

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----X
4 In Re: : 07-11448
5 THE 1031 TAX GROUP, LLC, :
6 Debtor. :
7 -----X
8 MCHALE, JR., :
9 Plaintiff, : 08-01402-MG
10 v. :
11 JPS NH, LLC, *et al.*, :
12 Defendants. :
13 -----X
14 MCHALE, JR., :
15 Plaintiff, : 08-01604-MG
16 v. :
17 WACHOVIA BANK, NATIONAL : One Bowling Green
18 ASSOCIATION, *et al.*, : New York, New York
19 Defendants. : December 15, 2008
20 -----X

19 TRANSCRIPT OF PRETRIAL HEARING
20 BEFORE THE HONORABLE MARTIN GLENN
21 UNITED STATES BANKRUPTCY JUDGE

22 APPEARANCES:

23 For the Chapter 11 Trustee: JONATHAN L. FLAXER, ESQ.
24 JACQUELINE G. VEIT, ESQ.
25 Golenbock, Eiseman, Assor & Bell
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(Appearances continue on next page.)

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 APPEARANCES CONTINUED:

4 For the Official ALLEN G. KADISH, ESQ.
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7 For the U.S. Trustee: ANDREW D. VELEZ-RIVERA, ESQ.
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transcript produced by transcription service

1 [Proceedings began at 2:01 p.m.]

2 THE COURT: Please be seated.

3 All right. I have all the appearances that have been
4 made in the courtroom and by telephone. So, Mr. Flaxer, let's
5 start with the agenda.

6 MR. FLAXER: Good afternoon, Your Honor.

7 THE COURT: Good afternoon.

8 MR. FLAXER: We have a number of matters on the
9 calendar. In light of the fact that Mr. McHale is able to move
10 his flight earlier, we could take up the fee applications first
11 only because the most people are here and in the courtroom on
12 that.

13 THE COURT: Well, let's deal with -- we have the
14 uncontested motion --

15 MR. FLAXER: Okay.

16 THE COURT: -- for dismissal in the two cases.
17 Anybody want to be heard on that for the dismissal of the cases
18 of 100 Corporate Drive LLC and CW Acquisition LLC? All right.

19 Hearing no objection, those -- the motion is granted.

20 MR. FLAXER: Thank you, Your Honor.

21 THE COURT: All right.

22 MR. FLAXER: I -- we also have the Beaner [Ph.]
23 complaint on the calendar, which is just we settled with the
24 main defendant. We're going to dismiss that adversary
25 proceeding. We just haven't yet taken the step of sending them

1 a piece of paper to do that, but we will do that.

2 THE COURT: Okay.

3 MR. FLAXER: As to the remaining defendants.

4 THE COURT: All right. All right. Let's start on
5 the fee applications.

6 MR. FLAXER: Your Honor, to begin for re -- good and
7 not so good reasons, the amended notice of fee applications had
8 some minor errors in it, not more than a few hundred dollars
9 either way. We have prepared a chart which has all of the
10 correct numbers and in which embodies all of the compromises
11 which have been made by the various parties and shows exactly
12 what we're proposing to do. If you would like, I can hand it
13 up. I've handed it up --

14 THE COURT: Yes, please.

15 MR. FLAXER: -- to everybody here.

16 THE COURT: Yes. That would be helpful. Thank you.
17 Just give me one second to pull up the docket sheet. Okay.
18 Mr. Flaxer, go ahead.

19 MR. FLAXER: What we've done, Your Honor, is
20 submitted a series of fee applications that I'll break down in
21 several categories. I would begin with the Olshan firm and the
22 Gilbert Oshinsky firms, which really started working the
23 March/April time frame so they, in a sense, missed the first
24 round of fee applications under which we, in essence, paid
25 professionals through January, not counting the three Trustee

1 professionals subject to a 40 percent hold-back, if you will.

2 With respect to those two firms, in order to treat
3 them the way other professionals have been treated up till now
4 we propose to pay those firms subject to a 60 percent hold-
5 back. The Oshan firm's period begins in mid-March and goes
6 through August and Gilbert Oshinsky is early April through the
7 end of September. We -- it was also -- there have been some
8 voluntary reductions in disbursements to the Oshan firm in
9 consultation with the U.S. Trustee and with the Trustee's
10 review of the expenses. The Gilbert Oshinsky firm has also
11 offered up and accepted a \$60,000.00 discount on their fees, so
12 the 60 percent number is based off of the number in the fees
13 incurred column of \$775,068.00 less \$60,000.00.

14 THE COURT: I think what would be useful for me,
15 Mr. Flaxer, is there are numerous objections. The Committee,
16 which may be in a different position than some counsel, but the
17 Committee certainly groups of exchangers who objected to the
18 award of any fees on an interim basis at this time. So let
19 me -- because that applies across the board --

20 MR. FLAXER: I'm sure.

21 THE COURT: -- let me hear -- I'd like to hear
22 argument on that specific objection first and then we'll get
23 to -- if appropriate, we'll get to --

24 MR. FLAXER: Okay.

25 THE COURT: -- specifics.

1 MR. FLAXER: Actually, if I may, to begin I would
2 note that when we were here -- the last time there were, by my
3 count, 24 objections, 17 of which objected to payment of any
4 fees at that point and six -- no, seven which objected to only
5 the pre-Trustee fees. By my count, this time we only have
6 three objections, unless I missed one or two. We have the U.S.
7 Trustee, which is really more of a statement. I didn't count
8 that as an objection. We have the Committee. We have the
9 Cohen Alvarez group of plaintiffs and we have Mr. Martin who
10 filed a letter. I didn't see any others unless --

11 THE COURT: I -- that's fair, but I think because
12 that applies to the award of fees to anyone, let's deal with
13 that issue first.

14 MR. FLAXER: Oh, absolutely. I only --

15 THE COURT: Yeah, I'm aware of what --

16 MR. FLAXER: -- know of actually where --

17 THE COURT: No, I've read everything.

18 MR. FLAXER: Okay. It seems to us that the primary
19 issue is whether or not the roughly 5.4 million of cash that we
20 propose to have in the estate is a sufficient amount of money
21 for the continued prudent administration of the estate that was
22 the issue that Your Honor and we all raised the last time.

23 When Your Honor signed the first interim fee order,
24 that was based on proceeding with 7.2 million of cash; now it's
25 5.4. Since then, we think a tremendous amount of progress has

1 been made and frankly a lot more than I would thought we would
2 have been able to accomplish at the time. The Cordell [Ph.]
3 matter has been finished, so that turns off the spigot on an
4 expensive proposition.

5 The Deloitte report has been finished, which isn't to
6 say there aren't more periods that could be investigated and
7 more documents to read, but basically the report has been done
8 and that formed the basis of the complaints we filed, the
9 complaints we intend to file, and a series of negotiations
10 which have led to a series of settlements.

11 And those -- the fact that we've reached settlements,
12 which as Mr. McHale testified, total approximately 40 million
13 dollars --

14 THE COURT: Subject to their being approved by the
15 Court.

16 MR. FLAXER: Absolutely. However, this is all based
17 on the assumption that we now proceed with the plan process
18 that we have a plan and a disclosure statement in draft form
19 and we're working on those to -- there's a number of issues
20 that we have to fix/revise, but we have drafts done. Our hope
21 and expectation is that the settlements will be approved under
22 the plan. If the plan process doesn't work, if the settlement
23 is not approved -- this is a very different situation, but I
24 think there is enough to believe that this is a process very
25 much worth going forward with.

1 But assuming the plan process works, a lot of the
2 disputes -- and I hate to keep being so coy about this but, you
3 know, other than the McCabe and ENO settlements, which are now
4 known in public, I'm not at liberty to talk openly about the
5 other ones that we have reached. We have discussed them with
6 the Creditors' Committee subject to a common interest
7 agreement. The Committee is fully briefed. That greatly
8 reduces the litigation burden on the estate going forward
9 assuming they're approved.

10 We also have the benefit of a preliminary injunction
11 for a limited period of time so that will reduce the amount of
12 litigation that we need to deal with for the next 90 days,
13 which is the time frame that we're contemplating if we're
14 really having the plan process pretty much geared up and all of
15 the settlements be known in public.

16 I would also note that we do expect to receive
17 another 2.2 million in the next -- I said 60 to 90 days -- I
18 believe the tax refund which is the much bigger item. The
19 million eight, we expect sooner than we expect the jewelry to
20 be sold. We should be filing an application to retain an
21 entity in the jewelry business to market and sell a piece --

22 THE COURT: I saw that -- the expectation of the tax
23 refund. Has that been negotiated with the IRS?

24 MR. FLAXER: There are ongoing discussions with the
25 IRS that I'm not a party to, but -- and I can't -- and maybe

1 Mr. McHale who's here can give you more detail. I can tell you
2 that it's my understanding that we're looking more in the 60-
3 day frame than the 90-day time frame, but I always hate to make
4 representations like that.

5 THE COURT: All right.

6 MR. FLAXER: All sorts of things can happen and go
7 wrong.

8 Going forward, what we're looking at, an investiture
9 of a fair amount of time and effort on the plan and the
10 disclosure statement finalizing the documentation of the
11 settlements we discussed. We have continuing litigation. Your
12 Honor will hear some argument on motion to dis -- on a motion
13 to dismiss in some other matters. Those litigations, as Your
14 Honor knows probably better than anybody in the courtroom, will
15 go up and down pace -- depend on the pace of the case and
16 what's happening in the cases and we'll be continuing to
17 develop potential objections to -- and claims against pre-
18 Trustee professionals as another area that's being actively
19 worked on.

20 Those are the major areas that we're looking at going
21 forward. So a lot of work has been done. I think we've
22 narrowed down enough that there'll be less accrual rate and
23 we've used the term "burn rate" in the papers, which as I
24 thought about it is not really an accurate term, because "burn"
25 really means you're burning through cash. We're, in a sense,

1 unfortunately from the prospective of the professionals, not
2 really burning through cash. We're accruing fees and we're
3 paying disbursements as we need to but, you know, there's an
4 element of risk. We only get paid as Your Honor approves our
5 fees, but that's more than anything a function of the
6 availability of cash. I mean, we do hope and expect to be
7 solvent, pay all professionals, and make a modest distribution
8 to general unsecured creditors upon the effective date of a
9 plan, but that all depends on obtaining approval of the various
10 relief against third-party potential claimants, which we won't
11 get into now.

12 With respect to -- well, so I would submit that based
13 on the progress that's been made since the last time that the
14 5.4 million is a reasonable amount of money going forward. The
15 big expenditures, I would say, of cash putting aside, accrual
16 of fees would be paying experts if we really get into hot and
17 heavy litigation with some of the defendants is going to be, I
18 think, some areas of expert testimony that, as Your Honor
19 knows, can get expensive. But I think those type of expenses
20 are adequately covered by 5.4 million dollars.

21 THE COURT: Well, the -- you're -- if I understand
22 correctly, the plan you contemplate will set up a litigation
23 trust?

24 MR. FLAXER: Most likely.

25 THE COURT: And whether you incur the expenses of

1 experts or whether the litigation trust is going to need to
2 have funds available, it has to go forward and litigate the
3 claim. So the -- it isn't only an issue of how much money you
4 have an anticipate burning through or accruing against --
5 assuming you're able to able to complete a plan, but if the
6 hope for larger recoveries depends on successfully prosecuting
7 litigation, somebody is going to have to pay for that.

8 MR. FLAXER: Absolutely. I mean, our projection now
9 is to fund litigation trusts with five million dollars. That's
10 the way we're seeing it now.

11 THE COURT: Okay.

12 MR. FLAXER: The five --

13 THE COURT: The way -- your papers talked about a
14 possible -- may not have been the exact term used but certainly
15 expressing appropriate caution, possibly a 15 percent recovery
16 for unsecureds. Does that assume the approval of the
17 settlements you've currently negotiated, plus additional ones
18 that you've not yet documented?

19 MR. FLAXER: Yes. It assumes approval of what's been
20 made public, approval of the ones we have not made public but
21 have reached agreements in principle subject to two
22 documentations.

23 THE COURT: Do those settlements include channeling
24 injunctions and nondebtor releases?

25 MR. FLAXER: Almost every one has some element of

1 that. In this case it seems impossible to avoid and we can't
2 seem to talk anybody out of it, but as we --

3 THE COURT: Well, that's usually the problem, but
4 that is the problem with nondebtor releases.

5 MR. FLAXER: Yeah. Also, as we've discussed -- as we
6 have discussed somewhat on the record on other hearings, we're
7 doing everything we can and looking into every option to avoid
8 it having to be something that the Court has to impose on
9 people. And as you know, we have a few thoughts on that.

10 THE COURT: All right. We'll deal with that when --
11 you know, in the future, but I wanted to focus on -- because
12 you used that 15 percent recovery and I wanted to get a better
13 sense of what problems are built into getting there.

14 MR. FLAXER: That's the big -- that's the problem.

15 THE COURT: All right.

16 MR. FLAXER: It's not --

17 THE COURT: Let me hear from those who object to any
18 payment of interim fees at the present time and I'll give you a
19 chance to reply to that if necessary, Mr. Flaxer.

20 MR. KADISH: Good afternoon, Your Honor. Allen
21 Kadish, Greenberg Traurig for the Committee. I think we all
22 acknowledge the funny shoes I'm standing in today, but we
23 managed that for the last hearing; we'll manage it for today.
24 The Committee co-chairs are participants in the hearing by
25 court call. I think they're on active participation. When I

1 conclude I believe John Benitez, who's one of the co-chairs
2 will ask to speak.

3 For now, the Committee's objection is short. It's
4 clear. There's one main concern. It's the concern they had
5 the last time and many other creditors did, which -- and it's
6 the topic of this morning's discussion. If you pay creditors
7 now on the threshold of a plan process will there be enough
8 left. The Committee in its papers acknowledged the work of the
9 Trustee. The Committee members just came in several weeks ago
10 from -- across the country to sit in New York for two days with
11 the Trustee and his advisors and so they have -- they're just
12 coming off a pretty in-depth two-day briefing. In person
13 always works better and their understanding at this point is
14 really pretty current.

15 The Committee meets with the Trustee regularly by
16 phone. Sometimes weekly, sometimes every two weeks. They're
17 active participants and they continue to be so and they
18 question whether if based on the Trustee's own timing and based
19 on the issues that will certainly come in the plan process
20 whether it's prudent to make these payments now.

21 So, Your Honor, I'd invite John Benitez to speak if
22 he'd like at this point.

23 THE COURT: Sure. I'd be happy to hear from
24 Mr. Benitez. He certainly has been in court before, testified
25 before the Court. So Mr. Benitez?

1 MR. BENITEZ: Good afternoon, Your Honor. Can you
2 hear me okay?

3 THE COURT: Yes, I can.

4 MR. BENITEZ: Thank you, Your Honor. This is John
5 Benitez, co-chair of the Creditors' Committee. Participating
6 with me today by phone, Your Honor, is the co-chair of the
7 Creditors' Committee, Mr. Steven Gray. Mr. Gray is in San
8 Antonio and I am in Denver today.

9 Your Honor, the Committee's objection as amended has
10 been filed with the Court. I would just like to add a few
11 comments, if you don't mind, for the Court's consideration. I
12 trust that these comments will assist the Court really in two
13 ways: (1) putting in context the Committee's objection; and
14 (2) to help the Court analyze really from a legal and
15 prospective -- legal and business prospective, excuse me, what
16 is in the best interests of the estate.

17 The essence of the Committee's objection really is
18 summarized as follows. Number one, I want to emphasize we
19 appreciate Your Honor and recognize the considerable work
20 undertaken by the Court and all professionals in this case. I
21 would really request that the objection not be interpreted as a
22 failure of the Committee to recognize that the professionals
23 have worked hard on this case and that eventually payments in
24 the proper amounts should be tendered.

