

IN THE UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF GEORGIA

NEWNAN DIVISION

IN RE:

AFH Air Pros, LLC, et al, Docket No. 25-10356-pmb

DEBTOR.

Atlanta, GA

AUGUST 06, 2025

1:00 p.m.

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TRANSCRIPT OF

HEARING BEFORE THE HONORABLE PAUL BAISIER

UNITED STATES BANKRUPTCY JUDGE

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P R O C E E D I N G S

THE COURT CLERK: Good afternoon, parties. My name is (indiscernible) and I'll be calling today's (indiscernible) Today is August 6th, 2025, and the time is now 1 p.m. We're here for the special set hybrid hearing for case number 25-10356 AFH Air Pros, LLC et al. There are two matters on the calendar. Beginning with the first, there is a Chapter 11 plan of liquidation, which was amended and supplemented by Docket number 618, and two, Debtor's Chapter 11 disclosure statement, which was supplemented by Docket 610.

At this moment, I will take appearances of those that are appearing in the courtroom, and then I'll take appearances of those that are appearing via Zoom.

MR. KURZWEIL: Good afternoon. David Kurzweil and Matt Petrie with Greenberg Traurig on behalf of the Debtors.

MR. WILLIAMSON: Good afternoon. Rob Williamson with Scroggins, Williamson, & Ray. With me is Whit Morley from the Latham & Watkins firm, and I believe virtually Ebba Gebisa from Latham & Watkins. We represent the Pre-Petition Lenders, and the DIP Lenders, as well as the Agent.

THE COURT CLERK: Thank you.

MS. HUMNICKY: Anna Humnicky. I'm here with Small Herrin, and we're here on behalf of the Committee, as well as (indiscernible) And on video should be Shirley Cho from

1 Pachulsky, who is the lead counsel for the Committee.

2 MR. ADAMS: Good afternoon. Jonathan Adams, on
3 behalf of the United States Trustee.

4 THE COURT CLERK: Thank you. I'll take
5 appearances of those that are joining us via Zoom.

6 MS. CHO: Good afternoon, Your Honor, Shirley Cho,
7 Pachulski Stang Ziehl & Jones, with Ms. Humnicky. We're
8 here on behalf of the Official Committee of Unsecured
9 Creditors.

10 THE COURT CLERK: Thank you. Will anyone else be
11 making an appearance?

12 MS. REITZEL: Sydney Reitzel, with Verita. We're
13 the Claims Agent for the Debtors.

14 THE COURT CLERK: Thank you. Will anyone else be
15 making an appearance?

16 Okay. I'll let His Honor know that we're ready
17 for him to join us.

18 THE COURT CLERK: All rise.

19 THE COURT: Please be seated.

20 THE COURT CLERK: The Court will now come to
21 order.

22 Good afternoon, Your Honor. Today is August 6th,
23 2025, the time is now 1:16 p.m. We are here for the 1 p.m.
24 specially set hybrid hearing for case number 25-10356, AFH
25 Air Pros, LLC et al. There are two matters, beginning with

1 the first, Debtor's Chapter 11 plan of liquidation, and two,
2 Debtor's Chapter 11 disclosure statement.

3 THE COURT: Good afternoon Mr. Kurtzweil.

4 MR. KURZWEIL: Good afternoon Your Honor.

5 May it please the Court, Your Honor may remember
6 that this case was filed on March 16th, 2025, and on March
7 31st, the United States appointed an Official Committee of
8 Unsecured Creditors who have remained very active in the
9 case since that time. On May 19th, the Court approved the
10 Debtor's sale of substantially all of their operating assets
11 through six separate sales, and consummated the sales, and
12 those are identified on Docket numbers 437, 438, 446, 447,
13 454, and 507.

14 At the confirmation process, solicitation
15 procedures was heard by the Court, and on June 23rd, 2025,
16 the Court entered an order approving the disclosure
17 statement on an interim basis, establishing procedures for
18 solicitation and tabulation of votes to accept or reject the
19 plan, approving the form of ballot and solicitation
20 materials, establishing a voting record date, fixing the
21 date, time, and place for hearing the final approval, which
22 was today, and approving related notice, procedures, and
23 deadlines.

24 The order, among other things, provided for the
25 procedures for solicitation of plan and related notices, and

1 the Court may remember comments from the Court at that
2 hearing, the form of ballot and solicitation packages. On
3 June 30th of this year, the Debtors claimed the Noticing
4 Agent, Verita, served the solicitation packages and combined
5 hearing notice, and other related notices set forth under
6 the procedures order. On July 14th, the Debtor has filed a
7 certain number of planned supplement documents, including
8 the identity and compensation of Litigation Trustee, the
9 form of litigation trust agreement, and the schedule of
10 assigned causes of action, and that can be found on Docket
11 number 557.

12 Further, on July 18th, the Debtors filed the
13 additional plan supplement documents, which can be found at
14 Docket number 562.

15 Your Honor, Now, these supplement, plan supplement
16 documents were further amended. There was an amendment
17 filed yesterday that just clarifies the items. The
18 litigation trust agreement can be found at Docket 16-1. If
19 Your Honor would like, I can briefly just tell the Court
20 those minor amendments that are in there.

21 THE COURT: Sure.

22 MR. KURZWEIL: At page 58 of 61, it provides that
23 upon written request -- And these red lines are of course
24 filed with the record, and can be found at Docket 16-1, page
25 58. And the edited language is upon written request of the

1 beneficiary, the Litigation Trustee shall provide copy of a
2 monthly report to such beneficiary at the sole expense of
3 the requesting beneficiary. On page 59 of 61, it talks
4 about the fiduciary duties of the Litigation Trustee, and
5 that the fiduciary duties contained in paragraph 315
6 include, but not limited to a laundry list of fiduciary
7 duties, and it was just listed that it was all inclusive.
8 And then on page 61 of 61, at Docket 616-1, the last
9 sentence of 8.5 was removed, which Your Honor, that sentence
10 was left over from the previous version of negotiations
11 between the parties, and I'd like to thank the U.S. Trustee,
12 Your Honor, for pointing these out. These are in response
13 to comments from the U.S. Trustee, in my understanding,
14 thanks to the U.S. Trustee (indiscernible) with that
15 document.

16 There were also very minor revisions to the wind
17 down plan, the wind down agreement, which is the plan
18 administration agreement, which can be found at Docket
19 number 616-2. There were two very minor changes to that,
20 Your Honor. Page 20 of 21, it just stated New York law as
21 the choice of law for that agreement, and had been
22 previously blank prior to that time. And on page 21 of 21,
23 I added a notice of audit for counsel for the wind down
24 administrator.

25 Your Honor, the deadline -- And if the Court

1 doesn't have any questions on that?

2 THE COURT: None so far.

3 MR. KURZWEIL: Okay. The deadline for all holders
4 of claims (indiscernible) plan to cast the ballots July
5 28th, and the deadline to file objections to the plan was
6 also July 28th. Your Honor, the Debtors filed their
7 confirmation memorandum at Docket 610, outlining the issues
8 before the Court for plan confirmation, as well as
9 responding to the limited objections that were filed to plan
10 confirmation. In addition, a voting declaration was filed,
11 Docket number 607, and set forth in the voting declaration
12 Classes 3 and Class 4 for the only classes entitled to vote,
13 and they voted overwhelmingly to accept the plan.

14 Your Honor, it may help to provide the Court and
15 parties just a very brief outline of what the plan does, if
16 the Court would like?

17 THE COURT: Sure.

18 MR. KURZWEIL: The plan provides for settlement
19 with the Committee, and the Committee settlement is
20 described in the disclosure statement and the committee
21 settlement term sheet, which is attached to the disclosure
22 statement as Exhibit C. The settlement provides for the
23 establishment of a Litigation Trust for the benefit of
24 holders of allowed general unsecured claims, including the
25 pre-petition (indiscernible) claim, and that the Litigation

1 Trust will be funded with \$1 million plus the unused portion
2 of the Debtor in Possession financing budget allocated as
3 the payment of the Committee's professionals. It also
4 provided that certain causes of action of the Debtors, as
5 described in the plan supplement, will be transferred to the
6 Litigation Trust.

7 Your Honor, the plan also provides for substantive
8 consolidation for voting and distribution purposes. This is
9 set forth in VII(c)(10) in the disclosure statement, and the
10 Debtors believe that substantive consolidation is necessary
11 in this case for the following reasons.

12 The Debtors used consolidated financial
13 statements, and had a number of intercompany transfers.
14 Although the Debtors maintained records of these
15 intercompany transfers since the petition date, the Debtors
16 did not historically reconcile these transactions of matter
17 that would allow them to determine net balances owed by one
18 Debtor to another Debtor. The second reason is that there
19 is unity of interest, common ownership of subsidiaries, and
20 co-minglings of business functions. The Debtors share a
21 unity of ownership and interest. All the Debtors, except
22 the holdings, are owned and controlled by AirPro Solutions
23 LLC, which is wholly owned by holdings. Many of the Debtors
24 historically share some management services through a
25 centralized corporate office maintained by the Debtor,

1 AirPro Solutions, which houses accounting, billing and
2 collections, corporate compliance, information technology,
3 and legal and marketing functions.

4 The third reason for the sub-con request, Your
5 Honor, is for parent and intercompany guarantees on loans.
6 All the Debtors are jointly and separately liable under the
7 pre-petition loan documents and DIP loan documents as either
8 a borrower or a guarantor, and all the Debtors have pledged
9 substantially all their assets as security for their
10 obligations under these documents.

11 The next reason, Your Honor, is that there would
12 be difficulty in segregating and ascertaining individual
13 assets and liabilities, as discussed in the stalking course
14 -- actually, as discussed in the disclosure statement. The
15 Debtors obtained approval to sell substantially all their
16 assets pursuant to the stalking horse APAs. The proceeds of
17 the sale have been remitted to the (indiscernible) secured
18 parties, to the pre-petition secured parties, except in the
19 amounts necessary to fund administration of these Chapter 11
20 cases, as well as the wind down cash amount, and the
21 Litigation Trust funding (indiscernible) and it would be
22 administratively impossible to segregate and ascertain the
23 individual assets and liabilities to be administered on the
24 sales.

25 And finally, Your Honor, the (indiscernible)

1 officers of record, prior to the petition date, each of the
2 Debtors historically had the same executive (indiscernible)
3 and therefore, the Debtor could (indiscernible) the plan,
4 and assert that it's essential for the implementation of the
5 plan.

6 THE COURT: And there isn't any objection to that?

7 MR. KURZWEIL: And no one objected to that, Your
8 Honor.

9 Providing an overview of the plan, Your Honor,
10 first if it would please the Court to turn to approval of
11 the disclosure statement, because that may be the simpler of
12 the matters before the Court today. That was approved on an
13 interim basis by the Court on June 23rd, 2025, at Docket
14 number 477. Your Honor, the disclosure statement contains
15 adequate information as provided in section 11.5 of the
16 Code. There were no objections filed, and therefore we
17 request that the Court approve the disclosure statement on a
18 final basis.

