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IN THE BANKRUPTCY COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO

IN RE: SCHWAB INDUSTRIES, INC.,)Case Nos. 10-60702,
MEDINA CARTAGE CO, MEDINA SUPPLY)10-60703, 10-6-7-4
COMPANY, QUALITY BLOCK & SUPPLY,)10-60705, 10-60706,
O.I.S. TIRE, INC., TWIN CITIES)10-60707, 10-60707,
CONCRETE COMPANY, SCHWAB READY-MIX,)10-60709, 10-60710,
SCHWAB MATERIALS, EASTERN CEMENT,)
)
Debtors,)

- - - - -

TRANSCRIPT OF PROCEEDINGS HAD

BEFORE THE HONORABLE RUSS KENDIG,

BANKRUPTCY JUDGE OF SAID COURT,

ON MARCH 2, 2010.

- - - - -

1 APPEARANCES :

2

3 For the Debtors: Lawrence E. Oscar, Esq.
4 Daniel A. DeMarco, Esq.
5 Christopher W. Peer, Esq.
6 Hahn, Loeser & Parks

7

8 Marc Merklin, Esq.
9 Kate M. Bradley, Esq.
10 Nicholas P. Capotosto, Esq.
11 Brouse McDowell

12 For the Trustee: Maria D. Giannirakis, Esq.,
13 Assistant U.S. Trustee

14

15 For KeyBank: Alan R. Lepene, Esq.
16 Thompson Hine

17 For Huntington Bank: Diana M. Thimmig, Esq.
18 Roetzel & Andress

19

20 For Bank of America: Teri G. Rasmussen, Esq.
21 Plunkett Cooney

22

23 For EFO Financial: Louis X. Amato, P.A.

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1 THE CLERK: Be seated.

2 Case 10-60702, Schwab Industries,

3 Incorporated; Case 10-60703, Medina Cartage Company; Case

4 10-60704, Medina Supply Company; Case 10-60705, Quality

10:11:06 5 Block & Supply, Incorporated; Case 10-60706, O.I.S. Tire

6 Incorporated; Case 10-60707, Twin Cities Concrete Company;

7 Case 10-60708 Schwab Ready-Mix, Incorporated; Case 10-60709,

8 Schwab Materials, Incorporated; Case 10-60710, Eastern

9 Cement Corporation.

10:11:50 10 First day motions.

11 THE COURT: Well, whoever is here for the

12 debtors, the floor is yours.

13 MR. OSCAR: Good morning, Your Honor. I'm

14 Larry Oscar on behalf of the debtors, and there are quite a

10:12:10 15 few people here for the debtors, if I can indulge you for a

16 moment and introduce you, but first I'd like to thank you

17 very much for seeing us on such short notice on these first

18 day motions.

19 I appreciate it very much and so do the

10:12:32 20 debtors.

21 THE COURT: Have at it.

22 MR. OSCAR: Thank you, Your Honor.

23 I'm here with my -- my partner Dan DeMarco and

24 colleague Chris Peer.

10:12:44 25 We have co-counsel Mr. Merklin and Kate

1 Bradley and their team from Brouse & McDowell.

2 Ron Mants of Bruner Cox is in the back.

3 Parkland Group, Larry Gaddar is the chief
4 restructuring officer and he's in the gallery.

10:14:34 5 And I'd also like to introduce you to David
6 Moreland who's the executive vice president of Schwab
7 Industries who's in the gallery, and Mr. David Exley who's
8 the vice president of administration of the debtors. And
9 they're in the gallery as well.

10:14:54 10 And if you'd just give me a moment or two, I'd
11 love to give you a little bit of background about these
12 cases and these debtors.

13 Family-owned businesses, four shareholders,
14 Schwab Industries and their affiliated debtors. They are
10:15:10 15 inextricably intertwined with the construction business and
16 infrastructure business, both in Ohio, northeast Ohio, and
17 Florida. They've currently approximately 300 employees; 200
18 in Ohio and a hundred in southwest Florida.

19 There are 13 Ready-Mix plants for turning
10:15:32 20 cement and other components into concrete in Ohio. Also
21 three concrete block -- block plants in Ohio, and
22 seven -- seven Ready-Mix plants in Florida.

23 They produce Ready-Mix concrete which goes
24 into the trucks that we all are familiar with that go out to
10:15:52 25 jobs and pour concrete. They make concrete block and they

1 also sell to -- in commercial, industrial, residential and
2 governmental customers cement and related products.

3 There's two other parts to the business that
4 I'm going to draw your attention to because they're going to
10:16:20 5 come in in conversation throughout this case, and I look at
6 them as a little bit towards vertical integration, Your
7 Honor.

8 There's Eastern Cement which is one of the
9 debtors. As was recited, Eastern Cement operates a port for
10:16:36 10 the importation and exportation of cement, a port in
11 Manatee, Florida. It's one of the largest deep water plants
12 in its -- and it has exclusive right to import and export
13 cement at that facility on the Gulf of Mexico. There's 47
14 years remaining on that exclusive lease and it's an
10:17:38 15 important asset.

16 And then in addition, Schwab Material Inc. has
17 2100 acres of property on Corkscrew Road near Ft. Myers. If
18 you drove by it today, you'd -- you'd see a citrus grove,
19 but what you wouldn't see is a very substantial high quality
10:18:02 20 lime -- proved through testing limestone deposit that is
21 beneath the ground there. And again as I say, that
22 limestone is an important aggregate component in turning
23 cement into concrete and that's a vital asset that you're
24 going to hear more about.

10:18:44 25 The company's been in business for 40 years,

1 Your Honor. They've had a very nice string of success in
2 fiscal year 2007 which ended on April 30th of 2007. Their
3 sales were just shy of \$200 million. They had operating
4 income that year of about \$16 million.

10:19:10 5 And then things started to slide as the
6 economy and particularly the construction industry started
7 to slide. And in fiscal year 2009 sales, which ended on
8 April 30th, 2009, the sales were just about half of what
9 they were in 2007, 103 million in sales, operating loss of
10:19:32 10 \$5 million in that year.

11 And it brings us to this point where we need
12 and they need, the debtors need to restructure. And just so
13 you're -- have your thoughts reconfirmed, Your Honor, it's
14 expensive to reconstruct -- restructure, particularly in
10:19:52 15 bankruptcy.

16 Just in this fiscal year 2010 alone the
17 company spent more than \$2.4 million on restructuring
18 expenses; over a million of that in bank fees and other
19 costs and then professional costs incurred to -- some at the
10:20:12 20 behest of the bank and some to advise the debtor. So it's a
21 very expensive proposition.

22 And when you have operating losses and are
23 incurring additional expenses, and things can't be worked
24 out with your lenders, you find yourself here in Bankruptcy
10:20:28 25 Court.

1 And just to give you a perspective on the
2 order of magnitude, Your Honor, the pre-petition Bank Group,
3 as of December 31st, 2009, had a revolver in the approximate
4 amount of \$8.6 million, a Term A loan in the approximate
10:21:00 5 amount of \$19.1 million, and a Term B loan in the
6 approximate amount of \$31.9 million. Those amounts are
7 reflected on the books and records of the debtor as of
8 December 31st, 2009.

9 So we're here because of the downturn in the
10:21:32 10 economy. And what's going to get us out of here? And this
11 is really concluding my remarks, Your Honor. I think there
12 are three, going to be three keys to the success here.

13 Mr. Gaddar of Parkland, his team are working
14 hard to improve and make operating adjustments of
10:21:52 15 these -- this enterprise to survive the weak economy and
16 take advantage of what is now becoming an opportunity as
17 people are turning towards infrastructure and looking
18 to -- to spend money there, both in Ohio and Florida.

19 We also plan to monetize nonessential assets
10:22:18 20 so that there will be cash generated through that purpose,
21 and the cash flow forecasts reflect that.

22 And finally, Your Honor, a reference back to
23 both the port and the Corkscrew Road property I referred to,
24 I think those will be integral to and important factors in
10:22:40 25 generating cash to pay down debt as part of a reorganization

1 effort in this case.

2 There are people hard at work to achieve that.
3 We've already spent a significant amount of time, and part
4 of the first step forward in that is -- is to have reached
10:22:58 5 agreement on the, what I will call, the routine first day
6 motions which I'll have Mr. DeMarco go through with you, and
7 then we will turn it over to Mr. Merklin and his team to
8 discuss debtor-in-possession financing.

9 THE COURT: Okay.

10:23:16 10 MR. OSCAR: Thank you very much, Your Honor.

11 MR. DeMARCO: Good morning, Your Honor. Dan
12 DeMarco on behalf of the debtors.

13 Your Honor, I know that in these kinds of
14 first day proceedings, notice is always a critical issue for
10:24:38 15 the debtors as well as the Court, and I thought before we
16 start moving through the motions, I might describe for the
17 Court what efforts we've made at service and assure, as best
18 we can, those are satisfactory for the Court as we proceed.

19 The Court certainly can take notice that we
10:24:58 20 have not quite standing room only, but we certainly have a
21 lot of folks in the courtroom today representing many
22 constituencies, and I think that speaks to the efforts that
23 we've made to properly serve these papers in connection with
24 this filing.

10:25:12 25 We commenced the filing Sunday afternoon, and

1 completed the first day filings in the wee hours Monday
2 morning, and at that point we sent out faxes and e-mails
3 that went out at approximately 3:00 a.m. Monday morning to a
4 very fullsome list of creditors and parties-in-interest.

10:25:44 5 And I could refer the Court to perhaps
6 Exhibit -- docket entry, I should say docket item 34 which
7 is a supplemental affidavit of service which enumerates by
8 category the creditors that received notice and the manner
9 in which they received it, either by fax or e-mail.

10:26:14 10 And the Court can see this encompasses the
11 United States Trustee who's here today, the pre-petition
12 lenders who are here today, the debtor-in-possession
13 financing lenders who are here today, debtors' counsel and
14 professionals, other parties with liens or security
10:26:38 15 interests of record. There are four of those parties, Your
16 Honor. They all received notice by fax or e-mail. I don't
17 know if any of them are here today.

18 The Internal Revenue Service and other taxing
19 authorities; the equity holders; U.S. Department of Justice;
10:26:58 20 Attorneys General for the States of Florida and Ohio;
21 depository bank, there's one depository bank in addition
22 to -- among the lending group. These parties received
23 notice by fax or e-mail.

24 I do want to note that there are, among the
10:27:20 25 other categories that the DIP lenders requested that we

1 serve, are parties that have an interest in real estate, and
2 I believe that there are two parties that we have not been
3 able to identify a fax or an e-mail for. They did receive
4 service by regular mail.

10:28:16 5 The other parties with an interest in land did
6 receive fax and e-mail notice.

7 We also, at the request of the
8 debtor-in-possession lender, served notice on the -- not
9 only the consolidated top 30 creditors, but the top 30
10:28:38 10 creditors for each of the nine debtors.

11 And I believe that 28 of the 30 top creditors
12 on a consolidated basis received fax and e-mail notice. And
13 among some of the smaller creditors with less than 10,000 on
14 the larger group, we may not have had fax or e-mail notices,
10:29:06 15 but this is all reflected in docket entry 27, which is the
16 initial affidavit of service which was a service of a notice
17 of the first day filings and of the request that we be here
18 this morning in front of Your Honor at 10:00 o'clock, the
19 supplemental affidavit that was filed this morning which
10:29:26 20 I've referred to and identifies these parties by category.

21 Also, Your Honor, after the Court entered the
22 order expediting the first day hearings and approved the
23 form of notice of the expedited hearing, which are docket
24 entries 30 and 31, there was another round of notice given
10:29:46 25 by fax and e-mail.

1 I personally sent those to counsel for the
2 pre-petition lenders and the United States Trustee within
3 minutes after they were entered by the Court prior to noon
4 yesterday, and then by 4:00 o'clock yesterday the fax and
10:30:04 5 e-mailing had been completed around the horn to all the
6 other parties that we've mentioned.

7 And then within the last half hour or so this
8 morning, there's been another affidavit of service filed
9 which indicates the service by United States Mail.

10:30:18 10 So probably more than the Court wanted to hear
11 on the subject of the notice, but we do take those
12 obligations seriously and wanted to let the Court know
13 specifically how we went about that. And Garden City Group
14 was instrumental in getting all that notice out.

10:30:36 15 Your Honor, if I might, first, turn to the
16 first day motions that we'll be presenting, we've had
17 discussion with the United States Trustee about a number of
18 issues, and we can go through those motions and orders and
19 indicate where we've made changes or accommodations for the
10:30:58 20 United States Trustee or provided him information that's
21 helped them be in a position where they would not object.

22 At this point I think there's one first day
23 motion where the United States Trustee and the debtors have
24 not reached an accord which has to do with the request to
10:31:14 25 pay pre-petition taxes. There's a number of subcategories

1 of taxes where we are in substantial agreement. There's
2 some categories that are -- pertain to the
3 debtor-in-possession financing that Mr. Merklin will
4 address. And then there are some others where we have some
10:31:30 5 past due taxes where the United States Trustee is not in a
6 position to accept the relief the debtor is seeking, at
7 least on a first day basis.

8 So if the Court would please, perhaps I could
9 address those motions where there's not opposition.

10:32:10 10 I guess the first of those motions would be
11 the motion for joint administration which I'm happy to speak
12 to, but I think is clearly warranted in a case like this.

13 THE COURT: Anyone here oppose the debtors'
14 motion for joint administration of the cases?

10:33:00 15 Seeing none, after you get us an order we'll
16 get it entered.

17 MR. DeMARCO: The next -- the next motion,
18 Your Honor, has to do with pre-petition wages. And, Your
19 Honor, as we go through these, if there are certain
10:33:30 20 objections, my colleague Mr. Peer, I may ask him to step
21 forward and address those, or Mr. Merklin, if it goes in
22 that direction with regard to the DIP financing.

23 But the pre-petition wages, I think it's a
24 pretty standard motion, and the good news is that the
10:33:48 25 salaried and hourly employees were paid Friday so they're

1 current.

2 And we -- the U.S. Trustee asked about
3 outstanding checks. Because the companies pay by direct
4 deposit, there shouldn't be outstanding checks other than
10:34:08 5 for expense reimbursements. As we've indicated in the
6 motion, there are no more than about \$7,250. And with that
7 representation, my understanding is the United States
8 Trustee has no opposition to granting this relief.

9 THE COURT: Okay. Is there anyone that
10:34:24 10 objects to the debtors' motion to pay pre-petition wages?

11 If not, if you give us an order, we'll get
12 that entered.

13 MR. DeMARCO: Thank you, Your Honor.

14 With regard to motion to pay certain
10:34:40 15 pre-petition claims of shippers, because of the filing over
16 the weekend, we really minimized the potential exposure on
17 this. We've indicated to Ms. Giannirakis for the U.S.
18 Trustee that we expect that will be zero. We think in a
19 worst case scenario if there's something that hasn't
10:35:00 20 surfaced yet, we're probably talking about less than a
21 couple thousand dollars.

22 And again I think this is standard first day
23 relief, and we'd ask the Court to grant that.

24 THE COURT: Anyone here with any objection to
10:35:42 25 the debtors' motion to pay claims of shippers?

1 Seeing none, if you'd get us an order on that,
2 we'll get it entered.

3 MR. DeMARCO: Your Honor, I'm going to defer
4 for now -- I had intended to address the sales and use taxes
10:35:56 5 and other pre-petition taxes. We'll return to that one.

6 We might turn next to the retention of the
7 Garden City Group as our claims noticing and balloting
8 agent. They've been very busy and very instrumental in
9 getting the case off the ground.

10:36:20 10 In discussion with the United States Trustee,
11 the Trustee raised concern about some limitations of
12 liability-type language that is in the engagement letter and
13 in the proposed order. My understanding is that the U.S.
14 Trustee and Garden City and the debtors have agreed that
10:36:36 15 that language would be struck, and with that change the U.S.
16 Trustee, as I understand it, has no further objection to
17 this relief.

18 THE COURT: Okay. Is this an order that
19 you've entered in the Northern District before recently?

10:36:54 20 MR. DeMARCO: Yes, Your Honor. I believe so.
21 I don't think there's anything peculiar to the Garden City
22 Group with regard to the terms and conditions.

23 THE COURT: Okay. We'll put it on. I'll run
24 it by the Clerk just, you know, we'll see if we have a
10:37:20 25 squawk there, but, you know, sometimes there are things that

1 wouldn't even occur to us about just the procedures of doing
2 things, but, yeah, with that caveat, just get us an order.
3 We should get that on.

4 There was no objection to the -- to that
10:37:58 5 motion, other than the change that you wanted to correct,
6 Ms. Giannirakis?

7 MS. GIANNIRAKIS: We -- no, that was our only
8 objection, Your Honor.

9 THE COURT: Okay. Were there any objections,
10:38:18 10 other objections to the motion to retain Garden City?

11 Get us an order.

12 MR. DeMARCO: Thank you, Your Honor.

13 Case management procedures, Your Honor, again
14 not -- not familiar with exactly what the Court's recent
10:38:36 15 proclivities are and how we handle that, but the basic idea
16 was to try to bring some procedural order to a case where
17 there's many parties and ask for some omnibus dates that we
18 all can work from.

19 So if the Court preferred to handle all the
10:38:52 20 scheduling issues at the end of today's hearing, we can do
21 that, or we can address it now.

22 THE COURT: Did you want one day a month?

23 MR. DeMARCO: That -- I think that would be
24 adequate, yes, Your Honor.

10:39:30 25 THE COURT: How does this sound? I had a

1 chance to look at that right before I came in.

2 If we could do them at 10:00 in the morning,
3 how about March 8th and everybody's favorite day April 15th,
4 and then May 11th?

10:40:08 5 Does any of that cause anybody to want to
6 grind their teeth?

7 MR. DeMARCO: I don't see any teeth grinding
8 on the debtors' side, Your Honor.

9 THE COURT: Okay. Yeah, if you want to just
10:40:24 10 fill those into the order, then we'll go with that.

11 MR. DeMARCO: Thank you very much.

12 And again, we're happy to address with you and
13 your chambers any other tweaks that would be helpful to the
14 Court on that.

10:40:38 15 THE COURT: Okay.

16 MR. DeMARCO: Thank you.

17 We also have a motion for interim compensation
18 procedures which again is a standard order, and we've
19 indicated that we've discussed that with the United States
10:40:54 20 Trustee.

21 There's no objection to that really.

22 THE COURT: I think Ms. Giannirakis wanted to
23 say something.

24 MS. GIANNIRAKIS: Good morning, Your Honor.

10:41:04 25 THE COURT: Good morning.

1 MS. GIANNIRAKIS: Maria Giannirakis on behalf
2 of the United States Trustee.

3 Your Honor, although -- I guess we had a
4 disagreement or maybe a misunderstanding. Although this is
5 a standard order in cases, I don't believe this is
6 necessarily a first day order. Nothing would be affected by
7 it not being entered on the first day.

8 THE COURT: Okay.

9 MS. GIANNIRAKIS: We actually haven't even
10 reviewed it because we didn't think it was going forward
11 today.

12 THE COURT: Okay. So you'd like it to go --

13 MS. GIANNIRAKIS: Just a --

14 THE COURT: -- in 15 days or whenever it is we
15 go?

16 MS. GIANNIRAKIS: Correct.

17 THE COURT: Okay.

18 MR. DeMARCO: That's certainly agreeable.

19 Would the March 8th date that the Court has
20 indicated be acceptable to your office?

21 MS. GIANNIRAKIS: That's fine.

22 THE COURT: Yeah. That's great.

23 Well, that's not 15 days. I thought you were
24 talking about doing it after you --

25 MS. GIANNIRAKIS: No, this is a standard

1 interim comp order. We just didn't even review the
2 procedures. I just don't think it's a first day.

3 I'm happy to review it and -- and make sure
4 it's the standard motion and order to go on on March -- on
10:44:08 5 March 8th.

6 I just didn't think it was necessary to be --
7 THE COURT: Okay. But the 8th is okay with
8 you?

9 MS. GIANNIRAKIS: Correct. Under Rule
10:44:18 10 thousand -- 6003, it's not an emergency.

11 THE COURT: Right.

12 MS. GIANNIRAKIS: Necessary for irreparable
13 harm.

14 Nobody would be paid in that time anyway, so
10:44:30 15 the procedures wouldn't even be in effect.

16 THE COURT: Okay. That's fine. We'll go to
17 the 8th.

18 MR. DeMARCO: Thank you, Ms. Giannirakis. I
19 apologize, she -- we did, in fact, have that just earlier.

10:44:46 20 Your Honor, I guess if the Court please, I
21 would next like to turn to the utilities motion.

22 Again I think this is a fairly standard motion
23 and order, and obviously we're taking the first step in a
24 process where parties will have an opportunity to be heard
10:45:10 25 down the road.

1 And Ms. Giannirakis and I have discussed this,
2 and although there are certain aspects of the relief we're
3 asking that I don't think the U.S. Trustee would, as a
4 matter of course, stand up and endorse, I think that in
10:45:26 5 terms of first day relief, as long as there's a reservation
6 for the U.S. Trustee, I don't believe that the U.S. Trustee
7 would object to the interim relief we're seeking here today.

8 THE COURT: Okay. Is there anything you want
9 to add to what he said?

10:45:40 10 MS. GIANNIRAKIS: No, Your Honor.

11 THE COURT: Okay. Anyone object to the
12 utility deposit motion?

13 Seeing no one, if you want to get us an order
14 on that, we'll get it entered.

10:45:48 15 MR. DeMARCO: Thank you, Your Honor.

16 Your Honor, I'd next like to turn to the cash
17 management motion and bank accounts motion, and again this
18 is fairly standard relief.

19 There's one aspect of this that the United
10:46:04 20 States Trustee objected and where we've been able to
21 resolve, and I'll describe that.

22 We have asked in the motion that the
23 checks -- obviously the Court is aware, U.S. Trustee rules
24 require that the checks bear the legend
10:46:20 25 "debtor-in-possession."

1 THE COURT: Right.

2 MR. DeMARCO: And we have asked for relief
3 that that not be the case for checks that are paid to
4 employees.

10:46:26 5 In light of the fact that our employees are
6 paid by direct deposit, we've agreed to withdraw that
7 request. The consequence of that is that the -- any checks
8 to the employees who are receiving expense reimbursements
9 might bear that legend, but the United States Trustee
10:46:46 10 indicated that this was not an area where there was any
11 flexibility, and so we are acceding to that request and
12 would modify the order that we would upload accordingly.

13 Otherwise, I believe that the U.S. Trustee
14 does not object.

10:47:02 15 THE COURT: Okay. Anyone with any objections
16 to the motion to maintain the existing bank accounts and
17 cash management procedures?

18 Seeing none, if you get us an order, we'll get
19 it entered.

10:47:14 20 MR. DeMARCO: Thank you, Your Honor.

21 I'd next like to turn, Your Honor, to a motion
22 seeking approval for Ordinary Course Professionals.

23 And Ms. Giannirakis has indicated to me that
24 the U.S. Trustee does not believe that this is the type of
10:47:56 25 relief that ought to be considered on a first day basis.

1 We have agreed with her that for the majority
2 of the ordinary course professionals on the list, that the
3 relief could await further hearing. And if it's agreeable
4 to Ms. Giannirakis, I would suggest March 8th, if possible.

10:48:22 5 There are two exceptions where Ms. Giannirakis
6 and I have tried to reach a resolution which I'll try and
7 present here.

8 Among the ordinary course professionals
9 listed, there are two that we believe are critical on a
10:48:40 10 first day basis.

11 One, Mr. Oscar described the citrus grove.
12 There's actually a management company that operates that
13 citrus grove for the debtors. It's not clear at all that
14 this management company would be a professional within the
10:49:02 15 ambit of the Bankruptcy Code, but because this operation is
16 so critical to the debtors' ventures and because, as we
17 understand it, it is a profitable operation, we want to make
18 sure that this management company didn't experience any
19 hiccups in terms of being able to continue to operate.

10:49:22 20 What I understand Ms. Giannirakis to have
21 indicated on behalf of the United States Trustee is that on
22 an interim basis, that the management company could continue
23 in place under the authority of an ordinary course
24 professional order, but that the U.S. Trustee and all other
10:49:38 25 parties would have the right to appear and be heard at a

1 later date, and that the compensation, if any, paid to this
2 management company on an interim basis would be protected.

3 Further compensation, of course, would be
4 subject to further hearing and order of the Court.

10:49:56 5 The same process we would request be applied
6 to one other of the ordinary course professionals which is
7 identified in the exhibit as Wells Fargo TPA. Wells Fargo
8 serves as a third party administrator for the debtors'
9 health and disability programs for its employees, and we
10:50:26 10 believe it's essential that that third party administrator
11 be available to us. And we think it's important for the
12 employees and for the morale of the employees that we not
13 have an interruption there.

14 And again if I understand Ms. Giannirakis
10:50:40 15 correctly, on an interim basis the United States Trustee
16 would not oppose that relief.

17 The rest of the relief sought in this motion,
18 Your Honor, we would defer, and I would suggest March 8th.

19 THE COURT: Okay. Ms. Giannirakis, does that
10:51:02 20 comport with what you thought?

21 MS. GIANNIRAKIS: Yes, Your Honor. I believe
22 it does.

23 Although we don't agree that, again, this is
24 necessarily a first day motion or that these may even be
10:51:20 25 professionals in the sense, given this case and for -- to

1 cooperate with the debtors, we are not objecting under those
2 terms to those two professionals.

3 I'm trying to think if March 8th is less than
4 a week, so I would -- I mean, my suggestion would be that
10:51:38 5 this motion be set out for 15 days on negative notice, and
6 if there aren't any objections, then -- then it be entered
7 at that time.

8 I -- I would suspect if the U.S. Trustee has
9 any comments, that they are small things that can be worked
10:52:04 10 out with the debtor.

11 THE COURT: Okay.

12 MS. GIANNIRAKIS: And I don't know if any of
13 the other parties would be objecting.

14 But I would rather not it be heard -- not be
10:52:22 15 heard on the 8th.

16 THE COURT: Right. I understand that's
17 pretty brief. That's what I was suggesting earlier on that
18 other one.

19 Mr. DeMarco, how do you feel about that,
10:52:56 20 sending out a negative notice?

21 MR. DeMARCO: I think a negative notice would
22 be a perfectly appropriate procedure.

23 THE COURT: Okay. And then we will just go to
24 the next hearing date which shouldn't be too far out, or if
10:53:16 25 it becomes an emergency because somebody's going to walk,

1 you know, we could do it right away.

2 MR. DeMARCO: Yeah, we certainly can assess
3 between now and then if there's other -- other folks where
4 we need to make a similar interim -- interim arrangement if
10:54:00 5 needed.

6 So thank you.

7 THE COURT: Okay.

8 MR. DeMARCO: Thank you, Ms. Giannirakis.

9 THE COURT: I suppose I should ask whether
10:54:16 10 there was anyone else with any objection to the ordinary
11 course professionals motion?