25 I must note an obvious point for the Court and that

1 members of the Committee have also worked diligently and we
2 understand that there will never be payment for our services.
3 You know, we understood that as a condition, Your Honor, and we
4 freely accepted it going into the assignment that we undertook
5 to be on the Committee. We also note that it's a duty to
6 continue this process and to understand that we'll never get
7 paid for the time we put in, but that's fine. We're fine with
8 that. We accepted that at the beginning.

9 We seek, Your Honor, your oversight and your
10 assistance for really one thing. We cannot get the arithmetic
11 to work for us. We can't get the numbers to work without being
12 speculative and that's the problem that we're having. To rely
13 on speculation at this point is akin, I would suggest, Your
14 Honor, to a bank today issuing a no-asset/no-income loan and
15 hope for the best.

16 One of the things that struck me as I reread the
17 declaration by Mr. McHale and the reply by his counsel is that
18 it's still unclear how much the going forward is going to cost.
19 Mr. Flaxer just indicated a number of going-forward items, the
20 litigation, the preparing the plan and the disclosure
21 statement, the settlement agreements, the pre-Trustee or claims
22 related to pre-Trustee professionals. And, Your Honor, I know
23 and acknowledge it's difficult to set a budget going forward,
24 but having said that, I do not hear or see any comment about
25 what the burn rate is anticipated to be in light of these

1 substantive legal efforts, which I recognize are complex and
2 require professional experienced counsel to deal with. But I
3 don't see what the proposed burn rate is going to be, number
4 one.

5 And, number two, as to the recognition of revenue
6 into the estate we have heard from the Trustee his efforts
7 concerning, as Mr. Flaxer just indicated, perhaps selling
8 jewelry and a tax refund and other potential sources of income.
9 But as the Court indicated, these settlements still have yet to
10 be finally approved. The plan has yet to be presented. The
11 disclosure statement has yet to be prepared and sent out.
12 There's a number of open issues that give us pause. That would
13 indicate that additional substantive and material amounts will
14 have to be incurred to pay the professionals and to accrue that
15 because those are very substantive issues.

16 I may note back on the arithmetic question perhaps an
17 unintended confusion between the declaration of Mr. McHale and
18 the reply by counsel on his behalf relating to the tax refund.
19 This goes to the arithmetic question, Your Honor. I think this
20 may be a typo, but I'd just draw it to the Court's attention.
21 In the declaration of Mr. McHale, he indicates the tax refund
22 would be -- this is on page 2 -- the tax refund would be 1.8
23 million. I believe Mr. Flaxer just confirmed that amount.

24 But in the reply by -- of the Trustee, they indicated
25 a tax refund of 2.8 million. That's on page 2, paragraph two,

1 last sentence. Again, I would guess it's probably a typo.
2 Maybe not, but that's the kind of arithmetic that we need to
3 have a sharp pencil on to make sure that we know and the
4 Trustee knows and has confidence of the amounts that are
5 actually going to be brought in.

6 A couple of verities for the Court to consider: One,
7 the estate as all estates and all businesses has limited
8 resources; number two, the estate may generate additional
9 revenue. It's not clear, Your Honor, how much or when that
10 additional revenue will be actually generated. What we do
11 know, number three, is that the estate will incur additional
12 expenses.

13 Your Honor, we have to leave it in your hands to
14 satisfy yourself that the estate will have enough money and I
15 would suggest and request that we not rely on speculation to
16 ensure the fiscal viability of this estate.

17 We appreciate your time, Your Honor, and I'm
18 certainly open to questions.

19 THE COURT: Thank you, Mr. Benitez.

20 Mr. Flaxer, can you address the amount of the
21 anticipated tax refund?

22 MR. FLAXER: Yes, Your Honor. I apologize. It is
23 2.8 million. I missed it. We all missed it. It is in the
24 disclosures we've given to the Creditors' Committee, a 2.8.
25 It's just a typo. I apologize.

1 THE COURT: That ought to make -- at least that ought
2 to make you happy, Mr. Benitez.

3 MR. BENITEZ: Well, that really helps. I appreciate
4 that clarification from Mr. Flaxer. Again, I know they're all
5 working hard and it's helpful to know the actual amounts, but
6 that is part of the challenge I'd just present to the Court.

7 THE COURT: No, and I appreciate that. It's a great
8 concern to the Court. It was during the initial fee
9 applications.

10 One thing I take note of and I'm going to want to
11 hear from Mr. Velez-Rivera on behalf of the U.S. Trustee at an
12 appropriate point, but the first time these came on for -- the
13 fee applications came on for approve -- interim fee awards,
14 the -- there was a 40 percent hold-back and that's the amount
15 for those who are making -- proposed amount for those who are
16 making their initial applications, but it's been reduced to a
17 70 percent hold-back for those who are making -- this is their
18 second interim application.

19 I think whatever I do today, unless there's some
20 dramatic improvement, I don't know when people anticipate --
21 maybe there won't be another interim application. Maybe it
22 will be in connection with confirmation, but no one should get
23 their hopes up for any substantial awards unless the situation
24 of the estates improves.

25 So I think that -- I guess, Mr. Flaxer, you're saying

1 if the amounts requested with the hold-backs are approved,
2 there'd be about five million dollars -- 5.4 million dollars
3 remaining.

4 MR. FLAXER: Absolutely.

5 THE COURT: And I'm very mindful of the continued
6 accrual of professional fees and expenses for work that I think
7 I really don't have any fundamental questions about that the
8 work has been good and has been valuable. It's sometimes
9 difficult to translate value initially into dollars into the
10 estate immediately and hopefully it will generate more dollars
11 in along the way. But just a caution to everybody that if I do
12 make interim awards, they shouldn't anticipate even 30 percent
13 if we come to evaluate additional fee applications.

14 Mr. Kadish?

15 MR. KADISH: Your Honor, unless Mr. Benitez or
16 Mr. Gray have any other comments I think that's the gist. No
17 substantial awards unless the estates improve. I think in
18 their view the estates haven't approved since we were last here
19 in April.

20 THE COURT: All right.

21 MR. KADISH: So John Benitez, Steve Gray --

22 THE COURT: Mr. Gray, Mr. Benitez, do you have
23 anything else you want to add?

24 MR. BENITEZ: Your Honor, just on that final comment
25 by Mr. Kadish, I do -- I don't want to belabor this point, but

1 I do recognize the work and I do understand the progress has
2 been made for everything that I have discussed with Mr. Flaxer,
3 members of his firm, and the Trustee. It seems like there has
4 been a progress, so I appreciate that.

5 THE COURT: Thank you, Mr. Benitez.

6 MR. BENITEZ: Thank you, Your Honor.

7 THE COURT: Does anybody else want to speak with
8 objections to the interim fee requests?

9 MR. BOSCHEE: Your Honor, this is Aaron Boschee
10 appearing on behalf of the -- commonly referred to as the
11 Alvarez party.

12 THE COURT: Yes, Mr. Boschee, and I did read your
13 objection.

14 MR. BOSCHEE: Thank you, Your Honor.

15 THE COURT: I just have some very brief comments and
16 things to add to what Mr. Kadish and Mr. Benitez said. You
17 know, according to the fee application, the estates are really
18 on the precipice of some substantial cash infusion, including
19 the 2.8 million dollar tax refund, some settlements with third
20 parties, and a plan that's -- should be filed within a month or
21 so. I think that, you know, doing the analysis under Section
22 330 can really be benefitted by just putting it off by a month
23 or so, so that, you know, as Mr. Flaxer mentioned, he can't
24 talk about a lot of the settlements, that they've expended a
25 lot of resources in reaching. But once they've filed their

1 disclosure statement and plan, presumably they will.

2 Additionally, to -- you know, we've dealt with this
3 issue in the adversary proceeding whether, you know, these
4 settlement agreements that contain provisions for nondebtor
5 releases are approvable under Metro Media and, you know,
6 whether or not the settlements that have been entered into have
7 provisions that were reasonably believed to be approvable and,
8 therefore, benefit the estate, I think, you know, is a question
9 that can't be answered until you look at the language of these
10 settlements.

11 So, you know, I don't think an adjournment of these
12 applications or, you know, a time sufficient to look -- at
13 least get a superficial read on the results can be done.

14 THE COURT: Thank you, Mr. Boschee. Anything else
15 you want to add?

16 MR. BOSCHEE: No. No, Your Honor. That's it.

17 THE COURT: Thank you. Mr. Velez-Rivera?

18 MR. VELEZ-RIVERA: Good afternoon, Your Honor. The
19 United States Trustee's position is generally even after seeing
20 the objections and the replies essentially what it was when we
21 filed our response. Mr. Flaxer and Mr. McHale have been in
22 contact with my office over several months before filing
23 motions with the Court, as well as follow-up discussions.

24 As I said in our papers, we believe that the current
25 applications negotiated as they were before and maybe tweaked a

1 little bit around the edges after we filed our own papers
2 strike a proper balance between the need to conserve some cash
3 of the estate at this point and compensating the professionals
4 properly.

5 THE COURT: Let me ask you this, Mr. Velez-Rivera.

6 MR. BOSCHÉE: Yes, Judge.

7 THE COURT: And I appreciate -- I thought it was a
8 thoughtful statement -- written statement that your office put
9 in and there obviously were some reductions in expenses made
10 and I guess and fee requests made based on discussions with
11 your office. An area -- you know, one of the things that has
12 struck me and my law clerks when we went through, the fee
13 request for the most part are sufficiently described and
14 documented and the expenses are not necessarily so.

15 Part -- the professionals have made some adjustments
16 in expenses based on communications with your office. I don't
17 want to impose sort of a double penalty for what -- you know,
18 what we have found. Some of the things that specifically, you
19 know -- and I think I've made this clear before when we had the
20 first round of interim fee applications. I do believe that
21 professionals particularly with respect to the expenses I may
22 at this point when I approve the first awards are in entire --
23 you know, shouldn't be financing the case and they're entitled
24 to their expenses reimbursed.

25 The General Order M150, General Order M104

1 identifying those two specifics and there may be others I can
2 go through, you know, impose various limits on meals, the
3 \$20.00 limit, on duplication expenses 20 cents per page. On
4 car services there's -- you're not supposed to have luxury
5 services, but these -- you know, judges don't get to ride car
6 services but, you know, to go from Manhattan to Westchester I'm
7 not sure even with a somewhat beat-up town car that you can do
8 it, that it comes in at less than what the guidelines refer to
9 as a luxury item.

10 Twenty-dollar meals or -- you know, I guess unless
11 you're eating at Burger King get pretty tough in the city, but
12 they are what they are.

13 MR. VELEZ-RIVERA: Yeah.

14 THE COURT: Again, I don't want to be exacting a
15 double penalty. I don't know the extent to which your
16 office -- you know, there were a lot of these expense
17 statements we got that just had a dollar amount for it
18 duplicated and I don't know whether people have adhered to the
19 20 cents per page or not. They put in for meals and it doesn't
20 indicate I have a total for a specific day. Doesn't indicate
21 how many people, how much per person.

22 MR. VELEZ-RIVERA: I could certainly tell, Your
23 Honor, I personally have made many phone calls about those two
24 items and I've been assured every time I have asked that the
25 copies are being kept to the 20-cent guideline and often less

1 than that and that with respect to meals some folks in the back
2 and I have had many discussions about that and they assure me
3 particularly for the charges that are way above the \$20.00
4 mark.

5 THE COURT: Right.

6 MR. VELEZ-RIVERA: There was more than one person.

7 THE COURT: Yeah, I couldn't tell -- we can't tell --
8 we don't know whether there was more than one person. They
9 don't indicate who it was.

10 MR. VELEZ-RIVERA: They don't indicate who it was,
11 Your Honor, but I personally have gone back and correlated
12 several of them to papers that were filed two or three days
13 later and that sort of thing and corroborated that several of
14 the professionals that I've asked were working late on some
15 projects for those particular times.

16 THE COURT: Okay.

17 MR. VELEZ-RIVERA: I've gone through most of those
18 with a fine-toothed comb.

19 THE COURT: All right. So you're -- your office is
20 satisfied that the expenses as they've been reduced based on
21 the discussions with you are consistent with the General Orders
22 and the guidelines?

23 MR. VELEZ-RIVERA: Yes, Your Honor. There were, as a
24 general matter, far better shape than they were the last time.

25 THE COURT: I am not surprised. Okay. There were a

1 few expensive airfares relatively. I mean, I haven't -- you
2 know, I don't fly much anymore, but in -- you know, I know
3 airfare has gotten more expensive. Have you looked -- did your
4 office review hotel expenses and airfare expenses?

5 MR. VELEZ-RIVERA: We did, Your Honor. They were a
6 tad bit on the high side but because they were one-shot affairs
7 we were fine with it. You know, at best I think -- at worst, I
8 should say, they would have gone over, you know, what we would
9 have thought would have been acceptable by about \$100.00 or
10 something like that.

11 THE COURT: Okay. All right.

12 MR. VELEZ-RIVERA: So we were okay with those.

13 THE COURT: Let me see whether generally I had any --
14 I guess I'll ask this of Mr. Kadish specifically on the
15 Greenberg Traurig application. I understand the position of
16 the Committee, but you had items identified as "special
17 clerical service." There were --

18 MR. KADISH: Your Honor, actually if you --

19 THE COURT: I don't know whether that's -- you know,
20 over time that --

21 MR. KADISH: If you look at the schedule that
22 Mr. Flaxer handed up, I'm going to tell you that Ms. Lim seems
23 to have gone through our expenses very finely because we have
24 agreed with her and with the U.S. Trustee to reduce \$708,86 --
25 I'm reading off of Mr. Flaxer's chart at the bottom. In -- in

1 those charges \$45.00 and a cancelled car and \$212.00 and other
2 car charges.

3 THE COURT: Okay. All right. Thank you, Mr. Velez-
4 Rivera.

5 MR. VELEZ-RIVERA: That correlates with my notes,
6 Your Honor.

7 THE COURT: Okay. All right. All right. Let me
8 address before we get into the specifics of the applications.
9 I'm very mindful of the objections to currently dealing with
10 the interim fee applications at this time whether there's
11 sufficient funds remaining in the estate whether these are
12 objections that have been raised by exchangers or by members of
13 the Committee and I appreciate Mr. Benitez's comments today.

14 Given the applications as submitted reflect the --
15 with respect to first interim applications, a 40 percent hold-
16 back and with respect to subsequent interim applications,
17 the -- it's really paying 30 percent, a 70 percent hold-back,
18 the Court will overrule the objections to consideration of the
19 fee applications at this time and subject to going through the
20 specific applications the Court is prepared to award interim
21 fees to the various professionals.

22 All right. Mr. Flaxer, do you want to go through
23 now --

24 MR. FLAXER: Yes, Your Honor. The motion from --

25 THE COURT: Just give me one second, Mr. Flaxer. Let

1 me -- before we get into the specifics, let me say in
2 overruling the objections that have been made the Court having
3 applied Section 330 of the Bankruptcy Code concludes that fees
4 and expenses subject to looking at the specific amounts are
5 necessary and were reasonably likely to benefit the estate.
6 That's certainly the standards that the Ames Department Store
7 case, which the Court places a lot of reliance on, 76 F.3d 66
8 (2d. Cir. 1996). In cases it cites and discusses, as I say, I
9 believe that the efforts of the professionals for whom fees are
10 sought were necessary and reasonably likely to benefit for the
11 estate, at least as it appeared at the time the services were
12 performed, which is the applicable test.

13 I reviewed the cases that the objectors cited in
14 support of deferring further consideration of the interim fee
15 applications at this time and I do not believe that those cases
16 support postponing review of the applications until
17 confirmation.

