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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In Re: : 07-11448
 :
THE 1031 TAX GROUP, LLC, : One Bowling Green
 : New York, New York
Debtor. : December 13, 2007
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TRANSCRIPT OF MOTION AND PRE-TRIAL CONFERENCE
BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Trustee: JONATHAN FLAXER, ESQ.
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For the Committee: ALLEN G. KADISH, ESQ.
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transcript produced by transcription service

1 THE CLERK: All rise.

2 THE COURT: Please be seated.

3 All right. We're here in 1031 Tax Group, 07-11448.
4 Counsel, please make your appearances.

5 MR. FLAXER: Jonathan Flaxer of Golenbock, Eisenman
6 for the Trustee.

7 MR. KADISH: Your Honor, good morning. Allen Kadish
8 of Greenberg Traurig for the creditors committee.

9 MR. VOSES: Good morning, Your Honor. Mark Voses of
10 Edwards, Angell, Palmer & Dodge for defendant Thomas Gerschman
11 in the adversary proceeding.

12 THE COURT: Thank you. Mr. Flaxer.

13 MR. FLAXER: Good morning, Your Honor.

14 THE COURT: In what order would you like to handle
15 this?

16 MR. FLAXER: Well, as a courtesy to Mr. Voses I
17 thought, perhaps, we would take up the Gerschman adversary
18 proceeding first.

19 THE COURT: Good suggestion.

20 MR. FLAXER: So we can get him on his way.

21 THE COURT: Absolutely.

22 MR. FLAXER: We have signed a stipulation which in
23 essence extends the existing stipulation for seven weeks. One
24 of the reasons for that date, I'm told -- and Mr. Voses could
25 elaborate if necessary -- is that Mr. Okun, himself, has moved

1 to dismiss the Massachusetts adversary proceeding on
2 jurisdictional grounds so the seven week date is pegged to a
3 date that takes us out beyond that and basically the
4 stipulation is a stand-still which leaves whatever attachments
5 they have obtained under Massachusetts law on certain bank
6 accounts in place without prejudice to our rights to assert
7 that it's ours and without prejudice to their rights to assert
8 that it's theirs.

9 THE COURT: Okay. May I see it?

10 MR. FLAXER: And I have an order with it.

11 THE COURT: Yes, may I see it.

12 MR. FLAXER: Yes.

13 [Judge reviewing stipulation and order]

14 THE COURT: Mr. Voses, explain to me what -- I see
15 where the agreement provides that you are free to proceed to
16 establish the Trustee process rights against the two bank
17 Trustee defendants. What is that? Explain what that is.

18 MR. VOSES: Your Honor, Mr. Flaxer had the same
19 question and Trustee process rights under Massachusetts law is
20 commonly known in New York as prejudgment attachment. We've
21 sued Mr. Okun and certain debtor and non-debtor entities in
22 Massachusetts, we've obtained a prejudgment attachment against
23 Wachovia and Citibank and that's all that refers to.

24 THE COURT: All right. I'll approve and enter this
25 stipulation and we'll get Mr. Voses -- you're from Boston?

1 MR. VOSES: No, from New York.

2 THE COURT: Okay. I'm concerned with your having to
3 travel back with the weather forecast so -- all right, we'll
4 enter that stipulation and order. Thank you very much.

5 MR. VOSES: Thank you, Your Honor.

6 THE COURT: You're certainly free to leave.

7 MR. VOSES: Okay. Your Honor?

8 THE COURT: Yes.

9 MR. VOSES: Will we be notified at a future date with
10 respect to the pre-trial conference?

11 THE COURT: Yes. I would suggest that you and Mr.
12 Flaxer confer and -- is there a schedule for the motion to
13 dismiss that Okun has filed in Massachusetts?

14 MR. VOSES: Not that I know of, Your Honor.

15 THE COURT: All right. You know, I don't want to
16 bring you in here unnecessarily so, perhaps, the best thing to
17 do would be, you know, on or before the last business day of
18 January to send me a joint status letter. If you need a
19 conference before that just call my chambers and request it and
20 we'll have it, otherwise, by the end of January send me a joint
21 status letter advising me on where things stands and, you know,
22 if appropriate I'll -- you know, I'll give you a conference on
23 it on short notice if you need a conference for any reason.
24 Okay?

