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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 07-11448-mg (lead case)

Case No. 07-03063 (adversary proceeding)

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In the Matters of:

THE 1031 TAX GROUP, LLC,  
Debtor.

- - - - -x

THE 1031 TAX GROUP,  
Plaintiffs,

-against-

NEWTON BAYARD LIMITED PARTNERSHIP, ET AL.,  
Defendants.

- - - - -x

United States Bankruptcy Court  
One Bowling Green  
New York, New York

October 26, 2007

11:05 AM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

1  
2 HEARING re Joint Motion for Approval of Agreement to Transfer  
3 Interest and Assets for the Benefit of Bankruptcy Estates Filed  
4 by Paul Traub

5  
6 HEARING to Render a Bench Decision on the Joint Motion for  
7 Injunctive Relief to Support Transfer of Assets for the Benefit  
8 of the Debtors' Bankruptcy Estates

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25 Transcribed by: Lisa Bar-Leib

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## P R O C E E D I N G S

1  
2 THE COURT: Please be seated. All right. We're here  
3 in number 07-11448, the 1031 Tax Group and also in adversary  
4 proceeding number 07-03063, the 1031 Tax Group versus Newton  
5 Bayard Limited Partnership, et al. Counsel have already made  
6 their appearances so let's proceed. Mr. Flaxer?

7 MR. FLAXER: Good morning, Your Honor. Jonathan  
8 Flaxer of Golenbock Eiseman. You may have noticed, I seemed to  
9 have moved to the other side of the room.

10 THE COURT: You seemed to have moved, Mr. Flaxer. I  
11 sort of had a hint when I saw that you had arranged the  
12 telephone connection for the --

13 MR. FLAXER: Obviously, Your Honor appointed a --  
14 directed the appointment of a trustee, a U.S. trustee  
15 directed -- or appointed, Gerard McHale, Jr., as trustee, Your  
16 Honor. As an order, Mr. McHale is here. I'm sure everybody  
17 wants to hear from him.

18 MR. MCHALE: Good morning, Your Honor.

19 THE COURT: Nice to see you, Mr. McHale.

20 MR. MCHALE: I hope that --

21 THE COURT: How was your trip from Florida?

22 MR. MCHALE: Oh, I love it. Thank you, Your Honor.

23 MR. FLAXER: I will be asking Mr. McHale to address  
24 the Court in very short order just to sort of set the table.  
25 Mr. McHale has asked the Johnson Pope firm who is here by

1 Angelina Lim and my firm to serve as his co-counsel in light of  
2 the flurry of activity of the past forty-eight hours. We  
3 actually haven't sent out our retention papers but they are  
4 done and they're in my office and when we get back to the  
5 office, hopefully in not too much time, we'll get those down to  
6 the U.S. trustee's office.

7 On the calendar today is the motion to approve the  
8 asset transfer agreement, the injunction action brought by the  
9 debtors that Your Honor mentioned. There will also be a  
10 request for a temporary restraining order. I hope a set of  
11 papers came down to chambers. I don't know if my partner,  
12 Mr. -- oh, he's here. Yeah, my partner, David Eiseman, is here  
13 on that and also the Greenberg firm, Your Honor -- no problem  
14 saying they did the work on this and they really did the  
15 papers.

16 I also want to note up front that the past forty-  
17 eight hours have gotten enormous cooperation and help from the  
18 Greenberg firm, the Mesirow firm, debtors' counsel and the  
19 debtors' advisors and Mr. Lukenda and his staff. This by way  
20 of clerical report with respect to the West Oaks Mall  
21 bankruptcy, there was an emergency hearing yesterday. Judge  
22 Heineken did direct the appointment of a Chapter 11 trustee  
23 over our request for an adjournment. Nobody has been appointed  
24 yet based on my check of the docket before I left court. With  
25 respect to the debtors' injunction action, there are three

1 defendants. I understand there already have been resolutions  
2 with two. And we reached a resolution this morning with Mr.  
3 Moorman's clients which, when we get to it, I would like to  
4 read that into the record.

5 If I may, at this point, Your Honor, I'd like Mr.  
6 McHale to address the Court.

7 THE COURT: Thank you very much, Mr. Flaxer.

8 MR. MCHALE: Your Honor, should I step forward?

9 THE COURT: No. Why don't you come over to the mike.  
10 We've got a -- yeah, I think -- is there a microphone on the --

11 MR. MCHALE: I don't know if it's on but it's there.

12 THE COURT: It is. It is.

13 MR. MCHALE: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MR. MCHALE: As you might appreciate, this has been a  
16 whirlwind week. I attended the hearing on Monday on the  
17 Colorado matter and met with the U.S. trustee's office on  
18 Monday afternoon. On Wednesday, I attended telephonically the  
19 entire hearing and I thought just on the outside shot that I  
20 would be condemned to be the trustee on this. I'd rather know  
21 what's going on so I attended that.

22 THE COURT: I guess it was Monday afternoon and then  
23 all day Tuesday.

24 MR. MCHALE: So were the hearings. I guess at this  
25 point I've been in the case for less than forty-eight hours.

1 As I see it, the case has serious legal problems. The case has  
2 had serious legal problems and I don't think it's any surprise  
3 to anybody in the room that the administrative fees in the case  
4 have been very serious. In the last forty-eight hours, we've  
5 addressed the problems of the Virginia foreclosure or attempted  
6 to address the problems of the Virginia foreclosure on the West  
7 Oaks Mall. We've addressed the problems on the nonjudicial  
8 foreclosure in Columbus. We've reached a settlement agreement  
9 with Newton Bayard, Mr. Moorman's client. But, having said,  
10 although I'm very concerned about the legal problems at this  
11 point, I'm almost more concerned about the operational problems  
12 going forward. As I see it, as trustee, I have four buckets of  
13 recovery to go after at this point. One would be the real  
14 estate assets of the debtor assuming that we are successful in  
15 getting the transfer approved. The second would be the  
16 operating assets. I said the operating assets we had the  
17 Crossroad situation and Crossroad is closer to an operating  
18 company but because of the operating company it also drives  
19 some of the real estate values in certain instances. Third we  
20 have what's been euphemistically referred to as the Toys and  
21 the organized Toys, they should have some value. Lastly, we  
22 have the potential causes of action against parties who did  
23 business with the debtor.

24 In conjunction with the real estate assets, I have  
25 talked with the independent property managers. They used to be

1 with the Pyramid Group out of Syracuse and Rochester, New York.  
2 They are independent. I've satisfied myself with their  
3 independence.

4 THE COURT: You're referring to Abacus?

5 MR. MCHALE: No, not Abacus.

6 THE COURT: No? Okay. I'm sorry.

7 MR. MCHALE: It's not Abacus. It's -- and forgive me  
8 on this. I hope that it's either Broadway or Boardwalk  
9 Property Managers. I checked their backgrounds. I'm very  
10 satisfied that at least initially they can provide the bridge  
11 to understand the operations of real estate properties.

12 On the operating properties, I have talked to  
13 Crossroads management. I've asked Crossroads management to be  
14 patient, especially be patient over the next fourteen days  
15 while I try and figure out just what Crossroads is, how much  
16 Crossroads cost to operate and do we have any value there.

17 As far as the Toys, we are in the process getting the  
18 titles to the Toys and especially on the vehicles, we need to  
19 get those consolidated into one area. They are very valuable  
20 toys and consider a liquidation method for those that --

21 As far as the Yacht, the Yacht's, I believe, 143  
22 point Yacht -- fortunately, as I understand it, and I have not  
23 had the opportunity to check it out, it is in Fort Lauderdale  
24 right now and will be in Fort Lauderdale for the Fort  
25 Lauderdale in water boat show. I believe Moran Yachts has the

1 listing on that. Moran is an independent yacht broker that I  
2 feel fairly comfortable with.

3 As far as the airplanes, at this point I'm really  
4 unsure. I believe one Gulfstream was sold shortly -- maybe ten  
5 days ago. I don't know when -- the other Gulfstream, I  
6 understand, is in my backyard down in Fort Meyers. The Lear  
7 jet and the helicopter, I've received notices this morning that  
8 we're delinquent on the insurance on those so a problem that  
9 has to be addressed.

10 I guess in a sense, a lot like motherhood and apple  
11 pie, but my objective will be to monetize those four areas and  
12 in monetizing those four areas, absolutely need to take into  
13 consideration the administrative costs that are going to be  
14 involved and the time and value of money going forward. This  
15 is a -- it's not an administratively insolvent estate at this  
16 point but currently we have 17.1 million dollars. And of that  
17 17.1 million dollars, I believe close to ten million gets paid  
18 in the next ten days in settlements. So I'll be down to about  
19 seven million dollars cash. For Your Honor's knowledge, I have  
20 arranged for the bond to be posted. It should be posted right  
21 now. Ten percent is not cash.

