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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:) Case No. 11-13167 (KG)
) Chapter 11
FRIENDLY ICE CREAM CORPORATION,) (Jointly Administered)
et al.,)
) Courtroom No. 3
) 824 Market Street
Debtors.) Wilmington, Delaware 19801
)
)
) November 1, 2011
) 9:00 A.M.

TRANSCRIPT OF HEARING
BEFORE HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE

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1 (Court commenced at 9:49 a.m.)

2 THE COURT: Good morning, everyone. Thank you and
3 please be seated. I know you've been working hard this
4 morning and now it's my turn. Mr. Kwasteniet, good morning.

5 MR. KWASTENIET: Good morning, Your Honor. Ross
6 Kwasteniet from Kirkland & Ellis on behalf of the Debtors.

7 THE COURT: Do we have a Friendly's hearing or an
8 un-Friendly's hearing?

9 MR. KWASTENIET: It's a friendly hearing in large
10 part I believe, Your Honor.

11 THE COURT: All right.

12 MR. KWASTENIET: I am pleased to report that we have
13 resolved the Creditors Committee's objections to the DIP
14 motion and to the bid procedures, and we thank Your Honor for
15 accommodating us with extra time this morning. We used it
16 productively handwriting changes, and so various of us will
17 present different aspects of this, and we'll explain to Your
18 Honor the changes that we made.

19 I believe there may still be a few landlords who
20 have objections or concerns with respect to perhaps the DIP
21 and I think several as the bidding procedures, but then you
22 know we can talk about that as we go through it.

23 THE COURT: Very well.

24 MR. KWASTENIET: So I think maybe the best way to
25 proceed is to just start with the agenda.

1 THE COURT: Yes.

2 MR. KWASTENIET: There's a number of uncontested
3 matters at the beginning, Your Honor, that we can maybe clear
4 the decks and then get down to what exactly we've been doing
5 with the DIP and the bid procedures. And then there's a
6 series of dates that we'll need to discuss with Your Honor
7 and those will flow back through the documents. So, to clear
8 the brush, we start with the uncontested matters at the
9 beginning of the agenda.

10 Your Honor, the first matter is the Pachulski
11 retention application.

12 THE COURT: Yes.

13 MR. KWASTENIET: There were no objections, no
14 informal comments to that, so we have a clean form of order,
15 unless Your Honor has any questions on that.

16 THE COURT: I do not. No, I'm prepared to obviously
17 approve that application.

18 MR. KWASTENIET: Great. Thank you, Your Honor. The
19 next -- Your Honor, the next item on the agenda is the
20 Debtors' application to retain Zolfo Cooper as restructuring
21 advisor. I do have a form of blackline. We received
22 informal comments from the US Trustee's office, so if I may
23 approach, I'll hand you that blackline.

24 THE COURT: That will be fine.

25 MR. KWASTENIET: I'll identify for you those

1 comments.

2 THE COURT: Excellent. Thank you. Thank you, Mr.
3 Kwasteniet. Good morning.

4 MR. KWASTENIET: Your Honor, the changes to the
5 Zolfo Cooper order appear on the last page or the fourth page
6 of the blackline. There's a new paragraph 8 where Zolfo
7 Cooper agrees to file a notice of rate increase should they
8 increase the hourly rate of compensation for any individual
9 working on the engagement to in excess of \$1,000 per hour.
10 And then there's also a coordination paragraph. Your Honor,
11 this will appear in several other orders, where Zolfo agrees
12 to make reasonable efforts to coordinate with the Debtors'
13 other advisors to avoid duplication.

14 THE COURT: All right. Thank you.

15 MR. KWASTENIET: So with that, Your Honor, we'd ask
16 that you approve the Zolfo Cooper retention.

17 THE COURT: I will do so as revised. Yes.

18 MR. KWASTENIET: Okay. Thank you. Your Honor, the
19 next item on the agenda is the Debtors' application to retain
20 GA Keen as real estate advisors.

21 THE COURT: Yes.

22 MR. KWASTENIET: Your Honor, I likewise have a
23 blackline for the GA Keen retention, so if I may approach.

24 THE COURT: You certainly may, Mr. Kwasteniet. I'll
25 give you, I'll give you blanket permission to do so.

1 MR. KWASTENIET: Thank you.

2 THE COURT: You bet.

3 MR. KWASTENIET: Your Honor, the Office of the US
4 Trustee had several comments that we've resolved with respect
5 to the Keen retention. Your Honor, the Keen retention is in
6 large part success fee driven.

7 THE COURT: Yes.

8 MR. KWASTENIET: So to the extent that we're able to
9 negotiate rent savings at a particular store location, which
10 is, their primary mandate is to negotiate with landlords,
11 they're entitled to a formulaic, it's a 5 percent fee of the
12 cost savings per location. So we've requested that that be
13 subject to 330 review and simply payable.

14 There's also another part of their retention that
15 they may be providing services on an hourly basis. So for
16 anything that's not the formulaic success fee, that would be
17 subject to 330 review. And I think that we've worked out
18 language with the Trustee and with Keen that would resolve
19 the Trustee's objections.

20 THE COURT: All right.

21 MR. KWASTENIET: There's a lot of text there, Your
22 Honor, but that's the gist of it.

23 THE COURT: Yes. And there's indemnification
24 language revised and --

25 MR. KWASTENIET: Yes. And we've also added the

1 coordination provision --

2 THE COURT: Yes.

3 MR. KWASTENIET: -- at the end of the order.

4 THE COURT: All right. It is acceptable and I will
5 -- oh, I'm sorry, Mr. Dublin, forgive me.

6 MR. DUBLIN: That's okay, Your Honor.

7 THE COURT: I'm sorry.

8 MR. DUBLIN: Phil Dublin, Akin Gump on behalf of the
9 Committee. Your Honor, we had filed the limited objection to
10 Keen's retention.

11 THE COURT: Yes.

12 MR. DUBLIN: Our objection has been resolved in
13 connection with the resolution of the DIP issues, so we are
14 no longer pressing it.

15 THE COURT: All right. Thank you. Anyone else?
16 All right. Hearing no one else, I will approve the
17 retention.

18 MR. KWASTENIET: Thank you, Your Honor. The next
19 item on the agenda is the Debtors' application to retain
20 Kirkland & Ellis as restructuring counsel. Your Honor, I do
21 have a blackline of that order also.

22 THE COURT: Very well. Thank you.

23 MR. KWASTENIET: Your Honor, similar to the Zolfo
24 Cooper order, Kirkland has agreed to file a notice of a rate
25 increase with the Court if we increase the professional

1 hourly rate for any attorney working on this matter to in
2 excess of \$1,000 per hour. And with that addition, I believe
3 we're resolved US Trustee's concerns.

4 THE COURT: All right. Anyone else on this? All
5 right. I'm prepared to approve that. Thank you, Mr.
6 Kwasteniet.

7 MR. KWASTENIET: Thank you, Your Honor. Your Honor,
8 the next item, before we get to the next item on the agenda,
9 I have one housekeeping matter.

10 THE COURT: Sure.

11 MR. KWASTENIET: Which is, we've had several interim
12 orders approving the Debtors' first day wages motion. And at
13 the last hearing, there was additional limited relief granted
14 with respect to severance, certain severance benefits. We
15 were in an ongoing, I reported we were in ongoing discussions
16 with the Creditors Committee at that time, Your Honor, about
17 the full approval of the Debtors' proposed rank and file,
18 which is a non-insider severance program, Your Honor. We
19 have agreed to language with the Committee, so I'd like to
20 hand up a blackline of that order as well.

21 THE COURT: Yes please.

22 MR. KWASTENIET: It's not on the agenda, but it was
23 continued over from the last hearing. Thank you.

24 THE COURT: I understand. That's fine. Thank you.

25 MR. KWASTENIET: Your Honor, the changes appear on

1 the second, primarily on the second page of the blackline
2 where we've listed out specific categories of employees in
3 caps in terms of potential eligibility, the severance amounts
4 that they may be entitled to. And obviously we've deleted
5 the paragraph about the final hearing because we're not
6 scheduling another further hearing on this matter.

7 THE COURT: Okay. All right.

8 MR. KWASTENIET: So unless Your Honor has questions
9 or anybody wants to be heard on that, we ask Your Honor to
10 enter that order as well.

11 THE COURT: Anyone wish to be heard on this
12 application? All right. Hearing no one, I certainly think
13 that the payments are appropriate and are consensual or at
14 least not objected to, and I will approve the --

15 MR. KWASTENIET: In this case, we'll take that, Your
16 Honor.

17 THE COURT: Yes. That's right. I will approve the
18 request.

19 MR. KWASTENIET: Thank you, Your Honor.

20 The next item on the agenda -- we're moving into the
21 contested matters portion of the agenda -- is the Debtors'
22 motion for entry of order approving the bidding procedures.
23 Your Honor, I do have, we're going to have to do this in a
24 couple of stages. I have a blackline which is as of last
25 night, and then this morning the parties have handwritten

1 certain additional changes into that, so perhaps it makes the
2 most sense for me to hand up a blackline and then after I
3 walk through the blackline I can describe what has changed
4 and what will be handwritten in addition to the blacklined
5 changes.

6 THE COURT: All right. That's a good suggestion,
7 Mr. Kwasteniet. Thank you.

8 MR. KWASTENIET: This is a pretty thick order, so I
9 don't mean to spring it on you all at once. I'll do a page
10 flip, I'll try to identify the more material changes.
11 There's a number of points throughout the document where
12 we've built in consultation rights with the Creditors
13 Committee and that kind of thing, so I won't pause to
14 highlight all of those.

15 THE COURT: All right.

16 MR. KWASTENIET: Your Honor, the first change to
17 identify is on page 5. And this really brings us to the
18 calendar issue.

19 THE COURT: Right.

20 MR. KWASTENIET: We have, the Creditors Committee
21 has informed the Debtors that they intend to, and in fact
22 have already filed a preliminary objection to the allowance
23 of the Sun Capital second lien claims in this case, which is
24 relevant for purposes of the bid procedures because parties
25 in this case want to know if Sun's able to credit bid its

1 allowed second lien claims at the auction. So we have
2 discussed with the Creditors Committee trying to set a
3 hearing date for the claim objection issue, and to have that
4 occur prior to the bid deadline so that the allowance or
5 disallowance of the Sun second lien claim for purposes of
6 credit bidding at the auction is addressed and resolved prior
7 to the sequence of dates where we have bids due and we have
8 the auction and the sale hearing and the closing.

9 Your Honor, we had amongst ourselves --

10 THE COURT: Sure.

11 MR. KWASTENIET: -- tentatively discussed a trial
12 date in, I think to be prudent, maybe it's we reserve two
13 dates, but somewhere in the December 14, 15, 16 time range.

14 THE COURT: All right. How many days are you
15 thinking?

16 MR. KWASTENIET: I think the parties are hopeful
17 that it could be a one day matter, but I think reserving two
18 days is probably appropriate.

19 THE COURT: I see Mr. Qureshi is ready to speak.
20 Mr. Qureshi, good morning.

21 MR. QURESHI: Good morning, Your Honor. For the
22 record, Abid Qureshi, Akin Gump on behalf of the Committee.
23 We do indeed think and hope that one day will be sufficient,
24 but, Your Honor, we're very early into the process of course.

25 THE COURT: Yes.

1 MR. QURESHI: We also have a very compressed
2 schedule to get from here to there in terms of discovery. I
3 think the biggest variable in terms of hearing time is of
4 course it's premature to determine what we will be able to
5 stipulate to by the way of facts, and what may require
6 testimony.

7 THE COURT: Right.

8 MR. QURESHI: Whether there will be expert
9 testimony. So if Your Honor has the time, we think it would
10 indeed be prudent to reserve two days, but of course, we're
11 hoping that we can do it in one.

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

13 MR. QURESHI: Thank you.

14 THE COURT: Well, here's what I'm thinking because I
15 do have a two week trial, but it may be --

16 MR. QURESHI: Your Honor?

17 THE COURT: Yes, go ahead.

18 MR. QURESHI: If I may just address the two week
19 trial. My understanding from your clerk was that it was
20 Nortel.

21 THE COURT: Yes.

22 MR. QURESHI: And my understanding, Your Honor, is
23 that we had reserved those dates in connection with the
24 allocation motion that we filed way back when.

25 THE COURT: That's right.

1 MR. QURESHI: And as Your Honor knows, we've now
2 been ordered to mediation with the Canadian Judge. We don't
3 expect the mediation, we hope that commences soon, but
4 certainly we're not going to be having a trial in December.

5 THE COURT: It's helpful to have you here Mr.
6 Qureshi, and I was thinking the same thing frankly. But I
7 could do this -- why don't we do the 15th and the 16th? That's
8 at the end of that trial, just in case, I don't know if
9 something else, if the parties will want something else heard
10 in time that's been reserved for them, and that's the end of
11 the schedule.

12 MR. QURESHI: That's fine with us, Your Honor.
13 Thank you

14 THE COURT: All right.

15 MR. KWASTENIET: Very good, Your Honor. So --

16 MR. MILLER: Your Honor?

17 THE COURT: Oh, please.

18 MR. MILLER: Michael Miller from [indiscernible].

19 THE COURT: Come forward sir. Thank you. Yes, Mr.
20 Miller.

21 MR. MILLER: We understand the scheduling concerns.
22 Our objection was basically based on the idea that we had to
23 investigate and possibly file an objection which may involve
24 some evidentiary matters.

25 THE COURT: Yes.

1 MR. MILLER: We would hope to be able to include
2 whatever we would, objections we would have within this time
3 period, but we just want to make sure we understand that we
4 are trying to keep our ability to object and present an
5 objection subject to whatever scheduling [indiscernible] else
6 has.

7 THE COURT: Is there some overlap on the issues, Mr.
8 Miller?

9 MR. MILLER: Yes, there should be, yes sir.

10 THE COURT: All right. So you would also want to be
11 involved on those dates.

12 MR. MILLER: Yes sir.

13 THE COURT: And that's I assume acceptable to
14 everyone.

15 MR. KWASTENIET: It is, Your Honor. In fact we've
16 made a change to the proposed form of DIP order to clarify
17 that other parties in addition to just the Committee to the
18 extent they have objections, may raise them and it would be
19 our expectation to deal with them in the same timeframe.

20 THE COURT: Mr. Dublin?

21 MR. DUBLIN: And, Your Honor, we'll coordinate with
22 the PBGC just to make sure --

23 THE COURT: Okay.

24 MR. DUBLIN: -- that it'll be as seamless as
25 possible, and where there are issues that we both have that

1 are the same, we'll make sure that the presentation is
2 coherent for the Court so you're not hearing duplicate
3 arguments.

4 THE COURT: All right. Well what we'll do is this.
5 Hopefully by that time the budget for our guards outside will
6 have, you know, been expanded somewhat, and I think we should
7 probably be thinking maybe a 9:00 to 7:00 trial day if that's
8 workable for everyone so that we can accommodate all of the
9 issues and all of the testimony and so on. So let's figure
10 at 9:00 on the 15th, and the 16th. All right.

11 MR. MILLER: Thank you, Your Honor.

12 THE COURT: Thank you, Mr. Miller. And certainly I
13 understand that you will be participating.

14 MR. KWASTENIET: Very good, Your Honor. So with
15 those dates fixed, and again this is assuming that Your Honor
16 is able to decide the matter more or less contemporaneously
17 with the end of the trial or within you know a few days
18 thereafter.

19 THE COURT: I'll have a whole weekend.

20 MR. KWASTENIET: Right. The Debtors would propose
21 that bids be due on December the 20th.

22 THE COURT: Okay.

23 MR. KWASTENIET: That the auction occur on December
24 the 22nd.

25 THE COURT: Right.

1 MR. KWASTENIET: That objections to the sale, maybe
2 you'll fast forward to the sale hearing itself.

3 THE COURT: Okay. What are you looking for?

4 MR. KWASTENIET: Because that'll require us to be
5 back in front of Your Honor. We were thinking some time in
6 the December 28, 29, 30 timeframe. And I think we're fine
7 going towards the end of that timeframe. That may help
8 accommodate some of the concerns of the landlords about not
9 having enough time to evaluate adequate assurance in the
10 event that somebody other than the stalking horse wins the
11 bid.

12 THE COURT: Right. How about the 30th at 10:00?

13 MR. KWASTENIET: That would be great, Your Honor,
14 thank you.

15 THE COURT: Yes, Mr. Dublin.

16 MR. DUBLIN: Just one issue there, Your Honor. One
17 of the provisions that has been negotiated is that the extent
18 there's another party that is the winning bidder in
19 connection with the sale process, they'll be required to take
20 out the existing DIP that's provided by Wells Fargo in which
21 Sun, the current stalking horse bidder, has a participation,
22 so that they no longer have any ongoing funding obligations
23 for the new year when there are rent payments that are due
24 and the like under the company's leases. So if we are in a
25 situation where we're having the sale hearing on the 30th, and

1 we're also on that date presumably seeking interim approval
2 of a takeout replacement financing, it may just make it
3 difficult to actually fund that loan in advance of the new
4 year --

5 THE COURT: Yes.

6 MR. DUBLIN: -- because I believe the 30th is a
7 Friday.

8 THE COURT: It is. Well I could also do this, I
9 have another matter, but I could probably switch. I could do
10 it the 27th or the 29th. Does that help a little bit?

