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IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI

In Re:) Case No. 20-43597
) St. Louis, Missouri
BRIGGS & STRATTON CORPORATION,)
ET AL.,)
) August 18, 2020
Debtors.) 9:57 AM
)
)

TRANSCRIPT OF HEARING RE:
MOTION OF DEBTORS FOR ENTRY OF ORDERS (I) AUTHORIZING DEBTORS
TO (A) CONTINUE EXISTING CASH MANAGEMENT SYSTEM, (B) HONOR
CERTAIN PRE-PETITION OBLIGATIONS RELATED TO THE USE THEREOF,
(C) CONTINUE INTER-COMPANY TRANSACTIONS AND PROVIDE
ADMINISTRATIVE EXPENSE PRIORITY FOR POST-PETITION
INTER-COMPANY CLAIMS, AND (D) CONTINUE SUPPLY CHAIN FINANCING;
(II) WAIVING REQUIREMENTS OF SECTION 345(B) OF THE BANKRUPTCY
CODE; AND (III) GRANTING RELATED RELIEF (DOC. 17)
MOTION OF DEBTORS FOR ORDERS (I) GRANTING AUTHORITY TO HONOR
CERTAIN PRE-PETITION OBLIGATIONS TO CUSTOMERS AND CONTINUE AND
MAINTAIN CUSTOMER PROGRAMS IN THE ORDINARY COURSE OF BUSINESS;
AND (II) GRANTING RELATED RELIEF (DOC. 7)
MOTION OF DEBTORS FOR INTERIM AND FINAL ORDERS (I) AUTHORIZING
DEBTORS TO (A) PAY PRE-PETITION WAGES, SALARIES, COMMISSIONS,
EMPLOYEE BENEFITS, AND OTHER OBLIGATIONS, (B) MAINTAIN EMPLOYEE
BENEFIT PROGRAMS, (C) PAY RELATED ADMINISTRATIVE OBLIGATIONS,
(D) PAY SUPPLEMENTAL WORKFORCE OBLIGATIONS, AND (E) TERMINATE
DEFERRED COMPENSATION CLAIMS; AND (II) GRANTING RELATED RELIEF
(DOC. 11)
MOTION OF DEBTORS FOR ENTRY OF ORDERS ESTABLISHING
NOTIFICATION PROCEDURES AND APPROVING RESTRICTIONS ON CERTAIN
TRANSFERS OF INTERESTS IN AND CLAIMS AGAINST THE DEBTOR (DOC.
32)
MOTION OF DEBTORS FOR ENTRY OF ORDER (I) ESTABLISHING
DEADLINES FOR FILING PROOFS OF CLAIM AND PROCEDURES RELATING
THERE TO AND (II) APPROVING FORM AND MANNER OF NOTICE THEREOF
(DOC. 283)
MOTION OF DEBTORS FOR INTERIM AND FINAL ORDERS (I) AUTHORIZING
PAYMENT OF CERTAIN PRE-PETITION TAXES AND FEES AND (II)
GRANTING RELATED RELIEF (DOC. 29)
MOTION OF DEBTORS FOR INTERIM AND FINAL ORDERS (I) AUTHORIZING
DEBTORS TO (A) CONTINUE INSURANCE POLICIES AND PROGRAMS, (B)
CONTINUE SURETY BOND PROGRAM, (C) PAY ALL INSURANCE AND SURETY
OBLIGATIONS, (II) LIFTING THE AUTOMATIC STAY FOR WORKERS'

1 COMPENSATION CLAIMS, AND (III) GRANTING RELATED RELIEF (DOC.
2 9)
3 DEBTORS' APPLICATION FOR APPOINTMENT OF KURTZMAN CARSON
4 CONSULTANTS, LLC AS CLAIMS AND NOTICING AGENT AND
5 ADMINISTRATIVE ADVISOR AS OF THE PETITION DATE (DOC. 4)
6 APPLICATION OF DEBTORS PURSUANT TO 11 U.S.C. SEC. 327(A), FED
7 R. BANKR. P. 2014(A) AND 2016, AND LOCAL RULES 2014 AND 2016-1
8 FOR AUTHORITY TO RETAIN AND EMPLOY WEIL, GOTSHAL & MANGES LLP
9 AS ATTORNEYS FOR THE DEBTORS EFFECTIVE AS OF THE PETITION DATE
10 (DOC. 28)
11 DEBTORS' APPLICATION FOR AUTHORITY TO EMPLOY CARMODY MACDONALD
12 P.C. AS LOCAL RESTRUCTURING COUNSEL FOR THE DEBTORS (DOC. 31)
13 APPLICATION OF DEBTORS FOR AN ORDER AUTHORIZING THE RETENTION
14 AND EMPLOYMENT OF FOLEY & LARDNER LLP AS SPECIAL COUNSEL FOR
15 THE DEBTORS EFFECTIVE AS OF PETITION DATE (DOC. 33)
16 APPLICATION OF DEBTORS FOR AN ORDER AUTHORIZING THE RETENTION
17 AND EMPLOYMENT OF KING & SPALDING LLP AS SPECIAL COUNSEL FOR
18 THE DEBTORS EFFECTIVE AS OF THE PETITION DATE (DOC. 194)
19 APPLICATION OF DEBTORS PURSUANT TO 11 U.S.C. SEC. 327(A), 328,
20 AND 330, FED. R. BANKR. P. 2014(A) AND 2016, AND LOCAL RULES
21 2014(A) FOR AUTHORITY TO RETAIN AND EMPLOY ERNST & YOUNG LLP
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25 HOULIHAN LOKEY CAPITAL, INC. AS INVESTMENT BANKER FOR THE
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AND STALKING HORSE BID PROTECTIONS, (C) SCHEDULING AUCTION AND
SALE HEARING, (D) FORM AND MANNER OF NOTICE OF SALE, AUCTION,

1 AND SALE HEARING, AND (E) ASSUMPTION AND ASSIGNMENT
2 PROCEDURES; (II) AUTHORIZING (A) SALE OF DEBTORS' ASSETS AND
3 EQUITY INTERESTS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS,
4 AND ENCUMBRANCES AND (B) ASSUMPTION AND ASSIGNMENT OF
5 EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (III) GRANTING
6 RELATED RELIEF (DOC. 53)
7 MOTION OF DEBTORS FOR INTERIM AND FINAL ORDERS (I) AUTHORIZING
8 DEBTORS TO OBTAIN POST-PETITION FINANCING, (II) AUTHORIZING
9 DEBTORS TO USE CASH COLLATERAL, (III) GRANTING LIENS AND
10 SUPERPRIORITY CLAIMS, (IV) GRANTING ADEQUATE PROTECTION TO
11 PRE-PETITION SECURED PARTIES, (V) MODIFYING AUTOMATIC STAY,
12 (VI) SCHEDULING FINAL HEARING AND (VII) GRANTING RELATED
13 RELIEF (DOC. 35)

14 BEFORE THE HONORABLE BARRY S. SCHERMER
15 UNITED STATES BANKRUPTCY COURT

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1 THE COURT: Today is the 18th of August, and we have
2 a Briggs and Stratton calendar.

3 Before we enter our appearance, why don't we just do
4 debtors' counsel first. And then as you appear, you can note
5 your appearance by record for nondebtor counsel.

6 Mr. Eggmann, please.

7 MR. EGGMANN: Good morning, Your Honor. Rob Eggmann
8 from the Carmody MacDonald law firm. We also have with us
9 from -- in the courtroom from Carmody MacDonald Tom Riske,
10 Danielle Suberi --

11 THE COURT: Good morning. Good morning.

12 MS SUBERI: Good morning.

13 MR. EGGMANN: Chris Lawhorn.

14 MR. LAWHORN: Good morning.

15 THE COURT: There you are.

16 MR. EGGMANN: Dormi Ko and Sandra Damko.

17 THE COURT: Thank you.

18 MR. EGGMANN: We have a number of people from the
19 Weil firm who are on the line. I will kind of give you the --
20 what I would call the main presenters. And that's Ronit
21 Berkovich, Debora Hoehne, Andrew Citron, Martha Martir, and
22 Eli Belchman.

23 We also have members of the Weil litigation team
24 that, as needed, will enter and identify themselves, Your
25 Honor.

1 THE COURT: Thank you, Mr. Eggmann.

2 MR. EGGMANN: Thank you.

3 THE COURT: What we'll do today is follow the agenda
4 as amended by the debtor. We'll start with the motion with
5 respect to cash management.

6 If someone doesn't understand my phraseology on the
7 categorization, just let me know.

8 Case management, Mr. Eggmann?

9 MR. EGGMANN: Thank you, Your Honor.

10 Before I present, just to kind of make sure it's okay
11 with the Court, I thought what we'd do today to make things
12 runs as smoothly as possible is I will more or less narrate.
13 I will stand up. And I will say, Judge, the cash management
14 motion which, in this case, is being handled by Ms. Hoehne.

15 I would also ask if it's okay with the Court that we
16 have the parties that are on the WebEx take their cameras off
17 unless they're presenting or they are objecting or, obviously,
18 with a witness because there are so many people on. It's
19 difficult to see. Is that acceptable to the Court?

20 THE COURT: Yes.

21 MR. EGGMANN: Thank you, Your Honor.

22 In that case, starting off with the cash management
23 motion will be Debora Hoehne from the Weil law firm.

24 MS. BERKOVICH: Actually --

25 MS. HOEHNE: Good morning, Your Honor. Oh.

1 MS. BERKOVICH: Sorry. This is Ronit Berkovich from
2 Weil. We actually prepared a short introduction before we get
3 to the first item on the agenda. And if it's okay with Your
4 Honor, we'd like to go through that.

5 THE COURT: Ms. Berkovich, why don't you do that,
6 please?

7 MS. BERKOVICH: Okay. So for the record, Ronit
8 Berkovich, Weil, Gotshal for the debtors, Briggs & Stratton
9 Corporation. We would like to thank the Court for hearing the
10 debtors this morning and particularly for providing us with
11 the opportunity to appear by video.

12 THE COURT: Well, we'll see if that --

13 MS. BERKOVICH: We are joined --

14 THE COURT: We'll see if that holds true at the end
15 of the hearing.

16 MS. BERKOVICH: Well, so far it seems to be working
17 well. So I think your court did a great job with getting the
18 technology up and running for us. And we do really sincerely
19 appreciate that.

20 We have with us our witnesses, Mr. Peluchiwski and
21 Mr. Jeffrey Lewis from Houlihan Lokey which are -- is the
22 debtors' investment banker. We also have Mr. Jeffrey Ficks
23 from Ernst & Young which is the debtors' restricting advisors.
24 So they're here in the virtual courtroom with us.

25 We also have on the phone members of the debtors'

1 management team which, as Your Honor can imagine, are keenly
2 interested in the outcome of today's hearing.

3 So the creditors' committee, as Your Honor will
4 recall, was appointed on August 5th. They retained counsel on
5 August 10th. That counsel was Brown Rudnick which was same
6 counsel that represented the had hoc group which was helpful
7 in terms of getting them up to speed. They retained DRG as
8 financial on August 11th.

9 Since that time, you know, just a week ago, we've
10 been working very closely with the committee and their
11 advisors to provide them the information they need to evaluate
12 our path forward as well as the road before the Court today.
13 This included a call with counsel on the very day that it was
14 appointed, call with the advisor, financial advisors, the day
15 they after they were retained, and the diligence session with
16 the company's CEO and CFO the day after that.

17 We've also provided them access to our full diligence
18 room and put even additional information in there that others
19 don't have that's just there for committee counsel. And we
20 voluntarily moved the hearings on the bidding procedures which
21 had initially been scheduled for last Tuesday -- we moved it
22 to today, again, to give the committee a chance to get up to
23 speed.

24 We have a very full agenda today. But thankfully we
25 were successful in consensually resolving most of the motions

1 and applications up for hearing today. We do thank the U.S.
2 Trustee, as well as the creditors' committee, for their input
3 and assistance in resolving the form of proposed orders for
4 the motions that would be presented on an uncontested basis
5 today.

6 There really are two main contested items on today's
7 calendar. We'll save those for the end. We'll be presenting
8 the debtors' motion for approval of bidding procedures as well
9 as the debtors' motion for approval of our DIP financing on a
10 final basis.

11 As a roadmap for today, we'll begin with the
12 uncontested items on the agenda. And we listed, as Your Honor
13 saw it, the individuals on the agenda to present those motions
14 and applications.

15 There are a few other items that are -- three other
16 items that are listed as contested, but only one of those, the
17 motion of Hoffer Plastics to compel assumption or rejection of
18 their contract, remains contested.

19 The limited objections to the retiree benefits motion
20 has been resolved.

21 And there is a limited reservation of rights filed in
22 connection with the critical vendors motion. But we believe
23 that all matters related to that motion have been resolved.
24 And we will confirm that when we present those motions to Your
25 Honor. And we will confirm that when we present those motions

1 to Your Honor.

2 I will present later the bidding procedures motions
3 and the DIP motion. And I will be joined with my colleagues
4 from our litigation group who will handle any
5 cross-examination and redirect of witnesses. Those are Mr.
6 Corey Berman and Ms. Lauren Alexander.

7 So all the forms of order for today have been posted
8 to the KCC website in advance of the hearing. And we believe
9 that the Carmody team has brought copies and redlines for the
10 Court.

11 We will introduce the evidence at the time that we
12 get to the particular motions that are being presented.

13 But, Your Honor, I would just say one last point.
14 For the benefit of the debtors' stakeholders, including the
15 thousands of employees and hundreds of vendors whose personal
16 livelihood and business depend on the survival of this company
17 as a going concern, we request that the relief that we're
18 seeking today be granted.

19 And with that, Your Honor, I will turn the podium
20 over to my colleague, Debora Hoenhe.

21 THE COURT: Thank you, Ms. Berkovich.

22 Let me just respond to one of the things you
23 mentioned, and that is our video hearing today. I wanted to
24 particularly thank the clerk and specifically the IT
25 department who's work very hard to put this together on short

1 notice. And maybe it was my fault. They should have had more
2 notice, but they put it together.

3 Ms. Hoehne?

4 MS. BERKOVICH: (Indiscernible).

5 THE COURT: Thank you.

6 MS. HOEHNE: Good morning, Your Honor. Debora
7 Hoehne, Weil, Gotshal & Manges, on behalf of the debtor.

8 As Your Honor noted, the first item on the agenda is
9 the debtor's cash management motion which was filed at docket
10 number 17. If you recall, at the first-day hearing, Your
11 Honor approved on an interim basis the continued use of the
12 existing cash management system, including the maintenance of
13 the debtors' existing bank account checks and business forms,
14 payment of bank fees, and the continuation of ordinary course
15 intercompany transaction.

16 After the hearing, we worked with the U.S. Trustee on
17 language in the interim order that provided a ninety-day
18 waiver of the requirement to Section 345 with respect to four
19 of the debtors' bank accounts with JPMorgan and Bank of
20 Montreal. The order also provides continued monitoring of
21 those accounts as requested by the U.S. Trustee. That waiver
22 language is still in effect in the proposed final order. And
23 to date, the debtors have provided all the information that
24 the U.S. Trustee's Office has requested in respect to those
25 accounts.

1 We did not receive any formal objections to the
2 motion. But over the weekend, we received a request from the
3 Committee for periodic reporting of intercompany transactions
4 between debtor and nondebtor entities. And we agreed to
5 provide the committee with monthly reporting in arrears of
6 intercompany transfers. And our understanding is they have
7 signed off on our proposed final order.

8 So unless Your Honor has any questions, we would ask
9 that the relief be granted on a final basis.

10 THE COURT: Thank you.

11 Does anyone wish to be heard in respect to the cash
12 management motion? Mr. Willard, good morning.

13 MR. WILLARD: Good morning, Judge. May it please the
14 Court?

15 This is probably the -- as good a time as any to set
16 the stage for the other side of the courtroom. I'm here on
17 behalf of the Official Unsecured Creditors' Committee as local
18 counsel. I'm joined today by my colleagues at the Brown
19 Rudnick firm, Robert Stark, Andrew Carty, Oksana Lashko, and
20 James Stoll. And our financial advisor, who will be a witness
21 today, Mr. Christopher Kearns, will also be available.

22 As to these uncontested matters, unless the Court
23 would prefer otherwise, the Court can assume, absent me coming
24 back up to the podium, that we have no comments as to these
25 uncontested matters.

1 THE COURT: Thank you.

2 MR. WILLARD: Certainly, if you have any questions,
3 Judge --

4 THE COURT: Those appearing by video can just use the
5 "raise your hands" signal. Otherwise, I'll take your silence
6 as acquiescence to the motion.

7 MR. WILLARD: Yes. And finally, Judge, it remains
8 only to be said to echo your comments about the Court and the
9 court staff and the Court's IT staff. We are deeply grateful.
10 We know it was a Herculean effort. We're here. The system is
11 up and running. And on behalf of the creditors' committee, we
12 want to say thank you very much.

13 THE COURT: And I'll say I was hoping Judge Clair
14 would get the first video hearing.

15 MR. WILLARD: No comment.

16 THE COURT: Ms. Wilson, do you wish to be heard in
17 respect of the cash management motion? Good morning.

18 MS. WILSON: Good morning. Sirena Wilson on behalf
19 of the Office of the U.S. Trustee. Paul Randolph is also the
20 line on behalf of the Office of the U.S. Trustee.

21 We have been working with debtors. It is our goal
22 and hope the debtors will continue to attempt to comply with
23 345. There is a limited waiver in place on those four counts,
24 but we will continue working on that.

25 THE COURT: Thank you, ma'am.

1 MS. WILSON: Thank you.

2 Ms. Hoehne, then you'll prepare a final order for me?

3 MS. HOEHNE: Yes, Your Honor.

4 THE COURT: Thank you.

5 Our next motion is our motion for certain
6 pre-petition obligation to customers, et al.

7 MR. EGGMANN: Thank you, Your Honor. And that matter
8 will also be handled by Ms. Hoehne.

9 MS. HOEHNE: Thank you, Your Honor.

10 The customer program motions, as you noted, item
11 number 2 on the agenda, was filed at docket number 7. No
12 formal objections were filed for this motion. And we also
13 received no informal comments.

14 Other than converting the order from interim to
15 final, there were no changes made to the order. We've
16 summarized the programs in the motion and believe there is a
17 sound basis to continue the program. Unless Your Honor has
18 any questions, we request this relief on a final basis.

19 THE COURT: Thank you. I have no questions. The
20 motion is granted. And I'll receive a final order, Mr.
21 Eggmann. Thank you.

22 Our next motion is the motion to establish
23 restriction -- well, restrictions on trades and transfers of
24 interest and claims.

25 MR. EGGMANN: Yes, Your Honor.

1 MS. HOEHNE: Your Honor --

2 MR. EGGMANN: That matter is being handled by Martha
3 Martir at the Weil law firm as well.

4 MS. HOEHNE: Actually, Your Honor, I believe we
5 skipped item number 3 on the agenda which is the wages motion.

6 THE COURT: I'll come back to it.

7 MS. HOEHNE: Okay.

8 THE COURT: Let's just do the transfers with Ms.
9 Martir. I apologize for skipping that.

10 MS. HOEHNE: Okay. Thank you. No problem.

11 MS. MARTIR: Good morning, Your Honor. Martha Martir
12 from Weil, Gotshal & Manges on behalf of the debtors and
13 debtors-in-possession.

14 The next item on the agenda, agenda item 4, is the
15 NOL motion which was filed at docket number 32. The interim
16 order was entered and filed at docket number 151.

17 Informal comments were received by the committee last
18 night and were incorporated into a revised final order. This
19 revised final order has been approved by counsel to the DIP
20 agent, Latham & Watkins, and was also previewed with the U.S.
21 Trustee this morning.

22 The motion seeks to establish procedures to protect
23 the potential value of the debtors' consolidated tax
24 attributes, including this allowed business interest expense,
25 carryover of unused business credits and consolidated net

1 operational losses, carryover of unused foreign tax credits
2 and certain other tax benefits.

3 The proposed procedures would imposed narrowly
4 tailored restrictions and notification requirements with
5 respect to the stock of Briggs & Stratton Corporation.

6 If Your Honor has no questions or objections, we ask
7 that you enter on a final basis an order approving the motion.

8 THE COURT: I don't see any objections to it. The
9 motion is granted. May I have a final order?

10 MS. MARTIR: Yes, Your Honor.

11 THE COURT: Thank you.

12 MR. EGGMANN: Your Honor, one comment with respect to
13 the orders. The one that Ms. Berkovich indicated had been
14 changed, we did bring redline versions to the courtroom today
15 for anybody that would like them. If ever you want to know
16 the changes, I've got them here. And I can certainly go over
17 them with you as you desire. But there are copies up there on
18 the counsel table. Just a note.

19 THE COURT: Thank you. If anyone wishes to look at
20 the amended order, the redlined copy, let me know and we'll
21 allow that to happen. Otherwise, we'll do orders -- we'll not
22 do orders on the record here.

23 MR. EGGMANN: Thank you, Your Honor.

24 THE COURT: And just send me the final, not the
25 redline.

1 MR. EGGMANN: We will do so. Thank you, Your Honor.

2 THE COURT: Thank you.

3 Number 3 on the agenda, the one that I skipped over,
4 is pre-petition wages, et cetera.

5 MR. EGGMANN: That matter is also being handled by
6 Ms. Hoehne.

7 THE COURT: Thank you.

8 MS. HOEHNE: Thank you, Your Honor.

9 The wage motion was filed at docket number 11. As
10 you may recall, this motion is a typical motion to grant or
11 pay all or a portion of pre-petition amounts that were accrued
12 and unpaid as of the filing date relating to employee benefits
13 and expenses.

14 At the first-day hearing, the Court accepted the
15 declaration of Jeff Ficks in support of that motion as an
16 offer of proof. The debtors request to continue and pay
17 severance obligations, vacation obligations, and ordinary
18 course incentive bonuses to (indiscernible) employees who were
19 deferred until today.

20 We have received no informal -- no formal objections
21 to the relief requested in the wage motion.

22 Your Honor, Wells Fargo, the trustee of the rabbi
23 trust for the deferred compensation plans that are being
24 terminated, requested certain language identifying the proper
25 name of the trust of the trustee and directing disposition of

1 the proceeds which would be distributed back to the debtors,
2 all of which is reflected in the redline of the proposed order
3 that Mr. Eggmann has available in the courtroom today.

4 We circulated the language to the committee and
5 lender's counsel. And we also sent it to the U.S. Trustee and
6 received no comments to that additional language.

7 Unless Your Honor has questions, we would ask for the
8 proposed final order to be entered.

9 THE COURT: I don't see anyone who wishes to be heard
10 in respect of pre-petition wages. The motion is granted. And
11 Mr. Eggmann will send me a final order on that. For some
12 reason we did an interim order on that. I'm not sure why.
13 But send me a final order on it.

14 MR. EGGMANN: And I think that had to do with certain
15 structure of some of the -- some commissioned employees. And
16 that's primarily why we did interim on that one, Your Honor.

17 THE COURT: Thank you.

18 The fifth item on the agenda is the order -- motion
19 to enter an order establishing filing of proof of claims
20 procedures therefor.

21 MR. EGGMANN: That matter is being presented by Eli
22 Blechman from the Weil law firm.

23 THE COURT: Thank you.

24 Mr. Blechman?

25 MR. BLECHMAN: Good morning. Eli Blechman on behalf

1 of the debtors. Can you hear me okay, Your Honor?

2 THE COURT: Yes.

3 MR. BLECHMAN: Thank you.

4 So the next item on the agenda is item number 5.

5 This is the debtors' (audio interference) to establish
6 deadlines for filing proofs of claim, establishing procedures
7 for those proofs of claims, and approving the form and manner
8 of the notice thereof.

9 Your Honor, this is a typical bar date motion. We're
10 seeking to establish certain bar dates and procedures in these
11 Chapter 11 cases.

12 No formal objections were filed to the motion, Your
13 Honor. We shared a draft of the motion and the proposed bar
14 date order with the clerk of court and received certain
15 comments that we have incorporated into the proposed bar date
16 order.

17 Specifically, Your Honor, by the motion, we're
18 seeking to establish two major deadlines. First is the
19 general bar date which will be October 7th. That's forty-five
20 days from the day we file -- the debtors intend to file their
21 schedules and statements and allow an equal five days for
22 service for our claims agent. And then January 19th will be
23 our supplemental bar date; that is, of course, 180 days from
24 the petition date.

25 Two additional bar dates in the motion, Your Honor,

1 that I'll just -- I want to quickly comment on. One is the
2 amended schedules bar date, and the other is the rejection of
3 damages bar date. Those are, again, (audio interference).
4 What we did here is we these bar dates as soft bars. The
5 clock will start ticking on those bar dates once we file -- if
6 we file amended schedules or a motion to reject a contract.
7 And from that, we'll have -- those claimants will have forty
8 days to file their claims.

9 Your Honor, on this -- on these two bar dates, we
10 received comments from the clerk of court asking us to either
11 set a hard deadline for these bar dates or somehow clarify --
12 have language that clarifies when exactly those bar dates will
13 actually come into play. And what we agreed on and what we'll
14 incorporate into our -- the bar date is -- if we -- in the
15 event we file amended schedule or a motion to reject contract,
16 we'll include in that motion or note the specific date which
17 is -- which will be the specific bar date for that -- for
18 those claims.

19 Your Honor, otherwise, the motion is standard. It
20 goes through who is required to file claims and who is not,
21 when those claims to need to be filed, where, and establishes
22 the form and manner of the notice, including the publication
23 notice. On that point, Your Honor, we are proposing to
24 publish one (audio interference) and one in the St. Louis
25 Post-Dispatch at least twenty-eight days before the general

1 Brunner date.

2 Your Honor, as I said before, we have no -- we
3 received no formal objections on the motion. And we've
4 incorporated informal comments. And so the Court -- unless
5 Your Honor has any questions, the debtors submit -- will
6 submit a slightly revised version of the proposed order and
7 request entry of the order.

8 THE COURT: Thank you, Mr. Blechman.

9 My understanding is that, with respect to who is to
10 receive notice on the objection, that'll be the counterparty
11 and pretty easy to identify.

12 With respect to amended schedules, who will get
13 notice will be determined by the debtor. And the debtor will
14 live with the consequences of who gets served rather than
15 trying to identify specific groups by nomenclature.

16 Number 2, I do appreciate your moving from the
17 formula which is somewhat cumbersome to a hard date. And we
18 appreciate that very much. So I look forward to receiving the
19 final order on the filing of proofs of claims and procedures.
20 The motion is granted.

21 MR. BLECHMAN: Thank you, Your Honor.

22 THE COURT: Thank you, Mr. Blechman.

23 MR. EGGMANN: The next item on the agenda is item
24 number 6, Your Honor, which is the motion of the debtors for
25 interim and final orders authorizing payment of certain

1 pre-petition taxes and fees and granting related relief which
2 will be handled by Andrew Citron of the Weil law firm.

3 THE COURT: Thank you.

4 Mr. Citron?

5 MR. CITRON: Good morning, Your Honor. Thank you --
6 thank you for having us today.

7 As we just said, the next item on the agenda is
8 number 6, taxes motion, which was filed at docket number 29.

9 By this motion, debtors are seeking authority to pay
10 certain pre-petition taxes and regulatory assessments. And I
11 believe we talked about the importance of these motions for
12 the debtors in this -- at the first-day hearing.

13 We have received no objections or -- formally or
14 informally to the motion. Unless Your Honor has any
15 questions, we'd ask that you enter the order on a final basis,
16 from interim to final.

17 THE COURT: Thank you, Mr. Citron.

18 I don't see anyone who wishes to be heard in respect
19 to the motion. It is granted.

20 Mr. Eggmann, you'll send me a final order. Thank
21 you.

22 Number 7 on the agenda is the insurance --
23 maintenance of insurance motion.

24 MR. EGGMANN: That matter is being handled by Andrew
25 Citron as well, Your Honor.

1 THE COURT: Thank you.

2 Mr. Citron?

3 MR. CITRON: Thank you, Your Honor.

4 On this motion, debtors seek a final -- an approval
5 on a final basis to maintain and pay insurance premiums and
6 maintain their insurance programs and policies in the ordinary
7 course of their business. These include a variety of
8 different insurance programs and policies, including surety
9 bonds. And the -- while being required under some state laws
10 and by the U.S. Trustee guidelines to maintain these policies,
11 it's also in the debtors' best interest to avoid costs down
12 the road.

13 I don't -- as to this motion, we have not received
14 any formal or informal objections to the relief sought. And
15 accordingly, we'd ask that Your Honor grant the motion on a
16 final basis unless Your Honor has any questions.

17 THE COURT: Are we premium financing? Are we
18 financing the premiums on these or paying by invoice?

19 MR. CITRON: So yes, Your Honor. Some of the
20 policies do have premium financing. These were arrangements
21 that the debtors entered into pre-petition in which the
22 financing company paid the premium in full to the -- paid the
23 premium to the insurance broker and which the debtors then
24 paid on a monthly basis that financing company. Those terms
25 of those are standard in the industry.

1 And without these -- without being able to pay those
2 going forward to the premium financing companies, the
3 financing company would have the authority -- would argue that
4 they could be entitled to cancel the policies and have the
5 unearned premiums returned to them. So without paying to the
6 premium financing company, the debtor could lose their
7 coverage under those certain policies.

8 THE COURT: I think you answered my --

9 MR. CITRON: I hope that answers your question.

10 THE COURT: I think you answered my question, but let
11 me pose it directly now. Is there anything other than the
12 standard or routine premium financing that I'm familiar with?

13 MR. CITRON: No, I do not believe so, Your Honor.

14 THE COURT: Again, I don't see anyone who wishes to
15 be heard. And with respect to the insurance motion, it is
16 granted. Mr. Eggmann will provide me a final order on it.

17 MR. EGGMANN: Yes, Your Honor.

18 THE COURT: The KCC or claims agent motion is next.
19 Mr. Eggmann?

20 MR. EGGMANN: And I'm presenting that motion, Your
21 Honor.

22 We have received no objections to this motion. We
23 had a provisional order entered on docket number 72 as well as
24 an interim order entered on docket number 203. And we've been
25 working with KCC obviously very closely in the evenings often.

1 And they've been doing an excellent job so far. We would ask
2 that that motion be granted as well.

3 THE COURT: And as I understand it, there are -- it's
4 a hybrid system of compensation. If we do the standard claims
5 and noticing, that's one compensation package. If we do a
6 different function entirely, then we have plan number 2 to be
7 compensated.

8 MR. EGGMANN: Indeed, Your Honor.

9 THE COURT: Okay. I don't see anyone who wishes to
10 be heard in respect of the KCC motion. It is granted. May I
11 have a final order, please?

12 MR. EGGMANN: Yes, Your Honor.

13 THE COURT: Next we have the motion to employ Weil,
14 Gotshal as debtors' counsel.

15 MR. EGGMANN: Yes, Your Honor. I'm handling that
16 matter as well.

17 Likewise with the previous motion, we've received no
18 objections to the motion to employ Weil, Gotshal as lead
19 counsel in this case. There was a provisional order entered
20 on this retention application as well. And that was document
21 number 72 (sic). There was a supplemental declaration filed
22 by Ms. Berkovich which was at docket number 281. We also have
23 an interim order in this case as well.

24 We've obviously been working very closely with Weil
25 and enjoyed working with them immensely. And there have been

1 no objections. We would ask that this retention motion be
2 granted as well.

3 THE COURT: And it will be.

4 Let me just go through a couple of things so that we
5 don't have to repeat it with respect to attorneys'
6 applications to be employed.

7 Standard retainer language that will draw down on the
8 retainer before being compensated under our local rule.

9 Number 2, monthly payments under our local rule, a
10 hundred percent expense reimbursement and eighty percent fee
11 allowance subject to interim and final orders. And then
12 lastly, we're going to be employed under -- pardon me,
13 compensated under 330, not 328. I think you've heard that
14 many times before.

15 MR. EGGMANN: We have, Your Honor. Thank you.

16 THE COURT: Thank you.

17 And let's do the same thing for Carmody MacDonald.

18 MR. EGGMANN: Yes, Your Honor.

19 THE COURT: If you'd like to present that, please.

20 MR. EGGMANN: Yes, Your Honor. Again, Rob Eggmann
21 presenting on behalf of my law firm, Carmody MacDonald, P.C.,
22 as local restructuring counsel for the debtor. We'll be
23 working with Weil, Gotshal law firm.

24 This matter was also preliminarily -- or
25 provisionally, I should say, granted, as well as granted on an

1 interim basis. And we would ask that this motion be granted
2 on a final basis as well.

3 THE COURT: There being no objection, the motion is
4 granted. May I have a final order please?

5 MR. EGGMANN: Yes, Your Honor.

6 THE COURT: We have an adjourned matter, and that is
7 to employer Houlihan Lokey.

8 MR. EGGMANN: Yes, Your Honor. We were asking that
9 that matter be adjourned to a later date.

10 THE COURT: Let's choose that day now if we may.

11 MR. EGGMANN: I'm happy to do that, Your Honor.

12 THE COURT: Did you have a week in mind for that?

13 MR. EGGMANN: If we could possibly have two weeks as
14 there may be the necessity of some person testifying, Your
15 Honor. We'd like to get that taken care of if possible before
16 the end of -- end of this month.

17 THE COURT: Will this be perhaps the only matter on
18 the docket for that day?

19 MR. EGGMANN: I would believe it would be, Your
20 Honor, yes, unless there was some other just quick
21 announcement that had to be made that day.

22 THE COURT: All right.

23 MR. EGGMANN: I imagine there won't be any
24 substantive --

25 THE COURT: If you want it this month, then we'll do

1 it on the 28th, a Friday, August 28, 10 o'clock, this
2 courtroom.

3 MR. EGGMANN: Thank you, Your Honor. That's perfect.

4 THE COURT: Thank you.

5 MR. EGGMANN: And that is, for the record, number 14
6 on the agenda.

7 THE COURT: Yes, it is.

8 And let's hear the application to employ Deloitte
9 Touche, please.

10 MR. EGGMANN: And that is, Your Honor, number 15 on
11 the agenda. This matter was granted on a provisional basis as
12 well, Your Honor. And that was docket number 76. We have the
13 declaration of Mr. Kulju at docket number 345. And we've
14 received no objections to this motion as well.

15 THE COURT: Thank you. The application to employ
16 Deloitte Touche is granted. May I have a final order?

17 MR. EGGMANN: Yes, Your Honor.

18 THE COURT: I have a motion of the committee next --

19 MR. EGGMANN: Your Honor, if I may --

20 THE COURT: -- for an expedited hearing.

21 MR. EGGMANN: -- be so bold as to interrupt.

22 We had a few other debtor applications. We could
23 certainly come back to those. But when we skipped over to the
24 adjourned matter, we skipped over King & Spalding, Foley
25 Lardner, and Ernst & Young.

1 THE COURT: The docket seems to go a lot faster when
2 I skip over matters.

3 MR. EGGMANN: It does.

4 THE COURT: You are, again, correct. We'll start
5 with Foley & Lardner.

6 MR. EGGMANN: Your Honor, and this is docket number
7 11. Foley Lardner has traditionally been the debtors'
8 pre-petition general counsel. We do have Foley & Lardner
9 lawyers on the phone today should the Court have any
10 questions. But Foley & Lardner is being engaged to not only
11 assist with items connected to the sale but general
12 litigation, general representation in the firm. And this too
13 has no objections. It was preliminarily -- or provisionally
14 granted on docket number 75. And we have the declaration of
15 Patrick Quick which is docket number 328. We would ask that
16 this be granted.

17 THE COURT: Thank you.

18 Let me apologize again for skipping over your
19 application. And seeing no objection, the application is
20 granted. You'll prepare a final order for me, please?

21 MR. EGGMANN: Yes, Your Honor.

22 THE COURT: Let's hear the application to be employed
23 of King & Spaulding.

24 MR. EGGMANN: King & Spaulding is also pre-petition
25 counsel to the debtor who handle a number of matters,

1 including litigation matters. This was provisionally granted
2 as well. And we have the -- or the declaration of Stephen J.
3 Orava which is number 225 on the docket. We have received no
4 objections, although the United States Trustee has asked us to
5 file the engagement letter which, if we've not done so
6 already, will be filed today. We would ask that this be
7 granted.

8 THE COURT: Thank you.

9 No one wishes to be heard in respect of this motion.
10 It is granted. And you'll prepare a final order for me,
11 please.

12 MR. EGGMANN: Yes, Your Honor.

13 THE COURT: Lastly we have Ernst & Young as your
14 financial advisor.

15 MR. EGGMANN: Your Honor, we've received no
16 objections to this. And we do have a provisional order which
17 is docket number 77 as well as a supplemental declaration of
18 Jeffrey Ficks which was docket number 284.

19 This one is just a little bit different because they
20 are not -- well, there's two components to what Ernst & Young
21 does for the debtor. One of them is a traditionally hourly
22 engagement where time records are kept.

23 The second is the sales and use tax recovery services
24 which Ernst & Young performs for us. The job in that case is
25 to locate potential refunds, file for them, and, of course,

1 obtain them. And that is more or less on a contingency basis
2 which brings into play Section 328.

3 And knowing Your Honor's feelings on Section 328, I
4 thought I would address that right up front. What we would
5 ask for in this particular instance is that it be subject to
6 330 review for only the Office of the United States Trustee,
7 and that office alone, like you have done in previous cases.
8 I believe in Peabody and Miranda (ph.), that was done in those
9 cases.

10 It's a unique situation with our financial advisor,
11 but it's an important component of the debtors' -- of Chapter
12 11 and their business prior to Chapter 11 as well.

13 THE COURT: Thank you.

14 No one wishes to be heard in respect of this
15 application. And it is granted. You've identified the hybrid
16 nature of the engagement.

17 MR. EGGMANN: Thank you, Your Honor. And I believe
18 that takes care of, at least for the time being, the debtors'
19 presentations.

20 THE COURT: Thank you.

21 Mr. Willard, we had a motion to expedite a matter
22 which I think has been withdrawn now; is that correct?

23 MR. WILLARD: Yes, Your Honor. Greg Willard for the
24 committee.

25 I guess for a brief background, as I think Your Honor

1 is aware, we've been dealing with a pretty significant amount
2 of material, nonpublic information as well as confidential
3 information.

4 With respect to an initial filing, we had filed that
5 with redactions.

6 THE COURT: In particular, there's one paragraph that
7 I circled that was -- that and a footnote, I believe.

8 MR. WILLARD: Right. And we filed then a motion to
9 authorize those redactions and motion to expedite.

10 The confidentiality aspect of that original filing
11 has been resolved. So those two motions as one or -- just
12 know that were withdrawn.

13 The last thirty-six hours as we were getting ready
14 for this hearing, it looked like we would -- we would be
15 getting in the similar areas, working with Mr. Eggmann and Mr.
16 Lawhorn. We anticipated that we would need to file the
17 motion. It turns out we were able to work out those issues.
18 And I just want to thank Mr. Eggmann and Lawhorn and the Court
19 or holding this place over. But the bottom line is we don't
20 need it. We were able to resolve it, Judge.

21 THE COURT: Perfect.

22 MR. WILLARD: Thank you.

23 THE COURT: Thank you.

24 I believe we're up to number 18 on the agenda which
25 is Hoffer Plastics' motion to compel assumption or rejection.

1 And who do we have for Hoffer Plastics? Is Hoffer Plastics
2 represented today?

3 MR. LAWHORN: Your Honor, Mr. Sant represents Hoffer
4 Plastics. I believe he was on the line earlier.

5 For the record, Chris Lawhorn on behalf of the
6 debtors, from Carmody MacDonald.

7 MR. SANT: Your Honor, Tal Sant on behalf of Hoffer
8 Plastics.

9 THE COURT: Thank you. Would you like to present
10 your motion?

11 MR. SANT: Yes, Your Honor.

12 Your Honor, Hoffer Plastics manufactures fuel tanks
13 and carburetors for Briggs. The issue in front of the Court
14 today is that there is a sophisticated forecasting an ordering
15 system whereby Briggs provides to Hoffer its requirements so
16 that Hoffer can then turn around and make -- place orders from
17 its suppliers.

18 And the issue is that, according to the forecasts
19 that have been received by Hoffer, Hoffer is in a position of
20 having to order approximately 321,000 dollars' worth of hearts
21 from its suppliers immediately. And if it fails to order
22 those parts, then in the future, there could be line outages
23 at Briggs and Stratton's manufacturing facility.

