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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Chapter 11
. Case No. 24-12391 (CTG)
AMERICAN TIRE DISTRIBUTORS .
INC., *et al.*, . (Jointly Administered)
. .
. Courtroom No. 7
. 824 Market Street
Debtors. . Wilmington, Delaware 19801
. .
. Tuesday, November 19, 2024
. 2:00 p.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE CRAIG T. GOLDBLATT
UNITED STATES BANKRUPTCY JUDGE

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1 (Proceedings commenced at 2:00 p.m.)

2 THE COURT: Good afternoon. We're here in, In re
3 American Tire Distributors, Inc., which is Case Number 24-
4 12391.

5 Mr. Husnick?

6 MR. HUSNICK: Good afternoon, Your Honor.

7 Chad Husnick with Kirkland & Ellis, appearing on
8 behalf of the debtors. I'm here with my partners, Mark
9 McKane and David Gremling, who will be walking Your Honor
10 through the agenda today.

11 If I may, before we hop into the agenda, just to
12 give you a short update on where the cases have come so far,
13 Your Honor, we have successfully transitioned the debtors
14 into Chapter 11. We're working closely with the newly formed
15 committee, represented by Morrison Foerster to get them up to
16 speed and to resolve any concerns that they had, in the first
17 instance with the first and second day pleadings. And I'm
18 happy to report as we stand here today that we were able to
19 resolve all of their objections of the Official Committee to,
20 both formally and informally, to the pleadings that were
21 scheduled for today, including the debtor-in-possession
22 financing facility. The only -- in fact, we've resolved all
23 formal and informal objections to all of the pleadings, with
24 the exception of the DIP, which we'll address today.

25 And we thank Your Honor, in advance of the

1 hearing, we had filed certifications of counsel, or of no
2 objection and all of those have been entered, so thank you
3 for that.

4 Your Honor, we've also filed a motion to approve
5 bid procedures, which has been adjourned with the agreement
6 of the parties to next Tuesday, so we'll be prepared to
7 present that on Tuesday. We do expect to be filing a copy of
8 the stalking horse bid in advance of that hearing; although,
9 not seeking to get anything approved at the hearing with the
10 stalking horse bid, we are asking to get that out there so
11 that folks can take a look at what it looks like sufficiently
12 in advance of the hearing.

13 Your Honor, turning to, and just a little bit
14 about the marketing process. Simultaneously with launching
15 the -- filing the bid procedures, we launched a formal
16 solicitation process with Moelis. Mr. Keil and Ms. Murray,
17 who you'll hear from today, are leading the charge on that
18 front. They've reached out to well over 100 potential
19 bidders. There are 43 bidders who have executed NDAs and are
20 in the data room.

21 Your Honor, we're continuing to reach out to new
22 parties with the newly formed committee. They've given us
23 some additional suggestions for potential interested parties
24 and we're working with them to reach out to those folks, as
25 well, so we expect that number to grow.

1 In the meantime, Your Honor, we've been trying to
2 work with the various stakeholders to position the debtors
3 for a potential going-concern sale, which has been our stated
4 goal from the commencement of these cases.

5 THE COURT: Uh-huh.

6 MR. HUSNICK: On that front, and most importantly,
7 we've been in active dialogue with our key vendors, including
8 our tire vendors. Your Honor, it won't surprise you that the
9 tire vendors are absolutely essential to the continued
10 operation of this company. In that vein, we've been
11 negotiating go-forward trade agreements. We have 24 critical
12 vendor agreements and well over a dozen that are underway or
13 in the midst of negotiations.

14 This is a particularly important stages for the
15 debtors as we enter the winter tire season. And for anyone
16 who's driven a car that doesn't have winter tires, it's a
17 bad, bad time, and I can attest to that, growing up in
18 Northern Wisconsin. So, it's a big time for the tire
19 industry, as a whole, and we need to keep the inventory
20 flowing.

21 And I mention that as my final statement in the
22 status update just to emphasize how critical timely financing
23 of the second tranche of the DIP is and that's why we're
24 pushing.

25 THE COURT: I thought that might be where you were

1 going.

2 MR. HUSNICK: Thank you.

3 So that takes me to the hearing on the DIP.
4 Before we get into the evidentiary proceeding or portion of
5 the hearing, we'd appreciate some additional guidance from
6 the Court now that Your Honor has had an opportunity to
7 review the replies and the other papers.

8 THE COURT: Uh-huh.

9 MR. HUSNICK: In our view, the issues of fact are
10 actually quite narrow and no one disputes the need, no one
11 disputes the size, no one disputes the terms, give and take.

12 THE COURT: Uh-huh.

13 MR. HUSNICK: No one disputes the lack of
14 available alternatives. We're really down to the "what about
15 me" type argument, which we addressed yesterday in
16 conversation.

17 But despite Your Honor's guidance yesterday, the
18 debtors, at least, and the debtors' investment banker spent
19 four hours under oath testifying yesterday while she was
20 trying to get across country, to deal with issues that I
21 actually don't think are going to be litigated today,
22 including the form of the order and allocation issues. So
23 we're hopeful before we open this up for a wide-ranging
24 evidentiary presentation that might potentially be misguided
25 to what Your Honor is looking for, to get some additional

1 guidance on from the Court.

2 THE COURT: So, look, I have some thoughts about
3 where I am. I guess I'd be interested in hearing from the
4 parties about what evidence folks intend to put on and to
5 what end, because based on my review of the papers, I don't
6 think -- look, I'm a believer in the idea that I let parties
7 present their cases, so I don't want to get up here and tell
8 you, this is how we're going to do this today. I don't think
9 that's the job of the judge.

10 But I can tell you that based on having reviewed
11 the papers, I think I've got mostly a legal question and not
12 a factual one. That said, you all know your cases better
13 than I do, so if someone wants to explain to me, you know,
14 what I've got wrong in that regard and what evidence they
15 want to put on and why it matters to the outcome of the
16 dispute in front of me, I want to listen to them.

17 So, is that responsive?

18 MR. HUSNICK: It does, Your Honor, and I can be
19 very brief for the debtors.

20 If it were up to the debtors, I think we were
21 would rest upon the written declarations that we submitted on
22 behalf of Mr. Bienias and Ms. Murray, both of their
23 declarations.

24 THE COURT: Uh-huh.

25 MR. HUSNICK: And I don't think we would need any

1 additional direct testimony.

2 THE COURT: All right. So, look, the only
3 objector is the minority group of holders, right? So why
4 don't I hear from them, because I think I understand what
5 you're saying, I just -- to the extent that you're saying to
6 me now, Judge, can you tell them that they don't need to put
7 on the case, I'm not yet biting at that.

8 MR. HUSNICK: No, understood.

9 That's what we would put on, so I will sit down.

10 THE COURT: Okay. Very well.

11 MR. HUSNICK: Thank you.

12 MR. WILSON: Good afternoon, Your Honor.

13 Thad Wilson from King & Spalding on behalf of the
14 Ad Hoc Group of Excluded Term Lenders.

15 With respect to the evidence that we anticipate
16 putting on today, Your Honor, we would have a cross-
17 examination of Ms. Murray, who's been offered by declaration
18 by the debtors.

19 THE COURT: Uh-huh.

20 MR. WILSON: We have no objection to her
21 declaration coming in, nor do we have an objection to
22 Mr. Bienias' declaration coming into the record, as well. We
23 do not have an objection to the debtors' proposed exhibits,
24 either.

25 We do have a list of exhibits that we intend to

1 proffer and --

2 THE COURT: Right. I saw the designations of
3 deposition testimony.

4 MR. WILSON: Exactly. And I think we've narrowed
5 a number of evidentiary-related issues with respect to those
6 exhibits.

7 THE COURT: So, can we back up a second?

8 MR. WILSON: Sure.

9 THE COURT: So holding aside what items of
10 evidence you want to put forward, what facts are actually
11 disputed that I need to resolve in order to decide whether to
12 approve the DIP?

13 MR. WILSON: Great question, Your Honor.

14 So, with respect to the proposed order that was
15 filed last night about midnight Eastern time, there are a
16 number of proposed factual findings that are included in the
17 proposed order that would go to potentially prejudicing our
18 client's rights, with respect to potential future litigation
19 that was part of the colloquy with the Court yesterday --

20 THE COURT: Uh-huh.

21 MR. WILSON: -- regarding breaches of the
22 prepetition credit agreement.

23 THE COURT: Okay. Imagine for this purpose that I
24 was steadfastly against, you know, almost no matter what the
25 evidence were, saying anything today that would prejudice

1 your rights. So the question isn't, does the evidence
2 support the finding? It's just a question of identifying
3 those findings and striking them out.

4 Would that reduce the volume of testimony you'd
5 need to present?

6 MR. WILSON: Well, I think that's an open question
7 for the debtors, because the findings that we would be asking
8 Your Honor to strike, among other things, would include the
9 fact that the DIP is being provided in good faith, that the
10 lenders are acting in good faith with respect to the DIP or
11 the DIP lenders, that is.

12 THE COURT: Okay. Imagine I added language that
13 said, Notwithstanding any of those findings, nothing herein
14 shall, in any way, prejudice any claim or be taken to
15 prejudice any claim that the operation of this roll-up
16 violates the *pro rata* distribution provision and it doesn't
17 relieve anyone of a dime's worth of liability for having so
18 breached the agreement.

19 MR. WILSON: We think it also goes to the basis as
20 to whether or not the Court can even approve the DIP in the
21 first instance, Your Honor, with respect to the good faith
22 findings. We think it's a violation, obviously, of the
23 prepetition credit agreement and the provisions thereof.

24 THE COURT: So, look, your ability to make a legal
25 argument --

1 MR. WILSON: Sure.

2 THE COURT: -- that because it's a breach I
3 shouldn't approve it would be a thousand percent preserved.
4 You could get to that podium and make that exact argument.

5 Whether it's a breach, tell me if I've got this
6 wrong. I think I understand the different -- I mean, I want
7 to be educated further; I don't want to overstate my
8 understanding -- but I think I've worked my way through the
9 prepetition agreement and the *pro rata* sharing provisions and
10 the Serta blocker and the Serta blocker and the arguments
11 about the meaning of the Serta blocker and whether the DIP
12 exception to the Serta blocker does or doesn't permit what's
13 happening here.

14 That's a legal question and I'm not limiting
15 anyone's ability to make an argument about that, but I'm not
16 sure -- if I'm wrong, tell me, because you know the case
17 better than I do -- but I'm not sure that, like, having a
18 document and a witness and cross-examination will make me a
19 lot smarter in any relevant way with respect to that
20 question.

21 Am I missing something there?

22 MR. WILSON: No, not with respect to the breach of
23 contract claim, Your Honor, and the potential findings. I do
24 think it, potentially, is prejudicial to our clients if there
25 are findings in the proposed order with respect to good

1 faith, fair and reasonable, with respect to the DIP being
2 provided on reasonably equivalent value and fair
3 consideration, all of those things.

4 THE COURT: So let me tell you just in a
5 straightforward way as I can with what I'm struggling with.
6 I want to give you every opportunity to present your case and
7 I don't -- that's my job, right. I listen to parties, I hear
8 them, I listen to the evidence, and I make a decision.

9 I also want to be efficient and manage the case in
10 a way that's rational. And the argument that they say --
11 good faith is such a, you know, wide-ranging word that it
12 opens, you could say it opens the door to everything and I
13 don't really intend on spending, you know, a month having
14 this proceeding. The company can't afford that. It's not
15 good for anybody. So, look, I want to let you present your
16 case, but I also want to be clear what I think is, you know,
17 sort of -- what is most helpful to me.

18 Does that make any sense?

19 MR. WILSON: Yes, Your Honor, it does make sense.

20 I think what we anticipate the evidence will show
21 is that there's very little, if any, analysis that was done
22 and that went into the proposed findings and conclusions that
23 are being proffered in the proposed order and we think the
24 evidence will show --

25 THE COURT: All right. So how many witnesses are

1 we talking?

2 MR. WILSON: We're talking about two witnesses and
3 relatively limited testimony. One is the declaration of
4 Ms. Murray and a limited cross-examination of her.

5 THE COURT: Right.

6 MR. WILSON: And then an examination of the
7 investment banker for the Ad Hoc Group.

8 THE COURT: All right. So, okay. That's helpful.
9 Thank you. That is useful.

10 So, Mr. Husnick, I guess what I would propose,
11 subject to hearing from the parties all around, is that we
12 hold off on the argument for now. That we try to get the
13 evidence in. That I encourage everyone to be efficient with
14 that evidence. Again, I don't want to pretermit. I want to
15 give everyone a fair chance to be heard, but I guess I'd be
16 interested in getting the evidence in, being as efficient
17 about that as possible, and then proceeding.

18 Is there more I can do, Mr. Husnick, under the
19 circumstances to do this in a streamlined way?

20 MR. HUSNICK: I have no objection to that, but if
21 counsel intends to walk through, line-by-line, through the
22 order and ask Ms. Murray the same questions he did in the
23 deposition, it's going to be a colossal waste of Your Honor's
24 time.

25 THE COURT: Well, I'm not going to rule on the

1 evidentiary objection now. I hear the notion that there's a
2 point at which that could be overkill and if we get there,
3 your rights to say so are preserved.

4 Is that fair enough?

5 MR. HUSNICK: Yes.

6 THE COURT: And I do want to be clear, to the
7 extent there's an issue -- let me just try to say it this
8 way, to the extent there's an issue that I can resolve by
9 looking at documents or the order and make a decision about
10 without chewing up everyone's time with a witness on the
11 stand, I'd much rather do it that way.

12 So where the question is about the meaning of a
13 document, I mean, if the testimony from a witness who
14 negotiated the document and you want to get parol evidence, I
15 don't want to pretermite that, but if it's just about, you
16 know, is the language of the order inconsistent with the
17 language of the agreement, we don't need to spend a lot of
18 witness time on that.

19 Is that clear enough?

20 MR. WILSON: Yeah. Understood, Your Honor.

21 THE COURT: Okay. Very well.

22 So -- yes?

23 MR. BRIMMAGE: Your Honor, may I be heard?

24 THE COURT: You may.

25 MR. BRIMMAGE: Your Honor, Marty Brimmage with

1 Akin, here on behalf of the Ad Hoc Group for the DIP Term
2 Lenders, depending on which pleading you read.

3 Let me just address this relevance issue. I think
4 you've hit the nail on the head and I'm not sure what would
5 go forward with evidence, testimony or documents.

6 THE COURT: Because judges are much less likely to
7 get in trouble for allowing a hearing to go forward than by
8 shutting it down.

9 MR. BRIMMAGE: Right. So we addressed that.

10 Judges are not going to get in trouble if they
11 take parties at their word. And yesterday, the Minority
12 Lenders filed a letter with the Court and I'm going to read
13 from the letter -- I'm not going to read it all -- but it's
14 on page 2 and let me quote, open quote:

15 "While the Ad Hoc Group of Excluded Term Lenders,"
16 that's Minority Lenders in our vernacular, "believes that the
17 Court can decide whether the minority term lender DIP
18 exclusion breaches the prepetition term loan agreement and
19 the relevance of such breach as a pure matter of law."

20 That's the sum and substance of their objection.
21 That's the whole point of their objection.

22 THE COURT: I understand, but he's also saying
23 that the order that you're insisting on includes findings
24 that aren't true. And it seems to me I don't get to decide
25 whether that's right or wrong without giving him the chance

1 to test that. That's where I think I am.

2 MR. BRIMMAGE: Okay. Then the only thing I will
3 say is, you're going to hear a lot of objections. And I'm
4 going to apologize right up front about relevance. I have to
5 go back to the Rules, right? I go to Rule 401 about what is
6 relevant evidence, right, because I think what you're going
7 to hear, because we had a meet-and-confer yesterday, you're
8 going to hear a lot of questions that don't go to these
9 issues.

10 THE COURT: All right. Look --

11 MR. BRIMMAGE: And then 403 about duplicative
12 testimony --

13 THE COURT: I understand --

14 MR. BRIMMAGE: So I'm just giving you the heads-
15 up.

16 THE COURT: I got it.

17 And you're all entitled to -- you know, look, they
18 give me this costume for a reason --

19 (Laughter)

20 MR. BRIMMAGE: And it looks good.

21 THE COURT: -- you know, compared to letting me
22 choose what to wear, and so if the parties want to put on
23 evidence and the parties want to object, someone's job is to
24 resolve those objections and --

25 MR. BRIMMAGE: Fair enough.

1 THE COURT: -- that's the judge for which I signed
2 up.

3 MR. BRIMMAGE: Then let me kick it off by the
4 agreement that the parties have on exhibits.

5 THE COURT: Terrific.

6 MR. BRIMMAGE: Let's move into that, if we could,
7 Your Honor. So, on the Minority Lender list, and I'm sure
8 I'll be corrected if I get it wrong, but there's no objection
9 to the admission to the following: Exhibits 1, 2, 3, 4, 5,
10 7, 16, 18, 19, 23, 24, 26, 30, and 31.

11 On behalf of the Ad Hoc Group --

12 MS. JACOBS: I am going to correct you.

13 MR. BRIMMAGE: Oh.

14 MS. JACOBS: 7 through 16.

15 MR. BRIMMAGE: Oh, 7 through 16, not 7 and 16.

16 THE COURT: Not 7 and 16, but 7 through 16.

17 MR. BRIMMAGE: 7 through 16, thank you.

18 THE COURT: All right. Hold on. Let me update my
19 notes for what it's worth.

20 MR. BRIMMAGE: 1 through 5, 7 through 16 --

21 THE COURT: Got it.

22 MR. BRIMMAGE: -- 18, 19, 23, 24, 26, 30, and 31.

23 THE COURT: Got it.

24 MR. BRIMMAGE: Okay. And the Ad Hoc Group list, I
25 believe there's no objection to Exhibits 1 through 11. We

1 filed an updated Exhibit 12. I haven't heard that there's an
2 objection to that.

3 MR. WILSON: We do object to the inclusion of
4 Exhibit 12.

5 THE COURT: All right.

6 MR. BRIMMAGE: We'll deal with that. Okay.

7 And then, Your Honor, let me -- I have to address
8 this. The entire transcript of Mr. McGovern was filed about
9 1:30ish. We're going to object to that. Let me give you
10 just a brief amount of history.