19 THE COURT: All right. Does anybody wish to be
20 heard with regard to the final approval of the disclosure
21 statement?

22 MR. ADAMS: Your Honor, very briefly, Jonathan
23 Adams on behalf of the United States Justice. As the Court
24 knows, the United States Trustee did object to the
25 disclosure statement. I believe it was heard on that matter

1 back in June. Within that objection to the disclosure
2 statement, we did raise certain issues regarding the
3 litigation trust agreement pending when we would receive
4 that, and reserved our rights as to that.

5 As Mr. Kurzweil has informed the Court, we have
6 now reviewed the litigation trust agreement. We did ask for
7 some minor changes, which the Debtor graciously agreed to.
8 As a result, we can believe those matters are resolved.

9 So the only remaining issue we have is probably
10 with regard to plan confirmation, and the releases, which we
11 will address more generally later. Thank you.

12 THE COURT: Thank you. Anyone else? All right.

13 There being no objections with regard the
14 disclosure statement (indiscernible) the last hearing
15 (indiscernible) so the disclosure statement will be approved
16 on a final basis.

17 MR. KURZWEIL: Thank you, Your Honor.

18 May it please the Court, I'd like to now turn to
19 the plan. Your Honor, there are seven classes of creditors
20 under the plan. The first two classes, Class 1 and Class 2,
21 are unimpaired, and aim to accept the plan. Classes 5, 6,
22 and 7 are impaired, and deemed to reject. And there remains
23 two voting classes, Class 3 and Class 4, the ballots
24 received overwhelmingly carried the votes (indiscernible)
25 classes. Class 3 is a pre-petition secured claim, which is

1 impaired, and Class 4 is the general unsecured claim, which
2 is also impaired.

3 Your Honor, the voting tabulation is embodied in
4 the declaration of Sydney Reitzel, which can be found at
5 Docket number 607. Ms. Reitzel is on the video. I'd like
6 to proffer her testimony and her declaration (indiscernible)

7 THE COURT: (indiscernible) as set forth on the
8 declaration?

9 MR. KURZWEIL: Yes, Your Honor.

10 THE COURT: Which you said is at Docket 607. All
11 right. Does anybody have any objection to accepting Ms.
12 Reitzel's declaration as her affirmative testimony? She is
13 available for cross-examination, should that be necessary.

14 Hearing no objection, it is admitted.

15 MR. KURZWEIL: Your Honor, if Ms. Reitzel was
16 called to testify, she would testify that Verita was
17 appointed as an administrative advisor, and also authorized
18 to assist the Debtors with soliciting, receiving, and
19 reviewing, determining the validity of, and tabulating
20 balance tests on, and planning by holds, claims, and voting
21 classes that the Court established June 23rd, 2025 as the
22 record date for determining which holds the claims
23 (indiscernible) vote, that the only claims of Classes 3 and
24 4 were entitled to vote on the plan.

25 She would further testify that Verita prepared

1 tabulation votes, which are attached to the declaration as
2 Exhibits A through C, that in review of the ballots
3 (indiscernible) with respect to Class 3, the pre-petition
4 (indiscernible) secured claims, two parties voted both to
5 accept the plan in the total amount of \$9,280,000. And
6 therefore 100% of those voting (indiscernible) except for
7 the Chapter 11 plan.

8 With respect to Class 4, general unsecured claims,
9 she would testify that 21 Creditors voted, 17 Creditors
10 voted, and 4 Creditors rejected. Therefore, 80.95%
11 (indiscernible) With respect to the amount, \$128,338,786.84
12 voted. Of that, \$128,056,589.05 accepted. And therefore,
13 an amount 99.78% accepted the plan.

14 I would also like to point out to the Court that
15 two votes in Class 4 were not counted. These two are in
16 addition to the 21. One ballot was not signed, and one was
17 (indiscernible) late. However if they were included, they
18 would not have changed the outcome.

19 I would like to offer the declaration of Sydney
20 Reitzel into evidence. And Ms. Reitzel is available for
21 cross-examination.

22 THE COURT: (indiscernible)

23 MR. KURZWEIL: Yep, I think we're good.

24 THE COURT: I think we're good.

25 MR. KURZWEIL: Your Honor, I would like to turn

1 now to the plan (indiscernible) the Bankruptcy Code. I have
2 Mr. Heath, the CRO, in the Court room. Mr. Hede and his --

3 THE COURT: Can I ask you something
4 (indiscernible) before we move on?

5 MR. KURZWEIL: Yes. Sure.

6 THE COURT: A couple of things, maybe one thing
7 (indiscernible) might be helpful with.

8 First, and to satisfy my own curiosity, so I
9 noticed in the stipulation and your writing tabulation that
10 the pre-petition Secured Creditors (indiscernible) a \$9
11 million secured claim. I would have thought we could close
12 six sales, and (indiscernible) all the proceeds. Where does
13 the \$9 million claim come from?

14 MR. KURZWEIL: Your Honor, there are still assets
15 and cash in the Estate. They have agreed to a treatment
16 that whatever's left over, that's not used in winding down
17 the Estate, and didn't go to the Litigation Trust, would go
18 to the pre-petition Secured Lenders. There's money from
19 deposits for various insurance. Other funds, you know, may
20 come in as does in a case, and that's why the claim is out
21 there. Certainly, if it's not collected, they have agreed
22 that they're okay with that.

23 THE COURT: Very good. So it's sort of the cats
24 and dogs of assets that remain after all the sales?

25 MR. KURZWEIL: That's correct, Your Honor.

1 THE COURT: And the other (indiscernible) question
2 is that I didn't see in the declaration or the charts
3 attached to it -- It shows how many people voted, but it
4 didn't show me how many ballots got sent out to start with.
5 Looking at the numbers, it looked like a couple hundred,
6 based on the (indiscernible) the numbers of the ballot that
7 voted were included in the (indiscernible) they ran through
8 about 200.

9 MR. KURZWEIL: Your Honor, it will take me one
10 minute (indiscernible) I have that number, Your Honor.

11 Your Honor, there were 198 in Class 4, and 56
12 nonvoting notices went out.

13 THE COURT: You said 196?

14 MR. KURZWEIL: 198, and 56.

15 THE COURT: Okay. Thank you.

16 MR. KURZWEIL: Your Honor, the declaration of Mr.
17 Hede, the CRO, can be found at Docket number 611. If called
18 to testify, Mr. Hede would testify that he is the senior
19 manager director of Accordion Partners, and head of
20 Accordion's turnaround and restructuring practice. He would
21 further testify that he has over 30 years of financial and
22 operational restructuring experience in both the United
23 States and Australia. He would further testify that
24 Accordion has been a financial advisor for the Debtors since
25 March 2024, and that he has served as Chief Restructuring

1 Officer of the Debtors since September 2024. He would
2 further testify that he is familiar with the provisions of
3 Debtor's second amended Chapter 11 plan for liquidation, and
4 the disclosure statement and all facts (indiscernible) and
5 his declaration are based on his personal knowledge, belief,
6 and understanding of discussions (indiscernible) advisors,
7 and agents.

8 Mr. Hede would testify that the Committee's
9 settlement is in the best interest of the Debtors, their
10 estates and the Creditors, and should be approved in
11 connection with confirmation of plan. And Mr. Hede would
12 further testify that the plan satisfies each mandatory
13 requirement of the Code for confirmation, that the plan
14 complies with the applicable provisions of Section
15 1129(a)(1), and that the plan properly classifies claims of
16 interest as required in Sections 1122, and that the class is
17 of equal treatment, and is required also in section 1123.

18 He would further testify that the plan provides
19 for and satisfies the applicable provisions of Section
20 1129(a)(2), and that the disclosure statement was approved
21 on a (indiscernible) basis prior to solicitation, that the
22 plan complies with Section 1125, and that each holder of the
23 claim received a disclosure statement prior to voting, that
24 the plan is proposed in good faith, and not by any means
25 forbidden by law, thereby complying with Section 1129(a)(3),

1 that the plan provides the payment of professional fees and
2 expenses subject to court approval, therefore complying with
3 Section 1129(a)(4,) that the plan discloses in the plan
4 supplement the identity of the Plan Administrator and
5 Litigation Trustee, and therefore complies with Section
6 1129(a)(5), that there is no governmental regulatory
7 approval of rate changes, and therefore no need to comply
8 with 1129(a)(6), that the plan is in the best interest of
9 Creditors, as each member will receive more than they would
10 in a (indiscernible) and therefore complies with 1129(a)(7),
11 that impaired classes of Class 3 and 4 voted to accept the
12 plan, and other impaired classes were deemed to reject.
13 However, the plan is not confirmable because the plan does
14 not discriminate unfairly to those classes, and therefore,
15 the plan complies with Section 1129(a)(8), that the plan
16 complies with the statutory mandate and treatment of
17 administrative priority tax claims under 1129(a)(9), that at
18 least one impaired class of claims has accepted the plan,
19 excluding insiders, and therefore the plan is compliant with
20 1129(a)(10), that the plan is feasible, and not likely to be
21 followed by a need for further financial authorization,
22 therefore complying with 1129(a)(11), that the plan provides
23 payment of all fees required under 28 U.S.C. Section 1930,
24 and therefore complying with 1129(a)(12).

25 Further, that sections 1129(a)(13) through (16) of

1 the Bankruptcy Code do not apply in this case.

2 He would further testify that the plan complies
3 with other provisions of Section 1129(c) (3) because there's
4 only one proposed plan, and not multiple plans, and the
5 purpose of the plan is not to avoid taxes or the applicable
6 application of Section 5 of the Security Act of 1933.

7 And finally, Your Honor, this is not a small
8 business case, and therefore 1129(e) does not apply.

9 Mr. Hede would further testify that with respect
10 to the releases contained in the plan, he believes the third
11 party releases are necessary, permissible, and consistent
12 with the applicable provisions of the Bankruptcy Code, that
13 the Debtor release is an essential component of the plan,
14 and constitutes a sound exercise of the Debtors' business
15 judgment, given that the plan presents a fully integrated
16 and comprehensive liquidation of Debtor's assets
17 (indiscernible) the claims to the Litigation Trust for
18 potential recovery to holders of general unsecured claims.

19 He would further testify that the third-party
20 release is appropriate because it's consensual, and complies
21 with the plan's solicitation procedures, providing Creditors
22 the opportunity to opt out of granting the third-party
23 release by checking the opt-out box on the applicable ballot
24 or opt-out form, and that consideration was supplied to
25 those parties receiving their notice.