25 MR. VOSES: Thank you, Your Honor.

1 THE COURT: All right. Thank you very much.

2 MR. VOSES: Thank you.

3 THE COURT: Okay, Mr. Flaxer.

4 MR. FLAXER: Your Honor, we have three pending
5 motions. I received an e-mail from Mr. Valez-Rivera of the
6 U.S. Trustee's Office advising us that they have no objection
7 to any of those three motions.

8 THE COURT: Okay.

9 MR. FLAXER: Perhaps, the easiest one to take up
10 first is the motion for joint administration of the two newly
11 filed IP of A debtors which is Columbus Works Virginia Trust
12 and Parkway Virginia Trust with the other IP of A debtors.

13 THE COURT: All right. Let me just identify that
14 case because I identified the 1031 case. This is in case No.
15 07-13621, Investment Properties of America, and it relates to
16 two additional Chapter 11 proceedings; 07-13799, Columbus Works
17 Virginia Trust and 07-13798, Parkway Virginia Trust, and it's
18 the IP of A debtors' motion for directing joint administration
19 of the affiliate cases and I've reviewed the motion papers,
20 noted that no objection was filed and that motion will be
21 granted.

22 MR. FLAXER: Shall I hand up an order?

23 THE COURT: Why don't you wait until we're finished.

24 MR. FLAXER: Okay. Next, Your Honor --

25 THE COURT: Now we're back to The 1031 Tax Group, 07-

1 11448.

2 MR. FLAXER: Indeed. We have a motion for permission
3 to sell what you might call de minimis assets without needing
4 to return to court every time but subject to a certain proposed
5 protocol and a similar motion relating to payment of necessary
6 expenses.

7 First of all, I just want to advise the Court that I
8 do have with me declarations signed by Mr. McHale just in case
9 the Court felt that it was necessary. We actually haven't put
10 them on the ECF but I do have them and, you know, they can
11 easily be put on the ECF. The declarations just in essence say
12 what the motions say.

13 On the motion to sell assets, the protocol we've
14 proposed is that assets of \$10,000.00 or less we can sell upon
15 giving three day's notice to the U.S. Trustee and to the
16 creditors committee up to a cap of \$50,000.00 and I've
17 explained in the motion that if like at one location there's a
18 group of furniture and things that would be considered one
19 asset and we have that situation in a few places. We also were
20 seeking some nunc pro tunc relief because there are some assets
21 that needed to be sold very quickly; a trailer and the Dodge
22 Intrepid, so we have provided for nunc pro tunc approval of
23 those two sales. As Your Honor may recall, you approved the
24 retention of a firm which has been charged with Mr. McHale and
25 to in essence deal with the so-called toys and most of these

1 sales would be as a result of that firm's efforts.

2 THE COURT: Now, there's a lot of automobiles; right?

3 MR. FLAXER: Yes.

4 THE COURT: And I assume -- I don't know, I mean I
5 saw some lists at some point, a lot of them seem to be sort of
6 vintage cars or unique cars. I don't know whether they have a
7 value in excess of \$10,000.00 or not but the collection of them
8 is going to hit \$50,000.00 pretty quickly.

9 MR. FLAXER: If it does we would come back to court
10 for an order.

11 THE COURT: Just explain to me how this -- I don't
12 know, was there a dozen cars? That may overstate the number of
13 cars.

14 MR. FLAXER: I don't know how many cars there are.
15 You have several categories; there are the Indie cars and then
16 you have the other exotic cars of different stripes. I
17 personally know almost nothing about this. I have no interest
18 in it, however, fortunately, Mr. McHale does have a fair amount
19 of knowledge about these things as well. The goal is to move
20 most of the cars that have substantial value to Florida where
21 there seems to be a flourishing market and where it's warm so
22 they're less likely to be subject to adverse weather. The cars
23 that have less value, their goal is to sell them where they are
24 rather than incur the cost of moving them and that's basically
25 the program.