11 Last night, right before midnight Eastern time, we
12 received depo designations from the Minority Lenders of
13 Mr. McGovern.

14 Earlier today, we quickly worked to provide cross-
15 designations or counter-designations to those designations,
16 just like you always do, right?

17 THE COURT: I understand.

18 MR. BRIMMAGE: And we sent them back and said,
19 Hey, yours are in green. Ours are in yellow. We propose
20 that we submit this to the Court as the designations by each
21 party so that the Court can have that and read it.

22 Nobody mentioned providing the entire transcript
23 to the Court, so we would object to that, Your Honor. I'm a
24 little surprised that was done. I don't know why it was
25 done, but we would object to that and move to strike it and

1 move that it not be included in this proceeding.

2 But what I have done, Your Honor, and we would
3 like to move this in as an Ad Hoc Group Exhibit 13, is, this
4 is the depo designations by color, and we would like to admit
5 this as Exhibit 13 on behalf of the Ad Hoc Group. It's got
6 both sides' depo designations, and put that to the Court.

7 THE COURT: Okay. And Mr. Wilson, is there any --
8 or whoever else on your side can address this?

9 MR. WILSON: We just need a chance to look at it,
10 Your Honor.

11 THE COURT: All right.

12 MR. WILSON: If counsel's representation is
13 accurate, I don't think we have an issue with that.

14 THE COURT: Okay. Terrific.
15 See how fabulous this is going so far?

16 MR. BRIMMAGE: Yeah.

17 UNIDENTIFIED SPEAKER: (Indiscernible) I'll do it.

18 MR. BRIMMAGE: Perfect.

19 The only thing I want to say about Exhibit 13,
20 which is the transcript, is you'll hear from me later, if
21 Mr. McGovern is called live, we'll talk about the limits of
22 his live testimony in light of the deposition testimony, but
23 I don't want to get ahead of myself.

24 THE COURT: That's fine.

25 MR. BRIMMAGE: And with that, Your Honor, I'll

1 turn the podium over to the debtors about their exhibits.

2 THE COURT: All right. Very well.

3 Mr. McKane?

4 MR. MCKANE: Thank you, Your Honor.

5 And I think you heard from Mr. Wilson that he does
6 not object to any of the exhibits on our list and so we'd
7 just ask that Your Honor move into evidence Exhibits 1
8 through 7 on the debtors' list, which include the first day
9 declaration, the DIP first day declaration from Mr. Bienias,
10 and the DIP declaration for Ms. Murray.

11 THE COURT: Okay. So let me pause for a moment.

12 What I understand is that the following exhibits
13 are not objected to. They are the Minority Lenders' 1, 2, 3,
14 4, 5, 7, 16, 18, 19, 23, 24, 26, 30, and 31; the Ad Hoc
15 Lenders' 1 through 11; and the Debtors' 1 through 7?

16 MR. MCKANE: Correct, Your Honor.

17 And I think in there, there's some redundancy.

18 THE COURT: Okay. That's fine. I've lived with
19 that before.

20 Is there any objection to the introduction into
21 evidence of any of those exhibits?

22 MR. WILSON: Your Honor, I think it's 7 through 16
23 of our list, not just 7 and 16.

24 THE COURT: Okay. I hope that's what I said, but
25 in any event, that's what it is.

1 Is there any objection with that clarification?

2 (No verbal response)

3 THE COURT: Okay. If not, those exhibits will be
4 admitted and why don't we proceed from here.

5 (Debtors' Exhibits 1 through 7 received into evidence)

6 (Minority Lenders' Exhibits 1, 2, 3, 4, 5, 7, 8, 9, 10,
7 11, 12, 13, 14, 15, 16, 18, 19, 23, 24, 26, 30, and 31
8 received into evidence)

9 (Ad Hoc Group's Exhibits 1 through 11 received into
10 evidence)

11 MR. MCKANE: Very good, Your Honor.

12 THE COURT: Thank you.

13 MR. MCKANE: Your Honor, we'll call -- and to the
14 extent that there's going to be a cross-examination, we'll
15 make Ms. Murray available. She is here in the courtroom
16 today.

17 THE COURT: Okay. Very well.

18 And just to be clear, on that Exhibit 13, we'll
19 come back to that once the parties have conferred.

20 And I think the debtors' exhibits include the
21 declarations --

22 MR. MCKANE: They do, Your Honor.

23 THE COURT: -- so the direct is in, and so -- and
24 I guess now is the time for --

25 MR. MCKANE: In light of Mr. Husnick's comments,

1 I'll save what I have for redirect --

2 THE COURT: Okay. Very well.

3 MR. MCKANE: -- to the extent that I need it.

4 THE COURT: All right. So, Ms. Murray, if you
5 could come to the stand.

6 And please swear the witness.

7 THE CLERK: Raise your right hand.

8 RACHEL MURRAY, DEBTORS' WITNESS, SWORN

9 THE WITNESS: I do.

10 THE CLERK: Please state your full name and spell
11 your last name for the record.

12 THE WITNESS: Rachel Murray, R-a-c-h-e-l. Last
13 name is Murray, M-u-r-r-a-y.

14 THE CLERK: You may be seated.

15 THE COURT: Okay. Mr. Wilson?

16 MR. WILSON: Give me just a moment, Your Honor.

17 THE COURT: Certainly.

18 (Pause)

19 CROSS-EXAMINATION

20 BY MR. WILSON:

21 Q Good afternoon, Ms. Murray.

22 A Ms. Murray.

23 Q You and your team at Moelis ran a marketing process for
24 DIP financing, correct?

25 A That is correct.

1 Q And during the marketing process, the debtors never
2 asked the Ad Hoc Group of Controlling Term Lenders whether
3 they would, as required lenders, subordinate their
4 prepetition term liens to a third-party DIP facility,
5 correct?

6 A We did not ask that specific question, because we
7 didn't have a proposal that would require that.

8 Q Okay. Without subordination of the prepetition term
9 loan liens, no third party would be willing to provide a DIP,
10 correct?

11 A That is what we heard from all the lenders that we
12 reached out to.

13 Q You and your team at Moelis helped negotiate the DIP
14 financing on behalf of the debtors, correct?

15 A That is correct.

16 Q In their negotiations with the Ad Hoc Group of
17 Controlling Term Lenders, the debtors tried multiple times to
18 convince the Ad Hoc Group of Controlling Term Lenders to
19 allow all prepetition term loan lenders the opportunity to
20 participate in the credit facility, correct?

21 A That is correct.

22 Q The debtors believed that there would be litigation if
23 certain lenders were not permitted to participate in the DIP
24 facility, correct?

25 A We believed that it was important to offer it out to

1 all to try to achieve a consensual process.

2 Q But that's because the credit agreement provides for a
3 *pro rata* sharing of payments, correct?

4 A I will defer to the lawyers on any legal interpretation
5 of the document.

6 Q Okay. Moelis never attempted to quantify the cost of
7 litigation to the debtors, correct?

8 A We did not attempt to quantify the cost of litigation.

9 Q AlixPartners never attempted to quantify the cost of
10 litigation to the debtors, correct?

11 A Not to my knowledge.

12 Q You've been involved in around 15 DIP financings in
13 your career, correct?

14 A That's correct.

15 Q None of those 15 DIP financings involved a situation
16 where a DIP was provided by the Majority Lenders in a
17 syndicated facility that was not offered to Minority Lenders
18 in the syndicated group on a *pro rata* basis, correct?

19 A Not that I recall, no.

20 Q Moelis did not provide an economic analysis with
21 respect to the impact of *pro rata* participation versus * non-
22 *pro rata* participation for the Minority Lenders, correct?

23 A I'm sorry, can you repeat the question?

24 Q Moelis did not prepare an economic analysis with
25 respect to the impact of *pro rata* participation of all term

1 lenders versus non-*pro rata* participation for the Minority
2 Lenders, correct?

3 A We did not make that analysis because it would require
4 some hypotheticals that we don't know the outcome of this
5 case.

6 Q The DIP facility contains a three-times roll-up,
7 correct?

8 A It has a three-times roll-up with respect to the term
9 loan or prepetition term loan.

10 Q And the DIP facility contains a roll-up of the
11 prepetition term loans held by members of the Ad Hoc Group of
12 Controlling Term Lenders, correct?

13 A It has a three-times roll-up for those that are
14 providing the DIP financing.

15 Q Okay. The DIP facility also contains a roll-up of the
16 prepetition 2024 FILO loans that were extended by four of the
17 five members of the Ad Hoc Group of Controlling Term Lenders,
18 correct?

19 A That is correct.

20 Q Moelis did no analysis regarding the additional
21 recovery that the members of the Ad Hoc Group of Controlling
22 Term Lenders would receive by rolling up the 2024 FILO loans
23 into the DIP facility, correct?

24 MR. BRIMMAGE: Your Honor, I'm just going to
25 object to the term "controlling lenders." It's not been used

1 in court. I don't know who the controlling DIP lenders are.
2 I'm suspecting it's the Ad Hoc Group.

3 But we would respectfully request that he refer to
4 us by what we're termed.

5 THE COURT: Response?

6 Are you talking about the same people?

7 MR. WILSON: We're talking about the same people;
8 it's semantics, Your Honor.

9 THE COURT: All right. I'll allow you to
10 continue.

11 MR. WILSON: Thank you.

12 BY MR. WILSON:

13 Q Moelis has not prepared an analysis of the prepetition
14 term loan recovery after accounting for new money, but not
15 accounting for the roll-up, correct?

16 A I'm sorry, can you repeat the question? I just want to
17 make sure I answer it appropriately, so I just want to
18 understand it.

19 Q Understood.

20 Moelis has not prepared an analysis of the prepetition
21 term loan recovery after accounting for new money, but not
22 accounting for the roll-up, correct?

23 A We did not perform an economic analysis that would
24 determine a future state of the company and recoveries that
25 are unknown at this time.

1 Q You anticipate that the Ad Hoc Group of Controlling
2 Term Lenders will credit bid the DIP loans and the roll-up
3 loans, correct?

4 A My understanding is that they will provide a credit
5 bid. I do not know at what dollar amount, but that has not
6 been determined yet or communicated to the debtors yet.

7 Q Well, the credit bid was actually due on November 12th
8 at 5:00 p.m. Eastern a week ago, right?

9 A It was due at that time, according to the milestones.

10 Q But it was not filed, correct?

11 A Correct, my understanding is it's still under
12 negotiation.

13 Q And that's because the DIP lenders do not want anyone
14 to know what the anticipated economic impact is on the
15 holders of the prepetition term loans will be, correct?

16 MR. MCKANE: Objection; foundation.

17 MR. BRIMMAGE: Also calls for speculation.

18 THE COURT: What's your response?

19 MR. WILSON: I think this goes to the heart of the
20 matter. The Ad Hoc Group of Controlling Term Lenders are
21 anticipating credit bidding. The foundation is included in
22 the deposition testimony that's been submitted into evidence,
23 that they will submit a credit bid, and they haven't done
24 so --

25 THE COURT: All right. Look, so this is the

1 representative of the debtor. You've asked a factual
2 question as to why a credit bid hasn't been submitted.

3 I think if the witness knows the answer to why it
4 hasn't been submitted, she can answer it. If she doesn't
5 know, she doesn't know.

6 Mr. Brimmage?

7 MR. BRIMMAGE: It was because the DIP lenders
8 want --

9 THE COURT: I understand.

10 If she has knowledge of what the DIP lenders want,
11 she can answer that question.

12 MR. BRIMMAGE: Then I would say it calls for
13 hearsay.

14 THE COURT: That's fair.

15 MR. BRIMMAGE: It either calls for speculation or
16 it calls for hearsay or it calls for both.

17 THE COURT: Well, let's back up a second, okay.
18 So just one evidentiary point is clear, unless you persuade
19 me otherwise, I'm proceeding on the assumption that the
20 debtor, the Ad Hoc Group, and the Minority Lenders are all
21 parties to this proceeding. So, to the extent she has -- the
22 witness has knowledge of information based on a statement by
23 your clients, that's a statement of a party-opponent and not
24 hearsay, right?

25 MR. BRIMMAGE: Well, I would say they're aligned

1 parties. I would not say that's a party-opponent.

2 THE COURT: All right.

3 MR. BRIMMAGE: We are aligned on the DIP, but --

4 THE COURT: All right. I'm trying -- look, you
5 filed pleadings in court. You're a -- just so we're all
6 clear -- I'm treating those three entities -- and I use
7 "entities" sort of in air quotes -- as parties for the
8 purposes of this proceeding.

9 MR. BRIMMAGE: That's fair, Your Honor.

10 But an admission by a party-opponent would mean an
11 adverse party to the other side. We are both supporting the
12 DIP; we're not adverse to the debtors, with regard to the
13 DIP.

14 THE COURT: All right. So let's take this in --
15 with why don't we slow down and break it into pieces.

16 Why don't you first ask a question about whether
17 she has knowledge and if so, we can figure out whether
18 there's a basis to get it out.

19 BY MR. WILSON:

20 Q Ms. Murray, do you have any knowledge as to why the DIP
21 lenders did not want a credit bid filed by the bid deadline
22 on November 12th of 2024 at 5:00 p.m. Eastern?

23 MR. BRIMMAGE: Your Honor, I'll also object, it
24 lacks foundation and assumes facts not in evidence about what
25 the debtor -- I mean -- sorry -- what the Ad Hoc Group didn't

1 want. There's been no evidence or testimony about what the
2 Ad Hoc Group didn't want --

3 THE COURT: Look, that's a fair objection.

4 Why don't you first start with "whether" --

5 MR. WILSON: Okay.

6 THE COURT: -- and then if the answer is "yes,"
7 turn to "why?"

8 BY MR. WILSON:

9 Q Did you know whether -- Ms. Murray, do you have
10 knowledge as to whether the Ad Hoc Group of Controlling Term
11 Lenders made a decision not to file the credit bid -- that's
12 a bad question.

13 A Sorry, do you mind rephrasing that?

14 Q Yeah.

15 A I just want to make sure I answer it appropriately.

16 Q Ms. Murray, do you know whether why the Ad Hoc Group of
17 Controlling Term Lenders did not submit a credit bid by the
18 bid deadline?

19 A My understanding is that they're still going back-and-
20 forth between the debtor and Ad Hoc Group regarding a number
21 of provisions.

22 Q Okay. Moelis has done no valuation in connection with
23 the value of the collateral packages for the debtors'
24 tranches of debt, correct?

25 A That is correct.

1 Q Moelis has not done any valuation analysis in
2 connection with the assets being sold pursuant to the sale
3 process, correct?

4 A The sale process results in whatever the highest value
5 is for the assets, so that would determine the value.

6 Q There are no valuation reports with respect to the
7 debtors' assets, correct?

8 A So, as we talked about yesterday, there's no formal
9 valuation with respect to all the debtors' assets, but
10 there -- you know, there is a borrowing base, so there's an
11 inventory appraisal that is done from time to time in
12 connection with the ABL facility.

13 Q Okay. But I believe you testified yesterday that those
14 inventory appraisals were stale, correct?

15 A Correct.

16 Q Okay. And, in fact, the debtors have not formed a view
17 as to the value of their assets, correct?

18 A That is correct.

19 Q Okay. Sitting here today, you do not know whether the
20 Ad Hoc Group of Controlling Term Lenders would recover more
21 in a liquidation as opposed to allowing the Minority Lenders
22 to participate in the proposed DIP on a *pro rata* basis,
23 correct?

24 A There were a lot of components to that question.

25 We have not done a liquidation analysis, so I cannot

1 tell you whether or not it's higher or lower.

2 Q Okay. That wasn't my question.

3 My question is, sitting here today, you do not know
4 whether the Ad Hoc Group of Controlling Term Lenders would
5 recover more in a liquidation as opposed to allowing the
6 Minority Lenders to participate in the proposed DIP on a *pro*
7 *rata* basis?

8 MR. MCKANE: Objection, Your Honor. It has an
9 embedded factual predicate that hasn't been established.
10 She's already stated they haven't done a liquidation
11 analysis, so she can't say whether it's higher or lower. So
12 she has no foundation to answer the question.

13 THE COURT: What's your response to that?

14 MR. WILSON: I think she said that there's no
15 valuation or no liquidation analysis. So, I presume the
16 answer to the question is "no."

17 THE COURT: There's no liquidation analysis, so
18 there's no valuation, so, obviously, the answer of anything
19 compared to something that is unknown must be unknown, right?

20 MR. WILSON: Correct. And that's all I'm --

21 THE COURT: So I'm going to sustain the objection
22 on that basis.

23 You can proceed.

24 MR. WILSON: Okay.

25 //

1 BY MR. WILSON:

2 Q Moelis has done no analysis regarding whether the
3 proposed DIP financing is an exchange for reasonably
4 equivalent value and fair consideration, correct?

5 A We've done no economic analysis there, but we did
6 receive funds and provided (indiscernible) in exchange.

7 Q Okay. But Moelis has done no economic analysis,
8 correct?

9 A Correct.

10 Q AlixPartners has done no analysis -- AlixPartners has
11 done no analysis regarding whether the proposed DIP financing
12 is in exchange for reasonably equivalent value and fair
13 consideration, correct?

14 A Not to my knowledge.

15 Q And the debtors, themselves, have done no analysis
16 regarding whether the proposed DIP financing is in exchange
17 for reasonably equivalent value and fair consideration,
18 correct?

19 A Not to my knowledge.

20 Q Moelis has not prepared any liquidation analyses with
21 respect to the debtors, correct?

22 A We have not prepared a liquidation analysis.

23 Q Moelis has not seen a liquidation analysis of the
24 debtors prepared by anyone else, correct?

25 A That's correct.

1 Q Moelis has not prepared an estimated range of the
2 debtors' enterprise value, correct?

3 A No, because we're running a marketing process and
4 that'll tell you the range of the value of the company.

5 Q And that marketing process hasn't concluded yet, has
6 it?

7 A It's still ongoing.

8 Q Okay. Have the debtors actually received any
9 indications of interest from prospective buyers?

10 A The indications of interest are due November 25th, as
11 outlined in the bid procedures.

12 Q Moelis has not prepared an estimated range of the
13 prepetition term loan collateral value, correct?

14 A That's correct.

15 Q And Moelis did no analysis as to whether other
16 prepetition term loan lenders who are not participating in
17 the proposed DIP would be adversely affected by the final
18 order approving the term DIP facility, correct?