22 I look at it to be a daunting task. I think to this  
23 point on plan A and plan B -- plan A was the JPS matter and JPS  
24 funding. I think a lot of effort went into JPS funding and  
25 unfortunately produced -- unfortunately nothing. On Plan B,

1 the debtor-in-possession liquidation, well, certainly there had  
2 been problems with certain constituencies opposed to or in  
3 favor of the transfer of assets. Again, I listened to the  
4 hearing on Wednesday. If we don't accomplish a transfer of  
5 asset, all we have is a bare no receivable. So we're going to  
6 have to do that.

7 I've looked at the transfer agreement. I think there  
8 is indication the transfer agreement that Mr. Okun will not be  
9 allowed to do anything illegal or improper and this trustee, if  
10 I have to make certain actions after they -- signing of that  
11 agreement, those actions will be independent of that agreement.

12 Again, I've only been here for -- it's all for forty-  
13 eight hours so --

14 THE COURT: You mean, you had something to do in this  
15 time? You know, I appreciate it, Mr. McHale. There's a lot  
16 obviously going on and you stepped into the middle of it.  
17 So --

18 MR. MCHALE: I didn't appreciate what is going on  
19 until I stepped in the middle of it but I'm willing to stay in  
20 and fight the good fight and see how we can work this out.

21 THE COURT: Thank you very much.

22 MR. MCHALE: I also have met with certain of the  
23 claims traders who I have dealt with in previous bankruptcies  
24 and I want them, I'm going to say, get on board with me. This  
25 train is leaving the station. It's better to be on it than

1 under it. And while it's better to be on it than under it, we  
2 don't have a lot of dollars to play with. We're going to have  
3 to spend judiciously and we're going to try to get that maximum  
4 recovery as quickly as we can. Thank you, Your Honor.

5 THE COURT: Thank you very much, Mr. McHale. Mr.  
6 Flaxer?

7 MR. FLAXER: Your Honor --

8 THE COURT: The only thing that Mr. McHale said that  
9 didn't completely register was over the property manager.  
10 Could you enlighten me?

11 MR. FLAXER: A property manager?

12 THE COURT: Yes.

13 MS. LIM: Asset manager.

14 MR. FLAXER: Oh. Mr. McHale, assuming the agreement  
15 is approved, in accordance with an order that we're going to  
16 ask Your Honor to consider would have the right but not the  
17 obligation to designate an asset manager.

18 THE COURT: Yes. And he has one in mind obviously.

19 MR. FLAXER: I'm not sure he does. I'll invite Ms.  
20 Lim in her capacity --

21 THE COURT: Okay. Ms. Lim?

22 MS. LIM: Your Honor, this is Angelina Lim on behalf  
23 of Mr. McHale. I believe there is a bit of a confusion when he  
24 said property manager. I believe he spoke with Mr. Okun's  
25 property manager of the real estate --

1 THE COURT: Okay.

2 MS. LIM: -- and he was not actually speaking of  
3 asset manager or --

4 THE COURT: Thanks. Thank you.

5 MS. LIM: -- CRO or whoever we term in that  
6 agreement. He has at this point not made any decisions.

7 THE COURT: That's fine, Ms. Lim. My  
8 misunderstanding. That clarifies it.

9 MR. MCHALE: My error, Your Honor. I'm sorry.

10 THE COURT: That's okay, Mr. McHale. Go ahead, Mr.  
11 Flaxer.

12 MR. FLAXER: I mentioned that we had a settlement  
13 with Newton Bayard Limited Partnership.

14 THE COURT: Yes.

15 MR. FLAXER: What I would like to do is read the  
16 settlement into the record. We have counsel for both sides  
17 present so I'll review with that it would be binding under the  
18 applicable provision of the New York CPLR. We may decide to  
19 submit an order. I'm also going to ask the Court to waive  
20 notice under Rule 9019. If Your Honor says no, obviously we'll  
21 notice it up.

22 The settlement is as follows and Mr. Moorman  
23 obviously will correct anything I say that's incomplete or  
24 incorrect. In exchange for the relief regarding the -- with  
25 regard to letting the injunction not stand in the way of the

1 asset transfer agreement and certain other things, we would pay  
2 to Mr. Moorman's client in the form of a substantial  
3 contribution and claim for the estate the sum of 50,000 dollars  
4 immediately and then they would have an allowed administrative  
5 claim in the amount of 75,000 dollars to be paid in essence at  
6 the end of the case, if you will, which I would define as  
7 contemporaneous with the first time we make a substantial  
8 distribution to general unsecured creditors. Obviously, I'm  
9 not -- I don't know if that's ever going to happen if it's the  
10 end of the case and there is no money to do that, he would come  
11 in at the same time as other admin creditors.

12 First of all, Newton Bayard Limited Partnership  
13 asserts specific a lien in two assets, IPofA or I should say  
14 open interest in IPofA and open holdings. Those two assertive  
15 liens would be preserved as if it were in a sense a 363 sale  
16 and the liens of a secured creditor would be attaching to the  
17 proceeds. He keeps that way and we can object to it. It is  
18 what it is. The assets of the transfer under the agreement,  
19 his client cannot and will not go after. Any other nondebtor  
20 assets, they are -- or assets that are not property of the  
21 estate, they are free to enforce whatever rights to have.

22 THE COURT: The New Hampshire property, for example?

23 MR. FLAXER: Precisely. And if there are other non -  
24 - if there are other assets of other entities that they believe  
25 they can go after, as long as they're not property of the

1 estate or they're not violating the automatic stay in some  
2 other bankruptcy case, they have their right including the  
3 right to seek contempt type sanctions.

4 They will not seek to set aside in any way the  
5 transfer that's being accomplished under the asset transfer  
6 agreement. However, if because of the action of anybody else,  
7 this transfer gets avoided then their rights against those  
8 assets would in essence click back into existence.

9 To the extent that they assert causative action  
10 against any assets or parties, to the extent that we believe  
11 that claim or that action is property of the estate, we have  
12 the right to seek to stop it. He has the right to say no, no,  
13 I'm allowed to do this, it's really not property of the estate.

14 And lastly, they will provide us with the information  
15 and the benefits of what I understand is a fairly extensive  
16 investigation that they have conducted into Mr. Okun's -- in  
17 assets in related matters. That obviously is another component  
18 of the substantial contribution to the estate, although I think  
19 the major one is standing aside -- with having their injunction  
20 just stand aside.

21 Lastly, Your Honor, having been the guy who not so  
22 long ago was arguing how under 9019 you have to give notice to  
23 the world, notwithstanding that, I do note that under Rule  
24 9006(c) the Court has the power to reduce notice with or  
25 without any notice of the request to so -- reduce notice -- I'm

1 going to submit to the Court that -- two things. One, it would  
2 really un-complicate matters if we could put the dispute with  
3 Newton Bayard to bed today as opposed to have to worry about  
4 what happens under 9019. Also, it seems to me that most of the  
5 people who are involved in this case but who still care, either  
6 here or on the phone. And so for those reasons, I would ask  
7 the Court to kindly waive the 9019 -- with that, I'd like to  
8 turn the floor over --

9 THE COURT: Thank you. Thank you, Mr. Flaxer. Mr.  
10 Moorman?

11 MR. MOORMAN: Good morning, Your Honor, William  
12 Moorman from Craig and Macauley on behalf of Newton Bayard  
13 Limited Partnership. Mr. Flaxer did a very good job of  
14 reciting our agreement. One slight little -- I wouldn't call  
15 it a twist or clarification is that -- this relates to the Okun  
16 Holdings, Inc. and IPofA interest that are coming into the  
17 estate subject to whatever lien rights we may have. The  
18 transfer into the estate itself shall not be deemed to affect  
19 those lien rights in any way. And that's the only real  
20 clarification I think I need to make. I certainly do also  
21 support the proposition that this be approved today. I think  
22 the trouble with it not being approved is what happens if down  
23 the road it was a -- what we talked about was having preserved  
24 my injunctive rights which would then -- we'd be in a position  
25 do we unscramble the egg in what has happened in the ten or

1 fifteen days.

2 THE COURT: Can I ask a couple of -- maybe a couple  
3 of questions but one initially. Am I correct, Mr. Moorman,  
4 that Okun Holdings, Inc. and Investment Properties of America  
5 LLC are defendants in your action in Massachusetts?

6 MR. MOORMAN: They are reach-and-applied defendants  
7 not direct defendants.

8 THE COURT: And what happens in the action in  
9 Massachusetts with respect -- this concept of reach-and-apply  
10 defendants is a new one for me.