11 MR. KWASTENIET: The 29th may be, well -- yeah, Your
12 Honor, I think that the 29th may be the best date for a
13 variety of reasons.

14 THE COURT: All right. So I'll make a note to
15 switch the one hearing and we'll do Friendly's at 10:00.

16 MR. KWASTENIET: 10:00 on the 29th, Your Honor.

17 THE COURT: Yes.

18 MR. KWASTENIET: Very good. So with the hearing
19 date on the 29th we would then propose that objections to the
20 sale, including I guess this would be cure objections.

21 THE COURT: Right.

22 MR. KWASTENIET: Or adequate assurance demands.
23 I'll break those apart. Why don't we say that objections to
24 the sale are due on the 27th.

25 Your Honor, I think what we propose is that

1 objections to the sale be due the 22nd, and objections to
2 adequate assurance if somebody other than the stalking horse
3 is the winning bidder, because the landlords won't fairly
4 know that until after the auction which we're scheduling for
5 the 20th, or the 22nd, that objections to adequate assurance
6 would be due on the 27th, and then we would then resolve those
7 appearing on the 29th.

8 MR. LECHNER: [indiscernible] for the record that
9 there is an objection as to that scheduling.

10 THE COURT: Yes. I'm sorry, who is speaking? I'm
11 sorry.

12 MR. LECHNER: This is Matthew Lechner of Continental
13 Illinois. And we have a matter that's coming up shortly in
14 these proceedings today which relates to this, which is that
15 we feel among a couple of other points that this is too
16 accelerated of a schedule and we propose a date in February
17 for submission of bids.

18 THE COURT: All right.

19 MR. KWASTENIET: Your Honor, it's not clear to us
20 that Continental Illinois Bank is a party in interest in
21 these matters or is a creditor or what their standing is.

22 MR. LECHNER: We're not a creditor and we're not a
23 bank, it's a general purpose Delaware corporation, and as has
24 been made clear to Kirkland & Ellis, we have expressed
25 interest in potentially trying to submit a bid.

1 THE COURT: All right. Well --

2 MR. LECHNER: And this is a company that involves
3 hundreds of leases, complexities with regards to the pension
4 plan, issues regarding PBGC, and there's just no realistic
5 way that a competing bidder could evaluate this information
6 and mobilize a bid within the timeframe that they're
7 allowing. Absolutely impossible.

8 THE COURT: Mr. Stempel, good morning.

9 MR. STEMPEL: Your Honor, yes, good morning. Jim
10 Stempel on behalf of the Debtors. We placed, I don't know if
11 you've read this pleading. We placed this pleading in the
12 responses to the bid procedures objections.

13 THE COURT: Yes.

14 MR. STEMPEL: Because there was a sentence in it
15 that said, we should continue to marketing through like
16 February. Continental Illinois called me a couple of weeks
17 ago, or emailed me, never called me, Mr. Lechner emailed me
18 expressing a desire to be a potential bidder. They are not a
19 creditor, he's just [indiscernible] in the pleading. I'm
20 standing up here because it besmirched me by name.

21 But in any event, his business -- I told him and
22 referred him to our marketing representative at Duff &
23 Phelps. I notified him that he would likely as all of the
24 other potential purchasers will need to, sign a
25 confidentiality agreement and show their financial

1 wherewithal. He tells me it's inappropriate for him to have
2 to sign a confidentiality agreement, or anybody else, just to
3 buy a restaurant out of chapter 11.

4 Having said all that, and without getting into any
5 of the detail of his pleading, which has a numerous set of
6 unsubstantiated and inaccurate statements of the law and
7 fact, and Mr. Lechner has also advised me he's appearing on
8 behalf of a corporation without counsel.

9 But in any event, his business judgment as to what a
10 purchaser should do and how the process should be run clearly
11 should not surpass the business judgment of the Debtor, the
12 business judgment of the Creditors Committee with which this
13 whole process has been vetted, negotiated. And I suppose if
14 he is a legitimate buyer, and I have my doubts, that he can
15 follow the process that this Court approves. And if he meets
16 the qualifications, including \$5 or \$10 million deposit, \$5
17 million cash deposit, and he signs a confidentiality
18 agreement like everybody else will have to, and I think we've
19 got 25 of those already signed, then we'll deal with him.
20 But until then --

21 MR. LECHNER: Apparently though we're not the only
22 ones who are objecting to the process. The PBGC is also
23 objecting to it.

24 And if I may briefly state some of my
25 qualifications. I'm a chartered retirement plan specialist,

1 I'm a certified financial risk manager and fairly
2 knowledgeable with regard to companies that relate to retail
3 leases. So as to you know who is besmirching whom here, I
4 don't know if that's something the Court wants to spend time
5 on, but there is no question that they are compressing the
6 schedule of the bidding to serve their own interest, and
7 that's not right.

8 They also have an unfunded pension plan here
9 apparently, and to expect anybody to evaluate that situation
10 in a matter of a couple of weeks and come up with a financial
11 solution, is absolutely impossible, and it's self-serving to
12 their own interest and extremely detrimental to the interest
13 of the creditors and also of the pension plan participants.
14 And we have submitted a valid *ex parte* application which is
15 on the record for hearing today.

16 THE COURT: Well Mr. Lechner, at the moment, you
17 really don't have any standing to assert your objection,
18 you're not a creditor, you're not a bidder, you're a
19 potential bidder. But I hear your concern, and I will
20 overrule it. Anyone else?

21 Mr. Herman, good morning.

22 MR. HERMAN: Good morning, Your Honor. Neil
23 Herman, Morgan Lewis for the stalking horse bidder, and the
24 participant in the DIP loan and the related entities.

25 THE COURT: Right.

1 MR. HERMAN: That people have affectionately
2 referred to us as Sun or Sun Capital. Your Honor, on the
3 scheduling point --

4 THE COURT: Yes.

5 MR. HERMAN: As we mentioned in our papers, my
6 client has determined for various economic and financial
7 reasons that the amount of the DIP loan that we can fund has
8 to be capped at \$35 million. Sun Capital and its affiliates
9 are putting in large amounts of money, they put in 6 million
10 prepetition, they're putting in 35 million now, they're going
11 to have to also pay off the Wells revolver, the cure amounts
12 for all of the many, many contracts and leases to be assumed.
13 And at some point, the amount of money you put in passes a
14 line, a Rubicon, were a liquidation would be a better
15 recovery than trying to restart and save the business. And
16 we're very close to that line already. Therefore, a lot of
17 the scheduling that you're hearing today comes from the fact
18 that there's only \$35 million and not a penny more that can
19 be put into this company by the DIP lenders, and therefore,
20 when you work with that number, you realize you can't go into
21 January, so you can't, this objector wanted to go to
22 February.

23 On January 1st, you have millions of dollars of rent
24 due on the leases, and February you have millions of dollars
25 of rent that comes due again. So the process has to be done

1 because we all have to live within that \$35 million number.
2 This isn't a situation where there's another DIP lender
3 ready, willing and available in the hallway who's willing to
4 say 36 million or 40 million. So there's an economic reality
5 and we do raise it because other people may want to be
6 objecting about the deadline and the scheduling. But it all
7 comes down to the fact that the \$35 million runs out in the
8 last week of December and we're just not funding into
9 January.

10 THE COURT: All right. Thank you, Mr. Herman. Mr.
11 Dublin?

12 MR. DUBLIN: Your Honor, I don't want to get into a
13 debate with Mr. Herman. We obviously have agreement on what
14 the terms are going to be for the DIP, for the bid
15 procedures, for the sale process, for the timing on the
16 determination of the allowance of their claim, what people
17 are or may not be willing to do in the future with respect to
18 funding obligations, the amount that may actually be drawn on
19 the DIP as of the end of December, there are projections, but
20 nobody knows if they're going to be exceeded. So any
21 testimony that Mr. Herman just put on the record, let's just
22 note that it is just an advocacy for his client and the DIP
23 lender, and the results will prove what they prove. Thank
24 you.

25 THE COURT: Good morning.

1 MS. ROBERTS: Good morning, Your Honor. Susan
2 Roberts from Whiteford Taylor & Preston on behalf of
3 Dannestown Road Associates.

4 THE COURT: Yes.

5 MS. ROBERTS: My client, Dannestown, is a landlord
6 with respect to a shopping center lease. And there are some
7 additional other objections that Dannestown has to the entire
8 bidding procedure and sales procedure motion. But since
9 we're just on the matter of scheduling, the objection date
10 for the cure which is to be set on the same day as the
11 auction is a bit early and we would contend that at the very
12 least all objections should be able to be put in after the
13 auction and after we find out who the stalking horse, who the
14 actual successful bidder is so that the entire amount of
15 information is available.

16 And for one thing, the landlords don't have to make
17 more than one objection. The way they have it scheduled now
18 you have, if I'm understanding it correctly, a cure objection
19 due on the 22nd, and then a secondary deadline of the 22nd, the
20 27th, rather to object to the sale which means double duty for
21 counsel, double expense to the clients. And so at a minimum,
22 aside from our objections to the fast track and the speed of
23 the sale, we would at the very least request that all
24 objections, including cure objections, adequate assurance
25 objections and so forth be pushed back to the 27th if in fact

1 we're going to go forward with the sale hearing on the 29th.

2 THE COURT: Who the purchaser is, would not affect
3 the cure amount, though. Is that correct? In other words,
4 that's something that you will be able to determine in
5 advance. The purchaser, I understand the adequate assurance
6 issue of course, but at least as far as the cure amount is
7 concerned, that is not dependent upon the purchaser.

8 MS. ROBERTS: I understand that, Your Honor.

9 THE COURT: And I --

10 MS. ROBERTS: It's a matter of efficiency --

11 THE COURT: Yes.

12 MS. ROBERTS: -- for all parties, that it would make
13 sense to have a single objection deadline rather than
14 multiple objection deadlines.

15 THE COURT: All right, thank you. Thank you.

16 MS. ROBERTS: If I may reserve the right to make
17 further objections.

18 THE COURT: Absolutely. I understand.

19 MS. ROBERTS: I appreciate it.

20 THE COURT: Yours is more of a scheduling issue at
21 the moment.

22 MS. ROBERTS: At the moment, yes.

23 THE COURT: Yes. Thank you.

24 MS. ROBERTS: Thank you, Your Honor.

25 THE COURT: You bet. Mr. Saydah, good morning.

1 MR. SAYDAH: Good morning, Your Honor. For the
2 record, Gilbert Saydah of Kelley Drye and Warren here today
3 on behalf of Realty Income and various other landlords. Your
4 Honor, Realty Income is the Debtors' largest landlord with
5 approximately 120 locations.

6 Your Honor, with respect to the scheduling, in the
7 time that Your Honor gave us prior to the hearing, which we
8 appreciate, we were able to work out sort of a consensual
9 deal with respect to providing additional information for
10 landlords to have the opportunity to evaluate adequate
11 assurance packages for the qualified bidders that were
12 submitted. I believe Mr. -- I'm going to butcher his name.

13 MR. KWASTENIET: Kwasteniet.

14 MR. SAYDAH: Kwasteniet, he said that we were going
15 to have an objection deadline of the 27th. I believe that was
16 a misstatement. It was in the agreed procedures order
17 objections to bidders other than the stalking horse, and we
18 asserted up until the sale hearing, which is now December
19 29th, it gives us a few extra days right after Christmas to be
20 able to speak with our clients, have the business people
21 evaluate those adequate assurance packages, and find out if
22 we in fact do have any issues. So with that one issue, I
23 think it'll be valuable for all the landlords and all the
24 parties on the line to just hear the agreement that we had
25 worked out prior to the hearing and perhaps that will resolve

1 some of the issues.

2 THE COURT: Thank you, Mr. Saydah.

3 MR. KWASTENIET: Your Honor, I think what we propose
4 is keeping the objection deadline the 22nd, having, we're
5 finding if somebody other than the stalking horse bidder
6 prevails at the auction, we will get adequate assurance
7 packages out to the landlords as soon as possible. We're
8 even going to try to do it in advance of the auction as soon
9 as qualifying people certainly.

10 THE COURT: Right.

11 MR. KWASTENIET: But you never know and if we're not
12 able to get it out, then we'll get it out as soon as possible
13 after the auction. We are fine with landlords raising
14 adequate assurance issues up through and including the date
15 of the sale hearing, so it will be on the 29th, Your Honor.
16 We're not, we don't need to impose a written deadline for
17 all, you know, I'm concerned people can show up in court and
18 object. And if we need to make an evidentiary burden, the
19 purchaser will have to be prepared to do that at the sale
20 hearings on the 29th.

21 THE COURT: I think that's certainly appropriate and
22 fair of the Debtors and the other parties, because of the
23 Christmas holiday which sort of --

24 MR. KWASTENIET: Certainly.

25 THE COURT: -- impacts all of these dates.

1 MR. KWASTENIET: Right. We do think though that if
2 somebody's got an objection based on the conduct of the
3 auction or who was the best bidder, I'd like to hear that a
4 few days in advance of the hearing. So basically anything
5 other than any adequate assurance issues for the landlords
6 and would request an objection, sort of a supplemental
7 objection deadline of the 27th for any issues related to the
8 auction itself.

9 THE COURT: And that's most likely it seems to me to
10 be other bidders.

11 MR. KWASTENIET: I think so.

12 THE COURT: Perhaps the Committee, but --

13 MR. KWASTENIET: We're going to be consulting with
14 the Committee about the selection, but consulting doesn't
15 mean necessarily agreeing, although we've done a decent job
16 so far agreeing, so.

17 THE COURT: I understand that. And given the
18 schedule that we're all dealing with and the holiday, I think
19 that that is appropriate.

20 MR. KWASTENIET: Very good. Thank you, Your Honor.

21 THE COURT: As far as cure amounts are concerned, I
22 do think, and I, it's regrettable but a lot of parties are
23 being accommodating here and being pressed here, and I think
24 that the 22nd is appropriate for the cure amount deadline.

25 MR. KWASTENIET: We do too, Your Honor.

1 THE COURT: That's something that could be certainly
2 prepared in advance of that date in any event, and is not
3 dependent upon the auction in any respect. And I know it's a
4 little bit of extra work for parties, but a lot of parties
5 are doing a lot of extra work, and I think that it's just got
6 to be that way.

7 MR. KWASTENIET: Thank you, Your Honor. All right,
8 Your Honor, I'll continue a page flip through the bidding
9 procedures order --

10 THE COURT: Yes.

11 MR. KWASTENIET: -- to identify what we believe are
12 the other material changes. And I'm sure that others in the
13 courtroom won't be shy about jumping up and reminding me if
14 I've skipped over anything.

15 THE COURT: Right.

16 MR. KWASTENIET: Your Honor, on page 7 of the
17 blackline, we've added in a concept related to this wind down
18 budget.

19 THE COURT: Right.

20 MR. KWASTENIET: So at the time of the filing of the
21 asset purchase agreement on the first day of the case, that
22 was left as an item that was essentially to come in the
23 purchase agreement. However, for other bidders to know what
24 they're bidding against, the proposed stalking horse bidder
25 has agreed not less than four days prior to the bid deadline

1 to propose the terms of a wind down budget which we envision
2 will cover at least the administrative expense claims, but
3 the exact parameters will be decided by the stalking horse
4 bidder.

5 We've built in some parameters in the order itself.
6 And the idea is once the Debtors receive that, we'll notify
7 other potentially interested bidders, and then a bid to be a
8 qualified bid at the auction, the bid deadline would be
9 several days later, would have to meet or exceed the stalking
10 horse proposal on the wind down budget. So it essentially
11 becomes another element of the purchase price.

12 THE COURT: Yes. All right.

13 MR. KWASTENIET: And we've set this up so that that
14 will be known, at least the stalking horse's bid will be
15 known on that point prior to the bid deadline.

16 THE COURT: Okay. That's acceptable. I think that
17 makes sense. Certainly.

18 MR. KWASTENIET: Right. And we've added additional
19 language on page 8 about service of adequate assurance
20 information, that's been negotiated with the Committee and
21 various landlords.

22 Again, on page 9, Your Honor, at the bottom in
23 paragraph 15, we've added additional language about service
24 of adequate assurance information in the event that there is
25

1 another successful bidder. That was also negotiated with the
2 Committee, Your Honor.

