debtors relinquish control of the premises to the landlord
5 and that would be -- really the way it works is in 1 it's if
6 the property is empty and it's vacated it'll be easy, it would
7 be the date that we file. If we're still on the premises it
8 would be the date we turn over the keys, you know, and there's
9 some fancier language in there but that really is effectively
10 what it's saying.

11 And then C deals with the date that we -- if there was
12 personal property still on the premises so it would be when
13 that personal property of a third party is removed -- of us is
14 removed; so it's equivalent to 2 -- really 2 to me.

15 THE COURT: Let me just ask about that last
16 alternative because in many cases, retailer cases, there's
17 usually language about any personal property left as deemed
18 abandoned as of -- so what my question is, are you going to run
19 into a problem because the landlord claims that some small
20 amount of personal property was left behind and therefore the
21 lease isn't deemed rejected then?

22 MR. GLEIT: Your Honor, I don't think we'll run into a
23 problem on that -- obviously I can't --

24 THE COURT: Can I see the proposed order?

25 MR. GLEIT: Yes, Your Honor, I'm sorry I thought you

1 had it.

2 THE COURT: Well, just tell me where in the binder it
3 is, because I thought you said you made some changes. Do I
4 have the latest version of it?

5 MR. GLEIT: You should have a version in there, a
6 redline, but Your Honor for ease I have it right here, I could
7 walk it right up if it's okay.

8 THE COURT: If you just tell me which tab it is, you
9 don't -- that may be harder, I don't know. You know, it's tab
10 13.

11 MR. GLEIT: And there's two paragraphs, Your Honor,
12 that are pertinent to --

13 THE COURT: Let me just find the proposed order.

14 MR. GLEIT: Sure.

15 THE COURT: Maybe you'd better hand it up; I don't see
16 the order.

17 MR. GLEIT: May I approach?

18 THE COURT: Yes, please, thanks.

19 This is paragraph 5 is what you're referring to?

20 MR. GLEIT: It's 5 and 6, Your Honor; 5 addresses the
21 abandonment issue.

22 THE COURT: All right, let me read it.

23 (Pause)

24 MR. GLEIT: Your Honor, Mr. Buechler points out that
25 it's 5 through 7 that address Your Honor's concerns.

1 THE COURT: Okay, let me read 7.

2 All right, does anybody else wish to be heard with
3 respect to the rejection procedures motion?

4 Okay, courts are not in the agreement as to when a
5 lease rejection takes effect. The effective date of a lease
6 rejection determines when a debtor's obligation to pay rent
7 ceases and is therefore a very relevant date in the life of the
8 debtor, see *In re At Home Corp.* 392 F.3d 1064,1069 (9th Cir.
9 2004).

10 Under the majority view the rejection of a lease
11 becomes effective upon entry of a court order giving a trustee
12 or the debtor's motion to reject an unexpired nonresidential
13 lease. This view perceives court approval as a condition
14 precedent to the rejection of the lease. See *Thinking Machines*
15 *Corp. v. Mellon Financial Corp.* #1, *In re Thinking Machines*
16 *Corp.* 67 F.3rd 1021, 1025 (1st Cir. 1995). The *Thinking*
17 *Machines* court went on to indicate that, "Nothing in our
18 holding today precludes a bankruptcy court at an appropriate
19 Section 365(a) case from approving a trustee's rejection of the
20 nonresidential lease retroactive to the motion filing date."
21 It's at page 1028.

22 The Second Circuit in *Adelphia Business Solutions Inc.*
23 *v. Abnos*, 482 F.3d 602, 607 endnote 1 (2nd Cir. 2007) stated
24 that, "We have not ruled on the existence or scope of a
25 bankruptcy court's equitable authority to order retroactive

1 approval of rejection under Section 365 and there's no need for
2 us to do so here."

3 We know that two of our sister circuits have held that
4 the bankruptcy courts have this equitable authority, though
5 without considering Grupo Mexicana. The Southern District" --
6 I'm leaving some out now, "the Southern District of New York
7 has held that a bankruptcy court may give retroactive effect to
8 its approval of rejection under Section 365 at least where
9 there is 'unnecessary delay caused by the creditor'".

10 While the proposed order here goes beyond making the
11 effective date of rejection the date that the court enters the
12 order, the Court is satisfied that it sufficiently protects the
13 interests of landlords and the debtor and provides a clear
14 delineation point of when the rejection takes effect,
15 particularly in light of the fact that the language in the
16 proposed order, the blackline, provides that the later of those
17 dates is deemed the date of rejection, so I will grant that
18 motion.

19 MR. GLEIT: Thank you, Your Honor.

20 Your Honor, the next motion on the agenda was a motion
21 to lift the automatic stay to allow for an offset of pre-
22 petition liability. It was filed by Dell Marketing; the motion
23 relates to a software license agreement. The debtors owed
24 \$92,346.08; the debtor owes Dell \$64,012.26. The proposed
25 order that we submitted was agreed upon between the debtor and

1 Dell; a copy was given to Mr. Buechler and it provides for the
2 setoff and then a payment within twenty days of the difference,
3 which is about 30,000 dollars, to the estate.

4 Unless Your Honor has any questions we would ask that
5 the proposed order approved by this Court.

6 THE COURT: Does anybody else wish to be heard with
7 respect to the Dell Marketing?

8 MR. BUECHLER: The committee's comments were
9 incorporated into the proposed stipulated order.

10 THE COURT: All right. The proposed stipulated order
11 is approved.

12 MR. GLEIT: Thank you, Your Honor, I'm going to turn
13 the podium over to Mr. Gleit.

14 MR. GLEIT: One moment, Your Honor.

15 The next item on the agenda, Your Honor, is docket
16 number 209, which is the debtors' motion to extend the deadline
17 to assume nonresidential leases. I believe we discussed this
18 in broad terms with Your Honor the last time we saw you.

19 Obviously, the company's real estate portfolio is a
20 critical part of the estate. The company has hired DJM whose
21 retention application is on the agenda for later today to
22 negotiate a package of rent concessions with landlords and to
23 market leases for potential assignment to third parties to
24 maximize value for the estate.

25 This case may be unique compared to other cases in

1 which this deadline is dealt with so early on in the case, and
2 that was one of the issues that was addressed in the
3 objections, but I believe as we set forth clearly in the
4 accompanying affidavit of Richard Klein, the debtor-in-
5 possession financing in this case has very strict deadlines.
6 Talking about --

7 THE COURT: Not yet approved?

8 MR. GLENN: Not yet approved proposed financing, yes.
9 The proposed DIP is still on the agenda.

10 In any case, the DIP lenders in this case want to
11 assure themselves that there's enough time to liquidate any
12 collateral that they have at the stores before our occupancy of
13 the stores is --

14 MR. GLENN: I thought that might be me.

15 THE COURT: No, we're getting feedback on your
16 microphone. Go ahead, Mr. Glenn.

17 MR. GLENN: Okay. The DIP lenders in this case want
18 to assure themselves that there's sufficient time to --

19 UNIDENTIFIED SPEAKER: It's still --

20 MR. GLENN: Is that better if I'm closer?

21 THE COURT: No, I think it's actually better if you're
22 a little further back.

23 MR. GLENN: Okay.

24 THE COURT: Okay, go ahead.

25 MR. GLENN: Okay. They want to assure themselves that

1 there's sufficient time to occupy the leased premises so that
2 if there are going to be liquidations in this case, as have
3 been commenced since very early on, that there will be
4 sufficient time to conclude that process before the debtor has
5 to vacate the property.

6 There are a series of deadlines in the motion from
7 twelve to fifteen weeks before the applicable deadline in each
8 case. The twelve-week deadline is obviously the most
9 important. On that day we have to commence a liquidation of
10 each of the leases that have not been extended. Some of the
11 deadlines have actually already passed in the DIP motion, as we
12 laid out in this motion, and the lenders have given us relief
13 to seek Your Honor's approval to extend those deadlines today.
14 So that's one of the reasons why we wanted to have this motion
15 heard before the DIP.

16 So what we're asking, Your Honor, is to give us, first
17 and foremost, the additional ninety days that 365(d)(4)
18 provides us. I believe that the motion supported by the
19 declaration outlines the underlying reasons why cause exists in
20 this case.

21 Number two -- and this is also part of the DJM
22 mandate -- we have already embarked on a process to extend,
23 assuming Your Honor grants us that ninety days, the extensions
24 beyond the 210-day period on a consensual basis with landlords.
25 And in fact, we've already gotten consent from a number of

1 parties in that regard. We're still negotiating with a number
2 of other landlords, some of the bigger landlords whose counsel
3 is in court today.

4 And what we would envision is after we get -- assuming
5 we get Your Honor's consent to the ninety-day extension, we
6 would put forward another stipulation or series of stipulations
7 with landlords affording us beyond the 210 days but seeking
8 other concessions that would be necessary to get Your Honor's
9 approval under Section 363 of the Code and Bankruptcy Rule
10 9019. Those matters are not on the calendar today. As I said,
11 they will be the subject of a later motion.

12 Some of the other objections that we've received and
13 resolved involved leases that are subject to the already
14 pending GOB process. For those we are carving those out of
15 this motion today without prejudice to our right to seek an
16 additional extension some time down the road.

17 THE COURT: You have until, what, June 16th, I
18 think --

19 MR. GLENN: I believe that's correct, Your Honor.

20 THE COURT: -- to seek an order extending the time to
21 assume or reject. I think that's the ninety days.

22 MR. GLENN: Correct.

23 THE COURT: And I know -- this was -- I was looking at
24 the wrong agenda item, but on this one I went through and
25 looked at pages 9 and 10 of the agenda. There are five

1 objections that you didn't resolve.

