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February 3, 2010

BY EFILE

Honorable Stephen Raslavich
United States Bankruptcy Court
for the Eastern District of Pennsylvania
Robert N.C. Nix, Sr. Federal Courthouse
900 Market Street, Suite 2004
Philadelphia, PA 19107

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Re: In re Philadelphia Newspapers, LLC, et. al., Case No. 09-11204

Dear Judge Raslavich:

We are counsel to the debtors and debtors in possession (collectively, the “Debtors”) in the above-referenced matter. We write further to our January 25, 2010 letter in support of the *Debtors’ Motion for an Order Compelling the Steering Group of Prepetition Lenders to Comply with Federal Rule of Bankruptcy Procedure 2019* [Doc. No. 1507] concerning the ruling by the Honorable Judge Brendan L. Shannon of the United States Bankruptcy Court for the District of Delaware in *In re Accuride Corp.* (Case No. 09-13449), in which Judge Shannon granted a motion (the “2019 Motion”) by the Official Committee of Equity Security Holders to compel an *ad hoc* group of noteholders to comply with Bankruptcy Rule 2019 [Docket No. 633].

Attached please find the transcript of the January 20, 2010 hearing on the 2019 Motion. The portion of the transcript relating to the 2019 Motion begins on page 77 and Judge Shannon’s bench ruling begins on page 116. Judge Shannon indicated (at page 116 of the transcript) that he does not intend to write an opinion with respect to the ruling.

Respectfully submitted,

Peter J. Young

Enclosure

cc: Counsel of Record (via ECF System)

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE: :
: Chapter 11
ACCURIDE CORPORATION, *et al.*, :
: Case No. 09-13449 (BLS)
Debtors. :
. Jointly Administered

Wilmington, Delaware
January 20, 2010
10:10 a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors: Michael R. Nestor, Esquire
Young, Conaway, Stargatt & Taylor

Caroline Reckler, Esquire
Latham & Watkins, LLP

For Jefferies & Co.: Susheel Kirpalani, Esquire
Quinn Emanuel

For the Equity
Committee: Monika Machen, Esquire
Sonnenschein, Nath & Rosenthal, LLP

Charlene Davis, Esquire
Bayard, PA

For the Ad Hoc
Noteholder Group: Robert C. Shenfeld, Esquire
Milbank, Tweed, Hadley & McCloy

For OCC: Jeffrey Reisner, Esquire
Irell & Manella, LLP

For Deutsche Bank,
as Agent: Scott Greissman, Esquire
White & Case, LLP

Jeffrey Schlerf, Esquire
Fox Rothschild, LLP

1 For the Official Kimberly E.C. Lawson, Esquire
Committee of Unsecured Reed Smith, LLP
2 Creditors:

3 For the U.S. Trustee: Jane Leamy, Esquire
Office of U.S. Trustee
4

5 VIA TELEPHONE:

6 For The Seaport Group: George Brickfield, Esquire
The Seaport Group

7 For the Ad Hoc Paul Denaro, Esquire
Committee: Milbank, Tweed, Hadley & McCloy
8

9 For the Creditor Tavi Flannagan, Esquire
Committee: Irell & Manella

10 For the Accuride David S. Foster, Esquire
Corporation: Latham & Watkins
11

12 Stephen Martin, Esquire
James Woodward, Esquire
Accuride Corporation

13 For Ed Howrk Community: Daniel Perry, Esquire
14 Milbank, Tweed, Hadley & McCloy

15 For Bank of New York: Curtis Plaza, Esquire
16 Riker, Danzig, Scherer,
Hyland & Perretti

17 For Hondo Sen: Hondo Sen - In Pro Per
Hondo Sen

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Shamong, NJ 08088
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23 Proceedings recorded by electronic sound recording;
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EXHIBITS:

	<u>Marked</u>	<u>Received</u>
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Jefferies & Company:

Exhibit-1	Document		25		41
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1 (Call to order of the Court.)

2 THE CLERK: All rise.

3 THE COURT: Please be seated. Good morning.

4 ALL: Good morning, Your Honor.

5 THE COURT: Ms. Reckler.

6 MS. RECKLER: Good morning, Your Honor. Caroline
7 Reckler, on behalf of the Debtors. Your Honor, thank you for
8 entering the Orders item numbers 1 and 2 on the Agenda.
9 Before we move to item number 3 on the Agenda, I'd like to
10 give the Court a brief update on the company and on some legal
11 matters. Your Honor, the company -- the state of the company
12 is good. The company is being comfortably in compliance with
13 all covenants and we don't foresee any issues in the near
14 term. The company has also been getting solid support from
15 its vendors.

16 With respect to the Disclosure Statement that was
17 approved on December 21st, the distribution of all solicitation
18 rights offering and other computation -- confirmation
19 materials was finished prior to December 29th and the return
20 date for all those materials is January 29th. All the
21 professionals in this case have been working very diligently
22 and cooperatively as we proceed towards confirmation. More
23 specifically, the Debtors, the Ad Hoc Noteholders Group, the
24 Unsecured Creditors' Committee and the Equity Committee have
25 all been working very hard to respond to and address the

1 confirmation related discovery requested by the Equity
2 Committee. Document production is complete and four of the
3 five fact witness depositions requested by the Equity
4 Committee have been completed with the final one taking place
5 on Friday. Expert discovery is also proceeding with expert
6 reports being exchanged today and expert depositions taking
7 place next week.

8 The Debtors have received a communication from the Equity
9 Committee regarding an alternative transaction. At present,
10 the Debtors have no reason to divert from the confirmation
11 schedule. With that, Your Honor, I'm going to turn the podium
12 over to Ms. Machen, and I believe her Retention Application is
13 up first.

14 THE COURT: Okay. Ms. Machen.

15 MS. MACHEN: Good morning, Your Honor. Thank you
16 very much for entertaining us this morning. We have our
17 Retention Applications up. These include Retention
18 Applications of Sonnenschein as counsel for the Equity
19 Committee as well as the Retention Application of the Bayard
20 firm his local counsel.

21 THE COURT: Yes. Why don't we do Sonnenschein and
22 Bayard together. Jefferies raises separate issues from the
23 objections that have been seen, so that seems to be the
24 easiest way to proceed if you wish.

25 MS. MACHEN: Yes, Your Honor.

1 THE COURT: Okay.

2 MS. MACHEN: This hearing is to determine whether or
3 not the Equity Committee will have confidence that it will
4 have representation by professionals as it goes forward during
5 these critical stages of these cases. The U.S. Trustee
6 appointed the Committee on November 19th. The Committee was
7 duly formed and is now seeking to retain professionals as it's
8 authorized to do under Section 1103. There's nothing in the
9 Code or in the Rules or the Bankruptcy laws that even suggest
10 that Equity Committees have less of a right to hire
11 professionals than other estate representatives. Sonnenschein
12 and Bayard have been working diligently since they were
13 retained to make sure that this case moves forward and that
14 Equity is adequately represented in these cases. Just to give
15 you some of the highlights of what we have been up to in the
16 last few weeks, first, the Committee filed -- prepared and
17 filed a Disclosure Statement objection, which Your Honor
18 reviewed.

19 THE COURT: Well, actually, I don't know that
20 there's an issue that anybody's really debating as a general
21 proposition of law that a formal committee is entitled to its
22 professionals. I mean, that's a truism. The way that I read
23 the Ad Hoc Committee's objection is basically, should we deal
24 with this now. And since we're only going to be, you know, in
25 three weeks dealing with, you know, the broader question of

7
1 whether or not the Equity Committee should be dissolved on
2 their motion, etcetera, wouldn't it be more appropriate to
3 deal with this then. So I think it's less a question of --
4 there's been no challenge and I appreciate that. There's no
5 challenge to certainly the competence and the ability of all
6 the professionals that have been identified by the Equity
7 Committee and so I don't need anybody to tell me anything
8 about that, I'm familiar with all of the firms. The issue is
9 one -- really as I read it, it's as a practical matter
10 certainly with counsel, it's a question of timing.

11 MS. MACHEN: Yes, Your Honor. And we respectfully
12 submit that retention now is absolutely necessary. We have
13 quite a bit to do before February 10th, and for our retention
14 to be up in the air, for us to -- for Sonnenschein and Bayard
15 to have the threat of nonpayment on February 10th, seems to me
16 to be a very difficult position for these law firms. We have
17 over the last few weeks done what typically takes three months
18 in a case to do. We have condensed that into a month. And
19 that was not at our own choosing, that was at the request of
20 the Debtors, at the request of the Ad Hoc Noteholder Group, at
21 the request of the Creditors' Committee, at the request of the
22 pre-petition Term Lenders. We have gone to extraordinary
23 lengths to do our job in this case. And to suggest that our
24 retention might not happen in three weeks is a tremendous blow
25 to our firms.

1 THE COURT: Okay.

2 MS. MACHEN: And, Your Honor, I would just add as a
3 policy matter, if Your Honor were to move forward today and
4 push back our Retention Applications until confirmation time,
5 you can be assured that the next time an Equity Committee is
6 appointed, there will be a Motion to Dissolve put forth
7 immediately. And right after that, you will see a motion --
8 an objection just like the one you've seen in this case and,
9 Your Honor, I can't imagine that if there's that kind of
10 uncertainty, that Equity Committees will ever get adequate
11 representation.

12 THE COURT: All right. Thank you.

13 MS. MACHEN: Thank you.

14 MS. DAVIS: On behalf of Bayard, Your Honor, I
15 simply wanted to echo Ms. Machen's comments.

16 THE COURT: Very good. Good morning, Ms. Davis.
17 Ready to proceed?

18 MR. SHENFELD: Good morning, Your Honor. Robert
19 Shenfeld, Milbank, Tweed, Hadley & McCloy, on behalf of the Ad
20 Hoc Noteholder Group. And certainly, I'd like to state for
21 the record that is not our objective to foment a revolution in
22 the retention of applications -- professionals for equity
23 committees, unsecured creditors' committees and other
24 committees formally appointed. I'd like to address two points
25 and I'll take them first to address the comments made by Ms.

1 Machen.

2 In the Reply pleadings, and all pleadings filed in
3 connection both the Bayard and Sonnenschein Applications,
4 there's no expression of indication of any prejudice
5 whatsoever, if we put the hearing over to February 10th. Both
6 applications are nunc pro tunc to November 19th and should they
7 be approved, they certainly would be approved nunc pro tunc to
8 November 19th, covering all of the fees. There's no risk that
9 should there be a properly formed Equity Committee and
10 professionals retained, that they would not be entitled to
11 come back and seek fees for the period that we're talking
12 about.

13 Secondly, Ms. Machen was about to tell you in greater
14 detail of all the efforts made by her firm and somewhat
15 extraordinary efforts. Fortunate for me I'm the bankruptcy
16 guy and so the litigators are handling all that, but it is
17 around the clock and there are five depositions. It's an
18 enormous amount of documents. I believe over 200,000 pages of
19 documents have been produced, so we know now, today, in Court,
20 that Bayard and Sonnenschein will not shirk from their
21 obligations to what they believe to be the prudent prosecution
22 of their clients interest. They have demonstrated they're
23 going to do that. They've been doing it since, I presume,
24 November 19th or 20th, so again, we have no reason to believe
25 that that will not continue unabated. Their reputations speak

1 for themselves as law firms, and they have out of the box come
2 to this Court and said that they are going to not just simply
3 evaluate this Plan but they're going to blow it up. And out
4 of the box, they've made that representation. That's critical
5 to consider in whether or not to push this hearing to the 10th
6 of February because, Your Honor, our Motion to Dissolve the
7 Committee is challenging whether the letters presented to the
8 U.S. Trustee were proper and appropriate. Whether there
9 should be a Committee existing here. Under no circumstances
10 has anyone, I believe, in the Motions to Retain both law firms
11 said anything that 330 will not apply. So 330 applies even
12 theoretically, if Your Honor approved it today, and it turns
13 out as the Noteholders and maybe some of the other Creditors
14 in this case have also argued that the full-scale attack on
15 the Debtor -- you know, when the Official Creditors' Committee
16 came into place, Your Honor may remember, this is the firm of
17 Irell, Manella, geared up, decided that they vetted the
18 process and they did their own analysis and supported the
19 Plan. Here we have a situation where from the get go, the
20 Equity Committee has decided to wage a full-scale war, attack
21 everything, blow up the Plan, seek alternative financing,
22 create valuations. Valuations that the Debtor has already
23 performed, that the Debtor has and its professionals have
24 sought other, you know, fees, applications, etcetera. Your
25 Honor, I won't belabor the point, you know where I'm going

1 with this but, again, ultimately we filed our application.
2 And to now to respond to the second point of Ms. Machen's
3 comment about how somehow there'd be a bright-line and there'd
4 be a C change in Retention Applications. Well, first, it's
5 not unusual for an application to be made to retain
6 professionals. Maybe a skirmish comes up and then ultimately
7 it's months before the order actually retaining that law firm
8 is entered. In situations, I won't go through a litany of
9 them, but there are situations where that order comes in five
10 months later. And, again, there's no prejudice to the
11 professionals. Similarly, again, always subject to 330, so
12 being told today that you can go ahead and launch this full-
13 scale attack is, in our view, unnecessary and wasteful,
14 doesn't mean you're going to get paid for that. You can take
15 five depositions, you can produce 200,000 pages, but if
16 ultimately this Court's going to decide whether that was an
17 appropriate benefit to the estate. So again, there's no
18 prejudice and none alleged, no literal prejudice. The idea
19 that a law firm of the stature of Bayard and Sonnenschein
20 needs to know today and they can't wait three weeks is
21 inappropriate. And in reverse, the prejudice is to the Ad Hoc
22 Noteholders and to the Dissolution Motion. You don't see a
23 lot of Dissolution Motions, although, I note that in
24 Washington Mutual there recently was one filed, that's a
25 different case than ours. Obviously, that Committee's been in

1 place for a long time. So the Noteholders made the Motion to
2 Dissolve as quickly as we thought was appropriate. We came in
3 due respect to the Court and asked the Court when you wanted
4 to have that heard. I apologize for using you, I meant Your
5 Honor wanted to hear that heard.

6 THE COURT: Yes.

7 MR. SHENFELD: So then we proceeded to take your --
8 to take instruction from the Court that the best and most
9 efficient use of this Court's time, of all the professionals'
10 time, was to have it heard in conjunction with confirmation
11 when the issue of valuation would be fully vetted and,
12 therefore, ties into the Motion. Intellectually, if you have
13 a motion pending to dissolve, it creates an interesting
14 problem for the Court. If you approve today, do you approve
15 it and say, well, it's fully subject to three weeks from now
16 deciding that there isn't a Committee and then we have to
17 disgorge whatever interim compensation or whatever
18 compensation you have been paid, if you're paid anything. And
19 the order today would be completely reserving every possible
20 right to revisit this in three weeks anyhow. Our suggestion,
21 based on Your Honor's earlier comments to Ms. Machen, would be
22 that the simplest and most direct way to go is to put it over
23 three weeks, reserve everybody's rights to adjust it under the
24 Bankruptcy Code, the Bankruptcy Rules. And, again, from my
25 point of view, from the Noteholders point of view, then

1 somehow we're prejudiced when we come in on February 10th,
2 because somehow there is a inference pre-staging out Motion to
3 Dissolve if there's existing counsel and financial advisors in
4 place.

5 THE COURT: Okay.

6 MR. SHENFELD: Thank you, Your Honor.

7 THE COURT: Thank you.

8 MS. RECKLER: Good morning. Caroline Reckler, on
9 behalf of the Debtors. The Debtors do not contest the right
10 of the Official Committee of Equity Security Holders to retain
11 counsel of their choice to the extent the Court determines
12 that the Committee should not be disbanded. A decision that
13 will be ultimately be decided later in the cases. Likewise,
14 the Debtors recognize that such counsel should be compensated,
15 if at all, to the extent any such compensation is determined
16 to be reasonable and appropriate under the facts and
17 circumstances of the cases.

18 To date, it is unclear whether value has been or can be
19 added by counsel to the Official Committee of Equity Security
20 Holders. And the Equity Committee's counsel has elected to
21 proceed in these cases, notwithstanding, the Debtors committed
22 position that Equity is simply out of the money. That being
23 said, we're not here today to argue valuation. Those issues
24 will be heard at confirmation. The Debtors rise only to
25 reserve their rights under 330 to the extent those rights even

1 need to be reserved, so that they can appropriately determine
2 --

3 THE COURT: I want to make sure. There's no
4 allegation or there's -- I didn't miss anything. The law
5 firms -- the 300, 328 question relates to the Jefferies
6 Application and we'll get to that, but the two law firms are
7 being retained under the -- or are being proposed to being
8 retained under the usual terms of Section 330, so any
9 application would be subject to a reasonableness review as
10 would all the lawyers in the case, right?

11 MS. RECKLER: That's how we understand it, Your
12 Honor.

13 THE COURT: Okay.

14 MS. RECKLER: Your Honor, we're simply asking that
15 the Debtors have a -- and the Debtors and all other parties-
16 in-interest have the opportunity to review their Fee
17 Applications and statements, just like ours will be reviewed
18 under 330, and at that time, we'll be able to determine
19 whether those fees are reasonable and appropriate.

20 THE COURT: Okay.

21 MS. RECKLER: Thank you.

22 THE COURT: All right. Anyone else? No. I've
23 heard enough. I'm going to overrule the objections. I will
24 approve the two separate Retention Applications. As noted, it
25 is a basic principle that an Official Committee is entitled to

1 engage counsel, obviously, subject to the structures of the
2 Bankruptcy Code and the Bankruptcy Rules. There is no
3 challenge to the qualifications of the two firms, and the
4 terms upon which they are proposed to be retained. I do note,
5 as we just discussed, that their retentions as is customary in
6 this Court for lawyers would be subject to Section 330 review
7 in the normal Fee Application process. I'm not going to
8 condition the payment or the perspective payment of the Equity
9 Committee to the request that they be paid out of whatever the
10 distribution is for equity. That's a question that's not
11 before me today, and can be raised at a later point if it's
12 appropriate. Similarly, I will not condition or limit their
13 ability to participate in the interim compensation procedures
14 that the Court has previously identified. I don't think that
15 that is either necessary or warranted under the circumstances.