12 Okay. And there isn't, so if you can get us
13 that one.

14 MR. DeMARCO: Your Honor, in trying to keep up
10:55:12 15 with my scorecard here, I believe that we've now addressed
16 the first day motions other than the tax motion --

17 THE COURT: Right.

18 MR. DeMARCO: -- that Hahn Loeser was going to
19 present. Of course, Mr. Merklin has two motions that he
10:56:12 20 would be presenting on the DIP financing and on an
21 appraiser.

22 I guess I would first ask if I'm -- if I've
23 overlooked anything.

24 THE COURT: I didn't see any.

10:56:26 25 MR. DeMARCO: Okay.

1 THE COURT: I've got a list.

2 MR. DeMARCO: Then, I guess, Your Honor, on
3 the taxes, I would cede the podium to my colleague Mr. Peer.

4 THE COURT: Okay.

10:56:44 5 MR. DeMARCO: Who will -- who will present on
6 that.

7 And let me just preface that by -- by
8 indicating to Your Honor that there are several categories
9 of taxes which are the subject of this request, and we may
10:57:08 10 be able to narrow the focus of those.

11 Essentially sales and use taxes are current.
12 Payroll taxes are current. There are approximately \$175,000
13 of corporate taxes, primarily corporate tax and franchise
14 tax and CAT, Commercial Activity Tax, which is past due and
10:57:40 15 which I understand presents an issue for the United States
16 Trustee.

17 We also have real estate taxes and personal
18 property taxes. I think Mr. Merklin will address the real
19 estate taxes because that relates to the
10:58:00 20 debtor-in-possession financing and the arrangements with
21 that party, so I guess I'll be ceding the podium to both
22 Mr. Merklin and Mr. Peer.

23 THE COURT: Thanks.

24 MR. DeMARCO: Thank you.

11:11:20 25 MR. PEER: Good morning, Your Honor.

1 THE COURT: Good morning.

2 MR. PEER: Thank you.

3 To keep this brief and just to add slight
4 amounts to what my colleague Mr. DeMarco had to say, and I'm
11:12:06 5 happy -- Mr. David actually is here in the courtroom and is
6 available to testify, if necessary.

7 The amounts that are in our papers are
8 accurate but they do -- do -- they do include accruals.

9 And I believe the primary issue, if I
11:12:52 10 understand my conversations with Ms. Giannirakis correctly,
11 is that the UST's concern is in relation to personal
12 property and real property taxes and not to the CAT tax or
13 the franchise tax or the sales and use taxes.

14 Those numbers are approximately \$363,000 for
11:13:54 15 real estate and approximately a hundred and -- \$191,000 for
16 personal property tax, both in Florida and in Ohio.

17 These amounts are important because of the
18 nature of the collateral. We do believe that keeping those
19 current is important.

11:14:16 20 More so, we also believe that these are
21 priority claims or would be priority claims in a plan of
22 reorganization down the road, and we see no reason to allow
23 those amounts to continue to accrue interest, accrue taxes
24 or anything else that a taxing authority may assert for late
11:14:34 25 payment.

1 Because it is February, those -- those amounts
2 have come due here in Ohio, at least with relation to real
3 estate taxes, and we want to avoid -- the debtor thinks it's
4 very important to avoid those continuing costs.

11:14:48 5 At this point I believe I need to -- to cede
6 the podium to Mr. Merklin to speak more directly about the
7 real estate issues.

8 THE COURT: Let me just ask you one question.

9 MR. PEER: Yes, Your Honor.

11:15:04 10 THE COURT: The 363,000 for real estate, does
11 that include accruals, or that's all past due?

12 MR. PEER: That includes accruals.

13 THE COURT: Okay. So what's -- the U.S.
14 Trustee is really only objecting to what's past due, right?

11:15:20 15 MR. PEER: Well, the -- in Ohio they became
16 due three days ago.

17 THE COURT: All 363?

18 MR. PEER: The Ohio properties. And with
19 relation to the Ohio properties, yes, so it's not -- it's
11:15:38 20 not the entire 363 amount.

21 I could speak to Mr. Exley and ask for a
22 further breakdown if the Court --

23 THE COURT: Okay. Then how about the personal
24 property taxes, what part of that's actually past due?

11:15:58 25 MR. PEER: I believe I would have to talk to

1 Mr. Exley to find that out.

2 THE COURT: Okay.

3 MR. PEER: I believe most of that is past due.

4 THE COURT: Okay. Thanks.

11:16:18 5 MR. MERKLIN: Good morning, Your Honor, Marc
6 Merklin along with Kate Bradley and Nick Capotosto as
7 special counsel and co-counsel for the debtors with respect
8 to the issues involving the pre-petition lenders and the
9 proposed DIP financing facility.

11:16:36 10 Your Honor, with respect to the real estate
11 taxes, obviously in addition to being priority taxes
12 potentially, they are also secured certainly in Ohio and I
13 believe in Florida by liens on the real estate.

14 To the extent that those are unpaid and
11:16:50 15 continue to accrue interest or penalties, those issues would
16 be of concern to both the pre-petition lenders and to the
17 DIP lender in connection with our motion for DIP financing
18 because obviously the occurrence of those claims would
19 continue to potentially erode any equity in those properties
11:17:12 20 with regard to issues involving the lenders.

21 So with respect to adequately protecting the
22 interests of those lenders, we think it is appropriate to
23 allow those claims to be paid in order to essentially stop
24 the interest and penalty clock and to, again, preserve the
11:17:28 25 equity in those properties for the benefit of the lenders.

1 THE COURT: Thanks.

2 MR. MERKLIN: Thank you.

3 THE COURT: Go ahead.

4 MS. GIANNIRAKIS: Your Honor, if I may have
11:17:44 5 one moment just to make sure I --

6 THE COURT: Absolutely.

7 MS. GIANNIRAKIS: -- haven't misheard
8 something.

9 (Pause).

10 MS. GIANNIRAKIS: I just -- I just wanted to
11 make sure I had the facts correct.

12 THE COURT: Okay.

13 MS. GIANNIRAKIS: Your Honor, the United
14 States Trustee does object to any portion -- to the portion
11:20:16 15 of any of the taxes that are -- that are past due; the
16 corporate tax, the franchise tax, the real estate taxes.

17 The purpose of this motion is to -- generally
18 on first days is to keep the debtor current on the current
19 taxes.

11:21:22 20 We have no objections to any of those taxes
21 that were cited in the motion; the sales taxes, the payroll
22 taxes. We believe those are necessary to be paid.

23 We understand that these are priority claims.
24 That doesn't make a difference from our perspective. They
11:21:42 25 will be paid under a plan of reorganization. They will be

1 paid in a timely manner. But we don't believe that on a
2 first day these taxes should be paid as part of a first day
3 motion, and we would object to those portions being paid.

4 THE COURT: Okay.

11:21:58 5 MS. GIANNIRAKIS: Thank you.

6 THE COURT: Thanks.

7 Go ahead.

8 MR. PEER: I wanted to make sure, I wanted to
9 report from my conversation with Mr. Exley.

11:22:12 10 THE COURT: Sure.

11 MR. PEER: I've learned also that the Florida
12 taxes came due. We reported this to Ms. -- I'm not sure if
13 you heard me say it because I said it kind of soft, softly,
14 the Florida taxes also came due in the last week as well.

11:22:28 15 So the 363 is a past due number as due and
16 payable. On the personal property tax, we believe a
17 significant portion, but I can't quantify that number
18 standing here today.

19 THE COURT: I'm sorry, a significant quantity
11:22:44 20 of --

21 MR. PEER: A significant -- a significant
22 amount of the 191 of the personal property taxes we believe
23 to be past due.

24 THE COURT: Okay.

11:22:52 25 MR. PEER: But I would need to -- the company

1 would need to do some further diligence --

2 THE COURT: Okay.

3 MR. PEER: -- for me to --

11:23:04

4 THE COURT: Do you know if it's more than or
5 less than half? I mean --

6 MR. PEER: I think I, if -- we're not -- we're
7 not certain, Your Honor.

8 THE COURT: Yeah, you're not required to know.
9 Well, you don't know.

11:23:34

10 MR. PEER: Yes.

11 THE COURT: Okay. Thanks.

12 Anything else you wanted to add, though?

13 MR. PEER: If, if Ms. Giannirakis would

14 prefer, we'd be happy to move this to March 8th to

11:23:46

15 have -- to allow further discussions to continue on, right,
16 on the corporate taxes, not on the real estate taxes; not on
17 the real estate taxes.

18 THE COURT: Okay. And then Mr. -- I'm sorry,
19 do you have anything else?

11:24:02

20 MR. PEER: No, Your Honor.

21 THE COURT: Mr. Merklin, do you want to add
22 anything else since Ms. Giannirakis had her opportunity?

23 MR. MERKLIN: No, Your Honor.

24 Again, this is an element both of payment of
11:24:20 25 pre-petition taxes but also it has an element to it of

1 adequate protection, and we think that would distinguish it
2 for purposes of today.

3 THE COURT: You mean because it's secured?

4 MR. MERKLIN: Because it's secured and as a
11:25:14 5 lien on the property as well, that's correct.

6 THE COURT: You want to add anything?

7 MS. GIANNIRAKIS: No, Your Honor.

8 THE COURT: Okay. I think what we should do,
9 I would agree with Mr. Merklin, the fact that it's secured
11:25:46 10 by the real estate, even though it's just in rem, would give
11 us sufficient grounds to -- to pay this even on a first day
12 basis.

13 I'm not sure we need to do it -- well, the
14 Court would be willing to authorize that.

11:27:08 15 As to the personal property taxes, I think we
16 should put that over, and not to the 8th but put it over to
17 the date when we'll conduct the final hearing on the finance
18 motions.

19 I'm sorry, go ahead.

11:29:06 20 MR. PEER: It may be, Your Honor, the motion
21 and the order do seek authority, but not direction to pay.

22 THE COURT: Right.

23 MR. PEER: So perhaps it's still -- it's still
24 about, you know, subject to funding as well.

11:30:14 25 THE COURT: Right.

1 MR. PEER: So perhaps some of that is handled
2 in that manner, Your Honor.

3 THE COURT: Okay.

4 MR. PEER: Thank you.

11:30:40 5 THE COURT: Thanks.

6 MS. GIANNIRAKIS: Just for clarification.

7 THE COURT: Sure.

8 MS. GIANNIRAKIS: Are we continuing just the
9 personal property portion?

11:30:52 10 THE COURT: Right.

11 MS. GIANNIRAKIS: And the corporate -- the
12 corporate portion, there's other --

13 THE COURT: Everything other than real estate.
14 We've referred to that other 191,000.

11:31:32 15 MS. GIANNIRAKIS: Okay.

16 THE COURT: By a number of different titles.

17 MS. GIANNIRAKIS: Thank you.

18 THE COURT: Yeah. Everything that's in that
19 191.

11:31:52 20 MR. PEER: The 191 is just personal property.

21 THE COURT: It is just personal property.

22 MR. PEER: The 191 is just personal property.

23 The CAT and franchise are \$80,000 combined, and then there's
24 sales and use tax.

11:32:48 25 THE COURT: Okay. And those are --

1 A MALE SPEAKER: I have those, I have those
2 amounts.

3 THE COURT: But those are what you're saying
4 are accruals, are current basically.

11:33:34 5 A MALE SPEAKER: Yes.

6 THE COURT: Okay. Is that the way
7 you -- that's the way I understood it. Is that the way --

8 MS. GIANNIRAKIS: Okay. If that's -- it is
9 what it is. I didn't understand. I thought the CAT and
10 the -- were delinquent.

11 A MALE SPEAKER: Are the CAT and franchise
12 delinquent? Or is the CAT --

13 MR. PEER: The franchise is past due. The CAT
14 tax is accrual.

11:37:00 15 THE COURT: Okay. Well, then for the past due
16 part of the franchise tax, we should take that to the date
17 when we hear the finance motions, too.

18 MS. GIANNIRAKIS: Thank you.

19 THE COURT: You sort that out in the order,
11:37:14 20 obviously, when you have time to get back to your office and
21 unscramble this in your head.

22 I think now did you want to go to your finance
23 motion, is that it?

24 MR. MERKLIN: Yes, please, Your Honor. Good
11:37:54 25 morning again, Your Honor.

1 We have filed a motion to seek
2 debtor-in-possession financing with a senior lien on all the
3 assets and obviously other protections including a super
4 priority claim.

11:38:10 5 There has been, as one might expect when
6 you're seeking a priming lien from the existing lenders, a
7 rather strenuous objection.

8 With Your Honor's permission, what I'd like to
9 do is generally describe the circumstances.

11:38:38 10 THE COURT: Okay.

11 MR. MERKLIN: And then perhaps I would address
12 in general terms the objection, and then we can move to any
13 necessary testimony.

14 THE COURT: Okay.

11:38:52 15 MR. MERKLIN: Your Honor, the -- the debtor is
16 seeking approval on an interim basis of a
17 debtor-in-possession financing facility with a company
18 called EFO.

19 And by the way, as a housekeeping matter, Your
11:39:10 20 Honor, I would move orally for the admission pro hac vice of
21 Louis Amato from the State of Florida in good standing with
22 the State of Florida Bar and admitted there, who represents
23 EFO and is here today.

24 THE COURT: Okay. Yeah, if you can get us an
11:39:32 25 affidavit and an order, we'll get it on.

1 MR. MERKLIN: We will do so, Your Honor.

2 THE COURT: Okay. Thanks.

3 MR. AMATO: Thank you, Your Honor.

4 And we're in the process of securing local
11:39:58 5 counsel, so I won't impose upon the Court for very much
6 longer on that.

7 THE COURT: Okay. Great.

8 MR. MERKLIN: Thank you, Your Honor.

9 Your Honor, in general terms, what the EFO
11:40:10 10 proposal entails is debtor-in-possession financing pursuant
11 to the terms of an executed commitment letter that was
12 negotiated and completed by the debtor, frankly, over the
13 weekend.

14 And that debtor-in-possession financing
11:40:26 15 provides for approximately \$18,308,655 in potential
16 debtor-in-possession financing that would be advanced in
17 three increments.

18 The first increment is what we're really
19 seeking today which is an emergency funding in order to
11:40:44 20 operate our -- the business currently, and that would be for
21 approximately \$3.5 million.

22 There would be a second tranche of that
23 financing that would be the subject of financing after the
24 entry of a final order after further hearing on this matter.

11:41:04 25 And then after the lender completes some

1 remaining due diligence and exercises its discretion under
2 the proposed commitment letter, there would be a tranche of
3 the 18-million-three-hundred-some-thousand which would be
4 used in part to pay off the first two advances.

11:41:34

5 The terms would be approximately one year.
6 The interest rates, various fees and costs are set forth in
7 the papers and I won't repeat them at this time, but they
8 are fully disclosed in our -- in our filings.

11:41:56

9 The lender would request and would require
10 under the commitment again a senior priming lien on all of
11 the assets of the debtor, certain super priority
12 protections. That would be there would be a carve-out of
13 that for avoidance claims which would be segregated if there
14 are proceeds from such avoidance claims but to which the
15 lenders would have -- the DIP lender would have neither a
16 lien, nor super priority.

11:42:28

11:42:42

17 Second, Your Honor, there is a provision for a
18 professional fee carve-out that would be funded in order to
19 assure that there is some ability to continue the case
20 should DIP financing terminate and there needs to be work to
21 bring the case to some conclusion.

11:43:02

22 Your Honor, the lenders have objected, as one
23 might expect, in connection with a priming lien, and as I
24 understand it -- have read their objection which was filed
25 very early this morning -- the first ground is an

1 adequate -- is an adequacy of notice issue or due process
2 issue which we would be prepared to -- to discuss with the
3 Court. I believe that is primarily, in my view, a legal
4 issue.

11:43:16 5 The second issue raised by the lenders is what
6 I would characterize as the adequate protection provisions,
7 essentially the argument over whether or not there is an
8 equity cushion in the assets that would be sufficient to
9 support a finding that a priming lien would still adequately
11:43:32 10 protect the lenders.

11 And I believe there, Your Honor, there are
12 both some factual and legal disputes both as to the standard
13 for valuation of the collateral of the debtor which is in
14 dispute, as well as some disputes over the actual valuation
11:43:44 15 of those assets.

16 I would disagree a bit with the lenders with
17 respect to what needs to be shown today because again the
18 issue today before the Court is not the entire \$18 million
19 DIP financing facility, but really the only thing the Court
11:44:02 20 needs to, in our view, address today is the emergency
21 advance of about \$3.5 million which is needed to fund
22 operations to presumably get us to that point of a final
23 hearing.

24 And presumably at a final hearing both sides
11:44:22 25 could present considerable additional evidence with respect

1 to the value of the debtors' assets and make all of the
2 arguments at that time.

3 Certainly to the extent that the lenders or
4 anyone else would interpret our motion today to seek final
11:45:16 5 approval of that entire facility, I would clarify for the
6 record that today we are seeking, again, only the emergency
7 advance.

8 Third, Your Honor, we would tender testimony
9 with respect to the fact that these expenses and the
11:45:30 10 expenditures outlined in the budget, which is attached as an
11 exhibit to our DIP financing motion and to the commitment
12 letter, are expenses that are necessary and urgently needed
13 in order to keep this business operating to be able to get
14 to the point of a final hearing.

11:45:48 15 With that, Your Honor, I could address the
16 lender's arguments in more detail and present testimony, or
17 I could defer to Mr. Lepene to describe in general terms his
18 objection.

19 THE COURT: Do you want to give Mr. Lepene a
11:46:02 20 couple minutes to just generally describe his objection, and
21 then we'll have you talk about the --

22 MR. MERKLIN: Thank you, Your Honor.

23 THE COURT: -- the legal issue?

24 Good morning.

11:46:18 25 MR. LEPENE: Good morning, Your Honor.

1 For the record, Alan Lepene with the law firm
2 of Thompson, Hine on behalf of KeyBank as agent for the
3 pre-petition lenders.

4 Your Honor, the one thing that I can agree
11:47:28 5 with Mr. Merklin on, and perhaps the only thing we're going
6 to be able to agree on, is that we have serious objections
7 with respect to what is being proposed, serious and
8 fundamental objections.

9 We do believe as a threshold matter there is a
11:47:48 10 serious due process issue with respect to the way they have
11 proceeded.

12 What they have brought before you is a request
13 for authority to obtain DIP financing secured by priming
14 liens on what is essentially roughly 36 hours' notice to us
11:48:14 15 of their intention to do so.

16 We don't believe that that satisfies any due
17 process threshold.

18 We believe we should be accorded a real
19 opportunity to take discovery, to present evidence, and we
11:48:32 20 don't believe that any priming liens should be granted until
21 we've had that opportunity.

22 And we can address the emergency issues that
23 they have raised, and at some point in this hearing we will
24 be wishing to address that because there are other
11:49:10 25 alternatives. And we have offered this debtor other

1 alternatives, and those are alternatives that we think are,
2 in fact, viable and represent the only viable path for
3 moving forward.

4 The debtor asks, Your Honor, that you grant a
11:49:38 5 priming lien in this interim order and that in the order you
6 provide that it will remain inviolate, even if we ultimately
7 prevail at the final hearing. And they rely on Section
8 364(e) of the Bankruptcy Code for that proposition.

9 Well, the fact of the matter is, Your Honor,
11:50:12 10 that Section 364(e) does not support that premise.

11 364(e) provides that provisions in a final
12 order will not be impacted on appeal to the extent that the
13 lender has acted in good faith, but it deals with final
14 orders that are taken up on appeal.

11:50:44 15 It does not the address this situation of
16 provisions in an interim order to the extent that subsequent
17 to the entry of the interim order the Court ultimately
18 determines at a final hearing, based on evidence that has
19 been presented, that in this case a priming lien was not
11:51:06 20 justified.

21 So that to the extent that they are seeking
22 authority to obtain a priming lien to the extent of three
23 and a half million dollars, that would prime the position of
24 the pre-petition lenders and would ask you to include in an
11:51:22 25 order that would make that inviolate, even if, after we have

1 had an opportunity for discovery and the presentation of
2 evidence, you determined that we are not adequately
3 protected, they are asking you to include a provision that
4 cannot be modified or changed.

11:52:04 5 That is not appropriate and it is not
6 supported by Section 364(e) of the Bankruptcy Code.

7 Equally as important, Your Honor, and we think
8 the evidence that will be presented today and that
9 ultimately will be presented will demonstrate that they, the
11:52:28 10 debtors, are incapable of providing adequate protection to
11 the pre-petition lenders.

12 The fact of the matter is and what we are
13 going to show, Your Honor, is that these debtors are
14 bleeding cash throughout the entire forecast period. I
11:52:46 15 think that's a paper that has already been filed and was
16 attached to the papers that they filed Sunday evening. And
17 it shows that this debtor is -- is hemorrhaging on a going
18 forward basis through the end of August.

19 And that, Your Honor, is well into their
11:53:04 20 construction season when their business should be picking
21 up, this debtor is forecasting that they will have negative
22 cash flow of \$11.2 million.

23 Now, Your Honor, it is actually much worse
24 than that as their cash flow forecast indicates, because
11:53:28 25 they propose, during that period, to sell an additional

1 \$4.2 million worth of collateral in which the pre-petition
2 lenders have a lien. And they propose to use those proceeds
3 in the operation of the business.

4 Rather than having the proceeds paid down to
11:54:10 5 the pre-petition lenders in satisfaction or in partial
6 payment of their debt, those proceeds will be used in the
7 operation of the business.

8 So, in effect, their negative cash flow from
9 operations is just under \$16 million.

11:54:34 10 Your Honor, they have not shown you this, but
11 I think the evidence will show that their own internal cash
12 flow projections show that they are forecasting substantial
13 negative cash flow through the end of 2010.

14 So the fact of the matter is, and this is what
11:54:52 15 the evidence, Your Honor, is going to show, that the value
16 of our collateral, collateral in which the pre-petition
17 lenders have a perfected priority pre-petition security
18 interest, is eroding every day and it is eroding rapidly.

19 There is no basis, and the evidence will not
11:55:16 20 establish a basis, for providing us adequate protection to
21 compensate for those losses from continuing erosion, plus
22 the imposition of an additional \$18 million of senior
23 post-petition debt that would be put on top of us.

24 The evidence will show there is no sufficient
11:55:44 25 equity cushion in this case.

1 They themselves commissioned updated
2 appraisals just last September and on an orderly liquidation
3 basis. Those clearly demonstrate, and we will present
4 evidence with respect to this -- and again it's their
11:56:04 5 numbers. We are in the process of obtaining our own
6 appraisals with respect to this, but just based on their
7 numbers, there is clearly the lack of any adequate equity
8 cushion.

9 Now, to try to remedy that, they're going to
11:56:22 10 present testimony and an appraisal report that they just
11 obtained two or three days before the filing of the
12 bankruptcy with respect to the property that they've
13 previously characterized to you this morning as the
14 so-called orange grove which is a piece of property they own
11:56:42 15 near Ft. Myers, Florida.

16 I'll reserve any comment with respect to that
17 so-called appraisal until the evidence is presented with
18 respect to that, but, Your Honor, it is fundamentally
19 flawed.

11:57:02 20 In that document, the appraiser refers to what
21 he calls his extraordinary assumptions. He hypothesizes
22 certain events that do not exist presently, and comes up
23 with a wildly, wildly inflated number with respect to that
24 particular property.

11:57:24 25 You know, the evidence is simply not going to

1 be there, especially, Your Honor, in face of these massive
2 cash losses that they are experiencing.

3 This is simply not a situation in which any
4 priming lien, whether it be three and a half million
11:57:44 5 dollars, \$7 million, \$18 million, none of it is supportable
6 by the evidence or the law as applied in this case.

7 And finally, Your Honor, I want to point out,
8 and I think this is really fundamental, if one reviews the
9 financing commitment that the debtor has obtained which
11:58:08 10 is -- they presented that to you, it shows that there is no
11 commitment at all. The document says there's no binding
12 commitment.

13 And in addition to that, within the document
14 itself, there is a provision -- and Mr. Merklin even alluded
11:58:26 15 to it in his remarks -- that the would-be DIP lender EFO has
16 the right, under this commitment, in its sole discretion,
17 for any reason whatsoever, within 21 business days after the
18 last piece of information, due diligence information is
19 provided to it, it can decide not to go forward.

11:58:54 20 So, Your Honor, what we have is a situation
21 where based on what they've presented to you or will be
22 presenting to you, it's quite possible the debtors could
23 draw down the first advance of three and a half million,
24 they could draw the second for a total of seven million --
11:59:10 25 and I would point out, Your Honor, that gets them, under

1 their projection, 30 days.

2 So we could be into this case for 30 days,
3 they've drawn down \$7 million, they've done it in the
4 context of an order that says that this priming lien is
11:59:28 5 inviolate, no matter what you determine further on in the
6 case based on the evidence, and then the DIP lender EFO
7 decides, for whatever reason, that it doesn't wish to
8 proceed further. It will have collected all of its fees, of
9 course, but it decides that it doesn't want to proceed
12:00:08 10 further.

11 At that point the debtor, based on its own
12 projections, will have no cash with which to operate. EFO
13 will have this senior priming lien. And the debtor will be
14 facing liquidation.

12:00:20 15 Now, Your Honor, the fact is the pre-petition
16 lenders are not adequately protected under that type of
17 scenario.

18 And I would submit to you, Your Honor, that a
19 DIP lender who wants to come in and get the protection and
12:00:40 20 be afforded a priming lien that is going to be ahead of
21 contractually agreed-to perfected pre-petition liens against
22 collateral that were relied on by pre-petition lenders when
23 they made loans to this debtor, that if someone's going to
24 come in and want to get a priming lien that would supplant
12:01:06 25 and be ahead of those pre-petition liens, they ought to be

1 prepared to commit to provide financing throughout the
2 entire period that is contemplated.

3 The fact that this DIP lender gets to walk
4 away and leave everybody else to face the consequences of
12:01:26 5 what transpires at that point should not be countenanced by
6 this Court.

7 And then finally, Your Honor, again I'll get
8 into more of this later, but I want to emphasize, this is
9 not a situation in which the debtor lacks other
12:01:42 10 alternatives.

11 We have offered DIP financing, we have been in
12 negotiations with this debtor for the last -- and my
13 colleagues here can correct me -- at least a month, with
14 respect to discussions regarding our willingness to provide
12:02:02 15 DIP financing, in conjunction with what we tried to reach
16 agreement on which would be a marketing and sale process for
17 these businesses.

18 And I'd point out that in the motion that they
19 filed, they talk about their desire to engage in a marketing
12:31:38 20 and sale process.

21 We think that is the only way to go. That's
22 the only viable way forward. And, in fact, Your Honor, and
23 evidence, if not presented today, certainly will be
24 presented during the course of this case and I think needs
12:32:00 25 to be presented very quickly in the face of these massive

1 cash losses that this debtor has experienced, we think an
2 expedited sale process over a 60 or 90-day period is
3 absolutely essential in order to realize the maximum value
4 of these assets, again based on their own projections which
12:32:22 5 show these massive operating losses.