19 A I think that'll come down to a future state that I
20 can't speak to at this moment. It'll depend on what happens
21 with the marketing process.

22 Q AlixPartners did no analysis as to whether other
23 prepetition term loan lenders who are not participating in
24 the DIP would be adversely affected by the final order
25 approving the term DIP facility, correct?

1 A Not to my knowledge.

2 Q And the debtors, themselves, did no analysis as to
3 whether other prepetition term loan lenders who are not
4 participating in the DIP would be adversely affected by the
5 final order approving the term DIP facility, correct?

6 A Not to my knowledge.

7 Q You understand that the proposed DIP order provides
8 that the debtors will suffer quote, "irreparable loss or
9 damage" if the DIP is not approved, correct?

10 A Yes, the company's liquidity, in order to continue as a
11 going-concern -- I think Mr. Husnick discussed this a little
12 bit earlier, but we're at a critical point for obtaining
13 inventory, so liquidity is necessary to continue.

14 Q Okay. But Moelis has done no analysis to quantify the
15 irreparable loss or damage if the DIP is not approved,
16 correct?

17 A We have not performed an economic analysis on that.

18 Q AlixPartners has not done an analysis to quantify
19 irreparable loss or damage if the DIP is not approved,
20 correct?

21 MR. MCKANE: I'm going to object. As Your Honor
22 knows all too well, irreparable harm is not really
23 (indiscernible) to a dollar. I don't know how this is
24 potentially aiding the Court.

25 THE COURT: I'm going to let it -- it's cross-

1 examination. I'll let it proceed a bit, but I -- but the
2 objection has some merit, so why don't we focus on what's
3 actually --

4 MR. WILSON: I understand, Your Honor.

5 I'm only asking the question because they're
6 asking the Court to make that finding in the proposed order.

7 THE COURT: I understand.

8 MR. WILSON: Okay.

9 BY MR. WILSON:

10 Q AlixPartners has not done any analysis as to whether or
11 not entry of the final order approving the term DIP facility
12 is in the best interests of the prepetition term lenders who
13 have not been allowed to participate in the DIP facility,
14 correct?

15 A I think there's some technical, legal terms in your
16 question, but not to my knowledge, has Alix prepared that
17 analysis.

18 Q Okay. And the debtors have not done any analysis as to
19 whether or not entry of the final order approving the term
20 DIP facility is in the best interests of prepetition term
21 loan lenders who have not been allowed to participate in the
22 DIP facility, correct?

23 A Not that I'm aware of.

24 Q Okay.

25 MR. WILSON: No further questions, Your Honor.

1 THE COURT: Very well.

2 Any other party wish to cross-examine the witness?

3 There was only one objecting party, so I guess we're fine.

4 And any redirect, Mr. McKane?

5 MR. MCKANE: Extremely limited.

6 THE COURT: Very well.

7 REDIRECT EXAMINATION

8 BY MR. MCKANE:

9 Q Good afternoon, Ms. Murray.

10 A Good afternoon.

11 Q You were asked a series of questions about whether you
12 or the Moelis team or the AlixPartners team had done economic
13 analysis and I believe I heard you say in response that, a
14 number of times, that no, we can't do that analysis because
15 it depends on future events or words to that effect.

16 Can you explain to the Court what you meant?

17 A Sure, happy to.

18 So right now we're in the middle of the marketing
19 process to determine the value of the company. We'll be
20 selling the assets to a third party and as part of that
21 process, we run a competitive process and the ultimate winner
22 of the auction will determined highest value.

23 Q Okay. And once you have the highest value, do you have
24 any idea what the recoveries might be?

25 A You have to run it through a waterfall.

1 Q And we're just not there yet?

2 A We're not there yet because we don't have a value.

3 Q Prepetition, the debtors did not receive any viable DIP
4 proposals, other than from the Ad Hoc Group of Term Loan
5 Lenders; is that correct?

6 A We received no other proposals.

7 Q Have you -- since filing, have the debtors received any
8 alternative DIP proposals?

9 A We've received no additional proposals.

10 Q Has any member of the Minority Term Loan Lenders
11 offered an alternative to the DIP financing?

12 A They have not.

13 Q I understand the DIP financing group, the Ad Hoc Group
14 has increased since the petition date; is that correct?

15 A I'm not sure if the Ad Hoc Group, technically, has
16 increased, but there are more parties providing the DIP
17 financing at this point.

18 Q Okay. Is Sound Point one of those additional parties
19 adding DIP financing?

20 A That is my understanding.

21 Q What is your understanding of how they became a member
22 of the DIP funding group, as opposed to the minority group?

23 A So my understanding is that Sound Point was in the
24 minority group. There were number of proposals going back
25 and forth between the Akin-Perella group and then the King &

1 Spalding group, also the Ad Hoc Group and the minority group.
2 As part of that, Sound Point agreed to take the offer on the
3 table and, therefore, are now part of the DIP facility or DIP
4 lender.

5 Q Just making sure we have all the facts, did the DIP
6 lenders followed up the first tranche?

7 A They did.

8 Q Did the ABL lenders consent to the use of cash
9 collateral?

10 A They did.

11 Q Did the Ad Hoc Group of Term Loan Lenders consent to
12 being primed?

13 A They did.

14 Q With this DIP financing, are the debtors able to
15 continue their sales process?

16 A We are.

17 Q With this DIP financing, are the debtors able to pursue
18 a potentially successful restructuring?

19 A That's the objective.

20 Q And is this DIP financing in the best interests of the
21 debtors and their estates?

22 A It is, because --

23 Q Why?

24 A -- without it, we will not be able to continue as a
25 going-concern. We need it to continue to pay employees. We

1 need it to continue to buy inventory. We need it to continue
2 to serve our customers, amongst other -- and to effectuate
3 the sale process.

4 MR. MCKANE: No further questions, Your Honor.

5 THE COURT: Okay. Very well.

6 Recross?

7 MR. BRIMMAGE: Your Honor, I'm going to supportive
8 direct.

9 THE COURT: Oh, I apologize, Mr. Brimmage.

10 MR. BRIMMAGE: I'm happy to cross if you'd like me
11 to.

12 THE COURT: No, why don't you just ask questions
13 and we'll worry about labels another day.

14 (Laughter)

15 MR. BRIMMAGE: Okay. All right.

16 REDIRECT EXAMINATION

17 BY MR. BRIMMAGE:

18 Q All right. Ms. Murray, Marty Brimmage with Akin.

19 You and I haven't spoken before in this case is it
20 accurate?

21 A That is correct.

22 Q I just have a few follow-up questions and a little bit
23 of my thunder was just stolen, so I'm going to weave around
24 that if I could.

25 You were dealing with the Ad Hoc Group in the

1 negotiations of the DIP, correct?

2 A That is correct.

3 Q And are you aware of anything that the Ad Hoc Group did
4 to attempt to deceive the debtors in the negotiations?

5 A No, we had an extensive back-and-forth.

6 Q But -- go ahead.

7 What about mislead the debtors in the negotiations?

8 A Not that I'm aware of.

9 Q What about engage in any form of trickery?

10 A Not that I'm aware of.

11 Q Any form of fraud?

12 A No.

13 Q Okay. In your understanding, were the Ad Hoc Group
14 negotiators straightforward with the debtors about the
15 issues?

16 MR. WILSON: Object to the form, and the objection
17 is that that calls for speculation and it calls for hearsay,
18 with respect to both, the Ad Hoc Lenders were required.

19 THE COURT: Response?

20 MR. BRIMMAGE: Your Honor, I think the witness can
21 state, based on her direct personal knowledge and experience
22 what was -- how they presented themselves to her.

23 THE COURT: I think the question asks for the
24 witness' impression of the conduct of the party with whom she
25 was negotiating and I think I'll overrule the objection.

1 You can answer.

2 THE WITNESS: Okay. So we had several
3 conversations and several term sheets that went back-and-
4 forth between the Moelis-Kirkland Alix side --

5 BY MR. BRIMMAGE:

6 Q Okay.

7 A -- and then the Perella-Akin and their Ad Hoc Group.
8 And to your point, I think it was that they were fair.

9 Q Right before I stood up, you said that once the DIP was
10 approved on an interim basis, it was funded, correct?

11 A That is correct -- or, you know, within a few days.

12 Q Right. And so my question is a little bit broader.
13 Did the Ad Hoc Group live up to all the obligations
14 that it had after the Court entered the interim DIP order?

15 A That is my --

16 MR. WILSON: Objection; vague: all the
17 obligations.

18 THE COURT: I'll overrule the objection. I think
19 it's sufficiently comprehensible from the perspective of the
20 witness and context, so you can answer the question.

21 THE WITNESS: So, yes, my understanding is that
22 they lived up to their obligations to, you know, fund the
23 DIP.

24 BY MR. BRIMMAGE:

25 Q Okay. In negotiating with the Ad Hoc Group, did the

1 debtors know that not all the lenders were included in the Ad
2 Hoc Group?

3 A We did.

4 Q And, in fact, the debtors, in negotiating on at least a
5 couple of occasions, maybe three, requested that all the
6 lenders be included in the Ad Hoc Group, correct?

7 A I would say at least three, but probably more than
8 that.

9 Q And what was the Ad Hoc Group's response each and every
10 time?

11 A That it was only for members of the Ad Hoc Group and
12 that they would not fund with any change to those terms.

13 Q Okay. I think you said in your testimony earlier, no
14 individual member of the Minority Lender group proposed a
15 DIP; is that correct?

16 A I have not -- we have not received anything to that
17 effect.

18 Q My question is, did the minority group lenders, as a
19 whole, propose an alternative DIP?

20 A They have not.

21 Q Okay. Was there anything prohibiting, either the
22 Minority Lender group, as a whole, that you're aware of, or
23 individual Minority Lenders from proposing a DIP?

24 A Not that I'm aware of or not that I recall.

25 Q In your opinion, since you negotiated, was the DIP

1 facility that was negotiated and approved on an interim
2 basis, was that a holistic package deal that was negotiated
3 by the debtors?

4 A Yes, we negotiated several provisions and arrived at
5 the whole set of terms, not only one.

6 Q All right. And I believe you testified that it was an
7 arm's-length negotiation, right?

8 A That is correct.

9 Q Describe for the Court in your words, what does "arm's-
10 length negotiation" mean?

11 A Arm's-length negotiation, in my view, is having two
12 parties with differing opinions and differing objectives
13 trying to negotiate the terms of, well, in this case, you
14 know, a DIP facility.

15 Q Okay. I'm going to go backwards a little bit.

16 Did any of the Minority Lenders or the Minority Lender
17 group, as a whole, sign an NDA?

18 A The minority holders, yes.

19 Q Okay. Did they all sign an NDA?

20 A An N -- sorry -- just to clarify --

21 Q The Minority Lenders.

22 A Some of them did sign an NDA when we were going through
23 our marketing process.

24 Q Okay. And you just told the Court your understanding
25 of what "arm's-length" means and I appreciate that.

1 Did the debtor push for as much as it could get in
2 these negotiations with the Ad Hoc Group?

3 A We did, on several occasions.

4 Q And you're convinced you got all you were going to get
5 out of them?

6 A We would have loved to get more. I would have loved to
7 have, you know, 1 percent cost to capital, but that was not
8 in the cards. We tried as hard as we could on multiple
9 occasions.

10 Q And over approximately how long were these negotiations
11 taking place?

12 A I would say, I'd have to look at the exact dates, but I
13 want to say it was over a week.

14 Q Okay. Let me go back in time to when the DIP was
15 negotiated and agreed to if I could.

16 A Sure.

17 Q You were familiar with the debtors' situation at the
18 time, correct?

19 A Correct.

20 Q Did the debtors have a viable business plan at the
21 time?

22 A The company was working through its bidding process.

23 Q But it didn't have one?

24 A When we started the discussions?

25 Q Yes.

1 A We did not have a business plan when we started the
2 discussions.

3 Q Was liquidity constrained?

4 A Very constrained.

5 Q Okay. Was there a limited tire inventory with no
6 guarantees of future shipments at that time?

7 A That is correct; at least, from certain vendors.

8 Q And was the senior executive team consisting primarily
9 of turnaround professionals at that time?

10 A That is correct.

11 Q Okay. Was a deadline fast-approaching with the DIP ABL
12 lenders on the terms of the new ABL facility?

13 A Can you rephrase that question just so make sure I
14 answer appropriately?

15 Q Was there a deadline for reaching an agreement with the
16 DIP ABL lenders on the terms of the new ABL facility?

17 A The ABL facility indicated that they would only support
18 changes to their terms in an in-court scenario.

19 Q Okay. And we're here in court, right?

20 A We are.

21 Q All right. At the time, was there a sure path forward
22 to emergence from Chapter 11?

23 A No.

24 Q Is there a guaranteed path forward to emergence from
25 Chapter 11 now?

1 A Nothing in life is guaranteed, but we are hopeful that
2 the sales process is successful, either as the credit bid or
3 as a third-party buyer.

4 Q In order for that hope to come true, one of the
5 component pieces is you need the Court to approve this DIP on
6 a final basis; is that correct?

7 A Yes, the company needs liquidity.

8 Q Thank you for your time.

9 MR. BRIMMAGE: Your Honor, I'll pass the witness.

10 THE COURT: Okay. Very well.

11 Any recross, Mr. Wilson?

12 RECCROSS-EXAMINATION

13 BY MR. WILSON:

14 Q Ms. Murray, on redirect, you testified that you
15 believed that the DIP was in the best interests of the
16 debtors, correct?

17 A I believe I did.

18 Q Okay. But Moelis did no economic analysis as to
19 whether or not the DIP was in the best interests of the
20 debtors, correct?

21 A We think it's -- Moelis believes it's in the best
22 interests to continue as a going-concern. A going-concern,
23 you know, preserves jobs. It allows for a continued supply
24 of inventory. So, from our vendors, as well as, you know,
25 continued service to our customers, amongst other things.

1 Q But you didn't quantify that, did you?

2 A I think it's hard to quantify.

3 Q Okay. You were asked about Sound Point joining in the
4 DIP, correct?

5 A I was.

6 Q All right. And there were other lenders that were also
7 allowed to participate in the DIP that are not members of the
8 Ad Hoc Group of Controlling Term Lenders, correct?

9 A Yeah, I believe your minority group and there may have
10 been others. We're not privy to all those conversations.

11 Q Okay. That wasn't my question.

12 My question is, there were other lenders that were
13 allowed to join in the DIP that aren't part of the Ad Hoc
14 Group of Controlling Term Lenders, correct?

15 A Correct.

16 Q Okay. And one of those is Bank of America, correct?

17 A That is correct.

18 Q Okay. And Bank of America was allowed to participate
19 in the DIP financing facility because they threatened to show
20 up at the first day hearing and raise an objection, correct?

21 MR. MCKANE: Objection, Your Honor; lack of
22 foundation.

23 THE COURT: Why don't you ask the question --
24 look, I'll sustain the objection on the grounds that there is
25 no foundation. Why don't you see if you can establish one.

1 MR. WILSON: Okay. Your Honor, this may be a good
2 time to take up one of the documents --

3 THE COURT: All right.

4 MR. WILSON: -- that is listed in our exhibit that
5 hasn't been agreed to come in. And that is Exhibit 21 and
6 Exhibit 22. I can hand up a copy of the binders.

7 THE COURT: So, I've got -- look, I've got your
8 binder --

9 MR. WILSON: Okay.

10 THE COURT: -- and you're cross-examining the
11 witness, so why don't you conduct your cross-examination and
12 when it comes time to move a document into evidence, we can
13 address its admissibility.

14 MR. WILSON: Well, we would like to move in all of
15 our documents and there's no objection --

16 THE COURT: All right. But you're in the middle
17 of cross-examination.

18 MR. WILSON: I understand, but there is no
19 objection on the foundation to the documents coming in.

20 MR. MCKANE: Your Honor, these exhibits are not
21 going to establish foundation for this witness.

22 THE COURT: It doesn't matter. The documents
23 don't walk into evidence, in any event, and so if -- you're
24 welcome to use the document as part of your cross-examination
25 without regard to its admissibility. We'll deal with the

1 admissibility separately.

2 But where we are is you've asked a question, as to
3 which there was no foundation, and you need to establish one,
4 based either on -- with a question or a document or what have
5 you.

6 Mr. Brimmage?

7 MR. BRIMMAGE: Your Honor, I object to this line
8 of questioning. It's outside the scope of the direct or the
9 redirect. She was asked about one entity on redirect, but
10 not this entity. He had every opportunity --

11 THE COURT: I think that opened the door. I'm
12 going to overrule that objection.

13 MR. BRIMMAGE: All right.

14 MR. WILSON: Your Honor, may I approach the
15 witness with --

16 THE COURT: You may.

17 BY MR. WILSON:

18 Q So, Ms. Murray, we were talking about Bank of America,
19 correct?

20 A That is correct.

21 Q Bank of America was allowed to participate in the
22 DIP -- in funding the DIP facility, correct?

23 A That is my understanding, yes.

24 Q And they are not a member of the ad hoc group of
25 controlling term lenders, correct?

1 A They are not a member of the ad hoc group.

2 Q Okay. If you could turn to what is marked as Tab 21 in
3 the binder, please.

4 A Okay.

5 Q This is an email exchange between Ms. Rachel Strickland
6 at Fried Frank, who is counsel for Bank of America, and
7 Mr. Dublin, who is sitting here at counsel table, from Akin
8 Gump on behalf of the ad hoc group of controlling term
9 lenders.

10 A I believe there is one other lawyer from Akin Gump cc'd
11 on this email.

12 Q Correct. We looked at this email at your deposition,
13 correct?

14 A Yeah, that was my first time seeing this email.

15 Q Okay. And with respect to the reasons for Bank of
16 America's joining in the DIP facility are you aware of why
17 Bank of America was allowed to participate in the DIP
18 facility?