16 I would also make the following observation in response
17 to counsel's concern. I don't believe that the retention of
18 counsel and professionals for the Equity Committee presages --
19 pre-stages; however, I'm not sure. I know what it doesn't do.
20 It does not dispose or really tilt the balance one way or the
21 other when I consider the question of the appointment of the
22 Committee and the request for dissolution. And I understand
23 why the issues would be raised and I appreciate it being
24 raised, but as a practical matter, there's neither an implicit
25 nor explicit suggestion that, you know, well, we're already

1 here and you approved the counsel so you can't dissolve the
2 Committee. I don't think that that would bear upon my
3 analysis of the issues or prevent me or limit my ability to
4 consider the matter purely on its own merits. And I want to
5 note that because, again, I appreciate counsel's concerns in
6 that respect and treating this as more of a scheduling thing,
7 but I'm satisfied that the Equity Committee has carried its
8 burden and the two attorney Retention Applications should be
9 approved. Do you have Orders?

10 MS. MACHEN: Yes, Your Honor. May I approach?

11 (Counsel approaches.)

12 THE COURT: Thank you. Next matter.

13 MS. MACHEN: Your Honor, I believe the next matter
14 is Jefferies -- excuse me, the Equity Committee's Retention
15 Application for Jefferies.

16 THE COURT: Okay.

17 MS. MACHEN: I will allow Mr. Susheel Kirpalani, who
18 is the attorney for Jefferies to present to the Court, I
19 believe that there's some specific issues, that should be
20 taken up specifically by Jefferies. Your Honor, I do want to
21 indicate to you that the Equity Committee fully supports the
22 retention of Jefferies. Jefferies is critical to the Equity
23 Committee's role in this case. They have done just as much if
24 not more than the professionals, the legal professionals, in
25 making sure that the Equity Committee gets a fair shot at

1 value in this case.

2 THE COURT: Okay.

3 MS. MACHEN: Thank you.

4 THE COURT: Let me ask a question and then in order
5 to streamline the discussion, I'd like to confirm if -- that
6 there is no issue. I think the parties have actually
7 stipulated to this or acknowledged it in the objections,
8 there's no issue with respect to Jefferies ability, their
9 competence, their experience, etcetera, so I don't think we
10 need to discuss that. And so usually I get the valedictory
11 speech about, you know, the relative professional. I'm happy
12 to hear. Submit it under a Declaration or something. But I
13 think that that issue is not in dispute right now and we'll
14 talk about, I think, it's the terms of the retention, the need
15 for the retention now but, otherwise, not a question about
16 whether or not, you know, they're competent to perform the
17 services requested.

18 MS. MACHEN: That's correct, Your Honor. And I also
19 would like to add that I believe there was some issue
20 originally with the indemnity provision that Jefferies has
21 submit. That --

22 THE COURT: I saw that's been resolved?

23 MS. MACHEN: Yes. My understanding is that has been
24 resolved. Certainly, if somebody objects, maybe Mr. Nestor
25 has an issue --

1 THE COURT: Mr. Nestor.

2 MS. MACHEN: -- with it.

3 MR. NESTOR: Thank you, Your Honor. May it please
4 the Court, Mike Nestor, for the Debtors. It was resolved but
5 it wasn't resolved in the Reply, and so I think we have
6 confirmation this morning. We had agreed -- Jefferies had
7 agreed to a similar arrangement in the Abinteen (ph) case and,
8 in fact, the language from Abinteen was used in connection
9 with Perella Weinberg which is the Debtors investment banker,
10 financial advisor. So I think we have an understanding on
11 that. I would, for the time being, just defer that and we can
12 chat afterwards just to make sure there's meeting of the
13 minds.

14 THE COURT: Okay. That's fine.

15 MR. NESTOR: Thank you.

16 THE COURT: Mr. Kirpalani.

17 MR. KIRPALANI: Good morning, Your Honor. Susheel
18 Kirpalani of Quinn Manuel, on behalf of Jefferies & Company,
19 the proposed financial advisor and investment banker for the
20 Official Committee of Equity Holders. Your Honor, just to --
21 so I don't forget, what counsel stated about the
22 indemnification being coterminous with whatever Perella
23 Weinberg got, that's exactly right.

24 THE COURT: Okay.

25 MR. KIRPALANI: We'll fix the documents to the

1 extent Your Honor approves the application. Your Honor, there
2 were three objections filed to Jefferies retention. The first
3 by the Debtors, the second by the Ad Hoc Committee of
4 Noteholders and the Official Committee of Unsecured Creditors,
5 files a joinder. The U.S. Trustee did not formally file an
6 objection, but they did reach out to us and tell us they had
7 concerns about issues that I'm sure Your Honor has seen
8 before. The precedent in forcing the U.S. Trustee to not have
9 Section 330 review for applications for professionals.
10 Jefferies is willing to do that for the U.S. Trustee as
11 Jefferies has done in other cases. But they would limit it at
12 -- you know, its their own waiver of what they're seeking.
13 They're limiting that to the U.S. Trustee's Office and not for
14 other parties, such as the litigants in the case.

15 The objections, Your Honor, that were filed, or the two
16 objections and the joinder, effectively state that, you're
17 right, it's not about the qualifications of Jefferies but
18 rather that the fee isn't market -- or it's not appropriate
19 based on the facts of this case. The Ad Hoc Noteholders'
20 objection says that they believe they should dictate the scope
21 of what Jefferies should be doing. They should dictate the
22 scope of what the Equity Committee should be focusing on.
23 That's simply not workable. That's not what the Bankruptcy
24 Code provides. The Equity Committee was formed by the Office
25 of the United States Trustee. And they will do what their

1 fiduciary duties dictate they do, and they will direct their
2 professionals to do that. And I don't think it's appropriate
3 for a litigant to try and dictate what they should be doing.
4 And let's contrast that, Your Honor, with the case -- with
5 other cases, which I know Your Honor's familiar, where it's a
6 subset of a creditor group that's already representative --
7 represented. They are overlap, duplication, all of those
8 issues do come into play and Your Honor is the gatekeeper of
9 ensuring that professionals are not just feeding at the trough.
10 This is not that case. This is a very fast-track case where
11 the entire purpose of forming this Official Equity Committee
12 was to validate whether or not the Debtors' Plan is
13 appropriate and fair to Equity Holders and in order to do
14 that, an Equity Committee needs professionals. Your Honor has
15 already approved the law firms. That's akin to the Equity
16 Committee having a bow. And so now what the objectors would
17 say is they could have a bow, but they can't have any arrows.
18 That's just not the adversarial process that the Bankruptcy
19 Code endorses with respect to issues as important as they are
20 such that the U.S. Trustee's Office would actually appoint an
21 Official Equity Committee. And so, Your Honor, keeping in
22 mind the limits of what we think is in dispute, the market
23 rates that are being charged by Jefferies, and they've been
24 amended and actually reduced from the original application as
25 we set forth in the Reply.

1 THE COURT: Right.

2 MR. KIRPALANI: And also to describe to the Court
3 exactly why Jefferies is needed, we have in the courtroom Mr.
4 Robert White from Jefferies. I don't think it would take very
5 long and I think it would be good for the record, Your Honor,
6 if I could just put some of his testimony into evidence.

7 THE COURT: Sure. Swear in the witness, please.

8 THE CLERK: Please state your name and spell your
9 last name, please.

10 MR. WHITE: Robert J. White, W-H-I-T-E.

11 ROBERT J. WHITE, JEFFERIES & COMPANY WITNESS, SWORN

12 THE CLERK: Thank you.

13 DIRECT EXAMINATION

14 BY MR. KIRPALANI:

15 Q. Mr. White, by whom are you employed?

16 A. I'm employed by Jefferies & Company.

17 Q. And what's your title there?

18 A. I am a senior vice-president in the recapitalization and
19 restructuring group.

20 Q. Okay. Can you just describe briefly your education and
21 employment background since you graduated from school?

22 A. Sure. I have an MBA from Boston University and an
23 undergraduate degree from Allegheny College. Prior to
24 Jefferies, I worked for a hedge fund called Fintech Advisory,
25 where we did distress debt investing. Prior to that, I was at

1 Barclays Capital in their distress debt trading desk and prior
2 to that, I was at Channing Capital Partners, where I spent
3 seven years as a restructuring advisor.

4 Q. Mr. White, were you personally involved in the negotiation
5 of Jefferies retention by the Equity Committee?

6 A. I was.

7 Q. Okay. And have the terms of your retention been modified
8 since the filing of the initial application?

9 A. They have.

10 Q. Can you describe what the proposed terms currently are
11 that you're seeking approval by this Court?

12 A. Sure. I thought I'd start with the initial -- our initial
13 engagement --

14 Q. Sure.

15 A. -- proposal. Our initial proposal was for \$150,000 per
16 month at a monthly fee and a \$1.5 million transaction fee. It
17 was a flat fee not tied to recoveries or support by the Equity
18 Committee. Our revised proposal is for a \$150,000 a month,
19 monthly fee for three months. If for any reason the case goes
20 beyond three months during our retention, we would credit that
21 monthly fee 50 percent against our valuation report fee and
22 our transaction fee. The valuation report fee is for \$400,000
23 fully creditable against any transaction fee, and most
24 importantly, I think we have reduced our transaction fee from
25 \$1 and a half million to a million dollars. Also, that

1 transaction fee is tied to an increase in recoveries to Equity
2 Holders, above and beyond what's proposed under the current
3 Plan and it's also tied to support by the Equity Committee.

4 Q. Okay. So to be clear, do you get a transaction fee if the
5 current Plan as currently proposed by the Debtors is confirmed
6 as is?

7 A. We do not.

8 Q. Do you get a transaction fee if the current Plan is
9 modified to increase recoveries for Equity Holders but for
10 whatever reason the Equity Committee does not support that
11 Plan?

12 A. We would not.

13 Q. Are you aware that there are certain parties that are
14 still objecting to your fee arrangement?

15 A. I am aware.

16 Q. Could you describe your understanding of what those
17 objections complain about?

18 A. My understanding of the Debtors' objection is that our
19 fees are off market and they'd also like -- based on the
20 negotiations we've had with them, I believe they'd like our --
21 number one, our valuation report fee to be potentially at risk
22 in the event that the Debtor does not emerge from bankruptcy
23 by the end of February and to defer our transaction fee to be
24 heard later at confirmation or prior to emergence.

25 Q. Is Jefferies willing to defer the transaction fee?

1 A. We are not.

2 Q. Why not?

3 A. From our perspective, it's custom and standard for
4 investment bankers to receive both a monthly fee and a
5 transaction fee. To the extent that we do not have a
6 transaction fee, we would likely have to raise our monthly fee
7 because it's, in our view, the transaction fee and the monthly
8 fee together are a package deal.

9 THE COURT: Mr. Kirpalani, --

10 MR. KIRPALANI: Yes?

11 THE COURT: I'm indifferent as to whether you
12 address my question now or later, but before the witness
13 leaves, I'd like him to walk through the math on the payment
14 of the transaction fee and the relative credits under a couple
15 of obvious scenarios. If it's confirmed on the 10th of
16 February with changes without changes, if it goes another
17 month or two and, again, where the valuation fee fits in. You
18 can deal with that at any point in your discussion, but I want
19 to make sure that I understand. I had seen the revisions and
20 I wanted to make sure that I understood them.

21 MR. KIRPALANI: Okay. I walk through in just a few
22 minutes. Thank you, Your Honor.

23 THE COURT: Okay.

24 BY MR. KIRPALANI:

25 Q. Did you consider, Mr. White, converting your fee

1 arrangement to an hourly fee?

2 A. We did not. That's not our business model. That's not
3 typical for investment bankers. As I mentioned, we view the
4 monthly fee and the transaction fee as customary and standard
5 for an investment banker, and as I said earlier, it's a
6 package deal. I think given the amount of work we've already
7 done under a very tight time line, it's highly likely that our
8 150 monthly fee would be significantly higher if we did it on
9 an hourly basis.

10 Q. Have you reviewed, in connection with today's hearing,
11 what retention terms other Equity Committee financial advisors
12 have been obtained in other Chapter 11 cases?

13 A. We have and we prepared a summary.

14 Q. Okay.

15 MR. KIRPALANI: Your Honor, may I approach the
16 witness?

17 THE COURT: Sure.

18 (Counsel approaches witness.)

19 THE WITNESS: Thanks.

20 THE COURT: Thank you. That's fine.

21 BY MR. KIRPALANI:

22 Q. Mr. White, could you identify the document I handed you
23 for identification purposes? At this point, I'd like to call
24 it, the Equity Committees -- or Jefferies-1.

25 A. Sure. We prepared an analysis taking a look at relatively

1 recent bankruptcy cases where an Equity Committee was
2 appointed and financial advisors were retained. We were able
3 to identify 13 cases as we outline here, and what we show you,
4 I'm happy to walk you through it, is each particular case, its
5 total assets and its total liabilities, the monthly fee that
6 was approved by the Court, pro the Courts order, and the
7 transaction fee, whether it be on a percentage basis tied to
8 recoveries or flat fee associated with a restructuring
9 transaction. As I said earlier, this analysis is based on an
10 examination of the Retention Applications, their engagement
11 letters and most importantly the Final Orders per the Court
12 approving their retention. To the extent there was any
13 modification in the Final Order, compared to the engagement
14 letter or Retention Application, we try to account for that in
15 this analysis. Now, the final column, the estimated total
16 fee, that's simply just a Jefferies estimate of the maximum
17 potential fees that the FA could have earned, including the
18 success fee. And this is all based on, you know, at the time
19 of the Court approving their retention. On an actual basis,
20 many of these FAs in these situations may not have received
21 their success fee or transaction fee as a result of the
22 outcome of the case.

23 Q. Okay. And could you explain to the Court what -- if you
24 derived in arithmetic mean for the 13 cases that you examined?

25 A. Sure. It's 3.5 million in total fees.

1 Q. And what about the median?

2 A. The median's 2.7 million.

3 Q. And according to your analysis, what would be the
4 estimated total fee for Jefferies proposed retention in these
5 cases?

6 A. The -- what you see there in the far right-hand column at
7 the bottom of the fee analysis is our estimate of our total
8 fee, assuming we'd receive a success fee, which again, is tied
9 to recoveries and the Equity Committee's approval. And it
10 assumes that we are only retained for three months. So we'd
11 receive our three monthly retainer fees and we would have been
12 entitled for our million dollar transaction fee in this
13 analysis.

14 Q. Okay. So now let's walk through what the Court had a
15 comment about. Just run a couple different scenarios. If you
16 were to perform your services for Jefferies and we get to
17 confirmation in the next several weeks, with the understanding
18 that you've been working since November, get to confirmation
19 in the next couple of weeks, but the Equity Committee's
20 opposition to the Plan is rejected, the Plan is confirmed as
21 is, what would your total fee be?

22 A. Our total fee would be approximately \$850,000 because we
23 would receive 150 per month for three months and then our
24 \$400,000 valuation report fee.

25 Q. Okay. You mentioned a valuation report fee. Is this a

1 valuation report that is germane to the dispute that's pending
2 before the Court in connection with confirmation?

3 A. I believe it is and --

4 Q. Have you been working on this report?

5 A. We've been working very hard on this report. We delivered
6 it to our valuation committee last night. We're scheduled to
7 deliver it to the Debtors and other advisors today.

8 Q. Now, let's imagine instead, in scenario two, you get to
9 confirmation, the Debtors' Plan is rejected but there's no
10 competing plan or alternative plan that's proposed and the
11 case goes on for another three months. In that plan, that
12 goes on for another three months, the Equity Committee still
13 does not support the plan or there's no increase in Equity
14 Holder recoveries --

15 A. Right.

16 Q. -- three months later, how would your fee be calculated?

17 A. After the three months, in the event that the case
18 continues and a plan's not confirmed, we wanted some
19 protections that, you know, as a result of still being
20 retained by the Committee and still doing a lot of work as
21 we'd be analyzing potential alternatives or continue to push
22 forward on potential alternatives, we would receive our 150 a
23 month less the 50 percent credit against any report fee and
24 transaction fees. We'd be effectively earning about \$75,000 a
25 month.

1 Q. Okay. So just to be clear, though, on -- in my scenario,
2 right, there is no transaction fee --

3 A. Right.

4 Q. -- because the Equity Committee does not support the Plan
5 or there's no increase in Equity Holders, are you saying that
6 the 150 a month after the three months is credited against the
7 \$400,000 valuation report?

8 A. It is. Correct.

9 Q. Similar fact pattern in terms of timing but at the end of
10 the six month period, the Plan does provide more for Equity
11 Holders and the Equity Committee supports the Plan and it's a
12 consensual Chapter 11 case --

13 A. Right.

14 Q. -- what would your total fee be?

15 A. It would be more than the 1.45 million because we'd be
16 earning 75,000 a month for that period beyond the three
17 months, but it wouldn't be much more than that because the
18 transaction fee -- excuse me, the valuation report fee is
19 fully creditable against the transaction fee. So, you know,
20 ballpark 1.7 million.

21 MR. KIRPALANI: Does that answer Your Honor's
22 questions?

23 THE COURT: It does.

24 MR. KIRPALANI: Okay.

25 THE COURT: Thank you. I appreciate that.

1 BY MR. KIRPALANI:

2 Q. There have been accusations of the Equity Committee that
3 the Equity Committee is trying to thwart and derail the Plan
4 that was pre-negotiated. Is that what you view Jefferies'
5 role as?

6 A. No. I think what we're doing is our job and fiduciary
7 duty to an Equity Committee appointed by the U.S. Trustee, and
8 that includes looking at alternatives.

9 Q. You say looking at alternatives, but is one of those -- do
10 you view it as your job to attempt to try and raise funds for
11 the Debtors?

12 A. We view our job as to -- number one, vet the Debtors' Plan
13 both on a valuation basis and to explore potential
14 alternatives that can improve recoveries to Equity Security
15 Holders. That would include, in our view, exploring
16 alternative sources of capital potentially to replace the
17 rights offering sponsored by the (indiscernible) Noteholders.

18 Q. And have you been engaged in that activity?

19 A. We've been actively engaged in that.

20 Q. Have you made any progress?

21 A. I think we've made substantial progress.

22 Q. Couldn't the Debtors simply do what you're saying, explore
23 alternative ways to raise capital?

24 A. My understanding from speaking to them is that they're in
25 Lock-up Agreements under this Plan and cannot solicit

1 alternative financing -- alternative sources of financing or
2 alternative plan of reorganization.