24 And so the issue, Your Honor, is that Hoffer is in
25 the untenable position of having to place noncancelable orders

1 and incur liability of approximately 321,000 dollars for which
2 it essentially seeks assurances from Briggs & Stratton so that
3 I can make sure that it will get paid and that it does not
4 incur additional liability on top of the substantial 503(b)(9)
5 and pre-petition claims that it already has.

6 So, Your Honor, also on the phone is Gretchen Hoffer
7 Farb who is the CFO at Hoffer Plastics. And we did tender to
8 the Court and to opposing counsel her declaration which
9 provides in more detail the information concerning the
10 forecasting system and a manner by which Hoffer then turns
11 around and places orders with its suppliers. And she is on
12 the line and available to address questions as necessary.

13 But, Your Honor, what we seek today first is approval
14 of hearing our substantive 365 motion and motion for other
15 relief on an expedited basis. The reason for the emergency is
16 the fact that we face either line outages at Briggs & Stratton
17 or Hoffer Plastics incurring additional liability for which it
18 does not have adequate assurances. And then, Your Honor, on
19 top of that, essentially wrapped into all of the issues as to
20 why it's an emergency are the substantive reasons why it would
21 be appropriate for the Court to compel Briggs & Stratton to
22 make a decision on assumption or a rejection of the contract
23 with Hoffer and then to provide adequate assurance of future
24 performance.

25 THE COURT: Thank you, Mr. Sant.

1 Let me respond by saying this. I did receive and
2 have read the declaration of Ms. Hoffer. Let me ask Mr.
3 Lawhorn first if he opposes the request to hear this on an
4 expedited basis.

5 MR. LAWHORN: I do, Your Honor. May it please the
6 Court? Chris Lawhorn on behalf of the debtors.

7 We do oppose the motion to hear this on an expedited
8 basis. And the reasons for it that I think are tied into the
9 substance motion itself. Your Honor, there's simply no basis
10 in which to compel -- have a hearing about a motion to compel
11 in this case. And if -- so that's the answer to your
12 question, Your Honor, is we do oppose it, yes.

13 THE COURT: Thank you.

14 Now, on the substance which Mr. Sant addressed?

15 MR. LAWHORN: Your Honor, Mr. Sant forgot to mention
16 one critical fact here, and that's in paragraph 9 of the
17 movant's motion, there is a critical fact that they point out
18 that I think is dispositive of this motion. And that is in
19 paragraph 9, it says, "If the agreement," which is the subject
20 of the motion to compel, "is in fact an executory contract."
21 And then there's a footnote. And the footnote says, "Hoffer
22 reserves all rights to assert that this contract is not an
23 executory contract."

24 Well, Your Honor, I don't know how you can move to
25 compel assumption of rejection of a potentially executory

1 contract. As a predicate fact, under 365, either it is or is
2 not an executory contract. Debtor has not taken a position
3 one way or another as to whether this is or is not an
4 executory contract. On that basis alone, Your Honor, we would
5 suggest that the motion should fail.

6 THE COURT: With respect to the motion for expedited
7 hearing, I'm granting it for the reasons that Mr. Sant
8 outlined which is does the sequence of events put Hoffer at a
9 disadvantage. It orders parts that may or may not be accepted
10 or needed. I think Hoffer is entitled to some clarity.

11 Number 2, I think you are correct. The first thing
12 we need to do is determine if this is an executory contract.
13 And using the countryman definition, why do you think it is
14 not?

15 MR. LAWHORN: Your Honor, the debtor has not taken a
16 position one way or another. I'll let Mr. Sant address it if
17 he wishes. But in the papers, the movant does not take a
18 position as to whether it is or is not an executory contract.

19 THE COURT: The two-step process that -- is it a
20 contract, and if it is, you assume it or reject it, needs to
21 be determined in my opinion rather quickly. Mr. Sant, what is
22 your suggestion?

23 MR. SANT: Your Honor, I might point out that very
24 forcefully at the very outset of this case, the debtor
25 adamantly took the position that this is a contract and that

1 Hoffer had to continue performing under the contract, under
2 very serious penalties. So I don't know if fits under
3 judicial estoppel or what. But Mr. Lawhorn was not involved
4 at the time, but the debtor has very adamantly taken that
5 position.

6 Obviously, Your Honor, if the Court finds there is no
7 executory contract, then my client, Hoffer Plastics, can
8 simply decline purchase orders. We really don't want to do
9 that.

10 But addressing the countryman definition of an
11 executory contract, certainly Hoffer does have to manufacture.
12 And certainly based upon purchase orders received, it is in
13 the process of manufacturing now. And certainly, the debtor
14 does have to pay for those orders that are purchased.

15 So, Your Honor, it appears that it is an executory
16 contract. We filed the pleading, leaving the issue open. But
17 the debtor has most certainly taken the position in written
18 letters to Hoffer, threatening them for ceasing manufacturing,
19 that this is a contract.

20 THE COURT: Do you have anything to add, Mr. Lawhorn?

21 MR. LAWHORN: I do, Your Honor. And the second part
22 of my argument is, even if this were an executory contract
23 that were subject to Section 365, Your Honor, we cite numerous
24 cases that explain the debtor is entitled to some breathing
25 space in making its decision.

1 THE COURT: No, no, no, don't go there.

2 MR. LAWHORN: That was my second argument, Judge.

3 THE COURT: It's weak.

4 Here's the point you're taking: Hurry up, hurry up,
5 I've to a sale. So don't tell me I can't hurry up, I'm
6 entitled to take my time. It's a little inconsistent.

7 MR. LAWHORN: Your Honor, I don't know the background
8 that Mr. Sant speaks of, so I can't speak to it.

9 THE COURT: Nor do I. I'm just speaking -- well,
10 here's what we'll do on this. Talk to Mr. Sant once you make
11 your decision with respect to whether this is executory or
12 not. If you decide that it is executory, then tell him what
13 your position is; assumption, rejection, or assume and assign.
14 Let's do that no later than the 25th -- pardon me, the 24th,
15 Monday, next week. And if there's a disagreement on whether
16 this is executory or not, or whether it should be assumed or
17 rejected, I'll hear that on the 25th, Tuesday, 10 o'clock,
18 this courtroom. I just think that Hoffer is entitled to some
19 clarity.

20 MR. LAWHORN: Understood, Your Honor. Thank you.

21 THE COURT: Mr. Sant, please prepare an order as I've
22 just outlined if you would, please.

23 MR. SANT: Yes, Your Honor. I will do that.

24 THE COURT: Now, Mr. Sant, is there anything other
25 than what we've talked about that we need to do today for

1 Hoffer Plastics?

2 MR. SANT: No, Your Honor. I would just add that I
3 don't believe that Hoffer Plastics will be placing orders with
4 its suppliers between now and the time that the debtor makes
5 its decision. So I just wanted to state that on the record.
6 But I do not believe there's anything else in front of the
7 Court. Thank you very much, Your Honor.

8 THE COURT: Thank you.

9 So that leaves us, Mr. Eggmann -- let me just take a
10 look here. I believe that leaves us with the 1114 motion.

11 MR. EGGMANN: Your Honor, that does indeed. And if I
12 could beg the Court's indulgence for just a moment. When
13 we're concluded with the 1114 motion, if perhaps we can take
14 up the adjourned matter, the Houlihan Lokey retention as well
15 before we move on to contested matter if that would be
16 acceptable to the Court.

17 THE COURT: Which one do you want to take up first?

18 MR. EGGMANN: Probably Houlihan since it's fresh in
19 my mind, number 17 on the agenda.

20 THE COURT: All right.

21 MR. EGGMANN: Your Honor, there are -- folks from
22 Houlihan are on the line now. And the sum and substance of
23 the basis for the adjournment was going to be testimony
24 regarding the 328 issue.

25 I was informed while I was in court that Houlihan

1 would be satisfied with the similar order as entered in E&Y.
2 They have a similar fee structure, Your Honor, with some
3 monthly components and some components that have to do with
4 the deal closing. And this is --

5 THE COURT: I'm surprised. Houlihan has been before
6 me before. And maybe you or -- well, or Mr. Willard can
7 recall the last time I reduced fees because I don't remember
8 such an occasion. Why are we making this bigger than it
9 should be?

10 MR. EGGMANN: And I guess the way I can answer that,
11 Your Honor, is it's more of a global issue. It's the way that
12 Houlihan traditionally is employed in large Chapters 11s
13 throughout the United States. And it's more of a --

14 THE COURT: So you've convinced every court in the
15 nation that we shouldn't keep time records. What else do they
16 want?

17 MR. EGGMANN: Well, Your Honor, they would ask that
18 they be employed similar terms to Ersnt & Young with the 330
19 review being limited to the United States Trustee as has been
20 done in, again, some previous cases in this Court where 328
21 employment has not been granted.

22 THE COURT: I usually don't negotiate in public, but
23 we'll go along with your suggestion.

24 MR. EGGMANN: Thank you, Your Honor. We can send up
25 a final order on that one as well, Your Honor. Thank you for

1 letting me jump back to that one.

2 THE COURT: All right. Do you want to take up the
3 1114 motion, please?

4 MR. EGGMANN: Yes, Your Honor. And that matter will
5 be handled by Nicholas Pappas with the Weil law firm as well.

6 THE COURT: Thank you.

7 MR. EGGMANN: Thank you.

8 MR. PAPPAS: May it please the Court? Your Honor,
9 Nicholas Pappas from Weil, Gotshal.

10 The next item is item number 20, the motion of the
11 debtors for an order confirming the inapplicability of Section
12 1114 of the Bankruptcy Code, or, in the alternative, approving
13 debtors' pre-petition termination of retiree benefits pursuant
14 to 1114(1).

15 Your Honor, we -- the motion is filed at docket 44.
16 And the reply is at docket 439. We received two objections to
17 the motion. One objection is by two individual retirees at
18 docket 365. The other objection was received informally from
19 the United Steelworkers.

20 I'm pleased to report that we have reached an
21 agreement with both sets of objectors which I will discuss in
22 a few minutes. As a result, the motion is now unopposed.

23 The Official Committee of Unsecured Creditors filed a
24 reservation of rights at docket 402, but there's no specific
25 objection stated in that objection. So we don't see anything

1 to respond to on that.

2 The motion is supported by the declaration of Rachel
3 Lehr at docket 44-1 and the supplemental declaration of Rachel
4 Lehr at docket 440. And Ms. Lair is available this morning on
5 the telephone for cross-examination. And at this time, the
6 debtors hereby move for admission into evidence the
7 declaration and supplemental declaration of Rachel Lehr.

8 THE COURT: Any objection to receive into evidence
9 Ms. Lehr's declaration?

10 It is received.

11 MR. PAPPAS: Your Honor, as set forth in the motion,
12 until recently, the debtors maintained health benefits for
13 approximately 450 retirees and life insurance benefits for
14 approximately 4,000 retirees.

15 Before the filing of its Chapter 11 petition, the
16 Board of Directors of the company terminated the group
17 insurance plan for retirees of Briggs & Stratton Corporation,
18 plan number 512, which provides for and governs all retiree
19 health and welfare benefits.

20 In order to give retirees the opportunity to
21 transition to new benefit arrangements under COBRA at their
22 own expense, the board decided to continue benefits until
23 August 31st, 2020. All retirees were given notice of the
24 termination immediately after the board's decision. And they
25 were also given notice of this motion.

1 In the motion, the debtors requested an order
2 confirming that Section 1114 of the Bankruptcy Code does not
3 apply to debtors' pre-petition termination of the retiree
4 benefits pursuant to the debtors' reserved right to terminate,
5 or, in the alternative, finding that the termination of
6 benefits is supposed by the balance of the equities under
7 Section 1114(1).

8 The primary basis for the motion is that the debtors
9 have an unqualified right to terminate retiree benefits in the
10 governing plan document. And that document is Exhibit A to
11 the Lehr declaration and discussed at page 9 of our motion.
12 Because of that explicit language, there's authority that
13 Section 1114 of the Bankruptcy Code does not require any
14 further process in this Court during the Chapter 11 proceeding
15 before the retiree benefit plan can terminate.

16 We cite to two key cases establishing that at page 10
17 of our motion, In re Doscocil and In re Delphi Corporation.
18 And those cases are very frequently cited for the proposition
19 that a reservation of rights allows immediate termination
20 without an 1114 process.

21 And outside the bankruptcy context, the Eighth
22 Circuit has, "Repeatedly held that an unambiguous reservation
23 of rights provision is sufficient without more to defeat a
24 claim that retiree welfare benefits are vested." And that's
25 Stearns v. NCR Corp. And that's cited at page 11 of our

1 motion.

2 As an independent basis to support the relief
3 requested, we point to the fact that the debtors terminated
4 their retiree plans prior to the Chapter 11 filing, on July
5 19th, 2020. And the words -- based on that, the words of
6 Section 1114 do not apply because, in section 1114(e), the
7 prohibition and modification of retiree benefits applies only
8 to a debtor. And that proposition, Your Honor, is supported
9 by Anchor Glass Container Corp which we cite at page 12 of our
10 motion.

11 In the alternative, as I stated earlier, Your Honor,
12 if Section 1114 applies here, because the termination of
13 retiree benefit occurred pre-petition, the Court may affirm
14 determination if the balance of the equities favors
15 termination of benefits. And we discussed pages 12 through 15
16 of our motion, the balance of the equities in this case
17 clearly favors denial of any reinstatement of the retiree
18 benefits.

19 As Your Honor know, the value of those retiree
20 benefits according to the actuaries would be over fifty
21 million dollars. And given the financial circumstances, we
22 believe and we'd argue that the balance of the equity favors
23 the relief requested here.

24 Now, as I noted at the outset, Your Honor, we did
25 receive two objections. The first received from the United

1 Steelworkers union. And as I mentioned earlier, we were able
2 to resolve that objection. And we submitted to the Court on
3 Saturday a stipulation which was signed by the debtors and the
4 steelworkers. And pursuant to that stipulation, the debtors
5 agreed to extend coverage for the union retirees from the
6 present August 31st deadline to September 30th, 2020. And the
7 stipulation also provides the union retirees will have an
8 allowed general unsecured claim against Briggs & Stratton in
9 the amount of 22,461,564 dollars.

10 The United Steelworkers otherwise consent to the
11 termination of the retiree plan and waive its objection to the
12 motion.

13 The unsecured creditors' committee was provided two
14 drafts of the final stipulation, including the final draft on
15 August 14th. We received no comments or questions about the
16 stipulation. And with that, Your Honor, subject to the
17 Court's approval of the stipulation, that would govern the
18 majority of the retirees of the debtors. And therefore, all
19 that's left of our motion are the health insurance and life
20 insurance benefits -- health insurance benefits of 200
21 retirees and life insurance benefits of 1,000 retirees.

22 I also mentioned two individuals who objected to the
23 termination, Mr. James Wier and Don Schoonenberg. That
24 objection was brought based on the fact that these two
25 individuals claim that they have individual employment

1 agreements, giving them special rights that are separate and
2 apart from the plans here. The objectors do not dispute that
3 the debtors have a right to terminate the group insurance
4 plan.

5 And although the debtors had that -- disagreed with
6 their position factually, the -- in that the -- all retirees
7 are covered by the group insurance plan, nevertheless, after
8 discussions, the parties this morning finalized an agreement
9 to resolve the objections. And that agreement provides that
10 the -- Mr. Schoonenberg would have a general -- an allowed
11 general unsecured claim of 260,000 dollars. And Mr.
12 Schoonenberg would have a -- I'm sorry, Mr. Weir would have a
13 general unsecured claim of 225,000 dollars.

14 We are preparing a stipulation that we'll discuss --
15 we will discuss with the objectors and provide to the
16 unsecured creditors' committee for comment before we submit it
17 to the Court for approval.

18 Therefore, Your Honor, based on the above, we believe
19 there's no unresolved objections to the retiree benefits
20 motion. And we ask the Court to grant the relief requested as
21 I outlined above. Unless the Court has any other questions,
22 we rest on our papers.

23 MR. VISURI: Excuse me, Your Honor. This is Michael
24 Visuri. And I requested to be heard on this matter today. I
25 am a retiree, and I do object to this motion.

1 THE COURT: On what basis do you object, sir?

2 MR. VISURI: That we have not -- that the retirees
3 have not had time to consult with legal counsel. I find many
4 of the comments and stipulations made in the motion to be
5 contestable. I think if Section 114 (sic) -- if the company
6 is confident in that Section 114 does apply, there shouldn't
7 be a -- it shouldn't delay anything giving the retirees a
8 little extra time to challenge that. There should be verbiage
9 that they can include to ensure any impacted parties that
10 that's nothing to worry about.

11 Alternatively, if it something to worry about or if
12 they're not confident, I think that's all the more reason to
13 grant retirees added time to seek counsel.

14 I also contest the pre-petition termination under the
15 contractual rights and because of the balance of the equities
16 favor that termination as we haven't had time to look at the
17 company's financials. And there are substantive discrepancies
18 in some of the reports as far as the language, the rights to
19 terminate at any time, when those were added.

20 And again, I'm not a -- I'm just a retiree. I'm not
21 an attorney. So I apologize for -- for not speaking as
22 eloquently as I could.

23 THE COURT: I think you've done a fine job.

24 Would you spell your last name for me, please?

25 MR. VISURI: Sure. V as in Victor, I-S-U-R-I.

1 THE COURT: Thank you. Are you or have you been a
2 member of the United Steelworkers union?

3 MR. VISURI: No, I am not, not a member of the union.
4 I'm part of, I guess, the other 250 employees impacted by
5 this.

6 THE COURT: Do you have a basis for disputing the
7 assertion of Briggs & Stratton that it retained the right to
8 terminate its plan?

9 MR. VISURI: Well, again, I'm not an attorney. I'd
10 like to consult one further on that. All I can state to that
11 subject at this time is -- and I don't have the exhibit in
12 front of me here. But there is a plan summary document -- and
13 I don't contest the plan summary document says that. I mean,
14 I'm assuming it does. Well, I know it does because I've seen
15 a copy of it submitted to the Court.

16 However, there is another exhibit which the employees
17 receive every year when they get to choose their benefits.
18 And the Lehr report refers to that and references the language
19 shown on that. That language is on the back page of number of
20 contact numbers in very fine print at the bottom. And that
21 was added at some time, Your Honor. I don't know when it was
22 added, but it was added after I retired because the -- I've
23 got a copy of a document -- or the same summary document
24 that's referenced that has -- does not contain that verbiage.

25 In addition, those brochures that are sent out to

1 employees have changes, important changes, from last year.
2 And nowhere could I find that additional verbiage included
3 under important changes. And the verbiage I'm referring to is
4 where the company reserves the right to terminate or modify
5 the plan at any time.

6 THE COURT: So I believe you told me that you have
7 seen -- you do not dispute that the company had the right to
8 terminate, but rather that option to terminate was not
9 expressed in the other documents. Is that what you're telling
10 me?

11 MR. VISURI: No. I'm saying I'm not disputing that
12 the plan documents states that, no. What I don't know is when
13 that was -- when that was changed and -- or when that -- you
14 know, if that has always been there or whether that was added.

15 And I would also add that other than the summary
16 that's sent out to every employee, I would hazard to guess
17 that very few employees, if any, ever requested a copy of the
18 entire plan which, you know -- which states that, you know --
19 the one with all the other legalese.

20 THE COURT: Thank you.

21 Is there anyone else who wishes to be heard in
22 respect to the 1114 motion?

23 MR. ELLISON: Yes, Your Honor. This is Josh Ellison,
24 Cohen Weiss and Simon LLP, for the steelworkers.

25 THE COURT: Yes, sir.

1 MR. ELLISON: And I'll be very brief. Just a few
2 words in support of approval of entry of the stipulation. We
3 thank the Court for hearing us. We'd also like to thank
4 debtors' counsel for working to resolve this with us.

5 We recognize this is difficult for all retirees,
6 including the steelworkers' retirees. And we were prepared to
7 object and fully litigate the motion. We don't necessarily
8 agree with the legal position that the debtors have taken
9 here. But the steelworkers and their counsel have dealt with
10 many retiree benefits motions. And we understand the
11 realities of the debtors' financial position.

12 The debtors provided us with the requested
13 information. We negotiated the settlement with our eyes open.
14 And we believe it's fair and reasonable in light of the legal
15 framework and the realities of the debtors' case. And, you
16 know, it provides the steelworkers' retirees with a bit of
17 additional time to adjust to the termination of their
18 benefits. And it stays within the DIP budget. And so we
19 would respectfully request that the Court authorize debtors to
20 entering into the stipulation. Thank you.

21 THE COURT: Thank you, sir.

22 Is there anyone else who wishes to be heard in
23 respect of the 1114 motion?

24 MR. LEVERSON: Yes, Your Honor. This is Len Leverson
25 on behalf of Jim Wier and Don Schoonenberg.

1 I would echo the comments of the union's attorneys
2 with respect to my clients. We did have a difference of
3 opinion with debtors' counsel on their situation, uniquely
4 their situation. But debtors' counsel has worked with us.
5 And we to believe that the stipulation resolving this matter
6 is in everybody's best interest.

7 THE COURT: Thank you, sir.

8 Who else wishes to be heard in respect of the 1114
9 motion?

10 Let me make the following findings, that adopting the
11 Lehr declaration as I did, Ms. Lehr testified that company
12 reserved the right to amend or end any of its benefits, in
13 whole or in part, at any time with respect to any and all
14 classes of employees, including retirees. Mr. Visuri
15 acknowledged that candidly.

16 With that in mind, I also make the finding that such
17 a termination was affected. And the Eighth Circuit has, as
18 Mr. Pappas stated, recognized the right to terminate and the
19 inapplicability, if it did, would apply 1114.

20 Accordingly, I'm going to grant the motion subject to
21 stipulation to be entered into between Mr. Wier, Mr.
22 Shoonenberg, and the debtor, as well as the stipulation
23 previously submitted to me with respect to the United
24 Steelworkers union.

25 Mr. Pappas, are you looking for just a single order

1 dealing with both the United Steelworkers, Messrs. Wier and
2 Shoonenberg, and all other parties?

3 MR. PAPPAS: Your Honor, we would propose that Your
4 Honor approve the stipulation and so order it with the
5 steelworkers. Our intent is for Mr. Wier and Shoonenberg to
6 submit a similar stipulation, separate stipulation, for them.
7 And then the -- we would need to amend the order that we
8 submitted previously slightly on the primary motion to grant
9 the relief requested while carving out those two stipulations.

10 THE COURT: So I think what you just told me is one
11 order with two stipulations.

12 MR. PAPPAS: Correct.

13 THE COURT: Let me also say that the settlement with
14 the United Steelworkers is more or less summarized in
15 paragraph 4 of the debtors' omnibus reply. I will receive a
16 stipulation from Wier and Shoonenberg and, upon receipt of
17 that, I'm going to grant the motion for the reasons I've said
18 on the record.

19 Mr. Pappas, you'll prepare both the stipulation with
20 the two individuals and then give me a proposed order, please.

21 MR. PAPPAS: We will do that, Your Honor. Thank you
22 very much.

23 THE COURT: Thank you all.

24 I believe the next matter to be heard is ordinary
25 course obligations and critical vendors, as well as foreign

1 creditors.

2 MR. EGGMANN: Yes, Your Honor. And that's matter 21
3 on the agenda. That'll be handled by Martha Martir of the
4 Weil law firm.

5 MS. MARTIR: Good morning, Your Honor. Martha Martir
6 from Weil, Gotshal & Manges on behalf of the debtors and
7 debtors-in-possession.

8 The next item on the agenda, number 21, is the
9 critical vendor order which was filed at docket number 30.
10 Your Honor entered an interim order which was filed at docket
11 number 145.

12 The debtors have received informal comments from the
13 committee requesting the same consultation rights as provided
14 to the DIP agent. And these comments were accepted and were
15 incorporated into a revised form of order, along with some
16 other changes that I will discuss in a second.

17 A formal limited objection and reservation of rights
18 was filed by Dantherm S.p.A. at docket number 356.

19 By this motion, Your Honor, the debtors are seeking
20 authority to pay the pre-petition claim, the certain vendor
21 claimants, in the ordinary course of business on a final
22 basis. These vendor claimants include critical vendors,
23 foreign vendors, and 503(b)(9) vendors. And payments of these
24 critical vendors under this motion is to the benefit of the
25 debtors' estates and preserves the going concern of the

1 business for all stakeholders.

2 Your Honor, pursuant to the motion, the debtors seek
3 authority and discretion to pay up to pay up to thirty-five
4 million on a final basis and a falling amount. For critical
5 vendors, in the motion, the debtors sought four million on a
6 final basis. However, we are now seeking a 4.4-million-dollar
7 increase to 8.4 million.

8 For foreign vendors, in the motion the debtor sought
9 10.2 million on a final basis but are now seeking a
10 4.4-million-dollar decrease to 5.8 million.

11 For the 503(b)(9) claimants, in the motion the debtor
12 sought 20.8 million on a final basis. And there is no change
13 there.

14 Your Honor, in the revised form of final order, the
15 debtors proposed to reallocate 4.4 million from the amounts
16 allocated to the foreign vendors to the amounts allocated to
17 critical vendors. And this is because since entry of the
18 interim order, the debtors have come to realize that they have
19 misallocated the total amounts available to critical vendors
20 and foreign vendors.

21 First, certain of the critical vendors and suppliers
22 who the company thought had valid and enforceable contracts
23 actually did not. Either the contract had been terminated
24 pre-petition or expired on its own terms. So they -- the
25 company still deemed them critical but had no way of enforcing

1 compliance.

2 Second, certain of the critical vendor claims were
3 misclassified. We've classified them as foreign when they
4 were, in fact, a domestic entity. But that is the basis for
5 why we are proposing to reallocate 4.4 million.

6 Notably, Your Honor, the debtors are not requesting
7 authority to increase the aggregate amount to pay the vendors
8 under the critical vendor order. There is no change to the
9 amount that the debtors seek authority to pay on behalf of the
10 503(b)(9) claimants.

11 The proposed final order, including these proposed
12 reallocated amounts, has been approved by counsel to the UCC
13 and counsel to the DIP agent. The debtor has also previewed
14 the proposed changes with the U.S. Trustee last night.

15 Next, Your Honor, I will discuss the one formal
16 objection that the debtors received. It was filed at docket
17 356 by Dantherm S.p.A. That objection is based, I think, on
18 two grounds, the first that the pre-petition amounts as
19 disclosed by the debtors in the top thirty which was attached
20 to the debtors' petition -- the amounts there they assert are
21 incorrect. And they request that their asserted claim be
22 included in the debtors' DIP budget.

23 And secondly, they request that if they are
24 considered the critical vendor, that its claims be paid a
25 hundred percent in full pursuant to the order. Your Honor,

1 this objection should be overruled. First, regarding is the
2 amount of the claim, the debtors are currently reconciling
3 this claim. I understand it's a bit of timing issue. So some
4 of the invoices were received just before we finalized our
5 papers prior to the petition date, and they just had not been
6 entered in the debtors' books and records.

7 Moreover, the debtors are filing their schedule fee
8 statements next week. And, you know, should Dantherm continue
9 to dispute the amount, you know, he's entitled to file a proof
10 of claim, just like any other claimant.

11 On the second piece, we also think Dantherm's
12 objection is premature. The debtors have not made a decision
13 regarding treatment of Dantherm's pre-petition claims. And if
14 so, you know, in what amounts, whether that would be at a
15 hundred or some lesser amount. I do note that the -- that the
16 interim order -- I'm sorry, Your Honor. Sorry. I do know
17 that the interim order provides authority but not direction to
18 make these payments. And also, the debtors have absolute
19 discretion to settle all or part of the pre-petition claims
20 for less than the face amount.

21 And so Dantherm cannot come today and seek to recover
22 the full amount of its claim. That's just -- it's just not
23 provided for the relief in the motion or in the orders.

24 Unless Your Honor has questions about the motion, the
25 debtors request that the Court enter the order.

1 THE COURT: Ms. Matir -- or Martir, how can it be
2 that the debtors have an initial list of critical vendors and
3 foreign creditors and then review it again to amend it as you
4 have identified but then call it premature when a creditor
5 says what about me? So how can it be --

6 MS. MARTIR: Well --

7 THE COURT: -- premature when you've already reviewed
8 this at least twice?

9 MS. MARTIR: Well, I mean, the objection is to the --
10 as to the amount which, again, we are reviewing and we will,
11 you know, make an offer when and if, in the debtors'
12 determination, they are considered to be a critical vendor.

13 THE COURT: But I think that the -- I think that
14 Dantherm also suggests that they qualify as a 503(b)(9) and as
15 a foreign creditor and as a domestic critical vendor. So why
16 can't that be reviewed promptly?

17 MS. MARTIR: It's being reviewed promptly, Your
18 Honor. However, it's -- you know, it's still the debtors'
19 discretion, right? They -- you know, they have a business
20 run. They have a finite number of dollars that they need to
21 allocate amongst, you know, a wide swath of vendors to keep
22 their operation going for the benefit of all creditors. So,
23 you know, the authority that we're seeking is authority but
24 not direction, right? So we, in our business judgment, are
25 determining which creditors we need on an ongoing basis and

1 that would require the pre-petition claims to be paid.

2 THE COURT: Mr. Willard, are we going back to the old
3 MCI routine?

4 MR. WILLARD: No.

5 THE COURT: Okay. Let me hear from either Mr.
6 Stevens or Mr. Stahl on behalf of Dantherm. Are either Mr.
7 Stevens or Mr. Stahl on the telephone?

8 MR. STAHL: Your Honor, this is Charles Stall. Can
9 you hear me?

10 THE COURT: Yes, I can.

11 MR. STAHL: Okay. Good afternoon, Your Honor. Thank
12 you. Charles Stahl on behalf of Dantherm.

13 Dantherm is a key supplier to the Allmand Brothers
14 entity in Nebraska that makes certain specially manufactured
15 parts. It's had a long relationship with the debtor.

16 It's listed in the thirty largest creditors at
17 640,000 dollars. It was of the understanding it would be
18 considered a critical vendor under this motion. So the
19 initial concern was to get the amount correct. In that amount
20 we've attached and filed of record the bills of laden and all
21 the invoices. And it demonstrates that the amount is over
22 three million dollars.

23 Ms. Martir was kind enough to reach out to me last
24 Thursday. And we spoke. And she explained how the debtor was
25 still trying to reconcile its books and records. And I can

1 appreciate that. And my understanding also is that certain
2 invoicing was perhaps just recently received by the debtors.

3 However, as we've set forth in the limited objection,
4 it would appear that Dantherm falls into one, if not all
5 three, of the categories of critical vendors defined. Without
6 question, Dantherm holds a 503(b)(9) claim. It's a foreign
7 supplier. It's based in Italy. It believes it's a critical
8 vendor, but I guess that is a judgment the debtors are in the
9 process of making. But there's pots here.

10 Dantherm thinks that it's definitely a participant,
11 subject to the debtors' discretion if you grant the critical
12 vendor motion, to receive compensation from the 503(b)(9)
13 fund. Whether or not it's a critical vendor or a foreign
14 supplier as determined by the debtors, it sounds like that's
15 still a moving target. It has not been finally determined.
16 And Dantherm is merely seeking to determine exactly what its
17 status is.

18 I think once those determinations are made and
19 communicated, then Dantherm can react accordingly. At the
20 very least, we would want to hopefully enter into an agreed
21 order as to the amount of Dantherm's 503(b)(9) claim, at least
22 that it would be allowed an amount, recognizing that if and
23 when you were to grant the critical vendor motion, the debtors
24 would be authorized but not to pay those amounts. But we
25 would just like to have the record on that as identified and

1 any claim that would be under the critical vendor motion
2 allowed.

3 THE COURT: Mr. Stahl, you recognize that even if you
4 are a foreign creditor or a domestic creditor, doesn't the
5 thrust of the motion as Ms. Martir said at least twice seek
6 authorization but not direction to pay which is code words for
7 in the debtor's discretion, using business judgment test, who
8 will be critical and who will not be. So how can I compel the
9 debtors to categorizes you as critical when, A, I have no
10 facts to determine that, and B, the authority they seek is
11 business judgment test?

12 MR. STAHL: Well, Your Honor, the -- as the motion
13 sets forth as I interpret it, a condition of being compensated
14 under this motion, one condition is for the supplier to enter
15 into a trade agreement that's attached as an exhibit. As I
16 understand my discussion with Ms. Martir last week, when that
17 agreements gets to a potential critical vendor, that's the
18 discussion of the (audio interference) of the critical vendor
19 motion would be paid.

20 I do recognize that it's discretionary. But I think
21 that if it's still under review, my concern is not premature.

22 THE COURT: I haven't approved anyone as a critical
23 vendor, nor will I under the motion. I think the best I can
24 do for you is ask Ms. Martir to get back to you by the 25th, a
25 week from today, and the debtor use its best efforts to

1 reconcile the alleged amount -- the amount of the claim and
2 determine in its business judgment whether it's a critical
3 vendor or not. Other than that, I'm going to grant the motion
4 and with the caveat that Ms. Martir get back to you by next
5 Tuesday, the 25th, and determine a status.

6 Ms. Martir, if you'll prepare an order for me, I
7 would appreciate it. Let me ask you this --

8 MS. MARTIR: Thank you, Your Honor.

9 THE COURT: -- Ms. Martir. If I read a proposed
10 order, why does the identity of critical vendors need to be
11 sheltered and not public information?

12 MS. MARTIR: Well, Your Honor, the debtors had many
13 global suppliers that they need for their operation. And it's
14 our view that -- sorry. Many of the claims when we're
15 entering into these trade agreements are settled for less than
16 a hundred percent. And it's -- the fear that posting these
17 amounts publicly will inhibit the debtors' ability to make
18 sales and to pay less of the pre-petition amount. And -- in
19 its negotiations with these vendors, this operation is on a
20 go-forward basis.

21 THE COURT: What about the identity of entities
22 deemed to be critical? Not the amount; the identity.

23 MS. MARTIR: I mean, I don't -- the -- sorry. Just
24 to make sure I'm answering your question correctly. The
25 identity of the persons who have received funds? Is that your

1 question, Your Honor?

2 THE COURT: Have received funds or will receive
3 funds, those who have been deemed to be critical.

4 MS. MARTIR: I mean, I think it's the same thing.
5 It's the debtors' business judgment. And it's trying to
6 negotiate deals. And these vendors talk to each other.
7 However, we do have confidentiality provisions in the trade
8 agreement. So if we settle with one, we don't want to have to
9 settle with two or three others that we might deem critical
10 but they're actually continuing to ship. Right. So by kind
11 of publicizing this, it invites people to kind of apply
12 pressure to the debtor. And then again, it slows down
13 negotiations, slows down shipping. And we're here. We're
14 trying to maximize value. And we just think that listing this
15 information publicly will slow that down.

16 THE COURT: And yet the -- you'll share the list with
17 the committee and the U.S. Trustee; is that correct?

18 MS. MARTIR: Correct, and the -- and the DIP agent.

19 THE COURT: Well, let me think about that. Please
20 prepare the order and submit it if you would, please.

21 MS. MARTIR: Yes, Your Honor.

22 THE COURT: Thank you.

23 MR. STAHL: Thank you, Your Honor.

24 THE COURT: Thank you, sir.

25 Mr. Eggmann, do you want to -- we have two remaining

1 matters, the bid procedures and the DIP financing, both of
2 which will take some time. Do you want to break now for ten
3 or fifteen minutes, or do you want to continue on?

4 MR. EGGMANN: Well, unless the folks on the WebEx say
5 otherwise, we are prepared to proceed forward, Your Honor.

6 THE COURT: Okay. Let's take up the bidding
7 procedures.

8 MR. EGGMANN: Your Honor, Thank you. It's item
9 number 22 on the agenda. This will be handled with oral
10 argument by Ms. Berkovich and the presentation of evidence by
11 Corey Berman, a litigator at the Weill law firm.

12 MR. STARK: Your Honor, I raised my -- it's Robert
13 Stark speaking on behalf of the committee. I raised my hand
14 online, but I don't know whether or not you got --

15 THE COURT: Of course. Please.

16 MR. STARK: I wanted to propose something. I did not
17 have the opportunity to discuss this with Ms. Berkovich
18 beforehand. I'm hoping she'll find in open court an
19 acceptable way to proceed.

20 The evidence and the argument that track through our
21 objections largely overlap one another. And so for court
22 efficiency, an enabling sort of one presentation and getting
23 through it all without having to segment, we were thinking the
24 best way to proceed would be to have one contested matter, get
25 the evidence in on both, and have the arguments for both

1 motions be heard at the same time. That might be -- that
2 might be some time-saving.

3 THE COURT: Ms. Berkovich, what's your response?

4 MS. BERKOVICH: Yes, Your Honor. I wish Mr. Spark
5 had proposed this yesterday. I might have been open to it.
6 But we're really prepared to proceed with the bidding
7 procedures motion first and the DIP motion second. And it
8 would be not ideal for my presentation's perspective to
9 combine them as he suggests.

10 THE COURT: All right. We'll proceed on a discrete
11 basis, one bid procedures, one DIP financing. We may just
12 have redundancy.

13 MR. STARK: Understood, Your Honor.

14 MS. BERKOVICH: Thank you, Your Honor.

15 THE COURT: Ms. Berkovich, if you would, please.

16 MS. BERKOVICH: Okay. Yes, Your Honor. For the
17 record, Monique Berkovich from Weil, Gotshal & Manges. I'm
18 here to present the bidding procedures motion on behalf of the
19 debtors. This is docket number 53. Your Honor, if it's
20 acceptable to the Court, I would like to give a short
21 introduction followed by your presentation of evidence and
22 then legal argument.

23 THE COURT: Of course.

24 MS. BERKOVICH: Thank you, Your Honor.

25 It's important to remember that this motion seeks two

1 separate orders granting different relief. The first one, and
2 the only one that's before the Court today, is the relief
3 sought in the bidding procedures order. If that relief is
4 granted today, we would be before Your Honor in a different
5 date, hopefully for weeks from now, seeking approval of the
6 second order which is the sale order. It is at that later
7 hearing, Your Honor, that we'll have to -- that it is at that
8 later hearing that Your Honor will have to make the decision
9 on whether the sale itself is in the best interest of
10 creditors.

11 I want to remind this Court that we initially sought
12 a hearing on this motion on August 11th. Your Honor was kind
13 enough to give us that date. But because of the delay in
14 getting the UCC forms and advisors retained, we did move the
15 hearing to today's date to give the creditors' committee a
16 chance to get up to speed.

17 So again, Your Honor, in the order we're seeking
18 today can really be divided into two parts. The first is the
19 bidding procedures themselves. And second are the stalking
20 horse bid protection. The bidding procedures, as Your Honor
21 knows, are primarily a schedule of deadlines or dates for
22 various events in our sale proceed; the bid deadline, the
23 auction, and the sale hearing date.

24 The debtors submit that the bid protection should be
25 viewed as insurance or at most cost of preserving our options

1 for a particular transaction. Again, approval of the
2 transaction itself is not before the Court today.

3 So let's take each of these in order, first the
4 bidding procedures. The dates that we're seeking -- the
5 primary dates that we're seeking, setting August 28th as the
6 deadlines to submit bids and September 1st as the auction date
7 and September 11th as the sale hearing date.

8 The debtors have engaged with various parties over
9 the last few weeks and made numerous changes to the bidding
10 procedures to address both informal and formal objections.
11 And these are reflected in the reply. For example, we made it
12 more explicit what has always been the case which is that
13 bidders can make partial bids for assets. We've also made it
14 explicit that credit bids are subject to the challenge
15 provisions in the DIP order.

16 THE COURT: Ms. Berkovich, I --

17 MS. BERKOVICH: Yes.

18 THE COURT: I apologize for interrupting you. One of
19 the objections specifically targeted partial bids. In your
20 response that was either -- recently filed, you did mention
21 partial bids. I want to make it clear -- or I'd like you to
22 make it clear to me, are you accepting partial bids, for
23 example, subsets of the whole?

24 MS. BERKOVICH: Yes, Your Honor. We are accepting
25 partial bids. The bid procedures make that even more clear.

1 I can tell you exactly where it is. We added an entire
2 paragraph to the bid procedure, page 11 of the blackline or
3 page 52 of docket number 461. We added a whole paragraph,
4 paragraph L, from partial bids. So it is clear. And we
5 encourage and hope that there are partial bids because it may
6 be right that two partial bids or three partial bids are worth
7 more than a bid for substantially all assets.