6 This is not a sustainable business, and the
7 best evidence of that is what they have already presented to
8 you.

9 So we have suggested to them we will provide
12:32:38 10 the DIP financing in conjunction with an orderly and
11 sensible sale process, again that in our view needs to be
12 done on an expedited basis because of the hemorrhaging that
13 this debtor is experiencing.

14 So as I said, Mr. Merklin and I don't agree on
12:33:00 15 much, but the one thing we do agree on is we have very, very
16 strong and strenuous objections to what is being proposed
17 today.

18 THE COURT: One thing I didn't hear you
19 mention, and Mr. Merklin didn't give any detail on it
12:33:14 20 either, was he said he thought that there was a disagreement
21 between the two sides as to the standard for valuation.

22 MR. LEPENE: Well, Your Honor, and I don't
23 know what Mr. Merklin was referring to in that regard.

24 We think clearly the appropriate standard here
12:33:32 25 for adequate protection purposes will be orderly liquidation

1 value, and I'm talking about a process, a liquidation in
2 terms of over an expedited period of time, reasonable but
3 expedited, that these units would be -- business units would
4 be offered for sale.

12:33:58 5 This debtor has had on board an investment
6 banker for the last year. They have been in discussions
7 with various prospective purchasers during that period of
8 time. There are letters of intent that have been presented
9 in that regard.

12:34:18 10 We think that -- and that, again, to me is
11 when I refer to an orderly liquidation process, that's the
12 type of process, that's the basis for valuing these assets
13 and the basis for determining whether we are adequately
14 protected.

12:34:36 15 And the reason, Your Honor, that that is the
16 appropriate standard in this particular case is because of
17 the massive cash losses that this debtor is experiencing now
18 and is projecting to experience on a going forward basis.

12:34:58 19 Your Honor, we simply don't have the luxury of
20 time to engage in a long, protracted process.

21 That's what we have suggested to the debtor,
22 and again we are prepared to provide the financing. It
23 ought to be done in conjunction with a sensible sale
24 process.

12:35:14 25 The investment banker is in place. The

1 interested parties have expressed their interest. Letters
2 of intent have been received.

3 Why we are standing here today arguing over an
4 a priming lien instead of being in front of you with respect
12:35:32 5 to an agreed DIP financing order and an agreed sale process
6 is, frankly, beyond me, Your Honor, because I think the
7 facts clearly are such that that is the only viable path
8 available to any of us.

9 THE COURT: Thanks.

12:35:50 10 MR. LEPENE: Thank you.

11 THE COURT: Mr. Merklin, is that what you were
12 referring to when you were talking about the standard of
13 valuation, that you don't believe it's an order of
14 liquidation?

12:36:00 15 MR. MERKLIN: Yes. We have cited cases in our
16 papers, Your Honor. We think that the evidence will support
17 the fact that in this instance the issue for whether or not
18 there is adequate protection is not based on orderly
19 liquidation value but it's based on fair market value.

12:36:20 20 And we would be prepared in the testimony to
21 describe these businesses which we believe the circumstances
22 will indicate that that's the appropriate value, and as
23 supported by the case law we've cited in our papers.

24 THE COURT: Okay.

12:36:38 25 MR. MERKLIN: I would like to address in

1 response to several of the points Mr. Lepene raised, if I
2 might.

3 Your Honor, with respect to the issue of due
4 process, the fact is that the Bankruptcy Code balances the
12:37:08 5 interests in setting up a procedure that permits for
6 emergency interim funding on a DIP basis and then the final
7 hearing.

8 THE COURT: Could you give me just one minute?
9 I have -- I have a copy of the Code here.

10 MR. MERKLIN: Certainly.

11 THE COURT: But I have another copy that I've
12 looked at more extensively this morning, and I just want to
13 get it.

14 Everybody just stay where you are, just keep
12:37:48 15 the recorder running. It won't take long. Everybody sit
16 down.

17 (Pause).

18 THE CLERK: Could you open the door for him?

19 THE COURT: Better to do it right than to do
12:38:22 20 it.

21 Go ahead.

22 MR. MERKLIN: Thank you, Your Honor.

23 The fact is, Your Honor, the request we're
24 seeking is bifurcated into the emergency portion of that
12:38:32 25 request which is three and a half million dollars, and then

1 the remainder of the request which can be certainly
2 addressed at a hearing which would give the lenders time to
3 fully investigate the other factual issues that Mr. Lepene
4 has mentioned, would allow them to conduct whatever
12:39:14 5 appraisals they want to have conducted, and would allow them
6 to have the full opportunity for a hearing on the rest of
7 the relief.

8 With respect to his argument that, in fact,
9 you cannot obtain 364(e) relief under an interim order,
12:39:32 10 their papers cite not a single case for that proposition.

11 In fact, 364(e), the word "Final" to my
12 reading doesn't appear anywhere in that -- in that section.
13 It merely indicates that the reversal or modification on
14 appeal of an authorization under Section 364 to obtain such
12:39:52 15 credit does not cause the DIP lender to lose its
16 protections.

17 If that weren't the case, Your Honor, two
18 results would occur.

19 One, there would be no DIP lender ever willing
12:40:04 20 to advance funds knowing that their status could be subject
21 to a lengthy appeal process with no protections in place for
22 money they've advanced.

23 And, second, Your Honor, it would give lenders
24 in these cases, all pre-petition lenders, essentially veto
12:40:18 25 power over any financing simply by virtue of filing of an

1 appeal.

2 So neither it makes logical -- there's neither
3 the logical conclusion that 364(e) relief is not available,
4 and it's also not practical in terms of how the Bankruptcy
12:40:36 5 Code operates.

6 Again, Mr. Lepene has suggested that we are
7 essentially seeking now to prime them to the full extent of
8 \$18 million. As I've indicated and as set forth in the
9 papers, that simply isn't true. This request is for three
12:40:50 10 and a half million dollars, and I request for the Court to
11 then set a final hearing at which these issues would be
12 fully heard with additional evidence.

13 Second, Your Honor, Mr. Lepene suggests that
14 we did not explore other alternatives. We will put on
12:41:04 15 testimony if necessary this morning, Your Honor, as to our
16 efforts to obtain other financing.

17 Suffice it to say that Mr. Lepene himself
18 indicated the very basis on which the alternative that
19 they've offered to the debtor is no alternative at all.

12:41:20 20 The DIP financing offered by the existing
21 lenders has a large string attached to it and that is that
22 the debtor must agree to an immediate liquidation, a process
23 of 30 to 60 days to sell its assets essentially at a fire
24 sale in order to pay off the pre-petition lenders to the
12:41:36 25 detriment of all the other constituencies, including the

1 employees, the creditors and the shareholders.

2 That is not a real alternative, Your Honor.

3 And the fact is the lenders have not offered anything more,
4 and we will present evidence that their only offer is again
12:41:56 5 subject to the condition that we turn to an immediate and
6 what Mr. Lepene called an expedited sale process.

7 Your Honor, another argument raised by
8 Mr. Lepene is that we are seeking to use four, in excess of
9 \$4 million from the sale of excess assets in cash flow. I
12:42:44 10 can indicate to the Court as set forth in our papers that is
11 certainly not proposed in this emergency interim period, and
12 again that can be addressed at a full hearing where the
13 Court can hear all testimony and all evidence from both
14 sides with respect to the existence or nonexistence, as
12:43:30 15 Mr. Lepene claims, of an equity cushion.

16 Your Honor, in their papers, they attach the
17 appraisal information with respect to the debtors' real
18 estate, but they don't attach the fair market appraisal.
19 They attach the -- only the orderly liquidation appraisal.

12:43:52 20 What we intend to do today is to show Your
21 Honor when you look at the fair market value of these
22 properties, when you look at the other assets of the debtor
23 including its accounts receivable, its inventory, its
24 machinery and equipment, its real estate, its port lease,
12:44:30 25 and a considerable asset in the form of the Corkscrew Road

1 property which has value both as an orange grove and a
2 quarry, we believe that we will establish a significant
3 equity cushion. But, in fact, again it doesn't need to be
4 to the extent of \$18 million today. It needs only today to
12:45:00 5 be to the extent of the three and a half million dollars
6 that we are seeking to finance on an emergency basis.

7 It is true that this debtor lost considerable
8 money. Frankly, I've been doing this for a long time, Your
9 Honor, and it's rare that the profitable company ends up
12:45:20 10 before this Court.

11 The issue is not what its past losses were.
12 The issue is not what cash it might have in the next 60 days
13 as it builds up inventory and addresses the fundamental
14 changes that Mr. Gaddar and Parkland Group have been working
12:46:00 15 on.

16 The issue is what are its prospects for
17 reorganization. And if necessary today, we would put on
18 testimony as to the viability of these businesses and the
19 fact that they should be permitted the opportunity to
12:46:14 20 reorganize or sell in a process that would not be an
21 expedited one occurring over the next 60 days.

22 Thank you, Your Honor.

23 THE COURT: Okay. Well, you're going to have
24 to do something to get value, I suppose, so do you want to
12:46:36 25 start there?

1 MR. MERKLIN: That's correct. That's correct,
2 Your Honor.

3 We would propose several things to expedite
4 things a bit.

12:46:52 5 THE COURT: Okay.

6 MR. MERKLIN: We have an exhibit we've
7 prepared as a summary of many voluminous exhibits that are
8 the appraisals that Mr. Lepene summarized in his papers.

9 THE COURT: Okay.

12:47:18 10 MR. MERKLIN: All right. And if the Court
11 would give me a moment.

12 THE COURT: Sure.

13 MR. MERKLIN: I would like to put the summary
14 before us.

12:47:24 15 THE COURT: Okay.

16 (Pause).

17 MR. MERKLIN: Your Honor, with your
18 permission, I would hand up the exhibits to the Court.

19 THE COURT: Sure.

13:13:56 20 MR. MERKLIN: Your Honor, for -- just for
21 purposes of illustration, and we will introduce some
22 testimony as to the elements of this later, this is an
23 exhibit that summarizes the real property owned by the
24 debtors by specific debtor, by its use, by its address,
13:14:12 25 acreage, square footage per building, and then the

1 appraisals that Mr. Lepene referenced and were cited in the
2 exhibit to his objection, both the fair market value and
3 liquidated appraisal -- orderly liquidation value reflected
4 in those appraisals as well as some testimony we will have,
13:14:30 5 if necessary, on how the tax authorities value those same
6 properties.

7 With Your Honor's permission, I guess I would
8 ask -- give Mr. Lepene a few moments to look at that to
9 determine whether he wants us to introduce each of these
13:14:48 10 separate appraisals as a separate exhibit, or whether we
11 could use this as a summary.

12 MR. LEPENE: Your Honor, I'm going to be
13 somewhat at a disadvantage. I'm seeing this for the first
14 time. Obviously we've got a lot of numbers on here.

13:15:06 15 THE COURT: Sure.

16 MR. LEPENE: I don't object to its being
17 offered as a summary, but I'm not in a position to be able
18 to determine or confirm that this equates with the actual
19 underlying appraisals.

13:15:22 20 And I'm certainly not looking to -- to extend
21 this unnecessarily.

22 All I would perhaps suggest is we defer
23 consideration of whether this may be admitted until such
24 time as we've had a chance to study this and confirm that it
13:15:50 25 ties back to the underlying appraisals.

1 MR. MERKLIN: We do have the appraisals here,
2 Your Honor. Would it make sense to take a few moments and
3 allow Mr. Lepene to look at them?

4 THE COURT: Yeah, why don't we do that?

13:16:06

5 MR. MERKLIN: It might save us considerable
6 time.

7 THE COURT: Yeah, why don't we do that?

8 We'll take a break, and let us know.

9 MR. LEPENE: Okay.

13:16:22

10 MR. MERKLIN: Okay.

11 (Recess taken).

12 THE CLERK: Please take your seats.

13 All rise. Be seated.

13:17:08

14 MR. MERKLIN: Your Honor, thank you for
15 the -- your patience and giving us that recess.

16 I -- I think for purposes of today's hearing,
17 Mr. Lepene and I are going to be able to agree that this is
18 an accurate summary with respect to the debtors' owned
19 property and the results of an appraisal that was done, I
20 believe, in August or September of -- September of 2009.

13:17:26

21 THE COURT: Okay.

22 MR. MERKLIN: Which will save us considerable
23 time in having to separately introduce each appraisal.

24 THE COURT: Okay.

13:17:36

25 MR. MERKLIN: Does that --

1 MR. LEPENE: Yes. Just for the record, Your
2 Honor, it is an accurate summary of what --

3 THE COURT: It is what it is.

4 MR. LEPENE: Yes. It is what it is.

13:17:54 5 THE COURT: Yeah. Okay.

6 MR. MERKLIN: Your Honor, with that, what I
7 would like to do is call a series of witnesses very briefly
8 to discuss some of the value issues and give some background
9 that would --

13:18:10 10 THE COURT: Okay.

11 MR. MERKLIN: -- add the context that we
12 believe is necessary in this case for the Court to determine
13 the valuation issues.

14 THE COURT: Sure.

13:18:16 15 MR. MERKLIN: Your Honor, first I would call
16 David Moreland to the stand as executive vice president of
17 the debtor.

18 DAVID MORELAND,
19 of lawful age, a witness called by the Debtors,
20 being first duly sworn, was examined
21 and testified as follows:

22 THE CLERK: Please be seated in the witness
23 stand.

24 MR. MERKLIN: Your Honor, I'm -- I'm not sure
13:18:54 25 if we had marked this summary as an exhibit, but I would

1 ask, I guess, to mark it as Debtors' Exhibit --

2 THE COURT: Okay.

3 MR. MERKLIN: -- 1.

4 THE COURT: Great.

13:19:28

5 DIRECT EXAMINATION OF DAVID MORELAND

6 BY MR. MERKLIN:

7 Q. Mr. Moreland, can you state your full name and spell
8 your last name for the record?

9 A. Yes. David L. Moreland, M-O-R-E-L-A-N-D.

13:19:56

10 Q. And are you employed, sir?

11 A. Yes, I am.

12 Q. And where are you employed?

13 A. Schwab Industries.

14 Q. And what's your position with the company?

13:20:02

15 A. Executive vice president.

16 Q. And how long have you been with Schwab Industries?

17 A. Since 1973.

18 Q. And can you tell me generally now what your duties are
19 as executive vice president?

13:20:18

20 A. I interact with our Board of Directors, our owners,
21 our management team both in Ohio and Florida, involved with
22 acquisitions of both real estate and equipment, oversee
23 hospitalization and our pension program.

24 Q. And are you -- you are, as executive vice president of
13:20:44 25 the debtor, Schwab Industries, you're also in that position

1 as well with the other affiliated companies?

2 A. Yes, I am.

3 Q. And as a consequence of your position with the
4 debtors, are you familiar with the debtors' businesses?

13:20:54 5 A. Yes.

6 Q. Can you describe generally for the Court what those
7 businesses consist of?

8 A. The businesses consist of Schwab Industries as the
9 parent corporation, and the subsidiaries are Twin Cities
13:21:06 10 Concrete, Quality Block & Supply, Schwab Ready-Mix, and
11 Eastern Cement.

12 Q. And what -- what is the general -- the general nature
13 of the debtors' business with respect to the Ready-Mix
14 plants?

13:21:22 15 What do those plants do?

16 A. Those plants produce Ready-Mix concrete for various
17 projects, commercial, residential, highway paving, street
18 paving, that type of work, and we also have a -- a division
19 that manufactures concrete block for both the residential
13:21:42 20 and commercial applications.

21 Q. And can you give the Court a very brief summary of the
22 process for the production of the concrete by the Ready-Mix
23 plants?

24 A. Yes. It is a process through which we incorporate
13:21:56 25 cement, coarse aggregate which would be a limestone product

1 is what we use, a fine aggregate which would be sand,
2 additives to increase the performance like a liquid
3 additive, Euclid Chemical for example, and some other
4 elements, fly ash and slag to -- to make a Ready-Mix
13:22:28 5 concrete.

6 There's probably approximately 3,000 different
7 mix designs that we utilize to produce this concrete on a
8 day-to-day basis.

9 Q. Is each mix design related to a separate application
13:22:42 10 or use of that ultimate product?

11 A. Yes. It -- you know, various contractors, various
12 State requirements will require certain mixes.

13 A large commercial floor would be different
14 than that of a basement in your home.

13:22:58 15 Q. And about how many Ready-Mix operations or plants do
16 the debtors operate?

17 A. We operate -- operate approximately 25 Ready-Mix
18 operations, three block operations.

19 Q. Can you describe for the Court generally the nature of
13:23:20 20 the kinds of equipment that are involved with respect to the
21 Ready-Mix operations?

22 A. Yes. We utilize various pieces of equipment.

23 For example, to deliver that product we have
24 Ready-Mix trucks. That's a specifically designed unit that
13:23:38 25 will mix that concrete in transit to -- to the job site.

1 You'll need dump trucks to haul aggregates and
2 so forth to -- into the plants.

3 You're going to need a Ready-Mix plant in
4 order to produce the product.

13:23:54 5 You'll need cement storage facilities, silos,
6 to store cement and fly ash, slag. You'll need bins to hold
7 your aggregate and so forth.

8 You'll need what we call bulkers to be able to
9 transport cement. You'll need heavy pieces of equipment to
13:24:16 10 load or charge your bins. Those are large loaders that
11 you'll -- that you'll see.

12 Q. And -- and each of those types of equipment at a
13 Ready-Mix plant you've described are present in the debtors'
14 roughly 25 Ready-Mix plant operations?

13:24:34 15 A. That is correct.

16 Q. And can you describe the equipment that is located to
17 those operations? Is it -- generally the condition of it.
18 Is it very old equipment, is it newer, is it --

19 A. No, our --

13:25:02 20 Q. -- state-of-the-art, non-state-of-the-art?

21 A. We feel we've got state-of-the-art equipment.

22 For example, our Berea block plant,
23 approximately ten years old, when that was fabricated and
24 put together, Besser where the equipment was purchased
13:25:28 25 brought personnel and future clients from all over the world

1 to that site because it was state-of-the-art technology.

2 MR. MERKLIN: Your Honor, it is not on the
3 summary, but I've discussed with Mr. Lepene that there was
4 an appraisal performed of the equipment owned by the debtor.

13:25:58 5 THE COURT: Okay.

6 MR. MERKLIN: And that that equipment showed
7 an orderly liquidation value of, I believe, \$15.6 million.

8 I'd just ask Mr. Lepene to confirm that.

9 MR. LEPENE: And I'll ask Mr. Togue that.

13:27:28 10 A MALE SPEAKER: Well, \$14.2 million.

11 MR. MERKLIN: Your Honor, the appraisal
12 included equipment that apparently has been sold since then,
13 so we believe that -- the debtors believe that that number's
14 15.6.

13:28:34 15 The secured lenders, I believe, say
16 \$14 million. We're willing to use the \$14 million number
17 for today's purposes.

18 THE COURT: Okay.

19 MR. MERKLIN: Obviously reserving the right to
13:28:44 20 at a final hearing introduce other testimony regarding the
21 value of equipment.

22 THE COURT: All right.

23 BY MR. MERKLIN:

24 Q. Mr. Moreland, I'm going to hand you what's been marked
13:28:54 25 for identification purposes today as Debtors' Exhibit 1.

1 A. Okay. Thank you.

2 Q. And I'm going to ask you, first, to confirm that this
3 is a summary of real estate that is owned by one or more of
4 the debtors?

13:29:10 5 A. Yes, it is.

6 Q. And there is a column that indicates "Use."

7 Is that a column that accurately indicates the
8 current use to which the debtors have that real property?

9 A. Yes.

13:29:30 10 Q. And the address that's listed is a correct address for
11 the location of that property?

12 A. Yes, it is.

13 Q. And to your knowledge, both the acreage and the
14 building square footage numbers listed are correct?

13:29:46 15 A. Yes.

16 Q. Do you see a tax market value figure at the far right
17 side of this?

18 A. Yes, I do.

19 Q. Did you gather up the tax bills from the various
13:29:56 20 parcels owned by the debtor and provide those --

21 A. Yes, I did.

22 Q. -- to us?

23 A. Yes.

24 Q. And is that a summary of those tax values?

13:30:00 25 A. Yes.

1 Q. There's been some discussion of what was referred to
2 as the port.

3 Does that appear on this list? I don't
4 believe it does, but can you confirm that?

13:30:24 5 A. No, it does not.

6 Q. Describe for the Court again what the port is.

7 A. The port is a facility, it's the oldest importing
8 cement company in the United States, and it affords us to be
9 able to import cement from all over the world from various
10 markets.

11 The other advantage is it is one of the 20th
12 largest ports in the entire world. And it gives us the
13 ability to bring in large ships into that deep water port
14 and store approximately 4 -- 44,000 tons of cement at a
15 time.

16 Q. How many comparable port facilities are there on
17 the -- on the west coast of Florida?

18 A. One other.

19 Q. And where is that located?

13:31:10 20 A. North up in Tampa.

21 Q. And the port property, is that owned by the debtors or
22 leased?

23 A. That is leased.

24 Q. And how long does that lease have to run,
13:31:20 25 approximately?

1 A. David Schwab was able to negotiate a 50 year lease,
2 and I believe there's 46 years left on it.

3 Q. Is that an exclusive lease?

4 A. Absolutely. It's exclusive for the importation of
13:31:34 5 cement into that terminal and aggregate.

6 Q. And at this point, without asking you to give a value,
7 do you believe it has some value?

8 A. I -- I believe it has a tremendous value. I think to
9 replace that port facility would be between 35 and
13:31:50 10 40 million dollars to replicate that facility.

11 The other advantage it has is its proximity to
12 the water, and the further away you get from water, makes it
13 more difficult to pneumatically pump that cement or any
14 other type of a product off.

13:32:14 15 So due to the fact that it's close, it adds to
16 that value.

17 Q. And how -- how is it that the cement reaches the shore
18 from the -- from the ships that deliver it?

19 A. We have -- we have the ability to offload cement in
13:32:46 20 two different capacities, either through a large clam into a
21 hold and introduce that into hoppers and pneumatically pump
22 that up, you know, through equipment, or some of the more
23 modern ships today are pneumatically equipped directly and
24 it goes through a large pipe and it will pump into that,
13:33:34 25 into the various -- there's four silos there.

1 Q. Are you familiar with another property that's been
2 referred to either as the Corkscrew quarry or the grove?

3 A. Yes, I am.

4 Q. Can you describe for the Court what that property is?

13:33:46 5 A. Tremendously valuable piece of property. It's
6 approximately 2100 acres. Right now as -- we refer to it as
7 the Corkscrew quarry, and right now it's being utilized as
8 an orange grove.

9 It's, you know, it's a terrific piece of
13:34:18 10 property, but the real value and the real importance of it
11 is it lets us become vertically integrated by being able to
12 not only have our own limestone, it lets us tie up with our
13 cement importing business, but I believe there's probably
14 between 50 to 70 years' worth of reserves underneath that.

13:34:44 15 And that's what makes that property extremely
16 valuable.

17 Q. And that's reserves of what?

18 A. Limestone.

19 Q. Limestone?

13:34:50 20 A. Limestone. It's got, through testing and work,
21 it -- it's got proven reserves and proven strength of that
22 aggregate, some of the hardest in that area, and it's the
23 last known quarry in that area.

24 Q. Now, you indicated it's presently an orange grove?

13:35:08 25 A. Yes.

1 Q. And I think there was reference earlier by I believe
2 Mr. Oscar that -- or Mr. DeMarco that there's a management
3 company that manages that piece of the business?

4 A. Yes.

13:35:20 5 Q. Do you know if that business generally is profitable?

6 A. Yes. I believe it's profitable, and David actually
7 will be able to expand a little bit further on that, but
8 very good management in place, very knowledgeable, and a
9 very highly productive operation.

13:36:16 10 MR. MERKLIN: Your Honor, if I can have just a
11 moment.

12 THE COURT: Sure.

13 MR. MERKLIN: No other questions from the
14 debtor at this time, Your Honor.

13:36:38 15 THE COURT: All right.

16 MR. LEPENE: Just a couple, Your Honor.

17 CROSS-EXAMINATION OF DAVID MORELAND

18 BY MR. LEPENE:

19 Q. Hi, Mr. Moreland.

13:36:52 20 A. Good morning.

21 Q. Mr. Merklin asked you some questions regarding the
22 port.

23 A. Yes.

24 Q. What is the status of operations at the port
13:37:10 25 presently?

1 A. I'm not involved in the day-to-day operations of the
2 port, sir.

3 Q. Okay. And notwithstanding the fact that you're not
4 involved daily, you are aware that it is essentially shut
13:37:24 5 down, is that correct?

6 A. Yes.

7 Q. All right. With respect to the orange grove, and
8 Mr. Merklin asked you some questions about that --

9 A. Um-hmm.

13:37:36 10 Q. -- and you mentioned the reserves that exist on that
11 property.

12 A. Yes.

13 Q. Am I correct that one needs to have a permit in order
14 to mine those reserves, is that correct?

13:37:50 15 A. That's a fair assumption, yes.

16 Q. It's more than an assumption; it's a fact, isn't it?

17 A. Yes.

18 Q. It's a fact?

19 A. Yes.

13:38:16 20 Q. Okay. And the company applied for a permit, did it
21 not?

22 A. Yes.

23 Q. And that application was denied?

24 A. Yes.

13:38:28 25 Q. And that's where the matter stands now; the company

1 has initiated some litigation, but as of right now --

2 A. Yes, there is litigation to address the permitting
3 issues.

4 Q. But there is no permit?

13:38:44 5 A. No, there is -- presently today there is no permit.

6 Q. Okay. And am I correct that people have indicated,
7 those who are familiar with this, that it could take up to
8 five years to -- for that issue --

9 A. That's not my -- that's not my understanding, sir.

13:39:12 10 Q. You don't have any understanding in that regard?

11 A. I don't have an understanding that it's a five-year
12 process, no.

13 Q. Okay.

14 MR. LEPENE: That's all the questions I have,
15 Your Honor.

16 THE COURT: Okay. Anything else?

17 MR. MERKLIN: No redirect, Your Honor.

18 THE COURT: You can return to your seat.

19 Thanks.

13:39:36 20 MR. MERKLIN: Your Honor, next we would call
21 David Exley.

22

23

24

25

1 DAVID EXLEY,
2 of lawful age, a witness called by the Debtors,
3 being first duly sworn, was examined
4 and testified as follows:

13:40:50 5 THE CLERK: Please be seated in the witness
6 stand.

7 DIRECT EXAMINATION OF DAVID EXLEY

8 BY MR. MERKLIN:

9 Q. Good morning, Mr. Exley. Can you please state your
13:41:00 10 name, full name, and spell your name for the record?

11 A. Yes, it's David R. Exley, and the last name is spelled
12 E-X-L-E-Y.

13 Q. And where are you currently employed?

14 A. Schwab Industries.

13:41:10 15 Q. And what's your position?