3 MR. KIRPALANI: Your Honor, I have no further
4 questions for the witness.

5 THE COURT: Okay. Cross-examination?

6 CROSS-EXAMINATION

7 MR. NESTOR: Your Honor, I'll repeat one of the most
8 overused phrases in this Court, I'll try to be brief.

9 BY MR. NESTOR:

10 Q. Mr. White, I think we need to hit one more potential
11 scenario. If the value to be received for equity under this
12 Plan is increased by a dollar, and a majority of the Equity
13 Committee supports the Plan, would you be entitled to the
14 million dollar fee?

15 A. We would from a strict interpretation, yes.

16 Q. Thank you. The fee that you had proposed in your
17 Application, would that have been paid if the Equity Committee
18 contested confirmation, lost, the Court overruled the
19 Committee and the Debtor confirmed the Plan that is currently
20 before the Court.

21 THE COURT: Hang on. I --

22 MR. KIRPALANI: Object, Your Honor, relevance.

23 THE COURT: Well, I think I'm going to ask you the
24 same question. Are you talking about the -- what was
25 originally proposed or the deal as revised?

1 MR. NESTOR: What was originally proposed, Your
2 Honor.

3 THE COURT: Okay. That's fine.

4 THE WITNESS: Can you repeat the question?

5 BY MR. NESTOR:

6 Q. With respect to the --

7 MR. NESTOR: You know what, strike that, Your Honor.
8 We'll move on.

9 THE COURT: Well, the relevance -- I'll overrule the
10 relevance objection. I mean, you can ask him but I think
11 we're past the proposal.

12 MR. NESTOR: Let's talk to the substance, Your
13 Honor.

14 THE COURT: Okay.

15 BY MR. NESTOR:

16 Q. Has Jefferies ever charged a valuation fee of \$400,000 in
17 a Chapter 11 case?

18 A. Yes.

19 Q. And what case was that?

20 A. Specifically, I don't necessarily -- I can't confirm that
21 it's 400,000 but in the Spancion case, were we represented a
22 group of Ad Hoc Noteholders, we have a valuation report fee.
23 Off the top of my head it's probably in the 300 to \$500,000
24 ballpark.

25 Q. Is there a reason that wasn't included in the summaries

1 that were provided with the parties and filed with the Court?

2 A. Well, what we were doing here in this summary was just
3 identifying Equity Committee fee -- you know, financial
4 advisory fee comparables.

5 Q. And are -- do you represent the Equity Committee in the
6 Spanion case?

7 A. No. We represent a group of Ad Hoc Convertible
8 Noteholders.

9 Q. Thank you. With respect to the summary that you filed,
10 can you explain to the Court what you reviewed when you
11 prepared that, sir? First of all, did you prepare the
12 summary?

13 A. I oversaw the preparation of it. I also looked through
14 all of the Retention Applications and the Final Orders
15 approving the retention of the financial advisor.

16 Q. And did you review anything else in connection with the
17 preparation of this chart?

18 A. No, I did not.

19 Q. Okay.

20 MR. NESTOR: Just so Your Honor knows, Jefferies did
21 supply us with the information that they reviewed and we
22 appreciated that in advance of this hearing.

23 BY MR. NESTOR:

24 Q. For these cases, did you review whether there was a
25 recovery to Unsecured Creditors in the case?

1 A. To Unsecured Creditors?

2 Q. I mean to Equity, sorry.

3 A. No, we did not. As I mentioned earlier, the estimated
4 total fee is just a Jefferies' estimate, a hypothetical, if
5 the success fee is earned.

6 Q. Okay. Thank you for answering my question. Did you
7 review the amount of time that the Equity Committee was in
8 place in any of these cases?

9 A. We did not.

10 Q. Did you review whether the Equity Committee supported or
11 objected to the Chapter 11 Plan in these cases?

12 A. We did not.

13 Q. Did you review whether the Equity Committee was a plan
14 proponent in any of these cases.

15 A. Did not.

16 Q. Did you review the final Fee Applications and Fee Orders
17 that were approved relative to these engagements?

18 A. We did not. And as I said earlier, that total fee is an
19 estimate. It's likely that the fees could have been higher or
20 lower than what that estimate provides.

21 Q. But what we're talking about here today is market, so if I
22 understand your analysis correctly, this does not contemplate
23 what's market in terms of payment of fees in Chapter 11 cases;
24 is that correct?

25 A. No. This is what is market in regard to retentions

1 approved by the Court as to the terms of financial advisor's
2 engagement.

3 Q. Okay. So to answer the question, it's not a reflection of
4 what is market in terms of payment on account of investment
5 bankers for Equity Committees in Chapter 11 cases. It's a yes
6 or no question.

7 A. Well, no. I would argue that it is market when it comes
8 to the monthly fee and the proposed success fee because that
9 is exactly what's been approved in the cases as provided in
10 this table. The estimated total fee to the far right is not
11 necessarily market because we had to make an assumption.

12 Q. Okay.

13 A. We were trying to estimate what the total potential fee
14 was.

15 Q. So you did not review the fees that were ultimately
16 approved by the Court in connection with these engagements; is
17 that correct?

18 A. We did not review the Final Fee Applications at the end of
19 case, no.

20 Q. And so, I'll try to ask it one more time. This is not a
21 reflection of what is market in terms of fees that are paid to
22 investment bankers for Equity Committees in Chapter 11 cases?

23 A. It is not -- the final column to the right is not what
24 actually potentially was paid in each situation. Again, I'd
25 argue it is market as laid out what the monthly fee is and

1 what the restructuring success fee is.

2 THE COURT: I think you --

3 MR. NESTOR: We made it, okay. Thank you, Your
4 Honor.

5 THE COURT: I understand that point.

6 MR. NESTOR: Nothing further, Your Honor.

7 THE COURT: Any redirect?

8 MR. KIRPALANI: Thank you, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. KIRPALANI:

11 Q. Mr. White, do you believe the Equity Committee would
12 support a Plan where the equity would get an increase of just
13 one dollar over the current Plan?

14 A. No. And that's actually why we had the second trigger.
15 One, we approve recoveries versus the current Plan and, two,
16 we have Equity Committee's support for the Plan.

17 MR. KIRPALANI: No further questions, Your Honor.

18 THE COURT: Any more witnesses?

19 MR. KIRPALANI: Not from Jefferies, Your Honor.

20 THE COURT: Thank you, Mr. White. You may step
21 down, sir.

22 THE WITNESS: Thank you.

23 MR. NESTOR: Your Honor, can I ask one more
24 question?

25 THE COURT: Sure. Have a seat.

1 Exhibit-1. I'd like to offer that into evidence.

2 THE COURT: Any objection?

3 MR. REISNER: Your Honor.

4 THE COURT: Yes, sir. Mr. Reisner.

5 MR. REISNER: Good morning, Your Honor.

6 THE COURT: Good morning. Jeffrey Reisner from
7 Irell Manella for the Official Creditors' Committee. Your
8 Honor, I note that materials were supplied apparently by
9 counsel for Jefferies to the Debtor. They were not supply to
10 the Official Creditors' Committee. We received this chart on
11 just a few days notice, not any more than that. No
12 identification of a witness and as Court is aware, at least
13 from this chart, there's no evidence whatsoever in the record
14 of the underlying documents, of the witness's first-hand
15 participation in any of these decisions. As counsel pointed
16 out, any review of the Final Fee Applications. It's really
17 prejudicial. The best evidence of what happened in this case
18 is is the records in those cases which the Court could take
19 judicial notice if somebody had bother to file those things
20 with the Court. That didn't happen. So on that basis, there
21 is an objection. I would still say that had we had sufficient
22 notice, we might have taken some depositions to ferret this
23 out. And we're in now, again, and I hate to revisit this
24 issue, this question of now versus later at the same time
25 because we got a late filed exhibit, which, in fact, goes out

1 of the scope of the Application. In reply we have no data and
2 we all know we're not suppose to do that for exactly this
3 reason of prejudice. Having said all that, you know, there is
4 no doubt that Jefferies is a qualified firm and a very fine
5 firm. You know, the Committee's made its position known with
6 respect to retention of Jefferies and the position of the
7 Official Committee that was not the issue here as the Court
8 pointed out. I don't want this statement to be refocused to a
9 general objection of Jefferies (indiscernible).

10 THE COURT: No, I understand. I think counsel has
11 been scrupulous about maintaining the point that the issue's
12 on the terms -- the actual economic terms of the retention and
13 I appreciate that.

14 MR. REISNER: We do have (indiscernible) here --

15 THE COURT: Okay.

16 MR. REISNER: -- from the way that this came about.

17 THE COURT: I understand.

18 MR. REISNER: Thank you, Your Honor.

19 THE COURT: All right.

20 MR. NESTOR: Your Honor, the Debtors don't have an
21 objection to the admission of the document. Our objection
22 really goes to weight as Mr. Reisner said. I mean, it really
23 is a snapshot of Retention Applications and Orders. It really
24 doesn't look at the substance of the cases. You know, what
25 actually --

1 THE COURT: Well, you raised an interesting
2 question. You know, we always say as, you know, the Third
3 Circuit teaches us pretty clearly and it's usually regarded as
4 an analysis that's simple to follow which is what's the
5 market? Bankruptcy professionals are intended to be paid in
6 accordance with what the market is. That's actually one of
7 the fixes to the Code in '78 that fixed all the problems from
8 the Chandler Act and going all the way back to the 1898 Act.
9 And so the question is what's the market and -- I've conducted
10 these hearings and we often have the question of that the
11 market is defined as what professionals are paid by their
12 clients for services either inside or outside of bankruptcy.
13 And I know that downstairs Judge Carey just handled a fairly
14 lengthy hearing on what exactly the appropriate market rates
15 are. What the upper limits are. I never thought about it in
16 these terms and I'm not sure how it applies, but I've never
17 thought about it in the terms of that the market may also be
18 defined by what bankruptcy courts have approved. Rather than
19 going back and finding out whether or not somebody actually
20 got paid because everyone sitting in this room has been in a
21 case that has gone not according to plan, and then you're
22 winding up explaining things to the management committee. But
23 the -- my only -- I think I would agree with your initial
24 point, which is at best the issue really does go to weight.
25 The significance to which I can accord to this and I think

1 that's -- that will be the substance of my ruling. That I
2 will admit it, but I regard it's -- it is of limited utility
3 to me. It's not remarkable. I've reviewed it. At least two
4 of these cases are mine and many of these cases I'm familiar
5 with, so I don't regard it as remarkable. I think it does go
6 to weight and so I'll admit it with that caveat and I think
7 that that disposes of the issue. Okay?

8 MR. NESTOR: Thank you, Your Honor.

9 THE COURT: Any further questions for Mr. White?

10 (No verbal response.)

11 THE COURT: Mr. White, you may step down, sir.

12 Thank you.

13 THE WITNESS: Thank you.

14 (Witness excused.)

15 THE COURT: Briefly.

16 MR. KIRPALANI: Thank you, Your Honor. But just in
17 the interest of completeness of the record. We do have with
18 us all of the backup to the Rule 1006 summary that we
19 introduced into evidence. The only party that asked us for
20 that information was the Debtors and the Agenda letter itself
21 says the Equity Committee intends to present the witness at
22 the hearing. So just wanted to complete that for the record.

23 Your Honor, I think where we are is we've got evidence in
24 the record about Jefferies being needed by the Equity
25 Committee. The work they're doing is exactly the work that

1 they should be doing. The Jefferies' firm views itself as
2 owing duty to its client, which itself owes fiduciary duties
3 to the Equity Security Holders at large. This is a fast-track
4 case and honestly, Your Honor, I know very little about the
5 substance and the merits of what's actually going on in the
6 case, but I do know something about retention of
7 professionals, and the facts of a particular case or how much
8 in the money a particular constituency is or isn't really
9 should have no bearing on whether or not an Official Statutory
10 Committee should have the professional of their choice
11 provided the terms are reasonable and are market.

12 With respect to Your Honor's question about the weight,
13 I'm not going to dwell on the deficiencies in the evidence on
14 whether we should also have included what was actually paid.
15 I'd only just ask Your Honor to observe an analogy which would
16 be just if the Court were to approve a 25 percent contingency
17 fee for my firm as reasonable but we never won the case, is it
18 not still relevant that 25 percent is a market rate for a
19 contingency firm. Thank you, Your Honor.

20 THE COURT: Thanks. Mr. Nestor.

21 MR. NESTOR: Your Honor, it's a difficult place to
22 object to the Retention Application about a professional.
23 Obviously we've all worked with Jefferies and enjoy working
24 with Jefferies and, in fact, soon after the Application was
25 filed, the Debtors, you know, immediately contacted Jefferies

1 and the Equity Committee and worked pretty hard to try to come
2 up with a resolution that they could live with that was
3 reasonable. And I think in doing so we were probably out in
4 front of the pack with respect to the positions of other
5 parties in the case. We ultimately were not able to get there
6 and without any prejudice to the parties interest in trying to
7 resolve this matter. What we have before the Court are, I
8 guess, three forms of compensation and I'll walk through them
9 and let the Court know where the Debtor stands with respect to
10 each.

11 With respect to the \$150,000 monthly fee in a revised
12 request, the Debtors are okay with that approach for three
13 months, and then we would submit that that is revisited to the
14 extent that the Equity Committee exists beyond February.

15 With respect to the \$400,000 valuation fee, while the
16 Debtor submits that's a difficult pill to swallow, in the
17 interest of providing the Equity Committee with an advisor of
18 its choice, the Debtor is okay with that fee, so long as they
19 emerge by the end of February.

20 With the success fee, Your Honor, that's kind of where
21 we're unable to reach a consensus. We just don't think
22 there's enough before the Court for the Court to make a
23 determination under Section 328(a), that this is reasonable as
24 proposed in the Application.

25 THE COURT: Let me ask a question. If the

1 Creditors' Committee had come to you with terms under this,
2 what would be your reaction?

3 MR. NESTOR: Say that again, Your Honor.

4 THE COURT: If the Creditors' Committee had come to
5 you with a financial advisor under terms similar to this, what
6 would have been your position?

7 MR. NESTOR: I would have had to consult with my
8 client, but my expectation would be that it's high. And we
9 would have asked that -- at the end of the day right now, Your
10 Honor, we just don't know what's going to happen in connection
11 with this case. And I think Mr. White said it best when I
12 asked him, is the Equity Committee, who essentially holds the
13 cards, is the Equity Committee able today to make a
14 determination of the reasonableness of the fee? He said, no.
15 There are too many moving parts and the process is moving
16 forward. And for that reason, Your Honor, we think it's
17 difficult if not impossible for the Court to make a
18 determination that a million dollar fee is reasonable. And we
19 post an example, which I think is extreme but relevant. You
20 know, there's no definition of an improvement to equity, so
21 there -- and it's a sliding scale, but if you take it to its,
22 you know, logical extreme -- if the value is improved by a
23 dollar and the majority of the Equity Committee supports the
24 Plan, not the fee, they get a million dollar fee. And we
25 think based upon the inability to come forward with any sort

1 of objective metric based upon the fact that the case is
2 moving towards confirmation and what appears to be a valuation
3 fight and based upon the fact that there's really no evidence
4 today for the Court to make a determination of the
5 reasonableness of the fee, we would ask that the Court defer a
6 determination on the transaction fee. Let the process play
7 out. Let all of the parties have a better understanding of
8 the facts of the case and the result and then come back at a
9 later date and enable everyone really to have a decent shot at
10 understanding and weighing on that fee.

11 We have two caveats, Your Honor. First, the indemnity.
12 As I said, I think we have an agreement on that and I'll
13 caucus with counsel after the hearing to ensure that we're on
14 the same page. And we would also request that in light of the
15 circumstances, our objection in the record, that the fees be
16 subject to 330 review by the Debtors as well.

17 THE COURT: Okay. I understand.

18 MR. NESTOR: Thank you, Your Honor.

19 THE COURT: Mr. Shenfeld.

20 MR. SHENFELD: Your Honor, again, Robert Shenfeld,
21 Milbank, Tweed, Hadley & McCloy, on behalf of the Ad Hoc
22 Noteholder Group. We filed an objection to the Jefferies'
23 Retention Application. I'm pleased to learn that in the Reply
24 they put -- through the Debtors' efforts, there has been some
25 significant reduction in the proposed fee. I guess we could

1 look at that as an indication of a concession by the Equity
2 Committee and by Jefferies that, you know, in light of what
3 this case actually is, and so that there was a need to retreat
4 from what I was calling the \$1.5 million unsuccess fee that it
5 previously been asking and the condition under which it would
6 be earned.

7 I'd like to address -- I presume Your Honor would have
8 asked me what would I have objected to if the Unsecured
9 Creditors' Committee had come to us and I guess my answer
10 would have been, if the record before the Court were that the
11 Unsecured Creditors were as deeply underwater as the Equity
12 Committee is here in this case, then we would have absolutely
13 objected as well, because we have injected ourselves into
14 these proceedings, again, as you know from our other
15 pleadings, our limited role in this case is supporting the
16 Plan. We've injected ourselves into this because this is --
17 these fees directly affect the Debtors liquidity and cash that
18 is otherwise available to pay the in the money creditors and
19 it, you know, retreats on that recovery. So we have injected
20 ourselves and wanted to have our voices heard. I comment on
21 Mr. Kirpalani's question about, you know, needing bows and
22 arrows. Well, that may very well be the case, but not
23 necessarily true that the Equity Committee needs torches to
24 burn down a Plan that we have to this day, to this very day,
25 not heard from the Equity Committee that the Debtor did

1 anything wrong. We heard Mr. White testify that in his
2 fiduciary duty that he needs to do valuations and look for
3 other financing, but he certainly didn't testify that the
4 Debtor did not pre-petition do what the Debtor was suppose to
5 do. We have not heard any basis for going down that road and
6 we've heard no basis that the absolute priority rule here is
7 in -- somehow upside down. I suspect and I'm not so good at
8 predicting the future, but I suspect that, you know, there's
9 going to have to be a significant increase in the valuation of
10 the Debtors assets to put the Equity Committee in money. And
11 so this \$400,000 valuation fee is undoubtedly going to show
12 that there's some -- I presume some enormous increase in the
13 Debtors' proposal. And the Debtor -- Ms. Reckler testified --
14 well, not testified, but told the Court this morning, that the
15 Debtors' current Plan is to stay on plan even though they've
16 received an alternative proposal from the Equity Committee.
17 So where I come around to this is first, are --

18 THE COURT: The Debtors' current Plan contains as
19 filed on the petition date contains a distribution to existing
20 equity, right?