8 THE COURT: Okay. And clearly, I was speaking of
9 Generac Power Systems' objection. And I'll hear from them --

10 MS. BERKOVICH: Yes.

11 THE COURT: -- at a later time.

12 MS. BERKOVICH: Yes, Your Honor. We will address
13 that. We've been in close contact with Generac. And we hope
14 that they submit a bid.

15 THE COURT: Thank you.

16 MS. BERKOVICH: We've also made modifications to
17 address two concerns raised by the pension benefit guarantee
18 corporation that relate to the statement of the pension plan
19 and the bidding process. And we've made various modifications
20 to address concerns raised by the creditors' committee such as
21 agreeing to provide them notice for various decisions that we
22 make for prospective potential bidders.

23 In addition to adding more specific language and
24 partial bids, we also indicated that a partial bid could
25 include an actionable proposal for a Chapter 11 plan. For

1 example, if we get a bid on a 363 sale on asset A and then a
2 Chapter 11 plan for the remaining business, as the ad hoc
3 group has suggested, that would be -- that would work within
4 our bidding process, and also that we would provide copies of
5 each bid to the creditors' committee. A mailer consultation
6 party, we intend to be in close contact with them throughout
7 the bidding process.

8 In a moment, we'll turn to the evidence. But in
9 short, the evidence will show that these bidding procedures
10 make sense. They were designed to maximize value while
11 minimizing administrative costs. It will also show that a
12 delay that the objectors are seeking is not likely to lead to
13 either more or higher bids. And it'll also show that the
14 longer we delay, the higher the administrative costs will be
15 and the lower the recovery for creditors will be.

16 So now, turning to the evidence, we submitted three
17 declarations in support of the evidence -- I'm sorry, support
18 of the motion. The first is the declaration of Reid
19 Snellenbarger. That's at docket 53-1. Second is the
20 supplemental declaration of William Peluchowski. And that was
21 filed at docket 459. That declaration adopts and incorporates
22 by reference Ms. Snellenbarger's declaration. But Mr.
23 Peluchowski is our witness for both of those declarations.

24 And then we also have the supplemental declaration of
25 Jeffery Ficks filed at docket 460. And I will -- would also

1 like to note that even though it was not originally submitted
2 in support of this motion because we do view the DIP and the
3 bidding procedures are separate transactions, we do rely upon
4 the declaration of Jeffrey Lewis in our papers. That one is
5 at docket 36 and, again, was submitted in connection with the
6 DIP motion.

7 Mr. Peluchowski and Mr. Ficks and Mr. Lewis are all
8 in the virtual courtroom today and available for
9 cross-examination. And each was deposed yesterday in
10 conjunction with his testimony, including Mr. Peluchowski
11 being deposed on all matters set forth in the Snellenbarger
12 declaration.

13 I would like to move all four declarations into
14 evidence.

15 THE COURT: Who opposes the receiving into evidence
16 of the four declarations identified by Ms. Berkovich?

17 MR. STARK: Your Honor, Robert Stark from Brown
18 Rudnick. My partner, Jim Stoll, will be handling the
19 evidentiary portion. I don't know Your Honor's courtroom
20 procedure well enough, and I apologize. Am I holding my
21 opening if it's to be responsive to Ms. Berkovich before the
22 submission of the evidence, or should I do -- wait until after
23 her case in chief?

24 THE COURT: Let me ask you your preference.

25 MR. STARK: I have literally two minutes of opening.

1 I generally don't do them. I tend to think if Your Honor has
2 had the opportunity to read my pleadings, you know it. But I
3 just -- it might be helpful to do the two minutes now before
4 the evidence comes in.

5 THE COURT: Why don't you give me your opening? Then
6 we'll go back to Berkovich for her presentation of evidence.

7 MR. STARK: Thank you, Your Honor.

8 All I wanted to say is that we do not agree at all
9 that the bid procedures are separate and apart from the DIP.
10 They're inexplicably entwined. One cannot focus only on the
11 bid procedures in a crucible away from the DIP procedure and
12 what the DIP lenders, specifically the stalking-horse bidder
13 who's a junior DIP lender, is imposing upon and identified
14 procedure for an M&A process.

15 Our fundamental objection to the bid procedures and
16 as it relates to the DIP are the milestones. And that what
17 the evidence will show you is that the milestones are very,
18 very narrow. It is not a conclusion of a pre-petition process
19 that is reliable enough to really ensure that we had true
20 inherent value of the business.

21 We do have some small matters. Ms. Berkovich
22 mentioned about consultation rights. They were disclosed back
23 and forth as everyone stayed up all night last night trying to
24 prepare for this hearing. I'm not exactly sure where the
25 actual order stands on things like consultation rights and

1 stuff like that. I'm assuming that's being worked out. But
2 our presentation will focus from an evidentiary perspective
3 and an argument on milestones in both this contested matter
4 and the DIP.

5 THE COURT: Thank you very much.

6 Ms. Berkovich, I'll receive into evidence the four
7 declarations. If you'd like to proceed.

8 MS. BERKOVICH: Thank you, Your Honor. My colleague,
9 Mr. Berman, will be handling the witnesses.

10 THE COURT: Thank you.

11 Mr. Berman?

12 MR. BERMAN: Good morning, Your Honor. Other than
13 the submission of the four declarations that are direct
14 evidence and testimony of these four witnesses, we will make
15 them available to cross in whatever order UCC counsel prefers.
16 And then we'll do redirect if necessary.

17 (Unrelated conversations)

18 MR. BERMAN: So I'm sorry. Other than the -- we
19 submitted the declarations as our direct testimony. So
20 whatever -- barring any cross-examination from other UCC
21 counsel or anyone -- or any other objector, I will wrap until
22 redirect.

23 THE COURT: Thank you.

24 So let's hear from the committee first, please.

25 MR. STOLL: Your Honor, hello. This is James Stoll

1 from Brown Rudnick on behalf of the committee.

2 THE COURT: Mr. Stoll?

3 MR. STOLL: Thank you.

4 So if I understand what the debtors propose, they're
5 proposing that Mr. Lewis is not submitting his declaration in
6 support of the bidding procedures motion. If that is correct,
7 and I'm asking if that's correct, then I would propose that we
8 begin with the cross-examination of Mr. Peluchiwski. I just
9 want to pause there and make sure I'm correct about that.

10 THE COURT: Mr. Berman, is that correct that you're
11 not receiving -- we're not receiving the Lewis declaration in
12 support of bid procedures?

13 MR. BERMAN: I may defer to Ms. Berkovich. But I
14 believe the statement is that some of his declaration is
15 referenced in our reply in support of the bidding procedures
16 but is not per se being relied upon. But I don't want to
17 speak out of turn.

18 THE COURT: All right. Then Ms. Berkovich?

19 MS. BERKOVICH: Yes, Your Honor. The only point that
20 Mr. Lewis is needed for is that this was our only DIP
21 financing. DIP financing and bid procedures are separate,
22 but, of course, there's some overlap as Mr. Stark said. And
23 their milestones are tied together. They're the same
24 milestones.

25 So the point that he's going to make -- and if people

1 can just accept it, then we don't need him to testify -- is
2 that the -- this is our only DIP financing. And if --
3 therefore, if we don't meet the milestones in the bidding
4 procedure, we won't have access to financing.

5 THE COURT: Mr. Stoll, I'll take that that you'll
6 proceed with your cross-examination of Mr. Peluchowski.

7 MR. STOLL: Thank you, Your Honor.

8 THE COURT: Mr. Peluchowski, are you with us on the
9 video?

10 MR. PELUCHIWSKI: I am, Your Honor. How are you?
11 Good morning.

12 THE COURT: Fine. Let us administer the oath to you,
13 please, at this time.

14 (Witness sworn)

15 THE COURT: Thank you.

16 Mr. Stoll, if you'd proceed then.

17 MR. STOLL: Thank you, Your Honor.

18 CROSS-EXAMINATION

19 BY MR. STOLL:

20 Q. Good afternoon, Mr. Peluchowski -- or I guess -- yeah,
21 good afternoon. So, sir, can you describe to the Court what
22 your role was in -- on behalf of Houlihan Lokey in
23 representing the Briggs & Stratton in connection with its
24 attempts to raise capital?

25 A. Yes. I was the senior banker on the transaction. I was

1 part of the initial discussion with Briggs. I was in many of
2 the discussions with investors and potential buyers of the
3 business, have been very much day-to-day on this transaction
4 from all sorts of angles and work streams.

5 Q. Okay. And when you got involved, it was approximately
6 early April, correct?

7 A. Correct.

8 Q. And Houlihan Lokey began in earnest its attempt to raise
9 capital on or about April 10th, correct?

10 A. That is correct, sir.

11 Q. And the charge to Houlihan Lokey at the time that it was
12 retained was to attempt to locate financing for essentially
13 two purposes: one, to address what was going to be the coming
14 maturity of the unsecured notes; and two, to raise additional
15 working capital for the company. Right?

16 A. That is correct. When we began the assignment, Briggs &
17 Stratton had already what I would call a preexisting condition
18 before we even began.

19 MR. STOLL: Your Honor, may I interrupt and move to
20 strike? I'd just ask the witness to respond to my questions
21 as opposed to getting into a narrative.

22 THE COURT: I think he was trying to do so. Let's
23 listen and see what his complete response is.

24 MR. STOLL: All right. Thank you, Your Honor.

25 BY MR. STOLL:

1 Q. I'm sorry to cut you off, Mr. Peluchowski.

2 A. No worries. I was just basically laying a framework for
3 how we began the assignment which was one of the Briggs &
4 Stratton Corporation having some preexisting condition terms
5 of a high degree of leverage, a level of earnings that didn't
6 support the level of leverage.

7 So when we looked at our options, we knew we needed to
8 raise capital. But likely, it wasn't going to be a simple
9 capital raise. It was simply substituting a asset-based
10 lender. You need to find a -- also create a level of
11 financing sources that would look through the overall assets
12 and the earnings and look at the opportunity the business also
13 provides. So we had to find a very robust group of lenders,
14 investors potentially, to look at the business.

15 Q. And the -- so the process, as I understand it, was that
16 you and a team that consisted of at least Mr. Lewis and Mr.
17 Snellenbarger went out and contacted certain potential sources
18 of interest in the idea providing capital to Briggs &
19 Stratton; is that fair?

20 A. It was a group of individuals from -- including the
21 people you mentioned, but it also included others from our
22 capital markets team as well as all the support people. It
23 was a fairly sizeable deal team looking for capital. And it
24 wasn't just limited to -- like I said, it wasn't just limited
25 to financing of simple source. It needed to be a sufficiently

1 wide group of investors who could look at financing the
2 business with all the permutations it had to deal with,
3 including the -- an appending maturity of the bonds as well as
4 (indiscernible) lien of the ABL as well.

5 Q. Okay. And in the course of preparing -- or conducting
6 this exercise of looking for capital, Houlihan created and
7 disseminated certain documents to the various potential
8 sources of interest; is that fair?

9 A. That is correct. We created an offer memorandum,
10 investor presentation that could be used to educate the
11 potential investors, still knowing that we still had to
12 effectively kind of put forth a set of projections and the
13 budget for the balance of the year as well which was not yet
14 prepared when we started our marketing process at the time.

15 Q. And then internally, if you will, and with respect to its
16 interactions with the debtor, Houlihan also created some
17 documents that reported to the debtor on the source of -- or
18 on the results of this attempt to raise capital; is that fair?

19 A. We gave multiple updates to the company as to the status
20 of investor response and -- and their interest levels over --
21 over the course of our engagement, even today.

22 Q. Okay. And I just want to, if I could, identify now with
23 you three of these documents because we're going to refer to
24 them as we go on.

25 MR. STOLL: So first of all, Your Honor, I hope you

1 have this binder in front of you. It should be listed as
2 Exhibit 17 in your binder. I'll just stop and make sure that
3 we're there.

4 THE COURT: The business plan?

5 MR. STOLL: The investor presentation, yes, business
6 plan dated May 23.

7 THE COURT: I don't see a date on it.

8 MR. STOLL: It should be on the bottom left side of
9 the cover page, Your Honor, where it says Project Badger. And
10 underneath that it says May 2020.

11 THE COURT: At tab 17 you said?

12 MR. STOLL: That's what I have, yes, tab 17, Your
13 Honor.

14 THE COURT: Mr. Willard, what is your tab 17?

15 This is the business plan of Briggs & Stratton,
16 privileged and confidential, but I don't see a date on it.

17 Do you have a date on yours?

18 MR. WILLARD: It's the Briggs & Stratton business
19 plan, privileged and confidential. Perhaps I could hold up
20 the document to the video.

21 THE COURT: Yes.

22 MR. WILLARD: And then --

23 THE COURT: Where is --

24 THE CLERK: To this camera.

25 MR. STOLL: No, not the right one. I see. I see

1 what you have here. Yeah, that's not -- that's not what I --
2 yeah, I see it. Okay. So the two other documents -- we'll
3 just pass on that one for the moment.

4 BY MR. STOLL:

5 Q. And when we look at -- just have you identify -- the
6 first one is -- excuse me, the exhibit marked as Exhibit 22.

7 UNIDENTIFIED SPEAKER: Will you present that on
8 screen?

9 MR. STOLL: Do you not have that available to you,
10 sir?

11 THE COURT: I think the request was would you put it
12 on the screen, sir. We'll do it here in St. Louis.

13 MR. STOLL: Yep. This is the Briggs & Stratton
14 pre-petition process overview dated August 2020.

15 UNIDENTIFIED SPEAKER: Thank you.

16 THE COURT: Thank you, Mr. Willard.

17 Q. Do you recognize that document, sir?

18 A. Yes.

19 Q. And am I correct that that document was prepared by
20 Houlihan Lokey to report on the results of its process in
21 searching for capital for the company?

22 A. One of the presentations, yes.

23 Q. Perfect. And then finally, before we get in a little
24 bit, I'd like you to -- if you could, sir, for the Court's
25 benefit, look at tab 18. It should be Exhibit 18 in the

1 binder.

2 MR. STOLL: Mr. Willard is going to perhaps -- is
3 going to put that up on the screen if that's necessary.

4 THE WITNESS: Yes, please.

5 MR. STOLL: Exhibit 18. You're going to have to pull
6 it back just a little bit because it's so blurry.

7 THE WITNESS: Thank you. No, I know what it is.

8 Thank you.

9 MR. STOLL: Okay. This is --

10 THE COURT: Thank you.

11 Q. -- an internal Houlihan Lokey document that tracked the
12 contacts with potential interested parties; is that correct?

13 A. That is correct.

14 Q. Okay. And okay. So we'll come back to that in a second.

15 So as I understand the process that the company went
16 through -- or that Houlihan went through on behalf of the
17 company, was the first set out, as you said, to weigh capital
18 for the purposes of adjusting the unsecured loans and working
19 capital for the company, right?

20 A. That was the initial effort. But --

21 Q. Right. And that --

22 A. No. Sorry. Just if I can finish, please.

23 Q. Sure.

24 A. Knowing that the likely amount of capital, the quantum of
25 capital needed -- and if you examine the level of indebtedness

1 the company had, that investor group included many what I call
2 nonlending investors, so investors that would basically be
3 interested in the equity or in the company itself because the
4 quantum of capital of needed as well as the overall leverage
5 the company had.

6 Q. Right.

7 A. So in our initial effort, we included investors that were
8 not just simply lenders, refinancing sources, but investors
9 that would be interested in more than just a piece of debt.

10 Q. So just -- if I can just stop here and ask you, as you
11 sit there in your virtual witness chair, sir, am I right that
12 you do not have in front of you any exhibits at all?

13 A. I do not have in front of me any exhibits at all.

14 MR. BERMAN: Again -- and, Your Honor, I can -- I can
15 try to facilitate -- I can try to share my screen and pull it
16 up, or if you have somebody on your team, Jim, that can do the
17 same. Maybe that's the way to facilitate it. At least, I can
18 start with the first exhibit you want to examine him on. And
19 then maybe someone on your team can get it going. Is that
20 something you want to try?

21 MR. STOLL: Sure, because it'd be hard to do this
22 without the ability to share the exhibits.

23 MR. BERMAN: Understood. Give me one second, okay?

24 (Pause)

25 MR. BERMAN: And I'm not sure if this possible, but

1 maybe the fact that I'm sharing it, if I can hand off control
2 of it to someone on your team. I don't know if that works,
3 but we can try that.

4 MR. STOLL: Control would be great if it's possible.

5 MR. BERMAN: No promises. But if I get the file
6 fixed in time -- because it's a big file. But this should
7 facilitate, well, this motion and the DIP motion, everything.
8 So worth it.

9 MR. STOLL: Maybe I can ask Andrew Carti (ph.) who is
10 on your line, I believe, from our office -- Andrew, if you can
11 take control of sharing the document if Corey is able to hand
12 that off.

13 I apologize for the glitch here, Your Honor.

14 THE COURT: Give me just a minute, please.

15 Doug, is there a way we can put documents -- do
16 documents by the camera?

17 THE BAILIFF: Do we have the documents?

18 THE COURT: We have the documents here, yes.

19 THE BAILIFF: On the computer?

20 THE COURT: No. They're in paper form.

21 THE BAILIFF: Just in paper form.

22 THE COURT: Yeah.

23 THE BAILIFF: It doesn't matter --

24 THE COURT: If we put a chair --

25 THE CLERK: The thing is in the way.

1 THE BAILIFF: Yeah.

2 THE COURT: If we put a chair in front of the camera,
3 would that help?

4 THE BAILIFF: We can try it that way, sure.

5 THE COURT: Please.

6 Let's do this. Let's take a ten-minute recess. And
7 we'll come back in ten minutes and see if we figured out how
8 to display the documents by video. Thank you.

9 MR. BERMAN: Your Honor, this is -- this is Corey
10 Berman.

11 Well, another option is we are going to send these to
12 the declarant. So maybe they can pull them up themselves.
13 But we'll try that as well.

14 THE COURT: Okay. Thank you.

15 (Recess from 11:52 a.m. until 12:09 p.m.)

16 THE BAILIFF: Your Honor, we are back on the record.

17 THE COURT: Thank you.

18 Please be seated.

19 Are we now in a better position to proceed with
20 cross-examination?

21 MR. STOLL: Your Honor, I -- there was a little
22 confusion here. I think --

23 MR. BERMAN: (Indiscernible).

24 MR. STOLL: I'm sorry, Your Honor. This is Jim Stoll
25 speaking again on behalf of the committee.

1 THE COURT: Yes, sir. If you'd proceed.

2 MR. STOLL: Can I just make one comment or make an
3 inquiry before we do, Your Honor?

4 THE COURT: Yes.

5 MR. STOLL: My understanding now is that the
6 witnesses actually do have the exhibits in their possession.
7 If that is accurate, then we do not have to have the exhibits
8 up on the screen. We can -- you have them in your binder.
9 And if the witnesses have them, we can just proceed without
10 having them displayed on the screen.

11 If that's not the case, then we can display them on
12 the screen I think.

13 THE COURT: Mr. Peluchowski --

14 THE WITNESS: This is Peluchowski speaking. I do
15 have it via PDF. It's obviously very expansive documents.
16 It'd be helpful to give us a little bit of time to get to the
17 right place. But I do have it via email now.

18 THE COURT: Thank you.

19 MR. STOLL: Yes. And just to try to make this
20 easier, the only three documents that I believe we're going to
21 work with, subject to something happening, is your
22 declaration, sir, which is Exhibit 3 in the judge's binder,
23 exhibit --

24 THE WITNESS: What page?

25 MR. STOLL: Well, I -- we'll --

1 MR. BERMAN: I'll find it.

2 THE WITNESS: Yeah. We'll need to go and page
3 through it, but I -- I should have it here.

4 MR. STOLL: All right. Exhibit 18 which is the bid
5 tracker document that we just talked about briefly.

6 THE WITNESS: Yes, I have that.

7 MR. STOLL: And Exhibit 22 which is the August 2020
8 pre-petition process overview that we also talked about
9 briefly.

10 THE WITNESS: Okay.

11 BY MR. STOLL:

12 Q. So if we have those -- and if you can pull up Exhibit 22
13 now which is the August 2020 pre-petition process overview, we
14 can start there.

15 A. I'm getting to it. It's toward the -- okay. I have it
16 now.

17 Q. All right. So if you could turn to page 4 of this
18 exhibit. There should be a heading at the very top that says
19 pre-petition process overview on --

20 A. Correct.

21 Q. -- page 14 -- page 4.

22 MR. STOLL: Excuse me, Your Honor. My screen is
23 displaying documents. I don't know who has control of it.

24 THE COURT: We'll take the -- it's page 4.

25 MR. STOLL: Whoever has the screen up, it's -- we're

1 looking at a different document.

2 THE COURT: Just a minute, please.

3 MR. STOLL: I don't know what's being looked at.

4 THE COURT: Do you have Exhibit 22 by chance, Doug?
5 Yeah, that's where they are. Page 4 of 22. No, and then page
6 4 of that. If we can --

7 MR. STOLL: I apologize, Your Honor. I'm not sure
8 who's controlling this. So I'm --

9 THE COURT: We're trying. Just --

10 MR. STOLL: That's fine. Thank you, Your Honor. I
11 just didn't want to slow you down.

12 THE COURT: Okay. Doug, why don't we do this? That's
13 all right. Why don't we ignore the screen? The witness has
14 Exhibit 22 in front of him, as do I. Let's proceed.

15 MR. STOLL: All right. Very good, Your Honor. Thank
16 you, Your Honor.

17 BY MR. STOLL:

18 Q. Okay. So, Mr. Peluchowski, page 4 of Exhibit 22 is
19 Houlihan Lokey's recounting of the pre-petition process that
20 it went through in order to end up with the result that it
21 finally ended up with with the stalking-horse bidder; is that
22 fair?

23 A. That is fair.

24 Q. Okay. And so I just wanted to walk through this a little
25 bit so we understand exactly what Houlihan Lokey did during

1 this process. As we already said, Houlihan Lokey was
2 originally retained to raise capital for the company's
3 long-term business plan, to refinance the senior notes, and to
4 provide a pay down of the ADL? Is that fair?

5 A. That is correct.

6 Q. And that's what the first bullet point on page 4 of
7 Exhibit 22 says, right?

8 A. That is correct. But I do think it's important that,
9 like I said earlier, to set the context of that effort and for
10 the -- for the -- for the Court's benefit, this is -- this --
11 this -- to share some -- some general statistics, this is
12 pre-pandemic. This is as of December quarter numbers. As I
13 said, Briggs & Stratton had a preexisting condition. Their
14 overall leverage, both between ABL, the bonds, as well as the
15 pension liability, it kind of was a EBITDA-to-debt level of
16 almost fourteen times leverage.

17 So when we looked at refinancing this deal, it was going
18 to be a very (indiscernible) level of investors because of the
19 amount of leverage which only increased is of the March
20 quarter.

21 Q. Okay. And that was the charge. The charge was to try to
22 raise capital for the purposes articulated in the first bullet
23 point on page 4, correct?

24 A. Yes.

25 Q. And then Houlihan then sent out solicitations to

1 companies that it thought it might be in a position to provide
2 that financing, correct?

3 A. That is correct, with the understanding of my overall
4 perspective that nay company looking to provide financing had
5 to look through a business that was fourteen times -- and in
6 fact, as of the March time when this went to market was, you
7 know, over twenty times the debt-to-EBITDA leverage.

8 Q. Understood. And at the time that this process was
9 underway in April, that was when, of course, the COVID
10 pandemic was beginning to be felt throughout the country,
11 correct?

12 A. Is that a question about the pandemic? I think the --
13 the answer is -- I think the -- the -- the answer is yes. I'm
14 not an expert on the pandemic, but I would say that that the
15 answer yes in April.

16 Q. And so the -- Houlihan went out at this point, but it
17 does not provide the company's business plan to its initial --
18 the initial contacts that it made, correct?

19 A. The business plan was not finished relative to its
20 budget. So when we went out, it was just to solicit interest
21 levels based on the public information that was available.
22 Obviously, based on the leverage I just kind of recited to
23 you, no traditional lender would be interested in stepping in
24 a position of that much leverage. And this all but had to be
25 a very specialized financing source who's looking through

1 various value of the business, looking at various -- any value
2 of the business.

3 Q. Now, at the same time that Houlihan was beginning this
4 process, Houlihan was also assisting the company in -- or
5 negotiating amendments to its ABL facility, correct?

6 A. That's correct. There was a -- the ABL required a
7 certain amount of liquidity. There is also a pending bond
8 interest payment as of June 15th. It was also kind of looming
9 ahead of us. And if you think about the grace period on that,
10 that kind of catches it. So you have a little time line of
11 the company's ability to finance itself as well as finance it
12 (indiscernible) indebtedness.

13 Q. And the ABL amendment that was initially introduced, that
14 was assisted by Houlihan Lokey with the fourth amendment,
15 correct?

16 A. I'm not sure which number it was.

17 Q. Okay. And if you look at the second bullet item on page
18 4, that bullet item describes the fact that eight new receipts
19 were received on the 15th, and satisfaction of the of the
20 milestone and the fourth amendment to the ABL facility,
21 correct?

22 A. That is correct.

23 Q. SO the ABL -- the amendments to the ABL facility were
24 creating certain timelines by which the company had to act in
25 order to -- with respect to its attempt at raising capital; is

1 that fair?

2 A. It's important to know what that fourth amendment was,
3 sir. And it was to show that there was proposals that
4 potentially could satisfy the fourth amendment but not
5 actually have to satisfy the amendment relative to action
6 ability in the proposals. So these were indications of
7 interest as oppose to actionable items in which later would be
8 due diligence because it was for the pending business plan.
9 So the answer is you have to answer it thoughtfully because it
10 did satisfy it, but it was also not actionable yet to actually
11 result in its financing.

12 Q. Right. I understand that. Okay. And I appreciate that
13 answer.

14 And if you were to turn to page 14 of Exhibit 22, page
15 14, 15, 16, and 17 when you get there, page 14, 15, 16, and
16 17.

17 A. Yes.

18 Q. Those pages summarize the various proposals received on
19 May 15th from the entities identified which were, as you said,
20 indications of interest; is that right?

21 A. That is correct.

22 Q. And these proposals were for various types of financing,
23 subject to further diligence once the company's business plan
24 was assumed, correct?

25 A. I think that understates the -- the actionability of

1 these proposals. This is based on our -- our overall
2 investor, you know, deck. But the reality is, until they got
3 the business plan and show the actual cash flows and demands
4 for capital, these are -- these are effectively just, you
5 know, pieces of paper at this stage.

6 Q. Okay.

7 A. But it did satisfy -- it did satisfy the ABL which we
8 needed it to satisfy because of date requirements.

9 Q. Okay. Well, if you can turn back to page 4 of Exhibit
10 22.

11 A. I'm there.

12 Q. Okay. And if we -- we look at the third bullet point on
13 that page. That is where we -- Houlihan recounts that it
14 subsequently distributed the company's business form to
15 potential investors on May 18th. Do you see that?

16 A. I do.

17 Q. Okay. And furthermore, that Houlihan requested of these
18 investors that they provide term sheets to the company by May
19 29th; is that fair?

20 A. That is fair.

21 Q. And then the two things that it identified as what the
22 term sheets should provide solutions for was raising 100 to
23 150 million dollars of incremental liquidity to fund the
24 long-term business plan of the company, correct?

25 A. That is correct.

1 Q. And the -- and the 195 million dollars of unsecured notes
2 and related spending maturity; is that fair?

3 A. That is fair. I would say there's an inclusive
4 additional liability that also needs to be understood here.
5 And that was the tension liability of over 200, 225 million,
6 give or take. There was initial liability that when someone
7 is looking at investing in this company have to be thinking
8 about how were they going to invest in this with the -- with
9 the pension liability as well on the unsecured -- the senior
10 unsecured notes.

11 Is someone on the line? I'm sorry.

12 MR. STOLL: Yeah. Can someone mute their phone?
13 There's some background talking.

14 Q. Okay. And then on the 29th of May, the company did
15 receive eight proposals from various investors, correct?

16 A. It did.

17 Q. And those proposals are set forth in summary fashion on
18 pages 12 and 13 of Exhibit 22; is that fair?

19 A. Yeah. It's worthwhile discussing each of these because,
20 again, from my earlier discussion in terms of the overall
21 leverage of the company from a -- from the quantum of -- under
22 the ABL which included leverage on -- you know, on fixed
23 assets as well as intellectual property. And then you look at
24 the quantum of debt from the unsecured notes as well as the
25 pension, it became apparent -- and also, based on the earnings

1 of the business even pre-COVID, it became apparent that any
2 investor investing here would be effectively owning the
3 business. It still had a corporate company that had public
4 shareholders, showing a market value of less than a hundred
5 million as well.

6 So it was a -- it was clear that all these investors were
7 looking at this business, looking at the quantum of capital
8 needed to clear just the ABL, in looking at the earnings of
9 the business, whether it's pre-COVID or if during, clearly,
10 they all had a -- basically a changed control vis a vis a
11 bankruptcy filing of the quantum of capital that was required.

12 MR. STOLL: Your Honor, may I ask for an instruction
13 for the witness to answer my questions as opposed to a
14 question that he wants to answer?

15 THE COURT: I think he's heard you. Mr. Stoll, if
16 you'd like to proceed.

17 MR. STOLL: Yes, sir. Thank you, Your Honor.
18 Q. Okay. So and then following the receipt of the leads --
19 proposals from these various prospective investors, there was
20 a period of negotiation that went on from May 29th to
21 approximately June 25th; is that right?

22 A. Sorry. I mean, what --

23 Q. So you --

24 A. -- was the question exactly?

25 Q. There was a -- if you turn to paragraph -- or to page 4

1 of the -- Exhibit 22 --

2 A. Yes.

3 Q. -- you detail the one item -- you can read the words from
4 May 29th to June 25th that --

5 A. Correct.

6 Q. -- investors performed -- investors performed due
7 diligence in advance of submitting final proposals, correct?

8 A. That is correct.

9 Q. And you've detailed a number of hours of calls and a
10 number of questions asked by the various investors, correct?

11 A. That is correct.

12 Q. And the total number of calls and site visits identified
13 in the first sub-bullet there, forty-five-plus hours and six
14 site visits, those relate primarily to discussions with three
15 parties, correct?

16 A. Well, kind of related to all the parties. But what's
17 your specific question about the three? I assume --

18 Q. Now, the three were --

19 A. -- be talking about KPS, Atlas, and JPMorgan.

20 Q. KPS and Atlas, yes, and JPMorgan, right. So the bulk of
21 the calls that you had and the bulk of the site visits that
22 you list related to interactions with KPS Capital Partners,
23 correct?

24 A. KPS and Atlas, correct, because they provided from the
25 prior indication of interest that they could get to a

1 valuation that least was able to fund the business and
2 capitalize business going forward. So we spent time with them
3 versus the other folks that basically provided indications
4 that were, frankly, not really actionable or solving the
5 company's capital needs or valuation.

6 Q. And so as I understand it, the -- as a result of
7 receiving ultimately, first of all, the May 29th proposals and
8 discussing those proposals and introducing those proposals,
9 would the parties -- the focus of the effort changed from
10 merely raising capital to satisfy the company's need to
11 entering into a transaction that would result in a change of
12 control and ownership as a result of --

13 A. I think that unfairly characterizes the process, sir. I
14 think that we started with the -- it's an evolution of a
15 process, of the financing process. And clearly, both Atlas
16 and KPS, their quantum of value they attributed to the company
17 in their valuation of the 550 million was sufficient enough to
18 work with them. It wasn't that we were precluded from working
19 with anybody else who wanted to finance it. It just didn't
20 work.

21 So to suggest that it was limited to, you know, just M&A
22 is not really true or fair. It was just that we were limited
23 to the parties that were provided actionable, you know,
24 proposals we could work with that would solve the capital
25 needs of the business as well as what the bank's requirements

1 as well as the timeline on the bond interest payments as well
2 as the grace period associated with that.

3 Q. Okay. And so -- and then ultimately the company decided
4 to proceed forward with KPS Capital; is that fair?

5 A. That is true, but it wasn't done in a vacuum. It was
6 done based on, you know, judgment. I've been in this business
7 for twenty-seven years. I've seen Atlas behave in auction
8 processes. I've seen KPS behave in auction processes. I've
9 concluded over 200-plus deals. I run a very sizeable group.
10 So I see a lot of deals every year. And so I have a good
11 judgment as to how serious people are prepared to proceed to
12 transaction.

13 It was apparent -- that Atlas though was interested, it
14 was apparent that KPS was putting their -- you know, their
15 back into it to get to a position to win the -- to win the
16 day. And so that's why the decision was made to go with KPS
17 and -- as opposed to Atlas because we had less conviction that
18 Atlas would get there versus KPS which ended up being correct
19 because Atlas decided not to participate once KPS was signed
20 up and signed the deal. So it was good judgment on our part
21 as well as evidence of Atlas's lack of participation in this
22 current overbid process.

23 Q. Okay. And, sir, during the first three weeks of July,
24 the company negotiated the stalking horse agreement and
25 related DIP proposals from KPS; is that correct?

1 A. It's worth -- can I spend just a few minutes just in
2 terms of M&A process and preparation? Because I do think the
3 company and both advisors, both Weil, Houlahan, and ALI (ph.),
4 as well as others, were working very hard to actually get
5 information to provide to KPS during this period of time.

6 So some of the time that it took to get -- to get either
7 prepared -- as you know, M&A deals are quite complicated.
8 There's quite a bit of information. There's schedules.
9 There's a host of actors here. Brigs & Stratton is a
10 billion-and-a-half-plus-dollar business with global
11 operations. So understanding how the international works, all
12 of the schedules attached to it, all that required preparation
13 and time and time to put that together.

14 So part of that is not necessarily negotiating the kind
15 of purchase agreement, but part of it was just preparing and
16 providing information which, frankly, everybody then would get
17 the benefit of it because they could see it, including the
18 schedules. So I just want to kind of -- like kind of provide
19 to the Court that it's a complicated process. And some of the
20 time is -- it wasn't just negotiating with KPS. It was
21 actually preparing information that goes into a purchase
22 agreement.

23 And then you -- the second part of your question was
24 on -- I think you asked about the DIP. KPS also volunteered
25 to participate in the DIP as well.

1 Q. Okay. And during the time period in July that you're
2 going through both the negotiation and all the other things
3 you just identified, the company agreed to a no-shop clause
4 with the -- with KPS; is that fair?

5 A. Yeah. In order to induce KPS to basically commit the
6 resources, time, and attention, a very kind of global
7 business, it required a period of exclusivity which
8 prevented -- which allowed us to be able to (audio
9 interference) KPS. And frankly, I think the bandwidth of the
10 company was, you know, sufficiently that KPS was probably, you
11 know, the one we need to focus on in light of what the other
12 alternatives, which wasn't as confident -- it wasn't as --
13 that didn't have as much conviction, like with Atlas, bid as
14 well.

15 Q. Okay. And that exclusivity period lasted throughout the
16 month of July and up and to the point of the filing of the
17 bankruptcy petition?

18 A. I think it was three weeks to be precise.

19 Q. Okay. Okay. And We touched on it already, but the
20 process of locating the financial investor unfolded, one of
21 the things that happened was the company was jointly looking
22 for -- the company was looking for a financial solution,
23 correct?

24 A. The company was looking for a solution. As I said, it
25 had substantial leverage. And it needed a solution.

1 Q. Right. And ultimately, that solution that materialized
2 with the proposals in June was for whoever was going to
3 ultimately be the winner, and it ended up being KPS Capital,
4 was to provide DIP financing with the right to credit bit and
5 ultimately potential become a stalking horse with regard to
6 the company; is that fair?

7 A. No. I don't think that is -- I don't think that's
8 accurate. We definitely had two different kind of warpaths
9 relative to the -- relative to the sale to KPS and relative to
10 the DIP financing.

11 What was interesting about being a public company,
12 Briggs, that they didn't really have the DIP lined up.
13 Frankly, we though, frankly, incumbent ABL lenders would have
14 been the DIP. They -- they ended up not really wanting -- not
15 really being effectively actionable. And we ended up -- ended
16 up going to KPS. But we negotiated with JPMorgan the DIP
17 terms. So in some ways, we get the benefit of both. We'll
18 get the benefit of a DIP terms and conditions with, you know,
19 independent -- or any ABL lenders and yet had the benefit of
20 also typing up KPS with the substantial DIP investments which
21 will lock them into a transaction as well. So it really
22 benefitted kind of -- we had really the benefit of both
23 worlds.

24 Q. All right. So, in fact, originally as the process was
25 winding down in June and their proposals were received, the

1 company decided that the JPMorgan DIP proposal was the best
2 proposal economically for the company and decided to go with
3 that; is that fair?

4 A. They wanted to pursue the JPMorgan DIP proposal as I
5 suggested. We thought the incumbent lenders would have
6 been -- I don't think it's a fair characterization to say the
7 process was winding down. I think it was just -- not sure
8 what that was referring to. But the company initially pursued
9 with the incumbent lenders to be the -- the DIP.

10 Q. Right. And because the company believed that the
11 JPMorgan proposal was the economically superior proposal,
12 correct?

13 A. Yeah. The JPMorgan proposal had some additional -- it
14 had some what I call interesting elements that were less
15 expensive than what KPS offered. But it was always the intent
16 that -- you know, it was always our thought that JPMorgan
17 would -- would be there from a DIP perspective. And frankly,
18 there was a boards perspective on it too. I think it was
19 somewhat surprising when JPMorgan didn't really kind of become
20 an incumbent lender. It didn't come and provide the DIP in
21 some ways and potentially put the company in jeopardy with --
22 a lot of people's livelihood and jobs and all the things that
23 go with it, that they would have -- they would have played it
24 so loose relative to the commitment to the -- the DIP.

25 Q. You're familiar with Mr. Lewis's declaration that was

1 submitted in this case on behalf of the debtors in support of
2 the DIP motion, aren't you, sir?

3 A. I am.

4 Q. And you're familiar that at paragraph 28 of his
5 declaration, he says that the JPMorgan DIP financing proposal
6 offers superior economic terms to any of the other proposals
7 received by the debtors, correct, sir?

8 A. I'm correct he -- that is true. Some of the terms were
9 superior, were better.

10 Q. Okay. And the company indeed decided that that was the
11 proposal it would proceed with, right?

12 A. Assuming it was actionable. So that's your -- that's
13 your fallacy of your question. The reality is the JPMorgan
14 proposal really wasn't actionable.

15 Q. Okay. Well, I'm --

16 A. So it's interesting -- well, I mean, I think this is
17 fascinating that, you know, we can talk about the theoretical
18 element of it, but the reality is that they weren't there.
19 And so I think what's interesting is that we -- we're able
20 to -- you know, basically, the company is able to kind of get
21 the terms of the JPMorgan proposal, albeit it wasn't really
22 there. And it really put KPS into those shoes.

23 MR. BERMAN: Your Honor, this is Mr. Berman. We put
24 up Mr. Peluchowski for cross on what was contained in his
25 declaration. He's not supporting the DIP motion. And so some

1 of these questions, I think, are getting far afield from
2 what's actually in his declaration.

3 MR. STOLL: Your Honor, this is Jim Stoll.

4 THE COURT: I'll be mindful of the questions. Let's
5 proceed.

6 MR. STOLL: Thank you, Your Honor.

7 Q. If you could turn to page 11 of the Exhibit 22, sir.

8 A. Hold on. Got it. Okay.

9 Q. So page 11 is entitled the June 29th proposals and it's
10 entitled DIP financing proposal. Did you see that?

11 A. I do.

12 Q. And it lays out on that page the proposal from JPMorgan,
13 KPS Capital, and Atlas Holdings, correct?

14 A. Yes, sir.

15 Q. And you can -- if you look at the proposals, it shows
16 the -- under the category facility, it shows the amount that
17 each party was proposing to offer at that time, right?

18 THE COURT: Mr. Stoll, these, as you've identified,
19 are DIP proposals. I'm trying to hear the motion on bid
20 procedures.

21 MR. STOLL: And, Your Honor, I'm just trying to set
22 the groundwork for how it rolled up into the current
23 stalking-horse bid and a bid procedures. And this is just
24 part and parcel of the negotiation that led to that ultimate
25 decision. So I'm just trying to lay the foundation to ask

1 that, you know, question of how they got to where they got to.

2 THE COURT: Please proceed.

3 MR. STOLL: Thank you, Your Honor.

4 Q. And so I think you alluded to this. But at least with
5 respect to as you walk down the categories on page 11, we can
6 see that the JPMorgan pricing was less expensive than that
7 proposed by KPS and Atlas. Do you see that under the pricing
8 column?

9 A. I do, sir.

10 Q. And the fees that JPMorgan was proposing, at least the
11 ones identified, were less expensive than the other two
12 proposals, correct?