2 MR. GLENN: Your Honor, actually overnight I think we
3 resolved even some of those.

4 As far as I'm aware, and the parties in court can
5 correct me, or on the phone, if I'm wrong. The only two
6 pending objections are that of Mt. Kisco Associates, docket
7 number 263, and the limited objection of Faber Bros., Inc.
8 Now, Faber Bros., I believe, and the landlord can correct me if
9 I'm wrong in representing today, is on the -- it's a vacant
10 property and so we would not be seeking to extend the deadline
11 with respect to that one.

12 I believe, and I've had a number of conversations with
13 landlords, that all other objections are resolved. I should
14 say that some of the landlords have asked me to make certain
15 representations on the record which I will do now.

16 First, the debtor made its March rent payments on a
17 timely basis. There was a banking glitch -- I think we
18 articulated that in the motion -- whereby funds in an
19 administrative account had not been moved in accordance with
20 our instructions, or some other glitch if I'm not getting that
21 technically correct. We worked feverishly, Your Honor, over
22 the past three or four days, to replace those checks with
23 wires. To the extent that anyone has not been paid I would
24 encourage them to contact me personally immediately and I will
25 resolve that immediately with the company's assistance.

1 Secondly, for the stores in the GOB process, we have
2 already paid the stub rent. There are a couple of landlords,
3 again, where there were glitches with those. If any landlord
4 has any issues with those stub rent payments, again I would ask
5 them to contact me personally --

6 THE COURT: Well, you've paid or your joint venture
7 partners are -- they're obligated to pay all the rent, so you
8 haven't paid it.

9 MR. GLENN: Well, we have the primary obligation to
10 pay, subject to reimbursement.

11 And then the remaining leases --

12 THE COURT: Why April 18th?

13 MR. GLENN: That's just a date that was negotiated,
14 Your Honor. There were a number of landlords who we've spoken
15 to about that. We discussed splitting it up in two pieces.

16 THE COURT: How much stub rent do you owe?

17 MR. GLENN: I believe the amount is approximately
18 five million dollars.

19 UNIDENTIFIED SPEAKER: Five to six million.

20 MR. GLENN: Five to six million dollars.

21 UNIDENTIFIED SPEAKER: I think it's part of the
22 budget.

23 MR. GLENN: But again, as we've discussed this with
24 landlords, there's been no objections and that amount has been
25 negotiated with all of the major landlords, again, who are in

1 court.

2 THE COURT: That amount or that date?

3 MR. GLENN: The date. I mean, I don't think the
4 amount is particularly --

5 THE COURT: Let me just -- okay, you've said Faber
6 Bros. you're not seeking to extend the time with --

7 MR. GLENN: If I'm correct -- and I'm trying to
8 confirm that but I believe that's correct. And if they're here
9 and they can --

10 THE COURT: Is anybody from Faber Bros. present on the
11 phone or in court?

12 No one.

13 All right, what about Inland American Retail
14 Management, et al?

15 MR. GLENN: That's been resolved. That was one of the
16 landlords who had some glitches with their rent to be paid. If
17 I'm incorrect they can speak up.

18 THE COURT: What about Taubman landlords? I'm looking
19 at the agenda.

20 MR. GLENN: Yes.

21 THE COURT: I put an R next to everything --

22 MR. GLENN: No, that's Mr. --

23 THE COURT: that you had shown as resolved --

24 MR. GLENN: Yes.

25 THE COURT: -- and this was not.

1 MR. GLENN: Mr. Branch is in the courtroom. I believe
2 that has been resolved.

3 MR. BRANCH: Yes.

4 THE COURT: Who just stood up?

5 MR. BRANCH: Dustin Branch of Katten Muchin.

6 THE COURT: Okay. All right. So Taubman is resolved.
7 All right, the next one is General Growth Properties,
8 GGP.

9 MR. GLENN: That I learned was resolved immediately
10 before the hearing with some clarifications about rent payments
11 that had been outstanding.

12 THE COURT: Okay. Does anybody else wish to be heard
13 with respect to the motion to extend the time to assume or
14 reject?

15 Mr. Buechler?

16 MR. BUECHLER: Your Honor, the creditors' committee
17 does support this motion. The committee did discuss it, did
18 raise the issue with regard to the stub rent for the non-GOB
19 sales as to whether it should be two-stepped or one-stepped.
20 When we heard from many of the landlords that they were
21 amenable to the mid-April date then the committee relayed to us
22 that if the landlords were acceptable to that, that would be
23 acceptable to the committee. We did make clear to the debtors
24 that we needed to have stub rent paid for the non-GOB stores
25 sooner than later.

1 With regard to the motion in its entirety, given the
2 way the DIP financing was arranged and the reality of retail
3 cases such as this with the overlay of the Bankruptcy Code
4 vis-a-vis the time to assume or reject unexpired leases of
5 nonresidential real property, the committee does fully support
6 the motion.

7 With regard to phase two -- with the second half of
8 the motion with regard to the stipulations, for the plain
9 vanilla stipulation attached we have no issue. We have
10 discussed with the debtors and some of the landlords some of
11 the additional provisions that may be in stipulations as to
12 where the committee comes out on those. And because that is
13 not before the Court today, we will reserve on that issue till
14 a future date.

15 With regard to the debtors' request to extend the time
16 for the additional period through the full 210 days, the
17 committee fully supports and asks that the Court enter the
18 order granting that relief that's sought by the debtor with the
19 modifications as agreed to.

20 THE COURT: Thank you, Mr. Buechler.

21 MR. BUECHLER: Thank you.

22 THE COURT: Why don't you hold on? Who's up next? Go
23 ahead.

24 MR. FONG: Good morning, Your Honor. May it please
25 the Court. Chris Fong of Paul, Hastings, Janofsky & Walker on

1 behalf of Mt. Kisco.

2 Your Honor, Mt. Kisco's objection is, I think, one of
3 the remaining objections that weren't resolved with the
4 debtors. And the basis for Mt. Kisco's objection is that it's
5 entirely too premature in these cases at this point, less than
6 a month into these cases, to grant a motion of a 365(d)(4).
7 Under the Code the debtors are provided an initial 120-day
8 period. And at this point, the only cause that the debtors
9 have put forward stating why this extension should be granted
10 is wholly self manufactured. The debtors and the DIP lenders
11 have come up with these deadlines under the DIP, and it's Mt.
12 Kisco's position that that should not constitute cause under
13 Section 365(d)(4).

14 Further, as to the complexity and the number of leases
15 in the case, I think the debtors' reply in their motion at best
16 are speculative as to the amount of work and how much time
17 they'll need. Mt. Kisco thinks the appropriate method in this
18 case is to get closer to the 120-day period and at that time
19 move the Court to revisit this issue. For that reason, Mt.
20 Kisco is seeking that the Court deny the motion without
21 prejudice.

22 THE COURT: If I understand correctly, Mt. Kisco has
23 been paid post-petition -- your objection did not raise the
24 issue about unpaid post-petition or stub rent?

25 MR. FONG: No, I believe, Your Honor, we are paid

1 currently, post-petition.

2 THE COURT: What about the stub -- including the stub
3 rent.

4 MR. FONG: Including the stub rent, yes.

5 THE COURT: Okay. All right. Anything else?

6 MR. FONG: That's it, Your Honor.

7 THE COURT: All right. Anybody else wish to be heard?

8 MS. KOSYDAR: Your Honor, this is Chris Kosydar in
9 Portland, Oregon.

10 THE COURT: Yes, please.

11 MS. KOSYDAR: We represent Valley Mall, LLC and we
12 also represent Bridgeport Village, LLC. We request that any
13 order that's entered regarding the extension of time to assume
14 or reject leases either be held or conditioned upon payment of
15 the stub rent. My clients have not received the stub rent.

16 THE COURT: Thank you.

17 All right, counsel?

18 MR. SAYDAH: Thank you, Your Honor. Your Honor, for
19 the record, Gilbert Saydah of Kelly Drye & Warren here today on
20 behalf of a number of --

21 THE COURT: A long list of landlords.

22 MR. SAYDAH: Correct, Your Honor, including Camino
23 Real, which is one of the resolved objections, Your Honor,
24 which raised the issue with respect to whether or not the
25 extension should be granted with respect to closing stores.

1 Since that has been withdrawn, our objection is resolved.

2 Your Honor, I rise because prior to the petition date
3 Kelly Drye & Warren represented an ad hoc group of landlords
4 and wanted to make Your Honor aware that the debtors have been
5 very cognizant during these cases of landlord issues.

6 Respectfully, usually I'm on the other side saying there's no
7 cause, they shouldn't be extended. Here we understand that the
8 debtors' financing, although not yet approved by the Court, is
9 closely tied to its leases, tied to its inventory. And we've
10 discussed this with our clients. They understand that this
11 initial extension is necessary and we believe indeed
12 constitutes cause. Thus we stand up and support this.

13 Your Honor, we did raise some of these issues that
14 have been addressed, for instance, the stub rent which is being
15 paid sixty days after the petition date, Your Honor, and the
16 debtors could have contested that and they didn't; they've
17 agreed to pay it by April 18th, I believe it is.

18 THE COURT: I have followed Judge Gropper's Stone Barn
19 decision in other cases and I'll just -- I've said this from
20 the bench in other cases so I --

21 MR. SAYDAH: We certainly appreciate that, Your Honor.
22 But we do believe that this is a part of it and this is
23 necessary and we want to see these cases get to a place where
24 they're able to continue as a going concern. We believe this
25 extension is necessary. So we would support the relief

1 requested.

2 THE COURT: Thank you.

3 Anyone else want to be heard with respect to the
4 extension and time to assume or reject?

5 All right. Mr. Glenn, let me ask you, the DIP budget,
6 assuming that the DIP is approved on a final basis, includes a
7 line item for rent including the stub rent?