11 MR. MOORMAN: If I get a judgment against Mr. Okun,  
12 that then in a sense perfects what allows me to realize upon my  
13 reach-and-apply lien which would then, essentially -- the  
14 concept of reach-and-apply is I've reached out to seize his  
15 interest in those two entities. I would then be allow to apply  
16 it to my judgment.

17 THE COURT: But the litigation -- because those two  
18 entities, Okun Holdings, Inc. and Investment Properties of  
19 America, LLC, if the asset transfer agreement is approved,  
20 those entities get transferred --

21 MR. MOORMAN: Correct. They come in --

22 THE COURT: -- to the debtor.

23 MR. MOORMAN: They come in to the estate so what  
24 would ultimately --

25 THE COURT: I just wanted to be sure that the

1 litigation against them is not going forward in Massachusetts.

2 MR. MOORMAN: No, it's not -- a reach-and-apply,  
3 that's something that usually just files an answer and I don't  
4 recall whether they did. I think they moved to dismiss for  
5 lack of jurisdiction. And then they don't have any other  
6 activity in the case.

7 THE COURT: Okay. Thank you, Mr. Moorman. Are there  
8 any objections?

9 MS. CYGANOWSKI: I don't mean to stand too soon.  
10 Melanie Cyganowski, Greenberg Traurig, counsel for the  
11 committee. I do not stand to object. The purpose of my  
12 standing is to say that the committee has not been presented  
13 with this. Having said that, clearly this is something that we  
14 would recommend and we do not stand in opposition. This is  
15 consistent with the goals of the adversary proceeding that the  
16 committee with the debtors, now the trustee, and clearly, the  
17 end result is in accord with that. I did not want to leave the  
18 impression, however, that there was an affirmative support  
19 since no meeting has taken place since the time of this  
20 resolution being reached.

21 THE COURT: Thank you, Ms. Cyganowski.

22 MS. CYGANOWSKI: One other clarification for the  
23 record is that there is one other defendant. Of course, that's  
24 the Gershman defendant. As to them or that party, there was  
25 the three week standstill, as I recall. That party stands

1 differently than Newton Bayard in that they do not have an  
2 injunction all the assets. So we were able to defer that  
3 without it impacting the Court's consideration of the approval  
4 of the agreement in stark contrast to the Newton Bayard  
5 situation.

6 THE COURT: Thank you.

7 MR. TEITELBAUM: Good morning, Your Honor. Jay  
8 Teitelbaum. I'm rising to speak in favor of this on behalf of  
9 my clients. I would just like to point out in addition to the  
10 potential and actual benefits of the actual resolution in this  
11 transaction, Mr. Moorman and his client's involvement in this  
12 case on behalf of the, quote, objector group have been integral  
13 to getting to a point where hopefully we have a trustee that  
14 will be able to make some progress in collecting on behalf of  
15 my clients. So the intangible factor, which may or may not be  
16 before Your Honor on the exact application, is the level of  
17 involvement and participation of Mr. Moorman and his client  
18 leading up to this moment. And for that reason, my clients  
19 support this.

20 THE COURT: Thank you, Mr. Teitelbaum. Anyone else  
21 wish to be heard? All right. Having heard the proposed  
22 settlement with Newton Bayard placed on the record and having  
23 heard Mr. Flaxer request a waiver of notice, the Court being  
24 fully familiar with the matter, having reviewed all of the  
25 extensive papers with respect to the hearing earlier this week,

1 is fully apprised of all the issues and therefore is prepared  
2 now to rule and to approve the settlement with Newton Bayard.

3 I won't recount all of the factors but applying the  
4 multi-factor test in *In re Iridium Operating, LLC*, 478 F.3d 452  
5 (2nd Cir. 2007). And I've dealt with those seven prongs in all  
6 of the settlements that have been approved in the 1031 cases to  
7 date. So here I feel fully familiar with the facts regarding  
8 the dispute and the law concerning approval of settlements in  
9 this court. And I would just conclude that I believe that a  
10 sufficient showing has been made that the proposed settlement  
11 is in the best interest of the debtors' estate and therefore  
12 the settlement is approved.

13 Mr. Flaxer, does that -- do you need anything further  
14 on that subject?

15 MR. FLAXER: No, Your Honor.

16 THE COURT: Thank you very much.

17 MR. MOORMAN: If I may -- I'm sorry. If I may just  
18 make one suggestion. I think it might make sense for us to put  
19 together an order for Your Honor to sign.

20 THE COURT: I think it would be helpful to have an  
21 order and hopefully you'll be able to work that out.

22 MR. MOORMAN: That won't be a problem.

23 THE COURT: Thank you very much, Mr. Moorman. And I  
24 appreciate the efforts of counsel after the hearing on Tuesday  
25 to resolve this matter. It was important that it get resolved

1 and I think that the resolution is an appropriate and fair one  
2 and I appreciate the efforts in light of everything that's been  
3 going on that you were able to accomplish it in the time  
4 available. So thank you.

5 MR. MOORMAN: Thank you.

6 MR. FLAXER: That takes us, I believe, to the asset  
7 transfer agreement. When we were last in court after a very  
8 lengthy evidentiary hearing, Your Honor, as I understand it,  
9 deferred the matter to today in order to permit the trustee an  
10 opportunity to consider the agreement. I think you heard in  
11 Mr. McHale's presentation that he's reviewed it and he's  
12 concluded that whatever problems or issues may exist, it is  
13 certainly on balance something that the estate should enter  
14 into. What I have done and what we have done, Your Honor, I  
15 made some fairly substantial revisions to the proposed order  
16 that was submitted with the papers. I circulated it to the  
17 parties in interest. I confess not until 5:59 last night.

18 THE COURT: I actually was a few minutes late taking  
19 the bench, Mr. Flaxer, because I reviewed the order before I  
20 took the bench. So I have it here and I have reviewed it.

21 MR. FLAXER: Obviously there are still pending  
22 objections. Mr. Feldman is here. It was not our intention to  
23 call him unless something came up that would necessitate him to  
24 retake the stand so perhaps the issue now is whether or not  
25 there are extant objections.

1 THE COURT: Well, my view first with respect to the  
2 evidence is that the evidence was closed on Tuesday. I  
3 continued the hearing until today to give the trustee not yet  
4 designated at that time an opportunity to review the agreement  
5 and you and Mr. McHale have indicated his support for approval  
6 of the agreement. So I guess the first question I have is do  
7 all -- are any of those present in person or on phone who've  
8 objected to the motion to approve the transfer, do your  
9 objections stand or are you withdrawing them?

10 MR. TEITELBAUM: Good morning, Your Honor. Again Jay  
11 Teitelbaum. We are not able to withdraw our objection at this  
12 time. I think unfortunately Mr. McHale is put in somewhat of  
13 an untenable situation. I understand --

14 THE COURT: I don't need to hear argument, Mr.  
15 Teitelbaum. I only need to know whether you're withdrawing  
16 your objection.

17 MR. TEITELBAUM: We do not and the reason --

18 THE COURT: Thank you, Mr. Teitelbaum.

19 MR. TEITELBAUM: You don't want to hear any reasons?

20 THE COURT: No, I don't.

21 MR. TEITELBAUM: Okay, thank you.

22 THE COURT: You're either withdrawing it or you're  
23 not.

24 MR. TEITELBAUM: I'm not. Thank you.

25 THE COURT: Ms. Fischer?

1 MS. FISCHER: Good morning, Your Honor. As Mr.  
2 McHale had stated, some of my clients actually met with him  
3 yesterday and are actually quite excited about the way he's  
4 moving forward with this case. And in light of my clients'  
5 discussions with Mr. McHale yesterday, we withdraw our  
6 objection.

7 THE COURT: Thank you.

8 MR. VELEZ-RIVERA: Andrew Velez-Rivera for the United  
9 States trustee.

10 THE COURT: Good morning, Mr. Velez-Rivera.

11 MR. VELEZ-RIVERA: Good morning, Your Honor. The  
12 United States trustee is deferring to the Chapter 11 trustee on  
13 this one, Your Honor. She deems her withdrawal -- excuse me.  
14 She deems her objection resolved.

15 THE COURT: Thank you very much, Mr. Velez-Rivera.  
16 Mr. Feldman?

17 MR. FELDMAN: Bernard Feldman representing USH. Your  
18 Honor, simply we believe that there were certain legal points  
19 and issues raised and we're not prepared to withdraw our  
20 objection.