19 MR. BRIMMAGE: Your Honor, I am just going to
20 object. She said the first time she saw this was yesterday.
21 She wasn't personally involved. So, to have her now testify
22 about that I think is --

23 THE COURT: Yeah, I am inclined to agree with
24 that.

25 MR. MCKANE: That was the basis for the foundation

1 objection in the first place.

2 THE COURT: Yeah.

3 MR. WILSON: I am asking if she is aware of a
4 reason why they were not -- why they were allowed to
5 participate in the DIP financing.

6 MR. BRIMMAGE: Your Honor, then I would object.
7 It still lacks foundation.

8 THE COURT: Well, the question whether she has
9 knowledge that doesn't -- that would be the foundation or not
10 but you don't need a foundation for that, right?

11 MR. MCKANE: Correct.

12 MR. BRIMMAGE: Just to be absolutely clear, I
13 mean, she can answer that question based on her personal
14 knowledge prior to seeing an email as a 30(b)(6) witness the
15 day before the hearing.

16 THE COURT: Yeah, I think you can ask her the
17 question if she has knowledge independent of having looked at
18 this email and if she does you can probe what it is and if
19 this document is the only basis then I am not sure you have
20 got anywhere to go other than try to get the document
21 admitted.

22 MR. BRIMMAGE: And to the extent Your Honor relies
23 on hearsay, either through the document or otherwise, we
24 would object on that basis.

25 THE COURT: I understand. So, look, I am only

1 going to permit as a foundation question whether the witness
2 has knowledge independent of this document.

3 BY MR. WILSON:

4 Q Independent of this document do you have any knowledge
5 as to why Bank of America was allowed to participate in the
6 DIP?

7 A I do not. All I know is when we did the funds flow
8 they were added in.

9 Q Okay. That was after the petition date, correct?

10 A Correct. That was after the hearing and when the DIP
11 was approved and we were working through the actual cash flow
12 to fund the DIP.

13 Q And after the first day hearing other term loan lenders
14 tried to participate in the DIP, correct?

15 A I don't have personal -- you know, they didn't talk --

16 THE COURT: I think you can -- it's not apparent
17 there is a foundation to that question. You can ask whether
18 she has knowledge.

19 MR. WILSON: Okay.

20 BY MR. WILSON:

21 Q Are you aware, Ms. Murray, whether any other lenders
22 attempted to participate in the DIP facility after the
23 petition date?

24 MR. BRIMMAGE: Your Honor, we object to the extent
25 her answer relies on hearsay, either through a document or

1 otherwise. If she has personal knowledge otherwise, that is
2 fine.

3 THE COURT: Look, if her knowledge is hearsay, we
4 can figure that out but I don't -- I think she can answer yes
5 or no to the question of whether she has knowledge and then
6 we can explore what the basis is and then we can figure out
7 what to do with that.

8 THE WITNESS: Yes. It is my understanding that
9 others wanted to participate in the DIP facility.

10 BY MR. WILSON:

11 Q Which lenders wanted to participate in the DIP
12 facility?

13 A So, I don't have a list of all of them but my
14 understanding is all the members of your group, the minority
15 group.

16 Q And there were other lenders beyond those that are in
17 our group, our clients, that attempted to participate in the
18 DIP after the petition date?

19 A Not that I am aware of.

20 Q You testified that --

21 A Sorry, just to be clear, other than Bank of America
22 which we just talked about. I should clarify that.

23 Q -- the minority lenders have not provided a DIP funding
24 proposal, correct?

25 A That is correct.

1 Q But the excluded lenders in our group are not the --
2 they do not constitute the rec lenders under the prepetition
3 term loan facility, correct?

4 A That is -- I would defer to Kirkland on some of those
5 legal interpretations but I have received no -- or Moelis and
6 the debtors have received no other proposals.

7 MR. WILSON: No further questions.

8 THE COURT: Okay. Thank you. Is there any
9 further examination of the witness?

10 MR. BRIMMAGE: Your Honor, one quick question.

11 FURTHER REDIRECT EXAMINATION

12 BY MR. BRIMMAGE:

13 Q Ms. Murray, do you know one way or another if Bank of
14 America was an ABL lender?

15 A They were an ABL lender.

16 MR. BRIMMAGE: Thank you, Your Honor.

17 THE COURT: Okay. Anything further?

18 (No verbal response)

19 THE COURT: Okay.

20 MR. MCKANE: Your Honor, we just ask that
21 Ms. Murray be excused.

22 THE COURT: Yes. Mr. Murray, thank you for your
23 testimony. Not that I can imagine there is any place you
24 would rather be, but you are excused from our proceeding.

25 (Witness excused)

1 THE COURT: Okay. So where to from here, counsel?

2 MR. MCKANE: Your Honor, my understanding is that
3 they do not have any questions of Mr. Bienias. The materials
4 are already in. We believe, from the debtors perspective, we
5 would be prepared to rest. I don't know if the DIP lender
6 has any additional evidence they want to present before we
7 proceed to the next witness.

8 THE COURT: Okay. So, sounds like the debtor is
9 resting -- on the understanding that the ABL lenders are
10 aligned, do you have an evidentiary case?

11 MR. BRIMMAGE: Your Honor, just one second.

12 THE COURT: Certainly. And just to confirm,
13 Mr. Wilson, I take it you don't need to cross-examine any of
14 the other witnesses whose declarations have come in, correct?

15 MR. WILSON: That is correct, Your Honor.

16 THE COURT: Okay, very well. Thank you.

17 MR. FIORILLO: Your Honor, Dan Fiorillo, counsel
18 for the agent for the ABL lenders.

19 The reference to us being aligned is correct.

20 THE COURT: I'm sorry, the reference --

21 MR. FIORILLO: We are aligned with the company's
22 position.

23 THE COURT: Okay, very well. Thank you.

24 Mr. Brimmage.

25 MR. BRIMMAGE: Thank you, Your Honor. Here on

1 behalf of the ad hoc group. We would respectfully ask that
2 the Court take judicial notice of Ad Hoc Group Exhibit 12,
3 applicable Rule 201, judicial notice of adjudicated facts.
4 Facts to be noticed here, Your Honor, the fact that we want
5 the Court to take judicial notice of the certain provisions
6 that exist in the Dave & Buster's credit agreement.

7 Specifically, if you turn to page 224 of
8 Exhibit 12, and I will slow down, Your Honor -- I am going to
9 get it myself, hang on. Your Honor, if you will turn to
10 Section 9.08(b) (x) you will see the language providing that
11 the DIP financing may not include a rollup. Mr. Dublin later
12 will offer argument about this fact but it's the kind of fact
13 that can be noticed, Your Honor, by a Court. Section --
14 Rule 201(b), the Court may judicially notice a fact that is
15 not subject to reasonable dispute because it to, under Roman
16 numeral (II), or letter two -- sorry, number 2 can be
17 accurately and readily determined by the sources whose
18 accuracy cannot reasonably be questioned.

19 Your Honor, as you probably know, its common in
20 the Third Circuit to take judicial notice of this type of
21 fact. Generally, SEC filings are relevant not to prove the
22 truth of their contents but only to determine what the
23 document stated. The Third Circuit has taken a judicial
24 notice of facts in the SEC filing not just the existence of
25 the document when considering a motion to dismiss. This is

1 Golden v. Community Health Systems, In Re Quorum Health
2 Corp., Nos. 20-10766 (BLS), 21-51190 (BLS), and then 2023
3 Bankruptcy Lexus 698 at page 20. This is a Delaware
4 bankruptcy case from March 16th, 2023.

5 Your Honor, SEC filings are public records and,
6 therefore, are typically subject to judicial notice. That is
7 Schmidt v. Skolas, 770 F.3d 241, pinpoint 249, that is the
8 Third Circuit 2014. Your Honor, this Court does not have
9 discretion on this. I am always reluctant to say that but
10 every time I bring up the judicial notice, I think you
11 probably have discretion on a lot of things but at least
12 according to the rule it says the Court must take judicial
13 notice if a party request it and supplies with the necessary
14 information.

15 Your Honor, we have supplied you with the
16 necessary information and we respectfully request that you
17 take judicial notice.

18 THE COURT: Mr. Wilson.

19 MR. WILSON: Objection, Your Honor. It's
20 completely irrelevant. Whatever the DIP data credit
21 agreement says its completely irrelevant.

22 THE COURT: So, let me ask this question: Do you
23 dispute that the document that is their Exhibit 12 is an SEC
24 filing?

25 MR. WILSON: I don't dispute that it's an SEC

1 filing.

2 THE COURT: So, look, whether this is judicial
3 notice or is more of a question of law is a closed question.
4 I am not sure it really matters at some level. It can be
5 just treated as, you know, a document that exists as, sort
6 of, legal authority. That is all I intend to use it for.
7 It's not, otherwise -- your point about relevance is fair to
8 the extent you are saying it just supports a legal argument.
9 So, I am going -- look, I will take judicial notice on the
10 theory that to the extent it matters I have the ability to
11 look at it but to the extent it doesn't bear on a factual
12 question I have to decide I, therefore, won't consider it.
13 So, that is my ruling.

14 MR. BRIMMAGE: Thank you, Your Honor. With that,
15 the ad hoc group rests its case.

16 THE COURT: Okay, very well. So, I think we
17 are -- unless I am missing something, Mr. Wilson, we are now
18 to your factual case, your evidentiary case.

19 MR. WILSON: Correct, Your Honor. Thad Wilson
20 from King & Spalding on behalf of the excluded -- the ad hoc
21 group of excluded term lenders. It's a little inconvenient
22 we don't have a table.

23 THE COURT: Sorry we can't be more accommodating,
24 Mr. Wilson.

25 MR. WILSON: Understood, Your Honor. We have been

1 feeling like shut out the whole time.

2 THE COURT: We will give you the same table here
3 that we give to others.

4 MR. WILSON: Understood. Your Honor, at this time
5 I would like to move into evidence several documents for
6 which there is no foundation objection, they are just
7 objections to hearsay and relevance and prejudice. Those are
8 Exhibit 20, Exhibit 21, Exhibit 22, Exhibit 28, and
9 Exhibit 29.

10 THE COURT: Okay, hold on, let's take them one at
11 a time.

12 MR. WILSON: I would suggest maybe we take those
13 up one by one.

14 THE COURT: Hold on, I need to look at the
15 document.

16 MR. BRIMMAGE: Your Honor, I am happy to do this
17 one at a time, but I am a little perplexed. I think this is
18 better done with a witness on the stand where we can put it
19 in the context of what is going on in the hearing. We stand
20 by our objections. We are happy to argue them, but I
21 understand there is no supporting witness for this, so I am
22 just a little confused about how we are proceeding here.

23 MR. WILSON: If Mr. Brimmage would like me to call
24 a witness with respect to these documents, I am happy to call
25 his partner, Mr. Dublin, to the stand because most of these

1 are communications that Mr. Dublin had with various parties.

2 MR. BRIMMAGE: In that case, Your Honor, we will
3 argue about the relevance of them and take it from there.

4 THE COURT: All right. So, what is the objection
5 to Exhibit 20?

6 MR. BRIMMAGE: Let me get there, Your Honor. Hang
7 on just one second. Your Honor, I think what you are going
8 to find is there are -- one is relevance. We don't think it
9 goes to the issues that the Court has to decide today for the
10 DIP motion. We have gone over that and so you have got that.
11 The other one I would say is some of the statements in there
12 certainly rely on hearsay. So, we would object on that basis
13 as well.

14 THE COURT: So, in Exhibit 20 tell me what
15 statement relies on hearsay.

16 MR. BRIMMAGE: Well, it's Mr. Harron's statement.
17 That would be hearsay.

18 THE COURT: Slow down. Which statement?

19 MR. BRIMMAGE: I am at Exhibit 20, the top
20 statement -- the email is from Mr. Harron, is that correct?

21 THE COURT: Yup.

22 MR. BRIMMAGE: So, he says, "Thanks, Daniel.
23 Hello, all. I would like to sign the RSA and contribute to
24 the DIP, etc."

25 THE COURT: All right. What is your response to

1 that?

2 MR. WILSON: This isn't hearsay, Your Honor.
3 We're not offering it for the truth of the matter that is
4 being asserted, only that there was an offer that was made.

5 THE COURT: So, limited to that what is your
6 objection?

7 MR. BRIMMAGE: Relevance, Your Honor.

8 THE COURT: What is your answer to the relevance?

9 MR. WILSON: Our response is this is a minority
10 lender. Zena (phonetic), I think, is the way that you
11 pronounce it. They are not in the ad hoc group of excluded
12 lenders. They are offering to participate in the DIP and the
13 decisions that were being made by the ad hoc group of
14 controlling term lenders as to who was allowed to participate
15 in the DIP and who was not allowed to participate in the DIP
16 was arbitrary. It goes to the good faith because it was a
17 proposed finding that the DIP lenders were acting in good
18 faith.

19 THE COURT: I hear you. Look, go ahead.

20 MR. BRIMMAGE: I want to hear what you have to
21 say, I don't mean to interrupt you.

22 THE COURT: Look, I am inclined to say that I
23 don't know how important this is, but in terms of, you know,
24 does it move the needle a micron sufficient to get over the
25 relevance I am inclined to think it is relevant. It doesn't

1 need to be very relevant to come in.

2 MR. BRIMMAGE: If I may, let me challenge that.

3 THE COURT: Okay.

4 MR. BRIMMAGE: The Court is here to decide the DIP
5 whether or not the debtors are exercising their business
6 judgment and it's in the best interest of the estate. You
7 had the debtors witness testify --

8 THE COURT: If you handed me a two-line order that
9 says that the debtors have exercised business judgment, it's
10 in the best interest of the estate then I will exclude this
11 document. If you want a 100-page DIP order, like you have
12 handed me then we have more to do.

13 MR. BRIMMAGE: Then let's talk about good faith
14 real quick.

15 THE COURT: Good faith to whom? We had the
16 debtors witness testify --

17 THE COURT: All right, I'm done. The document is
18 admitted.

19 (Minority Lenders' Exhibit 20, received into evidence)

20 MR. WILSON: Your Honor, I would move Exhibit 20
21 into evidence.

22 THE COURT: That has been admitted.

23 MR. WILSON: Okay. Now onto Exhibit 21, Your
24 Honor. This is an email chain between Ms. Strickland and
25 Mr. Dublin regarding Bank of America's participation as a DIP

1 lender. So, we would move Exhibit No. 21 into evidence.

2 THE COURT: On the same limitations?

3 MR. WILSON: On the same limitation.

4 THE COURT: Mr. Brimmage.

5 MR. BRIMMAGE: Same objection.

6 THE COURT: Okay, overruled again. Its admitted.

7 (Minority Lenders' Exhibit 21 received into evidence)

8 MR. WILSON: We would move Exhibit No. 22 into
9 evidence on the same limited basis.

10 THE COURT: I take it same objection.

11 MR. BRIMMAGE: Same objection, Your Honor.

12 THE COURT: Okay, the objection is overruled. The
13 document will be admitted.

14 (Minority Lenders' Exhibit 22 received into evidence)

15 MR. WILSON: Now moving to Exhibit 25, again
16 offering Exhibit 25 on the same limited grounds. Its yet
17 another lender offering to participate in the DIP.

18 THE COURT: Okay.

19 MR. BRIMMAGE: Same objection.

20 THE COURT: Objection is overruled. The document
21 will be admitted.

22 (Minority Lenders' Exhibit 25 received into evidence)

23 MR. WILSON: Exhibit 28. We would move Exhibit
24 No. 28 into evidence.

25 MR. BRIMMAGE: Same objection.

1 THE COURT: Okay, admitted.

2 (Minority Lenders' Exhibit 28 received into evidence)

3 MR. WILSON: Then Exhibit No. 29, please.

4 THE COURT: Same objections I take it.

5 MR. BRIMMAGE: Same objection, Your Honor.

6 THE COURT: Overruled. Admitted.

7 (Minority Lenders' Exhibit 29 received into evidence)

8 MR. WILSON: That leaves us with -- at this time
9 we would like to call Mr. Douglas McGovern to the stand
10 please.

11 THE COURT: Mr. McGovern, if you could take the
12 stand.

13 Ms. Barksdale, if you could swear the witness.

14 DOUGLAS MCGOVERN, AD HOC GROUP OF EXCLUDED TERM LENDERS'
15 WITNESS, SWORN

16 THE CLERK: Please state your full name and spell
17 your last for the record.

18 THE WITNESS: Douglas McGovern, last name is
19 spelled M-C-G-O-V-E-R-N.

20 THE CLERK: You may be seated.

21 MR. BRIMMAGE: Your Honor, I will be brief. We
22 will just -- I just want to give the Court -- we are going to
23 object to anything that goes over the testimony that has
24 already been designated.

25 THE COURT: Well, that document, I don't think,

1 has been nailed down yet, right, the designation?

2 MR. BRIMMAGE: I have got a hard copy for you,
3 Your Honor. We are having it filed.

4 THE COURT: Okay. So --

5 MR. WILSON: We just need time to review it. I
6 have been up here a lot, Your Honor, and I --

7 THE COURT: I understand. Look, to the extent we
8 end up with -- look, I am going to give you a little bit of
9 latitude to proceed on the theory that I am going to have to
10 make a decision in this case and I haven't read that document
11 yet. So, I am not going to categorically exclude anything
12 that overlaps but will ask you to, you know, be mindful of
13 the shortness of life.

14 MR. WILSON: Understood, Your Honor. I appreciate
15 that. And, Your Honor, I would ask permission of the Court
16 to treat this witness as a hostile witness.