16 A. Vice president, administration.

17 Q. And how long have you held that position?

18 A. Sixteen years.

19 Q. And how long have you been employed at Schwab
13:41:20 20 Industries?

21 A. Sixteen years.

22 Q. And do you hold that similar position with the
23 affiliated companies as well?

24 A. Yes.

13:41:28 25 Q. And what are your duties as vice president of

1 administration?

2 A. A multitude of things.

3 I oversee the accounts receivable process as
4 far as the collection process. I also see, oversee the
13:41:40 5 payables process, any, any monies going out, out of the
6 company, and work in conjunction with our -- our Chief
7 Financial Officer and our controller to oversee the
8 financial function, financial reporting.

9 Work with any year end auditing with our
13:41:56 10 auditors Bruner Cox, and assist any outside consultants or
11 any other issues such as that.

12 Q. So is it fair to say that you have some familiarity
13 with the debtors' books and records?

14 A. Yes, sir.

13:42:10 15 Q. And is it also fair to say that you function
16 equivalent to what perhaps a chief financial officer would
17 function?

18 A. Sure. Yes.

19 Q. All right. And you're familiar with the debtors'
13:42:24 20 accounts receivable?

21 A. Yes.

22 Q. Can you describe for the Court generally who generally
23 the customers are of the debtor?

24 A. Yes.

13:42:30 25 Q. In terms of the nature of what kind of customers.

1 A. Mainly our customers, we've got a few, I guess we
2 break them into three tiers.

3 There are residential customers who will
4 perform work who will use our Ready-Mix concrete, for
13:42:46 5 instance for driveways, homes, and that nature.

6 We have commercial contractors that would be
7 used to build a building such as this.

8 And then we have highway Department of
9 Transportation contractors who perform work on bridges,
13:43:02 10 highways.

11 Q. And is it fair to say that in your capacity and job,
12 you are familiar with the collection of those accounts
13 receivable?

14 A. Yes.

13:43:12 15 Q. And you're familiar with the aging of those?

16 A. Yes.

17 Q. Is there -- is there anything generally you would
18 describe about the general terms and conditions of payment
19 and the aging of receivables in this kind of business?

13:43:24 20 A. In the construction business, it's -- the accounts
21 receivables tend to age considerably as far as past sixty,
22 ninety days, even into the 120 day range, and especially
23 during -- in Ohio during this time of the year, during the
24 winter months, it's not uncommon to see accounts age in that
13:43:48 25 manner more so than the summer.

1 Q. You're familiar with the fact that the company had in
2 place certain loan facilities with KeyBank as agent?

3 A. Yes.

4 Q. And one of those facilities included a revolving loan?

13:44:02 5 A. Yes.

6 Q. Was that subject to a borrowing base calculation?

7 A. Yes.

8 Q. And are you familiar with what a borrowing base
9 calculation is?

13:44:08 10 A. Yes.

11 Q. Is a borrowing base calculation the same as
12 collectibility?

13 A. No.

14 Q. What is the distinction, from your understanding?

13:44:16 15 A. Well, in the borrowing base, the lenders are able to
16 give you credit, for instance, on accounts receivable, 80%
17 of your accounts receivable, on any accounts receivable
18 under ninety days.

19 Anything, any invoices that have aged in
13:44:32 20 excess of ninety days are not eligible to borrow against.

21 Q. So they're ineligible to borrow against, but are
22 they -- can they still be collectible?

23 A. Certainly, yes.

24 Q. Now, in the initial papers in this case it was
13:44:50 25 reported that the revolver, as of December 31st, 2009, with

1 the current existing lenders in KeyBank was about
2 \$8.5 million, is that correct?

3 A. Yes.

4 Q. As of the petition date was that number the same?

13:45:40 5 A. No.

6 Q. What was the number that was due on the revolver as of
7 the petition date?

8 A. According to my recollection, it was \$5.9 million.

9 Q. And are you familiar with what the debtors'
13:45:52 10 receivables were at the time of the filing of the petition?

11 A. Yes.

12 Q. What was the face amount of those receivables?

13 A. Open receivables, \$8.2 million.

14 Q. And of the open receivables, was there an allowance
13:46:02 15 for those that may be doubtful of collection?

16 A. Yes.

17 Q. What was that allowance?

18 A. 1.9 million.

19 Q. So is there -- would that imply that there's another
13:47:56 20 6.3 million that was not subject to that allowance?

21 A. Correct. Yes.

22 Q. And you believe that that is a fair value or
23 reasonable -- reasonable prospects of collecting those
24 receivables?

13:48:14 25 A. Yes.

1 Q. Are you familiar generally with the company's
2 inventory?

3 A. Yes.

4 Q. And what does that inventory generally consist of?

13:48:22 5 A. Our raw materials to make Ready-Mix concrete which are
6 primarily made up of cement, coarse aggregate which is a
7 limestone, sand, bulk add mixtures, chemicals.

8 That's -- that's primarily what our inventory
9 is, and we do have some finished goods, some concrete block
13:48:44 10 finished goods inventory.

11 Q. And do you know what the inventory value is as of the
12 petition date?

13 A. According to my recollection, it's 2.8 million.

14 Q. Are you familiar with a property that's been referred
13:49:08 15 to as the Corkscrew quarry?

16 A. Yes.

17 Q. And I think the testimony earlier was that that's
18 currently being operated as an orange grove?

19 A. Correct.

13:49:16 20 Q. Putting aside the mineral rights for a moment and just
21 looking at it as in the current use as an operating entity
22 growing oranges, is it making or losing money?

23 A. I believe it's making money, although I do not have an
24 actual number I could recite at this time.

13:49:42 25 Q. But to your knowledge, it is operating and generating

1 positive cash flow?

2 A. Yes, sir.

3 MR. MERKLIN: No -- no other questions at this
4 time, Your Honor.

13:51:04 5 MR. LEPENE: Just a couple, Your Honor.

6 CROSS-EXAMINATION OF DAVID EXLEY

7 BY MR. LEPENE:

8 Q. Hello, Mr. Exley.

9 A. Good morning.

13:51:44 10 Q. Can you tell me what factors in your industry affect
11 collectibility of receivables?

12 A. What factors --

13 Q. Affect collectibility, the ability to collect
14 receivables?

13:52:10 15 A. A lot of it depends on the -- well, of course, the
16 customer themselves, depending on their, their history and
17 the type of work that they do.

18 And in conjunction with that, the work that
19 they're doing, for instance, residential and commercial
13:52:30 20 work, O.D.O.T. work which is highway work, just to give you
21 an example, if we have a contractor that's doing work for
22 the State of Ohio, that work is bonded so that money is more
23 secure and we look at that as easier to collect and it's
24 usually not a problem.

13:52:48 25 Commercial jobs are -- we look at commercial

1 jobs in the same manner.

2 Residential jobs can be tricky, just depending
3 on where the funding's coming from.

4 So it starts at the source, it's the funding
13:53:04 5 source, and then of course depends on the contractor that
6 we're dealing with.

7 Q. Okay.

8 A. And to tie in the time of year.

9 Q. What percentage of your business is residential?

13:53:20 10 A. At this time I would say our -- probably 40% to -- 30
11 to 40% would be residential.

12 Q. Okay. And that's the sector, so 30 to 40% of your
13 business is affected by some of these problems that you
14 alluded to with respect to contractors or businesses that
13:53:56 15 are in the residential sector?

16 A. Yes.

17 Q. And that could affect the collectibility of
18 receivables going forward, couldn't it?

19 A. Yes.

13:54:04 20 Q. And it has in the past, hasn't it?

21 A. Yes.

22 Q. Okay. And do you know of the open accounts
23 receivable, what percentage of that is attributable to the
24 residential sector?

13:54:52 25 Would it be about 30 to 40%, would that be

1 your --

2 A. Oh, I would say --

3 Q. -- best estimate?

4 A. -- it would be less than that only because I feel that
13:55:08 5 the commercial work or the O.D.O.T. work would have a -- a
6 higher price attached to the concrete pricing.

7 Q. All right.

8 A. So maybe, maybe 25 to 30%.

9 Q. Speculation?

13:55:24 10 A. That's just a guess at this time, yes.

11 Q. And with respect to all of your customers, obviously
12 involved in the construction industry --

13 A. Um-hmm.

14 Q. -- and that industry is pretty depressed right now, is
13:55:36 15 that a fair statement?

16 A. Based on what I see on the news and based on business,
17 yes.

18 Q. Okay. And that affects the collectibility of
19 receivables going forward, too?

13:55:50 20 A. Certainly, yes.

21 Q. And you would expect that to affect the future
22 collection of receivables, wouldn't you?

23 A. Sure. Yes.

24 Q. Okay. What about the impact of filing bankruptcy? Do
13:56:06 25 you believe that could affect the impact of collecting

1 receivables going forward?

2 A. It's possible.

3 Q. Yeah.

4 A. If I may expand, we've -- early indications, we've had
13:56:18 5 some talks with customers just over the past day, and we've
6 received some positive feedback as far as encouraging words.
7 Everybody understands pretty much what we're trying to
8 accomplish.

9 Q. Of course, encouraging words aren't the same as
13:56:30 10 sending money, is it?

11 A. Of course not, no.

12 Q. Okay. With respect to your operations on a going
13 forward basis and looking at the cash flow forecast that was
14 filed with the papers on Sunday evening, am I correct that
13:56:52 15 you anticipate a collection rate on future accounts
16 receivable of 98%?

17 A. I do not have that in front of me, to be honest with
18 you. I did not look at that, no.

19 Q. You did not provide any input with respect to that?

13:57:16 20 A. Yes, but I -- I don't recall that at this time.

21 Q. Well, let me show you.

22 MR. LEPENE: Might I approach the witness?

23 Q. Let me just show you, this is -- I'm sure this will be
24 marked as an exhibit, Mr. Exley.

13:57:46 25 THE COURT: You pretty much have to give it to

1 him and then go back because we don't pick you up.

2 MR. LEPENE: Yes.

3 BY MR. LEPENE:

4 Q. Do you see the line item with respect to accounts
13:58:00 5 receivable and collections? And again post-petition.

6 A. Yes.

7 Q. Okay.

8 A. Top two lines?

9 You don't have one with you?

10 MR. LEPENE: May I approach again just to
11 point out the line, Your Honor?

12 THE COURT: Sure.

13 THE WITNESS: Sorry. I --

14 MR. LEPENE: No, no problem.

15 THE WITNESS: You mean these two lines?
13:58:28

16 MR. LEPENE: I should direct you to the right
17 page.

18 THE WITNESS: That's all right.

19 MR. LEPENE: Right there.

20 And let me just say, Your Honor, do you have a
13:59:02 21 copy of this particular exhibit?

22 THE COURT: No.

23 MR. LEPENE: And maybe we ought to mark it as
24 an exhibit.

13:59:12 25 MR. MERKLIN: Your Honor, I'm sorry to

1 interrupt.

2 We made some bigger copies if that would be
3 helpful for everybody.

4 MR. LEPENE: It certainly would help me.

14:00:04 5 MR. MERKLIN: Yeah.

6 MR. LEPENE: Mark it, can we mark that as an
7 exhibit?

8 MR. MERKLIN: If you give me a moment.

9 MR. LEPENE: Yeah, sure.

14:01:18 10 MR. MERKLIN: I'll get you better copies.

11 MR. LEPENE: You or I can do that. You want
12 to mark it?

13 MR. MERKLIN: I'll give you your copies.

14 MR. LEPENE: Okay.

14:02:58 15 MR. MERKLIN: It's a little bit bigger.

16 MR. LEPENE: Okay. Thank you.

17 THE COURT: What do you want to call them?

18 MR. LEPENE: Are you going to introduce it?

19 MR. MERKLIN: We are going to introduce it
14:04:28 20 anyway so Debtors' 2.

21 MR. LEPENE: Why don't we make it Debtors' 2?
22 That will be fine.

23 MR. MERKLIN: Okay.

24 BY MR. LEPENE:

14:05:00 25 Q. Okay. Mr. Exley, we've handed you what has been

1 marked as Debtors' Exhibit 2, and what I was referring to,
2 if I can find it, is on the third page of that exhibit and
3 actually it's -- this appears both -- even with this copy I
4 need my glasses, Your Honor.

14:05:32 5 This appears on Page 3, Mr. Exley, both with
6 respect to accounts receivable post-petition and accounts
7 receivable pre-petition.

8 You see there's a line item, cash receipts,
9 normal seven weeks, and then 98% that appears at both
14:06:16 10 places.

11 Do you see that?

12 A. I do.

13 Q. And what does that refer to?

14 A. Collecting 90% of the accounts receivable.

14:06:22 15 Q. 98%?

16 A. I'm sorry, 98%. I'm sorry.

17 Q. Okay. And so just speaking in terms of post-petition
18 receivables, for purposes of this forecast, that's what the
19 company's estimating it will be able to do?

14:06:48 20 A. Correct.

21 Q. Now, is that consistent with historical practice?

22 A. No.

23 Q. And historically, what percentage do you collect?

24 A. I -- I don't know what to tell you on that. I mean,
14:07:04 25 it's been different every year.

1 Q. Well, what has it been in the last -- for the last 12
2 months, approximately?

3 A. Approximately 90%.

14:07:26

4 Q. 90%. So why was the figure 98% chosen for this
5 analysis?

6 A. Because we felt confident in collecting the accounts
7 receivable.

8 Q. Despite all of the problems that you alluded to in
9 response to my previous questions?

14:07:40

10 A. Yes, sir.

11 Q. Okay. And you also presume the same with respect to
12 collection of pre-petition accounts receivable?

13 A. Yes, sir.

14:07:58

14 Q. And again, that despite the fact that over the last
15 twelve months you've only collected at the rate of 90%,
16 correct?

17 A. I -- yes, sir. I -- my 90% number might not be
18 accurate but --

19 Q. It might be lower?

14:08:06

20 A. I think it's higher.

21 Q. Okay. Are you familiar with collection activity at
22 Eastern Cement?

23 A. Yes.

24 Q. Eastern Cement is the port, correct?

14:08:16

25 A. Correct.

1 Q. How are collections going there?

2 A. In regard -- in relation to --

3 Q. Accounts receivable.

14:08:28

4 A. They're a little slower than the Ready-Mix industry,
5 if that's what you mean.

6 Q. And how has that manifested itself in terms of being a
7 little slower?

8 A. I don't understand your question.

14:08:42

9 Q. Well, have you had to bring lawsuits to collect on
10 receivables?

11 A. I believe there are some lawsuits, but I'm not -- I am
12 not privy to that information right now. I don't know what
13 that is.

14:08:52

14 Q. Are there judgments that you've obtained that have
15 been settled with balloon payments --

16 A. Not that I'm aware of.

17 Q. -- at points down the road?

18 A. Not that I'm aware of.

14:09:04

19 Q. Okay. But the bottom line is that collection activity
20 there is slower than the Ready-Mix industry?

21 A. Correct.

22 Q. And that's the operation that's essentially shut down,
23 correct?

24 A. I'm not aware that it is shut down at this time.

14:09:14

25 Q. Okay. You're not aware that it's operating either?

1 A. It was my understanding it is operating.

2 MR. LEPENE: Okay. That's all I have.

3 Thank you, Your Honor.

4 REDIRECT EXAMINATION OF DAVID EXLEY

14:09:48

5 BY MR. MERKLIN:

6 Q. Mr. Exley, Mr. Lepene described for you a number of
7 factors that go into determining collectibility.

8 Do you recall that, those questions?

9 A. Yes.

14:09:56

10 Q. Did you take all of those factors into account in
11 arriving at the allowance for doubtful accounts?

12 A. Yes, sir.

13 Q. So you believe that with respect to your testimony
14 that of the \$8.1 million in receivables that approximately
15 6.3 million is collectible is accurate?

14:10:30

16 A. Correct. Yes.

17 MR. MERKLIN: No other questions.

18 MR. LEPENE: Nothing further, Your Honor.

19 THE COURT: Anything else?

14:10:42

20 You can go ahead and return to your seat.

21 (Witness excused).

22 MR. MERKLIN: Your Honor, the debtors would
23 next call David Cesar.

24 THE CLERK: Please be seated in the witness
14:11:20 25 stand.

1 DAVID CESAR,
2 of lawful age, a witness called by the Debtors,
3 being first duly sworn, was examined
4 and testified as follows:

14:11:22 5 DIRECT EXAMINATION OF DAVID CESAR

6 BY MR. MERKLIN:

7 Q. Sir, can you state your full name for the record and
8 spell your last name?

9 A. David Cesar, C-E-S-A-R.

14:11:30 10 Q. And are you currently employed?

11 A. Yes, I am.

12 Q. Where are you employed?

13 A. I'm employed by the Parkland Group.

14 Q. And what is your position?

14:11:36 15 A. Principal and partner.

16 Q. And what is the relationship of Parkland Group to the
17 debtors?

18 A. We were retained as financial advisors, and Larry
19 Gaddar, a colleague of mine, was retained as chief
14:11:50 20 restructuring officer.

21 Q. And how long have you been involved now with the
22 debtors and their businesses?

23 A. Approximately four weeks.

24 Q. And during that time have you gone through any of the
14:12:00 25 debtors' facilities and looked at its operations?

1 A. Yes, I have.

2 Q. And can you describe generally what you've done in
3 that regard?

4 A. As far as site visits, we've toured the Medina Supply
14:12:12 5 operations in Medina, Ohio. Looked at, you know, a couple
6 Ready-Mix operations, some of the vacant land that they
7 have.

8 Also, made a visit down to Florida to look at
9 the Corkscrew quarry, orange grove property, and saw
14:12:30 10 the -- saw the Aliko Ready -- Ready-Mix operation.

11 Q. Have you been involved in any of the discussions with
12 either the lenders or trade creditors and other groups?

13 A. Yes.

14 Q. And what's been your involvement?

14:12:56 15 A. Varying degrees. You know, very involved on the EFO
16 side, participating in several conference calls, doing
17 projection modeling, preparing the cash forecasts for
18 various scenarios.

19 Q. In fact, sir, were you involved in preparation of
14:13:20 20 what's been marked as Debtors' Exhibit 2?

21 A. Yes, if that's the cash forecast.

22 Q. And what is your -- what is your involvement in that?

23 A. The original document was prepared by a former
24 consulting firm Fort Dearborn.

14:14:00 25 I took, when we were retained, we took that

1 model over and I've been maintaining it since -- since our
2 retention.

3 Q. And so you're familiar with the numbers that are set
4 forth on that exhibit?

14:14:16 5 A. Yes.

6 Q. And, in fact, they are largely a product of your work?

7 A. That's correct.

8 Q. Are you familiar with the current status of the
9 ability of the company to obtain unsecured trade credit?

14:14:24 10 A. Yes.

11 Q. And what is that status currently?

12 A. They're pretty much cut off with all their major
13 suppliers. They could still get material on a COD or cash
14 in advance basis, but trade credit is pretty much gone.

14:14:38 15 Q. And at this point you've made efforts to ask for trade
16 credit and you've been told that you're cut off?

17 A. That's correct.

18 Q. Were there efforts before the petition to look for
19 sources of financing and capital?

14:14:50 20 A. Yes.

21 Q. And can you describe generally what those efforts
22 were?

23 A. Contacted various parties. Three mainly expressed an
24 interest.

14:15:00 25 The first company is a supplier to Schwab

1 Ready-Mix, primarily their Medina Supply operation, a
2 company out of Findlay, Ohio called National Lime and Stone,
3 they expressed an interest in helping the company out.

4 They currently lease a portion of one of the
14:15:20 5 properties in Medina, Ohio. The company had -- National
6 Lime had expressed an interest in lending up to \$7 million
7 in funding to the company --

8 Q. And did that --

9 A. -- to help them through this period of time.

14:15:38 10 Q. I'm sorry. Did that proposal come to fruition?

11 A. No, it did not.

12 Q. Were there any other efforts to find either loans or
13 other capital for the company?

14 A. Yes. We talked to two other parties.

14:15:54 15 One party, the Bakers, John Baker used to own
16 Florida Rock and he sold his company to Vulcan. He is
17 interested in getting back into the Ready-Mix operation. I
18 called John Baker and asked him if they would have an
19 interest in making a loan to the Schwabs. He's very
14:16:14 20 familiar with the Schwab family. He said he, you know,
21 would not make a loan but he is interested in both the
22 Corkscrew property and the port facility.

23 A couple hours after I got off the phone with
24 John Baker his son Ted called back and said that they're
14:16:30 25 interested in actually the entire Schwab Ready-Mix Florida

1 operations.

2 The other party I had talked to is National --
3 or Natural Resource Properties, publicly traded limited
4 partnership out of Houston, Texas. They're very involved in
14:16:48 5 coal mining and aggregate mining. They do sale leasebacks.

6 I was given his name by the CFO of National
7 Lime and Stone. Talked to an individual Dennis Coker that's
8 heading up their aggregate division. He declined to make a
9 loan, but he did say they would have a lot of interest in
14:17:06 10 looking at doing a sale/leaseback on the Corkscrew property.

11 Pursued that line of discussion with him.
12 Sale/leaseback, he said if they moved at warp speed, would
13 probably take him absolute minimum of ninety days, in all
14 likelihood five to six months to accomplish.

14:17:34 15 Q. Is it your view that reasonable efforts have been made
16 to try to obtain alternative financing for these operations?

17 A. Yes.

18 Q. In fact, were you involved in the exploration of DIP
19 financing with the existing lender group?

14:17:54 20 A. Yes.

21 Q. And what was your involvement in that?

22 A. Primarily reviewing the term sheet.

23 My colleague Larry Goddard lead most of those
24 discussions.

14:18:04 25 Q. Was the term sheet and the proposal for DIP financing

1 made by the existing lenders acceptable to the company?

2 A. No.

3 Q. Can you explain why it was not acceptable to the
4 company?

14:18:18 5 A. The time frame to maximize the value of the assets is
6 just way too short.

7 Q. Can you be more specific?

8 A. Sure. The term sheet, if I'm remembering correctly,
9 required a sale process of approximately sixty days.

14:18:34 10 You know, there's substantial assets here.
11 They're very strategic, both in Ohio and in Florida. The
12 company previously had not been widely marketed by Western
13 Reserve. They only went to a few select parties, and, you
14 know, they felt, you know, the company -- owners felt that,
14:18:54 15 you know, additional time should be given to do the process
16 correctly.

17 Q. How long have you been with Parkland, sir?

18 A. About ten years.

19 Q. And have you been engaged frequently in turnarounds
14:19:06 20 and similar situations?

21 A. Absolutely.

22 Q. And based on that experience, have you been involved
23 in the marketing of companies?

24 A. Yes.

14:21:24 25 Q. Have you been involved in the financing of companies?

1 A. Yes.

2 Q. Other restructuring?

3 A. Yes.

14:21:40

4 Q. And do you believe the company was not reasonable in
5 suggesting that a longer period than sixty days was
6 necessary with respect to these assets?

7 A. I do not think that was unreasonable.

14:21:50

8 Q. Do you have an opinion as to how long a reasonable
9 time would be to either reorganize or look for an orderly
10 sale of these assets?

11 A. In my opinion, an adequate time would probably be five
12 to six months.

14:22:06

13 Q. And, sir, are you familiar generally with the
14 company's historical operations in what you've done in
15 looking at the numbers?

16 A. Yes.

17 Q. Can you give the Court some indication as to how the
18 construction downturn has impacted the total, total
19 revenues?

14:22:16

20 A. All you got to do is look at their top line. It went
21 from 204 million from two or from three years ago. It's
22 declined the last two years. This year revenues will be
23 projected to come in probably between 70 and 75 million.

14:22:48

24 Q. And in the time you've been working for the company in
25 connection with its advice and restructuring, have you found

1 that the decline in revenue is the result of management
2 decisions?

3 A. No.

4 Q. Is it a function of the market?

14:22:58 5 A. Function of -- strictly a function of the market.

6 Q. And if, for example, highway construction under any
7 government stimulus package begins in earnest, what would be
8 the impact on the company?

9 A. I would fully expect both their Ohio and Florida
14:23:12 10 operations to benefit and realize a sales increase.

11 Q. I'm going to ask you now to turn specifically to
12 Exhibit 2.

13 And what I want to spend a moment, sir, asking
14 about is in terms of the expenditures that are proposed for
15 what I'm calling this, this emergency period until we could
14:23:30 16 get to a final hearing, have you examined those expenses?

17 A. Yes.

18 Q. Do you believe that they are absolutely essential to
19 pay in order to keep the company in operation?

14:23:42 20 A. Yes. Absolutely.

21 Q. And do you believe that what would be the result if
22 the Court were not to approve the DIP financing today?

23 A. The company would probably cease operations.

24 Q. And would that result in a loss of value in your view?

14:23:58 25 A. Absolutely.

1 Q. And have you gone through the budget to ensure that
2 only those expenses that are absolutely necessary are
3 incurred --

4 A. Yes.

14:24:08 5 Q. -- in that first two-week period?

6 A. Yes.

7 Q. Now, the company is projected to use considerable cash
8 during the next 30 days or so, is that correct?

9 A. That's correct.

14:24:16 10 Q. Is any of that to be used for the buildup of any
11 working capital?

12 A. Yes.

13 Q. Can you describe that for the Court as well?

14 A. Sure. There's a lot of seasonality to the
14:24:36 15 construction industry, primarily up here in Ohio.

16 The largest subsidiary is Medina Supply.
17 Their sales are probably, you know, 50, 60% of the entire
18 entities.

19 The other two operations, Twin Cities is
14:24:56 20 also -- and Quality Block & Supply are down in the Dover,
21 Ohio area so they're very affected by the weather.

22 This is -- you know, from a seasonal point of
23 view, January and February are the worst months to, you
24 know, be in the construction industry.

14:25:18 25 It's very related to weather and temperature

1 and being able to pour concrete outdoors.

2 So as they move into their busy season which
3 starts in March, they start to acquire additional inventory
4 so they have a larger supply on the ground at their sites
14:34:42 5 and they also, as their sales pick up, they start to build
6 accounts receivable which is working capital.

7 Q. And in terms of cash flow, what's the cycle then from
8 beginning the process of acquiring the raw material until
9 the point it turns into a finished product and to the point
14:34:58 10 then that the receivable from the sale of that is collected;
11 what's the approximate time?

12 A. The typical process, you know, because their
13 inventories are down at this time of year, what they get in
14 from their suppliers this week, they'll wind up using most
14:35:12 15 of it, you know, within the next week or two. It goes out,
16 gets delivered, and then, you know, collected within
17 anywhere from probably, you know, I think their DSO is
18 probably around 45, 50 days on average.

19 Q. So again, this time of year is really the low?

14:35:34 20 A. It's the low.

21 Q. In terms of cash flow?

22 A. It's the low.

23 Q. And the need ramps up considerably as we go into the
24 construction season?

14:35:46 25 A. As well as, yeah, that's correct.

1 Q. And I think you said weather has some impact?

2 A. Weather has a tremendous impact.

3 Q. February has been a little snowy here in Ohio, has it
4 not?

14:36:00 5 A. Just a little bit.