8 MR. GLENN: I wouldn't want to represent that there's
9 a separate line item. I will turn to the CFO and confirm that
10 it's on -- it's included in the cash flows for the DIP budget.

11 MR. HENRY: That's correct.

12 THE COURT: All right. I'm going to grant the motion.
13 The decision to grant or deny a motion for an extension of time
14 is generally within the Court's discretion. See Association of
15 Retarded Citizens v. Thorne 68 F.3d 547, 554 (2d Cir. 1995).

16 However, in deciding whether to extend the time to
17 assume or reject the contract the Court should weigh the
18 following factors, including: 1) Whether the debtor was paying
19 for the use of the property; 2) Whether the debtors' continued
20 occupation could damage the lessor beyond the compensation
21 available under the Bankruptcy Code; 3) Whether the lease is
22 the debtors' primary asset; and 4) Whether the debtor has had
23 sufficient time to formulate a plan of reorganization.

24 See South Street Seaport, Ltd. Partnership v. Burger
25 Boys, Inc. (In re Burger Boys, Inc.), 94 F.3d 755, 761 (2d Cir.

1 1996).

2 See also In re Wedtech Corp., 72 B.R. 464, 471, 72
3 (Bankr. S.D.N.Y. 1987).

4 And the list of factors is by no means exhaustive and
5 in appropriate cases there may be other factors that a
6 bankruptcy court should consider, such as the complexity of
7 the case facing the debtor, the number of leases that the
8 debtor must evaluate, and the need for judicial determination
9 of whether a lease exists. See Burger Boys, 94 F.3d, 761.

10 Moreover, although the Court may consider the current
11 status of lease payments as one factor, the presence of lease
12 defaults does not preclude an extension and cure is not
13 required for an extension.

14 As is the case here, when a number of landlords object
15 to a debtors' request for an extension under Section 365(d)(4)
16 the Court must consider the particular concerns of each
17 landlord. See Escondido Mission Village L.P. v. Best Products
18 Co., 137 B.R. 114, 117. (S.D.N.Y. 1992).

19 Many of the objections, most of them resolved, but
20 certainly the Mt. Kisco objection, raises the issue that it's
21 premature for the Court to rule on the motion to extend the
22 time to assume or reject.

23 And the debtor cites several bankruptcy court orders
24 from this district in support of the request for relief.

25 However, these orders do not appear to really go as far as the

1 debtor suggests. All of those orders -- and one of those
2 cases, Uno Restaurant Holdings, was my case. The case was
3 filed on January 20, 2010. The order extending the time to
4 assume or reject was entered on May 11, 2010. The other cases:
5 Stone Barn, which obviously was Steve & Barry's, and Innkeepers
6 USA is another one. Those orders entering -- approving an
7 extension of the time were entered much further into the case,
8 or at least several months further into the case than is
9 requested here.

10 The Court's initial concern in reviewing this motion
11 was the unpaid stub rent. It was unclear to me why the debtor
12 had to wait until April 18th to fulfill its obligations in
13 paying all stub rent. But that issue -- Mt. Kisco has been
14 paid its stub rent and all post-petition rent so that point is
15 not a valid objection as to Mt. Kisco. And as to the other
16 objectors, they've resolved their claims.

17 I want to make clear, and we'll get to this when we
18 get to the DIP motion, I don't appreciate provisions in a DIP
19 order that constrain the Court's power provided by the
20 Bankruptcy Code. So when the DIP would require this Court to
21 approve the extension of time to assume or reject now,
22 something that's not contemplated by the Code, I react to that
23 the same way I do to other provisions in a DIP order --
24 proposed DIP order that would constrain the equitable
25 discretion of the bankruptcy court.

1 Putting that issue aside, as I said, I'm going to go
2 ahead and approve the extension of time. I think under the
3 circumstances of these debtors with the large number of retail
4 leases they have, some undergoing store closing now, some
5 subject to an option for further store closing, the debtor
6 obviously has a lot on its plate to deal with, with respect to
7 the leases, with respect to the inventory in each of its
8 stores. So I understand some of the concern, perhaps,
9 expressed by the DIP lenders in wanting an early resolution of
10 this.

11 In any event, considering all of the factors before
12 the Court, the Court concludes that it's in the best interests
13 of the debtor and the estate, even at this early stage of the
14 case, to extend the time to assume or reject the leases.

15 MR. GLENN: Thank you, Your Honor. Your Honor, at
16 this point, unless Your Honor has a different view, I think
17 we'd like to change the agenda around just a little bit. We
18 have a bunch of people out of town on the DIP. So if Your
19 Honor is okay with this, I would turn the podium over to Mr.
20 Friedman to present the DIP motion and then we would leave the
21 retention applications after that.

22 THE COURT: That's fine.

23 MR. GLENN: Thank you.

24 MR. FRIEDMAN: Your Honor, good morning. This is the
25 debtors' motion for final approval of debtor-in-possession

1 financing. My suspicion is, Your Honor, we will hear from you
2 on some of the issues regarding the order and I think we
3 welcome that opportunity because I can think of one particular
4 issue Your Honor undoubtedly worries just from sitting here and
5 having read Your Honor's transcripts in other cases about the
6 equities of the case and Section 552. And I think I'm
7 anticipating that will be an issue. And I've advised the
8 lenders' counsel that will be an issue. And I think we'll --

9 THE COURT: I've been consistent in every case that I
10 will not -- in some ways, it relates to the last comment I made
11 about constraining the Court's time to assume or reject in that
12 as I've consistently refused to approve a DIP order that
13 constrains the Court's power with respect to the equity of the
14 case doctrine.

15 MR. FRIEDMAN: Understood. And --

16 THE COURT: With that said, it's never come back to
17 life in any case I've had where that's been an issue. But I
18 just won't agree to it upfront.

19 MR. FRIEDMAN: Understood. And I think -- we welcome
20 hearing any other issues Your Honor has. So obviously, when we
21 submit the final, final order, it will be consistent with Your
22 Honor's --

23 THE COURT: Okay.

24 MR. FRIEDMAN: -- requirements.

25 What I would propose to do is just summarize the

1 record, if you will, with regard to the need for debtor-in-
2 possession financing and the appropriateness of this particular
3 package. And then I would welcome hearing from Your Honor. I
4 would then turn the podium over to Ms. Walker who is the
5 counsel for General Electric who has resolved all of the issues
6 with everyone other than the creditors' committee. And I think
7 she can put on the record -- most of them are the ad valorem
8 tax issues from the state of Texas. And then we'll work our
9 way through this and I'll announce the resolution of the
10 creditors' committee as well.

11 Your Honor, the record consists of the declarations of
12 Mr. Henry on the first day. Mr. Henry's in court today. As
13 well as Mr. Klein who submitted an initial declaration with the
14 motion and has submitted a supplemental declaration in response
15 to the objections.

16 THE COURT: Let me ask, Mr. Friedman. All of the
17 objections have been resolved?

18 MR. FRIEDMAN: Yes.

19 THE COURT: Okay. I'll entertain an offer to
20 introduce for purposes of this hearing the declaration of Scott
21 Henry -- that's ECF number 20 -- and the declaration of Richard
22 Klein and that's ECF number 28. Is there an additional Klein?

23 MR. FRIEDMAN: No. There's one Klein but there's two
24 declarations. There's a supplemental --

25 THE COURT: Okay.

1 MR. FRIEDMAN: -- declaration --

2 THE COURT: All right.

3 MR. FRIEDMAN: -- which is attached to docket number
4 355.

5 THE COURT: Okay. All right. You want to offer
6 those?

7 MR. FRIEDMAN: Yes, I do, Your Honor.

8 THE COURT: All right. Any objections? Okay. Those
9 declarations are admitted into evidence for purposes of the DIP
10 motion.

11 (Declaration of Scott Henry was hereby received into evidence
12 as of this date.)

13 (Declaration and supplemental declaration of Richard Klein were
14 hereby received into evidence as of this date.)

15 MR. FRIEDMAN: And, Your Honor, I will just summarize
16 the key points in less than a minute or two which is that the
17 debtors must have debtor-in-possession financing. Without it,
18 they're simply out of business and no one disputes that. The
19 debtors are unable to access unsecured credit. They're unable
20 to access subordinated secured credit. And they are even
21 unable to access a nonconsensual priming credit. And there is
22 no consensual priming credit available to the debtors. The
23 only means of obtaining credit here is through this facility
24 which refinances the preexisting secured debt.

25 THE COURT: How much new money is provided?

1 MR. FRIEDMAN: Well, the new money is, in the
2 aggregate, and it really depends how you count, but somewhere
3 between thirty and sixty million dollars. That's incremental
4 to the pre-petition facility. And that's in the form of more
5 liberalized advanced rates, other terms that have simply
6 enabled the debtors to borrow more money. And when the debtors
7 borrow more money here, what they really are doing is they're
8 pushing down further the term lenders who have a second lien on
9 the inventory. And inventory here is overwhelmingly, by an
10 order of magnitude, ninety percent or more the assets upon
11 which lenders are lending.

12 So there is an intercreditor agreement between the
13 term lenders and the working capital lenders pre-petition.
14 That agreement carries over into parties' obligations on a
15 post-petition basis. And absent the consent of the term
16 lenders, the intercreditor agreement arguably will be violated.
17 And we wouldn't get a working capital facility either. So we
18 tend to look at this in the aggregate, as we must. And we're
19 unable to -- and we tried. We're unable to bifurcate these
20 facilities in any way that will provide us, for example, with a
21 working capital facility of x dollars and then we come to the
22 Court and say, Judge, we want to prime the term lenders and we
23 want you to determine that there's adequate protection. It
24 can't be done. Not as a legal matter, it can't be as a
25 practical matter. No lender will come in and lend in the first

1 position without the consent of the term lenders. So this is
2 the state of play that existed pre-petition based upon the
3 intercreditor agreements already in place.

