

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

IN RE: . No. 09-12074-KJC  
BUILDING MATERIALS HOLDING, .  
CORPORATION, ET AL. . HEARING  
Debtor. . 12/17/2009  
. . . . .

Wilmington, Delaware

- - - - -  
BEFORE THE HONORABLE KEVIN J. CAREY  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors:

Building Materials Holding Corporation, et al.      Jeremy L. Graves, Esq.  
                                                                                 Mitchell A. Karlan, Esq.  
                                                                                 Robert F. Poppiti, Esq.  
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For the Interested Parties:

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Proceedings recorded by electronic sound recording;  
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FOR THE INTERESTED PARTY

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FOR THE DEBTORS

Brian Dietz                      98              121              140              142

Paul S. Street                      172              174              176              177

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1 THE COURT: Counsel, you're live in the  
2 courtroom.

3 (Whereupon certain parties of the proceedings join by  
4 telephonic conference.)

5 THE COURT: The hearing will begin shortly.  
6 Please remember when you're going to speak to state  
7 your name for the record, and when you're not speaking,  
8 always remember to keep your phone on mute. Thank you.

9 (Side comments off the record.)

10 THE COURT: Good afternoon, everyone.

11 IN UNISON: Good afternoon.

12 THE COURT: Let me begin by apologizing for  
13 any inconvenience for my rescheduling the timing of  
14 today's hearing may have caused, but was, for my end,  
15 unavoidable, and I thank you for your understanding.

16 MR. ROSENTHAL: Thank you, Your Honor.  
17 Michael Rosenthal, Mitchell Karlan, Richard Falek,  
18 Aaron York and Jeremy Graves from Gibson Dunn and Sean  
19 Beach and Robert Poppiti from Young, Conaway on behalf  
20 of the debtors.

21 I'd like to introduce the other people here  
22 on behalf of the debtors in connection with planned  
23 confirmation.

24 Paul Street is here who's the present Senior  
25 Vice President Chief Administrative Officer of General

1 Counseling and Corporate Secretary of the debtors and  
2 the proposed Chief Executive Officer and a director of  
3 the reorganized debtors.

4 Mr. Brad Dietz, who's the managing director  
5 and head of the restructuring group of Peter J. Solomon  
6 Company, the company's investment banker and financial  
7 advisor.

8 And, Jeff Stein who's Vice President of the  
9 Garden City Group, the court approved balloting and  
10 solicitation agent for the debtors.

11 Your Honor, I'd like to begin by handing the  
12 Court a set of binders that may be useful to you during  
13 the hearing. May I approach?

14 THE COURT: Certainly. I guess I can never  
15 have enough binders.

16 Do you have a set for my law clerk by any  
17 chance?

18 MR. ROSENTHAL: I believe we do.

19 THE COURT: Thank you.

20 MR. ROSENTHAL: To begin, Your Honor, I would  
21 request the Court to take judicial notice of the entire  
22 record in this case and to admit into evidence for this  
23 hearing the declarations of Mr. Street, Mr. Dietz and  
24 Mr. Stein (phonetic) and the other pleadings referred  
25 to in a list that I'll hand up to Your Honor.

1 May I approach again, Your Honor?

2 THE COURT: You may. Thank you.

3 MR. ROSENTHAL: I've handed Your Honor a list  
4 of the pleadings that we'd like admitted into evidence.

5 It lists the docket numbers of each. And, I  
6 don't want -- need -- hope I don't need to go through  
7 each of the pleadings, Your Honor. I think they're  
8 self-explanatory in their description, but I'd request  
9 that all of these be admitted into evidence.

10 THE COURT: Are the declarations that you  
11 mentioned on the list as well or no?

12 MR. ROSENTHAL: Yes, they are, Your Honor.

13 THE COURT: Okay. Well, I have with some  
14 regularity gotten request to incorporate into the  
15 confirmation record everything in the universe that's  
16 occurred as you've just -- my words, not yours -- asked  
17 today.

18 And, in the absence of objection, I probably  
19 will, but I say that and then say if someone should  
20 happen to appeal the confirmation order, what record  
21 exactly would get transmitted to the district court?

22 But, you don't have to answer that question  
23 now.

24 I will ask: Are there any objections to the  
25 moving into admission, into this record of the items

1 that counsel has identified?

2 I hear none. They are admitted without  
3 objection.

4 MR. ROSENTHAL: Your Honor, the declarations  
5 of Mr. Street, Mr. Dietz and Mr. Stein, which have been  
6 admitted into evidence represent their direct testimony  
7 in support of confirmation.

8 I'd like to proffer some additional testimony  
9 from Mr. Street and Mr. Dietz with respect to certain  
10 other documents that I'd like to have marked as  
11 exhibits and hand to the Court.

12 THE COURT: Okay. Thank you.

13 MR. ROSENTHAL: Your Honor, I've handed you  
14 three exhibits that we've marked as D-44, D-45 and D-46  
15 following on the numbering that we've used in the  
16 exhibit list that I previously handed to the Court.

17 If called to the stand, Mr. Street would  
18 testify that the document marked as Exhibit 44, which  
19 is the lengthy document is the acknowledgment of  
20 approval of planned condition that was executed by the  
21 debtors and each of the proposed participants to the  
22 exit credit facilities that was the basis of the  
23 planned supplement filed in November. November 15th.

24 And, I'd move for the admission of Exhibit D-  
25 44.

1 THE COURT: Is there any objection?

2 MR. COUSINS: Your Honor, Scott Cousins on  
3 behalf of Third Avenue. I'd just like to see copies  
4 before they're all admitted into evidence, please.

5 MR. ROSENTHAL: That's fine, Your Honor.

6 THE COURT: All right. Why don't you proceed  
7 with the other two?

8 MR. ROSENTHAL: That's fine, Your Honor.  
9 We've -- we're -- we will present to Mr. Cousins D-44,  
10 -45 and -46.

11 If called to the stand, Your Honor, Mr. Dietz  
12 would testify that the -- Mr. Dietz would testify the  
13 document marked as Exhibit 45 was prepared by Peter J.  
14 Solomon Company under Mr. Dietz' supervision and at his  
15 direction, and he would further testify that this  
16 exhibit is a comparison of the liquidity available  
17 under the exit credit facilities proposed in the  
18 November 15th plan supplement and the new exit credit  
19 facilities proposed on December 14 -- filed on December  
20 14th of this year.

21 He would further testify that this exhibit  
22 shows that liquidity under the new facility is  
23 significantly greater than liquidity under the old  
24 facility.

25 And I'd move for the admission of Exhibit D-



1 45.

2 THE COURT: Proceed with the next one, then  
3 we'll deal with the --

4 MR. ROSENTHAL: Fine.

5 THE COURT: -- long one.

6 MR. ROSENTHAL: Mr. Dietz would further  
7 testify that Exhibit 4 -- D-46 was prepared by Peter J.  
8 Solomon under Mr. Dietz' direction and that it is a  
9 comparison of the distribution of the expected tax  
10 refund proceeds under the \$135 million take-back loan  
11 proposed in the November 15th planned supplement to the  
12 expected distribution of those proceeds in the \$135  
13 million take-back agreement proposed on December 14th.

14 And that it shows that the impact is that the  
15 tax refund proceeds under the new facilities provisions  
16 actually reduce the take-back loan by approximately \$7  
17 million more than that loan would have been reduced  
18 under the old -- the terms of the old take-back loan  
19 facility.

20 And I'd move for the admission of that  
21 document.

22 THE COURT: All right. Let me ask if there's  
23 any objection to the admission of D-44, -45 or -46?

24 MS. LANE: Good afternoon, Your Honor. Katie  
25 Lane, Chris Giaimo, Brad Sandler on behalf of the

1 committee. We would also echo the sentiments of  
2 counsel that we'd like copies of this.

3 We believe that we've been provided the data  
4 and this analysis informally, but we're not positive  
5 based on representations that it's exactly what we've  
6 received.

7 THE COURT: All right.

8 MR. COUSINS: Good afternoon, Your Honor.  
9 Scott Cousins, again, on behalf of Third Avenue. This  
10 is the first time we're seeing the exhibits. I guess  
11 we'd ask for guidance from the Court.

12 We can cross-examine the witnesses on the  
13 stand, but frankly, we haven't had time to analyze the  
14 exhibits. It's the first time we're seeing them, but  
15 we'll be certainly be guided by the Court.

16 THE COURT: I feel the same way about Third  
17 Avenue's objection.

18 MR. COUSINS: I understand, Your Honor, and I  
19 can certainly address it now or at the appropriate  
20 time.

21 THE COURT: I'll reserve ruling for the  
22 moment on the admission of those three exhibits.

23 MR. COUSINS: Thank you, Your Honor.

24 MR. ROSENTHAL: Yes, Your Honor. Mr. Street  
25 and Mr. Dietz are available in the courtroom for cross-

1 examination on these exhibits.

2 THE COURT: Well, let me ask this. Was it  
3 your intention to offer any live testimony or rest with  
4 the declaration and the oral proffer and then allow  
5 others to cross-examine if they wished?

6 MR. ROSENTHAL: Our intention was to rest on  
7 the proffer and the declarations. If there is a cross-  
8 examination to reserve the right to redirect.

9 THE COURT: Okay, now, let me take a step  
10 back and let me ask what further, if anything, the  
11 debtor had in support of confirmation and are we to  
12 press through with that and then address the other  
13 matters on the agenda, or what were the debtors'  
14 intentions?

15 MR. ROSENTHAL: The intention, Your Honor, is  
16 to press forward with confirmation and make a  
17 presentation in support of confirmation, address the  
18 objections that had been previously raised and that  
19 have all been resolved, and then, address the objection  
20 that we received an hour and a half ago.

21 THE COURT: Okay. Proceed.

22 MR. ROSENTHAL: Your Honor, I plan to address  
23 just a few items because we've spent a lot of time with  
24 the written declarations and the memorandum that we  
25 filed in support of the legal issues regarding

1 confirmation.

2 THE COURT: They were all very detailed.

3 MR. ROSENTHAL: Thank you. As Your Honor  
4 knows, the debtors operate one of the largest  
5 residential business products and construction services  
6 business in the United States, and they operate out of  
7 more than 50 facilities located in states across the  
8 country and employ almost 5,000 employees.

9 As I explained at the first day hearing, the  
10 downturn in the U.S. housing economy hit the debtors  
11 hard and caused the sales revenues to decline.

12 And as a result, the debtors worked  
13 diligently with their lenders to obtain waivers of  
14 compliance with certain financial covenants and to  
15 amend those covenants. Most importantly, to start the  
16 process of rationalizing their operations for the  
17 market that they were experiencing to improve cash flow  
18 and profitability.

19 We negotiated, initially, a plan with the  
20 debtors pre-petitioned secure lenders, which we filed  
21 on the first day of the case, and that plan has evolved  
22 a bit over time, but it is presented to you today in  
23 essentially the same format that was filed initially.

24 It's critical, Your Honor, to the debtors  
25 that the plan -- the exit financing that we're

1 presenting to the Court -- be approved today.

2 The exit financing has a provision that  
3 provides that it terminates if the financing is not  
4 approved today and a confirmation order is not entered.  
5 And, it has provision that requires that the closing  
6 occur by January 4th.

7 Separate from that, the debtors' debtor and  
8 possession financing expires on December 31st, which  
9 happens to be, you know, a Saturday, I believe.  
10 Friday? Saturday?

11 It expires on December 31st.

12 THE COURT: Thursday, I think.

13 MR. ROSENTHAL: And any extension of that  
14 would require the payment of an extension fee.

15 MR. COUSINS: Thursday.

16 MR. ROSENTHAL: It's Thursday. Thursday, the  
17 next business day is January 1st, which is a holiday,  
18 and then we have the weekend and January 4th is the  
19 following Monday.

20 Your Honor, we filed an amended plan on  
21 December 14th as a result of a more favorable exit  
22 financing arrangements we were able to finalize in the  
23 last few days.

24 You know, I will describe the new exit  
25 financing in a moment, but let me summarize the

1 essential points of the plan that are before the Court.

2 The plan constitutes a separate sub-plan for  
3 each of the debtors and if you read through the plan,  
4 each debtor sub-plan is designated by a letter from "A"  
5 to "L."

6 For example, BMHC's plan is designated "A"  
7 and Select Build Illinois' plan is designated "L."

8 The plan seeks to preserve the value of the  
9 debtors for their creditors while recognizing and  
10 balancing the fact that the debtors pre-petitioned  
11 secured lenders have direct claims against the debtors  
12 that would result in creditors receiving substantially  
13 less on their claims under a Chapter 7 liquidation.

14 Under the plan, general unsecured claims are  
15 placed in Class 6. As you will recall, there was a  
16 stipulation agreed with the unsecured creditors that  
17 they -- and the committee -- that it would support  
18 confirmation of the plan provided that the distribution  
19 to unsecured creditors was the \$5.5 million that had  
20 been initially -- that had been proposed in the plan  
21 that was approved in connection with the disclosure  
22 statement and that the unsecured creditors have a small  
23 unsecured claims class of at least \$700,000.

24 And, in fact, that is the plan that is being  
25 presented to the Court today.

1           We believe, Your Honor, that it's shown in  
2           the most recent liquidation analysis that's attached as  
3           Exhibit A to the Dietz' declaration, that funding the  
4           unsecured cash fund with the \$5.5 million provides each  
5           holder of a general unsecured claim with substantially  
6           more than it would receive in a hypothetical Chapter 7  
7           liquidation.

8           And by way of example, under the plan the  
9           debtors have projected, as reflected in the Dietz'  
10          declaration that general unsecured claims will receive  
11          distributions with a value of approximately 12.1% of  
12          the holder's claim as compared to a Chapter 7  
13          liquidation distribution, which varies from 0% to 4.1%  
14          at the upper range.

15          Similarly, with respect to the small  
16          unsecured claims class, those creditors had an agreed  
17          treatment, and they were to receive an amount equal to  
18          the lesser of 25 hun -- 25% of their claims or \$1,205  
19          and there was a cap of \$700,000 on those payments.

20          That 25% of their claim, again, compares to  
21          the 0 to 4.1%, and we are informed by the voting agent,  
22          and the company that's evaluated the votes that we will  
23          not exceed the cap. So, there will not be any  
24          reduction or pro-ration.

25          Your Honor, Class 2 consists of the holders

1 of the pre-petition-funded lender claims, which are the  
2 claims of the secured lenders under the pre-petition  
3 credit agreement in an amount to approximately \$305  
4 million.

5 These creditors will receive a two-part  
6 distribution not uncommon in some of the most recent  
7 cases.

8 They will be the -- have a large, secured,  
9 but second lien debt position by having the \$135  
10 million take-back term loan, and they will also  
11 receive, essentially, 100% of the equity of the  
12 reorganized debtors subject to some dilution for  
13 management incentives that are issued.

14 While we had originally contemplated that the  
15 \$135 million -- the full \$135 million term loan would  
16 be issued on the effective date, we believe, Your  
17 Honor, as a result of a sale that we are going to  
18 present to Your Honor, hopefully, before the end of the  
19 year, that we will be able to generate \$2.8 million of  
20 proceeds in addition to some tax benefits, and those  
21 proceeds will, in fact, reduce the \$135 million by \$2.8  
22 million.

23 On the effective date, Your Honor, the re-  
24 organized debtors will emerge as a private company as  
25 opposed to the public company when they file. And,



1 100% of the equity interest will be owned by the pre-  
2 petition-funded -- holders of the pre-petition-funded  
3 lender claims.

4 There are some claims related to outstanding  
5 letters of credit that are also held by a subset of the  
6 pre-petitioned secured lenders. And there are two  
7 different types of claims here, Your Honor.

8 First, there are claims of holders of  
9 unsecured claims that are the beneficiaries of these  
10 pre-petitioned letters of credit, and the plan proposes  
11 that the letters of credit would stay in place, and in  
12 the process of -- in the post-effective date world, the  
13 debtors will pay those claims in the ordinary course  
14 when they arise and there will be no draws, hopefully,  
15 on the pre-petitioned letters of credit.

16 We believe those claims are unimpaired as  
17 they will be paid in full.

18 Class 3, Your Honor, is a related class with  
19 respect to these LC claims. And these are the claims  
20 of the letter of credit lenders themselves in the event  
21 that their letters of credit are drawn.

22 And, while we don't think it's likely that  
23 they will be drawn, we've agreed that during the period  
24 in which those letters of ou -- are outstanding, we'll  
25 pay some fees -- typical fees -- related to the

1           continuanance of letters of credit.

2                       And in the event that they are drawn, these  
3           letter of credit lenders, who are the same lenders as  
4           the revolver lenders under our pre-petition secured  
5           creditor agreement will receive the same consideration  
6           that the Class 2 lenders received -- those lenders that  
7           had already put out money prior to the effective date.

8                       Your Honor, obviously, the Court has the  
9           declaration of Garden City Group.

10                      A little bit about solicitation.

11                      The Court approved the disclosure statement  
12           on October 22nd. We were given an additional two days  
13           until October 27th to send out our packages and -- I'm  
14           sorry -- and we -- and to mail the packages by October  
15           29th, which we did.

16                      We published a notice of the confirmation  
17           hearing in a number of publications including the Wall  
18           Street Journal and in English and Spanish language  
19           newspapers in Las Vegas, Los Angeles and Phoenix.

20                      We filed our planned supplement -- the  
21           original planned supplement -- on November 15th, and  
22           that contained biographical and compensation  
23           information with respect to the proposed officers and  
24           directors, lists of the debtors causes of action,  
25           drafts of various planned documents, the exit financing

1 agreements as they existed at that time, the take-back  
2 term loan for \$135 million, an inter-creditor  
3 agreement, a shareholder agreement, and voting  
4 concluded on November 25th, the day before  
5 Thanksgiving.

6 The final voting report is attached to the  
7 declaration of Mr. Stein of the Garden City Group, and  
8 Your Honor, the voting report takes into account two  
9 stipulations that the debtors have reached with  
10 claimants concerning their votes, and these are also  
11 attached to Mr. Stein's declaration.

12 The first stipulation was with -- is with  
13 Liberty Mutual. Liberty voted \$105 million general  
14 unsecured claim in Class 6 to accept the plan for every  
15 debtor.

16 And we very much appreciated Liberty Mutual's  
17 vote, and would have liked to have counted that vote,  
18 but we are assuming the Liberty Mutual Indemnity  
19 Agreement, Your Honor, so we don't believe that Liberty  
20 Mutual actually had a proper claim for voting.

21 And, as a result, in the stipulation, Liberty  
22 Mutual agreed to withdraw its vote, and to the  
23 disallowance of its claim for voting purposes.

24 In the second voting stipulation, reg --  
25 relates to a \$381,000 vote to reject the plan of Select

1 Build Illinois that was filed by the Carpenters'  
2 Benefit Fund of Illinois. And after some discussion,  
3 that claimant actually realized that their claim was  
4 less than \$5,000 and agreed to withdraw their ballot  
5 and to the disallowance of their claim for voting  
6 purposes, as well.

7 With respect to the voting results, Your  
8 Honor, Classes 2, 3, 6 and 8 were impaired classes  
9 entitled to vote.

10 The creditors in Classes 2, which were the  
11 funded lender claims, voted overwhelming to accept the  
12 plan 96% in dollar amount, and basically 90%, I think,  
13 in number of votes in the class.

14 Notably, one of the parties that has filed  
15 the last minute objection, -- one of the ini -- exit  
16 lenders under the original facility, which had  
17 acknowledged the approval of the plan and had approved  
18 the confirmation order, actually did not vote at all.

19 The creditors in Class 3, which are the LC  
20 lender claims of the secured pre-petitioned lenders,  
21 also voted overwhelmingly in favor of the plan, 97% in  
22 dollar amount and over 90% in number of the votes in  
23 each of the sub-classes in each case.

24 The creditors in classes -- in the Class 8  
25 classes, which were the small, unsecured convenience

1 class, similarly voted overwhelmingly to accept the  
2 plan, 84% in dollar amount, and at least 83% in number  
3 of votes accepting the plan.

4 And, there was a mixed result with respect to  
5 the unsecured classes. Some of the unsecured classes  
6 voted to accept the plan: BMHC class, Select Build  
7 Arizona and Select Build Illinois.

8 However, some of the classes, the other Class  
9 6 classes, voted to reject the plan, and one class, in  
10 fact, Class 6(e), which was Illinois framing, had no  
11 votes. And while there's a split of authority, we  
12 think that Judge Fitzgerald ruled in 2005 that a class  
13 that has no votes should be deemed not to accept the  
14 plan.

15 However, we do not think this is a problem,  
16 Your Honor, because no class junior will receive any  
17 property under the plan that's set out in our  
18 confirmation brief.

19 And to just to complete the, sort of the  
20 results here, Class 9(a), the BMHC equity holders, will  
21 not receive anything under the plan and are deemed not  
22 to have accepted, and similarly, all the subordinating  
23 classes, Class 10(a) through (l) are also deemed non-  
24 accepting.

25 But, as to all of those, Your Honor, we

1 believe, as said on confirmation brief, which is -- has  
2 not been opposed by anyone, we've satisfied the  
3 Crandone (phonetic) requirements of Section 11:29(b).

4 I would mention, Your Honor, just as an aside  
5 that if, again, with respect to the last minute  
6 objection, if you revise the votes of the one creditor,  
7 Third Avenue, of the two that actually voted to move it  
8 to a rejection, we would have the acceptance of 91% in  
9 amount and 96% in percentages -- in number.

10 And, if you actually had included a vote from  
11 Grace Bay, which didn't vote, as a rejecting vote,  
12 we -- that would move the percentages down to 94%  
13 accepting by a number and 85% accepting by amount.

14 So, even if both of those entities had voted  
15 and had voted to reject, we would still easily pass the  
16 requisite percentages in Class 2.

17 Your Honor, I want to spend a little time on  
18 the new planned supplement that we filed.

19 We filed a planned supplement on December  
20 14th and again on Monday, December -- December 7th and  
21 then again on December 14th.

22 We filed Black Lines to the extent we could  
23 in the planned supplement. There were some documents  
24 that were either entirely new or, in some instances, we  
25 deleted entire documents, and so it was -- it was

1 impossible to Black Line those.

2 The changes largely relate to the exit credit  
3 facilities.

4 The planned supplement that we filed on  
5 November 15th contained documents reflecting an exit  
6 facility that had a \$50 million revolver provided by  
7 two entities, Wells Fargo and a Grace Bay affiliate,  
8 and a \$53.5 million term loan provided, in part, by a  
9 Grace Bay affiliate, in part by HIG and by four or five  
10 other entities.

11 And at the time, Your Honor, that represented  
12 the most favorable exit financing that the debtors  
13 could obtain.

14 As the Court will recall, we came before the  
15 Court and asked for the authority to pay a commitment  
16 fee, a 5% commitment fee with respect to that  
17 financing. And as a condition to that, we requested  
18 that people acknowledge before they receive the fee  
19 that they approved the plan, which had as a -- as  
20 attachments the exit financing, and that they approve  
21 the confirmation order and, in fact, everyone signed  
22 appro -- that acknowledgment, which we have marked as  
23 D-44 -- just submitted to the Court -- and received  
24 their 5% commitment fee.

25 I don't recall exactly what Third Avenue's

1 share of the original exit was, but Grace Bay's share  
2 was about 38%. So, they would have received -- it was  
3 about \$38 million. So, they would have received 5% of  
4 \$38 million as a commitment fee.