1 THE COURT: What entity -- is there a single entity
2 that owns all the cars?

3 MR. FLAXER: Most of them are owned, I believe, by
4 Okun directly. Some of them may be owned by entities but I
5 think they were mostly owned by Okun.

6 THE COURT: Here's what I'm -- you know, the order
7 that you're asking me to enter; first, the sale of individual
8 assets of the debtors for amounts of \$10,000.00 or less subject
9 to an overall cap of \$50,000.00, what umbrella do these cars
10 come under? I mean is this in the main case, the 1031 case? I
11 mean some of them -- you've now put a bunch of affiliates into
12 proceedings. They're subject to joint administration. I don't
13 know whether they own assets. Then there's non-debtors that
14 own assets like the airplane and the helicopter were a separate
15 entity that was not in a chapter proceeding. I'm just trying
16 to get a sense for how this works as a practical matter and how
17 do you count towards hitting the \$50,000.00 cap? I mean if you
18 start selling these cars, if they're valuable cars you're going
19 to hit \$50,000.00 pretty quickly. Is that renewable -- I don't
20 know what -- tell me how this is going to work.

21 MR. FLAXER: Well, you know, let me try to answer
22 each question.

23 I perceive all of the automobiles as being within the
24 main case because they're either owned by Okun which means Okun
25 conveyed them to the estate or they're owned by an entity

1 that's not one of the IP of A entities because the IP of A
2 entities are almost all if not all real estate entities.

3 THE COURT: Right.

4 MR. FLAXER: And they don't own anything other than
5 real estate. So Mr. McHale, as representative of The 1031
6 estate, owns the equity in an entity that owns an asset -- a
7 non-real property asset or a real property asset that's not a
8 commercial property in which case he is the sole member of the
9 LLC and in that capacity he's effecting the sale.

10 Now, on the second issue maybe the motion is too
11 conservative and we should have sought more broad authority and
12 we have the creditors committee here, maybe if the goal is to
13 avoid running to court maybe we should have a higher cap.

14 THE COURT: We're not going to change it without the
15 U.S. Trustee here --

16 MR. FLAXER: Okay.

17 THE COURT: -- that consented to the motion that
18 you've made but I'm just --

19 MR. FLAXER: Good point.

20 THE COURT: -- but if you have, hypothetically, a
21 dozen cars and you sell the first four and you collect
22 \$40,000.00 and the next one is an \$11,000.00 car does that mean
23 every car thereafter you're going to be coming into court to be
24 getting approval? I just want to know as a practical matter
25 how we're going to deal with this?

1 MR. FLAXER: You know, I think you make a very good
2 point because the way it's written now there's a \$50,000.00
3 cap. Period. So once we hit the cap we have to come back to
4 court.

5 THE COURT: Right.

6 MR. FLAXER: So, perhaps, we should not submit the
7 order today, consult with the UST and if the committee, the UST
8 and the Trustee agree, maybe we can submit an order that
9 provides a little more flexibility to save estate expenses.

10 THE COURT: Let me ask Mr. Kadish, what do you think?

11 MR. KADISH: Your Honor, Allen Kadish for the
12 committee.

13 We have reviewed these papers and obviously support
14 the Trustee's efforts. I think the way we viewed it is this
15 was the Trustee's first motion to let him just physically begin
16 to liquidate stuff without having to run to court and wait the
17 appropriate time and we certainly support that so I would say -
18 -

19 THE COURT: I think let's enter this order and then
20 figure out what you want to do more broadly.

21 MR. KADISH: I think for today let's proceed as we
22 are and these motions are efficient motions, they're not thirty
23 page motions, they don't draw objections and I think we can
24 work together to implement -- if there's a procedure, for
25 instance, or if there's a process or an offer for the sale of a

1 lot of the cars which, I think, is where the Trustee is going,
2 I think he's hoping to sell some of these assets in bulk --

3 THE COURT: Yes.

4 MR. KADISH: -- then it would be useful to come back
5 and have a motion for approval of a dozen of the cars together.
6 So I think let's take it step-by-step if the Court is all right
7 with that.