4 We -- the debtors retained Jefferies to source debtor-
5 in-possession financing. I think the debtors did what debtors
6 are supposed to do. Jefferies went down to thirty-nine
7 sources. They gave out confidentiality agreements to anybody
8 who was interested in participating. Ultimately, there were
9 two parties that came forward with proposals for a working
10 capital loan and two parties that were willing to consider a
11 term loan without overlap. Two -- four parties altogether.

12 With regard to the working capital facility, we really
13 negotiated back and forth with Bank of America and General
14 Electric until literally a day or two before the filing trying
15 to get the best term. The debtors selected General Electric
16 Capital. No one suggests that we made the wrong decision.
17 With regard to the term loan, we have the facility that was in
18 place agented by Great American and GA Capital. And we had a
19 second proposal that was put in place. The second proposal
20 never came to a -- was never ripened into a formal commitment.
21 But even if it had, the evidence is that would have been more
22 expensive to the estate than the facility that we ultimately
23 arrived at.

24 So, Your Honor, I think the record is clear this is
25 the product of arm's length bargaining. It is essential to the

1 debtors' liquidity needs. It was negotiated in good faith.
2 There are no provisions in there which the debtors view as
3 treacherous or that they're likely to violate. The board of
4 directors approved this facility in the exercise of their
5 business judgment. There was a full presentation to the board
6 on these issues. The facility was vetted with the creditors'
7 committee even before the resolution that I'm going to
8 announce. There was already significant movement and the
9 parties, I think, at all times should be commended for having
10 worked together to try to take issues off the table. And
11 ultimately, as we got to the eve of the hearing -- and we
12 apologize if -- that we couldn't get this done sooner. And I'm
13 sorry if Your Honor had to review more of this than would have
14 been necessary. But as things happen, hearings, as they -- as
15 you get closer to a hearing, people tend to make their best
16 proposals on the night before a hearing. So we apologize for
17 that. But we have now resolved all the issues.

18 Does Your Honor have questions about the order that I
19 can address or Ms. Walker, before she gets up, can address?

20 THE COURT: No. Let me hear from everybody and then
21 we'll --

22 MR. FRIEDMAN: Okay. Very good. But I'd like to
23 suggest is Ms. Walker come up now.

24 THE COURT: Okay. That's fine.

25 MR. FRIEDMAN: Thank you.

1 MS. WALKER: Good morning, Your Honor. Wendy Walker,
2 Morgan Lewis, for General Electric Capital, one of the DIP
3 agents, the working capital DIP agent. And as Mr. Friedman
4 said, we worked hard to resolve all the objections that were
5 pending to the DIP order. And if it's all right with the
6 Court, I'd like to hand up a copy of the order that's marked
7 against the copy that was filed last week.

8 THE COURT: Okay.

9 MS. WALKER: So I hope I --

10 THE COURT: Thank you.

11 MS. WALKER: Many of the changes resolving objections
12 were set forth in the form of the order that was filed last
13 week which is marked against the interim. And the copy I just
14 handed up is marked against that version. And I thought I
15 would just highlight the changes that were made in response to
16 each of the objections, if that's acceptable.

17 THE COURT: Please.

18 MS. WALKER: Three objections were filed by various
19 taxing authorities in Texas. Those are docket numbers 161, 290
20 and 292. Each of those taxing authorities sought confirmation
21 that the DIP secured parties are not priming their statutory
22 liens for ad valorem taxes and that they would receive proceeds
23 of any sale of collateral in which they have a first lien.
24 Each of those points has been confirmed. Each of those
25 objections were resolved. Specifically, we confirmed that the

1 statutory liens are not being primed. We confirmed that in the
2 last sentence of footnote 3. It's not highlighted in the copy
3 I just gave you. It was highlighted in last week's copy. But
4 you can see that the last sentence of footnote 3 --

5 MR. BUECHLER: Page 10.

6 THE COURT: What page?

7 MS. WALKER: I'm sorry?

8 MR. BUECHLER: Page 10.

9 MS. WALKER: Page 10.

10 THE COURT: Okay.

11 MS. WALKER: And we also confirmed their right to
12 receive sale proceeds with the addition of paragraph 19(f).

13 THE COURT: What page?

14 MS. WALKER: This is what happens when you revise the
15 order the morning of the hearing.

16 THE COURT: Right.

17 MR. BUECHLER: Page 45.

18 THE COURT: 40 --

19 MR. BUECHLER: 45.

20 THE COURT: 45. Yep. Okay.

21 MS. WALKER: Thank you.

22 (Pause)

23 THE COURT: Okay.

24 MS. WALKER: Verizon Communications filed an objection
25 at docket number 319. They also sought confirmation that the

1 DIP secured parties are not taking liens on any property that
2 belongs to Verizon and that to the extent that Verizon's
3 agreement with the debtors is actually a secured financing that
4 we're not priming them. We confirmed those points with Verizon
5 and Verizon was satisfied with paragraph 6 of the order, which
6 sets forth what is DIP collateral, and paragraph 7 of the
7 order, which sets forth the priorities of the DIP liens. They
8 were satisfied with those two provisions as they are that we
9 are not taking any liens on any of their property and not
10 priming them.

11 THE COURT: Okay. If there was any uncertainty, it's
12 cleared up by your representations on the record so that's
13 fine.

14 MS. WALKER: We also received informal comments from
15 AFCO -- that's A-F-C-O -- the debtors' insurance premium
16 finance company, seeking confirmation that they are not being
17 primed. We resolved that with the addition of paragraph --

18 MR. BUECHLER: 48.

19 MS. WALKER: -- 48 on page 68.

20 (Pause)

21 THE COURT: Okay.

22 MS. WALKER: Dallas last week -- before we get to the
23 committee, Dallas Fort Worth Airport filed an objection, docket
24 number 303, seeking clarification that the DIP secured parties
25 are not priming their interest in a bond posted to secure the

1 debtors' obligations under a lease with the airport. We
2 resolved that objection with the addition of paragraph 49.

3 (Pause)

4 THE COURT: All right.

5 MS. WALKER: DFW also objected to the extent that the
6 DIP liens would be secured by avoidance actions. The DIP liens
7 are not secured by avoidance actions. They are secured by
8 avoidance proceeds. We also have cut back substantially on the
9 recourse that the DIP lenders would have to avoidance actions.
10 That will be announced by Mr. Friedman as part of the agreement
11 with the committee to resolve their objection. DFW has
12 confirmed that whatever resolution we reach with the committee
13 is satisfactory to them and they are withdrawing their
14 objection.

15 THE COURT: Thank you very much, Ms. Walker. Mr.
16 Friedman? Or is -- Mr. Buechler? Or are you going to -- who's
17 getting up?

18 MR. FRIEDMAN: Your Honor, it might make sense for me
19 just to finish. And then, I think --

20 THE COURT: Go ahead. All right.

21 MR. FRIEDMAN: Because I don't have the slightest
22 doubt that if I miss something Mr. Buechler will correct me.
23 But I'm not sure if the reverse is true. So --

24 Your Honor has read our reply and understands that the
25 residual issues that were left with the creditors' committee --

1 and I really do -- as I said, I really do commend all the
2 parties for working through the night to resolve the open
3 issues.

4 Essentially, the remaining modifications that will be
5 either in the order or in the credit agreement are as follows:

6 The first is the ever present issue of avoidance
7 actions in every one of these DIP facilities. And to their
8 credit, the DIP lenders have now agreed -- and I believe this
9 applies to the pre-petition lenders as well with regard to
10 their residual adequate protection claims that there will be no
11 lien attaching to or a superpriority claim benefiting from the
12 proceeds of avoidance actions other than avoiding some actions
13 under Section 549 of the Bankruptcy Code the theory being that
14 under Section 549 any recovered transfer will be a transfer of
15 post-petition property.

16 THE COURT: That's what I -- that was one question I
17 had. I thought that was going to be the answer that any post-
18 petition transfers, it's their collateral already. It's being
19 transferred. They're entitled to get it back. That's the
20 theory.

21 MR. FRIEDMAN: Exactly. The --

22 THE COURT: What's the 506 argument? I must say,
23 we're all nonplused by it. I assume what you were saying is no
24 surcharging of collateral or you have some other point that
25 you're raising.

1 MR. FRIEDMAN: I thought that's what --

2 THE COURT: I don't understand what you have.

3 MR. FRIEDMAN: I thought -- well, that's not what --
4 isn't that out of the order now except for --

5 MR. BUECHLER: Your Honor, we asked that question as
6 well when they raised it. And the answer we were given is
7 there are certain permitted encumbrances where they exist in
8 place that, in essence, are not being primed by the DIP
9 lenders. Ms. Walker will correct me if I'm wrong on this
10 point. Therefore, the debtor is, to those lenders, that aren't
11 the DIP lenders, maintain a right to seek a 506(c) charge
12 against those permitted encumbrances. And therefore, to the
13 extent the debtors were to assert such a claim against those
14 other lenders. By way of example, it could be a purchased
15 money security interest in a photocopy machine or whatever. If
16 the debtors assert that 506(c) claim, that's part of the
17 assessment (sic) of the bank's collateral, not free. And we
18 view that as such an unlikely consequence and economically
19 insignificant issue that it wasn't worth pushing back on. And,
20 yes, we scratched our heads and said we really didn't fully
21 appreciate that.

22 THE COURT: I don't understand it. I'm always
23 reluctant to sign an order I don't understand. So, I mean,
24 you've sort of explained it.