5 But, since we filed the November 15th  
6 documents, Your Honor, we have been searching for and  
7 in discussions for more favorable exit financing, and  
8 I'll talk about that in -- why in a second.

9 And, we have now obtained commitments for and  
10 signed exit documents with respect to financing to be  
11 pres -- provided by Foothill as the revolving lender in  
12 the amount of \$50 million -- Wells Fargo Foothill.

13 And, by DK Acquisition Partners as the sole  
14 exit term lender in the amount of \$40 million.

15 We filed, as the Court knows, a motion to  
16 request -- requesting authority to reimburse the  
17 expenses and provide certain indemnities to these two  
18 new exit lenders, which is also set for today. And,  
19 since the discussion of that motion and these exit  
20 facilities are combined, I want to talk about the  
21 salient points and why we -- how we located these  
22 alternative providers and why we went to them now.

23 Several factors, Your Honor, caused the  
24 debtors to renew their efforts to find alternative exit  
25 financing.



1           First, in November of 2009, an event occurred  
2           that I had described as "manna from heaven." Actually,  
3           Congress enacted the Worker Home Ownership and Business  
4           Assistance Act of 2009. And, while most of the act  
5           dealt with things totally unrelated to this debtor, a  
6           few provision in the act related to changes -- one-time  
7           changes in the tax law that allow the carry-back by a  
8           company for five years instead of the normal two years  
9           of operating losses that they generate in either 2008  
10          or 2009. You could choose whichever year. We've  
11          chosen 2009.

12           And the result of this increased carry-back  
13          period, Your Honor, is the debtors believe that they  
14          will now be able to realize approximately \$70 million  
15          in 2010 by carrying back their 2009 losses and  
16          offsetting them against the profits that they had in  
17          2004 and 2005.

18           There's approximately \$82 million in tax that  
19          was paid in 2004 and 2005 that is available to be  
20          offset against the losses that would be carried back.

21           And, the result is that the debtors would be  
22          entitled to a refund of \$70 million.

23           It's really quite a phenomenal thing because  
24          this legislation passed in November, but also  
25          important, we actually had significant -- we had both

1 real losses in 2009, which is unfortunate, but  
2 significant profits in 2004 and 2005 to offset them.

3 The existence of this tax refund asset  
4 created the possibility for an alternative approach to  
5 exit financing. In effect, we could have what we might  
6 call a "tax day" loan.

7 Second major factor, Your Honor, was that  
8 notwithstanding the availability of this unanticipated  
9 significant tax refund asset, which facilitates the  
10 rapid de-leveraging of the debtors, we believe, Your  
11 Honor, and experienced in our negotiations that some of  
12 the key lenders in our old exit facility reacted  
13 negatively to the de-leveraging. They wanted the loan  
14 outstanding for three years, and the tax refund would  
15 have meant that it could have been paid back a lot  
16 quicker.

17 And the result was rather than getting more  
18 flexibility from those lenders, we got -- we  
19 encountered more difficulty in obtaining some covenants  
20 that made sense.

21 For example, one of the matters before the  
22 Court today is the Ontario -- sale of the Ontario  
23 Framing business. And, as the Court remembers, if --  
24 or, as the Court sees in the documents there, the  
25 Ontario Framing business has been a business that while

1 at one time a large driver of profitability and revenue  
2 for the debtors, has principally because of the impact  
3 of the case, the avail -- or the unavailability of  
4 assurity bonds and the like, its value has diminished  
5 somewhat, and its backlog has diminished significantly.

6 Nevertheless, that business generated  
7 approximately \$5 million of EBITDA to the debtors  
8 earnings on an annual basis.

9 The debtors made the decision that they were  
10 going to sell that business because, as the motion and  
11 the supporting declarations reflect, the value that the  
12 debtors ascribed to the business was about \$14.5  
13 million, and by selling the business, it enabled --  
14 because of the amount that we had paid for it -- it  
15 enabled the ability to 1: Get off some liabilities and  
16 some potential -- and payments to some -- to the  
17 owners, but 2: It enabled the debtors to carry back an  
18 additional loss which increased the refund amount from  
19 \$50 million from \$70 million.

20 That's how we get to the \$70 million.

21 But, the important point here about the  
22 recalcitrance we ran into from the lenders -- the old  
23 lenders -- was that even though we were generating real  
24 dollars through an increase in the tax refund, we were  
25 also reducing the EBITDA that was available because we

1 had sold that business.

2 And, so, we went to them and said, "We're  
3 giving you real dollars, but we need to covenants to be  
4 adjusted to reflect that our EBITDA will be lowered  
5 because we don't have that business generating  
6 earnings."

7 And the answer was, "No."

8 The answer was also, "If you get the \$70  
9 million 'manna from heaven,' we want a 3% repayment  
10 pre-payment fee attributable to it."

11 And then, in the process of this, we heard  
12 from Grace Bay that it was attempting to extract things  
13 that had nothing to do with exit financing at all.

14 MR. COUSINS: Your Honor, --

15 MR. ROSENTHAL: It made it --

16 MR. COUSINS: I apologize. Is this A  
17 proffer? Is this testimony? Is there a witness?

18 THE COURT: It's argument of --

19 MR. ROSENTHAL: There is a witness.

20 THE COURT: -- counsel. I'm assuming the  
21 rest will follow.

22 MR. COUSINS: I apologize.

23 THE COURT: Argument of counsel. What else  
24 could it be?

25 MR. COUSINS: Thank you.

1 MR. ROSENTHAL: We heard, Your Honor, that  
2 Grace Bay was conditioning its agreement to sign the  
3 exit -- the old exit financing on receiving from the  
4 pre-petitioned lenders as part of the shareholder  
5 agreement, a right of first refusal on any equity  
6 transfers, a reorganized BMHC stock, and at one point,  
7 an equity buy-out price.

8 All of these totally unrelated to the  
9 capacity in which we were dealing with them at the  
10 time, which was as an exit -- potential exit financing  
11 lender.

12 So, Your Honor, we -- one other factor I want  
13 to mention to the Court.

14 As you recall, I said that all of these  
15 lenders signed the acknowledgment and received their 5%  
16 fee -- including Grace Bay -- and everybody,  
17 ultimately, after -- everybody then, when it came time  
18 to vote, voted for the plan because the acknowledgment  
19 said, "We approve the plan and we approve the  
20 confirmation order," -- except Grace Bay.

21 You know, the Grace Bay affiliate that was  
22 the pre-petitioned creditor -- and remember, Grace Bay  
23 had about 37% of this exit facility -- refused to  
24 vote -- did not vote one way or another on the plan.

25 And the final factor that lead us to have

1 grave concerns about our old exit financing, Your  
2 Honor, is we negotiated for months to try to get to a  
3 conclusion. Even after signa -- signing the  
4 acknowledgment, we heard demand and demand and demand  
5 and demand -- new demands.

6 All of the lenders in the old exit facility  
7 released their signature pages except Grace Bay. They  
8 still were not content with the document. They were  
9 still negotiating as of a week ago whether the document  
10 was appropriate and had not authorized Paul Hastings  
11 (phonetic) to release their signature page.

12 All of these factors, Your Honor, gave us  
13 grave concern about 1: The flexibility that we needed  
14 from the exit financing and 2: Whether, in fact, we  
15 had exit financing from the old exit lenders.

16 Mr. Dietz, Peter J. Solomon, proceeded to  
17 look for alternative financing, and he had the tax  
18 refund as an incentive to find it.

19 In three and half weeks, Your Honor, we  
20 obtained and documented a new, binding financing  
21 commitment and exit financing documents with the new  
22 exit lenders, DK and Foothill.

23 It's for less money: \$90 million as to  
24 opposed to \$103.5 million. However, it has a lower  
25 overall cost. Interest rate is substantially lower.

1 Attached to the Dietz declaration is a side-by-side  
2 comparison of the old and new.

3 The interest rate on the old revolver, I  
4 think, was 17%; on the new revolver it's 7%. The  
5 interest rate on the old term loan was 17%; on the new  
6 term loan it's 14%.

7 More important than interest rate, however,  
8 Your Honor, is the fact that the new exit financing has  
9 much more favorable covenants. It does not contain the  
10 liquidity covenant, and it loosens that EBITDA covenant  
11 that I was talking about related to the -- to Ontario  
12 Framing.

13 And therefore, as a result of all of those  
14 factors in the new financing, even though the amount of  
15 the financing in the aggregate is less, if the Court  
16 looks at Exhibit D-45, the Court will see that the  
17 overall liquidity under the new financing is  
18 substantially greater.

19 So, I don't know if the Court wants to look  
20 at D-45, but if you look D-45, Your Honor, we -- that  
21 is the document entitled "Exit Facilities Overview  
22 Liquidity Covenant."

23 And essentially, break the page into the top  
24 half and the bottom half. And this is a comparison of  
25 the liquidity available under the old facility and

1 under the new facility in two different cases: the  
2 base case, and at the bottom, what we call the  
3 "covenant case."

4 And the operative line, Your Honor, is the  
5 line that is highlighted in blue. And if you look at  
6 the base case, you'll see, Your Honor, that the  
7 Foothill/DK deal is better by a substantial margin in  
8 terms of available liquidity in essentially every  
9 period other than August of 2010, and in that period,  
10 although it's \$1.1 million worse, we still have at that  
11 time \$6.1 million in available liquidity.

12 If you go to the bottom half of that page,  
13 that is a case -- the covenant case is one where we  
14 assume that all of the debtors' projections are just  
15 delayed a year.

16 And if you look again at the bottom line  
17 that's highlighted in blue, you will see that in every  
18 year, the available liquidity -- that's what's  
19 reflected in blue -- is greater under the new facility  
20 by a substantial margin than under the old facility.

21 And this is solely the result, Your Honor, of  
22 the relaxed liquidity covenant. Because although the  
23 old financing was a -- more money that we had to pay  
24 for up front and coming out when the financing was  
25 repaid, we couldn't use the money because the liquidity



1 covenant wouldn't allow us. It was so tight that we  
2 couldn't use the money.

3 Your Honor, Mr. Dietz' testimony declaration  
4 also contains a simple comparison at -- of the old and  
5 the new financing and I would hope that the Court would  
6 look at that exhibit, as well.

7 Your Honor, we believe that the new financing  
8 is significantly better from the perspective of the  
9 company than the old financing. And, we believe that  
10 we have submitted evidence to support the motion for  
11 authority to pay the expenses of the two new exit  
12 lenders who are standing here today prepared to -- not  
13 to execute, they've already executed, -- prepared to  
14 consummate the financing on January 4th of this year --  
15 of next year.

16 Your Honor, the amended and restated plans  
17 supplement -- there's one other factor about the  
18 financing because I -- that I want to raise, which is  
19 that there has been an issue raised about whether the  
20 identity of the lenders is material.

21 The old exit financing, Your Honor, provided  
22 that the lenders could assign their interests to anyone  
23 they wanted. And while the debtor had a right to  
24 consent, it was a right that was not to be unreasonably  
25 withheld.

1           So, the original lenders might not have been  
2           the lenders two weeks later or four weeks later or six  
3           weeks later. And we have a stark example of that.

4           Even when we signed the commitment letter,  
5           and when the Court approved the payment of the  
6           commitment fee, we had Third Avenue that had a  
7           significant position in the exit, and it assigned a  
8           significant portion of its position to Grace Bay.

9           So, there was al -- there -- even in the old  
10          exit financing, there was the right to assign interests  
11          in the exits.

12          It's impossible for me to believe, Your  
13          Honor, that the identity of the lenders is a material  
14          factor -- it was a material factor to any -- to  
15          anyone's vote.

16          The amended and restated planned supplement  
17          agreement also, Your Honor, does -- did some other  
18          things, none of which we believe are material.

19          We disclosed that Lisa Thomas was going to be  
20          the corporate secretary. We made some non-material  
21          revisions to the term loan agreement that talked about  
22          refinancing and pre-petitioned letters of credit. We  
23          increased slightly the amount of interest the company  
24          can pay in time in kind from 4.5% to 5%.

25          We loosened the financial reporting covenant.

1 We eliminated minimum liquidity thresholds and revised  
2 some of the EBITDA levels to conform them to the senior  
3 documents.

4 And there -- and then finally, on this point,  
5 we reduced the exit, the excess tax refund proceeds,  
6 which would be paid to the take-back lenders -- this is  
7 the second lien -- from 100% of the excess to 50%.

8 And this takes us to D-46, which reflects  
9 that the result of reducing the percentage of the  
10 excess tax refund proceeds from 100% to 50% in  
11 combination with lowering the amount of the exit term  
12 from 53 to 40 million actually meant that the amount of  
13 money that the second lien take-back lenders received  
14 from the excess cash flow goes -- related to the tax  
15 refund -- goes from \$800,000, under the old deal, to  
16 \$7.7 million, under the new deal.

17 So, they actually receive about \$7 million  
18 more under the new deal than under the old deal.

19 There were some revisions made to the inter-  
20 creditor agreement to reflect Wells Fargo Foothill is  
21 the agent, to provide that in the event of insolvency,  
22 first lien in obligations will be paid before second  
23 lien.

24 We made some revisions to reflect that we  
25 were going to continue the companies as C corporations

1 rather than turn them into LLC's, and as result, that  
2 requires some amendment to certificates of  
3 incorporation to include the bankruptcy prohibitions on  
4 issuance of non-voting securities and the like.

5 We made some revisions to the shareholders'  
6 agreement that were negotiated with counsel for the  
7 secured pre-petition lenders to conform the definition  
8 of change of control to lower the threshold for the  
9 r -- the votes required to remove a director, to reduce  
10 the threshold for major actions from 66% to 50%, added  
11 a provision to require the company to cooperate with  
12 stockholders, you know, request for information and the  
13 like.

14 We don't believe, Your Honor, that any of  
15 these changes is, in context, materially adverse.

16 We filed a further amended version of the  
17 confirmation order and plan with technical  
18 modifications on December 14th.

19 Most of the plan changes were designed to  
20 either address changes necessitated by the new exit  
21 credit facilities or to address objections or informal  
22 comments we'd received with respect to the plan.

23 You can see the changes on the cumulative  
24 Black Line in the binder, Your Honor, at Tab 10.

25 THE COURT: How does that differ, if at all,

1 from the most recent Black Line that received in a  
2 binder late yesterday?

3 MR. ROSENTHAL: None.

4 THE COURT: Okay.

5 MR. ROSENTHAL: None.

6 THE COURT: Thank you.

7 MR. ROSENTHAL: But, I was going to walk the  
8 Court through. Does the Court want me to walk through  
9 the -- those changes?

10 I can walk the Court through the major  
11 changes.

12 THE COURT: I think that would be  
13 appropriate.

14 MR. ROSENTHAL: Okay. Your Honor, if you  
15 look at the Black Line on Page 6, the Black -- the  
16 change to Section 2.1 was to address concerns raised by  
17 the California Franchise Tax Board in their objection.

18 The changes to Section 2.3 on Page 7 of the  
19 Black Line were also to address the California  
20 Franchise Tax Board concerns.

21 We changed Section 2.5 at the request of the  
22 US Trustee to make clear that US Trustee fees would be  
23 paid on the effective date.

24 Turning to Page 16, Your Honor, we changed  
25 this language to raise a concern that had been -- to

1 address a concern that had been raised informally by  
2 the US Trustee's office, and this language simply makes  
3 clear that the preservation of the debtors' corporate  
4 structure, by maintaining subsidiary equity interest is  
5 for the benefit of the new owners of the reorganized  
6 BMHC equity interest.

7 Consistent, Your Honor, with Judge Peck's  
8 decision, also, in a contested matter in re Ion Media  
9 Networks, that came out on November 24th of 2009.

10 In addition, Your Honor, we added language in  
11 4.2.2 and 4.3.2 clarifying that the liens of the pre-  
12 petitioned lenders are released on the effective date,  
13 which is when those lenders will receive their planned  
14 consideration.

15 This was always understood by the plan, but  
16 the new exit lenders wanted us to confirm that the old  
17 liens had been cancelled -- or, would be cancelled, in  
18 the effective date.

19 Turning to Page 18, Your Honor, we -- at the  
20 request of the agent for the pre-petitioned lenders --  
21 changed 4.3.2.5 at the top to make the language more  
22 clear.

23 We changed 4.4.2 on that same page to address  
24 concerns raised by the Texas ad valorem claimants and  
25 the local tax authorities to objections that had been

1 filed.

2 If you look at Page 24, we changed this  
3 section to address the US Trustee's informal concerns,  
4 again, about their preservation of equity interests and  
5 the subsidiary debtors.

6 Again, the language makes clear that the  
7 preservation is for the benefit of the new owners of  
8 the equity interest of the parent -- the new owners  
9 being the Class 2 secured pre-petitioned lenders, and  
10 it doesn't benefit the old equity owners who -- the old  
11 equity owners of the re-organized BMHC are wiped out  
12 and -- unfortunately in the plan.

13 We changed on Page 26, Section 6.3 to provide  
14 that parties -- to rejected executory contracts under  
15 the plan have 30 days after the effective date rather  
16 than 30 days after the date the confirmation order's  
17 entered to file rejection damages claims.

18 And, I'd like to point out to the Court that  
19 we filed yesterday the rejected executory contract and  
20 an expired lease list, and that's being served by  
21 Garden City.

22 On Page 41, Your Honor, we made this change  
23 to add that voted in favor of the plan to reflect the  
24 concern of the US Trustee's office that this be onl --  
25 a consensual release and also raised an objection filed

1 by Mr. Navarro (phonetic) and Ms. Ramirez (phonetic).

2 Page 45, it was a condition to the plan that  
3 the debtor -- that the IRS withdraw the claims it had  
4 filed with respect to a \$57 million tax refund that the  
5 debtors received in 2009 because the debtors had  
6 filed -- because the proof of claim dealt with other  
7 claims of the IRS -- they're actually priority claims  
8 that are going to be paid on the effective date. We  
9 revised the language here.

10 By the way, Your Honor, if the Court recalls  
11 that 2009 tax refund had been under review by the joint  
12 committee on taxation.

13 The auditor had come back and said, "We have  
14 no adjustments. Therefore, there will be no change to  
15 the tax refund."

16 Because of the size of the refund, the joint  
17 committee on taxation had to actually approve the  
18 auditor's report.

19 We received a call on Monday from Arlene  
20 Austin (phonetic) of the IRS that the IRS has signed  
21 off on the carry-back refunds and will be amending the  
22 IRS proof of claim to remove that claim. So,  
23 therefore, this condition should be satisfied.

24 On Page 47, Your Honor, we clarified this  
25 provision at the request of the new exit lenders to



1 provide that while a dispute under the financing  
2 commitment letters will be resolved in this Court, any  
3 future dispute post-effective date res -- dispute under  
4 the credit agreement, itself, will be resolved pursuant  
5 to the provisions of those, which are governed, I  
6 believe, by New York law.

7 And then, we made some other changes, of  
8 course, in the Glossary, we revised the definition of  
9 "Exit Term Loan" to change it from 53.5 to 40 million.  
10 We changed the dates of the planned supplements.

11 Your Honor, I'm pleased to report that all of  
12 the changes, coupled with some paragraphs that we added  
13 to the confirmation order, have resolved the concerns  
14 that were raised either formally or informally by the  
15 US Trustee, the Department of Justice on behalf of the  
16 EPA, Liberty Mutual, Westchester Fire Insurance and a  
17 number of other parties.

18 And here again, we don't believe any of the  
19 changes materially and adversely impact creditors who  
20 previously voted for the plan. And therefore, the  
21 modified plan satisfies the requirements of 11:27 of  
22 the Bankruptcy Code.

23 Your Honor, in addition to formal pleadings  
24 and informal comments, a number of individuals sent  
25 letters to the Court asking the Court to require or ask

1 the lenders to increase the recovery available to  
2 unsecured creditors. Some of those letters, I think,  
3 are consistent with letters the Court received from Mr.  
4 Milligan (phonetic) and Mr. Pierson (phonetic).

5 We -- you know, the debtors are obviously  
6 sympathetic to the requests made in these letters, but,  
7 Your Honor, we don't believe that they constitute  
8 objections or that the Court has the ability to  
9 intervene or otherwise make the secured creditors  
10 increase the funds available to unsecured creditors.

11 As Mr. Dietz' declaration states and as I've  
12 explained to the Court, the distribution under the plan  
13 substantially exceeds the Chapter 7 distribution. And  
14 therefore, the plan satisfies the best interest of  
15 creditors test, and may be confirmed.

16 And any objection, Your Honor, that is  
17 represented by these letters, we believe should be  
18 overruled.

19 Your Honor, we believe the plan satisfies the  
20 requirements for confirmation, and ask the Court to  
21 approve the confirmation order.

22 We have -- I can walk the Court through the  
23 confirmation order and the changes we've made there.  
24 Again, we've not revised them since the draft you would  
25 have reviewed yesterday with the addition of -- with

1 the exception of --

2 (Side comments off the record.)

3 MR. ROSENTHAL: -- with the exception that we  
4 may need to add an insertion about the proffer that I  
5 made of the new exhibits, and we have deleted --

6 (Side comments off the record.)

7 MR. ROSENTHAL: Your Honor, can we -- let  
8 me -- can I take you through the changes that we have  
9 made since the 14th? They're not very many, but just  
10 conforming changes?

11 THE COURT: Well, let me find my copy.

12 UNIDENTIFIED: Your Honor, may I approach?

13 MR. ROSENTHAL: It's Binder 11.

14 THE COURT: Okay. Thank you.

15 MR. ROSENTHAL: All right, Your Honor, these  
16 are changes since the 14th. We added some docket  
17 numbers.

18 We clarified in finding why that the Court  
19 retains post-confirmation jurisdiction to the extent  
20 provided in Article 9, and that was to take into  
21 account the new provision we ar -- we added to the plan  
22 with respect to jurisdiction under the exit credit  
23 facilities after the effective date.

24 We added a specific reference to approval of  
25 the new exit lender fee agreements in Paragraph 14.

1 Paragraph 14 is on -- I have Black Line -- it's the  
2 exit financing paragraph.

3 THE COURT: I see.

4 MR. ROSENTHAL: Okay. You know, we conformed  
5 Paragraph 39 as a jurisdiction provision to the change  
6 to 11.1.17 of the plan.

7 We changed an "and" to an "or" because the  
8 California Franchise Tax Board wanted us to.

9 We made a revision to Paragraph 45 at the  
10 request of counsel for Mr. Navarro and Mr. Ramirez to  
11 mirror Section 157(b)-5 of the judicial code.

12 We added a Paragraph 47, at the request of  
13 Westchester Fire Insurance, specifying that the debtors  
14 would replace their current indemnity agreement with  
15 respect to security bonds issued by Westchester with a  
16 new agreement.

17 We added a clarifying paragraph at Paragraph  
18 48 that allowed priority tax claims would be paid in  
19 equal monthly installments, and this was added at the  
20 request of California Franchise Board, but we also made  
21 clear that the language would not prevent the debtors  
22 from paying allowed priority tax claims in full at any  
23 time on or after the effective date.

24 We added a Paragraph 49 to address concerns  
25 raised informally by the Department of Justice on

1           behalf of the EPA with respect to environmental issues.

2                           (Side comments off the record.)