1 And Your Honor, I would like to offer the
2 declaration of Mr. Hede, which can be found at Docket number
3 611 into evidence, and he is in the courtroom
4 (indiscernible) requesting cross-examination.

5 THE COURT: All right. Does anybody object to the
6 Court accepting Mr. Hede's affirmative testimony by
7 declaration? He is here in the courtroom, and available for
8 cross-examination.

9 Hearing no objections, it's admitted.

10 MR. KURZWEIL: Thank you, Your Honor.

11 THE COURT: Does anybody wish to cross-examine Mr.
12 Hede?

13 THE COURT: No takers.

14 MR. KURZWEIL: Your Honor, there were two
15 objections filed to the plan. The first was filed by C&A,
16 which are the providers of the Debtor's insurance, and we
17 believe that has been resolved, and the resolution can be
18 found in language contained in the proposed confirmation
19 order, which is at Docket number 613, Exhibit -- paragraph
20 82, on page 31, and provides for the plan injunction, and
21 specifically carves out C&A from the plan injunction.

22 Your Honor, additionally, further on in that same
23 paragraph, there's a further provision for the avoidance of
24 doubt, and notwithstanding anything could change or the
25 contrary with the plan or the confirmation order, C&A shall

1 retain all rights of set-off or recruitment under its
2 policies, program agreements, and applicable law regardless
3 of when the applicable debt is and credit is accrued. And
4 therefore, Your Honor, I believe that we have resolved C&A's
5 objections.

6 THE COURT: All right. Anybody here or online
7 from C&A?

8 MS. WRIGHT: Good afternoon, Your Honor. Hannah
9 Wright, on behalf of CNA, and I can confirm that our
10 objection is resolved with that language.

11 THE COURT: Okay. Thank you very much.

12 MR. KURZWEIL: With that, Your Honor, I'll turn to
13 the other main objection, which is the U.S. Trustee's
14 objection to the third-party release.

15 Your Honor, we believe third-party release is
16 consensual, and that the U.S. Trustee's objection should be
17 overruled. We spelled out some of our arguments in
18 presentations and a brief that was filed with the Court,
19 which I incorporated therein. But basically, Your Honor,
20 the U.S. Trustee objects to the releases on three grounds,
21 that the third-party release is an improper, non-consensual
22 release that cannot be included in a Chapter 11 plan under
23 the Supreme Court's decision in Harrington (indiscernible)
24 Secondly, that the plan includes an improper injunction to
25 enforce the third-party release. And thirdly, that the plan

1 improperly deems the third-party release to be a settlement.

2 Your Honor, we believe that all of these arguments
3 fail because the U.S. Trustee's objection is premised in
4 large part on Purdue Pharma, in which the Supreme Court held
5 that the Bankruptcy Code does not allow non-consensual
6 third-party releases in Chapter 11 plans. And as the U.S.
7 Trustee observes in his objection, the Supreme Court did not
8 express a view on what qualifies as a consensual release.
9 The U.S. Trustee asked this Court to apply State Contract
10 Law in evaluating whether the third-party release is
11 consensual. However, this Court has previously recognized
12 Federal Bankruptcy Law rather than State Contract Law
13 controls whether releasing parties have consented to the
14 third-party release to the context of a Chapter 11 plan.

15 Consensual releases, Your Honor, are permitted in
16 Chapter 11 plans under Section 105(a) and 1123(b)(6), and
17 courts look at various factors to determine whether the opt-
18 out process in a particular case is acceptable. Courts will
19 consider whether affected parties received clear and
20 prominent notice and explanation of the releases, including
21 whether such recipient of an opt-out form would understand
22 the opt-out mechanism, the scope of the release claims, and
23 the identity of the released parties.

24 Evidence of consent, rather than whether the
25 release is necessary or appropriate, is an appropriate plan

1 provision (indiscernible) contract appears to be a
2 touchstone for determining whether a creditor can be bound
3 by a release. Under this standard, the Court has previously
4 applied -- under this standard, which the Court has
5 previously applied including consensual third-party
6 releases, the releasing parties in these Chapter 11 cases
7 have consented to these third-party releases. The third-
8 party release, with an opportunity to opt out, is consensual
9 and satisfies the standard for approval in this district.
10 First, holders of claims that voted to accept the plan have
11 indicated their express consent to third-party release by
12 voting to accept the plan. Second, parties that have voted
13 to reject the plan, but did not act out have likewise
14 consented to the third-party release. The balance approved
15 and considered by the Court solicitation procedures provide
16 clear and conspicuous notice of the third-party release, and
17 indicate that such parties would be deemed to have consented
18 to the third-party lease if they vote to reject the plan,
19 and did not opt out (indiscernible) the third-party release.

20 By voting to reject the plan but not checking the
21 conspicuous opt-out box, such parties have communicated
22 consent to grant the third-party release. Third parties
23 that either receive a ballot and abstained from voting, or
24 receive a notice of non-voting status and opt-out form in
25 each case but did not opt out of granting the third-party

1 release are presumed to have consented to granting the
2 third-party release. The balance of notices of non-voting
3 status each provide a clear and conspicuous notice of the
4 third-party release, and that such parties should be deemed
5 to have consented to the third-party release unless they
6 have timely completed and submitted the opt-out form, or
7 otherwise objected to the third-party release.

8 However, consistent with this Court's holding
9 ability, the plan includes an (indiscernible) presumption
10 that failure to timely act out of the third-party release
11 constitutes consent of the third-party release, specifically
12 Article X(d) of the plan (indiscernible) Any holder of a
13 claim of interest could not return a ballot or opt out
14 (indiscernible) form, or to the whole file an objection to a
15 third-party release that relieves its individual
16 circumstances related to its ability to return a ballot or
17 opt out of an (indiscernible) the third-party release, or to
18 object to the third-party release are such that should not
19 be deemed by consent (indiscernible) third-party release as
20 a result of such failure, and here is the operative portion
21 of it, Your Honor, may seek relief from the Bankruptcy Court
22 to exercise its right and claims free of a third-party
23 release by rebutting the presumption that's failing to
24 return a ballot or opt out (indiscernible) opting out of the
25 third-party release, or to object to the third-party release

1 should be deemed to represent its consent to the third-party
2 release.

3 And therefore, as requested by the Court, Your
4 Honor, all parties have recourse to come before the Court
5 should they feel that they have been appropriately -- or
6 treated inappropriately. This same standard, Your Honor,
7 would all apply in this particular case.

8 Further, Your Honor, the (indiscernible) releases
9 were supported by the major constituents of this case under
10 the plan, and were accepted by a majority of the Creditors
11 and members voting (indiscernible) Each of the
12 (indiscernible) factors are present, and further support the
13 third parties in this case. The opt out mechanism here is
14 clear and conspicuous,, the form of ballot was revised prior
15 to solicitation to include comments recommended by the Court
16 and comments by U.S. Trustee. The opt out mechanism is
17 relatively simple and easy to understand. The Creditor is
18 not (indiscernible) vote on a plan, but provided a notice of
19 non-voting status that included an opt-out form with clear
20 instructions for opting out of granting the third-party
21 release. The released parties (indiscernible) fiduciary
22 parties provide substantial consideration under the support
23 of the plan or affiliate such parties. First, the releases
24 (indiscernible) are limited to certain current directors and
25 offices that have contributed to the debt's restructuring

1 and (indiscernible) efforts. Additionally, the pre-petition
2 agent and pre-petition lender, DIP agent and SIP lenders
3 have provided substantial consideration, including providing
4 the DIP facility, and by agreeing to fund a litigation
5 trust, the wind-down amount, and all of that for potential
6 recovery of Unsecured Creditors.

7 The planning committees -- the plan
8 (indiscernible) settlement were a product of significant
9 negotiation among the Debtors and their primary
10 stakeholders, including their Secured Lenders, and they
11 support the plan and the third-party releases. Your Honor,
12 the third-party release is an equal part of the plan, and is
13 specifically contemplated by, and provided for in the
14 (indiscernible) settlement. The Creditors affected by the
15 third-party release are received in consideration in
16 exchange for granting the third-party release, including the
17 funding of the Litigation Trust and the funding of the wind
18 down cash amount.

19 Your Honor, accordingly, the third-party release
20 is clear and conspicuous, properly noticed, justified in the
21 facts, and is consensual under applicable law, and the
22 Debtors respectfully request that the third-party release
23 under the plan be approved.

24 Your Honor, the U.S. Trustee also objected in that
25 the plan injunction is not appropriate. In doing so, they

1 premised it (indiscernible) that the Bankruptcy Code permits
2 injunctions in support of non-consensual third-party
3 releases only in a (indiscernible) cases. However, in this
4 case, the third-party release under the (indiscernible) is
5 consensual, and the plan injunction is the primary mechanism
6 for enforcing the plan, including the third-party release,
7 and it's used to prevent Creditors from taking actions in
8 violation of the plan. Because the third-party release in
9 this case is consensual, the Court can approve the
10 injunction as a means to effectuate the plan, and as a means
11 to enforce the third-party release.

12 And finally, Your Honor, the third-party -- they
13 object because the third-party release they say is not an
14 appropriate settlement of the Bankruptcy Rule 9019. Your
15 Honor, nothing in Bankruptcy Rule 9019 permits Bankruptcy
16 Courts to force non-Debtors who have not consented to
17 release -- I'm sorry, Your Honor. I have a mistake. They
18 assert that nothing in Bankruptcy Rule 9019 permits
19 Bankruptcy Courts to force non-Debtors who have not
20 consented to release their rights to sue other non-Debtors
21 under applicable state law. This argument, Your Honor, is
22 also prefaced on the incorrect presumption that releasing
23 parties have not consented. However, as we previously
24 discussed, the releases in parties are consensual, and
25 therefore could be included in the settlement.

1 Your Honor, in discussions with the U.S. Trustee,
2 they also raised the concern that there were parties who
3 accepted the plan, yet voted to opt out of the release in
4 violation of the instruction of the plan, offering that as
5 some type of indication that parties may have misunderstood
6 the instruction of the plan. Your Honor, that has come up
7 in many cases before, and even as the Court sided in the
8 (indiscernible) case in the footnote, that happened in
9 Purdue Pharma, where parties voted to accept the plan, yet
10 in violation of the instructions voted to opt out. Your
11 Honor, that's no indication that parties didn't understand
12 what was going on, as most parties did, and parties were
13 smart enough to read and vote on the plan, they were
14 certainly smart enough to read and understand the ballot.
15 Certainly that happens every day, that parties understand
16 that they need to drive the speed limit of 55 on the
17 highway, yet parties don't do that. So that's not any
18 indication that there was any misunderstanding here.