25 MR. BUECHLER: That's --

1 THE COURT: You agree with that explanation?

2 MR. FRIEDMAN: I think so. I think the point being
3 that to the extent the debtors -- it's essentially that, from a
4 post-petition basis, whatever expenses the debtors incur are
5 expenses that are being funded by the DIP lenders with their
6 proceeds. So to the extent we have the ability to recover some
7 of those proceeds from a secured creditor as to which we
8 somehow enhanced or preserved their collateral, we did it with
9 their money. They should have first crack at it. I must admit
10 it's creative. I hadn't thought of it either.

11 THE COURT: Okay. The "okay" is I hear your argument.
12 I just didn't understand.

13 MR. FRIEDMAN: Yeah. Well --

14 THE COURT: Okay.

15 MR. FRIEDMAN: -- I think we're all in the same boat.
16 The next point, Your Honor, is a much easier one to
17 explain: the carve-out. The carve-out -- parties have agreed
18 that they would raise it to 6.5 million dollars.

19 THE COURT: Which is what the committee asked for.

20 MR. FRIEDMAN: Yes. The two final points relate to
21 the credit agreement -- they won't find their way into the
22 order -- one of which is the budget variance covenant which is
23 essentially a covenant that within any four week period, the
24 debtors have to -- the debtors' receipts must be within ten
25 percent of their projections. And their disbursements must

1 similarly be within ten percent.

2 THE COURT: The committee wanted an overall --

3 MR. FRIEDMAN: The committee wanted a longer measuring
4 period and a higher percentage.

5 THE COURT: Right.

6 MR. FRIEDMAN: And where that issue has been resolved
7 is that it's now instead of ten percent, it's twelve percent.

8 THE COURT: You split between fifteen and ten and you
9 wind up with twelve.

10 MR. BUECHLER: It's twelve percent, make it over a six
11 week period, not a four week period, and on a cumulative basis,
12 not on a line item basis for the budget. That's the agreement
13 reached with both the senior lender, GE Capital, and the junior
14 lender, GA Capital, under the --

15 THE COURT: Is that in the order that's just been
16 handed up to me or not yet?

17 MR. BUECHLER: Yeah. It's -- no. That actually will
18 find its way into the credit agreement which has not yet been
19 revised. And because we only reached this resolution on a
20 conference call at about 8:00 last night --

21 THE COURT: Okay.

22 MR. BUECHLER: -- that'll be done --

23 THE COURT: That was early last night then.

24 MR. BUECHLER: -- in the next day or so.

25 THE COURT: I mean, I would have thought this was a 3

1 in the morning issue. But --

2 MR. FRIEDMAN: Nah, it wasn't that late. And, Your
3 Honor, the last one really is not so much a negotiated point as
4 one of an issue of interpretation where neither the debtors nor
5 the creditors' committee view this as being an issue. We were
6 comfortable with the language that existed in the credit
7 agreement. But as we engaged in further discussions, we found
8 out that we had a disagreement with at least the term lenders
9 on one of the covenants and quite an important one.

10 It all relates to the 7.1(m) of the credit agreement.
11 That begins -- beginning with Section B, begins with a series
12 of weekly, if you will, liquidation related covenants that are
13 driven off of the leases. And all this, as Mr. Glenn pointed
14 out, is the lenders are lending us an asset-based loan. It's
15 driven off of the value of the inventory. The inventory is
16 appraised on the basis of being sold in place. If the
17 distribution platform evaporates, the inventory is worth far
18 less. So the lenders understandably are only willing to lend
19 for so long as they are comfortable that the debtors occupy the
20 premises.

21 So if you look at 7.1(m) beginning in Section B, you
22 have to divine or calculate the lease rejection date which is
23 now at least 210 days. So it's at least the June, July --
24 around middle of September, whenever that day is. And assuming
25 that we got no further extensions then fifteen weeks prior to

1 that date in mid-September we begin this process of identifying
2 liquidators, sending out bid packages, seeking approval from
3 the Court and commencing a sale.

4 Just to be clear, we hope this never happens. We hope
5 to emerge either through a sale of the company or a plan well
6 before this ever happens. But this is an important protection
7 to the lender.

8 The issue is that there is no single date upon which
9 the debtors must assume or reject all of their leases as Your
10 Honor just heard. We will undoubtedly have many extensions
11 through the middle of June. It's possible that some landlord
12 will say no more. And if he says no more then we're stuck with
13 him in the middle of September.

14 So the question is how do you deal with the --

15 THE COURT: Hang on. Mr. Buechler? Mr. Buechler --
16 Ms. Walker --

17 MR. BUECHLER: I'm sorry. We'll --

18 THE COURT: You're --

19 MR. BUECHLER: Apologize.

20 THE COURT: I'm trying to listen. Go ahead, Mr.
21 Friedman.

22 MR. BUECHLER: We're trying to clarify one other
23 issue.

24 THE COURT: Okay. Go ahead.

25 MR. FRIEDMAN: So the question is how do you deal with

1 the -- any quality of lease rejection dates. Now the way we
2 always interpreted it -- and I'll just give an example. Let's
3 say, for argument's sake, eighty percent of our leases were
4 extended to the middle of January and twenty percent of our
5 leases, the lenders would not extend until the middle of
6 September. The way we interpret is as to that inventory
7 located on leases that were expiring or subject to an
8 assumption rejection deadline in mid-September, the fifteen
9 week period would be calculated back from those dates and we
10 would be essentially beginning the liquidation process fifteen
11 weeks earlier for twenty percent of the stores. As to the
12 eighty percent of the stores that we had a longer runway, the
13 fifteen weeks would run from that longer runway hopefully never
14 to run because we would have emerged. The lenders -- and I
15 think, by the way, the language is -- I think the language is
16 clear in the credit agreement because lease rejection date,
17 which is the measuring date for all this, is the 120 date as
18 that date may be further extended by order of the Court. So we
19 think whether it's extended, as Your Honor just did, under
20 ninety days or further extended on consent, it would
21 accommodate a longer runway.

22 We had a disagreement. At least some of the lenders
23 read it differently. It doesn't matter at this point. It
24 might have mattered. Frankly, it doesn't matter because the
25 last element of our agreement is that the lenders -- and we'll

1 clarify this in the credit agreement. But the important point
2 is the lenders now accept our interpretation of the language.
3 And to the extent that we have -- to the extent that we have
4 stores that benefit from a consensual extension of the lease
5 rejection date beyond the 210 days, that fifteen-week and
6 subsequent period will not begin to run -- it will be measured
7 with respect to that later date not just the 210 day period.

8 THE COURT: I may be confusing provisions. As the
9 clock runs toward the rejection date, do you have to start
10 keeping reserves?

11 MR. FRIEDMAN: The -- in addition to the liquidation
12 covenant, there are reserves put in place as you get closer to
13 those dates. So the extension is relevant not only to the
14 actual covenant to proceed but the borrowing base of the
15 availability as well. So, yeah, reserves are imposed. I think
16 beginning twelve weeks out, reserves are imposed and you can't
17 use it anymore.

18 THE COURT: It was -- I mean, I will say I've approved
19 the extension of time to assume or reject so maybe this issue
20 becomes moot. I'm not going to make a fuss about it because
21 this was in the DIP order and DIP motion. As I said earlier,
22 put the reserve aside, when it was written that you had to get
23 an approval of the extension of time essentially by today,
24 under different circumstances, I simply wouldn't approve that
25 provision in the DIP. I've gone ahead and approved the order.

1 But I was trying to understand how -- 'cause this does tie into
2 the reserve issue. And I didn't have enough time thinking
3 about this trying to understand what are the magnitude of the
4 reserves that are going to have to be maintained as the clock
5 runs.

6 MR. FRIEDMAN: Well, the magnitude of the reserves --

7 THE COURT: Let me just say, part of what I understand
8 the undisputed evidence shows that this was the best deal you
9 were able to negotiate. And it's always a dilemma for the
10 Court whether accepting that it's the best deal that could be
11 negotiated, when does it just become too sweet a deal. And
12 when I look at what the cost of the incremental amount of new
13 money is coming in, it's pretty steep. It's very steep.

14 MR. FRIEDMAN: I think, Your Honor, we're not psycho
15 fans for lenders, you know.

16 THE COURT: I understand.

17 MR. FRIEDMAN: But I can tell Your Honor that we were
18 concerned about this issue. We're not -- we did not simply
19 approach this -- and I can assure you we did not approach this
20 by saying, look, we need money. Whoever's willing to give it
21 to us, we'll give you whatever you want. This was heavily
22 negotiated at every level including the fees. And we asked
23 Jefferies that question. And the reality is in the
24 marketplace, regardless about how we feel about the
25 marketplace, there is a marketplace for these types of

1 transactions. The marketplace is measured -- measures the fees
2 not on the basis of new money. It measures the fees on the
3 basis of the level of the commitment. And when you have a
4 circumstance here where there is no money available other than
5 a new loan -- and remember, this original loan was -- Bank of
6 America was the lender. GE is now the lender. Now, GE was a
7 participant in the old loan. But they made this loan to us on
8 a fully committed basis. We bore no syndication risk in this
9 transaction. And on that basis, the lenders charge a fee on
10 the committed amount. And as Your Honor, I'm sure, observed in
11 our papers, we have an unused commitment fee that we can take
12 down if we don't need the full amount of the money. And
13 that's, I think, still a matter of some discussion. But this
14 was an unsyndicated fully committed facility. And we are
15 paying in the aggregate less than three percent on the total
16 committed amount. And that is not outside the market. It's
17 maybe a lot of money but it's just not outside the market.

18 So, Your Honor, I think I've said what I need to say.
19 I would -- maybe Mr. Buechler and the lenders' counsel should
20 just get up and confirm some of the points.

21 THE COURT: Okay. But while you're standing there,
22 the equities of the case is in paragraph 39 on page 64. And as
23 you correctly raised it before I did, it's something -- if you
24 note transcripts in other cases, I won't approve it. So I
25 won't approve it here either.