21 THE COURT: Thank you very much, Mr. Feldman. Anyone  
22 else wish to be heard.

23 MR. MODUGNO (TELEPHONICALLY): Your Honor, this is  
24 Louis Modugno --

25 THE COURT: You'll have to speak up.

1 MR. MODUGNO: (indiscernible)

2 THE COURT: I'm sorry. You're going to have to speak  
3 up.

4 MR. MODUGNO: I'm sorry, Your Honor. Continental  
5 Casualty. If anyone should (indiscernible), our objection  
6 stands, Your Honor. All right. Anyone else wish to be heard  
7 on this?

8 MR. ROSNER (TELEPHONICALLY): Your Honor?

9 THE COURT: Yes?

10 MR. ROSNER: Yes. This is Douglas Rosner. We're  
11 counsel to Bolder Holdings IX and Bolder Holdings VI. And  
12 we've been just invited --

13 THE COURT: I'm not familiar with --

14 MR. ROSNER: Hello?

15 THE COURT: Yes. I'm not familiar with who your  
16 clients are.

17 MR. ROSNER: We were just invited to the party when a  
18 law suit was filed late last night against our client. And we  
19 don't really -- we're not a creditor of the case. We're a  
20 creditor of some subsidiaries, attenuated subsidiaries, of  
21 IPofA. And I guess I'm not objecting to the settlement because  
22 we didn't file a written objection since we weren't involved at  
23 the time but I guess I'm asking for clarification because it's  
24 unclear whether this settlement contemplates the transfer of  
25 Mr. Okun's equity interest in the various parent entities or

1 does this settlement agreement actually contemplate the  
2 transfer of the underlying real property assets in which Mr.  
3 Okun doesn't hold a direct interest in those entities.

4 THE COURT: Mr. Flaxer, do you want to respond?

5 MR. FLAXER: Yes. The answer is that the  
6 agreement -- it's exactly what the agreement says which is that  
7 in essence Mr. Okun and his wife are transferring whatever  
8 property interests they have in assets with I think 304  
9 exclusions. But basically, it's whatever they have is what  
10 gets transferred to the estate. So if it's an equity interest,  
11 it's an equity interest. If it's a direct ownership interest  
12 then that's what the estate inherits.

13 MR. ROSNER: Okay. Thank you for that clarification.

14 THE COURT: Anyone else on the phone wish to be  
15 heard?

16 MR. PROL (TELEPHONICALLY): Your Honor, this is  
17 Jeffrey Prol from Lowenstein Sandler.

18 THE COURT: Yes?

19 MR. PROL: I represent Valley National Bank which is  
20 a secured creditor of IPofA Water View, which is one of the  
21 entities which I assume based on the prior comment, the equity  
22 of that entity is going to be distributed to the estate under  
23 this agreement. And it's not clear in the agreement what the  
24 implications of that are. IPofA Water View owns a commercial  
25 building in Red bank, New Jersey which is vacant. There is a

1 bit of work that is being done there. My client's claim is  
2 well undersecured and it's unclear if and when this transfer  
3 takes place, is the debtor endeavoring to pay real estate taxes  
4 as they accrue on this property? Are they propose to make  
5 payments?

6 THE COURT: Mr. Prol? Mr. Prol? My suggestion is  
7 that I'm sure Mr. McHale will be pleased to speak with you or  
8 Mr. McHale's counsel will be pleased to speak with you to talk  
9 about what his intentions are. Anything further, Mr. Prol?

10 MR. PROL: Your Honor, the difficulty with the  
11 agreement at this point is that it will affect my client's  
12 rights, I assume, but my client is (indiscernible). We found  
13 out by accident last night about this and without that, I  
14 (indiscernible) completely review what all the ramifications of  
15 the proposed agreement are with respect to us and we don't  
16 believe that there's been sufficient or proper notice to us to  
17 allow for this hearing to go forward today.

18 THE COURT: All right. Thank you, Mr. Prol. Anyone  
19 else wish to be heard?

20 MR. SPELFOGEL (TELEPHONICALLY): Your Honor, this is  
21 Doug Spelfogel with Baker & Hostetler. We represent Cordell  
22 Funding and Cordell Retirement who are secured creditors of  
23 nondebtor entities. We were given notice this morning about an  
24 hour ago that some type of order to show cause would be  
25 presented for a restraining order. We have not had adequate

1 notice of the settlement and we reserve all our rights with  
2 respect to that.

3 THE COURT: Thank you. Anyone else wish to be heard?  
4 All right. The Court is prepared to rule. And I will read a  
5 bench decision into the record.

6 This matter is before the Court on a joint motion by  
7 the debtors and the unsecured creditors' committee for an order  
8 approving the debtors to enter into and effectuate the asset  
9 transfer agreement -- I'll refer to it simply as "the  
10 Agreement" -- dated October 11, 2007. And as is obvious, the  
11 agreement was entered into before Mr. McHale was appointed as  
12 trustee. He has now been appointed and has indicated his  
13 support for the agreement and the approval of the Agreement.

14 The Agreement is between the debtors, Mr. Okun and  
15 his wife, Ms. Simone Bilani, that can be found at ECF number  
16 743 at Exhibit A. Okun's obligations under the Agreement were  
17 "irrevocable upon the execution of this Agreement." See  
18 paragraph 7.2. Therefore, Okun transferred the assets covered  
19 by the Agreement at the time of his execution of the Agreement,  
20 October 11, 2007, although the acceptance of the assets by the  
21 debtors was subject to Court approval.

22 The motion seeking approval was originally filed on  
23 October 16, 2007. The hearing was held on October 23, 2007.  
24 During the hearing, the creditors' committee's financial James  
25 S. Feltman of Mesirow Financial Consulting testified regarding

1 the Agreement, the Okun assets and the disposition of assets  
2 since the filing of these Chapter 11 cases. Many parties in  
3 interest filed objections expressing concern ranging from the  
4 text consequences of the Agreement to the impact of the  
5 transfer of all of Okun's assets to the bankruptcy estates,  
6 IPofA West Oaks Mall, L.P., IPofA Columbus Works LeaseCo LLC  
7 and IPofA WOM Master LeaseCo LP. I'll refer to them  
8 collectively as the West Oaks Mall cases currently pending  
9 before the United States Bankruptcy Court for the eastern  
10 district of Virginia.

11 The objections filed by some of the 1031 exchange  
12 participants were withdrawn today during the hearing but others  
13 remain. Several objections remain from parties in interest in  
14 West Oaks Mall cases and perhaps some objections that we've  
15 heard from others who may be secured lenders of some of the  
16 underlying assets.

17 The parties in interest in the West Oaks Mall cases  
18 have failed to provide any legal basis that the debtors and  
19 Okun cannot enter into the Agreement. Okun is not a debtor in  
20 the West Oaks Mall cases. If Okun's transfer of property  
21 interest has reached any party's contractual rights, the remedy  
22 is not to be found in this court at least at this time. All  
23 objections have been considered by the Court and they are  
24 overruled. Given the risks of not approving and implementing  
25 the Agreement and the real possibility that this Agreement may

1 present the only source of recovery for the claim holders, the  
2 Court approves the Agreement.

3           Some Background. Some abbreviated background is  
4 helpful in understanding the current issues. However,  
5 familiarity with my prior decisions in this case is assumed.  
6 As explained in prior decisions the 1031 Tax Group and its  
7 affiliates, the debtors in these Chapter 11 cases, acted as  
8 qualified intermediaries, which I will refer to as a "QI", in  
9 connection with like-kind property exchanges intended to permit  
10 investors to defer capital gains taxes on the sale of  
11 investment property. Many exchangers contracted with and  
12 deposited their sale proceeds with one or more of the debtor QI  
13 entities. At the time of the debtor Chapter 11 filings, the  
14 debtors had approximately 300 open exchange transactions where  
15 they had received funds totaling approximately 150 million  
16 dollars from the exchange participants' sale of their initial  
17 properties. Unfortunately, the exchange participants' funds  
18 were diverted by Okun for use by Okun in the Okun entities in  
19 acquiring or supporting nondebtor investments represented by  
20 the assets that are the subject of the Agreement. Thus, the  
21 debtors had almost no cash upon the filing of the petition and  
22 the cash that was available has been significantly diminished  
23 through the various settlements and general progression of the  
24 case.

25           Currently, the largest asset that the debtors have is

1 a promissory note signed by Okun shortly before the debtors'  
2 Chapter 11 petitions were filed which, with accrued interest,  
3 obligates Okun to pay approximately 150 million dollars with  
4 interest continuing to accrue. Okun's ability to repay this  
5 amount appears completely dependent on the debtors gaining  
6 immediate control of the nondebtor assets. The debtors also  
7 have claims to the nondebtor assets themselves to the extent  
8 that the debtors' funds, essentially the diverted exchanger  
9 funds, were used to acquire or support the nondebtor assets  
10 Okun acquired through the Okun entities.