18 All right. Now, let's go on and talk about the
19 specifics. Let me find my notes on the Olshan Grundman. Okay.
20 Mr. Flaxer.

21 MR. FLAXER: The Oshan firm is reducing its requested
22 expenses by \$470.00 for meals and \$93.75 for word processing
23 charges. Other than that, it's the same as in the application
24 except that in our amended notice we have a -- he inverted a
25 six and an eight to the expenses incurred where our \$13,681.00

1 we had \$13,000.00 -- no, I'm sorry. Yeah, we had sent out a
2 notice saying \$13,681.00. The correct number was \$13,881.00.

3 THE COURT: All right. Does anyone want to be heard
4 specifically as to the Oshan Grundman fee application -- fee
5 expense reimbursement? All right. As I said, I have a list of
6 expense items. I did not have issues with respect to the fees,
7 but based on Mr. Velez-Rivera's assurance that the -- as it
8 characteristically does, the U.S. Trustee and I'm sure here
9 others have looked at it carefully given the expense reduction
10 that has been agreed upon, the Olshan Grundman fees -- interim
11 fees payable at 60 percent and expenses paid at 100 percent as
12 those amounts have been adjusted and reflect in the summary
13 that Mr. Flaxer provided will be approved.

14 MS. FISCHER: Thank you, Your Honor.

15 THE COURT: Thank you, Ms. Fischer.

16 Mr. Flaxer?

17 MR. FLAXER: With respect to the Gilbert and Oshinsky
18 firm --

19 THE COURT: Just let me find my notes here. Okay?
20 All right. Go ahead.

21 MR. FLAXER: The fees incurred figure of \$775,868.00
22 is being voluntarily reduced by \$60,000.00, so that comes off
23 the top number so the 60 percent number is the \$429,521.10.
24 The expenses, there were no comments on those expenses so that
25 would be -- propose to be allowed at the \$12,315.00.

1 THE COURT: Yeah, here -- and let me ask Mr. Velez-
2 Rivera. There was a lack of detail whether they applied the 20
3 cents per page, I mean whether -- is someone here from the firm
4 or on the phone?

5 MS. QUINN: Yes, Your Honor. This is Kami Quinn from
6 Gilbert Oshinsky.

7 THE COURT: Yes. And are you able to tell me did you
8 limit the charge on copying the 20 cents a page?

9 MS. QUINN: Typically, we don't count -- we don't
10 charge of in-house copying and charge only for vendor copying
11 and I believe that is limited to 20 cents a page, but I can
12 confirm that.

13 MR. FLAXER: I haven't -- since I looked at this a
14 few weeks ago, Your Honor, I vaguely recall looking at the
15 retention papers and seeing a statement that they complied with
16 our local guidelines in general.

17 THE COURT: Okay. And can you tell me whether your
18 meals have -- are in compliance with General Order M150 of
19 \$20.00 per person?

20 MS. QUINN: Yes, I believe so.

21 THE COURT: All right. And you're representing that
22 to be the case?

23 MS. QUINN: Again, I'd have to confirm that. I
24 actually -- we have somebody here who goes through these bills
25 to make sure that they are compliant. She has done that. I

1 have not done that, so I believe so.

2 THE COURT: And so you're advised by your colleague
3 that they've been reviewed --

4 MS. QUINN: Yes.

5 THE COURT: -- and limited to \$20.00 per person?

6 MS. QUINN: Yes.

7 THE COURT: Okay.

8 [Pause in the proceedings.]

9 THE COURT: All right. Based on the representations
10 that have been made and the statements that were submitted, the
11 Court will go ahead and approve the fees of Gilbert Oshinsky
12 payable at 60 percent and the expenses at 100 percent and it's
13 the fees as reduced.

14 And let me say, the Court's expectation is in the
15 future going forward where you are seeking reimbursement for
16 duplicating, the statements should expressly provide what per
17 page charge you've made, and with respect to meals you should
18 indicate the number of people and \$20.00 per person he has
19 been -- complied with. This shouldn't depend on the U.S.
20 Trustee's Office having to go back and check with each of you.
21 Your paper should affirmatively show that.

22 With respect to travel expenses, detailed support for
23 the travel expenses should be provided. The -- you know, there
24 was one with Gilbert Oshinsky. I think there was one airfare
25 for \$927.00. I'm not sure of the where and the why. I will

1 trust that -- and I'm sure that the Trustee also reviews these
2 applications, but future applications this goes to everyone. I
3 don't mean to be singling out Oshinsky because this issue
4 recurred. The support for the expense reimbursement should be
5 quite specific in itemizing in what's included and whether it's
6 consistent with the Court guidelines.

7 Mr. Flaxer?

8 MR. FLAXER: Mr. McHale was seeking based on his load
9 star \$148,775.25 subject to the 60 percent -- I'm sorry. That
10 is a 70 percent hold-back, if you will. He's only seeking 30
11 percent of the fees incurred and that covers the period as is
12 the case with the Trustee's professionals other than Oshan and
13 Gilbert Oshinsky from February through April.

14 THE COURT: All right. Does anybody want to be heard
15 with respect to Mr. McHale's application for interim fees and
16 expenses? All right. Hearing no further objection and based
17 on the 70 percent hold-back on the fees, 100 percent on
18 expense, the application is approved.

19 MR. FLAXER: Your Honor, with respect to my firm, the
20 Golenbock firm --

21 THE COURT: Oh, that's an old story, Mr. Flaxer.

22 [Laughter.]

23 THE COURT: I'm sorry. I couldn't resist. I only
24 had a slight heart attack, minor heart attack.

25 THE COURT: I'm sorry. Go ahead.

1 MR. FLAXER: I --

2 THE COURT: Go ahead. I'll listen to you.

3 MR. FLAXER: I would note that we did discount the
4 fees incurred relating to disputes about fees by about
5 \$15,000.00. The fees for that period were \$1,341,525.00 after
6 the 30 percent hold-back we're seeking actual payment of
7 \$402,457.50. Our disbursements are being reduced by \$1,500.00
8 that was charged to this case that should have been charged to
9 another case. That's something that Mr. McHale picked up and
10 \$845.00 of secretarial overtime. So the numbers in the chart
11 and in the proposed order will reflect those changes.

12 THE COURT: I think there were outside duplicating
13 fees of \$1,917.50. Was that charge with the 20-cent per page?

14 MR. FLAXER: Yes.

15 THE COURT: And the same comments would apply to your
16 future applications. There were meal expenses. Didn't
17 indicate how many people. February 11, 2008, \$135.40. Not
18 clear how many individuals. February 14, 2008, breakfast for
19 \$276.77. Unclear how many individuals. There were a few
20 others like that as well.

21 MR. FLAXER: I can absolutely assure you I'm there
22 when all these things happened and there are always more than
23 one person and a large meeting with the Creditors' Committee
24 there were obviously a lot of people there and we don't order
25 from anyplace fancy.

1 THE COURT: All right. Anyone want to be heard on
2 the Golenbock fee application? All right. The Golenbock
3 Eiseman fee application with a 70 percent hold-back and 100
4 percent expenses paid as reduced are approved.

5 MR. FLAXER: Thank you, Your Honor. With respect to
6 the Johnson Pope firm, again, it's the same standard with the
7 70 percent hold-back results in an actual payment of fees of
8 \$81,511.05. The expenses there were -- their expenses seem to
9 have gotten through the process without comment by the Trustee
10 or the U.S. Trustee, but --

11 THE COURT: Again, the photocopying didn't indicate
12 the per page charge.

13 MR. FLAXER: There is somebody from the firm. If I
14 may introduce Mike Marcom.

15 MR. MARCOM: Michael Marcom, Your Honor. I looked at
16 the application. I see that they end in 20-cent increments.
17 I'm relatively certain we had that in place and I'm certain
18 that that's what we're charging on the meal issue. I'm certain
19 that we're complying with the General Order, as well to the
20 extent we had any meals. I don't even know if we had meals on
21 this application.

22 THE COURT: There were several expense items that
23 were described only as Michael C. Marcom February 8, 2008,
24 \$371.78; February 15, 2008, \$483.79; April 18, 2008, \$1,288.00.

25 MR. MARCOM: I am relatively certain, Your Honor,

1 that those are travel expenses where I was the one traveling.
2 It was charged to my credit card and then a check for my firm
3 was written to me; hence, that's how it's coded in the
4 application. I think I see that code. It gets coded as 35,
5 which is travel expenses. I look back. I was just looking
6 back and noticed that those were days that I traveled either to
7 a deposition of Mr. Rosen in Miami or I believe I was up here
8 for a hearing where Mr. Okun testified in February, I think.

9 THE COURT: All right. Mr. McHale, are you -- have
10 you satisfied yourself as to the --

11 MR. MCHALE: Yes, I have.

12 THE COURT: -- propriety of it?

13 MR. MCHALE: Your Honor, I have taken notes and all
14 my professionals are receiving it all based on [inaudible].

15 THE COURT: I don't mean to be -- you know, I mean,
16 it's what's required, particularly in a case that --

17 MR. MCHALE: I understand, Your Honor.

18 THE COURT: -- funds are tight.

19 MR. MCHALE: I understand, Your Honor.

20 MR. MARCOM: We'll take care of it next time, Judge.

21 THE COURT: All right. Anyone want to be heard on
22 the fees of Johnson Pope firm?

23 All right. So the fees of the Johnson Pope firm with
24 a 70 percent hold-back, expenses paid at 100 percent are
25 approved.

1 MR. FLAXER: Your Honor, next up is Robert Davenport,
2 the Trustee's real estate consultant. He has fees of
3 \$70,350.00. In light of the fact that the fees are not that
4 much money and he is a solo practitioner, we have not sought
5 any hold-back with respect to those fees and he has \$3,737.45
6 of expenses. Again, this is for the February through April
7 time frame only and he is here, Your Honor.

8 THE COURT: The issue -- modest issue but there
9 were -- he's seeking reimbursement for 3,037 miles driven and
10 he used a 55-cent-per-mile reimbursement rate. I believe that
11 the applicable IRS deduction amount at the time was 50.5 cents
12 per mile.

13 MR. DAVENPORT: In February I went to do inspection
14 and to take the real estate consultants that we hired to market
15 the property in Kansas. From New York to Kansas is not an easy
16 trip and, believe it or not, airfares are quite expensive going
17 from --

18 THE COURT: I'm not questioning --

19 MR. DAVENPORT: Okay.

20 THE COURT: -- your driving. It's the re -- it's the
21 rate you used per mile.

22 MR. DAVENPORT: I may have misread the IRS
23 regulations, but --

24 THE COURT: I may be wrong about it, so if you want
25 to -- if you can correct me, that's okay.

1 MR. DAVENPORT: Well, I read it as 55 cents per mile.

2 THE COURT: And as gas prices kept going up, the IRS
3 kept changing the deductible amount.

4 MR. DAVENPORT: To our benefit, they haven't changed
5 it downward.

6 THE COURT: So far.

7 MR. FLAXER: Your Honor --

8 THE COURT: Mr. Flaxer?

9 MR. FLAXER: Well, we can certainly check what it
10 was -- what the IRS regulation was on the --

11 THE COURT: All right. Here is what I would ask.
12 Let me -- is there anyone else who wants to be heard with
13 respect to Mr. Davenport's fees or expenses?

14 Mr. Flaxer, I'm going to approve the fees and
15 expenses subject to your reviewing to make sure that the
16 appropriate mileage rate was used and, if not, to make the
17 adjustment in the order that's submitted. One of my law clerks
18 just sends me a note that the IRS increased the rate to
19 approximately 58 cents in July, but that was after the expenses
20 were incurred, but they may reduce it again now that gas prices
21 have gone down.

22 All right. So subject to your -- before you submit
23 the order, Mr. Flaxer, I would ask you to check it and, if
24 necessary, make the appropriate adjustment.

25 MR. FLAXER: Next is the Rivero Gordimer firm.

1 THE COURT: Yes.

2 MR. FLAXER: Because this one also was a relatively
3 modest amount of money and it's a small firm we did ask that,
4 but we are asking that they be compensated for 100 percent of
5 their fees during this period, which is \$52,135.00, and the
6 comment, their expenses of \$1,587.00 also seems to have not
7 drawn any comment.

8 THE COURT: Other than from me. Did somebody check
9 whether the expenses comply with General Order M104?

10 MR. DAVENPORT: Your Honor, I can't say that I have.

11 THE COURT: All right. Mr. Flaxer, with res --
12 anybody else want to be heard with respect to the Rivero
13 Gordimer application?

14 I'm going to approve it conditionally subject to the
15 Trustee or his other professionals reviewing the expenses to
16 make sure that they comply. Their -- the expenses were for
17 Mr. Zurotti [Ph.] and Mr. Helton and was airfare, hotel, care
18 mileage, parking, meals. And so you're going to need to check
19 the -- they comply; if not, make the adjustment.

20 MR. FLAXER: Will do, Your Honor.

21 THE COURT: Okay.

22 MR. FLAXER: Your Honor --

23 THE COURT: And I'm sure everybody would like --
24 whose fees are being approved want to be paid before the end of
25 the year, which means any of the orders this week since I won't

1 be here next week.

2 MR. FLAXER: Absolutely. You'll have them most
3 likely tomorrow.

4 THE COURT: This is something I know lawyers are very
5 good about.

6 MR. FLAXER: All of a sudden we're prompt.

7 THE COURT: Okay. Mr. Flaxer, go ahead.

8 MR. FLAXER: With respect to the Kaufman and Canoles
9 firm, our special Virginia counsel, that period extends through
10 October. After April, they didn't have much time. Their fees
11 are \$38,022.00. We're proposing to pay that one in full.
12 Their expenses are \$3,596.85. They also did not draw comment
13 unless --

14 THE COURT: Where are they based?

15 MR. FLAXER: Norfolk. They also have a small office
16 in Richmond.

17 THE COURT: Well, there were -- these are small
18 amounts, but there were -- on April 3, 2008 and July 31, 2008
19 they charged travel expenses for D. Ruindoski [Ph.] to and from
20 Richmond \$91.62 and \$100.61. I question if they -- where they
21 were -- I -- it was to and from Richmond. From where, I don't
22 know. They're traveling between two offices I raise a question
23 whether those are reimbursable.

24 MR. LEWANDOWSKI: Your Honor?

25 THE COURT: Yes.

1 MR. LEWANDOWSKI: This is Dennis Lewandoski. If I
2 could speak to that.

3 THE COURT: Sure.

4 MR. LEWANDOWSKI: Yes, we were traveling from Norfolk
5 to the -- my Norfolk office to the Richmond Bankruptcy Court.

6
7 THE COURT: Okay. This was in connection with the --
8 I'm blanking on the name of the case in Richmond.

9 MR. FLAXER: At the West Oaks Mall.

10 THE COURT: West Oaks Mall. Was this in connection
11 with the West Oaks Mall?

12 MR. LEWANDOWSKI: Yes, sir. And the settlement that
13 occurred involving the New York Trustee and the Richmond
14 Trustee.

15 THE COURT: All right. You've answered my question.
16 And can you tell me whether your photocopying expenses were
17 limited to 20 cents a page?

18 MR. LEWANDOWSKI: Yes, sir, they are.

19 THE COURT: Okay. All right. Anyone want to be
20 heard on the Kaufman and Canoles application?

21 All right. The Court will approve the payment of the
22 fees and expenses for Kaufman and Canoles in the amounts listed
23 in your schedule, Mr. Flaxer.

24 MR. FLAXER: Thank you, Your Honor. With respect to
25 the Greenberg firm, Your Honor, the fees incurred for the

1 applicable period from -- for that firm it is -- actually, I
2 think this is a mistake. It says, 2/1/08 but it should be
3 3/1/08 through 4/30/08. They're only -- it's a two-month
4 because the first time they went through February. I apologize
5 for that mistake.