13 A. Correct.

14 Q. And the maturity date of the DIP proposal that was being
15 proposed by JPMorgan was nine months as compared to 120 days
16 for KPS and October 15th for Atlas, correct?

17 A. Very true. Though I would, again, argue that the
18 JPMorgan proposal is a bit fictitious because it didn't really
19 materialize to be actionable. But keep on going.

20 Q. Okay. And so but the company did proceed with
21 authorizing JPMorgan to go out and attempt to syndicate its
22 DIP proposal, correct?

23 A. Well, actually, to step back, we actually asked JPMorgan
24 and all the lenders to basically commit to it and underwrite
25 to it without syndication. They refused to do that.

1 As a way of background, what's interesting is on the exit
2 financing, JPMorgan is not part of the exit financing for the
3 KPS offer which is interesting.

4 But we asked them to -- we asked them to fully commit to
5 it. They declined. They said, no, we have to syndicate. And
6 so we said, fine, go ahead and, you know, please do so. But,
7 you know -- keep on going with your questions.

8 Q. Okay. If you could turn back to page 7 of Exhibit 22.

9 A. Yeah, I'm here.

10 Q. Okay. On the third bullet item on the right side is page
11 7. In fact, describe very briefly the fact that Briggs
12 originally negotiated the terms of the DIP filing with JPM to
13 commence the best efforts syndication the week prior to the
14 Chapter 11 filing, right?

15 A. Yes.

16 THE COURT: Mr. Stoll --

17 MR. STOLL: Okay. And --

18 THE COURT: -- I'm going to ask your next question be
19 related to bid procedures. I've given you enormous latitude.

20 MR. STOLL: Right.

21 THE COURT: Let's steer back to the motion that is
22 before us.

23 MR. STOLL: Okay, Your Honor. I'm trying to do that.
24 I appreciate the latitude.

25 Q. And so this is a week before the Chapter 11 filing, so

1 the week of July 13th to July 20th, right?

2 A. Yes.

3 Q. Okay. And it was during that week that KPS offered to
4 provide the full commitment to the DIP loan, and then it
5 became the DIP lender as well as the stalking-horse bidder,
6 correct?

7 A. I think it's worth kind of describing kind of how KPS
8 stepped into the -- stepped into the DIP relative to the
9 JPMorgan's kind of best efforts syndication process because it
10 wasn't our initial intent. Our initial, you know, effort was
11 to get JPMorgan to do it. It wasn't until they failed to
12 really give any confidence they can actually syndicate it. So
13 in some ways, we also were thankful, frankly, KPS was there
14 because the entire -- we jeopardized the entire case without
15 having a DIP, without having a financing course.

16 And, you know frankly, we're grateful that KPS was able
17 to step into the shoes and take the entire DIP versus just
18 being a participant in the DIP. And so that required special
19 provisions on their part because they -- you know, capital
20 notice to their funds and all the rest of it. So that
21 requires special provisions on their part because they, you
22 know, give capital notice to their funds and all the rest of
23 it. So (indiscernible) degree of effort that KPS had to even
24 step into these shoes.

25 Q. Okay. So if we could change exhibits to Exhibit 18.

1 A. Which is that one?

2 Q. That is the bid tracker.

3 A. I just looked back up here. Hold on a second.

4 Q. Page 388 of 479 of the PDF.

5 A. Yeah. I just -- just kept it going. I'm on my -- give

6 one -- I know I'm coming up to it. Hold on a second. Okay.

7 I got it. Thank you. Thanks for the patience. Got it.

8 Q. Okay.

9 A. Bid tracker. Yep.

10 Q. So the bid tracker is a document that Houlihan creates
11 when it engages in a transaction to record the entity that it
12 reaches out to; is that fair?

13 A. That's fair. There's a whole --

14 Q. And --

15 A. -- section behind it. But yeah, this is a summary page.

16 Q. Okay. And the document that we have as Exhibit 18
17 identifies the name of the entity reached out to; is that
18 fair?

19 A. Yes.

20 Q. And it identified the characterization of that entity as
21 either a financial investor or a strategic investor; is that
22 fair?

23 A. It's what the column says. As we know, there's always --
24 it's not -- it's not perfect. There's always some imperfect
25 aspects of it. But we try to make that designation. But

1 again, it's not that relevant, but yeah, we try to make that
2 designation.

3 Q. Okay. And the tracker also identifies the entities that
4 were reached out before the bankruptcy petition was filed,
5 correct?

6 A. Correct.

7 Q. And then the entity that it was -- reached out to after
8 the bankruptcy petition was filed, correct?

9 A. Correct.

10 Q. And then it finally identifies those entities with signed
11 NDAs and the date that they signed it, right?

12 A. That is correct, sir.

13 Q. And then it also identifies those entities and the date
14 where they -- at least I guess observed and where they
15 answered the data; is that fair?

16 A. That's fair.

17 Q. And then finally, the tracker identifies whether terms
18 sheets or proposals were -- seek amendment, right?

19 A. Correct.

20 Q. At the top of Exhibit 18, there's a summary of the type
21 of investors that were reached out to by financial, strategic,
22 or other. Do you see that?

23 A. I do.

24 Q. And it totals them up and says financial 150, strategic
25 sixty-five, and other ten, correct?

1 A. Correct.

2 Q. And a strategic investors, as identified, is an entity
3 that would presumably have an interest in acquiring some or
4 all of the company's business because it meshes with their own
5 business; is that fair?

6 A. That is fair.

7 Q. And a financial investor, so defined or so called, is
8 either a party who simply wants to provide financing or maybe
9 wants to buy the company but is a financial investor as
10 opposed to an actual entity directing a business like the
11 company itself; is that correct?

12 A. So let me just kind of put -- clarification of strategic.
13 They may not be in the -- currently in the same business of
14 Briggs. They may want to be in the business. So that's
15 their -- really it's like ownership. And it goes to the
16 second question about financial. Financial could also be a
17 strategic. They own a portfolio company that is a strategic.
18 We would label them as financial in this instance. There were
19 none of those. But that's also kind of a slight variation of
20 how we think about it because you can have a financial sponsor
21 being a buyer, but it's also strategic because they have a
22 portfolio company. And this would be an add-on to it or a
23 platform to it.

24 Q. Okay. Moving on, now, looking at the list for
25 strategic -- I think on strategic parties that were reached

1 out to, I have identified three that were labeled as strategic
2 and reached out to by Houlihan on a pre-petition basis. And
3 I'd ask you to look in your -- ask you to look -- to scan the
4 list as you wish. The first one I see that fits the bill of
5 both strategic and solicited pre-petition is line item 159.
6 And the company is Positek Group (ph.).

7 A. Actually, that's not correct, sir. I'm -- yesterday
8 was -- I couldn't see the documents you're referring to. The
9 first one I'm on is Kohler which everybody would know. They
10 make plumbing fixtures, but they also have a division that is
11 kind of a smaller version of Briggs. And then line number
12 115, no, it inappropriately labeled as financial. And had I
13 looked at the list or had the list, I could have given that to
14 you. But that's one -- kind of the first strategic that was
15 kind of approached pre-petition.

16 And, you know, I would say that maybe this is a good
17 place to start because I think that -- you know, I think where
18 we thought about strategics in this -- in this phase of the
19 overall assignment is really kind of people who not only are
20 in a similar business but predominantly in a business of
21 lawncare or have lawncare elements to it because that's an
22 important distinction here though. Briggs has a lot of the
23 various kind of business lines, including pressure washers,
24 generators, among others, as well as an engine provider. We
25 wanted to make sure, you know, predominant revenues go into

1 kind of lawncare, both kind of commercial residential. So
2 that was an important criteria when we looked about
3 strategics, you know, how do we approach at least on a
4 pre-petition basis.

5 And obviously Kohler is -- is in that -- is in that vein.
6 They have a lawncare side of their business as well as inside
7 of the business. They also have -- do generators as well. So
8 they kind of mirror a little bit like Briggs as well.
9 Hopefully that clarifies for the Court's benefit.

10 Q. Okay. I appreciate that. So Kohler and Positek. And
11 then where is a strategic that is identified as investor 225
12 at the very bottom of the third page that is item number 225.
13 Do you see that?

14 A. Well, sir, you also missed Tensy (ph.) Electric. Tensy
15 Electric is a -- is also another lawncare provider. Actually,
16 the guy who runs that business is a former Briggs executive.
17 It's a Chinese business as well. So for the Court's benefit,
18 this one is -- I believe it's 172.

19 And then your question on investor 225, that is Toro.
20 Again, lawncare business. Obviously, a notable brand you
21 might have heard of as well.

22 THE COURT: Mr. Stoll --

23 MR. STOLL: So --

24 THE COURT: Mr. Stoll, how do you connect -- how do
25 you connect your questions to bid procedure?

1 MR. STOLL: Well, ultimately, Your Honor, what we're
2 arguing is that the process that was undertaken pre-petition
3 was not a (indiscernible) marketing process. It did not
4 include a significant canvassing or solicitation of strategic
5 investors. And now the bid procedures are calling for a bid
6 process that has to end by August 28th.

7 THE COURT: Then I will ask --

8 MR. STOLL: And it provides --

9 THE COURT: Then I'll ask you to move forward and
10 target your questions to bid procedures.

11 MR. STOLL: Okay. Maybe I can just ask one question
12 then.

13 BY MR. STOLL:

14 Q. Am I right, sir, that of the total number of strategic
15 investors that have now been solicited both pre- and
16 post-petition, only four were solicited through the petition?

17 THE COURT: Okay. We finished now. Are you
18 finished, Mr. Stoll?

19 THE WITNESS: Maybe for -- maybe for the benefit of
20 the Court --

21 THE COURT: Sir --

22 THE WITNESS: -- I would just --

23 THE COURT: Sir, sir, sir.

24 THE WITNESS: Sorry, Your Honor.

25 THE COURT: We're not going to answer the question

1 because I tried politely to ask Mr. Stoll to get back to bid
2 procedures.

3 If you don't wish to do so, we'll go on to the next
4 cross-examiner.

5 MR. STOLL: No. I'm done, Your Honor. I appreciate
6 it.

7 THE COURT: Okay. If the -- if Mr. Stoll is
8 finished --

9 MR. STOLL: No, I'm not finished, Your Honor.

10 THE COURT: Well, please proceed then with bid
11 procedure questions.

12 MR. STOLL: Thank you, Your Honor.

13 BY MR. STOLL:

14 Q. Mr. Peluchowski, you submitted a declaration in this
15 matter which is your direct testimony, correct?

16 A. Correct.

17 Q. And that's Exhibit 3 in His Honor's binder?

18 A. That is correct. Let me get to it.

19 Q. What number -- you had --

20 A. Okay. It's in the beginning. I apologize. It takes me
21 a little bit of time to get there.

22 (Pause)

23 MR. BERMAN: Bill, page 39 of the PDF. I don't know
24 if you have an iPad or if you --

25 THE WITNESS: Yeah, I am. I'm -- I'm getting close.

1 Thank you for the page number 39. Very hard to -- yeah, thank
2 you for that. I appreciate it.

3 Okay. I'm here. I would have gotten there anyway,
4 but it took me a little longer. But thank you for the page
5 number. I appreciate it. I'm ready.

6 Q. Okay. So the bid procedures as proposed require that
7 the -- all bids be submitted by August 28th; is that fair?

8 A. That is correct, sir.

9 Q. And in the -- in the post-petition marketing effort
10 leading up to the August 28th bid deadlines, Houlihan has
11 reached out to additional parties, including some sixty-odd
12 strategic parties, correct?

13 A. That is correct.

14 Q. Now, on page 6, paragraph 14 of your declaration --

15 A. Yes. I'm here.

16 Q. Okay. You make the comment that, on a preliminary
17 review, a number of the potential buyers of the strategic
18 buyers may require an extensive -- I shouldn't stay
19 extensive -- a review period of as short of four of six months
20 and as long as nine to twelve months due to anti-trust issues;
21 is that fair?

22 A. In normal circumstances, that is fair. It really depends
23 on -- it also depends on, frankly, the terms of the purchase
24 agreement and what they're prepared to go in with relative
25 to -- excuse my -- it's hell or high-water standards or

1 divestiture risk as well. So there's certain elements of a
2 purchase agreement to make it less concerning to the FTC to go
3 and grant the approval if you have certain provisions in the
4 purchase agreement to kind of deal with those attributes.

5 Q. Right. And so at least for those strategic buyers who
6 (indiscernible) at the bid, they either -- they have to make a
7 bid that would put the risk of an antitrust impediment on
8 themselves in order to meet the August 28th bid deadline,
9 correct?

10 A. Yeah. What's interesting is the four parties you
11 referenced -- and I know you were anxious to talk about those.
12 But those -- if you look at the market share of Briggs, of
13 Toro, of Tensy, Positek, they represent the majority of the
14 lawnmower market. So there's other folks that, you know,
15 potentially could participate that most of the overlap in the
16 market is with those four. And so that said, you know,
17 everything would be subject to review from FTC perspective.
18 And, obviously, with the failing company doctrine, we hope to
19 kind of make it shorter.

20 Q. Okay. The bid procedures also include a request for the
21 approval of a breakup fee in the event that the stalking-horse
22 bidder is not the successful bidder, correct?

23 A. Correct.

24 Q. And it --

25 A. Very typical.

1 Q. -- requires -- right. And it requires any successful
2 bidder to bid in a minimum an amount that would cover that
3 breakup fee, correct?

4 A. Or it'd be an acceptable overbid collectively, that
5 overbid, which could be a -- frankly, an element of various,
6 you know, parts bids would have to at least be in excess of
7 the amount plus -- plus the bid protection. Correct.

8 Q. And the --

9 A. So it's not just one -- it's not just one -- it's people
10 bid in pieces. If you look at the -- the way the people do
11 bid and were able to, you know, put a collective competing
12 offer together through a series of combinations, that
13 collectively would need to kind of exceed the -- or at least
14 be equal to the -- the value plus the overbid protection
15 versus one party --

16 Q. And --

17 A. -- (indiscernible).

18 Q. Okay. And the -- you said it was typical to have a three
19 percent over DIP fee; is that right?

20 A. Correct.

21 Q. What's a little different here is that the stalking-horse
22 bidder was also providing the DIP financing, correct?

23 A. Well, it sounds like you're characterizing it as a
24 negative. I'm glad they were able to because we wouldn't have
25 a DIP provider at that stage. But what also happens is that

1 the stalking-horse also is very tied -- well, closing the deal
2 because they have so much -- the quantum of capital at risk.
3 So the answer is yes, they are also providing the DIP, but
4 that's not necessarily a bad thing.

5 Q. I didn't say it was bad. But they are getting paid for
6 the DIP with fees and interest, correct?

7 A. Market fees that were, frankly, what JPMorgan wanted.

8 Q. And the purchase price that is being paid on the stalking
9 horse bid is the same as the DIP financing that's being
10 provided by the stalking-horse bidder, correct?

11 A. The quantum of capital that the company required, they
12 are -- they're similar. But it's also the quantum of capital
13 the company required as well and the value of the company.

14 Q. Right. It's all I'm -- all I'm asking you. They're
15 getting paid fees and interest for the DIP, and they're also
16 getting paid if they are not the winning bidder a three
17 percent breakup fee on the DIP, effectively on the same
18 capital that is represented by the DIP; is that fair?

19 A. That is fair. I do -- I do generally -- you know,
20 general M&A including public company work. And it's no
21 different than any other kind of public company takeover kind
22 of percentage. That's where actually the -- that's where that
23 notion that it can arrive from was from the public company
24 settings of traditional M&A processes.

25 Q. Okay.

1 A. But yes, that's correct.

2 Q. And just one last question back -- a couple questions
3 back on the -- on the process that's underway now. The data
4 room has been populated with approximately 7,000 documents or
5 so; is that right?

6 A. It's about right.

7 Q. And entities that are willing to sign an NDA and enter
8 that data room, had that volume (indiscernible) to go through
9 in order to evaluate the company and make a decision on its
10 bidding -- the bid, correct?

11 A. Just a point of clarification for the Court, they do have
12 access. But if you're in the -- if you're in the industry,
13 you like people like Toro, like Kohler. There's notions of
14 Generac. There's a clean team portion of it that they would
15 have full access to the data room. Then the nonclean team
16 portion, i.e. competitors, would be a redacted version of that
17 data room. There's certain elements of the data room. It's
18 information which probably doesn't lend itself to really any
19 investment decisions, but it's there for completeness as well.

20 MR. STOLL: Okay. Thank you very much, sir.

21 That's all I have, Your Honor.

22 THE COURT: Thank you.

23 So all right. The United States Trustee, Ms. Wilson,
24 do you want to examine the witness? You do not? Thank you.

25 What about the ad hoc group of senior noteholders?

1 MR. KRAUSE: Your Honor, Jeffrey Krause of Gibson,
2 Dunn & Crutcher on behalf of the ad hoc group. We do not need
3 to ask additional questions of the witness.

4 THE COURT: Thank you.
5 Jones Plastic Engineering Company?

6 MR. LAFLAMME: Your Honor, Ryan Laflamme on behalf of
7 Jones Plastic.

8 We have no desire to question the witness.

9 THE COURT: Thank you, Mr. Laflamme.
10 Generac Power Systems?

11 MR. JOHNSON: Good afternoon, Your Honor. Eric
12 Johnson on behalf of Generac Power Systems. And we do not
13 have any questions for the witness.

14 THE COURT: Thank you.
15 Is there anyone else who wishes to examine or
16 cross-examine the witness? Thank you.

17 Who is our next witness? Mr. Berman?

18 MR. BERMAN: We have no direct on Mr. Peluchiwski.
19 And I believe I will leave it up to the creditors' committee
20 counsel, but we also have submitted the declaration of Jeff
21 Ficks, Jeffrey Ficks.

22 THE COURT: Thank you. Mr. Stoll?

23 MR. STOLL: Yes, Your Honor. Yes, sir. Yes. We
24 will cross-examine Mr. Ficks.

25 THE COURT: All right. Let's get Mr. Fick (sic)

1 sworn in, please.

2 Mr. Fick, are you -- have you joined us?

3 MR. FICKS: I'm here, Your Honor.

4 THE COURT: Thank you.

5 THE CLERK: Please raise your right hand.

6 (Witness sworn)

7 THE COURT: Mr. Stoll?

8 MR. STOLL: Yes, Your Honor. Can I have one moment,
9 Your Honor? I've got to --

10 THE COURT: Certainly.

11 MR. STOLL: -- move my boards around here because of
12 the --

13 THE COURT: Take your time.

14 MR. WILLARD: Your Honor?

15 THE COURT: Yes, sir.

16 MR. WILLARD: If I can ask the Court's indulgence
17 from time to time with the court staff. We're trying to
18 coordinate the video. I don't want to interrupt and ask
19 permission to approach the bench. If I could just ask leave
20 to come up to the side from time to time to assist with that.

21 THE COURT: Certainly.

22 MR. WILLARD: Thank you.

23 THE COURT: Certainly. Thank you.

24 MR. STOLL: Okay. I'm ready, Your Honor.

25 THE COURT: I'm sorry, Mr. --

1 MR. STOLL: Good afternoon, Mr. --

2 THE COURT: Okay. Mr. Stoll will commence --

3 MR. STOLL: I'm sorry.

4 THE COURT: -- the cross-examination.

5 MR. STOLL: Yes. Thank you, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. STOLL:

8 Q. Mr. Ficks, your role at -- or excuse me, I should make
9 sure that everyone knows who you are. You work for Ernst &
10 Young; is that right, sir?

11 A. I'm a partner with Ernst & Young.

12 Q. And you've been assisting the company, the debtor, since
13 March of this year; is that correct?

14 A. Ernst & Young has had several engagements with the
15 debtor. I personally have been engaged with the debtor on
16 behalf of Ernst & Young since March 5th of this year.

17 Q. Okay. And what are your responsibilities since the
18 company has been in bankruptcy? You have to prepare its
19 weekly DIP forecast budgets; is that right?

20 A. My team and I assist the debtors with respect to the
21 analysis and roll-forward of its weekly debtor-in-possession
22 budget, correct.

23 Q. Okay. And you're aware that the committee has argued for
24 a thirty-day extension of the proposed bidding and other bid
25 procedure deadlines in order to facilitate a more robust

1 profits; is that fair?

2 A. I'm aware that there's been an objection, yeah.

3 Q. Okay. And you're aware that the committee has argued
4 that there is -- appears to be plenty of liquidity for the
5 company to extend the bid lines for that requested thirty
6 days; is that right? I'm not asking you to adopt it. I'm
7 just saying you're aware that's being argued.

8 A. If you can provide me with a specific question with
9 respect to the liquidity, I'd be honored to answer it.

10 Q. Okay. So when the case was originally filed on July
11 20th, it was -- the petition was accompanied with an opening
12 DIP budget, correct?

13 A. On July 20th, the debtors filed a DIP budget, yes.

14 Q. Okay. And every week the debtor provides an updated
15 budget that shows what actually happened in the previous week
16 and then what is still project to happen over the course of
17 the next eighteen weeks; is that fair?

18 A. That is correct.

19 THE COURT: Mr. Stoll.

20 MR. STOLL: Okay. And --

21 THE COURT: Mr. Stoll.

22 MR. STOLL: Yes?

23 THE COURT: Asking about DIP forecasts, budgets, and
24 variances, how does that -- how does that connect with the bid
25 procedures motion?

1 MR. STOLL: Well, again, Your Honor, what the
2 committee is asking for mainly is the extension of the
3 deadlines that are presently being requested. And --

4 THE COURT: That is what -- that is what you seek.
5 But I'm trying to hear --

6 MR. STOLL: Right.

7 THE COURT: -- a motion on bid procedures.

8 MR. STOLL: Understood.

9 THE COURT: Well, then let's --

10 MR. STOLL: The argument --

11 THE COURT: Then let's ask questions about bid
12 procedures.

13 MR. STOLL: Well, the argument, Your Honor, if I
14 might, that has been interposed by the debtors is that no
15 extension of timelines can be granted because of the cost and
16 absence of liquidity for the debtor. And so what we're trying
17 to establish is that there is liquidity based on the
18 operations of the debtors that could facilitate that request.

19 THE COURT: And I truly understand your position, but
20 I just don't see how it relates to a bid procedure motion.

21 MR. STOLL: Well, I've made my pitch, Your Honor, to
22 you. So --

23 THE COURT: Are we -- are we finished with Mr. Fick?

24 MR. STOLL: I guess we are, Your Honor.

25 MR. STARK: Your Honor, if I might. It's Robert

1 Stark. I'm not sure if I'm out of order here.

2 THE COURT: Go ahead.

3 MR. STARK: Your Honor, the argument that I will make
4 soon enough when we get to summation of the evidence is that
5 the system that's been set up -- and it's very structural.
6 It's in the DIP; it's in the bid procedures. It's why I said
7 early on there's a need to consider this holistically. And
8 that I think applies for the judicial standard of review as
9 well as the evidence. It's essentially this idea that
10 pre-petition they did a lot of M&A activity that gets
11 confirmed post-petition. You marry that up with our -- with
12 the response to our projection that, Judge, we can't allow for
13 more procedure because we'll run out of liquidity.

14 So if we're right that there isn't -- hasn't been a
15 satisfactory amount of pre-petition activity done, then they
16 throw up their hands and say too bad, we don't have liquidity
17 sufficient to enable an elongated process, notwithstanding
18 what may be appropriate here. Okay. So this evidence
19 rebuts -- it's the entire purpose Ms. Ficks' testimony comes
20 in in the beginning which is essentially about liquidity and
21 issues. And so we are going against that to say that we've
22 done very, very well post-petition. We have ample liquidity.
23 And we do have room to move forward with a better bid process,
24 better M&A process than what's proposed here. And the
25 countervailing argument is, unto itself, unsupported by the

1 evidence.

2 THE COURT: Mr. Berman, are you going to argue to me
3 on the bid procedures that you need them because of liquidity?

4 MR. BERMAN: Again, I apologize. I may defer to my
5 colleague, Ms. Berkovich. But -- okay. I'll defer then.

6 MS. BERKOVICH: Sure. Not exactly liquidity, but
7 losing money every week. So we need to put a figure on the
8 bidding procedures to minimize administrative expense, avoid
9 administrative insolvency, and maximize recovery to creditors.

10 THE COURT: Then, Mr. Stoll, you may proceed because
11 Ms. Berkovich just said she is going to bring up liquidity.
12 Okay.

13 MR. STOLL: Thank you, Your Honor.

14 THE COURT: Mr. Stoll, you're back on in the batter's
15 box. Let's continue on with Mr. Fick.

16 MR. STOLL: All right. Thank you, sir.

17 BY MR. STOLL:

18 Q. Okay. Mr. Fick, so over the first three weeks of the
19 case, the 20th of July, the 14th of July, the company had
20 performed better than projected with respect to both the sales
21 and its operating receipts; is that correct?

22 A. The company has performed better with regard to its
23 operating receipts, yes.

24 Q. Okay. And it's collected over thirty million dollars
25 more in operating receipts than they originally projected over

1 that three-week period, correct?

2 A. I believe that's in my declaration, yes.

3 Q. Okay. And sales have been over -- almost 100 million

4 dollars more, correct?

5 A. No, that's not correct. I'm sorry. Can you please

6 specific in what time period you're referring to?

7 Q. Okay. You're right, because I was getting -- I was

8 getting a little ahead of myself. Sales in the month of July

9 were higher than projected in the original DIP budget,

10 correct?

11 A. I don't have the specific July hearings. I think

12 you're -- can you be specific with respect to which budget

13 versus the debtor's business plan that you may be referring

14 to?

15 MR. BERMAN: And, Your Honor, I would ask if we're

16 going to ask questions -- you know, numbers like that, the

17 document be put in front of the witness if we can just to make

18 things go a little faster.

19 MR. STOLL: Sure.

20 Q. So let's look at Exhibit 9 and 10 in Your Honor's binder.

21 Are you with me, Mr. Ficks?

22 A. I'm getting to Exhibit 9. So you're referring to the

23 initial DIP budget?

24 Q. Correct.

25 A. I'm hearing somebody making a phone call.

1 Q. Just let me know when you've found the document.

2 A. Oh, I'm sorry. I'm prepared. Go ahead.

3 Q. Oh, okay. So Exhibit 9 is the original DIP budget as
4 filed by the -- I'm sorry, Exhibit 10 -- no, Exhibit 9, is the
5 original DIP budget as filed by the company with the petition;
6 is that fair?

7 A. This is the original DIP budget filed on July 20th by the
8 debtors, yes.

9 Q. Okay. And the actual pages are pages 2 and 4 which are
10 identical except for the length of time that they project
11 forward, correct?

12 A. Correct.

13 Q. And if you look at the first three weeks of the forecast
14 of July 20th, the operating receipts are forecasted on the top
15 line under the heading DIP cash forecast, correct?

16 A. Correct.

17 Q. And you can see that those numbers -- there are
18 approximately twelve million for the week of July 24, fifteen
19 million for the week of July 31, and fifteen million for the
20 week of August 7, right?

21 A. Correct.

22 Q. And then if you were to look at -- now turn to Exhibit 10
23 which is the DIP cash forecast as of August 12th --

24 A. Yep.

25 Q. That particular document, if you were to turn to page

1 8 -- I'm sorry, not page 8. If you were to turn to page 4,
2 page 4 provides a comparison of the first few weeks of the
3 actual budget, correct?

4 A. Correct.

5 Q. And page 4 shows that we forecasted operating receipts
6 for the three-week period was forty-two million. And the
7 actual operating receipts realized was seventy-six million,
8 correct?

9 A. That's correct.

10 Q. And that's a positive variance of thirty-four million
11 dollars, correct?

12 A. Correct, of which sales for the month of July did come in
13 favorable I think by about eighteen million. However, there
14 was also an overhead of receipts from later in the forecast
15 period on directly twelve million. And the balance was other
16 timing. But this entire amount is not a permanent variance.

17 I would also suggest that -- and you will see when we
18 roll forward the forecast for this week actual receipts for
19 the subsequent week ended August 14th came in over twenty
20 percent lower than forecast.

21 Q. So two things, sir. One is, we won't see that forecast
22 until Thursday because that's the day that those get released,
23 correct?

24 A. That's correct.

25 Q. And when you say came in twenty percent lower than

1 forecast, you're saying twenty percent lower than what was
2 forecasted in the August 12 budget that we're looking at now,
3 correct?

4 A. That is correct, for the week of August 19th.

5 Q. Yeah. And if you turn to page 8 of the August 12
6 forecast, Exhibit 10, the top line item, operating receipts,
7 forecast for August 14, twenty-two million dollars in
8 receipts, correct?

9 A. That was the forecast, yes.

10 Q. And you're saying that what actually happened during last
11 week was that the receipts came in twenty percent lower,
12 correct?

13 A. About twenty-four percent lower, correct.

14 Q. So about twenty million dollars; is that right? Oh, I'm
15 sorry. Twenty percent --

16 A. No.

17 Q. About eighteen million dollars?

18 A. No. About five million dollars total.

19 Q. Okay. So you're saying that if you were to look back at
20 Exhibit 9, the operating receipts that were projected for
21 August was seventeen million dollars originally, right?

22 A. That is correct. I think the point I'm trying to make is
23 that the inference that the favorability with respect to sales
24 and receipts as being a permanent variance and a permanent
25 source of liquidity is not a correct inference. In fact,

1 there has been higher sales activity. That higher sales
2 activity was reflected, you know, the continued sell-through
3 of inventory. And there was also the overhead of receipts
4 that were forecasted later in this DIP budget into the first
5 three weeks. Therefore, it's a timing issue.

6 Q. So the company also has updated its business plan in
7 August; is that right?

8 A. I believe -- sorry. The company released -- the company
9 has updated its internal annual budget. And I believe that
10 was released by the company last week.

11 Q. Okay. And that's in the form of an Excel spreadsheet,
12 right?

13 A. Could you put it in front of me, please, so I can see the
14 summary output?

15 Q. Sure. I was hoping not to have to do this, but I will
16 try to do it. This is Exhibit -- one second, please. It is
17 Exhibit 19.

18 A. Are you referring to the exhibit that was part of the
19 current declaration, or are you referring to -- I thought you
20 said Exhibit 19.

21 Q. Exhibit 19.

22 A. Okay. I have Exhibit 19 in front of me.

23 Q. Okay. That's the Excel spreadsheet that constitutes the
24 updated business plan of the company?

25 A. Yes.

1 Q. And you referred to the current exhibit which is attached
2 to Ms. Kearn's supplemental declaration. Is that what you
3 were referring to?

4 A. I believe that to summarize four of the months of the
5 company's updated budget as against the previously submitted
6 business plan.

7 Q. Right. But if we look at Exhibit 16 -- let me know when
8 you have it, sir.

9 A. Okay. Okay. I'm on Exhibit 16.

10 Q. Okay. And Exhibit 16 summarizes, as you said, the sales
11 projections that have now been upgraded in the company's
12 business plan, correct?

13 A. That is correct.

14 Q. You're reviewed this, right?

15 A. I have.

16 Q. And as Mr. Kearns has summarized, the new projections
17 show 107 million dollars higher projected sales over the
18 four-month projection period from July to October in the
19 original business plan by which the original DIP budget was
20 predicated, correct?

21 A. That's not entirely correct.

22 Q. Okay. What's not correct about that?

23 A. The original business plan and then subsequently the DIP
24 budget filed with the Court on July 20th had already included
25 a twenty-million-dollar increase for the month of July either

1 in terms of the sales for the remaining weeks of July or in
2 the existing collateral that resulted from the incremental
3 sales.

4 Furthermore, the DIP budget as of -- that was filed with
5 the Court on July 20th was only for the debtors.

6 107-million-dollar sales increase here relates to the company
7 as a whole and is inclusive of twenty-four million dollars'
8 worth of incremental sales for nondebtors' international
9 entities.

10 Furthermore, what this doesn't show is for the
11 corporation as a whole. The sales increase over the entire
12 year or the (indiscernible) over the entire year I think was
13 only roughly half of this, call it 450, four million dollars.
14 So in other words, there was a pull-forward of sales from
15 subsequent quarters into these four months.

16 Q. Okay. But I guess -- if I hear what you're saying, is
17 the 107 million dollars if you adjust it as you've articulated
18 should represent fifty million dollars of sales greater than
19 what was originally by the company and was the basis for the
20 original DIP budget, correct?

21 A. Potentially. But the company has also assumed that
22 sufficient inventory has been built in order to support only
23 incremental sales that are articulated here -- or I should --
24 projected on a forecast here. But there's sufficient
25 inventory that has been built to afford the level of sales

1 that are in the existing DIP budget. And when we start to
2 speak of the level of disbursement that have happened in the
3 three weeks of this case, as well as the significant
4 fell-through of inventory that happened in the quarter prior,
5 it will be noted that there is risk that the company has
6 insufficient -- or has still insufficient inventory to support
7 the level of sales forecast in the DIP budget, let alone this
8 incremental level of sales here.

9 Q. Okay. All right. So if you can look back at Exhibit K
10 which is the August forecast.

11 A. Just give me a second. All right. There's quite a few
12 pages. Do you have the page number?

13 Q. Yes, page 8.

14 A. No, I'm sorry, of the -- of the PDF that was provided
15 last evening.

16 Q. Oh.

17 A. In the data room.

18 MR. STOLL: Corey, can you help me out there?

19 MR. BERMAN: Can you say it one more time? What are
20 you looking for?

21 THE COURT: 185.

22 MR. BERMAN: Oh, the -- okay. It's on page 186 of
23 479. Also, if you're in Adobe, on the left side, you see a
24 bookmark. If you click that, you're able to jump quickly to
25 the exhibit.

1 THE WITNESS: Thank you. What pages do you want to
2 go to within the August 12th forecast?

3 Q. Page 8.

4 A. Okay. I'm on page 8.

5 Q. Okay. So this forecast, amongst other things, projects
6 what the utilized availability will be DIP loan, the ABL DIP
7 loan, as of any given -- you know, any of the given weeks that
8 are (indiscernible), correct?

9 A. That is correct.

10 Q. And what it shows based on the numbers here, to the
11 extent that they hold true, that beginning in the week of
12 August 2, they would expect to be getting twenty-five and a
13 half million dollars of availability under the DIP facility,
14 right?

15 A. I'm sorry. Can you repeat the date? I don't see an
16 August 2nd on this page.

17 Q. Did I say August? I meant October. I'm sorry. If I
18 said August -- I'm under week 11, October 2.

19 A. Week 11, October 2nd, represents a 25.6-million
20 unutilized availability which contemplates that the existing
21 DIP had been approved and that the remainder of the term loan
22 had come in to generate the liquidity.

23 Q. Right. And the way that term loan was going to generate
24 the -- or was going to generate the liquidity is it's going to
25 pay down the ABL, correct?

1 A. The term loan that comes in to pay down the remainder, to
2 the extent it can, of the ABL. However, you also have to
3 contemplate the collateral then leaves the borrowing base.

4 Q. And when the balance of the ABL is paid down, that
5 creates more availability under the ABL for the debtor to
6 borrow, correct?

7 A. Subject to the performance of the debtor, vis a vis the
8 ability to generate sufficient (indiscernible) collateral, so
9 in other words continuing to build inventory as well as
10 continuing to sell product. This contemplates the build of
11 inventory that had been forecast. To the extent that that
12 build of inventory does not occur, the available -- the
13 availability would potentially (indiscernible).

14 Q. Right, of course. But we're -- I'm looking at Exhibit
15 10. We're at least operating under the assumption that the
16 projection holds true in all respects, correct?

17 A. I'm sorry. I'm not sure I can answer the question.
18 There's specific assumptions that are built into this forecast
19 with respect to timing of the (indiscernible) and a DIP term
20 loan is coming in with respect to certain collateral leaving
21 the borrowing base with respect to the operating performance
22 of the debtor. I'm prepared to ask -- answer specific
23 questions you may have for that event.

24 Q. The -- would you agree with me that, to the extent that
25 the improved sales continues at the same -- or improved sales

1 continue into the future, that the projected liquidity under
2 the -- as represented under the August 12 DIP budget could
3 potentially be even greater?

4 A. Not necessarily. As I stated, the company sold
5 through -- let me back up. The company's fourth-quarter sale
6 exceed what had forecast by some forty million. It had also
7 exceeded the inventory reduction primarily due to the
8 sell-through and due to its liquidity position prior to the
9 filing. It had sold eighty -- sorry. Inventory was reduced
10 eighty million more than what was forecast for the fourth
11 quarter.

12 I believe in the -- the objector's -- sorry, the
13 objection, it had referenced third-quarter inventory as a
14 proxy for what the company -- or the debtors were entering the
15 case with. And that's -- that's inaccurate. In fact,
16 inventory had been depleted some 140 million from that number.
17 So the -- for the debtors to achieve the level of sales that
18 are forecast in the DIP budget filed with the Court on July
19 20th, the debtors need to replenish and build that inventory.

20 I believe in my declaration, I mention that in some
21 instances. I have an example for engines. I believe the
22 numbers received in the period of one to four weeks, depending
23 on an engine, it's processed, an engine is built, and the
24 product is shipped to the customer. That evidences a fairly
25 short cycle in terms of when the company is building inventory

1 and selling inventory.

2 But it's also important to understand that, historically,
3 this business did operate as more of a make-for-stock business
4 whereby it would sell through its inventory in the third and
5 fourth fiscal quarters, and it would replenish that inventory
6 for the following sale -- higher sales quarters. They would
7 replenish their inventory in the first and second quarter.

8 Because of the debtors' liquidity position, and in order
9 to minimize its financing needs, the debtors shifted from more
10 primary make-for-stock to attempting to more they make the
11 order. As a result, these -- the DIP budget contemplates
12 roughly a thirty-nine-million-dollar inventory build over the
13 eighteen weeks which contrasts with greater than an average of
14 a hundred million or more of inventory build in the prior five
15 years during the same timeframe.

16 So in other words, the debtors are building closer to the
17 sale. Therefore, when you consider that the debtors are
18 already entering this case with less inventory than it had
19 contemplated, and in the first three weeks of the case have
20 underspent with respect to the first, which there are a number
21 of reasons which I'm happy to discuss, the debtor is behind in
22 regards to its inventory build. And as a result, certain of
23 its products is already on backorder.

24 So the inference that the debtor can achieve carte
25 blanche greater sales because of the business plan I guess

1 depends on if it's afforded the opportunity to spend and
2 invest in inventory in order to catch up, in order to fund the
3 necessary build to meet the level of sales and therefore
4 receipts in this DIP budget, and then lastly build ahead
5 towards its seasonal traditional higher quarters.

6 Q. Okay. But I take it that the -- when the company buys
7 inventory to turn the product to satisfy sales, it has the
8 expectation of doing that at a profit; is that fair?

9 A. Yes.

10 Q. And the inventory build that you're talking about that's
11 necessary, even though it's been I guess time closer to actual
12 sales, that inventory build is for a period that is beyond the
13 DIP budget; is that fair?

14 A. No.

15 Q. Okay. So the -- so the inventory we purchase now is
16 expected to be for sale that would fall within the DIP budget
17 and therefore in theory generate a profit, correct?

18 A. I'm sorry. Are you asking a question with respect to the
19 original DIP budget sales forecast, or are you asking a
20 question with respect to what, if any, of the incremental 107
21 million of sales benefit this DIP forecast?

22 Q. I'm asking you -- because you made a point of talking
23 about the inventory build that has to -- that's assumed in the
24 budget, that that inventory build is expected to generate --
25 is tied to sales that are expected or that you actually have

1 and that those are expected to generate a profit over the cost
2 of the inventory.

3 A. I'm not sure --

4 Q. Is that correct?

5 A. -- I'm distinguishing between -- is your question with
6 regard to the level of inventory that is required to be built
7 in order to support the July DIP budget, or is your question
8 with respect to the incremental 107 million in sales?

9 Q. Let me try it this way. You just said -- I thought you
10 just said -- and tell me if I misheard you. I thought you
11 just said that the inventory build was tied to sales that were
12 already projected in the -- in the DIP budget. Did I hear
13 that wrong?

14 A. So the company is constantly replenishing its inventory.
15 The company had, as I indicated, already oversold its
16 projected inventory for the fourth quarter. In order to
17 maintain the level of sales and cash receipts in the DIP
18 budget, the company not only has to replenish that inventory,
19 but then it also has to continue to build inventory.