8 THE COURT: That's what I would prefer to do. I'll
9 enter this order but talk with the committee, talk with the
10 U.S. Trustee. I may be raising an issue that's not a real
11 issue but that's -- when I read it over and I saw the list of
12 the toys, it was a long list of cars, some of which probably
13 may be well over \$10,000.00 each in which case you'd have to
14 come back -- but figure out how -- you know, get with Mr.
15 McHale and get a feel for how this is going; if he has to come
16 back to come back or has come back on short notice to get an
17 approval of a good sale, well, we'll come back, you know, and
18 you'll -- okay?

19 MR. FLAXER: It sounds good. One last thing on the
20 order for the sale of the assets. Cordell objected to the
21 expenses motion that's coming next. We resolved that objection
22 by adding to the order approving the expenses motion some
23 reservation of rights language that contains plenty of "if
24 anys." At their request, although they did not object to this,
25 the motion to approve the sales, we added that same language

1 into that order so Your Honor will see that language in the --

2 THE COURT: All right. So you've got a new order to
3 hand up on this?

4 MR. FLAXER: Yes.

5 THE COURT: All right. That's fine. So with the
6 changes that you'll have in the revised order, that motion will
7 be granted.

8 MR. FLAXER: Thank you. The next item is a motion
9 for permission to pay certain expenses. This is one that
10 Cordell did file a formal objection to.

11 THE COURT: Yes.

12 MR. FLAXER: This is a motion -- it's in a sense the
13 flip side in a way of the motion for permission to sell assets.
14 Unfortunately, some of these assets are very hungry assets in
15 terms of maintenance costs.

16 THE COURT: Find a buyer for this yacht soon.

17 MR. FLAXER: Yes, we had our conference call with the
18 creditors committee last night and that was very much a topic.
19 We have an offer now that's just enough to get the estate
20 almost nothing. So we're trying to push it up so -- although I
21 actually haven't thought about that.

22 So, as you see, the salary for the crew on the yacht
23 is \$24,000.00 a month which we're seeking permission to pay on
24 an ongoing basis. Obviously, we're working very hard to sell
25 this as quickly as possible.

1 THE COURT: Well, let's just break this down and I
2 guess I know what you want to accomplish and I want to try and
3 accommodate it. I have a couple of concerns. It appears that
4 there are pre-petition obligations that are being paid. On the
5 other hand I don't want this yacht held hostage so I might --
6 if I understand, you know, you had to pay the marina to get the
7 boat, we could have had an admiralty proceeding as to the boat
8 but the U.S. Trustee is okay with this motion, I take it?

9 MR. FLAXER: Correct.

10 THE COURT: And the committee is okay with the
11 motion?

12 MR. KADISH: That's right.

13 THE COURT: I'm going to approve it. You know, there
14 are a few things that if necessarily get swept in here that I
15 would prefer not to have to dissect. If we didn't have a
16 Trustee I'd probably feel different about that but, you know, I
17 understand what you're working toward. Obviously, the yacht is
18 encumbered?

19 MR. FLAXER: Yes.

20 THE COURT: How big is the mortgage on the yacht?

21 MR. FLAXER: About \$8.2 million.

22 MR. KADISH: Yes, I think that's right. It's to
23 Wachovia, I believe.

24 MR. FLAXER: Correct.

25 THE COURT: Are there other liens on the yacht as

1 well?

2 MR. FLAXER: That's the only one that I'm aware of.
3 There would have been one but for the fact that we were held
4 hostage and had to pay the --

5 THE COURT: 140 foot yachts go for \$8 million? I
6 would have thought they were more than that.

7 MR. FLAXER: Well, this is an example of some of the
8 issues we're facing. This is a yacht that Mr. Okun only said
9 was worth in the \$14 million range. Then when you actually put
10 it out for sale the offers are coming in significantly less.
11 The best offer so far is \$9 million. We're negotiating with a
12 broker who wants a ten percent commission which may be standard
13 in that business but that \$9 million, it doesn't do us a lot of
14 good because there's a lien of \$8.2 million.