19 But again in this case, we went to great lengths
20 throughout the case (indiscernible) proceeding to
21 incorporate every party's comments to this, and took all the
22 Court's comments at the solicitation procedures hearing,
23 certainly listened to any suggestions by other parties of
24 the case, and they were all appropriate. And for those
25 reasons, Your Honor, we believe that the third-party release

1 was clear, unambiguous, easy to follow, and consensual, and
2 for these reasons we would request the Court to confirm
3 (indiscernible)

4 THE COURT: With the releases (indiscernible)

5 MR. KURZWEIL: With the releases (indiscernible)

6 THE COURT: So let me ask you some questions about
7 that. I know you've talked a lot -- or you've talked a lot
8 about my prior decision on this issue (indiscernible) If you
9 go towards the end, you will find the official findings,
10 which express, I guess, my desire, concern, whatever you
11 might want to call it, the third party release is not
12 (indiscernible) commonplace, where you're used to a
13 (indiscernible) or procedural routine, but instead should be
14 uncommon, and meet certain procedural requirements
15 (indiscernible) here, it should be justified under the
16 particular circumstances of the case.

17 And then, if you go on to (indiscernible)
18 paragraph five -- I'm sorry, six, and you read this I think
19 too, the Creditors effected by the release are receiving
20 substantial consideration in exchange for the release, and
21 that the release is an integral part of the plan and
22 settlement on which it's based. And maybe that's where I'm
23 having a little trouble, because I'm trying to figure out
24 exactly what substantial consideration the Unsecured
25 Creditors in this case are getting from the plan.

1 MR. KURZWEIL: Surely, Your Honor --

2 THE COURT: That they wouldn't be getting -- In
3 this case, they sold all the assets, there are presumably
4 some litigation claims that somebody thinks have some value.
5 The structure we've set up, I think I may have even
6 anticipated it when we started this case, and so I'm not
7 exactly clear what results of negotiation, or what changes
8 negotiations resulted in, other than what I might have
9 otherwise anticipated in terms of the --

10 So help me find the substantial consideration
11 that's at least (indiscernible) the releases are integral to
12 the settlement.

13 MR. KURZWEIL: (indiscernible) very good question,
14 and this is one (indiscernible) Your Honor.

15 Firstly, to start off with, it's important to
16 understand who is getting these releases. It's a very
17 narrow group of parties. It's the DIP lenders, there's one
18 officer, Brian Smith who was disclosed, who was the chief
19 operating officer of the Debtor prior to and through these
20 Chapter 11 cases, and then it's the CRO and Mr. Hirsch, Your
21 Honor, and Mr. Hirsch was the appointee designation,
22 designated appointee to the board by PIMCO, who took these
23 cases through the Chapter 11 proceedings.

24 So first of all, we're dealing with a very, very
25 narrow group. So when you take into account consideration

1 (indiscernible) falls on this. Secondly, Your Honor, as the
2 Court just pointed out, the Court is correct, the Secured
3 Creditor has a blank lien and all of the assets. So the
4 Secured Creditor could have come, had a 363 sale, sold
5 everything, and dismissed the case, converted the case. A
6 lot of the cases could have been handled, but for going
7 through a plan. That would have left the Estate with very
8 little funds to operate or wind down with. Instead, the
9 Debtor and the Committee negotiated for a responsible wind
10 down, which will --

11 THE COURT: I'm sorry, the wind down was mostly
12 the resolution for that \$9 million of assets I was asking
13 about before, which is all going to go to the Lenders. And
14 then the litigation, should it occur and be successful, as I
15 understand it about 70% of the proceeds of that are also
16 going to go to the Lenders. So how are those two
17 contributions doing anything but advancing the gains of the
18 Lenders?

19 MR. KURZWEIL: First, Your Honor, the amount of
20 assets is grossly less than \$9 million. That's the amount -
21 -

22 THE COURT: Well, whatever it is (indiscernible)
23 that sort of takes the wind out of the case.

24 MR. KURZWEIL: Unless you convert the case. You
25 could just convert the case to a Chapter 7. This case could

1 have been converted when the last sale closed, and we could
2 have -- The DIP order provided that a Creditor -- that the
3 Trustee gets \$50,000, and would have to deal with everything
4 that's left over. And between the last sale closing 45 days
5 ago, 60 days ago and now, there was a tremendous amount of
6 administrative work that had to be performed to get to this
7 point.

8 Secondly, Your Honor, there would have been no
9 funding for the Litigation Trust on that. There was no
10 requirement --

11 THE COURT: I understand. But the Lender is
12 getting 70% of whatever it is that they ever recover.
13 Right? So presumably, they put \$1 million (indiscernible)
14 because they think there's some valuable litigation here
15 that's worth more than \$1 million.

16 MR. KURZWEIL: Well, you know, I can't presume to
17 know what they thought as to why they did it. Whether they
18 believe there are valid claims or not there is something
19 different. But they were requested to do that by the
20 Committee, and they were requested to do it through a lot of
21 requests that were discussed as part of that. And the fact
22 they did do it, and they did it in reliance of these plan
23 provisions to get what they lobbied for, Your Honor, there
24 were very sophisticated parties involved in this case. The
25 Committee was represented by a very sophisticated,

1 nationally respected law firm, the Lenders are respected by
2 a very sophisticated national and international law firm,
3 and the parties thought that this was the best way to
4 proceed.

5 There was consideration, and I think we're talking
6 about the amount of consideration. There's no issue but
7 that there was substantial consideration made. Whether
8 there are any claims or not that would be released, that
9 investigation was certainly reviewed by the Committee. If
10 that was their purview, to understand what would be paid for
11 the release, but they agreed to it. I don't think that the
12 consideration was just limited to the \$1 million that's
13 going to the Litigation Trust, because this (indiscernible)
14 I can get the exact amount (indiscernible)

15 THE COURT: (indiscernible) last year you
16 described the wind downs, don't worry about what is says on
17 the wind down agreement because that's (indiscernible)
18 Secured Creditor. I'm pretty sure (indiscernible)

19 MR. KURZWEIL: And it is, Your Honor, but they got
20 to this point by being responsible. Your Honor, the case
21 could have been converted 45 days ago, and (indiscernible)
22 work performed in dealing with Creditors that weren't just
23 dumped on the Chapter 7 Trustee. The Secured Creditor may
24 have been better off by converting the case, and taking all
25 the money --

1 THE COURT: They can't convert the case if I don't
2 say so. But you may recall (indiscernible)

3 MR. KURZWEIL: Okay. But -- Well, Your Honor,
4 they would have to consent (indiscernible) cash collateral
5 to pay those items. I think what we have here is a Lender
6 that was completely responsible in doing this, and going
7 through this process, and they did that in reliance on the
8 benefit of their volume (indiscernible) Committee, and the
9 benefit of that volume was this third-party release.

10 Your Honor, one of the things that I noticed that
11 wasn't mentioned in a lot of these decisions that we've read
12 on releases was the bankruptcy concept of finality, and --
13 which is one of the most important things that we have when
14 we go through bankruptcy cases. That's why everything is
15 centered around in one court, we want the Court to review
16 everything, and when the order is entered, the matter has
17 been resolved, and nobody has to look over their shoulder.
18 And that's (indiscernible) the case, as the Court will know,
19 and plan confirmation.

20 In reaching an agreement, an agreement to provide
21 consideration, the parties who provide that consideration
22 are also entitled to that finality. Otherwise, why would
23 anybody ever agree to anything? Why would you agree, as we
24 all know as counsel, to settle a few things without settling
25 as much as you can? Because parties will keep coming back.

1 THE COURT: Well, you're making an argument for
2 why you should have one of these in every case, which is
3 precisely where I had no desire to be.

4 MR. KURZWEIL: Your Honor, I can only speak about
5 this case. And what we've gone through, as pointed out
6 earlier in another hearing, a lot of what goes on does not
7 come before the Court, and the Court does not see all the
8 negotiations that go on behind --

9 THE COURT: (indiscernible) for example in
10 (indiscernible) I saw the results of the negotiations, you
11 know, \$10 million in cash, a \$20 million DIP that was
12 forgiven, restructuring of a lot of real estate lease
13 obligations and such. And that's a slightly larger case
14 than this one, but not substantially larger.

15 And in this case, what I think I see is \$1
16 million, which is being spent primarily for the benefit of
17 the Secured Creditors, because again, if there is any
18 recovery, they're taking most of it (indiscernible) maybe
19 they didn't waive any part of their claim, they didn't
20 subordinate any part of their claim to recovery by the other
21 creditors first or anything. They just funded the potential
22 litigation, which if it goes anywhere, they're
23 (indiscernible)

24 MR. KURZWEIL: Well, Your Honor, they would be
25 entitled to 100% of everything. They -- Don't fault them --

1 Your Honor, you're faulting a lender for having a large
2 deficiency claim. By saying they're getting all of it, it's
3 because the assets weren't sufficient to pay the secured
4 claim in full. They don't have any less rights than another
5 Unsecured Creditor. But what they did have was a court
6 order, Your Honor, that gave them the rights to all the
7 preference recoveries, that gave them the rights to all the
8 (indiscernible) actions of all these claims, they would get
9 -- they had a super priority claim, and they had the right
10 to get paid first.

11 And Your Honor, they could have had insisted that
12 this be liquidated, and everything go to the Lenders. And
13 so that DIP order (indiscernible)

14 THE COURT: And how much different would that be
15 for not very many Unsecured Creditors (indiscernible) the
16 plan?

17 MR. KURZWEIL: It depends what the recovery is.
18 Your Honor, I'm sure that nobody cares more about wishing
19 they received more, and the deficiency claim was less than
20 the \$100-plus million that it is. Just because they're
21 getting a larger share of that doesn't mean they should be
22 punished for that, and somehow saying it's only for their
23 benefit. They're an equal Unsecured Creditor, and they
24 agreed to give up their collateral.

25 Your Honor, there was no other Creditor who

1 offered to give up any of their collateral for
2 (indiscernible) No one else came forward and said I'll fund
3 the Litigation Trust, I'll fund it to pursue the
4 protections. And therefore, because they set out to do
5 this, and they agreed to share that on a pro rate basis, and
6 they were hurt so bad so they happened to have a large
7 claim, that shouldn't be (indiscernible) Secure Lender.
8 mean, they should be admired for doing that, for acting
9 responsibly. Because what they could have done is said
10 (indiscernible) liquidate everything, and give me all the
11 money, and the Unsecured Creditors aren't entitled to
12 anything. They didn't have to (indiscernible) further
13 called out for the Unsecured Creditors Committee to pursue
14 anything else like this. They could have just funded
15 litigation, and took everything, you know, everything on
16 their own.

17 And this particular case would not have that
18 resolution, would not have that resolution but for an
19 overall settlement. And that was insisted upon by the
20 parties up to that settlement, and that was negotiated over
21 weeks, maybe even longer, between the Creditors Committee,
22 and the Lenders and the Debtors.