3 Your Honor, on page 12 of the blackline, paragraph
4 21, we've added in a relatively lengthy provision that
5 provides that the Committee and other interested parties, to
6 the extent that the Sun Capital, the stalking horse second
7 lien amount is ineligible, ruled by Your Honor ineligible for
8 credit bidding purposes at the auction.

9 THE COURT: Right.

10 MR. KWASTENIET: That other bidders may submit bids
11 in the form of a plan of reorganization as opposed to just
12 cash bid. We're not looking to disqualify people based on
13 the form of transaction, that they envision; however, it is
14 important from the Debtors' standpoint and certainly from the
15 DIP lender's standpoint that if somebody's proposing in late
16 December to switch to a plan process, that we have the
17 ability to, that that bid be accompanied by a signed
18 financing commitment that will take out the DIP facility,
19 then that'll provide financing on terms comparable to the
20 Debtors current DIP facility in accordance with the Debtors
21 then current 13 week budget, basically to allow the funding
22 of that process. If somebody wants us to consider plan
23 process at that point and we determine that that's the best
24 and most value maximizing transaction, that's fine, but we
25 wanted to make clear that that kind of a proposal has to take

1 out the existing DIP facility and has to provide adequate
2 runway for us to actually complete that kind of a process.

3 THE COURT: Wouldn't that be necessary in order to
4 be a qualified bidder in any event?

5 MR. KWASTENIET: You don't have to agree to take out
6 the DIP and provide ongoing financing.

7 THE COURT: I see.

8 MR. KWASTENIET: Because if you're making a cash
9 bid, and we're just going to close by the end of the year,
10 then the DIP would get paid off as part of the funds flow at
11 closing.

12 THE COURT: Right.

13 MR. KWASTENIET: But it wouldn't have to be an
14 ongoing financing commitment. They have to demonstrate some
15 ability to run the business and that they be adequately
16 capitalized and the like in order to make the bid. But to do
17 a plan process, they have to agree to fund an additional
18 seven months of the bankruptcy case, which is, is a
19 distinction I think from a cash bidder.

20 THE COURT: Fair enough. Yes.

21 MR. KWASTENIET: Your Honor, we provided in
22 paragraph 23, that in any event the DIP would have to be
23 taken up by December 30th.

24 Your Honor, page 15, paragraph 25, there's an insert
25 here from General Electric Capital Corporation. Apparently,

1 they've got a secured lien against certain of the Debtors or
2 they have asserted a secured claim against certain of the
3 Debtors' restaurant locations, and so we've built in
4 protection for them including limited credit bidding rights
5 with respect to assets that they may have liens on.

6 THE COURT: Okay.

7 MR. KWASTENIET: And that was it for the order
8 itself.

9 And we've made various conforming changes in the bid
10 procedures which are attached to the order.

11 Your Honor, one thing to note on page 3 of the bid
12 procedures which are attached as the first exhibit to the
13 order --

14 THE COURT: Consultation with the Committee. Yes.

15 MR. KWASTENIET: Yes. That's many, many references
16 to consultation. I'm going to be spending a lot of time
17 talking to Mr. Dublin, Your Honor, which I'm very pleased
18 about.

19 THE COURT: Yes.

20 MR. KWASTENIET: We did change the minimum bid.
21 Given now that we're going to be resolving the issue of the
22 allowance to the credit bid prior to the bid deadline, the
23 parties agree that the minimum bid would be set at \$75
24 million. The initial amount, Your Honor, is \$122 million,
25 that included partial credit bid of the second lien debt

1 amount. So the \$75 million number, and I'm sure that Mr.
2 Herman is going to correct or amplify my comment in just a
3 minute, is intended to be the projected amount of the DIP
4 balance at or around the time of the bid deadline, plus
5 approximately \$1 million which is the proposed amount of the
6 expense reimbursement for the stalking horse bidder, plus an
7 overbid increment of \$500,000.

8 So \$75 million is a plug number, and I believe that
9 the stalking horse purchaser's intention, that it's a plug
10 number for the actual DIP balance at the time plus those
11 increments. And because we don't know today what the actual
12 amount of the DIP balance will be when we come up to the bid
13 deadline, I believe that what the stalking horse purchaser is
14 going to do is to give the Debtors a notice and we'll be
15 conferring with them as to the actual amount of the DIP
16 balance, and then we will calculate the precise dollar number
17 to be the target bid that, and we'll do this in advance of
18 the bid deadline, that others need to hit. Looks like I got
19 that right.

20 THE COURT: The overbid, the \$500,000 overbid.

21 MR. KWASTENIET: Yes.

22 THE COURT: Is that a first round overbid, or will
23 it be --

24 MR. KWASTENIET: That being each successive bid has
25 to go up in \$500,000 increments. I participated in an

1 auction several months ago where it was \$1,000 increment and
2 that auction took a long time, Your Honor.

3 THE COURT: It would take a very long time.

4 MR. KWASTENIET: Yes. Mr. Herman is laughing, he
5 was also at the auction. We one upped each other for about
6 45 minutes.

7 THE COURT: And I see you have language in here
8 relating to the personally identifiable information issue.

9 MR. KWASTENIET: We do, Your Honor, the company does
10 have privacy policy, we are going to comply with that and we
11 think that the sale can be conducted in conformance with the
12 company's privacy policy, but we do have language that we've
13 negotiated with the purchaser and with the Office of the US
14 Trustee.

15 THE COURT: Very well.

16 MR. KWASTENIET: Give me just a moment, Your Honor,
17 I'm going to finish flipping pages and make sure there's
18 nothing else material that I wanted to call out. There
19 really isn't, there's various forms of notices, cure notices,
20 and hearing notices and the like at the end that will conform
21 with the dates and deadlines.

22 THE COURT: Excellent. Sure.

23 MR. KWASTENIET: But that's all that I had on the
24 bid procedures order.

25 THE COURT: All right.

1 MR. MILLER: [indiscernible]

2 THE COURT: You may. Mr. Miller.

3 MR. MILLER: In the objection that we filed, we also
4 raised the issue that to value the auction bid, should be
5 included, the value of the auction bid should be included in
6 the value of assuming the pension plan to the bidder. Now,
7 frankly I am not sure how you put that value into the bidding
8 procedures. I would suggest that perhaps it is part of the
9 business judgment of the Debtor in possession with the
10 Committee consultation to value which one is the best of the
11 bids. But we would suggest that perhaps there is some way
12 that the procedures could recognize the value of the bid
13 which involves assuming the pension plan by the bidder.

14 MR. KWASTENIET: Your Honor, if I may, I believe
15 that our procedures already contemplate that the Debtors will
16 value the assumption of obligations. It's not just cash,
17 it's also assumption of obligations, and we're also, again
18 subject to discretion, to the Debtors' discretion and
19 consultation with the Committee. But we'd be happy to
20 specifically reference the pension plan, you know, amongst
21 those, the various obligations, you know, where we will
22 factor in if somebody is willing to consider it or not.

23 MR. MILLER: Right. And the asset purchase
24 agreement specifically provides that the pension plan is not
25 going to be assumed to stalking horse. So we would like to

1 make sure that the pension, the plan is recognized in valuing
2 the bid.

3 MR. KWASTENIET: Yes. We certainly envision, I
4 believe that our language already encompasses the pension
5 plan, and any other obligations frankly that another bidder
6 is willing to assume that the stalking horse, you know,
7 bidder may not be. But we are happy to add a specific
8 reference to the pension plan.

9 THE COURT: All right.

10 MR. MILLER: Thank you, Your Honor.

11 THE COURT: That's helpful. Thank you, Mr. Miller.

12 Oh, I didn't see Mr. Herman back there. Mr.

13 Kwasteniet is a little too tall for both of us.

14 MR. HERMAN: He seems to get taller every day.

15 THE COURT: Yes.

16 MR. HERMAN: Your Honor, I thought it made sense for
17 me to jump in here since, before we turn the podium over to
18 objectors, I rise to support the motion. Just had a few
19 quick headlines. I wanted to mention to the Court that the
20 bid procedures order and procedures and auction procedures
21 were heavily and quite loudly and heatedly negotiated, and so
22 this is the product of extensive arms length negotiations
23 with the Committee and all parties.

24 THE COURT: Yes.

25 MR. HERMAN: Also, I just wanted to point out that

1 the bid procedures have gotten significantly better for the
2 estate since the form as filed.

3 And then the third point I wanted to mention, Your
4 Honor, was the expense reimbursement. We have sought a, for
5 the horse, a \$1 million expense reimbursement. There was
6 only one objection filed, it was by the US Trustee. It has
7 been settled, I'm pleased to advise the Court. And we walked
8 the US Trustee through the mechanics of how it worked. And
9 just to confirm on the record at the US Trustee's request,
10 this is actually something that I think you've seen before.
11 But just to be clear so there's no confusion, it's only for
12 actual and necessary documented expenses related to the sale
13 up to a maximum cap of a million dollars.

14 THE COURT: Yes.

15 MR. HERMAN: So it's not an automatic million
16 dollars.

17 THE COURT: Exactly.

18 MR. HERMAN: Of course, also there's no breakup fee,
19 and the US Trustee, the Committee and the Debtors will get
20 all the supporting documentation. And if they have
21 objections, Your Honor, that don't get resolved, Your Honor
22 will make the call and we'll have a hearing in front of you.
23 So nothing is done on the side or in hiding, it'll be out in
24 the public and the US Trustee will have a full opportunity to
25 object if he finds any of the fees to be unreasonable. So I

1 think that resolves the expense reimbursement piece.

2 The second item that the US Trustee objected to was
3 the consumer privacy issue, Your Honor. We have resolved
4 that with some heavily negotiated language that you should
5 have seen in the blacklined order.

6 THE COURT: I did.

7 MR. HERMAN: Rather than read it, I will mention to
8 you that its language that the US Trustee has approved and
9 signed off on.

10 THE COURT: All right.

11 MR. HERMAN: In addition, Your Honor, there are some
12 aspects of the bidding procedures that I just wanted to
13 mention before the objectors stand up which again is the
14 scheduling, the dates. I mentioned the maximum cap that the
15 DIP lender wanted, was willing to put into the case.

16 But there's also one other point that I want to make
17 clear, which is that, this is not just a scheduling order
18 because the parties pulled out their calendars and said these
19 are dates. Every single date in there relating to the trial,
20 the date that the bids are due, the auction, and the sale
21 hearing were negotiated in the concept of the larger package
22 of the bid procedures and the DIP loan, and where we're going
23 in this case and the possible recharacterization issues, and
24 all of that, such that when people would say let's have the
25 trial on this date or should we have, the bid is due on such

1 date, we thought about in the context of the entire package
2 as to what does it say to the market, what does it say to
3 other bidders out there if the date, if one date is moved
4 here or if it's before the auction, or after the trial.

5 So the dates weren't just a bunch of lawyers pulling
6 out their calendar. They were very heavily negotiated in
7 terms of the substantive effect it has on the case, on the
8 DIP lender, on the process, on potentially improving the
9 bidding process, channeling the process. So it's not just a
10 bunch of dates that work for us. And if people on the
11 objector's side want to get up and move dates around, I just
12 wanted the Court to be aware that it's absolutely an integral
13 part of the overall global settlement on the Committee's
14 objections and the PBGC's objections, that those dates stay
15 where they are.

16 THE COURT: Yes. I sense that Mr. Herman.

17 MR. HERMAN: Thank you, Your Honor.

18 THE COURT: I'm certainly sensitive to it.

19 MR. HERMAN: One other point. Debtors' counsel
20 mentioned the \$75 million number that is currently going to
21 be the headline number going out to the market for competing
22 bids. It is intended to be the amount of the \$35 million new
23 money facility put in by my client as of the sale hearing,
24 plus interest on that, plus the outstanding under the Wells
25 Fargo portion of their facility, plus interest on that, plus

1 the million dollar expense reimbursement, plus the \$500,000
2 overbid, plus any legal and other fees that Wells may have
3 the right to assert as the over-secured creditor, and other
4 types of similar closing costs. Our best guess today is that
5 it should be somewhere in the vicinity of that \$75 million
6 number. We clearly have agreed that we're going to huddle up
7 with the Debtor and the Committees. If it turns out that
8 that number is materially different, then we will huddle up,
9 and prior to the bid deadline, make the new number available
10 to other bidders before the bid deadline so they know what it
11 is.

12 THE COURT: Yes.

13 MR. HERMAN: Thank you, Your Honor.

14 THE COURT: All right. Thank you, Mr. Herman.

15 MR. DUBLIN: Phil Dublin again for the Committee
16 Your Honor.

17 THE COURT: Yes Mr. Dublin.

18 MR. DUBLIN: I agree with most everything that Mr.
19 Herman said. I don't need to use up any of the Court's time
20 with any minor tweets that I might make.

21 Just one thing to note with respect to how important
22 the dates were. An additional change that is going to be
23 made to the bidding procedures that you see in front of you
24 on page 5, is where it notes that the bid deadline is
25 December 20th, 2011, or such earlier date as may be agreed to

1 by the Debtors. That or such earlier date is going to be
2 struck from the procedures, so it will be the firm December
3 20th date, so all the bidders know what date they're looking
4 to hit.

5 THE COURT: All right. Thank you, Mr. Dublin.

6 MR. DUBLIN: Thank you.

7 THE COURT: Yeah, I think that is an important
8 change.

9 Mr. Pollack, good morning.

10 MR. POLLACK: Good morning, Your Honor.

11 THE COURT: Good to see you sir.

12 MR. POLLACK: You too, Your Honor. Your Honor, I'm
13 here this morning on behalf of Brixmore Property Group, GGP
14 Limited Partnership and especially for Pyramid Management
15 Group. All landlords, as you might expect.

16 THE COURT: Yes sir.

17 MR. POLLACK: Your Honor, with regard to Mr.
18 Herman's comments regarding the calendaring, I've known Mr.
19 Herman for many, many years and I have never seen him set
20 dates other than using a dart board, so I am really kind of
21 surprised to hear that these are the dates. Nevertheless, we
22 don't have a problem with those particular dates, other than
23 two kind of tweaks. I think one was counsel for the Debtor
24 misspoke on something. I thought we had agreed before the
25 hearing began that with regard to adequate assurance of

1 parties other than the stalking horse bidder, that that
2 adequate assurance information is to be provided one day
3 after receipt by the Debtors, and in order to become a
4 qualified bidder, a party has to give that information to the
5 Debtors, so as soon as the Debtors get it, they would turn
6 around and give it to the landlords, and that gives us
7 hopefully the necessary time between the time they would have
8 to do it, which will have to be before the 20th which is the
9 auction, I'm sorry, the bid deadline in order to qualify,
10 then we would have it in sufficient time. So if they might
11 just confirm that that is a correct date. And Mr. Stempel is
12 indicating.

13 THE COURT: Mr. Stempel is nodding for the record,
14 and I think that's helpful, certainly.

15 MR. POLLACK: Thank you. I think with that in
16 place, that the dates now give us, if we get the adequate
17 assurance information on the 20th, we can get those objections
18 in by the 27th or the 29th at the hearing, or whatever, it
19 gives us more than the usual half of a day.

20 THE COURT: Yes. Yes it does.

21 MR. POLLACK: Your Honor, on the timing issue, and I
22 understand what Your Honor has already said about cures. I
23 didn't want to jump in earlier, but I think we do still have
24 an issue.

25 THE COURT: All right. Talk to me.

1 MR. POLLACK: And the issue arises because there is
2 the possibility of designation rights under the asset
3 purchase agreement. Unfortunately, we and many of those
4 landlords in the courtroom today have been through this
5 exercise too many times this year, where for example, in
6 *Borders*, we filed cure objections three separate times, and
7 none of our leases were ever assumed or assumed and assigned
8 because the Debtors want the information, they want the
9 information, they want the information. We don't have a
10 problem giving information if the leases are those leases
11 that are going to be assumed, assigned, potentially at the
12 sale hearing. And we haven't seen any particular procedures
13 as yet with regard to that or with regard to designation
14 rights. And I assume that they will be forthcoming at some
15 point.

16 But with regard to cures, frankly our clients are
17 tired of having to go through the process multiple times. As
18 I said to Mr. Stempel, it's easy to go to my client the first
19 time and say give me the cure information. When you go back
20 to them and their accounting department the second and third
21 time, that becomes a problem.

22 And as Your Honor well knows, changes occur all the
23 time. Debtors sometimes don't pay exactly the amount that's
24 due under the lease, and that's a big surprise. Sometimes
25 landlords make mistakes in what they ask for, I would never

1 admit that, but other landlords other than mine sometimes do
2 that. And so the numbers do change, and especially as of the
3 first of the year, rents go up, [indiscernible] numbers
4 change, taxes change, year-end adjustments. And so what we
5 have asked is we don't have a problem giving the cure numbers
6 for leases that are going to be assumed and assigned under
7 the schedule that was proposed if those leases have been
8 identified. But if there are leases that are going on a
9 designation list, we don't want to have to keep going through
10 the exercise, and we shouldn't have to give cure information
11 until such time as a lease has been designated for assumption
12 and assignment. The bids are due before the cure deadline.
13 So, you know, unless the Debtors are telling us that their
14 numbers are so far off that they really need this
15 information, the Debtors have their own information.