20 I think analytically, we've taken a look at this. And
21 then an excess of eighty percent of the -- an excess of eighty
22 percent of the sales in the original DIP budget are generated
23 from the material purchases in that DIP budget. So there's a
24 high correlation between the amount of material that the
25 company is required to purchase in order to generate sales.

1 Separately you asked me the question how much of 107
2 million should it create additional liquidity during these
3 thirteen or eighteen weeks. And the two are intertwined
4 because the company is already behind in regards to its
5 inventory build for service, the existing level or the assumed
6 level of sales from the July 20th DIP budget.

7 But your question on the 107 million, if you reduce that
8 by roughly twenty million that had already been included and
9 you reduce that by the twenty-four million of international
10 nondebtor incremental sales, I think the math you had was
11 roughly called sixty-some-odd million, the company still needs
12 to build sufficient inventory for working capital in order to
13 service those sales. I believe that what would happen is that
14 the company would incur additional borrowing on its
15 debtor-in-possession facilities and that the construction of
16 that inventory would yield additional collateral. So there
17 could be a nominal level of incremental liquidity.

18 However, the conversion ultimately, because of your
19 question, the profit on those incremental sales and the
20 collection of the cash, likely falls beyond this -- the
21 (indiscernible).

22 MR. STOLL: All right. Your Honor, I have nothing
23 further of this witness.

24 THE COURT: Thank you.

25 Ms. Wilson, any questions? Thank you.

1 The ad hoc group?

2 MR. KRAUSE: Good afternoon, Your Honor. Jeffrey
3 Krause of Gibson Dunn for the ad hoc group. We have no
4 questions.

5 THE COURT: Thank you.

6 Jones Plastic? Thank you.

7 Generic Power Systems? Mr. Johnson?

8 MR. JOHNSON: No questions, Your Honor.

9 THE COURT: Thank you.

10 Mr. Stoll, who's our next witness you wish to
11 cross-examine?

12 MR. STOLL: I've been told that -- they only have one
13 other witness, Your Honor, was Mr. Lewis I think is restricted
14 to the DIP. So we have no other witnesses to cross-examine.

15 THE COURT: All right. You want to --

16 MR. STOLL: We do have, Your Honor, Mr. Kearns to
17 offer on behalf of the committee as the committee's direct
18 witness.

19 THE COURT: Let's be sure Mr. -- all right. I think
20 we've gone through the entire cross-examination. So we just
21 reverse the process, Mr. Stoll, with respect to your witness?

22 MR. STOLL: Yes, we should, Your Honor. And just to
23 start that off, in your binder you should have Exhibit 7 and
24 23 which are the initial and supplemental declarations of Mr.
25 Kearns. And Mr. Kearns is here and available to be

1 cross-examined.

2 THE COURT: Does anyone oppose the introduction into
3 evidence of the Kearns deposition -- pardon me, declaration
4 and supplemental declaration, Exhibits 7 and 23 in the current
5 binder?

6 MR. BERMAN: This is Corey Berman from the debtors,
7 Your Honor. The debtors do not object to the submission of
8 those declarations into evidence.

9 THE COURT: The Kearns declaration and supplemental
10 declarations are received.

11 Now, Mr. Berman, do you wish to start your
12 cross-examination?

13 MR. BERMAN: We do not have any cross-examination
14 questions for this witness.

15 THE COURT: Thank you. Mr. Stoll, any other
16 witnesses or declarations?

17 MR. STOLL: No, Your Honor.

18 THE COURT: Do you wish to be heard in summation, Mr.
19 Berman and Mr. Stoll?

20 MR. STOLL: Your Honor, this is Jim Stoll. Mr. Stark
21 will be finishing.

22 THE COURT: All right. Mr. --

23 MR. BERMAN: The same is here with respects to on
24 behalf of the debtor. Ms. Berkovich will handle that.

25 THE COURT: All right. Let's start with the debtor's

1 summation. Ms. Berkovich?

2 MS. BERKOVICH: Yes. Good afternoon, Your Honor.

3 For the record, Ronit Berkovich from Weil, Gotshal & Manges
4 for the debtor.

5 Your Honor was correct to remind the court repeatedly
6 that the only thing on for today are the bid procedures. And
7 we submit that the evidence demonstrates that those bid
8 procedures are in the best interest of the debtors' estate and
9 should be approved.

10 I would like highlight first some key points that
11 came out in the evidence. First, as Mr. Ficks testified in
12 his declaration, he wasn't really crossed on this point and
13 was demonstrated by the DIP budget, the debtors are burning
14 cash at an approximate rate of about eight million dollars per
15 week. This amount is an additional -- in addition to
16 professional fees and interest on the DIP loan which together
17 totaled approximately 2.6 million dollars per week. So each
18 week of delay equates to over ten million dollars in
19 additional administrative expenses which come directly out of
20 recovery for unsecured creditors.

21 Second, the debtor is required to financing to fund
22 their business and preserve their value. And this is very not
23 disputed that we do at some point need the financing. And we
24 only really have one option to exit financing which is the
25 pre-petition ABL lenders and KPS. This DIP financing has

1 milestones that require of the bidding procedures ordered by
2 August 25th.

3 Third, the debtor met a robust pre-petition process
4 to find a transaction any transaction to maximize value, which
5 included discussions with the ad hoc group of bondholders. As
6 Mr. Peluchiwski explained, the debtors weren't tethered to a
7 Section 363 sale process. But the only actionable that
8 supposed came out was the form of a 363 sale.

9 And, you know, in light of the cash bleed of the
10 business that I mentioned earlier, it really does make sense
11 that any buyer would want to purchase these assets quickly and
12 would -- and would (indiscernible) as to milestones. Every
13 day that the debtors remain in Chapter 11 increases the cash
14 crunch in the company which places the debtors at risk of
15 administrative insolvency which would make it very difficult
16 for them to effectuate any sale transaction. And buyers don't
17 like that.

18 Fourth, the best offer received from the process was
19 the KPS stalking-horse bid. I don't think that's contested.
20 As explained in the Snellenbarger declaration and adopted in
21 and expanded on by Mr. Peluchiwski, the stalking-horse bid
22 provided for a purchase of substantially all of the debtors'
23 assets through a Section 363 sale that provides a value to the
24 debtors' estate of almost 800 million dollars. This is
25 inclusive of a 531-million-dollar cash purchase price, 238

1 million of assumed liabilities, and twenty-nine million of
2 excluded assets that are left in the estate.

3 Just the debtors have been running and will continue
4 to run a robust competitive post-petition sale process to
5 ensure that they sell their assets at the highest price.

6 Mr. Peluchiwski, he has incredible experience, you
7 know, more than twenty-five years in the industry, the head of
8 the Houlihan industrial group, has been the key banker running
9 the process. And he testified strongly on the strength of the
10 process.

11 And the post-petition process, which would involve a
12 thirty-nine-day period of marketing from the petition date and
13 for the bid deadline, is sufficient to provide parties time to
14 formulate bids to purchase the debtors' assets or to provide
15 some other actionable goals such as a plan approval.

16 But Mr. Peluchiwski testified to this, and it really
17 is credible testimony. And he also testified that a longer
18 process is unlikely to lead to higher or better bids.
19 Therefore, delay the deadline as the objectors request would
20 only saddle the company with more cost and without any benefit
21 to the process which doesn't make any economic sense.

22 Six, as Mr. Peluchiwski testified, and as common
23 sense suggests, having the stalking-horse bid locked in is
24 likely to lead to a more competitive auction and higher bid
25 because the stalking-horse bid serves as a floor and provides

1 the market with necessary information upon which bidders can
2 rely. The stalking-horse bid sends a clear message to the
3 market about what the company is worth, at least as a going
4 concern. And it also provides the debtor with a baseline
5 bid, including which assets and liabilities are included and
6 excluded by which to judge competing bid for either all or a
7 portion of the debtors' assets.

8 The flip side of Mr. Peluchowski, he further
9 testified that without a stalking-horse bid, the bidding
10 process is likely to be less competitive and result in a lower
11 overall transaction value for the debtors' estate.

12 Based on these key six factual points that the
13 evidence bore out, I will highlight four primary reasons why
14 the bidding procedure should be approved today, although our
15 papers discuss this in more detail. And if (indiscernible)
16 step back, I'm dividing this presentation into two parts like
17 I did in my opening. First, the procedures themselves, and
18 second, I'll get to the bidding protection.

19 And I want to note also first that the objectors are
20 not seeking a short delay. They're not saying, Your Honor,
21 give us another week or something. They're actually seeking
22 an additional thirty days or more. I think Generac is until
23 September 4th, and the UCC is asking us to go out until
24 September 30th. And this delay is obviously a terrible idea.
25 We lose our DIP and with that our ability to fund the cases.

1 We lose our bird-in-hand stalking-horse. And we lose over ten
2 million dollars a week for every week of delay and
3 (indiscernible).

4 So first, without the proposed bidding procedures
5 being approved within the milestones, it would be in breach of
6 our DIP agreement. If the lenders call a default and there's
7 no alternative sources of financing available, which is what
8 Mr. Lewis testified as one point, the debtors would
9 potentially need to convert to Chapter 7, resulting in the
10 destruction of value, (indiscernible) of a storied company,
11 and the lost of thousands of jobs across the country.

12 Second, with the delay the objectors are seeking, the
13 stalking-horse bidder would be off the hook. It would be
14 relieved of its obligation to consummate what we have now
15 which is a finding highest and best to-date bid. There's
16 simply no guarantee that the stalking horse will continue to
17 be interested in these assets or that it would bid the same
18 amount of the Court denies the stalking horse designation.
19 And, as Mr. Peluchiwski testified, based on his experience, if
20 the stalking-horse bidder does bid again, it's likely that it
21 would start its bid at a much lower price than the current
22 contractually agreed-to price.

23 And since this is the best deal we received to date
24 in the pre-petition process, it's a really great risk to give
25 up this bird in hand. And if the stalking horse bid is no

1 longer there, other bidders will not have an incentive above
2 that. They're just going to bid the minimum. We may not get
3 to the great price that we have now. So the only party that
4 could benefit from such a scenario where the bids go low is
5 somebody that wants to take the asset from the -- and maybe
6 that's the ad hoc group, but that's not a good result for the
7 estate.

8 Third, the proposed timeline of the bid procedures is
9 sufficient to ensure competitive bidding and maximize value.
10 If the objectors are right and the value of the debtors is
11 much higher than KPS bid, this process will lead to
12 competitive bids, a higher purchase price, and a higher
13 recovery for unsecured creditors. It'll be a good day for
14 everyone. And this is true whether that value is reached by
15 bids for the whole package or for parts of the business.

16 Again, the bidding procedure provides for those
17 partial bids. And we made that even clearer in our revised
18 procedures. The market is the best determinate of values, not
19 what Mr. Kearns surmises might be the case in his declaration.
20 And this process will enable the market to determine the value
21 of the company. And that value will inure to the benefit of
22 creditors.

23 As Mr. Peluchowski testified, the proposed
24 post-petition marketing timeframe, thirty-nine days, is
25 enough. It's actually longer than the time that KPS had

1 before it indicated -- committed initial indication of
2 interest, between that and the submission of its final
3 proposal and a purchase agreement. And again, the
4 post-petition process is on top of the pre-petition process
5 where Houlihan reached out to well over a hundred bidders.

6 Mr. Stoll was trying to show through Mr.
7 Peluchiwski's testimony that the process wasn't a very robust
8 process. I think it actually showed the opposite. You also
9 on top of the cross have to look at his declaration which
10 described in detail the process that Houlihan ran.

11 In addition to that, it's actually been out there in
12 the public that there's -- at least on that, that for sale for
13 this company since March actually. The company indicated
14 publicly that certain assets were for sale. And the press
15 covered the -- some of the sale process that Houlihan was
16 running.

17 I will also note that the timeline that we're seeking
18 here is not, you know, extraordinary or much shorter than
19 what's been approved in other cases. As we laid out in our
20 motion and our reply, it's actually consistent with quite a
21 few other cases that have -- or have approved similar
22 timelines. Any delay in any of the dates that we propose is
23 unlikely to lead to increased bids, but it is likely to cost
24 the estate significantly.

25 And that takes me to my fourth point. And this is

1 where Mr. Ficks' testimony I think is relevant to the bidding
2 procedures. Any delay in the process -- if Your Honor were to
3 listen to the objectors and put the bid deadline to September
4 30th, that would delay closing of the transaction and would
5 cost the estate tens of millions of dollars that come out of
6 recovery to creditors.

7 As Mr. Peluchowski testified, the current bid is just
8 enough under current assumptions to pay all secured
9 administrative and priority claims in full and fund the wind-
10 down. We are already at risk of administrative insolvency.
11 And delay will only increase that risk. This process creates
12 the best opportunity for unsecured creditors to recover,
13 minimize this cost, and if there is competitive bids, it'll go
14 directly to unsecured creditors.

15 We mentioned the numbers before, eight million cash
16 burn from the business and over 2.6 million dollars of
17 professional fees and accrued interest under the DIP. So the
18 expeditious Section 363 sale we're seeking will only build the
19 business to exit Chapter 11 much more quickly, minimizing
20 business losses and other administrative expenses.

21 So next I'll turn to the second half of the relief
22 that we're seeking which is to ask the Court to approve the
23 stalking-horse bid protection. These are a break-up fee in
24 the amount of 16.5 million. Three percent of the
25 stalking-horse cash consideration, the expense reimbursement

1 of up to 2.75 million dollars. The total of up to 19.25
2 million dollars which, of course, only gets paid if we get a
3 topping bid or we breach the agreement which presumably we
4 would only do to accept a better offer.

5 And I would like to highlight some key points from
6 the evidence on this. First, Mr. Peluchowski testified these
7 bidding protections are the product of good faith arm-length
8 negotiations between the stalking-horse and the debtor.

9 Second, he testified these protections
10 (indiscernible) important are material inducement for and a
11 condition of the bidder's willingness to enter into the
12 stalking-horse agreement. This evidence is unrefuted. If the
13 bidding protection is not approved, the stalking horse can
14 walk away and, as Mr. Peluchowski testified, likely will walk
15 away.

16 Third, the bid protections are market. Mr.
17 Peluchowski testified to that. In fact, even Mr. Kearns, the
18 committee's own witness, and the ad hoc group in its
19 objections, concede that this is market. And they only
20 question whether these market protections are appropriate in
21 this case which we'll get to.

22 And fourth, the cost is worth the benefit. The
23 termination fee and expense reimbursement together -- again,
24 at most nineteen and a quarter million dollars, as compared to
25 the value of the company which is at least 550 million dollars

1 or much higher if you listen to the unsecured creditors'
2 committee's witness, so there's small -- a small fraction of
3 the value of the company. And for that small price, the
4 debtors get to lock in a transaction that, as Mr. Peluchowski
5 testified, just is at a fair and reasonable purchase price.

6 If the KPS transaction is the best deal out there,
7 which it might be, its insurance policy will be fee. There's
8 no termination fee paid, no expense reimbursement. And if the
9 company is actually worth more, then, as Mr. Peluchowski
10 testified, having the floor of the stalking-horse bid will
11 enable the debtors to get higher and more competitive bids.

12 In sum, the debtors believe these protections are
13 reasonable and make economic sense because the stalking-horse
14 agreement increases the likelihood that the price at which the
15 assets received in the process will reflect their market
16 value.

17 And for the standard in which to approve this, the --
18 direct Your Honor -- Your Honor, I'm sure, knows this well, to
19 a decision that Your Honor wrote in Re Wintz Company. This is
20 230 B.R. 840 from the Eighth Circuit bankruptcy appellate
21 panel, 1999. And the court there said that the bankruptcy
22 should be approved when they make economic sense and are in
23 the best interest in the bankruptcy estate and its creditors.

24 Your Honor, here the bidding protections makes sense
25 and are in the best interest of the estate -- for the estate.

1 I'd actually submit that based on the evidence, the bid
2 protections are an economic no-brainer. They're an admittedly
3 markedly break-up free and a customary expense reimbursement
4 which is like insurance with no upfront premium that provides
5 the debtor the opportunity to sell pursuant to the stalking
6 horse agreement if we're unable to find a higher or better
7 deal. And the evidence shows that the terms are reasonable
8 and what was necessary to induce the stalking-horse agreement.

9 Without the stalking horse agreement, we'd be without
10 our bird in hand which would unnecessarily (indiscernible) to
11 encourage competitive bidding as well as to provide comforts
12 to our stakeholders, lenders, employees, customers, and
13 vendors that this is a company that will continue to operate.

14 Finally, the bidding protections to not chill
15 bidding. Mr. Peluchowski testified to that. The objectors
16 have provided only conjecture that the break-up fee and
17 termination fee are designed to chill bidding or somehow
18 improper because the stalking-horse bidder is also providing a
19 portion of the company's DIP loan. The argument is
20 essentially, well, here you don't need the standard market bid
21 contract protection -- bid protection to close the
22 stalking-horse bidder who is also your DIP lender. But that
23 doesn't make any sense when you actually look at the facts
24 here.

25 First, the stalking-horse bidder's approve DIP right

1 now outstanding is only twenty million dollars, the term loan.
2 And they wouldn't be obligated to fund the rest of the term
3 loan or if the bidding procedures order doesn't get approved
4 within the milestone. So this is not a pre-petition lender
5 who's a forced party to the table and has no other choice but
6 to bid.

7 Moreover, our brief has numerous cases. They're
8 standard. The protections have been provided to
9 stalking-horse bidders that are also DIP lenders. And some of
10 those are even pre-petition lenders which we don't have here.
11 The objectors, in contrast, cite no cases where a court says
12 that it was inappropriate or improper to provide
13 stalking-horse protection to DIP lenders.

14 It seems that the objectors just make this point
15 because it's the only argument they can assert, but again, it
16 doesn't make sense. The fact that the stalking-horse bidder
17 pre-paid part of its purchase price through the DIP to help us
18 out when we couldn't find any other DIP financing does not
19 impact the fact that these bid protections are market, that
20 they were necessary to bring the stalking horse to the table.
21 And in fact, I don't think this Court should be discouraging
22 stalking-horse bidders from providing DIP loans. If the Court
23 were to rule otherwise, I think a DIP lender in KPS's position
24 would never provide a DIP loan. And the company would be
25 without DIP financing.

1 So these -- regardless of the fact that the stalking
2 horse is a DIP lender, the bidding protections do exactly what
3 they're designed to do, compensate the stalking-horse bidder
4 for the time, resources, and risk associated with formulating
5 a bid. And we also lock in a transaction for the estate.

6 Do we wish we had to pay the bid protection? Of
7 course not. And we negotiated to get them as low as possible.
8 But do we think that they're a fair price to pay for the
9 benefit that the debtors get from the whole deal? Absolutely.
10 And Mr. Peluchowski's clear testimony on this point hasn't
11 been refuted. There's a reason why it's standard for debtors
12 in large cases to sign stalking-horse agreements and agree to
13 pay breakup fees, because they lead to higher bids. And the
14 objectors don't seriously dispute that.

15 Just a couple more points that were raised in the
16 objections. Generac takes issue with the one percent
17 pre-payment period that would be payable under the DIP term
18 loan if the assets are sold to a party other than the
19 stalking-horse bidder. This is really an objection to the DIP
20 more than anything. The pre-payment premium is part of the
21 DIP lender's overall fee which is below market.

22 Second, actually, the DIP lender here is benefitting
23 the debtor by agreeing to waive that fee if it's the DIP
24 lender -- if it's -- sorry, if it's the winning debtor.

25 I'm hearing feedback. I don't know if it's my phone

1 or not. Are you hearing that?

2 THE COURT: Of course I can. Just a minute, please.

3 MS. BERKOVICH: Oh, let me try -- let me try
4 something else.

5 There is another lender providing the DIP loan. It's
6 who might have required the one percent (indiscernible)
7 penalty. The debtors would have been required to pay that
8 amount, regardless of which parties which the bid.

9 So the fact that the stalking-horse bidder is also a
10 DIP lender here provides the debtors an additional benefit as
11 the may have to get to avoid the prepaid (indiscernible) if
12 the stalking-horse bidder acquires the asset. (audio
13 interference).

14 And one last point to address the ten percent
15 deposit. There was an objection to this, that the standard
16 good-faith deposit required of all bidders, which is part of
17 any bid procedure that I've ever seen -- and to be clear, this
18 isn't the bid protection that's there for the benefit of the
19 stalking horse. This is a protection really for the debtors
20 and the estate against a potential bidder reaching obligations
21 under either the bidding (audio interference) or its signed
22 (audio interference). This is a (audio interference). There
23 is some bidder out there that goes to -- that believes the
24 company is overvalued, it shouldn't be that the ten percent
25 deposit will prevent them from submitting a bid. (audio

1 interference) the bid procedures actually give the (audio
2 interference) deposit and consultation with -- consultation
3 party.

4 So in sum, we submit that both the law and facts here
5 support entry of the bidding procedures order. Mr.
6 Peluchiwski's testimony that the bid procedures and bid
7 protections are reasonable and appropriate, we (indiscernible)
8 value that is really challenged. And Mr. Ficks' testimony
9 regarding the (indiscernible) wasn't really challenged here.
10 (audio interference).

11 THE COURT: Ms. Berkovich --

12 MS. BERKOVICH: (audio interference) --

13 THE COURT: Ms. Berkovich, just pause for just a
14 minute, please. Okay. Please resume.

15 MS. BERKOVICH: Apologies, Your Honor. Does Your
16 Honor have any questions? That concludes my presentation.

17 THE COURT: Thank you.

18 Who is going to speak in summary for the creditors'
19 committee?

20 MR. PESCE: I would, sir. It's Gregory Pesce on
21 behalf of the stalking-horse bidder. If I may just speak
22 briefly in support as well before the committee has their
23 chance.

24 THE COURT: Of course.

25 MR. PESCE: Thank you. And I'll be very brief.

1 Again, it's Gregory Pesce, Kirkland & Ellis, on behalf of KPS,
2 the sponsor of the stalking-horse bidder.

3 I'll be brief because we really appreciate Weil,
4 Gotshal and Houlihan Lokey putting on such a strong showing
5 today for relief that we submit is a clear-cut choice for the
6 Court to approve.

7 Taking a step back here, as I mentioned as the
8 first-day hearing in these cases, KPS is a private equity
9 sponsor, but it's unique among private equity sponsors in that
10 its investment thesis is that it invests in businesses as well
11 as people. And that includes businesses with significant
12 organized labor relationships to manage. In here, with the
13 steelworkers being the union for the company, we are a natural
14 relationship counterparty here and have been working with the
15 company and the steelworkers for many weeks now.

16 Just to bring one thing to Your Honor's attention,
17 over the weekend, the stalking-horse bidder and the
18 steelworkers ratified a new labor agreement to take effect
19 after the Court approved the transaction. That agreement is
20 exclusive to our -- to KPS, given our relationship with the
21 steelworkers. And we're very pleased that the steelworkers
22 did that, with their ranking file members approving it and for
23 the steelworkers' support for our bid to date.

24 Just to highlight a few other points here that I
25 think are relevant to the relief requested today, the

1 steelworkers' support here has obviously been instrumental.
2 But at the end of the day, what KPS was confronted with here
3 when Houlihan Lokey first reached out to us several months ago
4 was a big problem. The financing process (audio interference)
5 for capital (audio interference). And Briggs and Stratton
6 candidly faced the prospect of a liquidation. Over 4,000
7 people would have lost their jobs. It would have been a huge
8 hole in the supply chain in the United States and abroad. And
9 Briggs & Stratton and their advisors asked KPS to put their
10 best foot forward, which we did, reaching an agreement on a
11 purchase agreement structure very quickly.

12 As we can talk about at the rest of the hearing, we
13 ultimately had to pre-fund, effectively, or agree to pre-fund
14 a portion of our purchase price to provide the company with
15 liquidity and through our -- through our DIP commitment. This
16 is obviously (audio interference) it is today to have a
17 consensual Chapter 11 filing with all of its major funded debt
18 stakeholders, the ABL.

19 The bondholders (audio interference) to put the
20 company (audio interference) financing required that has an
21 agreement with the steelworkers. The Court should not permit
22 this iconic American company to puts its fate in the hands of
23 a couple of hedge funds that time and again have missed the
24 opportunity to step and put their money where their mouths
25 are. Hedge funds weren't there over the weeks prior to the

1 filing to provide a DIP or any other transaction. KPS was.

2 The transaction we believe, and we'll show this more
3 at the sale hearing, will provide tremendous value to the
4 company. In addition to 550 million dollars, (audio
5 interference) contracts in relationship with the store is
6 going to permit this company to complete its Chapter 11
7 restructuring. And in exchange for that, KPS is being
8 compensated, no doubt. We can talk a bit about the DIP fees
9 as part of that portion of the hearing. But insofar as the
10 bid procedures are concerned, the cost here are very
11 reasonable. We're asking for a standard breakup fee and
12 reimbursement of some of our expenses. We're giving the
13 company a firm binding bid that it can go out and, as Mr.
14 Peluchowski testified, is going out and market testing.

15 THE COURT: What's the difference between a breakup
16 fee and an expense reimbursement?

17 MR. PESCE: Breakup fee is intended to compensate the
18 stalking-horse bidder for putting its -- for the letting the
19 company market the bid and having its bid be exposed. And it
20 provides protection for the stalking horse to have its bid be
21 the public face of the marketing process. And, frankly, it
22 gives the stalking-horse bidder an incentive to go higher
23 upfront versus just waiting in the wings to show up at the
24 auction with a lower price in an uncontrolled sale. The
25 expense --

1 THE COURT: Of the 550-million-dollar stalking horse
2 bid, 200-what, 200-something-million is for the term loan; is
3 that correct?

4 MR. PESCE: We will be credit bidding the term loan
5 portion at the sale hearing if the term loan is funded.
6 Otherwise, our bid is still 550- which we would pay at the
7 closing.

8 THE COURT: So why do you get a -- why do you get a
9 breakup fee on a term loan?

10 MR. PESCE: Our original proposal to the company was
11 that we were willing to pay 550 million dollars in cash at
12 closing of the sale. To that end, when we signed the
13 agreement, we funded fifty-five million dollars or so as our
14 deposit, consistent with that agreement. And leading up to
15 the bankruptcy filing, the debtor told us that it didn't have
16 the liquidity to get through the process to do our sale. And
17 they asked us to turn a portion of our purchase price into a
18 DIP commitment, which we've agreed to pre-pay, effectively, at
19 entry of the final order.

20 We would have -- absent the liquidity challenges here
21 and the demand of the lenders and the other constituents, we
22 would have done this in a much more vanilla fashion like you
23 might have seen in other deals where the purchase price will
24 be funded in its entirety at closing net of the deposit which
25 we've already provided to the debtor in escrow.

1 THE COURT: Let me try it a different way.

2 MR. PESCE: Sure.

3 THE COURT: Why shouldn't the breakup fee be 550-
4 less the term loan facility?

5 MR. PESCE: The breakup fee should not be reflective
6 of just the portion we're paying in cash at closing because we
7 are -- in the same way that we are -- in the same way that KPS
8 or any stalking-horse bidder would reserve capital to pay this
9 purchase price at closing, we are committing the capital,
10 reserving the capital today to be a firm bid at closing. And
11 if the debtor otherwise has the source of liquidity and it
12 doesn't require our DIP loan, then we're happy to pay the
13 entire purchase price at closing and not have a credit bid
14 portion.

15 THE COURT: Anything further, sir?

16 MR. PESCE: We thank the Court for your time. And we
17 urge you to approve the bid protections today. Thank you very
18 much.

19 THE COURT: Does anyone else wish to be heard in
20 support of the bid procedure motion?

21 Mr. Johnson, I believe you raised your hand. Do you
22 wish to be heard, sir?

23 MR. JOHNSON: Your Honor, if it makes sense, I'll
24 defer until after the committee because I'd probably cover
25 much of the same ground. So they're probably in a better

1 position.

2 THE COURT: Thank you.

3 The committee?

4 MR. STARK: Thank you, Your Honor. I'm just -- can
5 you hear me okay? I know there's been a fair amount of
6 electronic noise.

7 THE COURT: Actually, I can hear you well.

8 MR. STARK: Good, I'm glad. If there's any point in
9 which we're having a problem, let me know. And I'll pick up
10 the handset and make sure it's easier.

11 And, Your Honor, I know -- I don't want to belabor
12 it, but I do want to express -- or join in the expression of
13 thanks. Those of us in New York who saw an awful lot in the
14 spring, this is a lot of a courtesy not only to us but to our
15 families. So thank you, Your Honor, and thank you to the IT
16 department of the court.

17 Another side step, a little bit of a funky hearing
18 today, Your Honor. As you might -- Your Honor might note,
19 besides the fact that we're trying to get through a lot of
20 evidence before Your Honor, we've been on the job for a week.
21 There's been an awful lot of briefing that was thrown at us in
22 the middle of the night. There were four depositions
23 yesterday to prepare for today. So a lot of us haven't slept
24 for quite a while, but we're muddling through.

25 But most important is when you're taking

1 cross-examination of a witness, okay, I'm going to ask Your
2 Honor at a certain point soon to sift through the explanations
3 and get to the unrefuted facts. There was a lot of
4 explanation, but the facts where what was spent the littlest
5 amount of time.

6 So with that, Your Honor, let me start. We're not
7 objecting to the bid procedures in toto. We're not objecting
8 to KPS being named as a stalking-horse bidder. We're not
9 objecting to sixteen and a half million of a stalking horse
10 fee, although I see others have presented that. And Your
11 Honor has asked very good questions of Mr. Pesce on that
12 particular point. Nor are we really even raising an issue on
13 the expense reimbursement.

14 We had some issues on consultation rights.
15 Committees normally have a lot of consultations rights. And
16 auction processes, I think those will be worked through. But
17 there's briefing on that. I don't know where my partners are
18 in terms of working that through, Ms. Berkovich's partners.

19 The sole issue with respect to the bid procedures,
20 and (indiscernible) over and inexplicably entwined with the
21 DIP, is the timeframe, is the milestone. That's our focus.
22 Okay? and a good place to start with evaluating the proposed
23 calendar is the law, whether the legal principles -- it's a
24 little more than just what Ms. Berkovich kind of said
25 referencing Your Honor's Wintz decision, although I do agree

1 that that's right. These milestones emanate, start, come out
2 of the DIP. And then they inform, if not direct how it is it
3 applies in terms of the calendar in the bid procedures. So
4 they are inexplicably entwined. And I congratulate Ms.
5 Berkovich for her litigation strategy of separating into its
6 own little crucible, but you can't. They are the same.
7 They're part of the same. They blend.

8 And, Your Honor, interestingly enough, I don't think
9 I have to belabor the point on the governing standards much
10 because they're pretty much the same as where it -- Wintz
11 talks about does it make economic sense, will it maximize
12 estate value. Those two is the way that we're supposed to
13 look at the DIP.

14 And not to advance to a later part of the hearing,
15 but I do think it's important to note that when you're -- the
16 debtor says it's their business judgment on the DIP, not so at
17 all. Business judgment can be a part of the analysis. But
18 what is in the best interest of the estate and its creditors
19 when it's fair, reasonable, and adequate. These are quotes
20 from Judge Venters' decision of Farmland Industries which
21 collected all the authority.

22 These are essentially the same. We're here in Your
23 Honor's discretion to figure out what makes sense, is economic
24 value-maximizing under the circumstances of this case. Okay.

25 With that, let me turn to a second legal principle

1 that informs us here. Your Honor, I don't -- I'm not doing
2 anything to the phone. I know that I'm -- are you still
3 hearing me okay?

4 THE COURT: I am. Thank you.

5 MR. STARK: Okay. What does the law think about
6 coming to bankruptcy with this quick sale strategy? I think
7 this is super important, Your Honor, okay? Because the answer
8 is not much, not much at all. Okay? this is that old Lionel
9 Corp, 722 F.2d 1063, Second Circuit decision from 1983.
10 Second Circuit, a little dated. But all one has to do is
11 crack Collier on Bankruptcy or any other form of authority
12 that talks about the foundational bankruptcy principle. And
13 that one comes to bear.

14 But I'll go one step further, Your Honor, judges in
15 this court have cited favorably Lionel; In re George Walsh
16 Chevrolet 118 B.R. R99, that's a 1990 case from this court; in
17 re Channel One Communications, 117 B.R. 493.

18 THE COURT: It's okay. Everybody -- even though it's
19 old, everyone like Lionel.

20 MR. STARK: And you know why, Your Honor? Because it
21 goes back to that point of value maximization. If a debtor is
22 going to come to Your Honor and say let's deviate from a
23 historical task, I want to come back in a minute, okay, you
24 need to come forward with a sound business justification to
25 say I got to sell today. And the one thing that the Circuit

1 says that we all cite it for is that you can't listen to the,
2 quote, hue and cry of the loudest special interest.

3 THE COURT: Exactly.

4 MR. STARK: Okay?

5 THE COURT: Exactly the quote from Lionel.

6 MR. STARK: Right. And we go to Judge Barda in
7 President Casino. He phrases it sort of similar. Sales are
8 not forbidden. But, quote, it's subject to scrutiny by
9 creditors and court. So the law wants us to look with what
10 they're doing, not with the prism that, hey, this is tis easy,
11 this is nothing but with skepticism because quick sales don't
12 necessarily yield the value, and they can go more towards the
13 hue and the cry of the special interest.

14 And on that point, we come to our third legal
15 principle that I think informs our analysis, okay? Chapter 11
16 objective is always about realizing and distributing
17 reorganization value, okay? When I was a young bankruptcy
18 lawyer -- I'm not nearly as experienced as Your Honor and Mr.
19 Willard. I've learned so much from you both. Okay. But I've
20 been doing this for a little while. I was taught that
21 bankruptcy Chapter 11 was a legal process. It is not a
22 transaction. A debtor filed for bankruptcy. It takes a
23 little time.

24 And in the good old days, a debtor would prepare a
25 business plan, start rehabilitating the business, reject some

1 contracts, streamline underperforming units, use 362, 365, and
2 all the other tools of Chapter 11 to rehabilitate the
3 business. Okay. And what we're getting at is reorganization
4 value which comes straight out of Consolidated Rock v. Du Bois
5 and a zillion other cases in our jurisdiction that's the
6 progeny of Du Bois. Okay.

7 But after the Great Recession, things changed. Okay?
8 Bankruptcy Chapter 11 became more of a transactional practice.
9 Debtors started saying, as you heard Ms. Berkowitz say to Your
10 Honor, forget Lionel, forget Consolidated Rock, we'll put the
11 company up for sale, and the sale price will automatically
12 necessarily get us to reorganization value. The cash flow to
13 is to be expected, it's countered back after we've
14 rehabilitated the business, they can figure it out better than
15 Your Honor can, and we can do that like that.

16 But, Your Honor, that's called the efficient market
17 hypothesis. Okay? And I am not a believer in the efficient
18 market hypothesis. I've written. I've lectured all over this
19 country about that. I don't believe that they can arise in a
20 363.

21 But even if you are a believer, even if you think
22 that the efficient market hypothesis operates when Mr. Pesce
23 comes in and he says I've got the greatest client in the world
24 and in two days we've got to get the sale, because if you
25 don't, I'm going to call cataclysm, right -- if that's still

1 an efficient market hypothesis, at least you have to do three
2 things. One, you have to make sure that there's a sufficient
3 time and sufficient opportunity for competitive bidding.

4 Okay?

5 Second, you have to have equality of all alternative
6 bidders. That's an information equality. That's fairness in
7 the process. That's an ability to come in without a leg-up.

8 And third, you have to have objective fairness. If
9 you want to go back to another old saw, In re Ira Housing. It
10 not only has to be right, but it has to seem right. Okay?

11 Because, as the Supreme Court said in Basic v. Levenson (ph.),
12 no one rolls dice in a crooked crap game. And it's a 363
13 process. It looks like a crooked crap game. No one will show
14 up. Okay?

15 So with that, let's look at the evidence. Those are
16 our three principles that kind of inform how we're supposed to
17 look at the evidence I respectfully submit, Your Honor, okay?

18 We have a schedule that looks like this. In ten
19 days, August 28th, you've got to submit your bid in ten days.
20 Fourteen days from now, September 1, we're going to have an
21 auction. Twenty-four days from now, September 11th, we're
22 going to come to Your Honor with a sale hearing. Less than --
23 a little bit more than three weeks, we're going to be back
24 before Your Honor with what may become a very big Lionel
25 trial, but let's leave that issue aside for a moment.

1 Obviously, this, unto itself, is not good M&A
2 process. This was the contained version of an M&A process.
3 Ten days is insufficient. Okay? So the debtors' case theory
4 has to be that this work now, this ten days that we're going
5 to have now, is just the icing on the cake. Everything that
6 was done up until now is all the M&A work. And that M&A work
7 has to be best interest of estate, sale appropriate, all that
8 kind of stuff we talked about before. Okay?

9 Now, Mr. Peluchiwski is a wonderful witness. I bet
10 you he's a wonderful banker. Okay? I don't know the man, but
11 he testifies very well. Okay? And what I'd ask Your Honor to
12 do is walk through with me, Your Honor, the actual facts, who
13 did what and when, not Mr. Peluchiwski's explanations of what
14 happened and his contextualization. Simply go back to what he
15 did and when, okay, because the explanations, I would contend,
16 Your Honor, are, number one, irrelevant, and, number two, they
17 don't really go to the question of whether or not all that
18 supposed pre-petition M&A worked. This is just icing on the
19 cake, okay?

20 So we focus primarily on Exhibit 22. This is
21 Houlihan's own written document that expresses to the board
22 and to all of here what actually happened and when. Okay. And
23 page 4 is really the bullet that lays it out. Again,
24 excluding of explanations and statements if things are
25 different then they're not as they seem, follow Houlihan's

1 written words to the board, okay?

2 April, April of 2020. Does Your Honor have it? I
3 don't want to go past you.

4 THE COURT: I've got it.

5 MR. STARK: You have it front if you?

6 THE COURT: Yes, I do.

7 MR. STARK: Okay. April 2020, a company hires
8 Houlihan Lokey to run a capital raise effort. That's what
9 this says. They were not engage to run an M&A process. They
10 did not run an M&A process, at least not at inception. And
11 it's worth reminding, and I'll keep doing this, that you're at
12 the height of the pandemic on the east coast and on the west
13 coast at this time. I for one, living in Brooklyn, didn't
14 leave my home. Okay.

15 From there, we migrate by the bullets, by Houlihan
16 Lokey's own written presentation, to mid to late May. This
17 is -- it was May 16th that we get the business plan out. And
18 you heard Mr. Peluchiwski say nothing really matters when a
19 last-minute business plan comes out. That's what he
20 testified. Nobody knew what they were doing with all the
21 moving targets.

22 They don't even start until the middle of May. Okay?
23 And the proposals come in at the end of May, and they don't
24 look very good. The market isn't really reacting well to the
25 capital raise idea. And the suggestion is coming through

1 around May 24th that we got to do a change of control
2 transaction. That's the better path, okay? And, in fact, it
3 says six M&A proposals come in on May 29th. Okay. That's
4 when we start. June is our M&A marketing period. This is the
5 fifth bullet on page 4.

6 Remember now, Wall Street is still closed. I'm still
7 living in my house in Brooklyn. Governor Cuomo is saying
8 don't go outside of your homes at this point in time, and
9 we're all very distracted because we have children learning
10 from home. Okay?

11 But now this is where it goes -- it goes into the
12 negotiations. June is our marketing time period. June 2nd is
13 when the negotiations with KPS begin in earnest. Okay? The
14 debtors and KPS start negotiating. You heard Mr. Peluchiwski
15 talk about that. Eighteen days later on June 20th, Weil,
16 Gotshal sends KPS a form, asset purchase agreement. Five days
17 later at the end of June, we get three proposals from KPS and
18 two others. And we know about these proposals, right? It's
19 all discussed. It's JPMorgan which, again, is not a bidder
20 qua bidder. It's a financier. We have KPS, and we have the
21 other one. Okay.

22 And you heard the colloquy of question and answer.
23 You see that seventh bullet where it talks about forty-five
24 hours? Forty-five hours. Come back to that in a minute.
25 650-plus diligent questions. It's mostly just those three,

1 mostly just those three. Again, we're dealing with JPMorgan
2 who's not a buyer. Okay?

3 So we're really honing in now on KPA and potentially
4 one other. Okay? Now get to July. Okay. July we get to
5 the eighteen-day note-shop. That's in his declaration at
6 paragraph 18. So around July 1, we get to a no-shop. KPS has
7 M&A exclusivity with this company. There is no shopping of
8 the company in July. It's all about KPS, just like it was all
9 about KPS, JPMorgan the financial, or the other guys in June,
10 okay? And two days later, July 20th, the company filed for
11 bankruptcy. Okay?