1 MR. FRIEDMAN: I assume Your Honor is focused on the
2 Court not being bound by it.

3 THE COURT: That's right. That's right.

4 MR. FRIEDMAN: But the parties can be bound.

5 THE COURT: The debtor can be bound by it. But the
6 Court can't be and any other party in interest could certainly
7 raise it. I don't -- I didn't go back to look at the precise
8 language that I've approved before. But it's some recitation
9 about the debtor -- reflects the debtors' agreement not to
10 assert the equities of the case doctrine. You can look back at
11 those orders. I think it's certainly a negotiating point. I'm
12 not saying you can't negotiate this issue but I'm not going to
13 be bound by it.

14 MR. FRIEDMAN: Understood.

15 THE COURT: It's never come back to haunt anybody but
16 it always could.

17 MR. FRIEDMAN: Understood.

18 THE COURT: Okay.

19 MR. FRIEDMAN: Anything more?

20 THE COURT: All right. Mr. Buechler?

21 MR. FRIEDMAN: Thank you.

22 THE COURT: Thank you, Mr. Friedman.

23 MR. BUECHLER: Thank you, Your Honor. Just one
24 clarification point. And maybe it's not worth quibbling on one
25 level but from the committee's perspective, when Mr. Friedman

1 talked about sixty million or so in new money, I guess we would
2 view it as additional availability beyond what was available
3 under the pre-petition loan with Bank of America as opposed to
4 actual new cash automatically flowing into the debtor. It's
5 available under the formula with the reserves, et cetera.

6 With regard to the proposed settlement, there was one
7 important term left out which deals with the net orderly
8 liquidation value vis-à-vis the borrowing base limitation. The
9 way it currently works is if you look at the inventory, which
10 there's a valuation that was done, you take ninety percent of
11 the eligible inventory and then you multiply that by what
12 currently is 71.6 percent based upon the valuation that was
13 attained by the lenders and debtors just prior to the
14 bankruptcy although they took that off by two-tenths of a point
15 for an issue with the distribution center. What the parties
16 have agreed is that within one day of the entry of the final
17 order, a new appraisal of the inventory will be ordered. It
18 should be in with less than a week. And then that multiplier
19 number will change based upon the results of that new
20 appraisal.

21 Lastly, with regard to the fees to be charged, which
22 the committee did raise an objection to, while it was part of
23 the settlement, that doesn't change. We simply want to clarify
24 that as to GA Capital, the term B lender, the 1,460,000 dollar
25 make-whole premium is not triggered by the committee's DIP

1 objection under the fee letter that was executed by the parties
2 pre-bankruptcy. I believe it was on the 14th of February,
3 2011. While the term B lenders reserve the right, based upon
4 future events, it is simply not triggered based on our
5 conversation with Mr. Simard who represents GA Capital by the
6 committee's filing of the DIP objection. And therefore, their
7 right to assert that in the future remains. And likewise, the
8 committee reserves its right, if it's asserted, to challenge it
9 on any grounds it may have.

10 That does resolve the issues we have reached with the
11 proposed order, the revised order that was submitted to the
12 Court a little while ago this morning. And I believe it was
13 filed -- I'm not sure if it was filed last night -- is
14 agreeable to that. There are changes that need to be made to
15 the DIP credit agreement to incorporate some of these changes
16 as well that would then solidify the agreement and we move
17 forward.

18 THE COURT: When do you anticipate having the final
19 credit agreement and the final order?

20 MR. BUECHLER: I think our conversation discussion was
21 realistic and probably more -- probably tomorrow. If we can do
22 it today, we'll try but I don't know that that will get done.

23 (Pause)

24 MS. WALKER: The changes that we have agreed upon with
25 the committee do require DIP lender consent because they were

1 reached late in the evening yesterday, we haven't been able to
2 attain that yet. But we expect to work through that during the
3 course of the day today. We've got changed pages to the credit
4 agreement filed together with the final version of the order, I
5 would say, tomorrow.

6 THE COURT: Okay. Let me just -- I'm here tomorrow.
7 I am away from early Thursday morning until next Tuesday
8 night -- actually Wednesday morning -- the following Wednesday
9 is my first day back in chambers. With respect to the DIP
10 order and the credit agreement, in particular, those I need to
11 see personally. Others, I'll be in touch with my chambers.
12 But those I want to see.

13 The interim order permitted use of 400 million
14 dollars. Is there still availabil -- I mean, does this order
15 have to get entered tomorrow, Mr. Friedman?

16 MR. FRIEDMAN: No. We're okay under the interim
17 order, I believe.

18 THE COURT: All right. I would rather you take the
19 time and make sure you've got everything buttoned down,
20 everybody's in agreement. You should be aware that next
21 Wednesday will be my first day back in after being away
22 starting Thursday morning. So --

23 MR. BUECHLER: I won't be concerned on behalf of the
24 committee. If we don't get it done tomorrow, we'll simply --
25 the start -- the ordering date then of the new appraisal which

1 would trigger then the new multiplier number on the inventory
2 valuation for use under the borrowing base formula. So we're
3 going to work and push the parties to get that done. And if
4 for some reason we can't get it done --

5 THE COURT: Don't expect you're going to get it to me
6 at 6:00 --

7 MR. BUECHLER: Right.

8 THE COURT: -- tomorrow night.

9 MR. BUECHLER: No, no. But I would ask the lenders
10 then to reconsider that if for some reason we don't get it
11 done, if they would order that appraisal -- and I'll ask it on
12 the record Thursday so that that process can get started.
13 Nonetheless, if for some reason, not due to the committee's
14 fault, we can't get this done because other changes need to be
15 made or they haven't gotten their final consents, we would like
16 that appraisal to be ordered by no later than Thursday of this
17 week so it's back next week so we can move ahead with that.

18 THE COURT: Ms. Walker?

19 MS. WALKER: Your Honor, I think that at this point we
20 need to talk offline with the committee, if you will, for five
21 or ten minutes because there were a couple of things that Mr.
22 Buechler has mentioned that we don't quite see eye to eye on.
23 I don't think it's an issue but I --

24 THE COURT: All right. Why don't we do this? Are
25 there any -- we're going to take a short recess. But before we

1 do that, is there anything else anybody wants to get on the
2 record right now? I mean, subject to -- just so it's clear,
3 subject to my final review of the order and the credit
4 agreement, I'm going to go ahead and approve on a final basis
5 the DIP motion. But it is subject to the -- let's take a
6 fifteen minute recess. Hopefully it will be very brief when I
7 come back on the bench. Okay?

8 MS. WALKER: Thank you, Your Honor.

9 THE COURT: Thank you. And when I come back,
10 everybody can just stay seated. You don't have to get up.

11 (Recess from 11:57 a.m. until 12:24 p.m.)

12 THE COURT: All right. We're back on the record in
13 Borders Group, Inc., number 11-10614. Mr. Friedman?

14 MR. FRIEDMAN: Thank you, Your Honor. I think I'm
15 going to pass to either Mr. Buechler or Ms. Walker on the final
16 resolution of this. But just on one point that I alluded to
17 earlier which is the interpretive issue with regard to the
18 lease rejection date, we're going to try to submit something to
19 the Court tomorrow morning. It will either have changed
20 language in the credit agreement on that issue or we will
21 determine that we're simply going to stand on the record that
22 I've -- that we've made earlier where I've provided to the
23 Court how we interpret that provision because, frankly, we
24 think the language works okay. We may decide to make a change.
25 But if we don't, we'd like just simply to have a record as to

1 how we interpret the language. And I'd ask Mr. Simard and Ms.
2 Walker to simply confirm that our interpretation is -- will be
3 observed in the absence of language changes in the credit
4 agreement.

5 THE COURT: Okay. Counsel, are you going to come on
6 up, identify yourself?

7 MR. SIMARD: Good afternoon, Your Honor. Kevin Simard
8 of Riemer Braunstein on behalf of GA Capital, LLC. Your Honor,
9 we confirm the debtors' interpretation of the definition of
10 lease rejection date under the credit agreement such that it
11 pertains -- there could be separate dates for each lease as the
12 date by which that lease has to assumed or rejected.

13 THE COURT: Okay. Thank you very much. Ms. Walker,
14 are you going to address this as well?

15 MS. WALKER: Yes, Your Honor. I confirm -- I agree
16 with Mr. Simard and Mr. Friedman.

17 THE COURT: Okay. Thank you very much.

18 MS. WALKER: But do -- and then, Your Honor, we did
19 have a moment just to clarify our resolution with the
20 creditors' committee counsel. And during Mr. Buechler's
21 presentation he mentioned that changes to the budget variance
22 test and the credit agreement, among the changes that would be
23 made was that they would be measured on a cumulative basis. So
24 we had a very interesting discussion about exactly what that
25 means and determined that no changes need to be made to the

1 credit agreement in that regard. It's -- we all understand the
2 way it works and are in agreement that that is the way it
3 should work and will work going forward.

4 THE COURT: All right.

5 MS. WALKER: And --

6 MR. BUECHLER: But it would be twelve percent on the
7 six week rolling basis. That change will be made to the credit
8 agreement.

9 MS. WALKER: Right.

10 THE COURT: You agree with that, Ms. Walker?

11 MS. WALKER: Yes, I do.

12 THE COURT: Okay.

13 MS. WALKER: In addition, we will order an appraisal
14 within the week. We will increase the number of appraisals --

15 THE COURT: Within the week, meaning this week?

16 MS. WALKER: Within the week -- yeah, within a week of
17 today.

18 THE COURT: Oh, within a week of -- okay.

19 MS. WALKER: Is that okay?

20 MR. BUECHLER: Yes. And when they get it in, they'll
21 provide us -- the committee with a copy.

22 MS. WALKER: Yes. And we will increase the number of
23 appraisals that we can order under the credit agreement from
24 four to five to accommodate the fact that we will likely want
25 another appraisal once the initial round of GOB sales that are

1 ongoing now are completed. And with that we'd have final
2 resolution with the committee on their objection and I would be
3 happy to address any comments -- any other comments that the
4 Court has on the order.