23 Your Honor, I won't go into settlement
24 discussions, but there were times when those discussions
25 completely broke down, and we had to get the parties back.

1 We didn't necessarily get a mediator. We talked internally
2 about seeing if we needed a mediator to get to there. But
3 parties ultimately agreed, and that was essential to them
4 putting in the money to make this work.

5 Now, if the Committee wants to give us -- the
6 Committee wants to give back all the assets to the lender,
7 and give that money back and not have any of the benefit of
8 that, I have (indiscernible) and ask them if they want that.
9 I don't think the Committee is ready to do that because they
10 fought so hard for that, but they can't take the benefits of
11 this and not have the burdens of it.

12 And additionally, Your Honor, notwithstanding the
13 Court's comment here, which is completely understandable and
14 I'm very sensitive to, the Committee supports this -- to
15 this. And no party other than the U.S. Trustee filed an
16 objection to this at all. So I mean (indiscernible) there
17 wasn't any other Creditors who were concerned enough for the
18 Committees to say that that shouldn't be an essential part
19 of the plan.

20 Your Honor, we believe that that's the only way
21 that this goes forward, and the only way that you can get a
22 Creditor to contribute consideration is to offer them
23 something. And maybe in some cases you don't need that
24 consideration for a case to go forward. Maybe in some
25 cases, there are unencumbered assets. But the amount versus

1 scope of release in balancing both of those out, and maybe
2 we can see the Courts' view if it was a very, very
3 widespread release, but it's not (indiscernible) and
4 therefore, Your Honor --

5 THE COURT: Well, I don't know who else in this
6 case would get a release, I mean, to be frank.

7 MR. KURZWEIL: (indiscernible) and we'll cave it
8 out of that. They are not -- this is not -- The only
9 insiders who received a release which was discussed with the
10 parties was the Chief Operating Officer, Brian Smith, the
11 CRO, and Mr. Hirsch. And that was openly and notoriously
12 discussed with all parties. No other insider has received
13 any release in this case.

14 So it is a much more narrowly tailored release
15 than you have (indiscernible) Your Honor, each case is
16 different, and we're very sensitive to the Court's comments,
17 and discussed it -- by prepping for today. But we do
18 believe the circumstances of this particular case warranted
19 it, and certainty further considerations (indiscernible)

20 THE COURT: All right. Thank you.

21 MR. WILLIAMSON: Good afternoon, Your Honor. If I
22 may be heard for a moment on the release issue? Ronald
23 Williamson, representing the pre-petition Lenders, the Dip
24 Lender, and the Agent.

25 Your Honor, just to reiterate what Mr. Kurzweil

1 said, I think -- and I understand the optics of the
2 paperwork that's before the Court, and the \$1 million stands
3 out, and the balance of the \$850,000 reserve that's set up
4 by Committee professionals. And that is part of the
5 consideration that my client is providing weekly as part of
6 the release, and was a material component of our agreement
7 to do the deal, which was negotiated, of course, with the
8 Creditors Committee, representing the Creditor body in this
9 case. But there's a lot more value, we believe, to the
10 considerations being provided by my clients.

11 For one thing (indiscernible) It hasn't been
12 quantified exactly today. The amount of the DIP claim, my
13 understanding is right now, currently around \$11 million.
14 And based on the analysis of the cash on hand, and what they
15 potential wind down expense are, we're looking at receiving
16 somewhere around \$4 million of the cash from the wind down
17 funds are on hand right now, which is somewhere -- I don't
18 know the exact amount. But by the time they do the wind
19 down, and the expenses are paid, we're looking at maybe
20 receiving somewhere around \$4 million. So there's going to
21 be a pretty --

22 THE COURT: Is that from the DIP lender, or is
23 that (indiscernible) the pre-petition claim (indiscernible)
24 reference to the DIP claim anywhere.

25 MR. WILLIAMSON: That's the DIP -- I think that's

1 the DIP claim. That's the DIP claim. That's the loan
2 that's secured, has the super priority, otherwise that's
3 going to receive the first dibs on any net recoveries on the
4 preference claims, and other causes of action.

5 And so we're thinking, in our view, that's
6 probably likely to be about a \$7 million give as additional
7 consideration that's being provided to this process in order
8 to make this happen, and hopefully provide some return for
9 the Unsecured Creditors. I understand --

10 THE COURT: (indiscernible) part of the pan, or I
11 guess -- I thought I read these documents, and
12 (indiscernible)

13 MR. WILLIAMSON: I believe that's a correct
14 assessment. I mean --

15 MR. KURZWEIL: Under the stipulation, the voting
16 stipulation of the division between what is remaining in the
17 wind down and what's going to the Litigation Trust, the
18 number is I believe \$9 million (indiscernible)

19 THE COURT: And part from the (indiscernible) the
20 pre-petition secured claim, isn't it?

21 MR. KURZWEIL: Your Honor, dollars are fungible,
22 so --

23 THE COURT: Sure. But I would imagine the DIP got
24 paid off by (indiscernible)

25 MR. KURZWEIL: Your Honor, the DIP has not been

1 paid off. The DIP is still outstanding. The pre-petition -
2 - The Lenders have the ability to apply for (indiscernible)
3 and the DIP is not paid off. They agreed to take the --
4 that whatever was left over from the wind down assets would
5 be applied to that claim.

6 THE COURT: And then what happens to the rest of
7 them?

8 MR. KURZWEIL: They don't get paid anything out.
9 So there's a large shortfall.

10 THE COURT: And that's my understanding of how
11 this is going to apply to the pre-petition secured claim as
12 the Lenders (indiscernible) the documents.

13 MR. WILLIAMSON: (indiscernible) thus the -- And
14 the fact of the matter is the deficiency balance, the reason
15 why the DIP Lender, or the pre-petition Lender is going to
16 have, you know, a large percentage of the interest in the
17 Creditor Trust is, of course, because they have a huge
18 deficiency claim in the case. We don't know that that's
19 necessarily relevant. That doesn't diminish the other
20 considerations being provided to the Estate. And likewise,
21 the remaining portion of the unsecured debt, the benefit
22 will constitute the other beneficiaries of the Trust.
23 Standard benefits (additionally we think from the
24 (indiscernible) are going to be pursued by the Litigation
25 Trust, and we think this is a more efficient way and a

1 better way to maximize (those recovering.

2 And sure, it could benefit my client, and we hope
3 it does benefit my client, but you know, the rising tide
4 lifts all boats, and we're hopeful that this will lift
5 everybody's boats, for all the beneficiaries that are in
6 that pool. We think under the circumstances that the
7 consideration that's being provided, this is a significant
8 benefit, and we do think it meets the need standards. We
9 don't think this is the ordinary case that is going to come
10 before you, Your Honor, so we understand the concern that
11 the Court expressed (indiscernible) and has expressed here
12 today (indiscernible) commonplace. But I don't think this
13 is the commonplace case that we're going to see frequently
14 before the Court.

15 It is different circumstances and different facts
16 from (indiscernible) we certainly think that the
17 consideration my client is providing, and relied upon in
18 order to get the deal done with the community of the Debtors
19 in this case, and frankly move this through pretty quickly,
20 and even though there's been a lot of administrative
21 expenses incurred, everybody has moved this efficiently and
22 quickly as they could to try to get to the point where
23 hopefully, we can start generating some return for the
24 Unsecured Creditors.

25 We do support the plan, and the releases in the

1 plan, and the Debtors request that the Court approve the
2 plan with the releases. If for some reason the releases are
3 not approved, I can't say exactly what that looks like at
4 that point, whether we're here asking Your Honor to convert
5 the case, or dismiss the case, or we go back to the drawing
6 board and try to consider -- figure something else out. And
7 I know as I stand here today that that's a material
8 consideration to my client to support this plan, and provide
9 support to the case, to try to get to the point where we are
10 here today. Thank you.

11 THE COURT: All right.

12 MS. CHO: Your Honor --

13 THE COURT: Please.

14 MS. CHO: May I be heard, Your Honor?

15 THE COURT: Sure.

16 MS. CHO: Good afternoon -- good afternoon, Your
17 Honor. It's Shirley Cho of Pachulski Stang Ziehl & Jones,
18 for the Official Committee of Unsecured Creditors. May I be
19 heard?

20 THE COURT: Yeah, you may.

21 MS. CHO: And apologies if someone else was in the
22 courtroom, trying to get up to the podium. I didn't mean to
23 cut anyone off.

24 Your Honor, from the Committee's perspective, the
25 totality of the case is bleak. As Mr. Kurzweil has outlined

1 for the Court, it is an underwater case where the Secured
2 Lenders aren't getting paid out in full. And so from the
3 Committee's perspective, where you have a case where the
4 Unsecured Creditors should, under the absolute priority
5 rule, really be receiving a zero recovery, and then have the
6 potential of being sued for preference claims, to add insult
7 to injury, that would be a fate worse than liquidation under
8 Chapter 7.

9 And so with that in mind, Your Honor, the
10 Committee did negotiate over a period of weeks the
11 consensual settlement that is outlined in the plan. What
12 was important to the Committee, Your Honors, is that the
13 releases were very narrow, as outlined by Mr. Kurzweil. You
14 don't have any of the former directors and officers being
15 released, you have significant causes of action being
16 preserved, and most importantly, from the Committee's
17 perspective, you have a dedicated trust for Unsecured
18 Creditors with the fiduciary that the Committee has selected
19 in order to pursue those causes of action, and to look out
20 for the interests of Unsecured Creditors. That was very
21 important for the Committee, to not have Creditors kind of,
22 you know, looking over their shoulders.

23 We do view this as kind of a hope note case. As
24 Your Honor has outlined, it is better than what would have
25 been the alternative here. The reality is, Your Honor, the

1 \$850,000 that's in the Committee, that's in the DIP budget
2 for the Committee professionals is insufficient to fund the
3 Committee professionals. And so the \$1 million pot of cash
4 that's set aside there for the Trust is actually anticipated
5 to -- a portion of that is anticipated to be used to pay the
6 Committee professional's shortfall. So that \$1 million pot
7 of money becomes even less, and at the end of the day, that
8 money needs to be used to reconcile unsecured claims to get
9 a distribution out the door.

10 So you know, obviously this will be the future
11 Trustee's call, but it is likely that contingency counsel
12 will even need to be brought in, Your Honor, to pursue those
13 causes of action. I just wanted to point that out, and give
14 Your Honor that preview.

15 THE COURT: Yeah. You mentioned preference
16 actions and such, and the indignity of getting nothing out
17 of the case, and then getting sued for money you already
18 received. What's your understanding of the intention to
19 prosecute those (indiscernible)

20 MS. CHO: Well, Your Honor, the plan does not
21 contain an express waiver of preference claims in favor of
22 trade vendors, or ordinary creditors that received
23 preference payments within the 90 days. But you know,
24 because the Trustee is a fiduciary, or is -- my
25 understanding is he's an advisor to a couple of the

1 Committee members, our understanding would be that the
2 Trustee would look to kind of insider preference claims, and
3 bring those, and leave the kind of ordinary course
4 preference claims alone. But of course, you know, that
5 would be the Trustee's call. That's certainly, you know,
6 all causes of action very broadly are being preserved for
7 the Trustee to evaluate and pursue.