17 THE COURT: Any objection to permitting leading
18 questions on that basis?

19 MR. BRIMMAGE: No objection.

20 THE COURT: Very well.

21 DIRECT EXAMINATION

22 BY MR. WILSON:

23 Q Good afternoon, Mr. McGovern.

24 A Good afternoon.

25 Q You are investment banker at --

1 THE COURT: Hold on, has the witness been sworn
2 and I just wasn't paying attention?

3 MR. WILSON: Okay. I apologize. Thank you.

4 You can proceed. My apologies.

5 BY MR. WILSON:

6 Q Mr. McGovern, you are investment banker at Perella
7 Weinberg Partners, correct?

8 A Yes.

9 Q And Perella is the investment banker for the ad hoc
10 group of controlling term lenders here, correct?

11 A Yes.

12 Q You and your team at Perella are advising the ad hoc
13 group of controlling term lenders with respect to the DIP
14 financing, correct?

15 A Yes.

16 Q You and your team at Perella are advising the members
17 of the ad hoc group of controlling term lenders in connection
18 with their negotiations with the debtors over the terms of
19 the DIP financing, correct?

20 A Yes.

21 Q In connection with the DIP negotiations the debtors
22 never asked the ad hoc group to subordinate their prepetition
23 term loan liens to new third party DIP facility, did they?

24 A I'm sorry, could you restate the question.

25 Q In connection with the DIP negotiations the debtors

1 never asked the ad hoc group of controlling term lenders to
2 subordinate their prepetition term loan liens to new third
3 party DIP financing facility, did they?

4 A Yes.

5 Q And you don't know whether the members of the ad hoc
6 group of controlling term lenders would have been willing to
7 subordinate their liens to third party DIP financing,
8 correct?

9 A Correct.

10 Q You have also been advising the ad hoc group of
11 controlling term lenders with respect to post-petition DIP
12 financing negotiations with lenders who are not part of the
13 ad hoc group of controlling term lenders, correct?

14 A Would you mind reading the question one more time.

15 Q You and your team at Perella have also been advising
16 the ad hoc group of controlling term lenders with respect to
17 post-petition DIP financing negotiations with lenders who are
18 not part of the ad hoc group, correct?

19 A Correct.

20 Q That advice includes the negotiations with the ad hoc
21 group of excluded term lenders, correct?

22 A Correct.

23 Q The excluded lenders were never invited to participate
24 in the DIP credit facility on a pro rata basis with respect
25 to their full-term loan holdings, correct?

1 A That is correct.

2 Q Bank of America, however, was invited to participate in
3 the DIP credit facility on a pro rata basis, correct?

4 A I don't believe they were invited to participate on a
5 completely pro rata basis.

6 Q Bank of America, however, was invited to participate in
7 the DIP credit facility, correct?

8 A Yes.

9 Q Sound Point was also invited to participate in the DIP
10 credit facility, correct?

11 A That is correct.

12 Q Bank of America threatened to object to the first day
13 hearing if they were not allowed to participate in the DIP
14 facility, correct?

15 A I believe that they used the word "instigate."

16 Q They also said that they wouldn't show up at the first
17 day hearing if they were cut into the DIP facility, correct?

18 A That is correct.

19 Q At least one member of the ad hoc group of controlling
20 term lenders has purchased prepetition term loans on a post-
21 petition basis, correct?

22 A I do not have knowledge of that.

23 Q You are not aware whether Silver Point has purchased
24 prepetition term loans on a post-petition basis?

25 A I am not aware of that.

1 Q With respect to the prepetition term loan claims --
2 strike that.

3 You and your team at Perella helped negotiate the RSA
4 on behalf of the ad hoc group of controlling term lenders,
5 correct?

6 A That is correct.

7 Q Prior to the petition date the excluded lenders were
8 not offered the chance to participate and sign onto the
9 restructuring support agreement, correct?

10 A That is correct.

11 Q The members of the ad hoc group of controlling term
12 lenders made the decision to not offer the excluded lenders
13 the opportunity to participate in the restructuring support
14 agreement, correct?

15 A I'm sorry, would you mind repeating the question.

16 Q The members of the ad hoc group of controlling term
17 lenders made the decision to not offer the excluded lenders
18 the opportunity to participate in the restructuring support
19 agreement, correct?

20 A That is correct.

21 Q And the RSA contains a credit bid term sheet, correct?

22 A It does.

23 Q The credit bid term sheet provides members of the ad
24 hoc group of controlling lenders may submit a credit bid on
25 account of their DIP loans, rollup loans, and prepetition

1 term loans, correct?

2 A That is correct.

3 Q Perella did not do an economic analysis with respect to
4 pro rata participation for the non-ad hoc term loan lenders
5 versus not having them participate in the restructuring
6 support agreement, correct?

7 A I believe analysis that we did was all at the
8 instruction of counsel and I believe that its privileged.

9 MR. WILSON: Your Honor, this was part of the
10 privilege issue that we were -- that we had raised with the
11 Court. There were a number of analyses that were --

12 THE COURT: So, look, here is where we are you
13 asked him a question and I haven't gotten an objection from
14 counsel that its privileged and I am going to overrule any
15 suggested objection by a witness. So, unless there is an
16 objection by counsel the witness should answer the question.

17 MR. BRIMMAGE: Well, Your Honor, I am not -- I
18 didn't know that it was but I am going to object now that
19 goes to the attorney/client privilege.

20 THE COURT: But the question was did you conduct
21 an analysis --

22 MR. BRIMMAGE: That is what I thought. I agree.

23 THE COURT: -- and so I think he can answer that
24 question.

25 MR. BRIMMAGE: I agree.

1 THE COURT: Okay, so you can proceed.

2 BY MR. WILSON:

3 Q Did Perella conduct an economic analysis with respect
4 to pro rata participation for the non-ad hoc group term loan
5 lenders versus not having those excluded lenders participate
6 in the restructuring support agreement?

7 A We did.

8 Q Okay. What did that analysis show?

9 MR. BRIMMAGE: Your Honor, on that I will object.

10 THE COURT: What is your basis?

11 MR. BRIMMAGE: Its attorney/client privilege, work
12 product privilege, consulting privilege.

13 THE COURT: How is that established? Explain to
14 me what in the record demonstrates that this was done at the
15 advice of counsel.

16 MR. BRIMMGAE: So, I think if I can take the
17 witness on voir dire, I will demonstrate it.

18 THE COURT: You can.

19 MR. BRIMAGE: Your Honor, it's Exhibit 8. And do
20 we have a witness notebook up there of the ad hoc group's
21 exhibits?

22 THE COURT: So, I think he only has the minority
23 exhibit.

24 MR. BRIMMAGE: Let me get it.

25 THE COURT: Okay, very well.

1 MR. BRIMMAGE: Your Honor, may I approach?

2 THE COURT: You may.

3 MR. BRIMMAGE: Your Honor, you have this, correct?

4 THE COURT: Yes, I do.

5 MR. BRIMMAGE: We are going to Exhibit 8, which
6 has already been admitted. Your Honor, let me change my
7 mind. Its Exhibit 8 but it's the minority lender group
8 Exhibit 8. I got it wrong. I apologize.

9 THE COURT: No problem at all.

10 MR. BRIMMAGE: Thank you.

11 VOIR DIRE EXAMINATION

12 BY MR. BRIMMAGE:

13 Q You have that, Mr. McGovern?

14 A I believe so.

15 Q Is Tab 8 an engagement letter?

16 A It is.

17 Q Mr. McGovern, do you recognize Exhibit 8 that has
18 previously been admitted?

19 A I do.

20 Q Can you tell the Court what it is?

21 A It is our engagement letter.

22 Q When you say our engagement letter whose engagement
23 letter?

24 A It is Perella Weinberg's engagement letter.

25 Q And when was Perella approximately engaged?

1 A It reads October 17th.

2 Q Let me go to the first paragraph, if I could. Who
3 engaged Perella?

4 A Akin Gump.

5 Q Going to the second paragraph it says, "We have been
6 retained on behalf of and will report solely to counsel." Do
7 you see that?

8 A Yes.

9 Q It says, "Notwithstanding that our fees and expenses
10 will be paid by the company." Do you see that?

11 A Correct.

12 Q Is that a true statement?

13 A Yes.

14 Q And has that been true during this engagement?

15 A Yes.

16 Q Have you taken direction regarding your -- well, let me
17 just keep going down here. Below that it lists the services
18 to be rendered. Do you see that?

19 A I do.

20 Q I am not going to read over all of them because I want
21 to be efficient with our time but as you look through them
22 many of them say "analyze, report to counsel." Correct?

23 A Yes.

24 Q And then I think (indiscernible) says "In connection
25 with counsel and do things at the direction of counsel." Do

1 you see that?

2 A I do.

3 Q Has that played out and been true in this case?

4 A Yes.

5 Q Okay. In all the meetings that you have attended has
6 counsel been present.

7 A Yes.

8 Q Have you taken direction from counsel on the analysis
9 that you and Perella decided to do or not do?

10 A Yes.

11 Q To date have you distributed or publicized any analysis
12 or communications with counsel about what you are supposed to
13 do or not do outside of the ad hoc group or counsel?

14 A Not to my knowledge.

15 MR. BRIMMAGE: Your Honor, that is the basis for
16 the --

17 THE COURT: So, help me with this, Mr. Brimmage,
18 is your claim of privilege -- so, look, let's assume that
19 they conducted a calculation, right, of something that you
20 could presumably figure out from looking at documents. It's a
21 math exercise and that they did it. He is -- the question
22 that is being asked is what was the answer to the math
23 analysis that you did. So, presumably -- I want to make sure
24 I am understanding your objection, it's not an
25 attorney/client privilege objection because he's not asking

1 about a communication, right?

2 MR. BRIMMAGE: Right.

3 THE COURT: So, you are saying that its work
4 product. You are saying that he did that calculation in
5 anticipation of litigation.

6 MR. BRIMMAGE: Correct.

7 THE COURT: How have you established that?

8 MR. BRIMMAGE: I will establish that, Your Honor.

9 THE COURT: As opposed to did it because we wanted
10 to understand the math in order to form a business decision
11 as opposed to help me prepare for pending or threatening
12 litigation, right. That is the question?

13 MR. BRIMMAGE: Yes. And, Your Honor, I think
14 there is case law out there that says you can't parse the two
15 when they are being directed by counsel. That is what -- and
16 I can cite the Court cases but let me address your issue.

17 BY MR. BRIMMAGE:

18 Q Let me go over one more provision, thank you, on page 8
19 of Exhibit 8 if you could turn there, Mr. McGovern. Can you
20 look at the middle paragraph, the second paragraph of
21 Paragraph 9. Do you see that?

22 A I do.

23 Q Do you recall that paragraph?

24 A I do.

25 Q All right. Can you do me a favor and read that

1 paragraph for the Court?

2 A Sure. "Perella Weinberg Partners acknowledges and
3 agrees that it is acting at the direction of counsel and any
4 work product produced by Perella Weinberg Partners pursuant
5 to this agreement is for the purpose of facilitating the
6 rendering by counsel of legal advice to the ad hoc group and
7 constitutes attorney work product and that any communication
8 to counsel, the ad hoc group or any member thereof, whether
9 written or oral, including without limitation any
10 correspondences, analysis, reports and related materials that
11 Perella Weinberg Partners prepares, delivers or receives
12 constitutes confidential and legally privileged and protected
13 communications to the extent permitted by law."

14 Q Were you performing these services to assist the ad hoc
15 group in making its decisions in conjunction with legal
16 counsel on how it wanted to move forward?

17 A Yes.

18 Q Including on how it wanted to move forward on the DIP?

19 A Yes.

20 Q What terms it might be willing to accept or not accept?

21 A Yes.

22 Q Whether or not it would or wouldn't let members into
23 the group?

24 A Yes.

25 Q What it would do in this bankruptcy if challenged in

1 certain ways by certain members of parties in interest.

2 A Yes.

3 MR. BRIMMAGE: Your Honor, with that, I that
4 covers it, if you want me to go a little more I can.

5 THE COURT: No. Look, here is where I am, whether
6 this is privileged or not is a close question. I am inclined
7 to sustain the objection. It's in part -- in part, my ruling
8 on the privileged question is informed by the fact that I
9 think there is enough common sense here that I don't actually
10 think I need the mathematical calculation in order to resolve
11 the dispute in front of me and I don't think I ought to run
12 the risk of improperly invading a privilege so that you can
13 establish a fact that I don't think I really need because
14 without doing the math myself I think I get it. So, I am not
15 sure it's necessary to quantify precisely how much better
16 this deal is for whom done in this form as opposed to another
17 form. I get that its better, that is not disputed and how
18 much better I don't think really matters. So, that is where
19 I am.

20 MR. WILSON: Understood, Your Honor. Just for the
21 record I would like to note that with respect to the proposed
22 findings of good faith actions by the DIP lenders we think
23 that the spurious claims of privilege and hiding behind
24 claims of privilege when the economic analysis done by
25 Perella was -- is and was not privileged at the time it

1 was --

2 THE COURT: Well, what have you don't to
3 establish -- look, if you want to ask additional questions to
4 establish the absence of privilege, I will give you that
5 opportunity but I am not finding anything -- a claim to be
6 spurious based on what is in front of me now.

7 MR. WILSON: Understood, Your Honor. I just wanted
8 to put that into the record. We have filed the separate
9 privilege related dispute letter with the Court prior to
10 today's hearing. I don't want to take up anymore of the
11 Court's time with respect to privilege related issue other
12 than to note that Mr. McGovern, at his deposition, claimed no
13 less than 44 times that he would not answer question on the
14 basis of privilege.

15 MR. BRIMMAGE: Because no less than 44 times he
16 asked for information that was covered by the privilege.
17 Your Honor, this is an ad hoc group, not the committee, not
18 the debtors. This is an ad hoc group where you almost never
19 see their people take the stand like this and they do consult
20 with counsel all the time to get this work done.

21 THE COURT: Look, we, unfortunately, living in the
22 world of the possible. So, in a perfect world I would have
23 resolved the privileged dispute and understood you could have
24 come to and sought to compel answers to the questions to the
25 deposition and we could have like the luxury of time to

1 figure things out. But in the world in which we are actually
2 living you sent the letter like right before I got on the
3 bench and the deposition took place yesterday.

4 So, I don't know the answer to those questions, to
5 whether the claims are privileged, or valid, or invalid and
6 unfortunately, I am going to make a decision today without
7 knowing the answer to that. I wish the world were different,
8 but if anyone has a better idea, I am happy to hear you, but
9 I don't think I have got any choice but to do the best I can
10 with what I have got.

11 MR. WILSON: Thank you, Your Honor.

12 THE COURT: Very well, you can proceed.

13 DIRECT EXAMINATION (CONT'D)

14 BY MR. WILSON:

15 Q I believe the pending question was -- we will go back,
16 Perella did an economic analysis with respect to pro rata
17 participation for the excluded term loan lenders versus not
18 having them participate in the restructuring support
19 agreement, correct?

20 A Yes.

21 Q And what did that analysis show?

22 MR. BRIMMAGE: Your Honor, I will object.

23 THE COURT: So, that is the objection that we are
24 sustaining. So, you can proceed.

25 BY MR. WILSON:

1 Q Perella did an analysis as to the economic impact of
2 pro rata participation by the excluded lenders in the RSA,
3 correct?

4 A Yes.

5 Q And what did that analysis show?

6 MR. BRIMMAGE: Your Honor, same objection.

7 THE COURT: Sustained for the same reason.

8 BY MR. WILSON:

9 Q The amount of the credit bid will dictate the
10 recoveries that the excluded term lenders would receive,
11 correct?

12 A Not necessarily.

13 Q Why not?

14 A Well, to the extent that there is a third-party cash
15 bid or some other alternative.

16 Q If there is a credit bid, that credit bid will dictate
17 the recoveries of the excluded term lenders, correct?

18 A Yes.

19 Q The credit bid has not been filed with the Court,
20 notwithstanding that the restructuring support agreement
21 milestone required it to be filed last week on November 12th
22 at 5 p.m. Eastern, correct?

23 A That is correct.

24 Q The ad hoc group of controlling term lenders agreed to
25 that milestone, correct?

1 A That is my understanding.

2 Q If the ad hoc group of controlling term lenders credit
3 bid is only for the amount of the DIP and the rollup loans
4 then the minority lenders would be unsecured creditors,
5 correct?

6 A I think that maybe requires a legal determination.
7 Would you -- I am not sure I understand your question.

8 THE COURT: Look, I understand how 506(b) works.
9 I'm not really sure you need to ask the witness to explain
10 the bifurcation of the claim. So, why don't you proceed with
11 the facts.

12 BY MR. WILSON:

13 Q Sitting here today the ad hoc group has not made a
14 determination as to the amount of its credit bid, correct?

15 A That is correct.

16 Q And as we discussed in your deposition, there is a
17 scenario where the non-rolled up prepetition term loans get
18 zero-dollar recovery and the DIP term claims get a par
19 recovery, correct?

20 A That is correct.

21 Q And under the proposed DIP a credit bid by the ad hoc
22 group of controlling term lenders for an amount less than the
23 amount of the DIP and the rollup loans would result in a
24 zero-dollar recovery for the holders of the non-rolled up
25 prepetition term loans, correct?

1 A It is correct that the scenario you are describing
2 would result in no recovery for the prepetition term loans.

3 Q Perella did an analysis regarding the economic impact
4 of the excluded lenders participating in the DIP, correct?

5 A I'm sorry, would you mind repeating the question.

6 Q Perella did an analysis regarding the economic impact
7 of the excluded term lenders participating in the DIP,
8 correct?

9 A Yes.

10 Q What did that analysis show?

11 MR. BRIMMAGE: Your Honor, I will object.

12 THE COURT: Sustained.

13 BY MR. WILSON:

14 Q Perella has not done a valuation of the debtors assets,
15 correct?

16 A That is correct.

17 Q And Perella has done no liquidation analysis, correct?

18 A Yes.

19 Q Perella did no analysis to determine whether there were
20 other DIPs where minority lenders were not afforded the
21 opportunity to participate in a DIP financing on a pro rata
22 basis, correct?

23 A Correct.

24 Q You did not ask Akin to do that analysis, correct?

25 MR. BRIMMAGE: Your Honor, I will object as that

1 does invade the attorney/client privilege.

2 THE COURT: Since you did not ask, so --

3 MR. BRIMNAGE: Your Honor, whether you did or
4 didn't do something with your counsel is --

5 THE COURT: I think whether you ask a question to
6 counsel that doesn't get into the answer is just subject
7 matter and not privilege. So, you can answer the question.