6 Q. Has that impacted the debtor, in your view?

7 A. Yes.

8 MR. MERKLIN: Your Honor, may I have a moment
9 or two?

14:36:42 10 BY MR. MERKLIN:

11 Q. Sir, I think Mr. Lepene suggested in his comments that
12 the company was bleeding cash, do you recall hearing that?

13 A. Yes.

14 Q. How much of that cash burn is what I'll call the
14:36:52 15 restructuring costs in your budget for professional fees and
16 other restructuring costs?

17 A. Approximately four to \$5 million.

18 Q. And how much would be the buildup of the receivables
19 and inventory and other working capital?

14:37:12 20 A. About another four, four and a half, \$5 million.

21 Q. Okay.

22 A. That's over the entire length of the forecast, through
23 August.

24 Q. Correct. It's not --

14:37:34 25 A. Yeah.

1 Q. -- just the next two weeks, obviously?

2 A. Yeah, just not the next two weeks.

3 MR. MERKLIN: No other questions, Your Honor.

4 MR. LEPENE: Thank you.

14:38:00 5 CROSS-EXAMINATION OF DAVID CESAR

6 BY MR. LEPENE:

7 Q. Hello, Mr. Cesar.

8 A. Good afternoon.

9 Q. You aren't proposing to work for free, are you?

14:38:08 10 A. No.

11 Q. So professionals have to be paid, don't they?

12 A. Yes.

13 Q. And that is an expense that will have to be incurred
14 and that burns cash, doesn't it?

14:38:20 15 A. Yes, it does.

16 Q. Okay. The forecast, again looking at Debtors' Exhibit
17 2, relative to the cash needs, extends out through the end
18 of August, is that right?

19 A. That is correct.

14:38:52 20 Q. Okay. And I think you indicated that a reasonable
21 period of time in your judgment for a sale process would be
22 five or six months?

23 A. That's correct.

24 Q. And by the way, you indicated that the lenders'
14:39:12 25 proposal was sale -- pre-petition lenders' proposal --

1 A. Um-hmm.

2 Q. -- was for a sale process of sixty days.

3 Wasn't it, in fact, ninety days that was being
4 discussed?

14:39:22 5 A. I don't recall. I thought it was sixty but I could
6 be -- I could be mistaken.

7 Q. Okay. And so essentially if the pre-petition lenders
8 were suggesting ninety days, three months, you're suggesting
9 five to six months, we're just -- we're a couple of months
14:39:42 10 off, right?

11 A. Yeah, about double the time period.

12 Q. Two months, sixty days, right?

13 A. On the low end of the scale, yes.

14 Q. At the low end of the scale, you're right.

14:39:54 15 Now, if your concept were followed, we're
16 talking about a sale process of roughly five to six months,
17 that takes us through the end of August, correct?

18 A. That's correct.

19 Q. Okay. And the total cash loss between now and the end
14:40:16 20 of August is shown on Exhibit 2, is it not, that is
21 \$11.5 million, is that right?

22 A. I --

23 Q. Do you have the exhibit?

24 A. No, I don't.

14:40:36 25 Q. And actually it appears on Page 2, and I misspoke,

1 it's \$11,216,000, is that correct?

2 A. That's correct, with additional availability of about
3 6.8 million.

4 Q. The additional availability being the priming -- the
14:40:58 5 DIP financing with the priming lien that you're proposing?

6 A. Correct. At the end of August, the entire facility
7 from EFO has not been drawn down yet. There's still an
8 additional 6.8 million available.

9 Q. Right. You've made a rather large assumption there,
14:41:18 10 haven't you?

11 A. Sure.

12 Q. And you're assuming that they won't exercise their
13 right to terminate their commitment as a result of whatever
14 they find out during their due diligence period, correct?

14:41:28 15 A. Well, the assumption is -- that I made, was referring
16 to, was that the Court would approve the DIP financing.

17 Q. Well --

18 A. Although in the term sheet, you know, they do -- it is
19 at, you know, they have to complete their due diligence.

14:41:44 20 I'm, you know, familiar with the assets and I'm very highly
21 confident that they'll be able to get there on the due
22 diligence side.

23 Q. You don't make that decision for them, though; they
24 make that decision?

14:41:58 25 A. No, I don't. That's correct.

1 Q. Okay. Now, that cash burn of 11,216,000 through the
2 end of August, that is net of an additional \$4.2 million?

3 A. Correct.

4 Q. Generated from the sale of collateral equipment that
14:42:24 5 is subject to the liens of the pre-petition lenders,
6 correct?

7 A. That sale of noncore assets, correct.

8 Q. And that appears on Page 1, does it not?

9 A. Yes, it does.

14:42:36 10 Q. In weeks 10 and 13?

11 A. That is, I believe, correct. Let me go to that.

12 Yes.

13 Q. And the proceeds from the sale of that collateral that
14 secures the pre-petition debt isn't going to be paid to the
14:42:52 15 pre-petition lenders under this proposal, is it?

16 A. That is correct.

17 Q. It's going to be used in the operation of the
18 business, correct?

19 A. Correct.

14:43:02 20 Q. And, therefore, from operations of the business, the
21 cash burn, net cash loss through the end of August, is the
22 sum of 11,216,000 plus 4,200,000, correct?

23 A. Correct.

24 Q. And that loss in cash, that has an effect on the value
14:43:36 25 of the underlying assets, doesn't it?

1 A. Not necessarily.

2 Q. Do you think this company is getting more valuable as
3 time goes on?

4 A. Their assets are very strategic.

14:43:48 5 You know, given their market position in Ohio
6 and in Florida, there's been significant interest in
7 acquiring those assets.

8 So it's, you know, in my opinion going through
9 an orderly sale process versus rushing through a sale
14:44:04 10 process will bring more of those people to the table.

11 Q. And it's your opinion that rushing through -- doing it
12 over a ninety day period would be rushing through; doing it
13 over a five-month period would be orderly, that's your view?

14 A. Five or six month period would be a more orderly
14:44:22 15 process, yes.

16 Q. More orderly, okay.

17 So if we could reach an agreement on a sale
18 process with the pre-petition lenders, there wouldn't be any
19 need for a priming DIP loan, would there?

14:44:40 20 A. Don't know. I mean, there's additional money
21 available through the EFO offer that, you know, provides the
22 company time to do a restructuring plan and turn around as
23 it pays down some of its bank debt.

24 Q. I said if we reached an agreement.

14:45:06 25 What projections have been provided to EFO at

1 this point?

2 A. They've seen the cash forecast.

3 Q. The cash forecast?

4 A. Exhibit 2, I believe this is.

14:45:20 5 Q. So they've seen the cash forecast through the end of
6 August?

7 A. Correct.

8 Q. Okay. Have they seen any other forecasts?

9 A. Not at this time.

14:45:28 10 Q. Okay. Do you have -- have you prepared internally
11 forecasts, cash forecasts through the end of 2010?

12 A. Not a cash forecast through the end of 2010.

13 We've done a projection model of an income
14 statement through the current fiscal year.

14:45:44 15 Q. Okay. Has that been shared with them?

16 A. No.

17 Q. Why not?

18 A. It was just completed yesterday.

19 Q. Okay. So they've seen no numbers beyond this cash
14:45:54 20 forecast that goes through the end of August?

21 A. That's correct.

22 Q. Is it true that the company is forecasting cash
23 losses, cash losses through the end of 2010?

24 A. No. I haven't seen any cash forecast through the end
14:46:12 25 of 2010.

1 The only cash forecast I have seen is the
2 forecast through August.

3 Q. So you don't know one way or the other?

4 A. What's going to happen beyond September or August?

14:46:22 5 Q. Beyond -- beyond August 31st.

6 A. Correct.

7 Q. As you sit here, you don't know whether this company
8 will be cash flow positive or cash flow negative after
9 August 31st, do you?

14:46:34 10 A. I'm not certain.

11 However, there is a --

12 Q. I think you've answered the question.

13 You don't know.

14 MR. LEPENE: That's all the questions I have
15 at this time, Your Honor.

16 REDIRECT EXAMINATION OF DAVID CESAR

17 BY MR. MERKLIN:

18 Q. Just a few follow-up questions, sir.

19 A. Sure.

14:47:14 20 Q. Mr. Lepene asked you whether the professional fees and
21 restructuring costs of four or five million would have to be
22 paid under any event, is that correct?

23 A. Yes.

24 Q. In terms of how a potential buyer would look at the
14:47:26 25 ongoing business and valuing it, would that buyer take into

1 account an ongoing obligation to pay restructuring and
2 professional fees?

3 A. No. A buyer would look at normalized operations.

14:47:42

4 Q. So that in looking at normalized operations, those
5 costs would be pulled out?

6 A. Correct.

7 Q. Have you looked at the normalized operations of these
8 businesses and its components?

9 A. Yes.

14:47:50

10 Q. Let's talk about the -- the quarry that's currently
11 being used as an orange grove.

12 A. Um-hmm.

13 Q. Do you -- are you familiar with that?

14 A. Yes.

14:47:58

15 Q. Is that cash flow positive or negative?

16 A. That's cash flow positive.

17 Q. And to what magnitude?

18 A. Annual net income the last couple years has been north
19 of a million dollars.

14:48:06

20 Q. So is there any reason in your view that that
21 particular property would be -- necessarily have to be the
22 subject of a quick sale?

23 A. No.

24 Q. Is there any reason that it should be liquidated --

14:48:20

25 A. No.

1 Q. -- in your view?

2 A. No. Absolutely not.

3 Q. And is that business capable, even if it's not
4 operated currently as a quarry, is it capable of
14:48:32 5 independently operating as an orange grove?

6 A. Yes.

7 Q. At a cash flow positive number?

8 A. At a cash flow positive number.

9 Q. Have you and Parkland been involved in helping the
14:48:44 10 company to return to profitability?

11 A. Yes.

12 Q. And what kinds of steps have you taken?

13 A. The major step that we've taken is we've looked at the
14 performance of each of the Ready-Mix facilities down in
14:48:56 15 Florida on how they're performing financially.

16 You know, we've put together a projection
17 model, normalizing operations through the end of their
18 current fiscal year which is April 30th, 2010, and made some
19 assumptions.

14:49:14 20 Some of their costs are significantly out of
21 line with a company of their size, and by bringing those
22 costs into line, you know, the operation would be -- have a
23 net loss probably of around \$700,000 but positive even out
24 of around five to \$6 million.

14:50:30 25 Q. Now, Mr. Lepene asked you if in your view a more

1 orderly process of going through a sale would take five to
2 six months?

3 A. Correct.

14:50:46

4 Q. Has the company directed you to engage in an orderly
5 sale process?

6 A. No.

7 Q. Has the company rejected the possibility of a
8 restructure where it would remain a viable entity?

14:50:56

9 A. No, they have not rejected -- they have not rejected
10 that.

11 Q. Do you believe that's not a viable alternative?

12 A. I think that's a very viable alternative.

13 MR. MERKLIN: No other questions.

14 RECROSS-EXAMINATION OF DAVID CESAR

14:51:10

15 BY MR. LEPENE:

16 Q. Mr. Cesar, Mr. Merklin just asked you about the orange
17 grove and the fact that it is cash flow positive?

18 A. Correct.

19 Q. It's a farming operation, correct?

14:51:22

20 A. Correct.

21 Q. Does the company have a consolidated cash management
22 system?

23 A. Yes.

14:51:38

24 Q. So that the cash from the operation of the farm, does
25 that go into that consolidated cash management system?

1 A. Yes.

2 Q. So we're talking about one enterprise here in terms of
3 cash, correct?

4 A. Cash is combined, yes.

14:51:50 5 Q. Yes. Okay. What would happen to the business,
6 assuming that the Court does grant the debtors' request for
7 the priming lien, what happens to the business if we go out
8 30 days and EFO, once they're provided additional
9 projections beyond August 31st, they decide that they don't
10 want to go forward?

11 What happens to the business at that point?

12 A. It would run out of cash.

13 Q. Have to liquidate?

14 A. Sure. Close operations.

14:52:30 15 MR. LEPENE: That's all I have, Your Honor.

16 MR. MERKLIN: No other redirect, Your Honor.

17 THE COURT: You can go ahead and return to
18 your seat, thanks.

19 MR. MERKLIN: Your Honor, before we get into
14:52:50 20 our next witness, may I have a five minute recess
21 potentially?

22 THE COURT: Sure. And how many more folks do
23 you plan on calling? We probably ought to let people go eat
24 at some point or I didn't know what else you --

14:53:08 25 MR. MERKLIN: I plan on probably calling one

1 more witness for our direct case and perhaps one on any
2 rebuttal case.

3 I would like to describe that witness's
4 testimony and run some numbers and that's why I wanted a
14:53:24 5 short recess to determine whether or not we ought to take
6 the time. That witness will take considerable time, I
7 imagine.

8 THE COURT: Okay. And what did you have
9 planned for today?

14:53:50 10 MR. LEPENE: Your Honor, we have one witness
11 who we may or may not call, depending on how the rest of the
12 direct goes.

13 THE COURT: Okay. Why don't we take a break
14 and we'll check with you in five or ten minutes and see what
14:54:10 15 you want to do?

16 MR. MERKLIN: Thank you, Your Honor.

17 THE CLERK: All rise.

18 (Recess taken).

19 THE CLERK: All rise. Be seated.

14:57:36 20 THE COURT: Well, where do you stand?

21 MR. MERKLIN: Your Honor, we apologize for
22 asking for the recess, but we would probably at this point
23 just go ahead with a final witness in our case in chief.

24 THE COURT: Okay. You think we ought to take
14:57:54 25 a break maybe?

1 MR. MERKLIN: I am willing to do whatever the
2 Court would please. We think our direct testimony is
3 probably half an hour to 45 minutes.

4 THE COURT: Yeah. I hate to push it, you
14:58:04 5 know, because there are some people that have all sorts of
6 restrictions on needing to eat and that sort of thing.

7 So why don't we -- is 2:00 o'clock enough
8 time? Is that okay?

9 MR. LEPENE: Yeah, if -- we'll be able to
14:58:38 10 finish easily.

11 THE COURT: Is that okay with you?

12 MR. MERKLIN: That's fine, Your Honor.

13 THE COURT: Okay. Why don't we come back at
14 2:00?

14:58:48 15 Thanks.

16 THE CLERK: All rise.

17 - - - - -

18 (Luncheon recess taken)

19 - - - - -

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1 AFTERNOON SESSION.

2 THE CLERK: All rise. Be seated.

3 MR. MERKLIN: Good afternoon again, Your
4 Honor.

14:59:22 5 THE COURT: Good afternoon.

6 MR. MERKLIN: We would call at this time John
7 Gillott, and the direct testimony will be handled by my
8 colleague Nick Capotosto.

9 THE COURT: Okay.

14:59:34 10 JOHN GILLOTT,

11 of lawful age, a witness called by Debtors,

12 being first duly sworn, was examined

13 and testified as follows:

14 THE CLERK: Please be seated in the witness
15:01:36 15 stand.

16 MR. CAPOTOSTO: Good afternoon, Your Honor.
17 Nick Capotosto on behalf of the debtors.

18 THE COURT: Good afternoon.

19 DIRECT EXAMINATION OF JOHN GILLOTT

20 BY MR. CAPOTOSTO:

21 Q. Mr. Gillott, will you please state and spell your name
22 for the record?

23 A. John A. Gillott, last name spelled G-I-L-L-O-T-T.

24 Q. And, Mr. Gillott, where are you employed?

15:02:04 25 A. Gillott Appraisal Service in Palm Harbor, Florida.

1 Q. And what is your position there?

2 A. I'm the owner.

3 Q. And what are some of your job duties as the owner of
4 that company?

15:02:18 5 A. We specialize in special assets, oil terminals,
6 refineries, pipelines, reserves underground, and all types
7 of mining.

8 Q. And what is your education?

9 A. I have a B.S. degree from Widener University in
15:02:42 10 Chester, Pennsylvania, and some post-graduate work from the
11 University of Kentucky.

12 Q. Have you undergone any specialized training?

13 A. Yes. We've done a lot of specialized training and
14 that resulted in an MAI designation that I hold, plus the
15:03:06 15 SRPA, the RM and the SRA designations.

16 And we're licensed through the State of
17 Florida, State of Georgia, and North Carolina.

18 Q. And can you tell us, the Court, what the MAI stands
19 for?

15:03:20 20 A. Well, it's a Member of the Appraisal Institute. That
21 just designates that you have some specialty in
22 commercial-type properties.

23 Q. And how about the SRA?

24 A. That's Senior Residential Appraiser, that denotes some
15:03:36 25 expertise in residential appraising.

1 Q. And the SRPA?

2 A. Senior Real Property Appraiser. That was a
3 designation given by the Society of Real Estate Appraisers
4 before they merged with the Appraisal Institute.

15:03:50 5 Q. And I believe you mentioned RM. What is that?

6 A. That's a Residential Member of the American Institute
7 of Appraisers, and that was awarded some years ago before
8 the companies merged.

9 Q. How long have you been an appraiser?

15:04:06 10 A. Thirty-five years.

11 Q. And do you hold any licenses?

12 A. Licenses in the State of Florida, Georgia, North
13 Carolina.

14 Q. Have you previously testified in court?

15:04:16 15 A. Yes, many times.

16 Q. How many?

17 A. Probably close to a hundred.

18 Q. Have you previously been qualified to give expert
19 testimony in a court?

15:04:30 20 A. Yes.

21 Q. And can you describe for the Court your experience in
22 appraising property used for a mine or a quarry?

23 A. We've appraised probably 70 mines and quarries around
24 the United States that deal with rock or limestone, sand,
15:04:52 25 emeralds, diamonds, granite, that type of -- and phosphate.

1 Q. Thank you, sir.

2 MR. CAPOTOSTO: Your Honor, at this time the
3 debtors move to have acceptance of John Gillott as an expert
4 witness in the area of real property appraisals, and permit
15:05:14 5 Mr. Gillott to testify as to certain opinions within his
6 area of expertise.

7 THE COURT: Do you have any objection?

8 MR. LEPENE: No objection.

9 THE COURT: You may.

15:05:52 10 MR. CAPOTOSTO: Thank you, Your Honor.

11 BY MR. CAPOTOSTO:

12 Q. Mr. Gillott, in connection with your appearance here
13 today, have you been asked to provide an opinion as to real
14 property owned by Schwab Industries?

15:06:04 15 A. I've been asked to provide an opinion of one of their
16 assets which is the quarry on Corkscrew Road in Ft. Myers or
17 Estero, Florida which is Ft. Myers, Florida.

18 Q. And what, what did you refer to that asset as by
19 nomenclature?

15:06:24 20 A. Well, that asset at -- at this time consists of
21 actually three items.

22 It is a fully operational orange grove, it is
23 a potato farm, a portion of it is a potato farm, and
24 underground is about 200 million tons of hard and very hard
15:06:48 25 limestone.

1 Q. And have you formed an opinion or opinions as to the
2 value of that real property?

3 A. We did.

15:07:06

4 Q. And did you prepare a report in relation to those
5 opinions?

6 A. Yes, we did.

7 MR. CAPOTOSTO: Your Honor, at this time I
8 would like to introduce Debtors' Exhibit 3.

9 Your Honor, may I approach the witness?

15:07:30

10 THE COURT: Sure.

11 BY MR. CAPOTOSTO:

12 Q. Mr. Gillott, do you recognize Defendants -- or
13 Debtors' Exhibit 3?

14 A. I do.

15:08:00

15 Q. And what is that?

16 A. This is the report that we prepared and issued for the
17 Court on the property on Corkscrew Road.

18 Q. And what are the opinions contained in this report?

15:08:26

19 A. Well, we actually have three values that we have
20 looked at for this property.

21 One involved the orange grove and the potato
22 farm. The other one involved the minerals underground. And
23 we provided a going concern or a business valuation for the
24 mining asset.

15:08:52

25 Q. And the opinion that you rendered, I think you related

1 to it as the entitled reserves, is that accurate?

2 A. That's correct, yes.

3 Q. And did you reach a value as to that opinion?

4 A. Yes. Most of the time when there is hard and very
15:09:22 5 hard rock underground, this material, if it's entitled,
6 sells for a certain amount of money. And we have found over
7 the years that this is approximately a dollar a ton for the
8 material underground.

9 So our value that we placed on the reserves,
15:09:46 10 and only the reserves, is about \$200 million.

11 The asset, as far as the orange grove is
12 concerned, it is a Class A operating very well-maintained
13 orange grove. It has virtually no skips in it. It has
14 replants in it. And we determined that the orange grove
15:10:16 15 property operation was about 33-and-a-half-million-dollars.

16 Q. And with respect to your opinion on the entitled
17 reserves, what techniques did you use in formulating that
18 opinion?

19 A. Well, we found sales of properties that we knew had
15:10:42 20 reserves underground so we actually used sales of those
21 types of properties. We determined what their reserves were
22 underground and provided a number based upon those sales.

23 And in our files we have probably 70 to 80
24 royalty agreements between mine owners and property owners
15:11:12 25 and we developed a value using the royalty and using the

1 sales comparison approach, both.

2 Q. And did you make any assumptions in arriving at that
3 value?

4 A. We made an assumption that, in fact, there would be a
15:11:34 5 permit or these would be entitled reserves underground, yes.

6 Q. Do you recall making any other assumptions in arriving
7 at that value?

8 A. Not that I can remember specifically.

9 I think the permit was the major issue, yes.

10 15:12:00 Q. Okay. Let's talk about the permit, sir.

11 A. Okay.

12 Q. In your 35 years of experience, I believe you
13 testified that you have been involved in 70 mines, is that
14 accurate?

15 15:12:16 A. That's correct.

16 Q. And out of those 70 mines, how many of those have
17 involved permitting issues?

18 A. Probably half of them or approximately half.

19 Q. And can you tell the Court about that permitting
15:12:28 20 process, please?

21 A. Well, of course the permitting process will differ
22 throughout the United States, but in southwest Florida in
23 the two or three major -- the counties that we have down
24 there, the process normally takes anywhere from two to three
15:12:50 25 years.

1 The initial permits that are -- that are
2 requested are usually denied because of either political
3 pressures or pressures from the people living around or near
4 the mines.

15:13:12 5 Then there's a second effort at getting the
6 permit and usually that results in a permit being issued.

7 If for some reason the permit is not issued,
8 then the landowner has the option of going under the Burt
9 Harris Act which if a county still denies the permit then
15:13:40 10 there has to be some kind of compensation to the property
11 owner.

12 So to answer your question it takes two to
13 three years and a certain amount of money, and then
14 generally the permit is issued.

15:13:56 15 In our case of this particular property, they
16 submitted an application in 2002. It was denied in 2002.
17 And the Burt Harris Act was filed in late 2006. It's due
18 for a hearing here this year, and there is absolutely no
19 reason why that permit will not be issued.

15:14:22 20 MR. LEPENE: Objection, Your Honor.

21 That's speculation in terms of predicting what
22 the outcome of the litigation would be. I don't believe
23 that, based on Mr. Gillott's educational background, he's
24 qualified to offer an opinion with respect to what the
15:14:38 25 outcome of that will be.

1 THE COURT: Can you qualify him a little bit
2 more about what he knows about mining in Florida, I guess,
3 and what he knows about this procedure?

4 MR. CAPOTOSTO: Yes, Your Honor.

15:14:54 5 BY MR. CAPOTOSTO:

6 Q. Mr. Gillott, would you please turn to Debtors' Exhibit
7 3, Page 4 of your, I believe, CV?

8 A. Of my -- go ahead.

9 Q. Sir, if I could direct your attention to the area
15:15:34 10 under your special projects that you've worked on entitled
11 mines and quarries, do you see what I'm talking about?

12 A. Yes.

13 Q. And are those specific projects related to mines and
14 quarries that you've been involved with?

15:15:44 15 A. Yes, they are specific mines that we have appraised.

16 Q. And I believe in total you said you've been involved
17 with the appraisal of 70 mines or quarries, is that correct?

18 A. Approximately, yes.

19 Q. And about half of those dealt with permitting issues,
15:16:04 20 correct?

21 A. Half of those dealt with permitting issues, yes.

22 Q. And can you tell the Court your involvement in that or
23 how you -- strike that, please.

24 Can you tell the Court the basis for your
15:16:22 25 belief that a permit will likely be issued in this case?

1 MR. LEPENE: Objection, Your Honor.

2 Again I don't believe this witness is
3 qualified to offer an opinion with respect to the outcome of
4 pending litigation.

15:16:38 5 THE COURT: Well, why don't -- well, we know
6 he has an opinion which hasn't been admitted at this point
7 really, but he's going to tell us now what his basis is and
8 we'll see if in the course of that he gives enough
9 background to say, well, he knows more than the average
10 bear.

11 Go ahead.

12 MR. CAPOTOSTO: Thank you, Your Honor.

13 A. With some of these mining ventures here, we were
14 responsible for obtaining the drilling, having the property
15 drilled, helping the mines with their applications, seeing
16 the applications through, answering any questions that there
17 might be concerning the reserves, concerning how deep the
18 reserves go, and we generally see them through to the end,
19 perhaps hiring the engineering firm, perhaps hiring the law
15:17:10 20 firm that is -- that is going to make the application.

21 So from start to finish we have been involved
22 in the processes on many of these.

23 Q. On many of the half of the 70 that you provided
24 appraisals on?

15:18:22 25 A. Yes. Um-hmm.

1 Q. What types of material -- you mentioned earlier, what
2 types of materials would be mined out of this particular
3 quarry?

4 A. Well, this particular quarry has reserves that go past
15:18:44 5 a hundred feet.

6 The property was drilled, I believe, in either
7 2000 or 2001, and what they observed in the -- in the
8 testing process was hard to very hard limestone. And of
9 course, there's some sands that would be harvested out of
15:19:12 10 this pit or out of this quarry along with the stone.

11 The stone is of sufficient quality that
12 it -- the first 50 feet or so is going to be used in
13 aggregates, either for asphalt or concrete, and that
14 material is very, very hard. And there's a lot of it.

15:19:44 15 Q. And, sir, in your 35 years of experience involving the
16 appraisal of many mines and quarries, in your experience,
17 have you formed an opinion or do you have knowledge as to
18 the current state of supply of that material in the State of
19 Florida?

15:20:04 20 A. Well, in the State of Florida right now, the -- the
21 demand is down somewhat, and it will probably stay down
22 probably for six months or maybe longer this year, but in
23 this particular area of Florida, which is the southwest
24 quadrant of Florida which takes in Charlotte County, Bonita
15:20:38 25 Springs, Lee County, Collier County, there has always been a

1 shortfall of material.

2 And the shortfall has been significant in the
3 fact that it has been as much as 10 to 15 million tons of
4 material that is used in that southwest area that's not
15:21:00 5 available in that southwest area.