6 THE COURT: All right.

7 MR. FLAXER: Getting this chart right. That figure
8 is \$124,463.00. Based upon discussions with the Trustee, the
9 Greenberg firm has agreed to defer it. Not waive, but defer it
10 to a subsequent application. Fees relating to the fee
11 disputes.

12 THE COURT: Yes.

13 MR. FLAXER: So that was \$78,998.50. So that reduced
14 the figure to which the 30 percent gets applied resulting in --

15 THE COURT: I'm not a big fan of fees -- on fees. In
16 other words, where you have to deal with what fees may be
17 recoverable, I'll certainly listen to this if appropriate at
18 the end of the case, but don't count on it, anybody.

19 Go ahead, Mr. Flaxer.

20 MR. FLAXER: As a result, the actual payment that
21 would be made is \$13,639.35. The firm also agreed based on
22 discussions with the Trustee and with the U.S. Trustee to
23 reduce overtime by \$708.86, I think [inaudible] already went
24 through this.

25 THE COURT: Yes.

1 MR. FLAXER: \$45.39 for cancelled car charge and
2 \$212.28 for other car charges.

3 THE COURT: All right. Anyone want to be heard on
4 this? All right. The Court will approve the award of interim
5 fees as adjusted. It's deferred, not reduced, I understand,
6 with a 70 percent hold-back and the expenses as adjusted and
7 100 percent. I'll approve that.

8 MR. FLAXER: Thank you, Your Honor. And lastly, with
9 respect to the Huron firm this covers a two-month period, March
10 and April of '08. The fees incurred were \$145,912.00. I'm
11 told that built into that is a 20 percent discount, that --
12 we're told by the Huron firm that that's what that number
13 reflects. They've agreed to defer, not reduce but defer
14 \$22,210.00 of expense -- of fees. I'm sorry. Fees, which
15 represents \$9,920.00 -- \$9,920.00 of fee dispute fees, if you
16 will, and certain time of Mr. Powers and exceeded eight hours a
17 day, which resulted in \$12,290.00 that's being deferred.

18 And this is mutually without prejudice meaning the --
19 all rights are being reserved to seek further reductions for
20 which -- to challenge further reductions.

21 THE COURT: There were a lot of meals that exceeded
22 the \$20.00 limit that are in the expenses. Mr. Samet? I mean,
23 I can give you the whole list of dates and they're all --

24 MR. SAMET: I have that --

25 THE COURT: -- Mr. Powers'.

1 MR. SAMET: -- list, Your Honor. Your Honor, Huron
2 went by the IRS guidelines, which is a \$49.00 a day for actual
3 travel. This was actual travel time to Denver to close up the
4 offices. Secondly, the --

5 THE COURT: I'm just saying about meals.

6 MR. SAMET: Meals.

7 THE COURT: Meals. They exceeded that number on some
8 of the entries.

9 MR. FLAXER: We believe that they were as adjusted
10 reduced down to a limit of \$49.00. It also reflected the fact
11 that there was only as an example breakfast or dinners. It did
12 not include lunch charges for that date for the travel work
13 that was done.

14 MR. LUKENDA: Your Honor, if I may clarify the
15 original fee statements, which were submitted early on --

16 THE COURT: Yes, Mr. Lukenda.

17 MR. LUKENDA: I'm sorry. James Lukenda for Huron
18 Consulting. The actual fee statement submitted earlier on
19 actually sort of occurred before we also went through the first
20 round and addressed questions. In my application here I
21 discussed how we went back through the application at the time
22 we submitted it and calculated the number of days for people --
23 or Chris Bowers [ph.] is out of town. Apply the \$49.00 flat
24 rate and then deducted all the other meals to only charge that
25 out-of-town allowed rate. So while there maybe -- there are

1 meals in there that are over that have adjusted for that in
2 submitting the application.

3 THE COURT: Thank you, Mr. Lukenda. Mr. Velez-
4 Rivera, what's the Trust -- U.S. Trustee's position on \$49.00
5 versus \$20.00?

6 MR. VELEZ-RIVERA: We hear that from time to time,
7 Your Honor.

8 THE COURT: And what's your position on it?

9 MR. VELEZ-RIVERA: We -- so long as it's -- we did go
10 through these and I should say we did notice that in many
11 instances charges that could have been made just weren't, so on
12 balance we were okay with it.

13 THE COURT: All right. Anybody else want to be
14 heard?

15 All right. The fee application of Huron with a
16 portion of the fees deferred with a 70 percent hold-back and
17 expenses in the amount sought, which Mr. Velez-Rivera assured
18 me he's reviewed with Huron will be approved.

19 MR. FLAXER: Your Honor, I'm told that by -- by my
20 client that I managed to skip over the Deloitte firm.

21 THE COURT: You did.

22 MR. FLAXER: That would make me very unpopular.

23 THE COURT: Probably so since theirs is a pretty big
24 fee application.

25 MR. FLAXER: The fees for that three-month period for

1 that firm are \$2,077,079.00. The amount to be paid as a result
2 of the 70 percent hold-back --

3 THE COURT: Just give me a second until I get --

4 MR. FLAXER: Yes.

5 THE COURT: -- to my notes. Okay. Go ahead.

6 MR. FLAXER: The amount to be paid in fees it would
7 be \$623,123.76. The expenses through several comments
8 resulting in a reduction of \$415.64 for local tabs and \$48.00
9 of meals, which brings the expenses to be paid in at
10 \$14,870.66.

11 THE COURT: Now, I understand that Deloitte carried
12 the laboring oar on the tracing analysis that was done.

13 MR. FLAXER: That's correct.

14 THE COURT: And that's been largely completed now?

15 MR. FLAXER: That's correct.

16 THE COURT: So the -- what will Deloitte be doing
17 going forward?

18 MR. FLAXER: They will be providing litigation
19 support in our pending litigations and their -- other than
20 that, they're primarily responding to questions. As questions
21 come up, we ask them and they can get the answer fairly quickly
22 and feed it back to us.

23 THE COURT: Okay. Anyone want to be heard with
24 respect to the Deloitte expenses?

25 Mr. Velez-Rivera, given that the large amounts, I

1 assume, that's something that your office has looked at
2 carefully.

3 MR. VELEZ-RIVERA: As well, Your Honor. Actually, on
4 this one, for example, the reduction in the local car charges
5 was the result of a very detailed line-by-line analysis and the
6 professionals concurred with us on that one.

7 THE COURT: All right. Anyone else want to be heard?
8 Okay. Deloitte fees with the 70 percent hold-back in expenses
9 as reduced paid in full are approved.

10 MR. FLAXER: I will not hand up the order. I
11 understand we have two items to go over. We'll get it down
12 here tomorrow.

13 THE COURT: Okay.

14 MR. FLAXER: I think that leads to motions to dismiss
15 on the pretrial conferences.

16 THE COURT: Correct.

17 MR. FLAXER: And with that, I will turn this over to
18 my partner, Jackie Veit.

19 THE COURT: Let me shift some paper here. Actually,
20 let's take a ten-minute recess. Okay.

21 [Recess taken.]

22 THE COURT: Please be seated.

23 Good afternoon.

24 MS. VEIT: Good afternoon, Your Honor. Jackie Veit
25 from Golenbock Eiseman. We have two adversary proceedings on

1 today. One is the case against Wachovia and one is the one
2 against the JPS defendants and others. My suggestion is
3 subject to what the Court would like to do is that we deal with
4 the Wachovia case first because it's just a pretrial conference
5 and should be relatively quick as supposed to oral argument.

6 THE COURT: Yes, let's do that. Nobody likes the
7 cash management order I entered.

8 MS. VEIT: That's in the other case, so --

9 THE COURT: Okay. All right. Counsel, please make
10 your appearances in this.

11 MR. CIEV: Good afternoon, Your Honor. Jordan Ciev,
12 C-i-e-v, from Reed Smith, along with my partner Daniel Marlow,
13 M-a-r-l-o-w, further Wachovia defendants in the adversary
14 proceeding.

15 THE COURT: Good afternoon.

16 MS. VEIT: Good afternoon.

17 MR. CIEV: Good afternoon.

18 MS. VEIT: Your Honor, this is adversary proceeding
19 number 08-01604. We're here today on a pretrial conference --
20 or preliminary conference, rather. The Wachovia defendants
21 have filed a motion to dismiss.

22 THE COURT: Yes, when am I going to be hearing that
23 in January -- late January.

24 MS. VEIT: Actually, the hearing date was moved to
25 February 4th.

1 THE COURT: February 4th. Okay.

2 MS. VEIT: The paper -- it will be fully briefed by
3 the 20th of January.

4 THE COURT: Okay.

5 MS. VEIT: But we are proceeding with discovery
6 notwithstanding the pending motion. I have a --

7 THE COURT: Did you do 2004 discovery before you
8 filed a complaint?

9 MS. VEIT: We did a 2004 discovery, yes. It was not
10 completed. We went ahead and filed. We did not, for example,
11 take any depositions and the discovery -- the document
12 discovery was not completed by Wachovia, but I believe it will
13 be completed in the course of this adversary proceeding and
14 likewise, we will provide discovery.

15 THE COURT: Okay. Should I be setting a full
16 schedule before we hear the motion to dismiss?

17 MS. VEIT: I guess that's up to the Court.

18 THE COURT: And what is the preference of counsel?
19 Doesn't necessarily follow that I'll do that, but let me ask
20 you your -- what you would like.

21 MS. VEIT: We have negotiated a schedule that takes
22 it through discovery and expert discovery up until summary
23 judgment motions. If the Court would like to hear it, I can
24 provide it or give it to the Court in --

25 THE COURT: Well, if you have a copy --

1 MS. VEIT: -- written form.

2 THE COURT: -- why don't you hand it up?

3 MS. VEIT: Certainly.

4 [Pause in the proceedings.]

5 THE COURT: I know I made Wachovia very unhappy
6 earlier in the case with the page limits I had imposed on the
7 briefing. I relented somewhat, but if I go ahead and approve
8 your proposed case management scheduling order, there are
9 certain provisions that I include in every case management and
10 scheduling order that I enter. Probably what I would do is
11 the -- do you have a disk with this?

12 MS. VEIT: I don't believe I have a disk, but I can
13 get it down to the Court tomorrow.

14 THE COURT: Well, what I -- I'll -- I want to ask you
15 about the schedule. Probably what I would do is enter a
16 separate order that imposes some additional requirements that
17 the page limits, the -- I do require that within 14 days after
18 the entry of the case management order that the parties meet
19 face to face to discuss settlement or ADR and if they do so
20 again within 14 days after close of fact discovery. But I
21 can -- let's talk about -- so that is going to be required
22 either in connection with this order or in a separate order.

23 And also, with respect to any discovery disputes
24 should there be any, I don't permit the filing of discovery
25 motions. Parties -- counsel are to meet and confer in an

1 effort to try and resolve the disputes and if they're unable to
2 do that to call chambers and arrange a mutually-convenient time
3 for a conference call. I think in the last two years there's
4 only been one instance when I wasn't able to resolve the
5 discovery dispute on the telephone without briefing where I
6 required, you know, except an additional brief, so I'm usually
7 able to do that. Usually counsel or experienced counsel are
8 usually able to work out the disputes without having to raise
9 them with the Court.

10 Let's just talk about -- and I see you propose to
11 have initial disclosures completed this week. With the 2004
12 discovery that the Trustee took did you take from third parties
13 or only from Wachovia?

14 MS. VEIT: Well, the Trustee has taken 2004 discovery
15 from other parties, but for purposes --

16 THE COURT: Right. And have you turned that over as
17 part of your initial disclosures?

18 MS. VEIT: We intend to produce documents from those
19 productions, as well as other sources of documents as part of
20 our document production. We won't be turning them over with
21 our initial disclosures but when we do our document production,
22 which we're in the process of doing now, those would be
23 included.

24 THE COURT: What discovery does the Trustee
25 anticipate taking in connection with the case?

1 MS. VEIT: From our perspective if -- we would like
2 more documents from Wachovia that are still missing, which we
3 will talk with counsel from Wachovia about it and try to
4 resolve what we think is missing still from the production.
5 There are a fair amount of depositions that we anticipate
6 needing. In this case, Wachovia through four different offices
7 in four different states had connections with Mr. Okun and the
8 1031 debtors and the IP of A entities that are all -- come up
9 in the course of the complaint.

10 So unfortunately, we'll need to depose different
11 people from different offices to get -- put the whole picture
12 together. So I think that the discovery will primarily be a
13 Wachovia personnel, but it could be, you know, 10 or 15
14 depositions in that range of Wachovia.

15 THE COURT: All right. Mr. Ciev, what discovery do
16 you anticipate taking?

17 MR. CIEV: Well, we, sir, recognizing that the --
18 that the Trustee has 2004 discovery rights and we've produced,
19 I believe, 75,000 pages or so, but recognizing that the Trustee
20 has rights to depositions and all we didn't seek any stay of
21 discovery. In fact, we served our own document request so that
22 when the Trustee commences with those depositions, we'll be in
23 a position to receive the documents as Your Honor indicated.

24 We believe that there will be some third parties who
25 are likely to want to hear from some of the exchangers

1 themselves relevant to some of the issues and certainly to the
2 extent we're able to folks associated with the Okun entities
3 and, of course, we recognize that there will be Wachovia
4 employees and ex-employees who will be deposed as part of this.

5 But until we get a full handle on the Trustee's
6 documents, which we haven't gotten through no fault of theirs,
7 it's a recent request we made but until we get a full handle on
8 those we're not in a position to give a full response to that,
9 but sketching it out that's where we think we are now.

10 THE COURT: How did you all pick the May 22 date for
11 cutoff of fact discovery? It's a little longer than I
12 ordinarily give even recognizing that this is a large case.

13 MR. CIEV: I think the discussion was because we had
14 this -- this conference was schedule I think before
15 Thanksgiving. We said we would serve a document request. It
16 would take about 30 days to respond. It would be -- I think it
17 was going to be about five, five and a half months for
18 discovery after that recognizing Christmas, New Year's was --
19 you know, nothing was likely to start --

20 THE COURT: Right.

21 MR. CIEV: -- till January, so I think it was really
22 about a five-month deposition window recognizing there's a lot
23 of travel, some former employees. I think that was the
24 thinking.

25 MS. VEIT: I think that's fair. There's just a lot

1 of different witnesses in different locations that will have to
2 be deposed. It's a big case. We have a lot of documents here.

3 THE COURT: It would be unusual that dispositive
4 motions would hinge in a completion of expert discovery. You
5 think otherwise here? I mean, you have the date for filing
6 dispositive motions. One of the things that I do insist on is
7 compliance with Rule 7056 dash -- I can't remember now whether
8 it's dash one or two of our local rules that require that you
9 request the premotion conference before filing any summary
10 judgment motions.

11 So probably what you ought to do is give me a disk
12 that goes with this order, but what I ordinarily do is set a
13 deadline for making a request for -- to be able to file a
14 summary judgment motion or summary judgment motions. Why is it
15 that you think you won't know whether you're going to make
16 summary judgment motions until after the completion of expert
17 discovery?

18 MS. VEIT: My -- in my experience, we've often done
19 it this way in cases, not just in Bankruptcy Court and
20 elsewhere, that sometimes there are issues that experts testify
21 on that go to the merits of the claim. Maybe that cert -- that
22 other claims at the conclusion of fact discovery you know
23 already, you're going to bring on the summary judgment motion.

24 THE COURT: All right. I think what I'll do is I'm
25 prepared to accept the deadlines you've given for fact --

1 cutoff of fact discovery and for expert reports and for
2 completion of expert depositions. I'm going to think a little
3 bit more about the dispositive motion issue. I've flagged for
4 you some of the provisions that are my standard provisions that
5 go into the case management order. So what I'll probably do is
6 when I get the disk from you enter the case management
7 scheduling order, but you won't be surprised -- won't be
8 surprised at least as to the dates for fact and expert
9 discovery. Okay.