8 THE WITNESS: I did not ask Akin to do that.

9 BY MR. WILSON:

10 Q Perella stands to make \$5.25 -- excuse me, Perella
11 stands to make a \$5.25 million restructuring fee in this case
12 if the debtors confirm a plan of reorganization or
13 liquidation or the Court approves a sale of substantially all
14 of the assets of the debtors, correct?

15 A That is correct.

16 Q If there is a liquidation outside of a plan of
17 liquidation, Perella would not get the \$5.25 million
18 restructuring fee, correct?

19 A That is correct.

20 Q Perella would still recommend to the ad hoc group of
21 controlling term lenders that the proposed DIP on the current
22 terms but without the exclusion of the excluded lenders,
23 correct?

24 MR. BRIMMAGE: Your Honor, I apologize. Can I
25 hear that question again.

1 BY MR. WILSON:

2 Q Perella would still recommend to the ad hoc group of
3 controlling term lenders the proposed DIP on the current
4 terms but without the exclusion of the excluded lenders,
5 correct?

6 A I don't know. That would call for speculation. I am
7 not sure exactly what we would recommend. It would depend on
8 the facts at the time.

9 Q Why would you not recommend that the ad hoc group of
10 controlling term lenders proceed with the DIP but without the
11 exclusion of the excluded lenders?

12 MR. BRIMMAGE: Your Honor, that is a little
13 tricky. I am going to object to the extent his answer calls
14 for communications or privileged information.

15 THE COURT: It doesn't. His question is asking
16 for his business judgment about is this a good or bad
17 transaction. I think that is a fair question.

18 MR. BRIMMAGE: To the extent its informed by
19 communications with counsel to be privileged, but I am okay
20 with that.

21 THE COURT: Okay, you can answer.

22 THE WITNESS: Do you mind asking the question one
23 more time.

24 BY MR. WILSON:

25 Q So, Perella would still recommend to the ad hoc group

1 of controlling term lenders the proposed DIP on the current
2 terms but without the exclusion of the excluded lenders
3 participation, correct?

4 A In what state of the world?

5 Q Today. So, if the Court conditioned approval of the
6 DIP without the exclusion of the excluded lenders, Perella
7 would still recommend to the ad hoc group of the controlling
8 term lenders that they proceed with a proposed DIP on the
9 current terms.

10 A I don't know exactly what we would recommend to the
11 clients under those circumstances.

12 Q Sitting here today, you have no business judgment as to
13 whether or not you would recommend to the ad hoc group of
14 controlling term lenders whether they should proceed on the
15 exact same current terms of the DIP but without the exclusion
16 of the excluded lenders.

17 MR. BRIMMAGE: Your Honor, objection; asked and
18 answered.

19 THE COURT: He has asked and -- that question has
20 been asked and whether exactly it's been answered I don't
21 know but I don't think asking it again is going to come any
22 closer.

23 MR. WILSON: With respect to Mr. McGovern, those
24 are all the live questions I have for him at the moment and I
25 will pass the witness. With respect to Mr. McGovern's

1 testimony, we have designated certain of his testimony.

2 THE COURT: I understand you guys are working on
3 getting me that piece of paper.

4 MR. WILSON: Correct. We will get that to you,
5 Your Honor.

6 THE COURT: Terrific.

7 MR. WILSON: I will pass the witness.

8 THE COURT: Very well. Mr. McKane.

9 CROSS-EXAMINATION

10 BY MR. MCKANE:

11 Q Good afternoon, Mr. McGovern. Just a very brief line
12 of questions.

13 Do you recall at the start of your cross-examination
14 you were asked some questions about a third-party DIP
15 proposal?

16 A Yes.

17 Q To the best of your knowledge, based on all of your
18 work, has there ever been a third-party DIP proposal?

19 A To the best of my knowledge there has been no other
20 alternative.

21 Q And to the best of your knowledge has anyone, whether
22 they were a prior lender or a participant in the capital
23 structure or not, has anyone else come forward with a DIP
24 proposal other than your group?

25 A As far as I know, no one.

1 MR. MCKANE: Pass the witness.

2 THE COURT: Okay. Mr. Brimmage.

3 MR. BRIMMAGE: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. BRIMMAGE:

6 Q Mr. McGovern, you were asked earlier about whether or
7 not the minority lenders were offered the same DIP deal with
8 full participation. Do you recall that?

9 A Yes.

10 Q And do you know whether or not the minority lenders
11 have ever been offered DIP terms after the interim order was
12 entered by the Court?

13 A They were.

14 Q And what were those terms?

15 A I believe that the terms were -- so, I believe that the
16 terms were participation with respect to the second half of
17 the DIP. So, the 125 that has not been approved yet. And
18 that they would not participate in the fees associated with
19 it.

20 Q Were you involved in the first day hearing where the
21 interim DIP order was entered?

22 A Sorry, was I involved.

23 Q Were you aware of it?

24 A I was aware of the hearing.

25 Q Okay. Do you know whether or not the minority lenders

1 objected to the DIP at the first day?

2 A They did not.

3 Q They did not, as a group, is that correct?

4 A Correct.

5 Q Did any of the individual members of the minority
6 lender group object to the DIP at the first day hearing?

7 A No.

8 Q Do you know if some of the individual members had
9 requested being part of the ad hoc group before the first day
10 hearing?

11 A They had.

12 Q And what was the minority lenders response to this
13 offer to participate in the second tranche of the DIP?

14 A There was one lender. Sound Point has been referenced
15 already who accepted the offer and left the group. The
16 others did not accept it.

17 Q When you say "left the group" what did Sound Point --
18 what happened with Sound Point after the offer?

19 A They, I believe, funded the DIP and signed the RSA.

20 Q And can you tell the Court what exactly will they
21 participate in, in the final DIP order if the Court enters
22 it?

23 A Sorry, you're asking about Sound Point?

24 Q Sound Point, yes.

25 A So, they would participate in the second half of the

1 DIP on a pro rata basis and would benefit from the rollup but
2 not get the fees associated with it.

3 Q All right. So, I want to go back to some questions.

4 Were you here when I talked to Ms. Murray?

5 A Yes.

6 Q I want to ask you some of the same questions. You were
7 leading the negotiations on behalf of the ad hoc group for
8 the DIP facility, correct?

9 A Yes.

10 Q Are you aware of anything that you or the ad hoc group
11 did to mislead the debtors?

12 A No.

13 Q What about any kind of deceit with the debtors?

14 A No.

15 Q What about trickery, or fraud, or anything else?

16 A No.

17 Q Once the Court entered the interim DIP order, to your
18 knowledge, did the ad hoc group live up to its obligations
19 that were required under the DIP facility?

20 A To my knowledge, yes.

21 Q Are the ad hoc group -- is the ad hoc group prepared to
22 live up to its obligations if the Court enters the final DIP
23 order?

24 A To my knowledge, yes.

25 Q You would know if they weren't, correct?

1 A Correct.

2 Q Was it made aware to the debtors by you and everyone
3 else that not all the term lenders were included in the ad
4 hoc group?

5 A Sorry, Marty, do you mind asking that one more time.

6 Q That there were minority lenders that weren't included
7 in the ad hoc group.

8 A Yes.

9 Q All right. You were on the other side of Ms. Murray
10 when she would propose including all of the lenders in the
11 DIP facility, correct?

12 A Yes.

13 Q What was the answer every time?

14 A The answer was no.

15 Q I'm going to try to be summary here. If I get an
16 objection we will break it down.

17 You heard Ms. Murray's testimony regarding arm's length
18 and the time it took for the negotiations, correct?

19 A Yes.

20 Q Do you disagree with her in any way?

21 A I do not.

22 Q I want to go back to the time that the DIP was being
23 negotiated if I could. Are you aware whether or not the
24 debtors had a viable business plan at that time?

25 A They did not have a complete business plan at that

1 time.

2 Q What about do you know if they were liquidity
3 constrained?

4 A They were.

5 Q Do you know if they had limited tire inventory and no
6 guarantees of future shipments?

7 A They did have limited tire inventory and they had no
8 guarantees of future shipments.

9 Q Do you know if their executive team consisted primarily
10 of turnaround professionals?

11 A That was the case.

12 Q Now at the time was there a sure path forward in an
13 emergence from Chapter 11 while you were negotiating the DIP?

14 A There was not.

15 Q Is there now?

16 A If the DIP is funded and the credit bid is successful
17 or the sale process is successful, then, yes, there is.

18 Q I want to talk to you about your perception or
19 understanding of risk associated with this company and the
20 DIP issues at the time it was negotiated versus today, okay?
21 Can you talk to the Court or describe for the Court how you
22 view the risk profile of this company and what was going on
23 at the time the DIP was being negotiated?

24 A Yeah, so I think there were four categories of risk on
25 a perpetuation basis at the time that the DIP was being

1 negotiated. So the first was around diligence and the lack
2 of a -- the lack of a business plan; the second was around
3 the C suite and the fact that there wasn't a CEO or CFO of
4 the company other than the AlixPartners professionals; the
5 third was around kind of the status of vendors and the status
6 of working capital, and the uncertainty around how the
7 vendors would treat the company; and the last was around the
8 ABL and whether or not there would be viable exit financing.

9 So, at the time that the DIP was put in, all of those
10 were big question marks. Standing where we are today, some
11 of that has been resolved. There's been a lot more time for
12 diligence, the business plan has been, you know, more
13 developed, and we've had the opportunity to vet it to an
14 extent. The C suite issues are not yet resolved; the company
15 does not yet have permanent professionals. And we've been
16 able to stabilize the vendor situation to a large extent
17 by -- you know, mostly by having funded the DIP and having
18 negotiations around critical vendor status. And then we've
19 had the opportunity to negotiate with the agent, with the ABL
20 agent, over the last few weeks, and are much, much closer to
21 understanding what an exit financing might look like.

22 Q Is it fair to say that the ad hoc group risk profile at
23 the DIP at the time it negotiated with the interim is much
24 different than it is today?

25 A Yes.

1 Q And if the minority lenders were allowed in today for
2 the full participation all the way back to the beginning
3 would they have experienced that risk in the early days of
4 this DIP?

5 A They would not.

6 MR. BRIMMAGE: Your Honor, with that, I will pass
7 the witness, other than to say we will also respectfully
8 request the Court rely on our counter designations of his
9 deposition transcript.

10 THE COURT: Okay, very well.

11 MR. BRIMMAGE: Thank you, Your Honor.

12 THE COURT: Thank you, Mr. Brimmage.

13 Any further -- Mr. Wilson.

14 REDIRECT EXAMINATION

15 BY MR. WILSON:

16 Q Mr. McGovern, Mr. Brimmage asked you whether certain of
17 the minority lenders, to use his vernacular, wanted to
18 participate in the DIP, do you remember that testimony?

19 A Yes.

20 Q And certain of the minority lenders did want to
21 participate in the DIP, correct?

22 A Correct.

23 Q Why were those lenders excluded from participating in
24 the DIP?

25 MR. BRIMMAGE: Your Honor, I'm going to object to

1 the extent that calls for attorney-client communications. My
2 understanding from the depo is this topic was hotly discussed
3 with counsel. Now, I will say this --

4 THE COURT: If the witness has knowledge -- why
5 don't we explore the question whether the witness has
6 knowledge independent of discussions with counsel?

7 MR. BRIMMAGE: May I take the witness on *voir*
8 *dire*, Your Honor?

9 THE COURT: You may.

10 MR. BRIMMAGE: All right.

11 VOIR DIRE EXAMINATION

12 BY MR. BRIMMAGE:

13 Q Mr. McGovern, the question that you were asked about
14 why certain minority lenders were not included in the DIP, do
15 you recall the question?

16 A Yes.

17 Q Can you tell the Court how you know the answer to that?
18 What were the circumstances that derive how you know the
19 answer to that?

20 A So communications with lenders who are outside of our
21 group were taken on board, they were discussed on a case-by-
22 case basis with counsel involved, and I participated in those
23 deliberations.

24 MR. BRIMMAGE: Okay. Your Honor, what we've done
25 is, the decision we're not hiding behind and the vote to make

1 the decision. The deliberations, Your Honor, those are pure
2 attorney-client privilege, work product privilege, and
3 consulting privilege. And so we would respectfully request
4 that the Court respect that privilege on the deliberations,
5 but I'm fine with Mr. McGovern saying what the ad hoc group
6 decided --

7 THE COURT: Look --

8 MR. BRIMMAGE: -- and the vote.

9 THE COURT: -- he can answer what the ultimate
10 group's decision was, and it seems to me he can answer a
11 question about his own judgment about the matter independent
12 of anything that was communicated. It seems to me that
13 that's -- that he can -- that that's a fair question --

14 MR. BRIMMAGE: Only if his judgment, Your Honor,
15 is not informed by attorney-client communications.

16 THE COURT: All right, let's take it one at a
17 time. So I hope that gives you sufficient guidance to
18 conduct an examination.

19 MR. WILSON: Sure, Your Honor.

20 REDIRECT EXAMINATION (CONT'D)

21 BY MR. WILSON:

22 Q So, Mr. McGovern, do you know why the lenders were
23 excluded from participating in the DIP?

24 A So --

25 THE COURT: There's no world in which the answer

1 to that is privileged. Does he know, he either does or
2 doesn't.

3 MR. BRIMMAGE: It's a yes or no.

4 THE COURT: Yeah.

5 MR. BRIMMAGE: So, when he said so, I was like
6 we're about to get an explanation.

7 THE COURT: All right, fair enough. Okay. I
8 didn't -- apologies for jumping on you.

9 MR. BRIMMAGE: I'm not -- I'm about to interrupt
10 the witness, not anybody else. It's a yes or no question,
11 Your Honor.

12 THE COURT: Fair enough, yeah. So you can answer
13 that question.

14 THE WITNESS: Yes.

15 BY MR. WILSON:

16 Q Okay. What is the basis of your knowledge as to why
17 the excluded lenders were excluded from participating in the
18 DIP?

19 A The basis of my knowledge is having participated in the
20 deliberations around each of those decisions.

21 MR. WILSON: Your Honor, this goes again to the
22 heart of what we were talking about in our letter, which is
23 the --

24 THE COURT: Yeah, and I think the answer is the
25 same, which is, look -- I'm sorry for being really blunt

1 about this, but I'm assuming for the purposes of this
2 analysis that the majority lender group made the choice they
3 did because it was better for them and worse for your
4 clients, and I don't think I need to be -- to quantify that,
5 and I'm not sure why I would go deeper into an area that is
6 at least arguably privileged in order to put a finer point on
7 something that is really pretty commonsensical. So that's
8 where -- tell me, am I thinking about that the wrong way?

9 MR. WILSON: No, Your Honor is thinking about that
10 exactly the right way, the question is whether the record
11 will reflect, right, that these -- that --

12 THE COURT: Let me say this: I'm comfortable,
13 based on what's been in front of me before, that the reason
14 this happened is because someone made an economic calculus
15 that was in their own economic self-interest. If anyone
16 wants to argue that something else happened here, I'm happy
17 to hear you, but this doesn't strike me as all that like --
18 and, again, I can't quantify it, but I don't need to --

19 MR. WILSON: Right.

20 THE COURT: -- in order to figure out what's in
21 front of me. And so I think you should proceed.

22 MR. WILSON: Okay, with that understanding, Your
23 Honor, I'll proceed.

24 BY MR. WILSON:

25 Q You were also asked, Mr. McGovern, about the risk of

1 the DIP; do you recall that testimony?

2 A I do.

3 Q Okay. If the DIP was so risky, why would the members
4 of the ad hoc group of controlling lenders not offload some
5 of that risk to other term loan lenders who wanted to
6 participate in the DIP?

7 MR. BRIMMAGE: Your Honor, I'm processing this. I
8 don't think -- I don't think that that would be covered or
9 protected by a privilege --

10 THE COURT: Okay.

11 MR. BRIMMAGE: -- but the truth is I don't know.

12 THE COURT: All right. Well, you have to make a
13 decision --

14 MR. BRIMMAGE: So --

15 THE COURT: -- whether you're objecting or not.

16 (Laughter)

17 MR. BRIMMAGE: So the wheels are -- the wheels are
18 spinning. Your Honor, may I take the witness on *voir dire*
19 with, I think, one question?

20 THE COURT: Sure.

21 VOIR DIRE EXAMINATION

22 BY MR. BRIMMAGE:

23 Q Mr. McGovern, if you know the answer to that question,
24 how do you know?

25 A Because I participated in deliberations with counsel

1 over these decisions.

2 MR. BRIMMAGE: In that case, Your Honor, I will
3 object as privilege.

4 MR. WILSON: Your Honor, I think those would be
5 communications coming directly from the individual members of
6 the ad hoc group telling Mr. McGovern that they weren't --

7 THE COURT: Well, why don't you ask Mr. McGovern
8 whether --

9 MR. WILSON: Okay.

10 THE COURT: -- he had communications with the
11 members.

12 MR. WILSON: Okay.

13 REDIRECT EXAMINATION (CONT'D)

14 BY MR. WILSON:

15 Q On the calls that you were on, Mr. McGovern, were the
16 individual members of the ad hoc group on those calls?

17 A Yes.

18 Q Okay. And did the individual members of the ad hoc
19 group tell you that they would not offload some of the risk
20 to the other term loan lenders because -- well, let me
21 rephrase.

22 Would the -- in your communications with the individual
23 members of the ad hoc group of controlling lenders, if they
24 viewed this DIP loan as so risky, what did they tell you as
25 to why they did not offload that risk onto other term loan

1 lenders who wanted to participate in the DIP?

2 MR. BRIMMAGE: Your Honor, to the extent counsel
3 was on the call and the communication is all of them
4 together, then I'm going to object as privilege, and I'm
5 happy to take him on *voir dire* and ask. I don't know the
6 answer to the question --

7 THE COURT: All right, look, can I ask this
8 question, don't I have emails in the record from your client
9 saying let me in?

10 MR. WILSON: Yes.

11 THE COURT: All right. And so, again, why isn't
12 common sense enough to get me through this such that I don't
13 need to do this brain damage?