3                   MR. ROSENTHAL:  And, we clarified in -- going  
4           back, Your Honor -- in finding you that we had  
5           originally said that Para -- that Class 6(e) because no  
6           ballot was cast was an accepting class, but we've taken  
7           that out and we've said no valid ballot was cast in  
8           Class 6(e).

9                           (Side comments off the record.)

10                   MR. ROSENTHAL:  Okay, Mr. York tells me one  
11           more thing.

12                   There was a blank in Paragraph 11 as to the  
13           number of shares the aggregate effective date equity  
14           issuance, and we've added in the number of shares to be  
15           issued on the effective date, which is 65,297,935.75  
16           shares.

17                   Your Honor, unless you have further  
18           questions, we would request entry of the confirmation  
19           order and we wou -- because the expense reimbursement  
20           of the two lenders is part and parcel a confirmation.

21                   We'd request the Court to enter the order  
22           approving that motion, as well.

23                   May I approach with copies of the final  
24           documents?

25                   THE COURT:  You may.

1 MR. ROSENTHAL: Of the final orders?

2 THE COURT: You may.

3 (Side comments off the record.)

4 MR. ROSENTHAL: Your Honor, while we had  
5 tried to be -- to proof these things, we found on Page  
6 38 that we had some additional words that appeared in  
7 por -- Paragraph 47 that we deleted so the sentence  
8 would --

9 THE COURT: I saw that in the Black Line.

10 MR. ROSENTHAL: Yes.

11 THE COURT: All right, you know, tell me  
12 other than the objections or letters sent by the  
13 individuals, where does the debtor stand objection  
14 other than Third Avenue and Grace Bay objection?

15 MR. ROSENTHAL: They've all been resolved,  
16 Your Honor.

17 THE COURT: Okay. Can you tell me more about  
18 that?

19 MR. ROSENTHAL: The resolution of the  
20 objections?

21 THE COURT: Yeah.

22 MR. ROSENTHAL: I -- when I was going through  
23 the list of items, that was the resolution. When we  
24 went through the --

25 THE COURT: Well, particularly --

1 MR. ROSENTHAL: -- things we added to the  
2 plan.

3 THE COURT: Well, tell me about Southwest  
4 Management.

5 (Side comments off the record.)

6 MR. ROSENTHAL: Your Honor, I think that a  
7 cure objection.

8 THE COURT: Yes.

9 MR. ROSENTHAL: Was it? Yeah, I'd defer  
10 to --

11 THE COURT: But, I gather from the --

12 MR. ROSENTHAL: -- Mr. Graves on that.

13 THE COURT: -- submissions, there was some  
14 issue about whether that had to be decided today. The  
15 debtor, in its submissions had indicated that issue  
16 should be put off and --

17 MR. ROSENTHAL: Your Honor, may I defer to --

18 THE COURT: Okay.

19 MR. ROSENTHAL: -- Mr. Graves?

20 THE COURT: Okay.

21 MR. ROSENTHAL: He's been handling that.

22 THE COURT: All right.

23 MR. GRAVES: Your Honor, for the record,  
24 Jeremy Graves with Gibson Dunn Crutcher on behalf of  
25 the debtors.

1           When we had submitted our initial response to  
2 all the cure claim objections, the debtors requested  
3 that the matter be adjourned, as a result, primarily of  
4 the taxing of the debtors' resources in dealing with  
5 all of the other issues related to confirmation.

6           Given the moving of the confirmation hearing  
7 to today, gave us an opportunity to provide the Court  
8 and opposing counsel with a response that we believe is  
9 adequate to handle the cure claim objection presented  
10 by Southwest Management, and the debtors are prepared  
11 to move forward today with that objection.

12           THE COURT: Well, in what form?

13           MR. GRAVES: We are prepared -- we would  
14 propose that the Court enter an order, which indicates  
15 that the cure amount in connection with assuming the  
16 contract with Southwest Management be fixed at zero.

17           And, I can walk you through the arguments now  
18 if you're interested in hearing them.

19           THE COURT: Well, I've read the papers,  
20 but -- well, at least as it's presented in your  
21 opponent's papers, the issue is not that simple.

22           It's not, as I view it, anyway, an ordinary  
23 run-of-the-mill cure objection. It bears on what can  
24 be assumed or not. Or must be assumed or not.

25           Am I correct about that?



1 MR. GRAVES: I believe that's correct, Your  
2 Honor.

3 As I read their papers, they did not object  
4 to the assumption, per se. They objected to the cure  
5 amount and they said that if we paid them the near  
6 million dollar cure objecti -- the cure amount, they  
7 would not object to the assumption.

8 THE COURT: Yeah, resting upon the argument  
9 of what was assumable and what was rejectable  
10 separately or not. And their position was there could  
11 be no separation.

12 Now, is it -- I mean, normally under those  
13 circumstances, people would offer evidence about what  
14 the parties intended or tell me that under the  
15 applicable State law, I must first look at the  
16 documents and tell me what those documents were and all  
17 of that.

18 I mean, I -- tell me what you've -- it  
19 doesn't sound like you've teed up for that kind of  
20 hearing today.

21 MR. GRAVES: We have not teed up evidence,  
22 Your Honor. We were content to rely on an  
23 interpretation of the contract, and we think that it  
24 could be decided on the law.

25 But, we would, obviously, be amenable to an

1 adjournment if Your Honor would prefer an evidentiary  
2 hearing on the intent of the parties relative to the  
3 contract.

4 THE COURT: Well, I rarely prefer adding more  
5 work to my docket, but when it is necessary, I tend to  
6 do that.

7 All right, let me hear from Southwest.

8 MR. GRAVES: Okay.

9 MR. FIRTH: Your Honor, Bill Firth from the  
10 Gibbons firm for Southwest Management. I have David  
11 Crapo here with me today, who was admitted pro hoc in  
12 the case. He'll be giving comments for Southwest.

13 THE COURT: All right. Good afternoon, sir.

14 MR. CRAPO: Good afternoon, Judge, I -- also  
15 with me today via telephone is Theodore Cohen and David  
16 Sunkin from the Sheppard Mullin firm in California.

17 We had initially -- when we responded --  
18 Southwest, when we initially responded to the cure  
19 objection had responded on the basis that the cure  
20 amount was not -- that the -- that we were owed  
21 approximately \$900,000 as a cure amount.

22 THE COURT: Yeah, based upon a combination of  
23 rejection damage claim and indemnity claim.

24 MR. CRAPO: Right. What the -- when the  
25 debtors filed their sale motion, we do not object to

1 the sale motion, but we have a concern about on going  
2 forward basis on whether or not the -- there's adequate  
3 assurance of future performance with so much of C  
4 Construction's business being sold as part of that sale  
5 and it not being clear how the refund will -- would  
6 benefit C Construction and who would be assisting C  
7 Construction in its obligations on -- in a going  
8 forward basis.

9 THE COURT: All right, well let me ask you  
10 this. Do you view that as a confirmation or a sale  
11 motion issue or both?

12 MR. CRAPO: I s -- we view it as an issue  
13 concerning the assumption of the contract and not, per  
14 se, as a confirmation issue.

15 THE COURT: Okay. And, what record do you  
16 think needs to be made today in connection with the  
17 sale motion?

18 MR. CRAPO: The sale mot -- with respect to  
19 the sale motion would be the s -- the record would be  
20 the documents' testimony as to value and where the  
21 money -- testimony where the money is, how the money  
22 is, how the money is going to be spread among the  
23 debtors.

24 THE COURT: Would --

25 MR. CRAPO: I don't know that that would need

1 a separate evidentiary hearing.

2 THE COURT: All right, thank you.

3 MR. CRAPO: Thank you, Your Honor.

4 THE COURT: All right. So, just so that I'm  
5 clear. Again, except for the individual objections,  
6 there are no -- again, aside from Third Avenue and  
7 Grace Bay -- no other confirmation objections.

8 MR. ROSENTHAL: No, Your Honor.

9 THE COURT: Okay. Does the debtor have  
10 anything further in support of its request for entry of  
11 the confirmation order?

12 MR. ROSENTHAL: No, Your Honor.

13 THE COURT: Okay. Let me just have -- ask  
14 for the record to confirm that except for Third Avenue  
15 and Grace Bay, am I to understand that there are no  
16 other objectors, past or present, who wish to be heard  
17 in connection with confirmation?

18 Okay. Mr. Cousins?

19 MR. COUSINS: Thank you, Your Honor. I do  
20 apologize. I know there's been several references to  
21 the last-minute objection. These technical  
22 modifications were last minute, too, and I apologize  
23 for getting it to the Court only this morning.

24 As the Court is well aware, under 11:27, the  
25 proponent has the burden to show that modifications

1           comply with 11:25.

2                       As the Court knows, we represent Third Avenue  
3           Special Situations and Grace Bay. Third Avenue voted  
4           to accept the original plan, and Mr. Fineman from Third  
5           Avenue is here and would testify as to the material  
6           modification to the plan, and would testify that he is  
7           apt to reconsider its vote based on those material  
8           modifications. And accordingly, that is the predicate  
9           for the re-solicitation of the votes on the plan.

10                      Mr. Rosenthal mentioned that, "Well, if you  
11           just don't count their votes."

12                      Well, this Court cannot confirm a plan that  
13           doesn't satisfy 11:25 with material modifications to  
14           the plan and these last-minute changes, and we'd be  
15           prepared to call Mr. Fineman to the stand.

16                      THE COURT: Well, let me follow up on that  
17           for a moment.

18                      So far as I know, you represent the only  
19           parties who are complaining that the latest changes  
20           represent material modifications.

21                      If, in fact, your client's votes were counted  
22           as rejections, and the numbers add up as the debtor's  
23           counsel has said they do, and -- well, it seems to me  
24           that I still have to address the issue that you raise,  
25           and that is, "Are they or are they not material

1 modifications?"

2 If I decide they're not, it seems to me -- at  
3 least based upon the evidence that's presented --  
4 there's nothing more for the Court to do in light of  
5 the fact that no other creditor has stepped forward to  
6 make that argument.

7 MR. COUSINS: If I could briefly, Your Honor.  
8 We don't know. We saw the technical modifications a  
9 couple -- well, I guess now three days ago. I got a  
10 call last night. We don't know who else would have  
11 made changes. I think with the Sentinel (phonetic)  
12 case and the American Trailer case say that if a  
13 creditor votes "Yes," and is apt to reconsider its vote  
14 based on modifications to a plan those are the  
15 predicates. It's thereby by definition a material  
16 modification.

17 We will put Mr. Fineman on. We will talk  
18 about -- as the Court pointed out -- Mr. Rosenthal's  
19 argument. There was no testimony on this and with  
20 tho -- the satisfaction of those two predicates,  
21 there's no basis to not count the vote, to revise the  
22 vote, because the plan, by definition, has been a  
23 material modification or requires their solicitation.

24 THE COURT: Okay. Well, let me ask, do you  
25 wish to cross-examine any of the debtors' declarants?

1 MR. COUSINS: Your Honor, I believe they  
2 rested their case, and we have no questions.

3 THE COURT: Well, whether they rested their  
4 case or not --

5 MR. COUSINS: I have no questions --

6 THE COURT: -- I can still afford --

7 MR. COUSINS: Thank you.

8 THE COURT: -- anyone else who wanted to  
9 cross-examine the declarant the opportunity to do so.

10 MR. COUSINS: That's true. We have no  
11 questions.

12 THE COURT: Okay.

13 MR. COUSINS: We can make our case with our  
14 witness, alone, Your Honor.

15 THE COURT: All right. Let me ask, are there  
16 any others who wish to cross-examine any of the  
17 debtors' declarants?

18 I hear no response. Then, it seems to me we  
19 ought to proceed to finishing out the evidentiary  
20 record on confirmation with Mr. Cousins' witness.

21 MR. COUSINS: Okay. Your Honor, Third Avenue  
22 Special Situations and Grace Bay Holdings call Mr.  
23 Michael Fineman to the stand.

24 MICHAEL FINEMAN, INTERESTED PARTY'S WITNESS, SWORN.

25 THE CLERK: Can you please state your full

1 name for the record and spell it?

2 MR. FINEMAN: It's Michael Fineman.

3 M-I-C-H-A-E-L F-I-N-E-M-A-N.

4 THE CLERK: Thank you. Please be seated.

5 MR. FINEMAN: Thank you.

6 DIRECT EXAMINATION

7 MR. COUSINS:

8 Q Good afternoon, Mr. Fineman.

9 A Good afternoon.

10 Q By whom are you employed?

11 A Third Avenue Management.

12 Q And what is your position with Third Avenue  
13 Management?

14 A I'm a Senior Research Analyst and a Portfolio  
15 Manager.

16 Q And how long have you worked with Third Avenue?

17 A Coming up, just now, on four years.

18 Q Okay. And what do your responsibilities at Third  
19 Avenue include?

20 A I'm responsible for distress investments at Third  
21 Avenue, making distress investments, and working  
22 through the restructuring of distress investments, as  
23 well as the portfolio management for the special  
24 situations fund.

25 Q Okay, and can you tell us briefly your educational



1 background?

2 A I have a BS from the University of Delaware, an  
3 MBA from Columbia University. I'm also a CFA and a  
4 CERA certified insolvent structuring associate.

5 Q And are you familiar with the debtors in this  
6 case?

7 A I am.

8 Q Are you familiar with their capital structure?

9 A I am.

10 Q And how about their operations?

11 A I am.

12 Q Okay. And what is Third Avenue's position with  
13 respect to this case?

14 A Third Avenue is a part of the pre-petition first  
15 lien bank facility.

16 Q Okay. And, all right, are you familiar with the  
17 original plan? You heard references by the debtor to  
18 the original plan before it was modified. Are you  
19 familiar with that plan?

20 A Yes, I am.

21 Q And, do you recall, did Third Avenue vote in favor  
22 of that plan?

23 A Yes, we did.

24 Q And do you recall when that voting deadline was?

25 A I don't recall the exact date. I know it was in

1 late November.

2 Q Late November. And, do you recall the sources of  
3 funding under the plan?

4 A Yes, I do.

5 Q And what are those?

6 A Those sources of funding were coming from an exit  
7 facility that consisted of a revolver -- \$50 million  
8 revolver -- as well as a term loan component, which was  
9 \$53.5 million.

10 Q Okay, and did the plan -- does the plan  
11 contemplate both the old plan and the new plan and the  
12 issuance of equity?

13 A Not the issuance of new equity for money. Just  
14 the exchange of old pre-petitioned into equity.

15 Q Okay, so it's a debt for equity swap?

16 A That's correct. That's right.

17 Q And, let's talk about the original exit financing.  
18 Who -- do you have an understanding as to who was going  
19 to provide that financing?

20 A I don't have with me all the different  
21 participants, but the larger players were -- that were  
22 providing the financing was Wells Fargo, Grace Bay, I  
23 believe, as it's referred to in the objection, Third  
24 Avenue and Highland.

25 Q Okay. And Mr. Rosenthal mentioned this

1 acknowledgment. Do you recall his discussion of the  
2 acknowledgment?

3 A Yes, I do.

4 Q And, could you just refresh, for my benefit, what  
5 the acknowledgment was?

6 A Sir?

7 Q What was the purpose of the acknow -- execution of  
8 the acknowledgment?

9 A The execution of the acknowledgment on --

10 Q Right. Why'd you sign the acknowledgment?

11 A The acknowledgment going with the support of the  
12 plan agreement?

13 Q That's correct.

14 A The plan, itself, with the contemplated funding  
15 was such that Third Avenue thought this made a lot of  
16 sense for us to be supportive of the plan, and thought  
17 it was actually moving in the right direction for the  
18 company.

19 Hence, we were supportive and agreed to sign  
20 on to the plan's support agreement associated with that  
21 funding.

22 Q Okay, in connection with the funding, we talked  
23 about the debt for equity swap. Do you recall that?

24 A Yes.

25 Q And was that part of the planned support?

1 A That was part of the plan, which was in the  
2 planned support agreement.

3 Q Now, there's been discussion about the new exit  
4 financing. Do you recall that?

5 A Yes.

6 Q Are you familiar with the new exit financing?

7 A I am as familiar as one can be having just seen it  
8 this week.

9 Q Okay, and before this week, when's the first you  
10 heard about the new facility?

11 A We were told approximately a week, a week a half  
12 ago, that the company was exploring other alternatives,  
13 but --

14 Q Okay.

15 A -- no specifics.

16 Q And you heard Mr. Rosenthal talk about since  
17 November that they've been exploring a new exit  
18 facility. Do you recall that?

19 A No, I don't.

20 Q Okay. Did the company ever dis -- or its advisors  
21 ever discuss with you addi -- a different exit  
22 facility?

23 A No, they hadn't, no.

24 Q When the company asked you to sign the  
25 acknowledgment, did they tell you that they were going

1 to go look for additional or replacement exit  
2 financing?

3 A No.

4 Q Now, Wells Fargo Foothill, who is that with  
5 respect to the new financing?

6 A I don't have a legal org. chart here, but I'm  
7 assuming its another part of Wells Fargo.

8 Q Okay, and is it providing, along with DK  
9 Acquisitions, the new facility?

10 A That's correct.

11 Q Are they also a pre-petitioned secured lender of  
12 this debtor?

13 A Not as far as I know.

14 Q Okay. Let's talk about your concerns. You had  
15 several concerns about the change -- the material --

16 A That's right.

17 Q -- modification of the plan. Could you briefly  
18 walk us through all those concerns?

19 A Sure, I suppose to begin with, yeah, I'll start  
20 with liquidity, and let me for purposes making sure  
21 everyone follows in the courtroom, I'm going to start  
22 with the term of the gross liquidity because while I  
23 just received the analysis on liquidity today as we  
24 were sitting in the courtroom, I believe that's  
25 actually a net liquidity analysis, meaning after

1 factoring in the covenants associated with our exit  
2 facility -- that being, I guess, the old exit facility.

3 On a gross basis, there's clearly more  
4 liquidity provided to the company in the older facility  
5 as we were both offering a \$50 million revolver, but  
6 the old one also had a \$53.5 million term loan versus a  
7 \$40 million term loan as in the new facility.

8 So, it's only when factoring in the liquidity  
9 covenant that one would come to the conclusion that  
10 there was less liquidity.

11 Q Okay. And let's talk about the company's history  
12 of projections. Do you have a view as to the ability  
13 of the company to project?

14 A I do.

15 Q And what's that view?

16 A They have not been very accurate, at all, in  
17 projecting and almost all the misses have been,  
18 unfortunately, to the negative, including the most  
19 recent results that we have received in October.

20 Q And does Third Avenue believe this reduced  
21 liquidity is a material new term in the technical  
22 modifications?

23 A Yes, certainly combined with the other issues such  
24 as shorter term, yes.

25 Q Okay. And I think you raised a concern about a

1 shorter maturity in connection with your objection.

2 Could you explain that?

3 A That's correct. The old facility was offering a  
4 three-year maturity. The new facility, I believe the  
5 term loan is a one-year facility, and I believe the  
6 revolver, while it shows two-year, actually comes due  
7 sooner to the extent that the certain events happen.

8 So, we do remain concerned. And, just one  
9 quick comment for you, which, you know, related to the  
10 projections, obviously we're tied to homebuilding, and  
11 nobody really knows where homebuilding's going to go.  
12 So, from our perspective, liquidity in term is  
13 paramount for this company to make sure they can  
14 survive and make it through.

15 Q Okay. And do you believe that this change in  
16 maturity is a material change in the plan?

17 A Yes, I do.

18 Q The pick option. Can you explain that? What's  
19 that?

20 A Sure. The old facility provided a pick option,  
21 which while it increased the total interest rate, it  
22 reduced the cash component that would be required to be  
23 paid by the company thereby allowing them to buy more  
24 time and survive through the strouth (phonetic) period.

25 Q And do you believe that that's a material change?

1 A I do, yes.

2 Q Okay. Let's talk about the revolver commitment  
3 fees. Do you have an understanding about the new  
4 revolver commitment fees?

5 A Are you referring to the unused fees or the  
6 commitment fee up front?

7 Q Well, what's the difference?

8 A Well, the -- there's an up front payment to close  
9 the deal, which -- I don't have the comparison here  
10 with me -- I believe the old was 2.5% commitment fee  
11 and the new may have been a 3% fee, but I may be  
12 incorrect on that number.

13 But then, there's an unused fee. And as a  
14 revolver factors into the company's model, the revolver  
15 is predominantly, in fact, entirely, used really for LC  
16 purposes.

17 So, it is never funded. One would never see  
18 a draw-down as it relates to the revolver.

19 So, in order to comp -- properly compare the  
20 two revolvers, one really needs to understand what's  
21 being charged on the LC component and the unused fee  
22 component -- not just the funded component.

23 Q Okay.

24 A So, I believe the comparison that I saw in the  
25 book provided today did accurately show what the funded



1 component difference would be, and it appears to be  
2 quite large.

3 But, since the company doesn't project  
4 funding on the revolver, I believe the more pertinent  
5 analysis would be to compare the LC fee, as well as the  
6 unused fee.

7 Q Okay. Now, that was the commitment fees with  
8 respect to revolver.

9 Was that all you had with respect to that?

10 A The LC fee and used fee, --

11 Q Okay.

12 A -- correct.

13 Q Now, how about the term loan commitment fees?

14 A I believe the commitment fee applied to the entire  
15 facility for both the old and the new.

16 But, there -- the term loan is a funded piece  
17 of paper.

18 So, this one it is -- it is more accurate to  
19 compare any funded perspective in terms of what the  
20 interest rates are.

21 But, the interesting thing to factor in when  
22 you're comparing the term loan is, "How long is that  
23 term loan outstanding?"

24 And, again, according to the company's model,  
25 should they receive the tax refund and be able to pay

1 down the term loan in its entirety by May or June of  
2 2010, the accurate analysis should be, "Well, what is  
3 the interest cost through that period?"

4 And frankly, I would argue the accurate  
5 comparison be the interest rate because there's a  
6 difference in dollars because of the amount being  
7 provided to the company, which is a separate issue.

8 Q Now, and do you believe that the commitment fees  
9 are a material change to the plan?

10 A From my perspective, I view everything -- all the  
11 fees and interest rate as the interest cost, regardless  
12 of what the terminology is.

13 Q Let's talk about the impact of the new exit  
14 facility on your pre-petitioned debt. Now, under the  
15 plan, you're going to have a second lien, is that  
16 correct?

17 A As well as equity, correct.

18 Q Okay, so second lien and equity. What's the  
19 impact of the new facility with respect to the tax  
20 refund that we spent a lot of time on this afternoon?

21 A Well, specifically just to the tax refund, the  
22 proceeds of the tax refund under the old facility would  
23 have paid down and cash collateralized the old facility  
24 and then 100% of the proceeds would be used for the  
25 second lien debt, which in this case, would go to the

1 pre-petitioned lenders.

2 My understanding of the new facility is only  
3 50% of those proceeds remaining would flow through to  
4 the second lien lenders.

5 I do believe that it was pointed out earlier  
6 that that results approximately \$7.7 million, which by  
7 their math is more than what the old facility would  
8 have provided.

9 However, not factored in there, really, is  
10 the total liquidity. So, the cash proceeds of the  
11 company is not just the tax refund. It's the cash on  
12 the balance sheet, as well. And because the old  
13 facility was providing \$13.5 million or more cash on  
14 the balance sheet, again, its actually not a very fair  
15 comparison to look at.

16 In fact, you would find that there's more  
17 liquidity under the old facility, which give the  
18 company the option to pay down, should they choose.