6 And just recently, there has been a situation
7 in the Miami Lakes area which is near Miami where that
8 permit for Florida rock, Apack, white -- white rock has been
9 suspended and that is going to put a -- more of a strain on
15:21:54 10 the supply because some of the supply from Miami Lakes was
11 going over to Naples, Ft. Myers, and that rock is no longer
12 available.

13 Q. How do they get the material over from one location to
14 another?

15:22:14 15 A. They truck it.

16 Q. And do you have any knowledge as to the expense of
17 that effort?

18 A. Expense of that is approximately 15 cents a ton per
19 mile, and to go from Miami Lakes to the Ft. Myers area is
15:22:30 20 about a hundred to 105 miles, and then they have the
21 dead-head price that they charge to get the truck back over
22 to Miami, so it's -- it's an expensive process.

23 Q. Now, regarding this aggregate and limestone, are you
24 familiar with its use by the Department of Transportation?

15:22:54 25 A. Yes.

1 Q. Can you tell the Court about that, please?

2 A. Well, the Department of Transportation buys a lot of
3 products from the mines. They'll buy fill dirt, they'll buy
4 embankment, they'll buy bank one shell and they'll buy
15:24:04 5 aggregates.

6 The material has to be tested, has to meet a
7 certain criteria for abrasion testing and LBRs which are
8 limestone bearing ratios, and depending upon what the
9 Florida Department of Transportation is building at the time
15:24:32 10 will dictate what they actually take from these mines.

11 But the significance of this property is that
12 it is full of material that can be crushed into what is
13 called 57 stone, 89 stone, number four, number two, number
14 four, and 131.

15:24:56 15 And this mine has an enormous amount of that
16 material.

17 Q. Do you know approximately how much, how many tons of
18 stone?

19 A. In this --

15:25:08 20 Q. In this quarry.

21 A. In the entire 2100 acres there's about 300 million
22 tons of material, but in the permitting process they're
23 going to permit most likely 70% of the 2100 acres so that
24 leaves a mining footprint of about 1450 acres.

15:25:34 25 And under that is about 200 million tons of

1 stone.

2 Q. Now, you mentioned earlier that there were other uses
3 for this property, correct?

4 A. Yes. 630 acres is in a potato farm under lease at the
15:25:48 5 moment, and the other 1500 or so or 1400 acres is an
6 operating orange grove.

7 Q. And I believe you testified earlier that the value as
8 an orange grove was approximately 33.6 million, correct?

9 A. Approximately that, yes.

10 Q. And, however, the highest and best use is not as an
11 orange grove, is that accurate?

12 A. That's correct. The very good part of this property
13 is that the mining operation is slated to start where the
14 potato farm is, which would leave the entire grove in
15:26:34 15 operation and producing income.

16 So that as the quarry is faced up, so to
17 speak, and they begin operations, they still have a cash
18 flow out of the orange grove and probably for the first ten
19 years or so of this operation they won't have to touch the
15:26:56 20 grove.

21 Q. Sir, you also, in your report, provided an opinion as
22 to the going concern value, is that accurate?

23 A. Yes, we did.

24 Q. And can you tell the Court what you did to arrive
15:27:10 25 at -- well, first of all, I'm sorry, sir, what is

1 the -- what is the value that you arrived at under the going
2 concern value?

3 A. On the going concern we arrived at a value of
4 \$240 million.

15:27:28 5 Q. And can you tell the Court what you did to arrive at
6 that value?

7 A. Well, from our files and all of the mines that we have
8 appraised, we assign to this quarry a very conservative
9 production rate of about 500,000 tons a year, which
10 represents only about 60 trucks a day for 286 days.

11 So we made the ordinary or extraordinary
12 assumption that they can produce at least 500,000 tons a
13 year.

14 Then we tack the three types of material that
15 were coming out of this mine which would be the aggregates,
16 the base rock and the fill, and we created a composite price
17 for the materials at about \$10 a ton.

18 If they produce more aggregates than we have
19 given them credit for, then that \$10, of course, will go up.

15:28:52 20 Then we determined what all of the expenses
21 would be, and the typical expenses for a mine include
22 blasting, labor, equipment repair, fuel, and the general
23 operational expenses for a property like this.

24 And they normally average somewhere between
15:29:18 25 40, 41, 42% of the selling price of the material.

1 So we've created a spreadsheet, and only a
2 10-year spreadsheet because we don't like to carry them out
3 too long, that showed that the sales minus all the expenses
4 to bring the rock out of the ground, prepare it for
15:34:26 5 shipment, and we did this on a 10-year basis.

6 We discounted the cash flows at 12%, which we
7 think is a reasonable discount rate, and ended up with a
8 value of \$224 million.

9 Q. And did you make any assumptions in forming your
15:34:52 10 opinion as a going concern?

11 A. Yes, we made an assumption that they could produce at
12 least 500,000 tons a year, and we made the hypothetical
13 assumption that the mine would be in operation when they get
14 the permit.

15:35:12 15 Q. And, sir, do you hold your opinions contained in
16 Debtors' Exhibit 3 to a reasonable degree of appraising
17 certainty?

18 A. Yes.

19 MR. CAPOTOSTO: That's all I have, Your Honor.

15:35:42 20 CROSS-EXAMINATION OF JOHN GILLOTT

21 BY MR. LEPENE:

22 Q. Good afternoon, Mr. Gillott.

23 A. Good afternoon.

24 Q. Let me first start by asking a couple of questions on
15:35:50 25 your background, if I might.

1 A. Sure.

2 Q. You do not have a law degree, do you?

3 A. I do not.

4 Q. Okay. You do not have an engineering degree, do you?

15:36:00 5 A. I do not.

6 Q. And you're not an economist, are you?

7 A. Excuse me?

8 Q. You're not an economist, are you?

9 A. No.

15:36:12 10 Q. All right. You indicated that when you are

11 involved -- or, strike that.

12 That in the past, in connection with these
13 other engagements that you list on your CV with respect to
14 mines and quarries, that typically you have involvement with
15 the drilling, did I understand you correctly in that regard?

15:36:40 16 A. Sometimes, yes.

17 Q. Okay. Did you have involvement with the drilling in
18 this particular case with respect to the orange grove
19 property?

15:36:50 20 A. No. Just reading the drilling report.

21 Q. Okay. But no involvement in selecting the firm or
22 assisting that firm in any way?

23 A. No.

24 Q. Is that correct?

15:37:00 25 That's correct?

1 A. That's correct.

2 Q. Okay. Now, you indicated that in these other
3 engagements, you quite often provide assistance in the
4 submission of the application for the permit?

15:37:10 5 A. Correct.

6 Q. Okay. Did you have any involvement with respect to
7 this -- the permit with respect to this particular property
8 in terms of its submission?

9 A. No.

15:37:20 10 Q. Okay. You indicated that in these other engagements,
11 you often assist in the hiring of the engineering firm that
12 is involved.

13 Did you have any involvement with respect to
14 the hiring of the engineering firm in this particular
15 matter?

15:37:38

16 A. No.

17 Q. You indicated that with respect to these other
18 engagements, you often assist in the hiring of the law firm
19 and you provide assistance to the law firm with respect to
20 the prosecution of the permit application.

15:37:50

21 A. Correct.

22 Q. Did you have any involvement with the law firm that
23 was selected by the company in this particular matter?

24 A. No.

15:37:58 25 Q. All right. Now, you indicate that in connection with

1 your appraisal you have made certain assumptions, is that
2 correct?

3 A. Yes.

4 Q. And, in fact, you refer to them in the appraisal as
15:38:42 5 extraordinary assumptions, is that correct?

6 A. Yes.

7 Q. And in particular, among the extraordinary assumptions
8 that you've made were the size and depth of the mining
9 footprint, is that correct?

15:38:56 10 A. Yes.

11 Q. Okay. So that's, again, that's an extraordinary
12 assumption on your part that you have made as a foundation
13 for this appraisal?

14 A. Yes.

15:39:06 15 Q. Also the -- the estimate of -- and in your appraisal
16 you indicate it's 190 million tons, is that -- is that
17 correct?

18 A. Yes. Um-hmm.

19 Q. That that estimate is also what you have characterized
15:39:22 20 in your appraisal as an extraordinary assumption, is that
21 right?

22 A. Yes.

23 Q. You also have made an assumption with respect to
24 production rates, is that right?

15:39:34 25 A. Correct.

1 Q. And you've characterized that in your appraisal as an
2 extraordinary assumption that is the foundation of this
3 appraisal, is that right?

4 A. That's correct.

15:39:46 5 Q. And you've also made an assumption with respect to
6 your estimates of income and expense in connection with the
7 operation of the mine if, in fact, they ever do get the
8 permit, is that right?

9 A. Correct.

15:40:06 10 Q. And you indicate in your appraisal that again that's
11 an extraordinary assumption that you've made that those
12 estimates are more or less correct, is that correct?

13 A. That's correct.

14 Q. All right. So you would agree that the foundation for
15:40:22 15 your appraisal is based upon what you have characterized as
16 extraordinary assumptions, is that right?

17 A. No, sir. The base for our appraisal is the 70 mines
18 that we have appraised in the past.

19 Q. Well, that gives you experience, but with respect to
15:40:46 20 this particular assignment, you have had to make
21 extraordinary assumptions, is that right?

22 A. Correct.

23 Q. Do you know whether this property has been marketed?

24 A. No.

15:41:16 25 Q. Do you know what would be a reasonable time period in

1 your estimation for the marketing of this property?

2 A. Probably about a year.

3 Q. So it would take a year to market this property?

4 A. Yes, sir.

15:41:28 5 Q. Do you know whether there have been any environmental
6 studies undertaken with respect to this property?

7 A. No.

8 Q. Do you know whether there has been a phase one
9 undertaken with respect to this property?

15:41:40 10 A. No.

11 Q. And if, in fact, there were environmental issues with
12 respect to that property, would that have an effect on your
13 appraisal, on your opinion?

14 A. Depends.

15:41:54 15 Q. Depends on what those environmental issues are,
16 correct?

17 A. Yes.

18 Q. And at this point you're not aware that any
19 environmental studies have been made, is that right?

15:42:02 20 A. No, we appraised it as if it was clean.

21 Q. But you do not know whether, in fact, it is clean or
22 not?

23 A. No.

24 Q. You have encountered in the past in your career
15:42:24 25 properties that you have appraised that, in fact, have had

1 significant environmental issues, have you not?

2 A. I have appraised properties with environmental issues,
3 yes.

4 Q. You indicate in the appraisal that you used a
15:43:26 5 nationally recognized formula to estimate the amount of
6 reserves at 190 million tons.

7 A. That's correct.

8 Q. All right. What is that formula?

9 A. That formula is the footprint in acres times the depth
15:43:46 10 times 400 -- 43500 -- 43,560 square feet divided by 27,
11 which gives you the cubic yards.

12 And you multiply that times a factor for stone
13 at 1.30, and that's how we arrived at the 190 million tons.

14 Q. And when you say that this is nationally recognized,
15:44:22 15 who, in fact, recognizes that formula?

16 A. All the miners.

17 Q. Okay. And who developed that formula?

18 A. I don't know.

19 Q. Do you know whether that's the only formula used in
15:44:34 20 the industry for determining the amount of reserves?

21 A. That is the formula used for determining reserves.

22 Q. And again in your appraisal, you refer to the
23 assumption that you've made that the permit will be issued?

24 A. That's correct.

15:45:00 25 Q. And you characterize that as a hypothetical

1 assumption, correct?

2 A. It has to be hypothetical at this point.

3 Q. Okay. And I take it that if there is no permit
4 issued, then this property does not have the value that you
15:45:20 5 have ascribed to it with respect to the mining reserves or
6 the operation of this property as a mine, is that correct?

7 A. That's correct.

8 Q. Are you familiar with the techniques that an
9 engineering firm would use to drill and test whether a
15:46:08 10 particular property has reserves and the amount of reserves
11 that the property might have?

12 A. Yes.

13 Q. Is there more than one technique that is used by
14 mining engineering companies?

15:46:20 15 A. Yes, there's more than one.

16 Q. Okay. How many different techniques are there?

17 A. Well, for boring there's generally two.

18 And testing, there's -- there's many different
19 ways, there are many different tests to perform on what they
15:46:36 20 pull up out of the ground.

21 Q. Okay. And do you know what methodology did the
22 engineering firm follow in this case?

23 A. They used the standard boring equipment from what I've
24 read in the report, and drilled to a depth of a hundred feet
15:46:58 25 in four locations on the property and brought those cores up

1 and had them tested for abrasion, LBR, and sieve tests.

2 Q. And do I understand correctly that there are other
3 methods that could have been used to drill and determine the
4 estimated amount of reserves?

15:47:24 5 A. That doesn't determine the amount of the reserves.

6 That determines what the reserves are.

7 Q. And are there other methods for determining that
8 beside the one that was used by this firm?

9 A. Yes.

15:47:38 10 Q. And why are there different methods used?

11 A. Just depends upon the engineering company and the
12 equipment that they own and operate.

13 It can be the typical hammer test or hammers a
14 tube into the ground, so many strokes a minute, or it could
15 be sonic coring which is a different piece of equipment that
16 brings the core samples up to the surface.

15:47:58

17 Q. And can these tests or methods produce different
18 conclusions?

19 A. No. They would -- they would be the same conclusion.

15:48:20 20 Q. And why is that?

21 A. Well, the material's a material that's inside the
22 tube. It doesn't matter what -- what procedure they use to
23 get the material in the tube.

15:48:44

24 Whatever's in the tube is in the tube and it's
25 the same no matter what they use.

1 Q. You indicate in the report that the application for
2 the permit was submitted in early 2002 and was denied in
3 late 2002 most likely due to the public's sentiment against
4 mining?

15:49:12 5 A. That's correct.

6 Q. Now, is that something that you have determined for a
7 fact, or is that just speculation on your part as to the
8 reasons for the denial?

9 A. That's my speculation on my part.

15:49:24 10 Q. So you don't know the reasons for the denial, do you?

11 A. I do not.

12 Q. All right. Do you know whether there is active
13 opposition to the issuance of this particular permit?

14 A. I do not.

15:49:46 15 Q. Do you know why it took the company four years to
16 bring an action to try to obtain the issuance of the permit?

17 A. I do not know.

18 Q. And you indicate that there will be a decision -- in
19 your appraisal you indicate that there will be a decision
15:50:10 20 forthcoming in 2010?

21 A. Yes.

22 Q. You really don't know that, do you?

23 A. Pretty much so, yes.

24 Q. Isn't that speculation on your part?

15:50:20 25 A. Somewhat speculation; some on what the county has

1 indicated is happening with that permit.

2 MR. LEPENE: All right. And I object and ask
3 that the last portion of that it be stricken as hearsay.

15:50:40

4 THE COURT: Well, he's an expert. Can't he
5 rely on hearsay?

6 MR. LEPENE: I'll withdraw the objection.

7 THE COURT: Okay.

8 BY MR. LEPENE:

15:51:50

9 Q. Mr. Gillott, you have the appraisal, your report in
10 front of you?

11 A. I do.

12 Q. If you would turn to Page 17, it's not numbered but it
13 is Page 17, and that is your analysis that you described in
14 response to questions on direct examination regarding going
15 concern value?

15:52:32

16 A. Correct.

17 Q. And what you are saying here is that it is your
18 opinion that someone would be willing to pay and although
19 you said \$240 million, I think in your report you indicated
20 that the going concern value is \$225 million in your
21 opinion?

15:52:56

22 A. 224, yes, sir.

23 Q. Yes. That someone be would be willing to pay
24 \$224 million to acquire the property on the basis that it
25 would operate in accordance with this type of analysis, is

15:53:18

1 that correct?

2 A. No.

3 Q. I'm sorry, then explain.

15:53:34

4 A. The going concern is the operational aspect of this
5 particular mine.

6 What somebody would purchase as far as this
7 property was -- would be concerned is the \$1.10 per ton of
8 material underground.

15:53:58

9 So a buyer would have at their disposal or at
10 their disposal the drilling report, hopefully they would
11 have the permit, any environmentalists that would be done on
12 the property, and at that point the purchase of the property
13 would be made on and strictly on the minerals underground.

15:54:20

14 The difference between these two processes
15 that we did between the minerals in the ground and the going
16 concern is to show what the profit would be in -- for
17 somebody to extract the minerals and sell them.

15:54:54

18 Q. Okay. So if I understand you correctly, because you
19 have opined that a willing purchaser, sometime if this
20 property is marketed over a one year period and if the
21 permit gets issued, would be willing to pay \$210 million to
22 acquire those minerals in place?

23 A. That's correct.

15:55:16

24 Q. Okay. And this analysis, if I understand you
25 correctly, that we're looking at on Page 17 would indicate

1 how that person who has paid \$210 million in cash to acquire
2 the property gets their money out, is that right?

3 A. It's the profit that they would make in buying the
4 entitled reserves.

22:56:30 5 Q. Well, I think we're saying the same thing?

6 A. Probably.

7 Q. They -- they're paying \$210 million and they need to
8 get a return on that investment?

9 A. That's correct.

22:56:38 10 Q. And this represents the return that they would get on
11 that investment?

12 A. This represents the profit, yes, the profit that they
13 would make on the -- on the going concern, yes.

14 Q. Right. And if you take a look at the line item on
22:56:52 15 this Page 17, which is the net cash flows, do you see that?

16 A. Yes.

17 Q. And they go through year one through ten?

18 A. That's correct.

19 Q. And if you add all of those up, which I did last
22:57:08 20 night, they total, if my math was correct, \$41,201,000, do
21 you think that would be about right, looks like it would be
22 about right?

23 A. Well, mine indicates that after discounting, it's 21
24 million, but before discounting it's probably closer to

22:57:42 25 39 --

1 Q. Okay.

2 A. -- forty million.

3 Q. Okay. So and you're right, that you have a net
4 present value number --

22:58:00 5 A. Right.

6 Q. -- with respect to that?

7 A. Correct.

8 Q. But in -- in dollars over a 10-year period, that's
9 what someone would be taking out of, in terms of the
22:58:14 10 dollars, the return on investment, that's what they would be
11 receiving, correct?

12 A. Based upon my assumptions, yes.

13 Q. Yes. And would you agree that what someone is buying
14 here is essentially a wasting asset?

22:58:28 15 A. It is.

16 Q. Because they are consuming the asset as they are,
17 obviously, extracting and selling the ore?

18 A. That's correct.

19 Q. The aggregate.

22:58:48 20 What I guess I'm having a hard time
21 understanding is why someone would pay \$210 million today
22 for what is a wasting asset with the expectation that over a
23 10-year period, all they would get back on their investment
24 is \$41 million over that 10-year period, and again
22:59:20 25 it's -- they've invested in what we've agreed is a wasting

1 asset, that is consuming itself.

2 Why would someone do that?

22:59:38

3 A. Well, first of all, in the 10-year period of time,
4 they're going to pull 6.2 million tons of material out of
5 the ground.

23:00:00

6 All the rest of the material still remains in
7 the ground, so the -- the return on the investment is pretty
8 good when you -- when you look at the fact that they're
9 getting a return of 39 or \$40 million based upon 6.2 million
10 tons of material that was removed.

11 That's all that was removed in ten years.

12 Q. Well, but it's certainly taking a long time to get
13 that investment.

23:00:14

14 It's really not the same as taking that money
15 and investing in a manufacturing enterprise or something
16 that is generating cash flow and return on the investment
17 and that is not consuming itself, basically.

23:00:36

18 A. Well, but you have a lot to consume here. You have
19 almost an 80-year project here if all the minerals are
20 extracted, and then at the end of that process, you have
21 created or the mining entity has created a series of lakes
22 around which then are built residential properties.

23:01:04

23 Q. Now, you're not aware of anyone who has come forward
24 that has offered to purchase this property for anywhere near
25 the amount that you've appraised it at, are you?

1 A. This property, no.

2 But we have many sales of properties with rock
3 in the ground that has sold anywhere from 90 cents to \$1.40
4 for the material in the ground.

23:01:24 5 Q. And those comparable sales, I think, appear on Page 10
6 of your appraisal?

7 A. Some of them, yes.

8 Q. And what struck me in looking at that was that all of
9 those sales were for dollar amounts, in other words
23:01:40 10 investment, substantially below what someone would have to
11 invest to buy this particular property.

12 Again looking at Page 10, do you have that in
13 front of you?

14 A. Sure.

23:02:20 15 Q. The -- you've got five -- excuse me -- six comparable
16 sales?

17 A. That's correct.

18 Q. That range from five million tons to the largest being
19 60 million tons?

23:02:32 20 A. That's correct.

21 Q. Here we're talking about 190 million tons?

22 A. That's correct.

23 Q. Isn't there an issue here in terms of potentially a
24 glut on the market --

23:02:42 25 A. No.

1 Q. -- with respect to --

2 A. No.

3 Q. -- all of this?

4 A. Mines are very hard to -- to get into operation.

23:03:04 5 It's very difficult to find a property with
6 the reserves that this one has.

7 This stone runs in a vein through that area.

8 There are -- and that area, by the way, is designated a

9 mining area because that vein of material runs through

23:03:34 10 there.

11 And there's no glut on the market. If
12 anything, there's a shortfall of material in that area
13 because there aren't enough mines.

14 Q. Well, the market has certainly been depressed the last
23:03:52 15 several years, hasn't it, with the problem in terms of the
16 economy in Florida and southwest Florida and the lack of
17 construction activity?

18 A. Well, that's every -- everything in Florida has been
19 affected.

23:04:06 20 The mines didn't cause this. The mines just
21 don't have anywhere to sell their material right now.

22 Q. That's the point. So there is no shortfall of
23 material. In fact, there's plenty of material. There's not
24 enough people to buy the material, isn't that true?

23:04:22 25 A. That's correct. But when this business cycle is over,

1 it will go right back to what it's always been, and the
2 shortfall will be there.

23:04:42

3 Q. That's right. But as you indicated, you're not an
4 economist, you're not able to predict what the future's
5 going to be with respect to the recovery of the economy?

6 A. No, but --

7 Q. In Florida or anywhere else, is that right?

23:05:00

8 A. No, but I've watched this for 35 years, and there have
9 been two other cycles like this, and they've gone right back
10 to having their shortfalls of material.

11 Q. Well, you would agree that what we've experienced over
12 the last two or three years is somewhat different than the
13 cycles that we had previously experienced in the recent
14 past; you'd agree with that, wouldn't you?

23:05:16

15 A. No, not necessarily.

16 Q. Okay.

17 MR. LEPENE: Your Honor, would you give me
18 just a minute, please?

19 THE COURT: Sure.

23:06:14

20 MR. LEPENE: Thank you.

21 (Pause).

22 BY MR. LEPENE:

23:07:36

23 Q. Mr. Gillott, again directing you to Page 10, and
24 specifically sale number one, in the analysis of that sale,
25 you show as the indicated price per acre is that \$47,107?

1 A. Correct.

2 Q. And what is the price per acre on -- that you've
3 opined with respect to this property?

23:08:10

4 A. As an orange grove, I believe it is about \$16,000 an
5 acre.

6 Q. And -- and the value as a -- as a quarry?

7 A. Well, they'd have to take it to the \$200 million and
8 divide it by 2100 acres, so.

9 Q. Is that about \$100,000?

23:08:54

10 A. Yes, it is, uh-huh.

11 Q. So you've got a value of \$100,000 per acre in this
12 particular case based on its use as a quarry, whereas with
13 respect to this particular sale, that transaction involved
14 selling it at \$47,000 an acre?

23:09:20

15 A. That's correct, because --

16 Q. That's quite a discrepancy.

23:09:48

17 A. Because ours has very deep rock so we have vertical
18 density as far as the rock is concerned, because the aquifer
19 is very low in this property and that means that they can
20 keep digging and digging until they hit the aquifer,
21 although in our analysis we only did the dig down to 70
22 feet.

23 We could have done it deeper.

23:10:16

24 Q. Now, in terms of the property as it sits today with
25 the permit having been denied, it's your opinion that the

1 value of this property is approximately 33.6 million, is
2 that correct?

3 A. As an orange grove.

23:10:36

4 Q. That is the use today, and that is the only permitted
5 use today, correct?

6 A. That's correct.

7 Q. Okay. And so the rest of this is really just based on
8 your speculation, correct?

9 A. That's correct.

23:10:48

10 MR. LEPENE: That's all the questions I have.

11 Thank you.

12 MR. CAPOTOSTO: Your Honor, I have no further
13 questions.

14 THE COURT: You can now return to your seat.

23:11:00

15 Thanks.

16 THE WITNESS: Thank you.

17 (Witness excused).

18 THE COURT: Is there anybody else?

19 MR. MERKLIN: Thank you, Your Honor. The

23:11:08

20 debtors have no other witnesses in their case in chief, and
21 would move for admission of our exhibits.

22 THE COURT: Okay.

23 MR. LEPENE: Your Honor, if I could

24 have -- and can we just go through the exhibits?

23:11:44

25 THE COURT: Sure.

1 MR. LEPENE: We can get those admitted, and
2 then I'd like five minutes just to see whether we're going
3 to call a witness.

4 THE COURT: Sure.

23:12:14 5 MR. LEPENE: The exhibits are --

6 THE COURT: One is that list of appraisals.
7 Two is that cash flow. And then three is the appraisal.

8 MR. LEPENE: We have no objections.

9 THE COURT: Okay. And then you want a couple
23:12:34 10 minutes?

11 MR. LEPENE: Could we have five minutes?

12 THE COURT: Sure.

13 MR. LEPENE: Just want to see whether we're
14 going to call witnesses.

23:12:52 15 THE COURT: We'll break.

16 MR. LEPENE: Thank you, Your Honor.

17 THE COURT: Let us know.

18 THE CLERK: All rise.

19 (Recess taken).

23:42:02 20 THE CLERK: All rise. Be seated.

21 MR. LEPENE: Thank you, Your Honor.

22 We would call Mr. Robert Wanat to the stand.

23

24

25

1 ROBERT WANAT,
2 of lawful age, a witness called by KeyBank,
3 being first duly sworn, was examined
4 and testified as follows:

23:42:26 5 THE CLERK: Please be seated in the witness
6 stand.

7 DIRECT EXAMINATION OF ROBERT WANAT

8 BY MR. LEPENE:

9 Q. Could you state your full name for the record, please?

23:43:10 10 A. Robert Wanat.

11 Q. And that's spelled?

12 A. W-A-N-A-T.

13 Q. And where do you reside?

14 A. Chicago, Illinois area.

23:43:20 15 Q. And by whom are you employed?

16 A. Morris Anderson & Associates.

17 Q. And what is Morris Anderson & Associates?

18 A. Morris Anderson & Associates is a management
19 consulting and financial advisory firm specializing in
23:44:54 20 underperforming companies, distressed companies.

21 Q. And how long have you been employed by Morris
22 Anderson?

23 A. Sixteen out of the last 18 years.

24 Q. And specifically your position with Morris Anderson?

23:45:26 25 A. Consulting manager.

1 Q. All right. And what is your educational background?

2 A. A Bachelor of Science in finance and marketing from
3 Northern Illinois University, and an MBA in operations
4 research from Northern Illinois University.