14 MR. WILSON: Understood, Your Honor. I'm just
15 trying to understand, Mr. Brimmage asked the question about
16 risk and he opened the door, which I think --

17 THE COURT: I understand.

18 MR. WILSON: -- waived any type of assertion of
19 privilege with respect to the answer to this question,
20 because the assertion was that this was such a risky DIP that
21 only the ad hoc group of controlling term lenders could do
22 it.

23 THE COURT: I understand and he did invite that.
24 So I'm going to -- why isn't that --

25 MR. BRIMMAGE: Absolutely not, Your Honor.

1 THE COURT: Why?

2 MR. BRIMMAGE: And by the way, this waiver issue
3 is what the problem is with this line of questioning and why
4 I need the Court to take these privilege issues seriously,
5 which you are and I appreciate that.

6 I did not ask him what the ad hoc group lenders
7 assessed as the risk, I asked him what he viewed the risks as
8 based on his experience with the debtors, and he articulated
9 the different risks. I didn't talk about communications with
10 the ad hoc group lenders or whether or not they knew or
11 didn't know the risk, we didn't get into that, it was him and
12 him alone. So if he wants to talk to him about his view
13 based on his analysis of the company of the risk, that's
14 fine, to go beyond that and invade the privilege --

15 THE COURT: Look --

16 MR. BRIMMAGE: -- I don't want to hear the waiver
17 issue anymore and I have to protect the privilege, Your
18 Honor.

19 THE COURT: Look --

20 MR. BRIMMAGE: I know you understand that.

21 THE COURT: -- here's where I am -- and I -- look,
22 I understand you're all doing your jobs, but I think this is
23 all a lot less complicated than this colloquy suggests. And,
24 look, Mr. Brimmage asked the question, gee, aren't you
25 allowing the -- wouldn't it be allowing the minority group

1 sort of an unfair option to come in now when there was risk
2 before, and your clients either asked to get in before or
3 not, and my recollection is that those will show me that they
4 did. And that will suggest that the reason they weren't let
5 in isn't the reason Mr. Brimmage is suggesting, which is
6 because that would give an option and because they're trying
7 to have it both ways, but instead because this was a very
8 favorable loan and the ad hoc group lenders wanted to keep it
9 to themselves.

10 I think I have enough of a record to figure out
11 what's going on here and I'm not sure that in a world in
12 which we weigh relevance versus the time that it's necessary
13 to go much further here. I think -- I'm not saying I'm a
14 genius, but I don't think I need to be to get basically
15 what's happening here.

16 MR. WILSON: So with that understanding, Your
17 Honor, I have no further questions for the witness.

18 THE COURT: Okay, very well.

19 Does anyone else have questions for Mr. McGovern?

20 MR. MCKANE: Absolutely not.

21 (Laughter)

22 MR. BRIMMAGE: Also absolutely not.

23 THE COURT: All right. So, thank you for your
24 testimony.

25 THE WITNESS: Thank you, Your Honor.

1 THE COURT: You can step down.

2 (Witness excused)

3 THE COURT: Okay, Mr. Wilson, where to from here?

4 MR. WILSON: I think we have admitted all of the
5 exhibits that we intend to offer, Your Honor. We also have
6 offered up the testimony of Mr. McGovern in terms of his live
7 testimony, but his --

8 THE COURT: Right --

9 MR. WILSON: -- designations --

10 THE COURT: -- the transcripts --

11 MR. WILSON: -- which we'll get to.

12 THE COURT: -- that I haven't seen yet.

13 MR. WILSON: With that, we have nothing further in
14 our case, Your Honor.

15 THE COURT: Okay. So am I correct then that the
16 evidentiary portion of today's hearing is now at a close?
17 Anyone else -- Mr. Brimmage.

18 MR. BRIMMAGE: Nothing else, Your Honor.

19 MR. MCKANE: Yeah, Your Honor, we have no
20 redirect -- rebuttal case.

21 THE COURT: Okay.

22 MR. WILSON: Nothing further.

23 THE COURT: Okay. So our evidence is now closed
24 and we -- I guess we go to argument, unless parties want to
25 go and settle this before we start.

1 (No verbal response)

2 THE COURT: I thought there was no harm in asking.

3 (Laughter)

4 THE COURT: Okay. So I'm happy to -- you know, I
5 guess it's the debtors' motion, but I'm happy to hear from
6 whoever will help me get this right, whatever works for the
7 parties.

8 MR. GREMLING: Your Honor, would you respectfully
9 request a brief break for some of us?

10 THE COURT: I'm more than happy to. What's -- so,
11 look, it's now 3:52, why don't we come back on at 4:05. Is
12 that appropriate?

13 MR. GREMLING: That's perfect, Your Honor.

14 THE COURT: Okay.

15 MR. GREMLING: Thank you.

16 THE COURT: So we're now in recess. Thank you.

17 (Recess taken at 3:52 p.m.)

18 (Proceedings resumed at 4:06 p.m.)

19 THE COURT: -- we'll have a conversation, if we
20 get there, about what --

21 MR. GREMLING: Yeah, I just wanted to make sure
22 that you have the labels.

23 THE COURT: No, I appreciate that. Thank you.

24 MR. GREMLING: Okay. And then, Your Honor, I'll
25 be brief with the argument from the debtors' perspective, we

1 think that this is relatively simple.

2 We have an absolutely dire need for funding, we
3 think that we need entry of an order this week, so that way
4 we can get the incremental liquidity we need to operate the
5 business and keep the sale process, the opportunity to bring
6 a third party buyer in, potentially, and, you know,
7 potentially implement a credit bid that you've heard a lot
8 about today. We think that we need that capital and we think
9 we need it very soon.

10 THE COURT: All right. So can I ask the following
11 question? For the purposes of -- I'll hear parties, but just
12 so you all know the target you're shooting at. Having worked
13 my way through the various provisions of the prepetition
14 credit agreement, I'm inclined to believe that what this
15 agreement does is in breach of that agreement. And I think
16 that what will happen, if I approve this, is that the
17 minority lenders will sue, and that they will win and that
18 they will be entitled to damages that will -- that they would
19 suffer on account of the breach.

20 And the question I have for you is, if I'm right
21 about that, then what should I do and why?

22 MR. GREMLING: Sure, Your Honor. The debtors
23 believe that the breach of a prepetition credit agreement, if
24 you're inclined to find one, does not prevent Your Honor from
25 approving the DIP facility --

1 THE COURT: But let's -- what I want to understand
2 as best I can is the effect on the estate, particularly in
3 light of the indemnity provisions, of -- it's a post-petition
4 indemnity, I think, you can help correct me if I'm wrong, but
5 I want to understand as concretely as I can what the effect
6 of the estate is and why it is that a good fiduciary would,
7 if that's what I think, nevertheless go forward with the deal
8 as currently constructed.

9 MR. HUSNICK: There is an indemnity for the DIP
10 lenders embedded in both the credit agreement and I believe
11 the DIP order.

12 THE COURT: Right.

13 MR. HUSNICK: So, to the extent that Your Honor
14 believes that's a breach, I think the cause of action
15 would -- I'm just thinking -- the cause of action would be
16 against the lenders --

17 THE COURT: Right.

18 MR. HUSNICK: -- for whatever the allocation is.

19 THE COURT: Correct.

20 MR. HUSNICK: If they're going to turn around and
21 come back after the estate, at the end of the day, it's kind
22 of a zero-sum game. They're credit bidding everything and
23 rolling everything in. So --

24 THE COURT: I see.

25 MR. HUSNICK: -- it's --

1 THE COURT: So it's just the fees --

2 MR. HUSNICK: Correct.

3 THE COURT: -- and which is in the scheme of
4 things a rounding error. So your view is, even if that's
5 right and the value gets redistributed among those players,
6 like you'd rather not have to pick up the fees, but compared
7 to the company not having cash, it's better than the
8 alternative.

9 MR. HUSNICK: Certainly, if I had the option of
10 saying let's avoid the fees, I would do that.

11 THE COURT: You tried more than three times
12 beforehand and you were told by the ad hoc group that it's my
13 way or the highway.

14 MR. HUSNICK: Yeah, we didn't invade the privilege
15 of Mr. Dublin and Chad Husnick's conversations, but I can
16 assure you I asked and was told no.

17 (Laughter)

18 THE COURT: I don't -- for this purpose, let's
19 presume that's stipulated.

20 (Laughter)

21 MR. HUSNICK: So, Your Honor, at the end of the
22 day, I think the answer to your question is why is it
23 consistent with our judgment --

24 THE COURT: Right, that's my question.

25 MR. HUSNICK: -- is our alternative --

1 THE COURT: Is so much -- is worse?

2 MR. HUSNICK: -- is liquidation.

3 THE COURT: Okay, I hear you. Is there anything
4 else I need to understand from the debtors' perspective?

5 MR. HUSNICK: Basically, Your Honor, I think --
6 I'll sum it up quickly -- is we believe we've satisfied the
7 standard under Section 364(d), which is what's required to
8 get the money in the door. We understand what Your Honor is
9 reading on that particular provision --

10 THE COURT: If you want to make a run at the
11 notion that -- on the contrary reading, I'm happy to hear it.
12 I mean, I suspect I'll hear more about that from Mr. Brimmage
13 than I will from you because --

14 MR. HUSNICK: Yeah, I think I'll let --

15 THE COURT: -- I'm not surprised by that.

16 MR. HUSNICK: -- I'll let the majority group have
17 that discussion with you.

18 THE COURT: Okay.

19 MR. HUSNICK: Thank you.

20 THE COURT: All right. Mr. Dublin.

21 MR. DUBLIN: Good afternoon, Your Honor.

22 THE COURT: Good afternoon.

23 MR. DUBLIN: Phil Dublin, Akin Gump Strauss
24 Hauer & Feld, on behalf of the majority ad hoc group.

25 So I had a whole long speech talking about the

1 business judgment, no heightened standard. I think we're
2 going to skip all that and we're going to get to the crux of
3 your view --

4 THE COURT: Yep.

5 MR. DUBLIN: -- with respect to --

6 THE COURT: Yeah, tell me --

7 MR. DUBLIN: -- the prepetition credit bid.

8 THE COURT: -- so, look, let me start by giving
9 you a firmer target at which to shoot. The agreement has
10 standard and ordinary pro rata sharing provisions, right, and
11 there are I think three of them in the prepetition credit
12 bid. And then there's a Serta blocker and that says,
13 essentially, that on the one hand you can't do -- and this is
14 paraphrasing, but in substance you can't do an up-tier
15 transaction without offering it to everybody with the
16 exception for DIP lending, right? And you're saying the DIP
17 lending exception means you don't need to extend it to
18 everybody. And I think that's correct in the sense you could
19 have a priming DIP with some, but not all. So if we had
20 exactly this loan without the rollup and it was offered --
21 and it was fabulous economics that everyone would have loved,
22 but they wanted to do it only with your group and not the
23 other seven percent, your answer would be that's fine, the
24 DIP lending exception permits that.

25 So that far, I'd be with you. Where you lose me

1 is what the rollup is -- and, again, I'll hear you on this if
2 I'm wrong about this, but it seems to me what the rollup is,
3 is a draw on the DIP to pay down the prepetition credit
4 agreement, and it seems to me that nothing in saying that you
5 can have a priming DIP with some, but not all, means that
6 when you pay down the prepetition debt you don't have to pay
7 down the prepetition debt in accordance with the prepetition
8 agreement, including its pro rata sharing agreement, and
9 that's just from the language. Then you've got a layer on
10 top of that, commercial rationality. And, the way I see it,
11 it would be preposterous to enter into an agreement that
12 provided for an exception to pro rata sharing in this
13 context. It would turn every prepetition agreement into what
14 is fundamentally a game of Russian roulette such that any
15 time you find yourself standing when the music stops, you go
16 to zero. And I don't see how anyone in their right mind
17 would enter into such an agreement; it makes zero commercial
18 sense to me.

19 So I think it's both not the best reading of the
20 words, but to the extent there's any ambiguity in the words
21 that would be informed by ordinary commercial common sense,
22 all of that counsels strongly against this. This strikes me
23 as a preposterous -- so the target you have to shoot at is
24 that your reading of the document strikes me as a
25 preposterous overreach.

1 Now, that then leads me to the question, what do I
2 do about that, and it's not obvious that the answer shouldn't
3 be I approve this, and I wait for them to sue you and you'll
4 lose. And so we can do it that way and that's, candidly,
5 where I -- where I'm inclined to be at the moment. So that's
6 how I'm thinking about it, tell me what part I've got wrong,
7 other than the preposterous overreach part.

8 (Laughter)

9 MR. DUBLIN: It's not the most outrageous position
10 I've found myself in in connection with a DIP hearing.
11 Earlier in my career, I was in front of Judge Gerber and he
12 told me that what we were proposing in a case, which was
13 Crunch Fitness years ago, was the most absurd DIP financing
14 he had ever seen in his life.

15 THE COURT: Well, I'll let you know that during
16 the break I told my law clerks that I am less annoyed by the
17 circumstance than Judge Gerber used to be.

18 (Laughter)

19 MR. DUBLIN: At the end of the hearing, he
20 approved the DIP, but I have a feeling this might be headed
21 in a different direction right now, but I'm going to give it
22 the college try.

23 THE COURT: Look, I'm not inclined to disapprove
24 it, you know --

25 MR. DUBLIN: Well, I'm not sure we would go

1 forward based on this, I'd have to obviously check with --

2 THE COURT: Okay.

3 MR. DUBLIN: -- my clients. Your Honor, I think
4 that -- I mean, the way we read 10.01(h), which is really the
5 provision that we're talking about, right, it creates an
6 exception for DIPs. So you have a traditional Serta blocker
7 in Section 10.01(h) and that prevents the company when it's
8 doing whatever it's doing outside of bankruptcy from
9 violating a no -- the subordination provision and no pro rata
10 share provision, but once the company files for bankruptcy,
11 all bets are off.

12 THE COURT: You can prime, right. And so you
13 could --

14 MR. DUBLIN: Well, it's not just prime, it allows
15 for -- I mean, it allows for priming and subordination,
16 and --

17 THE COURT: Well, that's --

18 MR. DUBLIN: -- but it allows for subordination of
19 the obligations.

20 THE COURT: Right.

21 MR. DUBLIN: It doesn't say that the obligations
22 at that point in time have to continue to be the same. And I
23 equate it to some --

24 THE COURT: No, so they're subordinated, that's
25 fine, they come after the DIP.

1 MR. DUBLIN: They come after the DIP, but it
2 doesn't prohibit the elevation of certain of the obligations.
3 It's akin to and I think very similar to the analysis that
4 was done by the District Court in TPC when the District Court
5 was analyzing the appeal of Your Honor's ruling. And the
6 language there, which his at 22 WL -- 2022 WL 2952518 *8, it
7 quotes from the Serta decision from the Southern District of
8 New York, and you can substitute into that language actually
9 what's happening here.

10 And what it says there, it says, while the
11 amendments have the effect of extinguishing certain first
12 lien lenders' loans in exchange for an elevation of their
13 priority rights under a new class of debt, which is what we
14 have here, elevating a portion of the first lien loans to a
15 new class of debt into the DIP, the amendments there -- the
16 DIP here leave untouched the pro rata rights of the first
17 lien lenders vis-a-vis other first lien lenders. We still
18 have first lien claims, we still have a majority of the first
19 lien claims by the members of our ad hoc group compared to
20 the minority group --

21 THE COURT: But so here's where you're -- where
22 you're losing me -- and maybe I'm missing it and I'm open to
23 that I'm wrong, but let's just talk about the mechanic of the
24 rollup. Do you disagree that what the rollup is doing is
25 it's a draw on the DIP, the proceeds of which are being used

1 to pay the existing prepetition term loan?

2 MR. DUBLIN: I disagree.

3 THE COURT: Okay, so explain to me why.

4 MR. DUBLIN: Sorry, Your Honor.

5 (Pause)

6 MR. DUBLIN: No, that's not it. Sorry. I'm
7 sorry, Your Honor, I'm just -- I had the provision before --

8 THE COURT: Let me ask a different question.

9 MR. DUBLIN: Yep.

10 THE COURT: Is a standard rollup, does a standard
11 rollup operate the way I just described?

12 MR. DUBLIN: I don't believe so, Your Honor.

13 THE COURT: Okay.

14 MR. DUBLIN: I believe that the way the orders
15 work when you're dealing with a debtor-in-possession
16 financing facility, taking you back to JCPenney, which was
17 one of the first ones that did not provide for a pro rata
18 participation between the majority and the minority, made it
19 clear that what was happening was there was an exchange of
20 DIP loan for prepetition loan, and it was in consideration
21 for the provision of the DIP loan, and it was converted on a
22 cashless basis and to constitute DIP term loans. That's the
23 provision that we have in the interim DIP order here, that's
24 the provisions of the order in JCPenney. So there was no
25 borrowing under the DIP to make a payment, it is a

1 conversion, and that is also similar to what happened in
2 Serta.

3 And what the language, continuing on the quote
4 that was in the District Court's decision in -- quoted in
5 TPC, it says, at base, the plaintiff's objection to the
6 transaction is not the interruption of their pro rata payment
7 rights within the same class of lenders, which remains fully
8 intact, but rather the subordination of their first lien
9 loans because they were -- right, it was the elevation in
10 Serta of the first lien loans. So it was a subordination
11 issue for a portion of the first lien loans, which is what we
12 have here.

13 THE COURT: So slow down a second. So just -- and
14 I apologize if I should understand this better than I do --
15 let's just walk -- walk me through in pieces the mechanic of
16 how this loan works and, in particular, the mechanic of the
17 rollup. Explain to me what's being exchanged for what.

18 MR. DUBLIN: For each one dollar of new money DIP
19 advanced, a prepetition -- an equivalent amount of
20 prepetition term loan is being exchanged for a DIP loan.
21 There is no payment, it's not going through the agent, we're
22 not receiving cash, it is a conversion and an exchange and
23 creating a subordination vis-a-vis the remaining first lien
24 loans.