19 Q And was there a covenant with respect to this tax  
20 refund and the old facility?

21 A No, there was no affirmative covenant.

22 Q And is there a covenant in the new facility?

23 A Yes, there is. I believe it's for a \$50 million  
24 tax refund.

25 Q And what happens if that \$50 million tax refund

1 doesn't come in?

2 A It would be an event to default.

3 Q Okay. Do you believe that the change in the  
4 treatment of the proceeds from the tax refund is a  
5 material change in the plan?

6 A Yes, I do.

7 Q Now, let's talk about new closing conditions and  
8 reps and warranties. You talk briefly about the tax  
9 refund rep. Is that right? Can you s --

10 A Correct.

11 Q Can you also talk about the sale to businesses  
12 that we heard about this afternoon?

13 A Sure. The sale of two businesses -- one is an  
14 Illinois business, and the other is -- I believe what's  
15 referred to as the Davis Brothers -- which is in  
16 Southern California -- business -- and it's the Davis  
17 Brothers business that is far larger in terms of  
18 magnitude that we're going to discuss here relative to  
19 Illinois.

20 So, I'm just going to focus on Davis Brothers  
21 for a minute here.

22 It is closing down -- shutting down the Davis  
23 Brothers that enables the incremental tax refund --  
24 that I believe is approximately \$20 million -- that  
25 would be provided to the company.

1           It should pointed out from a pre-petitioned  
2 perspective that closing down a business that by the  
3 company's projections was expected to have double digit  
4 EBITDA in the future, is, in essence, taking values  
5 away from the new owners of this business in order to  
6 provide fewer proceeds today.

7           Q     And what happens if the Davis Brothers business  
8 does not shut down in time?

9           A     I'm not a tax expert, so I can't answer that, but  
10 I imagine you'd need it shut down in order to file and  
11 apply for the tax refund.

12          Q     Okay. We heard something about the Obama  
13 Administration in November providing "manna from  
14 heaven."

15                   Are you familiar with that act?

16          A     Yes, I am.

17          Q     And can you briefly describe what's the purpose of  
18 that act to your understanding?

19          A     The purpose of the act was to enable companies to  
20 look back, and additionally, I believe it's three  
21 years, where they can offset losses that they're  
22 experiencing today with profits that were experienced  
23 back then.

24                   In the case of this company, that would  
25 actually result in approximately \$50 million tax refund

1 without the Davis Brothers component.

2 Q Okay. And, do you believe that the conditions  
3 with respect to the tax refund and the sale of the  
4 additional businesses was a material change to the  
5 plan?

6 A It was certainly a material change to the plan.  
7 It was one that was brought up on the steering  
8 committee, as well.

9 Q Okay. Now, do you have an understanding -- well,  
10 I think you testified that the new exit lenders are not  
11 part of the pre-petitioned lender group. Is that  
12 correct?

13 A Again, anybody has the ability to buy in the  
14 secondary market, but as far as I know, they are not.

15 Q And, they'll have a first lien on all of the  
16 assets? Is that right?

17 A They'll have a first lien, correct.

18 Q And, I think Mr. Rosenthal talked about the  
19 subordination agreement between the first and the  
20 second piece, did you hear that --

21 A Are you referring to the --

22 Q -- argument?

23 A -- inter-creditor agreement?

24 Q Yes.

25 A I recollect that, yes.

1 Q Yeah, okay. And do you have any concerns now that  
2 there's a new lender in a first lien position, assuming  
3 confirmation occurs, with respect to your second lien  
4 position and equity position?

5 A I definitely have concern -- I probably have  
6 greater concern -- given that they're already weakening  
7 the second lien covenants associated with that  
8 agreement.

9 Q And -- well, let me ask you -- is this a toothless  
10 subordination right that you have in the second lien?  
11 Do you understand what I mean by the nomenclature?

12 A No.

13 Q What rights do the second lien holders have if the  
14 first lien holders decide to change the react in the  
15 event of a default?

16 A There are some protections that are in the second  
17 lien credit facility that obviously would govern what  
18 can and can't be done. But, there's also a lot room  
19 and a -- potentially a lot of things that can be done  
20 through the first lien.

21 Q And, do you believe that the fact that there's a  
22 new set of lenders in the new proposed exit facility  
23 was a material change to the plan?

24 A Yes, I do.

25 Q Now, let me ask you -- in the aggregate, do you

1 believe that the changes that we just went through are  
2 a material modification to the plan?

3 A I do.

4 Q And, knowing what you know today, Third Avenue, do  
5 you have a view as to whether it would be apt to  
6 consider changing its "yes" vote based on what you  
7 know?

8 A I don't have a conclusion, but certainly if my  
9 choices are now to support a plan where I question  
10 their going concern viability because you have less  
11 liquidity and shorter maturity associated with these  
12 facilities, you know, I may actually find other  
13 alternatives have been more interesting.

14 Q Okay. Now, do you recall back in November Grant  
15 Thornton (phonetic) issuing an opinion with respect to  
16 Building Materials Holding Corporation?

17 A Yes, I do.

18 Q And, do you recall what that provision said with  
19 respect to EBITDA or liquidity covenant relief?

20 A As to Grant Thornton analysis was regarding the  
21 closing down of Illinois and the Davis Brothers  
22 operation and being that the Davis Brothers operation,  
23 as I mentioned earlier, is a material component from  
24 the overall companies EBITDA, -- and business for that  
25 matter -- simply closing it down, in theory, may have



1 presented issues for the debtor or company going  
2 forward as it relates to their EBITDA covenants and  
3 liquidity covenants.

4 The analysis that came back to us from Grant  
5 Thornton was that the company had not asked us, at all,  
6 to contemplate changing the EBITDA and liquidity  
7 covenants. Hence, they seemed quite comfortable with  
8 where it stood, and we never once heard back that we  
9 should contemplate changing it.

10 MR. COUSINS: Your Honor, I just need a  
11 minute. I have handwriting on a couple of exhibits, I  
12 think, and I certainly don't want to hand those to the  
13 witness.

14 I thi -- I'm looking for clean copies of  
15 exhibits -44, -45 and -46.

16 (Side comments off the record.)

17 MR. COUSINS: I apologize, Your Honor. This  
18 is Tab 9 in the binder. May I approach the witness?

19 THE COURT: You may.

20 (Side comments off the record.)

21 BY MR. COUSINS:

22 Q Mr. Fineman, have you seen that document that we  
23 just handed? It's entitled "Amended and Restated  
24 Declaration of Bradley I. Dietz," et cetera, et cetera.

25 A Yes, I have.

1 Q And, have you had an opportunity to review that  
2 declaration?

3 A I have.

4 Q And when did you review it?

5 A This morning here.

6 Q Okay, and I believe there's a discussion towards  
7 the end about the exit facility comparisons?

8 A Exhibit C.

9 Q You see that?

10 A Yes.

11 Q And which exhibit are you looking at?

12 A That's Exhibit C that I suppose are the cure  
13 comparisons, and I believe there was words referring to  
14 it on --

15 Q So, you're looking at the last page of the  
16 declaration?

17 A That's correct.

18 Q Okay. And, does this show the term loan?

19 A It does. The term loan is in here, as well.

20 Q And, the revolver?

21 A Yes.

22 Q Okay. And, you -- I believe you were testifying  
23 about the letter of credit fees associated with the  
24 costs of the facilities, is that correct?

25 A Correct.

1 Q And, we talked about the maturity, is that  
2 correct?

3 A Correct. The LC fees that we spoke about are not  
4 broken in on this table.

5 Q Okay. And, you've already testified about the LC  
6 fees.

7 And, let me ask you -- okay, so this has  
8 both -- it's my r -- this has both the term and the  
9 revolver on it, is --

10 A Yes, it --

11 Q -- that right?

12 A -- does.

13 Q Okay. Let me show you another exhibit. I think  
14 this is either -- there's two exhibits. It's the exit  
15 facilities overview liquidity covenant and tax refunds  
16 proceeds applied to \$135 million term loan.

17 MR. COUSINS: May I approach, Your Honor?

18 THE COURT: Yes.

19 (Side comments off the record.)

20 BY MR. COUSINS:

21 Q And, Mr. Fineman, have you seen that document  
22 before?

23 UNIDENTIFIED: Can we just get on the record  
24 what the documents the witness is looking at? I there  
25 are Exhibits -45 and -46?

1 (Side comments off the record.)

2 MR. COUSINS: I'll switch it so that way he  
3 make sure he's referring to the right one here.

4 THE COURT: Thank you.

5 MR. COUSINS: Thank you.

6 MR. FINEMAN: Thank you.

7 BY MR. COUSINS:

8 Q Mr. Fineman, can you identify what's been  
9 previously marked as Exhibit -45?

10 A This appears to be an analysis of the liquidity of  
11 the company from January 2010 going forward on a  
12 monthly basis.

13 Q Okay.

14 A It should -- only goes through 2010 monthly, 2011  
15 quarterly and 2012 annually.

16 Q And, do you have a view as to whether this  
17 facility is better for the debtor based on this  
18 exhibit?

19 A I don't believe you can conclude based on this  
20 exhibit alone. I believe this exhibit is misleading.

21 Q And why is it misleading?

22 A Well, this points only to a net liquidity that I  
23 was referring to earlier, which is comparing the two  
24 facilities after backing out the liquidity covenant  
25 that was associated with the old exit facility.

1                   But, it's important to note that that  
2                   liquidity covenant was agreed upon between the company  
3                   and the exit lenders with cushions to their model that  
4                   were there such that it should have never have been an  
5                   issue.

6                   And, I believe the more meaningful analysis  
7                   would be to look at the gross liquidity as liquidity is  
8                   frankly to be used should the company have a difficult  
9                   time making it through this trough, because nobody  
10                  really knows when home starts will again to grow.

11                 Q     Thank you.   And, look at Exhibit -46, please?

12                 A     Yes.

13                 Q     And do you have an understanding as to what this  
14                  exhibit shows?

15                 A     Again, just received it here during this  
16                  courtroom, but I believe this is trying to show that  
17                  more proceeds are actually available for pay-down to  
18                  the second lien from the tax refund proceeds under the  
19                  new facility -- more under the new facility than what  
20                  would have been available under the old.

21                 Q     Now, let me ask you, during Mr. Rosenthal's  
22                  argument, there was some statements about some old  
23                  lenders wanted the loans outstanding for three years.  
24                  Do you recall that?

25                 A     I'm sure anybody's who paying money to work wants

1 their money to remain outstanding and generate some  
2 return.

3 Q Mmhhh. And, --

4 A I don't know that three years was ever discussed.

5 MR. COUSINS: Nothing further, Your Honor.

6 THE COURT: Anyone wish to cross-examine this  
7 witness?

8 UNIDENTIFIED: I think that's everybody, Your  
9 Honor.

10 THE COURT: All right.

11 UNIDENTIFIED: Your Honor, would it be due  
12 position to ask for a five-minute recess?

13 THE COURT: No, it would not. May we take  
14 the five-minute break.

15 IN UNISON: Thank you.

16 THE COURT: We stand in recess.

17 (Recess)

18 THE CLERK: All rise.

19 THE COURT: Good afternoon. Let me just note  
20 in the way of scheduling that maybe in an overabundance  
21 of optimism, I scheduled a first-day hearing for 3:30  
22 today.

23 What I intend to do is have us go until 4,  
24 and if we're not done by then, which I suspect we may  
25 not be, we'll resume after the conclusion of my first-

1 day.

2 UNIDENTIFIED: Thank you, Your Honor.

3 THE COURT: Okay.

4 CROSS-EXAMINATION

5 BY MR. KARLAN:

6 Q Mr. Fineman, sir, I think you testified that  
7 quote, "People can always buy on the secondary market."

8 Is that correct?

9 A That sounds correct, yes.

10 Q Whether you said it or not, that is correct, isn't  
11 it?

12 A As far I know, you can --

13 Q Debt transfer.

14 A -- buy in the secondary market, correct.

15 Q And these days, there is regrettably, there is a  
16 rather liquid market for debt in distress companies,  
17 correct?

18 A I don't know that it's "regrettably," but all I  
19 can speak to are the facts.

20 Q You don't know that its regrettably because that's  
21 how you make your living. Isn't that correct?

22 A Not necessarily.

23 Q The business of your firm is to make dis --  
24 investments in distressed organizations, correct?

25 A The business of the firm is to make investments in

1 equity and distress investments.

2 Q Okay, and your focus is in the distressed end?

3 A Correct.

4 Q Okay. And there is an active secondary market for  
5 such investments, correct?

6 A For such investments?

7 Q Yes.

8 A Yes.

9 Q So, --

10 A For all of them.

11 Q So, anybody who voted in favor of this plan of  
12 reorganization would have had no assurance that the  
13 debt of the reorganized entity would remain forever --  
14 or for any period of time -- in the hands of the  
15 original lenders, correct?

16 A They'll probably hold for the equity, as well.  
17 Correct.

18 Q So, nobody could have reasonably cast their vote  
19 in favor of this plan of reorganization relying on the  
20 identity of the lender, correct?

21 A Don't necessarily agree.

22 Q Because it could have been sold the next day,  
23 correct?

24 A But, I think most investors, like myselfes (sic),  
25 will base their decision on what they know at that



1 point in time, and the circumstances dictate, you know,  
2 different responses to who would be in those different  
3 situations.

4 Q I'm sorry to have to do this. But, can you answer  
5 my question? It could have been sold the next day,  
6 isn't that correct?

7 A If it was trading, it could, and if there was a  
8 buyer and a seller, yes.

9 Q Yeah. In fact, your co-objector, Grace Bay,  
10 bought from your organization some substantial piece of  
11 your position in the original exit facility, correct?

12 A No, not correct.

13 Q Now, how did Grace Bay become a lender in the  
14 original exit facility?

15 A The original exit facility -- just to take a step  
16 back for a second -- the original exit facility was  
17 less than \$53.5 million of term loan. We were told  
18 that was insufficient by the company, they needed --

19 Q Can you answer my question, now?

20 A -- liquidity. Well, you need to understand how we  
21 got there.

22 THE COURT: Counsel, please do not interrupt  
23 the witness. If a motion to strike is appropriate at  
24 the conclusion of the response, I will consider it  
25 then.

1 MR. KARLAN: Thank you, Your Honor. I  
2 apologize.

3 THE COURT: Thank you.

4 BY MR. KARLAN:

5 A So, in an effort by the agent to try to generate  
6 more liquidity, for the company, Third Avenue stepped  
7 up and offered to take a bigger piece with modified  
8 terms, which resulted in Third Avenue, I believe,  
9 taking up out up to \$25 million of the term loan.

10 Q Do you remember my question?

11 A Yes, I do.

12 Sure. So, upon Grace Bay, I suppose, indicating  
13 to the agent that they, too, wanted to participate in  
14 the exit facility, it was asked of the -- what was then  
15 the existing term loan lenders, at least as it relates  
16 to me, would anybody give up some of their position so  
17 that Grace Bay can put in their own position and not  
18 slow down the process that we're in.

19 Being what was then the largest term loan  
20 lender of that facility, obviously, it made logical  
21 sense for Third Avenue to be the one that,  
22 unfortunately, had the most to give up.

23 In terms of the size that we had to give up  
24 to Third -- to Grace Bay, Third Avenue is not one fund.  
25 It actually consists of many funds that roll up into

1 our total assets.

2 So, there were several funds seeking to  
3 participate in our \$25 million. So, it doesn't make it  
4 easy to cut back just on a one-for-one basis, because  
5 to the extent there's an insignificant ownership on one  
6 of the other funds, they would not be interested in  
7 funding.

8 MR. KARLAN: I don't know that 4 o'clock's  
9 going to do it, Judge.

10 BY MR. KARLAN:

11 Q Do you remember the question that I asked you?

12 A Yes.

13 Q Would you tell me what it was?

14 UNIDENTIFIED: Your Honor?

15 BY MR. KARLAN:

16 A You asked me if we sold our position to Grace Bay.  
17 We did not.

18 Q You did not?

19 A Correct.

20 Q Did Grace Bay acquire from your organization its  
21 current position in the old exit facility?

22 A No.

23 Q No?

24 A Third Avenue never had a position in the old exit  
25 facility.

1 Q Did -- was Grace Bay a signatory, originally, to  
2 the exit commitment?

3 A No, they were not.

4 Q Okay. Is it now?

5 A Yes, they are.

6 Q And how -- and that happened because your  
7 organization gave them a piece, correct?

8 A It because several organizations gave them a piece  
9 including --

10 Q Including yours, correct? So, the answer to my  
11 original question --

12 UNIDENTIFIED: Your Honor, I object.

13 BY MR. KARLAN:

14 Q -- was not the long speech you gave, but was,  
15 "Yes,"

16 A No, no, --

17 Q -- correct?

18 A -- no. We did not sell our position.

19 Q I didn't ask you whether your sold it.

20 THE COURT: One moment. One moment,  
21 because --

22 MR. COUSINS: Your Honor, Can we please ask  
23 the Court impose some discipline? I understand the  
24 debtor's upset, but --

25 MR. KARLAN: I'm not upset, and I would ask

1 you not to say that I'm upset.

2 THE COURT: Counsel. Address the Court,  
3 please. Not each other.

4 BY MR. KARLAN:

5 Q So, nobody could have voted in favor of the  
6 original plan, reasonably, anyway, on the assumption  
7 that Grace Bay would not be a participant because Grace  
8 Bay wasn't originally participant, but then it became a  
9 participant, correct?

10 A There was no vote taken prior to Grace Bay being  
11 in the facility.

12 Q But, the change in Grace Bay's status could easily  
13 have happened after the vote, correct?

14 A If somebody was willing to sell it to them, as we  
15 discussed, correct.

16 Q Okay. So, the identity of a lender in a plan can  
17 never be a reasonable basis for someone to vote "yes"  
18 or "no" on the plan, correct?

19 A I disagree.

20 Q Okay. You are aware that you are -- your  
21 organization is the only party in interest who voted in  
22 favor of the plan and is now objecting, correct?

23 A Correct.

24 Q And you're aware that had your organization voted  
25 to reject the plan, or had it voted -- had it not voted

1 at all, that would not have had any meaningful change  
2 in the voting statistics outcome, correct?

3 A Correct.

4 Q Would you agree with me, generally, that the  
5 equity holder of an organization that is entering into  
6 a debt agreement wants the covenants in the debt  
7 agreement to be as loose and borrower-friendly as  
8 possible?

9 A To the extent that that results in more time to  
10 reach going concern, I would agree.

11 Q Okay. And would you agree with me that generally  
12 speaking, someone who has -- someone who is the lender  
13 to the entity has the opposite interests. That is, he  
14 wants the covenants to be, relatively speaking,  
15 tighter.

16 A Yes.

17 Q Now, as of a week and a half ago, your co-  
18 objector, Grace Bay, had not yet tendered its signature  
19 page to the loan agreement, correct?

20 A I don't know.

21 Q You don't know that?

22 A I imagine they tendered to the agent not to me. I  
23 don't know.

24 Q You've had no conversations with them on that  
25 subject?

1 A I've had conversations with the agent.

2 Q And?

3 A The agent indicated that they received their  
4 signature contingent on receiving certain information  
5 that the indicated seemed fair and reasonable.

6 Q Did they permit the agent to release the signature  
7 page to the debtor?

8 A I don't know.

9 Q You didn't have any conversation on that subject?

10 A No.

11 Q Okay. Are you aware that as of a week and a half  
12 ago, there were still negotiations between Grace Bay  
13 and the debtor on what terms would be acceptable to  
14 Grace Bay?

15 A I believe they were still negotiating because we  
16 had not received the final document term yet.

17 Q So, the answer to my question is yes, you're aware  
18 of that?

19 A I believe, yes.

20 Q Okay. Do you believe that the debtor had a  
21 fiduciary obligation to seek alternative financing  
22 under those alt -- under those conditions?

23 A I don't think I'm the appropriate one to answer a  
24 legal question.

25 Q Would you answer my question, please?

1 A I don't know.

2 Q Okay. You don't have an opinion on that one way  
3 or the other?

4 A Restate the question?

5 Q Do you think under those circumstances, the  
6 representatives of the debtor had a fiduciary  
7 obligation to seek alternative financing?

8 A If you're asking me for my opinion based upon the  
9 agent telling me that they thought that the signature  
10 was based on things that were fair -- the contingency  
11 was based -- fair and reasonable, and they expected it  
12 to be met, no.

13 Q Is it correct that after the disclosure statement  
14 was approved, your organization and Grace Bay continued  
15 to demand changes in the deal?

16 A We were negotiating on the exit facility, --

17 Q Yeah.

18 A -- which incorporates the plan of reorganizations.

19 Q The answer to my question is yes?

20 A Yes.

21 Q The answer to my question is yes?

22 A Yes.

23 Q You drew a distinction in your direct testimony  
24 between what you described as "net liquidity" and  
25 "gross liquidity." Am I right?



1 A Yes.

2 Q Okay. Would you look, please, at Exhibit 45,  
3 which you have in front of you? It's the chart says at  
4 the top "Exit Facilities Overview Liquidity Covenant."

5 A Okay.

6 MR. KARLAN: Your Honor, may I just remind  
7 the Court that Your Honor has not yet ruled on the  
8 admissibility of -44, -5 and -6.

9 THE COURT: I'm aware of that.

10 MR. KARLAN: Okay.

11 THE COURT: Thank you.

12 MR. KARLAN: May I proceed, nonetheless,  
13 to --

14 THE COURT: You may.

15 MR. KARLAN: -- examine? Thank you.

16 BY MR. KARLAN:

17 Q Do you have any criticisms or corrections to the  
18 arithmetic on Exhibit 45?

19 A I have not had an opportunity to actually check  
20 the arithmetic on this page. I just received it today.

21 Q So, the answer is -- to my question -- is no.  
22 Sitting here today, you do not have any.

23 A Sitting here today, I do not have any corrections.

24 Q Okay. Do you have reason to think that any of  
25 this arithmetic is wrong?

1 A I have no reasons, no.

2 Q Okay. Now, the reason you believe this --  
3 withdrawn. Would you agree with me, sir, that assuming  
4 the arithmetic on Exhibit 45 is correct, the company's  
5 net liquidity position, as you've defined that term,  
6 would be better -- significantly better under the new  
7 exit facility than under the old exit facility?

8 A It would be better --

9 Q Okay.

10 A -- based on these numbers, yes.

11 Q Now, as I understand it, the reason you believe  
12 this chart is misleading, -- I think that's the word  
13 you used -- is that it purports to set forth net  
14 liquidity figures rather than gross liquidity figures.  
15 Is that fair?

16 A That's fair.

17 Q Okay. Now, you're going to have to forgive me  
18 because I don't have an MBA, but when I was first  
19 coming out of law school, I got a lot of offers for  
20 credit cards from banks who told me that I could have a  
21 credit card with a line of \$5,000, if I would deposit  
22 \$5,000 in a savings account at that bank.

23 You're familiar with that kind of deal?

24 MR. COUSINS: Your Honor, can I ask that we  
25 have questions not speeches? We are going to run out

1 of time.

2 BY MR. KARLAN:

3 Q Are you familiar with that kind of deal?

4 THE COURT: I hope not. You may answer, sir.

5 BY MR. KARLAN:

6 A Yes.

7 Q And that is, in fact, the kind of deal that is  
8 contained in the old exit facility, yes?

9 A N -- I don't believe so, no.

10 Q There was an extension of \$50 million of credit  
11 paired with an obligation to keep that \$50 million at  
12 all times in house at the company in cash. Correct?