10 MR. CIEV: Okay. Thank you, Your Honor.

11 THE COURT: All right.

12 MS. VEIT: Thank you, Your Honor.

13 THE COURT: And again, if there are any discovery
14 issues I'm sure you'll hopefully be able to resolve them
15 yourself and if you can't just arrange -- call my courtroom
16 deputy and arrange a mutually convenient time for telephone
17 conference. Okay?

18 MS. VEIT: Thank you, Your Honor.

19 THE COURT: Thank you very much, counsel.

20 MR. CIEV: Thank you.

21 MS. VEIT: The other matter that's on for today is in
22 the case McHale v. JPS NH, LLC, which is at number 08-01402.

23 THE COURT: Right.

24 MS. VEIT: Two of the defendants, the first two, JPS
25 NH, LLC and NH Aaron Road, LLC filed motions to dismiss, so I

1 assume that their counsel will go first.

2 THE COURT: All right. And let's just -- and in this
3 case where people -- nobody is happy with case management
4 scheduling order that I entered, I'm a little confused as to
5 why because the agreement had been to coordinate discovery with
6 the New Hampshire case and I thought we did that. The only
7 date I added to what was in the stipulation and order in New
8 Hampshire was a deadline for completing expert depositions.
9 That was the only thing that was different.

10 MS. VEIT: I don't --

11 THE COURT: The first order I entered may have been
12 confusing but I thought I had fixed that, so what's the
13 problem?

14 MS. VEIT: I think when the parties -- at least among
15 ourselves when we talked about coordinating with New Hampshire
16 we didn't have in mind that the exact same discovery schedule
17 would apply to this case because this case is much broader. It
18 has more parties. It has more claims. It's more complicated
19 and it was filed months later. That case in New Hampshire only
20 has two parties and they've already been in discovery since
21 August. And as a practical reality, by using that schedule we
22 have expert reports due on January 5th when we haven't even had
23 the exchange of discov -- of initial disclosure yet, let alone
24 having conducted deposition or document discovery in this case.
25 So I don't think it's really possible for the parties to do

1 expert discovery before fact discovery.

2 THE COURT: That I would agree with. Hang on.

3 MS. VEIT: So the proposed order that we all
4 submitted --

5 THE COURT: Just let me find the document.

6 MS. VEIT: Certainly.

7 [Pause in the proceedings.]

8 THE COURT: Okay. Go ahead.

9 MS. VEIT: So under the existing order, for example,
10 fact discovery was to go until March 3rd.

11 THE COURT: Right.

12 MS. VEIT: But you have expert discovery starting
13 January 5th, so that was part of the problem.

14 THE COURT: Okay.

15 MS. VEIT: So in the order that we all submitted we
16 moved the fact discovery a little if the Court is willing till
17 March 31 just because of -- we're just doing initial
18 disclosures now, but I agree the issues in this case is not as
19 broad as --

20 THE COURT: But why are the issues really any
21 different than in the case before Judge Barbidoro? You get
22 more parties, but that -- why are issues different?

23 MS. VEIT: Because, first of all, only one of the JPS
24 parties was there, Newton Baird, and all that's at issue is the
25 relative priority of those two means as against one another.

1 It's the primary issue if I understand. Here in this case I
2 think we get into broader claims invalidating their liens of
3 both of the JPS entities and also as against the other parties
4 that have liens.

5 THE COURT: All right. One -- do you have -- why
6 don't you hand up your proposed order again? I'll think about
7 it.

8 MS. VEIT: And, Your Honor, I'm anticipating your
9 question. I don't have a disk. I apologize. I'll send it
10 with the other two.

11 THE COURT: That's fine. Why don't you give it to my
12 law clerks? All right. I mean, I -- I will most definitely
13 adjust the expert discovery. I'm not sure at this point
14 whether I'm going to alter the date for the completion of fact
15 discovery. I may want to see how you're all doing. I'll keep
16 an open mind about extending it, but we've got time to deal
17 with that.

18 MS. VEIT: That's fine, Your Honor. Thank you.

19 THE COURT: Okay. So let's get to the motion to
20 dismiss.

21 MR. O'CONNELL: Good afternoon, Your Honor. Scott
22 O'Connell and Lesley Varghese from Nixon Peabody. We represent
23 the JPS defendants that's been referenced. My mission here
24 today is to make sure that you don't even have to look at that
25 case structure and order because we think the claims as per JPS

1 should be dismissed. We have found our way into an interesting
2 conundrum, at least for you, and given your relative authority
3 from your colleagues and probably lunch mates you'll have to
4 pick perhaps one of them over the other. I'm going to convince
5 you, I hope, today that Enron is the standard that you should
6 be applying and not Fabrikant. Indeed --

7 THE COURT: Is there some reason you didn't even
8 bother to cite Fabrikant?

9 MR. O'CONNELL: Fabrikant. Well, it's
10 distinguishable, Your Honor, for the following reasons.
11 It's -- in that case, and I'll jump right to it, that situation
12 is different than what we have here in that that case the
13 immediate transferor was no longer an interest in the assets --
14 no longer had an interest and so the question became, you know,
15 whether it was impossible or impracticable to add that person if
16 necessary where they did not have the assets. That is not the
17 case here. We are on all fours with Enron with regard to the
18 fact that Mr. Okun still owns the property. My clients have --

19 THE COURT: Well, the trust is a party.

20 MR. O'CONNELL: True, true. But, I mean, the --

21 THE COURT: It's the trust that owned the property,
22 correct?

23 MR. O'CONNELL: That's correct. That's correct,
24 but --

25 THE COURT: As a named defendant.

1 MR. O'CONNELL: Yes, it is. I don't think that
2 changes the analysis, however.

3 THE COURT: Well, but that's one major difference
4 with Enron. Judge Gonzalez was faced with a situation where
5 the original transferor no longer existed. It had been
6 dissolved.

7 MR. O'CONNELL: But I still think that the plain
8 language of 550, which is the necessary remedy for 548 and 549
9 is crystal clear, except as otherwise provided in this section
10 to the extent that a transfer is avoided under the relevant
11 sections. It does not say "avoidable" and the analysis that
12 Judge Gonzalez went through in Enron is on all fours with us as
13 far as, you know, the meaning of the statute.

14 How can you possibly have a statutory scheme that
15 essentially -- if you interpolate the word "avoidable" which is
16 not there, you read out the statute of limitations --

17 THE COURT: Do you have --

18 MR. O'CONNELL: -- with regard to immediate
19 transfers.

20 THE COURT: Do you have any case that dismissed the
21 claim against the immediate transferee where the original
22 transferor was named as a defendant in the same action. I
23 understand your argument about the statute of limitations. I
24 understand your argument about the plain language of the
25 statute. I've read my colleagues' decisions in Enron and

1 Fabrikant more than once. Judge Gonzalez in Enron at 343 B.R.
2 82 says that:

3 "Nevertheless, while avoidance must be established before
4 recovery is effectuated, the two actions may be brought
5 simultaneously as long as the recovery is not effected
6 until the transfer has been established to be improper."

7 So, you know, Judge Gonzalez at Enron was faced with
8 a situation where the original transferor, an Enron entity, had
9 been dissolved and therefore no action could be brought against
10 it, but Judge Gonzalez seemed to say pretty clearly at page 82
11 of his decision that the two -- the two actions, and there's no
12 reason that I see why they can't be in a single action. Here
13 the Okun trust is named as a defendant. Even if you're right
14 that before the remedy under 550 can be awarded against your
15 client that the original transfer needs to be avoided, that
16 defendant is before the Court.

17 I mean, even, you know, Judge Bernstein in Fabrikant
18 goes through an analysis that Judge Gonzalez did not by looking
19 at Federal Rules of Civil Procedure 19 and if you apply Rule 19
20 in Judge Bernstein's analysis, if you're trying -- if you would
21 affect the interest of the original transferor, they would be a
22 necessary party and they are a party here. So it seemed to me
23 that I don't have to resolve the issue that --

24 MR. O'CONNELL: I would submit that you do, though.

25 THE COURT: -- it raised. Tell me why.

1 MR. O'CONNELL: Yeah. Well, first you asked for a
2 case and I'll have to confer with my colleague, but I believe
3 that the Latham & Watkins case that we've cited in our brief at
4 15, our original brief -- and I should note for the record,
5 Your Honor -- and let me pause right here. We filed a motion
6 to dismiss before an amended complaint came in --

7 THE COURT: I know and then you --

8 MR. O'CONNELL: -- and you saw the supplemental
9 filing and I just want to make sure you've seen that and then
10 reply.

11 THE COURT: Yes. Absolutely.

12 MR. O'CONNELL: Thank you. Okay. The Latham &
13 Watkins case, I believe, is of that ilk, but I would have to
14 check and I will do that when I sit down. It's a situation
15 where all parties were before the Court and the claims against
16 Latham & Watkins, who would be in the situation of my clients,
17 were dismissed out of the case because they were an
18 immediate --

19 THE COURT: See, you're --

20 MR. O'CONNELL: -- transferee.

21 THE COURT: You're trying to pit two of my colleagues
22 against each other and put me in the middle and it seemed to be
23 that --

24 MR. O'CONNELL: I'm not trying to.

25 THE COURT: -- this is -- you know, I can -- I don't

1 have to resolve the difference of opinion between Judge
2 Gonzalez and Judge Bernstein, because accepting either of you
3 the Trustee is okay here.

4 MR. O'CONNELL: Well, and I think --

5 THE COURT: Would you agree with --

6 MR. O'CONNELL: And I --

7 THE COURT: -- that if I were to accept Judge
8 Gonzalez's view as expressed in Enron, the Trustee still
9 satisfies the requirement?

10 MR. O'CONNELL: I don't.

11 THE COURT: Why not?

12 MR. O'CONNELL: Because here the difference in -- I
13 think it's Stark -- is that we as the defendant's immediate
14 transferor necessarily would --

15 THE COURT: Immediate transferee.

16 MR. O'CONNELL: Immediate transferee, excuse me,
17 follow exactly what process would happen with Okun. We will be
18 going through a simultaneous process where his conduct is
19 tried --

20 THE COURT: Yeah, we'll get it all resolved -- we'll
21 get it all resolved at one time.

22 MR. O'CONNELL: So how do we defend against that at
23 the same time that liability is being established or the remedy
24 is --

25 THE COURT: Vigorously, no doubt.

1 THE COURT: Well, I'm sure I will but the truth of
2 the matter is, we're not sure what essentially we are
3 litigating against. We're dealing with Mr. Okun. I mean,
4 first of all, the Trustee has real problems with their claims
5 against Mr. Okun. Under the Waggoner doctrine and under peri
6 delicto state law claims --

7 THE COURT: Not at all. Why does the Trustee have
8 problems against Mr. Okun in pari delicto I thought doesn't
9 apply where a trustee soothes insiders.

10 MR. O'CONNELL: But we're not insiders. There's no
11 suggestion that we're insiders.

12 THE COURT: That's not the claim against you. First
13 off, in pari delicto doesn't apply to the statutory
14 avoidance --

15 MR. O'CONNELL: I understand. It's -- it'd be all --

16 THE COURT: -- claims. You agree with that.

17 MR. O'CONNELL: I agree with that. Absolutely. But
18 those are only three of the ten claims. So we've got seven
19 more and so the point I'm making is there are some -- and I'll
20 cover the entire argument before I sit down, but the Trustee
21 has a significant row to hoe with regard to establishing or
22 vetting itself or getting away from the improper conduct of
23 Mr. Okun. I mean, they will wear that in the statutory -- in
24 the --

25 THE COURT: Not in the statutory claims.

1 MR. O'CONNELL: -- state law claims. I meant the
2 state law claims, not the statutory claims. That's absolutely
3 clear. 548, 549 would not be applicable there. Absolutely
4 crystal clear. But seven of the remaining claims are state law
5 based and they would and so we're essentially litigating
6 against those claims at the same time that Mr. Okun -- his
7 liability is being established and that's why the statutory
8 scheme provides for, avoid it [ph.] and gives them one year
9 after the avoidance is declared for them to bring an action if
10 they established that. And then we have the ability to defend.

11 THE COURT: Two years, but --

12 MR. O'CONNELL: Two years?

13 THE COURT: Bob Seifert [Ph.] changed --

14 MR. O'CONNELL: I believe it was one year. My
15 mistake. My mistake.

16 So that's with regard to the avoid language and I do
17 think that it's very different. I don't think it can be done
18 simultaneous in fairness to JPS. With regard to the other
19 claims that are before the Court, they sounded fraud. The
20 Trustee has not --

21 THE COURT: Well, you've studiously avoid talking
22 about JPS Capital in your motion. You would treat the other
23 JPS special purpose entities as pristine and the Trustee would
24 say, we need to collapse the transactions. And isn't the
25 Trustee right about that? Don't I have to -- I mean, I've got

1 to treat JPS as a collective group for purposes of this
2 analysis. Certainly, the allegation is made in the complaint.

3 MR. O'CONNELL: Well, JPS Capital is not before the
4 Court and didn't make any of the loans. I mean, they're not a
5 defendant here, so I don't know how you collapse them when
6 they're not, you know, before the Court in any fashion. I
7 think the --

8 THE COURT: Well, am I supposed to close my eyes to
9 the alleged conduct? I mean, that's what the Trustee refers
10 to -- you've -- the JPS entities here you make this point they
11 loaned, what, four and a half million dollars.

12 MR. O'CONNELL: Yes. That's correct.

13 THE COURT: And ignore the fact three million didn't
14 even pass go, immediately came back to JPS in the form of fees.

15 MR. O'CONNELL: Well, that's the Trustee's
16 allegation. That will be disputed but we have to take the
17 allegation as it's presented.

18 THE COURT: Sure.

19 MR. O'CONNELL: That's right. So we're not arguing
20 that here today, but let's assume that's true. I mean, most of
21 these events unfolded before Your Honor, so we've got the best
22 expert in the room on this stuff.

23 THE COURT: I don't know about an expert. You've
24 certainly --

25 MR. O'CONNELL: But --

1 THE COURT: -- events unfolded before my very eyes.

2 MR. O'CONNELL: That's right. And you were here when
3 the deal was cut with Mr. Okun. I mean, none of the property
4 at issue is part of the estate. I don't think that's disputed.
5 The Trustee has never said that this is, you know, property of
6 the estate. They're making theories that they want to reach
7 out and grab it.

8 But at the time that this court reviewed the transfer
9 agreement and specifically noted that this property in New
10 Hampshire was being carved out, you said, "This is to avoid
11 years of litigation." We cited the transcript to you.

12 THE COURT: It was to avoid years of litigation
13 whether that stuff would come into the estate. It didn't --
14 there's nothing in the transfer order that precludes the
15 Trustee from arguing through a tracing analysis now completed
16 that the debtor has an equitable interest, that under 541 it's
17 property of the estate. I guess it would have to be avoided,
18 so you can't -- I'm not sure it's property of the estate at
19 this point, but their argument is they've traced the flow of
20 funds. The transfer order didn't say the Trustee forever
21 waives releases, any claim to the New Hampshire properties. Am
22 I right on that?

23 MR. O'CONNELL: That's correct.

24 THE COURT: So you -- I mean, when I read your brief
25 and I started thinking back even before I read the Trustee's

1 opposition, I was thinking that didn't seem quite right to me.
2 I remember, yes, it avoided knock-down, dragged out litigation
3 at the time and certainly before the tracing analysis was
4 completed --

5 MR. O'CONNELL: Yes.

6 THE COURT: -- as to whether the estate had a good
7 claim as to the New Hampshire properties. Trustee now alleges
8 facts specifically that those properties were acquired by Okun
9 with funds stolen from exchangers or stolen from the 1031
10 estates.