15 THE COURT: Right.

16 MR. FLAXER: So that's why we're working very hard to
17 push the price up a little. There was another buyer from
18 Greece who was on the yacht, I believe, the day before
19 yesterday and I think he's going back on today and, you know,
20 one thought I had is maybe this is something we just put up for
21 auction. Pick an auction date, give notice and let people come
22 and bid. It's something to think about if we can't, you know -
23 - if the negotiation --

24 THE COURT: I'm going to leave that to the committee
25 and the Trustee to figure out what they want to do.

1 MR. FLAXER: All right. That's something I'll just
2 leave.

3 THE COURT: I don't know about boats, frankly, so it
4 isn't going to take too many months of insurance and paying for
5 the crew and marina fees -- it adds up pretty quickly.

6 MR. FLAXER: Yes, indeed, it does.

7 THE COURT: Okay. The motion will be granted. I'm
8 sure the committee is -- I'm sure Mr. McHale is very mindful of
9 what the costs are. You know, there are some amounts that have
10 gotten tucked in here that are not clearly post-petition
11 amounts. That's fine. I'll grant the order.

12 MR. FLAXER: Your Honor, if I may, items that are not
13 on the calendar but there are two Cordell litigations out there
14 if you will and I confess when your chambers called yesterday I
15 misspoke. We discontinued the request for an injunction as to
16 all parties but we've dismissed the adversary proceeding as to
17 all defendants except for --

18 THE COURT: I know. That's why I was on the bench
19 expecting to see counsel for the -- no one for Cordell showed
20 up either but there was a pre-trial conference in the
21 adversary.

22 MR. FLAXER: Both sides missed it and I'll apologize
23 for myself and on behalf of Mr. Scott Fogel.

24 THE COURT: That's all right.

25 MR. FLAXER: There is also a state court action -- in

1 New York state -- commenced by Cornell against Mr. Okun and all
2 of the entities, many of which are now debtors, upon which
3 Cordell asserts a lien upon assets of those entities. They
4 obtained a plea judgment TRO in state court which, I'm told, by
5 my litigators that unlike in the federal court that does not
6 expire after any given period. So that TRO is in place. But
7 shortly before Thanksgiving we removed that state court action
8 to federal court and I understand that this morning Judge
9 Berman assigned -- or the clerk or something -- it's been
10 assigned to you. I'm not going to explain it right
11 procedurally. So my thought was that we should have a date to
12 have a pre-trial conference in both now that the state court
13 action has also been assigned to Your Honor.

14 THE COURT: Okay. What I would suggest is next week
15 call my chambers and speak with my courtroom deputy -- she's
16 out this week -- and get a date.

17 MR. FLAXER: We'll do, Your Honor.

18 THE COURT: All right. I mean is the Cordell
19 adversary going to move forward? What's going to happen with
20 all of that? I mean I looked at the complaint yesterday and,
21 you know, if it goes forward there's going to be a lot --
22 necessarily a lot of discovery to prove what's in that
23 complaint.

24 MR. FLAXER: Yes. I mean one question is do we do
25 that in the context of that adversary or in the context of

1 2004s? That's one of the issues we have under consideration.

2 THE COURT: It's okay for you. If they want to take
3 discovery -- you know, they're a defendant in an adversary and
4 they're entitled to their discovery.

5 MR. FLAXER: We're used to that. Perhaps, what will
6 happen is we'll dismiss the adversary as to them on the same
7 terms that we dismissed the injunction which is they've agreed
8 to give us a certain amount of notice before they foreclose on
9 anything. That's something that we may wind up resolving it
10 but in the meantime we aren't there yet so we will proceed as
11 Your Honor has instructed.

12 THE COURT: I think when I saw you last I had asked
13 about the letter that was sent to the Judge. That's it?

14 MR. FLAXER: That's it.

15 THE COURT: I wanted to follow up on that. I haven't
16 received it.

17 MR. FLAXER: I'm sorry. I thought -- but I do have
18 it here.

19 THE COURT: Okay.

20 MR. FLAXER: I should probably just note for the
21 record that we and our local counsel in Virginia were not
22 consulted on this letter. Counsel for Mr. Luzinski, the
23 Virginia Trustee, sent it so we don't necessarily endorse
24 everything that's in this letter. This was sort of their view.
25 They just kind of did this on their own.