16 I can't recall the last time that I had to try a
17 cure objection in front of any of the judges of this Court.
18 The number of times -- yes there are differences and
19 sometimes there are big differences - but the number of times
20 those aren't resolved there for a couple of conversations or
21 aren't narrowed are not large. The bidders are going to be
22 bidding based upon what information they get from the
23 Debtors' books and records.

24 So we would ask that unless a lease is being assumed
25 and assigned, that the cure deadline and the cure amounts not

1 be due until such time as the lease is designated for
2 assumption. So that would be our next point.

3 Your Honor, the last point concerns the openness of
4 the auction. I think that we have worked out an agreement
5 with Mr. Stempel, and I won't waste Your Honor's time with
6 it. If there is an issue going forward, we'll bring it back
7 to the Court, and I'll just leave it at that. Thank you,
8 Your Honor.

9 THE COURT: All right. Thank you, Mr. Pollack. I
10 well understand your points. Ms. Roberts.

11 MS. ROBERTS: Yes, Your Honor. Again, for
12 Dannestown Road Associates. Thank you, Your Honor.
13 Dannestown has issues that are both substantive and
14 practical.

15 Number one, postpetition rent hasn't been paid. The
16 Debtors have filed their case October 5th, we're now into the
17 first of November and they are not taking care of their
18 obligations under 365(d) to pay their administrative rent.
19 And there is nothing in the procedures that requires them to
20 do so. So that's an issue and that should be included in any
21 order going forward.

22 Number 2, more substantive. First of all, we join
23 in on the objection with regard to the designation rights and
24 I don't think I need to repeat that.

25 More importantly, we see the entire procedures as

1 being substantively a problem. That is that a Debtor is
2 required when it's going to assume or reject, to state
3 definitively that's it's going to assume or reject, and
4 there's not such a thing as a contingent assumption or
5 rejection. And the entire process is exactly that. To this
6 date we don't know whether or not the Dannestown Road lease
7 is to be assumed or to be rejected, and therefore, Dannestown
8 absolutely does not consent because we don't know what's
9 going to happen and that again plays back into this whole
10 concept of the designation rights. The landlord could be
11 stuck in no man's land neither assumed nor rejected, sitting
12 out there, no requirement on the Debtor to pay postpetition
13 rent.

14 And we now have a new wrinkle in that they're
15 submitting a wind down budget which per se is potentially a
16 conversion to chapter 7 which is going to leave landlords
17 potentially hanging out there high and dry, never getting
18 paid their postpetition rent, not assumed, not rejected, and
19 subject to ongoing losses. That is patently unfair and it
20 violates due process.

21 Lastly, the due process provisions in the rules of,
22 in Rules 6004 and 6006 should not be waived. Given the holes
23 that are out there in what we know is going to happen, the
24 landlords should be able to come back in or any party in
25 interest should be able to come back in and say this

1 procedure has not complied with the requirements of due
2 process, it needs to be undone.

3 Lastly, as the Committee has documented, this is an
4 insider sale. It's a fast track sale. This Court itself in
5 *in re Exarus* (phonetic) required higher scrutiny and more
6 than higher scrutiny. The problems that we have, what
7 amounts to a *sub rosa* plan, you're going to dispose of all of
8 the assets of the Debtor, essentially leaving the Debtor with
9 nothing to pay out any kind of claims, and a potential
10 liquidation, a potential conversion, and people are going to
11 be left without the protections of disclosure and
12 solicitation that are normally required when you have an
13 asset sale.

14 And at the same time while the insiders given the
15 ability to go ahead with this fast track sale outside of a
16 plan, they are now including the requirement that other
17 people who would want to come in would be required to go
18 through and propose a plan. Well that's not appropriate.

19 THE COURT: Well I don't think they're requiring
20 that.

21 MS. ROBERTS: Well they're saying that that's an
22 option.

23 THE COURT: That's an option.

24 MS. ROBERTS: But the fact is a plan is there in the
25 Code for the purpose of providing the ultimate and the best

1 process and notice and protections to the creditors in an
2 instance like this. And Dannestown objects that this sale
3 process itself is flawed fundamentally in that it doesn't
4 provide the kind of process, the kind of protections that
5 should be there. And even including within the procedures
6 themselves, the creditors, the landlords are left hanging
7 there without even knowing whether they're going to be
8 assumed or rejected when or under what conditions, and
9 there's no absolute representation by the Debtors whatsoever
10 that their postpetition rent is going to be paid. I
11 appreciate your time. Thank you, Your Honor.

12 THE COURT: Of course. Thank you, Ms. Roberts.
13 Thank you. Mr. Kwasteniet.

14 MR. KWASTENIET: Your Honor, there's a couple of
15 points made there, so in no particular order, first with
16 respect to postpetition rent, the Debtors have ample
17 financing and we are paying postpetition obligations when
18 they come due. For many of our store locations, Your Honor,
19 rent is due on the first of the month.

20 THE COURT: Yes.

21 MR. KWASTENIET: So we had a situation where we
22 filed on October the 5th, so there were a number of landlords
23 that were not paid their October rent. There's a number of
24 landlords who may have assorted administrative claims for
25 rent for that stub period, the postpetition stub period in

1 the month of October. I'm not required to pay that today.
2 We've got -- today is November 1st.

3 THE COURT: Right.

4 MR. KWASTENIET: And rent checks have gone out and
5 landlords should be getting rent checks, those that were due
6 on the 1st of the month should be getting their rent checks
7 for November. So we simply don't have a fact pattern where
8 the Debtors have not been paying postpetition obligations, in
9 fact we have been. So that, we do have a situation where we
10 filed several days after the October rent was due, and we can
11 deal with that, that's not unusual, but it doesn't mean we're
12 not paying postpetition obligations.

13 THE COURT: Okay.

14 MR. KWASTENIET: I just wanted to clarify that.
15 Second, Your Honor, I heard what sounded like a number of
16 sale objections, and we're certainly not trying to foreclose
17 anybody's objections to the sale. All sale objections are
18 preserved.

19 Your Honor, with respect to when landlords have to
20 object to cures --

21 THE COURT: Yes, Mr. Pollack.

22 MR. KWASTENIET: Yeah, Mr. Pollack's concern.

23 THE COURT: Yes.

24 MR. KWASTENIET: To me it's a little bit of a
25 chicken and egg dilemma because I think from the purchaser's

1 standpoint, it's hard to know whether you're going to assume
2 a particular contract until you know whether the, what the
3 cure amount is and whether there's a significant dispute
4 about the cure amount. And from the estate's standpoint,
5 post closing, we want to get towards a conclusion of the case
6 as soon as possible. So from my standpoint, I don't want the
7 designation period to be any longer than it needs to be. Now
8 under the purchase agreement, purchasers committed to paying
9 the ongoing carrying costs of contracts during that, during
10 that designation period; however, I do think it is
11 appropriate that landlords reply and respond to the filing
12 cure objections to all the contracts regardless of you know
13 whether it's on the assumed list or on a designation list,
14 because that would allow our purchaser, whoever it may be,
15 the stalking horse or some other purchaser, to make an
16 informed decision quicker. And we recognize it may be, you
17 know, not quite as convenient from a landlord standpoint but
18 from the estate standpoint, you know, as we are helping to
19 advise bidders about whether it makes sense to continue in a
20 particular store location or not, for us, it's important to
21 know, you know, whether we have agreement on or whether
22 there's a significant dispute as to the costs of curing a
23 particular lease.

24 THE COURT: Yes. I understand your concerns. I
25 don't know a way to avoid it.

1 Mr. Pollack, I certainly would hear from you. You
2 know, it's sort of boiling down to a burden on the landlords
3 versus a necessity from the Debtors' side, so.

4 MR. POLLACK: Your Honor, you can argue obviously
5 either side of this. The problem is that they're going to
6 issue cure notices within three days of the date of the order
7 that's entered. So we're talking about November.

8 THE COURT: Yeah.

9 MR. POLLACK: They are going to, I assume, not
10 include November rent, assuming they're going to assume that
11 it was paid.

12 THE COURT: Right.

13 MR. POLLACK: Not every landlord is going to get the
14 November rent that is owed, and then we're going to have
15 December. Remember our numbers are not due until December
16 the 22nd after the bids have been submitted already. And this
17 happens in virtually every case. So the numbers that they
18 get, they're going to see a Debtors' number will say \$5,000
19 and the landlord's number of \$10,000.

20 THE COURT: Yes.

21 MR. POLLACK: They're not going to reconcile them
22 now. All their going to know is that there's a delta, and
23 every bidder will have already have submitted their bids for
24 a number of stores knowing that they're going to be deltas.
25 You know, one way or another, there is always going to be a

1 number, I can guarantee you that, that especially come
2 December 1st, there is going to be another number. And I will
3 also guarantee you that come January or February with all of
4 the landlords having year-end adjustments, some of them
5 putting accruals when they submit their cure numbers, some
6 not putting in cure numbers, accruals, there's going to be a
7 delta on every one. But the number of significant ones in
8 all of the cases over the last, I'm going to say 25 years or
9 more, I don't think is more than 5 percent at most. And as I
10 think Your Honor agrees, there just aren't cure objections
11 that are heard by the Court.

12 So why don't we wait and give them numbers that we
13 think are right when it looks like they're going to do
14 something. They have the Debtors' numbers. Unless the
15 Debtors' books of account are so far off that they're not
16 even close on these numbers, that is enough to estimate with.
17 They don't need the other numbers. They don't have to put us
18 through doing it one, two and three times. And that's the
19 issue. If the Debtor gives a number, and I don't believe
20 that this Debtor is going to do this, but we've all seen the
21 case where there are 300 leases and 250 of them show up as
22 zero. You know, I don't think they'll do that, and I don't
23 think Mr. Stempel will let them do that unless they are in
24 fact zero.

25 But you know if there's a number that's way out of

1 whack or that a bidder has a problem with, the bidder could
2 pick up the phone and call the landlord, or pick up the phone
3 and call counsel. You know, not an issue. In some cases we
4 have provided unofficial information when asked, or even when
5 not asked. But to make us continually go through the process
6 when we have done it so many times, not just this year but
7 other years, but in particular this year, at the end of the
8 year when accounting departments are trying to close books,
9 when people are on vacation. I mean the 22nd is the bid
10 deadline, you're going to have to do it well in advance
11 because the 23rd is the Friday before the Christmas holiday,
12 offices close early, a lot of people are off that week, a lot
13 of people are having their parties, you're really talking
14 about backing it up. It's just not appropriate to do it in
15 that fashion. If they want the ones -- people are going to
16 identify and say hey, I think I'm going to take these 75
17 leases, well give them those 75 leases, I don't have a
18 problem. But anything that goes on the designation list, and
19 they're going to know when they submit their bids what
20 they're going to designate and what they're not, they're not
21 going to make the bid any other way, we shouldn't have to
22 give that information up front. Thank you.

23 THE COURT: I truly do understand, and I'm sensitive
24 to your concerns. Mr. Stempel, let me hear from you.

25 MR. STEMPEL: Just a couple of points, Your Honor.

1 In response, one, I'm not so sure where Mr. Pollack gets this
2 November is an issue. We're paying our obligations in
3 November, so not sure that's going to create the issue. And
4 I have not practiced for 25 years like he has, a little less,
5 not by too much, but I think the reason you don't hear those
6 cure objections is because we run the process the very way
7 we're proposing. And they filed their objections and we've
8 discovered the delta and we've reached conclusions on it. So
9 I don't think the issue of never hearing them really answers
10 the question.

11 The burden we impose on the landlords, I appreciate
12 it's a burden, is necessary in these auction processes
13 because although I'm confident that our stalking horse bidder
14 when we get to a closing, is liable to know a lot of the
15 leases it's going to be assuming or not, but still does need
16 to know whether there is a big difference in the assertion as
17 to what the cure is. Because not knowing, I mean I
18 understand he wasn't admitting it, but the idea that
19 landlords might get it wrong when they assert it, I can tell
20 you without admitting, making admissions, Debtors are
21 probably more wrong when they give us their data.

22 THE COURT: Yes.

23 MR. STEMPEL: And that's why the landlords do file
24 cure objections almost all of them all of the time. So there
25 is going to be a spread. We all try to work it out ahead of

1 time. But our other bidders who might win, and in order to
2 determine whether, they just won't necessarily have the
3 ability as our stalking horse did because of the amount of
4 time to have identified virtually all the leases they're
5 interested in, and these designation rights have grown over
6 time in front of courts like yours, Your Honor, because of
7 that business reality.

8 THE COURT: Yes.

9 MR. STEMPEL: And it's that designation right that
10 becomes a valuable, quote, unquote "asset" of the estate to
11 enable bidders to help maximize value for us. And they just
12 may not know, and so I don't know about two, three, four
13 times, cure notices have to be sent, I can't imagine that's
14 our case. I think our case is the first one, and if the
15 stalking horse bidder wins, then maybe for a few designated
16 leases up to the 210th day arguably, there might be a second.
17 But for another successful bidder, if they win, you know,
18 again, it's probably a two step process, maybe a few less
19 identified at closing, and a few more on the designation
20 list. But our hands are tied on maximizing value, and to
21 impose that little extra burden on the landlord, and they
22 have to do this data checking anyway, even if we asked
23 informally, they have to do the work. So it's important for
24 us to get the information. And I think the equities would
25 weigh in favor of imposing that little additional burden.

1 THE COURT: Thank you, Mr. Stempel.

2 MR. STEMPEL: Sure.

3 THE COURT: Mr. Herman.

4 MR. HERMAN: Your Honor, on behalf of the stalking
5 horse bidder, let me give you our perspective. If -- and Mr.
6 Pollack and I have known each other for many, many years, and
7 we've been on both sides of the podium on opposite sides -- I
8 also represent quite a few landlords. And I can tell you
9 that the burden on the landlord's side for each particular
10 landlord is not that great. Every one of us has a standard
11 form cure objection, we change the name of the caption, you
12 change the location and then you say, pursuant to the chart
13 attached hereto, and the client emails you a chart. And
14 there's a reservation of rights to say if there's year-end
15 adjustment, we reserve the rights to comment. So the actual
16 burden on each landlord is very low. The burden on the
17 Debtor, the Committee and the stalking horse, is
18 significantly high though, assuming Mr. Pollack is right that
19 there's always a delta. And let's assume that the delta is,
20 oh, I don't know \$20,000.

21 THE COURT: Right.

22 MR. HERMAN: I have 20,000 times 190 stores, is
23 close to \$4 million that I have to decide whether to assume
24 or reject these leases. When you aggregate them, it's a big
25 number, it's a big issue. And Mr. Stempel is right, I have

1 an advantage, I'm the horse, I'm already in there and I'm
2 having a problem. If somebody comes in late in the game and
3 has to get up to speed on this, a competitive bidder, they
4 need to see that information. I don't think we can wait too
5 long to have that cure information, and I do think the burden
6 having been on that side, it's a burden, it's a pain in the
7 neck, but it's not that much of a big deal. But compared to
8 the burden to the estate and the bidders, it's a significant
9 problem.

10 THE COURT: Thank you, Mr. Herman.

11 MR. POLLACK: Mr. Herman does wear many hats,
12 fortunately not the Yankee hat today.

13 THE COURT: That's right.

14 MR. POLLACK: Your Honor, if we had --

15 THE COURT: It's not a Dodgers hat either frankly.

16 MR. POLLACK: If we have a \$20,000 delta on each one
17 of those leases, we've got real problems. If we have a
18 couple hundred dollar delta, completely different story.

19 THE COURT: Yes.

20 MR. POLLACK: And again, a couple of things, I'll
21 try to make it real brief. Number 1, the bids coming in
22 before the cure; the auction is the same day as the cure.
23 They're not going in blindly and saying okay, I might take
24 two leases or I might take 250 leases, I'll see you know what
25 the cure numbers are after I bid at the auction. It's not

1 happening. They know going in. Cure objections are
2 typically resolved after the sale hearing, not before the
3 sale hearing. So to say, oh we've got to have this
4 information. I mean if that's the issue, then give them the
5 right to pull a lease if the number is too big. We see that
6 in plans all the time where the Debtor says I don't want to
7 assume the lease if the court rules that the cure number is
8 off from what the Debtor says and it's much higher, I might
9 not want to assume the lease. Let him pull the lease, if
10 that's, I mean that's a solution for them. But to think that
11 they're not going to have the information or a non stalking
12 horse who has access to all of this information and is going
13 to look at the records and say oh, my god, they say they owe
14 a million dollars in cure, it could be 5 million, I mean it's
15 just no realistic. Thank you.