13 A I'm not familiar with that, no.

14 Q Are familiar with the terms of the credit  
15 facility?

16 A The old one, yes.

17 Q Yes?

18 MR. KARLAN: May I approach the witness, Your  
19 Honor?

20 THE COURT: You may, but show opposing  
21 counsel --

22 MR. KARLAN: Yes.

23 THE COURT: -- first what you're showing the  
24 witness.

25 (Side comments off the record.)

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BY MR. KARLAN:

Q Mr. Fineman, this binder that we've placed in front of you should be opened to Tab 19, and if you look at the title page of that document, without losing -- try not to lose your place because we're going to turn back to this page, but -- what I've shown you is the Notice of Filing of Plan supplement pursuant to joint plan of reorganization for the debtors.

Do you see that?

A Yes.

Q And, the document that we've turned to, which is an exhibit to that filing, is -- I'll show you what I -- the old -- correct?

A Correct.

Q And this is the document you're familiar with, sir?

A Correct.

Q All right, now I've opened your book to Page -- well, the pages aren't numbered -- to Section 8.19. Do you see that?

A Yes, I do.

Q And that's entitled, "Financial Covenants?"

A Yes, sir.

Q And, you're familiar with that section, sir?

A Yes, I am.

1 Q All right. And, would you agree with me that  
2 under Section 8.19 of the old exit facility, the  
3 borrower was required for every month during the  
4 calendar year 2010 to have a minimum liquidity  
5 sometimes as high as \$50 million?

6 A Yes, I agree.

7 Q And that was true, also, for some months in 2011?

8 A Yes.

9 Q And that is the reason -- withdrawn. That is the  
10 figure that is shown on Exhibit 45 under the 1 -- on  
11 the line entitled "Cushion," correct?

12 I'm sorry -- I'm lo -- pardon -- I'm sorry.  
13 On the line titled "Covenant," correct?

14 A Correct.

15 Q Okay. So, the figures on the line on Exhibit 45  
16 entitled "Covenant" accurately reflect the terms of  
17 Exhibit -- of Section 8.19 of the old exit facility,  
18 correct?

19 A They appear to, correct.

20 Q Okay. When your organization voted in favor of  
21 the plan, you were already aware that the company was  
22 going to receive a tax refund -- what Mr. Rosenthal has  
23 called the "manna from heaven," -- correct?

24 A When we voted, we were aware that they were going  
25 to file for a tax refund, yes.

1 Q So, that was not -- that's not new information to  
2 you, correct?

3 A At that point in time, no.

4 Q That is to say that wasn't information you learned  
5 after you voted for the plan. It's information you  
6 knew at the time you voted for the plan.

7 A Correct.

8 Q Okay. You gave some testimony about the \$7.7  
9 million. Do you recall that?

10 A Yes.

11 Q And you were -- tell me if this is a fair  
12 characterization -- you were complaining that under  
13 exit facility -- the one that's being proposed today --  
14 the company would retain \$7.7 million as opposed to  
15 paying all of that money to the lenders. Is that fair?

16 A No, actually --

17 Q Okay.

18 A Would you like to know what I --

19 Q Please. Yes, thank you.

20 A My point was, I believe this was used to point out  
21 that more proceeds to pay down the second lien under  
22 this new facility. And all I was trying to point out  
23 was this points only to the cash proceeds from the tax  
24 refund.

25 Q Mmhmm.

1 A Cash is fungible, as we all know, and doesn't  
2 factor in all the liquidity that would have been on the  
3 balance sheet under the old facility because there was  
4 more cash -- \$13.5 million more cash provided to the  
5 company.

6 So, when you factor in the true apples-to-apples  
7 comparison of liquidity, there's actually more under  
8 the old.

9 Q Would you agree with me that under the new credit  
10 facility that's being proposed, there is a smaller  
11 equity -- smaller liquidity cushion that's required? A  
12 smaller liquidity covenant?

13 A Yes, I agree.

14 Q And would you also agree with me that under the  
15 new proposal, a larger amount of money from the tax  
16 refund will go to the second lien holders than would  
17 have gone to the second lien holders under the old  
18 facility?

19 A Based on D-46, that's what this shows, yes.

20 Q Okay. Yeah. Just at the risk of beating a dead  
21 horse, Mr. Fineman, the fact that cash is shown as an  
22 asset on the balance sheet does not necessarily mean  
23 the cash is available for the company's use, if it's  
24 tied up by some liquidity covenant, is that fair?

25 A By itself, yes, that's fair.

1 MR. KARLAN: Okay. I have nothing further.  
2 Thank you, Your Honor.

3 THE COURT: Is there any other cross-  
4 examination? Redirect?

5 MR. COUSINS: Thank you, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. COUSINS:

8 Q Mr. Fineman, counsel showed you Exhibit 45 and 46.  
9 Do you recall that?

10 A Yes.

11 Q Do you see the underlying data that supports this  
12 schedule?

13 A Have I? No. This is all I've seen.

14 Q Have you seen any of the spreadsheets that compile  
15 this summary exhibit?

16 A No.

17 Q So, when counsel asked you about if the arithmetic  
18 is right, have you had an opportunity to determine  
19 whether the arithmetic is right?

20 A No, I have not.

21 THE COURT: I did hear that the first time.

22 MR. COUSINS: I apologize, Your Honor. I'm  
23 tired.

24 THE COURT: Okay, join the club.

25 MR. COUSINS: Nothing further, Your Honor.



1 THE COURT: Any re-cross?

2 MR. KARLAN: No, Your Honor.

3 THE COURT: All right. Thank you, sir. You  
4 may step down.

5 MR. FINEMAN: Thank you, Your Honor. Can I  
6 leave these exhibits here?

7 THE COURT: Yes, please. See -- well, let me  
8 ask this. Does the debtor have any rebuttal it wishes  
9 to offer at this point in the way of testimony or  
10 evidence.

11 MR. KARLAN: We will, Your Honor. Should we  
12 assume that the objection in this case is now closed?

13 THE COURT: I'm sorry, I did, but I should  
14 have specifically asked Mr. Cousins whether he had any  
15 other witness or other evidence to offer.

16 MR. COUSINS: No other witness or evidence,  
17 thank you.

18 THE COURT: All right. Thank you.

19 MR. KARLAN: We would like to call Mr. Dietz,  
20 Your Honor.

21 THE COURT: Very well.

22 BRIAN DIETZ, DEBTORS' WITNESS, SWORN.

23 THE CLERK: Please state your full name for  
24 the record and spell it.

25 MR. Dietz: Brian Dietz. Last name is D-I-E-

1 T-Z.

2 THE CLERK: Thank you.

3 MR. KARLAN: Your Honor, with your  
4 permission, since Your Honor already has the  
5 declaration from Mr. Dietz, which has all of his  
6 background, I'll skip over that and just jump right in.

7 THE COURT: Thank you.

8 MR. KARLAN: Okay.

9 DIRECT EXAMINATION

10 BY MR. KARLAN:

11 Q Mr. Dietz, were you involved at all in the  
12 discussions between the parties to the -- what I'll --  
13 I'm calling -- the "old exit facility" and the debtors?

14 A Yes. I was one of the principal negotiators of  
15 the exit facilities. Primarily acted -- interacting  
16 with Seth Moldolf (phonetic) at Wells Fargo and the  
17 Grant Thornton consulting team.

18 Q All right. And, did those discussions continue  
19 after the date on which the Court approved the  
20 disclosure statement?

21 A Yes.

22 Q And, did those discussions ultimately result in  
23 the debtor getting signature pages to final documents  
24 from all of the exit lenders?

25 A Yes.

1 Q Including Grace Bay?

2 A I believe that the signature page was submitted in  
3 escrow, so to speak, and that there were conditions to  
4 its release.

5 Q And what -- what were those conditions?

6 A Review of documents, exhibits. I clearly got the  
7 impression that there were negotiations going on with  
8 regard to other non-credit agreement issues.  
9 Specifically, board seat, the right of first refusal  
10 and the purchase of equity and probably some other  
11 provisions.

12 Q Did Grace Bay ask for a right of first refusal?

13 A Yes.

14 Q And was that term in the original exit facility?

15 A It was not.

16 Q Okay. Did Grace Bay ask for board seats?

17 A Yes, I believe they did.

18 Q Was that term in the --

19 A That was as related to me by Seth Moldolf.

20 Q Maybe we should identify who that --

21 MR. COUSINS: Hearsay, Your Honor.

22 MR. KARLAN: Okay.

23 MR. COUSINS: We now have double hearsay.

24 It's been related to him by Seth Moldolf about a  
25 conversation --

1 THE COURT: Well, --

2 MR. COUSINS: -- with Grace Bay.

3 THE COURT: Any response.

4 MR. KARLAN: I need -- let me withdraw the  
5 question.

6 THE COURT: Very well.

7 BY MR. KARLAN:

8 Q Tell us who Seth Moldolf is, first of all.

9 A Seth Moldolf is the lead work-out banker at Wells  
10 Fargo who is the administrative agent on both the term  
11 loan, and the pre-petitioned revolver and term loan.

12 Q Okay. And, was he the person with whom you had  
13 negotiations concerning the old exit facility?

14 A I had conversations with him, but separately, I  
15 had conversations with Grace Bay.

16 Q With whom at Grace Bay?

17 A Louis Shoenwedder (phonetic) and Andy Brown on, I  
18 believe, Friday, December 4th.

19 Q And, what is your understanding of their positions  
20 at Grace Bay?

21 A May I have the question again?

22 Q What's your understanding of the titles that -- or  
23 the functions that they held at Grace Bay?

24 A I believe Louis is a managing director and  
25 partner. Andy Brown, I think, is a principal. But,

1 they were the two parties that were responsible for the  
2 investment, much like Mike Fineman --

3 Q Okay.

4 A -- said he was at Third Avenue.

5 Q During the conversation you had with them on  
6 December 4th, did they make demands for additional  
7 terms or concessions in connection with the exit  
8 facility?

9 A It was linked or related in my view of that phone  
10 call which I had with both of them. They talked about  
11 they were moving forward on the credit agreement. They  
12 hoped to get there, but they were specific credit  
13 issues and then I raised the issue in terms of why they  
14 had not voted for the plan, why the signature page was  
15 not released.

16 They certainly linked, in my mind, the  
17 outstanding issues which they acknowledged a board seat  
18 and the right of first refusal on the purchase of  
19 equity.

20 Q Okay. Do you have there in front of you your  
21 exhibits -45 and -46?

22 A Yes, I do.

23 Q Let's look at -45 first, please. First of all,  
24 tell us how this chart was created, who created it and  
25 what it's based on.

1 A Well, this was created at my direction by the two  
2 vice president and associate that work with me for the  
3 entirety of the project.

4 What we wanted to do was take a look at  
5 the --

6 Q Say what --

7 A -- liquidity --

8 Q Say what their names are, please?

9 A Paul Crosey (phonetic) is the Vice President.  
10 Paul Garino (phonetic) is the associate.

11 So, this was prepared at my direction to  
12 compare the available liquidity, which the company  
13 would have as an operating matter to either borrow  
14 under the revolver or use cash on the balance sheet as  
15 a comparison of the Wells Agented Facility, as we  
16 describe it, and the Foothill DK facilities.

17 Q Okay. And let me start -- I'm not going to  
18 necessarily going to go through this in the right  
19 sequence, but let me start with the entitled  
20 "Covenant." I think it's the second line of figures  
21 there?

22 A That's right.

23 Q Can you just tell the Court what those figures are  
24 and where they come from?

25 A That was the covenant restriction that we

1 negotiated with the exit lenders in terms of the  
2 liquidity that we had to maintain either in a revolver  
3 availability or cash on the balance sheet to remain in  
4 compliance with the agreement --

5 Q Okay.

6 A -- on a monthly basis.

7 Q Now above that, you have a line, "Liquidity  
8 Measurement." What are those figures?

9 A The two components that go into the liquidity  
10 measurement are the availability under the revolver --  
11 in other words, the capacity if we have a \$50 million  
12 revolver -- plus the available cash.

13 Those two are totaled and then deducted as  
14 the covenant measuring the net availability or the  
15 cushion.

16 And I might volunteer a comment at this  
17 point. In terms of the net availability is all the  
18 company has available to it. And that is the  
19 combination of revolver availability and cash after the  
20 covenant reserve.

21 Gross availability is a concept that totals  
22 the maximum amount of collateral that's available to  
23 the company. It is restricted by a combination of the  
24 line limit -- in each circumstance here \$50 million --  
25 and also the covenant restriction.

1                   So, I cannot borrow against gross  
2                   availability.

3                   The gross availability in each of these cases  
4                   is nearly identical. In January, it's approximately  
5                   \$125 million.

6           Q     Let me interrupt you. When you say, "in each of  
7           these cases," what are you referring to?

8           A     Either the Wells agented case, --

9           Q     That's the top.

10          A     That's right.

11          Q     Okay. And what -- what are you --

12          A     Or the Foothill facility. That's gross  
13          availability.

14          Q     Okay.

15          A     I'm not able to borrow gross availability. What  
16          I'm restricted to, in terms of availability, is  
17          translated through the line limit and the covenant  
18          restriction.

19                   I can only use net availability.

20          Q     Okay.

21          A     I would love to borrow against gross availability,  
22          but I can't do it.

23          Q     And what you're calling "net availability" is  
24          identified as the "cushion" on the third line of  
25          figures on this chart?



1 A That's right. That's what I can use.

2 Q Okay. Now, the series of entries has the heading,  
3 "Foothill/DK Facilities." This is a different set of  
4 numbers now?

5 A That's the availability under the revolver plus  
6 cash on the balance sheet. That's our gross liquidity  
7 measure, and it is reserved by, essentially, the  
8 equivalent, the availability block of \$10 million.

9 So, I have available liquidity there of a --  
10 net available liquidity -- by way of example of month  
11 June or July -- let's take a look at June -- 55.9  
12 million and the Foothill/DK facilities --

13 Q I think that's actually --

14 A Can we do that on --

15 Q That's actually 65.9 million --

16 A That's --

17 Q Or, you're on the next -- okay, you're on  
18 available. Okay. Go ahead.

19 A Okay. I take out the availability block of 10, I  
20 available liquidity of 55.9. If I move to the top of  
21 the page, in the same column for June 2010, I have a  
22 liquidity measurement of 79.6 million. I have a li --  
23 a covenant. I have to maintain liquidity of \$40  
24 million meaning that there is a net \$39.6 million of  
25 cushion that I can use.

1                   The difference between those two numbers,  
2                   55.9 and 39.6, is the additional liquidity that is  
3                   available under the Foothill/DK Facilities, totaling  
4                   16.2 million.

5           Q     Okay. Are the two lines that are highlighted in  
6           yellow under the two facilities, the Wells Agented  
7           Facility and the Foothill/DK Facilities, those are the  
8           so-called gross numbers?

9           A     No, that's not the gross numbers.

10          Q     Okay.

11          A     Those are the remaining availability by the line  
12          limit.

13          Q     The yellow.

14          A     That's correct.

15          Q     Okay.

16          A     So, that's the line limit plus the cash that's on  
17          the balance sheet.

18          Q     Okay.

19          A     So, what's not used under the revolver of 50 plus  
20          the cash. That's all I can really use.

21                   The gross availability, which is a number  
22                   that was referred to previously, is something much  
23                   higher.

24          Q     Right.

25          A     It's not on the page.

1 Q No.

2 A And I can't borrow against it. So, net  
3 availability is the indicy (phonetic) that governs the  
4 company's liquidity: what's available to pay bills,  
5 make interest payments available in terms of use in the  
6 business.

7 I believe our calculations, the  
8 arithmetic, -- we have the supporting document, -- are  
9 correct. The only thing that's available is net -- not  
10 gross.

11 And I think the numbers would demonstrate,  
12 then, each of these months, it is better under the  
13 DK/Foothill Facilities than it is under the prior exit  
14 revolver.

15 Q Okay.

16 A Base case, the exclusion of one month, --

17 Q August --

18 A -- August, --

19 Q -- of '010 -- of '10.

20 A -- which it is \$1 million less than the exit  
21 facilities. But, if you move to the line above that in  
22 terms of the available liquidity, \$61.6 million, in our  
23 view, is adequate to run this business in a sufficient  
24 cushion.

25 Q Okay. Now, just one last question. You have two

1 sets of numbers: one at the very top and one at the  
2 bottom half of the page; one you're calling a "base  
3 case" and one you're calling a "covenant case."

4 What is the difference between those two?

5 A We reduce the company's performance both in terms  
6 of sales and EBITDA for the forecast period.

7 The very, very simple way to take a look at  
8 this is that we delayed the housing recovery by  
9 approximately one year.

10 So, I believe our EBITDA calculations were in  
11 round numbers a 20, a 51 and just slightly north of 100  
12 in the base case versus break-even 31 and approximately  
13 70 in the covenant case for the three years of the  
14 projection period.

15 Q Do you have an opinion about whether the  
16 Foothill/DK Facility is more favorable to the debtors  
17 than the Wells Agented Facility?

18 A Well, from a liquidity standpoint, I would make  
19 two points.

20 I think this chart clearly demonstrates that  
21 the net availability to the company is greater.

22 The flaw or difficulty that we had with the  
23 covenants that we negotiated under the prior facility  
24 functioned much like an EBITDA test. They moved up and  
25 down every month.

1 Q Mmhmm.

2 A So that in fact, the company -- and this is a  
3 seasonal business -- would have to be aware of meeting  
4 that monthly test, I believe, with a greater degree of  
5 sensitivity, than with a flat \$10 million availability  
6 block because it is moving up and down and functioning  
7 like an EBITDA test in terms of the use of cash.

8 That means that the company has to be more  
9 sensitive with regard to disbursements to vendors. It  
10 has to be more aggressive with regard to collection of  
11 accounts receivable.

12 So, as a practical matter, I think that this  
13 works better for the company. The other feature that  
14 we were able to negotiate in terms of cushion --

15 Q When you say "this work better," just -- so we're  
16 clear.

17 A It provides the company --

18 Q What is the "this?" What works better for the  
19 company?

20 A The liquidity covenant, as we've negotiated with  
21 Foothill --

22 Q Okay.

23 A -- and DK functions much better for the company  
24 with regard to flexibility.

25 It's not measured monthly like a snake --

1 like a sine wave. The other thing that we were able to  
2 negotiate, I think, here, that was important is greater  
3 flexibility on the EBITDA test. We have approximately  
4 \$5 million greater cushion in both the second and the  
5 third quarters of 2010, which are key turnaround  
6 periods for this company.

7 So, in very round numbers, it was in the  
8 first measurement period in July -- in June 2010, we  
9 have \$20 million of cushion from an operating  
10 standpoint in terms of 6 months of losses versus 15.

11 Now, I heard the point that in terms of this  
12 agreement weakens the position of the second lien  
13 lenders. As a matter of the agreements that any  
14 renegotiation of the first lien facility, it is my  
15 understanding that those covenants follow so that, in  
16 fact, that the cushions that we've negotiated and the  
17 covenant package follow into the second lien agreement.

18 It provides the company, I think, key  
19 liquidity and key performance metrics in the turn-  
20 around period, and in fact, if this facility was  
21 negotiated at any point in time, that same tagalong  
22 provision, -- as I would describe it -- would apply to  
23 the second lien at any case.

24 So, if at a future date, the facility was  
25 renegotiated, as was described, the covenants would be

1 weakened, but they would be weakened under the  
2 Foothill/DK deal or any other deal that was negotiated,  
3 and that was very specific to our negotiations under  
4 the exit facility.

5 So, I think we've got more flexibility with  
6 regard to the liquidity test and certainly more cushion  
7 under the EBITDA test, both as a percentage by 15%, and  
8 also, we've got specific credit for the closure of  
9 Davis Brothers for 2.7 million during fiscal 2010.

10 I think those are very important covenant  
11 flexibility and cushion issues for the company in the  
12 turnaround.

13 MR. COUSINS: Your Honor, I move to strike.  
14 Typically, there's questions and answers not  
15 narratives.

16 This has gone on -- this is a redirect case  
17 that entire -- three-quarters of that answer was non-  
18 responsive.

19 THE COURT: Well, I'm inclined to give this  
20 witness the same leeway I gave yours. Denied.

21 You may continue.

22 BY MR. KARLAN:

23 Q Would you turn to Exhibit 46, please?

24 A Yes.

25 Q That's the document entitled "Tax Refund Proceeds

1 Applied to \$135 Million Term Loan?"

2 A Correct.

3 Q Tell us please how this document was created.

4 A This was also prepared at my direction and by Paul  
5 Crosey and Paul Garino to analyze and illustrate the  
6 allocation of the tax refund between the various  
7 creditors in the capital structure -- what would be  
8 paid to the term loan and what would be repaid by the  
9 company.

10 Q Okay.

11 A Retained by the company.

12 Q Okay. Can you describe, please, what it shows at  
13 the -- on the top half of the page with respect to the  
14 Wells Agented facility?

15 A In our view, the \$70 million refund, which is the  
16 maximum refund, in general, that's anticipated here.  
17 Approximately \$70 million.

18 On the left side of the page, you have the  
19 balances under the prior exit facility, which totals  
20 \$69.2 million. This would suggest that with the  
21 receipt of a \$70 million tax refund after those  
22 facilities are either repaid in terms of outstandings  
23 under the term loan, LC's cash collateralized, there  
24 would be approximately \$1 million that would be  
25 available to pay down the second lien term loan.



1           Alternatively, and principally driven because  
2           the -- we have a lower term loan outstanding, by about  
3           \$13 or \$14 million -- once the term loan of \$41 million  
4           is paid, the LC's cash collateralized, that would leave  
5           \$15.5 million available for the 50-50 distribution.

6                        So, \$7.5 million would be retained by the  
7           company, and \$7.5 million would be paid to the term  
8           loan.

9           Q     Okay.

10          A     I would call this "less is more" in terms of a 50-  
11          50 percentage being less, but delivering more proceeds  
12          to the company. And I will point out, --

13          Q     Let me just --

14          A     Yeah.

15          Q     Let me earn a dollar here.

16          A     Sure.

17          Q     During your answer that you started to talk about  
18          the bottom half of the page, am I right? I -- you  
19          started by talking about --

20          A     Yes.

21          Q     -- the analysis under the Wells Agented facility,  
22          but then you said, alternatively, but from then on you  
23          were talking about the bottom --

24          A     That's right.

25          Q     -- half of the page, is that correct?

1 A Correct.

2 Q Okay. Now, do you have an opinion about whether  
3 the Foothill/DK facility is more favorable to the term  
4 loan holders than is the Wells Agented facility with  
5 respect to this tax refund?

6 A I do, and principally because the term loan which  
7 is being rented or used for a very, very short period  
8 of time, is \$13 million higher so that we are paying  
9 the cost of that money on the way in, we're paying the  
10 interest cost of that money along the way, and we're  
11 paying the exit cost.

12 So, the more favorable distribution to the  
13 term loan holders is driven by the fact that we don't  
14 have to repay that higher term loan amount, and  
15 providing a larger allocation to the second lien  
16 lenders.

17 I want to point out that this is included in  
18 our liquidity analysis, so that, in fact, we've  
19 captured a closed system, as may have been, you know,  
20 raised a doubt upon a few minutes ago.