11 However, given the precarious viability of these  
12 assets that's left in Okun's control, the debtors have decided  
13 against litigating their claims to the assets and instead opted  
14 to negotiate this proposed Agreement with Mr. Okun.

15 Based on the evidence and arguments presented at the  
16 hearings on October 23 and the brief discussion today, the  
17 Court finds that the proposed Agreement as set forth in the  
18 asset transfer Agreement dated October 11, 2007 is fair and  
19 equitable and in the best interest of the debtors' estates.

20 Jurisdiction and Venue. First, it is clear that this  
21 Court has subject matter jurisdiction over this matter pursuant  
22 to 28 U.S.C. Section 1334. This is a core proceeding within  
23 the meaning of 28 U.S.C. Section 157(b). Venue of this  
24 proceeding in this motion is proper pursuant to 28 U.S.C.  
25 Sections 1408 and 1409. Sections 363(b) and 105(a) of the

1 Bankruptcy Code authorize the relief sought in the joint  
2 motion. The motion is properly brought pursuant to Rule 9019  
3 of the Federal Rule of Bankruptcy Procedure.

4 First, with respect to user transfer of assets  
5 outside the ordinary course -- during the course of the Chapter  
6 11 proceedings to date, the debtors have shown a reasonable  
7 probability or better that they will prevail in establishing  
8 equitable rights of the nondebtor assets that are subject to  
9 the Agreement. As a result, the assets in questions are  
10 "property of the estate" under Bankruptcy Code Section 541 and  
11 therefore Bankruptcy Code Section 363 applies. Bankruptcy Code  
12 Section 363(b) provides in relevant part that "the trustee  
13 after notice and hearing may use, sell or lease other than in  
14 the ordinary course of business property of the estate" and  
15 then it goes on. Under applicable case law, a transaction must  
16 represent a reasonable exercise of business judgment on the  
17 part of the debtor-in-possession, now the Chapter 11 trustee to  
18 be approved under Section 363(b) of the Bankruptcy Code. See  
19 *In re Chateaugay Corp.*, 973 F.2d 141 (2nd Cir. 1992); *Committee*  
20 *of Equity Security Holders versus Lionel Corp.*, *In re Lionel*  
21 *Corp.*, 772 F.2d 1063, 1071 (2nd Cir. 1983); *In re Adelphia*  
22 *Communications Corp.*, it's the decision of Judge Gerber from  
23 July 31, 2002. That's in case number 02-41729. See also *In re*  
24 *Integrated Resources, Inc.*, 147 Bankruptcy Reporter 650, 656  
25 (S.D.N.Y. 1992). "The business judgment rule is a presumption

1 that in making a business decision, the directors of a  
2 corporation acting on an informed basis and in good faith and  
3 in the honest belief that the action was in the best interest  
4 of the company" which has continued -- that that rule has  
5 continued applicability in bankruptcy by either the debtor-in-  
6 possession or the trustee, as the case is now.

7 That the Agreement here represents an exercise of the  
8 trustee and the debtors' sound business judgment is  
9 demonstrated by the financial analysis and testimony offered by  
10 Mr. Feltman during the hearing on October 23 regarding both the  
11 financial condition of the Okun assets and Okun's continued  
12 disposal of the assets or any equity in them. Given that many  
13 of the nondebtor assets were acquired with or supported by  
14 exchanger funds diverted from the debtors by Okun and those  
15 assets are over-leveraged with little -- potentially little  
16 equity, the debtors and the committee believe that an immediate  
17 transfer of the assets into the control of the estate is the  
18 soundest and most cost effective means of gain in revitalizing  
19 these assets to produce value to these estates.

20 With the Agreement, the committee and the debtors  
21 believe they have delivered a similar result or even a superior  
22 result to what would be achieved after years of litigation,  
23 appeals, entity piercing, judgment and execution. As shown by  
24 the testimony of Mr. Feltman, which the Court concludes was  
25 credible and persuasive, the Agreement is delivered without

1 substantial costs, risks or the delay of litigation. The Court  
2 agrees that this particular use of estate assets is sound  
3 exercise of business judgment. And I say that recognizing that  
4 several of the assets that Mr. Okun holds, two homes and two  
5 cars, are not included within the terms of this Agreement.  
6 Nevertheless, I conclude that on balance, this Agreement is  
7 proper.

8           The Standards Governing a Motion to Approve the  
9 Settlement. I won't repeat what the analysis I've provided in  
10 several of the recent settlements that the Court has approved  
11 using the TMT Trailer standards, the In re Iridium Operating  
12 LLC standards versus the seven prong test that I've talked  
13 about before. With respect to the first two factors for Rule  
14 9019 approval, one, the balance between the litigation's  
15 likelihood of success and the settlement's future -- when I say  
16 the litigation, really the potential litigation -- the balance  
17 between the potential litigation's likelihood of success and  
18 the settlement's future benefits, and two, the chances that  
19 this potential litigation will be complex and protracted, the  
20 Court concludes as stated above in assessing the risk of delay  
21 necessary to litigate and establish the ownership of the  
22 nondebtor property, the debtors face a high likelihood of  
23 success on the merits but the remedy available at that point  
24 because of timing delay may not result in any recovery for the  
25 creditors at all. Under the asset transfer Agreement as

1 proposed, the estates increase -- substantially increase the  
2 likelihood of a meaningful recovery. In addition, the funding  
3 for the underlying potential litigation represents significant  
4 risks and obstacles to the estate.

5 Therefore, the Agreement strikes the appropriate  
6 balance between these concerns. Settlement benefits are  
7 substantial as well. The settlement eliminates the possibility  
8 of an unfavorable outcome of litigation to the estate and the  
9 risk that all of the assets in question would be exhausted or  
10 grabbed by other Okun creditors by the time any remedy could be  
11 obtained by the trustee. The Agreement will immediately result  
12 in the debtors recovering assets that can be used to support a  
13 liquidation plan and distributions to creditors.

14 The third factor asked the Court to evaluate whether  
15 the settlement is in the interest of the creditors. While the  
16 settlement does involve some risk and many unknowns, it also  
17 presents the best opportunity for creditors to receive a  
18 reasonable recovery within a reasonable period of time. As a  
19 result, balancing the two factors, the potential for the  
20 Agreement to provide the benefits to all creditors is the more  
21 likely result.

22 The fourth factor looks to what extent other parties  
23 in interest support the settlement. The creditors' committee  
24 has spoken to this and several of the other exchange  
25 participants have withdrawn objections while others have not.

1 While some 1031 exchangers oppose the settlement contending  
2 that there are too many unknowns and the Chapter 11 trustee  
3 should have more time to evaluate the Agreement, the Court  
4 overrules those objections. If the Court delays this decision  
5 further, at least some of the property that will be received by  
6 the debtors now is subject to a nonjudicial foreclosure sale  
7 currently scheduled for Monday, October 29, 2007. It also  
8 appears that other Okun creditors may be trying to grab these  
9 same assets with the risk of depriving the debtors' creditors  
10 from recovering the property acquired with or supported by the  
11 debtors' funds that were diverted by Okun. This property and  
12 whatever equity value it has would then be lost to this estate  
13 causing it immediate and real harm to recoveries. For these  
14 reasons, the Court concludes that factors three and four weigh  
15 heavily in favor of approving this settlement.

16 With respect to the fifth factor, counsel for all the  
17 parties that have appeared in this matter are competent and  
18 experienced.

19 With respect to the sixth factor, the settlement was  
20 negotiated in good faith and at arms length by all parties. No  
21 evidence points to the contrary.

22 For these reasons, the Court concludes that these  
23 factors support the finding that this settlement is fair and  
24 equitable and in the best interest of the creditors. As a  
25 result, the Agreement is approved. For the foregoing reason,

1 the Court overrules all of the objections and grants the joint  
2 motion to approve the entry of the trustee into this Agreement.

3 I did review -- that's the end of my bench decision.  
4 I did review the order that was submitted. As I said, I  
5 reviewed it just before taking the bench. With the correction  
6 of a typo or two, it will be approved and entered. Mr. Flaxer?

7 MR. FLAXER: I have --

8 THE COURT: Anything else I need to address on this?

9 MR. FLAXER: No, Your Honor. Just that, if you would  
10 like, I could hand up a disk.

11 THE COURT: Yes. Why don't you hand it up to one of  
12 my law clerks.

13 MR. FLAXER: And thank you for catching those typos.

14 THE COURT: Thank you. Are there any other matters  
15 on the calendar for today?

16 MR. FLAXER: No, Your Honor. There is nothing on the  
17 calendar. However, as I mentioned, we have a request for a  
18 temporary restraining order and I would propose, if I may, to  
19 turn the floor over to my partner, David Eiseman.