21 MR. SHENFELD: Yes, of 2 percent, Your Honor. And
22 the Disclosure Statement also says that it's an out of money
23 creditor -- out of money constituency that has been -- that
24 negotiated the Debtor and its board negotiated very heavily
25 for what is term of art in the bankruptcy parlance, a gift to

1 the Equity Committee to ensure that there would be some
2 distribution. But the analysis provided by the Debtor --

3 THE COURT: So your observation would be no good
4 deed is going unpunished.

5 MR. SHENFELD: Well, thank Your Honor, I'll adopt
6 that, yes. I've got a whole bunch of other phrases I'd like
7 to use but I'm going to stick with that one. So getting back
8 to our response, though, we see here -- I want to just go
9 again, we didn't feel an objection to a monthly fee
10 application -- a monthly application to Jefferies. And now in
11 this Reply with the revised structure, the \$400,000 which is
12 absolute and was credited against a success fee should there
13 be one, I would like to echo Mr. Nestor's reservations and
14 comments about that fee. I just don't think today we have
15 that issue. There's a lot of variables.

16 Equity Committee has come in, they're taking their shot.
17 And their shot is that not just vetting the Plan actually, but
18 doing everything they possibly can to propose an alternative
19 plan without yet having a witness testify or any evidence
20 produced that there's a reason to doubt what the Debtor has
21 done. My constituency is satisfied with the Debtors'
22 representations supporting the Plan. So somewhere, somehow
23 there's a -- arguments are being tossed around before this
24 Court last time and today, that this is necessary to do this
25 full throttle, torch burning (indiscernible), not just bows

1 and arrows. So at that point that we think it's relevant,
2 obviously when you approve something under 328(a), it's done.
3 And that's not the case here. We're going to see what the
4 determination is. The valuation report not filed yet, we
5 don't know that that's going to say that there's \$10 million
6 more in value or \$300 million more in value, and that should
7 impact the Court's ability, in our view, to determine whether
8 or not a 328(a) approval of a success fee even though it's
9 reduced and has credits at this point. So we would recommend
10 that that issue be put over until an appropriate time when the
11 Court can fully and fairly assess it and perhaps after we've
12 seen the valuation reports prepared by Jefferies & Company.
13 Again, reiterating what other counsel has said, we do not
14 oppose the qualifications of Jefferies.

15 And, finally, Your Honor, I'd like -- two objections that
16 the Ad Hoc Noteholder Group made that the Debtor did not make
17 and earlier today Your Honor ruled that Sonnenschein and
18 Bayard firms don't need to wait, we had argued the same
19 objection to Jefferies saying that they should wait for our
20 Dissolution Motion as well as be paid out of the equity. Now
21 they have indicated that the success fee will be paid provided
22 that the Equity Committee approves it, but I ask the question
23 out loud, I don't know today, I don't think there's been any
24 disclosure, what percentage of equity is the Equity Committee?
25 There's been publicly filed. Trimaran owns 9 percent I

1 believe or 7.9 percent. What happens, Your Honor, if the
2 overwhelming majority of the equity vote in favor of the Plan
3 and then somehow the Equity Committee says this is fine with
4 us. You have an Equity Committee that might vote in favor of
5 the Plan and then the valuation report and any improvement
6 therein or so forth may be academic. So I'm going to assume,
7 Your Honor, that your earlier ruling that we're not waiting
8 until February 10th, and by you shaking your head, I'm going to
9 assume that I'm correct, but then we want to reiterate that,
10 again, we do need to wait until February 10th to see what the
11 valuations are, to see where we are and see what the vote is
12 before we decide whether or not transaction fee/success fee is
13 warranted and certainly what the measure of that is because
14 there is not just the six or seven members of the Equity
15 Committee but there is an equity body out there who will have
16 their say about the Plan.

17 THE COURT: Okay.

18 MR. SHENFELD: Thank you.

19 THE COURT: Thank you. Ms. Machen.

20 MS. MACHEN: Thank you, Your Honor. Just a couple
21 of points. Mr. Shenfeld indicated that 328 is irreversible.
22 It is not. An employment under 328 provides that the Court
23 may allow compensation different from the compensation
24 provided if after the conclusion of such employment --

25 THE COURT: Improvident --

1 MS. MACHEN: Exactly, Your Honor.

2 THE COURT: -- in the light of circumstances --

3 MS. MACHEN: Exactly, Your Honor.

4 THE COURT: -- could not be ascertained at the time
5 of the retention.

6 MS. MACHEN: That's correct, Your Honor. And I
7 believe that that is the standard for retention for financial
8 advisors. Jefferies has indicated that they will be subject
9 to 328(a) and based on that, I don't see why there should be
10 all of this fuss about their success fee, which frankly, Your
11 Honor, we've talked to Jefferies about it. We have discussed
12 in great detail the extent of their success fee. They have
13 brought it down considerably. They're crediting the valuation
14 fee. They're crediting their going-forward monthly fees after
15 three months of work if the case goes on longer. So we think
16 that there are significant changes that have been made to
17 Jefferies' Retention Application that warrant their retention
18 at this point. Your Honor, I will also add, Jefferies is
19 essential to our fight. We are not here to blow up a plan. I
20 know that that has been the tenor, Mr. Shenfeld's comments.
21 We're not here to blow up a plan, but we are here to help the
22 Debtor look for an alternative financier. We believe that we
23 found one. It's taken some time. Some of that time has been
24 due to delay caused by Mr. Shenfeld's own clients, but we are
25 in the process of doing it. And why have we not come forward

1 and presented evidence? Well, we're just not at that point
2 yet, but we will, Your Honor, be before this Court very
3 shortly with something different for the Debtors. So in light
4 of this, Your Honor, I do want to emphasize the Equity
5 Committee would like to continue with its work with Jefferies.
6 We believe that the changes that have been made by Jefferies
7 are reasonable, are not excessive as indicated. Your Honor
8 has 328 review and if it turns out at the end of this case --

9 THE COURT: And the U.S. Trustee would as well,
10 correct?

11 MS. MACHEN: Yes. Yes. And the U.S. Trustee also
12 will have --

13 THE COURT: I'm sorry, 330 (indiscernible).

14 MS. MACHEN: 330, yes. And the U.S. Trustee will
15 also have 330 review. So, Your Honor, I think that there are
16 significant protections build in if the circumstances of this
17 case change, and for those reasons I believe that Jefferies'
18 retention should go forward today on the terms proposed by
19 Jefferies. Thank you, Your Honor.

20 MR. REISNER: Your Honor, may I be heard?

21 THE COURT: Sure.

22 MR. REISNER: Your Honor, the argument has focused
23 on what's really a very simple distinction between 328 and
24 330. I think the Court's made its thoughts clear about
25 deferring retention and that we're going to have retention

1 today on some terms and that's fine. Let's set that as a
2 platform. Okay. We have parties arguing why 328's
3 appropriate, parties arguing why 330's appropriate and all the
4 arguments in favor of 328 are the same ones well in advance of
5 the final fee hearing regarding 330. They are a necessity and
6 reasonableness, all of which are valid arguments. They
7 question is should the Court be forced to make that decision
8 now or later when it has more data. The Court knows very
9 little --

10 THE COURT: How can I make that determination later?

11 MR. REISNER: As to the reason --

12 THE COURT: That's I mean -- if I -- I mean, that's
13 like kissing your sister. I mean, if I say to Jefferies, I'll
14 let you know when I know -- when this whole thing is played
15 out, whether or not you're going to have the improvident
16 standard or the reasonableness standard, they will not have
17 gotten the benefit. I mean, I think the question is before me
18 at least for this issue today. Now, I'm not approving the
19 payment of their fee today, but the question is the standard
20 upon which it would be reviewed and I think it's actually
21 incumbent upon me to answer that question today, isn't it?

22 MR. REISNER: I'm being unclear, Your Honor.

23 THE COURT: Okay.

24 MR. REISNER: Well, let me try again. The point I
25 was making was that I agree with you. You have to make a

1 decision as to 328 and 330 given your decision to rule today
2 on the Applications. No issue there.

3 THE COURT: Okay.

4 MR. REISNER: What I'm saying is the arguments
5 you're hearing today about why 328 is appropriate, are the
6 same exact arguments you would hear in connection with a Final
7 Fee Application under 330. They are let's look at the fee.
8 It's a million dollars. Let's see what happened. It's
9 reasonable, it's market. All those things would be part of
10 the Court's consideration under 330. So as you think about
11 whether to make that decision today as to 328 or 330, again, I
12 think you have to make that decision. There's nothing that
13 stops anyone from arguing later on that the fee should be
14 awarded in full for all these reasons under the 330 standard.
15 The question is why should you be limited? And I watched Your
16 Honor when you recited the 328 standard. It's improvident in
17 light of facts that could not be ascertained. Your Honor
18 knows like all of us know that in the event that 328 is the
19 standard that's approved today, and in the event there's an
20 objection later on, the point will be made, Your Honor, we
21 talked about everything. This is not improvident in light of
22 facts that could not be ascertained. We talked about it,
23 here's the record. It was on the record. And it's important
24 to also go back to a question you raised about the Official
25 Creditors' Committee. The Official Creditors' Committee has a

1 financial advisor. I believe the standard's 300 and it's
2 hourly. And that's not to say that it's not appropriate to
3 have different fee structures for the Equity Committee and, in
4 fact, the Official Creditors' Committee doesn't oppose the
5 idea of a success fee as a general concept. The problem is
6 what's the standard. Success. We don't know what success
7 means. And we also have a problem of setting up as an
8 objective criteria the support of the Equity Committee for the
9 professional it's elected to get paid out of someone else's
10 money. We know how that comes out. That's not a real
11 criteria.

12 THE COURT: Well, no because they're not being asked
13 to support the fee, that's not the condition. They're not
14 being asked to support the fee. You're right, that would be a
15 sham. They're being asked to say, there's another -- this is
16 in response -- I mean, I think it's directly responsive to Mr.
17 Nestor's one dollar issue, which is their being -- the fee is
18 condition not on whether or not the Equity Committee likes the
19 fee, it's whether or not the appointed fiduciaries for Equity
20 Security Holders are supportive of an alternative plan. And
21 if they are, then the fee is triggered. If they're not, then
22 the fee would not be triggered. Mr. Shenfeld raised an
23 interesting question about what happens if equity as a group
24 supports it and I think I'd like to hear from somebody on
25 that. That's an interesting question but I mean, I think that

1 -- I will say this to the extent anybody's wondering, I see
2 that as a -- is it ideal because we put the Creditors'
3 Committee or the Equity Committee members into the mix on
4 that? No, but I think it's a necessary fix and there may have
5 been other ways of doing it. You could condition on equity
6 support for the Plan but, you know, the concern I had when I
7 first read this was the dollar question. You know, what
8 happens if it goes up a buck. Then you got to pay Jefferies a
9 million dollars and, you know, that's something that's not
10 intended by anybody in this room. So the idea is that's sort
11 of a -- that's a real world break on what the deal is and
12 everybody can do the math. Is the improvement going to be
13 sufficient, frankly, to garner Equity Committee member support
14 as well as justify the enhanced payment? And that's something
15 that was not in the original proposal and is demonstrably an
16 improvement.

17 MR. REISNER: Absolutely. But the problem is, Your
18 Honor, if the Debtors right as to value, the Equity Committee,
19 if it comes down to a decision by Your Honor, that the -- that
20 Equity was still terribly out of the money and assume that it
21 will not get a certificate approved under the Plan and a minor
22 improvement under the Plan is provided in order to accommodate
23 the parties, the problem you have is there's an obstacle now
24 being created to a settlement under -- that resolves the
25 issues under the Plan. If the parties get together, you will

1 never know about this, outside and it's concluded, you know
2 what, the valuations just don't support what the Equity
3 Committee's saying and there's just a minor improvement that
4 could be had and the parties want to settle by adjusting the
5 (indiscernible) strike price, for example, one of the factors
6 that will have to be considered is the impact of the fee in
7 the context of the settlement as opposed to leaving it to Your
8 Honor.

9 THE COURT: Well, I don't get to sit at those tables
10 anymore.

11 MR. REISNER: We miss you, but we understand.

12 THE COURT: But I have a measure of confidence that
13 Mr. White has been around the block.

14 MR. REISNER: I can't speak to Mr. White being
15 around the block.

16 THE COURT: And I can't say how that may or may not
17 play out, but I mean, these plays -- you're right. I mean,
18 but I face that precise identical question every time I'm
19 asked to approve a break-up fee, every time I'm asked to
20 approve a DIP facility fee, every time I'm ask to approve a
21 DIP financing termination fee. Your Honor, how are we going
22 to go find a better bidder? How are we going to go find a
23 better lender? How are we going to do a deal because we got
24 to pay these guys? And it's not an insignificant
25 consideration.

1 MR. REISNER: I think the only --

2 THE COURT: You're right. It's --

3 MR. REISNER: It's just another fact, Your Honor.

4 THE COURT: It's an impediment.

5 MR. REISNER: And the question really is, is why
6 does a party that knows that bringing value, fear the review
7 of 330? And why is it fair to have that 330 review right
8 vested solely on the U.S. Trustee with whom we have great
9 confidence. That isn't the issue. But where is that the
10 final and precise resolution here that we all need? These are
11 unique circumstances. I don't doubt that you're right. That
12 at the beginning of a case, you're asked to bless a lot of
13 fees. You don't have adequate information. A lot of charges.
14 Nobody really knows. This is a set table in many respects.
15 In many respects, it's not. We have unique facts here. You
16 have a pending motion that you need to consider and how do you
17 address the pending motion in light of this? What if you
18 determine that the U.S. Trustee was sold a bill of goods? I
19 would -- right now, that doesn't mean that counsel shouldn't
20 get paid or that Jefferies shouldn't be paid. I think it's a
21 factor that you want to consider. The improvident standard is
22 so strict, it just doesn't give you anywhere to go. That's
23 the only problem that the Official Creditors' Committee has
24 with it. It's not against the employment. It's not against
25 the employment now. It's not against the suggested fees. You

1 may not even hear from us. It's just a question of where you
2 can go at the time and it's not very far off. So we just urge
3 you for the sake of latitude to preserve that right to
4 yourself. Thank you, Your Honor.

5 THE COURT: Thank you.

6 MR. SCHLERF: Good morning, Your Honor. Jeffrey
7 Schlerf for Deutsche Bank as agent. Your Honor, we did not
8 file any papers but I thought it would be helpful for Your
9 Honor to know our position very quickly. We share the
10 Debtors' position, Your Honor, and agree that any terms of
11 Jefferies retention should be subject to Section 330 review by
12 all economic parties-in-interest and Mr. Nestor's good example
13 is just one of several reasons why we support that position.

14 THE COURT: Okay.

15 MR. SCHLERF: Thank you, Your Honor.

16 MR. KIRPALANI: Your Honor, if I could just try and
17 briefly respond to some of the issues. First, with respect to
18 Your Honor's question that you hope somebody would answer.
19 I'm sure you know me well enough that I'd love to try. If the
20 equity community as a whole support the current deal but the
21 Equity Committee, Jefferies' client, does not support the
22 deal, there's no transaction fee, that's easy. If the Equity
23 Committee as a whole, as Mr. Shenfeld may be predicting or
24 hoping, support the current deal and the Equity Committee
25 Holders on the Committee are a minority, notwithstanding, that

1 it's irrelevant for fiduciary purposes, I know Your Honor
2 understands that, but they're a minority so who really cares
3 what they think anyway. Again, the deal as proposed by the
4 Debtors and supported by the Ad Hoc Noteholders and the
5 Official Committee is approved with no changes, no fee. So
6 this isn't a situation where -- the third scenario is the
7 Equity Committee as a whole not only out votes the Equity
8 Committee but even nudges the Equity Committee just go along
9 with it, it's a good deal.

10 THE COURT: Let me ask you a --

11 MR. KIRPALANI: If that happens, still no
12 transaction.

13 THE COURT: Okay. Let me ask you a question and
14 whether this is most appropriately addressed to you or Ms.
15 Machen, you can decide, I don't care. But we do have the
16 pending Motion to Dissolve the Equity Committee. I understand
17 that's not your problem, but what parties have either directly
18 or indirectly said is, and Mr. Shenfeld went to this point
19 when he asked that I consider this later, how -- what happens
20 if I find that the Ad Hoc Committee has carried its burden and
21 the Equity Committee should be dissolved on the 10th of
22 February? And obviously, I have a fairly -- the parties have
23 said I have a fairly open landscape. They've asked for
24 dissolution as to the date of creation. Maybe I do, maybe I
25 don't, whatever, but if I approve today a 328 retention, it's

1 clearly obvious that I can foresee that that -- I mean, that
2 Motion's going to get either granted or denied, so either of
3 those scenarios are circumstances that I am foreseeing today,
4 what happens with that?

5 MR. KIRPALANI: Okay. And I'd like to take a try --

6 THE COURT: Okay.

7 MR. KIRPALANI: -- and answer Your Honor's question.
8 Here's what's going to happen. Bear in mind, Your Honor,
9 we're already over two months into the case. Jefferies has
10 been working diligently and faithfully for the client that
11 retained it.

12 THE COURT: Actually, hang on. One clarification.
13 I speak only to the success fee in that context. The issue of
14 -- I mean, the mechanics of the report fee --

15 MR. KIRPALANI: I was going to go through that.

16 THE COURT: -- and -- yeah, I figured you were. And
17 the monthly -- I mean, I think I can deal with that in the
18 same way that I would deal with the request for payment by the
19 various professionals. I will make that determination, I
20 don't know. But the success fee is a somewhat -- it's a much
21 more complicated exercise. I mean, I may be today approving
22 payment for an entity that doesn't exist.