8 Obviously, if there are legitimate preference
9 claims, you know, the Trustee would need to make that call.
10 But that would be up to that independent Trustee to make
11 that decision.

12 THE COURT: Okay. So they may yet be subject to
13 the indignity you describe?

14 MS. CHO: They may be, but the chances
15 (indiscernible) is being lessened, Your Honor.

16 THE COURT: Okay. Well, thank you.

17 MS. CHO: Thank you.

18 THE COURT: Mr. Williamson returns.

19 MR. WILLIAMSON: Yes. Just one last point, Your
20 Honor, I forgot to mention, which is an important point, I
21 think.

22 Of course as Your Honor knows, there is provision
23 in the plan which allows not only do we think that the
24 release system is paid for consensual, very conspicuous, but
25 certainly the provision allows the parties to come back to

1 Your Honor if they think they didn't get proper notice, or
2 for whatever reason that they shouldn't be bound by the
3 release. And so we think that's a provision you don't often
4 see in some of the other cases, or approved in the opt-out
5 of releases, and we think that's an important provision, and
6 is an additional reason why having that escape route I think
7 also merits the approval of releases under these
8 circumstances.

9 If somebody thinks they didn't get proper notice,
10 it's unlikely. We think it's unlikely anybody would have a
11 claim, for example, against my client. I can't think of
12 maybe tortious lending, they owe too much money or
13 something. But I don't think that theory is recognized here
14 in Georgia but (indiscernible) come back and try to
15 (indiscernible) support, if for whatever reason the release
16 wasn't consensual as to them, they have an opportunity to do
17 so.

18 Thank you, Your Honor.

19 THE COURT: All right. Before we get to Mr.
20 Adams, anybody else in the virtual room wish to be heard?

21 Okay. Hearing none, Mr. Adams (indiscernible)

22 MR. ADAMS: Good afternoon, Your Honor. Jonathan
23 Adams, on behalf of the United States Trustee. Before we
24 get started, I just want to say that to Debtors Counsel, I
25 do appreciate the professionalism that you've shown in the

1 case. They're very good and kind to us (indiscernible) and
2 we do appreciate your work, and appreciate the CRO
3 (indiscernible) you've done great, and all the other parties
4 in interest that have worked in this case, Your Honor. It's
5 been a great case to be a part of. I've enjoyed it. And
6 with that said, I guess the next thing to say to Your Honor,
7 here we are again.

8 As Your Honor well knows, I had the misfortune of
9 arguing the release provision in LaVie, and I was there when
10 the Court ruled against us in that case. I don't intend to
11 re-litigate LaVie. I don't think that's what the Court
12 would want to do with its time, and it's certainly not what
13 I want to do with mine. Our papers say what they say, and I
14 think the Court has carefully read them, just as they did in
15 LaVie, and we do appreciate the Court's attention to the
16 matter.

17 Your Honor, my time with you today I'd like to
18 spend thinking about three questions. And I think the first
19 question Your Honor has already hit pretty hard, but I'll
20 reiterate just to be safe. If the Court is inclined to
21 allow a third-party release here, under these factual
22 circumstances, under what circumstances would a third-party
23 release be appropriate? Your Honor, we've heard a lot about
24 the LaVie release, and I think Counsel for the Lender just
25 pointed out one of the big provisions that the Court added

1 to the LaVie release, that release valve. And so I think
2 it's fair to say, and I don't know if Mr. Kurzweil will
3 disagree with me if he's wrong, I think it's fair to say
4 that the AirPros release has been heavily influenced by the
5 release that this Court eventually granted in LaVie, and I
6 don't think that's of much dispute.

7 But Your Honor, LaVie was a very different case.
8 LaVie was a series of cases where I think there were 43
9 operating entities, operating nursing homes, and the threat
10 there was that if the plan didn't get confirmed, and if we
11 didn't have a new series of operators put in place, these
12 folks might not have anywhere to go, that these nursing
13 homes just might cease operations. And so there was a sense
14 in LaVie, as I recall from the confirmation hearing, that if
15 that release had not been granted, yes, the unsecured
16 creditors would have lost, but everybody would have lost.
17 There was a sense of collectivism there, in other words, in
18 the outcome. And Your Honor, I don't think that's the case
19 here.

20 Here, the reality is the customers, thankfully,
21 are already protected. Here, the sale of the businesses
22 have already occurred, and the warranties that were given to
23 those customers are enforced and are in place, and will be
24 protected by those new buyers. And so we're thankful that
25 the process worked out that way for the customer, but we

1 don't have that concern like we had in LaVie.

2 And again in LaVie, you had a different mechanism
3 through which the plan would function. That was the plan of
4 reorganization. Now, the reality was there were going to be
5 separate entities that would be set up through the plan, and
6 those entities were going to operate the Debtors, true
7 enough. But at the end of the day, there was going to be
8 something operating, and such that those releases would
9 protect them and allow them to go forward and do what they
10 need to do. Your Honor, that's not the case here. The
11 Debtors are dead. They're defunct. They're not going to do
12 business. This is a plan of liquidation.

13 So the customers aren't benefiting from this
14 release. The Debtors aren't benefiting from the release.
15 So who's left? Well, we have the released parties, which I
16 think Mr. Kurzweil (indiscernible) when he said that they're
17 very narrow. Your Honor, I think the reality is we're
18 talking about the Lenders. That's who's really getting the
19 relief. Everyone else, as subject to being a released
20 party, would be someone that would be allowed to get relief
21 under an exculpation provision that we see all the time,
22 Your Honor, and we work on those all the time, and those
23 folks could have gotten this relief under a similar sort of
24 arrangement here. Really, we're talking about the bank.
25 That's who benefits from this release here, the Lenders.

1 And I acknowledge the fact that the Lenders have
2 funded the Trust. If this plan is confirmed, they'll put \$1
3 billion in there. But as Your Honor pointed out, they're
4 going to get 70% of the proceeds roughly of what that Trust
5 generates. With regard to the DIP facility, I always -- I
6 try to jot down when I hear phrases I like, "Dollars are
7 fungible," I like that, and I don't hear that a lot. But I
8 think that says volumes here, that they decided which
9 dollars would be applied to which. And we're talking about
10 what was paid when they got the proceeds of the sale, and
11 then the optics of the paperwork are not very good here.
12 Your Honor, I don't think that's the optics of the paperwork
13 that aren't good here. The reality is it's just not a very
14 good deal here. The reality is we're paying \$1 million to
15 fund a trust, of which the Lender who's getting the release
16 is getting 70%.

17 I'm not asking the Court to question the business
18 judgment of the Committee. I know I'm in a fine space here.
19 That's not what I'm asking the Court to do. I am asking the
20 Court to apply what it said in LaVie. In LaVie, in the
21 opinion of the Court, I'm going to read it to make sure I
22 get it right, I don't want to say it wrong (indiscernible)
23 I'm nervous. I think this is 539 -- or excuse me, 24
24 (indiscernible) 29, pages 39 and 40. "As is the case with
25 numerous other aspects of this analysis, this Court agrees

1 with Judge Cavender and Mister (indiscernible) that third-
2 party releases should not be commonplace, or be reduced to a
3 matter of procedural routine, but instead they should be
4 uncommon, should meet certain procedural requirements, and
5 should be justified under the particular circumstances of
6 the case."

7 Your Honor, from our point of view, if we allow a
8 release here, I can't imagine a series of circumstances
9 where the Court would not grant a release. And I'd ask the
10 Court, if the Court disagrees with this, to explain that for
11 us so that we'll understand when we're trying to apply the
12 law going forward (indiscernible) can be applied properly.
13 Because from our point of view, there's not a lot of there
14 there. I understand the economics of the case. I
15 understand and readily acknowledge the Lender lost a lot of
16 money here. There's no question about that. So did all the
17 other Unsecured Creditors. There are a lot of people losing
18 a lot of money in this case. Unfortunately, that's just the
19 nature of some bankruptcy cases, including this one. So
20 Your Honor, we do question that.

21 Your Honor, the second question we would like the
22 Court to consider, and might go a little more towards the
23 traditional LaVie arguments there, but given the specific
24 facts in the case, how can we surmise that Creditors
25 understood much less consented to the options provided by

1 the Debtor here? Your Honor, you've heard some of the
2 numbers regarding voting, but I want to make sure we
3 highlight them, and make sure we fully articulate that.
4 It's my understanding that the Class 4 of the general
5 Unsecured Creditor, there were 198 ballots sent out to
6 Creditors. It's my understanding that there were 24
7 responses, and out of that, 21 of those Creditors voted.
8 And we've heard the breakdown of vote, that 17 of those
9 Creditors voted for the plan, but note that 5 of the
10 Creditors who voted for the plan also voted to opt out,
11 which under the plan they cannot do. I cannot imagine any
12 other circumstance why a Creditor would do that other than
13 they simply did not understand what they were doing. What's
14 the point of checking the opt-out box if you accepted the
15 plan, other than I didn't understand the opt-out box didn't
16 apply to me.

17 Your Honor, I would also point out that one of the
18 Creditors who did that, who voted for the plan and then
19 opted out, was on the Committee. They were in the room when
20 these things were negotiated, and yet they still did not
21 understand when it came time to vote that if they voted for
22 the plan, the opt-out box didn't apply to them. If a member
23 of the Committee didn't understand that, if one of the seven
24 folks who were put on this Committee, who were in the
25 meetings that the Committee had, were part of the active

1 negotiations with regard to this plan didn't understand
2 that, it seems difficult for me to understand how we can
3 surmise that the other 197 Creditors understood what they
4 got when they got the plan and they got the ballot.

5 And Your Honor, that knowledge or that
6 understanding in our opinion is an essential part of
7 consent. Whether you take the contract theory or you take
8 the fault theory, either way, there has to be an
9 understanding of what you're agreeing to. And we think
10 those five Creditors, again which would be 29.4% of everyone
11 who voted in favor of the plan in Class 4, and 23, or almost
12 23.8%, or almost a quarter of the entire voting party voted
13 in a non-sensible fashion, a quarter of your votes that
14 we're relying on here today voted in a way that just makes
15 no sense, you can't vote for the plan and opt out, yet these
16 folks did anyway, why? The only logical explanation for
17 that is they did not understand what they were doing.
18 Otherwise, they would have either not voted for the plan, or
19 they would have voted for the plan and not bothered checking
20 the box, because checking the box is irrelevant.