20 THE COURT: Okay. Before we do that, I would ask Mr.  
21 Teitelbaum to come to the podium.

22 MR. TEITELBAUM: Yes, sir?

23 THE COURT: Mr. Teitelbaum, during the course of  
24 these cases, almost from the very start, your conduct in this  
25 courtroom has at times been excellent and at times been way

1 over the line. You are a good lawyer and you are able to write  
2 effective briefs. But too often, as I commented generally  
3 before, your first line of argument is to attack your  
4 opponent's motives or worse. I have tried to stop the sniping  
5 that has gone on and it has been mutual; you haven't been  
6 alone. But it hasn't stopped. At the hearing on Tuesday of  
7 this week, your conduct went way overboard. You asked to take  
8 the podium when Mr. Fox had completed describing the agenda.  
9 Your conduct was, in my view, outrageous. You commented that  
10 you thought this was a complete waste of time and money,  
11 comments that are discourteous to the Court and to counsel.  
12 There was a hearing on Monday afternoon noticed for all  
13 parties. You were not required to be there; you weren't there.  
14 Following that conference, the Court held a chambers conference  
15 with -- and if you had been there, you would have been  
16 included. Adam Friedman and Mr. Sadowsky were there on behalf  
17 of creditors, the U.S. trustee, Mr. Velez-Rivera was there, the  
18 committee's counsel was there, the debtors' counsel was there.  
19 And we discussed how we would proceed with a very long calendar  
20 on Tuesday. We didn't finish until 7:30 at night. You were  
21 gone by then but we continued on. We don't debate agendas. If  
22 there are substantive issues before the Court, you're entitled  
23 to make your record on it. The administration of this case and  
24 the conduct of hearings is for the Court. And I considered  
25 your comments to be totally out of place and above -- just out

1 of bounds.

2           During your cross-examination of Mr. Feltman when I  
3 ruled on objections, you questioned objections after I ruled.  
4 The law in this circuit requires that I give counsel notice and  
5 a warning that conduct of this type will lead to sanctions.  
6 You are now warned. Future conduct of this type will result in  
7 an award of sanctions payable to the Court. Thank you, Mr.  
8 Teitelbaum.

9           MR. TEITELBAUM: Thank you, Your Honor.

10           THE COURT: Mr. Flaxer, one of your colleagues was  
11 going to address the --

12           MR. FLAXER: Yes, Your Honor. If I may, I have my  
13 partner, David Eiseman.

14           MR. EISEMAN: Good morning, Your Honor. David  
15 Eiseman from Golenbock Eiseman on behalf of Mr. McHale as the  
16 Chapter 11 trustee of the debtors. Last night, Your Honor, we  
17 filed a complaint and a proposed order temporarily restraining  
18 and staying defendants named in the complaint from taking  
19 action to enforce obligations under loans they had made to  
20 these entities that you referred to before in your decision of  
21 the transfer motion, essentially, the entities into which the  
22 money that Mr. Okun and his associates took out. They invested  
23 that money in these entities. These entities are now subject  
24 to claims by various creditors and it's those actions by the  
25 creditors that we're seeking to restrain and to stay.

1           We have made extensive efforts, for the most part  
2 successful but not completely, to notify and serve the named  
3 defendants in the case. I trust that Your Honor received a  
4 courtesy copy of the papers. They were sent down this morning.

5           THE COURT: I did not. I saw the adversary complaint  
6 when I -- well, I saw the entry for the adversary complaint  
7 when I reviewed the docket this morning. I had a matter on  
8 earlier at 10:00, another matter, so I have not seen the  
9 papers, Mr. Eiseman.

10           MR. EISEMAN: May I hand up another copy, Your Honor?

11           THE COURT: Yes.

12           MR. EISEMAN: Let me first tell Your Honor what it is  
13 that we've done to try to put all of these parties on notice,  
14 the parties named in the complaint as defendants. Through  
15 efforts that began last night which were to some extent  
16 unsuccessful and continued this morning, I believe that we've  
17 given notice by -- either orally on the telephone or by fax or  
18 by e-mail to every one of the named defendants, either their  
19 counsel, when we knew it, or to the defendants themselves  
20 except for Westheimer Mall LLC, which is one of the named  
21 defendants and for whom we could find no contact information on  
22 the internet or anywhere else.

23           The defendants, as I said, are lenders against the  
24 nondebtor Okun entities. And I believe that based on Your  
25 Honor's ruling with respect to the asset transfer motion, the

1 criteria for enjoining those parties from proceeding in any way  
2 against those assets whether in a judicial foreclosure or a  
3 nonjudicial foreclosure, I believe the appropriate criteria are  
4 met.

5 I hasten to add at the outset, Your Honor, that the  
6 papers, the laboring oar on the papers was taken by the counsel  
7 to the creditors' committee. And I understand that Mr. Gregory  
8 Ostfeld, who is the principle drafter, is here and to the  
9 extent that Your Honor has any questions that I cannot answer,  
10 I would respectfully defer to Mr. Ostfeld to answer those. And  
11 I will be brief with respect to the bases why we think that the  
12 temporary restraining order and stay should be signed.

13 Essentially, signing these orders is necessary to  
14 prevent irreparable harm and keep the status quo. I think Your  
15 Honor went through in considerable detail the type of harm that  
16 can inure to the estate if anything happens with respect to  
17 these assets that are the subject of these proceedings that  
18 would interfere in any way with the transfer of the assets of  
19 the estate and the ability to formulate a reorganization.

20 To be specific, there are really two principle  
21 reasons why there should be an injunction and a stay. First,  
22 as Your Honor pointed out, there is considerable evidence  
23 already that the debtors have equitable interest in these  
24 properties. If funds were wrongfully taken out of the debtors  
25 and invested in these properties that are the subject of these

1 enforcement actions then there exists inequitable interest.  
2 Should these lenders proceed with their foreclosure actions or  
3 take any other action to encumber or otherwise effect these  
4 assets then those equitable interests could either be wiped out  
5 or severely prejudiced.

6           Second, I think fairly obvious at this point in the  
7 proceeding, any action that any of these lenders take in any  
8 law suits will clearly interfere with the implementation of the  
9 asset transfer order that Your Honor just approved. And that  
10 obviously is the principle funding mechanism for the estate and  
11 will tremendously interfere with the debtors' efforts to  
12 propound a reorganization plan.

13           As set out in the papers, we think the Court -- it's  
14 clear that the Court has the power under Bankruptcy Code  
15 Section 363 and 105(a) to both extend the stay, the bankruptcy  
16 stay, to these parties who are suing the nondebtors as well as  
17 under 105(a) to issue an injunction in order to enforce that.  
18 As well, the Rule 65 in Federal Rules of Civil Procedure, which  
19 governs temporary restraining orders, is satisfied. Clearly,  
20 there would be irreparable harm here to the debtors' estates  
21 because of the interference with the reorganization efforts  
22 that would occur if any of the proceedings are going forward.  
23 And as far as the balance of harm is concerned, which is  
24 another factor, I think, under all of the standards, we think  
25 that also clearly favors issuance of an injunction.

1           There's no significant prejudice that will inure to  
2 these lenders if they cannot proceed right now to enforce their  
3 rights against these assets. On the other hand, there will be  
4 tremendous harm to the debtor and to the society in general in  
5 terms of its interest in the reorganization process if an  
6 injunction does not issue and any of these proceedings go  
7 forward.

8           I know Your Honor is aware that at least one of these  
9 is imminent. There is a foreclosure sale, a private  
10 foreclosure sale, that's scheduled to take place on Monday.  
11 That relates to the Cordell defendant. We would respectfully  
12 ask that the Court sign the order and temporarily restrain and  
13 stay the defendants from proceeding with their -- taking any  
14 actions to enforce their loans.

15           THE COURT: Is this the Columbus Works -- which is  
16 the one that's scheduled for nonjudicial foreclosure on Monday?

17           MR. EISEMAN: Yes. It's the Columbus Works.

18           THE COURT: And that's Cordell?

19           MR. EISEMAN: That's Cordell.

20           THE COURT: Are there others that face imminent  
21 foreclosure?

22           MR. EISEMAN: Shreveport.

23           THE COURT: And when is that potentially going to  
24 occur?

25           MR. EISEMAN: Monday as well, I'm told, Your Honor.

1 MR. SPELFOGEL (TELEPHONICALLY): Your Honor, may I be  
2 heard? This is Doug Spelfogel with Baker & Hostetler on behalf  
3 of Cordell.