23 MR. KIRPALANI: Right. So let me address that.

24 THE COURT: Sure.

25 MR. KIRPALANI: Just as the precursor because it's

1 still stuck in my head, the fee would be if Your Honor
2 approves Mr. Shenfeld's Motion and grants Mr. Shenfeld's
3 Motion, 150 a month plus assuming Jefferies delivers the
4 expert report that it's been asked by the Debtors to deliver,
5 another 400,000, \$850,000 was the cost of doing business in
6 Chapter 11 to have an Official Equity Committee. That's the
7 U.S. Trustee's decision to have one and they retained
8 professionals on market terms. That's the cost.

9 With respect to the transaction fee, there is no
10 transaction fee, Your Honor, because there is no Equity
11 Committee to support a plan. I would venture to guess that if
12 between now and the 11th, the Equity Committee somehow supports
13 the Plan, Mr. Shenfeld would not be so eager to dissolve that
14 Equity Committee.

15 THE COURT: I wouldn't bet on it, but I'm a little
16 flip.

17 MR. KIRPALANI: Well, it would also have to be an
18 improvement as well, Your Honor, under the current deal. I
19 think under those circumstances, we're talking about a
20 consensual deal. That's not -- I don't think the real risk
21 that Your Honor's trying to avoid. You want to address
22 something else?

23 MS. MACHEN: I just wanted to -- this is Monika
24 Machen for the Equity Committee. I wanted to say that Mr.
25 Kirpalani's understanding is absolutely correct. It's not

1 just 328, we have two very important triggers. First, there
2 must be a recovery to equity. If Mr. Shenfeld's Motion to
3 Dissolve is granted, it will be on the basis that there is no
4 equity. So they are certainly -- if he's right that what he's
5 already giving us is a gift under the Plan, we certainly
6 aren't going to get more. And second of all, the Equity
7 Committee has to support it. If there is no Equity Committee
8 certainly there can't be any support for any kind of plan.

9 THE COURT: Okay. Thank you.

10 MR. KIRPALANI: Your Honor, if I could just cover a
11 couple of brief issues. They almost emphasize with the
12 Debtors and the Committee and the Ad Hoc Committee of
13 Noteholders about gosh, we're so close to where we need to get
14 to, can't we just wait to approve this but, Your Honor, I
15 really do liken that to the situation where a child shoots his
16 parents and says -- throws himself on the mercy of the Court
17 and says, I'm an orphan. Your Honor, this is of the Debtors
18 and the Ad Hoc Noteholders design. The timing to have a
19 Chapter 11 case, and the burdens on the Court as much as it is
20 on the parties, decided, resolved, finished with a contested
21 valuation in three months from start to finish, is not the
22 Equity Committee's design. We're not writing on a clean
23 slate. This is a slate we were given. We were given that
24 slate, we've engaged professionals for that, to handle it,
25 everyone's acted responsibly, diligently and as quickly as

1 humanly possible working around the clock. That is where we
2 are. If it turns out the case is over, there is no minimum
3 number of monthly payments that's going to have to occur to
4 Mr. Shenfeld's point. He said just approve it for the three
5 months, after that we can see. Your Honor will decide whether
6 or not an Equity Committee should continue to live or not in
7 these cases at the end of the three months. If it doesn't,
8 there's no continued 150,000. You don't have to prejudge that
9 issue by definition. The engagement will end if the Equity
10 Committee ends. The other comment, I believe, Mr. Nestor made
11 that he had recommended. I didn't want to discuss this. I
12 thought it was in the nature of settlement discussions but
13 it's perfectly appropriate from my prospective. They had
14 thought it might make more sense for the Debtors to tie the
15 fees to when the Debtors emerge. If we can get out by the end
16 of February, you get your fee. Your Honor, this taints the
17 advice of what should be a professional giving his or her own
18 best judgment to the Court. It taints the advice because a
19 professional will be willing to give on issues in order to
20 meet the timetable that their adversary is requesting. I
21 think that compromises Jefferies independence and I wouldn't
22 recommend that they take that and I know they, on their own,
23 they said they can't do that. You make more if you capitulate
24 early does not make for a fair retention or a fair
25 representation of a client. The same thing is true with Mr.

1 Shenfeld's remarks that we can tie it to what the valuation
2 report actually says. Let's see it. Let's see the work that
3 they've been working on and then we can decide whether we need
4 to approve them or not. Again, Your Honor, same problem. You
5 can't make more if you deliver a report that shows more value.
6 That taints exactly the type of independence advice that
7 Jefferies is known for giving.

8 With respect to Section 330, the U.S. Trustee requested
9 this -- U.S. Trustees for whatever reason, and Your Honor
10 knows it better than I know it, are entitled to certain
11 deference that doesn't exist within the adversarial litigation
12 process. This is the same office that appointed the Equity
13 Committee. Jefferies took comfort in that. They're entitled
14 to take comfort in that. If they want to have Section 330
15 reviewed because that's how their office administers itself
16 and that's the way they do business, Jefferies is willing to
17 accommodate that. They cannot accommodate that for their
18 adversaries in forceful, fierce litigation for obvious
19 reasons.

20 With respect to the Committee's counsel comment about
21 well, what are we really worried about? We can approve this
22 at the end. All of these great arguments that we're making
23 about this is market. Your Honor can consider that under 330
24 and say hey, I guess it was market when they started the work
25 and so what's the real fear. This isn't about fear, Your

1 Honor. Fear is not the test in the Third Circuit. It's what
2 is the market standard? What's the market standard for
3 financial advisors doing the type of work that they're doing?
4 Your Honor, it's Section 328(a) and I know Your Honor knows
5 that and has ruled on that in other situations. Your Honor, I
6 think those are all the responses I had to the issues that I
7 believe were raised. If Your Honor has any other questions, I
8 will respond.

9 THE COURT: I don't.

10 MR. KIRPALANI: Okay. Thank you.

11 UNIDENTIFIED SPEAKER: Your Honor --

12 THE COURT: I've heard enough. Okay. I will
13 approve the Application and I will give my reasons. First, as
14 I noted earlier, I believe that an Official Committee is
15 entitled to seek to engage the attorneys and financial
16 advisors and other professionals of its choice, and the Equity
17 Committee in this case has exercised that in seeking
18 Jefferies. There is no opposition or concern expressed by any
19 party with respect to the ability or qualifications of
20 Jefferies and obviously, Jefferies has appeared in this court
21 before me and my colleagues many, many times.

22 With respect to the terms of the Application, obviously
23 there have been very, very substantial modifications to the
24 proposed retention that render what was originally a
25 particular troublesome or difficult application, more

1 palatable. I note first, that there is, from at least the
2 Debtors, no opposition to the \$150,000 a month fee, and I do
3 find from the Court's experience that that is consistent with
4 what I have seen in other cases, and I'm satisfied that that
5 is sufficiently within the range of the market. In addition,
6 the \$400,000 report fee is again, a structure that I have seen
7 in other cases and I think it's appropriate and I think it's
8 particularly appropriate that the report fee is simply payable
9 and that is responsive to an issue or a concern that was
10 expressed by Mr. Kirpalani at the conclusion, which was
11 whether or not you're buying the report you want. And so one
12 of the considerations that the Court has to weigh in approving
13 and considering Retention Applications is to ensure that
14 professionals are fairly compensated in accordance with the
15 market, but also that both appearance wise and substantively
16 that the Court can have confidence in the integrity of the
17 services that are being provided. And, again, I'm satisfied
18 that the \$400,000 fee structure for the report itself is
19 consistent with that.

20 As to the million dollar fee structure, again, I was
21 certainly troubled by the success fee as originally proposed
22 and I think that the objections to that fee structure were
23 well founded. For right now, I'm satisfied that the success
24 fee is structured in a way that is responsive to the needs and
25 particular interests of the represented constituency being the

1 Equity Security Holders, that the success fee is not payable
2 if the -- and I know this doesn't happen, but this is how
3 these objections are couched. If the professional simply sits
4 on their hands and watches another plan get confirmed it's not
5 payable. The objections that were to the original proposal in
6 that regard I think were well founded, but here the payment is
7 conditioned upon a material improvement, that is acceptable to
8 the holders -- to the members of the Equity Security
9 Committee. And I find that the -- that's a mechanism that I
10 said earlier is designed to be a reality check on the
11 exercise. And I do find, let me make a point, that the
12 concern expressed by Mr. Nestor, the dollar improvement is,
13 and I will say this right now, that is not a circumstance that
14 I would deem foreseeable today. So basically, to the extent
15 that there will be a success fee, it will be predicated upon
16 an improvement to the Plan for the constituents that are
17 represented by Jefferies and, again, the reality check on that
18 exercise is both fee material improvement and any acceptance
19 or support of that by the holders -- by the members of the
20 Official Committee of Equity Security Holders. So based upon
21 the record before me and with the substantial modifications
22 that have been approved and agreed to between the Equity
23 Committee and Jefferies, I will approve the Application.

24 Let me first ask, do you have a Form of Order and then
25 second, -- oh, you need to talk about the indemnification.

1 UNIDENTIFIED SPEAKER: That's what I was --

2 THE COURT: So I'll look for that under
3 Certification.

4 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

5 THE COURT: If that becomes an issue, then you can
6 get me on the phone, but I you can work through it. Mr.
7 Nestor.

8 MR. NESTOR: Your Honor, some materiality now is a
9 condition of the improvement to equity pursuant to your
10 ruling?

11 THE COURT: No. I read it that -- no, it's not --
12 I'm not imposing an additional condition. I read it as being
13 there has to be a material -- let's put it this way: I deem
14 it as there has to be an improvement and the way that I'm
15 satisfied that that improvement would be material is that the
16 members of the Equity Committee have to support it. And so
17 I'm not imposing a different analysis. I'm approving the
18 Application as submitted and I'm giving you my reasons why I'm
19 satisfied with the conditions that have been identified and
20 negotiated between the Equity Committee, the Debtors and
21 Jefferies.

22 MR. NESTOR: And that's under 328?

23 THE COURT: Oh, it is under 328 for all parties
24 except for the U.S. Trustee.

25 MR. NESTOR: Thank you, Your Honor.

1 THE COURT: Okay. So I'll look for the Order under
2 Certification between the parties. Before we break -- I'm
3 going to take a short break. I know that we have the next
4 Motion is the 2019 Motion; is that correct?

5 (No verbal response.)

6 THE COURT: Okay. Gentlemen, I assume you're here
7 for the Gibbons matter; is that correct?

8 MR. BEST (*ph*): Yes, Your Honor.

9 THE COURT: All right. Mr. Best. Mr. Buchbinder,
10 do you have any sense of how long that hearing will be?

11 MR. BUCHBINDER: No, I do not, Your Honor, I'm not
12 the one who filed the objection.

13 THE COURT: Okay. Mr. Best, do you have a sense?
14 Can you come on up, gentlemen?

15 MR. BEST: Robert Best, Your Honor, on behalf of
16 Penntax Construction Co., Inc. I would so expect it no more
17 than five minutes. Very brief.

18 MR. CIANCIULLI: Your Honor, Jeffrey Cianciulli, on
19 behalf of the Debtor. I can't speak for the objection. There
20 may be some background information about this Debtor that Your
21 Honor may want to hear. I would expect no more than five
22 minutes on my end.

23 THE COURT: Oh, okay. Well, let me ask counsel.
24 Obviously, -- because this is going to a relatively short
25 matter, it is a personal Chapter 11 case, --

1 UNIDENTIFIED SPEAKER: Yes, Sir.

2 THE COURT: -- I think we're at a good breaking
3 point and I'll give you the option. I can either break for --
4 I'm going to give you half an hour because two orders that say
5 five minutes, I can do the math. But I can either give you a
6 half an hour or we can reconvene at say 1:00. Do you have a
7 preference? Mr. Shenfeld?

8 MR. SHENFELD: Well, Your Honor, at a risk of
9 speaking out of turn, I mean, the Ad Hoc -- Milbank, Tweed and
10 Pachulski filed a 2019 Statement. I would suggest that the
11 motion is moot and that may alter how you proceed in the
12 schedule.

13 MS. MACHEN: Your Honor, --

14 THE COURT: Can you get to the -- then why don't we
15 do this. Ms. Machen.

16 MS. MACHEN: I was going to suggest that I think a
17 half hour would be fine, Your Honor. And that will give us
18 some time to also discuss the 2019 a little further.

19 THE COURT: Okay. When was the 2019 filed?

20 MR. SHENFELD: It was filed yesterday, Your Honor.
21 It's Docket Number 596 on the --

22 THE COURT: Somebody give me a copy of it.

23 MR. SHENFELD: Sure. I have your copy. I'll hand
24 it over to you.

25 (Counsel complies.)

1 THE COURT: Okay. Well, I'll hold on for just a
2 second to get that copy. I will take a five-minute break and
3 then I will reconvene with the Gibbons matter. At the risk of
4 imposing upon counsel in the Gibbons matter, I'm going to
5 permit counsel to leave your stuff on the table --

6 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

7 THE COURT: -- and we'll take a half an hour break
8 and then we'll reconvene and I'll hear any argument or --
9 opening issues on mootness, etcetera.

10 UNIDENTIFIED SPEAKER: Can (Indiscernible) and I be
11 excused? I think our matter is over.

12 THE COURT: Yes. I think so.

13 UNIDENTIFIED SPEAKER: Okay. Thank you.

14 THE COURT: Yes.

15 MR. SHENFELD: May I approach the bench?

16 THE COURT: Sure. Thank you very much. I just
17 didn't see it. I'm sure it's up here. All right. So we will
18 reconvene in five minutes with Gibbons and we'll reconvene in
19 a half hour or so on the Accuride matter. Okay.

20 ALL: Thank you, Your Honor.

21 THE COURT: Stand in recess. Thank you, counsel.

22 (Recess from 11:42 a.m. to 12:33 p.m.)

23 THE CLERK: All rise.

24 THE COURT: Please be seated. Counsel.

25 MS. MACHEN: Thank you, Your Honor. Monika Machen,

1 for the Equity Committee. Your Honor, we file a Motion to
2 Compel the Ad Hoc Noteholder Group to file a Rule 2019
3 Statement. We've received an objection from the Ad Hoc
4 Noteholder Group, which was followed by a Reply by the Equity
5 Committee filed last Monday. Yesterday, sometime in the
6 afternoon, I believe that Milbank, Tweed and Pachulski filed a
7 2019 Statement in which they made some disclosures regarding
8 the Ad Hoc Noteholder Group's holdings. Your Honor, we
9 appreciate the efforts of Milbank and Pachulski to move
10 forward and comply with 2019. I do point, Your Honor, that
11 our Motion to Compel was directed at the Ad Hoc Noteholder
12 Group and not at Milbank and Pachulski and so I think there's
13 a threshold issue of whether their filing is sufficient to
14 meet the requirement of what our Motion to Compel was about.
15 Your Honor, I do want to say that, you know, we've had some
16 conversations with Milbank since we -- since they filed their
17 2019. We've distilled the issues -- our main issue is that we
18 would like to know what equity holdings are held by the
19 Noteholders. From what I understand, there is a group of
20 Noteholders who comprise the Ad Hoc Noteholder Group. Those
21 entities are identified in the 2019 Statement filed by
22 Pachulski. I understand also as of last night and this
23 morning, that there are Noteholders who are subject to the
24 Plan Support Agreement, who are not part of the Ad Hoc
25 Noteholder Group and who, according to Pachulski's and

1 Milbank's 2019, Milbank does not purport to represent those
2 additional holders. That was a -- that was something that we
3 did not realize when we were filing the 2019 and we didn't --
4 we were not aware that this was -- that there was this type of
5 discrepancy. We've learned further that the entities who are
6 under the -- bound under the Plan Support Agreement the names
7 and identities of those particular Noteholders is with the
8 Debtor and that the Debtor is under a Confidentiality
9 Agreement and cannot disclose that information. All this
10 comes to a head as we approach confirmation. We have the
11 issue of Noteholders who may be Equity Holders, who may be
12 voting for the Plan as Equity Holders in the context of
13 supporting the Noteholder Plan. And that is something that
14 we, as the Equity Committee, are particularly concerned about.

15 THE COURT: Isn't that -- doesn't that seem -- at
16 least in part, that may be a discovery question rather than a
17 2019 question because I've reviewed this and I appreciate you
18 giving me a copy of it. I did not have a chance to review it.
19 I'm sure somebody got it to me beforehand but I didn't see it.
20 And so I mean, as I understand it or as I'm inferring from
21 your comments, your issue goes to the sufficiency of the 2019
22 Statement but I think it's also going pretty far beyond that
23 because you're talking about, I guess, an inquiry or a desire
24 for information with respect to people that are not on this Ad
25 Hoc Committee, and query whether or not that's a 2019 question

1 at all. I mean, if there -- I mean, 2019 is all about the
2 collective representation issue and the disclosures that are
3 required and there's, you know, all the recent back and forth,
4 I guess I'd say, between various courts on that question. But
5 here, -- well, I think I'd like to know where we're going then
6 today.

7 MS. MACHEN: Sure.

8 THE COURT: Where you'd like to go and I'll -- and
9 maybe this is in the nature of preliminary, so we're not
10 really arguing the substance of it, but I'd like to know
11 because I think the landscape of what's before me is obviously
12 changing.

13 MS. MACHEN: That's correct, Your Honor. And I
14 wanted to lay this out and you're right, I think that over the
15 last 24 hours, we have realized that it's both the 2019 issue
16 and also a discovery issue. With respect to the 2019 issue, I
17 do think that under 2019 the Ad Hoc Noteholder Group is still
18 required to disclose -- the members of that group are still
19 required to disclose their claims and in trust and in the
20 company.

21 As for the second issue which is the discovery, which we
22 just learned last night that the information is with the
23 Debtors, we have -- there are two ways of going about this.
24 First, there's the issue of the Confidentiality Agreement,
25 which the Debtors have indicated because of that

1 Confidentiality Agreement, they will not be in a position to
2 provide us with a copy of those signatures unless Your Honor
3 gives them some kind of relief from that Confidentiality
4 Agreement. And, Your Honor, I can also tell you that we are
5 bound by a Protective Order. We are bound and we think the
6 Equity Committee are also bound by a Confidentiality
7 Agreement. So I certainly think that to the extent that
8 information was shared, we could keep it under confidence
9 ourselves.