21 Q Did you render advice to the company, to the  
22 debtors, with respect to the question of whether --  
23 they should take a \$50 million refund and not close the  
24 business or take the \$70 million refund, even though it  
25 meant closing the business?

1 A We --

2 Q Just tell me "yes" or "no."

3 A We had a -- conversations. Yes, we did.

4 Q Okay, did you have an opinion on which course the  
5 company should take?

6 A Yes.

7 Q What was it?

8 A It was to close the business and realize the tax  
9 proceeds -- the tax refund proceeds about \$20 million.

10 Q Even though that closed company -- the name of  
11 which is escaping me -- I'm sorry --

12 A Davis Brothers.

13 Q -- thank you -- generates and was projected to  
14 continue to generate positive EBITDA?

15 A I do, and I think there was risk to that EBITDA  
16 from at least three factors.

17 One is, that the business has been damaged in  
18 the bankruptcy in terms of new business. It also  
19 requires bonding capacity, which takes a revolver  
20 availability.

21 Most importantly, the two gentlemen, the  
22 Davis Brothers, have the option to leave the business.  
23 One left the business this year and is now in a  
24 marketing position, the other brother has the  
25 opportunity to leave the business just about this time

1 next year.

2 And, I think that limited non-competes. So  
3 that we -- when we took a look at the condition of the  
4 business, the risks associated, the capital required in  
5 the form of letter of credit to support it in the near  
6 term, and the risk that, in fact, the core, the center  
7 of that business may leave NEWCO (phonetic), we thought  
8 that taking the \$20 million bird in hand was the  
9 appropriate business decision.

10 Q Have you done any analysis on the question of  
11 whether there is any significant risk that the company  
12 will not get this \$70 million?

13 A I have.

14 Q And what is your opinion on that?

15 A My discussions -- as background -- I've had are  
16 dissipated in phone calls with PWC and company and the  
17 company --

18 Q Sorry, with who?

19 A With Price Waterhouse, --

20 Q Okay.

21 A -- which is the company's tax advisors, has the  
22 company's tax return over the past two years, even as  
23 recently as this week. I wanted to make sure that the  
24 company had the same confidence in the tax return, so I  
25 spoke with Brad Harmitage (phonetic), who is the tax

1 manager. I spoke with the PWC tax director on the  
2 matter as recently as yesterday.

3 I reviewed where they stood in terms of the  
4 losses through the end of November. We talked  
5 generally about 382 issues, although, I admit that I am  
6 not a tax expert, but there has not been a change of  
7 control for tax purposes that the company is aware of.

8 There was a 382 study that was completed as  
9 of June. There had not been a change of control for  
10 tax purposes at that time. The company is --  
11 essentially, we don't believe that the equity trades.  
12 We don't know, but I think we've taken a look as we can  
13 at the tax work that's been prepared by both the  
14 company and PWC.

15 What PWC has said about the company is that  
16 in doing the tax return over the past two years, they  
17 have had no changes to it in terms of the company-  
18 prepared numbers so that, again, this year if the  
19 numbers are correct and they have no reason to believe,  
20 which is what it might take away from the conversation  
21 that the tax returns as refunds as estimated, are --  
22 l -- appear very good.

23 Q And when is it expected that that check will be  
24 received?

25 A I believe that the check, -- from the

1 conversations that I have with PWC, -- could be  
2 received this spring.

3 That the company received it, I believe, in  
4 May of last year, I think, with a timely filing, which  
5 is required, I believe, by the end of March that the  
6 tax refund may received even earlier that -- this year.

7 MR. KARLAN: Okay. May I have one moment,  
8 Judge?

9 THE COURT: You may.

10 BY MR. KARLAN:

11 Q Do you have any views on whether the interest  
12 rates that will be paid by the debtors under the  
13 Foothill/DK facility are more or less favorable to the  
14 company than the interest rates that would have been  
15 paid under the Wells Agented --

16 A Well, I --

17 Q -- Facility?

18 A When the tax refund is received, the company will  
19 have a revolving credit agreement with a 7% coupon. If  
20 it's not used, it gets grossed up by, you know, 1% so  
21 we, you know, we call it an 8% kind of facility if it's  
22 7 to 8%, that contrasts with a revolver provided by HIG  
23 and Wells Fargo that alternatively is 15 to 17% in the  
24 spring.

25 We have taken a look at what we think the

1 expected costs are of the term loan as well as the  
2 total interest in fee costs to the fee company through  
3 June 30th, and that we believe that the term loan  
4 package as provided by -- or the term loan as provided  
5 by DK is more favorable from a total cost standpoint.

6 I think the number is approximately \$6.7  
7 million versus \$7.7 million, so we think it's about \$1  
8 million favorable.

9 We have taken that through the end of June,  
10 where we think that the tax refund will be received.

11 We also think that the total cost of these  
12 facilities is about \$800,000 favorable. The difference  
13 there being --

14 Q These --

15 A -- the Foothill --

16 Q These --

17 A The comparison between --

18 Q Which one's more favorable?

19 A The comparison between the exit facility as  
20 proposed by Wells --

21 Q Mmhmm.

22 A -- and the Foothill/DK facilities.

23 Q Which one is 800 better?

24 A We think that Foothill/DK facility is about 800  
25 better. Taken with both facilities, we think the term

1 loan offered by DK is about \$1 million better.

2 MR. KARLAN: I have nothing further. Thank  
3 you, Your Honor.

4 THE COURT: Mr. Cousins, I'm assuming you  
5 wish to cross-examine Mr. Dietz, but rather than  
6 interrupt your mojo once you get started, maybe now  
7 would be a good time to break, for me to take the next  
8 hearing, and then come back to you. How's that?

9 MR. COUSINS: Thank you very much, Your  
10 Honor.

11 THE COURT: All right. We'll take a recess  
12 to allow the next matter to be set up.

13 (Recess)

14 THE CLERK: All rise.

15 THE COURT: Okay. All right, are we ready?

16 MR. COUSINS: Yes, thank you, --

17 THE COURT: Okay.

18 MR. COUSINS: -- Your Honor.

19 THE COURT: Let me remind you, sir, that you  
20 are still under oath.

21 MR. DIETZ: Yes, Your Honor.

22 THE COURT: All right.

23 BRIAN DIETZ, PREVIOUSLY SWORN.

24 CROSS-EXAMINATION

25 BY MR. COUSINS:



1 Q Mr. Dietz, have you ever been qualified as an  
2 expert before in a case?

3 A I don't recall actually.

4 Q Okay.

5 A I've testified here in Delaware, I've testified in  
6 Western Michigan, I've testified in Mexico, so, I've  
7 given plenty of e -- testimony. I don't recall whether  
8 I have been specifically qualified as an expert --

9 Q Okay.

10 A -- or not.

11 Q Have you ever been qualified in the area of tax?

12 A No.

13 Q What did the plan of reorganization assumptions  
14 provide with respect to the Davis Brothers in the  
15 Illinois assets?

16 A Can I have the question again, Mr. Cousins?

17 Q What were the assumptions contained in the pl --  
18 the original -- the old plan of reorganization with  
19 respect to the Davis Brothers and the Illinois  
20 businesses?

21 A Approximately \$6 million of EBITDA in 2010. I  
22 believe 9 in 2011 and 13 in 2012.

23 Q Okay. And -- but, did it assume that the  
24 reorganized debtor would maintain those assets?

25 A Yes.

1 Q And, now, the debtor as a covenant, as a condition  
2 to obtaining the exit facility, needs to sell those  
3 assets.

4 A It has decided to sell those assets.

5 Q It's a covenant to getting the exit facility,  
6 isn't it?

7 A Well, the -- when the company files its return,  
8 there are sort -- there are two conditions. It has  
9 to -- it has a covenant that the return is at least \$60  
10 million.

11 If there is a tax -- a change of control for  
12 tax purposes, the company -- the covenant automatically  
13 declines to \$50 million so that there is flex in the  
14 covenant, and even if the Davis Brothers is refu -- is  
15 not earned, the company always in excess of a \$50  
16 million refund.

17 So, we were comfortable that the covenant  
18 level would always be met.

19 Q But, there's some cushion, as you testified. Is  
20 that correct?

21 A I'm sorry, there's --

22 Q There's cushion.

23 A Yes, there's cushion.

24 Q And what happens if the Davis Brothers assets  
25 aren't sold?

1 A The tax refund is expected to be north of \$50  
2 million.

3 Q And, is that a covenant default if the Davis  
4 Brothers property is not sold?

5 A If it's -- no. If we have a \$50 million tax  
6 refund north of 50, we're going to repay the loan so  
7 that, in fact, -- again, we don't see it coming into  
8 play.

9 Q So, to -- what assurances can you give the Court  
10 that the \$50 million in tax refund --

11 A Well, as I explained in my prior testimony, I have  
12 spoken with PWC, I've spoken with the tax manager.

13 Q Mmhmm.

14 A These are normal operating losses that would  
15 qualify us for north of 50 million.

16 This is something that the company,  
17 unfortunately, did the old-fashioned way. It simply  
18 lost money on an operating basis rather than having  
19 these tax attributes driven by derivative transactions  
20 or anything tricky.

21 As I also pointed out, this is the exact same  
22 circumstance that the company applied and received a  
23 refund last year for \$57 million so that from a  
24 standards point of view, this is a law that's been  
25 passed, it was signed. There's no controversy about

1 it. Other companies are receiving it. We think that  
2 we'll receive it on a timely basis according to my  
3 conversations with PWC.

4 So, this is a drill, so to speak, that the  
5 company has been down the path before, last year. This  
6 is a simple extension of the law that allows to take  
7 operating losses back an additional two years to 2004  
8 and 5.

9 Q And the old exit facility didn't have a covenant  
10 as to the amount of the tax return, is that right?

11 A It did not, but it had covenants to it that this  
12 loan does not have. It had operating covenants to it,  
13 and as I described in my direct testimony, we found  
14 those direct covenants, including the liquidity test  
15 and the EBITDA test that we wanted and needed -- sought  
16 to modify, and they weren't willing to do it.

17 So, the old loan had operating covenants to  
18 it.

19 Q Okay. And you believe the new loan is materially  
20 better with respect to the covenants. Is that correct?

21 A Yes, I do. And I testified to that in my direct.

22 Q Now, the debtor -- do you have an idea as to how  
23 much -- well, let me rephrase.

24 Are you familiar with the debtors' EBITDA  
25 projections over the last several months?

1 A Yes.

2 Q And how's the debtor done with respect to the  
3 actuals -- it's actual performances versus projected.

4 A The company is running probably 10 to 15% below  
5 the covenant case from a revenue standpoint.

6 The company is probably losing a million and  
7 a half of EBITDA per month.

8 In the original plan, we had expected the  
9 company to be near break-even, you know, during the  
10 later part of 2009.

11 This is, Mr. Cousins, I don't have to tell  
12 you -- this has been a very challenging economic  
13 climate, home building market. This is the quietest  
14 period for the company, so that we know with the cost  
15 reductions that they've made at headquarters, we have  
16 basically deferred, in the covenant case, the  
17 turnaround in the company in the company for one year  
18 so that, in fact, yes, the company is trailing on a  
19 cov -- on a performance basis, but we feel relatively  
20 comfortable with the covenants that we -- the covenant  
21 case that we have.

22 Q Over the last five months, if I told you there was  
23 a negative variance of \$9.9 million between projected  
24 and actual, would that sound like it's in the ballpark?

25 A I'd have to check the number, but I look at the

1 monthly numbers as they come in, so we know that the  
2 company is behind plan, yes.

3 Q Okay, and which plan was -- business plan or  
4 projections -- were in the old -- in the plan that  
5 people voted on? Do you know?

6 A Base case.

7 Q The base case?

8 A That's right.

9 Q And you produced an exhibit here about the  
10 covenant case, is that right?

11 A That's right.

12 Q Okay. And, what -- the debtor hasn't hit its  
13 projections in the base case. Is that right?

14 A That's correct.

15 Q Okay, and let me see. In July, the debtor was  
16 projecting positive EBITDA of 900,000, and I'm seeing  
17 it had actual results of negative 1.4 million EBITDA.  
18 Does that sound right?

19 A I would much prefer if you'd put a schedule in  
20 front of me rather than speculate back, you know, five  
21 months. I'll accept your arithmetic, but yes, I've  
22 admitted that the company has been behind plan and for  
23 the reasons that I explained.

24 Q Okay. And the plan -- we're talking about two  
25 plans. The old plan of reorganization with a business

1 plan contained in that. Is that right?

2 My question is -- let me -- strike that.

3 Okay. Is the old plan that creditors voted  
4 on contained the assumptions, the projections that the  
5 debtor over the last five months hasn't hit? Is that  
6 right?

7 A I think the projections that were included in the  
8 plan were the go-forward projections for 2010 through  
9 '12.

10 Q Okay. And the debtor hasn't hit the actual EBITDA  
11 numbers that were contained in that business plan, is  
12 that right?

13 A I'm not trying to be one degree, two cute,  
14 honestly. The business plan that I believe is included  
15 in the plan is 2010 through '12.

16 Q Mmhmm.

17 A The company is behind its 2009 business plan.  
18 I've admitted that. But, it's not behind the plan  
19 that's -- the projections that are in the plan yet.  
20 Just from a temporal matter.

21 And again, I'm not trying to be difficult  
22 with you. I'm just saying as a technical matter, I  
23 think what's in the plan is 2010 through '12.

24 Q Okay. And you heard Mr. Fineman's testimony, I  
25 believe. You were here. Is that right?

1 A Yes, sir.

2 Q And, do you agree that there's no pick option in  
3 the new facility?

4 A There is not a pick option in revolver. There is  
5 a pick requirement in the DK facility, but there is not  
6 a pick option under revolver, that's right.

7 Q And, the new facility has a shorter maturity, is  
8 that correct?

9 A No, it doesn't. It has a three-year maturity,  
10 actually.

11 Q It didn't have a 12-month maturity with respect to  
12 the revolver?

13 A No. It's a three-year maturity.

14 Q And, the commitment fees. It has a higher set of  
15 commitment fees, is that right?

16 A Very modestly.

17 Q Mmhmm. There's an additional million dollars for  
18 reimbursement to Wells Fargo. That's over and above  
19 the prior commitments the debtors paid, is that right?

20 A Are you referring to Wells -- to Foothill? You're  
21 confusing the --

22 Q To Foothill. Yeah, I'm sorry.

23 A The way I would look at it is that we would owe  
24 the exit lenders 2.5% on close.

25 Q Mmhmm.



1 A We would owe the Foothill lenders 3%, so that  
2 there is just a modest different in terms of the cost.

3 Q But, you've already paid a commitment fee, is that  
4 right?

5 A We paid a 5% commitment fee to the exit lenders.

6 Q Okay.

7 A Yes, we did.

8 Q And, this fee is incremental to the prior fee?

9 A On both sides, yes. The 2.5 would be incremental  
10 to the existing --

11 Q Mmhmm.

12 A -- lenders. Yes, incremental.

13 Q And did you consider the impact in your schedules  
14 on the additional commitment fees?

15 A Yes, sir, we did.

16 Q And, your -- strike that. Your testimony is that  
17 the new facility is materially better than the old  
18 facility. Is that correct?

19 A No, I didn't say materially better. What I said  
20 during the term of the expected receipt of the tax  
21 refund and repayment of either the exit facility or the  
22 Foothill facility, we believe that the term loan --  
23 that the pricing, -- all in, fees, interest rate, et  
24 cetera, -- is approximately \$800,000 better through  
25 June 30th.

1 Q Okay. And the \$800,000, you don't believe is a  
2 material improvement?

3 A Well, these are large numbers. What's important  
4 is that it's an improvement. It's better pricing that  
5 we have today, and one of the things that I think is a  
6 real advantage to the company is that when the exit  
7 term loan or the DK term loan is repaid, we will have a  
8 revolver that's priced at a coupon of 7% versus a  
9 revolver that's priced at 15 to 17%, which includes a  
10 pick factor, for sure, on the 17%.

11 But, it -- that is a major difference in  
12 terms of if the company is required to use the  
13 revolver. And my thought would be that the company, at  
14 that point in time, would refinance the revolver for  
15 more commercially reasonable terms that in the exit  
16 loan would also require a 3% fee going out, which we  
17 avoid.

18 Q Okay, so the exit facility -- the new one -- is a  
19 bridge. Is that what you're telling me?

20 A No, the exit facility -- the revo -- the -- DK  
21 facility is the term loan. We have a revolver that is  
22 a three-year revolver, that is priced more attractively  
23 than the exit facility lenders -- making a very simple  
24 comparison -- on a coupon basis or 7% versus 15 to 17%,  
25 and at that point in time, to get more commercially

1 reasonable terms, we'd have to refinance the exit  
2 facility at a pre-payment penalty of an incremental 3%  
3 at that point in time.

4 An additional \$1.5 million cost to the  
5 company, which I don't have to pay under this facility.

6 Q And you also believe that if the Davis Brothers  
7 transaction doesn't occur that the debtor will have  
8 sufficient liquidity not to default under the exit  
9 facility. Is that correct?

10 A Yes.

11 Q And that's because the tax refund is going to be  
12 \$50 million at a minimum.

13 A Correct.

14 Q And that give the debtor enough liquidity, in your  
15 view, to not trip a covenant?

16 A This tax refund is incremental liquidity. It is  
17 increment to the plan, to what we'd have to live with  
18 under the advised facilities.

19 This was manna from heaven, and we were just  
20 trying to figure out how to de-leverage or provide it  
21 more liquidity.

22 Q Okay. When you were trying to de-leverage the  
23 company, how'd you shop the exit facility?

24 A I shopped the exit facility to four lenders  
25 outside of the bank group -- commercial lenders. I had

1 done that both during the dip and the exit.

2 I want to point out that the existing pre-  
3 pre-petition lender group included 14 commercial banks  
4 and asset based lenders. None of them stepped forward  
5 other than Wells Fargo.

6 We had JP Morgan. We had BNP. We had, you  
7 know, pretty much a hit parade of major commercial  
8 banks.

9 Q Mmhmm.

10 A Limiting the universe that I could go out to in  
11 terms of exit lenders, major commercial lenders.

12 I went out to four of them. I was declined  
13 by each of them.

14 We also, as part of the dip process, went  
15 out -- I think the record is clear in the Court in  
16 terms of our efforts. In the alternative financing  
17 market, I think we went to excess of 40 at the time of  
18 the dip. But, given the universe of 14 commercial  
19 banks that didn't step up, it left a smaller universe,  
20 but we certainly worked that very hard.

21 Q How many confidentiality agreements did you sign  
22 with proposed exit lenders?

23 A I don't think we needed to because people were not  
24 interested in the financing -- other than General  
25 Electric, which we signed a confidentiality agreement

1 with.

2 Q And, did you ever go back to the original set of  
3 lenders as you were dis -- in discussions Wells Fargo  
4 Foothill?

5 A Through the original?

6 Q The old exit facility lenders.

7 A They passed. They passed in terms of our, you  
8 know, process of organizing an exit facility. No one  
9 stepped forward. We had term sheets. People were not  
10 interested in participating.

11 Q When exactly did you get the new exit facility  
12 term sheet executed? Do you recall?

13 A You're talking about the Foothill/DK facility?

14 Q Yes.

15 A I apologize, because I was also on vacation for  
16 two weeks in Latin America arranging this financing.  
17 So, I'm a little fuzzy on dates, other than December  
18 4th.

19 But, I believe it was a week and a half ago  
20 when we got term sheets. But, this financing occurred  
21 over an approximately three and half week period.

22 As soon as we knew that the tax refund was  
23 available to the company, we redoubled our efforts in  
24 terms of creative thinking about the exit facilities,  
25 including the existing exit lenders.

1 Q And during this three and a half week period, you  
2 were only talking to DK and Foothill, is that correct?

3 A No, I actually when to -- I knew my universe of  
4 revolving lenders was probably exhausted on the time  
5 frame that I'm talking about.

6 So, we clearly knew that Foothill had looked  
7 at the company in terms of pre-petition, dip, post-  
8 petition. They are a major lender to the industry.  
9 They are the lead bank to stock building supply, so  
10 that we know they're knowledgeable. We know that they  
11 can move quickly. So, we knew that that was probably  
12 our most efficient source on the revolver.

13 I went to three hedge funds to arrange the  
14 tax day term loan. I got declines by two.

15 And DK was receptive to pursuing it.

16 Q Now, the Foothill/DK facility has a no-shop  
17 provision, is that right?

18 A The DK confidentiality -- or provision had a no-  
19 shop. Yes, that's correct.

20 Q When was a confidentiality agreement signed?

21 A I was traveling, I believe. I couldn't tell you  
22 the date. But, it's certainly within this, you know,  
23 time frame.

24 Q So, approximately three and a half weeks -- are we  
25 during this three and half week period?

1 A Mr. Cousins, I just don't know when it was signed.

2 Q Okay.

3 A But certainly within this general time frame.

4 Q So, within -- well, what's your understanding of a  
5 no-shop provision?

6 A Well, here was my thinking on this. The -- very  
7 typically, and I'm a lender from a long time ago -- I'm  
8 on the other side of the table. What's typical is a  
9 work fee.

10 DK didn't ask us for a work fee. So, we  
11 thought that given the very limited time that we had to  
12 execute this, and I had already gone to the market in  
13 terms of alternative hedge funds to provide it, it  
14 seems very reasonable to me to commit concentrating our  
15 efforts on DK to get this tr -- this piece of the  
16 transaction done in exchange for no work fee and no  
17 break-up fee.

18 So, we didn't have time and resources to be  
19 other than highly efficient about our search for  
20 alternative financing. And that was the basis of my  
21 agreement and support that we concentrate on one  
22 lender.

23 It was a pretty easy gift for me given that  
24 we did not have a work fee and we didn't have a break-  
25 up fee.

1 Q And, --

2 A And I just didn't have time to deal with anybody  
3 else anyway.

4 Q Okay, and when did you stop looking for  
5 alternatives other than DK and Foothill?

6 A No, I -- I'm sorry, I did go out to the other two  
7 hedge funds once we got declines from them. And I want  
8 to add that we also -- well, I -- whenever that  
9 happened in terms of within this time frame, we got  
10 declines by the other guys, and quite frankly, I've  
11 never put it together, a round number, \$100 million  
12 financing in a three and half week time frame during  
13 what is a slow-down in the market.

14 The market, from my perspective, is shut-down  
15 this week.

16 Q But, there came a period, as a result of the no-  
17 shop provision, that you stopped looking for  
18 alternative financing. Is that right?

19 A As a technical matter, yes.

20 Q And at that point, did you alert the syndicate of  
21 lenders in the old exit facility that you were no  
22 longer -- you were pursuing a new facility?

23 A I didn't inform the old syndicate that I was  
24 pursuing a new financing.

25 The syndicate, quite frankly, had been



1       extraordinarily difficult to work with, including  
2       December 4th when I didn't have a signature pager, the  
3       company did not have a signature page from Bay Side  
4       HIG, and was negotiating on three other ma -- three  
5       matters.

6                 One of which, I happen to remember -- as we  
7       were standing there, I talked about the board seat, I  
8       talked about the al -- the right of first refusal on  
9       purchasing, alone. I forgot to mention that they had  
10      added -- we're negotiating with Wells Fargo in terms of  
11      how to enhance our economics because this loan is out  
12      shorter than we had anticipated, initially.