11 MR. O'CONNELL: And I would submit the action for
12 this court still prevents them from making that claim because
13 JPS was brought in post-petition to try and fund the plan.
14 That was presented for consideration. That never came to be.
15 That is an entity that was brought in and looked at the playing
16 field and started to negotiate with the approval of the debtors
17 and the Creditors' Committee with Okun and his assets directly.
18 And it was based on that confluence of events that they took
19 the mortgages at issue as part of the effort to confirm the
20 plan to after the fact. To have that reliance essentially
21 taken out from under them, I would suggest, is inconsistent
22 with what this court ruled at the time.

23 I mean, the fact that you recognized in open court
24 that these properties are being carved out and this is a fair
25 resolution to avoid years of litigation certainly gave my

1 clients comfort that they were dealing with assets that were
2 available to secure the interest that they were funding.

3 THE COURT: And you may well have a good faith
4 defense. You may have affirmative defenses and so the Trustee
5 may very well have a tough row to hoe to recover on these
6 claims but the issue before me today is whether based on the
7 pleading -- the four corners of the pleading before me you get
8 the complaint dismissed.

9 MR. O'CONNELL: Now --

10 THE COURT: Not whether you've got a good defense,
11 whether, you know, either -- I mean, if the Trustee has to show
12 actual fraud, the Trustee may well have a hard time.

13 But on the other hand, let me ask you this. If the
14 Trustee were able to prove that JPS Capital entered into the
15 term sheet with no intention of ever funding the loans but only
16 to receive three million plus in fees will the Trustee have
17 established actual fraud?

18 MR. O'CONNELL: They will need to prove -- yes,
19 fraudulent intent -- assuming the facts that the Court has put
20 out there, which we disagree with just --

21 THE COURT: I understand that.

22 MR. O'CONNELL: -- to be clear, but --

23 THE COURT: This is --

24 MR. O'CONNELL: I understand. Just need to be clear
25 because a record is getting made.

1 THE COURT: Yes.

2 MR. O'CONNELL: Hypothetically you've put on the
3 table would give them a cause of action, but their complaint
4 does not allege that. They do not allege the fraudulent intent
5 of JPS. You can read their ten counts in vain looking for any
6 specific intent element. It does not have any of the badges of
7 fraud necessary for that type of claim.

8 THE COURT: All right. Well --

9 MR. O'CONNELL: And they've done that with Okun.

10 THE COURT: -- I'll hear what they have to say,
11 but -- okay.

12 MR. O'CONNELL: What's that?

13 THE COURT: No, I do want to hear what they have to
14 say about have they alleged --

15 MR. O'CONNELL: Yes.

16 THE COURT: -- sufficiently alleged fraud. They say
17 they have, but --

18 MR. O'CONNELL: Well, and I would submit to the Court
19 that under the 9(b) pleading requirements necessary, they have
20 not done what's necessary to do the who, what, where of the
21 client and we need to be able to defend it again that.
22 Especially if we're going to be in a simultaneous battle with
23 Mr. Okun, we need to know with particularity what is the
24 allegation of our fraudulent conduct.

25 Secondly under the Carr [Ph.] case, they need to be

1 able to establish now at the beginning of the case that we had
2 a fraudulent intent, which is not in the complaint. Without
3 that, they fail to state a cause of action. At a minimum, the
4 claim is deficient and needs to be replied but we would say
5 should be dismissed.

6 THE COURT: Let me ask you with respect to the
7 constructive fraudulent transfer claim --

8 MR. O'CONNELL: Yes.

9 THE COURT: -- does the Millen Bank [Ph.] case from
10 the Third Circuit which dealt with somewhat analogous
11 circumstances or facts, a term sheet that was -- really didn't
12 obligate the lender to anything and the issue was that fair
13 consideration. Would you agree that the Trustee has adequately
14 alleged a constructive fraudulent conveyance claim?

15 MR. O'CONNELL: No. Because we indeed have index --
16 we've given real value as the complainant acknowledges.

17 THE COURT: Well, what real value have you given?

18 MR. O'CONNELL: We incur legal fees to put -- try and
19 put the plan together and that was part of the term sheet and
20 the notes were undertaken in order to repay JPS for actual
21 expenses incurred to try and put this together.

22 THE COURT: Well, it might be that to the extent of
23 the value you actually provided in expenses incurred that it
24 can't be set aside, but specifically as to the commitment fees
25 that JPS Capital received doesn't the Mellin Bank case suggest

1 that I can't resolve this on a motion to dismiss. That is
2 sufficient --

3 MR. O'CONNELL: A factual issue.

4 THE COURT: Yes, to withstand --

5 MR. O'CONNELL: The courts --

6 THE COURT: -- a motion to dismiss and there's got to
7 be some discovery.

8 MR. O'CONNELL: I would say that the difference with
9 Mellin Bank in this case is that the Trustee has acknowledged
10 in this case that monies were disbursed. And now what the
11 Court is suggesting is, well, there may be a limitation on how
12 much was and isn't that a fact issue and I'll have to concede
13 that that is a fact issue. But if you look at the complaint as
14 pled, I think it undermined the holding of Mellin to answer
15 your very direct question.

16 Yours is slightly different, I think, and I think is
17 fairness there is a fact issue somewhere in there.

18 THE COURT: And what's your position with respect to
19 Mellin Bank? You don't think it's dispositive on this motion
20 to dismiss?

21 MR. O'CONNELL: I don't because the Trustee's
22 complaint is quite clear that -- I think it's different from
23 Mellin if I'm remembering Mellin correctly that here the monies
24 were disbursed. In that situation, no monies were disbursed.
25 I could be wrong about that.

1 THE COURT: But the monies that -- when you say
2 "monies were disbursed," you're talking about the expenses as
3 opposed to --

4 MR. O'CONNELL: The expenses. Right. You know, I --

5 THE COURT: You're not talking about the money that
6 went around like this?

7 MR. O'CONNELL: The loan commitment, you know, some
8 type of payment back for the origination loan. I'm not talking
9 about that. I'm talking about what was necessary in order to
10 start documenting the deal and doing what was necessary. I
11 don't think that occurred in Mellin but I'm not an expert on
12 that case, Your Honor. I think that makes a difference.

13 THE COURT: You'll forgive me if I never understood
14 what JPS was really doing. They would come back periodically
15 when I insisted that when a representative of JPS appear in
16 court it was never quite clear to me what was happening in the
17 effort to obtain this 300 million dollar loan secured by the
18 Okun assets. I'm not -- you know, I mean, it's --

19 THE COURT: And you are the one who lived through
20 this and I did not, so I can't answer your question. I know
21 that the deal did not come together for a variety of reasons,
22 not the least of which --

23 THE COURT: Mr. Okun --

24 MR. O'CONNELL: -- Mr. Okun's problems --

25 THE COURT: -- schnookered lots of people --

1 MR. O'CONNELL: That's right.

2 THE COURT: -- and I don't -- you know, that may well
3 be.

4 MR. O'CONNELL: And when you lend 300 million dollars
5 you do a lot of due diligence and I can't tell you what was
6 learned, but somewhere along the line that deal was not going
7 to happen but that predates my time in this case.

8 I am here on the motion to dismiss.

9 THE COURT: Right.

10 MR. O'CONNELL: I think the Trustee is overreaching.
11 I have a different point of view from Your Honor on 550. I
12 think the statutory language is clear and I stand on that.

13 THE COURT: Would you agree that if I concluded that
14 Fabrikant appropriately analyzes the issues that the 550 claim
15 survives?

16 MR. O'CONNELL: No, I think Fabrikant -- again, it's
17 a different issue. There was no --

18 THE COURT: Explain to me why.

19 MR. O'CONNELL: Yeah, sure. The immediate transferor
20 was not available in that proceeding and so the Court really
21 had -- it's kind of like what you're saying about Enron that
22 the entity was no longer available and so it was an
23 impossibility as opposed to -- and the enjoinder issue, could
24 you under Rule 19 proceed if you couldn't join someone and the
25 decision was in this set of circumstances, in this discrete one

1 off from the avoid -- avoidability language of 550, I believe
2 it's appropriate.

3 That is not the case here where you've got Mr. Okun
4 and his trust available and can -- and do the avoidance
5 necessary and then allow us to come in and deal with any
6 determination after that battle has been had. And again, I
7 think, you know, there's really no way to read Fabrikant and
8 have the statute of limitations provisions of the statute
9 survive. I think it's just erroneous with regard to, you know,
10 statutory --

11 THE COURT: Yeah, but isn't --

12 MR. O'CONNELL: -- construction.

13 THE COURT: Fabrikant -- I'll go back and relate them
14 with Watkins, but neither Fabrikant nor Enron --

15 MR. O'CONNELL: Yes.

16 THE COURT: -- there's no statute of limitations
17 here -- issue here. I mean, there may be --

18 MR. O'CONNELL: You're right.

19 THE COURT: -- some other case where you'd have a
20 good statute of limitations issues here. Haven't a statute of
21 limitations. Here you don't.

22 MR. O'CONNELL: I guess I have -- you're absolutely
23 right, but what I'm saying is the "reason avoided" is the magic
24 language and why Congress in its infinite wisdom chose that
25 word is to give meaning to the statute of limitations.

1 So, in other words, you cannot construe the statute
2 in a way that reads part of it to be meaningless and that's
3 what I'm suggesting. I'm putting the emphasis on "avoided" as
4 opposed to "avoidable," because if you accept "avoidable," then
5 the statute of limitations provision can never be invoked and I
6 don't think that's the intent. Well, certainly it's not
7 appropriate statutory construction to read that whole section
8 of the statute, even though it's not applicable here.

9 THE COURT: I think --

10 MR. O'CONNELL: It's evidence that it's intended to
11 be avoided.

12 THE COURT: I don't see why I have to resolve this
13 difference of opinion, if there is one, between Judges Gonzalez
14 and Judge Bernstein. I mean, Judge Bernstein at page 744 --
15 this is his Rule 19 analysis says, "A transferee that retains
16 title to or interest in the property conveyed is a necessary
17 party to the fraudulent transfer action."

18 Well, the Okun trustee is a party to this fraudulent
19 conveyance action, so that's not a problem. The language I
20 quoted to you earlier from Judge Gonzalez's opinion, I mean, he
21 didn't have to address and didn't address the issue of whether
22 the original transferor and the immediate transferee can both
23 be named in the same action, but it seems to me to be the
24 implication from what Judge Gonzalez said at page 82 of his
25 Enron opinion.

1 Whether in some other case on some other facts there
2 would be an issue about statute of limitations or where the
3 Court would have to resolve this -- the difference of what the
4 language to the extent avoided in the statute means, I don't --
5 I'm not -- I'll -- you say Latham & Watkins specifically.

6 MR. O'CONNELL: Yes. That's on page 15 of our brief.
7 I believe that stands for that proposition. I would also
8 suggest at the time that the case was remanded, the Gonzalez
9 decision was remanded back, the District Court had looked at
10 this and --

11 THE COURT: Well, the District Court I do have a
12 question --

13 MR. O'CONNELL: -- breathe life into --

14 THE COURT: -- for the Trustee's counsel. I mean,
15 you know, they -- I'm not sure that the footnote in Fabrikant
16 is 100 percent accurate. It's true that Judge Hellerstein
17 reversed Judge Gonzalez's order, but let me ask. Do you have a
18 copy of Judge Hellerstein's order?

19 MS. VEIT: It was attached to the reply papers, I
20 believe.

21 MR. O'CONNELL: Yes, we did attach it.

22 THE COURT: I didn't see it. I didn't see it there,
23 okay.

24 MR. O'CONNELL: It is, Your Honor.

25 THE COURT: Because he really decided it on somewhat

1 different grounds. I mean, it's not like this -- that he
2 weighed in with Judge Bernstein in what --

3 MS. VEIT: I can address it now or I can wait until
4 it's my --

5 THE COURT: You can wait. You can wait.

6 MS. VEIT: That's fine.

7 MR. O'CONNELL: Would you like a copy, Your Honor?

8 THE COURT: You know, I --

9 MR. O'CONNELL: It's attached as Exhibit B to the
10 reply, but I will give you another copy.

11 THE COURT: No, here's the reply. Let me see now.

12 MS. VEIT: Your Honor, if I may we've also attached
13 the transcript which gives more context because the order is a
14 summary order.

15 THE COURT: Right. I see it here and I didn't -- I
16 see red stuff online before, read -- and I didn't look at this
17 specific --

18 MR. O'CONNELL: Understood.

19 THE COURT: Read this over. Okay. You know, it's a
20 very short order that Judge Hellerstein entered and it's hard
21 to --

22 MR. O'CONNELL: I -- we've heard --

23 THE COURT: -- arrive exactly what -- I'm not sure
24 that he disagreed with Judge Gonzalez other than in the
25 circumstance where he said, first page of the order, "Why given

1 the circumstances of those transaction appellants have no
2 practical ability to affect a recovery under 11 U.S.C.
3 §550(a)(2) unless a declaration of avoidance against the
4 initial transferee can be made simultaneous." And of course,
5 the original transferor didn't exist anymore.

6 MR. O'CONNELL: Well, and he goes on to talk about
7 the impossibility. I mean, the one thread between Fabrikant
8 and the transcript that Judge Hellerstein provides with his
9 questions deals with the impossibility of bringing that other
10 party in and I think that is the common thread between those
11 two and a distinguish factor --

12 THE COURT: Okay. I have your --

13 MR. O'CONNELL: -- from our case.

14 THE COURT: -- argument.

15 MR. O'CONNELL: Thank you.

16 THE COURT: I'm not sure where it gets --

17 MR. O'CONNELL: I understand, Your Honor.

18 THE COURT: -- you on this.

19 MR. O'CONNELL: One last issue with regard to the
20 state law claims, though.

21 THE COURT: Yes.

22 MR. O'CONNELL: With regard to the equitable issues,
23 we've -- it's in our papers. I'd just ask you to focus on the
24 fact there is no fiduciary relationship. The Trustee may have
25 claims, as we discussed under 540 or 549, but the state law

1 claims are overreaching. You need privity. There needs to be
2 a basis with regard to unjust enrichment for them to assert
3 that claim and they simply don't have the standing or privity
4 in this situation. Remember, they are debtors in this case and
5 they have to take through Okun and the law of New York simply
6 does not support their claim either for an injunction,
7 constructive trust or unjust enrichment on the case.

8 THE COURT: Let me ask you. Constructive trust and
9 injunction; are those -- because those are remedies, correct?

10 MR. O'CONNELL: Correct.

11 THE COURT: And would those remedies be available on
12 the avoidance claims? I mean, it didn't -- what I was puzzled
13 about when I read the papers is why I need to reach the issue
14 whether constructive trust and injunction are available
15 remedies. That's separate from the issue of whether an unjust
16 enrichment claim has been properly stated.

17 MR. O'CONNELL: Not really because you only take --
18 the injunction or constructive trust would only exist if you
19 don't dismiss the unjust enrichment. It is a remedy under
20 unjust enrichment, to state it another way. Your question as
21 to whether it's a remedy under 550, I don't know. I will have
22 to sit down and think about that.

23 Thank you for your time, Your Honor.

24 THE COURT: Thank you very much. So you have you
25 pled actual fraud?

1 MS. VEIT: We believe we have.

2 THE COURT: Tell me which paragraphs of the complaint
3 I should look at.

4 MS. VEIT: Well, in our -- first of all, I disagree
5 with the -- in answer to your question, Your Honor, in our
6 opposition brief --

7 THE COURT: I don't want to know about the brief.

8 MS. VEIT: -- we did --

9 THE COURT: I want -- I -- you know --

10 MS. VEIT: We --

11 THE COURT: The motion to dismiss I've got to decide
12 on the four corners of the pleading, so point me to the
13 paragraphs in the complaint that support your contention that
14 you pleaded actual fraud.