10 The other alternative, which the Debtors have suggested
11 and which we're taking under consideration is perhaps waiting
12 until the voting deadline, which is January 29th. On January
13 29th the voting will be done. The claims' agent will prepare a
14 tally of the votes. The tally will indicate who's voted and
15 the shares that they hold. That's the Debtors understanding
16 of it. That's what they've conveyed to me. I, frankly, have
17 not seen what Garden City's tally looks like and so I can't at
18 this time know for certain whether what they will provide us
19 will be sufficient. So, Your Honor, I'm fine going in that
20 direction, which is to await Garden City's tally. My only
21 concern is what if that tally comes back and it takes too long
22 for them to produce it or they --

23 THE COURT: Well, those are questions we can answer.
24 I mean, Garden City can tell you precisely what their tally
25 will look like. I've seen many of them and you'll know, at

1 least, they'll give you a blank form and it will say and I
2 think it does say, you know, name of voting party, date
3 received, yes, no, number of units. You know, I don't think
4 that's anything anybody here doesn't know. And as for timing,
5 again, that's something that could be determined. Ms.
6 Reckler.

7 MS. RECKLER: Your Honor, there is in the Disclosure
8 Statement Order there is a date by which that has to be filed
9 and that's February 5th, so I think we do have a date, Sir.
10 And then we will certain endeavor to get that report on file
11 as soon as possible.

12 THE COURT: Well, I -- okay. I want to take a step
13 back though, because I'm not exactly sure where we're going
14 right now. Obviously, I'm pleased to hear that there's
15 discussion between the parties. I certainly don't need to be
16 part of this dialogue about what information is provided when
17 until and unless there's an issue, but where are we today for
18 purposes of what's pending before me today? What do you want
19 to do?

20 MS. MACHEN: Where we are today is we've got a 2019
21 Motion --

22 THE COURT: Right.

23 MS. MACHEN: -- to Compel the Ad Hoc Noteholder
24 Group to comply with their 2019 requirements. What we've seen
25 to date is a verified statement by Milbank and Pachulski. So

1 in essence, Your Honor, we're still -- we still have not
2 gotten the disclosures that we need from the Ad Hoc Noteholder
3 Group.

4 THE COURT: Okay. Let me hear from Mr. Shenfeld.
5 And I think treating this as in the nature of preliminary
6 observations or commentary, I'm trying to figure out what
7 we're going to do today. There may be some talking further or
8 -- but I'm -- I guess I'd like to know what your thoughts are.

9 MR. SHENFELD: Certainly, Your Honor. I will
10 respond to any inquiry that you want -- any address you want
11 to go and I think the last thing that Ms. Machen said was that
12 she is unsatisfied with the 2019 Statement that was filed. So
13 I think I'd respond to the Motion if that's all right, first.
14 The issue that's before you today is a Motion to Compel a 2019
15 Statement.

16 First, as we set forth in considerable detail in our
17 pleadings, Rule 2019 doesn't apply to the Committee. We're
18 not a committee, we're not an entity. It is not --

19 THE COURT: But haven't we moved past that. I mean,
20 you've -- oh, all right. I'm sorry. As to the Committee
21 rather than the firms.

22 MR. SHENFELD: She said today that she needs
23 disclosure from the Committee members is what she -- I believe
24 what Ms. Machen argued, so I am going to stand here today and
25 start with my argument, which is we -- it does not apply.

1 Okay. So it does not apply. Milbank and Pachulski filed a
2 2019 Statement to sort of put an end to the inquiry to sort of
3 be good sports about it and disclose -- the 2019 that we did
4 file, discloses what's been disclosed in this case since
5 October 8th and October 9th, who we are.

6 For the facts, which are not contested in the Reply, the
7 facts are that this group does not act like a committee. We
8 don't have bylaws, we don't -- we have not argued or filed a
9 single pleading that advocates a position on behalf of any
10 noteholder, on behalf of any backstop holder, on behalf of any
11 DIP lender. You know, the members --

12 THE COURT: Is it ended -- is the inquiry ended by
13 this question of and I did look in the dictionary. There are
14 lots of definitions for committees.

15 MR. SHENFELD: Yes.

16 THE COURT: It also says entity.

17 MR. SHENFELD: Right.

18 THE COURT: You know. I mean, it's interesting
19 because, you know, you form yourselves and titled yourselves
20 the Ad Hoc Committee. Are you a committee?

21 MR. SHENFELD: Well, actually, Your Honor, we are a
22 group of --

23 THE COURT: A gaggle, a murder, a pod, a herd.

24 MR. SHENFELD: I think sometimes it feels like to me
25 a herd of cats actually, Your Honor, but we are four -- five

1 -- currently five entities that have varying interest in this
2 case, and for the sake of economics have one counsel. DIP
3 lenders don't file 2019 Statements. Backstop parties don't
4 file 2019 Statements. Lock-up parties don't file 2019
5 Statements. We're not an entity. We're not a legally
6 cognizable group. We don't file tax returns. We can't be
7 sued. We don't have an existence separate and apart from
8 anything else. Members come and go. We had Principal
9 withdraw. Some of the members are backstop, some are
10 supporters. Not everybody is everything. We cross a variety
11 of borders. This position that we have here is pre-petition
12 negotiated with the Debtor to support the Debtors' Plan and
13 support the Debtors' valuations in going forward. So we don't
14 act like a committee. We don't -- aren't a legal entity. We
15 don't in anyway satisfy the definition of entity, of
16 definition of committee nor in the Northwest expansion (*ph*)
17 of what committees do and what Judge Walrath saw what a
18 committee does. We don't come in here and say we own 20
19 percent of the debt and we're trying to have something happen
20 for a 100 percent of the debt. We haven't advocated. We are
21 not the delegate, the representative, you know, like an
22 Indentured Trustee has a document that says you have to act on
23 behalf of all the holders. We act on our own interest. We
24 don't act for each other. The members of this group cannot
25 speak for another member. Every time that you see me here,

1 Your Honor, you can know that the group has unanimously agreed
2 that we take an action. I have conversations with the
3 Debtors' counsel that I cannot conclude because I don't have
4 unanimous consent and so, therefore, I represent them.
5 Members of my group have their own legal counsel as well as
6 have in-house counsel that represents them and helps them make
7 decisions. I don't represent them. I represent them
8 collectively in a pre-petition negotiation of a Plan Support
9 Agreement, of a Backstop Agreement and as last out DIP
10 Lenders. That's all happened pre-petition. We've stepped in
11 recently because to protect the cash flow and what we perceive
12 to be a overreaching foray by the Equity Committee, we've
13 stepped in, otherwise, you would not have seen us in this
14 case. And so we are not a committee. We are not an entity.
15 The brief and the Reply filed does not bring us within that
16 realm. In fact, we're very much -- you know, I would say
17 Judge Sontchi's ruling which has yet to be made into a written
18 decision, it typifies exactly where we are. We don't -- we
19 are not a committee. Rule 2019 doesn't apply to us.

20 THE COURT: Who does it apply to?

21 MR. SHENFELD: Well, Your Honor, I think I would
22 have to agree that in a situation where -- I'm (indiscernible)
23 a case law. Where a group comes in and says, we are the
24 committee, listen to us because we're doing something that
25 benefits all the Equity Holders, all the Subordinated

1 Noteholders.

2 THE COURT: Well, hang on. I don't think, actually,
3 as I read your definitional argument that it's a question that
4 you have to say that you're benefitting all. I think when you
5 say that you're a subset of all isn't it implicit then that
6 you have to be designated or authorized by all to speak?

7 MR. SHENFELD: Right. And we are not designated by
8 anyone to speak.

9 THE COURT: Well, nobody's ever designated by
10 everybody. There's never -- I mean, in most of these cases,
11 in the vast majority of these cases, it's difficult if not
12 impossible to find a 100 percent of the --

13 MR. SHENFELD: Sure.

14 THE COURT: -- existing owners and --

15 MR. SHENFELD: Right.

16 THE COURT: -- so --

17 MR. SHENFELD: And that's why the decisions like
18 Judge Walrath in Washington Mutual and in Northwest say, when
19 you come into my courtroom and you say, trust me, I'm the
20 mouthpiece, to coin a phrase from the Reply, from the Equity
21 (indiscernible), I'm speaking on behalf of these people. Then
22 I think you sort of take upon yourself that action. We
23 haven't done that at all in this case. The definitionally,
24 we're not --

25 THE COURT: You know, I have to say, I've heard

1 that. I mean, I hear you say that, but you haven't done
2 anything different than every Ad Hoc Committee I've seen and,
3 frankly, every Official Committee I've seen. You come in
4 competently and ably identifying a constituency and taking a
5 position that is entirely consistent and appropriate with the
6 interest and wishes of the people that you represent. And
7 whether maybe I'm simply reading too much into your
8 (indiscernible) but I mean, as a practical matter, when the
9 Debtor stands up -- you know, you make it -- it may be as
10 Judge Gropper said that you get the benefit of the added
11 gravitas of being a voice of many but, frankly, the Debtor
12 actually gets much of the benefit by saying, Your Honor, we'd
13 like to do this on shorten notice and we would like to report
14 that the Official Committee has not objected. The Ad Hoc
15 Committee has not objected and accordingly all interested
16 parties are -- and the lenders are on board, so all parties
17 with a stake in this are on board. Let's do it on shortened
18 notice and approve it and I will sign that order.

19 MR. SHENFELD: But in that regard, Your Honor, we
20 are not exactly adding gravitas, we're saying that five
21 Creditors, who hold 70 percent of the Debtor are on board. If
22 I had five separate lawyers here and the Debtor got up and
23 said, this firm, that firm, this firm and that firm all agreed
24 with as well, we're not -- we don't -- we have not been in
25 this case as a committee, as an advocate for anything other

1 than a pre-petition -- pre pre-petition agreements. DIP
2 Creditor Agreement, Backstop Agreement and simply, I have not
3 filed a pleading and so I'm not advocated it to the extent
4 that I have interjected myself (indiscernible) now because
5 it's threatening the -- like a said many times, the cash
6 liquidity here.

7 THE COURT: The deal you have. Right.

8 MR. SHENFELD: So that I stand up as a Creditor, I
9 could have five of us standing here and five of us could want,
10 you know, want -- five of us could say, well, today Mr.
11 Shenfeld is going to respond and Mr. Smith tomorrow and, Your
12 Honor, I reiterate not time to repeat that sort of not what a
13 committee, -- you know, 2019 applies to committees who and,
14 again, the two cases.

15 THE COURT: Who does it apply to? Take a typical
16 case --

17 MR. SHENFELD: Okay.

18 THE COURT: Take a typical case and tell me who
19 would have to file a 2019.

20 MR. SHENFELD: Well, I'm only going to tell you from
21 the case law because I can't hypothesize. One day hopefully
22 I'll be on your side of the bench, but today I can't
23 hypothesize --

24 THE COURT: Watch out for the pay cut.

25 MR. SHENFELD: Thank you. But the, you know, I

1 agree with the case law that says a committee is only when you
2 have a designated entity and a committee. So that's who I say
3 it applies to. The case law and to follow the case law it
4 says it's when somebody in Northwest who advocates and says, I
5 -- you know, I own 27 percent and I'm trying to advocate for
6 -- I'm acting for you. That's -- I'm not -- that's when --

7 THE COURT: That's different. You own -- I mean,
8 you just said, you --

9 MR. SHENFELD: I'm not acting for anyone else, Your
10 Honor.

11 THE COURT: You stand for people that own 70 percent
12 of an issuance of notes. So --

13 MR. SHENFELD: Who signed an agreement pre-petition
14 who have not varied from that pre-petition agreement and are
15 looking to enforce that pre-petition agreement for themselves.

16 THE COURT: And --

17 MR. SHENFELD: Not for the 30 percent who don't own.
18 I do not represent anyone who bought that note.

19 THE COURT: Agreed.

20 MR. SHENFELD: I do not represent the members of my
21 group as equity. I mean, you know, Ms. Machen's telling you
22 she'd like to have some additional discovery, which I think is
23 appropriate under 2004 not 2019. Some of the things she'd
24 like to know, I don't represent Milbank, Tweed and Pachulski,
25 Stang, do not represent anybody in the members of our group to

1 the extent that they own equity, if they own equity. I don't
2 act for them universally. I don't act for that member of my
3 group who is not a backstop party.

4 THE COURT: Well, -- but I don't think as I read
5 Gropper's opinion, that it's conditioned -- I mean, I think
6 it's explained by his point that Ad Hoc Committees get this
7 particular role and then if they're going to play that role,
8 that we need to understand who they are. I know precisely who
9 Mr. Reisner is and what his responsibilities are. Let me make
10 an aside, this question and you touch on it in the Wombly (ph)
11 decision, I think that the suggestion that you hold fiduciary
12 obligations to the other 30 percent is a -- that's a -- that
13 is a fraught proposition. And I don't -- I'm not sure I agree
14 with that but I think that that's sort of beside the point for
15 purposes of today. But your -- to get to Judge Gropper, I
16 don't believe that his opinion was conditioned upon what as Ad
17 Hoc Committee says because then, you know, you're subject to
18 2019 if you're standing up in the context of the DIP or the
19 Plan but not in the context of, you know, a separate Sale
20 Motion and that can't be. It's a question of whether or not
21 of who you are in the case. What is your role, right?

22 MR. SHENFELD: Right. And so if it's a question of
23 what our role in this case is our role -- we have taken no
24 role in this case to advocate on behalf of anyone other than
25 the specific members of our group. We are not broadening our

1 base. We don't represent a committee as a representative of a
2 larger group. We are not a larger group.

3 THE COURT: I will be blunt.

4 MR. SHENFELD: And I think -- wasn't it in Northwest
5 where they applied for official status and were denied.

6 THE COURT: I don't --

7 MR. SHENFELD: They sought to make themselves into
8 an Official Committee and that's not something that's happened
9 here. And, Your Honor, I'll --

10 THE COURT: Sure.

11 MR. SHENFELD: I don't mean to interrupt you but in
12 this world we need a name. Earlier we called the Motion to
13 Dissolve the Equity Committee, the Shenfeld Motion. Well, we
14 gave it a name. My name, -- you know, what would be the name
15 of the clients that I represent? We are the -- some of us
16 Backstop, some of us DIP Lenders, some of us Ad Hoc
17 Noteholders, some of us pre-petition Support Agreement, some
18 people who are unhappy with the KEIP. You know --

19 THE COURT: I'm not --

20 MR. SHENFELD: -- need a name, so the idea of
21 attaching committee or group to what my particular
22 representation here, may be a misnomer that sends it off into
23 an inquiry.

24 THE COURT: I don't think that it does and I
25 appreciate you bringing that up because I think that that's an

1 important consideration. I don't think that this is driven by
2 whether you call yourselves the committee, the working group,
3 the standing, you know, group committee, I don't know. I
4 don't think it's driven that way because if it is then it's
5 either -- I think it's a substantive rule and it goes to --
6 it's a rule of disclosure. And, again, I come back to this
7 question of who in a typical case -- people file 2019
8 Statements all the time, but if 2019 categorically does not
9 apply to an Ad Hoc Committee and applies only to a group that
10 is authorized as a subset of the larger group that has
11 designated that group to speak for it, is it fair to say that
12 that would to a great extent, at least, compared to existing
13 practice write 2019 out of the statute?

14 MR. SHENFELD: No, Your Honor. Because look at who
15 else files 2019. Indentured Trustee, a law firm that
16 represents a secured creditor, a law firm that also represents
17 an unsecured creditor and so maybe they file a 2019 to alert
18 the Court that not only do I represent somebody who has a
19 secured claim but somebody that has an unsecured claim and I
20 also represent a former CEO of the company who has a separate
21 claim. That doesn't write 2019 out of the -- doesn't write
22 2019 -- it doesn't eviscerate it. The inquiry as Judge
23 Sontchi indicated is it just does not apply to gaggle, herd of
24 group who to save the Debtor money and at the Debtors' request
25 get together. They have common interest pre-petition in

1 supporting a Plan that they believe in. And then from there
2 on should they evaporate. I mean, what happens then? We've
3 got this Support Agreement which is the keystone or one of the
4 four pivotal agreements not to participate in the case coming
5 forward. So we don't -- the idea of committee and with the
6 purpose of 2019 is to make sure that whomever is saying in
7 this Court, look at me and believe in me, take my credence
8 because I represent this greater group would not -- that would
9 not apply here because we've never come here and said, I
10 advocate for 30 percent of the Noteholders who I don't
11 represent. I advocate for their recovery. I advocate for --
12 I have never stood before this Court and advocated anything to
13 do with the DIP Agreement. So I'm a last -- my clients are
14 last out DIP Lenders. Deutsche Bank represents the DIP. They
15 made a motion. They presented an order. I sat in the back of
16 the room, so --

17 THE COURT: But you get -- let me be blunt and we'll
18 circle back to Judge Gropper's view or commentary that Ad Hoc
19 Committees play this role, and they solve a collective
20 representation problem. And it's -- collective representation
21 is an issue that permeates throughout bankruptcy. Who has
22 enough of a dog in the fight, that kind of thing. And I don't
23 disagree that the collective representation that, frankly,
24 you've undertaken is a boom to the Debtors, it saves them
25 money, it facilitates the process in the case, all of that's

1 fine, but you do -- I mean, I will tell you that you do get
2 the benefit -- the Ad Hoc Noteholders Committee gets the
3 benefit of that collective representation and, frankly, the
4 momentum that goes behind it. Whether if I am mistaken in
5 according that then so be it. But what you avoid, to be very
6 blunt, by this -- by your position and the way I guess that
7 the process has evolved, is you avoid the gadfly effect. You
8 know, if there were one random noteholder that filed a Motion
9 to Dissolve a duly appointed Official Committee of Unsecured
10 -- of Equity Security Holders then response would take the --
11 the response from the committee or the committees and the U.S.
12 Trustee or anybody else might take you a different tone but,
13 frankly, the matter is fully joined and whether or not some
14 people, -- you know, whether or not some people are more equal
15 than others or some entities are more equal than others, the
16 process is developed --

17 MR. SHENFELD: Right.

18 THE COURT: -- and I'm not telling you anything you
19 don't know. I -- you know, courts accord late to parties
20 predicated obviously on the merit of their legal opinions but
21 also on their stake in the fight. This is a question of the
22 adjustment. This Court is about the adjustment of economic
23 relationships.