21 Just going down the line, Your Honor, as I'm sure
22 Your Honor knows and will probably recognize from LaVie, we
23 broke down each subsection of potential Creditors and
24 analyzed that. But Your Honor, we don't have to worry about
25 the folks who rejected the plan in this case. There were

1 four of those, and all of them opted out, so there's no
2 issues about consent variance in that subclass. They all
3 opted out. They consented, it is what it is.

4 With regard to the largest class, which is always
5 the largest class in these opt-out cases, there were 174
6 folks who received a ballot, but then did not vote or did
7 not opt out. So that's about -- we had about 12.1% response
8 rate, so that's about 87.9% of all Creditors just simply
9 didn't do anything.

10 And I appreciate the bank's point about the
11 release ballot later on, and I do agree that probably helps
12 mitigate some risk to these folks. But at the end of the
13 day, Your Honor, we are making some assumptions about what
14 these folks know and about what these folks got. And given
15 the confusion that we saw from the limited amount of people
16 that did vote, I just don't see how we can make the
17 assumption that they fully understood what they were doing,
18 and just simply decided not to vote as some sort of consent.
19 I just don't see how that is possible, given the voting
20 nature here in this case.

21 Your Honor, in addition, there was a subclass of
22 folks that were presumed to accept or reject the plan. They
23 were subject to the release unless they sent in the opt-out
24 form. I think there were 56 of those notices out, that were
25 sent out. There was just one response, one opt-out from

1 that. So what we're looking at, we had -- make sure my
2 count is correct, we had -- we had 13, if I'm doing my math
3 correctly -- excuse me, 12, 12 attempted opt-outs in this
4 case, 12 of the 24 responses, all right? That's half of the
5 respondents, or about 6.1 of the class tried to opt-out.
6 But only 7 of them were successful, right? The other 5 were
7 unsuccessful. So of our 12, we had 5 unsuccessful attempts
8 because they voted for the plan.

9 Your Honor, again, I know I'm slicing the math a
10 slightly different way to make a point, but I hope the point
11 is clear. I just don't see how we can make the assumption
12 that these folks understood what they were doing when they
13 did it. It just makes -- That just doesn't -- it doesn't
14 make sense to me, Your Honor.

15 And the third and finally going through the
16 theory, and I guess the heart of what I would consider the
17 United States Trustee's disagreement with the
18 (indiscernible) Court's decision in LaVie is how can
19 forfeiture equate to consent? Because at the end of the
20 day, that's what we're talking about here. We're talking
21 about how can the Court assume consent out of a default? In
22 order to apply forfeiture law, this Court must imply that it
23 would have the authority to substantially rule on the merits
24 of a release, just as the Court would rule on any matter.
25 The Court has the authority to alter the rights of Debtors

1 and their Creditors under the Bankruptcy Code, but there's
2 no authority in the Code to alter the rights of the third
3 party and those same Creditors.

4 We agree, the Bankruptcy Court can acknowledge an
5 agreement that already exists. Of course it can do that.
6 If that agreement occurs by an opt-in perhaps, or some other
7 arrangement, that would be different. But it cannot impose
8 a release that it has no authority to impose. It just can't
9 do that. There's -- Without that consent, without that
10 agreement, we just don't think it can be done. And --

11 THE COURT: There's two words there, consent and
12 agreement, and those are not the same thing (indiscernible)

13 MR. ADAMS: And I suspect that goes to the heart -
14 -

15 THE COURT: (indiscernible)

16 MR. ADAMS: I'm sorry, Your Honor, I spoke over
17 you.

18 THE COURT: No, just go ahead.

19 MR. ADAMS: I suspect that that is the Court's
20 rejoinder and primary disagreement with our view. And I
21 acknowledge the fact that this is a difficult issue. But
22 you know, from our position, consent means two things,
23 really, that you've got to understand what you're doing, and
24 you've got to agree. We think that's part of the definition
25 of consent. And I suppose that might be the heart of the

1 disagreement that we have here a little bit. We think you
2 don't get consent without agreement. Unless the parties
3 understand what they're doing, and agree to it, they cannot
4 consent.

5 And a forfeiture is just something different than
6 that. That is then a situation where a party has the
7 ability to lose a right before a court, and it fails to
8 exercise that right. Those are two different things.
9 Purdue ruled on non-consensual releases, and we agree, and
10 we're arguing about that definition. But to us, those two
11 elements of consent can't be -- they're insoluble.

12 And I understand the desire for finality. I
13 understand the desire to make a deal and move on. But Your
14 Honor, another fundamental purpose of bankruptcy is
15 fairness. It is just, from our perspective, boiling it down
16 to one sentence, I think we believe it's unfair for a party
17 who did file bankruptcy to get a release without consent
18 after Purdue.

19 THE COURT: So I'm curious, so I'm sure you've
20 read Stewart Airlines.

21 MR. ADAMS: Yes, Your Honor, we have.

22 THE COURT: Okay. And in there, the judge
23 addresses some of the restatement law that you have cited,
24 and there are several exceptions that of course
25 (indiscernible) can't constitute acceptance. And you seem

1 to think, and I kind of thought when we were dealing with
2 LaVie that several of those exceptions might apply, and I
3 think he does a better job than I might have explaining why.
4 I just noted that you had -- you had mentioned there were
5 exceptions (indiscernible)

6 MR. ADAMS: Your Honor, I believe that --

7 THE COURT: Tell us about that.

8 MR. ADAMS: Yeah, sure. Two general exceptions,
9 if we take with respect to the contracts (indiscernible) or
10 Section 69, the offeree silently takes offered benefits, or
11 the parties relies on another party's manifestation of
12 intent. Your Honor, we just don't think either one of those
13 primary exceptions apply here. With regard to the offerees
14 silently taking offered benefits, I suppose they're bound by
15 the plan to receive 30% of this Trust. That is true, they
16 will receive that. But are they taking it, or are they
17 being forced to take it by not voting? I guess that would
18 be the position I would take as to the first exception.

19 And as to the second, I don't see how the Debtor
20 can say that it has relied on another party's manifestation
21 of intention here. At the end of the day, we don't believe
22 the Bankruptcy Court has the authority to force another
23 party to take a release. It just doesn't. So if they don't
24 have the authority to do that, how can the Debtor be relying
25 on it? This is the Debtor's plan, not the bank's plan. So

1 how can the Debtor possibly be reliant on anything?

2 We just don't think that those exceptions apply,
3 Your Honor.

4 THE COURT: All right.

5 MR. ADAMS: Your Honor, unless you have any other
6 questions for me, that's all I have.

7 THE COURT: (indiscernible)

8 MR. WILLIAMSON: (indiscernible)

9 MR. ADAMS: You're unresponsive. I am shocked,
10 Your Honor. Shocked. But I appreciate the Court's time.

11 MR. WILLIAMSON: Your Honor, if I could -- This is
12 Ron Williamson, and just before we get into arguments
13 (indiscernible) the deficiency claim on the SIP loans
14 (indiscernible) it is a little confusing.

15 The stipulation (indiscernible) the Debtor
16 understands was, just for purposes of establishing what
17 dollar amount on the secure claim would be used for voting
18 purposes. But the intention was that after the funds are
19 used for the wind down expenses, and the remaining funds are
20 applied to the DIP loan, there's going to be a deficiency, a
21 significant deficiency, and it will be converted to part of
22 the pre-petition deficiency claim that goes into the Trust.

23 My understanding is that the parties have been
24 circulating estimates on the wind down expenses, and they're
25 supposed to be somewhere in the neighborhood of \$1.1

1 million. There's -- The DIP loan, the outstanding balance
2 is approximately \$16.3 million, plus with accruing interest
3 would be approximately, somewhere around \$17 million we
4 believe at the time of the wind down.

5 The cash on hand we understand is somewhere around
6 \$11 million. So if you back out the \$1.1 million for the
7 wind down expense, and let's say you have approximately \$10
8 million left (indiscernible) to go against a \$17 million
9 remaining DIP plan. So there's a \$7 million difference
10 there that, absent the settlement, with super priority
11 (indiscernible) in other words, they would be entitled to
12 gobble up the first \$7 million of net proceeds, we believe,
13 from the causes of action (indiscernible) and the like.

14 There's a provision in the proposed confirmation
15 order, in paragraph 91, which (indiscernible) if entered by
16 the Court would say in part that any unpaid DIP lender
17 claims after there are no longer any remaining assets
18 constituted, and shall be added to the pre-petition lender
19 efficiency claim for distribution purchase under the plan.
20 So that was the plan (indiscernible) plan that my client
21 would convert whatever was remaining on the unpaid DIP plan
22 (indiscernible) into the trust.

23 So we think that's a very significant part of the
24 consideration that's being provided for this settlement, the
25 community settlement, and for the releases, and we just

1 wanted to make sure that the record was clear on that.

2 Thank you.

3 MR. KURZWEIL: Your Honor, if I may just respond
4 to the U.S. Trustee's three points that they raised in the
5 Court's inquiry, I'd like to start with the second one
6 first. And the term used for understanding.

7 Your Honor, when we start with foundational
8 concepts that have no place for (indiscernible) as addressed
9 in the Code, it becomes very difficult to craft a resolution
10 for that. And what I'm saying, or what I'm pointing out is
11 first of all, there's no evidence of what somebody
12 understood, or did or didn't understand with respect to
13 looking at a particular document. But nowhere in the Code
14 does the term whether somebody understood what happened or
15 what's going on have any bearing on the outcome
16 (indiscernible)

17 And that goes back to the old axiom, ignorance is
18 no excuse of the law, but that's also found throughout the
19 Bankruptcy Code. There's no level of understanding of what
20 the U.S. Trustee is trying to do, or suggesting as opposed
21 to a burden that doesn't otherwise exist. For example
22 (indiscernible) there's no level of requirement that
23 somebody understood what was in the document, if they
24 received it. It's finality, and they're bound by it.

25 Another good example of this is actually contained

1 in the plan process itself. If you look at the requirements
2 of what a disclosure statement would contain, the Code
3 provides information of a kind and sufficient detail as far
4 as reasonably practical, in light of (indiscernible) of the
5 Debtor, and condition of best books and records, including a
6 discussion of potential material federal tax consequences of
7 the (indiscernible) to the Debtor, and a hypothetical
8 investor typical of the holds of claims of interest that
9 would enable such a hypothetical investor of the relevant
10 class to make an informed judgment about the plan.

11 If you impose a level of understanding into the
12 Code at any point, it should apply to everything, and no one
13 would be able to get through any of the concepts, or any of
14 these proceedings before the Court. And that is why, first
15 of all, we're coming before the Court and asking for the
16 Court's review, but also the Unsecured Creditors have an
17 attorney in these cases, and a Committee who has the
18 fiduciary duty to represent all Unsecured Creditors
19 (indiscernible) have the right to obtain counsel, and they
20 have the right to obtain any counsel they want, and
21 sophisticated counsel. And usually the quality of that
22 counsel is not limited by the cost of that counsel because
23 it's paid for by the Debtor.