1 THE COURT: And I think the last time you were before
2 me there was some indication that the change of venue motion
3 might not go forward in early January?

4 MR. FLAXER: All those discussions at this moment
5 have collapsed and we're going forward. If there's any change,
6 obviously, your chambers will be the first to know.

7 THE COURT: Okay.

8 MR. FLAXER: But as of now that's on for January 9th
9 and we're proceeding with discovery and Mr. McHale is due to be
10 deposed, I think, it's December 19th.

11 THE COURT: Have there been any developments at all
12 with respect to Mr. Okun and the U.S. Attorney's investigation?
13 Anything public?

14 MR. FLAXER: The lawyer in my office who is handling
15 that is always very nervous when I ever talk about it. All I
16 know is that it's ongoing, it's a very active matter in the
17 U.S. Attorney's or the Postal Inspector's office but as to when
18 something might happen like an indictment, we really don't
19 know.

20 THE COURT: Sure.

21 MR. FLAXER: We waived the privilege, I believe, on
22 behalf of the estate which, I think, was helpful to the effort.

23 THE COURT: Okay. Well, we'll see, whatever happens
24 happens.

25 MR. FLAXER: Yes.

1 THE COURT: Mr. Kadish, is there something you wanted
2 to add?

3 MR. KADISH: Your Honor, a moment.

4 [Pause in proceedings.]

5 MR. FLAXER: I'm reminded by counsel to the committee
6 that the Trustee noted on the call yesterday that the grand
7 jury has convened.

8 THE COURT: Okay.

9 MR. FLAXER: The Trustee has had a few meetings with
10 Mr. Okun for what that's worth.

11 THE COURT: With respect to the assets that were held
12 by Mr. Okun that were subject to the transfer agreement has he
13 cooperated to the extent of signing whatever documents were
14 necessary to effect transfers of title and things like that?

15 MR. FLAXER: I'm not sure if we actually needed him
16 to sign anything yet so we haven't had to cross that bridge.
17 We do have some issues, though, with whether or not he is in
18 compliance with that agreement for several reasons.

19 THE COURT: Well, there was the issue about the
20 airplane that on the date that I was asked to approve the asset
21 transfer agreement when it was initially presented, at least it
22 was stated in open court that Mr. Okun had unilaterally crossed
23 out one of the leer jets or gulf stream jets and went ahead and
24 sold it.

25 MR. FLAXER: Right.

1 THE COURT: Has anything happened with respect to
2 that?

3 MR. FLAXER: Well, it's become a tracing exercise.
4 The good news is that the vast majority of the sale proceeds
5 went to pay off a lien which, I think, also attached to other
6 assets so the bad news is that there was a sum of about
7 \$165,000.00, I believe, it is that was equity if you will. Mr.
8 Okun claims that he put that right into IP of A, the main
9 parent entity, which may be true but the problem is always,
10 okay, what happened after that? Did it go right back out the
11 back door? That is not as easy as it may sound and something
12 that Deloitte is grappling with is that exercise of how you get
13 the right records to trace where that money went and where lots
14 of other money went. That's something that they've been
15 charged with and they're working on.

16 THE COURT: With any of the new -- changing the
17 subject -- with any of the new debtors, the recently added in
18 the IP of A umbrella case or The 1031 case, I guess it's really
19 an IP of A case, do any of these entities have positive cash
20 flow? I mean is there money coming into these estates?

21 MR. FLAXER: Some of them are running relatively
22 even. None of them are producing cash flow that's going to
23 make any difference to anybody in the long term.

24 THE COURT: Are they covering their expenses?

25 MR. FLAXER: Some of them are covering their

1 expenses. I believe Columbus Works is covering its expenses,
2 Salina is covering expenses, I'm pretty sure Juella, I believe
3 is. The Shreveport situation is a tough one but that's one
4 that we're, hopefully, moving to sell as quickly as possible
5 and there are some ongoing negotiations about that right now
6 but there doesn't appear to be any of them where there was
7 materially significant cash flow that you could actually hold
8 it long-term and try to wait for the market to turn around or
9 develop a new strategy to operate it. This is obviously a
10 discussion back and forth with the creditors committee. Part
11 of the problem is that some if not all of them but certainly
12 some, Mr. Okun took a lot of money out that he was not supposed
13 to and left them in a very precarious financial situation and
14 obviously all these properties have significant expenses but as
15 of now I'm not aware of any one of them that has materially
16 beneficial cash flow if you will.