16 MR. STEMPEL: Hopefully the last point, Your Honor.

17 THE COURT: Yes.

18 MR. STEMPEL: I think he makes the point for us.

19 Since they're not going to have all the information in front
20 of them, it's going to be hard for a competitive bidder to
21 say I'm taking all these leases subject to the right to kick
22 them off. We're going to have a 12, contemplated 12:30
23 closing and they're going to make, very difficult for another
24 purchaser to make that decision no matter what information
25 they have. But if they don't have it from the landlord, they

1 won't be able to make the determination, and a lot more will
2 be on that designation list. So we need the data so they can
3 make a quicker determination in an effort to have less on the
4 designation list by the time they close, if it's another
5 bidder. I mean that's actually to me better for the landlord
6 because it's more likely they're not in the limbo of
7 designation rights.

8 THE COURT: That's true. Look, I'm sympathetic to
9 the landlords on this issue, but I do think that in weighing
10 the relative equities, that it really has to be as the
11 Debtors are proposing and as we have typically done in cases,
12 and if the process down the line becomes overly burdensome
13 for the landlords, perhaps we can address it at that time as
14 far as costs for preparing the additional information if it
15 goes beyond a second or third requirement of determining the
16 cure costs. But I do think that it really is going to be
17 necessary, necessary information for potential bidders to
18 take into consideration. And so I'm going to overrule your
19 objection, but reserve for you the opportunity if it becomes
20 overly burdensome to come back and say I think we should get
21 some money for our extra work.

22 MR. POLLACK: Understood. Thank you, Your Honor. In
23 light of that ruling, there is one other request we would
24 make.

25 THE COURT: All right.

1 MR. POLLACK: And that is except in one case
2 recently or over the last couple of years, typically what the
3 Debtors do when they give the cure numbers, they say you owe
4 \$5,240, and that's it. They give us no information, and they
5 would like us to give them detailed information and backup.
6 The Debtors have, hopefully on their computers, a breakdown
7 of all of their information. It makes it a lot easier for
8 the parties to resolve and to come to a conclusion to figure
9 out if there's something you've got to adjust later on, if
10 they give the landlords the same information that they want
11 from the landlords. So instead of saying they owe us the
12 5,000 we would like to get the breakdown.

13 Now under the proposed order, they're supposed to
14 give that cure information in three days. With the cure
15 deadline not until December 22nd, your objection deadline, we
16 can live with not getting the cure information for you know
17 10 days or 15 days if that will enable them to also give us
18 the breakdown which will make things a little bit easier. So
19 we would ask that the distribution of the cure numbers be
20 delayed, but in exchange for that, that it not just be a cure
21 number, but the Debtor give their accounting breakdown of
22 what that number encompasses. Thank you.

23 THE COURT: All right. Thank you, Mr. Pollack. Any
24 response?

25 Mr. Stempel, if it's easier for you to speak from

1 the table, I don't have any problem with that at all.

2 MR. STEMPEL: I'm okay. No, no. I appreciate that
3 Your Honor. Actually I'm just more used to and it's more
4 customary for me to stand up, so I'm totally comfortable with
5 that.

6 THE COURT: You bet. All right.

7 MR. STEMPEL: Two answers. One, if Mr. Pollack will
8 accept it on the record, you know, we're happy, I don't know
9 how much more time we would need, we'd have to talk to client
10 about that, and at the end of this I'll ask, because our
11 chief financial officer I believe is on the phone, was able
12 to get phone usage out of headquarters today at least for a
13 little bit of time, so I'll ask Mr. Sanchioni to say if he's
14 still on.

15 MR. SANCHIONI: Yes I am.

16 MR. STEMPEL: Okay. And I'm not sure if Mr.
17 Sanchioni is the person at headquarters who would be able to
18 do this, but if he confirms for me in response to Mr.
19 Pollack, I think you know what I would say on the record is,
20 if the company is able, we would give them, to use our usual
21 terms, in reasonable detail the breakdown of what the Debtor
22 asserts is the cure to the extent the Debtor is capable of
23 giving such information. Mr. Sanchioni, if you are the right
24 person, whether you know if that's something the company
25 records would permit you to provide.

1 MR. SANCHIONI: Yes I do believe that we have that
2 information.

3 MR. STEMPEL: Okay.

4 THE COURT: All right. Then you will provide that
5 information.

6 MR. STEMPEL: So we'll provide some reasonable
7 detail of the breakdown of the cure amounts. I forget, I
8 don't think we need much more time. I mean if it was one
9 business -- what do we have three business days after the bid
10 procedures order to give it to you?

11 MR. POLLACK: It was three business days, Your
12 Honor, for the adequate assurance and the cure. We'd like
13 not to delay the adequate assurance.

14 THE COURT: Right.

15 MR. POLLACK: If they need a few more days for the
16 cure, again, ten days versus three days or whatever for cure
17 numbers where the objections are not due until December 22nd,
18 is not going to make a difference to us. So if they need
19 that time, that's fine. If we would just want to leave at
20 three days, but in order to get the detail it takes them you
21 know ten, fifteen days, that's okay too. We can leave that
22 on there that way.

23 MR. STEMPEL: Okay. Why don't we leave, because
24 there's enough changes to the orders, why don't we leave the
25 order as it stands, and on the record state that if we need

1 additional time for the detail, we will provide it a few days
2 later.

3 THE COURT: That's very well. All right. It's in
4 the notes now. Mr. Saydah?

5 MR. SAYDAH: Me too, Your Honor.

6 THE COURT: All right. I think this is --

7 MR. SAYDAH: I know the Debtors will work with us.
8 I just wanted to make sure it was clear on the record that
9 that's for all landlords to request that information, and I'm
10 sure --

11 MR. STEMPEL: On this one I won't rise, but yes that
12 was a statement as to not just Mr. Pollack's clients.

13 THE COURT: Right.

14 MR. STEMPEL: This would be a procedure for the
15 landlords as a whole.

16 THE COURT: My general approach is when Mr. Pollack
17 speaks it is for all the landlords. But other than you know
18 obvious individual objections. So I think that that's
19 appropriate.

20 MR. STEMPEL: I wish that were the case, Your Honor,
21 we would have a lot less to talk about.

22 MR. SAYDAH: We appreciate that, Your Honor. I
23 believe that Mr. Kwasteniet is also going to walk through the
24 handwritten changes to the order just so those are on the
25 record as well.

1 THE COURT: All right, Mr. Saydah.

2 MS. CADEMARTORI: Your Honor?

3 THE COURT: Yes.

4 MS. CADEMARTORI: Before we leave this issue -- this
5 Malani Cademartori, Sheppard Mullin on behalf of AGNL Ice
6 Cream Distributors. I do not yet have a *pro hac vice* on
7 file, but our local counsel, Morris Nichols, Mr. Alleman is
8 in the Court and I think he can vouch for me.

9 THE COURT: Absolutely. You certainly will be
10 heard.

11 MS. CADEMARTORI: Okay. Just quickly, and not to
12 belabor the issues that Mr. Pollack and Ms. Roberts brought
13 up, and we do join in those issues and look forward to
14 addressing those issues. But in addition to that, our main
15 issues are more technical in nature. Mr. Pollack brought up
16 the issue of I guess adequate assurance from the, from many
17 competing bidders, given by the bid deadline. And as I
18 understood it from what I heard, that adequate assurance
19 information is going to then be given to the landlords. I
20 just didn't see, and maybe I missed it, but I just didn't see
21 it in any of the bidding procedures or the order itself where
22 it provides that that information is in fact going to be
23 given to us. I realize that they just may be in agreement to
24 do it, but if it's not in the order or in the bidding
25 procedures, I would like to see it in there, since it is you

1 know something that's going to be signed by the Court.

2 And then the other issue is and this is the issue
3 that's very similar to what was brought up, is that I do
4 realize that under the bid procedures as they're now written,
5 all of the competing bidders as well as the stalking horse
6 bidder are going to have to designate which contracts or
7 leases they intend to take assignment of by the bid deadline.
8 What I don't see is when that information is going to be
9 turned around and provided to the landlords. I realize the
10 cure notice is going to go out three days after the bidding
11 procedures order is entered, and that's going to provide the
12 cures as the Debtors see it for all contracts and leases.
13 But it does come to mind, and not that my client will do so,
14 but that there may be landlords who want to object to the
15 fact that they're not being assumed or assigned. And given
16 that the deadline for a cure objection and other objections,
17 especially with respect to the stalking horse bidder, is the
18 22nd, two days later, I was looking for something, if it could
19 be provided, that turn around and give that information to
20 the landlords when it is provided to the Debtors in terms of
21 which leases and contracts would be assumed and assigned as
22 part of all of the proposed deals.

23 THE COURT: All right. Thank you Ms. Cademartori.
24 Mr. Kwasteniet?

25 MR. KWASTENIET: Yes, Your Honor. We do have

1 several handwritten changes that were negotiated with various
2 landlords' counsel this morning. One of which I believe
3 addresses the first concern that was raised on the phone. We
4 have agreed to modify the procedures to say that within one
5 calendar day after the bid deadline, we are requiring as part
6 of the bid submission package that each potentially
7 interested bidder, submit evidence of adequate assurance in
8 the package that we can then pass on to landlords. We have
9 committed that within one calendar day after the bid deadline
10 that the Debtors will serve each affected landlord and their
11 counsel, the adequate information, or adequate assurance
12 information provided by each qualified bidder. So if
13 somebody becomes a qualified bidder, we will then pass on
14 within the next business day afterwards, the adequate
15 assurance package provided by the bidder.

16 THE COURT: Is that helpful Ms. Cademartori?

17 MS. CADEMARTORI: Yes, Your Honor, that is very
18 helpful.

19 THE COURT: Good.

20 MR. KWASTENIET: Your Honor, we've also agreed that
21 we will say within, in paragraph 13 of the order, it says on
22 or before three business days after the entry of the bidding
23 procedures order, Debtors will, instead of saying, just
24 serve, we're going to say, will file with the bankruptcy
25 court and serve the notice of, the cure notice on all

1 contract parties and their counsel, if known.

2 THE COURT: Okay. So parties will be able to get
3 that information essentially immediately off of the Pacer.

4 MR. KWASTENIET: Yes. We've heard a concern, Your
5 Honor, that sometimes the notice addressed in a lease may be
6 you know, a location that's no longer operative --

7 THE COURT: That's right.

8 MR. KWASTENIET: -- or it then flows you know
9 through a lot of people internally at the landlord and
10 doesn't get to the right person, so we agree to file and
11 serve counsel to the extent known.

12 THE COURT: Excellent. That's an excellent
13 procedure.

14 MR. KWASTENIET: Your Honor, there are several other
15 handwritten changes that we've agreed to that will be in the
16 order we submit, including, you know, changes to the
17 procedures, but I wanted to identify those in particular.

18 THE COURT: Thank you. Is there anything in
19 particular that anyone wanted to make certain was read into
20 the record? All right.

21 MR. LECHNER: Our ex parte application has not been
22 heard yet to the best of our understanding, only the one
23 point regarding scheduling.

24 THE COURT: Well I understand that. And I don't see
25 where you have standing to assert an objection in this case.

1 So that was my ruling, and it's applicable to all of your
2 requests.

3 MR. LECHNER: So the entire application and motion
4 is denied.

5 THE COURT: That's correct.

6 MR. LECHNER: Then we're not going to bid.

7 THE COURT: All right. That's certainly your
8 choice.

9 MR. KWASTENIET: So, Your Honor, unless Your Honor
10 has anything further, or anybody else has anything further,
11 we request that you enter the revised form of order approving
12 the bidding procedures.

13 THE COURT: All right. Thank you. Anyone else just
14 -- well let me rule because I will say that this has
15 certainly been a very heavily negotiated motion. You know,
16 when you're a Judge you pick up one, you read one document at
17 a time, and I first read the Committee's objection, and got
18 my blood following so to speak. And then I read the
19 responses and I calmed down, you know, but it was awhile
20 before a calmed down. But I do think that it is a, it's
21 obviously an expedited procedure, but not as expedited as
22 some that I've seen and with the Committee's involvement it
23 certainly has become I think a very thoughtful procedure.

24 I did hear Ms. Roberts's objection as far as due
25 process is concerned, but I don't see this as a *sub rosa* plan

1 in any respect. I see it as really a necessity for the
2 future of this, of these Debtors, and its many employees and
3 landlords and vendors, that a sale proceed promptly. No one
4 can force anyone to continue to lend money to these Debtors
5 beyond a certain point. And the fact that they are willing
6 to do so for what is now additional time over what was
7 originally proposed I think is a very large and helpful
8 accommodation.

9 And on that basis, and the fact that there has been
10 largely a resolution of the objections, I will grant the
11 motion.

12 MR. KWASTENIET: Thank you very much, Your Honor.

13 THE COURT: With the dates as we have discussed, and
14 obviously as revised.

15 MR. KWASTENIET: Yes. Thank you, Your Honor.

16 THE COURT: Yes.

17 MR. KWASTENIET: Your Honor, the next item on the
18 agenda for this morning is the DIP motion. If I may
19 approach, Your Honor, I've got a blackline.

20 THE COURT: I see Mr. - yes please. And I'm going
21 to suggest maybe a brief, just a very brief recess if that's
22 all right.

23 But Mr. Hazeltine, do you have something to say with
24 respect to the bidding procedures?

25

1 MR. HAZELTINE: No Your Honor, I was just going to
2 say, in order to not interrupt the DIP hearing, I represent
3 National Industrial Portfolio Borrower. My co-counsel, Mr.
4 Bill Moormon of Craig and Macauley is on the phone.

5 THE COURT: Yes.

6 MR. HAZELTINE: He's admitted *pro hac vic*. I may
7 have to leave before the hearing is over, so I just wanted to
8 let you know that he will be speaking on behalf of National
9 Industrial.

10 THE COURT: Yes. Thank you for that, Mr. Hazeltine,
11 and that certainly is acceptable.

12 Why don't we take a ten minute recess and then we'll
13 come back and address the financing.

14 MR. KWASTENIET: Great. Thank you, Your Honor.

15 THE COURT: Thank you. We'll stand in recess.

16 (recess - 11:20 - 11:34)

17 THE COURT: Thank you everyone. Please be seated.

18 MR. KWASTENIET: Good morning, Your Honor.

19 THE COURT: Are you going to be handing up the
20 bidding procedures order, or are you going to revise it?

21 MR. KWASTENIET: Your Honor, on that order there
22 were enough handwritten changes that I want it to be
23 understandable by potential third party bidders.

24 THE COURT: Yes.

25 MR. KWASTENIET: So I think we're going to take it

1 back and clean it up electronically.

2 THE COURT: Absolutely.

3 MR. KWASTENIET: And then we're going to invite
4 everybody who has an interest in that order, or making sure a
5 particular language is in back to Pachulski's offices after
6 the hearing, we'll revise it there. Once everybody has
7 signed off, we'll submit it.

8 THE COURT: All right. Thank you.

9 MR. KWASTENIET: Your Honor, the next item on our
10 agenda is the Debtors' motion for final DIP order. I do have
11 a blackline, and again there are some additional handwritten
12 changes to the blackline that somebody else will explain
13 momentarily.

14 THE COURT: All right. Thank you. Thank you, Mr.
15 Kwasteniet. You've obviously taken out, subject to the final
16 word or language, and that sort of thing.

17 MR. KWASTENIET: Correct, Your Honor. There's a
18 number of references in here where we've filled in the actual
19 dates of the first day hearing, the second interim DIP
20 hearing, then we've made conforming changes to reflect the
21 fact that this is a final order, not an interim order. So
22 I'll generally, and I'll pause anywhere you have questions,
23 but I'll generally skip ahead to the what I believe are the
24 more material changes to highlight those for Your Honor.

25 Your Honor, the first material change that I come to

1 is on page, it's on page 22 of the order.

2 THE COURT: All right.

3 MR. KWASTENIET: A lot of the changes on the
4 preceding pages were all, you know, changing from interim to
5 final.

6 THE COURT: Exactly. And making reference to the
7 appointment of the Committee and the like.

8 MR. KWASTENIET: Appointment of the Committee, yes,
9 absolutely. So in paragraph 3, on top of page 22 of the
10 blackline, we've added in, this is all obviously highly
11 negotiated between the Committee, the Debtors, the DIP
12 lender, Wells Fargo as the agent, we've added in a
13 marshalling concept in this paragraph. It says that the DIP
14 lender will look to the prepetition encumbered assets before
15 it will look to any prepetition assets that were
16 unencumbered.