12 We'll talk about the presentation of the bankruptcy
13 in a minute. But if that is your evidence about all of this
14 M&A activity that supposedly happened pre-petition, it was all
15 of June focused on three parties, one of which was a lender.
16 Okay? So the company filed in July, after eighteen days of
17 exclusivity talking to no one but KPS. And they have their
18 narrative right at the forefront. None of this is
19 controversial. It's all stipulated. I don't think there's
20 much facts here in dispute.

21 KPS is the stalking-horse bidder. KPS is the DIP
22 lender. KPS DIP has the milestones which demands a sale in
23 days, not weeks or months. Okay? KPS is deep in negotiations
24 with the union, and now we know they have a union deal. Okay?
25 KPS is not only buying the business assets, but did you see

1 this little note? They're also buying the avoidance actions.
2 And just on the eve of bankruptcy, because 503(c) is meant to
3 be evaded at all possibility, the executive got a tons of
4 big -- really big bonuses, five or six million dollars of
5 retention bonuses that Your Honor would never approve
6 post-petition. And they're going to -- and KPS is binding
7 those avoidance actions in their bid so as to make sure that
8 those managers are exonerated. Okay?

9 And now we're also hearing in all of the latest
10 pleadings that were filed, a couple hundred that were filed
11 last night, about antitrust concerns. Well, I've been around
12 bankruptcy for twenty-five years. I've done my fair share of
13 M&A transactions. This -- I've even advised bidders in M&A
14 transactions in Chapter 11. The message is clear. Don't
15 bother. Don't waste your time. This is done. Management
16 wants KPS. There is no profit here. Go away. Go find
17 another engine company to buy. Okay? That is what the
18 evidence is.

19 Three more points because I'm not done. Okay?
20 Around 12:30 p.m. today, and I'm doing that central time, Your
21 Honor, during Mr. -- I'm butchering his name inadvertently,
22 Peluchiwski cross-examination, he said something and my jaw
23 was on the ground, okay? But it was in this whole explanation
24 thing, so I don't know whether or not it actually resonated.
25 Okay? He said this company is a difficult M&A target. It's a

1 billion-dollar international company with operations all over
2 the globe, a very, very complicated exercise to negotiate an
3 M&A deal. Okay. That is your evidence about what this M&A
4 target in that procedure looks like. This is not, you know,
5 six laundromats. This is Briggs and Stratton we're talking
6 about, a company that has IP of enormous value, but you have
7 to kind of figure that out, inventory that Mr. Flecks says is
8 coming and going, international sales of inventory all the way
9 around. Okay?

10 Second point, okay, and this is that chart, Exhibit
11 18 -- this is a fascinating chart because, again, over my
12 twenty-five years, I've seen this chart many, many, many,
13 many, many, many times. Okay? I'm not as fancy as Mr.
14 Peluchowski. I can't -- I can pretty much tell the
15 distinction between a financial buyer and a strategic buyer.
16 It's not so very complicated. Right? He kind of said, ah,
17 it's a little bit different than that because he knew what the
18 question was from the deposition.

19 There is a grand total -- and these are his
20 numbers -- of four strategic parties out of the 225 that were
21 contacted pre-petition, four out of 225. And one of those
22 which he's very quick to say, oh, (indiscernible), is Tensy
23 Electronic Machinery Co. which actually said they weren't
24 contacted until post-petition which is consistent with his
25 deposition that only three strategics were involved. He can

1 kind of make up that Deutsche Bank is a strategic too because
2 it owns a company that's in the business, but we all know
3 that's not -- that's fake. Okay?

4 M&A prophecies always have a distinction between
5 financial bidders, which is all he was focused on, private
6 equity shops, go down this list. JLL, KKR, private equity
7 shops, the kind of people that Mr. Pesce represents for a
8 living, and no strategic bidders who may very well want to buy
9 this company. And yes, you had back-and-forth discussion as
10 to whether or not they did or did not actually say to people
11 you can buy in pieces. We thought the evidence was you cannot
12 buy in pieces; you have to buy in whole. And certainly,
13 that's now the bid procedures were presented at the forefront.

14 So his explanations may be wonderful again, but the
15 facts are the facts are the facts. What did he do? It's
16 right here in Exhibit 18. And strategics were not actually
17 attended to. But that's okay, we've got ten days. They can
18 figure it out. This great, big international behemoth they
19 can figure out in ten days. That's your process.

20 Third point, okay -- I don't want to belabor it.
21 This is not what I do for a living, belaboring points like
22 this. Houlihan Lokey's engagement just got approved today.
23 We didn't raise an objection to it, but it's a matter of --
24 now, the order is going to be signed. It's a matter of -- for
25 judicial observation, okay? But Houlihan Lokey gets a

1 substantial fee if the DIP gets approved and if the sale
2 closes and they're (indiscernible) of one another. In the old
3 days we say that that's testimony, but I wasn't going to
4 dismiss him on that. Okay? But again, I'm just here a week
5 into this thing, trying to catch up and learn. Lots of
6 explanations as to why things are or aren't, but the facts are
7 the facts are the facts.

8 (Indiscernible) strategics were actually appointed --
9 were actually sought out pre-petition. They only had a couple
10 of weeks until they went in exclusivity. We're in COVID-land.
11 There's not some big M&A process. There is a stilted process
12 that adjourns perfectly with what the debtors are announcing
13 to everyone, don't waste your time, this deal is baked. Okay?

14 Back to our legal principles, Your Honor, you have
15 took at this thing today. I wanted to adjoin it into the DIP
16 Because I think that's part of it. But if you want to focus
17 on it as Ms. Berkovich would like you to do only as bid
18 procedures, okay, is this actually economic and the best
19 interest of the estate or DIP terms (indiscernible)? Is it in
20 the best interest of the estate and creditors, fair,
21 reasonable, and adequate? I don't think you have that record,
22 Your Honor. When you pierce through the explanations and see
23 what people bid as written in black and white as opposed to
24 the contextualization, okay, they didn't do enough. And ten
25 days doesn't remediate that. Okay?

1 Go to Lionel. Do we have a sound business
2 justification for this sale? Can we not do a plan here?
3 There is nothing on that.

4 We actually have something that's really interesting,
5 Your Honor. One of the things that I really enjoy about this
6 case, okay? Whenever I'm representing a committee and the
7 company says got to do a sale, got to do a sale, got to do a
8 sale, okay, one of the ways that they buttress their strategy
9 is they don't prepare a long-range business plan. They
10 deprive the objector of the ability to actually look at what
11 the company believes is the intrinsic value of the business
12 based upon, again, a reorganization value, what we think we
13 can accomplish in terms of cash flow. After we improve the
14 business, we rehabilitate this business. Okay?

15 But here we have one because they did the business
16 plan first because there was a capital raise. That's
17 serendipitous. We can know what this company is worth on a
18 reorganization value. We're not lacking in evidence. We know
19 what the CEO, the CFO, and the board thinks this business can
20 do and how it needs to be streamlined. They're not playing
21 bury the evidence, okay? We can do that, and we're going to
22 do it at a Lionel hearing if we don't get more time and a
23 better process. That's what we're locked in on. Okay?

24 Because I do not believe that the evidence today can
25 really give you to this idea of reorganization value of the

1 efficient market hypothesis as Ms. Berkovich wants to tell you
2 is -- you know, just don't worry about it, it'll go to market,
3 the market will do fine, despite all the chilling factors.
4 The market is the market is the market. I don't believe it
5 for a second. And if Your Honor's gut instinct is, oh, my
6 gosh, there could actually be something wrong here, then we
7 can't rest assured because you don't have an adversary process
8 yet.

9 Three points very briefly, Your Honor, before I open
10 up for question. And I do have a fix, by the way. We can do
11 that at the end. Just -- in brief to my chicken-scratch notes
12 when Ms. Berkowitz was talking, Mr. Flecks -- I'm not an
13 accountant, right? I can read a balance sheet pretty well. I
14 think I understand valuation concepts generally.

15 But the game that the accountants and the financial
16 people are -- it's pretty similar. It follows a similar act.
17 Well, aren't you trending in good -- no, bad things could
18 happen tomorrow. I don't know. Okay. Go back to the facts.
19 We are substantially outperforming the budget by their own
20 numbers. That is the document that is in the record, okay?
21 We are generating much more money. His answer was, well, but
22 you can't rely on that. That's a pull-forward of future
23 sales, okay, of future inventory sales.

24 Hold a second, Your Honor. Again, I'm not
25 accountant. But higher sales is not value deteriorated.

1 Higher sales means you convert inventory into AR, and AR comes
2 into the company, okay, usually at a higher level because you
3 had profit in there. Then you're borrowing. And they've got
4 twenty-four million of incremental sales. That's not a
5 complaint. That's something to have (audio interference).
6 Good job, company, you're doing great, keep up the good work.
7 Okay.

8 The other explanation he gave is why -- all kind of
9 shell game. And Ms. Berkovich jumped on this. We have eight
10 million dollars a week in usage of liquidity. Oh, my gosh.
11 And then she -- she went so far to say administrative
12 insolvency, okay? If you look at the -- if you look at the
13 budget, guess what they're using the eight million for? Two
14 million is fees. What is the rest of it for? It's not cap.
15 It's to build inventory. That's what (indiscernible) said.
16 And building inventory is value because it'll do -- simple
17 math.

18 I spend eight million to buy work in progress or
19 finished goods inventory. I don't have -- I have converted
20 cash into something else that is still generally a working
21 capital asset. Okay? That comes with profit. When I sell
22 it, the eight million becomes ten million or twelve million.
23 Okay? And you can easily borrow against the inventory build.
24 It is no explanation to say we have to spend eight million,
25 eight million a month is going to end up killing us, we're

1 going to be a melting ice cube because we're buying inventory.
2 Quite the exact opposite. That's a good thing to do. And on
3 top of that, that's not going to blow up the M&A process
4 because normally, at least in my experience, you do working
5 capital adjustments. If you build the inventory, generally
6 there's a credit for that in connection with the final outcome
7 of this.

8 So that's not an explanation as to why it is at all a
9 decreasing of additional capital means it's going to blow up
10 and we're burning cash. That is not our facts in the record.
11 That is (indiscernible) without explanation in the record.

12 Second point, okay, Ms. Berkovich said we are hurting
13 unsecured creditor recoveries by adding time. I don't
14 understand that point, Your Honor, because Ms. Berkovich said
15 at the first-day hearing -- and looking at the DIP, unsecured
16 creditors aren't getting anything out of this case. We're
17 excluded from it. If you actually stretch out they're going
18 to borrow 540 million under the DIP, okay, and then that gets
19 paid at 550, we don't get anything from this case. It can't
20 get any worse, right?

21 So why don't you give us a better process where we
22 actually could get something for, again, the retirees, the
23 unsecured bond holders, the trade creditors who are going to
24 be stiffed by what looks to me a very structured case being
25 done to prevent competitive bidding, not to help it.

1 And this is the final point, Your Honor. And it's
2 directly from there, which is I hear it time and time and time
3 again. Judge, we built this beautiful structure, we have DIPs
4 that are interlocking, it's so full of complexity, we have an
5 auction process that -- you may not love it, but we got to do
6 it because I don't want to blow up the DIP. And you hear it
7 again, time and again from debtors' counsel, Judge, if you
8 don't approve this, all is lost, nothing else is going to be
9 happening, you might as well just light the whole place on
10 fire. Okay?

11 And then Ms. Berkowitz said administrative
12 insolvency. I, Your Honor, actually believe, and this is very
13 presumptuous, you should be offended by that. I think every
14 judge should be offended by that because that means the law is
15 irrelevant. They do whatever they're going to do in a
16 bankruptcy ring and present it to Your Honor to rubberstamp
17 it. And the law standard of review and what's perfectly
18 appropriate under the circumstances of this case are
19 irrelevant because they say so.

20 I think the Court has a deeper function here, and the
21 function is protect a lot of people here who have nobody else
22 but us to advocate for them, to get to a process where they
23 can actually look back and say either there's a planned
24 construct here that we're going to be able to develop because
25 there's an opportunity or we're going to get into a more

1 better M&A process so we can all look back on this and say,
2 yep, we just shuffled it off to KPS because that's now
3 Kirkland & Ellis devised the whole strategy.

4 Your Honor, do you have any questions for me? You've
5 been very patient with my rambling. Forgive me.

6 THE COURT: You're far from a ranter.

7 MR. STARK: Thank you. Any questions, Your Honor?

8 THE COURT: I do not have any questions for you.

9 MR. STARK: Thank you, Your Honor.

10 THE COURT: Ms. Wilson, anything in closing on the
11 bid procedures?

12 MS. WILSON: Yes, Your Honor. We filed a limited
13 objection to the proposed bid protections. The fact that the
14 stalking-horse in this case is also the DIP lender calls into
15 question the necessity of the proposed termination fee.

16 The buyer has a clear interest in debtors' assets.
17 The need for additional inducement to participate in the sale
18 process don't see justified.

19 The question remains if it's reasonable and
20 appropriate. We ask that the Court sustain our objection.
21 But in the event the Court determines it's appropriate, we ask
22 that -- we ask for assurances to be made that there will be no
23 duplication of stalking-horse expenses and DIP lender expenses
24 in this case.

25 THE COURT: And they do merge after a while, don't

1 they? Thank you, Ms. Wilson.

2 MS. WILSON: Thank you.

3 THE COURT: Does the ad hoc group wish to be heard?

4 MR. KRAUSE: Yes, please, Your Honor. Thank you.

5 Jeffrey Krause of Gibson Dunn on behalf of the ad hoc group.

6 The ad hoc group does object to the timing of -- that
7 Mr. Stark has already address, but I'm going to not duplicate
8 his comments other than to say, in response to the debtor's
9 comment that a ten-percent deposit of sixty million dollars is
10 standard and is -- protects everybody by making sure that
11 somebody who makes a bid is, in fact, committed to the bid,
12 that is true, but it is a lot to accept those bidders ten days
13 from now submit a noncontingent bid with a
14 sixty-million-dollar deposit when it took much longer than the
15 bidder has how to due diligence for KPS to get there
16 pre-petition.

17 The one other comment I'd like to make with respect
18 to timing is the exhibit of the people that Houlihan contacted
19 unequivocally shows that they did not contact ninety-seven of
20 the potential buyers until post-petition. So the idea that
21 the pre-petition process is a substitute for the post-petition
22 process is just not accurate.

23 I would like comment on the unique position of the ad
24 hoc committee and the two attacks that were made on my
25 clients, one by the debtor and one by counsel for the buyer.

1 Counsel for the buyer said that the ad hoc group that is now
2 looking at making a competing DIP proposal and is trying to
3 complete the diligence to make an alternative DIP term loan
4 proposal didn't get there pre-petition, wasn't there (audio
5 interference) pre-petition.

6 There's no evidence in the record of that, and it is,
7 in fact, contrary to what actually happened pre-petition when
8 a different ad hoc group actually did make proposals to fund
9 the 100 million dollars that the debtor said that it needed in
10 financing, that it was the debtors' process that changed to a
11 sale of the entire company and a 265-million-dollar DIP loan
12 instead of the 100 million dollars that the ABL amendment, the
13 fourth amendment that's in the record, actually required the
14 debtor to raise.

15 And so the buyer, who wasn't there at that point in
16 time to throw stones at people who actually hold almost fifty
17 million dollars of the unsecured debt in the case, saying that
18 the group that now exists didn't make a proposal pre-petition
19 is not supported by the evidence and is factually untrue.

20 And it wasn't (audio interference) Analaya (ph.) who
21 is the single largest holder of bonds today as is reflected in
22 the 2019 statement we filed, was not an active member of the
23 group until a day or two before the transaction with KPS was
24 announced, was not participating in the process. The group,
25 as it currently exists with its current financial advisor

1 which is Ancora (ph.), got access to the data room on August
2 9th. We have asked for a total of about three weeks from the
3 time we got access to the data room to put together a proposal
4 to fund 265 million dollars as an alternative DIP source.

5 The debtors' counsel said one of the reason that this
6 has to go forward immediately is because otherwise we'll lose
7 the DIP. Well, if we provide an alternative DIP, they won't.
8 And while we have asked to get to the end of the month to give
9 us time to do that, it is important, Your Honor, to recognize
10 that the actual milestone for approval of the DIP and the
11 bid -- or excuse me, approval of the bid procedures, is not
12 until August 25th. And these milestones for approval of the
13 DIP loan is not until August 30th.

14 So there is no reason the Court has to approve either
15 of those today, seven -- or excuse me, nine days after our
16 group has had access to the data room. At the very least, the
17 Court could defer until next Tuesday when we would potentially
18 have submitted a committed alternative DIP loan. The debtor
19 is the one who said the absence of an alternative DIP loan is
20 part of the reason to rush to a sale now. And we are running
21 as fast as we can to put together that proposal. And we think
22 it's not reasonable to suggest that should be until the end of
23 the month.

24 With respect to the comment debtors' counsel made
25 that maybe we want the DIP loan and the bid to somehow go away

1 because our clients -- my clients, who are noteholders who own
2 fifty million dollars of claims, may somehow be trying to pick
3 up the company on the cheap is unfair, unsupported by any
4 evidence. We actually are the ones who will get the marginal
5 dollars of a better sale. And we are the ones who will lose
6 money from giving protections to KPS that might chill bidding.

7 The last thing I want to address ties into the U.S.
8 Trustee's comments and the Court's comments but also Mr.
9 Peluchowski's testimony. The purpose of the breakup fee is to
10 induce a bidder to bid. Mr. Peluchowski testified that the
11 reason he was happy KPS was in the DIP loan is because it
12 locked them into the transaction, the direct quote from his
13 testimony. He also testified later they are very tied to the
14 close. So it cannot be that they get both the status as a DIP
15 lender, the fees that entails, including the one percent exit
16 fee that I want to come back to and deal with separately, and
17 they get breakup fee protection.

18 I know Your Honor was focused on the breakup fee
19 protection (audio inference) to the back and had sort of a
20 middle ground. It splits the baby. The reality is the reason
21 for a breakup fee is it's necessary to induce a bidder to bid.
22 If KPS says put in 265 million dollars in the DIP, is it
23 really going to walk away and not bid? There's no breakup fee
24 that is necessary in that scenario.

25 And, Your Honor, with respect to the process, the

1 debtor is talking about ten days for people to submit
2 noncontingent bids. They're saying in that ten days, the
3 super complicated company where I think their witness
4 testifying to the DIP -- assessing what the actual performance
5 for the last four weeks versus projections means, they will --
6 if they get bids from different parts which Generac said maybe
7 it will do, they will figure out how to marry up and maximize
8 value of potentially multiple bids or bids in a standalone
9 plan, or they do a simple thing and sell it to KPs.

10 So, Your Honor, ten days, I know the debtors' counsel
11 said thirty-nine days since the petition day. Not all of
12 those bidders were contacted on the petition date. They
13 were -- ninety-seven of them were contacted post-petition, and
14 I don't know how long post-petition. (Audio interference) and
15 now to submit noncontended bids with fifteen-million-dollar
16 deposits. That is not enough time. And there's no reason it
17 needs to be set today.

18 To the extent it's given by the absence of an
19 alternative DIP term loan, we may be able to solve that
20 problem for the Court as soon as next Tuesday if the Court
21 were unwilling to give us more time than that, but certainly
22 by the end of the month. Thank you. And I'm happy to answer
23 any questions you may have, Your Honor.

24 THE COURT: Thank you very much.

25 Mr. Johnson, do you wish to be heard?

1 MR. JOHNSON: Yes, Your Honor, very briefly.
2 Once again, I represent Generac Power Supplies.

3 And first, Generac is not looking to derail the sale
4 process. It's (indiscernible) be a potential bidder in this
5 case. And if it wasn't serious, it wouldn't have committed
6 the resources that it has so far to the process.

7 There are some (audio interference) procedures. And
8 we've heard many of those today already that would inhibit us
9 and other potential strategic bidders from either submitting a
10 bid or have (indiscernible) to bid, one that'll be able to
11 meet the qualifications required by the bid procedures. We
12 outlined many of these in our written objection, so I'm only
13 going to briefly highlight three (audio interference).

14 With respect to access to information, I think the
15 testimony in both the debtors' reply and today is, yes,
16 Generac is a strategic potential purchaser, is not getting the
17 same information as other bidders for reasons of
18 confidentiality and competitively sensitive information.
19 However, Generac can't find the NDA.

20 And to the debtors' credit, they have sought an
21 accommodation where they've asked us for a list of information
22 of things that we'd like to see. However, that process is
23 cumbersome and naturally built in a list of delay as you're
24 going to have follow-up. And it also leads to open the
25 question of, if I don't ask for it and it's been redacted, is

1 there something in that data room that would be material
2 information.

3 So we are kind of coming from this from a vantage
4 point of not having access held information and more
5 importantly the delay in the follow-up of trying to get that
6 information. And I think that goes to the main issue as we
7 see it, and that's time.

8 Given the information for -- especially for strategic
9 (audio interference), it'll call into question the (audio
10 interference).

11 THE COURT: Mr. Johnson? Mr. Johnson?

12 MR. JOHNSON: Yes, (audio interference).

13 THE COURT: Let's just wait a minute and see if the
14 noise clears up. Thank you.

15 Let me address this so we don't proceed further. If
16 the debtor is not providing you the information that you think
17 you're entitled to or that others have, bring it to my
18 attention. And this whole process will come to a sudden stop.
19 That's a message that I want heard by the debtor not to play
20 hide-the-ball with information or data. That's something we
21 shouldn't even be talking about.

22 Please proceed, Mr. Johnson.

23 MR. JOHNSON: Thank you, Your Honor.

24 (Audio interference) --

25 THE COURT: Okay. Hold it. Mr. Johnson, on your

1 end, it seems to be quite noisy.

2 MR. JOHNSON: Your Honor, I'm talking through a
3 headset. I'm wondering if this is any better.

4 Your Honor, with respect to the timing of the sale
5 procedures, in our objection, we asked for a modest extension
6 of the bid deadlines. I think if the thirty days that we've
7 asked for, if those are counted against the entry of the
8 bidding procedure and, say, that -- those procedures were
9 entered today, that would amount to roughly a three-week
10 extension or September 17th to submit a bid.

11 I do understand the melting ice cube analogy. And I
12 think every Chapter 11 case pursuing a 363 sale uses it in
13 some form. We don't believe this short extension of time
14 we're asking for is unreasonable.

15 With that said, any extension of the bid down the
16 line, whether it's one week or thirty days, will increase the
17 changes that Generac will submit a bid or increase the quality
18 of any potential bid submitted.

19 With respect to the parts and whole, and this is
20 something that the Court noted early on, we do have some
21 consternation with respect to the acceptance of partial bids.
22 It may be the case that, especially where you have business
23 divisions, that potential bidders are interested in submitting
24 bids for certain divisions or parts of the overall corporate
25 enterprise. The debtors propose that they will qualify such

1 partial bids if they're in the aggregate equal amount of
2 certain thresholds that they set out in their revised bid
3 procedures. However, if they don't receive those types of
4 aggregate bids, then there will potentially be no auction.

5 Ultimately, it appears that potential bidders for
6 less than a whole though may never know that the other bidders
7 exist. And it's not clear what -- you know, what kind of
8 process is in place. Is the debtor or the investment banker
9 going to reach out and try to club some of those bids so they
10 can get an apple-to-apple for the entire process?

11 Rather, we would suggest that you allow the partial
12 bids to enter in the auction if they otherwise qualify and let
13 the auction process sort it out in some respects. We've seen
14 that in the past. And you also get the dynamics and fluid
15 nature of the auction process to maybe drive the sale.

16 Once again, if there's not enough individual bids
17 that equal the whole and the stalking-horse bid is still the
18 best and, you know, as far as highest and best, then that can
19 be determined at the sales procedures. But to not even let
20 folks come into the auction to drive that process seems,
21 especially on these truncated time limits, to be a little bit
22 shortsighted.

23 So we would ask that if a partial bid does otherwise
24 qualify, that it be allowed into the auction and to design a
25 framework that will encourage as far as aggregate bids to see

1 if the parts can equal the whole.

2 Ultimately, if that's not an option, giving even more
3 time, more than three days before the submission of qualified
4 bids in the actual auction, maybe even as much of a week to
5 see if some of those bids can be put into a form that can put
6 some real competition as far as the auction. So that does
7 give us concern and certainly could inhibit folks
8 participating.

9 In conclusion, Your Honor, we are an interested
10 potential buyer. And once again, we wouldn't be spending this
11 time if we weren't. We also understand if we don't like the
12 rules of the game, then we don't have to play. However, if we
13 feel that way, it may be the case that other potential bidders
14 feel that way. And buyers are -- well, buyers are awarded
15 tremendous benefits from a 363 sale. The spirit of the sale
16 is to expose the assets to the market in a fair and efficient
17 process. However, when there's barriers in time, information,
18 and transparency, it does raise the question of that process.

19 And with that, Your Honor, I would -- if you have any
20 questions for me, I have nothing further.

21 THE COURT: Mr. Johnson, if your client is a partial
22 bidder for less than the whole, then you're wholly depending
23 upon other partial bidders, is that correct, for a successful
24 challenge to the stalking horse?

25 MR. JOHNSON: Your Honor, I would assume that would

1 be the correct because I guess the question would be that
2 would leave potential other assets. And one division may not
3 justify approval of one sale of the other. And if the
4 stalking horse wanted that division, they may pull back. So
5 it would be more or less dependent on some type of club.

6 THE COURT: Thank you.

7 Does Jones Plastic and Engineering Company wish to be
8 heard?

9 MR. LAFLAMME: Brian LaFlamme on behalf of Jones
10 Plastic.

11 We filed our objection, and it's been stated many
12 times today that they're only talking about the bid procedures
13 and the protections. Debtors' omnibus reply said that we're
14 premature because our objections are primarily for the sale.
15 If I can get confirmation that we'll have an opportunity to be
16 heard at the sale hearing, then I think we can back off today
17 and let Your Honor deal with all that you've had to listen to
18 already.

19 THE COURT: Yes. Ms. Berkovich has told me in
20 writing in her pleading several times this isn't the sale
21 motion today.

22 MR. LAFLAMME: So you'll see me again, Your Honor.

23 THE COURT: Thank you.

24 Ms. Berkovich?

25 MS. BERKOVICH: Yes, Your Honor.

1 THE COURT: Why do we need minimums for partial
2 bidders, for bidders of less than the whole?

3 MS. BERKOVICH: Your Honor, there is no minimum for
4 any potential bidder. The way it's written that you add up
5 all the partial bidders and together must total more than the
6 stalking-horse purchase price.

7 THE COURT: Yes.

8 MS. BERKOVICH: That's what you --

9 THE COURT: That's what I explored with Mr. Johnson.
10 If he's a partial bidder, he's dependent upon others who may
11 or may not appear and bid on other parts.

12 MS. BERKOVICH: Correct.

13 THE COURT: Okay.

14 MS. BERKOVICH: Correct. If he's the only one that
15 shows up, right, other than KCS, it's not actual. There's
16 nothing we can do. We can't sell a partial business for half
17 the purchase price and leave the rest of it with no funding.
18 The business needs funding in order to operate as a going
19 concern.

20 THE COURT: Do you want --

21 MS. BERKOVICH: And I can -- you know, I can
22 address --

23 THE COURT: Do you want to respond to Mr. Stark, who
24 pointedly said of your burn rate, you're just purchasing
25 inventory?

1 MS. BERKOVICH: Your Honor, we're purchasing -- the
2 burn rate includes both purchases (audio interference) and the
3 sale, right? The burn rate is after you include both of
4 those, so inventory doesn't -- every dollar of inventory
5 doesn't lead to a dollar of extra liquidity, right? It takes
6 money to turn that inventory into sale. So it's eight million
7 dollar gross with purchase of sales.

8 And I would also say, and we laid this out quite well
9 in our reply, I would say, that bargain business of inventory
10 is simply not a viable -- it's not a viable option here,
11 right? Yeah, you (audio interference). It's more of a
12 current value, as Mr. Ficks testified fairly clearly.

13 It would also cause a breach of the stalking horse
14 purchase agreement, and it would hurt current sales and hurt
15 future sales, right? You're never going to make up those
16 sales again if you don't buy inventory. That's not a way to
17 run the business.

18 THE COURT: Thank you.

19 MS. BERKOVICH: May I address a few more points that
20 Mr. Stark made?

21 THE COURT: Yes, please.

22 MS. BERKOVICH: Okay. I would like to start by
23 saying that Mr. Stark is a great orator. He's entertaining
24 and full of zest. But when you look behind what he says, he
25 really is -- as misleading characterization of facts, and he's

1 more (indiscernible) facts in the record.

2 He made a point at some point during his presentation
3 that I was putting a lawyer gloss on a lot of the points, but
4 I would actually say, and I'll point out how, that it is he
5 that is putting lawyer gloss on the facts, right? Our
6 witnesses, Mr. Peluchowski and Mr. Ficks, have very detailed
7 declarations. We didn't put them on direct. We submitted
8 their declarations as direct testimony, and there was very,
9 very little to refute those.

10 Just to start with, he points at the DIP that maybe
11 that's the only reason that we're saying we need this approved
12 quickly. That's just not the case, right? There are
13 milestones in the DIP, so it is true that if we don't get this
14 approved within the milestones that we wouldn't have the DIP.
15 Mr. Stark has essentially (indiscernible) by saying oh, his
16 client's going to put in an alternate DIP.

17 So number one, and we can get to this later, his
18 client has, like, stepped up to the plate and we're ready, but
19 he hasn't come through at any point that we've needed him.

20 Number two, that doesn't solve our problem, because
21 the milestones are not just in the (audio interference).
22 They're also in the ABL DIP, and it's the ABL lenders that are
23 very interested also in having quick milestones. So it's not
24 just the DIP.

25 Secondly, (audio interference) the stalking horse

1 agreement will walk away. We'll lose it by (audio
2 interference). Somebody is -- this does not --

3 THE COURT: Wait. Wait. I'll raise my hand. We
4 need everybody on mute other than Ms. Berkovich. Let's try it
5 again. Go ahead.

6 MS. BERKOVICH: Okay. So again, if we don't get
7 these approved, the stalking horse agreement goes away. It
8 goes poof. They get to walk away. And again --

9 THE COURT: And very true. Everybody can walk away
10 from any deal. I get it. Let's move on.

11 MS. BERKOVICH: Okay. So Mr. Stark spends a lot of
12 time on Lionel. I just think forget Lionel, but I think Your
13 Honor knows that this is not before the Court today; the
14 approval of the sale is not before the Court today. It's just
15 the bidding procedures.

16 THE COURT: I acknowledge that. I acknowledge you
17 told me that three times in the pleadings.

18 MS. BERKOVICH: Okay. And Mr. Stark would have you
19 believe his characterization of the sale process and his
20 characterization of other market produces the best result
21 here, as opposed to Mr. Peluchiwski, who is our witness, who
22 has over twenty-five years' experience in this area. So for
23 Mr. Stark to be right, either Mr. Peluchiwski has to not know
24 what he's talking about -- he just has to be wrong that this
25 is a good process and wrong that this is going to lead to the

1 greatest good -- or he's crooked; he's lying. For some
2 reason, he's putting his whole reputation at stake to tell you
3 that this is a good process when, in fact, it's actually
4 something nefarious.

5 You'd have to believe that this is a crooked craps
6 game, to use the words that Mr. Stark told you. But if you
7 look very closely at the declarations that were filed, pages
8 and pages and pages about the process, and look at Mr.
9 Peluchowski's conclusion, that's what Your Honor should be
10 basing his evidence on, not some lawyer throwing rocks at the
11 process.

12 I would also say Mr. Peluchowski made a weird --
13 sorry. Mr. Stark made a weird comment about Houlihan's fees,
14 but Houlihan's fees actually go up the higher the bid (audio
15 interference).

16 THE COURT: Oh. Ms. Berkovich, you're swinging a
17 ball in the dirt. That's just a distraction.

18 MS. BERKOVICH: Okay. Well, okay. It's a
19 distraction, but everyone is incentivized here reputationally
20 and fiduciary -- the fiduciary matters to try to increase
21 their value, and we believe that our process does that.

22 Mr. Stark is also misleading when he talks about the
23 process being only ten days long. This goes back to no good
24 deed being unpunished. We did move the bidding procedures
25 hearing, and that does have the effect of shortening the

1 period between the bidding procedures order and the bid
2 deadline, but it doesn't change the total number of days of a
3 post-petition marketing process: thirty-nine days.

4 The evidence that lawyers lost -- the evidence, Mr.
5 Peluchowski said that is more than enough for us, the debtor,
6 to support the bids. And it's more than enough -- more than
7 fine that -- if KPS had -- to put in a bid.

8 And throughout all of this, Mr. Stark could always
9 exclude Mr. Peluchowski's explanation on these facts on the
10 topic. Why would you exclude his explanation? I think his
11 explanation of why this is a good process is exactly what Your
12 Honor should be paying attention to.

13 And it is also -- I think, Mr. Stark was also
14 misleading in terms of why the M&A proffer started. In his
15 own witness's declaration, and it's really public record that
16 the company started putting assets up for sale in March, okay?
17 So it's been way longer than June. And this second amended
18 process started in May, not June. Again it was (audio
19 interference) his declaration leaves it out completely.

20 Also Mr. Stark mentioned COVID, but again, the
21 testimony, the evidence, Mr. Peluchowski testified that COVID
22 did not have any impact on the marketing process. Even the
23 point that, again, the lawyer made that Wall Street was closed
24 in (indiscernible), just ask anyone (audio interference)
25 understands that between March and June there was a huge

1 rebound, and it hasn't been closed -- it was not closed in
2 June. So again, it didn't affect the sale process.

3 Mr. Stark made much of the (indiscernible) to
4 exclusivity for it, but then he ignored that for months prior
5 to that Houlihan was marketing the asset. There is also an
6 exception in the exclusivity, and that's if they have (audio
7 interference) closing in the declaration. The exception was
8 for the ad hoc group, but during that exclusivity period we
9 continued to negotiate with the ad hoc group, and the ad hoc
10 group just never made an actionable proposal.

11 Mr. Krause said oh, they didn't take our proposal.
12 Well, of course we would have liked to stay out of bankruptcy
13 if at all possible, but their proposal depended, among other
14 things, and this is in the evidence, on ABL consent. And they
15 simply weren't putting in enough money or giving a structure
16 that actually solved for the company's maturities on both the
17 bonds, which, I think, will return in December, or the spring
18 maturity on the pre-petition ABL.

19 Sorry. Just a moment.

20 And then another point that Mr. Stark made was about
21 unsecured creditor recoveries and that they were getting
22 nothing. I'll state the point again. The current bid would
23 lead, under certain assumption -- under certain functions --
24 to exactly zero unsecured creditors. So what this bid does,
25 and especially by eliminating the ten million dollars a month

1 of burn here, it creates the best opportunity for unsecured
2 creditor recovery.

3 If we were to delay the process as Mr. Stark asked,
4 and you believe the evidence of Mr. Peluchowski that it's
5 unlikely to lead to higher bids but is likely for Mr. Ficks to
6 release ten million dollars plus (indiscernible). That will
7 hurt unsecured creditor recovery. The best way to maximize
8 the opportunity for unsecured creditor recovery, because
9 that's the only thing we can do in this case, is to allow the
10 bid to proceed quickly and hope that a higher bid comes out in
11 this process.

12 Now, another -- and this is a minor point, but Mr.
13 Stark said he's only been involved for a week, and maybe you
14 didn't see his face three weeks ago or four weeks ago at the
15 first day hearing, but you certainly heard his voice. So I'm
16 not sure why he has to make that comment for a long time, but
17 he's been certainly involved longer than a week.

18 THE COURT: Thank --

19 MS. BERKOVICH: I would like to also -- I'm sorry?

20 THE COURT: Thank you, Ms. Berkovich.

21 MS. BERKOVICH: Would you like me to address any of
22 the other points that any of the objectors made?

23 THE COURT: No, ma'am.

24 MS. BERKOVICH: Okay.

25 THE COURT: With respect to the bid procedure

1 motion --

2 MR. STARK: Your Honor, may I --

3 THE COURT: -- Mr. Stark. Mr. Stark, I think --

4 MR. STARK: Well, you've heard enough. I just want
5 to address one question that Your Honor posed, if it could be
6 helpful, and that's all.

7 THE COURT: Yes, sir?

8 MR. STARK: Your Honor asked a question, I believe,
9 of Generac's counsel whose name escapes me, and all I wanted
10 to do is do something that I thought would be helpful. When
11 Your Honor pressed the question of that counsel as to whether
12 or not if that -- if his client were to submit a partial bid,
13 would that create problems -- at least that was my
14 interpretation -- to get to marry it off with other bidders
15 to, kind of, displace that. I just wanted to --

16 THE COURT: I don't think it causes a problem. It
17 takes a risk.

18 MR. STARK: It takes a risk. Right. But I think it
19 also creates an opportunity that just on the -- connect the
20 stars -- the bondholders, whose counsel has shown up and
21 indicated a potential willingness, that might be a funding
22 source; if you were to effectively sell a unit, that could
23 marry up with a self-creating plan of reorganization, which
24 would be remarkably value maximizing. And now that plan bids
25 are potentially allowed to be brought into the process,

1 having -- we want to have plan opportunities and financings
2 from our present creditors, because that could yield to
3 something very positive here. That's all I wanted to add,
4 Your Honor. Forgive me.

5 THE COURT: Thank you, sir.

6 Mr. Stark, what are you like on a full night's sleep?

7 MR. STARK: I am (audio interference), and we would
8 have a fun time. Next year.

9 THE COURT: With respect to the bid procedure motion,
10 many people have contributed, both those in favor of the
11 motion and those who oppose it, to some fairly basic
12 principles, and I think Mr. Stark identified them, as did
13 others.

14 The whole bid procedure is designed to maximize
15 value, and to do so in a way that encourages participation in
16 the process and is fair and equitable to all participants.

17 The big thrust of those objecting is you can call it
18 the milestone, the compactness of the process. It all results
19 in a request for additional time. And so I'll start with the
20 milestones.

21 I'm well aware that the milestones are only an
22 agreement between the DIP lenders and the debtor. They don't
23 bind me. They don't bind me to pleadings I haven't read,
24 hearings I haven't conducted, or decisions I haven't made.
25 The problem is with everyone, you can't forecast the future.

1 If we get more time, we'll maximize value.

2 Well, here's an observation. If you look at the so-
3 called thirty-nine days, or if you look at we only need a
4 week, or we only need two or three weeks, I think we're
5 looking at the tip of the spear, but I think what we should be
6 looking at to determine value maximization or fairness is the
7 process.

8 Ernst & Young testified, through Mr. Ficks that the
9 process started March the 5th. My notes indicate that he was
10 preparing DIP financing budgets forecasts. We know that in
11 the following month Houlihan & Lokey was engaged, and they
12 participated in the process, as described by its witness. And
13 we can parse this by picking out strategic buyers from
14 financial buyers. Everyone can second guess a process.
15 Everyone can do better on Monday morning than they actually
16 did on Sunday afternoon.

17 So the question is, on balance, do I determine that
18 this process, which, again, didn't start on the date of filing
19 or exclusivity, the no-shop provision. It started well before
20 then. Is it designed to maximize value? Is it designed to be
21 fair to all participants?

22 Well, one way we cleared up today for one of the
23 objectors is that we can bid partially without restriction or
24 minimums. Of course we take the risk that others will do the
25 same, so that the sum of our parts will eclipse the whole.

1 This is probably the least popular thing I'll say,
2 but in just reviewing proposed orders so far, all of you are
3 very aggressive. All of you seem to go the extra mile to
4 achieve a result, which tried to tame. I don't understand the
5 need for a termination fee when we have sixteen other bid
6 protections for the stalking horse bidder.

7 But let me go back to a couple of points Mr. Stark
8 made. There's a dispute as to the burn rate, but we'll just
9 call it -- and there's a dispute as to how did we do so well
10 for those two weeks? Doesn't that portend greater value and
11 that we'll do well in the future?

12 Of course there's a point/counterpoint to each of
13 these points. I don't think that doing well financially in a
14 two-week period is an indicator of much of anything in the
15 future.

16 I'm reminded of Mr. Willard's case, OSC or OCI,
17 whatever the name of that case was, where the witness from
18 Rothschild said, famously, well, the process was not a -- it
19 wasn't up to Washington University's standards, is what I
20 think he said. I wonder who prompted him to say that.