4 THE COURT: Yes.

5 MR. SPELFOGEL: Just as far as appearances, Your  
6 Honor, we represent Cordell Consultants, Inc. Money Purchase  
7 Plan and Cordell Funding LLP. We received notice of this by  
8 telephone and e-mail about an hour and a half ago. We'd like  
9 some time to be able to respond. I spoke to our client and our  
10 client has agreed to adjourn the two sales that are noticed for  
11 Monday, October 29th for one week voluntarily to November 5th  
12 to afford some time to meet with the trustee and also to take  
13 the immediate pressure off to have some time to respond.  
14 Cordell is owed approximately sixty million dollars by virtual  
15 advancing new money to various borrowers, nondebtors. The  
16 loans have been in default since May. There's over two million  
17 dollars in arrears. Defaults are continuing and at a rate of  
18 hundreds of thousands of dollars a month. Taxes haven't been  
19 paid. In certain circumstances, there are concerns that cash  
20 flow coming in by virtue of the properties are not being  
21 properly safeguarded. So we would submit that there is  
22 significant prejudice to Cordell in blocking efforts to protect  
23 the collateral and preserve the interest. If the  
24 (indiscernible) bankruptcies for those other entities then we  
25 certainly would be entitled to adequate protection under the

1 Bankruptcy Code and would have other rights and remedies. From  
2 my understanding, although we were not served as a party and  
3 respectfully reserve jurisdiction on it, from my understanding,  
4 what's being transferred under the settlement agreement, those  
5 are the equity interests in the companies, for various  
6 companies, as opposed to the direct assets themselves. To the  
7 extent the assets have no equity in them, frankly, there would  
8 not be a value to the estates. Also, there's no protection for  
9 any of the creditors secured under the current tax parties in  
10 any of those other cases that are all well connected to the  
11 various assets.

12           So we would submit, Your Honor, that (a) there is  
13 significant prejudice to Cordell, that Cordell agreed to  
14 adjourn out the sales for Monday to give at least some time for  
15 a proper response and argument on more than an hour and a  
16 half's notice on the matter. We would also submit that we  
17 don't believe there is a likelihood of success on the merits.  
18 We don't believe there's anything in the papers that in any way  
19 looks to even allege an attack on the duly recorded security  
20 interest of Cordell that Cordell has lent new funds and that  
21 those monies are in fact unpaid. In fact, in agreement that  
22 was signed by the creditors' committee and debtors in the  
23 bankruptcy case, there's an acknowledgment of the lien and  
24 obligations due to Cordell. So, Your Honor, we don't believe  
25 that there would be an ability to have success on the merits

1 here. In fact, we believe that if the (indiscernible)  
2 bankruptcies would be grounds to lift the stay immediately  
3 absent significant payment to Cordell to keep the debtors' quo  
4 intact.

5 So for those reasons, Your Honor, we respectfully  
6 request that no TRO will be granted today, that a hearing be  
7 set on appropriate notice as Your Honor's scheduling permits to  
8 allow us to respond with at least some reasonable time and that  
9 for whatever other reasonable relief Your Honor believes it  
10 appropriate.

11 THE COURT: Let me just --

12 MR. SPELFOGEL: Thank you.

13 THE COURT: Yes, thank you. I just wanted -- I want  
14 to be clear. Both the Columbus and Shreveport properties,  
15 Cordell is the lender? Am I right on that?

16 MR. EISEMAN: That's correct. Yes, Your Honor.

17 MR. SPELFOGEL: Again, Your Honor, I don't -- the  
18 sales were scheduled on the Columbus and Parkway facilities,  
19 not on Shreveport but on Columbus and Parkway and on a Morgan  
20 Stanley note which I don't believe is subject to the properties  
21 listed. It is an asset of its own IPofA America. Shreveport  
22 has not been foreclosed on yet.

23 THE COURT: Okay. What is supposed to happen as to  
24 this Morgan Stanley note?

25 MR. SPELFOGEL: The Morgan Stanley note as well as

1 Columbus and Parkway -- there are UCC sales scheduled. The  
2 initial dates were October 29th. After talking briefly with  
3 the U.S. trustee a couple of days ago -- that our client --  
4 they determined to pay it up for one week to give some time to  
5 meet with the newly appointed trustee and also in light of the  
6 motion today to give some time to gather on a more appropriate  
7 date before Your Honor on this.

8 THE COURT: I'm just trying to understand now -- I  
9 understand that you represented that your client is prepared to  
10 postpone the nonjudicial foreclosure sales of the Columbus and  
11 Parkway properties. What about with respect to the Morgan  
12 Stanley note?

13 MR. SPELFOGEL: We're prepared to do that as well on  
14 Morgan Stanley, Your Honor.

15 THE COURT: And as to all three of the assets for  
16 which a sale is scheduled for Monday?

17 MR. SPELFOGEL: Correct, yes.

18 THE COURT: Okay. Mr. Eiseman?

19 MR. EISEMAN: Yes. Your Honor, our position is that  
20 there's so many things happening here and the truth is that  
21 we're not -- you know, we're concerned. There are other  
22 lenders out there. I understand that Wachovia is either in the  
23 process of serving default notices or already has served  
24 default notices. Actions may be commenced. I understand that  
25 as far as Mr. Spelfogel's clients are concerned, they're

1 willing to put it off but there are other entities out there.  
2 And the truth is, is that if somebody moves forward with  
3 something and gets an attachment order or does a private  
4 foreclosure, then we're going to wind up being behind the eight  
5 ball significantly. The harm to them is harm that they're  
6 already agreeing to in effect by saying that they'll put off  
7 for a week. This is just a TRO we're seeking. All the  
8 arguments that Mr. Spelfogel was making will be appropriate on  
9 a preliminary injunction motion and we'll meet those arguments  
10 head on. But for right now, our interest is in solely in  
11 preserving the status quo and making sure that none of the  
12 debtors' property is in any way adversely affected by any  
13 actions not only by Mr. Spelfogel's clients, frankly, but by  
14 the other parties who are named as defendants in the complaint.

15 THE COURT: Mr. Spelfogel, are you in New York or are  
16 you in another city?

17 MR. SPELFOGEL: I'm in New York, Your Honor.

18 THE COURT: All right. I would like to -- I haven't  
19 read the papers because I didn't get them. And I won't rule  
20 without reading the papers. Mr. Spelfogel, can you be here at  
21 3:00?

22 MR. SPELFOGEL: Yes, hello?

23 THE COURT: Yes. Can you be in court at 3:00, Mr.  
24 Spelfogel?

25 MR. SPELFOGEL: If Your Honor is directing that I be

1 there, then I will move around other commitments to be there.

2 I have to say I'm not dressed with a suit today.

3 THE COURT: That's okay. That's perfectly acceptable  
4 to me. I would -- rather than have you on the phone in your  
5 casual clothes, I'd rather have you in court in your casual  
6 clothes. So I would Mr. Eiseman and Mr. Spelfogel and -- is  
7 there anyone else appearing who has received -- on the phone or  
8 in court who received notice of this TRO application?

9 MR. PROL: Your Honor, this is Jeffrey Prol for  
10 Valley National Bank.

11 THE COURT: Yes, Mr. Prol?

12 MR. PROL: I did not receive notice of the TRO but I  
13 do see that my client is named as a defendant in those papers.  
14 And we would join in the (indiscernible) name.

15 THE COURT: Are you able to be here at 3:00, Mr.  
16 Prol?

17 MR. PROL: Your Honor, I'm not sure that that's  
18 physically possible. I'm out in west New Jersey right now.  
19 And I would certainly appreciate it if I could get --

20 THE COURT: Well, Mr. Prol, why don't you arrange a  
21 call-in number for 3:00 and let my chambers know what it is.  
22 I'll permit you to -- under these circumstances, it's clearly  
23 appropriate for you to participate by telephone if you wish to.

24 MR. PROL: Thank you, Your Honor.

25 THE COURT: And if you advise my courtroom deputy of

1 the call-in number, we'll patch you in. Now is there anyone  
2 else present or on the telephone who --

3 MR. ROSNER: Your Honor?

4 THE COURT: Yes?

5 MR. ROSNER: Yes. This is Douglas Rosner for Bolder  
6 Holdings IX and VI. And I'm in Boston and would not be able to  
7 attend the hearing at 3:00 and would ask to participate by  
8 phone.

9 THE COURT: That's fine, Mr. Rosner. Why don't  
10 you -- Mr. Prol, why don't you give Mr. Rosner your phone  
11 number and the two of you can speak when we finish this hearing  
12 and coordinate about getting a call-in number. And it's  
13 appropriately for you, Mr. Prol and Mr. Rosner, to appear by  
14 telephone.