5 THE COURT: The only other question I have is when
6 will I be getting the order and the credit agreement?
7 That's --

8 MS. WALKER: And we --

9 THE COURT: Because I'm time constrained

10 MS. WALKER: We --

11 THE COURT: -- this week.

12 MS. WALKER: Given the Court's time constraints, Your
13 Honor, we have a proposal in that regard which would be to get
14 you the order as well as the changed pages or the entire credit
15 agreement marked against the last one -- whatever the Court
16 would prefer -- either later this afternoon if not first this
17 in the morning. We will still be in the process of obtaining
18 lender consent and what we would like to do is -- so that Your
19 Honor can have a chance to review it -- if you review it and we
20 will contact chambers, either ourselves or through the debtors,
21 whichever you prefer, as soon as we have lender consent.

22 THE COURT: Okay. If you get it to me by tomorrow
23 morning, if I - unless I have issues with what I review, it'll
24 get entered tomorrow. The calendar I had for tomorrow, the
25 matters have been adjourned so I will have time to devote to

1 it.

2 MS. WALKER: Thank you. Did you -- did the Court have
3 any other comments to the order besides the change to paragraph
4 39?

5 THE COURT: Not that I can tell you right now. I
6 don't anticipate -- I did review it all. I want to see what
7 the final -- and do the blackline against the last version.

8 MS. WALKER: The one that was filed?

9 THE COURT: Yes.

10 MS. WALKER: Will do.

11 THE COURT: Okay.

12 MS. WALKER: And on paragraph 39, I want to make sure
13 that we get it exactly right. And I understood the Court's
14 ruling in the Uno case to be that parties could be bound, the
15 Court is obviously not bound.

16 THE COURT: Correct.

17 MS. WALKER: And so --

18 THE COURT: The debtor can be bound. I don't know, is
19 the committee agreeing to this or -- I mean, in Uno it came up
20 the debtors agreed -- well, originally, the provision is as
21 it's written here and I said I wouldn't approve that. As I've
22 said before -- because, ordinarily, this is a provision where
23 the debtor is agreeing to something but it's not going to bind
24 other creditors and it's not going to bind the Court. Okay?

25 So typically, I think the language I approved in the

1 past said the debtors agree that they will not raise arguments
2 under 552(b) in the equities of the case doctrine. I'm not
3 telling the debtor what it ought to agree but I just won't --
4 everyone should understand I don't view my powers are
5 constrained either because someone raises it or if for some
6 reason I was to raise it.

7 MS. WALKER: Thank you, Your Honor. We'll make a
8 change in that regard.

9 THE COURT: Okay.

10 MS. WALKER: You'll see it in the next version of the
11 order that gets filed --

12 THE COURT: Okay.

13 MS. WALKER: -- at the latest tomorrow morning and
14 thank you.

15 THE COURT: Okay. Let me raise, before everybody
16 leaves, my law clerks reminded me to raise this. I obviously
17 wasn't here for the first day motions but there was an issue
18 about when the orders would be submitted to the Court for
19 entry. Judge Gonzalez approved motions and you were going to
20 provide orders. They weren't -- they didn't arrive when they
21 were promised. And I understand parties have -- particular on
22 first day motions, they want the orders entered promptly on
23 many of the things and that's fine.

24 On the one hearing I did have on the assumption and
25 assignment of the one lease, I specifically made a point during

1 the hearing, if it had to be entered, you needed to get the
2 order down here promptly. It didn't arrive when it was
3 promised and we couldn't reach anybody to make sure it came. I
4 just want to make clear, going forward, that, you know, I don't
5 enter orders personally. My law clerks don't enter orders
6 personally. My courtroom deputy leaves in the afternoon and
7 when we know there will be an order that is late, we'll usually
8 agree on what the deadline for it is and I'll arrange to have
9 somebody stay late in the clerk's office.

10 Well, with that Westwood order, it didn't get here
11 when it was promised and we bent over backwards to get somebody
12 in the clerk's office to stay late to get it done because I was
13 told at the hearing it really did need to be entered. I'm just
14 making this point generally. There's a lot of orders coming
15 out today. People are going to review them. That's all well
16 and good but if you expect to get orders entered, you got to
17 get them in timely.

18 MR. GLENN: Thank you, Your Honor. In that case, we
19 awaited consent of a third-party landlord on the west coast.
20 We just could not reach them and I apologize for that. But
21 what we've done --

22 THE COURT: Well, then call chambers.

23 MR. GLENN: Okay.

24 THE COURT: Because I had people waiting in the
25 clerk's office --

1 MR. GLENN: I'm sorry for that.

2 THE COURT: -- who were getting -- they don't work for
3 me. And they needed to leave and we got somebody to stay who
4 really did have to leave and we got it entered. I'm raising it
5 now because I'm told -- I wasn't here for the first days but
6 I'm told there was an issue also about order coming -- we were
7 told orders had to get entered and then didn't get down here
8 when they were supposed to.

9 MR. GLENN: Well, Your Honor, we have all the discs
10 here today. We have two laptops so that changes could be
11 made --

12 THE COURT: Okay.

13 MR. GLENN: -- on site and we will endeavor to get
14 them to the Court as soon as everyone's had a chance to sign
15 off and review them.

16 THE COURT: That's fine. I've got a 2 o'clock
17 calendar so you can -- you're welcome to use the courtroom
18 until then and get it done. Okay? Anything else anybody wants
19 to raise?

20 MR. GLENN: I think the retention applications, Your
21 Honor.

22 THE COURT: Ah, yes. You do want to raise that, don't
23 you?

24 MR. GLENN: Okay.

25 THE COURT: How did I forget?

1 MR. GLENN: I guess we'll take them in order from --
2 Is Ms. Golden still here?

3 MR. GLENN: She is not here, Your Honor. She told me
4 that she is fine with all of the orders as submitted.

5 THE COURT: Okay.

6 MR. GLENN: And that she believes she would be fine,
7 of course, with any changes that Your Honor wishes to make and
8 I told her we would run by any changes through her if they're
9 made as a result of the proceedings today.

10 THE COURT: Okay. So let's just roll through them.
11 The first one is your firm's --

12 MR. GLENN: Yes, Your Honor.

13 THE COURT: -- application.

14 MR. GLENN: We have submitted our application along
15 with three supplemental declarations of Mr. Friedman. I
16 believe that there was a blackline order reflecting the
17 supplemental declarations and that is the extent of the changes
18 that have been made as a result of the discussions with the
19 U.S. Trustee and the committee. And unless Your Honor has any
20 questions which Mr. Friedman would take, we'd like that
21 retention approved.

22 THE COURT: All right. Anyone wish to be heard with
23 respect to the Kasowitz retention? All right, the motion is
24 granted.

25 MR. GLENN: Okay. Thank you. Next on the agenda is

1 the Jefferies retention which is Docket No. 39. That
2 retention, Your Honor, has been the subject of significant
3 discussions and negotiations with both the committee and the
4 U.S. Trustee to a lesser extent. I believe we filed a
5 blacklined order reflecting the changes which I have a summary
6 of here if you'd like me to run through them very quickly.

7 THE COURT: Why don't you just run through the
8 changes.

9 MR. GLENN: Okay. First, the revised proposed order
10 would lower the trigger at which the monthly fee income that
11 Jefferies receive is creditable against the restructuring fee
12 from 1.2 million to 600,000 dollars. Second, the revised
13 proposed order provides that the so-called liquidation fee will
14 only be payable if Jefferies: one, runs a sale process; two,
15 market's assets or related investments; or three, provides
16 material services in connection with sale or liquidation.

17 The third change is that the restructuring fee and the
18 liquidation fee will not be earned if the debtors liquidate
19 under Chapter 7. Next, the indemnification provisions in the
20 letter agreement provide that Jefferies will be liable for
21 willful misconduct made with the consent of the debtor, the
22 contribution of indemnified persons in the case of gross
23 negligence or willful misconduct will not be capped by
24 Jefferies' fees and it previously was and the indemnification
25 is limited to reasonable fees and expenses of counsel. And I

1 believe -- if Mr. Buechler can confirm that -- that that
2 reflects the negotiation with the committee.

3 MR. BUECHLER: Your Honor, the committee, through
4 myself, had extensive negotiations with counsel for Jefferies
5 over the proposed terms of their engagement. The revised order
6 submitted properly reflects the terms of that agreement. In
7 addition, the revised order attached what I'll call the correct
8 letter agreement because it turned out part of the difficulty
9 we had was there was a change in a key provision between the
10 signed letter attached to the application that was changed but,
11 until I was at the negotiations, we realized part of the
12 difficulty was I was working of a different form of the letter
13 than Jefferies counsel was and therefore the correct engagement
14 letter is attached to the order and the order reflects that
15 that is the correct engagement letter.

16 So with those changes, the committee did not file and
17 objection and has no issue with the proposed engagement of
18 Jefferies as modified.

19 THE COURT: All right. Does anybody else wish to be
20 heard with respect to the Jefferies retention?

21 MR. GLENN: Your Honor, one --

22 THE COURT: Go ahead, Mr. Glenn.

23 MR. GLENN: One correction. And again, Mr. Buechler
24 can correct me if I've gotten this wrong. If there are
25 activities in the Chapter 7 liquidation that occur as a result

1 of Jefferies' work prior to a conversion within those
2 parameters that Jefferies also would be entitled to seek any
3 fees so earned.