21 This process isn't without its flaws, but since we
22 can't foretell the future, I think it meets the test of value
23 maximization. I think it meets the test of fairness.

24 Having said that, and I know this is -- well, we'll
25 just leave it at that.

1 I'm going to grant the motion for bid protections and
2 ask counsel to prepare an order for me.

3 Now, would you like to take a break, and then we'll
4 hear the 364 DIP financing motion?

5 Mr. Eggmann?

6 MR. EGGMANN: Sure, Your Honor. I think that would
7 be fine.

8 THE COURT: Well, let's resume at 3:45.

9 MR. EGGMANN: Thank you, Your Honor.

10 THE COURT: Thank you.

11 (Recess from 3:30 p.m. until 3:43p.m.)

12 THE CLERK: Your Honor, we are back on the record.

13 THE COURT: Thank you. Please be seated. Mr.
14 Eggmann, I believe the last matter on today's calendar is the
15 DIP financing motion.

16 MR. EGGMANN: Yes, Your Honor. That's item number 30
17 or 23 on the agenda, and Ms. Berkovich is up again, with the
18 assistance of one of the litigation lawyers at Weil, Lauren
19 Alexander.

20 THE COURT: Thank you. So let's see if we can follow
21 the same format. I'll call on Ms. Berkovich if she wants an
22 opening statement. If she does, then we'll go to Mr. Stark
23 and see if he would like to be heard, followed by the others
24 in basically the order I've called them in the previous
25 motion.

1 Then we'll put on the evidence by cross-examination
2 after the introduction into evidence of the declarations.

3 Ms. Berkovich?

4 MS. BERKOVICH: Yes, Your Honor. Good afternoon.
5 And thank you, Your Honor, for being so patient with us
6 throughout the day. I will try to keep these remarks brief
7 because it's clear to me that Your Honor certainly reads
8 everything on file, so -- and I assume that, Your Honor. I
9 just have a couple of opening remarks. I assume Your Honor
10 doesn't need a refresher on what those two DIP facilities are.

11 There's the ABL signature loan, and the (audio
12 interference) getting the ABL DIP facility to see --

13 THE COURT: Do you have a pencil handy?

14 MS. BERKOVICH: Yes.

15 THE COURT: Here's some things to think about.

16 MS. BERKOVICH: Yes.

17 THE COURT: I read your response, and at some point
18 you're going to tell me about the die maker, the mold guy, who
19 allegedly have statutory liens in either Wisconsin, Kentucky,
20 or Tennessee. And you're going to tell me why you need
21 Chapter 5 causes of action as collateral, okay?

22 MS. BERKOVICH: Okay.

23 THE COURT: Now.

24 MS. BERKOVICH: Yes, Your Honor.

25 THE COURT: I cut you off.

1 MS. BERKOVICH: The leases since have been resolved,
2 but I would -- I would (audio interference). In addition to
3 this -- getting to this ABL and based on the term loan, I, as
4 Your Honor knows, we're seeking a roll-up of the pre-petition
5 ABL should be paid off through the proceeds of the DIP
6 (indiscernible) loan. Another key element -- we've talked
7 about a lot of them today, is financing as a milestone.

8 Again, one of them we've hit, which is entry of the
9 bidding procedures order. Another one is entry of the final
10 DIP order by August 31st.

11 Over the course of the last week, the debtor has
12 engaged in intensive discussions with our objectors to try to
13 resolve as many of their points as possible, and we made many
14 changes to the DIP order. Some of those are included in the
15 blackline that was attached to our reply that we filed
16 yesterday morning. We also have additional changes in the
17 last twenty-four hours, a little blacklining support.

18 Would Your Honor like us to go through that or would
19 you prefer that we do that at the end?

20 THE COURT: Why don't you take care of it now by just
21 summarizing the changes you've made?

22 MS. BERKOVICH: Sure. Ms. Hoehne is closer to that,
23 so I'll actually ask her. She can do it in a more summary
24 fashion.

25 Ms. Hoehne. Ms. Hoehne, we can't hear you. Are you

1 on?

2 THE COURT: I'm sorry. Mr. Eggmann, who am I --

3 MS. BERKOVICH: I'm sorry; so we'll turn to that a
4 little bit later, and we'll make sure that she summarizes it.

5 I just want to make a few notes about timing, because
6 the biggest objections to the DIP seems to be this issue of
7 timing that was also raised in the bidding procedures, that
8 somehow -- and it's even more so here -- somehow we don't need
9 to draw on our DIP now, that the performance-to-date versus
10 budget has been so vastly improved that we can wait many, many
11 weeks, till September 4th or till September 30th before we get
12 final approval. And we do hope that they admitted that if we
13 have to solicit (audio interference) something else most
14 likely be ad hoc group come in to take out KPS.

15 The problem with the delay is mostly -- there's
16 multiple problems. One is it puts us beyond the milestone
17 date which leads to default in the DIP. But fundamentally,
18 also, (audio interference) understand the budget to
19 performance numbers and the effect a delay will have on our
20 business.

21 The evidence will show there has been some
22 improvement in actual versus forecast, but the vast majority
23 of that is time-based, as Mr. Ficks explained earlier. In
24 other words, maybe we didn't make some disbursements last
25 week, but we'll need to make them this week or next week. Or

1 yes, sales have increased now, but those are sales we were
2 expecting next week. Well, we need to purchase supplies now
3 to replenish the inventory, and we need to do so right now or
4 we hurt future sales.

5 So we did study the numbers, Your Honor, when we got
6 the request for additional time, to see how long we can go
7 without drawing on the DIP term loans without that getting
8 approved. And we could, from a liquidity perspective, go a
9 little bit (audio interference) but not really (audio
10 interference) factors with (indiscernible), to say the least.

11 In addition, the evidence will demonstrate that even
12 though we have liquidity to go a little bit longer, doing so
13 comes at a cost to business because if we don't get the DIP
14 approved today, it'll be harm to the business in terms of
15 customer and vendor confidence and no benefit. There's really
16 no benefits to delay here.

17 So there are also, in addition to, sort of, the
18 short-term lender, we need the money, so at least we have it,
19 if not the overall funding needs of the company over the next
20 few months.

21 And you saw Mr. Stark start to argue this. They
22 argue that we don't need to buy inventory, and we can preserve
23 liquidity by starving the business of any spending, and they
24 believe this will get us a longer runway. But the evidence
25 will show that this theory is simply false. We need to spend

1 on our business to preserve value, really, regardless of who
2 the purchaser is. And if we don't spend, we will lose sales,
3 not just temporarily but permanently, which hurts value.

4 So if the ad hoc group wants to come and propose a
5 DIP and take out KPS at some time in the future, there is
6 nothing that will prevent them from doing so. And we look
7 forward to discussions with them, but we can't harm the
8 business now while we wait for them to make a final decision.

9 And especially, again, I'll point out, this is a
10 group that we talked to twice before, we've been talking to
11 since mid-May, and they have yet to make an actual proposal,
12 either on a DIP, which they talked to us about pre-petition,
13 or on a merger transaction.

14 With that, I would like to move to the evidentiary
15 portion of the record. I would again --

16 THE COURT: Let --

17 MS. BERKOVICH: Yes?

18 THE COURT: Before we do that --

19 MS. BERKOVICH: Yes.

20 THE COURT: Let me go through the other constituents
21 and see if they want to give me an opening statement or
22 support your motion. We'll start with those in support.

23 JPMorgan, do you wish to be heard?

24 MR. KNIGHT: Yes.

25 THE COURT: Please tell me who --

1 MR. KNIGHT: Thank you, Your Honor. Can you hear me?

2 THE COURT: Yes. Yes.

3 MR. KNIGHT: Can you hear me, Your Honor?

4 THE COURT: Yes.

5 MR. KNIGHT: I've put on this headset, just very
6 fashionable, trying to let you hear me a little better.

7 It's Peter Knight on behalf of JPMorgan Chase Bank as
8 DIP agent or pre-petition agent. Your Honor, I'll be very
9 brief.

10 We obviously support the entry of the DIP order on a
11 final basis. We think the debtor has plainly satisfied
12 whatever standard you apply here under 364, and I would just
13 ask to reserve comment for after the objecting parties make
14 their statements.

15 THE COURT: Thank you, sir.

16 MR. KNIGHT: Thank you, Your Honor.

17 THE COURT: Let's hear from KPS Capital Partners, and
18 then, Mr. Stark, you're on the on-deck circle.

19 MR. PESCE: Thank you, Your Honor. It's Gregory
20 Pesce, Kirkland & Ellis, on behalf of KPS again. We thank you
21 for making time for us this afternoon.

22 We obviously support the DIP and are eager to support
23 the company's process here. Having come off of the bid
24 procedures hearing earlier today, we continue to support the
25 company's financing needs, but we have reflected with our

1 clients here and are willing to take into account the input
2 that you provided during the prior segment. And
3 notwithstanding any of the rhetoric in the pleadings today, we
4 are willing to proceed with the DIP even without the
5 prepayment penalty, provided the rest of the DIP, including
6 the milestones, obviously, contemplated therein, are approved
7 by Your Honor.

8 We hope this provides a modicum of help to the Court,
9 given the concerns you raised during the prior part of today's
10 session. And if there's any questions that you have, we're
11 happy to field them, and we obviously would reserve any other
12 feedback that the Court might have after the other people have
13 spoken in today's session.

14 THE COURT: Mr. Pesce, thank you for you candor.

15 Mr. Stark are we ready to go?

16 MR. STARK: I think so. Can you hear me?

17 THE COURT: I can.

18 MR. STARK: Okay. Thank you. I won't be long again.

19 I don't really believe in openings, but for purposes of
20 framing the --

21 THE COURT: Actually, Mr. Stark, actually I enjoy
22 listening to you.

23 MR. STARK: Well, don't entice me, Your Honor. It's
24 going to be a tough road, but I'll try. Thank you very much.
25 I appreciate it. The openings -- I really think, in terms of

1 the evidentiary presentation, I think -- I just want to give
2 you the sum and substance of the issues that remain. There's
3 still milestones. It's a carry-over from before. Okay.

4 Second is the roll-up. Talk about that for a while.

5 The third is the budget that is reserved for the
6 official creditors' committee's professionals, and there's two
7 law firms and a financial advisor.

8 Fourth, there are some smaller issues like --

9 THE COURT: I'm sorry, Mr. Stark. When you tell me
10 the third issues, the reserve for the committee, at some
11 point --

12 MR. STARK: Yes.

13 THE COURT: You'll tell me what your suggestion will
14 be.

15 MR. STARK: Yes. And I hope that it will reflect
16 what I -- there's been some discussions. They just haven't
17 finished. So my hope is that the last offer from the company,
18 which may be supported by the banks or may not, I don't know,
19 that was acceptable to us. I just don't know where that lies.

20 So I'll make the argument unless we solidify that and
21 the issue is obviated, I just don't know at this moment.
22 There was so much activity going on before, so I'll make the
23 argument, and we'll go from there.

24 THE COURT: Okay. And we'll hear --

25 MR. STARK: The last -- the point --

1 THE COURT: And we'll hear from Ms. Berkovich with
2 respect to that also.

3 MR. STARK: Thank you, Your Honor. There's a fourth
4 category, and I'll call it a miscellaneous grab bag. It's the
5 usual stuff, the liens on avoidance actions and the
6 recoveries, surcharge waivers, things like that. And I'll
7 hold those over until the end. I believe I'll run through
8 those, I think, very, very quickly.

9 The only thing that I'd ask as we get started, and
10 then I'll cede the podium back over to Ms. Berkovich, on the
11 evidence, I think it would be appropriate to carry over the
12 evidentiary record from the prior contested matter.

13 THE COURT: I agree with --

14 MR. STARK: So we don't have to --

15 THE COURT: I agree with you.

16 MR. STARK: Okay. And then --

17 THE COURT: Let me go one step further, and this is
18 poor on my part but not too late. All of the exhibits which
19 Stark and Berkovich and everyone else referred to will be
20 received into evidence. I failed to do that. I apologize to
21 you.

22 (All exhibits previously referred to were hereby received into
23 evidence, as of this date.)

24 MR. STARK: Thank you, Your Honor. There was one
25 issue, and I don't want to go out of turn, and maybe I am

1 predicting a problem that doesn't exist, but it sounded as if,
2 as Ms. Berkovich was presenting her opening, she wanted to
3 reset on the question of the milestones and the liquidity
4 issues, apparently dissatisfied with the evidentiary record
5 she established.

6 Your Honor, it was their direct testimony that came
7 in via direct affidavit. We did the cross. We rested. We
8 made argument. We don't have an opportunity for more
9 deposition time. If her intent was to bring the witness back
10 because she didn't like the way the evidence came in before,
11 that I would object to as, sort of, the process was supposed
12 to mean something.

13 THE COURT: I did not get --

14 MR. STARK: Of course I was nominate --

15 THE COURT: I did not get the impression that was
16 where she was going.

17 MR. STARK: Okay. Good. Then I'll rest on that and
18 cede the podium back.

19 THE COURT: Okay.

20 MR. STARK: Thank you, Your Honor.

21 THE COURT: Thank you. What about the --

22 MS. BERKOVICH: Your Honor.

23 THE COURT: Wait just a minute. Let's hear from the
24 ad hoc group. Do you wish to be heard in opening?

25 MR. KRAUSE: Thank you, Your Honor. Jeffrey Krause

1 of Gibson, Dunn on behalf of the ad hoc group. We have the
2 same concerns with the matters that we had with respect to the
3 overbid procedures. And I don't need to make any opening
4 argument with respect to it but would want to make closing
5 statements regarding the short milestones in the DIP and
6 whether or not it needs to be approved at all before next
7 Tuesday.

8 THE COURT: Thank you.

9 Jones Plastic? Mr. LaFlamme, good afternoon again.

10 MR. LAFLAMME: I'm here for Jones Plastic and Ataco
11 Steel. As of this morning, I was made aware that both my
12 clients have reached an agreement with the debtors as to lien
13 priority, inserting language in the final order that satisfies
14 my clients.

15 THE COURT: Are you the die and the mold guy?

16 MR. LAFLAMME: Yes.

17 THE COURT: Well, because I can't remember names.

18 MR. LAFLAMME: Yes, I am both.

19 THE COURT: Okay. Ataco is die and the molds are
20 Jones Plastic.

21 THE COURT: Thank you.

22 MR. LAFLAMME: All right.

23 THE COURT: All right. So Ms. Berkovich is going to
24 make the announcement at some time what the agreement is.
25 I'll ask you if you have anything else to supplement her

1 comments with.

2 MR. LAFLAMME: All right. Thank you, Your Honor.

3 And any other argument we had, we'll defer to the committee to
4 make their arguments through their --

5 THE COURT: Thank you. Before we get into the
6 declarations, then, and the evidence, Ms. Berkovich, do you
7 want to tell me what your resolutions are with the dies and
8 the molds?

9 MS. BERKOVICH: Yes, Your Honor. I'm turning to that
10 a minute. Also I located Ms. Hoehne. Or see, I'm glad that
11 she didn't start speaking about the resolutions, because there
12 continues to be discussion with both the committee and the DIP
13 lenders about certain issues that remain outstanding, and
14 those are happening in the background, so probably after the
15 evidence we can talk about where we are, but what we need
16 isn't.

17 The modification is to make clear that to the extent
18 the claimants have pre-existing statutory liens, (audio
19 interference) the DIP does not fund those. So we have
20 language, which I can read into the record that we've shared
21 with the --

22 THE COURT: That's all right. As long as the DIP
23 does not prime the statutory lien, that's, I assume,
24 acceptable to Mr. LaFlamme?

25 MR. LAFLAMME: Yes. Yes. We have specific agreed

1 language going back and forth.

2 THE COURT: Come on up. Come on up.

3 MR. LAFLAMME: In general, yes. I mean, we went back
4 and forth on --

5 THE COURT: Well, the specific language.

6 MR. LAFLAMME: -- on an "or" and "after" in the
7 paragraph. I think it was all agreed to this morning.

8 THE COURT: All right. Well, she's not going to
9 submit an order until she has your consent on it, so --

10 MR. LAFLAMME: Okay.

11 THE COURT: Don't worry about the exact words. The
12 concept is what I was worried about.

13 MR. LAFLAMME: Yes, Your Honor.

14 THE COURT: Okay.

15 MS. BERKOVICH: Right. And the point about trying to
16 redo the evidence, I wasn't doing that. I thought I was
17 simply stating the evidence that was already put into the
18 record which the Court -- everything that I said, but we'll
19 get to that.

20 So at this point, we can move to the evidentiary
21 portion of the third.

22 We have our two declarants in support of the motion,
23 Mr. Jeffrey Lewis of Houlihan and Mr. Jeffrey Ficks, that
24 you've heard of, and they're available for cross-examination.
25 We would ask that the Court move these two declarations into

1 evidence. It's the Lewis declaration filed at docket 36. The
2 original Ficks declaration, which was our first day
3 declaration, filed at docket 51, and the supplemental Ficks
4 declaration, filed at docket 460, into evidence.

5 THE COURT: All right. So is there any objection to
6 the receipt into evidence of the Ficks and Lewis declarations
7 and supplement thereto?

8 There's no objection. They are received into
9 evidence.

10 (Declaration of Jeffrey Lewis was hereby received into
11 evidence as Debtors' Exhibit, as of this date.)

12 (Declaration and supplemental declaration of Jeffrey Ficks
13 were hereby received into evidence as Debtors' Exhibit, as of
14 this date.)

15 THE COURT: So shall we start with you, Mr. Stark?

16 MR. STARK: Your Honor, I think I will cede the
17 podium to my partner, Mr. Stoll, again, if that's acceptable
18 to the Court.

19 THE COURT: Of course.

20 MS. BERKOVICH: And I will say that my colleague
21 Lauren Alexander is on the street (ph.) and she will handle
22 the evidence here.

23 THE COURT: Thank you. I look forward to hearing
24 from her.

25 If you would, sir.

1 Is your mute button on?

2 MR. STOLL: Can you hear me all right?

3 THE COURT: Is your mute button on, sir?

4 MR. STOLL: No, I think I'm on. Can you hear me?

5 THE COURT: I can now.

6 MR. STOLL: All right. Yes. Your Honor, we have no
7 questions of any of these declarants other than what we've
8 already initiated through their previous testimony.

9 THE COURT: Thank you. Then let me go to the ad hoc
10 group.

11 MR. KRAUSE: Thank you, Your Honor. Jeff Krause of
12 Gibson, Dunn for the ad hoc group. We have no questions for
13 the witnesses.

14 THE COURT: I assume Jones and Ataco have no
15 questions. I'm sure they don't. Okay.

16 Then we'll go back to Ms. Alexander, if you want to
17 present, please.

18 MS. ALEXANDER: Good afternoon, Your Honor. Lauren
19 Alexander for the debtors. If there's no cross-examination,
20 there is no redirect on my part, so I will turn the podium
21 back over to Ms. Berkovich.

22 THE COURT: All right. Ms. Berkovich, you want to
23 give me your argument in favor of granting the motion?

24 MR. EGGMANN: Your Honor, before we start with Ms.
25 Berkovich's argument, I want to make sure she fixed her

1 camera. It looks like she's got -- I think she had, some,
2 like a piece of paper over her camera. So if we're going
3 to --

4 THE COURT: How do you know these things?

5 MR. EGGMANN: Your Honor, I'm sure everyone noticed,
6 but I think everyone noticed but Ms. Berkovich.

7 THE COURT: All right. Ms. Berkovich, can you hear
8 us? That's not working. Okay.

9 MS. BERKOVICH: Yes, Your Honor. I was on mute. So
10 I can hear you, and I will get started.

11 So Your Honor, we believe, as set forth in our
12 papers, that the standard for approval of a DIP loan is
13 business judgment. And we could go forward with a lengthy
14 lecture about the business judgment standard here, but any
15 discussion before the Court is whether we satisfied it, and we
16 believe that the testimony from Mr. Lewis and Mr. Ficks is
17 clear. It supports our business judgment that approval of the
18 DIP loan is in the best interests of the debtors and their
19 estate.

20 I would like to highlight a few of the key simple
21 facts in in this case. Mr. Lewis testified about the robust
22 marketing process to obtain post-petition financing on the
23 best possible terms. The debtor and their advisors carefully
24 assessed the company's spending needs, prepared a budget,
25 provided the facility, and devoted weeks to hard fought

1 negotiations on all material terms to arrive at a financing
2 package.

3 And I'll keep coming back to that. This is a package
4 that, as a whole and under the circumstances, is reasonable,
5 consistent with market terms, and the best option available to
6 the debtors.

7 You did hear testimony about this earlier, but it's
8 set forth even more in Mr. Lewis' declaration that it would
9 be -- why a DIP agent's inability to syndicate the DIP term
10 loan facility, that while that's to KPS for the DIP term loan,
11 we did not have any other committed financing, and so we
12 needed to go with them in order to fund our cases.

13 So the board of directors, after being presented with
14 the terms of the DIP facilities and the advice of advisors,
15 made a good-faith decision that this was in the debtors' best
16 interest. It would fund operations, (indiscernible) sales
17 strategy, and maximize value, and this decision should not be
18 second-guessed.

19 But the key point here is that there is no
20 alternative financing that could work (audio interference) any
21 term available for the debtors at this time. Again, if the ad
22 hoc group wants to come in at some point with financing that's
23 better, we're happy to discuss it with them.

24 So on the key point at issue today, it seems to be
25 the need for DIP financing, which also leads to the question

1 about funding. There's a roll-up. Again, there's these
2 miscellaneous terms. Mr. Stark referred to some of them.

3 There doesn't seem to be a dispute about the debtors'
4 need for a DIP at some point for financing to fund the ongoing
5 business, so the only issue seems to be the twin issues of
6 when do we need that additional liquidity that would be made
7 available on, kind of, final approval, and second, how much
8 liquidity do we actually need to fund the business until the
9 sale?

10 The first point I would make to answer the timing of
11 the DIP milestones, we do need final DIP approval by August
12 31st or the lenders can terminate. This is a normal standard
13 milestone that justifies the timing.

14 Second is our need for liquidity. As Mr. Ficks
15 testified, we know when (audio interference) need access to
16 the liquidity provided under the final DIP.

17 This goes back to the two issues I mentioned earlier
18 and that were the focus of the objection to the declarations,
19 and those are the business performance and the inventory. A
20 lot of (indiscernible) in the pleadings, the declarations,
21 talk about these issues, but it seemed that the committee and
22 the ad hoc group mistakenly -- and Your Honor sort of
23 addressed this in his ruling on the bid procedures -- they
24 mistakenly assert that business performance indicates that the
25 debtors have sufficient liquidity to push out the final

1 approval for thirty or more days. But this misunderstands the
2 debtors favorable liquidity performance.

3 As Mr. Ficks testified, that favorable performance
4 debate is almost entirely a function of timing and doesn't
5 mean that we don't need immediate access to financing to
6 continue to run the business in the ordinary course. Although
7 cash receipts have outperformed the DIP budget in the first
8 few weeks of the case, our overall liquidity needs are not
9 significantly reduced. When you look at the two key drivers
10 of performance, which they're still (indiscernible) Mr. Ficks
11 was. One is lower than projected disbursements, and the
12 second is higher than projected sale receipts.

13 So disbursements have been lower than projected in
14 the first three weeks. We don't dispute that. But the reason
15 has been delayed disbursements for supplies and materials.
16 Most of these are related to delayed settlements of critical
17 vendors and 503(b)(9) claims, and those payments are expected
18 to be made this week or next week. So the disbursement side
19 is totally a function of timing.

20 At the same time, we have had increased sales in the
21 first three weeks, and these have had a slight positive impact
22 on liquidity, but those sales were due to debtor's inventory,
23 and we must rebuild that inventory to support both near term
24 and the forecast fiscal year 2021 sales and to avoid further
25 disruption to the operating plant.

1 So the initial improvement to liquidity is not really
2 as significant as the objecting parties assert, and, you know,
3 so while we didn't -- business is doing better, we can't delay
4 this financing.

5 That's, sort of, a temporary issue, so now we'll talk
6 overall DIP needs, because the objection focused on this too,
7 so -- and the view here that we don't need such a large DIP is
8 based primarily on the faulty assumption that we don't need to
9 build up inventory or incur other spending for materials that
10 we have in the thirteen-week forecast. This view of liquidity
11 is one that would effectively starve the (indiscernible).

12 Mr. Ficks' testimony on this point is clear that that
13 is an ill-formed strategy that would severely impact value and
14 recoveries for creditors. And this also makes common sense.

15 The debtors need to build inventory to meet sales.
16 Sales to order right now, and some of our sales are actually
17 on backorder, as Mr. Ficks mentioned, as well as future sales.

18 The other thing that this strategy of starving the
19 business within is because of reaching our stalking horse
20 agreement. Under that agreement, we're required -- the
21 debtors are required to operate in the ordinary course, and in
22 order to do so we must have sufficient liquidity. And even if
23 the stalking horse did not terminate the stalking horse
24 agreement as a result of this breach, a failure to buy
25 inventory would lead to a (audio interference) per dollar

1 reduction in the sale proceeds available due to the working
2 capital adjustment. It would also mean that any plan investor
3 in the future, or any buyer, would be willing to pay less for
4 the debtors' --

5 Next I'll turn to the DIP milestones. The committee
6 and the ad hoc group argue that those are aggressive and don't
7 provide sufficient time. They really dealt with this in the
8 bid procedures, but they made this into a KPS issue, but it's
9 not. These are points that were insisted upon by the ABL
10 lenders as well, and they're fairly standard. DIP financings
11 don't come with a carte blanche. They come with strings
12 attached. Interest rates, these milestones, that's why DIP
13 milestones are a basic feature of DIP financing and standard
14 practice.

15 So we do need to comply with them here, and those
16 milestones are also part of the overall financing package and
17 were negotiated in good faith and at arm's length.

18 Also, and as we've covered before, but it's important
19 (audio interference). Those milestones help us, actually,
20 minimize the incurrence of the necessary administrative
21 expenses, or the ten million plus a week that would be spent
22 for each week that the case and the milestones are delayed.
23 And we covered that, so I won't go through that again.

24 I don't want to cover old territory, so I will take a
25 minute just to look at my notes, and that will help in

1 efficiency for everybody.

2 THE COURT: Let me prompt you by asking you to
3 address roll-ups at some point in your presentation.

4 MS. BERKOVICH: Sure. Okay. It is in my
5 presentation. Let me first say that the reason for the delay,
6 again, is they want us to wait for a group with the -- a deal
7 with the ad hoc, but that group, as the Ficks' declaration
8 sets forth for you, had not stepped up to actually provide us
9 any financing.

10 Okay. So and again, I'll get to the roll-up, but I
11 want to keep in mind that it's part of a package that, as Mr.
12 Lewis testified, is market fair and reasonable under the
13 circumstances.

14 So now we get to the roll-up, and the roll-up is
15 supported for two reasons. First, again, it's a material
16 component of the DIP facilities. It was required by the ABL
17 lenders as a condition to their commitment to provide
18 financing. This was the only financing available, so we
19 really had no choice but to agree to the roll-up.

20 Second, similarly, we were unable to obtain post-
21 petition financing on better or similar terms that did not
22 provide for this roll-up.

23 Third, and this is one of the unique features of this
24 case, and a point that supports very much the roll-up, and the
25 objectors ignore, is that as part of the overall package,

1 including the roll-up, the pre-petition secured parties have
2 agreed to forebear from exercising their remedies against our
3 four subsidiaries, several of which are guarantors under the
4 pre-petition ABL facility.

5 That forbearance is very valuable to the company.
6 Without it, the company would be forced -- would be in default
7 of its debt and would be forced to file insolvency proceedings
8 in various countries. It's clear what -- how it would result
9 from that: timing, resources, destruction of value, delay, et
10 cetera. And that global insolvency proceedings, that needs to
11 be coordinated with this proceeding, and there's a good chance
12 it would impact the company's ability for purpose -- a value
13 maximizing transaction to close.

14 In addition, based on the analysis and as Mr. Lewis
15 testified, the pre-petition ABL lender, they're oversecured.
16 As such, this roll-up just affects the timing of their
17 payment, not the amount or certainty of the recovery.

18 There also are benefits there in that the DIP ABL, as
19 well as the DIP term loan, are both at an interest rate that
20 is lower than the pre-petition interest rate, so that does
21 save the debtors some money, having that roll-up. And we did
22 make it clear, based on the committee's objection, that the
23 roll-up is subject to potential challenge. That is a change
24 that was made. If the roll-up is approved, and the committee
25 successfully challenges it, then the lenders will have to

1 disgorge the --

2 And I will say also that the roll-up is supported by
3 law. These are common features these days in Chapter 11
4 cases. They've been approved in cases in this district --
5 Foresight, Noranda, Payless, Bakers Footwear -- and then we
6 cite at least a dozen cases from other districts. This is not
7 novel, and there's no reason that it shouldn't be approved
8 here.

9 Does Your Honor have any more questions about the
10 roll-up?

11 THE COURT: I don't have any right now.

12 MS. BERKOVICH: All right. And one other point. We
13 did negotiate. Better yet, we did try to get the lenders'
14 lawsuit included in what we suspect are (indiscernible), but
15 they did not budge on that, so --

16 Okay. The next evidence -- the next point is the
17 propriety of having KPS be our DIP lender. And the evidence
18 on this issue is clear. We did not want the DIP provided by
19 KPS, but ultimately we had no choice, but we're very
20 comfortable at this point with the way things turned out,
21 because KPS is not tying the DIP loans or being a purchaser.

22 In other words, at first they said okay, we'll give
23 you the DIP loans, but if we're outbid, that other bidder
24 needs to come and take out our DIP loan, and we said no to
25 that. So they're willing to stand behind and continue to be

1 funding the business even if they're outbid at the auction.

2 The terms they gave us are not, sort of, special
3 terms. These are the terms that substantially (indiscernible)
4 the ones that we negotiated with JPMorgan that (indiscernible)
5 is going to go out to the market bid. So we're pleased that
6 KPS stepped in to give us this committed financing.

7 Otherwise, we would have entered the cases of syndication
8 risk, which wouldn't be good for the estates or the process.

9 The bidders' objection that this somehow kills
10 bidding is never really explained and doesn't pass the common
11 sense test. We need that funding. Regardless who provides
12 it, a bidder will have to clear the 550-million-dollar cash
13 purchase price hurdle within the KPS bid and will pay off the
14 difference. So there's no reason that another bidder would
15 not be able to bid that price and satisfy that hurdle simply
16 because KPS is a DIP lender. I don't think the debtor cares
17 whether it's KPS or maybe your favorite bank or Ronit
18 Berkovich who provides the DIP loan here.

19 Just to touch on a couple of other issues. There's a
20 lot in the objection to that adequate protection -- the
21 adequate protection package. I think that becomes a little
22 bit irrelevant, because after the roll-up there's not going to
23 be anything outstanding on the pre-petition, so there'll be no
24 need for adequate protection. I will just say, though, that
25 the adequate protection here is the standard and only is being

1 provided for diminution in value. So (audio interference)
2 should be approved.

3 Next, I guess, is the means on unencumbered assets
4 and avoidance actions. This is an issue in almost every case,
5 right? DIP lenders want this, and creditors' committees
6 don't -- creditors' committees don't really like to give it.
7 This objection should be overruled here. The evidence is
8 clear in Mr. Lewis' testimony that the DIP lenders required it
9 as a condition to their providing the DIP.

10 Really, the creditors' committee shouldn't care if
11 they are of the view that the value is much higher than 550
12 million, then these DIP lenders won't have to, sort of, cap
13 them to be these avoidance actions and other unencumbered
14 assets.

15 It's standard, actually. This is different than even
16 giving adequate protection in the form of unencumbered assets
17 and avoidance actions. It really is standard for a DIP lender
18 to get the best possible collateral package. And this is part
19 of it.

20 So the debtor has determined that in their business
21 judgment this is a reasonable request. And we do think the
22 values are closer than the creditors' committee thinks it is,
23 because we understand that the DIP lenders believe that
24 there's a risk here and the company is a risk for
25 administrative insolvency, and therefore -- if their bid

1 somehow falls apart, and therefore we do think it is
2 reasonable to provide adequate protection -- sorry, to provide
3 this extra collateral in this case. And we cited in our
4 papers lots of cases where this has been done.

5 And I would say the same thing about the 506(c)
6 waiver and the waiver of the 552(b) equities-of-the case
7 doctrine. And again, I won't repeat what's in the papers
8 other than to say this is part of a package deal that was
9 negotiated for and is standard and reasonable under the
10 circumstances, and we had no choice.

11 Next, I guess, to the challenge period, the
12 investigation budget, and the professional fee cap.

13 The challenge period here, which is sixty days after
14 formation of the creditors' committee, is reasonable and
15 standard, and is also consistent with this court's Chapter 11
16 guidelines regarding cash collateral and financing orders. It
17 gives the committee more than enough time to review the
18 relevant documents and conduct its investigation. There's
19 nothing that's particularly, sort of, difficult, why they
20 couldn't use the standard time.

21 And also, it's possible for the creditors' committee
22 to move later to have that challenge period extended for cause
23 or to extend it with the consent of the debtors and DIP
24 lenders. But again, they're represented by experienced
25 professionals, and this should not be a problem.

1 Similarly, we believe that this post-investigation
2 budget of 150,000 is more than reasonable for a sixty-day
3 investigation period. Again, this isn't investigation of
4 insider transactions or anything that might create extra
5 scrutiny. This is a standard ABL loan from a bank lender
6 group.

7 Next, the creditors' committee argues that the
8 amounts reserved in the DIP budget for committee professionals
9 are unreasonably small. We don't believe so. The budget is
10 for 175,000 per week or an aggregate amount of 700,000 per
11 month. And we have increased the amount for the creditors'
12 committee under the carve-out to 200,000.

13 These are more than reasonable under the
14 circumstances, especially in a case -- in a case like this
15 where it's important for everyone to be mindful of not
16 incurring additional administrative expenses.

17 Those are all the points I wanted to make, and unless
18 Your Honor has questions, I'd reserve rebuttal time --

19 THE COURT: Thank --

20 MS. BERKOVICH: -- after we hear from the committee.

21 THE COURT: Thank you, Ms. Berkovich.

22 Mr. Stark, are you ready to go?

23 MR. STARK: I am, Your Honor. I don't know if --

24 THE COURT: Mr. Stark, I think you're always ready to
25 go.

1 MR. STARK: Thank you. You're very kind. Thank you
2 for the vote of confidence, Your Honor.

3 Let me just remind the Court about -- we have four
4 issues: the milestones, the roll-up, the budgeting, and then
5 miscellaneous stuff at the end. So let me take those in turn.

6 On the milestones -- and I'm not going to belabor the
7 argument that I belabored before; I think it was highly
8 covered. But there's a couple of things that I think are
9 worth pointing out.

10 The first is that bid procedures can and do change as
11 circumstance changes. Okay? And even in going to the
12 auction, they reserve the right, based upon the circumstances
13 that would happen then, to change the rules, and if people
14 have problems with it, it's put on the record or it's brought
15 before Your Honor, or the auction stops and Your Honor is
16 brought in.

17 Sometimes we don't have the time that's necessary,
18 because there's fervent bidding and we need more time. Right?
19 Sometimes there's changes that are necessitated because -- and
20 I'll make a suggestion here -- a plan construct is submitted
21 as a bid.

22 We have a tight time frame, by my argument, from
23 before; but we respect Your Honor's view about the bid
24 procedures. If you put it in a DIP becomes immovable. You
25 cannot undo a DIP milestone, because then we must find 550

1 million dollars to change the circumstance that's created.

2 THE COURT: Or -- or because of the circumstances
3 surrounding a deviation from the milestone, there's
4 capitulation by an oversecured creditor.

5 MR. STARK: And normally, we would have that, except
6 here our creditor is the stalking-horse bidder. That's the
7 problem in a nutshell. I don't have creditors who are the
8 lenders. I don't have economic actors. I have a bidder who
9 would be acting. And that bidder --

10 THE COURT: But --

11 MR. STARK: -- will not consent to that point, but --

12 THE COURT: But the bidder is still motivated by
13 self-interest. Does it --

14 MR. STARK: To close the deal that it's negotiated
15 without having competitive process. That's why it's making
16 the DIP loan. It's not making the DIP loan because it wants
17 to make 500,000 dollars with a commitment fee and another
18 300,000 dollars of interest until it closes. It wants to own
19 this company, and it wants to prevent everybody else from
20 trying to bid against it.

21 It will not cede to a competitive process, because
22 that cannibalizes its fundamental Chapter 11 status. If it
23 was JPMorgan making this DIP, I'd make a different argument,
24 but it isn't. Okay?

25 THE COURT: Yes, sir.

1 MR. STARK: It takes us back to the standard
2 governing this part of the hearing today. Okay? I
3 fundamentally, 110 percent, disagree with Ms. Berkovich on
4 business-judgment rule. It cannot be (audio interference)
5 hapless debtor's business judgment controls the question on
6 DIP financing, because we have enormous and historical body of
7 jurisprudence observing how secured creditors use, exploit,
8 sometimes abuse, their leverage, to get what courts
9 subsequently find to be overreaching terms. Okay?

10 The hapless debtor's business judgment can be
11 something that can be solved -- and if I could, again, I'll
12 revert back to Judge Venters' decision on Farmland Industries,
13 where, again, he consolidated the authorities and came up with
14 a multi-prong test. And the business judgment of the debtor,
15 "if both sound and reasonable" is but one of many factors, but
16 so too was "the best interests of the estate and its
17 creditors", and second quote "whether or not the terms are
18 fair, reasonable, and adequate."

19 Again, we find ourselves right before Your Honor to
20 make a determination contextually -- not what the debtors
21 wants to do, because we already know what the debtor wants to
22 do, but whether or not, looking at the circumstances of the
23 case, at the evidence and the arguments presented, that these
24 milestones placed in an immovable, difficult DIP, being
25 provided by our stalking-horse bidder, not some normal lending

1 scenario, is in the best interests of the estate and its
2 creditors, and is fair, reasonable, and adequate, under the
3 circumstances.

4 And we don't see how that conclusion can be made.
5 Again, Your Honor approved it in the bid procedures. That's
6 more than half the loaf. They have their procedures. That is
7 law of the case. Rule 60(b) will only come into effect if
8 something new and interesting and powerful changes the
9 procedure that we're on. Why do we need the belt and
10 suspenders which will definitely stranglehold the rest of the
11 case by sticking it into the DIP, when you've already
12 otherwise given them what they want? It's just beating it
13 down.

14 And I'll go one step further, Your Honor. Where we
15 are right at the moment -- again, full respect for Your
16 Honor's decision vis-a-vis the bid procedures -- is the burden
17 for the committee now gets a little bit harder. Right? We're
18 not going to have the thirty days to really test the market,
19 so and clearly we're in a litigious case. This is going to be
20 an adversary process.

21 That may require us, based upon how Mr. Krause's
22 client, the bondholders, come forward with their theories of a
23 plan of reorganization or whether it's Gener Act (ph.) or
24 other bidders, if they come to us and say, look, we are, in
25 fact, not having a very good M&A process. Your one-week of

1 diligence, your four days of -- four depositions the day
2 before the trial, as (audio interference) on the stand,
3 disabling -- it's disabling for us to really present an
4 adversary process today.

5 When we get to the true facts, when limits are a
6 little bit longer, we may find ourselves with a great big
7 Lionel Corp. trial coming up, because Your Honor said, quite
8 aptly, you haven't approved anything yet. Your Honor has not
9 entered any order on the sale. But that becomes our burden to
10 present the evidence as to why Lionel Trains is not the
11 appropriate way to go. This could be a litigious process.

12 Locking in the DIP and the milestones says it almost
13 doesn't matter how egregious the facts are, it almost doesn't
14 matter what the standard is and what Your Honor's previous
15 position may be, once you see the evidence at that trial,
16 because the DIP will default, and it eradicates your gavel
17 from being able to control the disposition of this case, based
18 on the evidence as they mature, in the days ahead. And that,
19 we think, is wrong.

20 They already have their half a loaf. It's more than
21 sufficient. If Your Honor is comfortable with that argument,
22 I'll move on to my next point.

23 THE COURT: I want to make sure you understood my
24 comment about the milestones in the previous motion. You
25 can't go -- these motions, these milestones, these events are

1 in sequence. You can't take them out of sequence, much to say
2 you can't go to second base until you've touched first base.

3 That doesn't mean, again, that I'm agreeing to
4 this -- to this line of events. We'll just have to see how
5 they play out. I do get it. Let's move on to roll-up.