15 MR. ROSNER: Did you say casual clothes?

16 THE COURT: You know, I'll tell you what. I'll take  
17 my tie off. How's that? If that makes you more comfortable.

18 MR. BERLIN (TELEPHONICALLY): Your Honor? Your  
19 Honor?

20 THE COURT: Yes.

21 MR. BERLIN: Your Honor, this is Howard Berlin from  
22 Kluger, Peretz, Kaplan & Berlin. We are also a defendant. I'm  
23 dialing in from Florida. Your Honor, if you would accept our  
24 position with regard to the term relief that's sought as not  
25 being opposed as we do not have any proceedings that are

1 imminent with regard to our collateral, if that is acceptable  
2 to you --

3 THE COURT: It is. It is.

4 MR. BERLIN: Then may I be excused from the 3:00  
5 call, Your Honor?

6 THE COURT: You certainly may. I assume, Mr.  
7 Eiseman, you don't have any problem about that?

8 MR. EISEMAN: No problem.

9 THE COURT: All right. Is there anybody else --

10 MR. BERLIN: Your Honor, we will contact the trustee  
11 and their counsel next week to talk about dealing with our  
12 position.

13 THE COURT: Okay. I mean -- look, it's -- you know,  
14 the trustee has a couple of choices. The trustee could  
15 endeavor to put these various entities into a chapter  
16 proceeding which is only going to increase the cost for  
17 everyone and delay. I think to the extent that Mr. Spelfogel  
18 raised a concern about where the money is going, the rents, I  
19 would think that having the trustee in place should be a  
20 comfort to people. So I would hope that -- you know, a TRO can  
21 last ten days and we'll have to set it down if a TRO is issued.  
22 I'm not ruling on it till I've had a chance to review the  
23 papers and hear those who oppose it. You know, I would hope  
24 that Mr. McHale -- and I'm sure he's already expressed a  
25 willingness, will try and see whether some forbearance

1 agreements can be arranged with the parties who are most  
2 directly concerned if we have to go forward with preliminary  
3 injunctions. We'll see what happens with the TRO. But if we  
4 have to go forward after a TRO with a preliminary injunction  
5 hearing, we'll go forward with it. That's just the way it is.  
6 Anything else, Mr. Eiseman, now?

7 MR. EISEMAN: No, Your Honor. I'll be here at 3:00.

8 THE COURT: So, 3:00 in this courtroom and, Mr. Prol  
9 and Mr. Rosner, we will have you included by phone. Ms.  
10 Cyganowski?

11 MS. CYGANOWSKI: Just one point of clarification. I  
12 know there are people on --

13 THE COURT: Right.

14 MS. CYGANOWSKI: We have, of course, Mr. James  
15 Feltman who's prepared to testify in support of the TRO. And I  
16 just wanted to clarify that the intention of the 3:00 hearing  
17 would be for the Court to take evidence if indeed it was  
18 proceeding. Otherwise, the request is whether or not Mr.  
19 Feltman could be excused.

20 THE COURT: Yes. I see there is a Feltman affidavit  
21 in support of the TRO.

22 MS. CYGANOWSKI: Yes.

23 THE COURT: I mean, ordinarily a TRO is simply heard  
24 on papers and not with live testimony.

25 MS. CYGANOWSKI: It's for that reason I ask the

1 question because if he could be excused --

2 THE COURT: He can. It's not my intention -- you've  
3 either made the case in the papers for a TRO or you've not.  
4 The -- if we have a preliminary injunction hearing, that will  
5 be with live testimony.

6 MS. CYGANOWSKI: Thank you.

7 THE COURT: Anything else anybody wishes to be heard  
8 on now? Mr. Flaxer?

9 MR. ROSNER: Can Mr. Prol -- can I get his phone  
10 number?

11 THE COURT: Yeah. Go ahead, Mr. Prol. We'll all  
12 write it down. Go ahead.

13 MR. PROL: Okay. Sure. It's 973-222-2569. Thank  
14 you.

15 THE COURT: Okay. So I'm going to leave it to the  
16 two of you to talk and one of you will arrange a call-in and  
17 advise my chambers of what that number is.

18 MR. PROL: Your Honor, if I could just -- one more  
19 thing. I'm on the ECIF right now and the only docket that I  
20 see is the adversary complaint. I don't see an affidavit or a  
21 memo of law. I just want to make sure that I have all of the  
22 papers.

23 THE COURT: Okay. I don't know what -- are you  
24 looking in the main case?

25 MR. PROL: Yes, I am.

1 THE COURT: The copies that have been handed up to me  
2 do not have the adversary proceeding number. Does somebody  
3 have that?

4 MR. EISEMAN: I think it's --

5 THE COURT: Why don't you come up to the microphone  
6 so that --

7 MR. EISEMAN: The adversary proceeding number is 07-  
8 03069.

9 THE COURT: Mr. Prol, were you able to hear that?

10 MR. PROL: 07-03069?

11 THE COURT: Yes.

12 MR. PROL: Okay. Thank you.

13 THE COURT: If you're on ECF now, why don't you see  
14 if you can find the docket and which hopefully will have those  
15 papers listed? The adversary complaint gets filed in both the  
16 docket for the adversary and the main case. But any supporting  
17 papers would only be in the adversaries.

18 MR. PROL: I -- yes, Your Honor. They're available  
19 in the adversary --

20 THE COURT: Okay.

21 MR. PROL: -- proceeding -- are the claims, the  
22 motion, memo of law and the affidavit of Mr. Feltman.

23 THE COURT: Thank you. You know, I would -- between  
24 now and -- it's 12:20. Between now and 3:00, Mr. McHale, Mr.  
25 Eiseman, you know, if Mr. Rosner and Mr. Prol are prepared to

1 talk to you, it would be better yet if you manage to work  
2 something out before the 3:00.

3 MR. ROSNER: Your Honor, Douglas Rosner on behalf of  
4 Bolder. Along those lines, we actually sent an e-mail to Mr.  
5 McHale yesterday proposing exactly this type of conversation  
6 and we haven't received a response other than the complaint.

7 THE COURT: Okay. One of the -- well, see what you  
8 can work out. I would ask -- I know, Mr. Spelfogel, you said  
9 your client was prepared to adjourn the sale to November 5th.  
10 You might, during the break, talk to your clients and see  
11 whether they would be prepared to extend their willingness for  
12 a few more days at least so that we could have a hearing on  
13 Monday, November 5th.

14 MR. SPELFOGEL: I will give them the message, Your  
15 Honor.

16 THE COURT: Yeah. And I would think, you know, at  
17 least two days after that would be appropriate. But I just ask  
18 you and your clients to consider that so that if we have to go  
19 forward with a preliminary -- because my calendar -- the next  
20 week -- I would prefer to have a few more days and I think you  
21 would all probably prefer a few more days for your papers at  
22 least. And if you can work out a longer schedule than that,  
23 that's certainly fine with the Court.

24 Anything else now?

25 MR. SPELFOGEL: Your Honor, just in terms of full

1 disclosure, Cordell also has -- which I think the Court knows,  
2 Cordell also has a motion which is returnable next Wednesday,  
3 October 31st for appointment of a receiver and/or attachment.  
4 There is, in connection with that, a restraining order in  
5 place. Cordell does not have a problem in theory to move that  
6 hearing also but we need consent of the defendants in that  
7 action to extend the restraining order.

8 THE COURT: Okay. I haven't reviewed those papers  
9 yet so I'm not conversant with it.

10 MR. SPELFOGEL: I understand.

11 THE COURT: Anything else for now? Mr. Flaxer?

12 MR. ROSNER: Your Honor, Douglas Rosner. In order --  
13 is someone representing Mr. McHale can just let us know how we  
14 can reach him and who that person is over the next hour or two?

15 THE COURT: Sure. Mr. Flaxer is rising again.

16 MR. FLAXER: Why don't you just call me? 212-907-  
17 7327.

18 MR. ROSNER: 7327. And Mr. Flaxer, what is your  
19 first name?

20 MR. FLAXER: Jonathan.

21 MR. ROSNER: Jonathan. Thank you.

22 MR. FLAXER: A pleasure to meet you. I have nothing  
23 further.

24 THE COURT: Okay. We're adjourned till 3:00.

25 MR. EISEMAN: Thank you, Your Honor.

1 MR. ROSNER: Thank you, Your Honor.

2 MR. FLAXER: Your Honor, those not parties to the --

3 THE COURT: Yeah, absolutely. Did you get back to  
4 Boston the other day?

5 MR. FLAXER: I didn't.

6 THE COURT: Sorry.

7 (Whereas these proceedings were concluded at 12:25  
8 p.m.)

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I N D E X

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

I, Lisa Bar-Leib, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

	October 29, 2007
Signature of Transcriber	Date

Lisa Bar-Leib  
typed or printed name