24 MR. SHENFELD: I would respectfully say that in this
25 particular instance, Your Honor, while I'm flattered that you

1 think that my presentation it accords weight, what you're
2 really saying is that when the Ad Hoc Noteholder Group in this
3 context has -- and what we really are talking about on
4 substantive motions not filed anything, right, is that five
5 different Creditors who collectively pre-petition had 70
6 percent of the note and are signed on to the Plan agree. And
7 whether that was five separate law firms who made that
8 representation or one law firm that filed and four joinders in
9 that pleading, again, it is a very, very specific distinction
10 here between Northwest and between Washington Mutual where
11 those people used the moniker Ad Hoc Committee to extract
12 credence that they may not have necessarily been entitled to.
13 And in Northwest they had 27 percent of the equity and were
14 advocating for the entire equity class. So in that instance,
15 then they are saying, look at me. Listen to me. Give me
16 credence, but the rule is -- and you're advocating for
17 everyone and the people who you're advocating for don't know
18 who you are. We are not advocating for anyone and, therefore,
19 have not exposed our self. We have not put anybody else's
20 recovery at risk. We have not gambled with their recovery,
21 gambled with their rights, taken on any obligation whatsoever
22 in that regard. So not a committee going back to like
23 definition of committee, definition of instrument, definition
24 of representation, delegate and agent, the DIP agent. You
25 know, other parties are weak. We stick to our parochial

1 interest in this case and then collectively as Creditors came
2 in and said, we think that the Equity Committee out of the box
3 has just decided to attack this entire Plan. And we see money
4 going out the door that we would like the Court to be aware
5 of. I haven't come in and said, every creditor -- nothing
6 that we have filed has precluded any individual Noteholder,
7 any DIP Lender. Mr. Schlerf got up today on behalf of
8 Deutsche Bank. I'm a subset of Deutsche Bank. You know, the
9 Equity Committee here didn't request a 2019 of the DIP
10 Lenders. You know, this is, you know, I won't diverse it's
11 clearly retaliation for the fact that we oppose their
12 Applications and you can go that way.

13 THE COURT: Well, let me ask you this: If you did
14 say some of the stuff that you said would 2019 apply? If you
15 came in, you didn't say -- actually, if you just said what you
16 -- much of what you said so far. Your Honor, I represent 70
17 percent. Suppose the Debtor starts to back out of its deal
18 and, you know, whatever, this case goes off the rails. I
19 mean, you haven't filed anything because -- I don't -- let me
20 take a step back. I think this is a very interesting issue
21 and I appreciate that it's been well presented by the parties
22 and it's gotten a lot of attention recently.

23 MR. SHENFELD: Right.

24 THE COURT: And it's an interesting question. I
25 like statutory construction. So, I mean, while we're having

1 this colloquy, I want you to know that, I mean, I don't have
2 any personal issue with the position that's been taken or,
3 frankly, with the conduct of your representation, okay. So I
4 want to be clear on that. I mean, when I get a head of steam
5 going, I may seem accusatory. I'm not.

6 MR. SHENFELD: I took no (indiscernible), Your
7 Honor.

8 THE COURT: Okay. But suppose we've done
9 everything. Suppose that largely what has happened -- what
10 happens in this case if you come in and say I represent 70
11 percent of the -- of this class of debt.

12 MR. SHENFELD: Right.

13 THE COURT: And, Your Honor, the Debtor is trying to
14 get away with something here. They're walking away from their
15 obligations or the -- and you can't let it happen. And, you
16 know, we carry the class or we just about carry the class and
17 we have the largest economic stake, respect our dog in this
18 fight. At that point, I fall within the -- you fall within
19 the category, I think, that you've just described.

20 MR. SHENFELD: Right.

21 THE COURT: Isn't that true?

22 MR. SHENFELD: Well, Your Honor, respectively no.
23 And I'll -- well, first by saying, let's say that I had one
24 client who had 72 percent of the debt and signed the Support
25 Agreement and I came in here and said, Your Honor, I own 72

1 percent of the debt.

2 THE COURT: We know who you represent. You filed a
3 Notice of Appearance.

4 MR. SHENFELD: And we filed a 2019 and we tell you
5 who we represent and that would be sufficient. Because I
6 think the intellectual exercise and in what little free time I
7 have, I would be happy to write an article with you on how we
8 could find a bright-line test for the District of Delaware.

9 THE COURT: Well, they're working pretty hard on the
10 revised rule right now.

11 MR. SHENFELD: Right. But today, I don't think that
12 the -- well, I know that -- not I think, I know I'm not asking
13 you to make a bright-line test. We've presented our case very
14 factually, very specific driven because looking at the case
15 law that does exist and looking at the straight definitions
16 under 2019, I have --

17 THE COURT: Do you regard Northwest as a bright-line
18 rule?

19 MR. SHENFELD: I regard the question that you asked
20 me as trying to find out whether or not you should be imposing
21 today whether this particular motion requires you to speak for
22 this district and speak for the other judges and say, in
23 Delaware this is what the bright-line test is going to be.

24 THE COURT: They don't listen to me on anything.

25 MR. SHENFELD: Well, Your Honor, I'm listening to

1 you very intensely today and the response is --

2 THE COURT: I mean, I'm reduced to circulating Judge
3 Sontchi's press clippings. Your co-counsel can explain that
4 to you.

5 MR. SHENFELD: Your Honor, you don't want to be at
6 Milbank on Friday afternoon when I'm circulating notices about
7 getting your time sheets in. But in any event, I --
8 sincerely, we responded as the issue is today before you and I
9 don't think you have to decide today a bright-line test. This
10 is an issue very unique to these unique circumstances. We
11 have a prepack, we have an Equity Committee appointed. At the
12 tenth hour, we have a variety of issues, but the -- this
13 particular group does not fit in to that bright-line test. We
14 deviate significantly from the holdings in Northwest and in
15 Washington Mutual and we stick to the -- it does not apply
16 because we are not a committee, we are not a delegate, there
17 is no document, there is no instrument, we're not appointed.
18 We are not advocating on behalf of anyone. We are not hiding
19 some -- we are not presenting ourselves to the Court in a way
20 that we're asking for credence without telling you who we are.
21 In fact, the pleadings that we filed the first day told you
22 who the members -- who had signed onto the Plan and Support
23 Agreement. The Backstop Agreement said who the backstop
24 parties are. The DIP loan said who was the last out and first
25 out DIP Lenders. So, you know, the rule is designed to

1 disclose to the public, who is here standing before you and we
2 have disclosed those things. Irrespective of the fact that
3 the Rule 2019 does not apply to us because we are not a
4 committee or an entity or otherwise within that definition.
5 But, that being the case, all that information has been here
6 in this case and that makes this unique and that enables Your
7 Honor to I believe deny the Motion, be satisfied with the 2019
8 that Milbank and Pachulski had filed and not create a bright-
9 line rule that disagrees necessarily with Washington Mutual or
10 Northwestern, even what I hope will be Judge Sontchi's ruling,
11 I'm basing only on his transcript of his hearing. And in that
12 case, he struggled with the same issues that you're talking
13 about and said that basically, it does not apply to a
14 committee. These people are not a committee that require that
15 kind of disclosure. That being said, we have it -- in an
16 effort, in a forthright effort that we have, we've come to
17 this Court and said we believe in the Debtors' valuation.
18 Pachulski, Ms. Jones, Mr. Cairns, myself, members of Milbank,
19 we come and we filed a 2019 to sort of put an end to that
20 because the -- that explains it. We argued in our brief that
21 this was all before Your Honor in various pleadings filed a
22 2019.

23 One of the things and I won't jump to the next level, but
24 one of the statements that Ms. Machen is saying states, now
25 she wants to know Equity Committee and she wants to know the

1 names of other Bondholders that I don't represent, and so
2 somehow the 2019 that we filed is insufficient because I
3 should go out and find other information for her and submit
4 that. That's a danger of taking groups, entities, loosely
5 formed consortiums, gangs and herds who join together to save
6 legal fees for the estate and who have a commonality of pre-
7 petition purpose to all of the sudden have disclosure
8 requirements going forward. And with all due respect, if we
9 had frankness, we'd been disclosing all along. I know there's
10 a side argument in the objection and the Reply that like they
11 shouldn't have to read the briefs that have been filed. Well,
12 I think an Equity Committee in particular, should read the
13 briefs that have been filed and the motions that precede them
14 and glean that. So, you know, coming here and telling us as a
15 challenge, Your Honor, by the way, when you get Ms. Machen,
16 please ask her if she's -- all the additional information she
17 wants is because without even assessing the facts, she wants
18 to prepare motions to designate votes of people and that's why
19 she needs information quick and early rather than filing a
20 2019 or waiting for the vote to tally them up. This isn't as
21 sufficient because she's got to start working on a motion to
22 designate votes of people who she doesn't know whether or not
23 they voted if they hold. And I think that's a real danger of
24 creating a rule in this particular case where you have my
25 particular consortium of representations to say, you're a

1 committee, you must do everything. You are akin to those two
2 decisions that say, you've been here advocating for
3 (indiscernible). I have never advocated for the Bondholders
4 whose identity Ms. Machen now wants. How can I give them that
5 information. The members of my group I do not represent them
6 individually or equity. In the papers I don't know what they
7 pay. I don't know their trading information. They don't have
8 to agree with each other. We have no bylaws. We have no
9 instrument. We have no Robert's Rules of Order. It
10 frustrates me personally and I know that's no concern to the
11 Court, but that -- that's what we've done here is we took a
12 pre-petition relationship and tried to see it through to
13 support the Debtors' Plan. Does not make us a committee, does
14 not make us a delegate and in particular, uniquely here, have
15 not filed a substantive pleading that advocates a position for
16 someone other than to try and rein in Equity Committee
17 spending in a case where -- and I apologize but I do feel
18 compelled that where the Debtor did exercise their fiduciary
19 duty pre-petition to put together a Plan that makes sense that
20 a lot earlier today, that gave a gift when they're deeply out
21 of the money. I mean, there's been -- maybe we'll see a
22 valuation that gives \$300 million more value to this company.
23 So I'm monitoring this case going forward and I think the
24 danger would be then simply rather than making it easier for
25 Debtors to do pre-packaged plans and have a swift and

1 expeditious emergence from bankruptcy that allows them in four
2 or five months even, you know, the unheard of cases like, you
3 know, Chrysler, you get these cases move quickly. In the new
4 (indiscernible) maybe there'd have to be five separate law
5 firms and five separate people standing there one day and that
6 would be a very disastrous rule because then no one would be
7 motivated to participate in collective discussions and have
8 meetings with Debtors when the Debtor needs them most to help
9 restructure their balance sheets and move forward. So, again,
10 unique to this case, we have not advocated. We have not fit
11 into any of the prior court orders. We continue to stand by
12 the point that we are not fit within the standard of 2019.
13 It's moot. We are -- you know, I'm just repeating myself but
14 I also want to, you know, make it clear that I think that is
15 the case. And I don't know if Your Honor feels today that you
16 have to issue a bright-line order or it's incumbent upon you
17 to speak for your brother and sister at the bench.

18 THE COURT: Sister, this morning.

19 MR. SHENFELD: Sister. Well, I remember Judge
20 Bailex (ph). I apologize.

21 THE COURT: This actually was her old courtroom, so
22 I take some pleasure in that. Okay.

23 MR. SHENFELD: So I don't know if I can answer any
24 other questions.

25 THE COURT: No.

1 MR. SHENFELD: Specifically, there were questions
2 about the -- that Ms. Machen has raised if you want to discuss
3 the idea of other holdings or other disclosures.

4 THE COURT: No, I don't. I mean, I think I may
5 discuss that with Ms. Machen, and if necessary, I'll certainly
6 give you an opportunity to that but one of the reason that we
7 started the way we did was I wanted to find out exactly where
8 the rubber's meeting the road today. I had seen the response.
9 The issues of parties that are not within the ambit of your Ad
10 Hoc Committee, seemed to me to be not directly before me today
11 but, you know, if that issue comes up you can be confident
12 I'll give you an opportunity --

13 MR. SHENFELD: I'll be sitting right over there.

14 THE COURT: -- to respond. Okay.

15 MR. SHENFELD: Thank you, Your Honor.

16 THE COURT: Sure. Ms. Machen.

17 MS. MACHEN: Your Honor, I just want to point out
18 that Mr. Shenfeld indicated that the bond -- excuse me, the
19 Noteholders that he represents own 70 percent as of the
20 petition date. Throughout this case, it's that gravitas, that
21 70 percent, we represent 70 percent of these nos, that has
22 given them the weight in this bankruptcy case. And that's why
23 the Debtors are able to stand up and say, Your Honor, the Ad
24 Hoc Noteholder Group that represents 70 percent of the notes,
25 supports this Plan. The 2019 that was filed by Milbank and

1 Pachulski indicates, yes, as of the petition date 70.1 percent
2 of the Noteholders were represented by Milbank. Since that
3 time, there has been trading. Principal, for example, has
4 fallen off the list, from what I understand other entities
5 have come and gone under the Plan Support Agreement. So it
6 seems to me unclear who Mr. Shenfeld is representing that
7 still holds the 70 percent, and while the 2019 Statement filed
8 by Milbank was a lot more than we had previously seen, I still
9 don't think it answers that question. And so I think to the
10 extent that Mr. Shenfeld is coming up and indicating that he
11 -- that his constituents represent 70 percent maybe there's an
12 asterisk and it's really 70 percent as of the petition date.
13 I don't know what that is today.

14 Going to Mr. Shenfeld's arguments about committee -- who
15 is a committee, I think Your Honor hit it on the head when you
16 asked, well, who would this rule cover because if you go about
17 it in that very, very narrow way that Mr. Shenfeld is
18 suggesting, I think the exceptions swallow the rule and all of
19 the sudden you have an effective rule. I know that parties
20 oftentimes view 2019 as being non-substantive and just a rule
21 of procedure, maybe because it's in the rule section, but it
22 does have a purpose. Judge Walrath noted that it does have a
23 purpose. And part of the purpose is to make sure that the
24 bankruptcy process remains fair and transparent and that
25 parties make disclosures. We, Sonnenschein and Bayard,

1 represent the Equity Committee. The Equity Committee is
2 comprised of certain members. Their names, address were
3 disclosed to the U.S. -- or were selected by the U.S. Trustee
4 and were given to her. Their holdings were also disclosed to
5 the U.S. Trustee. All of that information is public.

6 Likewise with the Creditors' Committee. We have Creditors
7 whose holdings are known to the Debtors, who are known to the
8 public and they're easily ascertainable. When the Ad Hoc
9 Noteholders Group comes to this Court and hides behind the
10 veil of we are the Ad Hoc Noteholders Group, listen to us, we
11 command your attention, Your Honor, because we're a
12 significant player. Well, it's up to them to explain why
13 they're a significant player in this Court. And, Your Honor,
14 I'm not trying to retaliate certainly. Yes, I could have gone
15 out and filed a 2019 Motion to Compel in this case against --

16 THE COURT: You did.

17 MS. MACHEN: -- against others. Against others as
18 well but, Your Honor, at some point we do have to pick our
19 battles. And the reason why this particularly important is
20 because we are entitled to know our adversary. We are
21 entitled to know who it is we're up against and I just don't
22 think that that has been all that clear in the Ad Hoc
23 Noteholder Groups' papers and that was part of the process
24 behind this.

25 Now, going to the issue of my suggesting to Mr. Shenfeld

1 that he needed to go out and find out for me all of the
2 individuals who signed up to the Plan Support Agreement, Your
3 Honor, I submit that that's somewhat of a distortion of the
4 facts. I had originally requested that when Mr. Shenfeld
5 indicated to me that in fact he did not know that information
6 and that was information with the Debtors. I did not pursue
7 that request.

8 THE COURT: Yes. Well, that's extraneous
9 (indiscernible) before us to.

10 MS. MACHEN: Right. And so I just wanted to --

11 THE COURT: Okay.

12 MS. MACHEN: -- clear the record on that, Your
13 Honor. I'm not asking Mr. Shenfeld to provide me with that
14 information. Your Honor, the rule is the rule. It's 2019. I
15 didn't write it. You didn't write it. Judge Walrath didn't
16 write it. Judge Gropper didn't write it.

17 THE COURT: Well, how do you respond though to Judge
18 Sontchi's observation that the rule was structured in the
19 context of the Chandler Act and the protective committees that
20 were, frankly, a recipe for at least questionable behavior and
21 motivations. And that's a context that doesn't apply any more
22 and then move forward from there to Rule 2019 which is
23 effectively identical to what it was. And then we have --
24 this really isn't a committee in some ways, at least as the
25 concept of a committee is thought of because what it is is

1 he's got five clients. It's not -- I mean, we can talk about
2 gravitas or additional momentum or oomph to your position but
3 he has five clients. He doesn't have five clients for a
4 thousand parties. He's got five clients.

5 MS. MACHEN: Well, Your Honor, first of all, going
6 to your original question about the impetus for the
7 predecessor rule to rule 2019, Your Honor, yes that rule was
8 created in the context of the protective committees. Those
9 protective Committees aren't really around any more. Yet,
10 Rule 2019 has lasted. Even though those specific concerns are
11 no longer here today, we still have Rule 2019. Courts still
12 enforce 2019 and that's because while the original purpose of
13 2019 might not be as applicable, there are now additional
14 reasons that mandate that disclosures be made in the
15 bankruptcy context.

16 THE COURT: Well, what if he never said we're the Ad
17 Hoc Noteholders Committee. I mean, we've talked about --
18 we've talked about, you know, what you call -- what they call
19 themselves and I was, frankly, busting his chops a little bit
20 about exactly what they call themselves but, you know, if he
21 just said I represent Harbinger Capital, Paradise Funds,
22 Pacific Equity Investors and Smith Capital and we own a lot of
23 this and we like the Plan, period. He's not filing, you know,
24 -- and maybe he files different motions or he just files, you
25 know, as Milbank as counsel for five entities hereby objects

1 to the appointment of an Equity Committee, hereby joins this.
2 Would they be subject to it?