15 MS. VEIT: Reason that I mentioned the brief, Your
16 Honor, is that we did reference exact paragraphs in the
17 complaint in our argument, but I'd be happy to --

18 THE COURT: Okay. But I've got the complaint open
19 here and --

20 MS. VEIT: -- refer to that.

21 THE COURT: -- so you'll --

22 MS. VEIT: Okay.

23 THE COURT: You'll just read me from your brief --

24 MS. VEIT: That's --

25 THE COURT: -- what paragraphs you want me to look

1 at.

2 MS. VEIT: Paragraphs 31 and 32 detail Okun's
3 wrongful use of misappropriated funds and the criminal charges
4 for that.

5 THE COURT: Hold on. Let me scroll back.

6 MS. VEIT: There's a lot of paragraphs I can read
7 through. I don't know.

8 THE COURT: That's fine.

9 MS. VEIT: That's fine. And I'm not talking about
10 the conclusory paragraphs at the end. I'm talking about --

11 THE COURT: Right.

12 MS. VEIT: -- the factual paragraphs.

13 THE COURT: And I take it your view is that you only
14 have to allege actual fraud on the part of the transferor?

15 MS. VEIT: I believe that the statute is clear that
16 it's only the initial --

17 THE COURT: Right.

18 MS. VEIT: That the transferor --

19 THE COURT: Okay.

20 MS. VEIT: -- whose intent is relevant and the case
21 is cited by JPS to try to take a different position under a
22 state provision.

23 THE COURT: Yeah, under 276 the --

24 MS. VEIT: It's different.

25 THE COURT: -- cases are actually split even in this

1 district on whether you have to allege fraud on the part of the
2 transferor and transferee or only the transferor.

3 MS. VEIT: I think under 548 it's clear and also
4 those cases seem to say that where you have fraudulent intent
5 of both of the parties then you don't have to show insolvency
6 and lack of consideration.

7 THE COURT: Right. Well, let --

8 MS. VEIT: It's a different situation.

9 THE COURT: Okay. All right. 31, 32. What else?

10 MS. VEIT: 31, 32. 40 through 48 go through all the
11 misappropriation of funds on 39 Aaron Road and 52 through 55 on
12 49 Aaron Road. Then there is many --

13 THE COURT: Let me just scan through those.

14 MS. VEIT: Yes, Your Honor. I think I mentioned 52
15 to 55 are 49 Aaron Road.

16 THE COURT: Just give me a second while I scan this.

17 MS. VEIT: Paragraph 21.

18 THE COURT: Hold on.

19 MS. VEIT: It's more on Okun.

20 THE COURT: Okay.

21 MS. VEIT: We also have quite a number of paragraphs
22 about the lack of consideration here, which is an important
23 badge of fraud that they keep referring to that we don't have
24 any other badges of fraud. I think we do, but on inadequacy of
25 consideration and we plead it both against the JPS defendants

1 and against JPS Capital, because we think they're relevant to
2 many --

3 THE COURT: I think the allegations about --

4 MS. VEIT: -- of our claims.

5 THE COURT: -- inadequacy of consideration are
6 clearly pled. There was questions I raised and I thought the
7 Mellin Bank case that you cited in your brief was at least at
8 this stage. The motion to dismiss stage was strong authority
9 on that point.

10 MS. VEIT: Do you want --

11 THE COURT: Well, you're arguing it as a badge of
12 fraud.

13 MS. VEIT: I believe it is.

14 THE COURT: Okay.

15 MS. VEIT: It's one of the first badges of fraud
16 that --

17 THE COURT: Right.

18 MS. VEIT: -- the cases point to.

19 THE COURT: Okay.

20 MS. VEIT: There's also -- we kind of went through
21 the badges on page 14 of our brief.

22 THE COURT: Right.

23 MS. VEIT: Inadequacy of consideration. We laid out
24 some of the paragraphs there and then it's also -- you know,
25 there's a whole discussion about that in our brief at page 5

1 through 7. Then also we went through the -- here are some of
2 the badges: transfers, knowledge of the creditor's claim, and
3 his or her inability to pay for it. That goes to Okun. And
4 also there's another badge depending on which state law you're
5 looking at that's similar that Okun was insolvent or became
6 insolvent shortly after the transfer was made or the obligation
7 was incurred. We believe absolutely that's pled. Paragraphs
8 59 --

9 THE COURT: Mr. O'Connell, do you dispute that Okun
10 was insolvent?

11 MR. O'CONNELL: No.

12 THE COURT: Okay. I didn't think anybody could,
13 but --

14 MR. O'CONNELL: No, no.

15 THE COURT: Okay.

16 MS. VEIT: That the transfer -- that the transfer was
17 not in the ordinary course of business. I don't think that
18 you -- I think that's pled in paragraphs listed here. Also,
19 another one. Before the transfer was made to the JPS
20 defendants, the debtor had been accused of improprieties and,
21 thus, threatened with suit. Here he's --

22 THE COURT: Everybody knew that. Okay.

23 MS. VEIT: That's fairly in there. The transfer
24 occurred shortly before or after a substantial debt was
25 incurred. We allege in here that Okun guaranteed all the 1031

1 exchangers and that's a debt that he made -- that's -- he's now
2 a creditor of the 1031 debtors as a result of that guarantee.

3 THE COURT: So what about Mr. O'Connell's point that,
4 you know, the agreements with the JPS entities were all done in
5 plain sight with everybody's -- you know, Creditors' Committee
6 signed off. I certainly approved them going forward. Why
7 isn't that a defense?

8 MS. VEIT: Well, a few things. First of all, why
9 isn't it a defense isn't why we're here today; we're here on a
10 motion to dismiss. So if they someday want to bring a defense
11 that they have the burden of proving, we're not obligated to
12 put facts that support that in this complaint.

13 THE COURT: Okay.

14 MS. VEIT: I think we did put facts in here and I
15 think there's other facts that aren't in here that go to that
16 exact point. First of all, it's the amended term sheet. I
17 don't think there's any dispute that the debtors didn't sign
18 the initial term sheet. The amended term sheet, which they
19 make a big deal about, the debtor signed it specifically
20 subject to Bankruptcy Court approval and the complaint alleges
21 that no one ever sought Bankruptcy Court approval and that the
22 Court did not approve it. So we disagree that we -- that that
23 was agreed to and signed off and they say in their papers even
24 that it was blessed by the Court and it never was.

25 We also plead -- there are other issues going to the

1 same point that they knew about it. When they got involved
2 with JPS the allegations were already out there that Okun had
3 been misappropriating money and the 1031 debtors in buying
4 himself personal properties including mansions, so they were on
5 notice even before they ever took the liens and even before JPS
6 Capital got involved as to what the overall scheme that was
7 going on.

8 We also plead in the complaint after that amended
9 term sheet was signed JPS never came through. They never
10 offered the anticipated loan, that when they ultimately offered
11 a loan it was for half the dollar amount and contained so many
12 conditions in it that nobody was ever going to sign on and
13 didn't, so in my view the lack of consideration point has to be
14 viewed after all the facts are on the table. It's not -- and
15 we've pled plenty in here to show a lack of consideration and
16 their argument seems to be that because the debtors knew about
17 the term sheet or even signed it, although they didn't --
18 couldn't do that without getting Bankruptcy Court approval and
19 no one sought that, that they somehow -- I don't know if their
20 argument is a waiver argument that we've waived the ability to
21 challenge the consideration of the document, but that certainly
22 is not something that has to be pled in the complaint. But we
23 would submit that lack of consideration is viewed at the end of
24 the transaction as in the Mellin Bank case. These facts are
25 not in the pleading, but ultimately I guess would come to bear.

1 You recall that Mr. Stricken [Ph.] stood here in this
2 court on August 16th and made all kinds of representations
3 about what JPS was doing and how far along they were and it was
4 the very next day that the amended term sheet was signed. It
5 wasn't until two months later that everyone learned that none
6 of that in fact happened and that JPS did not come through.

7 So I would submit that later on we realized there
8 wasn't consideration for something. Maybe on August 17th
9 certain people thought there might be, but that doesn't -- that
10 would not get them off the hook now. You're talking about now
11 causes of action where a lack of consideration --

12 THE COURT: It wouldn't be a basis for a motion to
13 dismiss. That's --

14 MS. VEIT: It certainly wouldn't be a basis for a
15 motion to -- and I believe that in the Mellin Bank case the
16 monies actually were paid to the bank and the Trustee there was
17 seeking them back from the bank. These are all paid and they
18 sought back -- I think \$550,000.00 was paid. They were seeking
19 back \$390,000.00 of it. Because it was similar to this kind of
20 term sheet, the Court granted it because they said there was
21 not a reasonable value provided for those fees that were paid
22 in connection with that term sheet. So it's only after that
23 whole transaction ran its course and no loan was provided and
24 everyone was able to look back, that there was a determination
25 of lack of consideration.

1 So the answer to your question, Your Honor, is I
2 think that the complaint has a lot of the badges of fraud. It
3 pleads the bad acts of Okun. I don't believe that we have to
4 prove fraudulent intent by JPS to make out these causes of
5 action.

6 THE COURT: Okay. Address briefly the argument that
7 you first have to avoid the Okun trust transfer before you
8 can -- before you can attack JPS.

9 MS. VEIT: Well, as you know, we put the Fabrikant
10 case out. We think the Fabrikant case is on point and found
11 otherwise. We did look back at all of JPS cases and in none of
12 those cases did the Court not allow the claims to go
13 simultaneously as --

14 THE COURT: Yeah. What about Latham & Watkins? I'll
15 go back and read it, but I -- do you -- I don't know whether
16 you -- is whether that's fresh in mind. That was the one case
17 that was argued that --

18 MS. VEIT: I asked someone in my office to go back
19 and look at all their cases and they reported back to me. I
20 didn't read that particular one.

21 THE COURT: All right.

22 MS. VEIT: But I was --

23 THE COURT: We can all go read it separately.

24 MS. VEIT: When I read Enron and I read the reversal,
25 two things jumped out at me and this is what raised that

1 question in my mind as to what happened in those other cases.

2 First of all, the lower court -- the Bankruptcy Court
3 decision was reversed, but in that decision, as Your Honor
4 mentioned, and also in the reversal order that we just looked
5 at, both judges were in agreement that if you bring the claim
6 simultaneously that seemed to be satisfactory, which is what
7 was --

8 THE COURT: Judge Hellerstein is not crystal clear
9 about it, but certainly Judge Gonzalez's decision in the
10 language I quoted earlier would seem to -- that simultaneous
11 does not seem to require separate. They can be in the same
12 complaint.

13 MS. VEIT: The other thing that was --

14 THE COURT: It wouldn't make sense -- I have to tell
15 you, it doesn't make sense to me why you couldn't do it in one
16 complaint.

17 MS. VEIT: Why you should have to. And the second
18 thing that was mentioned in the District Court order, which I
19 think is pertinent here, is that the Judge was open to the idea
20 that it was futile to go after the additional transferee and it
21 didn't make sense to send them off to --

22 THE COURT: Well, it couldn't. It didn't exist
23 anymore in Enron. It had been dissolved.

24 MS. VEIT: But the language in it is -- allowed the
25 party to amend the complaint to allege the futility of it. And

1 that's exactly what Judge Bernstein mentioned also in Fabrikant
2 that, let's say, you settled with the initial transferee or
3 that transferee is not available for some reason. It doesn't
4 make sense that you can't then pursue immediate or immediate
5 transferees and subsequent transferees because you haven't gone
6 through a judicial determination of --

7 THE COURT: I think Judge Bernstein also pointed out
8 you may have an incentive to settle with the -- with one and
9 then pursue the other, so --

10 MS. VEIT: We did sue Okun trust here, but I believe
11 that that's a pretty futile claim.

12 THE COURT: Really?

13 MS. VEIT: He's sitting in jail and they've already
14 defaulted, so even if we hadn't named them I still think we'd
15 be on safe ground under all of these decisions.

16 THE COURT: So take their default. You'll have an
17 avoidance judgment and then -- anyway, I don't -- not
18 suggesting that that's what you need to do.

19 MS. VEIT: I'd like to just raise a couple of --

20 THE COURT: Go ahead.

21 MS. VEIT: -- issues. On the unjust enrichment
22 and --

23 THE COURT: Yeah, I do want to hear on that.

24 MS. VEIT: -- constructive trusts and the equitable
25 lien claims, unjust enrichment is the heart of those and I

1 agree with those the rest are remedies. The injunction claim
2 is somewhat different. I don't see how it's subject to a
3 motion to dismiss at all. What the injunction is -- again,
4 you're right. It's looking for a remedy, but it's just saying
5 that the two JPS entities were single-purpose entities that
6 were set up just to hold this loan, so we're confident that
7 there wouldn't -- or we think that there wouldn't be anyone
8 there so we --

9 THE COURT: Tell me why you've stated a claim for
10 unjust enrichment.

11 MS. VEIT: The un -- what you need for unjust
12 enrichment is proof that the defendant benefitted at the
13 plaintiff's expense and that equity and good conscience require
14 restitution. It's a very flexible equitable doctrine and the
15 different remedies for it are likely flexible and --

16 THE COURT: Doesn't *peri delicto* apply to unjust
17 enrichment?

18 MS. VEIT: The answer is yes. I believe it does.
19 Actually, there's a mixed answer. There are cases that say it
20 does not. It's conflict -- there's a conflict in the cases as
21 to whether it does or it doesn't.

22 I would say two things first on this motion to
23 dismiss. JPS did not raise *peri delicto* in Waggoner in the
24 defense as an argument in its motion. In its initial motion,
25 it mentioned *peri delicto* in Waggoner in one sentence as an

1 after-thought in the Bankruptcy Code arguments that there was
2 no Bankruptcy Code.

3 THE COURT: I know. And you came back and said it's
4 not a defense --

5 MS. VEIT: And then they came back in their reply and
6 suddenly --

7 THE COURT: -- to the statutory claims.

8 MS. VEIT: -- brought in and came in on the reply
9 brief and said five state court causes of action are all barred
10 by *peri delicto* in Waggoner, which we did not have an
11 opportunity to address. I -- there are cases --

12 THE COURT: So tell me. Address it now. If you need
13 to brief it, I'll let you brief it first.

14 MS. VEIT: I'd like to, but I would like to say that
15 they've waived it because there are cases that say if you don't
16 bring it in your initial motion that they've waived the
17 argument.

18 THE COURT: Go ahead. Let me hear why you think it
19 doesn't apply.

20 MS. VEIT: On which, unjust enrichment?

21 THE COURT: Other than the waiver. Yeah.

22 MS. VEIT: We have several arguments and if we're
23 going to -- if the Court is going to consider this, we
24 definitely would like the opportunity to brief it.

25 But first of all, there's an argument here that

1 Waggoner and *peri delicto* doesn't apply because the bad
2 management in the 1031 debtors was replaced prior to the
3 petition date. Lukenda -- Mr. Lukenda and his organization
4 came in to operate the company prior to the petition date and
5 the Trustee takes over the debtors as of the petition date
6 whatever condition they're in. And there are cases that say
7 where the tainted management was out prior to the petition
8 date, the Trustee does not step in the shoes of the tainted
9 management.

10 Now, if the Court were to disagree with that and we
11 think that there's a good argument for that both under the
12 statutory language and under some cases which we didn't present
13 here, we would argue that it doesn't apply in this case because
14 the adverse interest exception applies and we would fall within
15 the adverse interest exception.