23:45:46 5 Q. And just very briefly, your employment experience
6 prior to joining Morris Anderson.

7 A. Was operations manager, plant manager, and vice
8 president of manufacturing for various manufacturing
9 companies including Motorola, Sanford Akin, Baxter Travenol
23:46:10 10 Laboratories.

11 Q. Okay. And are -- what professional organizations do
12 you belong to?

13 A. The Turnaround Management Society, APICS, it's the
14 American Production Inventory Control Society. Those are
23:46:34 15 the two primary ones.

16 Q. Are you certified in the turnaround field?

17 A. Yes, I have my CTP, Certified Turnaround Professional.
18 Got that designation about four years ago.

19 Q. All right. The -- you're familiar with the debtor in
23:48:12 20 this case, Schwab Industries?

21 A. Yes.

22 Q. And how did you become familiar with Schwab
23 Industries?

24 A. Our firm was retained by the Bank Group to evaluate
23:48:56 25 the business plans, the cash flow models, and the viability

1 of the company on a go forward basis.

2 Q. When were you retained by the agent bank?

3 A. About four weeks ago, five weeks ago.

4 Q. All right. And just very briefly, what have you done
23:49:16 5 during the last four to five-week period to familiarize
6 yourself with the company?

7 A. The company provided us with financial information
8 that they also provided the Bank Group, cash flows, business
9 models, financial statements, and any related documentation
23:49:38 10 for their operations on a current basis, the 13-week cash
11 flow, and ultimately cash flows that extended through the
12 August period.

13 I personally viewed the Florida operations,
14 the orange grove operation, the Eastern Cement operation,
23:49:54 15 and spent a little bit of time at corporate a couple weeks
16 ago reviewing data and speaking to a couple of individuals
17 there.

18 Q. When did you visit the Florida orange grove site?

19 A. I believe it was the first week of February, either
23:50:12 20 Monday or Tuesday, the 1st or 2nd of February.

21 Q. And who was with you when you visited that site?

22 A. David Schwab, the CEO was with us; the CRO Larry
23 Gaddar; and the appraiser who did the original appraisal
24 back in September, I believe, Cliff Bowman from Upper
23:50:54 25 Business I believe the name of the company is.

1 Q. Now, that appraisal was done --

2 A. In the fall.

3 Q. -- in the fall of this -- of last year?

4 A. Of '09, fall of '09.

23:51:08 5 Q. Okay. And what had that -- what was the value that
6 that property had been appraised at at that time?

7 A. It was appraised at \$40 million.

8 Q. And did you have discussions with the appraiser
9 regarding that property?

23:51:36 10 A. Yes, and in the car as we toured the facility and
11 subsequent to that on a phone interview.

12 Q. Okay. And this was in your meeting when you were with
13 David Schwab?

14 A. Yes.

23:51:46 15 Q. And the rest of the group that you identified?

16 A. Yes.

17 Q. All right. And what were you told about that
18 appraisal?

19 MR. MERKLIN: Objection, Your Honor.

23:51:58 20 THE COURT: Well, I guess on what?

21 MR. MERKLIN: It's pretty clearly hearsay.

22 I mean, I certainly have no objection to the
23 appraisal being used as we've done today, but asking what
24 the appraiser told him I think goes beyond that.

23:52:18 25 THE COURT: I don't have any idea what he's

1 going to say. Why don't we wait and see what he says a
2 little bit and --

3 MR. LEPENE: Okay. And again, Your Honor, I
4 would offer Mr. Wanat based on his professional background
23:53:10 5 as an expert witness and, therefore, would also suggest that
6 the hearsay rule would not apply with respect to those
7 discussions.

8 MR. MERKLIN: Well, first of all, Your Honor,
9 I don't understand what he's being asked to give expert
23:54:14 10 testimony with respect to what kind of expert testimony.

11 So I don't know whether I would object or not.

12 THE COURT: Right. Let's see what he talks
13 about a little bit first.

14 BY MR. LEPENE:

23:54:26 15 Q. What did the -- what were you told about the
16 appraisal?

17 A. In discussions with the appraiser, asking him what the
18 basis was for the \$40 million valuation, you know, how he
19 arrived at that number, what methodology did he use.

23:54:46 20 He basically said that he was basing his
21 valuation or appraisal valuation on a high watermark based
22 on 2005, 2006 real estate values, plus using a discounted
23 cash flow basis to value a going business concern which the
24 orange grove facility is.

23:55:16 25 He was pretty much instructed, you know, to

1 come up optimistic approach.

2 The appraisal was done for Stonehill and for
3 the company, and he was looking at history to see what this
4 property would have sold in good times, the peak Florida
5 market back four, five years ago, versus what it was today.

23:55:44

6 Q. And was there any indication as to what he felt the
7 property could be sold for today?

8 A. Yes. When we -- when we talked to him, further
9 pressed, he, you know, said if he had to sell the property,
10 that it was about three answers to that part.

23:56:08

11 Should I go through all three?

12 Q. Please.

13 A. You know, there was a quick sale process answer, there
14 was a more moderate time frame, and a longer time frame.

23:56:36

15 You know, he's -- you know, the appraiser is
16 also a real estate salesperson in the area, too, or works
17 for a real estate company.

18 On a quick sale, you know, 90, 120 days, his
19 estimate would be in the 13 to \$15 million range only
20 because of lack of time to market the property.

23:56:56

21 If additional times were available, six months
22 to a year or a little longer, he thought the price, because
23 of timing, marketing time, you know, would go from maybe 15
24 to \$18 million.

23:57:14

25 And then at today's market, today's economy

1 with selling or not selling in the State of Florida,
2 southwest Florida, he might get into the mid-twenties if he
3 had an unlimited time and a buyer that wasn't -- or a seller
4 that wasn't anxious to sell.

23:57:40 5 Q. Did you have discussions with David Schwab regarding
6 his thoughts with respect to that property and its
7 suitability for mining if the permit application eventually
8 was granted?

9 A. Yes. Somewhere along the line, you know, we spent two
23:58:04 10 days with David and with Larry Gaddar touring facilities,
11 and during the discussion, I don't remember which part of
12 the tour we were on, you know, he did indicate that, you
13 know, they were pursuing at that time, you know, trying to
14 get the permits, you know, taking it to the next step.

23:58:20 15 There was a court date scheduled for March.

16 But even if they did win the Court appearance,
17 based on market conditions and lack of a customer base, you
18 know, they probably wouldn't start mining operations for a
19 couple years because the price of aggregate and limestone is
23:58:46 20 down, the market to sell it is down, and it's not a good
21 economic time to start a business of that type.

22 Q. Now, are you also familiar with the appraisals that
23 were made of other assets, other real estate that were
24 updated by the company last fall?

23:59:18 25 A. Yes.

1 Q. And did you have occasion to meet with the individual
2 that undertook that appraisal?

3 A. I met with one of the field -- or interviewed over the
4 phone one of the field appraisers Doug Vanderhook.

23:59:34 5 Q. And that is the -- those are the appraisals that are
6 summarized in Exhibit 2?

7 A. Summarized --

8 Q. Excuse me, Exhibit 1. Let me show you Exhibit 1.

9 A. Please, yeah.

23:59:56 10 MR. LEPENE: Your Honor, if I might approach.

11 THE COURT: Sure.

12 A. Yes.

13 Q. And what did the appraiser tell you about the
14 methodology used with respect to those prices?

00:00:44 15 MR. MERKLIN: Same objection, Your Honor.

16 Again this is hearsay on hearsay.

17 And this witness has not been qualified to
18 give expert testimony on valuation.

19 MR. LEPENE: Well, Your Honor, we're obviously
00:00:56 20 here again on 36 hours' notice with respect to a motion that
21 has been filed by the debtor where they are seeking to
22 establish liens on property in which we have a security
23 interest that would be ahead of us in this case.

24 I think that Mr. Wanat is, by education, an
00:01:18 25 expert with respect to turnaround matters, and we're

1 offering his testimony to provide the framework within which
2 all of these issues are being presented to the Court.

3 THE COURT: Yeah, I think this is just too
4 far. I don't -- I don't think this goes within the area of
00:01:40 5 his expert -- of his -- of his expertise.

6 If I let him get into it, it would probably be
7 discounted so much it probably wouldn't do you -- wouldn't
8 do much good anyhow.

9 MR. LEPENE: All right, Your Honor.

00:02:02 10 If I might have one moment.

11 THE COURT: Sure.

12 MR. LEPENE: Your Honor, if we might mark an
13 exhibit, so this would be Respondent's Exhibit A.

14 THE COURT: Okay.

00:02:28 15 MR. LEPENE: May I approach?

16 If I might approach the witness?

17 THE COURT: Sure.

18 BY MR. LEPENE:

19 Q. Mr. Wanat, handing you what has been marked as
00:03:34 20 Respondent's Exhibit A, can you identify this document,
21 please?

22 A. Yes. It's a document that we received, I believe,
23 through the Parkland Group, summarizing potential sales
24 receipts or marketing receipts from the marketing of the
00:03:52 25 company on various scenarios, accelerated process and

1 orderly process.

2 Q. And this indicates who the company, through its
3 investment banker, has had discussions with prior to the
4 filing of the bankruptcy?

00:04:14 5 MR. MERKLIN: Your Honor, I'm sorry, I'm not
6 sure I heard the last answer.

7 I believe this witness testified he didn't
8 prepare this, and, therefore, there's no foundation to ask
9 him questions about it.

00:04:26 10 THE COURT: I'm not sure I understood where
11 this came from again.

12 MR. LEPENE: Well, this was a document that
13 was produced to us by the debtor.

14 THE COURT: Okay. So what are we going to ask
00:04:36 15 him that he knows?

16 MR. LEPENE: I really -- this was produced by
17 us -- excuse me -- to us by the debtor as evidence of their
18 activity with respect to the marketing and sale process.

19 Your Honor, I'm happy to -- to call one of the
00:05:02 20 debtors' witnesses to identify this, if Mr. Merklin would
21 prefer that I do that.

22 THE COURT: Yeah, do you want --

23 MR. MERKLIN: Your Honor, I've never seen it
24 before. I'm not questioning Mr. Lepene, but I'd certainly
00:05:14 25 like an opportunity to at least ask my client if -- what

1 this is and where it came from.

2 THE COURT: Do you want to do that?

3 MR. MERKLIN: If we could take a -- just a
4 short recess.

00:05:26 5 THE COURT: Well, why don't you just do it?
6 I'll just hang around.

7 (Discussion had off the record).

8 MR. MERKLIN: Thank you, Your Honor.

9 I've confirmed that, I guess, this was
00:06:14 10 produced by an investment banking group that had been
11 retained previously by the debtors.

12 THE COURT: Okay.

13 BY MR. LEPENE:

14 Q. Okay. Mr. Wanat, I think I had asked you again what
00:07:14 15 is the information, what information is indicated on this
16 particular exhibit?

17 A. Yeah, the exhibit shows or summarizes the efforts,
18 some of the efforts by Western Reserve over the time that
19 they were engaged to market the company via their investment
00:07:36 20 banking efforts.

21 And it summarizes from their perspective what
22 the accelerated process of a sales process would look like
23 with the results, and what the orderly process would be, and
24 the timing there is just a matter of, you know, the number
00:07:52 25 of days available to market the properties.

1 They came up with a low and a high for each
2 process that they've identified based on several companies
3 who showed interest and even offered letters of interest to
4 the company over the last twelve-month period.

00:08:10 5 Most recently, I believe, in the December time
6 period they received a couple offers from Old Castle and
7 from Audits Group.

8 Q. All right.

9 A. The summary breaks out the values that they placed on
00:08:28 10 the marketing of the company as a going concern, and they
11 broke it out into three components: You know, the Ready-Mix
12 business as a stand-alone entity, if it were to be broken up
13 until that day; ECC stands for Eastern Cement Company, that
14 support operation that was referenced earlier; and Corkscrew
00:09:08 15 is the orange grove.

16 And the numbers, I think, speak for
17 themselves. I can go through them, but they place low
18 value --

19 Q. Let me just ask you -- yeah, excuse me, Mr. Wanat, let
00:09:32 20 me just ask you a couple questions in that regard.

21 So the -- and again these are -- this is
22 analysis prepared by the company's investment banker?

23 A. Correct.

24 Q. And this was given to you and the agent bank how far
00:09:58 25 in advance of the filing of this bankruptcy?

1 A. About two weeks ago, I think, I received this.

2 Q. And the column "Accelerated processes," and there's a
3 footnote two that indicates the timing with respect to that
4 sale process, and what was the timing for that?

00:10:16 5 A. Well, the accelerated process as the note says was
6 approximately sixty days and the orderly process was ninety
7 days.

8 Q. Okay. And was this based on, as you understand it,
9 offers or letters of intent that had been received by the
00:10:34 10 company for these various assets?

11 A. Yes, discussions that the investment banker had with
12 the two groups involved and their speculation on what ECC,
13 Eastern, might bring in the market given conditions and what
14 they could sell the orange grove for independently.

00:10:58 15 Q. Okay. And again, this then shows a range on the
16 accelerated process, the low for all of the assets then
17 would be what?

18 A. The low would be \$35 million.

19 Q. And on the high side?

00:11:16 20 A. Would be 60 million.

21 Q. No, for the accelerated process.

22 A. Oh, I'm sorry, it would be 48 million.

23 Q. And the orderly process, the low would be?

24 A. 47.5 million.

00:11:34 25 Q. And the high?

1 A. Sixty million.

2 Q. All right. Now, let me turn your attention to Exhibit
3 2.

4 MR. LEPENE: Might I approach the witness,
00:12:08 5 Your Honor?

6 THE COURT: Sure. Is that the --

7 BY MR. LEPENE:

8 Q. And I would ask you to focus on the first two weeks in
9 the cash flow forecast that would address the company's
00:12:30 10 immediate needs, and if the company were not able to obtain
11 the DIP financing that is being offered by EFO, can you go
12 through this -- again now let's do it first week and then
13 second week -- and indicate what the company's cash needs
14 would be under that circumstance, again presuming that EFO
00:13:10 15 is not going to provide financing and, therefore, no fees
16 would need to be paid to them in that regard.

17 A. Okay. So it would be more of a business as usual?

18 Q. Yes, from an operational standpoint, what -- what is
19 the amount of cash that they need?

00:13:44 20 A. So, in essence, which of these items would -- would
21 not be applicable in that scenario.

22 Q. Well, yeah, and let's just go through the categories.

23 We obviously have cash receipts, correct, that
24 would be coming in?

00:14:04 25 A. Cash receipts would be coming in.

1 Q. Right. And then with respect to the disbursements, I
2 presume would payroll continue to have to be paid?

3 A. Payroll would be paid, correct.

4 Q. All right. And the -- the additional operating
00:14:22 5 disbursements, assuming the Court permits the professional
6 fee escrow to be funded, would all of those have to be paid?

7 A. Could you repeat, please?

8 Q. Assuming the Court authorizes the payment of a
9 professional fee escrow, do you see that on the schedule?

00:14:36 10 A. Yes.

11 Q. Would that -- would all of those operating
12 disbursements then need to be paid?

13 A. Yes, they would.

14 Q. All right.

00:14:50 15 A. But moving back up, there is one line item, health and
16 welfare, ACH --

17 Q. Yes.

18 A. -- some of that may be able to be spread.

19 It would certainly be an effort in these type
00:15:38 20 of situations that one would try to spread that out and make
21 arrangements, which is a sizable number.

22 Q. I take it, again, if the debtor were denied the
23 ability to borrow from EFO, then none of the fees payable to
24 EFO would have to be funded, correct?

00:16:24 25 A. Correct.

1 Q. All right. So are you able to tell me, then, based on
2 that type of analysis, and if the debtor is able to access
3 the cash that is being collected from receivables
4 pre-petition in the first week, what would the cash need be?

00:16:46 5 A. Just quickly I would project, you know, a half a
6 million to 600,000 range.

7 Q. In terms of a need for debtor-in-possession financing
8 from some source?

9 A. Debtor-in-possession, yeah, some financing of some
00:17:16 10 sort.

11 Q. Such as the pre-petition lenders?

12 A. Correct.

13 Q. All right. And what is the situation in the second
14 week?

00:17:22 15 A. Second week, based on the projections, it looks like
16 the cash flow is positive that week, without any infusions.

17 Q. All right. So during that first two-week period, if
18 the debtor is able to access cash collateral with the
19 consent of the DIP lenders, and a small DIP financing
00:18:56 20 arrangement were approved, the debtor would be able to
21 operate without the need to draw down three and a half
22 million dollars from the -- from EFO, is that right?

23 A. Yes.

24 MR. LEPENE: If I could have a minute, Your
00:19:24 25 Honor.

1 THE COURT: Sure.

2 (Pause).

3 BY MR. LEPENE:

4 Q. In addition to what is shown on the cash flow
00:20:00 5 forecasts, Mr. Wanat, Debtors' Exhibit 2, do you know
6 whether the debtor currently has a cash balance in his bank
7 account?

8 A. Yes, I do.

9 Q. And do you know what that number is?

00:20:16 10 A. I thought it was, if I recall, in the four to 500,000
11 range.

12 Q. All right.

13 A. But I'm speculating a little.

14 Q. All right. So between the cash that is available,
00:20:30 15 assuming an agreement was reached with the DIP lenders,
16 consent was given, again the first week DIP financing
17 perhaps of no more than a half a million dollars and then in
18 the second week they're actually cash flow positive, is that
19 right?

00:20:56 20 A. Yes. That's what it appears based on these schedules.

21 Q. Okay.

22 MR. LEPENE: That's all the questions I have
23 for this witness, Your Honor.

24 THE COURT: All right.

00:21:12 25 MR. MERKLIN: Thank you, Your Honor.

1 CROSS-EXAMINATION OF ROBERT WANAT

2 BY MR. MERKLIN:

3 Q. Sir, I think you acknowledge that the -- that the
4 orange grove that you saw is an operating orange grove?5 A. Correct.
00:21:226 Q. And I think in the discussions you described in the
7 car with the company officials and the Parkland
8 representatives and the appraiser, that it was discussed
9 that it was an operating orange grove?10 A. Correct.
00:21:4611 Q. And, in fact, do you have any reason to question the
12 testimony that it, in fact, as a separate unit, the cash
13 flow was positive?

14 A. Correct.

15 Q. So there's no compelling reason to liquidate that
16 asset right now, is there?

17 A. In that context, no.

18 Q. And, therefore, if higher value could be obtained over
19 a longer period of time than sixty or ninety days, that
20 would make sense, wouldn't it?
00:22:5021 A. Provided the net return of the fund, the operating
22 losses were exceeded by the increased value.23 Q. What operating losses are achieved with respect to the
24 orange grove. It's making money, isn't it?25 A. The -- it's making money.
00:23:14

1 Q. So for the purposes of that orange grove, you would
2 agree with me that using a liquidation value isn't necessary
3 because it's an operating and going concern?

4 A. But all funds are commingled at the company.

00:23:30 5 Q. Well, I'm talking about the orange grove.

6 A. The orange grove?

7 Q. Are you telling me that it makes sense to liquidate
8 that asset within sixty or ninety days based on the orange
9 grove's value?

00:23:46 10 A. As a stand-alone entity, if it was a stand-alone
11 entity, not linked to the other companies, yes.

12 Q. Is it currently a stand-alone entity in the sense of
13 it's generating positive cash flow even with management?

14 A. No.

00:24:18 15 Q. So you don't believe it's generating positive cash
16 flow?

17 A. It's generating positive cash flow, but all the cash
18 flow, all the banking are all commingled under one entity.

19 Q. The -- you're not an expert, sir, on the price of
00:25:02 20 limestone, are you?

21 A. No.

22 Q. And you're not an expert on the price of aggregates?

23 A. No.

24 Q. Let me ask you about Respondent's Exhibit -- I can't
00:25:20 25 recall if it was marked as Exhibit 1 or A, but it's the -- I

1 showed that to you.

2 A. Yes.

3 Q. Do you have that in front of you?

4 A. Yeah. Yeah.

00:25:52 5 Q. This is essentially a liquidation analysis, isn't it?

6 A. What's your definition of "liquidation," please?

7 Q. Well, it proposes a sale within 30 -- within 60 to 90
8 days of these assets, correct?

9 A. An accelerated sale process.

00:26:18 10 Q. So it's a liquidation sale?

11 A. I -- I need more clarification on what you mean by --

12 Q. Well, it's an attempt to come up with an orderly
13 liquidation process valuation, is it not?

14 A. It's -- from what I understand, the purpose of this
00:26:38 15 document was to show what could be realized in a 60 to 90
16 day process to stem the operating losses at the company and,
17 you know, satisfy the debts that have been approved to date.

18 Q. So it contemplates again a 60 to 90 day process?

19 A. Sixty to 90 day process to sell the --

00:27:36 20 Q. And you were in the turnaround -- I'm sorry.

21 I'm sorry, I didn't mean to interrupt you.

22 A. To sell the company.

23 Q. And you are in the turnaround business, sir, are you
24 not?

00:28:02 25 A. Yes.

1 Q. And you heard testimony from Mr. Cesar earlier about
2 his experience in the turnaround industry?

3 A. Yes.

4 Q. And you heard his suggestion that this was at least a
00:28:22 5 five or six month process to try to find a buyer. Did you
6 hear that testimony?

7 A. I heard him say that.

8 Q. And you disagree with that?

9 A. Do not disagree with that.

00:28:32 10 Q. So you don't disagree that five or six months to find
11 a going concern buyer would not be unreasonable?

12 A. Depending on the cash flow, cash burn, the
13 requirements. It ends up, you have to look at it at the net
14 cash flow.

00:28:56 15 You know, can I give you an example of what
16 I'm trying to say?

17 Q. Well, let me -- let me ask the questions a little
18 different.

19 You mentioned that the company could operate
00:30:04 20 by using its cash receipts that are currently shown as the
21 cash collateral of the bank in a budget?

22 A. Yes.

23 Q. But you'd acknowledge that to do so, we would have to
24 provide the bank adequate protection, is that your
00:30:26 25 understanding at least?

1 A. That would be my understanding.

2 Q. And that adequate protection analysis is the same
3 analysis we're talking about right now with regard to DIP
4 financing?

00:30:58 5 A. It would be continuing the status quo to bring the
6 case to an orderly conclusion.

7 Q. So if Mr. Lepene is correct in his arguments that we
8 aren't adequately protecting the bank on DIP financing, I
9 can't adequately protect the bank on the use of that cash,
00:31:34 10 can I?

11 A. It is a risk factor.

12 Q. You suggested that we -- we can spread the health care
13 costs, correct?

14 A. They have -- yes.

00:31:58 15 Q. Do you have health insurance with your employer?

16 A. I do.

17 Q. Do you expect that your medical bills get paid by your
18 employer-provided insurance?

19 A. Yes.

00:32:06 20 Q. The company here is self-funded, is it not?

21 A. I believe it is.

22 Q. So you're suggesting that the employees ought to just
23 sit back and not have their medical bills paid for a while,
24 right?

00:32:46 25 A. These are extraordinary times for the company.

1 Q. And, in fact, you'd suggest that we throw them out of
2 work in 60 or 90 days and not pay their health insurance
3 either, correct?

4 MR. LEPENE: That's not fair.

00:33:20 5 A. I'm not suggesting that at all, sir.

6 MR. LEPENE: That's not fair.

7 MR. MERKLIN: I withdraw the question, Your
8 Honor. I'm sorry.

9 BY MR. MERKLIN:

00:33:54 10 Q. The appraiser you talked to when you did the tour of
11 the orange grove, he was giving you the valuation he did as
12 an orange grove, correct?

13 A. Correct.

14 Q. He had not looked at the value as a quarry, to your
00:34:12 15 knowledge?

16 A. To my knowledge, no.

17 Q. So he hadn't provided any valuation with regard to any
18 of the mineral deposits that are under the land?

19 A. He was aware of them.

00:34:22 20 Q. But he didn't indicate that was part of his valuation,
21 correct?

22 A. I cannot speculate to what he was thinking.

23 Q. He didn't tell you that?

24 A. He didn't tell me or did not tell me.

00:34:50 25 MR. MERKLIN: Could I have a few moments, Your

1 Honor?

2 THE COURT: Sure.

3 (Pause).

4 BY MR. MERKLIN:

00:35:24 5 Q. In that conversation you had with the appraiser,
6 Mr. Gaddar was present for those -- at that meeting?

7 A. We were together in the car, you know, for several
8 hours.

9 Q. Is it accurate that the appraiser indicated to you
00:35:38 10 that he was not qualified to appraise the minerals?

11 A. He made no reference.

12 Q. Okay.

13 MR. MERKLIN: No other questions, Your Honor.

14 THE COURT: Okay.

00:35:52 15 REDIRECT EXAMINATION OF ROBERT WANAT

16 BY MR. LEPENE:

17 Q. All right. Mr. Wanat, you indicated when Mr. Merklin
18 was questioning you, you wanted to give an example.

19 Frankly, I've lost track of the question, but
00:36:06 20 if you still -- if you remember the question and want to
21 give an example, I want to give you an opportunity to do so.

22 A. As best I recall the question, it had to do with, you
23 know, taking a longer time to try to market the property.

24 Mr. Cesar said, you know, five, six months
00:36:24 25 would be better.

1 It's been discussed to try to accelerate for
2 90 days. And the rationale for the 90 days is based on what
3 was testified, I forget who spoke about it this morning, it
4 might have been Mr. Cesar, that the company is bleeding cash
00:36:42 5 profusely, by the day, by the week; you know, give or take
6 anywhere from 250,000 to \$500,000 negative cash flow,
7 meaning that the revenue coming in is 500,000 less on some
8 weeks than the expenses that it needs to cover.

9 To extend, you know, in that process by the
00:37:10 10 documents that we see in front of us, Exhibits 1 or 2, shows
11 that those losses are going to continue, not at a higher
12 rate, but will continue through at least August, which
13 indicates that, you know, revenues again are going to be
14 insufficient to cover the losses.

00:38:24 15 The losses will continue to rack up and it
16 will -- will be diminishing the value of the assets.

17 You know, it's already been reported that 4.2
18 million of the assets will be sold, you know, which will
19 reduce the value of the estate, the collateral value, just
00:38:52 20 to minimize the amount of funding that's required from
21 whoever the entity is that might provide it.

22 It's like, you know, the example I wanted to
23 provide was, you know, yes, five months might be better in
24 certain circumstances, but in this one, you know, my opinion
00:39:12 25 is it's not because of the cash burn rate.

1 It's like I'll spend an extra \$2, you know, on
2 this entity to maybe get a dollar back extra return. There
3 is no ROI; it's negative. So I'm going to risk \$2 to maybe
4 get two back, be a wash, more than likely get a dollar back
00:39:50 5 because by their own projections and, you know, I'm not an
6 economist or anything, but we all read the paper, and the
7 Florida market, you know, housing is not coming back this
8 year in Florida construction. It's highly unlikely.