17 THE COURT: Yes.

18 MR. KWASTENIET: So they have agreed to a
19 marshalling concept as set forth in paragraph 3.

20 On page 23, paragraph 4, we've added a clarifying
21 provision in an attempt to address one of the concerns raised
22 by Huntington Bank in one of its objections that the liens
23 and security interest claimed by Huntington Bank shall be
24 deemed to be permitted prior liens under the DIP agreement to
25 the extent that they are [indiscernible] valid enforceable

1 security interest. So it's admitting [indiscernible] it's
2 just to say that to the extent that Huntington has valid
3 liens, those valid liens are not, would not default the DIP
4 facility.

5 THE COURT: Yes.

6 MR. KWASTENIET: We've, on page 24, added the
7 Committee and the Committee members to the carve out. There
8 was an interim provision that capped at 150,000, I believe it
9 was subsequently increased to 225,000 for the first 30 days,
10 the fees and expenses of the Committee. The Committee and
11 the Committee members have been fully added to the carve out
12 subject to a cap on investigation claims, which I'll get to a
13 few pages later. We've also increased from 500,000 to
14 750,000 the amount of the post default portion of the carve
15 out. So the carve out is structured as whatever fees and
16 expenses are accrued through the date of default, so we
17 called that the pipeline portion, and then plus a certain
18 amounts, 750 post default and that's a change from the
19 interim order.

20 On page 25, here we've added some clarifying
21 language to the mechanics. We are going to be funding a
22 carve out escrow for the professional fees. So that will be
23 sort of building up of course during these cases. Retained
24 professionals are paid significantly in arrears for time
25 spent, but in order to keep track of things on a more real

1 time basis, the Debtors will be providing weekly estimates to
2 the DIP lenders, and the DIP lenders will then be escrowing
3 the estimated professional fees that have been incurred so
4 that they're tracking it on a more of a real time basis.

5 THE COURT: All right.

6 MR. KWASTENIET: Your Honor, starting on page 26 and
7 carrying over to page 27, perhaps the most heavily negotiated
8 paragraph in the order deals with the investigation, and the
9 Committee's ability to use DIP proceeds to investigate
10 claims. And what the parties have agreed to is a \$700,000
11 cap which begins on October the 18th and runs through as I
12 understand it, it's the date immediately before the date of
13 the trial which we've now set for I believe December 16, 15th
14 and 16th, 15th and 16th. So from October 18 through December
15 14, the Committee has access to \$700,000 to investigate the
16 claims of the lenders.

17 There are various other restrictions and caveats and
18 qualifications in there. And then also Mr. Austin is going
19 to be explaining any further handwritten changes that were
20 agreed to this morning, but that's the basic concept.

21 THE COURT: All right. And on page 27, a couple of
22 dates will have to be changed, but that's easy enough.

23 MR. KWASTENIET: Yes. Yes. Your Honor, on page 29,
24 in the prior draft of the order, we had a formula for
25 determining the length of the investigation period.

1 THE COURT: Yes.

2 MR. KWASTENIET: The parties have agreed to dispense
3 of the formula and to provide that the investigation period
4 will run through December 12th.

5 THE COURT: Okay.

6 MR. KWASTENIET: 2011. Your Honor, on page 8, and
7 this addresses I believe the PBGC's concern that they raised
8 earlier today, previously there was language at the bottom of
9 paragraph 8, the last full sentence, it's now been struck
10 that provided that if a Committee has been appointed, then
11 the Committee should be entitled to bring the challenge and
12 no other party shall be entitled to investigate. We've heard
13 from PBGC that they also wanted to you know conduct their own
14 investigation, and we're not attempting to limit that. So we
15 struck that, that limitation language on page 8, paragraph 8,
16 page 31.

17 Your Honor, we also struck paragraph 10, this was an
18 interim order provision on the use of cash collateral, it's
19 now been replaced by paragraph 11.

20 THE COURT: Right.

21 MR. KWASTENIET: Which provides for use of cash
22 collateral on a final basis in compliance with the DIP
23 budget.

24 Your Honor, on page 35, this is paragraph 12A, to
25 the extent that the prepetition secured first lien

1 obligations have not been paid down, this provides for
2 continuation of the creeping rollup mechanism that was
3 described and approved at the interim order, that is
4 continued through paragraph 12A.

5 Your Honor, we've added a new paragraph 12C, again
6 in an attempt to address concerns raised by Huntington Bank
7 and to extent that they have valid liens against Debtors'
8 assets and I believe it is five different store locations
9 that those are preserved. And I believe we've also agreed to
10 add in language clarifying that the liens would extend to
11 proceeds of the Huntington collateral, not just the
12 Huntington collateral itself.

13 Your Honor, we have additional language on page 38,
14 that again clarifies the marshalling concept that I
15 previously explained.

16 At the bottom of page 38, we've added in, we've done
17 it in various places, we'll highlight it here, sharing of
18 information with the Committee which previously the Debtor
19 had an obligation to provide information to the DIP lender,
20 we're also adding the Committee.

21 Your Honor, page 40 of the blackline, in paragraph
22 13, towards the bottom of the page, we added clarifying
23 language that says, to the extent that any interest paid on
24 account of the prepetition first lien indebtedness, if that
25 first lien indebtedness is later found to be unsecured, the

1 liens are voided, then the interest paid during the case up
2 to that point is subject to disgorgement.

3 THE COURT: Okay.

4 MR. KWASTENIET: I believe the rest is just
5 conforming changes through the rest of the document.

6 THE COURT: That's what I'm seeing so far Mr.
7 Kwasteniet. Yes.

8 MR. KWASTENIET: So at this point I'd like to yield
9 the podium to anybody else who would like to speak in favor
10 of the motion. I believe that Mr. --

11 THE COURT: Austin, I know --

12 MR. KWASTENIET: -- Austin is going to go through
13 some additional clarifying changes that were agreed to this
14 morning, Your Honor.

15 THE COURT: Thank you. Thank you, Mr. Kwasteniet.
16 Mr. Austin, good morning.

17 MR. AUSTIN: Good morning, Your Honor.

18 THE COURT: I read your papers with care last night,
19 and I certainly understood them well.

20 MR. AUSTIN: Well we'll put those in the form file
21 because now the objections I believe at least from the
22 Committee have been resolved.

23 THE COURT: Yes.

24 MR. AUSTIN: For the record, Your Honor, I'm Jess
25 Austin with the firm of Paul Hastings. We are here today

1 representing Wells Fargo Capital Finance, double check, I
2 think it's Inc. But in any event, it's the, it was the agent
3 on the prepetition working capital liquidity credit facility
4 and issuer of letters of credit. It is the proposed agent,
5 and it was also the lender under the prepetition facility.
6 It is the agent under the DIP facility and the lender of
7 record. Although as the first day order, first day hearings
8 noted, that over a certain dollar amount the affiliates of
9 Sun Capital are funding the extra dollars of the DIP loan
10 through a participation agreement under the DIP credit
11 facility.

12 THE COURT: Yes sir.

13 MR. AUSTIN: I'd like to do a couple of things, Your
14 Honor. You had before you the blackline, and that is the
15 blackline of the final order before we made some, negotiated
16 some additional changes this morning. I'd like to point out
17 a couple of more points in that order for the record, as
18 well. Then I'll turn to the additional changes which we've
19 incorporated based on the negotiations with the Creditors
20 Committee this morning.

21 THE COURT: All right.

22 MR. AUSTIN: What we would propose, Your Honor,
23 because we have done some additional handwritten provisions
24 is that following this morning's hearing, assuming we have
25 verbal approval of the financing, is that we'll go back,

1 we'll make these changes in typewritten form, circulate it
2 around, and then submit it with a full blackline from that
3 order to the interim order that can be put on the record, and
4 also for this Court to be able to easily see all of the
5 respective changes.

6 THE COURT: Thank you. That will be certainly very
7 helpful.

8 MR. AUSTIN: With respect to the initial blackline,
9 there was one thing that, a couple of things that I wanted to
10 point out. If you look on page 11, and this is in, trying to
11 look at, it's paragraph, it's paragraph F what we call number
12 2, excuse me number 3.

13 THE COURT: Yes.

14 MR. AUSTIN: We clarified that the prepetition
15 collateral did not include, specifically stated it did not
16 include what was properly identified on Schedule 1(e) as
17 excluded collateral with respect to the DIP facility, with
18 respect to the prepetition. However, with respect to the DIP
19 facility, Wells Fargo in its capacity as both the agent and
20 the DIP lender, we've requested and insisted on a lien on
21 that collateral, albeit, we did agree to the marshalling
22 concept so that if there's a future default under the DIP
23 loan, all of the proceeds, all of the claims of the DIP loan
24 will look first to the prepetition encumbered collateral
25 before looking to any that might be deemed to be unencumbered

1 collateral.

2 THE COURT: All right.

3 MR. AUSTIN: The other thing I also wanted to point
4 out to the Court, if you look at the page under the prior
5 one, it's in the, it's in paragraph 19, it's the automatic
6 stay section.

7 THE COURT: Okay.

8 MR. AUSTIN: Generally, I think this Court is
9 familiar with the structure and the form of the order which I
10 know Wells Fargo has generally presented and certainly if I'm
11 their counsel have generally presented to this Court, that if
12 there's an event of default, the issue that is normally
13 addressed at any emergency hearing that's been set is whether
14 there has actually been an event of default. There is an
15 additional modification that's made here which is not only,
16 the issues that can be addressed, is not only whether there's
17 an event of default, but what was the cause of that event of
18 default. The reason that is added into this order is because
19 under the terms of the participation agreement, under the
20 terms of the DIP loan, Wells as the DIP lender of record is
21 not required to fund if Sun's affiliate is not otherwise
22 funding under its participation. And the Committee, while
23 it's not a direct, the Debtor is not as, say a direct party
24 to that participation agreement, the Committee wanted to make
25 sure it at least had the ability to look at whether or not

1 that affiliate was doing things appropriately relative to a
2 funding request. So we've kicked that or added that into
3 here and wanted the Court to be well aware of that.

4 With respect to this order, and I think you've seen
5 not only from our responsive papers but certainly from the
6 objections and responses and initially filed by the
7 Committee, as you go through our objections, even before we
8 got here over this weekend and got here today, we had made a
9 number of changes to the order that the Committee had
10 previously requested. And I think that we had clearly
11 outlined that in our responses such as the points about that
12 to the extent there was an effective challenge, there were to
13 be disgorgement or appropriate remedy built in, that we did
14 the marshalling idea, we made sure that the Committee had
15 consultation rights on the budget, we made sure that the
16 Committee had the right to object to various fees, there was
17 not the automatic accrual of interest on the second lien
18 debt. So we had made, as we outlined in our responses at
19 pages 5 and 6 and carryover to 7, a number of the changes we
20 had already made before even this weekend in coming here
21 today.

22 THE COURT: Yes. Your response was a calming
23 influence, Mr. Austin.

24 MR. AUSTIN: Right. As a result of continued
25 negotiations and ultimately as a result of the negotiations

1 primarily between the Committee and the Sun affiliates on how
2 to deal with the funding of the investigation --

3 THE COURT: Yes.

4 MR. AUSTIN: -- since they reached agreement on
5 those provisions and to a certain extent I and my client were
6 like all right, if you want to fight the bulk just so we
7 don't get the flu in Europe (phonetic) I don't really care
8 about it. They reached their agreement, as a result of some
9 of the other objections that the Committee had raised, such
10 as the issue on the 506(c) waiver and a number of other
11 provisions, they would say fine, we will let that go because
12 we got what we ultimately wanted here.

13 What they got there, as I would say, on the
14 investigation, I would want to also make very clear to this
15 Court, that at least from Wells Fargo Capital Financing
16 perspective and certainly from my own perspective as counsel
17 to Wells, as well as counsel to other DIP lenders that
18 appeared before this Court, we will not consider the fact of
19 giving \$700,000 for investigation rights in any way shape or
20 form precedential and future DIP orders which we will be
21 presenting.

22 THE COURT: I understand completely.

23 MR. AUSTIN: You know, it was something that, that's
24 what's took by the piece, that's fine. We are usually more
25 focused on whether it's a 50 to 75 or even I notice that my

1 partner in the [indiscernible] was able to, let's just say
2 get a good number at \$150,000, but I would say that's the
3 upper range of where I'd like to feel comfortable on what
4 those numbers should be.

5 THE COURT: Yes.

6 MR. AUSTIN: So I just wanted the Court to be clear
7 that at least when I'll be back here, not to be considered
8 precedential.

9 Additional changes that were made as a result of
10 overnight discussions and even this morning, I will now bring
11 to the Court's attention.

12 THE COURT: Yes sir.

13 MR. AUSTIN: The first would be in, it is in
14 paragraph 5, and it's in sub paragraph (d) of that order.

15 THE COURT: Okay. I 'm right with you.

16 MR. AUSTIN: And that's where we will be discussing
17 and putting in the, what they call as being defined to be the
18 Committee limited fee cap, and that goes to the issue of the
19 \$700,000. We've made it clear that it's certainly there to
20 investigate the perfection of the liens of all of the
21 prepetition secured parties, so that would include Wells
22 Fargo, that would include the subordinated note holder.
23 However, that to the extent that there is going to be
24 litigation concerning anything, any discovery, of what could
25 get up to a trial, then that relates only to action against

1 the subordinated note holders. We on Wells Fargo's behalf
2 are not consenting to all of that money to be used to
3 litigate against us.

4 THE COURT: Sure.

5 MR. AUSTIN: Now, everybody keeps saying to me, go
6 to the corner, be quiet, we're not shooting at you.
7 Unfortunately, in bankruptcy cases, when you walk down here,
8 you never know who's looking at you in the back. So we're
9 just trying to be careful there.

10 THE COURT: Yes.

11 MR. AUSTIN: The second thing, Your Honor, is that
12 certainly the use of these funds and what they can be used
13 for were keyed up to the date that this actual trial may be
14 heard, the hearing date, trial date, whatever it is. And we
15 are providing that if that trial, as we're defining it, is
16 adjourned or delayed at the request of or is otherwise caused
17 by the subordinated note holder or its affiliates, then the
18 use of that defined term, Committee limited fee cap by the
19 Committee shall be extended until the day immediately prior
20 to the commencement of such trial. So that to the extent
21 that there's some reason that that, whatever date people
22 agree to, if it gets extended out because the subordinated
23 note holder, its affiliates come in here and ask for a delay
24 or ask for an extension or for some other reason that can be
25 pegged to it being the cause thereof of that extension, then

1 the Committee gets an extended right to continue to use the
2 dollars. It's not be used as a what I would call a false
3 deadline just to cut off what the Committee can use that
4 money for and up to when it should use it.

5 The next major change, Your Honor, is in paragraph
6 6, and that's where it should be clarified that just for the
7 avoidance of doubt, in the absence of a successful challenge,
8 that's a defined term, and the assertions of the claims and
9 any other claims against a secured party in any other
10 capacity, shall not limit the ability of the secured parties
11 to credit bid pursuant to either 363(k) or as otherwise
12 provided in the final order. So that for example, if you
13 get, like you got some disallowed interest claim or something
14 of that order, that shouldn't in and of itself blow out your
15 entire ability to pursue a credit bid.

16 And the last change that we will be putting into the
17 order, Your Honor, deals with the adequate protection to the
18 Huntington National Bank and that's where we will be
19 clarifying that to the extent that the Huntington Bank has
20 valid liens on assets, its replacement liens will also flow
21 to the identifiable proceeds of those assets on a going
22 forward basis.

23 THE COURT: And that would be I assume in paragraph
24 12(c).

25 MR. AUSTIN: That would be in -- that's correct,

1 Your Honor.

2 THE COURT: Okay.

3 MR. AUSTIN: So with those modifications, I think we
4 can report that I believe we've at least resolved the issues
5 with the Committee. My understanding that we may still have
6 some objections from some of the landlords who I believe
7 raised a 506(c) type objection, I think that irrespective of
8 what we have proposed to provide to Huntington Bank, National
9 Bank, it may still have some issues or comments it wants to
10 make on the record. What I would propose to do is I will
11 just address those objections after they've actually come
12 forward.

13 THE COURT: Yes.

14 MR. AUSTIN: I don't want to presume what they're
15 actually going to say, but we can otherwise address those
16 comments.

17 Outside of that Your Honor, the order has been, I
18 would say very carefully reviewed by all the parties and
19 heavily negotiated through the process. We would join in the
20 Debtor subject to these additional modifications asking the
21 Court approve this financing.

22 THE COURT: Thank you, Mr. Austin.

23 MR. AUSTIN: Thank you.

24 THE COURT: I understand. Thank you, sir. Mr.
25 Herman?

1 MR. HERMAN: Thank you, Your Honor. Your Honor,
2 I'll be brief. We join in the points made by the Debtor and
3 Wells Fargo. I just have a few other quick items here.