13      Q       So, --

14      A       I don't know -- I'm sorry, go ahead.

15      Q       Was it your view that as a result of this  
16      conduct, -- well, strike that -- you were still  
17      negotiating over the terms of the exit facility.

18      A       I was -- believed that they were still moving  
19      around in terms of what they may require at the end.

20                 That was my concern because there were -- had  
21      used the words, "We're putting it sort of in Wells  
22      Fargo's lap to figure out how to improve our economics  
23      for what our expectations were."

24                 I didn't know what that meant other than I  
25      was concerned. I believe that they had a commitment to

1 fund this company based on what had been signed and  
2 agreed to. I was concerned, quite frankly, as a banker  
3 who has many, many years of doing this, that there was  
4 a re-trade at the end based on the conversations that I  
5 had. And I was concerned about it.

6 Q And were your concerns contained in the disclosure  
7 statement that went out for a vote?

8 A I believe our concerns, in general, were outlined  
9 in the fee reimbursement letter, in terms of with the  
10 lenders.

11 Q Was that contained in the disclosure statement  
12 somewhere?

13 A I don't know the answer to that. I know it was  
14 filed with the Court.

15 Q I believe you testified -- do you have Exhibit  
16 45 --

17 A Yes.

18 Q -- up there?

19 A Yes, sir.

20 Q I believe you testified that you believe these  
21 numbers are correct? Do you recall that?

22 A Yes, they are correct.

23 Q They are correct? Is there under -- is there an  
24 underlying spreadsheet, a compilation that this is  
25 summarizing?

1 A Yes.

2 Q And what is that? What does that say?

3 A Well, it's the company's projections for -- it's a  
4 financial model, complete financial model --

5 Q Mmhmm.

6 A -- for these two cases and these two capital  
7 structures.

8 Q And, does the company update those projections to  
9 reflect the last five months? The negative EBITDA over  
10 the last five months?

11 A I believe we updated through July for our cases.  
12 But, I don't think we have updated since July.

13 Q Okay. And if I were to tell you it's -- the  
14 variance is -\$9.9 million since July, would that  
15 surprise you?

16 A In all due respect, I think I answered that  
17 question that --

18 Q Yes, I heard your counsel say that.

19 A -- I accept -- I accept your number. I don't have  
20 it in front of me to proof it. I only want to again  
21 comment that it is an industry that we all understand  
22 is very challenged and that's why our projections with  
23 regard to the covenant case essentially took the  
24 recovery one year.

25 Q Okay. So, the answer to my question is the

1 disclosure statement doesn't have the negative  
2 variances to the projections that you updated in July.

3 A I believe that it -- well, I don't know in terms  
4 of -- I think up to July, but you asked me a question  
5 about being beyond that, I thought. But, --

6 Q Yes.

7 A -- no, we have not re -- updated for the most  
8 recent performance, is my understanding.

9 Q Okay. And, just for clarity, the disclosure  
10 statement had -- did reflect the update that you did  
11 in July, is that right?

12 A I believe so.

13 MR. COUSINS: Okay. Nothing further, Your  
14 Honor.

15 THE COURT: Any redirect?

16 MR. KARLAN: One line, Your Honor. Very  
17 short. Just let me get the chronology straight.

18 REDIRECT EXAMINATION

19 BY MR. KARLAN:

20 Q You testified that at some point you developed --  
21 tell me if this a fair summary.

22 I think at some point you said you developed  
23 concerns that the signatories to the old exit facility  
24 were not prepared to honor it.

25 Is that generally a fair statement of what

1 you said?

2 A Yes.

3 Q Okay, and then you were asked whether those  
4 concerns were reflected in the disclosure statement  
5 that went out to creditors. Remember you were asked  
6 that?

7 A Yes.

8 Q Okay, I just want to make sure we have the time  
9 sequence right.

10 The concerns that you developed, did those  
11 concerns develop before or after the disclosure  
12 statement went out?

13 A I think we've -- we reached agreement with the  
14 exit lenders. I think I've always been a little bit  
15 uneasy in terms of a continuing negotiation when I  
16 thought we were done.

17 Q Okay.

18 A I was alerted -- became more concerned as the date  
19 grew closer and I had a conversation with one of the  
20 parties, on Friday, December 4th when the signature  
21 pages were due.

22 And, understood clearly that they were moving  
23 around both with regard to the documentation and some  
24 unrelated issues that seemed to have bearing on, in my  
25 interpretation of that conversation, whether they would

1 be there to fund or not.

2 Q Okay, and that December 4th conversation was  
3 before or after the disclosure statement went out?

4 A That was after.

5 RECCROSS-EXAMINATION

6 BY MR. COUSINS:

7 Q Okay. Real quick. Did the disclosure statement  
8 reflect, prior to the voting deadline, your concerns  
9 about the ability the old exit facility to close?

10 A I had no -- and continued not to have -- concerns  
11 about the ability to close. It's the willingness to  
12 close, which have been crystallized in terms of the  
13 closing process.

14 Q What's the difference between willingness and  
15 ability?

16 A Because each of these parties have absolute  
17 financial capacity to do this transaction.

18 Q But, nowhere in the disclosure statement did you  
19 express a concern about the willingness of the old exit  
20 facility to close -- the lenders, I mean.

21 A I don't recall that, no.

22 MR. COUSINS: Thank you.

23 THE COURT: Thank you, sir. You may step  
24 down.

25 MR. DIETZ: Thank you, Your Honor.

1 THE COURT: All right. Does the debtor have  
2 anything further in rebuttal?

3 MR. KARLAN: No further evidence, Your Honor.

4 THE COURT: All right. Let's finish up,  
5 then, the evidentiary record.

6 Let me ask Mr. Cousins, do you still press  
7 your objections to the admission of D-44, D-45 and D-  
8 46?

9 MR. COUSINS: No, Your Honor.

10 THE COURT: All right.

11 MR. KARLAN: No objection.

12 THE COURT: They're admitted without  
13 objection.

14 Okay. The evidentiary record on confirmation  
15 and on the motion authorizing disbursement of expenses  
16 is closed.

17 Let me ask if anybody wishes to be heard in  
18 the way of final statement or argument on either.

19 I'll begin with the debtor.

20 MR. ROSENTHAL: Your Honor, I have a very,  
21 very brief closing, and that is, I believe that the  
22 debtor has demonstrated that the plan satisfies the  
23 confirmation requirements under 11.29, that we have  
24 obtained sufficient votes to confirm the plan in all  
25 categories, and with respect to the classes that have

1 not voted to accept that the plan is confirmed under  
2 Rule 11:29(b.)

3 There's only one objection that we've  
4 received that we've not resolved and that's the one  
5 that the Court's been hearing. I think it's been filed  
6 by two disgruntled, old exit lenders in an effort to  
7 try to derail this process and effectively undo the new  
8 financing, which expires if the plan's not confirmed  
9 and the financing is not approved today.

10 Your Honor, we believe that the objection is  
11 without merit, that we've demonstrated that the new  
12 financing is materially better than the old financing,  
13 that the identity of the lender is not material, that,  
14 in fact, the old exit documents provide for the  
15 assignment by lenders of their claims, and that that is  
16 typical according to the witness from Third Avenue --  
17 that it is typical that parties assign their claims, --  
18 that even if the identity of the lender were material,  
19 Your Honor, that none of the changes are adverse.

20 And, as you know, re-solicitation requires  
21 that changes be both material and adverse, and I would  
22 refer the Court to a number of cases including  
23 Armstrong and Century Glove.

24 Your Honor, we would hope that the Court  
25 would enter an order confirming the plan approving the



1 exit financing and approving the expense reimbursement  
2 motion with respect to the new exit financing today.

3 THE COURT: Thank you. Does anyone wish --  
4 else wish to be heard in favor of confirmation?

5 Okay, Mr. Cousins.

6 MR. COUSINS: Thank you, Your Honor, I know  
7 it's been a long day.

8 THE COURT: They all seem to go that way  
9 these days, so. For all of us, I guess.

10 MR. COUSINS: Yeah, I guess so.

11 And, Your Honor, we heard the unequivocal  
12 testimony from Third Avenue. They voted to accept the  
13 plan. The testimony that hasn't been challenged wh --  
14 from Mr. Fineman, was that it was likely to reconsider  
15 voting for the plan.

16 THE COURT: What would his -- but, my notes  
17 reflect his testimony was that -- is it that he had  
18 reached no conclusion about whether he would change his  
19 "yes" vote, and that he might find other alternatives  
20 more interesting.

21 And I will tell you, I appreciate his candor.  
22 I believe that testimony to have been truthful. And,  
23 if it was truthful as I believe it to have been, it  
24 doesn't meet the standard that you articulated at the  
25 outset when you pressed your objection.

1 MR. COUSINS: I -- well, Your Honor, I do  
2 apo -- I do recall his testimony where he said -- I  
3 asked in response to the question that very precise  
4 question.

5 And, nevertheless, I understand the Court's  
6 point. You've heard our arguments on the material  
7 changes, and we would ask that the Court re-solicit.

8 THE COURT: All right. Thank you.

9 MR. COUSINS: Thank you.

10 THE COURT: Does anyone else wish to be heard  
11 in connection with confirmation or the expense  
12 reimbursement motion?

13 I hear no further response.

14 I'll note that this is the first time in two  
15 years, probably more, that there's been more than one  
16 entity clamoring to make an exit loan. Maybe that's a  
17 good sign.

18 With respect to the objection that has been  
19 raised to both the confirmation and to the expense  
20 reimbursement motion, I'm going to overrule it and I'll  
21 tell you why.

22 Based on the record that's been made and  
23 under these circumstances, even if the change in lender  
24 could be considered a material change, -- and I don't  
25 think it is under these circumstances, -- under these

1 circumstances, -- but even if it could be considered a  
2 material change, I think the debtor is right: it  
3 enhances the debtor's plan. It enhances the  
4 feasibility of the debtor's plan on this record.

5 And, frankly, under these circumstances, it  
6 is not a reasonable basis on which a creditor --  
7 particularly this one or these two who are objecting  
8 with the one -- to change its vote on the plan.

9 And, in fact, I do -- I am convinced, as the  
10 debtor has been asserting here and is supported by the  
11 record that the change in exit lenders has actually  
12 enhanced the position not just of the debtor generally  
13 and its creditor body, but of this -- those who hold  
14 the position of this creditor, specifically.

15 I do understand the argument that having more  
16 availability under a loan agreement may have some  
17 benefit. But, in a way, it's counter-intuitive to  
18 suggest the debtor should be borrowing more rather than  
19 less.

20 I find that under these circumstances, the  
21 debtor has demonstrated that it has properly exercised  
22 its business judgment and satisfied the confirmation  
23 standards with respect to that point and all others.

24 I'm therefore prepared to confirm the plan  
25 and to approve the order authorizing the reimbursement

1 of expenses.

2 (Side comments off the record.)

3 THE COURT: Those orders have been signed.

4 (Side comments off the record.)

5 MR. ROSENTHAL: Your Honor, we have two more  
6 matters and I will try to get to them quickly. The  
7 first is the sa -- what we've called "The Davis Sale."  
8 It's also referred to as the -- in the motion it is the  
9 motion to authorize the sale by C Construction and the  
10 wind down of the Illinois business operations.

11 Your Honor, we have referred to this  
12 throughout the argument, and some of the testimony --  
13 basically what this calls for is a sale of the assets  
14 of the Ontario Framing Business to the Davis  
15 Development, which is an entity that is owned by the  
16 two Davis brothers, as I understand it, who are now  
17 instrumental in the Ontario Framing Business.

18 Your Honor, as has been evident from some of  
19 the testimony and from my presentation in connection  
20 with confirmation, it is important for tax reasons that  
21 this sale close both before the end the year and before  
22 the plan goes effective.

23 We believe that the purchaser here is the  
24 most logical purchaser of the seller's assets in the  
25 case of Ontario Framing. The purchaser's shareholders

1 are the members of the management team of Ontario  
2 Framing, and before we purchased the business, we're  
3 the former owners of that business.

4 Although we had contacted other interested  
5 parties none had shown an interest, and we do not  
6 believe that in the time frame we have available that  
7 there is any other feasible alternative.

8 Mr. Dietz testified in connection with  
9 confirmation that there were -- although though the  
10 business was in the operative results of the  
11 reorganized debtors, that there were operational risks  
12 related to Ontario Framing.

13 Recent financial performance had suffered,  
14 falling revenues throughout 2009, falling backlog, and  
15 there was succession risk related to the potential that  
16 one or both of the Davis Brothers would continue to be  
17 associated with the business, and there was some exit  
18 financing issues related to the ability to provide the  
19 bonding.

20 As the Court knows from the motion, this  
21 business is also relatively separate from the debtor's  
22 other businesses. It's involved in a different aspect  
23 of the construction business -- more multi-unit as  
24 opposed to single-asset residences. And, it'd only  
25 been part of the operation since 2006.

1           As the Dietz declaration noted in support of  
2 this, the present value that had been assigned to the  
3 Ontario Framing Business in our evaluation was about  
4 \$14.6 million.

5           We believe, Your Honor, that the benefit from  
6 sale of the Ontario Framing Business exceeds that 14.6  
7 both because we have a release from contingent  
8 liabilities and because we contemplate that the tax  
9 benefits under the Worker Home Ownership and Business  
10 Assistance Act of 2009 will be approximately \$20.5  
11 million.

12           Slightly different rationale for Illinois --  
13 the Illinois business wind down.

14           The Illinois business has, in fact, been --  
15 delivered negative EBITDA. And, year-to-date is  
16 negative about \$775,000. We believe that the  
17 benefits -- again the tax benefits related to the  
18 close-down would be approximately \$2.5 million, but in  
19 addition to that, because the business is negative, we  
20 won't be feeding any further that negative business.

21           So, closing it down before the end of the  
22 year facilitates not only the receipt of the tax  
23 benefits, but also, minimizes the additional cash  
24 that's used for those businesses.

25           Your Honor, we think that under the

1       circumstances, adequate notice has been given. We  
2       receive no objection to this motion. We believe that  
3       the price, the consideration, is fair and reasonable  
4       under the circumstances. You know, we have acted in  
5       good faith and attempted to do these transactions in a  
6       way that would close them promptly and the give the  
7       debtor the maximum benefit. And we would ask that the  
8       Court approve the transactions.

9               There are some issues, Your Honor, related to  
10       assumption assignment of contracts that we have --

11               (Side comments off the record.)

12              MR. ROSENTHAL: -- that we would like the  
13       Court to put on the 30th. And these are just for  
14       notice reasons.

15              We do not believe that there are any  
16       outstanding cure amounts. We have a date on the  
17       30th -- we have some time on the 30th. We don't intend  
18       to take a lot of your time on your 30th, but we want to  
19       be able to give appropriate notice of the cure  
20       assumption assignment of some contracts related to the  
21       wind down of the Illinois business.

22              And, there have been some discussions with  
23       the counter-parties. We don't think these will be  
24       contested, but we don't want them running to notice  
25       problems with respect to that.

1           So, I would ask the Court to approve the  
2 motion, and to set for hearing the issues related to  
3 assumption and assignment of certain contract.

4           THE COURT: All right. Do you move the  
5 admission of the Street and Dietz declarations?

6           MR. ROSENTHAL: I would move the admission of  
7 the Street and Dietz declarations, Your Honor.

8           THE COURT: Yes, Dockets 11-53 for Mr. Street  
9 and 11-55 Mr. Dietz.

10           Does anyone have any objection to that?

11           I hear no response. They're admitted without  
12 objection.

13           Debtor have anything further in support of  
14 its motion?

15           MR. ROSENTHAL: No, Your Honor.

16           THE COURT: Does anyone else wish to be heard  
17 in connection with this motion?

18           Are you telling me that Southwest had agreed  
19 to the January date? I mean to the December date?

20           MR. GRAVES: I don't. I think it's  
21 different.

22           MR. CRAPO: No, Your Honor, that's a separate  
23 matter. That is a proposed cure amount in connection  
24 with the cure notice we sent in connection with the  
25 plan. The cure notice is that Mr. Rosenthal is



1 referring to our assumption in assignments of contract  
2 with Illinois Framing.

3 THE COURT: I know what he's referring to,  
4 but I'm --

5 MR. CRAPO: I --

6 THE COURT: I believe that from an earlier  
7 statement that Southwest wanted an adequate assurance  
8 record in connection with this motion. Or, am I wrong  
9 about that?

10 MR. GRAVES: We think that an adequate  
11 insurance record is necessary for the cure objection,  
12 that it would have had to have been established in  
13 connection with this motion.

14 It seems that the benefit to the estates --  
15 the primary benefit to the estates from this sale is  
16 the tax cr -- or, the tax refunds, and we can't tell  
17 from the information that's available how those will  
18 flow TO particularly C Construction, who is debtor, or  
19 the debtor that we've contracted -- or contacted -- or  
20 contracted with -- and how that benefit's going to flow  
21 to C Construction because the contract that we have  
22 with C Construction has ongoing obligations and with C  
23 Construction's business essentially being shut down,  
24 that we feel that there's a problem with adequate  
25 assurance going forward because of less or no income in

1 the future to meet those requirements.

2 THE COURT: Okay, so what are you telling me  
3 is with respect to what you would like to see happen  
4 today?

5 MR. GRAVES: Today, I would like to see  
6 evidence that there was -- that -- there's going to be  
7 income flowing --

8 THE COURT: You're --

9 MR. GRAVES: -- continuing to flow --

10 THE COURT: You're resting your adequate  
11 insurance objection today.

12 MR. GRAVES: Yes. Yes.

13 THE COURT: Do you wish to examine either Mr.  
14 Street or Mr. Dietz?

15 MR. GRAVES: Yes, Your Honor. Either now or  
16 when the cure objection is being heard.

17 THE COURT: Well, --

18 MR. GRAVES: Okay.

19 THE COURT: -- or --

20 MR. GRAVES: I can do that.

21 THE COURT: If you're pressing an adequate  
22 assurance objection today, this is when I would hear  
23 it.

24 MR. GRAVES: Yes.

25 THE COURT: Unless you agree to have it heard

1 at the time to which we put the cure objections.

2 MR. GRAVES: Well, I didn't understand that  
3 our cure objection was one of the ones that was being  
4 put to the 30th.

5 THE COURT: Well, I'm having a hard time  
6 understanding --

7 MR. ROSENTHAL: Right, --

8 THE COURT: -- what it is --

9 MR. ROSENTHAL: -- Your Honor, we believe  
10 that that --

11 THE COURT: Do you need a couple of minutes  
12 to talk?

13 MR. ROSENTHAL: We believe that that should  
14 pushed to the 30th, and we can hear the adequate  
15 assurance of future performance and the cure objection  
16 issues at that time.

17 If it's determined that we cannot provide  
18 adequate assurance of future performance, and theref --  
19 and cannot cure, then, we will ma -- obviously, we will  
20 not be able to assume and assign those agreements.

21 If we can provide those elements, then we  
22 will be able to assume and assign those --

23 THE COURT: And the form of order that I'm  
24 going to be asked to sign has that provision?

25 MR. ROSENTHAL: The form of order does -- let

1 me ask Mr. Graves.

2 MR. GRAVES: I'm sorry, I didn't hear the  
3 question.

4 MR. ROSENTHAL: Does it have a provision that  
5 reserves the issue with respect to these contracts?

6 MR. GRAVES: The proposed form of order that  
7 we had submitted was to adjourn the matter with respect  
8 to this -- with respect to the Southwest Management  
9 contract.

10 My understanding is that the objection is to  
11 adequate assure its -- with respect to the Southwest  
12 Management contract, which is different than the  
13 Illinois Framing Contract and whether the debtors could  
14 provide adequate assurance under that particular  
15 contract.

16 THE COURT: Okay. I'm confused.

17 MR. GRAVES: Okay.

18 THE COURT: Maybe it's just --

19 MR. ROSENTHAL: Your Honor, --

20 MR. GRAVES: Can you give us five minutes,  
21 Your Honor.

22

23 THE COURT: All right.

24 MR. GRAVES: We'll straighten this out.

25 THE COURT: Take five minutes.

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(Recess)

THE CLERK: All rise.

MR. ROSENTHAL: All right, Your Honor, I'm going to a -- try to clarify what's happening.

In connection with Agenda number 18, which is the sale of what we've called "Ontario Framing," which is Davis Brothers in the s -- in the Illinois wind down.

There is no objection relative to Southwest Management.

THE COURT: Okay.

MR. ROSENTHAL: And we would ask the Court to approve that sale. There are no objections that have been filed with respect to that.

THE COURT: All right. Does anyone else wish to be heard in connection with this motion?

I hear no response.

Do you have a form of order for me?

(Side comments off the record.)

MR. ROSENTHAL: And there is a Black Line, Your Honor, that has some clarifying changes. If the Court looks at the introductory paragraph, we've indicated instead of severance payments, payments to employees.

We've added on Page 3 that it's consummate

1 and the Illinois business wind down because there are  
2 two separate transactions involving separate entities.

3 But, otherwise, this order is the same as was  
4 submitted on Page 10 all cure costs to cure amounts.

5 THE COURT: All right, I've reviewed the  
6 Black Line, don't have any questions.

7 The order has been signed. I think that  
8 relief is amply supported by the record, particularly  
9 the Street declaration offered in connection with the  
10 motion.

11 MR. ROSENTHAL: All right, now the --  
12 Southwest Management has filed a motion -- I mean, has  
13 filed an objection to a cure notice that they received  
14 in connection with the plan.

15 THE COURT: Okay.

16 MR. ROSENTHAL: And, they have raised some  
17 issues and they are prepared to go forward briefly,  
18 tonight, -- if the Court has time -- and we are  
19 prepared to go forward tonight.

20 We don't think it will take a long time, but  
21 in -- that's where Southwest Management stands.

22 And, then the third management that was  
23 getting confused here, which relates to the hearing on  
24 the 30th is that we have -- we in -- we would like to  
25 file and we intend to file two motions that we need to

1 be heard. We would very much like to be heard before  
2 the end of the year, and we contacted your chambers and  
3 were told that you had some hearing time on the 30th --

4 THE COURT: About an hour or so I have for  
5 you.

6 MR. ROSENTHAL: Yeah. Those motions are  
7 motions to sell one piece of real estate for \$2.8  
8 million that has to be consummated before the end of  
9 the year, and a motion to assume and assign certain  
10 contracts related to the Illinois business wind down.

11 It's separate, but it's related to the  
12 Illinois business. And we file those motions and ask  
13 the Court to set those on the 30th for the hearing time  
14 that's been set aside.

15 THE COURT: Okay. All right. We'll need to,  
16 at this point, file motions to shorten along with them,  
17 but I will approve it.

18 MR. ROSENTHAL: We intend to file a motion to  
19 shorten.

20 THE COURT: Okay.

21 MR. ROSENTHAL: All right, Your Honor, going  
22 back to s -- Item 17, we had the Gibson Dunn fee  
23 requests at --

24 THE COURT: I have no questions. I've  
25 reviewed the fee auditor's report. No additional

1 questions about the submission. I'm prepared to grant  
2 the relief that's been requested.