4 THE COURT: Mr. Buechler.

5 MR. GLENN: Is that --

6 MR. BUECHLER: To be honest, Your Honor, I'm not sure
7 we ever discussed that. I'm not sure what that means. We
8 agreed to what's exactly in the revised order. I stand by
9 what's in the revised order. If this is meant to be a tweak
10 that we didn't discuss, I'm not accepting that as I stand here
11 on the fly today, Your Honor.

12 (Pause)

13 MR. BUECHLER: I'm not sure.

14 (Pause)

15 THE COURT: Here's the way we're going to resolve it.
16 I either get a consensual form of order or it's going to be
17 carried to the next hearing --

18 MR. GLENN: That's fine, Your Honor.

19 THE COURT: -- one or the other.

20 MR. GLENN: We will work this out. We will work this
21 out.

22 THE COURT: Okay.

23 MR. GLENN: I don't think it's a significant dispute.

24 MR. BUECHLER: I'm not exactly sure what the issue is,
25 Judge, so I stand by --

1 THE COURT: No. I --

2 MR. BUECHLER: -- what we negotiated and --

3 THE COURT: Mr. Buechler, that's fine. And I either
4 get a consensual order or it's carried to the next hearing.

5 MR. GLENN: Yes.

6 MR. BUECHLER: Thank you, Judge.

7 MR. GLENN: Okay. Thank you, Your Honor. The next
8 item on the agenda is Docket No. 46 which is the application to
9 retain AP Services and to designate Holly Felder Etlin as the
10 chief restructuring officer. Again, Docket No. 46.

11 Your Honor, the debtor needs what is commonly known as
12 AlixPartners. This entity is AP Services. AlixPartners has
13 been significantly engaged in providing restructuring services
14 and turnaround services to the company. And the leader of that
15 team is Holly Felder Etlin and Ms. Etlin was instrumental in
16 the unprecedented, successful GOB auction that occurred before
17 Your Honor became involved in the case. Again, there's no
18 objections to this motion and the form of order has been
19 presented to all parties-in-interest and is on the docket.

20 THE COURT: Does anybody wish to be heard with respect
21 to the retention of AP Services?

22 MR. BUECHLER: Your Honor, the committee had a couple
23 of questions which were properly answered and the one thing
24 that was agreed to which we agreed would not have to be put in
25 there but we'll put on the record is that AlixPartners agreed

1 to provide copies of their detailed invoices to the committee
2 with the quarterly compensation report that they submit.

3 MR. GLENN: That is correct.

4 THE COURT: All right. Motion is granted.

5 MR. GLENN: Next, Your Honor, is docket number 48, the
6 application to employ Baker & McKenzie as the debtors' special
7 counsel. Baker & McKenzie has primarily been involved in the
8 aspects of this case involving securities law, corporate
9 governance and financing issues. They took the lead role on
10 negotiating the credit agreement underlying the DIP. There
11 have been revisions to the proposed order that are subject of
12 the blackline provided to the Court.

13 Number one, the revised proposed order includes
14 provisions for providing any rate increases to the U.S. Trustee
15 and the other parties-in-interest. Two, revised proposed order
16 clarifies that any pre-petition retainer will be applied to the
17 fees awarded pursuant to the first interim order issued by the
18 Court and the supplemental Roeder declaration discloses that
19 none of the entities on the conflicts check list, which are
20 Baker & McKenzie clients, represent more than one percent of
21 Baker's revenue for the past year.

22 THE COURT: All right.

23 MR. GLENN: Unless Your Hon --

24 THE COURT: Does anybody wish to be heard with respect
25 to the Baker & McKenzie retention? Mr. Buechler?

1 MR. BUECHLER: Well, the committee had no objection.
2 I'll just raise what we kind of mean by little light motif on
3 the forms of order. I just don't understand why, when there's
4 changes to the orders which were clearly done before today,
5 they can't simply be sending me office a copy. This is another
6 order where I wasn't aware there were any changes and haven't
7 seen a blackline. So, I'm simply asking the Court, the
8 debtors' counsel, when they've done these in advance, send
9 them. It would be a lot more efficient for everybody.

10 MR. GLENN: That will be corrected immediately, Your
11 Honor. In any case --

12 THE COURT: Subject to getting a consensual order --

13 MR. GLENN: Yes.

14 THE COURT: -- the motion's granted.

15 MR. GLENN: Thank you. Next on the agenda is DJM,
16 Docket No. 49. We previewed with Your Honor the high
17 importance of DJM's retention and role in this case. While I'm
18 not at liberty, at this point, to go into the details of what
19 they've already accomplished, in general they have given -- the
20 have negotiated multimillion dollar rent reductions that are
21 going to inure to the estate and help us in our reorganization.
22 And they have gotten tens of these stipulations that were the
23 subject of the motion earlier to day, signed. There have been
24 a number of negotiated points on this retention. I will just
25 go through them very quickly.

1 First from the U.S. Trustee, the revised proposed
2 order clarifies that any pre-petition first monthly payment
3 will be applied to the fees awarded pursuant to the first
4 interim order. Two, that the revised proposed order reserves
5 for the U.S. Trustee the ability to review DJM's fee
6 applications for reasonableness under Section 330 of the
7 Bankruptcy Code. Next, the proposed order included limitations
8 to scope and application of the indemnification provisions of
9 the engagement agreement.

10 Next, after negotiations with the committee, the
11 retention is revised to reflect that after four monthly
12 payments of their hundred thousand dollar fee, fifty percent of
13 any additional monthly payments would be credited against other
14 fees earned in the case. There was a catchall provision that
15 DJM could be compensated at a rate of 400 dollars per hour for
16 items beyond the specific scope of the success fees and monthly
17 fees that are in the engagement letter. For those, we've
18 agreed with the committee that we would provide notice with an
19 opportunity to comment and consult with the committee before
20 they start doing anything that would trigger that 400 dollar
21 fee so that the committee can, sort of, watchdog role to ensure
22 that that's not a problem.

23 Finally, the committee has been granted the right to
24 review DJM's fee application for reasonableness under Section
25 330, akin to what the U.S. Trustee has obtained. I believe Mr.

1 Buechler has seen the blackline of this one so unless he has
2 any issues --

3 MR. BUECHLER: We're good, Judge --

4 MR. GLENN: Thank you.

5 MR. BUECHLER: -- on this one.

6 MR. GLENN: Great.

7 THE COURT: Anybody else wish to be heard with respect
8 to the DJM retention? All right, motion's granted.

9 MR. GLENN: Okay. Two more, Your Honor. First the
10 Garden City Group, Docket No. 51. Garden City Group is our
11 proposed claims agent in this case. We have not received any
12 objections. That retention was run by the U.S. Trustee's
13 office before this Chapter 11 case was filed. There was a
14 minor change made about the termination -- the right to apply,
15 I believe, for the termination of their services. If Mr.
16 Buechler hasn't seen that one, we will provide it to him.
17 Again, no objections have been filed.

18 MR. BUECHLER: I haven't seen any revised order.

19 THE COURT: Subject to your review --

20 MR. BUECHLER: But --

21 THE COURT: -- of that --

22 MR. BUECHLER: -- it shouldn't be an issue.

23 THE COURT: -- the motion is granted.

24 MR. GLENN: Okay.

25 THE COURT: So whatever orders you're going to submit,

1 I'm assuming are consensual, in form and --

2 MR. GLENN: Absolutely.

3 THE COURT: All right.

4 MR. GLENN: Finally, the Dickinson Wright retention.
5 Dickinson Wright has been proposed as special counsel to the
6 debtors. The company has literally hundreds of vendors that it
7 deals with in the ordinary course of business. The company
8 actually -- the general counsel or the in-house counsel's
9 department is relatively strained to deal with those issues.
10 There are only, I believe, three, maybe four attorneys in that
11 group. It became quickly apparent, after we filed this case,
12 that they needed that function bolstered. So Dickinson Wright
13 has been proposed as special counsel to handle those and other
14 matters set forth in their application.

15 No one has objected to that retention application so,
16 unless Your Honor has questions, we would ask that that be
17 approved.

18 THE COURT: Anybody wish to be heard with respect to
19 the Dickinson Wright retention? All right, the motion is
20 granted.

21 MR. GLENN: I believe that that concludes the agenda
22 for today.

23 THE COURT: Okay. I think April 7th is the next date
24 we have, is that right?

25 MR. BUECHLER: Correct.

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MR. GLENN: Yes.

THE COURT: Okay. We're adjourned.

MR. GLENN: Thank you, Your Honor.

MR. BUECHLER: Thank you.

(Whereupon these proceedings were concluded at 12:46 PM)

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I N D E X

E X H I B I T S

DEBTORS	DESCRIPTION	ID	EVID.
---	Declaration of Scott Henry		65
---	Declaration and supplemental declaration of Richard Klein		65

RULINGS

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Interim professional compensation granted	15	16
Employee wage motion granted subject to the committee viewing the proposed order before its submission	16	23
Insurance motion granted	17	16
Distribution network vendors motion granted	18	6
Payment of taxes motion granted	18	20
Equity and claim trading motion granted	20	1
Cash management motion granted subject to the U.S. Trustee's review of the order	21	4

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I N D E X (cont'd)

RULINGS

Utilities motion is approved on an interim basis until 4/7, as per the Court's instructions on the record.	36	8
Rejection procedures motion granted	46	18
Proposed stipulated order with respect to Dell Marketing approved	47	10
Debtors' motion for an extension of time to assume or reject unexpired leases of nonresidential real property granted	59	12
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C E R T I F I C A T I O N

I, Sara Davis, certify that the foregoing transcript is a true and accurate record of the proceedings.

Sara Davis

Digitally signed by Sara Davis
DN: cn=Sara Davis, o, ou,
email=digital1@veritext.com,
c=US
Date: 2011.03.16 16:04:59 -04'00'

SARA DAVIS

AAERT Certified Electronic Transcriber CETD 567**

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: March 16, 2011