4 I wanted to mention that at least in our view and I
5 think in the Committee's view and the Debtors, but I don't
6 want to speak for them, but it's certainly in our view, the
7 bid procedures, and bid procedures order, and the DIP loan
8 were really a package that the parties negotiated
9 collectively and they are really tied together as a single
10 package. And I just wanted to mention that that it's very
11 difficult when we get into the objections to try to treat
12 them in a vacuum. At least certainly my client and I'm
13 almost a 100 percent positive, but I'll let them speak for
14 themselves, but the other parties also saw it as a single
15 package and this is the global settlement in essence of all
16 of those items.

17 THE COURT: That's what I understood from the papers
18 as well, Mr. Herman.

19 MR. HERMAN: Next point, Your Honor, I just wanted
20 to briefly mention that as pointed out in our brief and as
21 quoted, your quote from the transcript of the first day
22 hearing, you had previously found that the interim DIP was at
23 or better than market, and we think it's now better than
24 better, or as they said in the Dumb and Dumber movies, more
25 betterer.

1 THE COURT: Yes.

2 MR. HERMAN: We in our reply papers set forth a list
3 of all of the items which we thought show that it was below
4 market, meaning better for the Debtors. I know that Wells
5 did the same, and so I won't burden the record, but there are
6 many, many items that, concessions that were made by the
7 lenders to make it better than market. And there's a list in
8 the record that I think the Court can take notice of.

9 The third point, Your Honor, is the PBGC's
10 objections. They certainly join in the Committee's
11 objections and they are a Committee member, but they also had
12 some objections on their own behalf as a creditor and a party
13 in interest. Our reply papers said that we were reserving
14 all of their rights, and specifically I just wanted to
15 confirm it on the record, that in fact nothing in this order
16 or in the bid procedures order, or anything else that's done
17 today would prejudice their rights to file any claim, to
18 object, to file a brief, to file a suit. And not just in
19 this case, Your Honor, but also in the related case of the
20 other Debtors that have filed after the initial Friendly's
21 filing. So it's a full reservation of all their rights to
22 object, to be heard, to file claims and to basically do
23 anything as a creditor and party of interest in these cases.
24 And it should be fully and expressly reserved.

25 I do note, and has been noted previously that

1 there's clearly going to be some overlap in the claims that
2 the Committee is investigating and the PBGC may want to
3 investigate, and we will of course try to cooperate and
4 coordinate so that overlapping claims can be heard together.
5 We certainly want to avoid two bites at the apple, the risk
6 of inconsistent judgments and rulings and we want to try to
7 have some efficiencies and cost. So to the extent that we
8 can, we'd like to have all of those overlapping issues heard
9 together. We don't have the actual nuts and bolts for how
10 that's going to work in this order or in the bid procedures
11 order, but we'll try to work it out collectively, and if we
12 can't, we'll have to just, we'll come to you.

13 THE COURT: Of course.

14 MR. HERMAN: But I assume that's the type of thing
15 we could work out without Court intervention.

16 THE COURT: All right. But I'm here if you need me.

17 MR. HERMAN: The next point, Your Honor, is
18 something that's not exactly on the agenda today, but it
19 relates directly to the investigation process and funding.
20 Previously you heard from us that as part of the
21 investigation, Sun Capital and its various affiliates would
22 be producing information and documents and neither Sun nor
23 Friendly's are publicly held entities, so there's an extreme
24 sensitivity to confidentiality issues here. We mentioned to
25 you previously that we had started to comply with the

1 document production requests and that we had a protective
2 order to be put in place.

3 THE COURT: Yes.

4 MR. HERMAN: I'm pleased to advise that we now have
5 finalized the protective order that would govern the flowing
6 of information for the investigation that you would approve
7 today if you approve the DIP loan. So, Your Honor, you have
8 previously advised us that you would not make the parties go
9 through the hurdle of time and the expense and delay of
10 making a motion and having a separate hearing to approve
11 that. It is on consent, and if I may approach the Court with
12 the protective order.

13 THE COURT: You may.

14 MR. HERMAN: Thank you, Your Honor.

15 THE COURT: You certainly may. And I'll note that
16 the Committee did file its objection under seal, and in
17 respect of the understanding. All right. This is fully
18 consensual. Is that right, Mr. Dublin?

19 MR. DUBLIN: That's correct, Your Honor.

20 THE COURT: very well. All right. I will certainly
21 grant it.

22 MR. HERMAN: Thank you, Your Honor. That would
23 conclude my comments in support. And I would of course
24 reserve my right to respond to any objections.

25 THE COURT: You bet. Of course. Mr. Dublin.

1 MR. DUBLIN: Your Honor, again I'll be very brief.
2 The order obviously was heavily negotiated among the Debtors,
3 the Committee, Sun and Wells. Everybody is happy and not
4 happy with the result, everybody gave something they didn't
5 want give and got something that was really important to
6 them. So we think it is a fair resolution. It is
7 definitely, I don't know if I want to use the word, global, a
8 global resolution would resolve our litigation with respect
9 to the recharacterization, but as far as the DIP order goes
10 and the bid procedures go, one was contingent on the other,
11 and it was give and take in connection with both of those
12 matters in order for us to achieve the resolutions that are
13 reflected both in the proposed final DIP order, as well as
14 the bid procedures order that you have already considered.

15 I think the order speaks for itself with respect to
16 the Committee's ability to investigate and pursue causes of
17 action against Sun. Just to clarify, we will be able to use
18 cash collateral DIP proceeds for all matters unrelated to the
19 investigation and prosecution of claims and causes of action
20 against the prepetition secured lenders, generally considered
21 your garden variety type chapter 11 services that a Creditors
22 Committee would undertake, monitoring the Debtors' assets,
23 examining the Debtors' assets and liabilities, being involved
24 in the sale process, responding to motions and the like.

25 With respect to the investigation of the prepetition

1 secured lenders' claims, from and after October 18th, that's
2 when the \$700,000 kicks in, prior to October 18th, there was
3 no cap, there wasn't that much done, there was a little bit
4 of work, but in connection with negotiating the resolution,
5 everybody agreed that, the limitation of the \$700,000 would
6 not start until October 18th, obviously go into the day
7 immediately prior to what we'll refer to as the trial on the
8 merits which is currently scheduled for December 15th. So
9 that would stop on December 14th.

10 Mr. Austin is correct that the use of the \$700,000
11 is only in respect of the investigation as it relates to
12 Wells. However, it is relating, as far as it relates to Sun,
13 if we are unable to reach a true global settlement and we end
14 up going to a trial on the merits on the 15th, the \$700,000
15 can be used for everything leading up to the day immediately
16 prior to the trial, except for any type of dispositive
17 motion. So if the Committee were to, which it will not, file
18 a motion for summary judgment, it would not be able to use
19 the \$700,000 because that could be viewed as a delay tactic
20 to try to put off a hearing on the merits. The Committee is
21 not going to be filing a motion for summary judgment, we're
22 going to go straight to their merits. And we expect that the
23 parties will work constructively and in good faith in order
24 to set and establish appropriate discovery deadlines,
25 deadlines for submission of expert reports to the extent

1 necessary, depositions and the like, so that we do not have
2 to appear before Your Honor to address those issues.

3 While the parties have been strong advocates for
4 their positions, we have for the most part been relatively
5 civil, and have been able to reach the agreement today based
6 on everybody's good faith efforts, and we expect that that
7 will continue.

8 THE COURT: Excellent, Mr. Dublin.

9 MR. DUBLIN: Thank you, Your Honor.

10 THE COURT: Thank you.

11 MR. HERMAN: Your Honor, can I make one more
12 comment?

13 THE COURT: Of course.

14 MR. HERMAN: I'm sorry. I just heard, this may have
15 been an oversight on our part, the protective order that you
16 assigned dealing with the confidentiality provisions between
17 Sun and the Committee, we neglected to include Wells Fargo,
18 they're going to also be part of an investigation. I believe
19 Your Honor, what they're now going to do is they are just
20 going to literally photocopy it and submit at some point an
21 identical protective order for themselves. So we just wanted
22 to give you a heads up. And if they could have permission to
23 just perhaps leave it with chambers.

24 THE COURT: Yes.

25 MR. HERMAN: It should be identical except it'll

1 have a signature line for them.

2 THE COURT: That's fine. And obviously it will be
3 applicable in the interim, but I'm sure I'll be seeing that
4 sooner rather than later in any event. Thank you, Mr.
5 Herman.

6 All right. I guess it's now time for me to hear
7 from objectors if any remain.

8 Mr. Sullivan, I only mention your name so that
9 others on the phone will know that you're coming forward.

10 MR. SULLIVAN: Okay.

11 THE COURT: Good afternoon.

12 MR. SULLIVAN: Good afternoon, Your Honor. Bill
13 Sullivan on behalf of the Huntington National Bank. Your
14 Honor may recall that Huntington is a secured lender with
15 respect to five stores in the Dayton, Ohio area that were
16 previously operated by a franchisee of Friendly's.

17 THE COURT: Yes.

18 MR. SULLIVAN: That franchisee apparently turned
19 over the keys to Friendly's several days before the petition
20 date. Friendly's has continued to operate those locations
21 going forward. And the franchisee was Fourth Day
22 Hospitality, that's the entity that signed the loan documents
23 with respect to those locations, and Huntington has, is
24 secured with respect to the business assets of those
25 locations.

1 Your Honor, we filed an objection to the entry of
2 the interim order that was entered into the entry of the
3 final order. You've heard some language today that has
4 partially resolved our objection. But it is not resolved in
5 full. And, Your Honor, with respect to the paragraph 12(c)
6 that Your Honor was referred to, that is the paragraph that
7 proposes to provide adequate protection liens for Huntington.
8 And Your Honor was, it was pointed out that there was a
9 modification of paragraph 12(c) that would give Huntington
10 replacement liens in the proceeds of the sale of any
11 Huntington collateral which is acceptable as to a, if there
12 is a sale of these locations, that includes Huntington
13 collateral. But the adequate protection that has been
14 proposed is not adequate with respect to the continuing use
15 by the Debtors of the Huntington collateral to operate these
16 stores, and because it does not provide any protection or any
17 lien protection for the diminution of value of the equipment
18 there. And Your Honor is fully aware that there's a sale
19 process going on, and that there could be a designation
20 rights period with respect to locations. So the Debtors
21 could be continuing, under those procedures, could be
22 continuing to operate these stores for a period of up to six
23 months from today.

24 And so, Your Honor, Huntington, the Debtor has not
25 offered any liens to deal with a diminution of value for the

1 equipment that is in these locations. And for that reason,
2 we have a continuing objection and the final, assuming that
3 there is no further offer with respect to diminution of
4 value, this final DIP order should not include a finding that
5 we are adequately protected with respect to the use of these
6 stores, or with respect to diminution of value. And nothing
7 in this order should be deemed to limit or impair
8 Huntington's right to seek relief from the automatic stay
9 with respect to these locations.

10 THE COURT: All right. I understand your point, Mr.
11 Sullivan, certainly.

12 Do we want to hear all of the objections? Would
13 that be your preference and then --

14 MR. KWASTENIET: It would, Your Honor.

15 THE COURT: All right, let's do that. Let's do that
16 then, Mr. Kwasteniet.

17 Who else wishes to be heard with an objection? Yes
18 sir, Mr. Miller? For the PBGC?

19 MR. MILLER: Yes, Your Honor. Thank you. We filed
20 an objection because it was our understanding that the
21 proposed DIP order might have had an effect on our ability to
22 investigate and file an objection to the subordinated note
23 and the credit bid process. As I understand it, the
24 negotiated language in the order that's being sent up to you
25 basically alleviates our concern, and counsel's statements

1 indicating that they have no intention and nothing that they
2 understand prevents PBGC from again investigating and filing
3 claims, or filing objections to subordinate notes. If that's
4 the case then we're willing to withdraw our objection and
5 move forward. And we appreciate the cooperation of the
6 parties.

7 THE COURT: All right. Thank you. And that is my
8 understanding as well. And I think that was fairly clearly
9 expressed on the record.

10 MR. MILLER: I think it was, Your Honor.

11 THE COURT: And thank you.

12 MR. MILLER: Thank you very much.

13 THE COURT: All right, sir. Anyone else?

14 MR. MOORMAN: Your Honor, William Moorman from Craig
15 & Macauley on behalf of National Industrial Portfolio
16 Borrower, LLC.

17 THE COURT: Yes. Good afternoon.

18 MR. MOORMAN: Good afternoon, Your Honor. My client
19 is the Debtors' warehouse distribution freezer and
20 refrigeration landlord. My understanding is there
21 [indiscernible] for those purposes. Our objection is with
22 respect to primarily the 506(c) waiver and super priority
23 claim. If there was ever a landlord that I think would fall
24 into the bucket of claims would get the benefits of Section
25 506(c) it's this type of landlord where without the use of

1 the space, the ice cream would melt, Your Honor, and the ice
2 cream would not be distributed to various restaurants and
3 stores of the Debtors.

4 So our objection is really to the 506(c) waiver. I
5 have listened throughout this hearing. I understand that our
6 battle is a much more significant battle now that the
7 Committee is withdrawing its objection to the 506(c) waiver.

8 Without belaboring the point, I still think that it
9 is inappropriate to have a 506(c) waiver, but my client would
10 be willing to withdraw its objection if it could be given
11 assurances that the payment of postpetition rent to my client
12 is built into the budget. Not something that we can identify
13 in the budget, I'm concerned about the sub-rent, I don't know
14 if that's built into the budget. Obviously if this case
15 falters and becomes administratively insolvent, that's a big
16 issue.

17 In addition to the sub-rent the other situation I
18 would be concerned about is where the lease is rejected.
19 Let's use for example, let's say January 5th is when the sale
20 actually closes and the January 1st rent is not paid. So that
21 the rent would otherwise be payable under section 365, the
22 way that I understand it is sub-rent has to be paid if the
23 Debtor occupies the space for even one day of the month, is
24 in jeopardy. And I don't know if there's anything built
25 into the budget to contemplate the possibility of a closing

1 occurring after December 3rd.

2 Those are my concerns. I don't know if the
3 [indiscernible] can be made by the DIP lender, by the Debtor
4 regarding what's built into, but that's what I would be
5 asking for.

6 THE COURT: All right. And --

7 MR. MOORMAN: And my third concern --

8 THE COURT: Oh yes, please.

9 MR. MOORMAN: -- is an objection being raised to
10 respect to the DIP lender's ability to come on the premises
11 and remove its collateral. And the concerns there are
12 typically like any landlord, indemnification, damage to the
13 property, insurance being maintained. My reading of the
14 revised interim order, and particularly to 18.

15 THE COURT: All right.

16 MR. MOORMAN: Seems to address the issue reading
17 correctly, understanding is that notwithstanding all the
18 language at the beginning of paragraph 18, the DIP agents
19 rights are still limited to whatever its rights under
20 essentially are under essentially state law, what has been
21 consented to by the landlord, or what rights might be able to
22 achieve by a subsequent motion before this Court.

23 THE COURT: Yes, on notice.

24 MR. MOORMAN: So I don't know if there's an
25 agreement between my client and the lender. Obviously we

1 would abide by that if there is. So if my reading of
2 paragraph 18 is correct, the final part of my objection would
3 also be withdrawn.

4 THE COURT: All right. We will hear from the Debtor
5 on those points. Thank you. Anyone -- before I ask, is
6 there anyone else on the phone or in the courtroom who wishes
7 to be heard with an objection or a response? All right. Mr.
8 Kwasteniet. Yes.

9 MR. KWASTENIET: Ross Kwasteniet for the Debtors,
10 Your Honor. On the last point about the access to the
11 property, I've confirmed with counsel for the DIP lenders
12 that his reading is correct, and that's what the paragraph
13 provides.

14 Your Honor, there are several points, different
15 pointes raised here. On the 506(c) waiver, you know, that's
16 something I typically argue against on behalf of the Debtors
17 and I'm very rarely successful. This was part of the broader
18 negotiations that we raised, that the Committee raised it,
19 and in its papers raised it in its negotiations.

20 THE COURT: Yes.

21 MR. KWASTENIET: It definitely was a specifically
22 negotiated point. And the DIP lenders were not willing to
23 proceed without the full and customary 506(c) waiver. So
24 we've gone as far as we can on that. However, if Mr.
25 Sanchioni, the Debtors' CFO is on, I'll ask him to confirm,

1 but it is my understanding having worked with the company and
2 its financial advisors on preparing the budget, that the
3 budget does contemplate ongoing rent expense, and in my
4 understanding is it would also, this would include rent
5 expense at this particular distribution center. If Mr.
6 Sanchioni is on the phone and is able to confirm my
7 understanding, I'll let him speak now.