9 And to speculate that it might, you know, is
00:40:16 10 speculating, you know, at the expense of the estate because
11 it's an unlikely event.

12 It's unfortunate, but, you know, these are the
13 hands that we were dealt with, and we have to, you know,
14 make the best of bad situations.

00:40:34 15 MR. LEPENE: All right. Your Honor, that's
16 all the questions that I have.

17 THE COURT: Go ahead.

18 MR. MERKLIN: Very briefly, Your Honor.

19 REXCROSS-EXAMINATION OF ROBERT WANAT

00:40:42 20 BY MR. MERKLIN:

21 Q. Sir, you would agree with me that the words "operating
22 loss" -- that the words "negative cash" and "loss" are not
23 synonymous?

24 A. Correct.

00:40:50 25 MR. MERKLIN: No other questions.

1 THE COURT: Do you have anything else?

2 MR. LEPENE: No, Your Honor.

3 THE COURT: You can go ahead and return to
4 your seat.

00:40:58 5 (Witness excused)

6 THE COURT: Go ahead.

7 MR. LEPENE: Your Honor, we have no further
8 witnesses to present.

9 THE COURT: Okay. So you want to put in
07:58:20 10 Exhibit A?

11 MR. LEPENE: We do.

12 THE COURT: Okay.

13 MR. LEPENE: Oh, I'm sorry, Your Honor,
14 Mr. DeMarco had requested and we would agree if we could put
07:58:34 15 Exhibit A under seal since it does have information
16 regarding potential sales.

17 And from a -- the standpoint of the marketing
18 effort that may be undertaken in the future, it probably
19 would be best if that particular exhibit were placed under
07:59:14 20 seal and not made part of the public record or the record
21 that was accessible to the public.

22 THE COURT: Yeah. That's fine.

23 And you didn't have any particular objection
24 to the admission of that, I take it?

07:59:28 25 MR. MERKLIN: Not for the purposes it's

1 produced, Your Honor.

2 THE COURT: Right. Okay. Falls back to you.

3 MR. MERKLIN: Your Honor, we -- we have no
4 other witnesses.

07:59:52 5 I would like the opportunity to make a final
6 argument based on the evidence that's been put before the
7 Court today.

8 THE COURT: Okay. How long would you like;
9 five minutes?

08:00:00 10 MR. MERKLIN: Five to ten minutes at maximum,
11 if even that long.

12 THE COURT: Okay. Can you go right now?

13 MR. MERKLIN: I could.

14 THE COURT: Okay. Let's go ahead.

08:00:12 15 MR. MERKLIN: Your Honor, the request we made
16 today is for the entry of an order that will provide for DIP
17 financing for a period calculated to get us through the date
18 where the Court can conduct a hearing on a final order for
19 interim financing for a period calculated to get us through
08:01:40 20 the date where the Court can conduct a hearing on a final
21 order for DIP financing for the entire facility.

22 So what we're talking about is a period of
23 approximately two weeks, and DIP financing in that two-week
24 period of \$3.5 million.

08:01:56 25 Looking at the elements that we were required

1 to establish under the case law and under Section 364 of the
2 Bankruptcy Code, I believe that we have clearly met that
3 burden.

4 First, we have provided evidence that was
08:02:14 5 uncontroverted that there was efforts made by the company to
6 obtain both unsecured credit, credit secured by other
7 financing or junior liens, and other ways of getting use of
8 creditors' money through unsecured trade debt that would
9 permit the company to operate in Chapter 11, and that that
08:02:42 10 was not possible.

11 The only alternative, one suggested by the
12 lenders, was to accept DIP financing that had a huge string
13 attached to it, and that was the requirement that we
14 liquidate the company within 60 to 90 days, the result of
08:03:00 15 which based on the exhibit propounded by the respondent
16 would clearly be a -- a lower valuation in their view.

17 So we don't believe that we have failed at all
18 to meet the burden of showing that we made reasonable
19 efforts to find an alternative other than the DIP financing
08:03:14 20 proposed by EFO.

21 Your Honor, there is no testimony that EFO has
22 any connection whatsoever to the debtor, any other party,
23 that the negotiations with it were anything other than on
24 the board, up front, arm's length negotiations, and there's
08:03:30 25 no reason that on the record whatsoever that this Court

1 could not make a finding of good faith with respect to their
2 proposal to submit to DIP financing to allow the debtor to
3 operate.

4 That leaves, Your Honor, the issue of whether
08:03:54 5 or not the debtors have necessary expenses to expend and
6 whether or not the lenders are adequately protected.

7 We've had testimony with respect to the budget
8 that that need is \$3.5 million. Although the respondents
9 had some evidence that with the use of cash of about a
08:04:16 10 million and a half dollars of cash collateral and what they
11 perceived to be a half million dollars, and with not paying
12 certain other expenses, that the debtors could perhaps get
13 by without the DIP financing, that is not the option before
14 the Court today.

08:04:34 15 There is no proposal to use cash collateral.
16 There is no acceptable proposal by the lenders to provide
17 DIP financing. So what is an option is illusory at best and
18 it is not an option that is before the Court, and it has not
19 been an offer made to the debtors that's been acceptable,
08:04:48 20 and we've explained the reasons for that.

21 With regard to adequate protection, obviously,
22 Your Honor, there needs to be evidence presented at the
23 final hearing, but if we run through the math, even based on
24 some of the conservative numbers on orderly liquidation
08:05:02 25 value that we heard today, we believe that we have

1 established a sufficient equity cushion.

2 In fact, Your Honor, I would submit that based
3 upon the testimony alone, there is no reason to use orderly
4 liquidation value with respect to the quarry which is an
08:05:24 5 operating orange grove. No one has suggested that it should
6 be liquidated. No one has suggested that it is appropriate
7 to look at it at anything less than fair market value.

8 If I can direct your attention, Your Honor, to
9 Exhibit 1, and again if we go to the bottom line for
08:05:46 10 illustration of the numbers here, based on the orderly
11 liquidation values of the appraisals that were summarized
12 here, we had real estate valued at about \$49.3 million, of
13 which the orange grove was valued at only 26.6 million even
14 though we have a more recent appraisal that even as an
08:06:14 15 orange grove values at approximately \$7 million higher.

16 So even using the most conservative figure on
17 this page, which is the orderly liquidation value, we have
18 \$49,326,667 in value.

19 Your Honor, to that, if you add in the
08:06:40 20 \$14 million of equipment which again was stipulated to the
21 orderly liquidation value, not going concern value, you have
22 approximately \$63 million and you add to that, Your Honor,
23 at least \$9 million in working capital based on the
24 testimony that was before the Court, so you have \$72 million
08:07:06 25 at the lowest range of that valuation.

1 And that's assuming, again, the lowest value
2 range.

3 If we add to that even any modicum of the
4 differential in value between going concern and liquidation
08:07:28 5 value for the orange grove or the quarry property alone,
6 that that number would be -- would expand by at least
7 \$7 million and, frankly, based on the \$40 million appraisal
8 done in the fall would expand by more than \$14 million.

9 The current debt to the lender group is
08:07:52 10 approximately \$57 million. With the three and a half
11 million dollars DIP financing, that's --

12 THE COURT: Is that --

13 MR. MERKLIN: I'm sorry, Your Honor?

14 THE COURT: The current debt to the lending
08:08:16 15 group you say is what?

16 MR. MERKLIN: 57 million. And that consists
17 of the Term Loan A, Term Loan B which total about
18 \$60 million -- I'm sorry -- which total -- I'll get those
19 totals for Your Honor -- about \$50 million, and there's
08:09:00 20 about \$5.8 million I believe was the testimony regarding
21 what the revolving piece is as of today.

22 So we're looking at approximately somewhere in
23 the range of 57 or \$58 million in current debt to the
24 existing lender group.

08:09:28 25 If you add in the three and a half million

1 dollars emergency advance under the DIP facility, we're
2 looking at total secured debt of about \$60,500,000 even
3 under the most conservative of approaches.

4 If you suggest, as the cases have suggested,
08:09:52 5 that a 20% equity cushion is more than adequate, that means
6 the value has to be more than about \$72 million.

7 As I've just run through the numbers, we are
8 there even on the conservative basis. And particularly
9 given that this is a two-week motion, we don't believe that
08:10:06 10 there is any testimony that the cash burn for this company
11 is going to substantially eat into that 20% equity cushion
12 in the next two weeks.

13 Given those circumstances, we believe the
14 debtors should be permitted to operate, should be permitted
08:10:22 15 to engage in the DIP financing in order to keep this company
16 operating and keep its employees employed, and that we
17 should be permitted then at the final hearing to put on
18 evidence as to the fair value of these assets, and to seek
19 at that time approval of the entire DIP facility.

08:10:48 20 Thank you, Your Honor.

21 THE COURT: Thanks.

22 MR. LEPENE: Thank you, Your Honor, and thank
23 you for taking the time to hear us this morning and
24 afternoon.

08:11:08 25 Your Honor, I would submit to you that the

1 granting of a priming lien that would be superior to a
2 contractual pre-petition security interest granted prior to
3 the filing is a very serious step. This is not something
4 that can be done routinely. I know the Court understands
08:11:34 5 that.

6 What I would further submit is that before one
7 starts to permit layering on priming liens, again that have
8 this -- this status ahead of pre-petition perfected security
9 interests, one needs to look at the viability of the entire
08:12:02 10 program that is being proposed.

11 You have received a lot of evidence today. I
12 think we can pretty much get a sense of where this case is
13 going, frankly, from the evidence that was presented today.

14 And what does that evidence show?

08:12:20 15 That evidence shows that this debtor is
16 bleeding cash, and that's, frankly, that's the only way to
17 characterize it. Between now and the end of August, and
18 that's well into their season, you've got \$11.2 million of
19 cash that will be lost.

08:12:42 20 We're not talking about losses. Mr. Merklin
21 was right, there is a difference between loss and cash.
22 We're talking about cash here. \$11.2 million of cash that
23 will be lost in that regard.

24 And on top of that, you've got to add the
08:12:58 25 \$4.2 million of proceeds from the sale of the pre-petition

1 lenders collateral that will be consumed in this losing
2 operation.

3 The evidence is uncontroverted, the time here
4 is very much of the essence. This is why we have taken the
08:15:08 5 position that we have. And again, I think, Your Honor, in
6 evaluating all of this, you've got to take all of that into
7 account in making ultimately what you believe is the correct
8 decision.

9 The reason that we are saying that an
08:15:24 10 expedited sale process is really the only viable way
11 forward, it's not something that we created. And I
12 understand, you know, it's not necessarily their fault.
13 We're all the victims of the economic conditions that we
14 face, but nonetheless we have to face them. That's the
08:15:42 15 reality of the situation.

16 And so the evidence that is before you
17 uncontroverted establishes that this debtor simply is not
18 viable on any extended basis. They themselves have not
19 produced any evidence to show that this situation is going
08:16:06 20 to turn around. That's their burden, and they have not come
21 forward with any evidence to demonstrate that at all.

22 And so, Your Honor, what you have in terms of
23 the situation that we're faced with is clearly the lack of
24 adequate protection, again in the context of the overall
08:16:32 25 program that they are proposing.

1 And what is that program? Because again, I
2 don't think you can isolate and divorce that from the
3 determination that you have to make.

4 They want to get authority ultimately to put
08:16:46 5 on \$18 million of senior security debt that would prime the
6 existing pre-petition debt. When you look at the losses,
7 the cash that is being burned, and you add on top of that
8 that tremendous amount of secured debt, there is no
9 demonstration of adequate protection. And they aren't going
08:17:14 10 to be able to demonstrate adequate protection. And again I
11 think the evidence that has been presented today undeniably
12 establishes that they're not going to be able ultimately to
13 sustain their burden with respect to that.

14 And then, Your Honor, what they've come
08:17:34 15 forward with in what can only best be characterized as a one
16 minute left in the fourth quarter Hail Mary pass to the end
17 zone is the appraisal that they offered you with respect to
18 the orange grove. And you heard the testimony with respect
19 to that.

08:17:54 20 I think the last statement that the witness
21 made on the witness stand in response to a question I put to
22 him summarizes it all. He testified that his appraisal was
23 speculative; not my word, his word.

24 Based on that, Your Honor, there is not going
08:18:12 25 to be any basis upon which you're going to be able to rely

1 on that appraisal as a foundation for determining that we
2 are adequately protected.

3 The evidence is simply not there. It's never
4 going to be there.

08:18:56 5 When you couple that with the fact that what
6 they're asking you to do is approve an interim financing,
7 pay out all of these fees, the number, I don't have the
8 exhibit in front of me, I think it was something like
9 \$2 million in fees that are going to get paid to EFO, and
08:19:24 10 they have the ability, after incrementally advancing money
11 and collecting fees, to ultimately walk away a month from
12 now or perhaps even later, depending on when the last item
13 of due diligence is provided to them, and Mr. Wanat
14 testified if that happens, we're looking at liquidation, the
08:20:24 15 company will have no cash with which to continue to operate.

16 So have they satisfied their burden here, Your
17 Honor? They haven't even come close.

18 Now, what I said in my opening remarks, is
19 there an alternative? Are we suggesting that there needs to
08:20:48 20 be a shutdown of this facility and all of these people get
21 thrown out of work and health care benefits not get paid?
22 We are not suggesting that at all.

23 We have indicated and we stand ready to
24 provide reasonable use of cash collateral and DIP financing
08:21:10 25 tied into a reasonable sale process that I heard, in terms

1 of the testimony, you know what our dispute is right now?
2 We're trying to rationalize between whether it ought to be a
3 90 day period or a five month period.

4 And you heard the testimony just a few minutes
08:21:56 5 ago from Mr. Wanat as to why we feel, given the tremendous
6 cash erosion and loss in this case, it needs to be an
7 expedited, and we think appropriate, 90 day basis.

8 But the fact is there are alternatives.
9 Rather than spending all of this time and having them march
08:22:24 10 down a path that inevitably is going to lead to, I believe,
11 a determination that we are not adequately protected and
12 possibly, if they get their wish today, that we'll now be
13 faced with a priming lien of three and a half million
14 dollars ahead of us is just going to further complicate the
08:22:44 15 situation, I suggest the time would be much better spent if
16 we were working together towards a solution that would
17 enable us to consent to the use of cash collateral, provide
18 the necessary DIP financing tied into a reasonable sale
19 process, and maximize the recovery for the benefit of the
08:23:04 20 estate and its creditors.

21 That's all that we are asking for, and,
22 therefore, we would hope that the Court would see fit to
23 deny the motion and urge the parties to immediately engage
24 in discussions relative to the use of cash collateral on an
08:23:20 25 interim basis, and then on a more permanent basis that would

1 permit the implementation of a sensible sale process as a
2 way to move forward.

3 Thank you, Your Honor.

4 THE COURT: Thank you.

08:23:36 5 Do you want a couple -- just a minute or two?

6 MR. MERKLIN: Just a brief response, Your
7 Honor.

8 First of all, Mr. Lepene and I have a
9 fundamental disagreement on the viability of the business,
08:23:52 10 and obviously there was not a lot of testimony today and
11 there would be considerably more at the final hearing on
12 that issue, but the fact is I -- he has indicated that there
13 is not a viable business here.

14 We couldn't disagree more strongly. He's
08:24:28 15 indicated that the -- that Your Honor should determine
16 basically that the fact that they have offered to negotiate
17 DIP financing with us is dispositive of this Court's ability
18 to approve the third party DIP financing we've put before
19 you.

08:24:42 20 They have no case citations for that. In
21 fact, as I've indicated in my argument and as Mr. Lepene has
22 admitted, that financing comes at a heavy cost and that cost
23 is a sale process that is quick and that is not necessarily
24 in the interests of the creditors, the employees, and the
08:24:58 25 other constituents in this case.

1 As Mr. Gaddar -- I'm sorry -- as Mr. Cesar
2 testified to, a sale process could take five to six months,
3 if there were to be such a process, but that the company, he
4 believed, and testified, can certainly reorganize. And
08:25:20 5 that's what we're here for. That's what the Bankruptcy Code
6 provides is that opportunity.

7 And Chapter 11 is simply not "Let's liquidate
8 the bank's collateral as quickly as we can so that they can
9 go home and everyone else can fend for themselves."

08:25:38 10 That's not why we're here.

11 Finally, Your Honor, with respect to the
12 so-called speculative appraisal, if I could use by analogy
13 the fact that if I go home this evening to my home and I
14 find out that I'm sitting on a gold mine and there's
08:25:52 15 literally gold under my home but it's not currently zoned to
16 be residentially mined, it's zoned for residential use, not
17 a mine, that doesn't mean you pretend it doesn't have gold
18 under it.

19 Now, we will obviously have considerably
08:26:04 20 greater testimony at some future point and the proof will be
21 in the pudding if we are able to extract those minerals and
22 make value there, but the fact is it is not speculative to
23 suggest that there is 190 million metric tons of mineral and
24 that that mineral has a market price.

08:26:36 25 So we don't believe it's speculative. We

1 believe that, in fact, it shows that there is a viable
2 business that is potentially here and that should be
3 salvaged, and we believe we've met every threshold for this
4 interim financing to allow this company to get through the
08:26:58 5 next two weeks when this Court can consider the final DIP
6 financing.

7 Thank you, Your Honor.

8 THE COURT: Thanks.

9 Give me about 15 minutes and I'll let you know
08:27:06 10 where we stand at that point.

11 THE CLERK: All rise.

12 (Recess taken).

13 THE CLERK: All rise. Be seated.

14 THE COURT: Well, thanks for -- thanks for
08:28:36 15 your time to all of you. To those of you that actually paid
16 attention, really thank you.

17 This -- this is the Court's decision. In a
18 proceeding arising in a case referred to this Court by the
19 standing order of reference entered in the Northern District
08:28:58 20 of Ohio and is a court proceeding pursuant to 28, U.S.C.,
21 Section 137(b)(2), this oral decision, limited as it may be,
22 constitutes the Court's findings of fact and conclusions of
23 law pursuant to Bankruptcy Rule 7052.

24 And the Court notes that in coming to that
08:29:36 25 conclusion, it has considered the testimony of the witnesses

1 and the exhibits and all of the evidence that was introduced
2 of any nature.

3 With those preliminaries out of the way, the
4 Court finds that the debtor has carried its burden on an
08:29:52 5 expedited limited basis to satisfy Section 364, that they
6 made efforts to find credit on less onerous terms and, not
7 surprisingly, that under the current status of the debtor
8 were not able to find credit on better terms.

9 Further, that based on the limited nature of
08:30:12 10 the testimony and the evidence available today, that there
11 is a sufficient equity cushion based on the numbers as
12 summarized by Mr. Merklin in his -- in his closing argument.

13 Whether we look at this on a reasonable
14 liquidation basis or on a more of a fair market basis, there
08:30:30 15 would be sufficient grounds to find an equity cushion based
16 on the limited evidence that we had today.

17 Further, the Court doesn't find support for
18 the legal arguments in the brief of the Bank Group that
19 under Section 364, and then I looked a little more
08:30:50 20 substantially under Rule 4001 and I understand there are
21 limitations to that, for the proposition that there can't be
22 any priming lien borrowing prior to the final hearing.

23 I took it more from the language of 364, more
24 specifically from the language of the rule that the
08:31:10 25 borrowing can't be any more than is absolutely necessary for

1 the limited time period until a -- until a final hearing can
2 be commenced and concluded.

3 And based on that basis, and that basis alone,
4 the Court would allow limited borrowing on a priming basis
08:31:40 5 of three and a half million dollars until we can return here
6 on the first day following 15 days of the filing of the
7 motion.

8 Having said that, when we return, the Court
9 feels compelled to note that we haven't seen much of a plan
08:31:54 10 and I understand that this was a limited hearing, the debtor
11 didn't have a great deal of time, didn't want to try to keep
12 people here until 7:00 or 8:00 o'clock at night because
13 nobody wanted to be here until 7:00 or 8:00 o'clock at
14 night, including anybody sitting behind -- behind the Bench
08:32:16 15 here, that there are all those limitations in a preliminary
16 hearing, but having said that, when a debtor is hemorrhaging
17 cash at the rate of which this debtor is hemorrhaging cash,
18 that typical honeymoon period in a Chapter 11 is extremely
19 short, and short might be to the end of the day today.

08:32:50 20 There needs to be some end game. And the
21 testimony will have to be more compelling. The Court can't
22 help but notice what the Bank Group wants to say but is
23 trying not to say which is that the debtors don't have any
24 skin in the game and the lenders do.

08:33:22 25 And, thus, the willingness to throw dice on

1 one side of the table is much more compelling than the
2 other.

3 Moreover, the Court does note with some degree
4 of concern the argument made by the Bank Group and the
08:33:40 5 accuracy thereof that this is a loan on extremely onerous
6 terms, which it is a loan on extremely onerous terms which
7 is what you get when you have a debtor in this sort of
8 condition and you're asking for new cash, but the Court
9 would implore the parties to discuss this matter further.

08:33:58 10 I know everyone's done that and probably feels
11 they have gone as far as they can, but would implore the
12 parties to discuss this further, maybe today even if -- if
13 there's any sentiment for it at all before three and a half
14 million dollars is drawn.

08:34:18 15 I feel like it's a scene in a bad movie where
16 we're insisting on driving over the cliff together. And if
17 we have to do that, we'll do that and then we'll issue a
18 decision when we come back. And we'll either be three and a
19 half million more dollars down in terms of money that's been
08:34:46 20 put into a, what is currently a cash losing operation, or
21 perhaps more, depending on what the -- what the proof is
22 when we return.

23 So having said that, let's look at the
24 calendar and see when we can come back here.

08:35:00 25 Mr. Merklin, Mr. Lepene, I would think would

1 the 16th be the first day?

2 MR. MERKLIN: It would, Your Honor.

3 I would ask some indulgence, I return from out
4 of town that day and Ms. Bradley is in another hearing in
08:35:24 5 Akron Bankruptcy Court. If we could perhaps go to the 17th,
6 that would be much more -- much better for us.

7 THE COURT: Okay.

8 MR. LEPENE: Let me just check real quick,
9 Your Honor, if I might.

08:35:36 10 The 17th, St. Patrick's Day, will work just
11 fine.

12 THE COURT: Yeah, the parade here is about 50
13 feet long so you don't have to worry about that.

14 MR. LEPENE: Will there be green beer?

08:35:50 15 THE COURT: Having gone to college in Chicago,
16 I know what the difference is in the St. Patrick's Day
17 parades.

18 Yeah, wouldn't you know it? I've got a
19 dentist appointment that day. We'll break for that. I'll
08:36:16 20 have to leave a little bit before 11:00 and I guess we'll
21 just go to lunch then and we'll figure out when to come
22 back.

23 MR. LEPENE: We'll try not to exacerbate your
24 pain, Your Honor.

08:36:34 25 THE COURT: I always do enjoy the experience

1 so much.

2 Might not be able to tell when one stops and
3 the other one starts.

4 We would have the 18th available. I'm
08:36:54 5 thinking we should probably talk this week, somebody from
6 each side of the table, about how long you're actually going
7 to want to consume starting on the 17th.

8 We do have some time on the 18th, but I do
9 think, and I understand it's very difficult to do that today
08:37:12 10 because you're coming in here on such a limited basis,
11 you're struggling just to get documents together and you
12 don't have a great deal of time to prepare witnesses and
13 that sort of thing, but we'll have to be more efficient on
14 the 17th.

08:37:24 15 So I was going to suggest could we talk on the
16 phone on the afternoon of the 4th, which is this Thursday,
17 about maybe how we go forward on the 17th?

18 MR. MERKLIN: Your Honor, my grandfather
19 passed away, I'll be at a funeral that afternoon.

08:37:48 20 THE COURT: Okay.

21 MR. MERKLIN: But Ms. Bradley would be
22 available.

23 THE COURT: Okay. Well, how about the 5th?

24 MR. MERKLIN: Fifth would be fine, Your Honor.

08:37:58 25 THE COURT: Does that work for you,

1 Mr. Lepene?

2 MR. LEPENE: Yeah, it does, Your Honor.

3 THE COURT: Why don't we say the morning of
4 the 5th at 10:00?

08:38:10 5 And it will basically be trying to figure out
6 how we're going to limit the amount of time that this is
7 going to consume and still get in what you folks need to get
8 in, because it could wind up being very open-ended, and
9 probably if we have a conversation maybe we can help with
08:38:28 10 that.

11 So we will come back on the 17th.

12 Now, we had talked about coming back on those
13 first day motions on another date. Was that the 16th or
14 15th?

08:38:40 15 MS. GIANNIRAKIS: The 8th.

16 THE COURT: I'm sorry, the 8th.

17 What time did we talk about doing that? 2:00?

18 MR. LEPENE: 10:00 a.m.

19 THE COURT: Oh, at 10:00. Oh, yeah, that's
08:39:04 20 right, because the last thing we have there is a 9:00.

21 Does this change your thinking on that at all,
22 or you still want to come back on the 8th?

23 MR. MERKLIN: Whatever suits the Court, Your
24 Honor.

08:39:28 25 THE COURT: Well, we'll leave it there.

1 MR. MERKLIN: Sometime in the seven to 15 days
2 we should be back.

3 THE COURT: Yeah, that's fine. Think about
4 it. If there's a time that works better, if that makes you
08:39:44 5 think you want to put it off a little further for some
6 reason, I'll work with you.

7 We have the time on the 8th if you want to
8 leave it there.

9 And I guess, then make sure we covered
08:40:00 10 everything. Yeah, I think we did.

11 Go ahead.

12 A MALE SPEAKER: Yes, Your Honor. Would your
13 findings of fact also include a finding of good faith on
14 behalf of EFO?

08:40:16 15 THE COURT: Basically I was willing to accept
16 the order with the limitations I had expressed which was
17 just that it was three and a half million dollars.

18 A MALE SPEAKER: Thank you, Your Honor.

19 THE COURT: Mr. Merklin or Mr. Oscar, with
08:40:32 20 that, was there anything else you wanted to try to
21 accomplish today?

22 MR. OSCAR: Not today. Thank you, Your Honor.

23 MR. MERKLIN: No, Your Honor.

24 THE COURT: Okay. Mr. Lepene, anything else
08:40:52 25 you wanted to try to get done today?

1 MR. LEPENE: No, I don't think so.

2 I may wish to consult with Mr. Merklin
3 regarding some language in the order, and if we had any
4 issues with respect to that I assume we can bring them in to
5 you.

08:41:16

6 THE COURT: Yeah, and I'll be here tomorrow.

7 Okay, thanks. Hope you all have a good
8 evening.

9 MR. LEPENE: Thank you, Your Honor.

08:41:48

10 THE CLERK: All rise.

11 - - - - -

12 (Proceedings concluded)

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C E R T I F I C A T E

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2
3 I, Susan Trischan, within and for the State of Ohio,
4 do hereby certify that the above transcript is a true and
5 accurate record of the hearing held before Bankruptcy Judge
6 Russ Kendig. This record was prepared from a tape provided
7 by the Court.

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12
13 **/s/ Susan Trischan**

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