25 THE COURT: So you're trading -- for every dollar

1 of new money in the DIP, you're acquiring your own --

2 MR. DUBLIN: Exchanging --

3 THE COURT: -- exchanging --

4 MR. DUBLIN: -- a prepetition first lien loan for
5 a rollup term loan, for a DIP term loan.

6 THE COURT: Okay.

7 MR. DUBLIN: So it creates a subordination issue,
8 which is what any DIP financing can provide pursuant to (ii)
9 in 10.01(h).

10 THE COURT: All right. So, look, here's -- I
11 understand that. I wasn't in any event intending to rule,
12 other than offer some preliminary thoughts, on the merits of
13 whether this does or doesn't violate the DIP loan. I hear
14 you saying that it might be more complicated than my gut-
15 level reaction because I was thinking of it under the
16 structure, frankly, as described in the debtors' papers of
17 the way I grew up understanding what a rollup was. You're
18 now telling me it's actually something different from that.
19 I don't know if that's right, if it's too cute by half. At
20 some level, that is what it is. What I'm not going to do is
21 let you off the hook on that litigation one iota.

22 So I'm more than happy if you want to say, look,
23 that suit will be filed, if and when it's filed, we'll deal
24 with it. We understand that we're not getting any findings
25 that tilt the playing field in that lawsuit and we'll deal

1 with it when it comes. If you're prepared to proceed on that
2 basis then I'm inclined, based on the record before me, to
3 approve it. If you need something that says, oh, don't
4 worry, you're going to win that lawsuit because I think the
5 world of you, that's more than I am prepared to give you
6 today.

7 So is that helpful at all?

8 MR. DUBLIN: Well, I used to work for Judge
9 Gerber, so I was hoping that that's why I got that DIP
10 approved that day.

11 Your Honor, I think I need to discuss it with our
12 clients --

13 THE COURT: Okay.

14 MR. DUBLIN: -- as to see how they want to proceed
15 given your commentary.

16 THE COURT: Okay. Does it make sense for us to do
17 anything now other than break to permit those conversations
18 to take place? Is there anybody who would like to be heard?

19 MR. HANDLER: Your Honor, may I approach?

20 THE COURT: You may.

21 MR. HANDLER: I would like --

22 THE COURT: Just for the record, if you could
23 introduce --

24 MR. HANDLER: Sorry. Michael Handler of King &
25 Spalding, counsel to the ad hoc group of excluded term

1 lenders.

2 So, if you will, Your Honor, I would like to just
3 respond to Mr. Dublin's sort of characterization of the
4 prepetition term loan credit agreement and the rollup, and
5 then also explain why I do think it's relevant to the relief,
6 approval of the DIP motion without removing the minority term
7 DIP exclusion.

8 I'm just going to jump ahead. So, Your Honor,
9 first, if I could direct you to the term DIP credit agreement
10 filed at Docket 291, Exhibit 6. And section 203(a) of the
11 term DIP credit agreement says -- I'm not going to read the
12 entire thing, but if you go down it says, in an amount equal
13 to such term initial rollup commitment shall be deemed funded
14 and immediately, automatically applied in repaying the
15 corresponding principal amount of the prepetition term loan
16 obligations.

17 THE COURT: Okay. So can I stop you there for a
18 second because -- look, I want to give you the chance to be
19 heard, but I think where we are is I said what I said, he's
20 made arguments as to why I could be wrong, you want to tell
21 me why, no, what I said originally was right, but it seems
22 there's a logical -- what Mr. Dublin's point was, there's a
23 logical antecedent question, which is, in light of what I
24 said already, do we still have a loan here. And if the
25 answer to that is no, which would surprise and disappoint me,

1 but, you know, I can't make anyone lend, then I don't think
2 any of this matters. So it seems to me that Mr. Dublin's
3 suggestion that he talk to his client first before we get
4 into this makes sense, but tell me why that's wrong and I
5 should listen to you now as opposed to later.

6 MR. HANDLER: Sure.

7 THE COURT: I will listen to you.

8 MR. HANDLER: I mean, I'm happy if Mr. Dublin
9 wants to talk with his clients and -- right? I mean, I think
10 the main point I wanted to convey is that I don't think
11 approval of the DIP and just preserving the breach of
12 contract lawsuit is the best outcome --

13 THE COURT: Okay, why is that?

14 MR. HANDLER: So I think approval of a rollup,
15 right, is subject to heightened scrutiny and, in approving
16 the DIP and the rollup, you're being asked to find in the DIP
17 order that it's fair and reasonable. And essentially, right,
18 what is happening with the exclusion of the minority lenders
19 is a transfer of value from the minority to the majority vis-
20 a-vis not being able to participate in the DIP.

21 And so essentially what you have --

22 THE COURT: Wouldn't that happen if we -- couldn't
23 we do the same economics with just a DIP loan with just the
24 93 percent and -- we could get to the same economics by
25 playing with the interest rate, right? I mean, it would

1 approach a point --

2 MR. HANDLER: But not --

3 THE COURT: -- where it would be preposterous,
4 but --

5 MR. HANDLER: -- but once you add the rollup,
6 right, and the nonparticipation, and you don't know what the
7 credit bid is going to be, we don't actually know what those
8 economics are. And that's why I think just on the facts and
9 circumstances here what has happened is very dangerous
10 precedent, right, because you go out with a DIP with no
11 minority lender participation, right, it's silent on that
12 point, and then on a case-by-case basis --

13 THE COURT: Let me stop. Let's just slow down and
14 go piece by piece.

15 MR. HANDLER: Sure.

16 THE COURT: If there weren't a rollup piece of it,
17 if there were just a DIP, and they chose to do it with two
18 percent or seven percent or 93 percent of the other lenders,
19 and there were favorable economics and you wish you had a
20 chance to be in the sandbox, but weren't invited, for
21 whatever reason, would you have anything to complain about?

22 MR. HANDLER: No. And in fact the prepetition
23 term loan credit bid allows a DIP without being offered to
24 minority lenders, so no.

25 THE COURT: So it's just the rollup portion?

1 MR. HANDLER: Right, but in the hypothetical you
2 gave, right, the 93 percent interest rate would be before the
3 Court and you -- would be paid for by the estate, and you
4 would determine whether that is reasonable, fair, and make
5 your decision.

6 Here, we have essentially a disguised fee, right,
7 where the minority lenders vis-a-vis not being able to
8 participate in the DIP are transferring value to the majority
9 lenders because they can't participate. And the economics of
10 that transfer, we have no idea what it is --

11 THE COURT: Okay. So, look, let me tell you, my
12 way of thinking about that is that the work of protecting
13 yourself against that transfer is done by contract, not by
14 bankruptcy law, and therefore the problem with this is a
15 problem of contract, not bankruptcy law. I happen to think
16 most likely the way your agreement is written does protect
17 you against it. You know, Mr. Dublin made an argument that I
18 haven't -- that I want to think more about if and when the
19 time comes as to maybe I should read it so that you didn't
20 protect yourself against it, but we're not here talking about
21 plan distributions where all similarly situated creditors are
22 entitled to similar treatment, we're talking -- or the same
23 treatment, we're talking about the debtor's decision to do
24 business on a post-petition basis with the party with whom
25 it's chosen to do business, and I'm not sure of the fact that

1 it leads to skewed economics as among creditors creates a
2 bankruptcy law problem.

3 MR. HANDLER: I understand --

4 THE COURT: Am I making any sense?

5 MR. HANDLER: You're making sense. I think it
6 goes to the fairness of -- in this particular situation,
7 right, the fairness and reasonableness of the DIP, right?
8 Our --

9 THE COURT: All right. And so let's assume, if
10 I'm going to enter an order, it will say that none of the
11 findings interfere with your -- don't extend to your argument
12 that it violates your prepetition contract rights. So,
13 therefore, you're essentially carved out of the fair and
14 equitable finding.

15 MR. HANDLER: Sure. I mean, look, obviously
16 preserving what in my view and I think your view is a clear
17 breach of the prepetition term loan credit agreement is
18 important for the minority lenders in protecting their rights
19 and realizing value when, other than litigation, they're not
20 going to receive any, or at least receive grossly
21 disproportionate economics to the majority lenders. So
22 certainly that's better than no litigation, but, you know,
23 the minority lenders hold seven and a half percent of the
24 prepetition term loan facility, they're not really focused on
25 being litigious or disrupting the debtors, they support the

1 debtors, they just want to preserve their economic interests
2 in --

3 THE COURT: I understand that. Look, I get it.
4 Look, let me just -- I'll rule when I rule, but the way I
5 think about the world shouldn't be a big secret.

6 Look, Mr. Husnick would like your clients to have
7 been dealt in, his life would be easier if you were in, you
8 know, my life would be easier if you were in. I don't think
9 my job, though, is to tilt the leverage. I'm not one of
10 these judges who think that a Bankruptcy Judge is another
11 fiduciary for the estate and where parties sort of cut their
12 deal with the debtor and then they have to negotiate again
13 with the Judge, I don't think that's the job of the Judge. I
14 think my job is to resolve disputes in accordance with the
15 law and the facts. And so while there are limits to what,
16 you know, would be a reasoned exercise of business judgment,
17 once we're within, like I get why the debtor did that, I
18 don't think I get to say but I would prefer there be a
19 different deal, so I'm going to blue pencil it, I just don't
20 think that's my job.

21 So I'm trying to think about how to deal with the
22 problem, you know, applying the tools that a Judge properly
23 has. I'm not saying -- I don't mean this as a criticism of
24 judges who have a different perspective, but I don't think I
25 get to say, because I'd prefer that you be dealt in, I'm

1 going to require it. That doesn't feel like judging. What
2 does feel like judging is saying, look, you have the
3 prepetition rights you have, we're not -- you're entitled to
4 have them not be prejudiced, and I'll only approve it if we
5 protect your rights.

6 Now, would it be easier to deal you in than to go
7 through the steps of having this litigation? Maybe it would,
8 but I can't -- I don't think I can -- I don't think it's
9 appropriate for me to condition approval on the parties
10 reaching a different economic arrangement. I think I can
11 condition it on preserving your rights.

12 MR. HANDLER: Okay, Your Honor. Thank you. I
13 just want to go back to respond to Mr. Dublin's --

14 THE COURT: Okay.

15 MR. HANDLER: -- description of the prepetition
16 term loan credit bid and the sacred rights.

17 THE COURT: Yep.

18 MR. HANDLER: So Mr. Dublin understands how Serta
19 protection works, Kirkland understands how Serta protection
20 works, they are very sophisticated institutions who have done
21 a lot of liability management exercises with up-tier
22 transactions, right?

23 There are two components of Serta protection,
24 there's the lien subordination and the payment subordination,
25 and then there's the up-tier or pro rata payment protections.

1 And in Serta and a lot of these other up-tier litigations,
2 right, you have two issues, can you subordinate the new debt
3 to the existing debt, and then can --

4 THE COURT: Subordinate the old debt.

5 MR. HANDLER: Subordinate the old debt to the new
6 debt.

7 THE COURT: Right.

8 MR. HANDLER: And then can you exchange existing
9 debt into this superpriority facility.

10 There's two separate transactions, right, the
11 incurrence of the new debt and then the purchase of the old
12 debt into additional new debt, right? And so this credit
13 agreement has the carveout from the lien and debt
14 subordination with respect to debtor-in-possession financing,
15 right? But it doesn't have any carveout, in fact it protects
16 against non-pro rata payments, distributions of collateral.

17 And so I think it's very clear, right, as I say in
18 the limited objection, you have the one clause in
19 10.07(b)(2)(H), which has pro rata sharing protection, and
20 then you have a separate clause which has the lien and
21 payment subordination to the incurrence of indebtedness. And
22 the ad hoc group of controlling lenders can, you know, point
23 to the DIP order and say this is a deemed exchanged, but an
24 exchange, a purchaser, it all implicates the pro rata sharing
25 protections and not the incurrence of debt, lien

1 subordination.

2 So --

3 THE COURT: Okay.

4 MR. HANDLER: -- with that --

5 THE COURT: Understood. All right, so I
6 understand your position.

7 And, Mr. Dublin, where to from here?

8 MR. DUBLIN: Well, I disagree with everything
9 Mr. Handler said --

10 (Laughter)

11 THE COURT: Let me say this, Mr. Dublin, nothing
12 could surprise me less.

13 (Laughter)

14 MR. DUBLIN: Including the standard, there is no
15 heightened standard. That's a creation actually of Mr.
16 Handler in an article that he wrote. But besides that, I
17 think -- we have sent out a dial-in for our clients -- we
18 take a break, I think we start with 15 minutes?

19 THE COURT: Certainly. So tell me what time you'd
20 like to resume.

21 MR. DUBLIN: 4:50?

22 THE COURT: Okay, any objection to breaking and
23 resuming at 4:50?

24 (No verbal response)

25 THE COURT: All right. Okay, all right. So we'll

1 go into recess and we'll see everyone at 4:50.

2 MR. DUBLIN: Thank you, Your Honor.

3 (Recess taken at 4:36 p.m.)

4 (Proceedings resumed at 5:21 p.m.)

5 THE COURT: Be seated. Just give me a few moments
6 to unlock my computer. Apologies. Not that it was bored,
7 but it went to sleep.

8 Okay, we are back. You can proceed. So where do
9 things stand?

10 MR. DUBLIN: Thank you, Your Honor, for the
11 record, Phil Dublin, Akin, on behalf of the majority ad hoc
12 group. And thank you for -- you and your chambers with our
13 rolling time. I was a little optimistic.

14 THE COURT: Been there, totally --

15 MR. DUBLIN: If it was my decision, you know --

16 THE COURT: -- totally understand.

17 MR. DUBLIN: -- we'd have an answer, but we don't
18 have a response right now, Your Honor. We're not in a
19 position to go forward based on your preliminary rulings. We
20 have another call with our group scheduled for tomorrow
21 morning. We'd like to find out if Your Honor has
22 availability on Thursday. I know you have a disclosure
23 statement hearing in a matter on Thursday morning. And then,
24 failing that, I know we have a hearing on Tuesday, but the
25 company --

1 THE COURT: No, I want --

2 MR. DUBLIN: -- does not want to wait until

3 Tuesday.

4 THE COURT: -- I want to be available so that we
5 don't leave uncertainty for longer than necessary. I
6 appreciate you all need time to work through issues, but
7 we'll figure out a way to get you in.

8 So Thursday I have a disclosure statement at --

9 MR. DUBLIN: 9:30.

10 THE COURT: -- 9:30, and is there anyone who's on
11 both of these teams who can -- I know there are a few issues
12 there.

13 COUNSEL: Is it for Yellow?

14 MR. DUBLIN: It is Yellow --

15 THE COURT: Yes.

16 MR. DUBLIN: -- yes.

17 THE COURT: Okay. How long is that going to take?

18 MR. DUBLIN: Five minutes.

19 COUNSEL: Hopefully, it will be quick, it seems
20 like.

21 THE COURT: Okay. You know what, why don't we --
22 what if we came back at 2 o'clock on Thursday, does that
23 work?

24 MR. DUBLIN: Yes, Your Honor.

25 THE COURT: Okay, I'll hear you -- we'll set this

1 to come back at 2:00 p.m. on Thursday.

2 From the debtors' perspective, I take it -- look,
3 I understand you'd prefer to have an order today, but in a
4 world of the possible, does that work?

5 MR. HUSNICK: Chad for the debtors -- or Chad
6 Husnick for the debtors --

7 (Laughter)

8 MR. HUSNICK: -- it works, Your Honor.

9 THE COURT: Okay, very well. Thank you, Mr.
10 Husnick.

11 Okay. So, look, I encourage folks to continue
12 their -- can I ask this -- no, I should just let you do your
13 thing. Do your thing, we'll come back on Thursday, we'll be
14 where we are, and if we're back to having to resolve a
15 dispute, I'll do my job. Then, if peace were to break out,
16 you know, that would be fine, but I think at this point I
17 should let you all do your thing and see you on Thursday, and
18 we'll deal with it -- wherever we are at that time, we'll
19 deal with it then.

20 Is there anything else that I can do to be
21 helpful?

22 MR. HUSNICK: That's it, Your Honor. Thank you.

23 THE COURT: Okay.

24 MS. JACOBS: Good afternoon, Your Honor, Ashley
25 Jacobs of Young Conaway Stargatt & Taylor on behalf of the ad

1 hoc group of excluded term lenders. I had just one
2 administrative matter, Your Honor --

3 THE COURT: Yes.

4 MS. JACOBS: -- and that was our seal motion that
5 we filed. We filed a motion to seal our limited DIP
6 objection, and Exhibits A and B included some PII and Exhibit
7 C was produced under a protective order, so I just wanted to
8 ask Your Honor to approve that.

9 THE COURT: Okay. Is there any objection to my
10 granting the motion to seal the documents in question?

11 MR. HUSNICK: No, Your Honor, but we actually have
12 no objection to the document being filed publicly. So it's
13 fine to unseal it, from our perspective.

14 THE COURT: Who's confidential information is it?

15 MR. HUSNICK: I believe it's the debtors and
16 yours.

17 MR. DUBLIN: Yeah, we're fine as well, Your Honor,
18 we don't need to seal it.

19 THE COURT: Okay. So can you work with the
20 objectors to get a public version on file then, is that --
21 Ms. Jacobs, is that agreeable from your perspective?

22 MS. JACOBS: Yes, Your Honor, yes.

23 THE COURT: Okay. I'm glad I was so helpful.

24 (Laughter)

25 THE COURT: Okay. Look, let me thank the parties.

1 I appreciate that these issues are complicated, that there
2 was a lot of work put in all around, and that I haven't made
3 a lot of friends here today, but, you know, that is the job
4 for which I signed up. And you've all, I thought, done a
5 terrific job, and let me encourage everyone to be as
6 practical and commercial as possible, and we'll come back on
7 Thursday. And to the extent there are disputes that I need
8 to resolve at that point, I'll do my best to get them right.
9 So, if something were to arise between now and then, you all
10 know how to reach chambers, and I'm happy to be as available
11 as possible.

12 So, with that and my thanks to everyone, and my
13 best wishes for productive discussions ahead, we're
14 adjourned. Thank you.

15 COUNSEL: Thank you, Your Honor.

16 (Proceedings concluded at 5:26 p.m.)

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