6 MR. STARK: And I think that's right, Your Honor. If
7 ultimately circumstances prove themselves differently, we want
8 to be able to come back to you. And my only argument is once
9 it's in the DIP, we lose that opportunity, as a practical
10 matter.

11 But let's move on to the roll-up, as Your Honor
12 suggested. I want to be -- it's a very complicated structure.
13 And forgive me if Your Honor understands this. I don't want
14 to -- I don't want to belabor it too much. But I think it's
15 important to understand how this is supposed to work.

16 If the Court enters the order approving not one, but
17 both DIPs, okay, the debtors close soon after on the KPS
18 junior DIP loan. It's not a revolver. It's not an asset-
19 based loan. There's no borrowing base. It's a term loan.
20 They take the full 265 million dollars right then and there.

21 They don't use that money to buy inventory, raw
22 material, goods, pay salaries or taxes or utilities. They
23 tender it to the ABL lenders. Okay? And so they are now --
24 they already have a fair amount of roll-up from the interim
25 order. But this rolls them up entirely.

1 THE COURT: Yeah, we --

2 MR. STARK: Okay?

3 THE COURT: -- we stopped from the creeping roll-up
4 to the full roll-up.

5 MR. STARK: Right.

6 THE COURT: Grant the motion, and the pre-petition
7 debt is paid.

8 MR. STARK: Right.

9 THE COURT: Yeah.

10 MR. STARK: And then we're back to my point about
11 KPS, our stalking-horse bidder, now controls that piece via
12 it's (audio interference).

13 But let's go back to legal standards. I don't think
14 I'm saying anything controversial to say our jurisprudence
15 does not like roll-ups. It didn't like its prior version of
16 cross-collateralization. We have a fair amount of
17 jurisprudence on that. It is this kind of maneuver that, if
18 you follow the cases from Tenney Village to Ames, to all of
19 the other litany thereafter, that we're not supposed to all be
20 working here for DIP lenders or, as stated here, DIP lenders
21 who are stalking-horse bidders, right?

22 And so we do have -- Ms. Berkovich is right to talk
23 about certain cases that approve them, and I'll come back to
24 that in a minute. But there's a fair amount of jurisprudence
25 that is recent jurisprudence, where a court says that we're

1 not going to approve roll-ups, okay?

2 THE COURT: Well, okay. Without belaboring the
3 point, there are cases that grant it, there are cases that
4 oppose it.

5 MR. STARK: Right, and but the -- but let me tell you
6 why they hate it, and then let me tell you why some of the
7 courts actually do approve it. Let me create the
8 jurisprudence categorization, if Your Honor will allow me.
9 Okay?

10 It's not the cost of capital, and it's not as Ms.
11 Berkovich said, the when/if scenario. That's a red-herring
12 argument. What ends up happening when you convert pre-
13 petition debt into post-petition debt, besides getting
14 replacement liens and other sorts of grabs, you get that
15 administrative claim. 1129(a)(9) says all administrative
16 claims have to be paid in full, in cash, on the plan effective
17 date. So --

18 THE COURT: So --

19 MR. STARK: -- it builds dramatically -- I'm sorry?

20 THE COURT: So I've heard. But --

21 MR. STARK: Yeah, but build it dramatically --

22 THE COURT: -- but isn't the difference that we're
23 fully secured. This isn't Manufacturers Hanover and Saybrook,
24 where we elevated unsecured debt to secured debt.

25 MR. STARK: But it's the same problem, though, Your

1 Honor. Because I want to do a plan. I think the law wants us
2 to at least explore a plan. I think the law wants us to
3 explore a plan, because that gets us to that reorganization
4 value.

5 I don't have a lot of time to do it, but I have a
6 business plan. I have bondholders that at least, so far, have
7 expressed they have a sincere interest in exploring the
8 opportunity to finance that plan.

9 If I have the capacity to go ahead and convert debt
10 to debt, okay, and I do a rights offering in stock, I've
11 dramatically improved my chances of the value of a previous
12 plan. Or stated differently, if I've converted 325 million of
13 pre-petition debt unnecessarily into post-petition debt, it's
14 great for the ABL lenders. We're not all working for the ABL
15 lenders. But that really hampers our ability to get a plan
16 done. That's we Ms. Berkovich is just plain wrong when she
17 says it's a matter of if, not when. It's not a matter of
18 currency. And that's critically important.

19 But let me -- let me go to the next point, which
20 is -- Ms. Berkovich is right; there are some courts that have
21 approved these. And she kind of did the usual gloss. I've
22 seen this so many times. This is the best we could have done.
23 The DIP -- the ABL lenders are very, very difficult. And she
24 went one step further, and this was kind of bold. She said:
25 this is market, Judge. This is market. This is what

1 everyone's doing nowadays. Okay?

2 Well, but let's talk about that. I'm sorry, did I
3 interrupt you, Your Honor?

4 THE COURT: No, sir.

5 MR. STARK: Okay. Sometimes courts do approve these
6 roll-ups. And in my experience, when they've done, they sort
7 of have this doctrine-of-necessity feel about it. You have a
8 debtor that comes to the bankruptcy court with so much secured
9 debt, oftentimes in tiered formats, and you have poor recent
10 performance. Look at all the oil and gas cases down in Texas,
11 for example. Tons and tons and tons of debt, and then the
12 commodity pricing really sank, so you've overdrawn on your ABL
13 and really, the commodity is what you have in the business.

14 You can't have an adequate protection hearing.
15 There's no way the debtor can carry its burden of proof. It
16 must accede to whatever the demands are from the lenders, so
17 they can live to fight another day. Okay?

18 That's what's happening in Texas and a lot of courts
19 around the country, because the secured debt is the fulcrum
20 debt. Okay? But those are not our facts. Okay?

21 Here we have not powerful evidence, dispositive
22 evidence, that the ABL lenders do not need a roll-up, are not
23 the fulcrum debt, and there's vast collateral cushion beyond
24 their debt. And I need to point to nothing other than KPS's
25 stalking-horse bid.

1 Their debt is 325 million dollars. The ABL debt is
2 325 million dollars. The stalking-horse bid is 550 million
3 dollars. Even I can do that math. Okay?

4 True, they're going to borrow some. And again, as I
5 said before, if you borrow to build inventory: you buy
6 something for eight dollars, you intend to sell it for ten,
7 that is value-accretive in time, it is not value-
8 deteriorative, as if it was CapEx, okay?

9 So it's not a very good argument to say oh, we need
10 liquidity and this thing is a melting ice cube, when there's
11 no evidence of it. Right? So what you have -- and I'll go
12 one step further. Your Honor, when have you ever seen a
13 lender lending loan-to-value without any collateral equity
14 cushion?

15 If you look carefully at the budget, the full draws
16 will be 540 million before this case is done. That means that
17 KPS providing this loan on a junior basis, is going to be
18 right up to its purchase price. Okay? It's been twenty-five
19 years, I've seen a lot -- I haven't seen as much, but I've
20 seen a lot -- I have never seen a lender lend loan-to-value;
21 proof positive that the collateral cushion is much more than
22 325 million; it's worth much more than 550 million. Okay?

23 Again, they come back and they say -- this is the
24 argument, Judge -- do the roll up because that's what lenders
25 expect now. They're very difficult people, okay? And they're

1 looking at those cases down in Texas. It doesn't matter what
2 the collateral value is, it doesn't matter that you have a bid
3 that's nine figures greater than the amount of your debt,
4 okay? We must have a roll-up because, lord knows, the debtors
5 with their bankers, never, ever, ever asked a third-party
6 financier, you know what, we're going to go ahead -- I want a
7 quick financing package from you, because I will actually try
8 to get a priming DIP, because I've got a stalking-horse bid in
9 hand that shows that much excess collateral value. Right?

10 They would never dream of marketing that, nor would
11 they ever dream to give a priming battle before Your Honor.
12 Houlihan Lokey gets an enormous fee simply by saying I dialed
13 twelve people; we come in to Your Honor, it's KPS, it's all
14 over, because we can't do a priming.

15 Those are not our facts. They are confusing apples
16 to oranges. And this becomes a market-creep argument. Do
17 whatever the market says because the lenders say so,
18 irrespective of what the evidence shows Your Honor collateral
19 value. And that argument, Your Honor, is untethered to the
20 law. It is wrongful and should not be endorsed here. Okay?

21 THE COURT: Did you notice how you took the cheap
22 shot at Houlihan again?

23 MR. STARK: I didn't mean to. I actually had --

24 THE COURT: Of course.

25 MR. STARK: -- I think the world of them.

1 THE COURT: No, of course you did.

2 MR. STARK: No, no, no. I won't do it again, Your
3 Honor. Sometimes I get not enough sleep. Apologies.

4 Let's go to the budgeting, unless Your Honor has any
5 further questions for me on the roll-up.

6 THE COURT: No, sir.

7 MR. STARK: Okay.

8 THE COURT: Budgeting and challenge period.

9 MR. STARK: Yes, okay. So the official creditors'
10 committee's budget, at least prior to this hearing when
11 somebody was telling me, and the papers went back and forth,
12 was 500,000 dollars a month for the two law firms representing
13 the committee and BRG, our financial advisor; versus what I
14 was told was up to fifteen million for the debtors'
15 professionals.

16 I'm not doing a compare and contrast. The debtors
17 have more to do. I appreciate that. But as Your Honor can
18 see, this is not going to be a kumbaya case. We're going to
19 have issues here. Okay? And so 500,000 dollars is
20 essentially intended, I gather, to keep us a bit on the
21 come -- so it's to quell some of our litigation ambitions, I
22 suppose. But it's just not appropriate.

23 THE COURT: I thought --

24 MR. STARK: It indicates --

25 THE COURT: I thought you were at 750- a month?

1 MR. STARK: That was -- that was the first I heard of
2 it from --

3 THE COURT: No, I --

4 MR. STARK: -- from Ms. Berkovich.

5 THE COURT: -- no, I read that in the pleadings,
6 didn't I?

7 MR. STARK: You may have, Your Honor. There were 200
8 of them, dropped on my lap -- 200 pages of them dropped on my
9 lap this morning, so I didn't get through it all.

10 But where I thought we were --

11 THE COURT: You need a law clerk --

12 MR. STARK: -- was --

13 THE COURT: -- you need a law clerk like Ms. Cohen.

14 MR. STARK: I do. I do. I definitely do.

15 Where I thought we were in terms of the negotiations
16 leading into this hearing, was a million a month, okay, and
17 that would work. We would split that between the lawyers and
18 BRG. We have a lot to do here. And obviously it's going to
19 be a straight-through-the-night kind of a case. So (audio
20 interference) being able to do our job, from that perspective.
21 Okay?

22 Okay, and then -- I apologize, Your Honor, I got out
23 of sorts. What was --

24 THE COURT: The challenge --

25 MR. STARK: -- you wanted me to --

1 THE COURT: -- the challenge period.

2 MR. STARK: Right. Okay. They have it at sixty
3 days. We countered at ninety days. Why did we counter at
4 ninety days? Because the first sixty days are going to be
5 very active with doing things like bids and auctions and other
6 things.

7 I guess I could double track and do avoidance-type
8 stuff too, but gee, it would be a pretty good idea if we can
9 kind of sequence these things a little bit or otherwise focus
10 on the things (audio interference) at hand.

11 Forgive me. My partner, Ms. Lashko just reminded me,
12 the bid-ask spread on the professional fee was -- I was
13 mistaken. It was one million for the lawyers and BRG was
14 separate. But there may be an offer on the table for 1.4 for
15 both -- for the lawyers and BRG. And we would live with 1.4,
16 if that's, in fact, on the table.

17 Okay. So that's the ninety days and the challenge.

18 If it works for Your Honor, I'd like to go down the
19 other list of the miscellaneous.

20 THE COURT: Please.

21 MR. STARK: Okay. The liens on avoidance actions and
22 the liens and administrative expenses expense claims on the
23 recoveries, okay? Right now, as Ms. Berkovich said to Your
24 Honor during her -- one of her presentations, it doesn't look
25 very likely that unsecured creditors are going to (audio

1 interference). Perhaps there'll be fervent bidding. We hope
2 there's fervent (audio interference) or even better, a plan
3 construct.

4 But preference actions generally are the situation
5 where somebody got paid and everybody else is left holding the
6 bag. And it's the concept of that blend. It is not the
7 concept to be taking that money and giving it to the DIP
8 lenders with everything else. Right? That's why in court --
9 and it's not generally followed that avoidance actions are
10 even assets of the estate. They are standing -- it's a
11 principle of standing to bring it for the unsecured creditors.

12 THE COURT: In fact --

13 MR. STARK: And that's why --

14 THE COURT: -- in fact, your argument is that 550
15 says the recovery is for the estate.

16 MR. STARK: Right. But the jurisprudence of that,
17 Your Honor, has always been -- at least my understanding of
18 the jurisprudence, for the benefit of the unsecured creditors.
19 It's otherwise going to be that we've got this whole case
20 lined up for our DIP lenders or secured lenders, without much
21 recovery opportunity, at least as it presently stands, for
22 unsecured creditors.

23 The notion is then having the preference actions sold
24 to KPS under their --

25 THE COURT: Okay, I think --

1 MR. STARK: -- and (audio interference).

2 THE COURT: -- I think we get the argument. I tried
3 to -- you need to acknowledge when I'm on your side.

4 MR. STARK: Perhaps I'm --

5 THE COURT: Sometimes you need to -- sometimes you
6 need to accept yes as a response.

7 MR. STARK: Apologies, yeah. I'll take the yes.

8 THE COURT: Okay.

9 MR. STARK: The estate waivers of 506(c) and 502(b)
10 and the marshalling, again, I'm always academically interested
11 in knowing how people possibly waive of statutory
12 requirements. But leaving that academic issue aside, again,
13 if there's unencumbered value that's being utilized to bolster
14 up the company, then that ought be preserved and surcharged
15 against the collateral.

16 Our investigation budget is 150,000 dollars for the
17 company (audio interference). We asked for 250,000 (audio
18 interference).

19 And post-default carve-outs, we are capped at 200,000
20 and we've asked -- I'm asking (audio interference) for a
21 750,000-dollar cap. Those are my issues, Your Honor.

22 Apologies for being a little dense with the (audio
23 interference).

24 THE COURT: It's all right.

25 Let's check and make sure everyone's on mute, except,

1 of course, the ad hoc group, if you wish to be heard at this
2 time.

3 MR. KRAUSE: Thank you, Your Honor. Jeff Krause from
4 Gibson Dunn, for the ad hoc noteholders. I won't repeat any
5 of the arguments that Mr. Stark has made on behalf of the
6 committee. I really want to address the timing requests for
7 the -- not so much from the milestones or the fact that
8 locking the sale milestones into the DIP does create the
9 additional issues Mr. Stark referred to, but really, tying
10 into comments by debtors' counsel that they didn't -- they did
11 not want KPS to be the lender, but that they were the lenders
12 of last resort for the term piece of the loan, and that the ad
13 hoc group has not yet completed its diligence to commit to
14 provide that same financing.

15 And counsel commented that absent approval of the DIP
16 loan by the deadline -- the final DIP order -- entry of the
17 final DIP order by the deadline in the DIP pleadings, it would
18 be an event of default, under the DIP. That's true. But that
19 deadline is August 30th.

20 My clients have been in the data room for nine days.
21 Giving them additional time to complete their diligence and to
22 propose an alternative, so that the stalking-horse bidder
23 doesn't have to be the term lender, which will not trigger a
24 default under the deadline for entry of a final DIP order,
25 would be in the best interests of all parties.

1 And so Your Honor, I know that you chose not to set
2 over the time frame for ruling on the bid procedures to next
3 week, but the deadline for the final DIP order is even out
4 beyond that, and the reality is, as Mr. Stark argued, locking
5 the deadlines into a DIP order that rolls up the pre-petition
6 debt and makes all of the debt a post-petition administrative
7 priority claim, and puts KPS, as the stalking-horse bidder, in
8 the driving seat, when it is not necessary, because the
9 deadline isn't until August 30th, we respectfully request that
10 the Court defer ruling on final approval of the DIP until
11 closer to August 30th.

12 THE COURT: Thank you.

13 Mr. Stark, let me ask you a question that is unfair.
14 Where's Mr. Stark? Do we have him on the --

15 MR. STARK: I'm back. Can you see me, Your Honor?

16 THE COURT: There you are.

17 MR. STARK: Thank you.

18 THE COURT: Do you think that the motion which is
19 reflective of the agreement between the debtor, the ABL, and
20 the stalking-horse lender, do you think that is made in good
21 faith?

22 MR. STARK: I'm not going to -- thank you, Your
23 Honor, for offering me that opportunity. I don't have any
24 evidence to believe that they're prosecuting their motions in
25 bad faith. I don't agree with the structure. I think it has

1 bad implications for the case. But I'm not going to bite on
2 that invitation, Your Honor. I don't have evidence to support
3 that.

4 THE COURT: I appreciate your candor.

5 And the ad hoc group, may I ask you the same
6 question?

7 MR. KRAUSE: Yes, Your Honor. We do not have any
8 evidence that this is being pursued in bad faith and have not
9 raised any 364 bad-faith arguments vis-a-vis the lenders.

10 THE COURT: Thank you.

11 Ms. Berkovich, with respect to the carve-out for
12 committee counsel and their financial advisors, what is your
13 response to the request of not 750-, but one million dollars a
14 month plus the financial advisor amount, which we don't quite
15 know yet?

16 MS. BERKOVICH: Yes, Your Honor. I will turn it over
17 to Ms. Hoehne, who's been having sort of same-time
18 conversations on this issue. I'm not sure that we have a
19 resolution, but she has been in touch with our financial
20 advisors and the DIP lenders at this point, and she can tell
21 you the latest.

22 THE COURT: And with respect --

23 MS. HOEHNE: Good afternoon --

24 THE COURT: -- please.

25 MS. HOEHNE: Apologies, Your Honor. I did not mean

1 to interrupt you.

2 THE COURT: No.

3 MS. HOEHNE: Your Honor, we -- the debtors have
4 consulted with Ernst & Young and we would be comfortable
5 increasing, for all UCC professionals, the budgeted amount,
6 which Your Honor was correct, it was 700,000 a month -- to
7 bump that up to one million.

8 We also would be okay -- we've confirmed that the
9 budget will accommodate increasing the cap in the post-
10 trigger -- the post-trigger carve-out cap, to increase that to
11 750,000.

12 THE COURT: And what about the financial advisor? Is
13 that included in the one million?

14 MS. HOEHNE: Yes, Your Honor, that would be included
15 in the one million.

16 THE COURT: And can you go up to seventy-five days
17 for the challenge period?

18 MS. HOEHNE: Your Honor, I'm going to need to defer
19 to lenders' counsel on that point, because I believe it's more
20 of an issue for the DIP lenders' counsel.

21 THE COURT: Okay.

22 MS. HOEHNE: But Your Honor, to be clear, we have
23 discussed it with them, and they would prefer to keep it at
24 sixty days and accommodate a tolling. If you look at the
25 version of the order that we submitted, we were willing to

1 toll the challenge deadline up to ten days, so long as the
2 committee filed a motion with a complaint attached by the
3 challenge deadline.

4 I think the intent was just to get any standing
5 motion heard within a reasonable amount of time, subject to
6 the Court's calendar, and not jam the Court. But we were
7 willing to offer some tolling if there was a motion properly
8 filed within the challenge period.

9 THE COURT: I feel strongly that seventy-five days is
10 reasonable, but you'll decide what you want to do.

11 MR. KNIGHT: Your Honor, may I address the Court for
12 a moment?

13 THE COURT: Yes.

14 MR. KNIGHT: Again, for the record Peter Knight, on
15 behalf of JPM. We were simply trying to achieve that time
16 frame. Whether it's sixty days plus ten days to -- for the
17 Court to address a standing motion, or whether it's seventy
18 days -- seventy-five days with the standing motion filed and
19 adjudicated within that period, either of those would be
20 acceptable to JPM.

21 THE COURT: I appreciate that. Thank you.

22 With respect to the motion for DIP financing, first
23 of all, we start with, again, the tip of the spear. We're
24 compressing the next forty-five days to a lot of activity.
25 But that doesn't mean that -- and I'm not criticizing any

1 party, but any party could have suggested alternative
2 financing. This is the only one on the table. Others were --
3 presumably many others were invited to the table, no one chose
4 the opportunity to take advantage of that. So we have to deal
5 with the hand that's been dealt to us.

6 It would be naive to say that lenders don't have
7 significant influence on financing when the debtor has little
8 leverage. That's to address Mr. Stark's quotation from
9 Lionel, the hue and cry. I don't think there was total
10 capitulation in this case, as evidenced -- well, I just don't
11 think there was total capitulation.

12 When you look at the Lionel factors for business
13 justification, which recite many of the factors to be
14 considered, whether it's the melting-ice-cube case or not,
15 everyone seems to forget the last sentence of that paragraph,
16 which is: this list is not intended to be exclusive, but
17 merely to provide guidance to the bankruptcy judge.

18 Well, we go back to the process, which I know Mr.
19 Stark doesn't like the process; he thinks it was flawed. I'm
20 not saying it was a perfect process, but it certainly met the
21 business-judgment test. It certainly met the testing of the
22 marketplace test. And I think testing of the marketplace is
23 significant.

24 With respect to milestones, I've already addressed
25 that. This is a fast-tracked case, in part, because there's

1 no alternative; and I just don't think it's unreasonable.

2 With respect to the roll-up, it is not cross-
3 collateralization; I acknowledge that. And it is disfavored.
4 But that doesn't mean that other courts haven't allowed it,
5 even if it might be construed -- and I'm not saying it is --
6 as the minority position. Here, the lender is oversecured,
7 which I think is a significant tell.

8 With respect to the Chapter 5 causes of action, that
9 is one of the reasons I'm going to deny the motion for DIP
10 financing unless that provision is removed, because:
11 a) they're fully secured; and b) as I said to Mr. Stark, 550,
12 if you couple it with either 544 or 548 or 547, it says
13 "recoveries to be made for the benefit of the estate." I
14 don't think that can be construed as the post-petition lender.

15 We've talked about the challenge period will be
16 seventy-five days. JPMorgan -- I don't say this casually --
17 you're free to say I need the sixty days or I need the Chapter
18 5 causes of action lien, and if I don't get it, I walk away.
19 I appreciate that you can do that. And I'm not trying to
20 challenge that authority of yours or that option of yours.

21 And we've talked about the challenge period, seventy-
22 five days. I think we're at a million dollars for the
23 creditors' committee, which would include the financial
24 advisor.

25 Unfortunately, Mr. Willard has altered my view, and

1 506(c) inapplicability is pretty standard in this district.
2 We've just done it too many times. So that I find acceptable.

3 So the two issues that I'd like JPMorgan to consider
4 is the Chapter 5 causes of action and the carve-out and
5 challenge period.

6 So JPMorgan, do you want to take a ten-minute break
7 and consult with your clients, or what's your pleasure, sir?

8 MR. KNIGHT: Your Honor, thank you very much.
9 Appreciate that guidance, and I'm happy to take the ten-minute
10 break to get confirmation from my client.

11 One quick clarification, if I may? You had indicated
12 a million dollars pre-default carve-out, including all
13 committee professionals. I didn't hear you comment on the
14 post-default trigger. I think it was suggested that would be
15 750-. I wanted to clarify the --

16 THE COURT: I thought that --

17 MR. KNIGHT: -- the Court's request there.

18 THE COURT: Thank you. I thought that the 750- was
19 acceptable to Mr. Stark. Mr. Stark, did I have that correct
20 or incorrect?

21 MR. STARK: That is correct, Your Honor.

22 THE COURT: Okay, so that's not an issue. 750 is the
23 number.

24 MR. KNIGHT: Okay, thank you, Your Honor. If we
25 could take a ten-minute recess, I would very much appreciate

1 it. And I expect I'll be able to connect with my client in
2 that time.

3 THE COURT: And you'll be the first at bat. Thank
4 you.

5 MR. KNIGHT: Thank you.

6 (Recess from 4:57 p.m. until 5:06 p.m.)

7 THE CLERK: Your Honor, we are back on the record.

8 THE COURT: Thank you. Please be seated.

9 THE CLERK: If all parties on the phone would please
10 mute their phones unless they are speaking inside the virtual
11 courtroom. And when you are finished speaking, please remute
12 your phone. Thank you.

13 THE COURT: Sir, what did you -- what do you have to
14 report to us? What do you have to report to us from your
15 client?

16 MR. KNIGHT: Sorry, Your Honor. Can you hear me now?

17 THE COURT: I can.

18 MR. KNIGHT: Okay. Thank you very much. Again, for
19 the record, Peter Knight on behalf of JPM, as agent.

20 I was able to circle with the agent, and they are
21 fine with the changes that Your Honor proposed, as part of
22 getting the final order entered. And just to repeat those for
23 the record, it would be removal of Chapter 5 causes of action
24 from DIP collateral, the challenge period would be seventy-
25 five days from committee formation, with a standing -- the

1 standing issue being resolved within that window; a million
2 dollars per month for committee professionals, as part of the
3 pre-default carve-out; and 750,000 dollars for the post-
4 trigger carve-out.

5 I do want to make sure that Mr. Pesce, on behalf of
6 KPS, is heard as the junior DIP lender, but again, it's
7 acceptable from the perspective of the ABL agent.

8 THE COURT: Thank you. And with respect to KPS, are
9 you still with us?

10 MR. PESCE: Yes, Your Honor. It's Gregory Pesce of
11 Kirkland & Ellis on behalf of KPS. We are here. I apologize.
12 I had a technical issue during the prior segment.

13 If JPMorgan is amenable to those -- to that
14 arrangement, we would be as well. I think the one thing that
15 we just want to have clarity from the committee here, tonight,
16 is with respect to the credit bid issue, which has come up in
17 some of their papers, just to make clear that they can reserve
18 any rights they have with respect to the sale transaction, but
19 our credit -- if we credit bid it's -- we're credit bidding
20 for the DIP and it's not subject to challenge like a pre-
21 petition credit bid might be.

22 So I don't think that should be in dispute, but I
23 just wanted to put that out there for everyone so that we're
24 all on the same page.

25 THE COURT: Mr. Pesce, thank you. I apologize for

1 not raising that issue, because I don't think it's an issue.
2 You have the right to credit bid. And if you want to put that
3 in the DIP order, you may do so.

4 MR. PESCE: Thank you, Your Honor.

5 THE COURT: Let me go back to Ms. Berkovich. And if
6 you would look at your calendar, please, what is our next
7 event that we'll need a hearing for?

8 MS. BERKOVICH: Your Honor, we do have the sale
9 hearing now scheduled for September 11th.

10 THE COURT: Yeah, that's going to be a problem. I
11 have a --

12 MS. BERKOVICH: That's -- yeah, sorry.

13 THE COURT: Mr. Stark has unequivocally told me that
14 that's going to be a lengthy hearing, which is fine, but I
15 can't start it until the afternoon, because I have a
16 commitment, that I will honor, until noon. So we could start
17 at 1 o'clock on Friday the 11th, for the sale motion.

18 Let's work backwards and see when responses have to
19 be filed to that or any other dates that are applicable to
20 that event.

21 MS. BERKOVICH: Yes, Your Honor. The bidding
22 procedures actually give proposed dates here. With the time
23 frame for the auction being August (sic) 1st, and the folks
24 not being available for a couple of days, we have --
25 objections are due, I don't remember it's the 7th or 8th, and

1 we have replies on the 10th.

2 THE COURT: Well --

3 MS. BERKOVICH: (Audio interference). Just a moment.

4 Hold on. Lots of documents on the floor.

5 THE COURT: Thank you. I though you lost interest

6 and left.

7 MS. BERKOVICH: No. The deadline to file objections
8 to the sale is September 8th. I think that date is partly to
9 give the committee -- the most possible time to (audio
10 interference) the auction, and then we have our reply deadline
11 proposed as September 10th.

12 THE COURT: Okay. Well, let's back up a minute. Do
13 you need a hearing on September 11th? Yes. What's the
14 deadline before September 11th?

15 MS. BERKOVICH: The reply deadline we have it
16 September 10th, but that's because we have the objection
17 deadline on September 8th.

18 MR. PESCE: Your Honor, it's Greg Pesce at Kirkland,
19 again. We don't want -- at least on behalf of KPS, we don't
20 want to unduly burden you, if you have an earlier commitment
21 that day. From KPS's perspective, so long as the bid deadline
22 and the auction occurs as planned, we could probably entertain
23 doing it maybe early the following week, Monday or something
24 or -- if that would be better for you (audio interference), I
25 don't know what else you have planned.

1 THE COURT: Sure. Tell me again what your --

2 MR. PESCE: Yes.

3 THE COURT: -- I'm sorry, you wanted the auction at a
4 certain date; is that what you said?

5 MR. PESCE: Yeah, the --

6 THE COURT: Just a minute. I don't need notes.

7 MR. PESCE: Yeah, as long as the auction is September
8 1st, and the bid deadline on the 28th remains the same, we can
9 probably have flexibility for a day or two into the following
10 week if it would help Your Honor's scheduling for that matter.

11 THE COURT: Well, we're --

12 MS. BERKOVICH: And that's acceptable to the debtors
13 if Your Honor would (audio interference) the week of September
14 13th.

15 THE COURT: Could we move the 11th of September,
16 then, to the 15th of September, and we'll start at -- let's
17 start at 9:30.

18 MS. BERKOVICH: Yes, Your Honor.

19 THE COURT: That's not a burden for you. Why don't
20 we just start at 9:30. 9:30 on the 15th will be the bid
21 proceed -- well, I'm sorry -- will be -- the sale hearing will
22 be on the 15th at 9:30, and we'll have a better -- hopefully a
23 different virtual hearing vendor, make this a little smoother.

24 Now, let's go backwards. The sale hearing is the
25 15th. The deadline for which to reply to objections and the

1 deadline to object -- when are you going to file your sale
2 motion?

3 MS. BERKOVICH: The motion that we have on file is
4 our sale motion, Your Honor. It seeks relief in those two
5 orders.

6 THE COURT: That's fine. Then let's have the -- we
7 can keep September 3rd as the deadline. And September the 8th
8 is the objection to the sale motion. Okay, why don't we move
9 that -- objections to the sale motion to September 9th, and
10 reply by 3 p.m. on the 14th.

11 MS. BERKOVICH: Thank you, Your Honor. That is
12 actually good. It will give parties more time to object and
13 give us more time to file a reply and more time for us to work
14 out the objections.

15 THE COURT: Okay.

16 MS. BERKOVICH: And we do appreciate that.

17 THE COURT: Then I think that that's all we have to
18 do today for dates; is that right?

19 MS. BERKOVICH: I believe that's correct.

20 THE COURT: Okay. All right, is there anything else
21 we can do for the debtor today? Are we going to -- Mr.
22 Eggmann, are we hearing Houlihan Lokey or not?

23 MR. EGGMANN: Houlihan Lokey, we did hear today, and
24 the Court granted that.

25 THE COURT: So we can take that off the 28th.

1 MR. EGGMANN: We can take that off.

2 THE COURT: Okay. All right, anything else for the
3 debtor?

4 MR. EGGMANN: I'm not aware of anything else. Again,
5 thank you for the Court's time. And I know the Court
6 mentioned the vendor, but I think things went incredibly
7 smoothly for putting everyone together like this, so --

8 THE COURT: Well, you're very kind.

9 MR. EGGMANN: -- thanks for your -- thank for your
10 patience.

11 THE COURT: Mr. Hardy helped a great deal.

12 MR. EGGMANN: Thank you, Mr. Hardy.

13 THE COURT: What about the creditors' committee?

14 MR. STARK: Your Honor, we have nothing further but
15 to say -- to offer our thanks.

16 THE COURT: That's fine.

17 MR. WILLARD: Nothing further, Judge, other than to
18 echo Mr. Eggmann's gratitude to Your Honor and the Court
19 staff. We really appreciate it.

20 In terms of scheduling, we will work with chambers.
21 The Brown Rudnick application and the financial advisory
22 application --

23 THE COURT: Right.

24 MR. WILLARD: -- will need to be --

25 THE COURT: I need to set those for hearing, so

1 that --

2 MR. WILLARD: Yes.

3 THE COURT: -- we can get the final okeydokey on
4 those.

5 MR. WILLARD: Yes, sure.

6 THE COURT: All right.

7 MR. WILLARD: So but other than that, we have nothing
8 further. Thank you, again, Your Honor.

9 THE COURT: Thank you. JPMorgan, is there anything
10 we can do for you, today?

11 MR. KNIGHT: No, Your Honor. Thank you very much.

12 THE COURT: Thank you.

13 MR. KNIGHT: And we very much appreciate the
14 accommodation on doing this remotely.

15 THE COURT: All right. Mr. Pesce, anything for KPS?

16 MR. PESCE: No, Your Honor. Thank you very much for
17 your indulgence today.

18 THE COURT: Thank you. Mr. Stark, anything for the
19 committee, from your end?

20 MR. STARK: No, Your Honor. Thank you very much for
21 the time.

22 THE COURT: Thank you. Mr. Knight, for the ad hoc
23 group?

24 MR. KRAUSE: I'm sorry, it's Jeff Krause for the ad
25 hoc group, Your Honor.

1 THE COURT: Pardon me.

2 MR. KRAUSE: Nothing further on our end. And we do
3 appreciate the ability to participate remotely.

4 THE COURT: Thank you. Then we are adjourned. Thank
5 you.

6 (Whereupon these proceedings were concluded at 5:17 pm)

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I N D E X

WITNESSES: DIRECT CROSS REDIRECT RECROSS VOIR
FOR THE DEBTOR: DIRE

William Peluchowski 75
Jeffrey Ficks 121

EXHIBITS:

No.	Description	Marked	Admitted
Varied	All exhibits previously referred to		216
	Declaration of Jeffrey Lewis		221
	Declaration and supplemental declaration of Jeffrey Ficks		221

RULINGS:

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Application for debtors to retain and employ Deloitte & Touche LLP as independent auditor is granted.	30	16
Application authorizing the retention and employment of Foley & Lardner LLP as special counsel is granted.	31	20
Application authorizing the retention and employment of King & Spalding LLP as special counsel is granted.	32	10
Application for authority to retain and employ Ernst & Young LLP as financial advisor is granted.	33	15
Motion to expedite hearing on motion to compel assumption or rejection is granted.	38	7
Motion approving termination of retiree benefits is granted.	53	20
Motion for orders authorizing debtors to pay pre-petition obligations is granted.	63	3
Motion for orders granting pre-petition obligations to customers is granted.	16	20
Motion for entry of orders establishing notifications procedures and approving restrictions is granted.	18	9

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I N D E X

	PAGE	LINE
RULINGS:		
Pre-petition wages motion is granted.	20	10
Motion to establish proof of claim deadlines is granted.	23	20
Motion of the debtors for interim and final orders authorizing payment of certain pre-petition taxes and fees and granting related relief is granted.	24	19
Motion authorizing debtors to continue insurance policies and programs is granted.	26	16
Debtors' application for appointment of Kurtzman Carson Consultants, LLC is granted.	27	10
Debtors' application to retain Weil, Gotshal & Manges LLP as attorneys is granted.	28	3
Debtors' application for authority to employee Carmody MacDonald, P.C. is granted.	29	4
Bid procedures motion is granted	207	4
Motion for DIP financing is granted as amended on the record.	263	15

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C E R T I F I C A T I O N

I, Michael Drake, the court-approved transcriber, do hereby certify the foregoing is a true and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



August 24, 2020

MICHAEL DRAKE (CET-513)

DATE

AAERT Certified Electronic Transcriber

<p style="text-align: center;">A</p>	<p>262:7;265:12 acceptance (1) 191:21 accepted (3) 19:14;38:9;55:14 accepting (2) 68:22,24 access (11) 10:17;75:4; 118:12,15;186:1,3, 16;189:14;190:4; 225:15;226:5 accommodate (2) 256:9,24 accommodation (2) 189:21;268:14 accompanied (1) 122:11 accomplish (1) 178:13 according (2) 35:18;46:20 accordingly (3) 25:15;53:20;61:19 account (2) 13:13;214:1 accountant (2) 179:13,25 accountants (1) 179:15 accounts (3) 13:19,21,25 accrued (2) 19:11;150:17 accurate (3) 85:7;100:8;184:22 achieve (4) 136:17;137:24; 206:4;257:15 acknowledge (4) 198:16,16;252:3; 259:3 acknowledged (1) 53:15 acquiescence (1) 15:6 acquires (1) 156:12 acquiring (1) 109:3 across (1) 147:11 act (3) 90:24;179:16; 239:23 acting (1) 237:9 action (6) 91:5;208:21; 259:8,18;260:4; 261:23 actionability (1) 91:25</p>	<p>actionable (12) 69:25;91:7,10; 96:4,23;100:15; 102:12,14;104:19; 144:7;145:15; 201:10 actions (10) 174:1,7;216:5; 233:4,13,17;250:21; 251:4,9,23 active (2) 185:22;250:5 activity (7) 124:10,15;130:1, 2;173:14;215:22; 257:24 actors (2) 98:9;237:8 actual (15) 72:25;92:3; 109:10;127:9;128:3, 7,18;138:11;170:12; 186:10;188:4;193:4; 195:15;210:22; 212:11 Actually (71) 8:24;9:2;17:4; 22:13;56:23;64:10; 85:6;91:5,10;98:4, 21;103:2;104:23,23; 106:12;110:7; 111:15;117:22; 122:15;129:10; 138:25;146:21; 148:25;149:8,11,13, 20;152:9;153:1,23; 155:22;157:1;163:7; 170:22;174:24; 175:23;176:10,16; 177:8,9,18;178:4,10; 179:6;181:17,22; 182:12,23;185:7,8, 13,16;187:4;197:4; 199:3,14;201:16; 205:15;209:23; 214:21,21;225:8; 227:16;228:19; 229:8;233:15;243:7; 247:7,23;263:22; 266:12 actuaries (1) 46:20 ad (33) 70:2;118:25; 119:2;141:1,3; 144:5;148:6;151:18; 184:3,5,6,23;185:1, 8;201:8,9,9;210:14; 212:4;217:24;218:1; 222:9,12;224:21; 225:22;228:6;229:7; 253:1,4,12;255:5; 268:22,24</p>	<p>adamantly (2) 38:25;39:4 add (5) 39:20;41:2;51:15; 195:4;204:3 added (8) 49:13,19;50:21,22, 22;51:14;69:1,3 adding (2) 69:23;181:13 addition (9) 50:25;69:23; 143:15;149:11; 160:4;209:2;211:11, 17;230:14 additional (28) 10:18;20:6;21:25; 36:4,17;51:2;52:17; 76:14;93:4;101:13; 114:11;119:3;140:2, 14,16;143:15,19; 146:22;156:10; 181:9;183:17; 204:19;209:16; 211:6;225:6;235:16; 253:9,21 add-on (1) 109:22 address (21) 33:4;36:12;38:16; 68:10;69:12,17,20; 76:13;156:14;184:7; 187:7;190:15; 195:22;196:19; 202:21;203:5;229:3; 253:6;257:11,17; 258:8 addressed (3) 37:14;225:23; 258:24 addressing (1) 39:10 adequate (13) 36:18,23;165:19; 177:21;232:20,21, 24,25;233:16;234:2; 238:18;239:2; 245:14 adjoin (1) 177:15 adjourned (5) 29:6,9;30:24; 41:14;269:4 adjournment (1) 41:23 adjourns (1) 177:12 adjudicated (1) 257:19 adjust (2) 52:17;132:17 adjusting (1) 81:18</p>	<p>adjustment (1) 228:2 adjustments (1) 181:5 ADL (1) 88:4 administer (1) 75:12 administrative (18) 70:11,14;125:8,9; 143:19;144:15; 150:9,10,20;180:11; 182:11;228:20; 233:25;235:16; 243:15,15;250:22; 254:6 admission (1) 44:6 admitted (1) 210:12 admittedly (1) 153:2 Adobe (1) 133:23 adopt (1) 122:6 adopted (1) 144:20 adopting (1) 53:10 adopts (1) 70:21 advance (3) 12:8;95:7;165:14 advantage (1) 258:4 adversary (3) 179:7;239:20; 240:4 advice (1) 224:14 advised (1) 174:13 advisor (10) 10:14;14:20; 32:14;33:10;185:25; 215:7;248:13; 255:14;256:12; 259:24 advisors (10) 9:23;10:11,14; 67:14;98:3;159:9; 223:23;224:14; 255:12,20 advisory (1) 267:21 advocate (1) 182:22 affect (1) 201:2 affected (1) 53:17 affects (1)</p>
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