17 The Deloitte firm is conducting valuations on each.
18 They've completed their first cut on some of them and they're
19 supposed to have all of them done by the end of the day today
20 so that's something we're all waiting to see.

21 THE COURT: What is this -- I recognize there was a
22 separate Trustee with the West Oaks Mall Chapter 11 proceedings
23 and while you've indicated that the change of venue motion at
24 least as of now is going forward in January is there
25 cooperation between the two Trustees in understanding the

1 financials of those entities?

2 MR. FLAXER: Not as much as we would like and that
3 seems to be where the negotiations to extend our venue motion
4 foundered. We thought we had an agreement to exchange
5 information. We started to produce information to them and
6 then when we asked for information it was my understanding that
7 it is not forthcoming and at that point we couldn't understand
8 how we could have a continuing good faith negotiation and
9 that's when the litigation got back on track and I say that
10 understanding that the other side isn't here. I'm sure they
11 would have a different spin on that so I'm just telling you my
12 understanding.

13 THE COURT: Okay. Do you have any understanding of
14 whether those properties are cash flow positive or at least --
15 I mean has the lender made a lift stay motion? What's the
16 status there? I have looked at the docket at some point but I
17 haven't done that --

18 MR. FLAXER: The lender has not moved to lift the
19 stay that I'm aware of. To the extent there's equity and there
20 may be some but it's not a lot, it's relatively thin, a swing
21 number here is whether the lenders prepayment penalty is
22 enforceable. That's a big number. That's about a \$15 million
23 swing. Without that there may be some equity, not a home run
24 but maybe a single. With that there's probably no equity.
25 Then you have the larger issue of whether there's a basis to

1 challenge the lien through asserting a constructive trust which
2 gets back to the tracing argument as well as taking discovery;
3 how much did they know and when did they know it and all that.

4 THE COURT: All right. Anything else, Mr. Kadish?

5 MR. KADISH: Your Honor, it's hard for me to sit when
6 we talk about real estate and since the Court has invited the
7 discussion I just want to leave a placeholder here among the
8 three of us and posterity that the committee's view always has
9 been -- even before we knew what the assets were -- we knew
10 these assets were in distress and we knew these assets were a
11 source of Okun folly or funding and that the approach that we
12 think ought to be taken or at least a run at it is that these
13 assets shouldn't be looked at in a Kodak moment but maybe in a
14 way that over some time with some financing and some
15 development, yes, this might return some value. So I know it's
16 not a question for today but each time we raise the real
17 estate, Your Honor, and you ask about, are they producing value
18 and how they're doing for the estate, understand that there is
19 a dialogue as Mr. Flaxer referred to between the committee and
20 the Trustee about how the real estate ought to be viewed and
21 whether there's a strategic approach that can be taken.

22 THE COURT: Well, that was certainly prior to the
23 appointment of the Trustee. That was certainly the position of
24 the -- I won't say the "position," it was an articulated
25 explanation of both the debtor and the committee at that time.

1 My questions on whether they're cash flow positive is
2 where you're going to get the financing -- if they're not cash
3 flow positive how are you going to fund the losses until you
4 can turn the properties around. So that's not a question to be
5 answered today. So when I asked my questions focus on whether
6 they're cash flow positive, it's just -- I mean there's no
7 debtor-in-possession financing in place here, you don't have a
8 source to fund continuing losses while you're trying to turn
9 the properties around in the expectation that at the end of the
10 day they'll be more valuable as a result.

11 MR. KADISH: Well, Your Honor, that's exactly the
12 question is whether as the Trustee becomes more familiar with
13 these assets and as his professionals get to the financial
14 truth whether we can find some value for the creditors here.

15 THE COURT: All right. Anything else for today?

16 MR. FLAXER: That's it, Your Honor.

17 THE COURT: Thank you very much. We're adjourned.

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

CARLA NUTTER

Dated: December 18, 2007

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