3 MR. ROSENTHAL: Thank you, may I approach?

4 THE COURT: You may. Thank you.

5 MR. ROSENTHAL: And, Your Honor, Mr.

6 Poppiti's going to handle a claim objection that had  
7 been filed by Young Conaway.

8 THE COURT: Okay.

9 MR. POPPITI: I guess I should say good  
10 evening, Your Honor.

11 For the record, Robert Poppiti from Young,  
12 Conaway, Stargatt and Taylor on behalf of the debtors.

13 I -- going back to the agenda, we're at Item  
14 21, Your Honor, the debtor's fifth omnibus claims  
15 objection.

16 To speed things up, Your Honor, would it be  
17 okay if I approach now with the form of order and  
18 copies of claims so that Your Honor doesn't have to  
19 sift through the binders at this point.

20 THE COURT: That's fine. Thank you. Thank  
21 you.

22 MR. POPPITI: What I've handed to you, Your  
23 Honor, is a copy of the two proofs of claim we're going  
24 to be going forward on at this point.

25 Looking back at the agenda, we received four



1 responses to the claims objection.

2 Response A, Your Honor, is of Sarah Mark  
3 Products. We will be going forward on that.

4 Response B was Continental Trading. The  
5 debtors have removed them from the claims objection as  
6 a result of certain supplemental documentation they've  
7 provided to us. We'll also be going forward on Item C,  
8 the response of Monarch Building Services.

9 And with respect to Item D, Your Honor, we  
10 have adjourned that we can work with Associated  
11 Materials, Inc. to resolve that.

12 Focusing in on the response of Sarah Mak,  
13 Your Honor, if you look at the proof of claim, they're  
14 asserted 503(b)-9 priority for the full amount of the  
15 claim, \$560,076. However, Your Honor, only a certain  
16 portion of the goods were received within the 20 days  
17 of the petition date.

18 So, that's exactly what the debtors'  
19 objection was. We have a declaration from Mr. Street  
20 on file certifying that, you know, we are giving them  
21 priority for the 20 day goods, but the rest of the  
22 claim is obviously a general unsecured claim.

23 If Your Honor looks at the response, the  
24 response is really more of in the nature that, you  
25 know, they did business with the debtors in good faith

1 and they should be, you know, paid for the amounts,  
2 Your Honor. And it's not that it's not going to be  
3 paid, just obviously a portion's going to be an  
4 unsecured claim.

5 So, on that basis, we'd ask that Your Honor  
6 overrule the objection.

7 THE COURT: All right, does anyone -- present  
8 or on the phone -- on behalf of Sarah Mark Products?

9 I hear no response. The obj -- the  
10 response -- the claim objection will be sustained.

11 MR. POPPITI: Thank you, Your Honor.

12 MR. ROSENTHAL: And then the next one, Your  
13 Honor, is Monarch Building Services. Monarch filed a  
14 claim for \$981 and asserted 503(b)-9 priority, as well  
15 as a claim for taxes under 507(a)-8.

16 However, the debtors believe that Monarch is  
17 not entitled to priority on the basis of 503(b)-9,  
18 because it's a claim for services and not goods, Your  
19 Honor.

20 And then, with respect to the taxes, what  
21 they assert is that the money we paid them for the --  
22 or owed them for the janitorial services. They had  
23 earmarked them for taxes, but obviously that's not a  
24 tax, Your Honor, if in fact they did earmark this money  
25 for taxes that the debtors are liable for, so we feel

1 as though that's not properly entitled to priority  
2 under 507(a)-8.

3 So, similar to what -- Sarah Mark, Your  
4 Honor, we would request that Your Honor overrule the  
5 objection and enter the debtors' claims objection.

6 THE COURT: Is anyone present here in the  
7 courtroom or on the phone on behalf of Monarch Building  
8 Services?

9 I hear no response. The claim objection will  
10 be sustained.

11 MR. POPPITI: Thank you, Your Honor. And I  
12 handed up a clean order, so you should have everything  
13 you need.

14 THE COURT: The order has been signed.

15 MR. POPPITI: Thank you, Your Honor.

16 (Side comments off the record.)

17 MR. POPPITI: Okay, I'm going to turn the  
18 podium over to Mr. Rosenthal -- or --

19 MR. ROSENTHAL: To Mr. Graves, to handle the  
20 outstanding cure issues that we have with respect to  
21 confirmation.

22 THE COURT: All right.

23 MR. ROSENTHAL: Thank you.

24 MR. GRAVES: Your Honor, I apologize for my  
25 inartfulness earlier, and thank Mr. Rosenthal for

1 interjecting some clarity to the issue.

2 The issue before the Court is a cure claim,  
3 and if I could just provide a little bit of a  
4 background here.

5 The debtors, in short, believe that the  
6 matter can and should be decided on the basis of the  
7 plain language of the contract, and the record that has  
8 been submitted to this Court. As an initial matter, I  
9 would like to move to admit the declaration of Paul  
10 Street and the attachment thereto that was submitted in  
11 connection with our memorandum of law with respect to  
12 the Southwest Management objection.

13 THE COURT: All right. Tell me where that is  
14 in the binder.

15 MR. GRAVES: It -- Your Honor, I'm frankly  
16 now sure. May I approach, Your Honor?

17 THE COURT: You may.

18 (Side comments off the record.)

19 MR. GRAVES: As I mentioned, that was on  
20 the -- attached to the memorandum of law that was filed  
21 on the docket.

22 THE COURT: All right.

23 MR. GRAVES: By way of background, in July of  
24 2005, the debtors entered into an agreement to purchase  
25 the business of Southwest Management and its affiliated

1 companies that were all associated with an individual  
2 named Steve Campbell (phonetic). And I may have  
3 referred interchangeably to Southwest Management as  
4 "Campbell" here because that's how the entities are  
5 referred to in the underlying purchase agreement  
6 contract.

7 The purchase agreement is an executory  
8 contract, because there are remaining indemnification  
9 obligations and other obligations on both sides. And  
10 as result of the indemnification obligations running  
11 from Campbell or Southwest Management to the debtors,  
12 the debtors desire to assume the contract.

13 The debtors believe that there are no  
14 existing defaults under the contract, and for that  
15 reason, they mailed Campbell a notice of a proposed  
16 year with a cure amount listed as zero.

17 Southwest Management or Campbell objected,  
18 and instead, proposed a cure amount of nearly \$1  
19 million.

20 The basis for Campbell's proposed cure amount  
21 is two-fold.

22 First, Campbell asserts that the debtors owe  
23 it \$300,000 in connection with litigation brought  
24 against Campbell for its failure to pay Worker's  
25 Compensation insurance premiums.

1           As I'll discuss in a moment, under the plain  
2 language of the contract, the debtors believe this was  
3 an excluded liability for which the debtors cannot be  
4 held responsible.

5           The second theory Campbell asserts is that  
6 the purchase agreement was actually an integrated  
7 agreement with certain leases that have already been  
8 rejected, and I'll address that argument in a moment.

9           THE COURT: Well, I'll tell you what. Let me  
10 stop you there.

11          MR. GRAVES: Sure.

12          THE COURT: Apparently some of my confusion  
13 is lingering.

14          Are we -- are the parties proposing to submit  
15 for decision today a -- an adequate assurance objection  
16 or a cure objection related to the -- is it one  
17 contract clause and/or the two amounts?

18          I mean, I've read the papers, I understand  
19 what the issues are --

20          MR. GRAVES: Mmhmm.

21          THE COURT: It -- I will tell you, I'm not  
22 going to decide the issue from the bench at this point  
23 on whether the contracts are integrated or not. I'm  
24 not going to do it.

25          MR. GRAVES: Your Honor, the debtors believe

1 that based on the objection raised by Southwest  
2 Management, that's a fundamental issue in the objection  
3 that they raised.

4 The debtors have no problems with the matter  
5 being adjourned and with Your Honor deciding that  
6 matter at a later date.

7 THE COURT: Yeah, I mean. And it seems to me  
8 that even they're right about -- well, first of all,  
9 the debtor has said if upon disposition by the Court,  
10 the Court decides that they owe the nearly million  
11 dollars claims or -- then they'll -- then they may not  
12 assume the agreement.

13 MR. GRAVES: That's correct.

14 THE COURT: Okay. So, I guess the other part  
15 of it is, if I decide later that you can't assume it,  
16 just as well, I guess, for the objector here if that's  
17 what it really wants.

18 But, I don't -- in terms of how it impacts  
19 confirmation given the debtor's position that it  
20 stated, I don't know why I would hear that today.

21 And I -- and -- when it's -- if it's not  
22 directed to adequate assurance, I mean, that I would  
23 hear today, at the insistence of the objector, but I  
24 don't -- it doesn't sound to me that's where you're  
25 going.

1 Or, did I stop you too soon?

2 MR. GRAVES: No, Your Honor. What the  
3 debtors were requesting was an entry of an order  
4 authorizing the debtors to assume the contract with a  
5 cure amount of zero and a ruling that there are no  
6 existing defaults in the contract.

7 THE COURT: I know what you asked for.

8 MR. GRAVES: Right, I don't -- I --

9 THE COURT: And the objector stood up and  
10 said, among other things, "I want adequate assurance,"  
11 and sometimes, we consider cure amounts and adequate  
12 assurance issues separately.

13 I mean, and I thought what was happening was  
14 the record that was going to be made tonight was on  
15 adequate assurance, but -- and that would be the only  
16 thing that I would hear since your witnesses are here,  
17 who I assume would be able to testify.

18 And maybe I'm wrong about that, but on the  
19 legal issue of is it an integrated agreement or not, I  
20 have had some time and my law clerk had some time to  
21 look at that, but frankly with what I heard earlier, I  
22 pulled her off that and had her work on something else.

23 MR. GRAVES: Understood.

24 THE COURT: And, she's now gone, so -- I, you  
25 know, I'm at a loss here to figure out what to do now.



1 (Side comments off the record.)

2 MR. GRAVES: We're prepared to go forward on  
3 testimony on adequate assurance and reserve all other  
4 issues for later.

5 THE COURT: Okay. Let me ask Southwest. Are  
6 you okay with that? Or, are you -- would you just as  
7 soon have it heard all at once? I mean, I -- that  
8 choice I will leave to you.

9 MR. CRAPO: I think, Your Honor, it would be  
10 better to hear it all at once since it's a matter of  
11 the paper -- I mean, it's just a matter of our -- we --  
12 we both briefed it, and the adequate assurance --  
13 the -- and the other issues, the cure issues, are  
14 related to each other. I mean, it's -- they're --

15 THE COURT: I agree.

16 MR. CRAPO: -- related to each other.

17 THE COURT: Everything's intertwined, and if  
18 I decide the legal issue, it may make the other issues  
19 go away. So, I mean, I understand.

20 MR. CRAPO: Yes, Your Honor.

21 THE COURT: Okay. Well, let's put it over to  
22 the 30th then. Okay?

23 MR. GRAVES: Okay. So, you don't want to  
24 hear both the legal issue and the adequate assurance  
25 tonight, then?

1 THE COURT: No, I told you. I'm not going to  
2 decide the legal issue from the bench tonight. I'm  
3 just not. I -- because I haven't had -- I've had some  
4 opportunity, but very little opportunity to review the  
5 documents.

6 My law clerk worked on it all morning this  
7 morning, and frankly, what I found so far is there may  
8 very well be arguments on both sides of the issue, and  
9 I assume that's why it's here because if it were clear,  
10 you wouldn't be coming to me --

11 MR. GRAVES: Right.

12 THE COURT: -- you would have resolved it.

13 MR. GRAVES: Yes, Your Honor. Then, I  
14 misunderstood, Your Honor, I think that if we've got  
15 the witnesses here for the adequate assurance, we could  
16 just put them on tonight, and then -- or, if Your Honor  
17 would prefer to have this all done at --

18 THE COURT: No, I told you I would hear  
19 adequate assurance and if the witnesses are here, I'll  
20 hear it now.

21 MR. GRAVES: Yes, Your Honor.

22 THE COURT: Okay.

23 MR. GRAVES: If that's their purpose it's  
24 fine with the debtors.

25 THE COURT: Let's go.

1           MR. GRAVES: Your Honor, on the point of  
2           adequate assurance, I believe that the debtors would  
3           ask Your Honor to judicial notice the \$90 million  
4           debtor in possession exit financing facility, which he  
5           believed provides the debtors with ample liquidity and  
6           access to funds to adequately assure that the debtors  
7           can perform all monetary obligations under the  
8           contract, and I would also ask Your Honor to take  
9           notice of the fact that the contract in question is  
10          with two entities that are debtor entities, C  
11          Construction and Select Build Construction,  
12          Incorporated, and the objection that has been raised is  
13          that because the -- certain assets of C Construction  
14          are going to be sold to the Davis Brothers, there are  
15          allegations that there's a liquidation of all of the  
16          assets of C Construction.

17                 And, I believe that Mr. Street, if called to  
18          testify, would testify that C Construction has -- and  
19          I'm going to ask him to correct me if I'm wrong --  
20          other operations besides the Davis Brothers operations  
21          that are being sold.

22                 And in addition, there are other business  
23          operations that are on-going by Select Build  
24          Construction, Inc. and for those reasons --

25

1 (Side comments off the record.)

2 MR. GRAVES: Can I just call Mr. Street to  
3 the stand?

4 THE COURT: Yes, you can.

5 MR. GRAVES: Okay. Mr.?

6 PAUL STREET, DEBTORS' WITNESS, SWORN.

7 THE CLERK: Please state your full name for  
8 the record and spell it.

9 MR. STREET: My name is Paul S. Street.  
10 P-A-U-L, middle initial S, Street: S-T-R-E-E-T.

11 DIRECT EXAMINATION

12 BY MR. GRAVES:

13 Q Mr. Street, what is your current capacity with the  
14 debtors?

15 A Senior Vice President, general counsel, corporate  
16 secretary.

17 Q In that capacity, are you familiar with the  
18 debtor's day-to-day operations and business affairs?

19 A Yes.

20 Q Does debtor, C Construction, have business  
21 operations other than the operations that are -- that  
22 have -- will be sold to the Davis Brothers pursuant to  
23 the sale motion that the judge just read?

24 A With the sale of Davis, it'll be a very limited  
25 number of operations.

1 May I expand on the way the transactions --

2 Q Yes.

3 A -- and the corporate structure works, --

4 Q Please do.

5 A -- if that would be okay.

6 In the documents that have been filed in this  
7 proceeding, Building Materials Holding Corporation is  
8 the parent entity and then it has two direct  
9 subsidiaries, BMC West Corporation and Select Build  
10 Construction, Inc.

11 And the transaction that occurred between C  
12 Construction and the Campbell companies, that was C  
13 Construction was a party as well as Select Build  
14 Construction, Inc.

15 Underneath Select Build Construction, Inc. is  
16 C Construction and all of the other Select Build  
17 entities. So, the Select Build Construction entity,  
18 which is a party to the transaction with Campbell  
19 companies, is still there and has all of those other  
20 operations under it.

21 So, although the entity, C Construction,  
22 itself, as a result of the Davis disposition, has 1 --  
23 very limited operations, the contracts also roll up to  
24 the entire Select Build Construction, Inc.

25 Q In your capacity as Vice President of the debtors,

1 is it your opinion that the debtors have the ability to  
2 provide adequate assurance of future performance of all  
3 remaining obligations under the outstanding purchase  
4 agreement?

5 A Yes.

6 MR. GRAVES: No further questions, Your  
7 Honor.

8 THE COURT: Cross-examination?

9 CROSS-EXAMINATION BY MR. CRAPO:

10 Q Mr. Street, my name is David Crapo, I represent  
11 Southwest Management. I just had a couple of  
12 questions.

13 What operations will C Construction have  
14 after the sale of the -- Davis?

15 A There are some limited framing operations in  
16 Southern California that involve C Construction, but  
17 it's a limited number.

18 Q Mmhmm. Do you -- approximately what kind of  
19 annual revenues will C Construction have after the  
20 Davis sale?

21 A I don't know the answer to that, but it would be a  
22 small number. Davis is the -- by far, the biggest  
23 piece of C Construction at this point.

24 Q Do you know what specific revenues that Select  
25 Build, C Construction's parent, has?

1 A I don't have that in front of me. It's roughly  
2 30% of the entire enterprise is in the construction  
3 services activity, so if were at \$1 billion, it would  
4 be 30% of 1 billion would the sales revenue, and the --  
5 at the present time.

6 Because all of the construction activities of  
7 the company are owned by Select Build Construction,  
8 Inc. That's the parent of H&R, TWF, down the line.

9 Q But, do you have -- what would be -- what would  
10 you estimate would the approximate revenues for 2009  
11 for Select Build? Select Build itself and not its  
12 subsidiaries?

13 A It's a holding company.

14 Q Yes.

15 A It doesn't have any direct operations. It's a  
16 holding company for the s -- for the construction  
17 services activity.

18 Q Okay. And, do you know if any kind of an analysis  
19 has been done concerning how the tax refund -- the  
20 anticipated tax refunds w -- from the -- or, that will  
21 result from the Davis sale will be allocated among the  
22 various debtors?

23 A None that -- I d -- I'm not aware of any analysis  
24 at this point.

25 MR. CRAPO: Okay. I have no further

1 questions.

2 THE COURT: Is there any redirect?

3 Sir, one moment, please.

4 MR. STREET: Sorry, Your Honor.

5 THE COURT: See, you're not alone. Usually

6 people are in a hurry to get out of that seat.

7 I don't blame you for that.

8 MR. GRAVES: Just two questions. I'll be

9 brief.

10 REDIRECT EXAMINATION BY MR. GRAVES:

11 Q Does Select Build Construction have value by  
12 virtue of the subsidiaries that it owns?

13 A Yes, its values is in the subsidiaries it owns.

14 Q If it became necessary for Select Build  
15 Construction or C Construction to access the debtors --  
16 exit financing facility to satisfy the obligations to  
17 make them due under the purchase agreement with  
18 Southwest Management if it is assumed, would the  
19 debtors, in fact, do so?

20 A Yes, we operate on the basis that all of the  
21 subsidiaries have access to the financing available to  
22 the parent entity.

23 MR. GRAVES: No further questions, Your  
24 Honor.

25 THE COURT: Any recross?



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RECROSS-EXAMINATION

BY MR. CRAPO:

Q Are you are aware of any guarantees by a -- of C Construction's obligations other than by Select Build, the parent?

A I don't have the document in front of me. I'm not aware of any. I think it was just C Construction and Select Build Construction, Inc. were the parties to the documents.

Q Thank you.

THE COURT: Thank you, sir. You may step down.

MR. STREET: Thank you.

THE COURT: Debtor have anything further?

MR. GRAVES: No, Your Honor.

THE COURT: All right. Mr. Crapo, you have any evidence to present?

MR. CRAPO: No, Your Honor, that's --

THE COURT: Do you -- in light of the testimony, do you press your adequate assurance objection?

MR. CRAPO: Yes, Your Honor, I --

THE COURT: Come to a microphone. Thank you.

MR. CRAPO: Yes, Your Honor. We would reiterate the argument -- the previous arguments that

1 we've made that at this point, there's no guarantee or  
2 that either the tax refund is going to flow to C  
3 Construction or that other debtors will take over C  
4 Construction's obligations.

5 THE COURT: All right. Thank you.

6 All right, this is just one piece of the  
7 dispute between the parties, and it's subject to  
8 whatever decision I should make on the 30th.

9 But, subject to that, I'm satisfied that the  
10 debtor has met its adequate assurance burden by virtue  
11 of available to the exit financing. So, I will  
12 overrule that objection. All the other issues will be  
13 reserved to the 30th.

14 MR. CRAPO: Thank you, Your Honor.

15 THE COURT: Is there anything further for  
16 today?

17 (Side comments off the record.)

18 MR. GRAVES: Your Honor, we'll submit an  
19 order to that effect if the Court needs, or else, we  
20 can just delay until the 30th --

21 THE COURT: I think --

22 MR. GRAVES: -- and then have an overall  
23 order.

24 THE COURT: Southwest have a preference?

25 MR. CRAPO: A single order would be okay,

1 Your Honor.

2 THE COURT: Okay. All right.

3 (Side comments off the record.)

4 MR. GRAVES: Okay, Your Honor. Just to  
5 clarify the record with regards to the cure claim  
6 responses that the debtors did receive, we filed an  
7 omnibus response to the cure claims.

8 To the cure claim response is they fall into  
9 more or less three categories. One are cure claims  
10 that the debtors agreed, with the proposed cure amount,  
11 and the debtors desire to proceed with assuming the  
12 contract at the proposed cure amount. The other  
13 category are responses we received. Once the debtors  
14 received the responses, the debtors decided that it was  
15 more favorable to reject the underlying contract rather  
16 than to proceed with assumption at the higher cure  
17 amount.

18 I think that resolves everything other than  
19 two, which is Southwest Management and a response that  
20 we received by a company CNI Tax Consultants.

21 THE COURT: Well, let me just ask, have you  
22 made any agreement with them?

23 MR. GRAVES: I spoke with them over the  
24 phone. We don't believe that their objection --

25 THE COURT: Mhmm. I know what your position

1 is.

2 MR. GRAVES: Right. We --

3 THE COURT: Is there anyone present on their  
4 behalf or on the phone? I hear no response.

5 Okay, I understand the argument that you made  
6 and I've seen nothing to the contrary.

7 So, you know, with the assumption that --  
8 poor choice of words to be used in connection with this  
9 matter.

10 With the understanding that there is nothing  
11 due under the agreement, -- at least at this point in  
12 time, -- there is no cure to be paid. And to the  
13 extent there is a cure objection being asserted by  
14 them, I will overrule it.

15 MR. GRAVES: Thank you, Your Honor.

16 THE COURT: All right.

17 MR. ROSENTHAL: We have a proposed order that  
18 we will need to make some changes to in light of  
19 adjourning the Southwest Management that we would  
20 submit to chambers later in light of the hour.

21 THE COURT: All right. And run it by  
22 opposing counsel, first.

23 MR. ROSENTHAL: Will do.

24 THE COURT: All right.

25 MR. ROSENTHAL: Thank you, Your Honor.

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THE COURT: Is there anything further for today?

MR. ROSENTHAL: We have nothing further, Your Honor. Thank you very much for staying so late for us.

THE COURT: Thank my staff.

MR. ROSENTHAL: Thank your staff.

THE COURT: All right. Thank you all very much. That concludes this hearing. Court will stand adjourned.

\* \* \* \* \*

CERTIFICATION

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

\_\_\_\_\_

12/27/09

ELENA ZONIADIS

Date

**UNITED STATES BANKRUPTCY COURT**  
**District of Delaware**

**In Re:**

Building Materials Holding Corporation  
720 Park Boulevard, Suite 200  
Boise, ID 83712  
EIN: 91-1834269

**Chapter:** 11

*Case No.:* 09-12074-KJC

***NOTICE OF FILING OF TRANSCRIPT AND OF DEADLINES RELATED TO RESTRICTION AND REDACTION***


A transcript of the proceeding held on 12/17/2009 was filed on 12/29/2009 . The following deadlines apply:

The parties have 7 days to file with the court a *Notice of Intent to Request Redaction* of this transcript. The deadline for filing a *request for redaction* is 1/19/2010 .

If a request for redaction is filed, the redacted transcript is due 1/29/2010 .

If no such notice is filed, the transcript may be made available for remote electronic access upon expiration of the restriction period, which is 3/29/2010 unless extended by court order.

To review the transcript for redaction purposes, you may purchase a copy from the transcriber (see docket for Transcriber's information) or you may view the document at the clerk's office public terminal.



Clerk of Court

Date: 12/29/09

(ntc)

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