24 So therefore, there is a path for understanding
25 what's going on. The concern that the Debtor has that if --

1 and I do as a bankruptcy attorney, if you start imposing a
2 level of understanding, seeing what a person understands or
3 doesn't understand, it applies to everything, and that would
4 be -- we would propose that be inappropriate.

5 The second comment I'd like to raise is that of
6 the forfeiture equal to consent. And again, Your Honor,
7 that is, and I appreciate the U.S. Trustee pointing out the
8 concept of finality, but that's also an axiom based on law,
9 and based in the fundamental portions of Bankruptcy Law,
10 that you have to have finality because you have to bring all
11 the parties together, and they have to be able to negotiate
12 for a resolution, and not have it overturned. Imagine if
13 DIP orders didn't have the finality to them, or other orders
14 of the Court, sale orders didn't have the finality to them.
15 The issue about forfeiture also exists.

16 Now, we're not talking about State Law out of
17 context forfeiture. We're talking about parties that are
18 involved first in a legal proceeding. By the time parties
19 in this case get a plan, they've got a number of legal
20 documents. They know they're involved in a legal
21 proceeding. And throughout that legal proceeding, there's a
22 number of matters that they have to comply with. Otherwise,
23 they lose their rights. The most one that we're all used to
24 is the bar date. Bar date has been litigated throughout
25 since the Code was started. You miss it by an hour, you

1 miss it by a day, you file it in one place, you're out,
2 unless there is some act of God, or something that's
3 completely unusual that some court will listen to, but it's
4 a very, very high burden.

5 So that concept, again, is not foreign in
6 proceedings, and is consistent with bankruptcy cases. And
7 additionally, to make sure that the process is fair and that
8 it's a level playing field, again creditors are provided
9 with counsel throughout this, and everything is reviewed by
10 the Court.

11 And finally, the first point was raised, which is
12 the amount involved in the consideration. And we certainly
13 are highly sensitive to that. And Your Honor, LaVie was an
14 extremely very well-reasoned position, and really does a
15 tremendous job of navigating the different issues in
16 releases, and bringing that up is certainly very -- We agree
17 it's extremely appropriate in the case. But consideration
18 is one of relativity involved in the circumstances of the
19 case, and when you have parties that have obviously
20 disagreements, because they're coming from different sides,
21 you have a lender with their constituency, you have
22 creditors with their constituency, you have the debtor with
23 their constituency, each one represented and coming to a
24 resolution, it's their business judgment collectively that's
25 being put before the Court for the resolution of the matter

1 (indiscernible)

2 And in particular, the facts and circumstances of
3 this particular case, not (indiscernible) case, the parties
4 in this case thought that was the best way to proceed.

5 Certainly, the Committee believed that they were extracting
6 enough consideration to make this addition in the plan look
7 (indiscernible) Otherwise, they either wouldn't agree to it,
8 or they would be objecting to it. Why? Because they have
9 the fiduciary duty to do that on behalf of the Creditors,
10 and they don't think it's (indiscernible) Obviously, the
11 Lenders don't want to have to pay anything. Why should they
12 want to have to pay anything? Any dollar paid, \$1 that's
13 out of their pocket, and they have their reasons for
14 negotiating this. So certainly, the Debtor is trying to
15 create the best forum to get all this resolved.

16 THE COURT: Well, let me ask you about that. So
17 if the Lenders (indiscernible) viability of the claims that
18 the Trust is assigned to pursue, but if they believe that
19 those claims had merit and were worth pursuing, then, I
20 mean, aren't they just paying for the pursuit of claims? I
21 mean, if they got 100% of the money, then they would have to
22 pay for the pursuit of those claims. So what they're
23 dealing with is the 30% potential.

24 MR. KURZWEIL: Well, they're paying for the entire
25 pursuit of those claims either way, because that's the only

1 funding source for this. As Committee Counsel pointed out,
2 they may (indiscernible)

3 THE COURT: (indiscernible) then they can pursue
4 those claims, presumably?

5 MR. KURZWEIL: They could pursue those claims.
6 Yes, Your Honor, they could.

7 THE COURT: Yes.

8 MR. KURZWEIL: But the parties thought that
9 (indiscernible)

10 THE COURT: (indiscernible) they're collateral.
11 So they're going to need to pursue them themselves, and pay
12 for 100% of it, and get 100%. So what they negotiated with
13 the (indiscernible) is the 30%.

14 MR. KURZWEIL: Well, Your Honor, I believe that
15 the Lenders would be happy, if their claim was so small,
16 that they were only 10% instead of 70% of it. It just so
17 happens --

18 THE COURT: Those were the circumstances when we
19 got this case. Those are the things that were caused by
20 this case. They were already \$120 million or whatever it is
21 underwater when they got here.

22 MR. KURZWEIL: You Honor, the assets were worth
23 what the assets were worth, but they (indiscernible)

24 THE COURT: (indiscernible) were already agreed to
25 by the time they got here.

1 MR. KURZWEIL: Well, right, before we filed. But
2 -- well, there was an adjustment, Your Honor. There was an
3 adjustment. The Court remember (indiscernible) \$10 million
4 to one of the sales to the negative on that. But the
5 Lenders did agree to fund the case, and they did agree to
6 fund --

7 THE COURT: They funded the case because they
8 wanted their sale to go through. Right?

9 MR. KURZWEIL: But --

10 THE COURT: They weren't doing that for the
11 charity of anyone else.

12 MR. KURZWEIL: Well, Your Honor, how would
13 Debtor's Counsel (indiscernible) debtor's Counsel would
14 never be able to get a Lender to fund a wind down if they
15 didn't agree to certain or some (indiscernible) negotiations
16 to some of the things that a Lender wanted in respect to
17 what happens as part of that money (indiscernible) and the
18 Committee (indiscernible)

19 THE COURT: But the Debtor can weight his claims
20 against the Lender, what they may be.

21 MR. KURZWEIL: Well, those (indiscernible) So
22 those were -- And that's the point here too, that the third-
23 party release is so narrow, those were already -- That's
24 nothing new. Those were already waived. And again, there
25 was a (indiscernible) So Your Honor, that is why this

1 release is so narrow, because that is something that's been
2 open and notorious, those issues open and conspicuous I
3 should say rather notorious, open and conspicuous since the
4 beginning of the case. And the stipulations are part of the
5 DIP (indiscernible)

6 It's the Committee who said this is valuable
7 enough to them, who represent the majority (indiscernible)
8 and the majority in dollars of the unsecured debt other than
9 the Lender, on that who thought in their business judgments,
10 under the facts of this particular case, under these
11 circumstances, that this was the way to proceed on this.

12 Your Honor, there probably would have been a lot
13 more litigation in this case if the parties -- There would
14 have been a lot more litigation in this case had the parties
15 not agreed to the settlement, and this was an essential part
16 of the settlement on this.

17 So there's no way to undo it, you know? And as
18 Mr. Williamson pointed out, I don't know where to go with
19 (indiscernible) because that is the essential part of this
20 process moving forward, and where we sit today on these,
21 again, very narrowly construed, very narrowly construed
22 third-party releases.

23 THE COURT: Well, they're very broad as to the
24 Lender. They're not -- They don't include other parties,
25 but --

1 MR. KURZWEIL: Well, they include, they -- Right,
2 Your Honor. They include --

3 THE COURT: And the Lender is the one who's
4 insisting on it, right?

5 MR. KURZWEIL: Well, Your Honor, everybody,
6 everybody who settled the case is insisting on it, because
7 that's a term of the settlement. So I don't think it's fair
8 to say, I do not think it's fair to say that it's the Lender
9 insisting on it. It was a term that was negotiated as part
10 of an overall structure, as part of the whole
11 (indiscernible) statute. You pull one part out, the whole
12 thing falls. There were multiple provisions to this, and
13 that was just, you know, that was just one of those
14 conditions.

15 And Your Honor, we believe that under the
16 circumstances of this particular case, under this particular
17 plan, at this particular time, based on the consideration
18 provided, based on where we are, that we would impress to
19 the Court to approve this solely for (indiscernible) Chapter
20 11 proceeding.

21 THE COURT: All right.

22 All right. I guess with regard to -- the release
23 issue aside, with regard to confirmation of the requirement,
24 it seems like the requirements for confirmation under 1129
25 have been met. The only issue the Court has to decide is

1 the release issue, and I think -- I hate to use this word
2 again because it's been overused today, but as I did in
3 LaVie, I'm going to take a little time to consider what I've
4 heard here today, heard from you all, and I (indiscernible)
5 and we can all meet together again soon. And we don't have
6 to do it in person, but I can give you my (indiscernible)

7 THE COURT CLERK: (indiscernible)

8 THE COURT: I appreciate everybody indulging me
9 today, and answering my questions. I don't know how much of
10 that was expected or not, but I appreciate the time and
11 attention you've given it.

12 Mr. Adams, I appreciate you not walking through
13 entire brief issues (indiscernible) seen before.

14 So I'll take this matter under advisement, and
15 I'll advise you when (indiscernible)

16 Let me just ask in terms of timeline, are there
17 deadlines I'm working against? Is the world going to come
18 to an end at some point in the near future with regard to
19 the Debtors, that need to be (indiscernible) by some
20 particular point in time?

21 MR. KURZWEIL: Your Honor, if I could just talk to
22 the Lender's Counsel (indiscernible)

23 THE COURT: Sure.

24 MR. KURZWEIL: No, Your Honor. I think we're fine
25 (indiscernible)

1 THE COURT: (indiscernible) take too long, and get
2 a phone call from your tomorrow saying, we've got to know by
3 the end of the day tomorrow, or whatever (indiscernible)

4 MR. KURZWEIL: (indiscernible)

5 THE COURT: All right, great.

6 All right. Well, thank you all. Appreciate you
7 all coming out (indiscernible)

8 I guess we've got another omnibus (indiscernible)
9 right on the 20th?

10 THE COURT CLERK: Yes, Your Honor (indiscernible)
11 the 20th.

12 THE COURT: Okay. We'll (indiscernible)

13 MR. KURZWEIL: (indiscernible)

14 THE COURT: Right, yeah. I was talking about
15 September 20th (indiscernible)

16 All right (indiscernible)

17 THE COURT CLERK: Court is now adjourned. All
18 rise.

19

20 (Whereupon these proceedings were concluded.)

21

22

23

24

25

C E R T I F I C A T I O N

I, Lindsay Peacock, certified that the foregoing transcript is a true and accurate record of the proceedings.



Lindsay Peacock

Veritext Legal Solutions

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Date: August 19, 2025

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