8 MR. SANCHIONI: Yes, this Steve Sanchioni. Yes,
9 that has been included in the DIP budget.

10 THE COURT: All right.

11 MR. MOORMAN: Your Honor, Mr. Moorman again if I
12 may. It is not clear from the question and the answer to me
13 whether the sub-rent payment is included in the budget or
14 whether the Debtor intends to have that as an end of the case
15 administrative claim that may or may not get paid depending
16 on the solvency, the administrative solvency of the case.

17 MR. KWASTENIET: Your Honor, I understand that it's
18 in the budget as an end of case administrative expense.

19 THE COURT: All right.

20 MR. KWASTENIET: But it's in the budget.

21 THE COURT: Very well. Does that accommodate your
22 concerns?

23 MR. MOORMAN: Your Honor, I think realistically if
24 that's [indiscernible] the overall allowance of the various
25 pleadings in the case.

1 THE COURT: All right. Well thank you, Mr. Moorman.

2 MR. KWASTENIET: Your Honor, in response then to the
3 Huntington objection.

4 THE COURT: Yes.

5 MR. KWASTENIET: We, the Debtors don't have any
6 problem with Huntington continuing to reserve its right to
7 subsequently seek additional adequate protection and/or
8 relief from the automatic stay. Obviously, the Debtors would
9 reserve all rights if Huntington made such a request. But
10 again I think that given the amount of DIP financing we have
11 which we believe is adequate for funding operations during
12 these cases, and given the near term dates and deadlines
13 related to the sale process and the transition of the
14 ownership of the assets and the locations and the assumption
15 of the leases and the like, we believe that Huntington is
16 adequately protected today, but again, we're not seeking to
17 foreclose their right to come in if circumstances change and
18 they believe that they you know deserve additional adequate
19 protection beyond what we propose today with the replacement
20 liens or if they believe they've got justification for relief
21 from the stay. We're not, we'll state on the record that
22 we're not seeking to foreclose that today.

23 THE COURT: Mr. Sullivan will come forward. And was
24 there, was there one other, one other BPGC and that was
25 resolved. Yes.

1 MR. KWASTENIET: Yes.

2 THE COURT: Thank you.

3 MR. KWASTENIET: We'll clarify again for the record
4 that that is.

5 THE COURT: Mr. Sullivan, yes sir.

6 MR. SULLIVAN: For the record, Bill Sullivan on
7 behalf of the Huntington National Bank. Your Honor, what I
8 heard was, something about if circumstances change. We don't
9 think circumstances need to change to seek relief from the
10 automatic stay. We certainly understand that if we seek
11 relief from the automatic stay, they may object or they may
12 offer something, but it's not a question of circumstances
13 changing. Right now, there is no offer to Huntington to
14 provide them adequate protection from diminution and value
15 for the use of the collateral at those five stores going
16 forward. So there's nothing that needs to change for us to
17 seek relief from the automatic stay. As long as that's
18 understood, then I guess there is no more to argue about.
19 The parties will have to make decisions and move forward.
20 But I just wanted to make it clear that there doesn't need to
21 be some triggering event or something different occurring for
22 Huntington to do that.

23 THE COURT: Yes, I do.

24 MR. KWASTENIET: Your Honor, that's fine, I wasn't
25 intending to impose an additional condition.

1 THE COURT: Right.

2 MR. KWASTENIET: It's a full reservation by

3 Huntington to seek adequate protection --

4 THE COURT: On the diminution.

5 MR. KWASTENIET: -- or relief from stay at any time.

6 THE COURT: Right. All right. I do understand.

7 It's a fairly fast moving case, but --

8 MR. SULLIVAN: Which is why I'm not jumping up and
9 down, Your Honor, saying Huntington is going to have to make
10 a decision as to how things progress. And again, with the
11 designation rights period, that's a factor too.

12 THE COURT: Of course.

13 MR. SULLIVAN: So there's timeframes that people
14 have to consider, there's costs and other things. But so I
15 guess then with respect to the proposed paragraph 12(C) we
16 can, if it's limited to the sale, then what has been proposed
17 is acceptable, but not with respect to user diminution value.
18 I can talk with counsel about how to fix that or we can
19 remove the paragraph entirely. Either way, but we can talk
20 about -- I don't want to hold up the entry of the order is
21 what I'm saying. But we can't have a finding that what
22 they've offered is adequate protection for the diminution of
23 value.

24 MR. KWASTENIET: We're fine to stipulate that that
25 paragraph relates to the sale and not to diminution and that

1 Huntington's rights are reserved with respect to diminution
2 value.

3 THE COURT: I'm not sure then if that's sufficient
4 for you Mr. Sullivan or if you are asking that that paragraph
5 be removed. In other words, if we took out the, including
6 any diminution in value. Is that really what you need to be
7 a little more satisfied, Mr. Sullivan?

8 MR. KWASTENIET: Your Honor, I think we've reached
9 an agreement on modification of language here.

10 THE COURT: Okay. All right.

11 MR. SULLIVAN: Yeah, I would prefer not to have to
12 go back and forth between the order and the record at a
13 future date, Your Honor.

14 THE COURT: I think that's wise, Mr. Sullivan.

15 MR. SULLIVAN: Okay.

16 THE COURT: All right.

17 MR. KWASTENIET: So Your Honor, with the various
18 changes that we've described on the record, clarifications
19 and the like we believe that there's ample, an ample
20 evidentiary record with the first day declarations including
21 declaration of Mr. Sanchioni and Mr. Brule (phonetic) from
22 Duff & Phelps, that the Debtors need DIP financing, and that
23 this is the best financing available to us, and we've gone
24 through extensive negotiations with the Committee and various
25 landlords, and we respectfully request that Your Honor enter

1 the revised order approving the Debtors' DIP financing.

2 THE COURT: Thank you Mr. Kwasteniet. And I thank
3 all of you. And yes, I will enter the order. I am satisfied
4 obviously that the, the basic requirements for Debtor in
5 financing has been met, and I'm more than satisfied that the
6 terms are fair and reasonable based upon the very contested
7 negotiations, and the arms length of the parties.

8 And I didn't get into it of course, because it
9 really wasn't necessary, but I will observe that the Debtors
10 have argued at least that there is an independent director in
11 this case, and again I'm not making any finding that he is
12 independent or that he has performed his duties, because
13 there's been no evidence, and it hasn't been an issue for me
14 today. But I don't want to let the record close on this
15 hearing without noting at least that it is the Debtors'
16 position that the business judgment rule does apply under the
17 circumstances, and I will concede that the Committee still
18 has the right to contest that. But at least it gives me some
19 comfort for purposes of today.

20 And if there's nothing else, then I will be prepared
21 to enter orders as submitted. I know that there were some
22 orders that may be ready or --

23 MR. KWASTENIET: Thank you, Your Honor. There are a
24 couple of additional minor items on the --

25 THE COURT: Some retention orders.

1 MR. KWASTENIET: -- on the agenda. Yes, we do have
2 orders to hand up.

3 THE COURT: Yes.

4 MR. KWASTENIET: The next item on the agenda after
5 the DIP financing was the --

6 THE COURT: I forgot.

7 MR. KWASTENIET: -- was the Duff & Phelps retention.

8 THE COURT: Yes.

9 MR. KWASTENIET: Your Honor, the Committee has filed
10 an objection what I characterize as a more substantive
11 objection to that, to the amount and structure of the fee.
12 Duff & Phelps and the Debtors have filed replies. We filed
13 replies yesterday. However, we envision that the hearing on
14 that matter may need to be an evidentiary hearing, and so I
15 would like to find a date, you know, sometime in the next you
16 know few weeks, and I know that counsel for Duff & Phelps is
17 here and when we're comparing calendars here, I need, she's
18 got the view of when Duff is available.

19 THE COURT: All right. Thank you. Ms. Mumford.

20 MS. MUMFORD: Good afternoon, Your Honor.

21 THE COURT: Good afternoon.

22 MS. MUMFORD: Keri Mumford from Landis Rath and Cobb
23 on behalf of Duff & Phelps. Your Honor, we are asking for a
24 special hearing on this, and unfortunately with the number of
25 parties involved, there is some scheduling issues, and I do

1 have some dates, and I understand that Your Honor is very
2 busy in the upcoming weeks, but we're hoping we could get an
3 hour, two max, to put on our witness with respect to the
4 Committee's objection.

5 Your Honor, without getting into the merits, they
6 have objected to any fee being paid if the stalking bid is
7 selected, and have also objected to the proposed fee for any
8 other bidder. Obviously Your Honor, it's important to Duff &
9 Phelps to get this issue resolved as they continue to market
10 the assets on behalf of the Debtors.

11 THE COURT: Certainly.

12 MS. MUMFORD: Your Honor, the dates that we have
13 that are available are 11/16 is the first one, so I guess we
14 can just tick through them and see what Your Honor has.

15 THE COURT: Let's do that. The 16th, I'm just going
16 to compare --

17 MS. MUMFORD: Okay. Your Honor, the 17th.

18 THE COURT: -- how difficult one is over the other.
19 Or what was the other one? I'm sorry.

20 MS. MUMFORD: The 17th in the morning.

21 THE COURT: Yes. All right.

22 MS. MUMFORD: And the 21st or the 22nd in the morning.

23 THE COURT: Let's see, does the 21st have to be in
24 the morning? Is that --

25 MS. MUMFORD: No, Your Honor, all day is available.

1 THE COURT: I'll tell you why. I'm attending a
2 seminar out of town but I don't have the luxury of doing it
3 all day. So I could be, I will be back in the afternoon now.
4 And we could do this at 2:30.

5 MS. MUMFORD: Thank you, Your Honor.

6 THE COURT: On the afternoon of the 21st. Does that
7 work for people?

8 UNIDENTIFIED SPEAKER: Yes, Your Honor.

9 THE COURT: Okay. I have not told my staff yet that
10 I had made that that sort of decision to come back early. So
11 I will write down here, Friendly's Duff & Phelps. And I
12 understand the issues. And obviously it'll be necessary, I
13 agree, I would need evidence on that.

14 MS. MUMFORD: Thank you, Your Honor. I appreciate
15 your accommodating the request.

16 THE COURT: You bet.

17 MR. KWASTENIET: Your Honor, two final items on the
18 agenda. The next one is Committee's --

19 THE COURT: Oh you know what -- forgive me. Is the
20 21st, forgive me, Ms. Jones, isn't that our seminar program
21 here?

22 MS. DAVIS JONES: It is, Your Honor. That is the
23 Delaware [indiscernible].

24 THE COURT: Yeah, I have it wrong. It's the week
25 before that's out of town. Okay, let me just -- I could do

1 the morning on the 21st as it turns out.

2 MS. MUMFORD: Okay.

3 THE COURT: Which is what I think people had asked
4 for originally.

5 Ms. Jones, is that good for you? Does that work for
6 you that morning?

7 MS. DAVIS JONES: Your Honor, I think I'll be, I
8 think I'm probably out of town, I'm not sure [indiscernible].

9 THE COURT: All right. And you know if it involves
10 other people in your firm, Ms. Jones, I will certainly allow
11 them to appear here on that occasion without you, although I
12 suspect there will be somebody available, but --

13 MS. DAVIS JONES: Thank you, Your Honor. I
14 appreciate that.

15 THE COURT: You bet. So let's do it, let's do it
16 then at 10:00.

17 MS. MUMFORD: okay, Your Honor.

18 THE COURT: I almost made a big mistake.

19 MR. KWASTENIET: Your Honor, the next item on the
20 agenda is the Committee's motion. They filed a motion to
21 file under seal an unredacted version of their objection --

22 THE COURT: Yes.

23 MR. KWASTENIET: -- their omnibus objection. The
24 Debtors have no objection to that motion. So unless Your
25 Honor has questions, I'll let Mr. Dublin address it briefly.

1 THE COURT: Mr. Dublin, yes.

2 MR. DUBLIN: Thanks. Your Honor, we filed a
3 redacted version of our objection and provided to the Court,
4 the US Trustee, the Debtors, Sun, and Wells Fargo an
5 unredacted version. The only, there was very limited
6 information that was redacted. It pertained to a schedule as
7 to how the interest accrued on the subordinate notes, the
8 sources and uses on the what we'll refer to as the going
9 private transaction back in 2007.

10 THE COURT: Right.

11 MR. DUBLIN: And some specific potentially sensitive
12 information as provided as to the value of the company on the
13 date that the subordinated note was entered into as well as
14 their leveraged ratio at the time.

15 Based on the agreement with respect to the
16 protective order that we were working under which has now
17 been signed by the Court, we had agreed to file that type of
18 information under seal.

19 THE COURT: Yes.

20 MR. DUBLIN: We have requested of Sun their
21 permission, after they've had an opportunity to fully review
22 it and discuss with their clients to file the unredacted
23 version subject to them preferring to keep it redacted which
24 we have no objection to it staying that way because it was
25 such a limited redaction.

1 THE COURT: Okay. All right. Anyone else? Mr.
2 Herman?

3 MR. HERMAN: Your Honor, apparently I'm a much
4 better lawyer than I thought. The confidentiality agreement
5 and the protective order that I gave you, it turns out it
6 does have Wells Fargo Capital Finance listed as a party.

7 THE COURT: Okay.

8 MR. HERMAN: And on the signature pages, it does
9 seem to have Paul Hastings with an s/slash, so I apologize
10 for that, Your Honor, there will not be a separate protective
11 order being submitted. Wells is already a party to it.

12 THE COURT: Very well.

13 MR. HERMAN: Sorry about that confusion.

14 THE COURT: That's wonderful. And as far as the
15 redaction is concerned, do you want, you probably want a
16 little time to review it.

17 MR. HERMAN: Yes, Your Honor.

18 THE COURT: Yes. All right. And you'll work that
19 out between you and -- is there an order for me to sign, Mr.
20 Dublin?

21 MR. DUBLIN: We'll have that submitted to you, Your
22 Honor.

23 THE COURT: Very well. Good. And I will sign it at
24 that time.

25 MR. KWASTENIET: Thank you, Your Honor. The last

1 item on the agenda is Debtors' motion for entry of an order
2 granting an extension of time. We're asking for ten
3 additional days for filing of schedules and statements.

4 THE COURT: Okay. Any objection? That is a very
5 reasonable amount of time, and I'll be pleased to sign that
6 Mr. Kwasteniet.

7 MR. KWASTENIET: Thank you, Your Honor. Your Honor,
8 I do have forms of various orders that we are certain that
9 we're going to have to go back and make changes to
10 electronically and then we'll submit later.

11 THE COURT: Yes. If you don't mind, if just for my
12 reassurance and so that I am looking for the right orders, I
13 think I'm getting orders on number 5, and 6 and I think I've
14 done, I got 8, no, and 8, that will be coming from the
15 Committee.

16 MR. KWASTENIET: Yes, 5, 6 and 8 will come
17 separately.

18 THE COURT: And 7 of course is adjourned.

19 MR. KWASTENIET: Correct.

20 THE COURT: And number 9 you'll have for me I guess
21 here. Is that right?

22 MR. KWASTENIET: I believe I have that in my, in my
23 pile here.

24 THE COURT: Good. Okay. All right. Well I will
25 look for those orders being submitted, and I'll be pleased to

1 sign those that are being handed up now.

2 MR. KWASTENIET: Great. Thank you, Your Honor.

3 MR. STEMPEL: Your Honor, in the definition of
4 housekeeping.

5 THE COURT: Yes. Good afternoon.

6 UNIDENTIFIED SPEAKER: We also filed a motion for
7 leave to file a reply in support of everything and to exceed
8 the page limits as well.

9 THE COURT: Yes.

10 UNIDENTIFIED SPEAKER: And while we've resolved it
11 now, we were certain that it was the inherently reasonable
12 tone annunciated in that reply that was the critical driving
13 point in those negotiations, so if we may approach with an
14 order that would bless that.

15 THE COURT: Please. Thank you.

16 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

17 THE COURT: Good to see you. I'll sign that one as
18 well.

19 MR. KWASTENIET: Your Honor, I apologize, apparently
20 we didn't have a copy in chambers of the order approving the
21 extension of the schedules and statements.

22 THE COURT: Okay.

23 MR. KWASTENIET: So number 9 will be submitted --

24 THE COURT: Coming over as well.

25 MR. KWASTENIET: -- later. Yes.

1 THE COURT: Excellent. Okay. I'll look for all of
2 those. And anything further from anyone? A dangerous
3 question, but I got carried away. All right everyone. I
4 thank you for an excellent hearing. Thank you for your hard
5 work and we will stand in recess. And good afternoon to all
6 of you.

7 MR. KWASTENIET: Thank you, Your Honor.
8 (Court was adjourned at 12:36 p.m.)

9

10

CERTIFICATE

11

I certify that the foregoing is a correct transcript from the
12 electronic sound recording of the proceedings in the above-
13 entitled matter.

14

/s/Mary Zajaczkowski
15 Mary Zajaczkowski, CET**D-531

November 3, 2011
Date

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