3 MS. MACHEN: Well, Your Honor, to the extent that
4 they come to this Court under the cape of one collective
5 entity, I think the rule does cover them. I think that if
6 that was the manner in which they approached Your Honor and
7 other parties and tried to leverage their weight in this Court
8 because they represent five major Creditors, I still think
9 that we would -- they would be required to provide some
10 indication as to what their -- the nature and extent of their
11 interest in claims in this case. So I don't think that just
12 by self identifying, you necessarily escape 2019.

13 THE COURT: Well, then who -- I mean, it's difficult
14 -- the courts like bright-lines and I've been asked to either
15 abide by one or avoid one but I'm trying to figure out where
16 that line would be drawn if, indeed, it applies to anybody
17 that's serving in a collective capacity. When it gets to this
18 issue that I have to evaluate whether 2019 applies based upon
19 what you do and what you say, that's complicated.

20 MS. MACHEN: Well, not necessarily, Your Honor. I
21 think you can have a rule that says, Rule 2019 applies to
22 every entity or committee that represents one or more
23 creditors -- or excuse me, more than one creditor or equity
24 security holder. That's exactly what Rule 2019 says --

25 THE COURT: So when --

1 MS. MACHEN: -- and that can be the bright-line.

2 THE COURT: So what we're talking about here though
3 let's talk about it because we've got a couple different
4 levels and I want to make sure I understand what you're asking
5 me to do. Let's take something that we see everyday here in
6 Delaware, which is, you know, someone from one of the local
7 firms has received phone calls from a half dozen different
8 landlords say. And they're not acting in concert but they all
9 have someone's number. And they said, do me a favor, monitor
10 the case and if I need something filed I'll call you, but
11 report to me after the hearings, etcetera. That firm, I think
12 we'd all agree, has to file a 2019 that says, you know, Young,
13 Conaway represents these five landlords. Okay. And as a
14 practical matter since we're talking about what they do, as a
15 general rule, at least, experience tells us that at that point
16 the lawyer from that firm doesn't necessarily stand up and say
17 I represent the landlords. They may say I represent a bunch
18 of landlords. But those landlords collectively do not have to
19 make the substantive disclosures under Rule 2019 about what
20 their interest is, etcetera. The firm has made the
21 disclosure. And now here, we have involvement of a different
22 quality or capacity, meaning that we do have disclosures from
23 counsel, all right, because they're, I think, governed by Rule
24 2019. They represent multiple parties. A law firm is an
25 entity. Mr. Shenfeld, if you disagree with any of this, you

1 know, I'll give you an opportunity certainly to respond. But
2 the law firm is an entity. They have multiple clients and so
3 they disclose. But then what you want now is that the
4 committee, qua committee, or the members of the committee
5 effectively must make disclosure consistent with the
6 information required in 2019; is that it?

7 MS. MACHEN: Yes, Your Honor. In Mr. Shenfeld's
8 context, I do believe that a 2019 is required by the members
9 of his committee. And that's because that situation is
10 distinct from the situation where Young, Conaway represents a
11 bunch of landlord. In that situation each landlord may take
12 an individual position. Each landlord may have a different
13 interest. Each landlord may not even -- maybe, and I won't
14 use Young, Conaway, but they may not even know of the
15 representation of the other entities. Moreover, when Young,
16 Conaway -- let's just call it firm, I don't want --

17 THE COURT: Sure.

18 MS. MACHEN: -- to keep bringing Young, Conaway into
19 this.

20 THE COURT: Cast all the aspersions you want.

21 MS. MACHEN: I like mine too much. If the law firm
22 itself is not filing a collective motion or pleadings on
23 behalf of all of these landlords as one, it's not treating
24 them as a collective entity. It just says, I represent a
25 bunch of landlords. I represent them in their different

1 capacities because one has a property here, another one has a
2 property there, they have different takes on the case. When I
3 file pleadings, I file them individually for each client
4 individually. But in Mr. Shenfeld's situation, we have a
5 different set of facts, which is these entities have come
6 together for a collective purpose. They have come together
7 through this Ad Hoc Noteholder Group, which is their
8 mouthpiece. I have not seen or discussed this with Mr.
9 Shenfeld, but I suspect that if one entity wanted to take a
10 different position in this case, that entity would have to
11 come in and file its own separate pleading. It wouldn't file
12 it through the collective mouthpiece of the Ad Hoc Noteholder
13 Group. So in that way, I think it's a very distinct situation
14 where you have a law firm that's representing a bunch of
15 different entities versus a law firm that is not representing
16 a group, which is comprised of constituent members who have a
17 collective interest and a collective agenda that they are
18 advancing.

19 THE COURT: I understand. Although, we still remain
20 in the same context of struggling over application of a rule
21 based upon what a lawyer says, you know. Because let's take
22 it this way, and again, we can choose what firm you want but
23 somebody's got -- take a retail case, somebody's got six
24 landlords. And if those landlords are General Growth and
25 DeBartolo and Rausse (*ph*) and it's a good size case and that

1 person stands up and says, I represent -- I mean, I've done
2 this before. I mean, I know who -- if it's a mall case and
3 it's DeBartolo and Rausse and General Growth and they stand up
4 and say, if I file my 2019, I have these three clients. These
5 are who they are. We oppose the terms of the GOB. How do I
6 treat them. By the names of their clients, which counsel will
7 -- counsel is not going to get up in that context and say, I
8 represent some landlords. He's going to get up and say, I
9 represent these folks. At that point, we could be six months
10 into the case. He could have stood up five times and said,
11 Your Honor, I represent a bunch of landlords. We had issues
12 about the DIP and we've resolved them, we're okay. I
13 represent a bunch of landlords, we are concerned about the
14 critical vendors, we're okay now. Then we get to the GOB sale
15 and he stands up and says, this is who I am. And I say those
16 are names I recognize. He gets from the -- he falls then into
17 the category that Judge Gropper described but, I mean, is it a
18 situational rule? How do I apply it?

19 MS. MACHEN: Well, Your Honor, it does sometimes
20 devolve into a situational rule and I can't promise you that
21 every time a set of creditors comes through a single entity,
22 whether it's a law firm or an Ad Hoc Committee of some sort
23 that someone's going to come up and start arguing that a 2019
24 should be filed or that you, on your own motion, need to say,
25 hey, a 2019 needs to be filed. And, certainly, you have the

1 ability to do so and, certainly, parties in the case have the
2 ability to do so. Do I suspect that that will happen
3 practically? No, I don't think it will and I think like a lot
4 of things in life, it'll just go past and nobody will really
5 care because it didn't have an impact on the case and so
6 nobody will ever raise it. Neither the parties, nor the
7 judge. But in a case where it does come up and where there is
8 some implication of that joint representation and that
9 collective mouthpiece, it is upon the parties-in-interest and
10 it is upon the Court, I believe, to enforce that rule.

11 THE COURT: Well, and again, maybe you've given the
12 best answer there is out there that's, you know, it's a messy
13 business we're in. But I am troubled by just the fact pattern
14 that I described, which I don't think anybody in here would
15 say is remarkable or unusual and unless I'm mistaken, I think,
16 Rule 2019 is the only rule or one of the only rules that
17 actually prescribes the remedy or the penalty, which is that
18 you'll not be heard. And in that scenario, you could have
19 somebody who has proceeded in good faith, done everything
20 exactly as the normal lawyering would have expected and come
21 in and five separate times said, I represent -- you know, I've
22 got a bunch of clients. They're all landlords. We've
23 negotiated, we're opposed to this, we're in favor of this.
24 None of the I represent the universe. Just I have some
25 landlords, but then at a later point, comes in and uses -- or

1 doesn't use, but simply makes an argument that in the context
2 of that particular dispute, they have the benefit say of the
3 added significance or weight that Judge Gropper describes. At
4 that point, I can see somebody hopping up and say, I know
5 you've been here six months. I've never said a word, strike
6 the transcript. Don't allow him to be heard. He's acting as
7 an Official or Ad Hoc Committee or an entity purporting to
8 speak on behalf of other creditors and he has failed to make
9 the required disclosures and we're six months into the case
10 and it becomes almost this gotcha thing that no one would ever
11 know whether they're subject to it or not.

12 MS. MACHEN: Well, Your Honor, you would have an
13 opportunity to say, excuse me, counsel, is this correct, that
14 you've not filed your 2019 Statement? What do you think about
15 that? And they might go back and say, Your Honor, give me
16 five minutes, I'll have my colleague write up a 2019 and
17 submit it, and the question will be over. So I do see that
18 there's a remedy if you don't comply, but I don't think that
19 if someone indicates that they will comply right away, because
20 that oftentimes does happen, I don't see that it's going to
21 have this far-reaching implication. Unless you have -- unless
22 there's some compelling reason for you not to file a 2019, why
23 wouldn't you just file it?

24 THE COURT: Well, in that case, the law firm has
25 already filed it. What you're saying is that at this point

1 the additional disclosures would be required as to the
2 individual constituent members, what would by that point be
3 deemed, you know, the working lender group.

4 MS. MACHEN: Well, I --

5 THE COURT: Or the working landlord group, I'm
6 sorry.

7 MS. MACHEN: Well, I commend Milbank and Pachulski
8 for doing the proper thing and living up to their expectations
9 and filing a 2019 but, Your Honor, the 2019 is not a -- is not
10 a derivative rule just because Pachulski and Milbank file it.
11 It certainly doesn't mean that now their clients have complied
12 with the rule.

13 THE COURT: I understand.

14 MS. MACHEN: Thank you, Your Honor.

15 THE COURT: Mr. Shenfeld. Actually, let me see,
16 does anybody else wish to be heard on this and then, Mr.
17 Shenfeld, you can respond.

18 (No verbal response.)

19 THE COURT: All right. Mr. Shenfeld.

20 MR. SHENFELD: Thank you, Your Honor. First, I'd
21 like to respond to the direct question, yes, Milbank, Tweed's
22 an entity of which I'm very proud to be a part of and to stand
23 here before you as a representative from that firm. I think
24 we are very much like the DeBartolo, General Growth, Green
25 Acres, who you talked about. And I think I'm sitting here

1 today kicking myself whether -- you know, because when this
2 case started there was no bright-line rule in this district
3 and there was considerable debate, intellectual curiosity
4 about the application of 2019. Certainly, everyone in this
5 courtroom knows that bankruptcy practice in particular moves
6 very quickly, subject to very creative arguments and,
7 occasionally, decisions that sort of don't make sense or in
8 other cases might make sense in one and so forth. But where
9 we are, I'm sort of kicking myself that I did not come in and
10 say, I am counsel to DeBartolo, Green Gross (ph),
11 (indiscernible), ABC and IBM, because as Ms. Machen was
12 saying, you know, she was saying that if you have different
13 interests than you aren't really under 2019. Well, that is
14 our case. I've got backstop parties, DIP lenders, people who
15 supported the (indiscernible) Agreement, -- I mean the Plan
16 Support Agreement, so that is that case. I also think it's
17 critical to consider here, we have a Lender Support Agreement
18 and there's no request for, who are the lenders? You know, I
19 don't know if the Debtor in the past has come up and said,
20 I've got 82 percent of the Lenders on board for this Plan as
21 well, but I think that the Disclosure Statement says that as
22 well. No one says, where's the lenders support for that. The
23 lenders are not advocating for anybody. I have today, the
24 unenviable reality of sort of taking my support very seriously
25 for the Plan and coming to court when I saw perhaps, you know,

1 when the Debtor had -- the Debtor perhaps could not come
2 forward and say, you know, this is a waste of our money, so
3 I've interjected myself to support a Plan because the Plan
4 Support Agreement has benchmarks, financials, liquidity
5 covenants, as does the DIP Credit Agreement. The DIP is very
6 tight on (indiscernible). So I came in and I said, you know,
7 Your Honor, I've got to inject myself. So I don't want to
8 kick myself for having advocated on behalf of five clients, at
9 one time six, who had a similar positions and look to have one
10 counsel and save the estate funds for doing that. The
11 gravitas by the way is suppose to be the (indiscernible) and
12 not the argument, so hopefully, that will set that issue to
13 rest.

14 THE COURT: Well said.

15 MR. SHENFELD: The question, Your Honor, as I'm
16 listening today is twofold for today. One, does 2019 apply?
17 We've argued that it doesn't and explained that and why. And
18 the other question is has -- have we complied when Milbank and
19 Pachulski filed that 2019? Is that compliance and is that
20 sufficient and should there be something other than what we
21 have filed, which discloses and mirrors disclosures that have
22 been made throughout this case?

23 THE COURT: Okay. I understand.

24 MR. SHENFELD: Thank you, Your Honor.

25 THE COURT: Okay. Anyone else?

1 MR. SCHLERF: Your Honor, just an observation.

2 THE COURT: Can you get to the podium, please.

3 MR. SCHLERF: Sure. I didn't want to interject
4 myself to this. I just see this very thorny issue, maybe I
5 can help a little bit. The Rule 2019, which like Your Honor,
6 I haven't had too many chances to study, says every entity or
7 committee representing more than -- if you don't have a legal
8 entity, how can an entity issue a statement.

9 THE COURT: It doesn't say legal entity, it says
10 entity.

11 MR. SCHLERF: No. I understand. So I think it
12 creates an issue of if you have loose consortium, let's just
13 use that term, of how does that (indiscernible) to do anything
14 other than through its counsel anyway. So if the informal
15 group were to do something, it would simply do something
16 through its counsel, who would say this is what the group
17 says. I don't know that he could do anything else. I think
18 that's why it's modified further by saying or committee, which
19 suggests more of a formal organization. So I think -- I'm
20 just talking about the mechanics. I think you have to get the
21 statement out of a lawyer anyway because there's no entity
22 that can appear. There's no entity that can do anything. So
23 the lawyer would say, this statement's made on behalf of a
24 group. That's all it could do because it doesn't exist
25 separately. It was just an observation based on the rule.

1 THE COURT: Okay. Let me make some -- okay. I need
2 ten minutes to review my notes. We'll stand in recess.

3 (Recess from 1:37 p.m. to 1:59 p.m.)

4 THE CLERK: All rise.

5 THE COURT: Please be seated. Okay. The matter
6 before the Court is the Motion of the Equity Security Holders
7 Committee for an order compelling the Noteholder Group to
8 comply with Bankruptcy Rule 2019 and I will grant that Motion.
9 As a threshold matter, it is obviously an understatement, I
10 think, to say that I have tremendous respect for Judge Sontchi
11 as well as for Judge Walrath and Judge Gropper and I
12 appreciate from counsel in the courtroom. Frankly, I don't do
13 this everyday. An excellent argument on a very, very
14 interesting and more neddlesome topic than I would have
15 actually thought at the outset of this exercise. But I will
16 enter an order approving the Motion. I do not intend to write
17 an opinion on it. And my reasoning for that is that I have
18 carefully read the decision of Judge Gropper in Northwest --
19 decisions of Judge Gropper in Northwest and the decision of
20 Judge Walrath in Washington Mutual and I am in agreement with
21 their conclusions with one, I think, editorial observation and
22 that is that I do not necessarily concur with Judge Walrath's
23 observation that I don't think is central to her finding, but
24 I do not necessarily concur that there are fiduciary
25 obligations that arise in the -- by definition in the context

1 of multiple representation. But looking at Bankruptcy Rule
2 2019, and I have considered its history and its development
3 from the '30s and more importantly, since the advent of the
4 Bankruptcy Code in 1978, it is a statute that requires
5 disclosure. The disclosure is a central -- the concept to
6 disclosure is a central element of the Bankruptcy Code. It
7 permeates a variety of areas and it's a truism. Experienced
8 counsel have appeared in my court many, many times and recited
9 that there is no -- that the three rules in bankruptcy are
10 disclosed, disclosed, disclosed. And based upon that
11 underlying fact, I see no justification or purpose to be
12 served by a narrow or constricted reading of Bankruptcy Rule
13 2019. So I find that the Ad Hoc Committee in this case is
14 subject to the requirements of Bankruptcy Rule 2019.

15 There has been a request that I bar the Ad Hoc Committee
16 or strike their appearances. I will not do so because
17 obviously this matter is the subject of some dispute or
18 development in the case law. I am aware that it is also the
19 subject of consideration for revision on a going-forward
20 basis, so it -- I don't believe that there's anything
21 inappropriate about the delay or failure of the Ad Hoc
22 Committee to file a 2019 Statement and I certainly would not
23 penalize them for doing so.

24 There is a question or a request that's before me that I
25 will defer consideration of and that is the request that I

1 seal the information that would be required to be included.
2 And I don't know that I can determine that under Bankruptcy
3 Code Section 107, without further information from the
4 parties. The threshold question before me is whether or not
5 the rule applies and I find that it does apply. If issues
6 remain after the filing or after development of the -- after
7 consideration of my ruling, whether or not it should be sealed
8 or not or whether or not certain information must be
9 disclosed, I leave that to further development and what I
10 would ask the parties to do is rather than engaging in further
11 motion practice on this issue, I would invite you to get me on
12 the phone. And the reason is that I think we've talked a lot
13 about Bankruptcy Rule 2019. I understand the context of this
14 case, and I don't know that I would be well served by
15 pleadings and motion practice. Everyone is in agreement.
16 This case is on a fast track and, frankly, the attention and
17 focus of all the parties are better directed toward the
18 prosecution of the cases and the issues that are currently in
19 dispute between the Equity Committee and the other parties in
20 the case. So I'm not going to rule today on the request that
21 certain information be sealed, but I do find that the Ad Hoc
22 Committee in this case is an entity that is -- or a committee
23 that is subject to the strictures of Bankruptcy Rule 2019.
24 And in so ruling, I find that that is a construction that is
25 consistent with Congress's intent throughout the Bankruptcy

1 Code and in Bankruptcy Rule 2019 in particular. Are there any
2 questions?

3 MS. MACHEN: No further questions, Your Honor.
4 Thank you very much.

5 THE COURT: Okay. Do we have anything further
6 today?

7 (No verbal response.)

8 THE COURT: All right. All right. Thank you very
9 much. We will stand in recess and I believe I have Freedom
10 coming up momentarily; is that correct?

11 UNIDENTIFIED SPEAKER: Yes, Your Honor.

12 THE COURT: Okay. We'll take five minutes before
13 Freedom. Stand in recess.

14 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

15 (Court adjourned at 2:05 p.m.)

16 CERTIFICATE

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

20

21 /s/April J. Foga
22 April J. Foga, CET, CCR, CRCC

January 27, 2010

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