16 THE COURT: Because?

17 MS. VEIT: Because Okun and his cohorts were stealing
18 money from the 1031 debtors, were using just for their own
19 self-interests and to buy themselves whatever with the stolen
20 funds, were not acting on -- in the interests of the 1031
21 debtors.

22 THE COURT: And the sole actor rule doesn't apply
23 because?

24 MS. VEIT: Because there were insiders within the
25 company who learned of -- when they -- once they learned of it,

1 they did take action. They didn't know at first and once they
2 learned of it, they did take action.

3 But also, I -- let me add one other thing. All of
4 the events in this case as to against JPS, Your Honor, occurred
5 post-petition and --

6 THE COURT: I know and in my Food Management decision
7 I dealt with the application in peri delicto to post-petition
8 conduct.

9 MS. VEIT: And in other cases. I mean, our
10 understanding is it doesn't apply in this case and I frankly
11 wasn't surprised not to see it in their brief because the JP --
12 all of the JPS events occurred post-petition and JPS Capital
13 came in post-petition. All of these liens occurred post-
14 petition and our understanding, not just of that one case but
15 of other cases, is that the post-petition conduct does not fall
16 within Waggoner and peri delicto. Now --

17 THE COURT: There actually is a First Circuit case
18 recently. I was a little surprised at seeing where they seemed
19 to rule the other way on it. It's an issue I've been
20 interested in because I wrote the Food Management decision when
21 the First Circuit -- and I can't remember the name of the
22 case -- decided within the last couple of months and it doesn't
23 talk about Food Management, but I'm also --

24 MS. VEIT: Well, I think --

25 THE COURT: I'm also not -- this is not the First

1 Circuit, but --

2 MS. VEIT: I think that's the Outlier [Ph.] decision,
3 so I should have mentioned that first because really we think
4 that that's why this doesn't apply in this case and why JPS
5 apparently didn't raise it in the first instance because it
6 doesn't apply in post-petition conduct.

7 But if this court were to decide that it does apply
8 to the conduct here and that they haven't waived it as a result
9 of the motion, then we would certainly want to brief it to
10 address whether it applies to any prepetition conduct here. I
11 mean, any prepetition conduct in this complaint is others.
12 Okun, for example, it wasn't the JPS parties. And certainly
13 the Trustee's claims against the JPS parties rose post-petition
14 because they couldn't have arisen prepetition.

15 THE COURT: Right. Anything else?

16 MS. VEIT: We did lay out in our brief the
17 pleading -- the parts of our complaint that satisfy the unjust
18 enrichment. We think it's very strong in this case under the
19 circumstances of this case where JPS came in knowing about the
20 types of misappropriations that Mr. Okun and others were doing
21 taking the funds and using it to buy themselves properties
22 where --

23 THE COURT: Well --

24 MS. VEIT: -- the 1031 debtors have got zero
25 consideration for the five million dollars that was taken and

1 put into this house and their liens on the house came after
2 they had this knowledge. They're claiming their liens come
3 before the 1031 debtors, so certainly their claims are at the
4 expense of the plaintiffs here. We think it's clearly within
5 that doctrine.

6 THE COURT: The problem I have -- and this -- the
7 motion to dismiss is probably not the time where the Court
8 would deal with it, but I worry about unintended consequences
9 from your argument that carried to its logical or illogical
10 conclusion. I mean, if no one was comp -- no one in this case,
11 and Mr. Flaxer was here for a different party at the time, was
12 complaining when -- well, let me retract. There were some
13 exchangers who objected to everything, but the Committee wasn't
14 complaining when JPS appeared to be prepared to lend 300
15 million dollars secured by Okun's nondebtor assets potentially
16 including the two New Hampshire properties.

17 The problem I have is -- I mean, why would anyone
18 ever want to come in and be a DIP lender if they're going to be
19 secured by -- you know, in part by nondebtor assets as well if,
20 you know, a Chapter 11 trustee appointed after the fact could
21 come in and challenge the transaction? Whether you're ever
22 going to be able -- I mean, you say you don't have to approve
23 the fraud by JPS. Whether you can show lack of adequate
24 consideration, a different issue but I'm troubled by the notion
25 that -- why would anybody in their right mind ever be willing

1 to lend.

2 MS. VEIT: I think part of the problem with JPS is
3 that we've learned later that we don't believe that they were
4 doing what they claimed to have been doing and that their fees
5 were exorbitant for what they claimed to have been doing and
6 ultimately did.

7 Had they come through with that loan and the
8 exchangers had been made to [inaudible], no one would be
9 objecting to it because they would have followed through on
10 what they had represented in court that they would be able to
11 do.

12 THE COURT: Well, they didn't guarantee that they
13 were going to lend 300 million dollars. I mean, it was a
14 separate issue I've raised from the bench before when Mr. Traub
15 with caveats represented that nondebtor assets appeared to be
16 worth approximately 300 million dollars in that this case was
17 going to be brought to a rapid conclusion because JPS would
18 fund sufficient -- you know, an amount sufficient to pay off
19 all the exchangers.

20 You know, I listened. We had a number of hearings
21 about it and it wasn't until a hearing I think on the transfer
22 agreement when Mr. Feltman testified that the value of the
23 nondebtor assets was at that time probably negligible. I
24 expressed from the bench my surprise in that, you know, I think
25 I probably even said these words, it would raise the question

1 of what did they know and when did they know it. I think I --
2 those famous Howard Baker words from Watergate, you know,
3 until -- I mean, I have this vivid recollection of
4 Mr. Feltman's testimony. Mr. Kadish was sitting in the back.
5 It was the Committee's financial advisor, so -- you know, but
6 what did JPS know and when did they know it. I mean, if they
7 were sold a bill of goods until they did their due diligence
8 and found out the value wasn't there, you know, we'll -- maybe
9 we'll hear that at some point.

10 MS. VEIT: Well, Mr. Flaxer just handed me a note,
11 which I think is -- I'll just share with you that your opening
12 question was why would anyone make a DIP loan and he's pointing
13 out that no one would make a DIP loan without court approval.
14 Bankruptcy Court approval is always obtained for that and no
15 court approval was ever obtained on any of this. They know
16 when -- they didn't apply for it. They could have and perhaps
17 should have, but they didn't.

18 THE COURT: Okay.

19 MS. VEIT: And the Court never approved it.

20 THE COURT: And you're referring to the amended term
21 sheet?

22 MS. VEIT: Well, that's the only one that got into
23 these details about the mortgage and the fees.

24 THE COURT: Okay.

25 MS. VEIT: If you look at the initial term sheet you

1 can't tell what the fees would be because it's some percentage
2 of a loan up to 300, so how would you calculate that so I don't
3 think that on the initial term sheet it was clear what the fees
4 would be.

5 THE COURT: Thank you, counsel.

6 MS. VEIT: Thank you, Your Honor.

7 THE COURT: Mr. O'Connell?

8 MR. O'CONNELL: Very briefly, Your Honor. With
9 regard to Judge Hellerstein, he's -- when you have time as
10 you're considering this, look at page 39 of the transcript --
11 well, it's page 21 in the printout, but it looks like 39 on the
12 electronic version where he quite clearly says in the
13 instructions back to Judge Gonzalez that the allegations that
14 needed to be part of any amended complaint should be a legally
15 sufficient justification for bypassing the normal regimen of
16 first proceeding to avoid their -- and it says "therefore," but
17 I think thereafter are proceeding to recover from a subsequent
18 transferee. You get --

19 THE COURT: He wasn't faced with the issue of whether
20 it could be done in one proceeding.

21 MR. O'CONNELL: You're right, Your Honor. I
22 understand that.

23 THE COURT: He wasn't. He wasn't.

24 MR. O'CONNELL: I understand that. With regard to
25 the Mellin Bank distinguishable circumstance by Trustee's own

1 pleadings, that was a situation where the commitment letter was
2 so full of holes and allegations that it could --

3 THE COURT: And your commitment letter wasn't?

4 MR. O'CONNELL: But we gave real money. I mean, we
5 did. We lent money. I mean, we did --

6 THE COURT: Went around like this in a circle. I
7 mean, you've got -- you essentially laid out a million and a
8 half dollars and have a mortgage for -- you know, with interest
9 whatever the amount is today, so that's -- I mean, that's not
10 to be decided now. It may have been value and it may not.

11 MR. O'CONNELL: And to answer your question about DIP
12 lending, I mean, the fact is everyone came to the Court and
13 shined a light on exactly this situation and JPS did come into
14 this. There is an estoppel argument that comes into play and I
15 guess the Court's predisposition is, okay, bring that up when
16 you defend your case at trial.

17 But I submit that, you know, that type of flashlight
18 on the events at the time needs to be a bar or should be a bar
19 for coming back and trying to undo especially after this
20 reliance and we'll take that up, I guess, at another time on a
21 motion for summary judgment or a trial.

22 THE COURT: Let me just add, Trustee's counsel went
23 through and identified specific paragraphs of the complaint
24 that it does seem to me pretty clearly allege fraud by Okun.

25 THE COURT: Correct.

1 MR. O'CONNELL: And for the 548 plan it's only Okun's
2 fraud that has to be alleged. Isn't that true?

3 MR. O'CONNELL: My counsel colleague tells me there's
4 a divide in this Circuit about that, that it also -- it's the
5 intent of both parties and I don't know the cases because I sat
6 here and when you had the --

7 THE COURT: I've seen the split on --

8 MR. O'CONNELL: -- colloquy with other counsel --

9 THE COURT: -- 276 in the debtor/creditor law claim
10 whether it's both, but I've never seen -- and --

11 MR. O'CONNELL: I am --

12 THE COURT: -- maybe you're --

13 MR. O'CONNELL: What's that?

14 MS. VEIT:: I'm thinking of the same case. I'll go
15 back and look and see if it addresses 548, but we were looking
16 at the -- when we were researching it was our impression that
17 there was a split at least here. Not over where we are in the
18 First Circuit, but at least here as to both and it could be
19 that the case was sparse in speaking primarily to 276.

20 MR. O'CONNELL: One other point. It's got to be
21 noted that the Trustee has sued under 548. I mean, the
22 colloquy you just had about no prepetition behavior being an
23 issue is not true. I mean, Okun's conduct in getting a house
24 is clearly going to be on trial here and *peri delicto* in the
25 Waggoner doctrine clearly applied to that.

1 THE COURT: They don't apply to the statutory claim.
2 In peri delicto is a state court equitable defense. The state
3 court --

4 MR. O'CONNELL: No, I understand.

5 THE COURT: The state law causes of action. It is
6 crystal clear in peri delicto is not a defense to avoidance
7 claims brought by a trustee.

8 MR. O'CONNELL: I agree, but my point is different
9 and I apologize if I've not been clear. The Trustee said the
10 only issues involving JP were -- are post-petition, yet their
11 complaint is getting into a lot of detail as prepetition and
12 that the best evidence of that is they got both claims in here.
13 Which is it? Is it 548 or is it 549? I heard her say just a
14 moment ago that every minute pertains to JPS is 549 and that's
15 simply not true because what's at issue here based on the
16 Trustee's complaint is the way in which Okun took title to his
17 property.

18 One thing we didn't discuss, but it's in our
19 papers -- and you'll be hearing in the Wachovia matter is a lot
20 on this -- money passed through IP of A development in New
21 Jersey long before it got to New Hampshire. So this notion
22 that unjust enrichment is unbridled and that if somebody gets
23 screwed they get to sue someone else just isn't the law.

24 THE COURT: I --

25 MR. O'CONNELL: You know, that's not the way it

1 works. You've got to have privity and you've got to have
2 standing. And there has to be -- you know, the debtor doesn't
3 have standing to raise unjust enrichment with regard to our
4 client. Okun would, but they don't. Thank you.

5 THE COURT: Okay. I would like an additional brief
6 from the Trustee's counsel addressing in peri -- the
7 applicability or nonapplicability of in peri delicto. I agree
8 that it was really raised in the reply and so I just want --
9 when would you like to submit that mindful of the holidays?

10 MS. VEIT: And also the issue as to whether, you
11 know, applying post-petition claims then?

12 THE COURT: Yes. Yeah, I'm including that.

13 MR. VEIT: Because state law can [inaudible] --

14 THE COURT: Right.

15 MS. VEIT: Your Honor, the reason I say that is that
16 when he's speaking he's confusing fraudulent conveyance claims
17 under the Bankruptcy Code and then state law claims. In peri
18 delicto when it comes up on state law claims --

19 THE COURT: Correct.

20 MS. VEIT: -- that doesn't -- those are constructive
21 trust, unjust enrichment, and on those claims, the claims
22 against JPS rose post-petition.

23 THE COURT: Okay. Well, you -- when you would
24 like -- you were going to brief that.

25 MS. VEIT: I was reaching -- yes. I was just

1 reaching for my calendar.

2 THE COURT: Okay. That's fine.

3 MS. VEIT: Because with the holidays, I'm --

4 THE COURT: Absolutely. At some point in January I
5 would like your brief.

6 MS. VEIT: May I speak with -- you're raise -- we're
7 going to be making the same argument in connection with the
8 Wachovia motion to dismiss. That's -- well, not on the post-
9 petition case. There's prepetition, but on the Waggoner
10 applicability. Can we do them at the same time?

11 THE COURT: When is your brief due?

12 MS. VEIT: January 9th.

13 THE COURT: January 9th? My own experience as a
14 guide, you're going to be crunching for January 9th to get that
15 brief in.

16 MS. VEIT: That's true. I was just thinking that as
17 I said without having to do the same thing.

18 THE COURT: Mr. O'Connell, do you have any objection
19 to their brief January 15th?

20 MR. O'CONNELL: None at all and we apologize for any
21 inconvenience the way it --

22 THE COURT: It's not --

23 MR. O'CONNELL: I thank the Court for dealing with it
24 and I apologize to opposing counsel.

25 THE COURT: It's not incon -- January. Does that

1 give you enough time?

2 MS. VEIT: Yeah, that would be better because we'll
3 file one and then we can just work the same argument into the
4 post-petition situation for this case.

5 THE COURT: And I anticipate that will be the last
6 brief. Okay. You know, I'm not going to rule. I think
7 it's -- I think it should be clear that something is surviving.
8 Okay. You've already worked out a discovery schedule subject
9 to adjustments, so you're obviously not going to have a
10 decision until after some reasonable time after January 15th,
11 but it shouldn't. I don't think that's going to hold up
12 whatever anybody is doing.

13 MR. O'CONNELL: We -- our schedule we're working
14 under it.

15 THE COURT: That's fine.

16 MR. O'CONNELL: When you'll rule, you'll rule and
17 take appropriate action as necessary.

18 MS. VEIT: Thank you, Your Honor.

19 THE COURT: Okay.

20 MR. O'CONNELL: Thank you.

21 THE COURT: Have -- have you met to try and resolve
22 this case as between the parties who are here?

23 MS. VEIT: Not yet, but we would be open to doing
24 so --

25 THE COURT: Okay. Well, I will order --

1 MS. VEIT: -- if JPS would.

2 MR. O'CONNELL: Well --

3 THE COURT: As I said, my -- my standard case
4 management order requires a face-to-face meeting. We made an
5 offer. It's outstanding. We'd love to hear a response.

6 THE COURT: Okay. You'll talk about it face to face.
7 Okay. Anything else for today?

8 MR. O'CONNELL: No. Thank you, Your Honor.

9 THE COURT: Good briefing. Good arguments.

10 MR. O'CONNELL: Thanks for your time.

11 THE COURT: Thank you very much.

12 MR. O'CONNELL: Good holiday.

13 THE COURT: Enjoy your holidays.

14 MS. VEIT: Thank you, Your Honor.

15 [Proceedings concluded at 5:04 p.m.]

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

Ruth Ann Hager

Dated: December 24, 2008